Saturday, December 20. *

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MACRITCHIE OR LECKIE AND OTHERS *v.* HISLOP.

Superior and Vassal—Restrictions in a Feu-Charter — Interest of Co-feuar to Insist—Effect of Superior's "Consent and Concurrence."

In a suspension and interdict brought by a party against a co-feuar for a breach of restrictions contained in a feu-contract, *held* (*diss.* Lord Young) that the fact that the note was presented "with consent and concurrence" of the superior imported into the suit the title and interest of the latter to have the obligations of the feu-right implemented.

Superior and Vassal—Enforcement of Obligations imposed by a Common Superior.

Circumstances in which it was *held* that a restriction in a feu-contract had been contravened, and an interdict was granted, at the instance of a co-feuar with "consent and concurrence" of the superior, against the operations complained of.

Circumstances where *held* (*per* Lord Rutherfurd Clark (Ordinary) and Lord Gifford—*dub.* the Lord Justice-Clerk—*diss.* Lord Young) that there was sufficient similarity in the restrictions contained in the feu-charters of two co-feuars to infer a mutuality of interest and to entitle the one to enforce the restrictions in a co-feuar's charter against the latter.

Title to Sue—"With Consent and Concurrence."

Observations per curiam upon the import and effect of the "consent and concurrence" which a second party gives to the real pursuer of an action, and under which he is combined with him in the instance.

John Hislop, the respondent in this note of suspension and interdict, was proprietor of certain subjects in Gayfield Square, Edinburgh, on which there was built a dwelling-house, being No. 2 of that street. It stood about 25 feet back from the street, the intervening space having been till the time of this action unbuilt on. The frontage was about 50 feet. The complainers Mrs Christian MacRitchie or Leckie and others, trustees of the late Thomas Elder MacRitchie of Craigton, W.S., were proprietors of No. 4 in the same Square, which was a similar but rather smaller property, and was separated from No. 2 by No. 3. The respondent had erected or was in course of erecting a building between his house and the street, and had executed various operations in the garden ground behind his house, and the object of this note was to prevent him from building upon any part of the ground in front of his dwelling-house, and also from erecting, on the garden behind, a carriage or other manufactory, or any structure other than "offices," not exceeding 12 feet in height, and to have him ordained to remove any building already erected.

The complainers and respondent were co-feuars of the governors of Cauvin's Hospital, their authors having originally received their feus from James Jollie, W.S., the predecessor of Cauvin's Hospital. The complainers sued "with consent and concurrence" of the governors of Cauvin's Hospital, the superiors.

The defence relied on by the respondent was rested on two grounds—(1) that the complainers had no title or interest to interfere, in respect that there were not similar restrictions in both the titles which would confer a mutuality of title and, interest, to sue among the feuars themselves, and, besides, that the complainers' predecessor had himself contravened the restrictions, and that they and he had acquiesced in the contravention by others of the feuars; and (2) that the concurrence of the superior was of no avail in supporting their title, as it did not bring him into the action.

The clauses in the various titles in regard to building restrictions were as follows:—(1) In the charter of resignation and confirmation obtained from the superior Mr Jollie in favour of the complainers' author, and dated 28th October 1825—"But declaring always that the said Thomas Elder MacRitchie and his foresaids shall be subject to the limitations and provisions contained in a charter of confirmation and precept of *clare constat* granted by the governors of George Heriot's Hospital to me, and in my infeftment following thereon, recorded in the Particular Register of Sasines at Edinburgh the 4th day of December 1777, in so far as such limitations and provisions may be found to be still effectual; and also declaring, as by the original feu-charter in favour of the said deceased William Fitzsimmons it is specially provided and declared that the said Thomas Elder MacRitchie and his foresaids shall have full power and liberty to erect another tenement of houses upon the ground hereby disponed, to front the said intended street upon the south-west, to be placed on a line with the houses hereafter to be erected upon the property lying on the south-east of the ground feued by me to Andrew Dick, and to be of the same height with these houses so to be erected; and also declaring that the said Thomas Elder MacRitchie and his foresaids shall not erect any other buildings upon the piece of ground hereby disponed besides the above specified, except the walls of enclosure and the necessary offices, neither of which are to exceed nine feet in height, and that the said Thomas Elder MacRitchie shall not set or sell the tenement built or to be built by him on the area hereby disponed, or any part thereof, for stills or for making candles, or any dangerous or offensive nuisances, nor suffer or allow any garbage, dung, or other gross or nauseous matter to be laid down or remain upon the premises or the street opposite thereto."

The respondent's original title (a feu-contract dated June 6, 1782) contained the following clauses:—"That the contract was entered into under (1) the limitations and provisions contained in a charter granted by the governors of Heriot's Hospital to the deceased George Spankie and Walter Jollie, both tailors in Edinburgh, of date the 24th September 1750, in so far as such may be still effectual; and (2) the burdens, declarations, and restrictions contained in the feu-contract itself, and which were as follows—'And further, that the said Andrew Dick and his fore-

* Decided December 17, 1879.

saids shall not erect any other buildings upon the said piece of ground except the tenement of houses and walls of enclosure already erected thereon, and if he or they shall build any offices upon the back ground, which they are at liberty to do, the same shall not exceed twelve feet in height in the side walls.' The feu-contract further provided that the declarations and restrictions contained in it were to be 'specially engrossed in the said infeftment to follow hereon, and in all future renovations of the said feu, declaring always that such infeftments as do not contain such shall *ipso facto* become void and null.' The subsequent titles of the respondent's property contained similar clauses.

The following were the circumstances in reference to the alterations by the respondent, and the alleged contravention of the feuing restrictions by other proprietors in the Square. Nos. 1 to 5 formed the west side of the Square; these houses were not uniform in size, but each had a plot of ground in front and also behind. Behind the ground belonging to Nos. 2 and 3 was a narrow lane; behind Nos. 4 and 5 was East Broughton Place; and there were two vacant building stances on the ground behind Nos. 4 and 5, on which the complainers alleged the proprietors had a right to build; upon the ground behind No. 5 there had been erected a building of three storeys by the Broughton Place U.P. Church, with a large hall and it was alleged by the respondent that this had been done with the complainers' acquiescence.

It was further alleged by the respondent that the complainers' author had built on his own back-green buildings in contravention of the alleged restriction, and that the proprietor of No. 3 had done the same; and also that Mr Jollie, the original superior, had built tenements of several storeys in height on the ground behind No. 1. He further stated that prior to commencing the alterations on his property he had shown the plan of his proposed alterations to the proprietors of Nos. 1 and 3, and that he had obtained their consent or acquiescence. His external alterations he averred consisted (1) in his covering in part of the front plot of ground "by throwing a flat roof across from the top of the south boundary wall to another wall of the same height erected by the respondent, and the substitution of a glass front with cast iron pillars for the old front wall and railing, of about the same height with said old front wall and railing; (2) erecting a projecting office at the back upon the site of a former building, enlarged by a few feet; and (3) levelling the back green, which was formerly about seven feet higher than the ground floor, and was entered by a flight of steps."

The complainers stated that it was the intention of the respondent to build a coach factory in the back green; this was not admitted, but it was conceded that the purpose of the front alteration was to form a carriage show-room.

The respondent pleaded, *inter alia*—"(3) The complainers not having any title to interfere with the respondent's operations, the note ought to be refused. (4) The complainers having no interest to enforce any restrictions or prohibitions against the respondent's operations, the note ought to be refused. (5) The complainers and their predecessor having been aware of the respondent's operations, and made no objection until these were externally completed, are not entitled to decree as craved. (6) The complainers' predecessor having himself contravened the alleged restrictions against building, and, *separatim*, having acquiesced in contravention of the same by the neighbouring proprietors, the complainers are barred from now insisting upon the enforcement of the alleged restrictions or conditions against the respondent."

It was admitted by the respondent at the debate that the alterations were in point of fact an infringement of the restrictions in his titles, but for the reasons before and after mentioned he maintained that the complainers were not entitled to object.

The Lord Ordinary (Rutherfurd Clark) on 15th July 1879 pronounced an interlocutor interdicting the respondent from building upon the ground in front of his dwelling-house 2 Gayfield Square, and also from erecting, upon the garden behind, a carriage or other manufactory or structure other than "offices" not exceeding 12 feet in height in the side walls, and further ordaining him to remove any already built in contravention of his titles. He added the following note:—

"*Note*.—. . . . 1. The first question is, Whether the conditions of the feu-contract of the respondent are enforceable by a co-feuar? The Lord Ordinary thinks that they are. The feu-contracts contain similar though not identical conditions as to building. These conditions seem to the Lord Ordinary to have been inserted for the joint behoof of the feuars, and are therefore enforceable by any one against the others.

"2. The respondent maintains that the complainers have lost their right to enforce the conditions because they have themselves violated them or permitted a violation by others. That the predecessors of the complainers and other feuars have erected buildings which may be considered to be a violation of the conditions seems to be certain. But they were of a different order from those which the respondent has erected. They were intended merely for the improvement and better enjoyment of the dwelling-houses. In the opinion of the Lord Ordinary the complainers have not from this cause lost their title to enforce the conditions.

"The respondent relied chiefly on the alterations which had been made on the back ground of the feus fronting Antigua Street. These feus were also granted by Mr Jollie, and contain conditions similar to those in the Gayfield Square feus. The back ground forms a part of the side of Gayfield Square, in which the feus of the complainers and respondent are situated, and there can be no doubt the conditions have been grossly violated. Whatever may be said as to the superiors, it is very doubtful whether the vassals had a sufficient interest to object to the violation, and thus the Lord Ordinary cannot sustain the plea which has been put forward by the respondent.

"3. The respondent did not dispute that the buildings which he had erected were in violation of the conditions of his feu-contract. He relied only on the defences, which have already been noticed."

The respondent reclaimed, and argued—The complainers had no title to interfere, (1) because there was no mutuality in the obligations of the feu-contract—*Stewart* v. *Bunten*, July 20, 1878,

5 R. 1108; *Dalrymple* v. *Herdman*, June 5, 1878, 5 R. 847; (2) because they had no interest—*Gould* v. *M'Corquodale*, Nov. 24, 1869, 8 Macph. 165; *Dennistoun* v. *Thomson*, Nov. 22, 1872, 11 Macph. 121; *Campbell* v. *Clydesdale Bank*, June 19, 1868, 6 Macph. 943; and (3) because they had acquiesced in contraventions by others of the feuars, and in those complained of, and had, moreover, contravened the restrictions themselves — *Walker* v. *Renton*, March 11, 1825, 3 Sh. 455; *Croall* v. *Magistrates of Edinburgh, &c.*, Dec. 20, 1870, 9 Macph. 323. The concurrence of the superior did not help the complainers' title, as it did not make him a party to the action.

Argued for respondent—He did not require the superior's concurrence, as there was sufficient mutuality, from the similarity of restrictions in the different titles, to give him a right to sue. If the presence of the superiors was necessary, all that was requisite was supplied by their concurring—*Dalrymple* v. *Herdman*, quoted *supra; Robertson* v. *North British Railway Company*, July 18, 1874, 1 R. 1213; *Governors of Heriot's Hospital* v. *Cockburn, &c.*, May 23, 1826, 2 W. and S. 293.

At advising—

Lord Gifford—This case involves some considerations of nicety and delicacy, but on the whole I agree with the Lord Ordinary. The first question is, Whether the governors of Cauvin's Hospital, who are superiors of the ground in question, are parties to this suit to the effect of enabling the complainers as in right of the superiors to plead the clauses, restrictions, and conditions contained in the feu-contract granted by them or their authors to the respondent Mr Hislop or his authors, and which clauses, restrictions, and conditions are repeated in all the subsequent grants, and which are contained in the title upon which the respondent Mr Hislop now holds and possesses his property? This question does not appear to have been argued before the Lord Ordinary, as he takes no notice of it in his interlocutor or note, but it was strenuously contended at your Lordships' bar that the governors of Cauvin's Hospital are not parties to the present process, and that neither they nor anyone else in their right are entitled to plead against the respondent the terms of the respondent's own title. It was urged that the case must be decided without reference to the rights or interests of the superiors, and just as if the question had arisen between two neighbouring vassals, neither of whom was entitled to use the superior's name or to plead or avail himself in any way of the superior's interests or rights.

Now, I cannot take this view of the position of the parties to the present suit. No doubt the question directly arises between two neighbouring feuars, but the complaint of MacRitchie's trustees against an alleged violation of the terms of the feu is not brought in their own name and title alone, but also in name of the governors of Cauvin's Hospital, who are the common superiors of all the other parties, and of the whole line of villas or tenements down the south-west side of Gayfield Square.

The suspension and interdict bears to be at the instance of MacRitchie's trustees, who are proprietors of the villa next adjoining but one the villa of the respondent, and whose feu immediately adjoins the piece of ground on which the respondent's villa is built, but the note is presented "with consent and concurrence of the governors of Cauvin's Hospital, incorporated by an Act of Parliament in the 7th and 8th years of the reign of his late Majesty George IV. chap. 11, . . . complainers."

It appears to me that the governors of Cauvin's Hospital, as consenters and concurrers, are really parties to the present suit—consenting and concurring parties—and that they or the other complainers in their right are entitled to plead all conditions and restrictions in the respondent's title just as the superiors themselves could do.

It is obvious that this was the very purpose for which the incorporated governors of Cauvin's Hospital gave their consent and concurrence. It was just to avoid any doubt which might arise as to the right and title of adjoining or of neighbouring feuars to plead as against each other the conditions and restrictions contained in their respective feu-contracts all flowing from one common superior. It often happens that a superior laying out a new street, and desirous to maintain its amenity, its freedom from nuisance or from manufactures, or its appearance or character, inserts in all the feu-rights certain conditions or restrictions limiting the extent or the character of the buildings to be erected, and imposing certain restrictions on their use. In such cases, when it is not expressly provided that each feuar may enforce the conditions and restrictions against his neighbouring feuars so far as he is interested therein, a question frequently arises whether the right of mutually insisting on the conditions of the feu accrues to the feuars *inter se*, or whether the common superior alone can enforce the conditions which are intended for the common benefit of all. It so happens in the present case that the different feu-contracts do not in so many words declare that each feuar may insist against his neighbours that all shall observe the terms of the contracts, but this is left to implication, and the question may arise, whether such mutual right is implied in law? The complainers maintain that it is, but in order to avoid any question or difficulty they very properly and very prudently obtained the consent and the concurrence of the common superiors, who had inserted somewhat similar conditions in all the feu-rights, and in the observance of which undoubtedly all the feuars were equally interested.

But now the question is seriously raised, whether it is enough for the superiors to consent and concur in the complaint and allow the vassal who is more immediately interested to plead their rights? or whether they must themselves be represented at your Lordships' bar, and take the position of principal complainers?

I am humbly of opinion that the superiors are sufficiently parties to the present action as consenting and concurring therein, and that this consent and concurrence is sufficient to give the other complainers the benefit of the superiors' title in challenging the alleged contraventions of the feu-contract. This was the very purpose and intention of the superiors in giving their consent and concurrence, and to deny it this effect would be to deny it all effect whatever. I am not prepared to do this. The very strongest effect has always been given to "consent" deliberately given, in whatever form it is interposed. He who is merely a consenter to

a disposition of heritage is held to be really a disponer if the true title to the subject be found to be in him. He who consents to a discharge thereby himself discharges, and he who consents to and concurs in a judicial demand should in all fairness, I think, be himself held as a pursuer or complainer. To concur is a stronger word than to consent, and the consent and concurrence which are judicially given here can have no meaning at all if they do not make the superiors parties to the suit to the effect of giving the other complainers the benefit of their title. It seemed to be admitted that if in the title of the note of suspension, after mentioning the superiors, the words had been added "and they for their interest," or some similar words, this would have been sufficient to let in all the superiors' pleas; but I think these words are implied, for if the superiors consent and concur in the complaint, they are complainers for their interest, and I should be adverse on the strongest grounds to give effect to a mere technicality which can cause no real prejudice to anyone, and to make it necessary--for that would be all—that the superiors should present a supplementary note of suspension and interdict, in which instead of consenting to and concurring in the prayer they should repeat that prayer for "their own interest." I think this is useless and unnecessary. It would only create delay and expense. I think, as the case stands, I am bound to consider the pleas on the merits as stated in name of the superiors and in their right, as well as by the individual feuars who are complaining.

Even though a strict, and as I think an unreasonably strict, view of the rules of pleading should be taken, and if it were to be held that the superiors are no parties to the present action although they consent and concur therein, I would still be for superseding the case for a few days, to enable the superiors, if so advised, formally to sist themselves as parties. I think justice and fair play requires this to be done. Indeed, I rather think that the Court is bound to allow this amendment under the provisions of the Court of Session Act of 1868 (31 and 32 Vict. c. 100), which provides, section 29, that amendments may be made at any time, and expressly enacts "that all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made."

If, then, I am right in thinking that the superiors are parties to the present action, and that the pleas stated are really pleas stated by and for the superiors, this would make it unnecessary to decide the next question raised, namely, whether without the consent of the superiors the feuars have a right to insist *inter se* that the conditions of their respective feu-contracts shall be observed? Difficult questions often arise as to this, and it is a question of circumstances whether the feuars in the same street or in the same neighbourhood are bound to each other as well as to the superior in the observance of the conditions contained in their respective feu-rights. The Lord Ordinary has held that in the present case the feuars may mutually enforce the conditions of the feu, which are similar and nearly identical in the different feu-charters, and which he holds to have been inserted, not for the interest of the superior alone, but for the mutual benefit and behoof of the feuars themselves. I am disposed to agree with the Lord Ordinary. I think the conditions inserted in the feu-rights of the five villas fronting Gayfield Square are so similar that it is a fair inference that they were inserted for the mutual behoof of all the five feuars. At the same time, the question is attended with so much difficulty that I am glad to have it superseded by holding that the superiors themselves are here seeking to enforce the conditions of the feu-contract according to their true meaning and intent.

The next question then is, Has the respondent by the buildings which he has erected contravened the terms of his feu-contract? I think he has.

The original feu-contract in favour of the respondent's author is dated 6th June 1782, and was granted after the erection of the villa or tenement which is now upon the ground. It contains this condition—"And further, the said Andrew Dick binds and obliges him and his foresaids not to erect any other buildings upon the said piece of ground except the tenement of houses and walls of enclosure already erected thereon, and if he or they shall build any offices upon the back ground, which they are at liberty to do, the same shall not exceed twelve feet in height in the side walls." This condition is ordered to be engrossed in the infeftment and in all future renovations of the feu. Infeftments that do not contain the same are declared null and void. Accordingly the condition has been repeated in all infeftments. It is contained in the last investiture in favour of the respondent himself—a notarial instrument dated 15th May 1876.

What the respondent has done is to build on a large portion (considerably more that one-half) of the whole ground in front of his villa, so as to bring the building forward to the public street, covering more than one-half of the front plot with building. Now, I think this is a contravention of the condition of the feu. The ground in front of all the five villas is of the same breadth, and is laid out as plots or gardens in front of the villas which thus stand in a uniform line. I think it was the intention of the superior, and the meaning of the feu contracts into which he entered, that this line should be preserved, and that the plots in front of the respective villas should not be built upon, but should remain as open or garden ground. I think he has effectually provided for this by prohibiting the feuars from (I take the words of the respondent's feu-contract, the others being similar) erecting "any other buildings upon the said piece of ground except the tenement of houses and walls of enclosure already erected thereon;" and then follows a permission to erect certain offices on the back ground—a permission which makes the prohibition to build on the front ground all the more emphatic. Of course the words of the prohibition must be fairly and reasonably construed. If the existing villa, which was erected prior to the date of the feu-contract, should be burned down or fall into decay, the respondent undoubtedly could erect another similar tenement in its place, and he is not held down to any style of architecture or to any elevation or to any details, but still I think he would be obliged to leave the front plot unbuilt upon as it was at the date of the feu-contract.

This is the true meaning of the bargain between the parties, and I think that to build a shop upon the front plot, as the respondent has done, is a breach of the bargain—a contravention of the prohibition—to which both parties have agreed, and which has been made a condition of the feu entering the whole titles and made public upon the records.

The only remaining question is, whether the superiors have released or dispensed with the condition and prohibition contained in the feu-contract, or have done anything which bars or prevents them from enforcing it? The respondent pleads that the prohibition, if ever it was binding, has been departed from and abandoned because the superior has allowed the feuars of the tenement of houses facing Antigua Street or Leith Walk to build upon their back ground up to the line of the public street of Gayfield Square, and has also allowed the other villa proprietors in Gayfield Square to build additions to their villas and erections upon their grounds inconsistent with the conditions in the feu-contract. I do not think that this plea is well founded. The tenement fronting Antigua Street or Leith Walk is no part of the line of villas, the uniformity and amenity of which was intended to be protected by the prohibition in the respondent's feu-contract. The Antigua Street tenement is of a different description, and faces a different street. It is separated from the Gayfield Square line of villas by a lane or road, and the amenity or appearance of these villas is not affected by the buildings on the Antigua Street back ground. The alterations and additions made by the villa proprietors consist of enlargements of the villas to the back, and of certain other buildings which were specially permitted by the original feu-contracts, but none of which affect or injure either the amenity or the appearance of the line of villas fronting Gayfield Square. No buildings whatever had been erected on the front ground of any of the villas until the respondent erected the shop now complained of. One of the plans in process erroneously shows buildings on the plot in front of two of the villas, but this is a mistake. It appears to me, therefore, that there is no room for any plea of bar in this case, but that the complainers are entitled to enforce the prohibition in the feu-contract.

LORD YOUNG—The respondent is proprietor in fee-simple of a small piece of ground in Gayfield Square on which there is a dwelling-house that stands about 25 feet back from the street or roadway, the intervening space having been till recently unbuilt on. The frontage is about 50 feet, and the house is at present No. 2 of the Square. The complainers are proprietors also in fee-simple of No. 4 of the same Square, which is a similar but rather smaller property, and separated from No. 2 by the property which is No. 3, and which is of the same size as No. 2. The respondent recently erected a building on a portion of his ground, 50 feet by 25, intervening between his house and the Square, and the purpose of the action is to obtain an order for the removal of this building, as being "in contravention of his (the respondent's) titles." The Lord Ordinary has ordered the removal, and the question for us is whether the order is right.

The parties both hold under Cauvin's Hospital as their immediate superior—their feus having been granted in 1782 and 1784 respectively by James Jollie, the Hospital's predecessor in title. By the feu-contract of 1782 the respondent's predecessor (Dick) bound himself and his successors "not to erect any other buildings upon the said piece of ground except the tenement of houses and walls of enclosure already erected thereon," which I shall assume imported an obligation not to build on the space already referred to as intervening between the house and the Square, lawful and enforceable by the party in whose favour it was undertaken, viz., the other party to the contract in which it occurs. I also assume that the obligation and corresponding right constituted a condition of the feu. But assuming this, the respondent contends that the complainers not being parties to the feu-contract, or in any way privy to it, have no right in its conditions or title to enforce them. The complainers, on the other hand, maintain that feuars under a common superior in the same street or square, who hold on similar conditions, have a legal title to enforce the conditions of each other's feu-rights in so far as they are in fact interested in their observance, and that if there is any imperfection in their title it is remedied by the "consent and concurrence of the superior."

Prima facie, the superior only can enforce the conditions of a feu-contract made by him or his predecessor in the title. At the same time it is reasonable that a proprietor who feus out a piece of ground in lots to several feuars should be entitled, and quite settled that he is, to put each lot under servitude to all or any of the others—thus constituting mutual servitudes which the feuars may enforce *inter se*. The doctrine of *jus quæsitum tertio* has been appealed to, but as the *jus quod est quæsitum* in every such case is the species of *jus* which is denominated servitude, I think it better to consider the matter with reference to the law of servitude. In this view the primary question is, whether or not the respondent's property is under a servitude against building in favour of that of the complainers?

Now, omitting all mere general observation on the law of servitude, and coming at once to the particular doctrine on which the complainers rely, I think the rule is this—that when a proprietor of a piece of ground has so feued it in lots for building, on a plan prescribed, that it is reasonable to imply that each feuar contracted with reference to and in reliance on the conditions imposed on the others to observe that plan, mutual servitudes enforceable *inter se* are thereby constituted. I state the rule thus because it seems to me to be the form in which it is commonly applicable. The principle on which it rests is, however, applicable to various circumstances. That principle is that the feuars, although they do not directly contract with each other, nevertheless all contract with the same superior, and to the same end in which they are all alike interested, viz., the creation and maintenance of a street or square on a particular plan, and that it is reasonable to impute to each the knowledge that the others contract in reliance on his obligations. Express reference to a plan, or the sameness or similarity of the obligations imposed on each feuar may not be, and I think is not necessarily, conclusive, but is nevertheless always a strong ground for implying that the feuars in-

tended to be bound *inter se* to execute and maintain a common design. Whether they did so or not is always the question for decision, according to the facts and circumstances of the individual case.

Now, I must say that I find nothing in the original feu-contracts of the properties now belonging to the parties before us which warrants me in imputing to either feuar an intention to come under any obligation to the other, or in holding that either contracted with reference to the conditions of the other's feu-contract. Neither contract refers to a settled or proposed plan, or to conditions imposed or intended to be imposed with a view to the execution and maintenance of any plan or design. I should not have regarded the case as substantially different if the conditions of these two plans had happened to be identical, but it is noticeable that they are substantially different, and confining attention to the west side of the Square the conditions in the contracts of the several feuars are all different—not two of them, I think, being alike. The several feus might, had the parties been so minded, have been expressly put under obligations, or as I should say servitudes, in favour of each other, but ground for implying such obligations or servitudes there is I think none.

I am therefore of opinion that the complainers have no legal interest in the conditions of the respondent's feu, and consequently no right of action upon them.

But assuming this, it is contended that the superior (Cauvin's Hospital) having such interest and consequent right of action has communicated a title to the complainers by concurring in the suit. If I thought this position sound, I should require evidence of the concurrence to which virtue is attributed. We assume, in the absence of evidence to the contrary, that the parties to an action are here represented by counsel who profess to appear for them; but Cauvin's Hospital is not a party to this action, and the complainers counsel told us that he did not appear for the Hospital, but only for the complainers, who professed to sue with the concurrence of the Hospital. I could not assume the truth of this profession if I thought it material, but thinking it immaterial, I do not dwell on the matter of fact, and proceed to explain why I regard it as immaterial.

Concurrence in an action at the instance of another is a familiar matter in our practice. Primarily, such concurrence is associated with the guardianship or curatory of persons under disability—such as married women and minors. Such a person, although having a right of action, is, speaking generally, only permitted to sue it with the concurrence of a guardian, husband, or curator, as the case may be. In all such cases the person under disability sues on his own right and title, although the policy of our practice requires that he and his adversary shall have the protection of the guardian's concurrence in the judicial proceedings to enforce or defend it. But although this is the proper and primary notion of concurrence in a suit, I am aware that it has been extended in practice to another class of cases, with a view to exclude some anticipated or reasonably possible objection to the pursuer's title by the party concurring, whereby the defender might be subsequently prejudiced. The most obvious and familiar illustration is that of an assignee to a debt or demand suing the debtor therein with the concurrence of the cedent. In this and similar cases the object is to guarantee the pursuer's title to receive payment and discharge the debt against any objection by the person concurring, who is by the fact of his concurrence barred from stating it. It is really only a legitimate expedient to save trouble and avoid unnecessary pleas touching the validity as in a question with a third party, viz., the party concurring, of a right of action otherwise *prima facie* good. I never heard it suggested that "concurrence" conferred a right of action on a person who had none, and there is assuredly no authority for such a proposition. If the complainers have a lawful interest in the conditions of the respondent's feu and consequent right of action on them, it is not for the superior to permit or decline to permit them to use their right by granting or refusing concurrence to their suit. They are *sui juris*, labour under no disability, and so are at liberty to assert their right in a court of law without any concurrence. But if they have no right, which is the condition of the argument on this part of the case, and in accordance with my opinion, they can take nothing by the superior's concurrence—for there is here obviously no room for what I may call a precautionary concurrence by the superior to assure the respondent against any subsequent objection by him in case of their yielding voluntarily or on compulsion to the complainer's demands. From the nature of the case any such objection is manifestly out of the question.

Cauvin's Hospital retains the superiority, and all right attached to it, including the interest in the conditions of the respondent's feu, and doing so cannot transfer to the complainers any right of action existing in respect of the superiority—for a right of action cannot be transferred or communicated while the substantial right in respect of which it exists is retained. It is a fixed rule of law that a party who seeks judicially to vindicate his rights shall do so in his own name and at his own instance, and the propriety of the rule is illustrated by what the Lord Ordinary indicates as the not improbable result of an action at the superior's instance against the respondents.

LORD JUSTICE-CLERK—This is an action on an express condition in a feu-right, in which the superior is the primary creditor, but which the adjoining feuars contend that they have a *jus quæsitum* to enforce. The feuars, if they have a right to compel observance of the condition, acquire it as a subordinate or derivative right, the primary right remaining with the superior.

The condition in question is quite clearly expressed, and it is as clearly made a real burden on Hislop's right. *Prima facie*, therefore, in a question between superior and vassal, it must be fulfilled unless it has been directly or inferentially discharged.

The position of the adjoining feuars is different. It has been held that if all the feuars are laid under similar restrictions a community of interest arises which raises a presumption that the restrictive clauses were meant for their benefit, and that they have thus an interest to enforce them on a presumed title from the superior; but as between the superior and his own vassal the conditions

must be fulfilled. It is not in my opinion a right of servitude in any sense. The *dominium directum* is not a dominant tenement in any legal acceptation. The restriction is a feudal condition and exception on the footing of communication of the superior's right—that is, *jus quæsitum tertio;* that of the feuars could not be, and I am not aware that it ever has been, sustained.

In the present case I think it doubtful whether the case of the feuars comes up to the mark of that community of restriction which is held to give them a derivative title. The restrictions are not identical in the different feus, and, in particular, I do not find the particular restriction here sought to be enforced in the title of the principal pursuers, and had the case remained on that footing I should have much difficulty in giving effect to their demand. But then it is said that the superior concurs in the action, and that his title is unquestionable. On the other hand, it is denied that the superior is here at all as a complainer, as he only concurs in the action.

I much regret that the superior's position was not made more definite, as it certainly ought to have been; but I am of opinion that the superior's concurrence imports into the suit his title and interest as well as that of the vassal, and that he as well as the feuars would be conclusively bound by the judgment to be pronounced. He concurs for his own interest, and no other meaning can, I think, be attached to his concurrence. Had this been a suit by two separate and independent parties having distinct rights and interests in the subject-matter of the suit, I might have participated in Lord Young's difficulties; but that is not the position of the parties here. There are many instances in which one party has the primary, and another a subordinate or derivative, title to enforce the same right, such as landlord and tenant, truster and trustee, creditor in possession and fiar, and such like, in which the concurrence of the holder of the radical right will competently validate and fortify the right of action in the holder of the derivative right. The case of superior and vassal is a simple illustration of this form of procedure, and holding it to be clear that the superior would be effectually bound by an adverse judgment, I am of opinion that his title is brought into judgment here, and must be met by the respondent. Neither the respondent nor the Lord Ordinary had any doubt that the superior had given his concurrence, and indeed no question was raised as to the effect of it before him. The condition is clear on the face of the title, and the only remaining question is, whether it has been directly or inferentially discharged? All the superior has to do is to point to the condition in the right which he gave to Hislop. If the vassal plead acquiescence or abandonment, it is for him to prove it. I would refer to Lord Neaves' opinion in the case of the *Clydesdale Bank* (6 Macph. 943), and that of Lord Cowan in *Croall* v. *The Charlotte Square Feuars* (9 Macph. 323), as entirely establishing this proposition.

On the facts of this case I do not think that any of the alleged violations of the conditions laid on the adjoining feuars were of such a nature as if permitted by the superior would infer discharge of the obligation now in question. The conditions said to have been violated related either to back ground or to the houses fronting Antigua Street, and were therefore different in character, or at least in importance, from those relating to the tenements fronting Gayfield Square; and in this respect the facts are in marked contrast to those in the case of the *Clydesdale Bank*, and indeed of any others in which the superior's challenge has been excluded.

The Court adhered.

Counsel for Complainers (Respondents)--Balfour—Wallace. Agent—Lindsay Mackersy, W.S.

Counsel for Respondent (Reclaimer)—Kinnear—Low. Agents—Macandrew & Wright, W.S.

Saturday, December 20.*

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MP.—LOVE AND ANOTHER (LOVE'S TRUSTEES) *v.* LOVE AND ANOTHER.

Succession—Vesting—Period of Division—Quod fieri debet infectum valet.

A testator who died in 1859 directed his trustees to divide his estate among his three sons R. J. and W. (who were themselves trustees under his settlement) in shares of equal value, but so that R. should take his estate of T., J. his estate of N., and W. an equivalent share in cash. Vesting was to take place at the testator's death, so far as to infer a *jus disponendi*, but not to effect transmission by intestate sucession until the period of division and conveyance, which was to be as soon as the trustees had paid the testator's debts and valued the estate. If a son died intestate and without issue before the testator, or before the period of division, the estate was to be divided equally between the remaining two, the eldest always to take the estate of T. R. died without surviving issue in 1877, leaving a general settlement in favour of his brothers, but specially excepting the estate of T., which he desired "should descend or transmit to T. in terms of his father's trust-disposition and deed of settlement." No conveyance of the estate had been granted to R. during his lifetime. *Held* that, on the principle *quod fieri debet infectum valet*, division and conveyance must be assumed to have taken place during R.'s life, that the destination in the trust-disposition and settlement reguated the succession to the estate of T., and that therefore the original tripartite destination still held good.

John Love senior of Threepwood died on 6th September 1859 leaving a trust-disposition and settlement dated 4th June 1849, and duly recorded, whereby he disponed and conveyed his whole estate, real and personal, in trust to the trustees therein named. The sole surviving and accepting trustees at his death were his three sons Robert, John, and William Fulton, and also a William Love who acted as trustee till 1863, when he became incapacitated and died in 1866. Robert Love, the eldest son, died on 13th September

* Decided 19th December.