Tuesday, January 31.

SECOND DIVISION.

[Dean of Guild Court, North Berwick.

CALDER *v.* NORTH BERWICK BURGH COMMISSIONERS.

Superior and Vassal — Restrictions on Buildings—Approval of Plans at Superior's Discretion.

Land belonging to the commissioners of a burgh was feued by them on the condition that before commencing any building the purchaser should be bound to submit to them the elevation, plans, and measurements, and that the building should not proceed until such approval had been obtained in writing, and that after such approval had been obtained the purchaser should not be entitled to deviate therefrom or alter the buildings in all time coming without their consent. The feuar obtained the consent of the commissioners to erect buildings of three storeys upon the ground according to plans approved. Thereafter he proposed to add another storey, but the superior objected on the ground that the additional storey was unsuitable, having regard to the narrowness of the street.

Held that the purchaser was not entitled to build the additional storey, there being no averment to show that the commissioners' refusal to sanction it was not a *bona fide* exercise of their right under the contract.

Alexander Calder, builder, Edinburgh, was proprietor of ground in Melbourne Road and Quadrant Lane, North Berwick. Part of the ground was held burgage and the remainder had been acquired in feu by Mr Calder from the Commissioners of the burgh of North Berwick conform to articles and conditions of roup and sale thereof dated 31st May, minute of re-exposure dated 29th November, and minute of preference and enactment dated 29th November, all in the year 1897

By article *Sexto* of the said articles and conditions of roup and sale it was, *inter alia*, provided as follows :—"Before commencing any building the purchaser shall be bound to submit the elevation and whole detailed working plans, specifications, and measurements for approval to the exposers and their foresaids, and the building shall not proceed until such approval has been obtained in writing, and after such approval has been obtained, the purchaser shall not be entitled to deviate from the said plans or to alter the building therefrom in all time coming without the consent of the exposers or their foresaids."

In terms of the said provisions Mr Calder submitted to the Commissioners plans for the erection of three tenements fronting Quadrant Lane, consisting each of three storeys, and the Commissioners approved of the same. Mr Calder having obtained warrant from the Dean of Guild Court on 22nd June 1898, proceeded with the erection of the tenements in accordance with the plans so approved. Thereafter he became desirous of deviating from the said warrant to the extent of erecting an additional storey upon each of the two southmost of the said three tenements. These two tenements were situated partly on the ground held burgage and partly on the ground acquired by Mr Calder in feu as above-mentioned, and had a frontage to Quadrant Lane, which opposite the tenements was not more than 29 feet 6 inches wide. The height of the tenements, according to the plans sanctioned by the Court, was 33 feet, and, if the additional storey were added, the height would be 44 feet.

In compliance with the provisions in the articles of roup Mr Calder submitted to the Commissioners the plan of the additional storey, but they refused to sanction it on the ground that an additional storey was unsuitable in a narrow street like Quadrant Lane, and in opposition to the spirit of the provisions of section 152 of the Burgh Police (Scotland) Act 1892, and would detrimentally affect the amenity of the neighbourhood, and also depreciate materially the value of the property in the district, inasmuch as the class of houses were inferior to those already approved by them.

Thereafter Mr Calder presented a petition to the Dean of Guild Court at North Berwick for warrant to erect the additional storey on the said two tenements.

He pleaded—"(1) As the operations in question are confined to the petitioner's own property, and can be executed without danger, the petitioner is entitled to warrant as craved. (2) The said Police Commissioners and Magistrates and Town Council having no title or interest to withhold their approval of the said plan, the petitioner is entitled to warrant as craved."

The Commissioners opposed the application, and pleaded—"(3) In terms of the condition of sale the petitioner is bound *ante omnia* to obtain the sanction of the respondents for his proposed deviation, and not having obtained such sanction, the warrant ought to be refused."

On 24th January the Dean of Guild pronounced the following interlocutor : — "Finds that the petitioner has not, in terms of the articles of roup, obtained the consent of the respondents, the said Commissioners of North Berwick, to the erection of a fourth storey on two tenements in Quadrant Lane, North Berwick: Therefore sustains the third plea-in-law stated for the compearing respondents; dismisses the petition," &c.

Note.—"In this case the petitioner craves warrant to add a storey to each of the two tenements presently in course of erection by him in Quadrant Lane, plans for the erection of three tenements of three storeys each facing that lane having been already submitted to and passed by this Court after having received the sanction of the respondents. It is admitted by the petitioner that the plans of the proposed addition of a fourth storey to the southmost tenements have been submitted to and disapproved of by the respondents. It is maintained for the petitioner that the respondents have not on

any ground any title to withhold their approval of the plan of the additional storey for which warrant is craved, nor have they any interest to do so; and at the hearing it was further maintained that in any event it was open to the Court to find that under article 6 of the articles of roup, under which the petitioner acquired the property, he was entitled to erect four-storey tenements fronting Quadrant Lane. As set forth in the preceding judgment, the Court is of opinion that it is not competent for them to grant the warrant craved until the petitioner obtains the respondents' consent; and further, that if it were necessary for the disposal of the question raised by this petition, it appears to them that the discretion exercised by the Commissioners in refusing to allow buildings of the height for which warrant is craved, fronting a lane only 29 feet 6 inches in width, is a reasonable one."

The petitioner appealed, and argued—Although he had not yet obtained a feudal title from the Commissioners, he was willing to take the case as if the provision in the article of roup had been inserted in a feu-charter. In judging of the nature of stipulations inserted in a feu-charter the presumption was always for freedom. The power conferred on a superior by a condition restricting a vassal from building without the superior's consent must not be exercised without good cause, and the Court will set aside the superior's veto if they think it has been used unreasonably—*Governors of Heriot's Hospital* v. *Ferguson*, March 2, 1774, 3 Paton's Ap. 674; *Cowan* v. *Magistrates of Edinburgh*, March 19, 1887, 14 R. 682; *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141. The last of theses cases was specially in point, as in the feu-charter with which it dealt there was a condition that the plans should be submitted to the superior. Indeed, the deed in that case was more stringent than the present, since it provided that the buildings should be of a certain style. The clause as to the alteration of the plans was supplementary to that dealing with the approval of the original plans and the superior's position with regard to contemplated alterations was the same as that with regard to approval of the original plans. The superior was not entitled to veto a building if the plan showed that it was a reasonable building. [Lord Young—What is a reasonable building? I daresay you can figure a case where the Court might interfere, as, for instance, where in a case of this kind the superior intimates to the feuar that he will not sanction any plan unless the buildings shown on it are each ten storeys high or have each a steeple and a clock with a weathercock upon the top.] The superior's right was to judge as to whether the buildings were of such a class that his feu-duty would be secure and that his property would not be deteriorated. On the merits of the case these buildings if erected would effect a great improvement, and he was quite prepared to prove this.

Counsel for respondents was not called on.

At advising—

Lord Justice-Clerk — The petitioner and appellant has a title which he took from the respondents putting himself under strong restrictive conditions. The sixth condition is not such a condition as one would naturally expect to find in ordinary articles of sale, although it is, I understand, quite common in the case of feuing estates. I can quite understand that when the superiors of a proposed feu are the Magistrates and Town Council of a burgh such as North Berwick, the feuar would probably come to the conclusion that he would be quite safe in accepting a title from them under such conditions, because the superiors have only the interests of the burgh at heart, and are not to be expected to follow any unreasonable course in preventing things being done by a purchaser unless it is in the interests of the burgh or the community. Now, of course, in such a position as this I think it is quite certain that if any objection were taken by the superiors to prevent anything being done, not merely unreasonably but plainly to prevent the purchaser from having the beneficial use of such ground, no doubt the Court would interfere. If the restriction to be imposed were absolutely inconsistent with his having the beneficial enjoyment of what he had purchased and paid for, the Court would certainly interfere. But that is not the case here. The case put here is that these parties have agreed that before commencing any building, the purchaser shall be bound to submit the elevation and whole detailed working plans for approval to the exposers, and the building shall not proceed until such approval has been obtained in writing. That being the first stipulation, the purchaser did present his plans, and did get them approved of, for erecting a tenement of three storeys in height on this ground. Having got that approved of, he proceeds later on to do something more, viz., to add on an additional storey; and the condition under which he is entitled to do that, according to the feu-contract, is that he shall not be entitled to deviate from the original plan approved of, or to alter the building, without the consent of the Magistrates and Town Council. Now, they decline to give their consent to going beyond the three storey tenement which he originally himself proposed to erect. In the circumstances of this case, and with this condition facing us, and without there being any such averments as would lead us to the conclusion to which I pointed in my earlier observations, I can see no ground for holding that the superior has been preventing the feuar from getting the due use of the land, and I see nothing wrong in the decision of the Dean of Guild. I am therefore for dismissing the appeal.

Lord Young—I am of the same opinion. I think the case is so clear as hardly to require one to add anything to the very distinct opinion expressed by the Dean of Guild. When the case was opened it was pointed out that this clause in the articles

of roup had not yet got into a feudal title. But the appellant here has no other title than that of the contract of sale, and there is no doubt that when he gets a feudal title it will be so expressed as to carry out the contract of sale according to its true meaning, and particularly that this clause will be inserted if the sellers insist upon it, which I presume they will. No one can be surprised that the sellers here, the Magistrates of North Berwick, charged with the public interest—namely, the interests of the community of the burgh of North Berwick—stipulated that there should be no buildings upon the feu except of a character and according to a plan which those charged with the interests of the community thought were fitting and proper in their interests. I think they would have neglected their public duty had they done otherwise than they did. There is no ambiguity as to the meaning of the clause. I can see none. They are to be the judges of the plans of all buildings, and the purchaser is required to submit the plans to them, and they may approve of them or not in all their details as they shall judge fit. They make themselves the arbiters in the matter, quite fittingly and appropriately, and it is just as binding as if they had required that all questions should be submitted to a certain architect, and that he should be the sole and only judge with respect to them.

If the Commissioners had stated any objection, or actively required anything particular to be done which was upon the face of it, and which the Court were satisfied was a dishonest exercise of their right under the contract, or an interference with the appellant's right, for an indirect purpose, there might be room for interference. But we have no such case to deal with, and therefore do not need to consider it. When the question is what is best or most proper to be done the Commissioners are the exclusive judges. I am of opinion, therefore, that the judgment of the Dean of Guild ought to be adhered to.

Lord Trayner — The appellant purchased a piece of ground from the Police Commissioners of North Berwick. It was sold to him on this condition, among others—"Before commencing any building the purchaser shall be bound to submit the elevation and whole detailed working plans, specifications, and measurements for approval to the exposers and their foresaids, and the building shall not proceed until such approval has been obtained in writing; and after such approval has been obtained the purchaser shall not be entitled to deviate from the said plans or to alter the building therefrom in all time coming without the consent of the exposers or their foresaids."

This language is not technical but plain and popular, and it shows what the bargain was. The appellant wishes to break the bargain, and I am not disposed to help him to do so. It is to be presumed that he never would have got the ground except upon the terms of that bargain, and if he keeps the land which he bought and got on these particular terms he must observe them. I am not careful to consider now whether there might be cases in which the Court would interfere with the exercise of a veto by a seller or by a superior under such a clause. I shall say only in this case that the rights of parties are best protected by strict adherence to the conditions which the parties to a contract have made for themselves.

I think the judgment of the Dean of Guild is sound, and I have heard nothing in the argument to lead me to a contrary view.

Lord Moncreiff—I agree. If an objection by a superior were contrary to the good faith of the contract a court of law might interfere. We have no such case here. The stipulation is unambiguous, and the right and interest of the respondents to enforce it are plain. They are charged with the care of the amenity of the town, and they made the conditions which they desire to enforce with a view to the discharge of their public duty. It is not necessary to decide any question under the Burgh Police Act 1892. It is enough that in the opinion of the respondents they ought not to allow this deviation from the plans which have already received their sanction. They think in the exercise of their discretion that the erection now proposed (a four storey house) would be unsuitable and improper in a narrow street like Quadrant Lane, and that is sufficient to warrant their interference.

The Court dismissed the appeal, affirmed the interlocutor appealed against, of new dismissed the action, and decerned.

Counsel for the Petitioner—Balfour, Q.C. —M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondents—Graham Stewart. Agents—Mackay & Young, W.S.

Tuesday, January 31

SECOND DIVISION.

BEGG'S TRUSTEES *v.* REID.

Succession—Vesting—Clause of Survivorship—Power to Make Advances out of Capital before Period of Division.

A testator directed his trustees on the death of his widow to divide one-half of the residue of his estate equally among his grandchildren, one-third to each family, and as regards the members of each family equally among them share and share alike. The revenue of the grandchildren's shares was to be paid to them until the period of division of the capital, and the trustees had a discretionary power to advance to any of the grandchildren or their issue, before the period of division, such sum to account of their ultimate shares as they should think fit. As regards the period