Lord Ordinary has taken, I do not think it necessary to say more.

LORD KYLLACHY — The only question raised by this reclaiming note is the question whether the donation made to the defender by Mrs Scott was afterwards revoked. It was not seriously contended that the clause of revocation in the general settlement of the deceased necessarily operated revocation, or that, apart from the revocation clause, the general conveyance in the settlement necessarily carried this deposit-receipt. Any such suggestion is excluded by the judgment in the case of *Crosbie's Trustees*, which was decided in very similar circumstances. Therefore the only question is whether it has been shown that there has been a competent revocation in some other manner. I am satisfied of the contrary, and find it enough to say —waiving all questions of competency or relevancy—that the proof here fails to establish that there was even any change of intention on the part of Mrs Scott. I entirely concur in the judgment of the Lord Ordinary.

LORD STORMONTH DARLING—I concur. I have little to add, because I entirely agree with the opinion of the Lord Ordinary.

The important dates in the case are as follows—the deposit-receipt, which the defender claims to retain, is dated 10th July 1903; the final trust-disposition and settlement is dated 10th November 1903; and Mrs Scott died on 19th February 1904.

The will contains a general clause of revocation, which it is not now seriously contended is sufficient by itself to revoke the gift. Is there, then, other evidence of an intention to revoke a gift made so lately as 10th July 1903?

The act is proved to have been done with the full knowledge of its effects; the evidence of Provost Keith shows that he satisfied himself that it was Mrs Scott's intention to make a donation. Now, I cannot find evidence that there was ever any intention to undo what had been solemnly and deliberately done in July.

LORD LOW—I considered this case very carefully in the Outer House, and the argument which I have heard to-day has confirmed me in the view which I then formed.

The Court adhered.

Counsel for Pursuers (Reclaimers)—A. J. Young—Graham Stewart. Agents—Tait & Johnston, S.S.C.

Counsel for Defender (Respondent) — Crabb Watt, K.C.—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, December 15.

SECOND DIVISION.

[Lord Dundas, Ordinary.

J. & F. FORREST *v.* GOVERNORS OF GEORGE WATSON'S HOSPITAL.

Superior and Vassal—Feu Charter—Condition of Feu Charter—Building Restriction—Interest to Enforce Condition of Feu Charter.

The singular successors of the original feuars of a piece of ground, about an acre in extent, brought an action against the superiors for declarator that they were entitled to remove a villa situated on the feu, and to erect tenements of dwelling-houses on the ground as they might think proper. The feu charter provided, *inter alia*, that the feuar "shall be bound to build and maintain on the area or piece of ground hereinbefore disponed, a dwelling-house of the value of not less than £800, according to a plan to be approved of by" the superiors, "and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors;" it also contained a declaration that "all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null;" with resolutive clauses. There was no general prohibition in the feu charter against dwelling-houses additional to that stipulated for being built on the feu, and certain tenements had already been erected. The ground on which the pursuers sought the declarator was, that the said tenements already built fulfilled the conditions required in the stipulated dwelling-house and that the superiors had no longer any interest to object to the erection of additional tenements involving the demolition of Napier Villa.

Held that even if it were necessary for the superiors to shew an interest to insist on the maintenance of said dwelling-house (which the Court did not hold that it was) the stipulation itself implied interest, and that nothing had occurred to take away that interest.

This was an action by the feuars of a piece of ground extending to about an acre situated at the corner of Morningside Road and Merchiston Place, Edinburgh, against the superiors, the Governors of George Watson's Hospital, concluding for declarator (1) that the pursuers were entitled to remove a dwelling-house called Napier Villa situated on said piece of ground, and (2) that they were entitled to erect tenements of dwelling-houses on the said ground in such way or manner as they might think proper. The defenders by feu charter dated 1st August 1854 had disponed the said piece

of ground to William Kerr. He disponed it in 1870 to Mr and Mrs Steedman (the original pursuers), who by disposition dated 13th May 1901 disponed it to James Forrest and Francis Forrest as trustees for the firm of J. & F. Forrest (the pursuers).

The said feu charter of 1854 provided, *inter alia*, as follows:—"And it is further provided and declared that the said William Kerr shall be bound to build and maintain, on the area or piece of ground hereinbefore disponed, a dwelling-house of the value of not less than £800, according to a plan to be approved of by said Governors, and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof [*i.e.*, Merchiston Place] than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors;" it also contained an express declaration that "all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null;" and resolutive clauses followed.

The following history of the action is taken from the opinion of Lord Kincairney which accompanied his interlocutor of 22nd November 1904—"Shortly after the date of the charter the feuars erected on the feu the dwelling-house known as Napier Villa. The original pursuers of the action, Mr and Mrs Steedman, became by singular succession owners of the villa and the feu, which they afterwards disponed to James Forrest and Francis Forrest, who, in 1904, were sisted as pursuers of this action.

"This action was signeted on 6th August 1889, and on 30th November 1889 an interlocutor was pronounced declaring that the pursuers (the feuars) were entitled to erect tenements of dwelling-houses in such way and manner as they might think proper on the area in question 'other than the portion thereof occupied by "Napier Villa" and the ground between the said villa and Merchiston Place,' and superseding further consideration of the cause. This interlocutor became final, and it was thus determined that there was nothing in the charter which restrained them in building on the feu, so long as they confined themselves to dwelling-houses, except what bore on the house and the ground in front of it. Nothing was then decided about the pursuers' (the feuars') claim of right to remove Napier Villa or as to the occupation of the ground between it and Merchiston Place. These points were reserved.

"In 1902 the pursuers presented a petition to the Dean of Guild for authority to erect two tenements on the feu, and on 6th March 1902 the Dean granted warrant to erect one of the tenements, but refused leave to build the other, the erection of which he apparently held, as appears from his note, to be prohibited by the interlocutor of 30th November 1889.

"The pursuers appealed, and a record was made up in the appeal, but before an interlocutor was pronounced, a minute was lodged for the superiors, in which they stated that they no longer objected to the prayer of the petition, and consented to the appeal being sustained and the interlocutor of the Dean of Guild being recalled, so far as it refused the prayer of the feuars' petition."

On 22nd November 1904 the Lord Ordinary (KINCAIRNEY) allowed the parties a proof. His opinion accompanying this interlocutor, after stating the nature of the action and narrating its history as above quoted, proceeded—"That seems to leave undecided between the parties only two questions raised in this action—(1) Whether the pursuers had right to remove the villa; and (2) Whether they had right to build on the site of it and on the space between that site and Merchiston Place; and I understand that the recent debate was directed to these points. Practically there was and is only one point now in dispute, viz.—Whether the feuars are entitled to take down the villa, or whether the superiors are entitled to insist on the maintenance of it.

"On that point the superiors insisted that the provisions of the charter were clear, that the feuars were expressly bound to maintain the villa, and that the superiors were entitled to enforce it, and that the question of patrimonial interest is immaterial. They cited, *inter alia*, *The Magistrates of Edinburgh* v. *Macfarlane*, 1857, 20 D. 156; *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 47; *Waddell* v. *Campbell*, 21st January 1898, 25 R. 456. The feuars did not admit that any obligation was imposed on them by the charter to maintain Napier Villa; the obligation was to build and maintain a dwelling-house worth £800, but not Napier Villa; and so long as such a house was on the feu their obligation was fulfilled. Therefore they were entitled to remove the villa if they secured the feu-duty by building a house of equal value. I am inclined, however, to think that when Napier Villa was built and accepted and approved, the clauses in the charter in reference to the house applied to Napier Villa. As to the superiors' argument that they were not bound to prove material patrimonial interest, the law seems to be that while a superior would not be permitted to enforce conditions on a feuar in which he had no interest, yet his interest to enforce them was to be presumed from the mere fact that he imposed and the feuar accepted them—*Zetland* v. *Hislop*, *supra*; *Menzies* v. *Commissioners of Caledonian Canal*, 2 F. 953. There could have been no doubt that if the feuars had proposed to take down the villa immediately after it had been built the superiors could have prevented them; their interest to prevent it could not have been questioned. But here the condition of matters has been materially changed. It is averred that many buildings have been erected on the feu sufficient to secure the feu-duty many times over, and that the superiors have now absolutely no interest to insist on the maintenance of Napier Villa considered merely as a security for the feu-duty. The superiors, indeed, have not admitted the pursuers' averments as to the value of the buildings placed on the ground since the date of the charter. Per-

haps they may give a sufficient admission on the point. But they say, besides, that such buildings do not afford them the same security as Napier Villa does, because while they have a contractual right to insist on Napier Villa being maintained, they have no right of the kind in regard to the new buildings. I think, however, that probably they have a right under the contract to insist on the feu-duty being secured to the extent stated in the contract, and I doubt whether there is any reality in the professed apprehension that the security from buildings on the feu may prove insufficient. I do not see, however, that I can decide that point without proof or admissions.

"I understand, however, that the superiors are against the removal of Napier Villa on grounds connected with the amenity of the feu and of the adjoining feus. I do not see how I can determine these questions without some enquiry, which need not, however, be long. But I cannot at present see how I can either treat the pursuers' averments as irrelevant or at once grant decree in their favour."

On 17th March 1905 the Lord Ordinary (DUNDAS) pronounced this interlocutor:—"Finds that the pursuers are not entitled to take down and remove the villa or dwelling-house known as Napier Villa, Merchiston, Edinburgh, nor to erect upon the ground described in the summons tenements of dwelling-houses in any way or manner incompatible with the continued existence and maintenance of the said villa *in situ:* Therefore assoilzies the defenders from the first branch of the conclusion of the summons: Further, subject to the above finding and to the decree of declarator contained in the interlocutor, dated 30th November 1889, assoilzies the defenders from the second branch of the conclusion of the summons and decerns."

Opinion.—"This action has been in Court since 1889, and its history and procedure have been somewhat peculiar. For a clear narrative of these down to the date when proof was ordered, I refer to the note which accompanied Lord Kincairney's interlocutor of 22nd November 1904. Proof has now been led before me, throwing light upon the various points as to which Lord Kincairney indicated that evidence should be forthcoming. But the pursuers' counsel now takes a very high ground, and contends that the whole, or almost the whole, of the proof is irrelevant. He argues that, upon a sound construction of the feu-charter, and it being admitted or proved that the tenements built upon the feu are of greater value than is necessary to secure the feu-duty, the superiors have no right or title to be heard to object to the erection of the additional tenements which would involve the demolition of Napier Villa, and that any other or further question of interest on the part of the superiors is immaterial and irrelevant. This contention, which I do not find sharply raised by the pursuers' record, is, in my opinion, untenable. The obligation upon the original feuar William Kerr, which it was admitted would, up to the limits of its meaning and effect, run with the lands, so as to affect singular successors, was to 'build and maintain' upon the ground conveyed 'a dwelling-house of the value of not less than £800, according to a plan to be approved of by the said Governors, and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors.' The charter contains an express declaration that 'all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null,' and resolutive clauses follow. The pursuers propose to build tenements of dwelling-houses which will necessarily involve the demolition of Napier Villa, which is the dwelling-house built according to a plan approved of by the superiors, and ever since maintained in terms of the above clause, and of the value, and situated at the distance from the street, there specified. Not only, if the pursuers are right, is the villa approved by the superiors no longer to be maintained, but the dwelling-house or houses to be substituted are, without the sanction and against the protest of the superiors, to occupy a position which would infringe the stipulation about the distance of 26 feet from the street. Whatever may have been the intention of the granters of the charter, this is, according to the pursuers' argument, the result. I cannot accept this contention. The question arises purely between the proprietors of the ground and the superiors, and has no element of mutual rights competent to a body of feuars *inter se.* Now, it was, no doubt, decided by Lord Kincairney's interlocutor of 30th November 1889, which is now final, that the pursuers are entitled to erect tenements of dwelling-houses as they please upon the ground of the feu, other than the portion thereof occupied by Napier Villa and the ground between said villa and Merchiston Place. But that was just because the feu-charter contains no words sufficient to expressly prohibit building to the extent and of the character allowed by the interlocutor. But a distinction was drawn in regard to the excepted part of the feu. I see no reason why the superiors, if they have a reasonable interest to do so, should not still insist upon the maintenance of the dwelling-house originally approved by them in its stipulated position with regard to the street. The case of *Clark* v. *The City of Glasgow Life Assurance and Reversionary Company,* 12 D. 1047, 1 Macq. 668, although it presents some features of specialty, seems to me to go far to defeat the pursuers' contention. Nor, in my opinion, are the cases of *Moir's Trustees,* 7 R. 1141, *Buchanan,* 10 R. 936, and *Miller,* 15 R. 991, cited by the pursuers, helpful to their argument, but rather the reverse. In these cases, as I understand them, it was held that what was objected to was rather a new use of the premises than a structural deviation from the original design, but no doubt was cast upon the necessity of the building being conform to design and plan,

nor was anything said to suggest that it might lawfully be pulled down and something else substituted, so long as the latter was not of less value than the former.

"The question remains whether the defenders have sufficient interest to maintain their objection. I am of opinion that they have. I was referred to the cases cited by Lord Kincairney in his note of 22nd November 1904, and also to a recent judgment of Lord Stormonth Darling—*Wingate's Trustees* v. *Oswald*, 20th December 1902, 10 S.L.T. 517. The onus in this matter is upon the pursuers, because interest is presumed from the fact of stipulation, and I think they have entirely failed to discharge it. If evidence of patrimonial interest were necessary, which, upon the authorities, I apprehend it is not, I should be prepared to hold that it exists in the proof. It would, I think, serve no useful purpose to examine the evidence in detail. It is sufficient to point out that there are, on the one hand, witnesses such as Mr Harrison and Mr Heron, who explain the earnest desire on the part of the superiors to act in all cases up to the spirit, as well as the letter, of their contracts with feuars, and who indicate that the maintenance of a good name in this regard is to be desired not only from its chivalrous but also from its pecuniary aspect. On the other hand, practical men of weight, such as Mr Marwick and Mr Robertson, make it, I think, clear that the gradual introduction of tenements into this district, which has been hitherto deliberately reserved for villas, would tend, not only to disorganise the feuing schemes of the defenders, but also to diminish amenity, and in many ways to affect the financial interests of the superiors.

"I am therefore of opinion that the pursuers are not entitled to take down and remove Napier Villa, nor to proceed to erect tenements which admittedly could not be completed so as to secure sufficient open space, compatibly with its continued maintenance *in situ*."

The pursuers reclaimed, and argued—The obligation imposed on the feuars by the charter was to build and maintain a dwelling-house worth £800, at least 26 feet from Merchiston Place, not to build and maintain Napier Villa. So long as a dwelling-house on the feu complied with those conditions their obligation was fulfilled, for the obligation did not refer to a specific building. This distinguished the case from that of *Clark* v. *City of Glasgow Life Assurance and Reversionary Company*, June 20, 1850, 12 D. 1047, and 1854, 1 Macq. 668, where the obligation was to maintain specific buildings already in existence. There was no prohibition, whatever may have been intended, against building other dwelling-houses to any extent on the feu, and the tenements already built on the feu fulfilled the above conditions. Had they been built before Napier Villa the superiors would have had to accept them as the stipulated dwelling-house; accordingly the singular successors of the original feuar were entitled to pull down Napier Villa, the said tenements being substituted—*Oswald* v. *Wilson*, 1898 (O.H.), 6 S.L.T. 69; *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141, 17 S.L.R. 765; *Buchanan and Another* v. *Marr*, June 7, 1883, 10 R. 936, 20 S.L.R. 635; *Johnston* v. *MacRitchie*, March 15, 1893, 20 R. 539, 30 S.L.R. 518; *Miller* v. *Carmichael*, July 18, 1888, 15 R. 991, 25 S.L.R. 712. No burdens or restrictions could be imposed upon the vassal which were not clearly expressed in the feu charter—*Cowan* v. *Magistrates of Edinburgh*, March 19, 1887, 14 R. 682, 24 S.L.R. 474; *Walker's Trustees* v. *Haldane*, February 28, 1902, 4 F. 594, 39 S.L.R. 409; *Russell* v. *Cowpar and Another*, February 24, 1882, 9 R. 660, 19 S.L.R. 443. The superiors had now no interest, patrimonial or otherwise, to object to the pulling down of Napier Villa and the erection of more tenements. Their feu-duty was amply secured by the tenements, and as regards amenity, there were already tenements on a part of the feu, and the whole character of the neighbourhood had changed since the date of the feu charter.

The defenders (respondents), who admitted there was no effectual general prohibition against other dwelling-houses being built on the feu, argued—(1) The superiors did not require any interest to insist on the maintainance of Napier Villa because its maintenance was an essential condition of the feu, not a building restriction—Bell's Lectures, vol. i, p. 614; Menzies (ed. 1900), p. 576; *Macrae* v. *Mackenzie's Trustees*, November 20, 1891, 19 R. 138, Lord Kinnear at 145, 29 S.L.R. 127; *Waddell* v. *Campbell*, January 21, 1898, 25 R. 456, 35 S.L.R. 351; *Calder* v. *North Berwick Police Commissioners*, January 31, 1899, 1 F. 491, 36 S.L.R. 380. Even assuming that the tenements already built were sufficient to fulfil the original stipulations, as soon as Napier Villa was built and approved of, it became the specific dwelling-house which the feuars were bound to maintain, and it was no answer that other buildings (the tenements) had been put up of greater value—*Clark* (*supra*), especially Lord President Boyle at p. 1054 of 12 D. (2) The superior must be presumed to have had an interest from the mere fact that he imposed the condition, and the onus lay on the vassal to prove loss of interest—*Zetland* v. *Hislop*, June 12, 1882, 9 R. (H.L.) 47, 7 A.C. 427, 19 S.L.R. 680; *Menzies* v. *Caledonian Canal Commissioners*, June 7, 1900, 2 F. 953, 37 S.L.R. 742; *Wingate's Trustees* v. *Oswald*, 1902 (O.H.), 10 S.L.T. 517. This onus the pursuers had failed to discharge. These cases also showed that the superiors' interest need not be patrimonial, and was not confined to the particular feu in question. (3) If interest, even if patrimonial interest, were required, it was disclosed in the proof, which showed that the progressive encroachment of tenements destroyed, and would destroy, the confidence of the feuars and prospective feuars in other parts, and cause a diminution in the capital value of the villas, causing the selling values of feu-duties to fall from 28 years' purchase to 25; that these tenement blocks competed and would compete with the superiors' tene-

ment ground, and that the present feu-duty was easily recovered, but from tenements it was not, whether allocated or not.

At advising—

LORD JUSTICE-CLERK—The stipulation in the title in this case, which forms the basis of the defence against the pursuers' declarator, is very distinct and clear. It is, that the pursuers' author was taken bound to "build and maintain" upon the ground conveyed—"a dwelling-house of the value of not less than £800, according to a plan to be approved of by the said Governors, . . . and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors." The object of the pursuer's declarator is to have it found and declared that the pursuers are entitled to take down and remove the house which was built in accordance with this condition of the title, and that they are entitled to erect tenements of dwelling-houses on the ground "as they may think proper." It appears to be very clear, that if such a declarator had been brought immediately after the feuars had built the house, the erection of which was a condition of their holding the feu, no decree in their favour could have been given. If therefore they have a right now to such a declarator, it must be from some new agreement between them and the superiors, or because of some change of circumstances which acts as a bar to the defenders enforcing the stipulation to which the pursuers agreed as a condition of their obtaining their right. Now, it cannot be contended with any force that the superiors have agreed either to the house being removed or to tenements being erected on its site and on the 26 feet in front of it on the north side. As regards change of circumstances, it is contended that because the pursuers have been allowed to erect tenements along the north side of the feu, therefore it must follow that they can do so over the whole feu. To that construction I am unable to give any assent. There is nothing in the fact that there are tenements on another part of the ground to militate against the right of the defenders to insist on the maintenance of the obligation I have quoted, with which the erection of these tenements has not in any way interfered. The house approved of by the defenders stands where it did, and the 26 feet between it and the road on the north stands still unoccupied by buildings, and that something has been done on another part of the feu to which the obligation does not apply, seems to me to form no ground for saying that the pursuers have acquired any new right inconsistent with the obligation, or that the defenders have lost their right to insist upon the observance of an express and definite obligation, if they consider it to be in their interest to do so, whether as regards the particular feu itself or as regards the general interest of their estate of which it formed a part.

This is not a question of putting an existing building to some new and different use to that to which it was originally put when a feu was first given off and a building erected. It is a proposal to remove altogether what was erected in fulfilment of the obligation to build a house approved of by the superiors and to occupy with buildings ground on which it was not permissible to put the building stipulated for. Even if it were necessary for the superior to show an interest to insist on observance of the obligation (which I do not hold that it was), *prima facie* the superior's interest cannot be doubted. The stipulation itself implies interest, and I am quite unable to see how that interest has been taken away. It certainly is not taken away by anything that has been done upon the south side of the feu, and as regards what has been done at the eastern corner, consent was obtained for a consideration. But such a consent can never be founded on to extinguish rights in regard to another part of the feu where no consent has been given, and where the superiors have all along insisted on the express stipulation in the title being carried out.

This case in no way resembles the numerous cases in which rights of a body of feuars *inter se* have suffered extinction by things being permitted to be done which subverted the original conditions and rendered them incapable of enforcement in their entirety. It is a question solely between one superior and one vassal, and I have no hesitation in holding that the Lord Ordinary has rightly decided that the pursuer's contentions are untenable and that the defenders are entitled to absolvitor.

LORD KYLLACHY—I concur, and have nothing to add. I am quite satisfied with the Lord Ordinary's judgment.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Ure, K.C.—M'Lennan, K.C.—Sandeman. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Defenders (Respondents) Shaw, K.C.—W. J. Robertson. Agent—Alex. Heron, S.S.C.

Friday, December 15.

SECOND DIVISION.

[Lord Low, Ordinary.

CONNAL & CO. LIMITED *v.* REID AND OTHERS.

CLYDE NAVIGATION TRUSTEES *v.* REID AND OTHERS.

Process—Multiplepoinding—Competency—Double Distress.

A & Co., timber merchants, shortly before bankruptcy granted to B & Co., timber measurers, one of their creditors, delivery orders applicable to certain lots of timber which were lying