maintaining this heritable subject in its actual state, but I shall not allow a deduction for them, because I think they are repairs which should be made at the tenant's expense. I have no doubt that as a rule the deductions contemplated by the statute are those required by the outlays of the proprietor, because the intention is obviously to allow such deductions from the gross rent as will enable the subjects to be maintained in a position to command that rent. But if that is the effect of the statute, the poor-law officer is not called upon to enter into any elaborate calculation outside the statute for the purpose of attaining it. He must confine himself to the single task imposed upon him by the Legislature, and taking the gross annual value of lands and heritages as it is given him in the valuation roll he must deduct the average cost of the repairs which are necessary to maintain such lands and heritages in their actual state. The reporter has set himself to do this and nothing more in the estimate which he has given, and I find no relevant averment that in doing it he has committed any error which requires to be corrected. The apparent difficulty which seems to arise from the magnitude of the deductions in proportion to the total annual value of the subjects turns out to be no difficulty at all when the nature of the subjects is considered. The greater part of the value of this complex heritage is due to the inclusion of machinery and plant, which would not be considered as land and would not be valued at all but for the operation of a somewhat artificial rule of positive law. But if it turns out that the things so included are perishable in the using, and if therefore the cost of maintaining the entire complex heritage in its actual state turns out to be so great as to bring down the annual value of the whole to its proprietor to something not much exceeding the proper rental of the lands and buildings without the machinery and plant, there is nothing anomalous in that result, and at all events it is the consequence of an estimate which is made in exact conformity with the statute.

It may no doubt be assumed that the annual value of the trade carried on in the complainers' work is very much greater than the sum which the Lord Ordinary finds should be taken as the basis of assessment. But it is not the complainers' trade but their heritable property only which is to be valued and assessed.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD KINNEAR intimated that Lord Kincairney, who was present at the hearing but not at the advising, had read his opinion, and concurred in it.

The LORD PRESIDENT and LORD M'LAREN were absent at the hearing.

The Court adhered.

Counsel for the Complainers and Respondents—Salvesen, K.C.—Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Respondent and Reclaimer — W. Campbell, K.C. — Munro. Agents—Douglas & Miller, W.S.

Wednesday, May 29.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

GOVERNORS OF MUIRHEAD COLLEGE *v.* MILLAR.

Superior and Vassal — Restrictions on Buildings—Enforcement by Vassals inter se — Mutuality — Enforcement against Superior—Defect in Plan Attached to Feu-Contract—Personal Bar.

In a feu-contract, dated in 1864, of a portion of the lands of L., it was stipulated and declared that the vassal should not be entitled to make any erections on the ground feued other than villas or dwelling-houses to be occupied exclusively as such, and the superiors bound themselves not to use and occupy the portion of their lands of L. "within the limits delineated on the said plan endorsed hereon, for the erection of buildings other than self-contained houses or villas, and bound themselves in feuing to subject the same to similar restrictions." The plan referred to showed an adjacent portion of the superior's lands of L. delineated on the plan by a red line. The ground feued was subsequently acquired in 1869 by a person who also acquired from the superiors another piece of land adjacent thereto, and received from them a feu-contract and charter of novodamus which conveyed to him (1) the portion of ground newly acquired by him, and (2), the original feu *de novo*. The deed of 1869 contained the same stipulations and declarations, and the same obligations on the superiors as were contained in the deed of 1864, but, *per incuriam*, the plan endorsed thereon showed only the land disponed by the deed, and did not show any portion of the adjacent lands delineated by a red line. The deed of 1869 also contained a declaration that the piece of ground thereby disponed of new was so disponed under the restrictions contained in the deed of 1864. An educational trust entered into a conditional agreement to acquire both pieces of ground so feued by the deeds of 1864 and 1869. They also acquired the superiority of these two pieces of ground. They brought an action to have it declared that they were entitled to use the two pieces of ground in question for the purposes of their college. They called as defenders the feuars of the adjacent portions of the lands of L. They maintained that the absence of any delineation of an adjacent portion of the

superiors' lands in the plan annexed to the deed of 1869 made the obligation of the superiors contained in that deed unintelligible, and therefore of no effect, and that in the absence of that clause there was no such mutuality as to entitle the feuars to enforce the restrictions *inter se*. *Held* (*rev.* Lord Kyllachy, Ordinary) that the defenders were entitled to decree of absolvitor, *per curiam*, upon the ground that the obligation upon the superiors contained in the deed of 1869 could not be read out of it in consequence of any defect in the plan, and that if that obligation was not limited to certain parts of the lands of L. it extended to the whole of the then unfeued parts of these lands, and that if the deeds of 1864 and 1869 were read together the limits of the superiors' obligation were made quite clear and intelligible; and, *per* Lord Trayner and the Lord Justice-Clerk, also in respect that, even if upon technical grounds the absence of the line in the plan annexed to the deed of 1869 made the restrictions not enforceable by the feuars *inter se*, the pursuers as superiors of the ground disponed by that deed were not entitled to take advantage from a mistake with regard to the plan annexed thereto, for which their authors in the superiority were responsible.

This was an action at the instance of the surviving first Governors of Muirhead College, Glasgow, in which the pursuers concluded for declarator that they had right to use certain portions of the lands of Langside for the purposes of the Muirhead College, and that the defenders, who were the feuars of certain other portions of the lands of Langside, had no right, title, or interest to interfere with the pursuers in so doing.

By feu-contract, dated 28th, 29th, and 30th March, and 1st April, and recorded in the Register of Sasines 22nd April 1864, and entered into between the trustees of Neale Thomson of Camphill on the one part, and Robert Wemyss, merchant in Glasgow, on the other part, the first party in feu farm disponed to the second party a plot of ground, part of the lands of Langside, containing one acre, three roods, thirty-nine poles, and sixty-eight one hundred parts of a pole (hereinafter referred to as lot I). The feu-contract contained a declaration that the second party, and his heirs and disponees, should be bound to erect, in so far as not already done, and to maintain on the said plot a self-contained villa or dwelling-house. It also contained the following stipulation:—"And it is hereby stipulated and declared that the said second party or his foresaids shall not be entitled to erect any houses or other buildings, or make any erections of any kind, upon the said plot or area of ground other than villas or dwelling-houses, with suitable offices thereto, which shall be of stone and lime and covered with slates, and each dwelling-house shall have attached to it a quantity of ground at least equal in extent to the minimum quantity of ground forming part of the first party's lands of Langside, within the limits delineated on the plan endorsed hereon, feued out or to be feued out by them for the erection of dwelling-houses." It was further declared "that it shall not be lawful to nor in the power of the said second party and his foresaids" to use the said plot for certain manufacturing purposes, or to carry on any trade or business which might be considered by the superiors to be injurious, offensive, nauseous, or hurtful, or might occasion disturbance or annoyance to the neighbouring feuars, "in favour of whom and of the said first party and their foresaids it is hereby declared that this declaration shall operate as a servitude upon the said plot or area of ground; and declaring that it shall not be lawful to nor in the power of the said second party and his foresaids to make use of the dwelling-houses and offices on the said plot or area of ground or any part thereof as an inn, hotel, or public stables, or to sell porter, ale, beer, wine, or spirituous liquors therein, but the same shall be occupied in all time coming exclusively as dwelling-houses and offices thereto . . . All which reservations, burdens, conditions, provisions, restrictions, limitations, obligations, declarations, and others herein written are hereby created and declared to be real liens and burdens upon and affecting the said plot or area of ground and buildings thereon, and are hereby appointed to be inserted in any notarial instrument that may be expede hereon, and inserted or validly referred to in all the future charters, precepts, dispositions, conveyances, instruments of sasine, notarial instruments, and other transmissions and investitures of the said plot or area of ground and buildings thereon, or of any part thereof, otherwise the same shall be, *ipso facto*, void and null; declaring further, that the said first party and their foresaids shall not be bound to follow out or observe the manner of laying out the said lands of Langside and others delineated on any plan or design thereof in any manner of way, but they shall be bound not to use and occupy that portion of the lands of Langside within the limits delineated on the said plan endorsed hereon for the erection of buildings other than self-contained houses or villas, and in selling, feuing, or otherwise disposing of the said portion of the lands of Langside they shall be bound to subject the same to conditions, restrictions, provisions, and others similar to those imposed upon the said plot of ground hereby disponed."

Annexed to the feu-contract was the plan referred to, which showed the plot of land disponed marked off with a blue line, and certain adjacent unfeued parts of the lands of Langside surrounded by a red line.

The lands so feued in 1864 to Mr Wemyss were acquired by Mr Alexander Bannatyne Stewart, who, desirous of adding to the amenity of his residence, procured from the superiors another plot of ground, 1 acre 2 roods and 35·53 poles in extent, immediately adjoining that which had been acquired from Mr Wemyss (hereinafter re-

ferred to as lot II. Accordingly, in 1869 the superiors, Neale Thomson's trustees, executed in favour of Mr Stewart a feu-contract and charter of novodamus dated 2nd, 11th, and 12th August, and recorded in the Register of Sasines 10th September 1869, by which they conveyed to him the second plot, and of new conveyed to him the plot he had acquired from Mr Wemyss. The reason why this form of conveyance was resorted to, as appeared from the deed itself, was this—Mr Stewart intended to use the second plot entirely as pleasure-ground, and he was therefore not taken bound to erect any house thereon. In order, however, to give the superior some security for the feu-duty payable in respect of the second lot on which no house was to be built, the two lots were included in the one deed of conveyance, and the house and offices erected on the first lot were burdened with the feu-duty exigible for both. In this deed (the deed of 1869), practically the same restrictions and obligations as those quoted (*supra*) from the deed of 1864 were repeated.

There was practically no difference in the wording of the clauses of restriction as to building and use of the lands feued between the original feu-contract of lot I. and the new feu-contract and charter of novodamus of 1869, except that the latter contained the following clause:—"And declaring that the plot or area of ground before described in the second place, and hereby disponed of new, is so disponed always with and under the whole reservations, burdens, conditions, provisions, restrictions, limitations, obligations, declarations, and others specified in" the original feu-contract. But the plan annexed to the deed of 1869 was different from the plan annexed to the deed of 1864. The plan annexed to the deed of 1869 showed nothing marked off upon it but lots I. and II., and there was no red line showing the adjacent parts of the lands of Langside referred to in the deed as those within which the first parties bound themselves not to use and occupy the ground for the erection of buildings other than self-contained houses and villas, and bound themselves to subject the same to conditions and restrictions similar to those imposed upon the lands thereby feued.

By minute of agreement and sale dated in 1899 and 1900 the Governors of the Muirhead College, Glasgow, purchased lots I. and II. from Mr Stewart's trustees. The agreement provided that as there was a question whether the sellers' title did not prohibit the use of the subjects as a college the present action should be brought, and the sale was conditional on a favourable decree being obtained by the purchasers.

The Governors of Muirhead College also acquired the superiority of the property in question conform to disposition in their favour recorded 7th April 1900.

On 24th February 1900 the Governors of Muirhead College raised the present action. They concluded for declarator that they, as proprietors of lots I. and II., had right to use these two pieces of ground, and buildings erected or to be erected thereon, for the purposes of the Muirhead College under the scheme sanctioned by the Court of Session upon 12th May 1899, including the foundation and maintenance of a residence for teachers and students, of class-rooms, physiological and chemical laboratories, of a dissecting-room, and of whatever might be necessary or expedient for the full equipment of the said college; and further, that the pursuers had right to erect such additional buildings upon the said two pieces of ground as might be necessary for the purposes of the college, and that the defenders, the feuars of the adjacent lands, had no right, title, or interest to interfere with the pursuers making such use of their property or erecting such additional buildings for the purposes of their college as they might consider necessary or expedient. The summons was afterwards amended by the adjection of a provision and declaration reserving the effect of the nuisance clause in the feu-contracts, and by the addition of the following alternative conclusions—"Or alternatively, it ought and should be found and declared by decree of the Lords of our Council and Session that (but always subject to the proviso and limitation aforesaid) the pursuers as proprietors foresaid have right to use lot I. aforesaid and the buildings erected or to be erected thereon as a residence for teachers and students of said college; and further, to carry on the said college on lot II. aforesaid, and to use said lot II. and the buildings in so far as now erected thereon or to be erected thereon for a residence for teachers and students, and for class-rooms, dissecting-rooms, and physiological and chemical laboratories in connection with said college; or alternatively, that it ought and should be found by decree of the Lords of our Council and Session that (subject to the proviso and limitation foresaid) the pursuers, as proprietors foresaid, have right to use the dwelling-house and offices at present erected on the said two plots or areas of ground as a residence for teachers and students of said college, and to carry on said college on the remaining portions of lots I. and II. aforesaid, and to use such remaining portions and the buildings erected or to be erected thereon for class-rooms, dissecting-rooms, and physiological and chemical laboratories in connection with said college."

The pursuers pleaded—"(1) On a sound construction of the said feu-contracts, they contain no prohibition against the use of the buildings on the said two pieces of ground for the purposes of the said college, or against the erection thereon of such additional buildings as may be necessary for the said purposes. (3) The defenders are not entitled to enforce the restrictions in the said feu-contracts because they do not apply to all the feuars within the area which the superior contracted to place under the said restrictions."

Defences were lodged by three of the feuars on the lands of Langside, viz., Thomas Millar, proprietor of lot III., which

lay immediately to the west of lot II., William Lorimer, proprietor of lot XV,, which lay immediately to the north of lot I., and George Smeaton Rodger's trustees, the proprietors of lot XIII., which lay to the north of lot XV. All these lots were within the area surrounded by a red line on the plan annexed to the original (1864) feu-contract of lot I. The original titles of lots III. and XV., dated respectively in 1870 and 1871, contained similar prohibitions and obligations to that contained in the titles of lot I., and a plan was endorsed on each of them similar to that endorsed on the original feu-contract of lot I. The original title to lot XIII. was dated in 1857, and in it the obligation on the superior was confined to the nuisance clause and applied to the whole of the lands of Langside.

The defenders averred that the plan adjected to the deed of 1869 was obviously *per incuriam* confined to the two plots of ground comprised thereon instead of being made identical, as was intended, with the plan appended to the deed of 1864.

The defenders pleaded—"(4) The pursuers having acquired the superiority of the ground referred to on record are barred from founding on the mistake . . . made by their authors in the plan appended to the disposition of lot II. and novodamus of lot I. (5) On a sound construction of the titles, the pursuers are not entitled to decree in terms of the conclusions of the summons, and the defenders should be assoilzied from the same accordingly."

On 16th January 1901 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds, declares, and decerns in terms of the first alternative conclusion of the summons as amended: finds it unnecessary to deal with the second alternative conclusion, and dismisses the same: *Quoad ultra* assoilzies the defenders from the conclusions of the action, and decerns."

Note.—"In this case I have no doubt that the pursuers cannot have decree in terms of the original conclusions of their summons. Looking to the wideness of those conclusions, they could only have such decree in the view either that the ground in question is absolutely unrestricted, or that the defenders have no *jus quæsitum*, and therefore no title to enforce the restrictions. But neither of these contentions is in my opinion possible. For unquestionably both feus are in terms restricted to dwelling-houses, and are also restricted by what has been called the nuisance clause. And with respect to the defenders' *jus quæsitum*, the only disputable point seems to be whether such *jus quæsitum* as applied to feu No. II. goes beyond the enforcement of the nuisance clause. As to the mutuality of that clause there is no dispute.

"The summons has, however, been amended, and the first question is, whether the pursuers can have decree as regards either feu in terms of their original conclusion as now modified by the adjection of a provision and declaration reserving the effect of the nuisance clause. On this point —which, looking to the alternative conclusions which now follow, is not perhaps of much importance—I am still against the pursuers. I do not see my way to giving them a declarator which would really be to the effect that as regards both feus they are restricted only by the nuisance clause and not at all by the restriction to dwelling-houses contained in the titles.

"The question, however, remains whether one or other of the alternative conclusions now introduced may properly be affirmed. And as to this, my view is that I may properly affirm the first of those two conclusions. I am of opinion that the proposed use of the feu No. I. is not in contravention of the titles, and further, that the proposed use of feu No. II. cannot be effectually challenged by the defenders—at least cannot be so provided that the pursuers while erecting on No. II. buildings which are not dwelling-houses do nothing which shall involve a contravention of what I have called the nuisance clause. It is not, I think, possible—as the title to No. II. stands —to contend that with respect to the erection of dwelling-houses it imposes any servitude in favour of what is now the defenders' ground, or, what comes to the same thing, that it contains any obligation on the superior to impose the same restriction on the defenders' ground when feued off. In short, as the title to No. II. stands there is no mutuality and therefore no *jus quæsitum* in the defenders except only as regards the nuisance clause.

"The suggestion, however, is that in the title to No. II. there is an obvious mistake—the mistake being that the plan No. 20 annexed to No. II. feu-contract was *per incuriam* confined to the areas of feus Nos. I. and II., and did not, like the plan No. 19 annexed to No. I. feu-contract, show the whole red area there mentioned, including the ground of the three defenders. As to this I must acknowledge that if I were permitted to conjecture I should think the suggested mistake extremely probable. I cannot, I confess, see any reason except accident why the plan annexed to the feu-contract No. 2 should be different from the plan No. 19 annexed to the feu-contract No. 1. But while this is so, I am in the first place afraid that in a matter of this kind it is not permitted to conjecture, and in the next place I am not at all satisfied that even assuming the mistake suggested, it could be corrected at the instance and for the benefit of the defenders, who are not parties to the deed. I do not see how it could be so, either on the principle of the case of the Glasgow Feuing Company referred to at the discussion, or any other principle with which I am acquainted. I heard an ingenious and able argument on this point, but all I can say is, that I have not seen my way to accept it," . . .

The compearing defenders reclaimed, and argued—A mutual right of enforcing the conditions of the titles was created by the deeds irrespective of the plans altogether. The titles were practically in similar terms and enforceability as between vassals was established if there was identity of condi-

tions. Even if the same conditions were not in all the titles, it was enough if the conditions were put into a group of titles. It was not material that there should be a plan if in fact the superior had generally imposed similar restrictions on the other feuars. There was here such a case of mutuality and community of interests as entitled the feuars to object—*M'Gibbon* v. *Rankin*, January 19, 1871, 9 Macph. 423; *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95. If the plans had to be taken into account, it was a question of interpreting them. The charter of novodamus assisted in interpreting the plan attached to the title of lot II. It brought into the feu the plan attached to lot I. If there was a mistake in the plan attached to lot II. by reason of the boundaries being omitted, then that was a clerical error which would be corrected by the Court—*Glasgow Feuing and Building Company, Limited* v. *Watson's Trustees*, March 11, 1887, 14 R. 610. In any event, the pursuers acquired their titles with the knowledge of what they now called a defect in them, and were not entitled to found upon it—*Petrie* v. *Forsyth*, December 16, 1874, 2 R. 214; *Stoddart* v. *Dalzell*, December 16, 1876, 4 R. 236. Further, they were now the superiors of the lands, and were barred from founding on the mistake in the plan annexed to the disposition of lot II. They represented the original superior, who had undertaken to insert the conditions in all the titles, and they could not take advantage of his failing to do so. In any event, there being no line in the plan endorsed on the disposition of lot II, marking out the part of the unfeued lands referred to in the superiors' obligation, the obligation must be held to extend to the whole lands of Langside then unfeued.

Argued for the pursuers and respondents — The defenders practically argued that because identical clauses appeared in several of the feu-contracts there was therefore such mutuality as entitled them to enforce the conditions. But the fact of the same conditions appearing in several feu-contracts derived from the same superior was not sufficient to give each feuar a title to enforce it—opinion of Lord Watson in *Hislop, supra*, 8 R. (H.L.) 102. It must appear from the similarity of conditions that mutuality of interests among the feuars had been or was meant to be established. In the present case this did not appear from the titles. The title of Rodger's trustees did not contain any such clause restricting the use of the ground to the erection of dwelling-houses. And in the case of lot II. the superior's obligation could not be enforced because it could not be ascertained, there being no line on the plan showing the limits of the obligation. In such circumstances there was no such mutuality among the feuars as entitled one to compel another to observe the conditions imposed. It was said that the deed of 1869 being a charter of novodamus, the plan attached to the deed of 1864 was imported into it. But this was absurd; for the purpose of the deed of 1869 was to make a change in the arrangement under the deed of 1864. Restrictions on the use of property should be read strictly — opinion of Lord Curriehill in *Frame* v. *Cameron*, December 21, 1864, 3 Macph. 292—and would not be read into a deed by inference. It was said that there was an error in the plan attached to lot II. But if there was a mistake, the very persons who were entitled to found on it were the superiors and the vassal of that lot, and if they were content with a bungled deed no-one else had any right to complain. The case of *Glasgow Feuing and Building Company, Limited, supra*, was between the original parties to the contract, and did not apply to the present circumstances. The cases of *Petrie* and *Stoddart, supra*, had no bearing on the question. The interlocutor of the Lord Ordinary should be affirmed.

At advising—

Lord Trayner—[*After stating the facts*] —So far as the words in the two deeds (of 1864 and 1869) are concerned there is no difference. The difference between them is this—that whereas in the plan indorsed on the deed of 1864 there is a line marking out the parts of the unfeued lands of Langside referred to in the superiors' obligation, on the plan endorsed on the deed of 1869 there is no such line, but merely a plan showing the lands conveyed (originally and *de novo*) by that deed. In this state of matters the pursuers maintain (1) that the want of that line practically obliterates from the deed the superiors' obligation, because the extent or limit of that obligation is not defined and cannot be ascertained, and (2) that without that obligation there is not that mutuality of right and interest created among the feuars which entitles one feuar to insist on any other feuar observing the conditions of his feu. This view the Lord Ordinary has practically sustained, and in that judgment I am unable to concur.

The pursuers in this action seek to have it declared that they may lawfully build on lot II. something that is not a dwelling-house, nor to be occupied as such, provided that it be not or is not so used as to be a nuisance. I put the nuisance clause in the pursuers' title aside entirely; if they violate it there will be ample remedy for all who have interest or right to enforce that clause. The question here to be determined is, whether in the state of the titles the pursuers are entitled to build on lot II. anything but a dwelling-house. The defenders maintain the negative of this question on the ground that the pursuers' title expressly prohibits the erection of anything but a dwelling-house; and the pursuers' answer is, as I have already indicated, not that there is no such prohibition, but that the defenders are not entitled to enforce it because there has not been validly created as between the feuars a mutuality of right and interest in the prohibitions and restrictions placed upon the feuars which entitles them *inter se* to enforce the restriction. The decision of the case turns upon the effect to be given to the fact that on the

plan endorsed on the deed of 1869 there is no line indicating the part of the unfeued lands of Langside to which the superiors' obligation refers. If there had been such a line it is not maintained that the pursuers could have successfully claimed the decree they conclude for.

It is not without importance to notice that the character in which the pursuers seek to establish their right to immunity from the building restriction (so far as lot II. is concerned) is not that of vassals in lot II. but as superiors of that lot. The pursuers are not vested in one inch of the *dominium utile* of that lot, but they have acquired the superiority. Accordingly, what the pursuers are now endeavouring to do is to get free from what is their own obligation as superiors — an obligation expressed in language clear and unambiguous—because of a neglect or error in the execution of the plan for which they (or those whom they now represent) were as much responsible as anyone else. This does not predispose me in favour of the pursuers' contention. But they ask no favour—they claim a right, and whatever is their right must be accorded. There are some pleas which reflect no credit on the person putting them forward, which must nevertheless be sustained. But what is the effect of the want of the line? The superiors bound themselves to subject to similar restrictions as those imposed on the vassal in lots I. and II. "that portion of the lands of Langside within the limits delineated on the said plan endorsed hereon," Now, it was not the delineation which imposed the obligation. The delineation was to mark the bounds beyond which the obligation was not to be binding, and if the superiors failed to mark their plan so as to limit the extent of their obligation I should be disposed to say that the obligation remained without limit rather than to say that there was no obligation at all. The consequence of that would be that the superiors underlay an obligation to place the building restrictions on all the unfeued lands of Langside. It is clear that some part of the lands of Langside were to be restricted, and on the faith of that obligation, which appeared on the record, other feuars took their feus. Are they to suffer loss or inconvenience because the superiors did not sufficiently limit or define their obligation on a plan which did not enter the record, of which subsequent feuars had no knowledge, and of which they had no right to demand exhibition? The superiors did not leave out the delineation intentionally in order to enable them to maintain such an argument as they are now maintaining. That would have been dishonest, pretending to give an obligation while they were taking care to provide the means by which they could get rid of it. They knew the lands or portion of lands they referred to. The defenders are asking the superiors to do nothing more now than was intended by the deed of 1869 to be done. But further, what was intended by the obligation—indeed what was, in my opinion, done by the obligation — is ascertainable from a reference to the deed of 1864, executed by the same parties. The lands which the superiors bound themselves by that deed to put under restriction are delineated, and that deed may, and I think ought, to be read as part of the deed of 1869, for in 1869 the conveyance of 1864 is granted *de novo*. If you take the two deeds together, with their endorsed plans, no doubt is left as to the portion of the lands to be put under restriction mutually with other feus as to building.

The superiors' view of their own obligation is shown by the fact that in all the titles to feus adjoining lot II. the building restrictions are inserted in the same terms as in the deeds of 1864 and 1869, and the same obligation on the superior to impose the like restrictions on the other unfeued portions of Langside.

To allow the superiors now to repudiate their obligation in respect of an error for which they are themselves responsible, on the ground that technically that error obliterates the obligation, would certainly be doing an injustice to other feuars, who took their feus on the faith of that obligation, and who could not know of or correct the error so committed. But no technicality of conveyancing compels me to take that view. The obligation is there and cannot be read out of the deed. If not limited to certain parts of the unfeued lands of Langside by delineation on the plan, then it is without limit and extends to all the unfeued parts of Langside. But if the superiors' own deeds relative to lots I. and II. are taken together the limit of the superiors' obligation is made clear.

I am of opinion that the interlocutor of the Lord Ordinary should be recalled and the defender assoilzied.

LORD YOUNG concurred.

LORD MONCREIFF—In this case the pursuers, the first Governors of Muirhead College, seek to have it declared that they have right to use two pieces of ground which they have recently purchased, and which are described in the summons as lots I. and II. "for the purposes of the Muirhead College, including the foundation and maintenance of a residence for teachers and students, of class-rooms, physiological and chemical laboratories, of a dissecting-room, and of whatever may be necessary or expedient for the full equipment of the said college."

Under the original feu-rights applicable to lots I. and II. (dated 1864 and 1869 respectively), the feuars are prohibited from erecting on the said plots any buildings other than dwelling-houses and offices, and from using the buildings erected for any other purpose. It is therefore clear that many of the purposes for which the pursuers propose to use the said lots would be in contravention of the conditions of their feus.

I think it was a condition of the agreement that the superior could restrain them if he chose. But the pursuers have acquired the superiority of the said lots in order to free themselves from objection from that quarter.

The real question is, whether the defenders who have appeared, who are feuars of ground adjoining lots I. and II., and whose rights flow from the same superior, have a title to object. The defender William Lorimer is proprietor of a lot, No. XV., immediately to the north of lot. I. The defender Mr Millar is proprietor of a lot, No. III., which lies to the west of lot II.

Turning first to the titles of these defenders it will be seen that the first title of lot No. XV. is a feu-contract dated 1870, which contains a similar prohibition to that contained in the pursuers' earlier titles dated in 1864 and 1869 relative to lots I. and II.

The original title of lot No. III dated in 1871 contains a similar prohibition.

It will thus be seen that the feu-rights of those lots—I., II., XV., and III.—all contain substantially the same stipulation, to the effect that only dwelling-houses and offices shall be erected and used on the feus. That of itself might not be enough to give one feuar a direct right of action against another to enforce the conditions of feu, and therefore it is necessary to examine the titles to see whether it was the intention of parties in each case that such mutual right of action should be created.

According to the authorities it is not indispensable that the titles should contain an express declaration. It is sufficient if such an intention can be reasonably inferred from the mutual obligations contained in the titles, the nature of the properties, and the relation of the various proprietors to each other — *M'Gibbon* v. *Ranken*, 9 Macph. 423; *Hislop*, 8 R. (H.L.) 95.

The matter stands thus — The title of the pursuers' lot No. I. contains an express obligation on the superiors "not to use and occupy that portion of the lands of Langside within the limits delineated on the said plan endorsed hereon for the erection of buildings other than self-contained houses or villas, and in selling, feuing, or otherwise disposing of the said portion of the lands of Langside they shall be bound to subject the same to conditions, restrictions, provisions, and others similar to those imposed on the said plot of ground hereby disponed."

The title of lot No. II. contains a similar obligation.

The titles of lots XV. and III. contain a similar obligation on the superior.

So far it is plain that as between lots I., II., XV., and III., according to the recognised canons of construction, mutuality has been well created in the titles.

The difficulty consists simply in this, that while the feu-contract of lot II. contains an obligation on the superior in precisely the same terms as that applicable to lots I., XV., and III., the plan endorsed on the feu-contract, by an undoubted error, does not show the area to which the restrictions are intended to apply. It only shows the lots conveyed. The pursuers maintain that there being no plan which shows the area, there is no effectual obligation on the superior to impose similar restrictions on feus to be subsequently granted, and that thus there is no mutuality between the proprietor of lot No. II. and the defenders. It does not necessarily follow that because a proper plan is not appended to the feu-contract of lot No. II. the superior is thereby wholly freed from his obligation. On the contrary, *prima facie* it lies upon the superior to show why the obligation should not apply to the whole of the lands of Langside.

But it is not necessary to consider this, because notwithstanding the absence of a proper plan it is not difficult to ascertain from the remainder of the deed itself the limits within which the parties to it intended that the restrictions should be imposed. It so happens that along with and in the same deed as the grant of lot No. II. there is a charter of novodamus of lot No. I., the purpose being to enable the feuar of lot No. II. to use the building already erected on lot No. I. as security for the performance and fulfilment of his whole obligations in regard to lot No. II. He was desirous of using lot No. II. for purposes which might not at once require the erection of villas or dwelling-houses thereon; and the building already erected on lot No. I. was of sufficient value to secure payment and performance of all the feuar's obligations in connection with either lot. Thus to certain effects lots I. and II. were to be treated as one feu. Now lot No. I. remained subject to all the conditions and restrictions of the original feu, and these included, as I have shown, an obligation on the superior to insert the conditions and restrictions imposed upon the feuar upon all feus subsequently granted within the area which is correctly delineated on the plan annexed to the feu-contract, being the same as that shown on the plans annexed to the titles of feus XV. and III.

There is thus no reasonable doubt on the titles that the superior's obligation on the feu-contract applicable to lot No. II. was intended and understood by both parties to apply to the same area, and that is all that the law requires.

I have not yet referred in this connection to the feu-right of lot No. XIII., the present proprietors of which are the defenders Rodgers' trustees. The original feu-contract of that lot is the oldest in date of those before us, having been granted in 1857, at which time the pursuer does not seem to have definitely decided as to his feuing-plans, although he undoubtedly intended to feu out the lands of Langside or part thereof, and to confer mutual rights on his feuars. The deed, however, contains an obligation on the feuar to erect either a self-contained house or double villa of certain dimensions, and declares that it shall not be lawful for him to erect more than a double villa of description foresaid with suitable offices on each half-acre of ground. Then follows a nuisance clause, and after it an obligation upon the superior in these terms—"The first party hereby bind and oblige themselves and their successors to insert similar declarations and provisions relative to the depositing of dung or rubbish on the land, carrying on of trades or businesses, and erection of manufactories or

works in the feu-rights and dispositions to be hereafter executed by them and their foresaids of the remainder of the said lands of Langside or any part or portion thereof." The plan annexed shows only the feu conveyed.

In the deed two things will be observed—*first*, that the obligation does not in terms apply to the erection and occupation of villas; it is confined to the nuisance clause; *secondly*, that it applies to the whole lands of Langside, and not merely to part thereof. It is thus not precisely in the same terms as the superior's corresponding obligation in the subsequent feu-rights.

It is not in my opinion necessary to consider whether, had the only compearing defender been the proprietor of lot No XIII., the terms of his title would have been sufficient to instruct mutuality between him and the pursuers.

The original feu-contract applying to lot No. XIII. is the earliest in date, and I am not satisfied that the fact that the superior's obligation in that feu-contract is apparently of a more limited nature affects the rights *inter se* of proprietors of feus subsequently created. Even if it were held that there is no mutuality between lot XIII. and subsequent feus, the only effect would be to restrict the area to which the conditions in question apply and the number of the parties entitled to enforce them.

On the whole matter, although the titles of the respective feus are not in all respects identical, I think the clear intention, at least of all parties to the feus of lots I., II., XV., and III., was that the restrictions should exist and be enforced for the benefit of other feuars within the area delineated, and that there is sufficient legal evidence of this intention to sustain the defenders' title to object to decree being granted.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied.

LORD JUSTICE-CLERK — I have had an opportunity of reading the opinion of Lord Trayner, in which I entirely concur.

The Court recalled the interlocutor reclaimed against, assoilzied the compearing defenders from the conclusions of the action, and decerned.

Counsel for the Pursuers and Respondents — C. K. Mackenzie, K.C. — Craigie. Agent—D. Hill Murray, S.S.C.

Counsel for the Compearing Defenders and Reclaimers — Johnston, K.C.—Clyde. Agents—Webster, Will, & Co., S.S.C.

RAILWAY & CANAL COMMISSION.

Tuesday, June 4.

(Before Lord Stormonth Darling, Viscount Cobham, and Sir Frederick Peel.)

INVERNESS CHAMBER OF COMMERCE *v.* HIGHLAND RAILWAY COMPANY.

Railway — Undue Preference — Traders' Tickets — Issue of Traders' Tickets at Rates Varying according to Amount of Traffic—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. c.* 31), *sec.* 2—*Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict c.* 25), *secs.* 27 *and* 55.

Held that a practice followed by a railway company of issuing traders' tickets at rates varying according to the amount of traffic sent or received in the course of the year by the persons who applied for these tickets was not an undue preference in favour of or against any person or class of persons within the meaning of the Railway and Canal Traffic Acts 1854 and 1888; and application to have the railway company enjoined to desist from issuing such tickets at such varying rates *dismissed*.

Question — Whether a railway company is entitled to reserve right to decline to issue a trader's ticket without assigning any reason.

Opinions reserved, in respect that the railway company had not attempted to act upon the notice issued by them to that effect.

The Railway and Canal Traffic Act 1854 (17 and 18 Vict. c. 31) enacts as follows—Sec. 2—No railway company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever."

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25), enacts as follows:—Sec. 27—"(1) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than the charges to other traders or classes of traders or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company. (2) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable, in addition to any other con-