case of all the female legatees being unmarried at the time of his death. And then he goes on to make provision for any of them that should be at that date married. I think it is impossible not to see that the married females are only to enjoy the annual produce, not to possess the fee of the capital.

In construing such a deed as this I am not disposed to expunge any words or part, but to take the whole deed, and try and give it a meaning as it stands.

(*Upon the second question*)—This question is one in itself of some difficulty, and that difficulty has been rendered as great as possible by the ingenuity of Mr Kinnear's argument. The question really is this—What is the residue dealt with by Mr Duthie in his codicil? I take it that the testator means to deal with a certain portion of his estate so far as free from restrictions otherwise imposed—[*His Lordship read the clause of the codicil*]. It is clear that the residue left by the principal settlement is to be calculated after the annuity of £600 has been deducted, and the codicil is evidently dealing with the same residue. I can quite understand that the testator while leaving this £100,000 free to his sister, yet was at the same time anxious that she should be secured at anyrate and in all events in a reasonable sum. I think this object has been sufficiently well carried out.

Lord Gifford—(*Upon the first question*)—The only difficulty I have in this case arises from the somewhat arbitrary rule introduced by some recent cases—such, for example, as those decisions regarding the use of the word "allenarly," or again such cases as *Gibson's Trustees*, where from want of machinery provided by the testator the Court were not able to give effect to what was his undoubted intention.

I do not, however, think that the intention of the testator should be ever defeated unless such a result cannot by any possibility be avoided. The difficulty here arises from the testator not having said in whose name the investments were to be made. I think, however, that it can be seen that there is no doubt he meant that the sums named were to be invested by the trustees, and that exactly in the terms of the deed.

(*Upon the second question*) —As to the annuity, I am of the same opinion as Lord Ormidale. There does not appear to me to be any inconsistency in giving an alimentary annuity to the person the testator is most interested in, and in also giving all the residue of his estate besides, because the one bequest does not destroy the other. The real difficulty, and the only difficulty, is, whether the codicil has changed the whole nature of the principal deed. But Mr Duthie does not say I have changed my views as to my sister; he only says I have changed them as to the residue of my estate.

The Court therefore found — (1) That the parties of the first part were bound to invest the capital sums bequeathed in favour of the second parties and their children, in their own names, for behoof of the second parties and their children, in terms of the third purpose of the trust, and to pay the annual proceeds to the second parties respectively, and on their death to divide the fee equally among their children; (2) that the parties of the first part were bound to provide out of the trust-estate for payment of an annuity to the party of the fourth part, in terms of the second purpose of the trust; and (3) that the party of the fourth part was not entitled to payment of the residue without a sum being retained or provided for the said annuity, &c.

Counsel for the First, Third, and Fourth Parties — Robertson — Maconochie. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties — Kinnear. Agents—Dundas & Wilson, W.S.

Wednesday, June 5.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

DALRYMPLE AND OTHERS *v.* HERDMAN AND OTHERS.

Superior and Vassal—Feu-Contract—Power of Superior and Vassal to Discharge Feu-Charter Restrictions in a Question with other Feuars Holding under the same Title.

A superior disponed certain parts of his lands for building purposes. There were various restrictive conditions in the feu-contract, with a stipulation that on a contravention of any of them the superior might either irritate the feu or demand double feu-duty for each year during which the contravention should continue. Sub-infeudation was prohibited, and alienations, except those with an *a me* holding. The original disponee sold parts of the lands to various parties, in each case under the whole conditions, provisions, and stipulations of the feu-charter as above stated. To one of these conveyances the superior was a party, and granted therein a discharge of the restrictive conditions above referred to. In a suspension and interdict brought by other feuars against the disponee under that conveyance upon his proceeding to contravene the provisions of the original deed, the Court [*reversing* the Lord Ordinary (Curriehill)] *held* that the terms of the feu-contract entitled the complainers, as disponees of the original feuars, to enforce observance of the conditions and restrictions therein mentioned, and that that right was not reserved to the superior alone by the clause allowing the option of a payment of the double feu-duty in lieu of an irritancy of the feu.

This was a note of suspension and interdict at the instance of Miss Dalrymple, John Bertram Stephenson, and others, feuars in Belford Terrace, Edinburgh, against Messrs Herdman, Haymarket Mills, Edinburgh, to have the latter prohibited from erecting or proceeding with the erection of a shed and office, or other buildings in connection with a sculptor-work, on a piece of ground in Belford Terrace, and from

using the ground for the purposes of such a work or other manufactory, in contravention of the provisions of a feu-contract between the superior of the ground on the one part, and the author of both parties on the other. The following statement of the circumstances of the case is taken from the note to the interlocutor by the Lord Ordinary reclaimed against :—

"By feu-contract, dated 6th, and recorded in the Register of Sasines, 7th May 1872, Mrs Forsyth, with consent of her husband, disponed to James Forbes and John Forbes, the partners of the firm of J. & J. Forbes, builders, and their disponees whomsoever, part of her lands of Bell's Mills, near Edinburgh, extending to 1·242 acres. By the feu-contract it was, *inter alia*, provided that the Messrs Forbes and their disponees should be bound to erect on the said ground, previous to Whitsunday 1877, not less than thirteen dwelling-houses, each of which should cost in the erection thereof not less than £600. Of these dwelling-houses not less than six were to be completed and ready for occupation prior to Whitsunday 1873; not less than eight prior to Whitsunday 1874; not less than ten prior to Whitsunday 1875; and the whole prior to Whitsunday 1876. The buildings were to be erected in strict conformity to the plans, elevations, and specifications approved of by the superiors; and it was declared that it should not be in the power of the Messrs Forbes or their disponees to make any projection whatever beyond the lines of the front and back walls thereof higher than the level of the dining-room floor, all of which were expressly prohibited. The erection of common stairs or separate houses within the said dwelling-houses was also prohibited, as well as the erection of any buildings on the background exceeding the height of the dining-room floor. Minute directions were also given as to the materials of which the buildings on the background were to be erected, and it was provided that, with an exception after mentioned, the Messrs Forbes and their disponees should "not be entitled to convert the said dwelling-houses or any other buildings to be erected on the subjects thereby feued into shops or warehouses for the sale of goods or merchandise, or into working houses or manufacturing houses of any kind, nor to use the same or any part thereof for these or the like purposes, or for stables, or for any other purpose which may be injurious or disagreeable to the proprietors, tenants, or feuars of any portions of the lands of Bell's Mills, it being hereby declared that the said houses and other buildings that may be erected on the subjects hereby feued shall, under the exception after mentioned, be used as dwelling-houses only.' The exception here referred to is the ground flat of the eastmost house, which the feuars were to be entitled to use as a shop, but not for the sale of exciseable liquors to be consumed on the premises. The feu-contract contains the following additional provision, the terms of which must be carefully attended to:—'It is hereby expressly provided and declared that if the said disponees or their foresaids shall contravene any of the said conditions and provisions, then and in every such case the person so contravening shall be bound and obliged to make payment to the said Mrs Janet Spottiswoode Sawers or Forsyth and her foresaids of the double of the ordinary annual feu-duty herein stipulated payable for the said subjects, or for the portion thereof in feudal or beneficial right whereof he shall be for the time, and that half-yearly, at the period, and with interest and termly failures as herein expressed, which shall be considered as pactional and additional feu-duty, and not as penalty, and shall be payable in place of the stated feu-duty of the year as often as any such contravention shall be committed, and so long as any such contravention shall continue, or, in the option of the said Mrs Janet Spottiswoode Sawers or Forsyth and her foresaids, this present right and infeftment, and all that may have followed thereon, shall, in so far as the same may relate to the portion of the said subjects belonging to the person so contravening, become *ipso facto* void and null, without declarator or other process of law, and the said subjects shall thereupon revert and belong to the said Mrs Janet Spottiswoode Sawers or Forsyth and her foresaids, free and disencumbered of all burdens whatsoever, and they shall have right to remove the said disponees and their foresaids, and enter into possession and levy the rents of said subjects in time coming; and which conditions and provisions, clauses irritant, and reservations hereinbefore written, are appointed to be inserted in the future deeds of transmission, decrees of special service, &c., of or concerning the said subjects or any part thereof, or referred to therein in terms of law, otherwise such deeds, decrees, and instruments shall be null and void.'

"The subjects were to be held of Mrs Forsyth and her successors for payment of a feu-duty rising from £11, 3s. 6d. in 1872 to £37, 5s. 2d. per annum in 1876 and subsequent years, and doubling the said feu-duty in the twenty-first year, and at the end of every twentieth year thereafter, in lieu of entry-money or composition, 'and also doubling the said feu-duty on the occasion of every contravention of the conditions, provisions, and other stipulations herein contained as aforesaid, and for every year during which such contravention shall continue, in respect of such contravention.' Subinfeudation was strictly prohibited, and all alienations except those with an *a me* holding only.

"The Messrs Forbes were infeft in the said subjects by registration of the said feu-contract in the register of sasines on 7th May 1872, the whole of the conditions, provisions, and other clauses of the deed being thus recorded at full length. Between 1873 and 1875 the Messrs Forbes sold at various times and in various lots to the complainers nine of the thirteen stances for houses referred to in the feu-contract, and on each stance a dwelling-house and other buildings have been erected by one or other of the complainers, in strict conformity, as they allege, with the conditions and provisions of the contract, and in reliance upon these being inserted in the conveyances of the other four lots. The respondents, however, allege that the complainers had in some important respects violated or contravened these conditions. In the whole of the conveyances by the Messrs Forbes to the complainers the subjects are disponed under the whole conditions, provisions, and declarations and stipulations contained in the original feu-contract, and particularly under the conditions of doubling the feu-duty on the occasion of every contravention, and during the subsistence of the contravention.

"The houses thus erected form part of what

is now called 'Belford Terrace,' and the remaining four lots, being the intended sites of the four eastmost houses of the block, have been recently purchased, along with the house No. 4 Belford Terrace, by the respondents John and James Herdman and James Steele, conform to disposition in their favour by J. & J. Forbes, dated 17th, 22d, and 23d May 1876. The respondents have recently let a part of the vacant ground to the other respondent Robert Smith, sculptor, for the purpose of erecting premises for a sculptor's work thereon, and Mr Smith is proceeding with the erection of an office and shed upon the ground for the purpose of his works."

There was the following provision in the disposition by J. & J. Forbes to the respondents, and discharge by the superior of the burdens and conditions affecting the subjects:—"But which subjects second above described are disponed with and under the whole conditions and provisions, clauses irritant, and reservations specified and contained in the said feu-contract last mentioned, dated and recorded as aforesaid, in so far as the same are not hereinafter discharged: And whereas it has been arranged between the parties hereto that the subjects hereinbefore disponed should be discharged to the effect after mentioned of the burdens and conditions affecting the same, by or under the foresaid feu-contracts—Therefore I, the said Mrs Janet Spottiswoode Sawers or Forsyth, the superior of the said subjects, with advice and consent of my said husband, and I the said Henry Forsyth, for my own right and interest, and as taking burden on me for my said wife, and we, the granters of the foregoing disposition, for our own right and interest, hereby discharge, in so far as we respectively have power to do so, the whole subjects hereinbefore conveyed of all burdens, conditions, provisions, limitations, obligations, and restrictions imposed on the subjects hereinbefore disponed by and under the two feu-contracts hereinbefore mentioned, granted by me the said Mrs Janet Spottiswoode Sawers or Forsyth, with advice and consent foresaid, in favour of us the said James Forbes and John Forbes, as trustees foresaid, dated and recorded as aforesaid, and declare the said subjects to be redeemed of the same accordingly." A suspension and interdict having been brought as before stated, the Lord Ordinary in the Bill Chamber (ADAM) granted interim interdict, and passed the note to try the question.

A record was thereafter made up, and the Lord Ordinary (CURRIEHILL), after hearing counsel, pronounced an interlocutor repelling the reasons of suspension, recalling the interdict already granted, and refusing the note.

In the note to his interlocutor his Lordship gave the following grounds of judgment:—"I am of opinion that the construction of the feu-contract contended for by the respondents is the sound one, and that each feuar in purchasing his individual lot must be held to have taken it under the condition that the superior might allow any contravention to be committed, and to continue as long as she pleased, upon payment to her by the contravener of a double of the feu-duty. This being so, it was competent to the superior and any individual feuar to transact as to the terms upon which a contravention should be sanctioned, and it is *jus tertii* to the complainers to ask what these terms are. It appears that by an arrangement between the superior and the Messrs Forbes and the respondents the superior has discharged the restrictions against building in so far as regards the ground lying to the east of the houses belonging to the complainers. But for the clause referred to, I should have been of opinion that the case clearly fell within the principles upon which the Court proceeded in deciding the well-known series of cases—*Gould* v. *M'Corquodale*, 8 Macph. 165; *M'Gibbon* v. *Rankine*, 9 Macph. 423; and *Alexander* v. *Stobo*, 9 Macph. 599. The restrictions are so expressed as to apply to all the thirteen stances of ground, and are appointed to be embodied or referred to in all future transmissions thereof; and but for the clause in question, the complainers, all of whom are now entered with the superior, would have been entitled to prevent the Messrs Forbes and the purchasers from them of the remaining lots, from using the same in contravention of the restrictions, either on the ground of *jus quæsitum tertio*, or in respect of the mutuality of right and obligation created by the titles flowing from Mrs Forsyth, the common author. But it appears to me that the parties have contracted themselves out of the rule of these cases by placing it in the power of the superior to allow any of the feuars to contravene the restrictions upon payment to her, not of a penalty, but of an additional stipulated feu-duty. . . .

"The result of the whole matter is, that the interim interdict should be recalled, and the prayer of the note of suspension refused, with expenses."

The complainers reclaimed.

Authorities—*Robertson* v. *North British Railway*, July 18, 1874, 1 R. 1213; *Park's Curators* v. *Pattison*, March 27, 1865, 3 Macph. 779, H. of L., July 23, 1868, 6 Macph. 147; *M'Neill* v. *Mackenzie*, Feb. 5, 1870, 8 Macph. 520; *Beattie* v. *Ure*, March 18, 1876, 3 R. 634; *Crum Ewing*, Nov. 23, 1877, 15 Scot. Law Rep. 145.

At advising—

LORD DEAS—The question in this case arises out of a mutual contract entered into on 6th May 1872, whereby Mrs Forsyth (with her husband's consent), on the one part, "for and in consideration of the feu-duty and other prestations" therein mentioned, sold and in feu-farm disponed to and for behoof of Messrs James and John Forbes and their disponees, All and whole a lot or piece of ground, part of Mrs Forsyth's lands of Bell's Mills, measuring one acre and 242 decimal parts of an acre or thereby, as shown on a plan annexed to the contract and signed as relative thereto, upon which piece of ground Messrs Forbes and their disponees were taken bound to erect not fewer than thirteen dwelling-houses at the cost of not less than £600 each, at different dates all prior to Whitsunday 1876, and all "in strict conformity to the plans, elevations and specifications" which had been approved of by or on behalf of Mr and Mrs Forsyth. A variety of specific restrictions are then imposed by the contract, including a restriction against common stairs or separate flats, a restriction against buildings on the back ground above the height of the dining-room floors, a restriction against converting the dwelling-houses or other buildings into shops or warehouses, or into working or

manufacturing houses of any kind, or into stables —"It being declared that the said houses and other buildings that may be erected on the subjects hereby feued shall, under the exception after mentioned, be used as dwelling-houses only." The exception thus referred to was an exception to the effect that the ground flat of the eastmost house might be used as a shop for the sale of goods or merchandise not being spirituous liquors to be consumed on the premises.

Then comes the provision, which I shall notice more particularly afterwards, that the contravener of any of the conditions and provisions should be liable in double feu-duty, or in the option of the superiors his right should be *ipso facto* void and null. This is followed up by a stipulation that all the "conditions and provisions, clauses irritant, and reservations hereinbefore written," shall be inserted in all future transmissions, deeds, decrees, and instruments concerning the subjects—"otherwise such deeds, decrees, and instruments shall be null and void."

For these causes, and on the other part, the Messrs Forbes bind themselves by the contract, and their disponees in the subjects, to pay to the superior Mrs Forsyth the feu-duties therein specified, doubling the same in the twenty-first year after the date of the contract, and every twentieth year thereafter, in lieu of entry-money or composition on the entry of heirs or singular successors, and also doubling the feu-duty on the occasion of every contravention foresaid, and during the continuance of that contravention, but with power to the disponees to apportion the feu-duties on the different houses in a manner sufficient to secure the same, but not to be binding on the superior till the dispositions or other writings whereby the apportionments are made shall be confirmed by them. The holding is declared to be *a me* only, subinfeudation being strictly prohibited.

This deed was forthwith feudalised by being recorded in the register of sasines on 7th May 1872.

Between 1872 and 1875 the Messrs Forbes sold and conveyed to the different complainers nine of the thirteen stances contained in the feu-contract and shown on the plan. The disposition in favour of the complainer John Bertram Stephenson, dated 15th May 1873, may be taken as a specimen of all the rest. It bears to be granted under all the conditions, provisions, and declarations contained in the feu-contract, and that the holding shall be *a me*, for payment to the superiors of £4 yearly as the proportion of the cumulo feu-duty allocated on the lot thereby conveyed, and doubling that feu-duty on the occasion of every contravention of these conditions, provisions, and declarations, and for every year during which the contravention shall continue. This disposition was feudalised by being recorded in the register of sasines on the same day on which it was granted; and on 13th August following it was duly confirmed by writ of confirmation executed by the superiors. The dispositions in favour of the other complainers have been in like manner duly feudalised by being recorded in the register of sasines; and all of these dispositions, in like manner with the disposition to Mr Stephenson have been confirmed by the superior.

All the complainers have erected dwelling-houses of the stipulated value upon their respective lots, and these houses are said to be, and for the purposes of the present judgment must be assumed to be, in conformity with the conditions, provisions, and declarations in the feu-contract and relative plans, elevations, and specifications approved of by the superior. If the respondents mean to prove the reverse they will now require specifically to say so. The buildings have thus assumed the form of a street, called Belford Terrace, and the complainers are proprietors of Nos. 5, 6, 7, 9, 10, 11 and 12 of that street, leaving four sites only (being the four eastmost of the block) unbuilt upon. These four sites or lots, and also the house No. 4 of the terrace, have been acquired from the Messrs Forbes by the respondents under a disposition executed on the 17th, 22d, and 23d May 1876, and feudalised by being recorded in the register of sasines on the 25th of the same month and year.

The application for interdict now before us was presented in consequence of the avowed intention of the respondents to erect a marble-work on part of the vacant sites acquired by them, which work is not pretended to be in conformity with the conditions, provisions, and declarations in the feu-contract, but it is defended on the ground that the respondents are entitled to erect any sort of works or buildings, not being a nuisance at common law, upon their four vacant lots, as well as upon the site of their dwelling-house, at present forming No. 4 Belford Terrace.

This contention is rested upon two grounds:—1st, That from the outset no title was conferred upon any of the complainers as disponees of the original feuars to enforce *inter se* or against the other feuars the restrictive conditions, provisions, and declarations contained in the feu-contract. 2d, That supposing this to have been otherwise, the superior was entitled to discharge, and has effectually discharged, these conditions, provisions, and declarations so far as regards the property of the respondents.

These two contentions have been considerably mixed up in the pleadings of the respondents as well as in the note of the Lord Ordinary, and no doubt they run a good deal into each other. But at same time precision requires that they should be examined separately.

The respondents' third plea-in-law is thus expressed—"The conditions and restrictions in question being only enforceable by the superior, and she having validly discharged the same *quoad* the respondents' ground, the present complaint is groundless, and ought to be dismissed with expenses."

Now, there are here two things mixed up together—the one in the form of an assumption that the feuars never had a title to enforce the restrictions *inter se*, and the other, which is put as a sequence from that assumption, that the superior has validly discharged the respondents and their subjects from these conditions and restrictions.

But in order to see where the case lies, let the assumption be reversed—that is to say, let it be assumed that but for the discharge the disponees of the original feuars must have been held under the terms of the feu-contract and deeds of transmission to have had a title to enforce the conditions and restrictions of that con-

tract *inter se*, and surely it would in that view be very clear that the superior could not afterwards take that title away—that he could not hold the complainers bound by the conditions and restrictions as applicable to their lots, and at the same time authorise the respondents to erect upon their vacant lots, and convert their dwelling-house No. 4 of the terrace into a manufactory or other work, however destructive to the amenity of the street, provided only it was short of a nuisance at common law.

Let it be observed how matters stood at the date when the conveyance by Messrs Forbes to the respondents containing the superior's discharge was executed. The deed is dated 17th, 22d, and 23d May, 1876. The period within which the whole houses were to be erected and completed had expired at the previous Whitsunday. The feu-contract had stipulated that not fewer than six of the houses, at a cost of not less than £600 each, should be completed for occupation prior to Whitsunday 1873; not fewer than eight prior to Whitsunday 1874; not fewer than ten prior to Whitsunday 1875; and the whole prior to Whitsunday 1876. The complainers had respectively complied with this stipulation by erecting houses on their respective lots of the prescribed value and within the prescribed periods, and it cannot be contended that they did this otherwise than on the faith of the mutual rights conferred on them under authority of the feu-contract by the dispositions granted to them respectively by the Messrs Forbes, which had been all duly feudalized by public registration and confirmed by Mrs Forsyth, the superior. It is very clear that in these circumstances the Messrs Forbes could not *ex post facto* take away from their own disponees, the complainers, the mutual rights and privileges they had irrevocably conferred upon them; and it is equally clear, I think, that Mrs Forsyth, the superior, could not do so either.

The case thus really resolves into the one question—Did the feu-contract, when it was executed, import that the disponees of the Messrs Forbes, the direct vassals under that contract, were to have a title to enforce *inter se* the conditions and restrictions with reference to buildings contained in that contract?

Now the general law on that subject admits of no doubt. It is correctly laid down in the opinion of your Lordship in the chair in the case of *Robertson* v. *The North British Railway Company*. 18th July, 1874 (1 Rettie, 1221), in the following terms:—"I think the question in the case admits of being stated very simply thus,—whether or not the well-known principle of law recognised in the case of *Gould* v. *M'Corquodale* is applicable to the present case. That principle is, that when a superior feus out his land for building purposes, and lays all his feuars under the same obligations, there arises a mutuality of obligation amongst the feuars, which depends upon the community of their relation to the superior. If all are bound to the superior, then the general rule undoubtedly is that they have rights *inter se*, whereby they are enabled to enforce the common obligation against one another."

In the present case the feu-contract takes the original feuars and their disponees expressly bound to the superior to erect dwelling-houses on their respective lots of a specified value and description—prohibits them from converting these dwelling-houses into shops or warehouses, or into working or manufacturing houses or stables, and declares that they shall be used as dwelling-houses only, under the penalty of paying double feu-duty, or, in the superior's option, of forfeiture of the subjects as they then stand, which subjects shall thereupon revert and belong to the superior, who shall "have power to remove the said disponees and their foresaids, and enter into possession, and levy the rents of the subjects in time coming."

The superior Mrs Forsyth thus feued out her land for building purposes,—laid her direct feuars and all their disponees under the same obligations,—took all of them bound to her as superior to implement these obligations; and if the mutuality of obligations amongst vassals depends upon the community of their relation to the superior, I cannot see how that mutuality of relation can be held not to have been created amongst all who might become the vassals of Mrs Forbes under this feu-contract. The Lord Ordinary entertained no doubt that this would have been so had it not been for the stipulation that the superior might exact double feu-duty from any contravener of the obligations. That stipulation appears to me rather to intensify than to weaken the obligations themselves, and the community of relation of all the vassals to the superior. It confers no right on any one vassal to contravene upon tendering payment of double feu-duty. On the contrary, the object is to secure enforcement of the obligations, as is conclusively shown by the option reserved to the superior of confiscation of the contravener's ground, with all the buildings, however valuable, erected upon it. If the superior had here exercised that option, I am not prepared to say that in a question with the respondents she could herself, as then proprietrix of the *dominium utile* of certain lots, have contravened at her pleasure the conditions and restrictions which in her character of superior she had by the mutual contract imposed on the *dominium utile* of the whole lots. But no question of that kind here arises. She has neither exacted the double feu-duty nor exercised the option of forfeiture. She has simply attempted an invidious discharge, to which I am of opinion that no effect whatever can be given. Laying aside that discharge, I am further of opinion that there are here all the elements which the law requires to entitle vassals who are laid under the same lawful and reasonable restrictions to enforce these restrictions against each other so far as they have a fair and legitimate interest so to do.

No doubt it is further requisite in order to such enforcement among singular successors that the feudal titles of the parties should be such as the law desiderates in order to authorise one man to interfere with and control the exercise of the rights of property of another. The law is always jealous of such interference, and whenever it is contemplated, especially in permanency, technicalities as well as substance must be strictly attended to, otherwise there can be no complaint if the intention, however obvious, fails to receive effect. In all my opinions on this branch of the law I have recognised this principle. But there is no room for any difficulty of that kind here. The feu-contract con-

taining the conditions and restrictions was itself feudalised, and all the transmissions alike in favour of the complainers and respondents have been also feudalised and the *a me* holdings made unexceptionable by being confirmed by the superior.

In *M'Gibbon* v. *Rankine* (9 Macph. 423) and *Alexander* v. *Stobo* (9 Macph. 599) the superior in feuing out a stance in a street under certain conditions and restrictions bound himself to insert similar conditions and restrictions in all the feu-rights to be subsequently granted by him of stances in the same street. But whatever may have been the importance in these cases of such an obligation in determining the rights of enforcement among the feuars *inter se*, it is obvious to remark that in the present case there was no room for such an obligation, or to found upon its absence, because the whole lots or stances in question were feued out by one contract, which is the common title of all the vassals now before the Court.

Upon the whole, therefore, I am of opinion that the interlocutor under review must be recalled and the interdict granted, unless the respondents desire to be heard in support of the relevancy of the averments in their answer to the complainers' seventh statement and their fourth plea-in-law, as to which they have as yet offered no argument.

Lord Mure—It has been argued that there are certain specialties in this case—first, that no right is expressly given to one vassal to protect himself against his co-vassals. But it is settled that it is not necessary for the superior to give such special right. In the very imposition of the restriction on the whole subject there arises an implied right to each vassal to protect himself. But it is further argued that there is no obligation expressly undertaken here by the superior to insert such conditions in all future titles, and that in the titles of the present respondents the condition is not inserted. As to the absence of any undertaking on the part of the superior, it is no doubt true that in some of the decided cases such special undertaking does occur, but in some it does not, and I quite concur with Lord Deas in thinking that it is not necessary. The whole property is put under the restriction by the superior, and therefore every person who applied to the Messrs Forbes for a stance saw that the Messrs Forbes were themselves subject to the restriction, and were bound to insert the condition in every disposition they granted.

But then there is the special fact that the titles of the respondents do not contain the restrictions in the same terms as those of the original feu-charter. But if we look at the disposition by the Messrs Forbes, and the discharge by the superior of the burdens affecting the subjects conveyed, we find the restriction put in a very peculiar way —[*reads as quoted above*]. Now, observe the subjects are discharged only so far as the superior had power to do so, and I have very great doubt whether any such discharge could be effected by agreement between the superior and the Messrs Forbes, or any of their particular disponees, which could be effectual against the other disponees. The question simply then is—Whether the Messrs Forbes and the superior had power by agreement to discharge the restriction on any part of the property? I am distinctly of opinion that the Messrs Forbes could not themselves avoid putting their four stances under the same conditions as the whole property was placed in in their own hands. If they were bound to do so, could the superior release them from that obligation? The superior imposed the condition originally, and took the Messrs Forbes bound to impose it on their disponees, and their disponees were entitled to think that the whole ground would be built upon in accordance with the plan which the restrictions and conditions were meant to carry out. The argument that the obligation was only enforceable by the superior will not therefore stand.

Nor can the claim whereby the superior stipulates for double of the feu-duty in the event of contravention of the restrictions and conditions in the feu-charter be carried as far as the Lord Ordinary carries it. I do not think that this stipulation on the part of the superior can deprive the vassals of their right to enforce specific performance. The clause may have been inserted to meet a possible event, or an agreement—as in *Campbell* v. *The Clydesdale Banking Co.*—to depart from the restrictions in their feu-contract, which the superior would then have an interest to enforce. In that case the superior could step in and demand her double feu-duty. But his right to do so does not enable him to step in and discharge any one feuar from the obligation imposed on the whole property. I therefore come to the same conclusion as Lord Deas—that the complainers here are entitled to the remedy they ask.

Lord Shand—I concur. In order to come to a sound conclusion on this question the case must be taken apart from the clause in the feu-charter under which the superior reserved to himself the option of taking a double of the feu-duty instead of enforcing the restriction. In that view it is no doubt true that so long as James and John Forbes held all the stances feued from Mrs Forsyth they could by agreement with her relieve them from the restrictions. But it appears to me that directly they were divided and given off by them, and the vassals were entered with the superiors (subinfeudations being prohibited) the case became different.

When this note was presented, eight of these stances had so changed hands, and all of them were held directly from the superiors. The restriction imposed by the superior was evidently intended for the benefit not only of the whole subject, but of each separate part of it, and so each individual feuar was interested in the restriction. As soon therefore as the Messrs Forbes gave off these stances there arose between them and their disponees, and also between the disponees themselves, a mutuality of obligation, which amounted to a *jus quæsitum* on the part of each feuar to enforce the restriction against his co-feuars. But the vassals also acquired a right to insist that in all time coming the successive dispositions or other conveyances and titles should contain a reference to this restriction.

After these eight disponees of the Messrs Forbes had entered with the superior, the case was precisely as if the superior had given off

eight new feus under eight new charters, and one to the Messrs Forbes, putting them all under the same restrictions and conditions. On the one hand, the Messrs Forbes were bound as in a question with the feuars; on the other they had a right to object to contravention of the restrictions by any feuar, and similarly the disponees of the Messrs Forbes' disponees were bound as well as the disponees of the Messrs Forbes themselves.

But has the clause on which the Lord Ordinary has founded changed all this, and placed the feuars practically at the mercy of the superior. I should be slow to adopt any construction of that clause which could lead to so unreasonable a result, and I do not think that the Lord Ordinary's construction is the right one. We are familiar with clauses intended to effectuate restrictions and prohibitions of this kind—usually simply a clause irritant. But here we have the addition of an alternative option to the superior to insist on a double payment of the feu-duty during the contravention of the restriction. But I think that that alternative has been inserted for the purpose of securing more efficiently the enforcement of the restrictions—to give the superior a prompt remedy whenever there is a contravention—not to give him the power to allow the vassal to contract himself out of the mutual obligation he lies under not only to the superior but also to his co-feuars.

The LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the complainers against Lord Curriehill's interlocutor dated 18th July 1877, Recal the said interlocutor; continue the interdict formerly granted; and remit the cause to the Lord Ordinary to proceed further: Find the complainers entitled to expenses since the date of the interlocutor reclaimed against: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and to report to the Lord Ordinary, with power to his Lordship to decern for the taxed amount."

Counsel for Complainer (Reclaimer)—M'Laren—Keir. Agents, Lindsay, Howe, Tytler & Co., W.S.

Counsel for Defenders (Respondents)—Trayner—Robertson. Agents — Curror & Cowper, S.S.C.

Thursday, June 6.

SECOND DIVISION.

SDEUARD, LIQUIDATOR OF PROVINCIAL HERITABLE TRUST ASSOCIATION (LIMITED)—PETITIONER.

Public Company—"Companies Acts 1862 *and* 1867 *"—Power of a Liquidator in a Voluntary Liquidation to obtain Decree for Payment of Calls.*

The liquidator of a limited liability company, which was in course of being wound up voluntarily, applied to the Court, under the 138th and 121st sections of the "Companies Act 1862," to enforce certain calls which he had made upon the shareholders, and which they had failed to meet. The Court was asked "to find that the required exercise of power will be just and beneficial; and to pronounce forthwith a decree against "the several contributories named in the said list . . . . for payment to the petitioner of the sums therein certified . . . . in the same way and to the same effect as if they had severally consented to registration for execution on a charge of six days, of a legal obligation to pay such sums and interest, and to grant warrant for extracting said decree immediately, or otherwise to accede wholly or partially to this application, upon such terms and subject to such conditions as your Lordships think fit; or to make such other order, interlocutor or decree on this application as your Lordships think just."

The Court *granted* the application without intimation.

Counsel for Petitioner—Lang. Agents—Hagart & Burn Murdoch, W.S.

Thursday, June 6.

SECOND DIVISION.

[Exchequer Case.

SUMNER *v.* MIDDLETON.

Process—Appeal—Statute 33 *and* 34 *Vict. cap.* 57 *(Gun Licence Act)—Statute* 7 *and* 8 *Geo. IV. cap.* 53, *(General Management and Regulation Excise Act) secs.* 83 *and* 84.

By the Statute 7 and 8 Geo. IV. cap. 53, sec. 83, an appeal against a judgment by Justices of Peace is directed to be taken "at and immediately upon the giving of the judgment." *Held* that an appeal taken ten days after was incompetent.

Opinions (per curiam) that after judgment has been pronounced by the Justices at Quarter Sessions it is irregular to state a case for the opinion and direction of the Court.

Expenses.—Statute, 7 *and* 8 *Geo. IV. cap.* 53 *(General Management and Regulation Excise Act) secs.* 83 *and* 84.

Held, distinguishing the case from that of *R.* v. *Beattie* (December 18, 1866, 5 Macph.