according to the statutory rule for such cases. That value might have been more than the assessment authorised to be levied by the local authority. But if the owners of property were liable to be compelled to take water as they are in this case under section 89 of the statute, the lettable value could scarcely be less than a sum sufficient to enable the proprietors to extinguish the expenditure within 30 years, unless the powers of charging for water were limited so as to make this impossible. I think that no difficulty of that kind is shown to exist here.

With regard to the alleged arrears of assessment which the appellants claim to deduct, I also agree with Lord Fraser. It is not shown that the powers of assessment conferred by the 94th section of the statute are insufficient to enable the local authority to recover the full amount which they have imposed.

The Court were therefore of opinion that the determination of the Valuation Committee was right.

Counsel for Appellants—W. C. Smith. Agent—Thomas M'Naught, S.S.C.

HOUSE OF LORDS.

Thursday, June 23, 1881.

(Before the Lord Chancellor Selborne, Lords Blackburn and Watson.)

HISLOP *v.* MACRITCHIE OR LECKIE AND OTHERS (MACRITCHIE'S TRUSTEES).

(*Ante*, vol. xviii., p. 254.)

Superior and Vassal—Restrictions in Feu-Charter—Right of Co-feuar to Insist for Enforcement of Obligation imposed by a Common Superior.

In order to give one feuar right to insist against another feuar holding of the same superior for the enforcement of restrictions upon building imposed by the superior, there must be an undertaking by the superior to insert the same or similar restrictions in all feus given out by him, or a reference to a common building plan, or an agreement among the feuars themselves; otherwise there is no mutuality of rights and obligations among the feuars, and no one can enforce against another the restrictions contained in the feu-charter.

Terms of a charter and circumstances which were *held* (*rev.* judgment of the Second Division) insufficient to bring a case under any of these categories.

Process—Title to Sue—Consent and Concurrence.

Held (*rev.* judgment of the Second Division) that where the party bringing an action has no title to sue, this defective instance cannot be cured by obtaining the consent and concurrence of the person who has alone the right of action.

Ante, Dec. 17, 1879, vol. xviii. p. 254, 7. R. 384.

The respondent appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, the effect of the interlocutors appealed from in this case is to enforce against the appellant at the suit of the respondents certain restrictions on building contained in a feu-contract dated the 6th of June 1782 between one James Jollie and Andrew Dick, the appellant's predecessor in title—Jollie being the superior, and Dick the vassal, under the contract.

These interlocutors are right if the respondents, who are neighbouring feuars under the same superior, were and are, by the combined effect of their own and the appellant's titles, interested in the obligations and restraints imposed upon the appellant by Dick's feu-contract, so as to be entitled to enforce those obligations and restraints for their own interest; or (however this may be) if the superior is, or ought to be deemed, a party complainant in the action in such a sense as to be suing for his own separate interest. If neither of those propositions can be established the appellant ought to have been assoilzied from the action, and the present appeal ought to be allowed.

James Jollie was in 1782 absolute owner of the whole ground in the city of Edinburgh which is now bounded by Gayfield Square to the north-east, East Broughton Place and Union Street to the south-west, and on the other two sides by Antigua Street and Gayfield Street. He divided it into four plots or parcels, one of which, consisting of two roods or thereabouts, was feued by him to Andrew Dick on the 6th of June 1782. This feu-contract recites that Dick had then lately enclosed that parcel of land, and had built upon it two separate houses, conform to a plan of elevation approved by Jollie. The feu is described as in one part bounded by ground lately feued by James Jollie to persons named Besillie and Moffat, and in all other parts by Jollie's remaining property, and by the street (then belonging to Jollie) upon the north-east. This feu-contract contained the restrictions on building which the respondents seek to enforce; and it also contained an agreement concerning certain walls of enclosure which Dick had built, or was to build, for the purpose of dividing his land from the parcels adjoining it, to the effect that such walls of enclosure were to "be mutual," and that "one-half of the expense of building the said mutual walls should be paid by the neighbouring feuars," Jollie thereby becoming bound "that the said feuars should fulfil that part of the agreement." There is no provision in this contract that either Besillie and Moffat (the persons spoken of as already feuars of part of the adjoining land), or any future feuars of any other part, should have the benefit of, or be in any way interested in, the restrictions as to building, or should be bound in favour of Dick and his successors in title by any similar restrictions. No general scheme or plan of building upon or otherwise using the adjoining parcels of land, or any of them, is indicated or referred to. The express provision already mentioned as to enclosure walls is adverse to any implication of an intention that in other respects mutual burdens for each other's benefit should be imposed upon Dick and the adjoining feuars.

The land so feued to Dick is now divided between two proprietors. The house No. 2 Gay-

field Square, with the ground belonging to it, which is vested in the appellant, constitutes one-half of that feu. No. 3 Gayfield Square (now vested in another proprietor), and the ground belonging to it, constitutes the other half, and intervenes between No. 2 and the respondent's feu, No. 4.

No. 1 on the other (or east) side of No. 2 was feued to Besillie and Moffat by contract dated the 14th of June 1783, in implement (doubtless) of some earlier agreement. It contained provisions and restrictions as to building, to the effect that a house or houses, the erection of which was contemplated with a frontage towards Gayfield Square, should be set back from the street, as Dick's houses were, and should not exceed two storeys in height. As to the rest of the land in this feu, the stipulations were different from those in Dick's feu-contract, and there was nothing in it, expressly or by implication, communicating to those feuars the benefit of any of the obligations entered into by Dick (except as to the enclosure walls) or making any obligation entered into by those feuars (with the same exception) a *jus quæsitum* for Dick's benefit.

The next feu granted was of No. 4 Gayfield Square, and the land belonging to it, to the respondents' predecessor in title (one Fitzsimmons) on the 13th of February 1784. The house fronting Gayfield Square in line with Nos. 1, 2, and 3 appears to have been then already built upon it, and so far from placing Fitzsimmons under restrictions corresponding with those placed on Dick, he was expressly authorised to build other houses on the south-east part of it, so as to range in point of height with some which Jollie, the superior, then contemplated building towards the street now called East Broughton Place. There is no reference in this feu-contract to the restrictions on building to which Dick's feu was subject, still less anything purporting to communicate to Fitzsimmons any benefit from those restrictions.

The fourth and last plot of ground was afterwards feued, as to part, to Fitzsimmons (who conveyed it to Ferrier), and as to the rest to Ferrier, with provisions as to building similar in substance to those in the feu-contract of No. 4 to Fitzsimmons.

No general scheme or plan of building was embodied or referred to in any of these feu-contracts, and (except that the houses Nos. 1, 2, 3, 4, and 5 have a uniform frontage, so far as relates to their distance from the street, towards Gayfield Square) no such general plan appears to have been followed in building upon any of the plots of ground feued.

Under these circumstances it appears to me to be clear that this case does not come within the principle of *M'Gibbon* v. *Rankin*, 9 Macph. 423, and the other authorities of that class. The restrictive provision as to building in Dick's feu-contract was not in any sense *jus quæsitum tertio*; it was merely a condition of tenure between superior and vassal. The fact of several feuars of neighbouring plots of building land in the same street holding from a common superior, does not by itself entitle one of those feuars to claim the benefit of restrictions contained in the feu-contract of another unless some mutuality and community of rights and obligations is otherwise established between them, which can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves. Here there are none of those things. It follows that the respondents at your Lordships' bar have no interest of their own—no right or cause of action against the appellant. They are strangers to the contract in which the restrictions which they seek to enforce are contained.

The appeal therefore must be allowed, unless the fact that the note of suspension and interdict is expressed to be "with consent and concurrence of the Governors of Cauvin's Hospital" makes the Governors of the Hospital (whom I assume to have now the title of superiority which at the time when the several feus was granted was vested in James Jollie) parties suing for their own title and interest, independently of any right, title, or interest in the respondents.

The majority of the Judges of the Second Division (Lord Young dissenting) appeared to have thought that the Governors of Cauvin's Hospital were in substance complainers in this action, so as to cure by the strength of their title any infirmity or defect in the title of the respondents. I am not myself able to concur in that opinion, and I am not satisfied that it would have been the conclusion of those learned Judges if they had thought (as I do) that the respondents had no title of their own upon which they could sue in their own right.

The pleadings are throughout constructed upon the view that the respondents, the feuars of No. 4 (and they only), are "complainers" in the suit. The reasons of suspension and interdict, the answers to the statement of facts for the present appellant, and the pleas-in-law for the complainers, are those of the feuars, and of the feuars only. Nor is it easy to conceive why the superiors, if they intended to be the complainers at all, should not have been so in the ordinary form. I think it plain upon the whole record that the consent and concurrence of the superiors was thought necessary, and was alleged in the note of suspension and interdict only because it was with and to them that the obligation which the feuars claimed the benefit was originally undertaken. There is no definite averment of the superiors' title, as there surely ought to have been if it had been intended to make a case on which the superiors might stand without the feuars, and which could be met by separate defences available against the superiors only.

This particular form of suit with "consent and concurrence" seems to be not uncommon law in Scotland when the principal parties have an interest or right of their own qualified by or dependent upon some *jus tertii* or some limitation or condition which might be an obstacle or impediment to their suing without such consent, but which ceases to be so when they have it. No authority was cited for the general proposition that under this form of suit the consenting or concurring parties ought to be or can be regarded as sole or principal actors when it turns out that the parties suing as principals on the record have not the interest or right which they claim. I infer from what was said by the Lord Justice-Clerk that his Lordship was not prepared to affirm that general proposition, and I have myself no hesitation in stating that I think it untenable in law.

The result is, that considering the respondents to be strangers not entitled to the benefit of the restrictions in the feu-contract of the 6th of June 1782, I think this appeal ought to be allowed; and I therefore move your Lordships that the interlocutor appealed from be reversed, and the case remitted to the Court of Session, with directions to sustain the third plea-in-law for the appellants and to refuse the reasons of suspension, with expenses. The costs of the appeal to this House will follow the event.

Lord Blackburn—My Lords, James Jollie in the years 1782, 1783, and 1784 gave out feus of what now forms one side of Gayfield Square in Edinburgh. His title is now in the Governors of Cauvin's Hospital.

The Lord Ordinary states the first question thus:—"The feus of Gayfield Square were given out by James Jollie. The complainers [the respondents before this House] are the proprietors of feu No. 4, while the respondent [the appellant before this House] is the proprietor of feu No. 2. The purpose of this action is to restrain the respondent from building in contravention of the conditions of his feu, and to have him ordained to remove such buildings as he has built in contravention of these conditions. The first question is, whether the conditions of the feu-contract of the respondent are enforceable by a co-feuar? The Lord Ordinary thinks that they are. The feu-contracts contain similar, though not identical, conditions as to building. These conditions seem to the Lord Ordinary to have been inserted for the joint behoof of the feuars, and are therefore enforceable by any one against the others."

A great deal of house property in Scotland is held under feus containing in the feu-charters restrictions as to what is to be done. Such restrictions are, *prima facie*, enforceable only by the superior, who alone is a party to the contract of feu. If he has entered into another contract of feu, the superior may, if he considers that the relations he has entered into with that other feuar render it either morally or legally incumbent on him so to do, enforce those restrictions for the benefit of that feuar, though the latter be no party to the contract which created the restrictions. It may, at first sight, seem not very material whether the restriction is to be enforced by the superior suing at the instance of the co-feuar, probably (after having taken due security for his indemnity) permitting him to conduct the litigation, or by the co-feuar direct; but practically it makes a good deal of difference. I think it must be taken as settled that where it appears that the restrictions were entered into for the benefit of other feus, either already existing or to be created by the superior thereafter, the restriction may be enforced by each co-feuar as far as his interest is concerned. It might have been better if the question whether it so appeared had been from the first considered to depend entirely on the construction of the contract of feu, applying the ordinary rules of construction to the terms used in it; but there are expressions used in some of the judgments on this subject which, if taken literally, seem to go further.

As many houses are bought and sold, the price being regulated according as it is thought that the purchaser has a direct remedy to enforce such restrictions as are in his favour against his neighbours, or, on the other hand, that he can easily, by dealing with the superior, and the superior alone, get relieved from such restrictions on his own property as are burdensome, I think it desirable in this, as in all conveyancing questions, not to depart from what has been established.

But I think that in the case now at the bar there is nothing to indicate that restrictions were imposed for the benefit of the co-feuars beyond the fact that the feus were all given out nearly at the same time, and that some of the conditions inserted in the feus are similar to each other. That, and the fact (which exists in most cases where a square has been built at about the same time, whether on land belonging to one estate or to several) that the houses are built so as to produce a considerable degree of uniformity, are all that the respondents' counsel could point out as tending to show that the restrictions were originally imposed for the benefit of the co-feuars; and though some expressions used by Lord President Hope (2 W. and S. 302) and Lord President Inglis seem to indicate an opinion that this is enough to justify the conclusion that the restrictions were imposed for the benefit of the co-feuars, I think no decided judgment has yet been given on the ground that that alone is enough.

I come to the conclusion that the cases should not be carried further than they have already been, and consequently I must advise your Lordships to differ from the opinion expressed by the Lord Ordinary.

The other question is a very technical one of pleading. Practically the difference between being permitted to enforce the restrictions by suing in the co-feuar's name with the concurrence of the superior, and by suing in the name of the superior for the benefit of the co-feuar, seems to me only to consist in the greater probability that the superior will permit the one course to be taken than the other. I think it more desirable that the superior should distinctly know what he is doing, and there being no authority in favour of the respondents' contention I think this point also should be decided in favour of the appellant.

I therefore agree with the judgment proposed by the noble and learned Lord on the woolsack.

Lord Watson—My Lords, the Governors of Cauvin's Hospital are the superiors of a piece of ground lying upon the west side of Gayfield Square in the city of Edinburgh, which was feued out in lots for building purposes about the end of last century. The northern portion, consisting of nearly one-half of the ground in question, was given off in five separate lots, upon each of which there has been erected a dwelling-house fronting Gayfield Square, with offices behind. These houses are erected on the same building line, and in front of each there is an open space twenty feet in breadth, separated from the street by a low wall and railing, which the feuar is under obligation to maintain. Upon the background of No. 5, which is the northernmost of these lots, there has also been erected a large hall, and upon the background of No. 4 an additional dwelling-house, these buildings having frontage to other streets belonging to the superiors. The buildings which I have just described are sanctioned by the terms of the respective feu-rights, all of which contain an express prohibition against the erection of any other buildings.

The appellant, who is now the proprietor of lot No. 2, was proceeding to convert his dwelling-house and offices into a carriage manufactory, and the alterations which he was in course of making for that purpose included the erection of a show-room, one storey in height, upon the vacant space between the house and Gayfield Square, and also the erection of buildings of similar character, and of considerable extent, upon the background. It was not seriously disputed at the bar, and it does not appear to me to admit of reasonable doubt, that these operations were in direct violation of that condition of the appellant's feu-right by which he is bound "not to erect any other buildings upon the said piece of ground (*i.e.*, lot No. 2) except the tenement of houses and walls of enclosure already erected thereon."

The process of suspension and interdict, in which the present appeal is taken, was raised at the instance of the respondents, who, as trustees of the late Thomas Elder MacRitchie, W.S., are proprietors of the feu forming lot No. 4, "with consent and concurrence" of the superiors, the Governors of Cauvin's Hospital. The object of the action is to enforce the condition of the appellant's feu-contract, by interdict against the erection of any buildings on lot 2 other than those which are expressly sanctioned by the terms of that contract.

The Lord Ordinary was of opinion that the respondents, MacRitchie's trustees, had *per se* a good title to enforce the restriction, and he accordingly granted interdict to the effect craved. On a reclaiming note to the Second Division of the Court the Lord Justice-Clerk and Lord Gifford (Lord Young dissenting) affirmed the judgment of the Lord Ordinary, on the ground that, assuming the respondents to have no right to enforce the restriction, they were entitled to decree in respect of the consent and concurrence of the superiors, who had the right. Lord Gifford seems to have been of opinion with the Lord Ordinary that the feuars of these five lots were mutually entitled to enforce the conditions of their respective feu-rights. So far as expressed, the opinion of the Lord Justice-Clerk upon that point is unfavourable to the respondents. Lord Young held that the respondents had of themselves no title to sue, and that the appellant must prevail, because the defective instance of the respondents could not be validated by the mere consent and concurrence of parties having a good title to insist for the same remedy in an action at their own instance.

It is settled by a series of decisions in the Courts of Scotland that every one of a class of feuars deriving their title from a common superior may have an implied right or *jus quæsitum* to enforce conditions occurring in contracts between the superior and his co-feuars to which he was not a party. In some cases it is made a matter of express stipulation by the superior, in contracting with his vassals, that each of them shall have that right. The right in those cases, when it has been held to arise by implication, appears to me to have been originally admitted upon considerations of expediency, and partly with the view of avoiding circuitous and unnecessary litigation.

Both parties, in their argument at the bar, assumed, and rightly assumed, that in order to the constitution of such a *jus quæsitum*, it is essential that the conditions to be enforced shall appear in all the feu-rights, that they shall in all cases be similar, if not identical, and of such a character that each feuar has an interest in enforcing them. But the respondents carried their argument so far as to maintain that these considerations, where they are found to co-exist, sufficiently indicate that the conditions of feu were intended for the mutual benefit of all the feuars, and must therefore be held to confer upon each feuar a right of action against his co-feuars for the enforcement of these conditions. The respondents did not assert that the proposition thus advanced by them has as yet been judicially determined in their favour, but they did maintain that it is as strictly in accordance with the principle of the decided cases, that contention being founded mainly, if not altogether, upon certain *dicta* of Lord President Hope in the case of the *Governors of Heriot's Hospital* v. *Cockburn*, 2 W. and S. 302, and of Lord Ardmillan in the recent case of *Robertson* v. *North British Railway Company*, 1 R. 1218. In the latter case Lord Ardmillan said—"Where in titles originally springing from the same person there is an undoubted and substantial interest in one feuar to enforce a restriction such as this, partaking of the nature of a servitude, against another feuar, the law will recognise a title available and sufficient to support his interest and to enforce the restriction."

If those words were taken as a complete statement of the law applicable to cases like the present they would support the contention of the respondents, and so would the language used by Lord President Hope in the *Governors of Heriot's Hospital* v. *Cockburn*, which I have not thought it necessary to quote. The soundness of Lord President Hope's *dicta* has been seriously questioned in subsequent cases, but I doubt whether either of the learned Judges intended in the passages relied on by the respondents to give an exhaustive definition of what is requisite in order to create a right in one feuar to enforce the conditions of another feu. Their statements of the law are unimpeachable if read with reference to the circumstances of the case in which they were uttered. If they were intended to have a wider application they were unnecessary for its decision.

The fact of the same condition appearing in feu-charters derived from a common superior, coupled with a substantial interest in its observance, does not appear to me to be sufficient to give each feuar a title to enforce it. No single feuar can, in my opinion, be subjected in liability to his co-feuars unless it appears from the titles under which he holds his feu that such similarity of conditions and mutuality of interest among the feuars either had been or was meant to be established. According to the tenor of the feu-disposition or feu-contract, as the case may be, the feuar and his superior are the only parties to it; and I am of opinion that no *jus quæsitum* can arise to any *tertius* except by the consent of both these contracting parties. That being so, unless the feuar either in express words or by implication gives his consent to the introduction of a *tertius*, the superior cannot as against him create any such interest by imposing the same conditions to which he has submitted upon another feu in his vicinity.

In dealing with this question it is necessary to keep in view that when the feuar has a *jus quæsitum*, his title, and that of the superior, to enforce common feuing conditions are independent and substantially different rights. The title of the superior rests upon contract—a contract running with the estate of superiority and burdening the subaltern estate of the vassal. The right of the feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement; consequently he cannot enforce it against other feuars except in so far as he can qualify an interest to do so. Again, the superior's consent to discharge the condition cannot affect the right of the feuar, and as little can the feuar's renunciation of his servitude impair the superior's right to enforce the condition. It appears to me that it would be unreasonable and contrary to all principle to hold that a feuar was subject to such a servitude except upon evidence warranting the inference that in accepting a title to his own feu he had it in contemplation, and tacitly agreed, that such a burden should be imposed upon him. And seeing that the burden when imposed affects the land which is the subject of his feu, I think the evidence of his consent to its imposition can only be derived from the titles under which his feu is held. What kind or amount of evidence derivable from his titles will suffice to indicate the feuar's consent is a question which must depend upon the circumstances of each case.

If the *dicta* upon which the respondents found were to be taken *per se*, and as expressing all that is required in order to create mutual servitudes as between the feuars, the superior would necessarily have the power of creating such servitudes without the consent, and even against the wish, of the feuars burdened thereby. I should not have been prepared to except to that view of the law had I been of opinion that the creation of such servitudes was in substance and effect nothing more than an assignation to each feuar of the superior's right as against his co-feuars. But the effect of an assignation is to divest the cedent of his right, at least to the extent to which it is assigned; whereas the effect of creating mutual servitudes among the feuars is to leave the superior's right as against each of them undiminished and unimpaired, and to subject the feuar in liability to a body of servitude owners, whose interest, as well as that of the superior, he must purchase or settle for before he can obtain a release from the conditions of his feu-charter. I know of no principle upon which that liability ought to be imposed upon a feuar except of his own consent; and, so far as I am aware, there is no decision by which his liability has been affirmed in the absence of evidence from which his consent was matter of legitimate inference.

The first case in which it was held that each member of a class of feuars had an implied right to enforce a common condition was that of the *Governors of Heriot's Hospital* v. *Cockburn*, already referred to. But the judgment of the Court of Session was reversed by this House, as being unnecessary to the disposal of the cause. The next decision was in the *Magistrates of Edinburgh* v. *Macfarlane*, 20 D. 156, and similar judgments have been given in subsequent cases. All of these appear to me to fall under one or other of two categories, either (1) where the superior feus out his land in separate lots for the erection of houses, in streets or squares, upon a uniform plan, or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him.

To the first of these categories belongs *M'Gibbon* v. *Rankin*, 9 Macph. 423. The superior in that case had laid off a piece of ground for the formation of a continuous line of houses or terrace, and from time to time granted separate feu-charters of the site of each house, and in each charter there occurred the same condition regarding the size and design of the buildings to be erected, coupled with a stipulation that it should be inserted by the superior in all the other feu-rights of the terrace. The defender, who was infringing the condition, objected to the title of the pursuer, whose charter of feu was posterior in date to his own; but the Court held that in stipulating that the condition should be imposed upon his co-feuars, the defender must have had in contemplation that it was to operate for the mutual benefit of all the feuars and be mutually enforceable by them.

Robertson v. *North British Railway Company*, 1 R. 1213, affords an illustration of the cases falling under the second category. A superior feued to A a piece of ground lying within the city of Glasgow, subject to the restriction, *inter alia*, that no part of it should be used for the storage of manure, and on the express condition that the restriction was to be imposed by A upon all his disponees or sub-feuars. A, without taking infeftment, conveyed part of the ground to B, and the remainder to C. The restriction was duly inserted in the feudal title completed by B; but C made up his title without any notice of the restriction, and subsequently conveyed to D, a singular successor, against whom an action was brought to enforce the restriction by a pursuer deriving right from B. The defender maintained that the restriction was not validly imposed upon him, and that even if it were, B, and those in his right, had no title to enforce it. As to the first of these points, the majority of the First Division were of opinion, upon grounds which appear to me to admit of considerable doubt, that the restriction was well imposed upon D as well as upon his author C, and upon that footing their Lordships were of opinion that it was a mutual restriction, and that B had a good title to compel its observance by D.

The *ratio decidendi* in such cases as *M'Gibbon* v. *Rankin* seems to have been that a feuar, who stipulates with his superior that a particular restriction shall be imposed upon all his fellow-feuars as well as upon himself, must intend that he shall have the power of enforcing it against them, and that they shall have the like power as in a question with him. In *Robertson* v. *North British Railway Company* and similar cases the principle of decision appears to me to have been that a sub-feuar or disponee acquiring a building lot, subject to a particular condition, with notice in his titles that the common author, whether his immediate or over-superior, has imposed that condition upon the whole area of which his lot formed part, must be taken as consenting that the condition shall be for mutual behoof of all

the feuars or disponees within the area, and that all who have interest shall have a title to enforce it. In other words, the feuar is held as consenting to be bound by the law laid down by the common author for the benefit of all future feuars. I have been unable to find any decision proceeding upon the principle that a superior who feus out a portion of his estate to A under a precise restriction as to building, and who in giving a title to A neither undertakes nor intimates an intention to impose similar restrictions in feuing the remainder of his ground, can thereafter confer upon every feuar who acquires a building lot in the vicinity a *jus quæsitum* enabling him to sue A directly.

In the present case the respondents' title to sue appears to me to fail in two essential particulars. The titles to the appellant's feu are of older date than those of any other of the five lots in question with the exception of lot 3, which was originally included in the same feu-contract of the 6th of June 1782. That deed lays no obligation upon the superior to observe any limitation in building upon the adjacent ground, or to impose any such limitation upon those to whom he might subsequently feu or dispone it. No doubt there are words occurring in the deed from which it might be inferred that it was in the view of the superior to feu the adjoining ground on both sides; but there is not a single expression which can reasonably be held to indicate the superior's intention to restrict the adjoining feuars, and still less to imply that he meant to come under an obligation to that effect. Again, the several restrictions as to building contained in the titles of the appellant and the respondents do not, in my opinion, so resemble each other as to raise the inference that they were intended to be mutual. These restrictions are in both sets of titles expressed in the same words, but in substance they are very different. The one is a prohibition against building anything except a single house fronting Gayfield Square, with offices. The other is a prohibition against building anything more than two dwelling-houses with offices, the one fronting to Gayfield Square on the east, and the other to a street on the west. The restriction imposed upon the appellant has, in the case of the respondents, been departed from to the extent of allowing them to build a second dwelling-house upon the west end of their feu—a departure which seems to me to be fatal to the existence of that similarity and consequent mutuality of restriction upon which the argument of the respondents was mainly rested.

I have accordingly come to the conclusion that the respondents had and have no title in their own persons to raise and insist in the present action. That leaves the question whether their right to sue, which I assume to be *nil*, has been validated by the consent and concurrence of their superiors, to the effect of entitling them to decree in the terms of the prayer of the note of suspension and interdict.

It was argued for the appellant that the superiors, the trustees of Cauvin's Hospital, have waived their right to enforce the restriction in his titles by permitting others of their feuars in the vicinity to violate the building conditions to which they were subject. If that proposition were clearly made out, it would be sufficient for the disposal of the case; but I am unable to adopt the appellant's argument, which was necessarily based upon an implied obligation on the part of the superiors to impose and enforce these conditions for his behoof. It appears to me that the case must be disposed of on the footing that the superiors have still a good title to enforce the restrictions as against him, and that they have given their consent and concurrence to the instance of the respondents. I think the appellant is barred by his pleadings on the record from maintaining that such consent and concurrence was not in point of fact given. Upon this branch of the case I concur in the views which were expressed by Lord Young in the Court below. Actions at the instance of one party with the consent and concurrence of another are of everyday occurrence in the practice of the Courts of Scotland. In all such cases the proper instance is that of the leading pursuer or complainer who sues in his or her own right and title. Thus, a wife *stante matrimonio* sues with consent of her husband, and a minor with consent of his curators, but the right of action is vested in the wife and the minor only, and decree passes in their favour, the interposition of their legal guardians, as parties consenting, being merely required as a judicial precaution against any neglect of their interests in the conduct of the suit. Various other illustrations of the practice are to be found in the opinion of Lord Young, and it is unnecessary to repeat them here. But I know of no authority for holding that, according to the law or practice of Scotland, a person who has no right or title whatever can sue an action, provided he obtain the consent and concurrence of the party to whom alone such right or title belongs.

The reasons assigned for their judgment by the Lord Justice-Clerk and Lord Gifford appear to me to be unsatisfactory. The Lord Justice-Clerk deals with the case as if the superiors had the primary right and the respondents "a subordinate and derivative title to enforce" the restriction in question. If the respondents were really possessed of a subordinate and derivative title I should come to the same conclusion as his Lordship, but that is not their true position. The respondents may indeed have an interest to prevent the erection of the buildings contemplated by the appellant, but their interest is no greater than it would be if they had no feudal relation to the superiors of the appellant's feu or if there were no restriction in the appellant's titles. They have no right or title, primary or subordinate, to enforce the restriction; neither have they any title to compel the superiors to enforce it. Lord Gifford, on the other hand, seems to hold it conclusive of the present question that "he who is merely a consenter to a disposition of heritage is held to be really a disponer if the true title of the subject be found to be in him." That illustration embodies a correct statement of the law, but it has no bearing upon judicial procedure, and if admitted as an analogy would necessarily lead to the result that any stranger might insist in an action with regard to landed estate in which he had no right or interest provided he sued with the consent and concurrence of the proprietor.

It was suggested by Lord Gifford that the instance of the respondents, assuming it to be defective, might be cured by amending the libel to the effect of allowing the superiors to stand as complainers for their interest under the provisions

of section 29 of the Court of Session Act of 1868 (31 and 32 Vict. c. 100). That clause enacts that "all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." I cannot doubt that the amendment proposed by the learned Judge would have been unwarranted by the terms of the statute, which contemplate alterations on the record with the view of facilitating the determination of the real question at issue between the original parties, but not the importation of new parties into the litigation.

On these grounds I am of opinion that the interlocutors under appeal ought to be reversed, and a remit made in the terms proposed by your Lordships.

Interlocutors appealed from reversed, with costs, and the cause "remitted back to the Court of Session in Scotland, with directions to sustain the third plea-in-law for the appellant, and to refuse the reasons of suspension, and find the respondents liable in expenses, and to ordain the respondents to repay to the appellant the expenses in the Court of Session.

Counsel for Complainers — Solicitor-General (Balfour, Q.C.) Agents—F. W. Reynolds—L. Mackersy, W.S.

Counsel for Respondents—D.-F. Kinnear, Q.C. —Davey, Q.C. Agents—William Robertson—Macandrew & Wright, W.S.

Thursday, December 1, 1881.

(Before Lords Penzance, Blackburn, and Watson.)

SHEPHERD *v.* HENDERSON.

(*Ante*, vol. xviii. p. 349.)

*Appeal—Competency—*6 *Geo. IV. c.* 120, *sec.* 40 *—Findings in Fact.*

Terms of an interlocutor which were *held* to import a judgment upon a matter of fact, and consequently under the Judicature Act not to be capable of being carried by appeal to the House of Lords.

Opinion (*per* Lord Watson) that parties are not entitled to ask the House of Lords as a matter of right to send a case back to be heard again in the Court of Session on the ground that they did not at the former hearing there insist on facts on which it was then open to them to have insisted.

This case was reported in the Court of Session of date February 25, 1881, *ante*, vol. xviii. p. 349, 8 R. 518.

The Lords of the Second Division, in affirming the judgment of the Sheriff, pronounced this interlocutor:—"Find that on 23d May 1879 the pursuer's steamship 'Krishna,' being then insured in terms of the policy founded on, and the defender (respondent) being an insurer to the extent of £50, was stranded during a violent storm on the coast of Hindostan, between Panjim and Bombay: Find that on or about the 7th day of June following the pursuer (appellant) intimated to the underwriters in said policy that he abandoned the 'Krishna,' and claimed as for a total loss: Find that the underwriters did not accept the abandonment: Find that the pursuer brought this action for indemnification of his loss upon the 1st day of October 1879: Find that shortly after the stranding of the 'Krishna' the south-west monsoon began upon the coast of India, and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the 'Krishna' afloat; but find that there was on the 7th of June and continued thereafter to be a reasonable prospect of her being got off the sandy shore on which she lay without greater expense than a prudent uninsured owner would reasonably incur: Find, therefore, that there was not at that date a constructive total loss of the ship: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and decern."

The pursuer appealed to the House of Lords, but the defender maintained that in terms of the 4th section of the Judicature Act the interlocutor, since it contained a judgment on a matter of fact only, was not subject to appeal.

The appellant, in support of the competency of the appeal, argued, first, that this was a mixed question of law and fact; and second, that the findings in fact were incomplete, and should be rectified. He cited *Hudson* v. *Harrison*, 3 B. & B. 97; *Provincial Insurance Company of Canada* v. *Ledne*, L.R., 6 P.C. 224; *Peck* v. *Merchants Insurance Company*, 3 Mason 27; Phillips on Insurance, vol. ii., 5th ed., 375; *Moss* v. *Smith*, 9 C.B. 94; *Irving* v. *Manning*, 6 C.B. 392; *Mackay* v. *Dick & Stevenson*, 18 S.L.R. 387; 8 R. (H. of L.) 37.

The respondent was not called upon.

At delivering judgment—

Lord Penzance said—It seems to me that the question whether the underwriters accepted the abandonment or not is a question of fact to begin with, but the circumstances of the case may be such that a jury may be told as a matter of law, and properly told, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted. And further, I think it may well be that although they have not really accepted the abandonment, they may have so acted that a Judge may very properly tell a jury that, having acted in a certain way, and having thereby altered the rights, the condition, and the interest of the owner, although they have not accepted the abandonment, and the jury ought to find accordingly in point of fact, yet in point of law they ought to be dealt with as if they had accepted it. I think that those are the propositions which belong to a case of this kind. But subject to those exceptions, I think that from first to last the question whether the underwriters have accepted the abandonment or not is a question of fact. The Judges of the Court below found as a matter of fact that the underwriters did not accept the abandonment. I can hardly understand how your Lordships can be asked, without going into the facts of the case, but confining yourselves to what appears on the record—which according to the case of *Mackay* v. *Dick & Stevenson* is that alone which your Lordships have to look to—how your Lordships can be asked to send this case back to the Court of Session to tell that Court to discriminate whether they meant this finding as to the aban-