

LORD CRAIGHILL was absent.

The Court, after findings in fact as above, pronounced this interlocutor:—

“Find in law that the right of property in the jewellery remained with the claimant Westren: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute; repel the claim of the claimant Kerr, and sustain the claim of the claimant Westren.”

Counsel for the Appellant—D.-F. Mackintosh—Dickson. Agent—P. Morison, S.S.C.

Counsel for the Respondent—Goudy—Adam. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, July 18.

SECOND DIVISION.

[Dean of Guild of Greenock.

MILLER v. CARMICHAEL.

Property—Feu-Contract—Restriction on Building—Self-contained House.

A feu-contract, by which were feued four building stances, provided that dwelling-houses were to be erected thereon, which were to be self-contained and occupied by one tenant or occupier only. After the houses were built the feuar sold the lots under the above condition. One of the purchasers presented a petition to the Dean of Guild for authority to alter a villa on his stance by cutting off the stair between the first and second floor of the house, and constructing a separate outside stair to the upper flat and attics, so that it could be occupied by two tenants. The purchaser of one of the other lots objected. There was no appearance for the superior, and it was admitted that there was no common plan, and that the neighbourhood was given up to shops and flats.

Held (following *Buchanan, &c. v. Marr*, June 7, 1883, 10 R. 936) that the proposed alteration was unobjectionable, as not being one affecting the structure, but merely the use of the house—Lord Young being further of opinion that there was no such community as gave the objecting sub-feuar a *jus quæsitum* which entitled her to object.

By feu-contract dated 18th and 19th March and recorded 5th April 1880, Sir Michael Shaw Stewart of Ardgowan, near Greenock, the first party, feued out to Messrs Miller & Brown, joiners in Greenock, the second parties, all and whole those pieces of ground lying on the north-east side of Finnart Street, Greenock, described as plots 1, 2, 3, and 4, and laid down on a plan subscribed as relative to the feu-contract. The contract narrated that it was granted under “the burdens, conditions, provisions, declarations, restrictions, prohibitions, obligations, and others” therein set forth; and, *inter alia*—“Third, The only houses, buildings, or erections which it shall be competent to the second parties and the survivor of them, and the heirs

of the survivor, and their or his foresaids, to erect and maintain on each of the said several pieces of ground, shall be a villa dwelling-house and cellars and washing-house.” Then followed a minute description of the plan of the houses to be erected, which provided that “each of the said villa dwelling-houses shall be detached from the others, and shall be self-contained and occupied by one tenant only . . . and the second parties . . . shall be bound within twelve months from the last date hereof to erect, and thereafter in all time coming to maintain, on each of the said several pieces of ground a villa dwelling-house of the foresaid description.” These conditions, as well as all the other conditions of the contract, were made real burdens on each of the said several plots of ground in the following terms:—“Which conditions, provisions, declarations, restrictions, prohibitions, obligations, feu-duties, casualties, and others before and after specified are created and declared to be real burdens on the said several pieces of ground and others before deponed, and real conditions of the feu-right thereto, and as such shall be duly observed, paid, and performed by the second parties and the survivor of them, and the heirs of the survivor and their and his foresaids, and be inserted and duly referred to in statutory form in every future charter, disposition, conveyance, sub-feu right, and deed of investiture of the said several pieces of ground and others, or any part thereof, under the pain of nullity.”

On each of the four plots of ground, which were all contiguous, and which formed Nos. 74, 76, 78, and 80 Finnart Street, self-contained villas were built by the feuars in conformity with the feu-contract, and were occupied by one tenant only. In 1881 Miller & Brown sold to Miss Annie Carmichael the plot described in the feu-contract as No. 3, together with the villa built thereon, and the disposition to her was granted always “with and under the burdens, conditions, provisions, declarations, restrictions, prohibitions, obligations, and others, so far as applicable to the piece of ground so disposed to her,” contained in the feu-contract. On this disposition Miss Carmichael was infeft in the said plot and villa. Miller & Brown also disposed to Mr Miller, joiner, the plots Nos. 1, 2, and 4 as specified in the feu-contract, and as delineated on the plan annexed thereto, “always with and under, so far as applicable to the said subjects, the real burdens of the feu-duties, casualties, and others, and burdens, conditions, provisions, declarations, restrictions, prohibitions, obligations, and others specified and contained in the said feu-contract and recorded as aforesaid.”

On 14th May 1888 Mr John Miller presented a petition to the Dean of Guild for authority to alter the villas erected on the plots 1 and 2, known as 78 and 80 Finnart Street. The plan produced showed that he proposed to turn one of his villas into a flatted house by cutting off the stair or communication between the first and second floors, and constructing a separate outside stair to the upper flat and attics. This object was to enable him to let the dwelling-house to two tenants, the one tenant occupying the main flat and basement, and the other tenant the first flat and attics.

Miss Carmichael, the feuar of the villa on plot 3, or No. 76 Finnart Street, which bounded the petitioner's feu on the east, lodged objections to the petition, in which she stated that she had purchased her plot on the faith that on the east and west of her the dwelling-houses should be self-contained, and each occupied by one tenant only. She also became interested in the feu-contract jointly with the original feuars of the ground, and acquired jointly with them and their successors the right to prevent buildings of a description other than those specified in the feu-contract being erected on each of the plots of ground, or the dwelling-houses being used except as provided for in the feu-contract. "If the alterations proposed are carried out, the villas, which are presently self-contained, and which have always been occupied when let by one tenant or occupier only, will cease to be self-contained villas occupied by one tenant or occupier only, and the number of tenants or occupiers will be doubled. The proposed alterations will otherwise greatly injure the objector's property as a self-contained villa by lowering the rental and otherwise, and the value of her property will be greatly lessened . . . the petitioner and the objector being bound in common by the terms of the said feu-contract, the petitioner is not at liberty to make the alterations without the consent of the objector."

The petitioner replied "that the ground was not originally feued out as one lot, but in four several plots, and though for convenience and to save expense the four plots are contained in one feu-contract, they are dealt with therein separately and distinctly, and in the same manner as if they had been feued under four separate feu-contracts." He stated that the houses in Finnart Street and the neighbouring locality were not built of any uniform design, but were of various designs and constructions, some being self-contained villas, others flatted houses occupied by two tenants, and others large tenements of dwelling-houses occupied by several tenants; and that the four villas in question did not form or complete any particular section or portion of Finnart Street; further, that the petitioner had submitted the plans to the superior, and that he had been called in the petition and had not appeared.

The objector pleaded—"(1) The petitioner is bound to observe the conditions and restrictions in the foresaid feu-contract, and is not entitled, even with the consent of the superior, to make the alterations on the self-contained villas, Nos. 78 and 80 Finnart Street, so as to turn these villas into flatted houses, to be occupied by two tenants as proposed. (2) The petitioner and objector being entitled to enforce the conditions and restrictions in the said feu-contract *inter se*, the petitioner is not entitled to make the alterations proposed without the consent of the objector, or otherwise the objector having a common interest, *jus quæsitum tertio*, or other right or title to object to the proposed alterations, and having objected to same, the petitioner is not entitled at his own hands to alter the buildings as proposed, and the warrant asked ought not to be granted. (3) The objector having acquired her feu in reliance on the provisions of the said feu-contract being observed as to the whole of the ground

therein contained, and as the proposed alterations, if made, would injuriously affect the objector's property, she is entitled to object to the warrant asked being granted. (4) The objector having refused to sanction the proposed alterations, and to depart from the terms and restrictions of the foresaid feu-contract in that respect, the present application is incompetent, and the said plans should not be approved of, and the warrant prayed for should be refused, and the objector found entitled to expenses."

The petitioner pleaded—"Preliminary—(1) The objections set forth being outwith the jurisdiction or competency of the Dean of Guild and the plans referred to in the petition, and the alterations proposed being structurally sufficient, decree falls to be granted in terms of the prayer of the petition. *On the merits*—(2) The respondent has no common interest, *jus quæsitum tertio*, or other right or title entitling her to object, and decree falls to be granted as craved. (4) The character of the locality having been changed, and immediately adjoining properties having been converted into flats, the respondent has no sufficient interest to object. (5) The objections to the use and occupancy of the villas referred to in the petition being premature, they should be repelled."

The plan produced showed a flatted house just on the other side of the street, and sundry lots of unrestricted ground in the immediate vicinity. It showed that there was no common plan, and that the neighbourhood was given up to shops and flats. By minute the parties admitted the correctness of the plan, and also admitted that no further consent of the superior to the proposed alterations by the petitioner beyond what was implied by accepting citation and not appearing in Court to oppose, had been obtained, and renounced further probation.

The Dean of Guild (R. W. JAMIESON) refused to grant the prayer of the petition or to approve of the petitioner's plan, and dismissed the action.

"*Note.*—[After narrating the facts above stated]—The Court has felt constrained to give effect to Miss Carmichael's contention for the reasons to be now shortly stated. It was not disputed that the conditions of the feu-contract were legally constituted real burdens, or that those real burdens have been legally imported into the dispositions granted to the objector and to the petitioner. In opposition to Mr Miller's contention the objector maintains that she has a *jus quæsitum tertio* which entitles her to object to the alterations proposed by the petitioner; while on the other hand, the petitioner maintains that the objector, according to a just construction of the contract, has no *jus quæsitum* or any other right which entitles her to object to the alterations he proposes or to the use to which the flats may or may not be put. This became the chief, if not the sole, point of contention between the parties. Now, the fact that the four plots of ground on which the villas have been built are all contained in one original feu-contract, although described in separate plots by that deed—that the plots and villas are all contiguous, that the site of the plots and villas form a section, although a very limited section, of Finnart Street—and that the conditions,

restrictions, prohibitions, and real burdens contained in the feu-contract have been transmitted by the dispositions to the objector and to the petitioner would seem to create what is known in law as mutuality of interest between all the parties holding under the conditions of the feu-contract; and in respect of this mutuality no one party acquiring any of the plots can contravene those conditions, which were made real burdens, without the consent of the superior and of the other parties holding the other plots. The four plots with the villas built thereon appear to be all tied together, and must, as regards the real burdens affecting each of them, stand or fall together. The superior was called as a party to the action for his interest. He accepted citation by his accredited agent, but he did not enter appearance in the cause; he was therefore held as confessed; so that while he cannot now oppose, he does not expressly consent to the alterations proposed to be made by the petitioner on his villas. If there has been mutuality of interest created by the feu-contract between the parties to it, and all the parties holding under it, it is presumed that the superior and his feuars are equally bound to observe the burdens so stringently set forth in the deed, and that these burdens could not be relaxed without the consent of all the parties concerned. Were it otherwise, and could the real burdens be relaxed as between the superior and any one of the parties concerned, then such relaxation might go so far as to depreciate if not to a large extent to destroy in value all the other plots. If any one party holding any one of the plots could of his own accord, and even with the consent of the superior, but against the wish of the parties holding the other plots, contravene the conditions of the feu-contract, then he might do so to such an extent as would seriously injure and depreciate in value all the other plots. Such a construction of the feu-contract would surely operate most inequitably, and could not have been in the contemplation of parties when it was entered into, or when the objector purchased her villa from Miller & Brown. The objector maintains in her pleadings that the amenity of the locality in Finnart Street would be prejudicially affected, and the privacy of her villa would be injured if the petitioner were allowed to divide his villas into two flats. The Court can give little weight to that contention. The Court is inclined to think that the removal of the restrictions on all the different villas would not seriously affect the locality in question.

“It may be proper to say that the cases relied on by the petitioner in support of his contention were—*Robertson v. North British Railway Company*, 1 R. 1213; *Walker and Dick v. Park*, 15 R. 477; *Dalrymple v. Herdman*, 5 R. 847; *Hislop v. MacRitchie's Trustees*, 8 R. (H. of L.) 95; *Moir's Trustees v. M'Ewan*, 7 R. 1141; *Buchanan v. Marr*, 10 R. 936; *Calder v. Merchant Company of Edinburgh*, 13 R. 623. And those relied on by the objector were *Dalrymple and Others v. Herdman*, 5 R. 847; *Stewart v. Buntin*, July 20, 1878, 5 R. 1108; *Calder v. Merchant Company of Edinburgh*, February 26, 1886, 13 R. 623.”

The petitioner appealed, and argued—The proposed alteration was not a violation of any

right in the respondent. It was an exercise of the petitioner's right of property—*Moir's Trustees v. M'Ewan*, July 15, 1880, 7 R. 1141; *Buchanan, &c. v. Marr*, June 7, 1883, 11 R. 936; *Fraser v. Downie*, June 22, 1877, 4 R. 942, per Lord Shand, p. 945. In these cases, to which the superior had been a party, while here he was not opposing, the very point in question was the subject of opinion, though these opinions were not altogether necessary to the decision of the cases. The clause founded on by the respondent was a limitation on use and not on structure, and therefore neither to be favourably regarded by the Court, nor indeed, in strictness, competent to the Dean of Guild. But (2) the respondent had no interest to object. The Dean of Guild so stated in his note. The plan was conclusive on this point, and had been admitted as correct. It showed that there was no common plan, and also that the neighbourhood was given up to shops and flats. To support the objection, however, interest was indispensable, and that was expressed in all the cases—*Hislop v. MacRitchie's Trustees*, June 23, 1881, 8 R. (H. of L.) 95, per Lord Watson, 101. It lay on the objector to show interest. Even, however, if it lay on the appellant to disprove it, he had done so. (3) There was no mutuality of obligation which could give the respondent a *jus quasitum* in the obligation as to structure. There was no evidence in the deed that it was intended to create a *jus quasitum* in disponees from the original feu. The restrictions in the feu-contract were intended for the superior's benefit, and his only. Further, there was no community, for so small a piece of a street with no common plan did not afford the elements necessary for community of interest. There must be a common plan to be appealed to, or some similar circumstance to be found in the deed which would raise the inference that mutuality of obligation was intended.

Argued for the respondent—(1) It was an error to say the matter was one of use alone. The feu-contract, on a just construction of it, treated use as definitive of structure. The decision in *Moir's Trustees* and *Buchanan* did not, assuming their soundness, carry the appellant nearly so far as he maintained. There was not in either of them the specific stipulation that the feu was to erect and always maintain a house to be occupied by one tenant only, and suitable only for such occupation. It was not disguised on the other side that the intention was to get rid of this restriction. The power of the Court to enforce such a restriction on use was well settled—*Ewing v. Campbell*, November 23, 1877, 5 R. 230; *Ewing, &c. v. Hastie*, January 12, 1878, 5 R. 439. It was not repugnant to the right of property that a restriction on the use of it should exist, and be strictly enforced—*Earl of Zetland v. Hislop*, June 12, 1882, 9 R. (H. of L.) 40. (2) It lay on the other side to show that there was no interest. Interest was to be presumed from the fact that the bargain had been made. That was the law as to the interest of a superior, and the same principle applied to the *jus quasitum* in a feu—*Hislop v. MacRitchie's Trustees*. (3) There was a strong case of mutuality of obligation, and therefore of title to enforce the obligations *inter se*. Four lots had been given off to the same vassal, one of which he had given off to the

respondent under the restrictions imposed on himself, retaining the others to which the same restrictions applied. That was even a stronger case than if there had been a common feuing plan. The whole was under one title at first, and the respondent was taken bound to conform to it. That obligation was in favour of the other feus, and not the superior only. There was clear evidence of a common scheme. Four feus were not too small a number to establish community of interest—*Dalrymple v. Herdman, &c.*, June 5, 1878, 5 R. 847.

At advising—

LORD YOUNG—This is an application to the Dean of Guild for authority to make certain alterations on a house, the alterations being such as will enable it to be occupied as two houses instead of one. The application is opposed by a feuar in the same street, under the same superior, on the ground that there is a condition in the applicant's title from the superior that the house shall be self-contained, and occupied by one tenant only. It appears that Miller & Brown got a feu from the superior of four building stances in Finnart Street, Greenock, all adjoining each other, and the condition of the feu was that on each stance there should be erected a self-contained house to be occupied by one tenant only. After the houses were built, one of them was sold to the respondent, and the other three to the appellant, with and under the same conditions as were contained in the original feu-contract. The alteration proposed by the appellant is on one of his own plots. The questions are—(1) Whether the proposal is objectionable in its nature; and (2) whether it is liable to be objected to by the present respondent?

On the first point it is contended, on the authority of the case of *Buchanan v. Marr*, 10 R. 936, that the proposal is not objectionable in itself as relating to mere use. There is no structural alteration on the house, and nothing which can interfere with the rights and interests of others, but only an access to an upper storey which may be used separately from the under storey. In the case of *Buchanan* we held that there was not such a change or departure from the conditions of the feu-contract that even the superior could object. This case is so like it that I cannot distinguish it, and I do not think it would be becoming on us to go back on a judgment so recently and so deliberately pronounced by us. It is a case of use merely.

The respondent maintains that she is one of a community of four feuars, and therefore has a *jus quæsitum*. It is a small community, and I do not think that the doctrine of community, as inferring in the interest of feuars a condition primarily in favour of the superior, was ever extended to a case of this kind. Where a street is laid out on a common plan, and the same conditions are imposed on all who take stances, there you have community. Each agrees to erect and maintain his own portion of a square or street according to that plan. Here we have one of the largest streets in Greenock, in which there is almost every kind of building, and the feu-contract declares that four stances in that street shall be self-contained. The superior is not seeking to enforce the condition, and does not object to the proposed use. But the respondent says there is

a community into which she has been admitted, and that the appellant and the superior shall not be at liberty to make the alterations. I do not think this is well founded. Therefore, on the authority of *Buchanan v. Marr*, I think the proposal is unobjectionable; and further, that there is no community of interest as regards the feuars of which the respondent is one. I should therefore propose—the Dean of Guild being satisfied that the operations are unobjectionable in themselves, and also telling us that the objection is a fastidious one—that we should recal his interlocutor and remit to him to grant the application.

LORD RUTHERFURD CLARK—I am of opinion that the Dean of Guild's interlocutor should be recalled. I proceed entirely on the case of *Buchanan*, from which I cannot distinguish the present, and which I think we are bound to follow, and I must say it affords me satisfaction to have at last come to a right decision in one of these cases. I do not give any opinion on the case on any other ground.

The LORD JUSTICE-CLERK concurred.

LORD CRAIGHILL was absent.

The Court recalled the Dean of Guild's interlocutor, and remitted to him to grant the prayer of the petition.

Counsel for the Appellant—Low—Sym. Agent—Wm. B. Rainnie, S.S.C.

Counsel for the Respondent—Balfour, Q.C.—Dickson. Agents—Smith & Mason, S.S.C.

Friday, July 20.

WHOLE COURT.

[Lord Lee, Ordinary.

CRAIG V. MILLAR.

Lease—Landlord and Tenant—Implied Condition.

Held that in a lease of premises situated in a populous part of a city, which were occupied as a common lodging-house, there was no obligation on the landlord not to set up, during the currency of the lease, a rival establishment in an adjacent building belonging to him.

Observations on Campbell v. Watt, Hume's Decisions, p. 788.

This was an action of damages at the instance of the tenant of a common lodging-house against his landlord for injury caused by the establishment of a rival lodging-house in alleged violation of the good faith of the contract between them.

At Whitsunday 1883 the pursuer Thomas Craig entered into occupation of the lodging-house, known as Graham's Lodging-House, 22 Graeme Street, Glasgow, in terms of a lease for seven years between him and the defender Gavin Bell Millar, sole partner of the firm of W. & G. Millar, warehousemen, Glasgow, at a yearly rent, including certain half-yearly payments, of £460. The subjects were described "as presently occupied as Graham's Lodging-House," and the pursuer was