Friday, February 26.

FIRST DIVISION.

[Dean of Guild of Edinburgh.

CALDER AND ANOTHER *v.* THE MERCHANT COMPANY OF EDINBURGH AND OTHERS.

Superior and Vassal—Building Restrictions—Common Feuing Plan—Enforcement by Superior and Co-Feuars—Common Interest—Interference with Light and Air or Support—Amenity.

In 1822 a piece of building ground extending to 129 feet, containing four stances, was feued out under certain conditions, provisions, and restrictions by which the feuars became bound to erect buildings in conformity with an elevation and plan relative to the feu-charter, and were prohibited from altering the buildings so erected. These conditions, provisions, and restrictions were appointed to be inserted in all future conveyances or transmissions of the feu. The disponees were duly infeft. Buildings forming part of a street were erected on the three southmost stances in conformity with the building plan. No buildings were then erected on the northmost stance, which extended to 45 feet. In 1827 this northmost stance was reconveyed by the original feuars to the superiors under all the conditions, provisions, and restrictions contained in the original feu-charter. Resignation was made in virtue of the procuratory in the disposition, and the superiors expede an instrument of resignation *ad remanentiam*. This lot they again feued out in 1867 to different feuars, not under the conditions, provisions, and restrictions contained in the original feu-charter, but under different conditions, provisions, and restrictions. Buildings had been in 1862 erected on this northmost stance which were not in conformity with the provisions of the original feu-charter. In 1885 the proprietor of a main-door and sunk flat, No. 7 of the street, with three cellars in the front area and back ground, which were on one of three southmost areas feued out in 1822, presented a petition to the Dean of Guild for warrant to convert the main-door into two shops, to slap out the front wall, and bring out the shop fronts. The superiors, the proprietor of the flat immediately above the main-door, entering by the common stair No. 5, and the proprietor of No. 3, the house to the south, consisting of a main-door and sunk flat with cellars in front area and back ground, and of the flat immediately above, also entering from No. 5, opposed the application. Both the petitioner and the two latter respondents were infeft under the conditions, provisions, and restrictions of the feu-charter of 1822. The Dean of Guild granted the petition. On appeal, *held* (1) that the superiors had no title to enforce the restrictions in the original feu, in respect they had abandoned the common feuing plan as regards part of the subjects, viz., the northmost lot, and therefore could not enforce them as regarded the rest; (2) that the co-feuars had no *jus quæsitum* to enforce the conditions, provisions, and restrictions in the original feu, in respect the feuars of all the four areas originally feued out constituted the community to which the restrictions applied, and that the conditions to be enforced did not appear in all the feu-rights, but had been abandoned in essential respects *quoad* one of the feuars intended to be bound, viz., the proprietor of the northmost lot; and (3) that the co-feuars were not entitled to object on the ground that they had a common interest in the subjects, in respect the area over which the petitioner proposed to erect his shops was his exclusive property, that the proposed alterations were to be entirely *in suo*, and that to found such an objection it was necessary to show either appreciable interference with the light and air of the windows of the common tenement, or injury to the right of support belonging to the proprietors of the upper floors, and that averments of injury to amenity only were not sufficient.

The Court therefore *refused* the appeal.

This petition was presented in the Dean of Guild Court at Edinburgh by Alexander Calder, proprietor of the subjects after mentioned, for warrant "to convert the main-door dwelling-house, No. 7 Lothian Road, Edinburgh, and pertinents thereof, into two shops, to slap out the front wall and insert iron beams resting on iron pillars and cube-stone piers, to bring out shop fronts, to lower the whole floors with the exception of back room over common passage, to substitute iron beams for the partitions shown in red, and all as shown on two plans produced."

The titles of the petitioners and the adjoining proprietors, who were called as respondents in the petition, and two of whom lodged answers, are set out in the opinion of Lord Adam *infra*.

The Merchant Company of Edinburgh, as George Grindlay's trustees, were the superiors of the feu in question, and were also called as respondents, and lodged answers to the petition.

The Dean of Guild granted the prayer of the petition, subject to an immaterial amendment.

The respondents appealed to the Court of Session, and argued that they were entitled to prevail both on the ground that the proposed operations were in contravention of the conditions contained in the petitioner's titles, and also on the ground that they had a common interest in the subjects—Bell's Prin. sec. 1085. It was settled that when feus had been given out by a common superior, subject to the same conditions and restrictions, then these conditions and restrictions were pleadable by the vassals *inter se;* and the disponees of the original vassals had the same right to enforce conditions and restrictions—*Magistrates of Edinburgh* v. *Macfarlane*, Dec. 2, 1857, 20 D. 156; *MacGibbon* v. *Rankine*, Jan. 19, 1871, 9 Macph. 423; *Alexander* v. *Stobo*, March 3, 1871, 9 Macph. 599; *Johnstone* v. *White*, May 18, 1877, 4 R. 721. These were cases between proprietors of separate buildings; the principle contained in them applied therefore with greater force when the question was between different proprietors of the same building. The superior had a right to enforce conditions imposed by his grant, and even if he discharged the stipulations as regarded one feuar, that would not affect his

rights as against the other feuars—*Dalrymple* v. *Herdman*, *&c.*, June 5, 1878, 5 R. 847. The acquiescence of a vassal in the case of one departure would not bar him from objecting to departure from the stipulations in another case—*Gould* v. *M'Corquodale*, Nov. 24, 1867, 8 Macph. 165. In the present case the original feu was granted subject to conditions which applied to the whole four stances. This created a mutuality between the feuars so as to prevent deviation from the original plan—*Ewing*, *&c.* v. *Hastie*, Jan. 12, 1858, 5 R. 439; *Ewing* v. *Campbells*, Nov. 23, 1877, 5 R. 230. The adjoining feuars had not lost their rights through what the superior had done in regard to the northmost lot, because it was not clear that at the time the buildings were erected on that lot they had any interest to interfere.

The petitioner argued (1) that the superiors were barred from objecting, because out of the 129 feet originally feued they had completely altered the plan as regards 45 feet—*Campbell* v. *Clydesdale Bank*, June 19, 1868, 6 Macph. 943. The contract between superior and vassal required to be looked at with reference to the purpose of the restriction. If the purpose was uniformity, and that had been departed from, then the superior had no interest to object. (2) As regarded the right of the adjoining feuars, they were bound by acquiescence in the buildings erected on the northmost stance from objecting to the proposed alterations—*Fraser* v. *Downie*, June 22, 1877, 4 R. 942; the case of *MacRitchie's Trustees* v. *Hislop*, Dec. 14, 1879, 7 R. 384, *revd.* June 23, 1881, 8 R. (H.L.) 95, was against the respondents. The only cases founded on the principle of mutuality given effect to in *M'Gibbon* v. *Rankine* [*sup. cit*] were those in which the question had arisen between the proprietors of different houses. Here the respondents and petitioner were proprietors of the same house, which raised rather a question of common interest like *Johnstone* v. *White* [*sup. cit*]. The law as between proprietors of the same house was that while the one proprietor could do nothing to imperil the safety of his neighbour's property, mere injury to amenity was not a sufficient reason for interference — *Barclay* v. *M'Ewen*, May 27, 1880, 7 R. 792. But here there was no averment that the petitioner's operations would render the respondents' property insecure —*Boswell* v. *Magistrates of Edinburgh*, July 19, 1881, 8 R. 906; *Urquhart* v. *Melville*, Dec. 22, 1853, 16 D. 307; *Taylor* v. *Dunlop*, Nov. 1, 1872, 11 Macph. 25.

At advising—

Lord Adam—This case originated in a petition to the Dean of Guild Court of Edinburgh by Mr Calder for a warrant to make certain alterations on premises belonging to him.

The petition relates to a tenement of houses, Nos. 3, 5, and 7 Lothian Road, and to the adjoining tenement No. 9 Lothian Road, which has been erected on an area of ground which was originally included in the same feuing elevation and plan as Nos. 3, 5, and 7.

The petitioner Mr Calder is the proprietor of No. 7, consisting of the northmost ground storey and sunk storey beneath. The appellant Mr Spence is the proprietor of the first flat or storey immediately above him, and entering by the common stair No. 5. A Mr Simson is proprietor of the third, or top, flat above Mr Spence. The appellant Dr Menzies is proprietor of No. 3, consisting of the southmost ground storey and sunk storey beneath. Dr Menzies is also proprietor of the flat or storey immediately above, entering by No. 5, and a Mr Sutherland is proprietor of the southmost top flat or storey. A Mr Turner is proprietor of No. 9 Lothian Road. The Merchant Company as George Grindlay's trustees are superiors of the several subjects.

All these persons, as also the Lord Provost and Magistrates of the City for the public interest, are called as respondents, but only the Merchant Company and Dr Menzies and Mr Spence appeared to oppose the prayer of the petition.

The prayer of the petition is for a warrant "to convert the maindoor dwelling-house No. 7 Lothian Road into two shops, to slap out the front wall and insert iron beams resting on iron pillars and cube stone piers, to bring out the shop fronts, to lower the whole floors with the exception of the back room over the common passage, to substitute iron beams for the partitions shown in red, and all as shown on two plans herewith produced."

By interlocutor, dated 4th June 1885, the Dean of Guild granted warrant to the petitioner in terms of the prayer of the petition, but subject to the amendment of his plans to the effect of keeping back the front of his proposed erection so as to be in a line with the area of the corner tenement on the south, an alteration to which the petitioner expressed his willingness to agree.

The effect of this amendment is, I understand, to keep back the front of the proposed shops about 18 inches from the line originally proposed. The proposed shops, however, will still project 10 or 11 feet in front of the line of the present buildings.

The appellants have appealed against this judgment. Since the case was in the Dean of Guild Court certain amendments have been made to the record, and additional titles produced, and we have now to dispose of the case.

The pleas maintained to us were that the proposed alterations were in violation of the conditions of the feu-rights under which the petitioner and appellants respectively held their houses, and further that they were in violation of the rights and interests which the appellants had, in common with the petitioner, in the subjects, arising from the situation and character of the buildings as a common tenement.

The ground on which the tenement of houses in question is built was originally part of the lands of Orchardfield, of which the Merchant Company and Messrs David and John Grindlay were *pro indiviso* proprietors.

The Merchant Company and the Messrs Grindlay entered into an agreement, dated in June and October 1821, with reference to the feuing of these lands.

The agreement sets forth that they had obtained from William Burn, Esq., architect in Edinburgh, a regular plan of the same, laid out in streets and rows, and with a place or circus, of which plan the parties had approved and subscribed as relative thereto, and they bound themselves to feu and lay out the ground, and to form and execute the buildings, in conformity to the plan, subject to such alterations as might afterwards be suggested by either party, provided such alterations

should be approved by the Dean of Guild at the time.

The agreement then proceeds to set forth various provisions as to the lines and names of the streets, the dimensions of the houses to be built, and various other conditions and provisions which it is unnecessary to detail. This extensive feuing plan of Orchardfield, of which the ground in this case formed part, was not carried out as originally intended. Streets have been laid out and buildings erected, not in conformity with it, but in conformity with a new feuing plan subsequently obtained from Mr M'Gibbon. The Dean of Guild has rested his judgment principally upon the fact that the lands of Orchardfield have not been laid out and built upon in conformity with the original feuing plan, which he thinks relieves the several proprietors of the tenement in question of the obligations in their titles as to uniformity of building. I am not satisfied, however, that this is a sufficient ground of judgment, but I think the judgment is right on other grounds, which I shall now state.

By feu-charter dated 20th June 1822, John Grindlay and the Merchant Company, joint heritable proprietors of the subjects, sold, alienated, and in feu-farm disponed to David Scott Threshie and Robert Threshie four areas of ground situated in Lothian Road, measuring 129 feet towards the said road. These areas are described as being bounded by the centre of the mutual gable of the corner house or area of the lands feued to David Scott Threshie, and by the centre of the mutual wall dividing the back ground of the southmost of the four areas thereby disponed on the south, by the Lothian Road on the west, by an intended street to be called Grindlay Street on the north, and partly by the centre of the mutual wall dividing the back ground of the northmost of the said four areas from the background of the adjoining area in Grindlay Street, and partly by an intended meuse lane, and partly by two passages therefrom, on the east parts. The four areas are described as being part of the lands of Orchardfield, as the said areas are delineated upon the feuing plan by Mr Burn, docquetted by the proprietors on 23d June and 8th October 1821, this being the general feuing plan of the lands of Orchardfield above mentioned.

The disponees thereby bind and oblige themselves to erect buildings in strict conformity to the elevation and plan furnished to them by Mr Burn, and signed by the parties as relative to the feu-charter.

The feu-charter contains various provisions as to laying out and maintaining the streets and lanes and other matters, and then it provides that the said David Scott Threshie and Robert Threshie, and their foresaids, should not have it in their power at any future time to alter, and they are thereby expressly limited, restricted, and prohibited from altering, the external appearance of the said buildings to be erected on the said areas in any respect whatever. Subinfeudation was prohibited. The conditions and provisions were fenced by an irritant and resolutive clause, and sasine was directed to be given under burden of the provisions, conditions, and declarations contained in the feu-charter which were appointed to be engrossed in all future conveyances or transmissions of the feu. The disponees were duly infeft in the subjects conform to instrument of sasine dated 22d March and recorded 7th April 1827.

The elevation and plan referred to in the feu-charter as having been furnished by Mr Burn cannot be found, but an elevation and plan, which is said to be a copy of it, has been produced. It is this plan, which is the common feuing plan, to which it is said that the petitioner and the other proprietors of the tenement of houses Nos. 3, 5, and 7 Lothian Road are bound to conform, and there is no doubt that the tenement has been erected in conformity with it. The tenement consists of three flats or storeys above the ground, and a sunk storey, and comprises six separate houses. It was built by the Messrs Threshie upon three of the four areas acquired by them, and extends 84 feet along the Lothian Road. The fourth area extending 45 feet along the Lothian Road, and on which No. 9 Lothian Road now stands, was not built on by them.

The Messrs Threshie disposed of the houses and of the unbuilt-on areas as follows:—

By disposition, dated 26th March 1827, they disponed to Mr Scott, W.S., the third or uppermost storey, consisting of two dwelling-houses with two cellars in the front area. These subjects were disponed under the conditions and provisions contained in the Messrs Threshie's feu-contract of date 20th June 1822, and *inter alia* under the condition that the disponee and his foresaids should not have it in their power at any future time to alter, and they were expressly prohibited from altering, the external appearance of the buildings in any respect whatever. Mr Scott was infeft on the 11th April 1827 under the foresaid conditions and provisions, and his infeftment was recorded on 24th April 1827 and duly confirmed by the superiors.

By disposition dated 12th June 1827 Mr Scott sold the southmost of these two houses to a Mr Johnston. By disposition dated 7th, 10th, and 11th, and recorded 17th June 1862, Mr Johnston's trustees disponed this house to Mr George Simson, and Mr Simson by disposition dated 5th and recorded 6th June 1878 disponed it to David Sutherland, the present proprietor, who is duly infeft therein under the conditions and provisions contained in Messrs Threshie's feu-charter of 20th June 1822.

The northmost house on the top flat remained the property of Mr Scott until 19th December 1832, when the superiors, the Merchant Company, re-acquired it by decree of declarator of irritancy *ob non solutum canonem* obtained against him of that date. On 18th May 1869 the Merchant Company, who had now become sole superiors of the subjects, disponed this house to a Mrs Burns Crowe, and it is now vested in Mr Andrew Simpson under the conditions and provisions foresaid, conform to disposition in his favour by the trustees of Mrs Crowe, dated 7th and 8th, and recorded in the register of sasines 16th May 1884.

The Messrs Threshie next proceeded to deal with the fourth area, or that part of the ground originally unbuilt-on.

By disposition dated 10th and 14th September 1827 they disponed to the superiors, John Grindlay and the Merchant Company, this area of ground, described as being the northmost of those four areas of ground feued by them as aforesaid, and extending 45 feet along the Lothian Road,

with and under the conditions, provisions, and restrictions contained in their own feu-charter, and particularly under the condition that the disponees should erect buildings in strict conformity to the elevation and plan furnished by Mr Burn, and that they should not alter the external appearance of the building to be erected thereon in any respect whatever. The disposition contained a procuratory of resignation *ad remanentiam*, in virtue of which the disponees executed an instrument of resignation in their own favour, dated 31st December 1834, and recorded 20th January 1835.

This fourth area of ground having thus returned to the superiors, was dealt with by them as follows:—By feu-charter dated 10th and 11th December, and recorded 11th December 1867, with consents therein mentioned, they disponed to Robert Hutchison all and whole that piece of ground, with the teinds thereof, situated on the east side of Lothian Road, being a portion of the area marked No. 55, and the whole of those marked 56 and 57 on the feuing plan of the lands of Orchardfield made out by David M'Gibbon, Esq., architect, and extending along the Lothian Road 104 feet and 3¼ inches or thereby, all as shown on a sketch or measurement of the said ground annexed thereto, and signed as relative to the charter.

The area marked No. 57 thereby disponed is the northmost of the four areas of ground which had been feued to the Messrs Threshie, and had been resigned by them into the hands of their superiors as aforesaid.

The subjects contained in this feu-charter were disponed under the condition that the disponee and his foresaids should be bound to erect on the ground, in so far as he had not already done so, and thereafter to keep up and maintain thereon, tenements according to plans which should be submitted to and approved of by the said David M'Gibbon, and which should be in uniformity with the adjoining feus.

It was also thereby, *inter alia*, provided that the disponees should not have it in their power at any future time to alter the front or external appearance of the said tenement erected on the ground without the approval of the superiors' architect, or to convert the same or any part thereof into different buildings without the express written consent of the superiors and their successors.

The charter was duly recorded in the register of sasines on 11th December 1867.

By disposition dated 30th January, and recorded in the register of sasines 1st February 1875, Robert Hutchison disponed to Thomas Rowatt senior and others all and whole the front shop of Lothian Road, Edinburgh, room behind the same, and others therein specified, erected on parts of the piece of ground feued to him by the last mentioned feu-charter. These subjects are erected on the piece of ground therein called lot No. 57, and which is the northmost of the four areas of ground originally feued to the Messrs Threshie.

Mr Turner is now vested in these subjects conform to disposition in his favour by James A. Molleson, judicial factor on the estates of Thomas Rowatt & Son, dated 10th, 11th, and 12th, and recorded in the register of sasines 14th November 1881.

It will be observed, accordingly, that this fourth area of ground has not been feued out under the conditions, provisions, and restrictions contained in Messrs Threshie's feu-charter of 20th June 1822, but under entirely different conditions, provisions, and restrictions.

To return now to the rest of the houses erected by Mersrs Threshie, it appears that the ground and first flats remained their property until 1877.

By disposition dated 12th, and recorded in the register of sasines 16th May 1877, Mr Threshie disponed the sunk flat and main-door flat No. 7 Lothian Road, with the three cellars in the front area and back-ground behind the same, to Dr Craig. Dr Craig was infeft under the conditions, provisions, and restrictions contained in the original feu-charter of 20th June 1822, granted to the Messrs Threshie. The petitioner Mr Calder is now in right of these subjects.

By disposition of the same date, 12th May 1877, and recorded in the register of sasines 4th June 1877, Mr Threshie disponed the flat immediately above the house now belonging to Mr Calder to the appellant Mr Spence, who is infeft under the same conditions, provisions, and restrictions.

By disposition, also of the same date, and recorded in the register of sasines 4th June 1877, Mr Threshie conveyed to the appellant Dr Menzies the dwelling-house No. 3 Lothian Road, consisting of the sunk flat and maindoor flat, with the cellars in the front area and back-ground, and also the flat immediately above the same, under the same conditions, provisions, and restrictions.

From the narrative I have thus given of the titles of the several proprietors of the houses in the tenement in question, it appears that they are all infeft under the conditions, provisions, and restrictions contained in Messrs Threshie's feu-charter of 20th June 1822, which is the common title from which all their rights flow. But it also appears that Mr Turner, who is proprietor of the subjects erected on the fourth area, holds his subjects under an entirely independent title, and under different conditions, provisions, and restrictions.

As regards the buildings which have been erected on the four areas originally feued to the Messrs Threshie, the state of matters would appear to be, that the tenement of houses erected on the three southernmost areas had been erected in conformity with Mr Burns' elevation and plan referred to in the feu-charter of 20th June 1822, and signed as relative to it, and that no alteration has hitherto been made thereon. As regards the buildings on the fourth or northmost area, it would appear that about 1862 or 1863 a tenement, now called No. 9 Lothian Road, had been erected on it. This tenement is not in conformity with Mr Burns' elevation and plan; in particular, it is four storeys in height in place of three, as shown in that elevation and plan, and it has shops on the ground floor which extend about six feet beyond the line of the houses as shown on that plan.

It also appears that Grindlay Street, which was to have bounded this fourth area on the north, has been constructed about 200 feet farther to the north, tenements having been erected between it and No. 9.

These being the facts of the case as regards the titles of the several parties and the buildings erected on the ground feued to the Messrs Threshie, the question is whether Mr Calder is

entitled, in the circumstances which have arisen, to carry out the alterations he proposes. There is no doubt that by the terms of his title Mr Calder is restricted from altering the external appearance of his house, but the question is whether either his superiors the Merchant Company, or his co-feuars, Dr Menzies and Mr Spence, have a right to enforce this restriction.

The question is different as regards the superiors and as regards the co-feuars.

As regards the superiors—I am of opinion that they have no title to enforce the restriction. The restriction had reference to all the buildings erected or to be erected on the four areas feued by them to the Messrs Threshie, as shown on Mr Burns' plan, which was the common feuing plan. They re-acquired, as we have seen, the northmost of these four areas, and of new feued it out, but not under the conditions, provisions, and restrictions which affected the other three areas but under conditions, provisions, and restrictions essentially different. They have thus, therefore, themselves abandoned the common feuing plan or scheme as regards part of the subjects embraced in it, and therefore, I think, cannot enforce it against the rest.

The case, however, of the co-feuars, Dr Menzies and Mr Spence, is different.

Had the common building plan or scheme been restricted to the tenement of houses erected on the first three areas of ground, or had Mr Turner's title contained the same conditions, provisions, and restrictions as those of the other feuars, and the buildings erected on his feu been in conformity with Mr Burns' elevation and plan, I should have thought that the case would have fallen within the principle of *M'Gibbon* v. *Rankine*, 9 Macph. 423, and the other cases of that class. There is here a reference to a common feuing plan, and an obligation that the same conditions, provisions, and restrictions should be inserted in the feu-rights of the several feuars and in all the future transmissions of the feus.

That being so, I think that each of the feuars would have had an implied right or *jus quæsitum* to enforce the conditions of the feu against the other co-feuars.

But I think, to use the words of Lord Watson in the case of *Hislop* v. *M'Ritchie's Trustees*, 8 R. (H.L.) 95, that "in order to the acquisition 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." Now, I think that the case of Dr Menzies and Mr Spence fails in this essential respect, that the condition sought to be enforced does not appear in all the feu-rights. It does not appear in the feu-right of Mr Turner, who is the proprietor of the fourth area contained in the Messrs Threshie's feu-charter.

The common feuing scheme or plan here was one of which the feuars of all the four areas were to constitute the community. But after Mr Turner's predecessor obtained in 1867 his feu-right, the common plan or scheme came to an end. I cannot see that Dr Menzies or Mr Spence ever acquired an implied right or *jus quæsitum* to insist that a common scheme which should embrace three only of the areas originally feued should be maintained. I think that all the feuars of the original four areas must be bound or none.

The position of the property in 1867, when Mr Turner's predecessor obtained his feu, was this:—The superiors were proprietors of that area, which had been redisponed to them in 1827. They were also proprietors of the northmost house of the top flat, which they had re-acquired by decree of declarator *ob non solutum canonem* in 1832. Mr Sutherland's predecessor, Mr Simpson, was proprietor of the southmost house of the top flat, and the Messrs Threshie were proprietors of the four houses on the ground and first flats.

In that state of matters it may very well be, applying the principles given effect to in the case of Dalrymple, 5 R. 847, that either Mr Simpson or the Messrs Threshie would have had a title to prevent the superiors from granting a feu-right to the fourth area, in terms inconsistent with those contained in their own feu-rights in so far as these might be to their prejudice. It may also be, that if, as in that case, Mr Turner's predecessor's title had flowed from the Messrs Threshie's feu-charter, which was the common title of the other feuars, he would not have been entitled to take a feu-right freeing him from the restrictions in question, which in that case he knew, or ought to have known, the superiors would have had no right to grant. But the case we have here to deal with is different. Mr Turner's title although granted by the same superiors, does not flow from the common title but is altogether independent of it. He has got his title free from any restriction such as that sought to be imposed on the petitioner. There is erected on his feu a building consisting of a tenement four storeys in height, with a shop on the ground floor, projecting some six feet from the line of the buildings. This is not only not in conformity with the common feuing plan, but essentially in violation of it. Neither the superiors nor the appellants Dr Menzies and Mr Spence profess that they can interfere with this building. The contention of the appellants is, that although the common feuing plan is thus at an end, the petitioner shall nevertheless be bound to conform to it in so far as respects his house, although what he proposes to do is very much the same thing as Mr Turner has done, viz., to construct a shop on the ground floor. I know no authority for saying that where a common feuing plan has been abandoned in essential respects *quoad* certain of the feuars intended to be bound by it, it shall nevertheless continue in force as regards the others. I think, therefore, that Dr Menzies and Mr Spence have no title to enforce the conditions, provisions, and restrictions contained in the petitioner's titles, to which they are no parties.

But the question remains, whether, apart from any restriction in the feu-rights of the parties, the appellants Dr Menzies and Mr Spence, or either of them, has, in respect of their common interest in the tenement, a right to prevent the petitioner's proposed alterations? Now, I think it is quite settled that the proprietors of the upper floors of a tenement of this kind have no right to prevent the proprietor of the ground floor from converting his house into shops, provided always that it be done without danger

to the floors above. Such alterations are entirely *in suo*. The upper proprietors have a right to support but if that be not injured they have no right to complain.—*Denniston*, 2 S. 784; *Greig*, 4 S. 104.

On the other hand, I think that the proprietor of the ground floor, being also the proprietor in front, or of the ground behind, has no right to erect buildings thereon which shall appreciably interfere with the light and air of the windows in the upper floors of the common tenement — *Heron*, 8 R. 155; *Boswell*, 8 R. 986.

Now, in this case I think it is clear that there is no apprehension of danger to the upper floors from the petitioner's proposed alterations, and I do not understand the appellants to say that there is.

I also think that it is clear that the petitioner has an exclusive right of property in the area on or over which he proposes to erect his shops, and I think that he is entitled to carry out his proposed operations unless the appellants can show that they will injuriously affect the light and air of their windows. The appellants, however, maintain that they are entitled to stop the operations if they will materially interfere with the comfort or amenity of their houses. This question was raised in the case of *Johnston* v. *White*, 4 R. 721. In that case the proprietor of the street flat, which had been converted into a shop, proposed to extend his shop over the area in front. The Dean of Guild dismissed his petition on the ground that the proprietors of the upper floors had a common right of property in the area, and that the petitioner was therefore not entitled to build on it without their consent. The Court recalled that interlocutor on the ground that the area belonged exclusively to the proprietor of the shop floor, and that the upper proprietors had only a right of common interest in the area, and could not prevent buildings being erected thereon, except on the ground of injury to their property. An averment to this effect was added to the record, and the case remitted for further inquiry. In advising that case Lord Deas remarked that a common interest in the proprietor of one floor of a tenement may be such as to entitle him to object to alterations materially injurious to him on another floor of the tenement. His Lordship then refers to a case of *Kemnys* v. *Beattie*, where it was proposed to build on the front area of the house No. 9 Castle Street, in which a similar question had been raised, and in which a report from Mr Bryce, architect, had been obtained, that the mode of executing the alterations would be attended with danger, and that they would deteriorate the value of the upper floors. A second report was afterwards obtained from Mr Bryce, in which he reported that by certain proposed alterations the risk of danger had been removed, but no change of opinion as to the deteriorating effect on the value of the upper floors. In that state of matters his Lordship says:—"I do not think any of us were prepared to sanction the alteration without further consideration, and my impression certainly was against doing so."

Lord Shand also in the same case says:—"It remains to be seen whether the operations would injure the property above, or would materially interfere with its comfort or amenity. I should be disposed to hold that there would be injury such as will entitle the upper proprietor to prevent what is proposed to be done."

The case of *Kemnys* referred to by Lord Deas was settled, and no further proceedings are reported in *White* v. *Johnstone*.

But the question was raised and decided in the case of *Barclay* v. *M'Ewen* [May 27, 1880], 7 R. 792. In that case the proprietor of a main-door house in Brougham Street proposed to remove the wall and railing enclosing the plot in front of his house, to pave the space occupied by the plot, and to convert his dwelling-house into two shops. The Court remitted to Mr Wardrop, architect, who reported that the proposed alterations would only affect the amenity of the respondents' property, but that the amenity in his opinion would be seriously injured. The Court held that the petitioner was the exclusive proprietor of the area, and Lord Gifford said:—"I am not at all moved by the report of Mr Wardrop. No doubt a proprietor who converts his dwelling-house into shops may injure the amenity of neighbouring dwellings, whether they be upper flats of the same tenement or adjoining or neighbouring tenements, and the introduction of shops may depreciate the marketable value of the whole street. But if the introduction of shops is not prohibited, and is in itself lawful, the neighbours cannot prevent it, nor can they claim damages, for the cause is one occurring every day *damnum sine injuria*—and the Lord Justice-Clerk concurred with him.

I concur in that decision, and I think that it applies to this case. No doubt the operations on the area in front in this case are more extensive than in that, but I cannot see that it makes any difference in principle that the injury to the amenity, and consequent alleged depreciation in value of the upper floors or adjoining houses arises from operations on the ground-floor house itself or on the area in front. The upper or adjoining proprietor would in either case have an equal interest and therefore right to interfere. The appellant Dr Menzies is an adjoining proprietor, and I do not think that the fact that he holds his house from the same superior, in the absence of any restrictive clauses—which must be assumed if I am right in the opinion I have previously expressed—gives him any higher right than any other adjoining proprietor. Mr Spence I think is in exactly the same position, with this difference, that his right of support shall not be interfered with. If the light or air of Mr Spence's windows were to be injuriously interfered with, then I think he would have a right to complain, but that is out of the question in this case.

On these grounds I am of opinion that the Dean of Guild's judgment ought to be adhered to and the appeal dismissed.

Lord Shand—Since this case was before the Dean of Guild we have had an amendment of the record of some length, and a full production of the titles not only of the parties to this litigation, but also of all the parties who are in possession of parts of the property to be immediately affected, and also of the immediately adjoining property to the north. As the result of a careful examina-

tion of all the titles I have come to the same conclusion as Lord Adam.

The feu with which we are concerned in this case embraced, as originally given out, four stances which had a frontage of 129 feet. In the original feu-contract there were conditions which prescribed that buildings were to be erected in conformity with a prescribed feuing plan, and there was a further condition that the buildings so erected should not be altered by the parties who might subsequently come into possession. These conditions, and the prohibitions against alterations, were applicable to the whole 129 feet, and we find that in the titles now produced of all the parties who are litigating here that these stipulations are repeated on the footing expressed in the various deeds that each is possessor of a part of the original 129 feet, and in the description of each it is stated that it is part of that original feu of 129 feet, on the footing that each is part of the whole to which the prescribed conditions apply.

The state of matters now so far as regards 45 feet of the original 129 is that buildings have been put upon that part which are not in conformity with the conditions of the original feu-contract. The buildings consist of four storeys instead of three, so that it is different in design, and further, what was originally the front area has been covered in, and to the extent of 45 feet of frontage what was formerly a dwelling-house has been altered into shops.

The history of this 45 feet, which is the northmost part of the ground originally feued, is that in 1827, five years I think after the original feu was granted, the 45 feet of frontage with the corresponding ground to the back was resigned into the lands of the superiors *ad remanentiam*. The superiors then expede an instrument of resignation *ad remanentiam*, and thus re-acquired the ground feued out. They then feued out this ground entirely freed from the conditions which had originally applied to the whole 129 feet.

The question is, whether in this state of the facts we are to enforce the conditions which were applicable to the whole of the original feu. One-third of the ground has been given back to the superior and feued out upon different conditions; the erections on the ground are not conform to the original conditions, and even these have been altered from their original state.

I think that as the original restrictions have been relaxed, or rather abolished, with regard to one-third of the original feu, these conditions cannot be enforced as regards the remaining two-thirds. The true construction of the titles of the parties seems to me to be that they were restricted in regard to buildings on the footing that each stance remained part of the whole 129 feet. As that state of matters was altered by giving back the 45 feet, and as the conditions are not applicable with regard to the one-third, I think they cannot be legally enforced with regard to the remaining two-thirds. I therefore agree with your Lordships as to this being the result of the titles.

The common law question presents itself in this shape. Even assuming that there is no restriction as regards the two-thirds, it has been maintained that as there were buildings of a certain description put up on that ground, none of the parties are entitled to make any change upon what I may call the unity of the plan, if they thereby cause any injury to the amenity. As Lord Adam has observed, I said in the case of *Johnston* v. *White*, 4 R. 721—"It remains to be seen whether the operations would injure the property above, or would materially interfere with its comfort or amenity. I should be disposed to hold that there would be injury such as will entitle the upper proprietor to prevent what is proposed to be done." That matter has been up for decision since, in the Second Division in the case of *Barclay* v. *M'Ewen*, 7 R. 792, and it was then decided that mere amenity was no good reason for objecting to a proposed building. That being so, I look upon the matter as decided; and I may say that having reconsidered the question I am not disposed to differ from the view taken in *Barclay's* case. The principle is that the operation here proposed by the owner of the lowest flat and of the flat immediately above the lowest is to be entirely on his own property, for it is agreed that the area is his. Now, it was decided in *Barclay's* case that the owner might cover over the area and convert the house into a shop. Here we are going a step further; for we decide that the owner may not only make a footpath over the area, but that he may raise the building up to the point where his property ceases. I think that is justified by the case of *Barclay* v. *M'Ewen*. It is too clear for observation that the proprietor can do nothing which will render the buildings belonging to his neighbours insecure; it is not, however, said that the operations here will have that effect.

On this ground also I am of opinion that the case for the appellant fails.

Lord President—I have had the advantage of reading the full and lucid opinion of Lord Adam, and as I concur not only in the general result, but also in all the grounds of that opinion, I should not think it necessary to say anything were it not for a somewhat misleading statement in the judgment of the House of Lords in the case of *Hislop* v. *MacRitchie's Trustees*, 8 R. (H. of L.) 95.

Lord Blackburn in his opinion says:—"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 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 cannot help thinking that Lord Blackburn in ascribing those views to me was under the impression that I concurred in the judgment pronounced in *Robertson* v. *The North British*

Railway Company [July 18, 1874], 1 R. 1213, whereas I dissented from that judgment, and very much on the grounds stated by Lord Blackburn in the opinion I have referred to. I am not aware that I have ever adopted the opinion of Lord President Hope in the case of *Heriot's Hospital* v. *Cockburn*, 2 W. & S. 802, nor am I aware that I have ever entertained or expressed any opinion inconsistent with the decision in *Hislop's* case.

I may further say that I am authorised by Lord Mure to state that his Lordship concurs in the judgment.

The Court refused the appeal and affirmed the judgment of the Dean of Guild.

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Counsel for Respondents — Asher, Q.C.— Jameson. Agents—Mill & Bonar, W.S.

Wednesday, March 3.

SECOND DIVISION.

PRINGLE'S TRUSTEES *v.* FERGUSSON (RITCHIE'S EXECUTOR) AND ANOTHER.

Husband and Wife—Marriage-Contract—Succession—Jus mariti—*Transmissible Right.*

In an antenuptial marriage-contract (which did not exclude the *jus mariti*), the wife conveyed to her husband "all debts and sums of money whatsoever presently pertaining and belonging to her, or which may fall to her during the subsistence of the said marriage." During the subsistence of the marriage the wife became entitled under an English will to an interest in expectancy in a sum of money, which interest was by English law not vested till the occurrence of a contingency which did not happen during the subsistence of the marriage, but was till that event a transmissible contingent interest capable of passing to representatives and assignees. The husband predeceased leaving a will, and the wife, after surviving the occurrence of the contingency contemplated, also died leaving a will. In a question between her representatives and her husband's, *held* that the interest was a "sum of money" in the sense of the contract, and therefore was carried by the assignation therein contained, and *separatim* fell under the *jus mariti* of the husband, and so in either view formed part of the husband's estate.

Miss Catherine Fergusson, one of the daughters of Sir James Fergusson of Kilkerran, married Mr Henry Ritchie of Busbie and Cloncaird in January 1838. An antenuptial contract of marriage was entered into dated 16th January 1838. By this contract she *inter alia* assigned, conveyed, and made over to Henry Ritchie, her promised spouse, and his heirs and assignees whomsoever, "all debts and sums of money whatsoever presently pertaining and belonging to her, or which may fall to her during the subsistence of the marriage, with the securities therefor." There was no exclusion of Mr Ritchie's *jus mariti*.

Miss Henrietta Grant of Clifton, who was one of three sisters who were joint proprietrices of the Holcombe-Barton estate, in the county of Devon, died on 30th September 1840. She left a last will and testament dated 19th May 1832. By this will she gave and devised to trustees therein named all real estate that she was possessed of in the island of Grenada and in Great Britain for certain purposes—first, that they were to hold the same for the use of her sister Anne Grant and her assigns for and during the term of her natural life, and without impeachment of or for any manner of waste; on her decease, then for the use of another sister Mrs Catherine Grant or Anderson, then married to Mr Anderson; on the death of the survivor of them, for the use of her daughter (Mrs Anderson's daughter) Mary Anderson and her assigns, for the term of her natural life. On the death of the last survivor of these the property was to be held for the use of Mary Anderson's children, if she should marry and have issue. But if Miss Anderson should not marry, or if she should marry and have no issue, then the trustees were, by mortgage and sale thereof, or in some other competent way, to raise, levy, and borrow the sum of £4000, and divide the same equally among the four daughters of Sir James Fergusson of Kilkerran, Bart. The names of his four daughters were Anne, Jane, Catherine, and Mary.

Miss Anne Grant died on 4th November 1840. She also left a last will and testament of the same date, and in similar terms to that of her sister Miss Henrietta Grant. She also directed that in case Mary Anderson should die without leaving issue the trustees were to raise £4000 and divide it equally among Sir James Fergusson's daughters. On the death of her sisters Mrs Catherine Grant or Anderson became entitled to the liferent of these two-third shares. On her death in 1856 her daughter Mary Anderson became entitled absolutely to one-third share of the Holcome-Barton estate and to the liferent of the remaining two-thirds thereof. Mary Anderson married Mr David Pringle on 2d June 1858.

Mr Ritchie died on 6th November 1843. He left a trust-disposition and settlement dated 23d May 1828, and recorded in the Books of Council and Session on 18th November 1843. By this settlement he left all moveable and heritable estate which should belong to him at the time of his death to trustees for the purpose of dividing it among his nephews and nieces.

On 13th May 1864 an indenture of agreement was entered into between Mrs Pringle, Mrs Ritchie, and the then surviving trustees of Mr Ritchie, and David Pringle, Colonel afterwards General Walker, now dead, and Frederick Pitman, W.S., as trustees for the purposes therein mentioned. This agreement proceeded upon a narrative that Mrs Pringle was born on the 19th day of October 1809; that she had had no issue, and that it was highly improbable that any issue would be born, and in that case the parties to the said agreement were the only persons interested in the Holcombe-Barton estate; that they were desirous that the estate should be sold; that one-third of the proceeds of the sale were to be paid to Mrs Pringle; and that £8000 (part of the remaining two-thirds, being the two sums of £4000 which the Misses Grant directed in the foresaid event of Mary Anderson, Mrs Pringle, having no children, to be raised) should be invested for payment of the income to Mrs Pringle