opinion of the law officers, could not have obtained a decision under any form of ordinary action. But by the consent of the Scotch Education Department the parish councils have been enabled to obtain a judicial decision of the question of construction in which they are interested.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"The Lords having considered the Special Case and heard counsel for the parties, answer the alternative question in the case in the affirmative."

Counsel for the First Party—Lord Advocate (Graham Murray, K.C.)—J. H. Millar. Agent—George Inglis, S.S.C.

Counsel for the Second Party—Shaw, K.C.—A. S. D. Thomson. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 28.

FIRST DIVISION.

[Lord Low, Ordinary.

THE WALKER TRUSTEES *v.* HALDANE.

Superior and Vassal — Feu-Charter — Restriction on Building — Reference to Plans—"Level of Dining-Room Floor."

A feu-charter granted in 1825 of ground occupied by a dwelling-house in Edinburgh, with "back ground" and "stable ground" behind, contained a provision that "the coach-houses and stables to be erected by" the vassal and his successors on the stable ground thereby disponed should be in strict conformity with "the plans and elevations signed . . . . as relative hereto and not otherwise." No coach-houses or stables were in fact erected. There was a further provision that the vassal was to have liberty to "erect buildings on the back ground, provided they do not exceed the height of 1 foot above the level of the dining-room floor."

In an action raised, *inter alios*, by the superior of the subjects to interdict the vassal, *inter alia*, from erecting certain proposed buildings on the back ground and the stable ground, in respect that the buildings proposed to be erected on the stable ground were not stables, and were not conform to the plans and elevations referred to in the feu-charter, and that the building proposed to be erected on the back ground exceeded the prescribed height — *held* (1) that as the vassal was not taken bound to erect stables, or expressly prohibited from erecting any buildings except stables on the stable ground, the erection of the buildings proposed to be erected on the stable ground was not a contravention of the charter, and (2) that the expression "dining-room floor" meant, not as maintained by the vassal the dining-room flat, but the floor of the dining-room, and that consequently the vassal was prohibited by the feu-charter from erecting upon the back ground of the feu any building exceeding the height of 1 foot above that level.

By a feu-charter dated 11th July 1825 Sir Patrick Walker of Coates feued to James Buckham, builder, two areas of ground on the north side of Melville Street, Edinburgh, which were described as "All and Whole those two areas or pieces of ground on the north side of Melville Street, marked numbers 53 and 55 on the feuing-plan of said street, consisting of 28 feet in front, nett measure, with the dwelling-houses and other buildings erected (or to be erected) thereon, and stable ground behind the same after described . . . bounded as follows, *videlicet:*— On the north by the front wall of a range of stables and coach-houses to be erected between the said areas and the meuse lane (*then followed the other boundaries*), and which pieces of stable ground extend from front to back 33 feet each, and from centre to centre of gable 16 feet each, and lie contiguous, and are bounded as follows, *videlicet:* — (*then followed the boundaries*).

The ground thus disponed consisted of (1) the ground on which the houses were built, (2) the "back ground" behind the houses, and (3) the "stable ground" behind the "back ground."

The charter contained the following provision:—"Whereas it is hereby expressly provided and declared that the dwelling-houses built or to be built on the said areas must be erected and made in strict conformity to the plan and elevation adopted for said street (and the plans and elevations of the two houses erected or to be erected on the said area or pieces of ground hereby disponed, now signed by me and the said James Buckham as relative hereto) with balconies and iron railings in front thereof, conform to the pattern adopted for said street, it is hereby expressly provided and declared that it shall not be in the power of the said James Buckham or his foresaids to convert the said dwelling-houses into shops or warerooms for the sale of goods or merchandise of any kind, or to erect or make common stairs or separate tenements within the said houses, but to use the same as dwelling-houses only, or to make any deviation from or alteration upon the plans and elevations and pattern balconies and iron railings above mentioned: But declaring, and it is hereby declared, that the coach-houses and stables to be erected by the said James Buckham and his foresaids on the foresaid two areas of stable ground hereby disponed shall be in strict conformity to the plans and elevations of the same now signed by him and me as relative hereto, and not otherwise; and with liberty to erect buildings on the back ground, provided they do not exceed the height of 1 foot above the level of the dining-room floor, and that the same shall not be converted into shops or working-houses, or to any other pur-

poses which may be injurious or disagreeable to the neighbouring feuars contrary to the true intent and meaning of this permission."

The vassal was not taken bound to erect stables, and in fact no stables were erected on the stable ground.

Mr William Stowell Haldane, W.S., heritable proprietor of No. 55 Melville Street, on 13th April 1901 presented a petition to the Dean of Guild "for warrant to erect a building upon the back-green and stable ground behind the petitioner's dwelling-house No. 55 Melville Street, Edinburgh, containing a play-room, three bedrooms, press and stair, and to form along the west side of the said back-green a connecting passage from the flat top of the wash-house to the new building, and to execute all relative alterations, all as shown on the plan herewith produced." This petition was served only on the proprietors of Nos. 53 and 57 Melville Street.

No answers were lodged, and warrant was granted to the petitioner in terms of the prayer of the petition.

A note of suspension and interdict was presented by the Walker Trustees—superiors of the lands of Coates—and certain of the other neighbouring feuars craving the Court to interdict Mr Haldane from "erecting or continuing with the erection of any buildings now in process of construction on the back ground of his feu at 55 Melville Street, as more fully described in a feu-charter granted by Sir Patrick Walker of Coates in favour of James Buckham, builder, dated 11th July 1825, exceeding the height of 1 foot above the level of the dining-room floor, and from erecting or continuing with the erection of any buildings on the stable ground, described in said charter as lying to the north of said back-ground, and extending from front to back 33 feet, and from centre to centre of gable 16 feet, other than a coach-house and stable, in strict conformity to the plans and elevations of the same signed as relative to the said feu-charter."

The complainers maintained that the proposed operations were in contravention of the conditions of the feu-charter quoted above, in respect that the building which was being erected partly on the stable-ground and partly on the back-ground was not a coach-house or stable, and was not in any way conform to the elevations on the plan signed as relative to the feu-charter; and that the building on the back-ground exceeded in height one foot above the level of the dining-room floor. The plan showing the elevations of the coach-houses and stables signed as relative to the feu-charter was produced.

The respondent explained that the level of the back-ground was only 4 feet 4 inches below the level of the floor of the dining-room and maintained that the proposed buildings were not in contravention of any building restriction in his feu-rights, that he was not bound to build a stable, and that by "the dining-room floor" was meant the street or dining-room flat and not the floor of the dining-room.

The Lord Ordinary (Low) on 20th December 1901 pronounced the following interlocutor—"Finds (1) that the building which the respondent is erecting upon the ground described in the feu-charter of 11th July 1825, mentioned in the prayer of the note as stable ground, is not in contravention of the conditions of said feu-charter; therefore refuses the prayer of the note in so far as it seeks to have the respondent interdicted from erecting or continuing the erection of the said building, and decerns; (2) that by the said feu-charter the respondent is prohibited from erecting upon the background of his feu at No. 55 Melville Street, Edinburgh, as described in the said feu-charter, any building exceeding the height of one foot above the level of the floor of the dining-room of the house No. 55 Melville Street foresaid: Appoints the cause to be enrolled for further procedure: Reserves all questions of expenses, and grants leave to reclaim."

Opinion.—"In the construction of feu-charters or contracts imposing building restrictions the presumption is in favour of freedom of ownership, and accordingly a restriction which is not expressed is not easily implied.

"In this case I think that it cannot be doubted that the superior and the original feuar both contemplated that the strip of ground behind the back-greens of the dwelling-houses should only be used for the erection of stables, and a plan according to which, and 'not otherwise,' the stables should be built was annexed to the charter. The plan includes a ground plan of the stables, which, however, shows nothing more than their area, and also an elevation plan of the stables towards the lane which bounds the ground on the north.

"But whatever the intention of the parties was, the vassal was not in fact taken bound to erect stables upon the ground, and it is clear that he could not have been compelled to do so. Further, there is no express prohibition against erecting buildings which are not stables, nor is there any prohibition against the use to be made of the stables when built.

"The complainers contended that although the feuar might not be bound to erect stables, or to use them as stables if erected, yet if he built upon the ground at all he was tied down to the elevation shown upon the plan which he had signed as relative to the charter.

"The question seems to me to be one of considerable difficulty, because, as I have already said, I think that the parties contemplated that nothing except stables should be built upon the ground, and although the presumption is in favour of freedom of ownership, such presumption cannot override the fair and natural meaning of the charter or feu-contract.

"Construing the charter, however, according to the ordinary meaning of the language used, I cannot find more in it than a provision that if the vassal does erect stables they shall be in strict accordance with the plan annexed, and I am unable to spell out of the charter either an

obligation to erect stables or a prohibition against using the ground for any other purpose.

"I am therefore of opinion that the building which the respondent is erecting upon the stable ground is not a contravention of the charter.

"The next question has regard to a covered passage which the respondent is erecting upon the back-green for the purpose of connecting his dwelling-house with the building upon the stable ground.

"The clause in the charter in regard to the back-green is as follows—'With liberty to erect buildings on the back ground, provided they do not exceed the height of one foot above the level of the dining-room floor.'

"The passage is considerably more than one foot above the level of the floor of the dining-room, but the respondent contends that the words in the charter 'the dining-room floor' mean 'the dining-room flat,' and that accordingly he is entitled to erect buildings upon the back-green which shall be one foot higher than the level of the floor of the room above the dining-room.

"I am unable to assent to that argument, because I see no reason for holding that the word 'floor' is used in any other than its ordinary sense, or that the words 'the dining-room floor' mean the dining-room ceiling, or the floor of the room above the dining-room."

The complainers reclaimed, and argued—(1) The expression "stable ground" was clearly indicative of the use to which and to which alone the ground must be put. It was true that the restriction to be binding must be clear and unambiguous, but here the meaning of the contract could be implied from the language used. A clear implication was as good as an actual expression—*Park Yard Company* v. *North British Railway Company*, June 20, 1898, 25 R. (H.L.) 47, at p. 53, 35 S.L.R. 950. The distinct reference in the charter to the plans left no doubt as to the contemplated nature of the buildings, and to the condition that if the vassal built at all he must build in conformity with those plans—*Assets Company* v. *Lamb & Gibson*, March 6, 1896, 23 R. 569, 33 S.L.R. 407; *Crawford* v. *Field*, October 15, 1874, 2 R. 20, 12 S.L.R. 7; *Dennistoun* v. *Thomson*, November 22, 1872, 11 Macph. 121, 10 S.L.R. 69; *Barr* v. *Robertson*, July 12, 1854, 16 D. 1049. (2) "Floor" was used in the ordinary sense, and not as meaning flat, as the respondent contended. If that were the meaning it would not designate a definitely ascertained level. Moreover, the point had been expressly decided in *Greenhill* v. *Forrester*, November, 26, 1824, 3 S. 325.

Argued for the respondent—(1) It was only if he built a stable that he was under an obligation to build in conformity with the plans. He was not bound to build a stable, and there was no prohibition against putting up buildings other than stables. This was a very old charter, which was not strictly a contract, and the Court would construe it in favour of liberty to the vassal, and would not enforce restrictions not unequivocally expressed—*Cowan* v. *Magistrates of Edinburgh*, March 19, 1887, 14 R. 682, 24 S.L.R. 474; *Russell* v. *Cowpar*, February 24, 1882, 9 R. 660, 19 S.L.R. 443; *Heriot's Hospital* v. *Ferguson*, 1774, 3 Paton's App. 674. (2) The meaning of "floor" was well established in Scotland as being flat. The meaning of the restriction was to enable the vassal to build as high as that flat and no higher. If the complainers' contention were sustained owing to the formation of the ground the vassal could only build to a height of 4 feet, which was obviously not intended.

At advising—

LORD PRESIDENT—Two questions were argued before us—(1) Whether the building which the defender is erecting upon the ground described as "stable ground" or "stable area" in the feu-charter dated 11th July 1825, under which he holds his property, 55 Melville Street, Edinburgh, is in contravention of the provisions of that feu-charter; and (2) Whether by that feu-charter the defender is restrained from erecting upon the "back ground" of his feu, that is, the ground between the back of his house and the "stable ground," any building higher than one foot above the level of the dining-room of his house.

The northmost portion of the ground behind the defender's house is repeatedly described in the feu-charter as "stable ground," and the northern boundary of his feu is therein stated to be "the front wall of a range of stables and coach-houses to be erected between the said areas and the meuse lane," *i.e.*, between the defender's feu and the feu lying immediately to the east of it and the meuse lane, both of these feus having been granted to Mr Buckham, a builder, under the feu-charter already mentioned. The "pieces of stable ground" in each of the feu-grants are described as extending from front to back 33 feet each, and from centre to centre of gable 16 feet each, and their boundaries are then stated. It is further declared in the feu-charter that "the coach-houses and stables to be erected by" Mr Buckham and his heirs and assignees "on the foresaid two areas of stable ground hereby disponed shall be in strict conformity with the plans and elevations now signed by him" (the grantor) "and me as relative hereto, and not otherwise." From this and other passages in the feu-charter it is plain that it was contemplated and intended that coach-houses and stables should be erected on the northmost part of the feu, but no obligation is imposed upon the vassal or his successors to erect any such buildings, and although nearly seventy-seven years have elapsed since the date of the charter no such buildings have been erected. It is well settled in the construction of such instruments that an obligation to erect buildings upon a piece of ground feued to a vassal must be unequivocally expressed, and cannot be derived from inferences as to intention not so expressed. Now, in the present case there is no such obligation, and I am therefore of opinion that the defender is not bound to erect coach-houses

and stables, or either of them, upon the "stable ground." I may further point out that, even if the feu-charter had bound the vassal and his successors in the feu to erect coach-houses and stables on the ground in question, it imposes no obligation to use the buildings as coach-houses and stables, and contains no prohibition against the use of them for other purposes. Therefore again applying the strict rule of construction which obtains in such cases, the vassal might have used the buildings for other purposes if he thought fit. Assuming, however, that this is so, the question remains whether the defender is entitled to erect the building which he proposes to erect or is erecting upon the stable ground. The feu-charter contains no prohibition against erecting any buildings other than coach-houses and stables on the ground in question, and again applying the settled principles of strict construction already referred to, I am of opinion that the defender is not effectually restrained by the titles from erecting the building in question upon the "stable ground."

The second question depends upon the construction and effect of the words in the charter "with liberty to erect buildings on the back ground" (that is, the ground between the back of the defender's house and the "stable ground") "provided they do not exceed the height of one foot above the level of the dining-room floor." The pursuers maintain that the defender is not entitled to erect any building upon that ground exceeding the height of one foot above the level of the floor of the dining-room of the defenders' house, while the defender maintains that, as used in the charter, the words "dining-room floor" mean dining-room flat, and that consequently he is entitled to build one foot above the level of that flat, whatever that level may be. It is true that the term "floor" is sometimes used as equivalent to "flat," but I concur with the Lord Ordinary in thinking that it is not used in that sense in the charter under which the defender holds his house. The words "one foot above the level of the dining-room floor" seem to designate a definitely ascertained or definitely ascertainable level, such as the floor of a dining-room is, while if the word floor was intended to mean flat it would be very difficult to decide what the particular level was above which the back building was not to rise more than one foot. I understood that the defender's counsel were not disposed to accept the view that the point from which the foot was to be measured was the ceiling of the dining-room, or that it was the floor of the bedroom flat, which could not with any propriety be described as part of the dining-room flat, and if so, the foot would require to be measured from some point between that ceiling and that floor, but I did not quite gather from the argument submitted to us from what point of that intervening structure the defender's counsel maintained that the measurement should be made. Reference was made to the case of *Greenhill* v. *Forrester and Others*, 3 S. 325, November 26, 1824, which was decided a little more than seven months prior to the date of the charter under which the defender holds his house, and in which it was held that a provision that the "roofs of any buildings on the back area of the houses shall not be higher than the joists of the parlour floor," did not entitle the proprietor to erect buildings on the back area to a height equal to the level of the beams of the roof of the parlour storey. The language of this clause is not identical with that of the defender's charter, the words "joists of the parlour floor" giving a more definite standard than that given in the present case, but the decision tends to support the view that the term "floor" is to be construed in its natural sense unless there is something in the context to show that it was intended as an equivalent for flat. It may also be said that the case indicates that at that time it was the practice of superiors in Edinburgh to limit the height of back buildings to one foot above the floor of the dining-room or parlour.

For these reasons I consider that the Lord Ordinary's interlocutor should be adhered to, and that the case should be remitted to his Lordship to dispose of the other questions raised on record.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Complainers—Dundas, K.C.—Blackburn. Agent—Hugh Patten, W.S.

Counsel for the Respondent—Clyde, K.C. —Chree. Agents—W. & F. Haldane, W.S.

Tuesday, March 4.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

NEILL *v.* DOBSON, MOLLE, & COMPANY, LIMITED.

Bill of Exchange—Summary Diligence—Presentment for Payment—Presentment to Acceptor of Bill Accepted Generally—Diligence—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *secs.* 45 (4) (*b*), 47, 52 (1), *and* 98.

Section 52, subsection 1, of the Bills of Exchange Act provides that when a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable. Section 98 of the Act declares that nothing in the Act shall alter or affect the existing law and practice in Scotland in regard to summary diligence. *Held* that when a bill is accepted generally, no place of payment being specified, due presentment for payment in accordance with