of the deed, viz., "if no children, then in that case her share shall revert and be divided, share and share alike, among my other children," how would that have been construed in the event which has happened? That would, as in the case of *Hamilton* v. *Ferguson's Trustees*, 22 D. 1442, either import a direct legacy to the other daughters or a destination to them in liferent without the provision of a trust to perpetuate and carry out the direction.

"But even if I felt myself entitled to regard the intention of the truster, I can find no satisfactory evidence of intention that the share of a predeceasor should in the case of daughters remain subject to a liferent. He establishes that restriction upon the shares originally destined to them, but it does not follow that he wishes to carry the same principle through all the ramifications of the family succession. The usual form of destination is that in such cases the accrescing share should vest absolutely. That is the simple way of interpreting such destinations, and avoids the inconvenience of applying a complicated destination to small sums in which a large number of persons may come to be interested."

Counsel for Mrs Connell and Mrs Gebbie—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for Mrs Swan and Others—W. Campbell. Agents—Mackenzie & Kermack, W.S.

HOUSE OF LORDS.

Monday, June 12.

(Before Lord Chancellor Selborne, Lords Blackburn and Watson.)

EARL OF ZETLAND *v.* HISLOP AND OTHERS.

(*Ante*, March 18, 1881, vol. xviii. p. 424, and 8 R. 675.)

Superior and Vassal—Condition in Favour of Pursuer—Property—Restraint on Trade.

A superior in granting feu-rights in the beginning of the century in what was then a small village, inserted as a condition of these rights a prohibition against the use of the buildings to be erected on the ground as public-houses; *held* (*rev.* judgment of the Court of Session) that such a condition was neither null as being inconsistent with the right granted, nor unlawful as being contrary to public policy; and

Therefore (*a*) that although the village had become a populous place, and had adopted the General Police Act, the superior was entitled nevertheless to enforce the condition of the rights granted by him upon showing a patrimonial interest in doing so; and (*b*) That his right of superiority, by virtue of which the *dominium utile* of all the feus might return to him, the fact that he was proprietor of certain dwelling-houses in the town and of ground in the neighbourhood suitable for feuing, and the proximity of his own dwelling-house, constituted such a patrimonial interest.

Acquiescence.

Remit to the Court of Session to allow a proof of averment by the vassals as to acquiescence importing a discharge of the condition contained in their right.

This case was decided in the Court of Session by the Second Division of the Court March 18, 1881, and is reported in vol. xviii. p. 424, and 8 R. 675.

The Earl of Zetland now appealed against the judgment.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is an appeal from interlocutors of the Court of Session dismissing four conjoined actions brought by the Earl of Zetland as superior against several feuars on his Grangemouth estate, on the ground that the pursuer had not set forth any interest to sue the actions—the question in each case arising on relevancy, *i.e.*, taking as true the averments and admissions of the pursuer on the record. The conclusion of the summons in each case was for an interdict to prohibit the defenders from selling or retailing any kind of malt or spirituous liquors, or allowing the same to be sold or retailed within the buildings erected on their feus.

The Court of Session has dealt with all these actions as if the case stated in the record by the pursuer in each of them were substantially the same. This would be right if Lord Young's ground of judgment could be maintained; for that learned Judge considered that the restriction sought to be enforced by the pursuer was repugnant to the nature of the feuar's estate, and therefore invalid in law. The same may be said of another ground of judgment taken by Lord Craighill, who thought the restriction inconsistent with public policy. Neither, however, of these opinions was adopted by the Lord Justice-Clerk, or by the Lord Ordinary, both of whom proceeded upon a different ground, viz:—that the Court was asked by the pursuer to enforce the restriction, not for the protection of his own patrimonial interest, but in order to give effect to his views of the moral and social wellbeing of the community of Grangemouth.

It will be convenient, in the first place, to consider whether the opinions of Lord Young and Lord Craighill are correct; and if your Lordships should think otherwise, then, whether it is consistent with the averments and admissions of the pursuer on the record to hold that he seeks to enforce the restriction, not for the protection of any property in which he is interested, but for other reasons.

The feus were granted by the appellant's predecessor in title in the years 1801, 1811, 1814, and 1822 respectively, and in all of them the restriction was the same. I state it as contained in the feu-disposition in favour of James Simpson, the predecessor in title of the respondent Hislop:—"It shall not be lawful for the said James Simpson or his foresaids" (*i.e.*, his heirs and assignees whatsoever), "or any tenant or possessor of the buildings to be erected" (on the land feued), "to carry on the business of candle-making, coppersmiths, blacksmiths, slaughtering or butchering of cattle, or any other trade, manufacture, or occupation that shall be deemed nauseous, troublesome, or dangerous to the neighbourhood by the superior or his baron bailie, who

shall have power to determine thereon, and whose judgment shall be final; nor shall it be lawful for them to build public brewhouses or bakers' ovens in or upon any part of the premises, at least fronting the street, without prejudice always to them to brew or bake within the same for their own private use allenarly. Neither shall it be lawful for the said James Simpson or his foresaids, or any tenant or possessor of the said houses, to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses, unless they shall obtain permission in writing to that effect from the superior."

It was argued at the bar that this was not a condition of the feu which could run with the land against a singular successor, but was only a personal agreement between the original parties to the feu-contract. Nothing, however, can be more certain than that it was the intention of those parties to make it a condition of the feu, if by law they were able to do so; because it purports, on the one hand, to bind not James Simpson and his heirs only, but his assignees or any tenant or possessor of the houses to be erected on the feu; and, on the other hand, the power to enforce or dispense with it is given, not to the disponer or his heirs, but to the superior for the time being; unless, therefore, the condition was repugnant to the nature of the estate taken by the feuar, or to public policy, it must be a condition of the feu, and must run with the land against singular successors.

The view taken by Lord Young appears to have been that the *dominium utile* of land feued can only be affected by such burdens as are known and lawful servitudes, beneficial to some dominant tenement, and his Lordship, admitting that building conditions and restrictions among a community of feuars in a street or square would not be repugnant to the nature of a feu, regarded such conditions as examples of the servitude *de non ædificando*, and held that the restriction now in question was not analogous to a condition of that kind. I am unable to reconcile that opinion with the authorities which were cited by the appellant's counsel at your Lordships' bar. In the case of *The Tailors of Aberdeen* v. *Coutts* (1 Robinson's Appeal Cases, 324), which was one of burgage tenure, considered to depend upon the same principles as a feu, the Court (in an opinion approved by this House) affirmed the legality of conditions not distinguishable in my judgment from that now in question. "There is," it was there said, "a prohibition to tan leather, to refine tallow, to make candles, to slaughter cattle, and various other nuisances, which, leaving out of view the circumstances of this particular case, are all of a nature to bind singular successors without being declared in express terms to be real burdens or fenced with irritancies, because they are lawful conditions of the grant." It appears to me that the word "nuisances" in this passage does not mean things which are necessarily and in their own nature nuisances in law, but has reference to the manner in which the neighbourhood of businesses such as are there mentioned may affect the value and amenity of dwelling-houses or property suitable for the erection of dwelling-houses, and the comfort of the persons residing therein; and in this respect I see no important distinction between such businesses and the trade of a publican selling by retail malt or spirituous liquors.

In *Ewing* v. *Campbell* (5 R. 230) the Judges of the First Division appear to have entertained no doubt as to the validity of such a restriction against the trade of a publican, though in that case the question whether it was binding on a singular successor did not arise. It was contended at your Lordships' bar that such a restriction tends to a monopoly, and offends against public policy, as being in restraint of trade. The Court in *Ewing* v. *Campbell* evidently did not think so, and if there were any foundation for that argument, it must be as valid in England as in Scotland, which would be contrary to many English authorities, and it would be fatal to the condition whether it did or did not run with the land. If a restraint against carrying on such lawful businesses as those of a tanner, a blacksmith, or a schoolmaster is good in law and capable of running with the land, and is not repugnant to the *dominium utile* vested in a feuar, I am unable to conceive any reason why it should be otherwise as to the business of a publican. The fact that restrictions are placed by statute law upon the freedom of that particular trade, and that it cannot be carried on without licences from magistrates, constitutes in my judgment no reason why a private contract to prevent it from being carried on by a feuar in his feu without the consent of his superior should be held invalid or contrary to law. So far from any such objections acquiring greater force from the power of dispensing with the restriction, which the superior in the case before your Lordships has expressly reserved, I think the tendency of that power of relaxation is in the opposite direction.

It was indeed contended by the respondent's counsel that although a prohibition of this kind might be valid, and bind singular successors if it were absolute, it could not do so here, because as to some trades a power of judgment whether they are nuisances, &c., or not, and as to the particular trade in question a power to dispense with the prohibition, is reserved to the superior. For this distinction no authority was cited, and it does not appear to me to be well founded in principle. In all cases of restrictive conditions in a feu-charter (such, for example, as restrictions on building) the superior must have power to enforce them or to dispense with them according to his own will, whether the charter is so expressed or not, unless the benefit of them and the right to enforce them are communicated to other feuars. The recent case of *Hislop* v. *Leckie*, June 23, 1881 (*supra* p. 571, 8 R. (H. of L.) 95, 6 Law Reports, Appeal Cases, 560), before your Lordships, is an example of restrictions of that kind which the superior only had a right to enforce. Your Lordships in that case dismissed the action of a neighbouring feuar as having no interest, but I think you entertained no doubt that the condition was valid, and might have been enforced or dispensed with by the superior at his pleasure.

The proposition that no conventional restrictions can be imposed upon the *dominium utile* of the feuar beyond those which are *naturalia feudi*, has of course not been maintained. Lord Young's view, that a restrictive condition in order to bind a singular successor must create some known or lawful servitude for the benefit of some dominant tenement, converts that into a rule which seems to me to be, at best, an imperfect analogy. Such

prohibitions of particular trades as were held to be binding on singular successors in the case of the *Tailors of Aberdeen* are clearly not "servitudes" in the proper sense of that term, though they may be like servitudes in two respects—first, because they are burdens upon the *dominium utile*, and secondly, because the superior must have some patrimonial interest in order to enforce them. In these respects the restriction now in question stands exactly upon the same ground. I can understand that there may be good reason for drawing a line between restrictions by which it is attempted to impose upon the feuar for the time being some personal obligation, as in *Campbell* v. *Harley*, Jan. 16, 1822, 1 S. 236, and other Scotch authorities cited at the bar, and those which relate to the use or employment of the land or of buildings erected upon it, and for holding that the former cannot, while the latter may, run with the land against singular successors. This distinction would reconcile the decision upon the facts in the case of *Keppel* v. *Bailey*, 2 Myl. and K. 538, and 1 Smith's L.C. 70-71, 5th ed. (whatever may be thought of some parts of Lord Brougham's reasoning) with other English authorities, except *Catt* v. *Tourle*, L.R. 4 Ch. 654, as to which case the present is not a proper occasion for expressing any opinion. But assuming the soundness of the distinction, and to me it appears to be sound in principle, the restriction in the case before your Lordships is not personal, but relates to the use and employment of buildings erected on the land.

I am for these reasons unable to agree with the opinions delivered by Lord Young and Lord Craighill in this case. It is of course a different question whether the pursuer in all or any of these cases may be seeking to enforce the restriction under circumstances or in a manner which ought to deprive him of the assistance of the Court. But the original validity of the restriction must, in my opinion, depend upon the law applicable to it at the date of the feu-contract, and not upon any subsequent events.

The next question is, whether there is any sufficient ground on these records for holding, with the Lord Ordinary and the Lord Justice-Clerk, that the interest to sue the actions set forth by the pursuer is unconnected with his patrimonial rights, and relevant only to the general well-being, as he regards it, of the community of Grangemouth? That question must be determined, for the purpose of the present appeal, upon the averments and admissions of the pursuer on the record, and upon those materials only. It appears from those averments and admissions that the whole of the town of Grangemouth, now containing a population of more than 5000 inhabitants, with large shipping and other trade, is built on the pursuer's estate; that there are now in Grangemouth fourteen houses and shops licensed by the magistrates for the sale of malt or spirituous liquors, consisting of two hotels, seven dram-shops, four grocers' shops, and a restaurant; that many feu-rights granted by the pursuer and his predecessors in title during the last thirty years contain no prohibition against the obtaining of grocers' licences, but that the prohibition against dram-shops has been contained in all the feu-rights granted by them; that certain coppersmiths' and blacksmiths' shops, eating-houses, and victualling-houses have for many years existed in the town with the consent of the pursuer and his predecessors in title, and that certain public-houses have also existed for different periods prior to Whitsunday 1880 with their knowledge; that the pursuer is now endeavouring to enforce the prohibition in question against all the dram-shops in Grangemouth, but that he is not interfering with the four licenced grocers' shops, and that he does not propose to interfere with the two hotels or the restaurant provided they are conducted in an unobjectionable manner. These are admissions made by the answers for the pursuer to the statement of facts for the defender, and I find nothing else in those answers which appears to me to be material to the question now under consideration.

In his own condescendence the pursuer states the interest in respect of which he sues in the following manner:—He first sets out the material terms of the feu-disposition, his own title, and the titles of the several defenders; the fact that the buildings on the feus are used as public-houses for the sale of malt and spirituous liquors, a notice given by him in January 1880 of his intention to put the prohibition in force on and after the 15th of May 1880, and the continuance of the sale of malt and spirituous liquors upon the premises notwithstanding such notice. He then, in the 10th and 11th articles of the condescendence, concludes as follows:—"(10) The town of Grangemouth was commenced about a century ago by the pursuer's ancestor Sir Lawrence Dundas, who built a number of dwelling-houses in what is now the heart of the town. These houses, which yield an annual rental of about £750, now belong to the pursuer. The whole of the rest of the town is built on ground held of the pursuer as superior, and he still has a large extent of ground in and adjacent to the town available for feuing, including upwards of 140 acres within the burgh boundaries. The pursuer's mansion-house of Kerse is also within half-a-mile of the town, and his policy grounds extend considerably nearer to it. (11) The existence of so many public-houses as there at present are in Grangemouth, including the premises embraced in the summons, and the prevalence of drunkenness thence arising, are detrimental to the value of the pursuer's property above referred to, and seriously interfere with the comfort and wellbeing of his tenants and feuars, besides being prejudicial to the comfort and amenity of his mansion-house and policies."

I am unable to find upon the record any statement by the pursuer that he is suing to enforce any views which he may entertain as to the moral or social wellbeing of the community of Grangemouth as distinct from the protection of his own patrimonial interest. He has stated upon the record a clear patrimonial interest in the following subjects—(*a*) his right of superiority in each and every one of the parcels of land feued by him, by virtue of which, in certain contingencies, the *dominium utile* in the premises feued might revert to him, which interest alone would be enough to justify him in seeking to maintain unimpaired the value of the houses erected on all such premises; (*b*) the houses in the town yielding him a rent of £750 a-year; (*c*) his building ground available for feuing within the burgh boundaries being in extent more than 140 acres; and (*d*) the mansion-house and policy grounds of Kerse within the

distance of half-a-mile of the town. As to all this property, he alleges generally that its value is prejudicially affected by the existence of the present number of public-houses in Grangemouth, including the particular premises embraced in the summons, and by the prevalence of drunkenness thence arising, and that the same causes seriously interfere not only with the comfort and wellbeing of many of his tenants and feuars, but with the comfort and amenity of his own mansion-house and policies. I cannot myself doubt that this is an allegation sufficiently clear and distinct of injury to the pursuer's patrimonial interest. The word "wellbeing" used as to his tenants and feuars may indeed be susceptible of a wider sense, but it cannot prevent the other words with which it is associated from receiving their natural construction.

It was contended at the bar that the allegation did not sufficiently connect the particular trade carried on upon the premises mentioned in the summons with the alleged injury, but I am not of that opinion.

The object of a restriction against carrying on a trade of this nature without licence from the superior is, that the superior may judge for himself what number of public-houses, and in what parts of the town, may be permitted by him without prejudice to the value and amenity of his other property. When he finds the condition violated in such a number of cases as to result in some detriment to the value or the amenity of his property, he is in my opinion entitled, without attempting to apportion the precise amount of damage due to each particular public-house, to enforce the prohibition against such houses as he does not think fit to license, unless indeed by some conduct or acquiescence of his own he is estopped from doing so.

There are other defences besides want of interest pleaded in all the actions, which, not being in my judgment established by the averments or admissions of the pursuer on the record, cannot at present be disposed of, but on which the parties must proceed to proof. On the record as it now stands, the case as between the pursuer and the defenders appears to be the same in all the actions as to all but one of the defences so pleaded, but as to one of them, that of consent and acquiescence, the cases of the several defenders are distinct, and if it were proper *in hoc statu* to dispose of them I might myself be led to different conclusions, at least in the cases of Webster and Rankin, and MacArthur and Storie, from those which I should adopt in Hislop's case. But as the pursuer has made a case, upon his own pleading, against all the defenders, which, if not displaced by them, is sufficient to entitle him to the relief which he prays, and as I understand it to be the opinion of your Lordships that he is not so concluded by his answers to the statements of any of the defenders as to exclude the possibility of his being able hereafter to repel the pleas of consent or acquiescence, as well as the other pleas, I am content that the judgment to be now pronounced should be in accordance with that opinion, and I assent to it the more readily because the actions have been hitherto conjoined, and it does not appear that the judgment of the Court of Session has been addressed to any other question than that of the pursuer's interest, in a sense foreign to this particular question of consent or acquiescence.

The result is that I am prepared to move your Lordships to reverse the interlocutors appealed from in all these cases, and to remit them to the Court below to proceed therein as may be just, with expenses to the pursuer in the Court below from the dates of the Lord Ordinary's interlocutors appealed against, all other questions being reserved for the disposal of the Court below. The appellant must have the costs of this appeal.

Lord Blackburn—My Lords, I had at the close of the argument come to the conclusion that the interlocutors appealed against in these causes ought to be reversed, and the causes remitted with directions to proceed therein as might be just. Further investigation and consideration have confirmed me in that opinion. I have had the advantage of perusing the opinions of the Lord Chancellor, and my noble friend opposite, Lord Watson, and finding that the reasons which have led me to that conclusion are fully and clearly stated in them, I do not repeat them.

I do not think that this House ought to decide now whether the fact admitted on the pleadings, that one of these defenders had used her feu for this purpose for more than forty years, would alone, if unqualified, entitle her to a decree in her favour. The Court below have not decided anything on that ground. It is enough to say that though use under some circumstances might prove acquiescence such as to be a defence, it might on these pleadings be shown to be under such circumstances as not to do so.

Lord Watson—My Lords, these four cases have been decided upon relevancy by the Courts below. In all of them Lord Zetland, the pursuer and appellant, has stated substantially the same grounds of action, and if these were, as the judgments under appeal determine, insufficient in law to entitle him to a decree, it would be unnecessary to consider separately the defences stated for the several respondents. Being of opinion, with your Lordships, that these judgments are erroneous, I shall confine my observations, in the first instance, to the case of *Lord Zetland* v. *Hislop*, which sufficiently raises the common question as to the relevancy of the averments made by the appellant.

On the 27th September 1814, Thomas Lord Dundas, predecessor of the appellant in the barony of Kerse, feued to James Simpson and his heirs and assignees whatsoever a piece of ground at Grangemouth, forming part of the barony lands. By the terms of the feu-right certain conditions were imposed upon the vassal, the first of these being to the effect that two good and substantial dwelling-houses, of a specified character and size, were to be erected before the term of Whitsunday 1816, and were thereafter to be kept in good habitable condition and repair, and rebuilt when necessary.

The second condition declares that it shall not be lawful for the vassal or any tenant or possessor of the buildings to be erected on the feu to carry on the business of "candle-making, coppersmiths, blacksmiths, slaughtering or butchering of cattle, or any other trade, manufacture, or occupation that shall be deemed nauseous, troublesome, or dangerous to the neighbourhood by the superior or his baron-bailie, who shall have power to determine thereon, and whose judgment shall be final; nor shall it be lawful for them to build

public brewhouses or bakers' ovens in or upon any part of the premises, without prejudice alw ays to them to brew or bake within the same for their private use allenarly." Then follow the words which have given rise to the present litigation—"Neither shall it be lawful for the said James Simpson or his foresaids, or any tenant or possessor of the said houses, to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses, unless they shall obtain permission in writing to that effect from the superior."

The fourth and fifth conditions relate to streets and sewers, which are to be made and maintained at the joint expense of the vassal and neighbouring feuars, and also to some matters of sanitary regulation. The fifth condition declares that nothing contained in the disposition of feu "shall be so construed as to prevent me or those succeeding to me from making any alterations we may judge proper upon the general plan, articles, and regulations for the town of Grangemouth, nor oblige us to adhere to the same in granting after feus within the said town." The remaining conditions, which comprise a prohibition against subinfeudation, conclude with an express provision and declaration that the whole burdens, conditions, provisions, and irritancies expressed in the deed shall be inserted in the vassal's infeftment, and in all subsequent deeds and titles transmitting the right, otherwise the same shall be void and null.

From the tenor of these conditions I think it must necessarily be inferred that both the parties to the feu-disposition had in contemplation the future growth of the town of Grangemouth, and that the conditions were framed, not merely with regard to the then existing state of things, but also with reference to the altered state of circumstances which the increase of the town and its population would naturally occasion. The inference is equally obvious that so far as concerned the condition prohibiting the sale of liquor, it was not intended to create any mutuality of interest or of right as between Simpson and his successors and the other feuars in the town. The qualification attached to the prohibition, making it removeable in the option of the superior, is inconsistent with the idea of any such mutual right.

The town of Grangemouth, which in 1814 was a mere hamlet, now contains 5000 inhabitants, the population having doubled within the last fifteen years, and by adopting the provisions of the General Act of 1862 it has become a police burgh with municipal government. In all the feu-rights granted by the appellant and his predecessors the same prohibition against the sale of spirituous liquors which occurs in Simpson's title has been inserted, with this exception, that in many feu-rights given off within the last thirty years the prohibition is limited to sale for consumption on the premises, and does not extend to the retail of liquors under a grocer's licence. In the beginning of the year 1880 there were in the town two hotels, four grocers' shops, and nine public-houses, all duly licensed to sell malt and spirituous liquors. The buildings erected upon the ground feued to James Simpson had at that time been duly licensed as a public-house for thirteen consecutive years.

The respondent John Hislop acquired in 1879, by a singular title, the subjects feued to Simpson, and he is now infeft in them, subject to all the burdens and conditions expressed in the original feu-disposition. At Whitsunday 1880 the respondent duly obtained a certificate from the licensing authorities for the use of the premises as a public-house till Whitsunday 1881, and on the 22d June 1880 the appellant commenced the present proceedings against him by summons, concluding to have it found and declared that the condition of the original feu-right is binding upon the respondent, and for interdict against his selling or retailing any kind of malt or spirituous liquor, or allowing the same to be sold or retailed within the building erected on the feu.

In his condescendence, after setting forth the conditions of the respondent's tenure, the appellant alleges that he is the proprietor of a number of dwelling-houses in the centre of the town, yielding an annual rental of about £750, that the rest of the town is built on ground held of him as superior, and that he is proprietor of a large extent of ground in and adjacent to the town available for feuing, including upwards of 140 acres within the burgh boundaries, and also that his mansion-house of Kerse is within half-a-mile of the town, and that his policy is still nearer to it.

The appellant further avers (condescendence 11) that "the existence of so many public-houses as there at present are in Grangemouth, including the premises embraced in the summons, and the prevalence of drunkenness thence arising, are detrimental to the value of the pursuer's property above referred to, and seriously interfere with the comfort and wellbeing of many of his tenants and feuars, besides being prejudicial to the comfort and amenity of his mansion-house and policies."

The defence stated by the respondent, so far as it rests upon allegations of fact, is directed to these points—That the use of the premises in question as a public-house has been acquiesced in by the appellant and his predecessors; that they have waived their right to enforce the prohibition by departing from similar restrictions in the case of other feuars; that in the altered circumstances of the town the superior has no interest in the prohibition; and that his attempt to enforce it now is nimious and oppressive.

The Lord Ordinary (RUTHERFURD CLARK), upon the 4th November 1880, found that the appellant had not "set forth any interest to sue this action," and in respect of that finding dismissed the action with expenses. On a reclaiming note to the Second Division both parties were allowed to amend their pleadings, and thereafter, upon the 18th March 1881, their Lordships adhered *simpliciter* to the interlocutor of the Lord Ordinary.

The record, when the case was before the Lord Ordinary, did not, as I understand, contain the allegations of detriment to the value of the appellant's property which I have already cited. These were made for the first time in the Inner House, and it appears from the note appended to his Lordship's judgment that he decided against the appellant in respect of the absence of any averment of patrimonial interest to enforce the condition of the feu-disposition.

I agree with the Lord Ordinary in thinking that the case of *The Tailors of Aberdeen* v. *Coutts* (1 Robinson's App. Ca. 307) does determine that wherever a feu-right contains a restriction on property, the superior, or the party in whose favour it

is conceived, cannot enforce it unless he has some legitimate interest. But that case does not lay down the doctrine that an action at the superior's instance, which merely sets forth the condition of his feu-right and its violation by his vassal, must be dismissed as irrelevant because the pursuer has failed to allege interest. *Prima facie*, the vassal in consenting to be bound by the restriction concedes the interest of the superior, and therefore it appears to me that the *onus* is upon the vassal, who is pleading a release from his contract, to allege and prove that owing to some change of circumstances any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist. The law was so stated, and in my opinion correctly stated, by Lord Neaves in the case of *Campbell* v. *Clydesdale Banking Company*, June 19, 1868, 6 Macph. 950.

Although the interlocutor of the Lord Ordinary was in terms adopted by the Judges of the Second Division, it does not very accurately indicate the various legal grounds upon which their Lordships proceeded in giving judgment. Lord Young held that the condition sought to be enforced is in its own nature repugnant to the right of property conferred upon the vassal by the disposition of feu; and Lord Craighill, though of opinion that the appellant had shown no interest entitling him to enforce it, was prepared to hold, if that had been necessary, that the condition "was void as being a restriction upon trade, and also as being inconsistent with public policy."

If Lord Young is right in the view which he takes of the character of the clause in question, no amount of patrimonial interest in the superior would make it enforceable at his instance against a singular successor like the respondent; and, on the other hand, if Lord Craighill has rightly estimated its character, the clause is a mere nullity, and could not have been enforced as a personal obligation against the original vassal. Having regard to the opinions expressed by these learned Judges, who constituted the majority of the Court below, I think it will be expedient to consider in the first instance whether *sua natura* the condition is one which may be lawfully imposed upon his vassals by a superior having a legitimate interest in its observance.

It has long been a settled point in the law of Scotland that a condition may be inserted in a feudal grant so as to run with the lands although it is neither declared a real burden nor protected by an irritancy. Professor Bell (Principles, section 861) says—"The peculiarity of the feudal contract admits of another principle, viz., the force of a condition as entitling the superior to refuse a renewal of the feu if the conditions stipulated in his contract with the vassal have not been observed, and to insist on such conditions against singular successors as well as against heirs."

The same principle extends to obligations undertaken by the superior, and is strongly illustrated by the decisions of this House in the *Braco* case (*Stewart* v. *The Duke of Montrose*), 4 Macq. 499, and in the recent case of *Dunbar* v. *The British Fisheries Company*, July 12, 1878, 5 R. (H. of L.) 221, Law Reports, 3 Appeal Cases, 1298 in both of which an obligation to relieve the vassal of certain permanent annual charges upon the *dominium utile* was held to be binding, not only upon the original granter of the feu, but upon all his successors in the estate of superiority. In the second branch of the *Braco* case (*M'Callum* v. *Stewart*), which is only to be found in the Court of Session Reports (8 Macph. House of Lords, p. 1), it was held by the House, affirming the decision of a large majority of the Judges of the Court of Session, that the words of an original charter, which imposed an obligation of relief upon the granter and his heirs and successors, merely imported that the superior for the time being, whether an heir or a singular successor, was to be liable, and were incapable of creating any personal obligation against the granter or his representatives if they ceased to be superiors. It is the privity of estate subsisting between the superior and vassal which enables them so to contract that their stipulations, if these be such as the law permits to run with the estate, will be binding upon the superior and his successors in the superiority, or upon the vassal and his successors in the feu.

In the present case the language used in the feu-disposition of September 1814 is such as will make the second condition binding upon the feuar for the time being whether he be the heir or the singular successor of the original vassal, if that condition is in itself unobjectionable. I accept the doctrine stated by the Scottish Judges in answer to a remit from this House in *The Tailors of Aberdeen* v. *Coutts*, to the effect that such feuing condition "must not be contrary to law or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of land or to create a monopoly."

Is, then, the condition that two dwelling-houses erected upon a piece of ground feued for that purpose shall not be used for the sale or retail of malt and spirituous liquors, contrary to law or inconsistent with the feuar's right of property? Lord Young has answered that question in the affirmative, but I know of no authority in the law of Scotland, and none was cited at the bar, by which the view expressed by his Lordship can be supported. It was indeed maintained on behalf of the respondent that the only conditions of an urban feu which have been recognised as valid by the decisions of the Scottish Courts were such as related mainly, if not entirely, to the structural character of the buildings on the feu, and not merely to their use.

There is, however, a consistent series of decisions, commencing with the case of *Landen* in 1815, Faculty Collections, 16th June, 1815, p. 450, and ending with *Ewing* v. *Campbell*, Nov. 23, 1877, 5 R. 230, and *Ewing* v. *Hastie*, Jan. 12, 1878, 5 R. 439, which not only confute that argument, but seem to me to establish, that restrictions similar to, if not the very same with, that which the appellant is seeking to enforce, are lawful and may be made to run with the feu. These decisions refer to a great variety of restrictions, including nearly all of those which are expressed in the second condition of the original feu-disposition in favour of James Simpson, and in not one of them was the intrinsic validity of the restriction made matter of dispute.

It is unnecessary to refer in detail to these authorities, which are well known to every Scotch lawyer, and I only notice *Gold* v. *Houldsworth*, July 16, 1870, 8 Macph. p. 1006, and *Ewing* v.

Campbell, 5 R. p. 230, because doubts were suggested as to their value as precedents by one of the learned Judges in the Court below. The case of *Gold* v. *Houldsworth* comes very near to the present. In a lease granted in the year 1815 for the term of 999 years, and therefore equivalent to an alienation in perpetuity, the lessees and his heirs, assigns, and successors were prohibited under certain penalties from keeping a public-house or selling liquor without the licence in writing of the lessor for the time being. The First Division of the Court in the year 1870 gave effect to the prohibition, the defence relied on by the tenant being that he was entitled to disregard the prohibition on payment of the penalty attached to its violation. The Lord President (Inglis), who delivered the unanimous judgment of the Court, said—"It is a lease for 999 years, and therefore in so far as the interests of the parties are concerned it resembles a contract of feu. I look upon it in the same light as if it were a feu-contract between Sir James Stewart Denholm and the predecessor of Mr Gold in 1815."

Lord Craighill, however, holds that the case of *Gold* is inapplicable, because there is no analogy between the position of a feuar and that of a lessee. That may be his Lordship's view, but it will not explain away the fact that the First Division based their decision upon the assumption that the holder of the lease for 999 years was not an ordinary tenant, and that his rights and obligations, so far as concerned the prohibition in dispute, were precisely the same as if he had held under a contract of feu.

In *Ewing* v. *Campbell*, which was the case of a proper contract of feu, the prohibition founded on by the superior was against the use of the dwelling-house, which the feuar was bound to erect, as a public-house. The feuar proposed to use it as a hydropathic establishment, and the only question raised was whether such an institution fell within the language of the prohibition. There was, as Lord Craighill correctly states, no controversy as to the enforcibility of the condition, but he adds—"The reason being that the estate from which the ground feued was given off was an entailed estate; that the ground was feued in virtue of 31 and 32 Vict. cap. 84, under the conditions approved of by the Sheriff; that the clause in question expressed a condition approved of by the Sheriff; and consequently that the condition there came to be of statutory authority." No doubt the estate of the superior in that case was under entail fetters, and the feu-charter was therefore adjusted by the Sheriff in terms of the statute; but I feel assured that the inference which the learned Judge derives from that circumstance never occurred to the Court or to the counsel for the feuar, of whom I happened to be one, and I cannot conceive how the condition, if it were void at common law, could be validated by the Sheriff's approval, seeing that the statute gives no authority for the introduction of other than lawful feuing restrictions.

The true explanation of the fact that there was no controversy as to the legality of the restrictions enforced in *Gold* v. *Houldsworth*, or in *Ewing* v. *Campbell*, or indeed in any one of the series of decisions to which I have referred, I believe to be this—That neither the bar nor the bench entertained the slightest doubt that these restrictions were lawful conditions of a contract of feu affecting the tenure of every vassal, whether heir or singular successor, and that the legality of such conditions has been judicially impeached for the first time in the causes which your Lordships are now considering.

It is hardly necessary to notice the argument by which the respondent endeavoured to establish that the prohibition in question tends to create a monopoly of the sale of liquor in Grangemouth, and is therefore void on considerations of public policy. It appeared to me to involve the fallacious assumption that the statutory function of the licensing authorities is to establish public-houses, whereas all that is committed to them by statute is to determine whether persons who are otherwise at liberty to sell liquor upon their premises shall have licence to do so, having regard to the character of the premises and the possible requirements of the locality. If such a prohibition were in itself contrary to public policy it would be quite as objectionable in an ordinary lease of buildings capable of being used for the sale of liquor as in a contract of feu, and yet the respondent's counsel did not dispute that every proprietor in Grangemouth might let his house subject to the prohibition, and that Lord Zetland himself, had he been fee-simple proprietor of the whole burgh, might have lawfully introduced it into the lease of every tenement in the burgh.

The question therefore comes to be, whether the appellant has set forth on record any legitimate interest to enforce the prohibition. The appellant, assuming an *onus* which was not necessarily incumbent on him, has made an explicit statement of the facts and circumstances upon which he relies as giving him that interest, and if that statement were plainly irrelevant I apprehend that your Lordships would have no difficulty in holding that the action ought to be dismissed. But in my humble opinion the averments of the appellant, which in a question of revelancy must be taken as true, disclose a very plain case of patrimonial interest. I am at a loss to understand how some of the Judges in the Court below, in the face of his very specific allegations of detriment to the value of his house property and of his land, both feued and unfeued, as well as to the comfort and amenity of his mansion-house and policies, have been able to arrive at the conclusion that the object of the appellant in these actions is not to protect any property right, but to promote the social and moral wellbeing of the community.

From the views expressed by his two colleagues in regard to the intrinsic illegality of the condition, the Lord Justice-Clerk strongly dissents, and I do not understand that his Lordship would have doubted the appellant's interest and right to enforce it had matters remained as they were in the year 1814. His Lordship seems, however, to hold that the superior's right to maintain conditions which may benefit his property, but are also calculated to affect the social or moral wellbeing of the people, is incompatible with the powers of management conferred on Burgh Commissioners by the General Police Act, and consequently that the right and interest of the appellant to prohibit public-houses have disappeared now that Grangemouth has five thousand inhabitants and a municipal government of its own. I entertain no doubt that a feuing condition may become through a change of circum-

stances inapplicable, and therefore inoperative; and an increase of population may be an element in estimating such change. If all the dwelling-houses save one in a particular street were by licence of the superior used for the sale of liquor, I can conceive that the superior might have difficulty in showing a legitimate interest to prohibit the sale of liquor in that one house. But I am at a loss to understand why the existence of a whole street of public-houses in one part of the burgh should disable him from enforcing the prohibition in a street of villa dwellings in another quarter of the town. To adopt this view of the Lord Justice-Clerk would be tantamount to holding that no such condition can be valid when the subject of the feu is situated within the limits of a police burgh with a population of five thousand or more—at all events, the logical result of his Lordship's opinion is, that the prohibition against public-houses has become a dead letter in the case of every feu within the police boundaries of Grangemouth, no matter what may be the character of the buildings erected upon it or of the locality in which it is situate.

The learned counsel for the respondents, in arguing that the prohibition, assuming it to be neither inconsistent with the feuars' right of property nor at variance with public policy, is no longer enforceable by reason of an admitted change of circumstances, relied mainly upon the authority of *Brown* v. *Burns* (2 S. 261), and of *Campbell* v. *The Clydesdale Bank* (6 Macph. 943). In both of these cases the superior had imposed upon all the feuars in a particular street a prohibition, in the one instance against using their houses as shops, and in the other against erecting buildings other than tenements of a certain elevation and design. The prohibition was absolute in both cases, and in one of them the superior had undertaken to his vassals to insert it in all their feu-rights, the obvious intention of the superior in imposing, and of the vassal in submitting to the restriction, being to secure uniformity in the architecture of the buildings or in the character of their occupancy. The superior in *Brown* v. *Burns* admitted that all the houses in the street had without objection on his part been converted into shops, and in *Campbell* v. *The Clydesdale Bank* it was admitted that the superior had allowed a number of feuars in the street to depart from the common restriction. In these circumstances the Court held that the superior, who had thus disabled himself from challenging the acts of those feuars who had already disregarded the restriction, was not in a position to enforce it against his other feuars. Any other decision would in my opinion have been unjust and contrary to the good faith of the contract, because in consequence of the action of the superior himself the object which the contracting parties contemplated in creating the prohibition could no longer be attained by enforcing it against each or all of the feuars by whom it had not been violated.

But these decisions have no possible bearing upon the facts alleged or admitted in the present case. In the feu-rights given by Lord Zetland it is not stipulated or contemplated that no feu should be used for the purpose of a public-house or for the sale of liquor.

The plain intention of the contracting parties, as expressed in those feu-rights, is that the superior shall determine whether there are to be public-houses upon any of the feus, and if so, what is to be their number and position. Accordingly the superior in granting his licence to certain feuars to sell liquor is in no sense departing from or waiving the prohibition, as was the case in *Brown* v. *Burns* and *Campbell* v. *The Clydesdale Bank*; he is acting in exercise of the discretionary power conferred upon him by the feu-rights.

I accordingly agree with your Lordship that in *Zetland* v. *Hislop* the interlocutor under appeal must be reversed, and the cause remitted to the Court below. In the other three actions the same result must follow so far as regards the interlocutors under appeal; but in these cases a question arises whether the respondents are not entitled to have the pleas of acquiescence stated by them sustained, and on that ground to have judgment of absolvitor. It appears to me that these respondents have in their defences averred facts and circumstances from which, if proved or admitted, it might be matter of legal inference that successive superiors have so acquiesced in the feuars' use of their premises for the sale of liquor that the prohibition must be held to have been unconditionally discharged.

But the respondents are not entitled to a judgment in their favour upon the record, unless the appellant has given an unqualified admission of averments sufficient to infer discharge of the prohibition; and it is not enough, in my opinion, that the admitted facts would, taken *per se*, sustain the inference, if the record leaves it open to the appellant to adduce proof which may give a different colour to these facts. Upon a careful consideration of the records I have come to the conclusion that it is open to the appellant to prove such qualifications of the facts which he has admitted as may entirely alter their complexion, and whatever my own views may be as to the probabilities of the appellant having available evidence at his command, I do not feel justified in refusing him the opportunity of adducing such proof as he may have to offer.

In the *Earl of Zetland* v. *Webster and Rankin* the respondents allege that shortly after the feu was given off in 1811 a building was erected, "and premises therein used and occupied as a public-house for a considerable number of years immediately subsequent to 1812, without objection on the part of the superior. After an interval of some years they were again licensed, and have been occupied as a public-house for the last thirty years." The appellant in answer admits that part of the dwelling-house erected on the feu "has been occupied for a public-house for about thirty years," and *quoad ultra* denies the respondents' allegations. Again, the appellant meets with a simple denial the respondents' further allegation to the effect "the pursuer and his predecessor have acquiesced in the occupation of the defenders' subjects as a public-house for forty years and upwards, and it was with their consent as superiors that such use and occupation originally began." All that the appellant admits is the bare fact of use as a public-house for thirty years. He denies consent, and he denies acquiescence. No doubt his denials are made in general terms, but they are not more general than the respondents' averments, and as no complaint has been made of want of specification

on either side, I entertain no doubt that according to the practice of the Scotch Courts it would be quite competent for the appellant to prove that the respondents had annually obtained the licence of the superior. I do not mean to suggest that the appellant will be able to adduce any such proof; but I neither know what evidence he may have, nor am able to judge what its possible effect may be, when taken in conjunction with the facts which he has admitted. I am therefore of opinion that the respondents' plea of acquiescence ought not to be disposed of until the facts of the case have been ascertained in the usual way.

I do not think it necessary to criticise in detail the records in the *Earl of Zetland* v. *Carmichael*, and the *Earl of Zetland* v. *M'Arthur*, because in both of them the pleadings of the parties appear to me to be in substantially the same position, the appellant in his answers having laid sufficient foundation to entitle him to put in evidence facts and circumstances tending to show that notwithstanding the long continued use of the respondents' premises for the sale and consumption of exciseable liquors, the superior did not, either expressly or by implication, consent to the absolute discharge of the prohibition.

I am therefore of opinion that in all these appeals the interlocutor of the Court below ought to be reversed, and judgment given in the terms proposed by the noble and learned Lord on the woolsack.

Interlocutors appealed from reversed; causes remitted to the Court below to proceed therein as may be just, with expenses to the pursuer in the Court below from the dates of the Lord Ordinary's interlocutors appealed against; all other questions being reserved for the disposal of the Court below; the appellant to have the costs of the present appeal.

Counsel for the Appellant—S.-G. Asher, Q.C.—Benjamin. Agents—H. G. & S. Dickson, W.S., and W. A. Loch.

Counsel for the Respondents—Lord Advocate Balfour, Q.C.—R. V. Campbell. Agents—James Wilson, L.A., and Andrew Beveridge.

Thursday, June 15.

(Before Lord Chancellor Selborne, Lords O'Hagan, Blackburn, and Watson).

WHYTE *v.* HAMILTON.

(*Ante*, July 13, 1881, vol. xviii., p. 676, and 8 R. 940.)

Succession—Testamentary Writ—"Notes of Intended Settlement"—Proof—Competency of Parole.

A document holograph of the granter, disposing completely and regularly of his whole heritable and moveable estate, was headed "Notes of intended settlement;" the granter left no other testamentary writing. *Held (aff.* judgment of the Court of Session) that the terms of the title justified the admission of evidence *prout de jure* to confirm or to disprove the testamentary character of the document, and that, the evidence so led being neutral in its result, the ambiguity of the title was not sufficient to show that the document was not a final expression of the granter's will; and the document *sustained* accordingly as a valid testamentary writing.

This case was decided by the Second Division of the Court of Session on July 13, 1881, *ante*, vol. xviii, p. 676, and 8 R. 940.

The defenders appealed and were heard by the House, but the pursuer was not called on.

At delivering judgment—

Lord Chancellor—My Lords, the question in this case appears to me to admit of no serious doubt or difficulty, and I believe that that is the opinion of your Lordships, and therefore we have not thought it necessary to call upon the learned counsel who appear to support the judgment of the Court below to address us. The sole question is, whether this document, entitled "Notes of intended settlement by Walter Whyte of Bankhead" is, as the Court below have thought, a complete and perfect will of the testator. It is in his handwriting, holograph, and signed by him, and it is not suggested that, if it was originally a will, anything to revoke it took place during his lifetime. The argument has been that on account of the heading and absence of evidence which would tend to show that it was meant to be a will—if otherwise that conclusion cannot be arrived at—it cannot be so viewed.

Now, my Lords, I take it that the principles applicable to such questions admit of no reasonable doubt. In the first place, I lay it down that it is in my judgment a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator. Of course it might happen that something which he did not originally intend to be a testamentary act was converted into a testamentary act by a subsequent and sufficient manifestation of intention on his part, but either at the time when the act was originally done or at some other time he must in a sufficient way manifest his purpose that it should be a testamentary act, and with regard to all the cases which have been referred to, in which early death, sudden death, or anything of that kind was a material circumstance, I do not at all understand that the circumstance was ever held to make an instrument testamentary which had no testamentary character independently of it. The materiality of that particular state of circumstances arises with regard to instruments of which the testamentary character is deemed to be provisional and qualified, so that the question whether it continued testamentary, as expressive of the last will of the testator down to and at the time of his death, will depend upon the nature and circumstances of the qualification of the originally testamentary instrument with reference to which it may be said to have been provisional.

My Lords, with that preface I come to the next point, which is this, When you have an instrument in all points of form and in all points of substance on the face of it testamentary, and nothing more is needed to obtain probate of it in England or confirmation of it in Scotland (I am now of course speaking of it as operating upon personal estate) than proof of the mere act, yet if on the face of the instrument there is something to suggest a doubt or a question whether it