defender's hotel, or with customers who were leaving it, so that there is no ground in fact on which this part of the prayer could be sustained. I am not to be understood as expressing any opinion as to whether the pursuer would have been entitled to interdict in terms of this part of the prayer had the fact averred in support of it been established.

The pursuers have the power to regulate the use of their station by rules and byelaws issued by them with the approval of the Board of Trade. It appears to me that that affords a better way of regulating the station than is afforded by an application like the present.

LORD MONCREIFF—I am satisfied that the pursuers are not entitled to interdict in terms of any branches of the prayer. They ask, in the first place, that the defenders should be interdicted from "unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the pursuers." This is far too general. The pursuers were bound to specify wherein the unlawful entering or trespass sought to be interdicted consists. If, for instance, by the words quoted it is meant that anyone who enters the precincts of a railway station without intending to travel by the railway, or without having travelled or arrived by it, commits a trespass, this should have been distinctly stated.

In regard to the remainder of the prayer, I am satisfied from the proof (1) that it is not proved that the respondents entered the complainers' premises for the purpose of "obtaining" customers. They only went there for the purpose of meeting customers who were known to be arriving by train, or to see customers off.

It is not proved that the defender Ross's "boots" touted for business or caused any disturbance or confusion.

As to the "boots'" uniform or badge—if the complainers are entitled to exclude from the station, without reason assigned, any person except travellers, they may attach any conditions they please, and therefore they may exclude a man on account of any badge or uniform he may choose to wear. But taken by itself it is not a ground for interdict.

The more general question which was dealt with in argument, viz., whether the pursuers are entitled as matter of right to exclude not merely from their platforms, but from the precincts of their stations, anyone who has not actually travelled or is about to travel by the railway, is not properly raised. It is not covered by the prayer, and leave to amend was not asked. But I must say that as at present advised I am not prepared to affirm that broad and startling proposition. A railway company is not in the position of an owner of private property. They hold their stations for the convenience of the travelling public. It may be that the ultimate decision as to what facilities they are bound to provide for the travelling public rests with the Railway Commissioners. But when a railway company applies to this Court for interdict on such grounds, in the absence of any deliverance by the Railway Commissioners, I do not think that they should obtain the assistance of the Court unless their right is demonstrated beyond doubt. Now, *prima facie*, there are many cases in which a passenger requires as a necessary convenience the attendance of a relative or servant to see him away or meet him at the train, and to call the relative or servant a trespasser seems an abuse of the term. To recognise the traveller's right to have this accommodation in no way interferes with the railway company's right to regulate the admission of those who are not passengers. They have power to frame regulations to be approved of by the Board of Trade, and possibly they have power without any such sanction to erect barricades at the platforms or other suitable places within the station. But what the pursuers desire to do here is to exclude such persons altogether from the premises. As I have said, whatever remedies they may be able to obtain from the Railway Commissioners on cause shown, I do not think they are entitled to interdict at common law.

The Court pronounced the following interlocutor:—

"Recal the interlocutors appealed against: Find in fact (1) that the defender did not by himself or his servants enter the pursuers' station except for the purpose of accompanying passengers who were leaving his hotel, or of meeting passengers who had intimated that they were to arrive at the defender's hotel; and (2) that neither the defender nor his servants have caused any obstruction or inconvenience at the pursuers' station: Find in law that the pursuers are not entitled to interdict against the defenders as craved: Therefore recal the interim interdict formerly granted: Refuse the prayer of the petition and decern."

Counsel for the Pursuers—Balfour, Q.C.—F. T. Cooper. Agent—James Watson, S.S.C.

Counsel for the Defender—W. Campbell—Graham Stewart. Agent—John Hay, L.A.

Friday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.

STEVENSON AND OTHERS *v.* STEEL COMPANY OF SCOTLAND, LIMITED.

Jus quæsitum tertio—Superior and Vassal—Obligation in Feu-Contract—Right of Disponee of Superior to Enforce such Obligation—Mutuality of Obligation.

In 1871 the proprietor of B feued to a vassal two plots of land, reserving to himself and his successors in his lands and estate the minerals therein,

"under the declaration and provision that a street shall be made" along the south boundary of the plots, with such sewers or drains as the superior or his "foresaids, including any parties who have feued or who may feu or purchase ground on the opposite side of the said street," and the vassal might consider proper, the street to be so constructed and the drains formed on such levels as the superior "or his foresaids, including as aforesaid," and the vassal might think fit, "having regard to the continuation of the same eastward, so as conveniently to accommodate the portion of" the superior's "remaining lands lying to the east of the ground hereby feued." It was also declared that the vassal should be bound and obliged, whenever required by the superior or his foresaids, "including as aforesaid," to construct the one half of the said street next to the plot of ground disponed. The vassal also bound himself to make and form certain other streets, but the obligation so undertaken was in favour of the superior and his successors only, and did not extend to other feuars. It was further declared that the superior should be entitled to give a right of access to and a power to use said streets and drains to his feuars in the remaining parts of B, or to anyone he might think proper.

In 1877 the proprietor of B disponed to a purchaser certain lands, together with all the disponer's "rights, title, and interest, present and future, therein." These lands lay immediately to the east of said plots and on the same side of the line of the proposed street.

In 1890 the vassal renounced his feu and conveyed it to the superior, the proprietor of B, with and under the reservations, burdens, conditions, &c., specified in his feu-charter.

In 1890 the proprietor of B, without having consolidated the superiority and *dominium utile*, disponed the subjects feued in 1871 to a purchaser, under the following provision—"Our disponees shall relieve us of all obligations undertaken by us as superiors of the said lands of B, with regard to roads or accesses, and drains or sewers through or in the said lands and others hereinbefore disponed."

An action having been brought by the disponee of the lands sold in 1877 against the disponee of the lands sold in 1890, to compel the latter to implement the obligations imposed on the vassal by the feu- contract of 1871—*held* (*aff.* judgment of Lord Low) that the pursuer had no title to sue in respect (1) that the right to enforce these obligations had not been expressly conveyed to him by his author, (2) that he had not been plainly defined as belonging to, but on the contrary excluded from, the *tertii*, in whose favour the feu-contract of 1871 might have created a *jus quæsitum*, and (3) that there was no mutuality of obligation between him and the vassal in the feu-contract of 1871.

In 1854 the trustees of Sir William Baillie of Polkemmet, proprietor of the estate of Blochairn, feued a plot of ground to certain vassals, under the following declaration and provision—"that the said first party (viz., the superior) or their foresaids shall be entitled, at any time hereafter they may think proper, to direct and appoint that a street not exceeding 60 feet in breadth shall be made and formed, extending along the north by east and north-north-west boundaries of the said plot or area of ground hereby disponed, or any part thereof, with such common sewers and drains therein as they may consider proper; which street shall be formed upon such levels and of such breadth of roadway and pavements on each side thereof respectively, as the said first party or their foresaids may think fit, and the said roadway and pavement shall be made and formed in such manner and of such materials, and the said common sewers and drains shall be made and formed of such depth and width and in such manner as the said first party and their foresaids may appoint; and declaring, as it is hereby expressly provided and declared, that the said second party and their foresaids shall be bound and obliged, whenever required by the said first party or their foresaids, to level, make, form, causeway, and finish the one-half of the roadway of the said street situated next to the said plot or area of ground hereby disponed, and to make and form the pavement situated on the side thereof in the manner and of the materials foresaid, so far as extending along the said plot or area of ground hereby disponed, and at one and the same time the said first party and their foresaids shall be bound and obliged to level, make, form, and causeway and finish the other half of the roadway of the said street, and the pavement on the other side thereof, in a similar manner so far as extending along the said plot or area of ground hereby disponed." It was also declared that the superiors should have power to make and causeway the said street, and to construct drains, and to recover one-half the expense thereof from the vassals.

In 1864 the Baillie trustees feued a plot of ground to the same vassals which would have formed part of the street provided for by the feu-contract of 1854. By the feu-contract of 1864 it was provided that the street should be constructed 60 feet further north, and it was declared that the feu-contract was granted under the declarations and provisions contained in the former one.

The Steel Company of Scotland, Limited, are now vassals under these feu-contracts.

In 1871 Baillie's trustees feued to Robert Hannay and others, as trustees for the firm of Hannay & Sons, two plots of ground lying to the north of those above mentioned, and separated from them by the proposed street.

By the feu-contract of 1871 the minerals were reserved to the superiors and

their successors in the said lands and estate of [Blochairn], and it was provided and declared "that a street of 60 feet in breadth marked A, B, C, D on the said plan shall, so far as not already done, be made and formed, extending along the south by west and south-south-east boundary of the plot or area of ground in the first place hereby disponed, and along the south-south-east boundary of the plot or area of ground in the second place hereby disponed, with such common sewers and drains therein as the said first parties or their foresaids, including any parties who have feued or who may feu or purchase the ground on the opposite side of the said street, and the second parties or their foresaids, may consider proper, which street shall be formed of such breadth of roadway and pavements on each side thereof respectively, and the same and the said sewer and drains shall be formed on such levels, as the said first parties or their foresaids, including as aforesaid, and the second parties or their foresaids, may think fit, having regard to the continuation of the same eastward, so as conveniently to accommodate the portion of the first party's remaining lands lying on the north bank of the canal, and to the east of the ground hereby feued: . . . And declaring, as it is hereby expressly provided and declared, that the said second party and their foresaids shall be bound and obliged, whenever required by the said first party or their foresaids, including as aforesaid, to level, make, form, causeway, and finish the one-half of the roadway of the said street situated next to the said plots or areas of ground hereby disponed, and to make and form the pavement situated on the side thereof of the width, on the level, in the manner, and of the materials foresaid, so far as extending along the said plots or areas of ground hereby disponed: And also declaring, as it is hereby expressly provided and declared, that it shall be in the power, either of the said first parties and their foresaids, or their successors in the remaining lands of Blochairn, including any parties who have feued or purchased or may feu or purchase the ground on the opposite side of the said street, or of the second party and their foresaids, to make and form the said common sewer and drains on the levels, and of the materials and in the manner before mentioned, whenever they shall think proper so to do; and the said other party and their foresaids shall be bound and obliged to repay to the party forming the said sewer and drains, and their foresaids, the one-half of the expenses of forming the said common sewer and drains so far as extending along the said plots or areas of ground hereby disponed; and also declaring, as it is hereby expressly provided and declared, that the second party and their foresaids shall be bound and obliged, with all convenient speed after the execution of these presents, to make and form a street of 60 feet in breadth between the points marked C, E, F on the said plan, extending along the north by east, and east-north-east boundaries of the plot or area of ground in the first place hereby disponed, and along the south by west and west-south-west boundaries of the plot or area of ground in the second place hereby disponed; and as soon as the ground lying to the north of the canal and to the east of the ground in the second place hereby disponed, or any portion thereof, is feued, to make and form a street of 60 feet in breadth between the points marked E G on the said plan, and that with such common sewers and drains therein as the first and the second parties may consider proper, which street shall be formed of such breadth of roadway and pavements on each side thereof respectively, and the same and the said sewer and drain shall be formed on such levels as the first parties or their foresaids and the second parties or their foresaids may think fit, having regard to the continuation of the street E G eastward so as conveniently to accommodate the portion of the first party's remaining lands lying on the north bank of the canal, and to the east of the ground hereby feued; . . . and also declaring, as it is hereby expressly provided and declared, that in the event of the said first party or their successors, as proprietors of the remaining lands of Blochairn, deeming it expedient themselves to make and form the said streets and causeway the roads thereof or any of them, or any part thereof, and make and form the said pavements or any of them, or any part of such pavements, and the said common sewers or drains in the said streets marked C E F and E G, or any of them or any part thereof, which the said second party and their foresaids are hereinbefore taken bound to form and causeway and make and form respectively, in the event of the said second party and their foresaids failing to implement the foregoing obligation to form and causeway and make and form the same respectively, they shall be entitled so to do, and in that event the said second party and their foresaids shall be bound and obliged to repay to the first party and their foresaids the one-half of the expense of making, forming, and causewaying the roadway of the said street marked A B C D, . . . and also to repay to the first party and their foresaids the whole of the expense of making and forming and causewaying the roadways of the said streets marked C E F and E G. . . . Declaring that the said first party and their foresaids shall be entitled to give a right of access to and a power to use the said streets and common sewers or drains, or the portions thereof from time to time formed, as well as any other streets and common sewers or drains which may be formed by the second party and their foresaids in the plots or areas of ground hereby feued, to their feuars in the remaining parts and portions of their said lands of Blochairn, or to any other parties they may think proper, . . . all which reservations, burdens, conditions, provisions, restrictions, limitations, obligations, declarations, and others before written are hereby created and declared to be real conditions and qualifications of these presents, and real liens and burdens upon

and affecting the said plots or areas of ground hereby disponed, and the houses and buildings erected or which may be erected thereon." It was finally declared that the whole provisions and declarations in the feu-contract should be real burdens upon the ground disponed, and should be validly referred to in all future conveyances and investitures thereof.

By disposition dated May 1877 Baillie's trustees conveyed to William Stevenson and others, as trustees for themselves, the lands situated immediately to the east of the lands feued in 1871, "together with the parts, pertinents, privileges, and pendicles of the said portions of ground, their whole rights, title, and interest, present and future therein, and whole buildings and erections thereon."

In 1890 the estates of Hannay & Sons having been sequestrated, the trustee thereon renounced in favour of Baillie's trustees, and the sole surviving partner of the firm with his concurrence made over and conveyed to them, the subjects feued in 1871 (with the exception of a portion disponed by the Hannays), "but always with and under the reservations, burdens, conditions, provisions, restrictions, limitations, obligations, declarations, and others specified" in the feu-contract of 1871. The Messrs Hannay had done nothing in the way of forming the streets.

By disposition recorded on 15th November 1890 Baillie's trustees disponed to the Steel Company of Scotland the plots of ground formerly feued to the Hannays. The disposition contained the following provision:—"Our said disponees shall, as by acceptance hereof they agree to, relieve us of all obligations undertaken by us or our predecessors as superiors of the said lands of Blochairn with regard to roads or accesses, and drains or sewers through or in the said lands and others hereinbefore disponed." The disposition did not contain any of the declarations and provisions as to the streets which were made in the Hanneys' feu-contract. Baillie's trustees had executed a minute of consolidation of the superiority and *dominium utile*, which was not however recorded till the 18th of November subsequent to the date of recording of the disposition in favour of the Steel Company of Scotland.

On 7th October 1895 William Stevenson and others raised an action against the Steel Company of Scotland to have it declared that the defenders were bound forthwith to make, form, and causeway a street of 60 feet in breadth marked A B C D; that they were bound to make the streets C E F and E G, and that in the event of the defenders refusing to make such streets, the pursuers were entitled to do so, and the defenders bound to pay to the pursuers the whole expense thereof.

The pursuers founded on the feu-contract of 1871, and their own disposition of 1877, and pleaded—"(1) The defenders being, on a sound construction of their titles, bound to construct the road, &c., mentioned in the first conclusion of the summons, and the pursuers having, by virtue of their titles, right to enforce said obligation by said defenders, decree as first concluded for ought to be pronounced with expenses. (3) The defenders being, on a sound construction of their titles, bound to construct the roads mentioned in the third conclusion of the summons, and the pursuers having a right to enforce said obligation, decree ought to be pronounced in terms of the third conclusion of the summons with expenses. (4) In the event of the defenders refusing or failing to make and form said streets, &c., as concluded for, decree ought to be pronounced in terms of the fourth conclusion of the summons with expenses."

The defenders pleaded—"(2) No title to sue. (4) The pursuers having no *jus crediti* in the said feu-contract, the defenders should be assoilzied with expenses."

On 21st May 1896 the Lord Ordinary (Low) pronounced an interlocutor in which he sustained the second plea-in-law for the defenders, and assoilzied them from the conclusions of the summons.

Opinion.— . . . "In the present action the pursuers seek to have it declared that the defenders are bound to make the streets referred to in Hannays' feu-contract, or, alternatively, that the pursuers are entitled to make the streets and charge the defenders with the cost, in terms of the feu-contract in favour of the Messrs Hannay.

"The first question is, whether the pursuers have a good title to sue?

"I have already pointed out that the pursuers acquired their lands in 1877, and if the disposition in their favour gives them a title to enforce the obligations against the Messrs Hannay, then I assume that the subsequent renunciation of the feu by Hannays' trustee, and the disposition of the ground, without reference to the streets, to the defenders, could not prejudice the pursuers. I shall therefore consider the case as if it had arisen between the pursuers and the Messrs Hannay.

"I shall first deal with the street A B C D. The clause of the contract referring to that street does not commence by laying an obligation upon the feuars to make it, but by a declaration that such a street shall be made, and a description of the character of the street. It is in this part of the clause that it is provided that the street shall be of such a breadth as to accommodate the portion of the first parties' remaining lands to the east of the ground hereby feued. That is the only reference to the ground to the east as distinguished from the other unfeued parts of the lands of Blochairn, and I think that it is not unimportant to observe that it occurs in a part of the clause which lays no obligation on the feuars.

"The obligation which is subsequently laid on the feuars is expressed thus—'The said second parties and their foresaids shall be bound and obliged, whenever required by the said first parties or their foresaids, including as aforesaid,' to make the one-half of the street next the ground feued to them.

"Now, the foresaids of the first parties

there referred to are their successors in the lands of Blochairn, and the words 'including as aforesaid' mean (as shown by the context) including 'any parties who have feued or may feu or purchase the ground on the opposite side of the street.'

"The pursuers argued that two separate classes of persons were thereby empowered to enforce the obligation—(1) The successors in the lands of Blochairn (which the pursuers claim to be); and (2) The feuars on the opposite side of the proposed street. Whether the feuars on the opposite side of the street would by themselves have a title to enforce the obligation depends upon the meaning of the word 'including.' The defenders argued that that word must be read in its natural sense, and as signifying that the 'foresaids' of Baillie's trustees should mean their successors in the lands *plus* the feuars on the opposite side of the street. I do not think it likely that Baillie's trustees should have stipulated that the obligation should not be enforceable by them and their successors alone, but that they should require the concurrence of certain feuars. Further, I notice that in the feu-contract, which is quoted in the record, and which is conceived in practically the same terms as the feu-contract in favour of the Messrs Hannay, an obligation is laid upon 'the first party, their foresaids,' or the parties, 'who have feued' ground on the opposite side of the street. I am, therefore, inclined to think that the word 'including' means that the term 'foresaids' shall include the feuars on the opposite side of the street, and that either they or Baillie's trustees and their successors should be entitled to enforce the obligation. But that does not help the pursuers, because they are not feuars on the opposite side of the street, nor are they the successors of Baillie's trustees in the lands of Blochairn, but only in a portion thereof. No doubt they have acquired the lands lying to the east of the ground feued to the Hannays, and these are the lands which the street was to be constructed so as to accommodate, but the clause imposing this obligation cannot, in my opinion, be construed so as to limit the expression 'foresaids' to successors in a particular part of the lands of Blochairn. It would have been a different question if the only lands remaining in the hands of the superior had been those to the east, but that was not the case.

"As regarded the street C E F, the Messrs Hannay were taken bound to make it 'with all convenient speed after the execution of these presents.' It was also declared that if the Messrs Hannay failed to make the street, 'the first party, or their successors in the remaining lands of Blochairn,' should be entitled to do so at the expense of the Messrs Hannay. What I have already said applies to this street also. The pursuers are not the successors of Baillie's trustees in the remaining lands of Blochairn.

"The third street, E G, is in the same position as the street C E F, with this exception, that it is declared that it shall be made 'so as conveniently to accommodate the portion of the first party's lands lying to the east of the ground hereby feued.' That however can, in my opinion, make no difference to the title of the pursuers. What I have said in regard to the other streets applies equally to the street E G.

"I am therefore of opinion that the defenders must be assoilzied."

The pursuers reclaimed, and argued—(1) The right to enforce this obligation to make certain roads was communicated to the pursuers by the clause about pertinents, &c., in the disposition of 1877. (2) Alternatively, the pursuers had a *jus quæsitum* to enforce the contract between Baillie's trustees and the original vassal. The pursuers were successors of Baillie's trustees in the whole lands intended to be benefited. When the feu-contract of 1871 was made, a right vested in a *tertius* — who turned out to be the pursuers—of enforcing the obligations therein. Nothing more was required for the valid creation of such a right than that the contracting parties should intend that a *tertius* should have a vested right. Authorities referred to — *Finnie* v. *Glasgow & South-Western Railway Company*, August 13, 1857, 3 Macq. 177; *Peddie* v. *Brown, Gordon & Company*, June 11, 1857, 3 Macq. 65; *M'Gibbon* v. *Rankin*, January 19, 1871, 8 Macph. 423; *Hislop* v. *M'Ritchie's Trustees*, June 23, 1887, 8 R. (H. of L.) 95.

Argued for the defenders—The obligation to make streets was a condition of tenure not a real burden, and therefore the superior alone could enforce it. It could only be enforced by a third party (1) if the power to enforce were expressly conveyed, which it was not, by the disposition of 1877; (2) if the *tertius* were expressly described in the feu-contract imposing the obligation, which was not the case here, see *Finnie, ut sup.*; or (3) if the *tertius* undertook some reciprocal obligation. Here, while the scheme was to benefit the whole lands of Blochairn, the pursuers were not bound to do anything to further the scheme; there was no mutuality — *Walker* v. *Dick & Park*, February 29, 1888, 15 R. 477.

At advising—

LORD KINNEAR—The pursuers and defenders are respectively proprietors of two adjoining pieces of land in the neighbourhood of Glasgow, and their rights are derived from a common author, the trustees of Sir William Baillie of Polkemmet. As the titles now stand, Sir William Baillie's trustees are entirely divested of all right and interest in either parcel of land. But the defenders' property was formerly held of the trustees in feu-farm by virtue of a feu-contract executed in 1871 between them as superiors and Robert and William Hannay and others as feuars, and the purpose of the action is to enforce against the defenders certain conditions of this feu-contract, which are said to enure to the benefit of the pursuers as proprietors of the adjoining lands. The defenders are now in right of the superiority as well as of the *dominium utile* of the lands feued to the Hannays.

But they do not maintain that the obligations in question are extinguished *confusione*, and in abstaining from stating any plea of this kind I think they have taken a correct view of their title.

It appears that in July 1890 the subjects set in feu were reconveyed to the superiors by the trustees and commissioners on the sequestrated estate of the vassals. The superiors recorded the disposition in the Register of Sasines, but before taking any step for consolidating the *dominium utile* with the superiority, they in November 1891 disponed the subjects to the defenders to be held of the granter's superior. The disposition has not been printed, but the parties are agreed as to its import and effect. The defenders recorded the disposition in their favour on the 15th of November, and were thereupon entered, as I understand, with the Crown as superiors under the Conveyancing Act 1874. Three days later the disponers recorded a minute of consolidation. But this is admitted to be inept by reason of the prior infeftment of the defenders. The defenders therefore are not in a position to maintain, as they might have done had consolidation been validly effected before the disposition in their favour was recorded, that they held the *plenum dominium* as singular successors under a title which is unaffected by the obligations of the original feuars. The property and superiority are still held as separate estate, and the record has not been cleared of the feu-contract. It follows that although the mutual rights and liabilities of superior and vassal may be suspended *confusione*, they have not been extinguished so as to prevent the rights of third persons, if such there be, from being enforced in the same manner as if the feu were still held by the original feuars or their disponees under the feu-contract, and by no other title. I therefore agree with the Lord Ordinary that the pursuers, who acquired their lands in 1877, cannot be prejudiced by subsequent alterations of the defenders' title, and that the question must be decided in the same way as if they had brought their action against the Hannays before 1890. But taking the case on that assumption, I am of opinion that they have no right or interest in the Hannay's feu-contract, and no title to enforce any of its stipulations.

The conditions which they claim right to enforce impose obligations on the pursuers for the construction of certain streets, and in order to construe these conditions correctly it is necessary to understand the relative positions both in fact and in point of title of the various pieces of ground to which they are said to relate. The ground feued to the Hannays was bounded on the south and also on the east by other portions of the Blochairn estate. The ground to the south had been already feued out. The defenders have now acquired both the property and the superiority of the greater part of this ground, and the remainder, extending to 3 acres or thereby, belongs to the Caledonian Railway Company. But at the date of the feu-contract in favour of the Hannays both portions were held in feu of Sir William Baillie's trustees; and they were still so held when the piece of land to the east of the Hannay's feu was acquired by the pursuers. This last portion was never set in feu, but in 1877 it was disponed to the pursuers, who still held it under a title which contains no reference to the feu-contract with the Hannays, or to any of the obligations which it creates. The pursuers maintain however that the mere title to the lands of which they are now in possession carries with it a title to sue upon the defenders' contract; and they allege that by that contract the defenders are bound to form and causeway three separate streets for the mutual convenience of themselves and the pursuers.

The first of these is a street marked A B C D, on a plan extending along the south and south-east boundaries of the plots of ground feued. The precise terms of the contract with reference to this street must be considered, but for a just appreciation of their effect it is necessary to observe in the first place that by feu-contracts of the ground to the south it had already been agreed between the superior and the feuars that a street of sixty feet in breadth should be made in this situation, and that the feuars should be bound to make, form, causeway, and finish the one-half of the roadway of the said street next to the plots or areas of ground disponed to them respectively. This is an obligation in favour of the superior which he was entitled to enforce for the benefit of the ground to the north, and keeping this in view there is no difficulty in ascertaining the extent of the obligation imposed upon the Hannays when this ground to the north was feued to them. The clause begins with a declaration that a street of sixty feet in breadth shall be made and formed extending along the south and south-east boundaries of the areas in question, with such common sewers and drains therein "as the said first parties or their foresaids," that is, the superiors or their successors in the lands and estate of Blochairn, "including any parties who have feued or who may feu or purchase the ground on the opposite side of the said street, and the second parties or their foresaids," that is, the original vassals and the survivors and heirs of the survivor as trustees for the Hannays and their assignees, "may consider proper; which street shall be formed of such breadth of roadway and pavements on each side thereof respectively, and the same said sewer and drains shall be formed on such levels as the said first parties or their foresaids, including as aforesaid, and the second parties or their foresaids, may think fit, having regard to the continuation of the same eastward so as conveniently to accommodate the portion of the first parties' remaining lands lying on the north bank of the canal, and to the east of the ground hereby feued." So far there is no obligation imposed directly upon the vassal, but there is a very plain indication that the street to be formed is primarily for the accommodation of the ground to the south as well as of the ground feued, and that it

may be continued eastward for the accommodation of the superior's land to the east. Then come conditions as to materials and mode of construction, and a provision for arbitration in case of difference; and then follow the words of obligation—"And declaring, as it is hereby expressly provided and declared, that the said second party and their foresaids shall be bound and obliged, whenever required by the said first party or their foresaids, including as aforesaid, to level, make, form, causeway, and finish the one-half of the roadway of the said street situated next to the said plots or areas of ground hereby disponed, and to make and form the pavement situated on the side thereof of the width, on the level, in the manner and of the materials foresaid, so far as extending along the said plots or areas of ground hereby disponed; and also declaring, as it is hereby expressly provided and declared, that it shall be in the power either of the said first parties and their foresaids or their successors in the remaining lands of Blochairn, including any parties who have feued or purchased or may feu or purchase the ground on the opposite side of the said streets, or of the second party and their foresaids, to make and form the said common sewer and drains on the levels, and of the materials, and in the manner before mentioned, whenever they shall think proper so to do; and the said other party and their foresaids shall be bound and obliged to repay to the party forming the said sewer and drains and their foresaids the one-half of the" expense with interest. Now, that is just the counterpart of the obligations which had been already imposed upon the feuars of the ground to the south; and I cannot say that I see any difficulty in construing it. It is an excellent example of the manner in which each of several feuars deriving right from a common superior may acquire a *jus quæsitum* in the feu-contracts of the others. It does not matter that no feuar is a party to the contract between any other feuar and the superior. Each is taken bound to contribute to the operation which is intended for the common benefit of all; and right to compel performance as against the second set of feuars is conferred in terms upon the first. It is unnecessary to determine whether the Hannays could have sued in their own name upon the contracts with the feuars to the south which are conceived in different terms from their own. I assume in favour of the pursuers' argument that their title so to sue might have been supported by reasonable implication from the reference in both contracts to a common scheme of operations for the benefit of both feus. But I am unable to see any ground on which the purchasers of ground to the east can maintain that the same right is conferred upon them. I agree with the Lord Ordinary that they are not within the words by which the possible creditors in the obligation are described in the feu-contract. They are not the successors of the superiors either in the superiority or in the remaining lands of Blochairn. These words cannot be construed to cover an indefinite number of purchasers of separate portions of that estate; and if they could otherwise have been so construed, I think that interpretation would have been excluded by the contrast between the manner in which the land to the east and the land to the south is dealt with in the contract. It is contemplated, as we have seen, that the street may be continued so as to accommodate the land to the east, but there is no obligation either on superior or vassal to continue it, and there is no stipulation in favour of feuars or purchasers of land to the east, corresponding to the stipulation in favour of feuars or purchasers of land to the south. When it is intended that purchasers of separate portions of the estate shall have right to enforce the obligations of the feuars, it is so stipulated in express terms, and the inference is that other purchasers for which no such stipulation is made were not intended to have any similar right.

The same reasoning applies to the other streets, C E F and E G. The only distinction is that in these cases the obligation is in favour of the superiors and their successors alone, and not of any feuar or purchaser of separate lots.

For these reasons I agree with the Lord Ordinary on the construction of the obligation. But that conclusion is confirmed by the stipulations at page 11 of the print with reference to the right of access to, and power to use, the streets, sewers, and drains. The superiors stipulate that they shall be entitled to give such rights of use and access to "their feuars in the remaining parts and portions of their said lands of Blochairn, or to any other parties they may think proper, without being liable in any compensation" to the vassals. This is important as an element of construction, because it shows how the parties thought it necessary to describe the feuars of "parts and portions" of the estate when they intended to make stipulations in their favour. But it is also of very material importance for another reason. As a counterpart of the right to be conferred on other feuars, it is declared that "the said second party and their foresaids shall have right of access and power, so far as the first parties can competently confer the same, to use all streets and common sewers or drains or portions thereof which have been or may be formed by the first party or their feuars in the remaining portions of the said lands of Blochairn, without being liable in any compensation therefor to the first party or their successors or their feuars in the said lands, and the first party bind and oblige themselves and their successors to insert clauses sufficient to secure these objects in all the future conveyances to be granted by them or their foresaids of the lands of Blochairn or parts thereof."

The pursuers' right to make use of the streets if they were made is thus dependent upon its being conferred upon them by the superiors, and they could not validly confer it except upon condition of their imposing a corresponding obligation on the pursuers themselves. But the superiors

have conferred no such right upon the pursuers, and they have imposed no such obligation. It follows that the community of rights and obligations which the contract contemplated as possible has not been brought into existence, and the pursuers can have no title or interest to compel the construction of streets, which when they have been constructed they will not be entitled to use.

The pursuers' counsel relied upon a well-known series of cases with reference to building restrictions. These cases are not directly in point, because the pursuers are not claiming the benefit of a servitude or restriction, but seeking to enforce a personal obligation *ad factum præstandum*. But the result of the decisions, as the law is laid down by the House of Lords in *M'Ritchie* v. *Hislop*, is that to give neighbouring feuars the benefit of restrictions in feu-contracts to which they are strangers, there must be either (1) an express stipulation in their respective contracts with the superior, or (2) a reference in both contracts to a common plan or scheme of building, or (3) an agreement between the feuars themselves. The pursuers' title satisfies none of these conditions.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I think that in order to give the pursuer a title to sue, he must either have assigned to him the creditor's right in the obligation, or he must show that by some antecedent contract the pursuer had undertaken to make a road for the alleged debtor's benefit. In such a case the principle of *M'Ritchie* applies. If the superior puts the adjacent feuar under such an obligation, the person with whom he has agreed to give a right to enforce that obligation will have the benefit of that obligation. The analysis which Lord Kinnear has made of the titles, shows to my mind completely that neither of these conditions applies, and therefore that the pursuer's case is not well founded.

LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—D.-F. Asher, Q.C.—Rankine—Guy. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders and Respondents—W. Campbell—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.

MESS (SANG & COMPANY'S TRUSTEE) *v.* LOW.

Partnership—Constitution—Loan or Partnership—Share of Profits—Application of Profits to Extinction of Prior Debt.

J. advanced the sum of £1000 to L. & Co. on terms provided by a minute of agreement, which proceeded on the narrative that "the first parties have applied to the second party for an advance by way of a loan to enable them the better to carry on their business." The following conditions were contained in the deed:—(1) The second party was to receive 5 per cent. interest upon the loan; (2) The profits were to be retained in the business till the expiry of the agreement (which was to last for three years), when the loan was to be repaid and the profits divided equally between the parties; (3) the second party was primarily to apply his share of the profits in the extinction of a prior debt due to him by the partners of the firm; (4) the first parties were to have sole charge of the business of the firm, but were to supply half-yearly balance-sheets; (5) should the balance-sheet at any time show that the capital of the firm had fallen to £500, the agreement was to terminate, and the balance was to be paid to the second party, who was "in no circumstances to be liable beyond the amount of his loan;" (6) it was declared that the said second party should not be deemed or held to be in any respect a partner in the said firm.

Held that the contract was one of loan and not of partnership.

Title to Sue — Bankruptcy — Trustee in Sequestration—Partnership.

Opinion (by Lord M'Laren) that where the estates of a firm and certain of its partners have been sequestrated, the trustee in the sequestration has no title to call upon a person outside the trust, and who has not been made bankrupt, to contribute as a partner to the funds for distribution, unless such person is bound by the contract of copartnery so to contribute.

The estates of Laing Brothers & Company, jute spinners, Dundee, as a company, and of the individual partners, were sequestrated on March 9th 1895, and Mr John Mess, accountant, Dundee, was appointed trustee in the sequestration. Previous to the sequestration he had been acting under a voluntary trust-deed granted in his favour by the partners on 25th July 1894.

On 28th August 1891 Laing Brothers & Company and Mr John Low, nephew of the partners, entered into the following minute of agreement:—"Whereas the first parties have applied to the second party