the expense of this application, and that within a week from this date."

The bankrupt appealed, and argued—The bankrupt was entitled to apply for his discharge without finding caution—*Melrose-Drover Limited* v. *Heddle*, June 28, 1905, 7 F. 852, 42 S.L.R. 650; *Heggie* v. *Heggie*, June 6, 1855, 17 D. 802; *Hooper* v. *Ferguson*, July 20, 1850, 12 D. 1309. In *Gilmour* v. *Donnelly*, December 23, 1899, 7 S.L.T. 267, there were other circumstances besides the pursuer's bankruptcy which justified the order to find caution.

Argued for the respondents—The Sheriff-Substitute had a discretion to order the bankrupt to find caution—*Gilmour* v. *Donnelly* (*cit.*). *Melrose-Drover Limited* v. *Heddle* (*cit.*) was not inconsistent with the existence or exercise of such a discretion. The Court should be slow to disturb the Sheriff's finding, since it was an exercise of his discretion. A bankrupt was not entitled to his discharge until his trustee's expenses had been paid—*M'Carter* v. *Aikman*, July 20, 1893, 20 R. 1090, 30 S.L.R. 934.

LORD DUNDAS—This is an application by a bankrupt for his discharge. By the interlocutor appealed against the learned Sheriff-Substitute allowed the pursuer to answer the objections by the trustee "upon finding caution to the satisfaction of the Clerk of Court for the expenses of this application, and that within a week from this date." The pursuer is willing and apparently anxious to answer the objections, but he objects strenuously to the condition of doing so upon caution, and that is the subject of this appeal.

It may prove that the application for discharge will not be entirely plain sailing for the applicant, but the point at the moment, and the only point, is whether the condition of caution should be imposed upon him at this stage. I think it should not. I think he ought to be allowed to proceed in the meantime with his application unhampered by this obligation.

In the case of *Melrose-Drover*, (1905) 7 F. 852, to which we were referred, Lord President Dunedin said that the petition before him was one by a bankrupt for his own discharge, "and that is in a different position from a litigation by him about other matters. I do not think that a bankrupt applying for his discharge should be hampered by being ordered by the Court to find caution;" and the other learned Judges concurred. I do not take it that Lord Dunedin was there laying down a principle to which no exception could be found, but the general rule he states in perfectly distinct terms, and I cannot see anything in what we have before us to take this case out of the scope of that general rule.

I therefore move your Lordships to recal the interlocutor in so far as it orders caution to be found by the pursuer; and *quoad ultra* to adhere to the interlocutor and remit the matter back to the Sheriff-Substitute.

LORD SALVESEN—I concur. We are not in the habit of requiring a litigant to find caution, even though it be plain that he has no means to pay his opponent's expenses should he fail in his litigation. If so, the reasons for a similar practice are much stronger in the case of a man who has been divested of his estate, and who is seeking an opportunity to earn a livelihood free from the debts which led to his sequestration. Everything that he has hitherto earned has fallen into the net of the sequestration. He cannot, therefore, have any means from which to provide for the expenses of his opponents; and if he has no means, it can only be by the charity of his friends that he could implement the interlocutor of the Sheriff-Substitute.

These considerations have led to the settling of a general rule that a bankrupt who is petitioning for his discharge should not be ordained to find caution; and I can find nothing so exceptional in this case, where as yet there has been no inquiry, as to justify a departure from it. I accordingly agree with your Lordship that we should recal the part of the interlocutor appealed against.

LORD GUTHRIE—I am of the same opinion. There are cases in which a trustee in a sequestration who depends on the assets of the estate to meet his expenses has also the compulsitor that a discharge will not be granted unless the expenses incurred by him are paid. The course proposed by your Lordship does not in the least interfere—when the facts are ascertained, and if the case be a suitable one for applying the compulsitor—with the preservation of the trustee's rights.

The LORD JUSTICE-CLERK was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and remitted the cause to him to allow the appellant to answer the objections by the trustee without finding caution.

Counsel for the Appellant—Kemp. Agent—Wm. Geddes, Solicitor.

Counsel for the Respondents—Valentine. Agents—J. & A. F. Adam, W.S.

Tuesday, May 26.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

ANDERSON *v.* DICKIE.

Property—Real Burden—Constitution—Building Restriction.

A disposition of lands by X contained a declaration that it should not be lawful for A (the disponee) or his foresaids to sell or feu part of the lands disponed except under certain specified conditions as to the number and value of the dwelling-houses to be erected thereon, "which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of" B (another disponee of X) and his foresaids in all time coming.

Held that the declaration merely placed upon A and his heirs a personal prohibition against selling or feuing except under the conditions specified, and did not constitute the restriction a real burden on the lands, and that, accordingly, a singular successor of B was not entitled to interdict a singular successor of A from contravening the restriction.

Observations per curiam as to whether the restriction was sufficiently specific as to be enforced.

Robert Anderson, merchant, Princes Square, Glasgow, *pursuer*, brought an action against Matthew Dickie, builder, King's Park, Glasgow, *defender*, for *declarator* that "the defender is not entitled to erect any dwelling-houses other than one dwelling-house with suitable offices on any two acres of ground, and of the value of at least £900, on any part of the ground now or formerly occupied as the lawn between the ground feued by Thomas Smith to the pursuer's author William Miller by feu-contract dated 14th, 22nd, 27th, and 30th September 1852, and the mansion-house of Eastwood Park, in the parish of Eastwood and sheriffdom of Renfrew, all as said ground is marked numbers 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, and 70 on the sketch or plan endorsed on the said feu-contract and coloured blue on the plan produced." Conclusions for interdict followed.

The pursuer averred— ". . . (Cond. 2) The said feu-contract in favour of William Millar, the foundation of the pursuer's title, contains the following declaration:—'Declaring also, as it is hereby expressly provided and declared, that it shall not be lawful to me or my foresaids or the other disponers to sell or feu any part of the said ground now occupied as the lawn between the ground hereby feued and the said present mansion-house of Eastwood Park, and as marked Nos. 59, 61, 62, 63, 64, 65, 66, 67, 68, 69 and 70 on the said sketch or plan endorsed hereon, excepting under the express conditions and declarations that there shall be no more than one dwelling-house with suitable offices on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto shall be of the value of at least nine hundred pounds sterling, and be maintained in good condition and of such value in all time coming; which restriction shall also be a real burden affecting the said lands and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming.' The statements in answer, so far as not coinciding with the pursuer's averments, are denied. (Ans. 2) The said feu-contract is referred to for its terms, beyond which no admission is made. Explained that the sketch or plan endorsed on the said feu-contract did not enter the record, and that the ground referred to in the said disposition as 'now occupied as the lawn between the ground hereby feued and the present mansion-house of Eastwoodhill' is not otherwise identified with precision in the said feu-contract or in the recorded titles. The area of ground occupied as lawn in connection with the mansion-house of Eastwood Park has varied from time to time, and in any event the portion of the said lawn 'between' the ground feued in the said feu-contract and the mansion-house of Eastwood Park is only a very small portion of the total land from time to time occupied as lawn. The mansion-house of Eastwood Park since the date of the pursuer's feu-contract has been largely added to, and the frontage of the buildings to the lawn is now more than double the frontage as at the last-mentioned date. Explained further that the clause quoted has reference only to the erection of dwelling-houses on the said ground. By antecedent clauses of the said feu-contract the said Thomas Smith was left free to erect works on the lawn ground described, other than works of such a nature as could be legally deemed a nuisance. . . . (Cond. 4) The disposition granted by Thomas Smith in favour of Joseph Colen Wakefield (the defender's author) contains the following declaration:—'And with and under the declaration that it shall not be lawful to the said Joseph Colen Wakefield or his foresaids to sell or feu any part of the ground occupied as the lawn between the ground feued by me to William Miller, merchant in Glasgow, and the present mansion-house of Eastwood Park, except under the express conditions and declarations that there shall be no more than one dwelling-house with suitable offices on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto shall be of the value of at least nine hundred pounds sterling, and be maintained in good condition and of such value in all time coming; which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming.' . . . (Cond. 5) The said declarations, restrictions, burdens, and servitudes appear upon the record, and are made real burdens and servitudes upon the subjects now held by the defender in favour of the lands now held by the pursuer, and they are incorporated in and affect the defender's title to said subjects. The ground which at the date of the said feu-contract in favour of William Miller, and of the said disposition in favour of Joseph Colen Wakefield, was occupied as the lawn, comprises the whole ground between the Eastwood Park mansion-house and the feu given off to the said William Miller, and is shown coloured blue on the plan produced. (Ans. 4 and 5) . . . . Denied that the ground described as 'occupied as the lawn' comprises the whole ground between the Eastwood Park mansion-house and the feu given off to the said William Miller, which is shown coloured blue on the plan produced by the pursuer. Explained that the clause partially quoted from the disposition to Mr Wakefield, the defender's author of 1884, has references only to ground occupied as lawn at that date. Not known and not admitted that the ground then so occupied was the same as that referred to in the feu-contract between the said Thomas Smith and William Miller in 1852 and the relative

instrument of sasine in favour of William Miller. In the disposition to the defender's said author there is no reference to the numbered sections mentioned in article 2 of the condescendence as appearing in the said instrument of sasine, nor is there any reference to the plan therein mentioned. . . . The said restriction accordingly is entirely vague and indefinite, and is not binding on the defender as a singular successor. . . .

The defender pleaded—"(3) The operations proposed by the defender not being illegal or contrary to his titles, the pursuer is not entitled to decree in terms of the conclusions of the summons, and the defender should be assoilzied. (4) The pursuer not being entitled on a sound construction of his titles to the decree sought by him, the defender should be assoilzied with expenses."

After a hearing in the procedure roll the Lord Ordinary (SKERRINGTON) on 7th February 1913 allowed a proof.

Opinion.—"The pursuer is the proprietor of the mansion-house and grounds called Eastwoodhill, which extend to about 4½ acres, and which form part of the lands of Eastwood Park. The defender is the proprietor of the remaining part of the lands of Eastwood Park, which consist of 62 acres with a mansion-house. Both parties derive title from a common author, and each is a singular successor of the original grantee. The pursuer's title begins with a feu-contract dated September 1852 between Thomas Smith, the common author, and William Miller. The defender's title begins with a disposition granted by the said Thomas Smith in favour of Joseph Colen Wakefield, dated and recorded in May 1864. The defender is not vested in the superiority of the pursuer's feu, and accordingly there is no privity of contract or of tenure between them.

"The pursuer concludes for declarator that—[*His Lordship then quoted the declaratory conclusion of the summons*]. Though the pursuer has thus adopted the feu-contract of 1852 as showing the extent of the ground subject to the alleged restriction, his counsel stated that he did not found upon this deed as creating any real burden or servitude over the property now belonging to the defender. He refused to argue that the servitude which his client seeks to enforce was one of the known servitudes which would be effectual though it did not appear in the sasine of the servient tenement. The pursuer's case is that the disposal of the ground in 1852 was the same as in 1864.

"The clause in the disposition of 1864, which forms the commencement of the defender's title, is as follows:—'. . . [*quotes, vide supra*] . . . The later titles merely refer to the real burden specified in this disposition, and do not purport in themselves to create any real burden or servitude in favour of Miller's feu.

"The defender's counsel argued that the clause above quoted was not intended to create, and did not create, an immediate real burden affecting a portion at least of the lands which formed the subject of the conveyance. He argued that it merely stated the terms of a restriction which must be inserted in any future disposition or feu-charter which might be granted by Mr Wakefield or his successors. In short, the question between the parties is whether the declaration that the restriction 'shall be a real burden' was intended to take effect as from the date of the infeftment to follow on the disposition of 1864, or as from the date of the infeftment following upon some deed which might be granted in the future. I think that the former construction is the more natural and is preferable. It is apparent both from the clause above quoted and also from the remainder of the disposition that the future tense is used throughout as equivalent to the present. I accordingly reject the argument that the words of the clause are not habile to create an immediate real burden. The defender's counsel further contended that the language of the clause was so vague as to make it impossible to ascertain the exact area which was subject to the alleged restriction, and that the clause was therefore incapable of creating a real burden. I am of opinion that the pursuer is entitled to a proof for the purpose of defining if he can the extent of the ground which was occupied in 1864 'as the lawn between' his feu and the defender's mansion-house. If he is unable to discharge this burden the restriction will be inoperative. On the other hand, I do not think that it is possible to apply a stricter rule to a clause creating a real burden than to a clause which described the subjects conveyed. In the latter case a parole proof is always competent for the purpose of explaining the language of the conveyance, and I see no reason why a similar rule should not apply when the purpose is to ascertain the area which is subject to a real burden. I shall accordingly allow a proof."

On 18th June 1913 the Lord Ordinary sustained the third and fourth pleas-in-law for the defender, and assoilzied him from the conclusions of the summons.

Opinion—"In the note to the interlocutor of 7th February 1913 I stated that the pursuer was entitled to a proof for the purpose of defining, if he could, the extent of the ground which was occupied in 1864 'as the lawn between' the feu now belonging to the pursuer and the mansion-house of Eastwood Park now belonging to the defender. That proof has now been led, and the evidence was specially directed to the year 1864. [*His Lordship then examined the evidence, holding that the lawn mentioned in the disposition might be identified as a certain marked enclosure No.* 854 *on the Ordnance Survey map* 1857.]

"There remains the question whether the pursuer as a mere servitude holder has proved any legitimate interest to maintain the building restriction as affecting the area No. 854, seeing that I hold that the defender is free to build as he likes both on the area No. 889, which actually adjoins the pursuer's feu along the greater part of the western boundary, and also on the area No. 884, which lies only a short distance to the

westward of the feu. The pursuer led no evidence to show that he had any such interest, as was only natural, seeing that the view which I have suggested did not occur to either of the parties. If the only purpose and effect of the restriction had been to secure air, light, and prospect by limiting the number of buildings in the vicinity of the feu, I might have been entitled without special evidence to that effect to draw the inference that the restriction was of some value to the feu, even if it affected only the enclosure No. 854 as contrasted with the whole area claimed by the pursuer. But it is an integral part of the restriction that the dwelling-houses shall be of a certain pecuniary value, and also (as I construe it) that each building lot shall contain two acres—the evident object being to secure a superior class of dwelling-houses in the vicinity of the feu. I cannot assume without evidence that such a restriction would be of any value to the pursuer's feu if it is held to affect only the area No. 854, or that any reasonable person would stipulate for or submit to any such restriction. The practical result of my opinion is to decide that the clause of restriction as expressed in the defender's title has been so badly blundered that it cannot receive any effect. I accordingly assoilzie the defender."

The pursuer reclaimed, and argued — It was not for the pursuer to show that he had a substantial interest to enforce the restriction, but for the defender to show that he (the pursuer) had not—*Greenhill* v. *Allan*, July 8, 1825, 4 S. 160; *Proprietors of Royal Exchange Buildings, Glasgow, Limited* v. *Cotton*, 1912 S.C. 1151, *per* Lord Kinnear at 1158, 49 S.L.R. 945, at 949. *Esto* that the pursuer could not found on the feu-contract, the disposition contained the same declaration. The pursuer's title to enforce the restriction was good. The words "Miller and his foresaids" meant "Miller and his heirs and assignees." A burden in favour of a disponer's vassal was in a much stronger position than a *jus quæsitum* — *Coutts* v. *Tailors of Aberdeen*, August 3, 1840, 1 Robb. App. 296, *per* Lord Gillies at 306 and 310. The subjects were sufficiently described. The words "the ground now or formerly occupied as the lawn between," &c., were perfectly definite, but if they were not it was competent to use parole evidence to identify the subjects—*Caledonian Railway Company* v. *Jamieson*, November 17, 1899, 2 F. 100, 37 S.L.R. 63; *Reid, &c.* v. *M'Coll*, October 25, 1879, 7 R. 84, *per* Lord Justice-Clerk (Moncreiff) at 90, 17 S.L.R. 56, at 59; *Houstoun* v. *Barr*, 1911 S.C. 134, *per* Lord Dundas at 142, 48 S.L.R. 262, at 265. With regard to the meaning of the word lawn, reference was made to *Palmer* v. *M'Cormick*, 1889, L.R., 25 Ir. 110.

Argued for respondent—The pursuer could not found on the feu-contract. Moreover, it merely imposed a personal obligation on Smith that if he feued the adjacent ground he would put the restriction into the relative feu-charter, and the disposition only placed Wakefield under the same personal obligation. Further, the restriction was conceived in favour of Miller alone, for "his foresaids" were nowhere described or defined in the preceding clauses of the disposition. The restriction was not binding on a singular successor of Wakefield, for there were no words in the defender's titles habile to impose a real burden on the lands. The question in the present case was not one between a granter and a grantee, nor was it a question of prescriptive possession. Only the defender's titles could be looked at to ascertain whether or not there was a real burden—*Magistrates of Arbroath* v. *Dickson*, *cit.* (*per* Lord President (Inglis) at 634), *followed* in *Campbell's Trustees* v. *Corporation of Glasgow*, March 20, 1902, 4 F. 752, *per* Lord Kinnear at 760, 39 S.L.R. 461, at 466; *Caledonian Railway Company* v. *Jamieson*, *cit.* The titles must be strictly construed—*Cronin* v. *Sutherland*, November 29, 1899, 2 F. 217, 37 S.L.R. 160; *Liddall* v. *Duncan*, July 12, 1898, 25 R. 1119, 35 S.L.R. 801; *Clark & Sons* v. *School Board of Perth*, May 28, 1898, 25 R. 919, 35 S.L.R. 716. A real burden could only be imposed on a property if it were definite, and its definiteness could not be ascertained by going outside the titles. The intention of parties could not be invoked by the pursuer to validate the restriction if the restriction were not properly expressed in the titles—*Walker's Trustees* v. *Haldane*, February 28, 1902, 4 F. 594, 39 S.L.R. 409; *Craig* v. *Gould*, November 9, 1861, 24 D. 20, *per* Lord Ordinary (Mackenzie) at 24. Counsel also referred to *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, *per* Lord Watson at 102, 19 S.L.R. 571, at 575. Further, the restriction here was ambiguous. The date of occupation, whether that meant the date of the disposition or the date of entry, the words "between the ground feued by me," &c., and the word "lawn" were ambiguous.

At advising—

LORD DUNDAS—The pursuer Mr Anderson is the owner of a small residential property called Eastwoodhill, about 4½ acres in extent, which was formerly part of the lands of Eastwood Park. The defender Mr Dickie, a builder, acquired in 1910 the remaining lands of Eastwood Park, extending to about 62 acres, on which the mansion-house is situated. He proposes to erect upon part of these lands buildings which the pursuer describes as tenements of dwelling-houses, and alleges would be contrary to certain restrictions contained in the defender's titles, and injurious to the amenity and the value of the lands of Eastwoodhill.

The summons asks for declarator that the defender is not entitled to erect any dwelling-houses other than one dwelling-house with suitable offices on any two acres of ground, and of the value of at least £900, on any part of the ground now or formerly occupied as the lawn between the ground disponed in 1852 by feu-contract by Thomas Smith to the pursuer's author William Miller, and the mansion-house of Eastwood Park, all as said ground is marked numbers 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, and 70 on the sketch or plan endorsed on the said feu-contract,

and coloured blue on a plan produced by the pursuer. The wording of the summons is taken substantially from a clause in the said feu-contract of 1852, by which the granter expressly provided and declared that it should not be lawful to him or his foresaids to sell or feu any part of the ground then occupied as the lawn between the ground thereby feued and the present mansion-house of Eastwood Park, and as marked by the said numbers on the plan endorsed thereon excepting under the express conditions and declarations that there should be no more than one dwelling-house with suitable offices on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto should be of the value of at least £900 sterling, and be maintained in good condition and of such value in all time coming; "which restriction shall also be a real burden affecting the said lands, and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming." The pursuer, however, does not found upon the terms of this feu-contract as creating any real burden or servitude over the lands now belonging to the defender. The Lord Ordinary, in the opinion which he delivered on 7th February 1913, when he allowed a proof, expressly so states the position taken up by the pursuer's counsel in the Outer House, adding that "he refused to argue that the servitude which his client seeks to enforce was one of the known servitudes which would be effectual though it did not appear in the sasine of the servient tenement." The same attitude was maintained by the pursuer's counsel at our bar. One need not, therefore, consider whether or not it might have been possible for the pursuer to argue successfully that a negative servitude—*non ædificandi*—was validly constituted over the defender's lands by the feu-contract of 1852, and is now enforceable by the pursuer, though not appearing in the titles by which the defender's lands are now held.

The pursuer bases his case upon a clause in a disposition in 1864 of the remaining lands of Eastwood Park by Mr Smith in favour of the defender's author Mr Wakefield, which contains a declaration in terms almost identical with those of the feu-contract of 1852 already referred to, except that the specific numbers therein contained are not repeated, to the effect that it should not be lawful to Wakefield or his foresaids to sell or feu any part of "the ground occupied as the lawn," as described, except under the conditions and declarations above set forth, "which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming." The first and principal question which we have to decide is whether or not by the disposition of 1864 a real burden or servitude now enforceable by the pursuer was validly imposed upon the lands presently belonging to the defender. I have come to the conclusion that this question must be answered in the negative.

It seems pretty clear that the parties to this deed intended that these lands should be subjected to a real burden of some sort in favour of "William Miller and his foresaids." The defender's counsel pointed out that Miller's "foresaids" are nowhere described or defined in the preceding clauses of the disposition, but while I note the point I do not think it is of much value, especially looking to the immediately succeeding words "in all time coming." It is, however, by no means so clear what the real burden was intended to be, or whether any real burden at all was effectually constituted. The Lord Ordinary in his first opinion already referred to says—"The question between the parties is whether the declaration that the restriction 'shall be a real burden' was intended to take effect as from the date of the infeftment following upon the disposition of 1864, or as from the date of the infeftment following upon some deed which might be granted in the future. I think the former construction is the more natural and is preferable." If the Lord Ordinary means—as I gather he does mean—that the effect of the disposition and Wakefield's infeftment on it was to constitute a real burden on the lands, instantly operative, and restrictive of Wakefield's own right of building, I cannot agree with him. I attach no particular importance to the use of the words "shall be," as militating against the idea of instant and immediate constitution of a burden. But as I read the clause it imposes no restriction or limitations upon Wakefield or his heirs in the matter of building, but only declares that they shall not sell or feu to third parties except under the conditions specified. It is only in that event that any building restriction is contemplated. The point is a pure matter of construction, but I cannot construe the clause as the Lord Ordinary appears to do. I think it imposed no obligation on Wakefield or his heirs so long as they did not sell or feu. Nor in my judgment is it possible to read it as directly imposing upon the ground in the hands of Wakefield's singular successors the burden of a restriction which was not to bind himself. Even if the parties intended to make such an arrangement as that, it seems to me very doubtful whether it could have been competently effected under our system of conveyancing. A restriction in order to be a real burden must affect the land itself, in whose hands soever it may be, not one or another of its successive owners. But however this may be, I do not think the words of the clause can be construed as importing such a meaning. The clause, then, according to the proper construction of its language, does not, in my opinion, impose the contemplated building restriction directly as a burden upon the land at all, but merely places on Wakefield and his heirs a personal prohibition against selling or feuing except under specified conditions, leaving it to him or them to constitute these as real burdens on the title of the disponee or feuar when a sale or feu should take place. We are not concerned to speculate as to the reasons for so peculiar and hazardous an arrangement, nor indeed

whether this or something quite different was what the parties really intended. In considering whether or how far a singular successor is effectually restricted in the use of his own property it is not the intention but the import and effect of the deed that matters, and on a proper construction of this clause in the disposition of 1864 I cannot see that any real burden or servitude has been effectually created as the pursuer contends. The prohibition imposed on Wakefield was not a real burden, and no machinery was provided for making it effectual against his singular successors. No real burden or servitude has in fact been created by the subsequent titles—Wakefield's disposition to Tod in 1877, and the disposition by Tod's trustees to the defender in 1910. These deeds make no express mention of any building conditions or restrictions, but merely refer in general terms to the burdens, &c., specified in the disposition to Wakefield in 1864, "so far as applicable to the lands . . . and still subsisting." This reference, which is in the usual statutory form, cannot of course import into the later title any burden which is not to be found in Wakefield's own title. If the views which I have stated are correct, they afford sufficient grounds for the decision of the case in favour of the defender; and any allowance of proof was unnecessary.

Even if I could have agreed with the Lord Ordinary in holding that the words of the clause in the disposition of 1864 were (as he puts it) "habile to create an immediate real burden," it is obvious that the pursuer would still have serious obstacles to overcome. It is not easy to define with any certainty at this time of day the limits of "the ground occupied as the lawn between" the pursuer's lands and the mansion-house of Eastwood Park, even if one prays in aid the plan of 1852 with its numbers. [*His Lordship then discussed the evidence.*] Upon the parole evidence, though it is not very clear or conclusive, I should have been disposed to hold that No. 889 (Ordnance Survey map, 1857) was as well entitled to be regarded as part of the lawn between the pursuer's lands and the mansion-house as No. 854, which the Lord Ordinary considers should be so regarded. If this view of the matter were taken to be correct, there would be no occasion to consider whether or not the Lord Ordinary was right in deciding that the pursuer's interest to maintain the building restriction as affecting No. 854 failed because he was not entitled to maintain it as affecting No. 889. This point, it appears, was not argued to the Lord Ordinary, and I have considerable doubt as to the soundness of his opinion upon it. But I need not deal in further detail with this matter, or with the proper limits of the lawn, because (as already explained) I do not consider that these arise as subjects for decision in the case. I hold that, upon a sound construction of the disposition of 1864, no real burden or servitude was validly created over the lands now belonging to the defender; and I am accordingly of opinion, though not for the reasons stated by the Lord Ordinary, that the interlocutor reclaimed against is right and ought to be adhered to.

[*His Lordship then referred to a point in the case with which this report is not concerned.*]

LORD SALVESEN—In this case I have found more difficulty in reaching a conclusion satisfactory to my own mind than your Lordships appear to have had. In the first place, I do not agree with the Lord Ordinary in the grounds on which he has assoilzied the defender. Even if I adopted his view—that the building restriction affected only area No. 854 (Ordnance Survey map 1857) and did not cover the area 889, which actually adjoins the pursuer's feu along the greater part of the western boundary—I am of opinion that the pursuer has sufficient interest to enforce it. If it is a valid restriction, it would be at least worth the defender's while to pay the pursuer for having it relaxed; and I cannot assume that if the object was to protect the amenity of the pursuer's house and grounds, the mere fact that the amenity might be partly destroyed by building on the area No. 889 would take away the pursuer's interest in protecting the amenity of his feu at another place. But my objection to the Lord Ordinary's decision goes deeper. [*His Lordship then dealt with the meaning of the term "lawn" occurring in the clause founded on, and held that it included a wider area than the area which the Lord Ordinary held it included.*] Nor do I think the restriction invalid because there is a certain indefiniteness as to the western boundary of the area affected by it. The Court, if necessary, would have to fix the line by reference to the description contained in the title; and for myself I should have little difficulty in doing so by drawing such a line from the mansion-house to the Paisley Road parallel to the line of the pursuer's feu. I go further and hold that even if we could not fix the line of the western boundary of the area in question the restriction would be enforced if it were being violated at a point which clearly fell within its terms. In a popular sense, however, I think the area which I have referred to was, in view of the general use to which it was put at the date of the title, quite properly described as "the lawn between the ground feued to William Miller and the present mansion-house of Eastwood Park."

The more difficult question, in my judgment, is whether the clause quoted in cond. 4 is expressed in terms habile to impose a real burden on the lands such as the pursuer affirms. It must be confessed that it is not well expressed, and, as I think, it does not impose any obligation on the disponee to refrain from building houses upon the area in question to any extent that he might desire. If so, no greater burden is imposed upon the defender, for the disposition in his favour is granted under "the real burdens, servitudes, and declarations specified in the disposition in favour of his author Mr Wakefield." There appears to be nothing, therefore, to prevent the defender from building on his own land, and once the dwelling-

houses are erected there is nothing to restrict him from selling them to third parties. On this somewhat narrow ground, which turns entirely on the construction of the declaration founded on, I have come to be of opinion that the result at which the Lord Ordinary arrives ought to be affirmed.

LORD GUTHRIE—I am of opinion with Lord Dundas that the Lord Ordinary has rightly assoilzied the defender from the conclusions of the summons, but I am unable to concur in the ground on which he has proceeded. He has held that had the pursuer proved a legitimate interest to maintain the building restriction in question, he would have decided in his favour to the extent of holding that the area of ground belonging to the defender numbered 854 in the Ordnance Survey map of 1857 is subject to the restriction alleged by the pursuer. In my opinion if the defender's title validly imposed on the ground numbered 854 the building restriction alleged in favour of the pursuer's ground, it would have been for the defender to have proved that the pursuer had no legitimate interest, not for the pursuer to prove that he had such an interest.

Disagreeing as I do with the ground on which the Lord Ordinary proceeds, it becomes necessary to consider the question apart from the element of interest. It is admitted that the basis on which the summons is framed, namely, to identify the ground alleged to be restricted by reference to the numbers contained in the plan endorsed on the pursuer's author's title is inadmissible, because among other reasons the restriction, if it exists, not being one of the known servitudes effectual although not appearing in the title of the servient tenement, must be found in the defender's titles. Again, neither the area coloured blue in the plan produced with the summons, nor the part of it numbered 884 (Ordnance Survey map, 1857) on which the defender is proposing to build, was seriously contended for. Indeed it was admitted that the plan produced would require amendment in some method not distinctly defined. The pursuer argued for the area 854, which the Lord Ordinary thought restricted, and he proposed to add the area 889. In my opinion he is not entitled to have it held that any building restriction was validly imposed in favour of his feu on any part of the defender's lands. I do not differ from any of the grounds on which Lord Dundas has proceeded, but I am content to base my judgment against the pursuer on the ground that the alleged restriction is not sufficiently specific to be enforced. The same exact precision may not be required in the case of a building restriction as in the case of a money payment which is made a real burden on land, but in my opinion the restriction must be such that the extent of it can be ascertained by a singular successor without travelling beyond the four corners of his titles. In this case the alleged restriction applies to "the ground occupied as the lawn between the ground feued by me to William Miller, merchant in Glasgow, and the present mansion-house of Eastwood Park." Take, first, the word "lawn." This is an ambiguous word used in many senses, and I see no sufficient reason for preferring in this case the wide interpretation for which the pursuer contended as against the narrower one maintained by the defender. Suppose, however, the word "lawn" be taken as covering land, part of which is under trees and which is occasionally ploughed, what are the limits of a lawn between ground contained within a certain feu and a mansion-house on the adjoining feu? What ground north, south, east, and west is covered by the word "between"? A number of suggestions were made, and here again I see no sufficient reason for preferring the suggestion, or rather the alternative suggestion, put forward by the pursuer. But if I am wrong in thinking that the extent of the restriction must be capable of ascertainment from the terms of the title of the servient subject alone, and if parole evidence was competent, the proof (while it may establish that in a certain sense part or parts of the ground were occupied as lawn at or about the date of Mr Wakefield the defender's author's entry in 1860 or in 1864, the date of his title) entirely fails to show what were the limits of the ground which in this sense ought to be considered as lawn between the pursuer's feu and the defender's mansion-house. Then the pursuer falls back on the argument, which the Lord Ordinary seems to accept, that at all events he has shown that area 854, and perhaps also area 889, must be treated as within the lawn mentioned in the defender's titles. I think there is neither principle nor authority for this view. No authority in point was quoted. It would admittedly not be permissible to hold a money payment to be a real burden on land if the total amount were left ambiguous, even if it were possible to be certain about the value of a certain part of the sum. I see no reason why a different rule should prevail in the case of a building restriction. I am therefore of opinion that the defender is entitled to absolvitor.

The LORD JUSTICE-CLERK concurred in the opinion of Lord Dundas.

The Court adhered.

Counsel for the Reclaimer (Pursuer)—Murray, K.C.—Chree, K.C.—MacRobert. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Respondent (Defender)—Blackburn, K.C.—Sandeman, K.C.—Christie, K.C.—Burnet. Agents—Simpson & Marwick, W.S.