be the superior who he may, or the vassal who he may. One of the obligations undertaken by the superior was to relieve the vassal of certain burdens on the lands and teinds. This was held to be enforceable against the superior by the vassal at the time, although he had no special assignation to the obligation of relief in any of the successive titles of the progress which connected him with the vassalage. Had we to deal in this case with an inherent condition declared to affect the subject of the feu, this decision might have been referred to as an authority by the superior; but not as the case actually stands. Another decision was referred to—*M'Farlane* v. *Magistrates of Edinburgh*, 2d December 1857—but which, when examined, affords anything but an authority for the contention of the appellants. The conditions as to building, which were enforced by the Court, were inserted in the original constitution of the feu, and were validly imported into the title of the party against whom they were enforced. In the completion of his title he had obtained a charter of confirmation, in which the whole conditions in the instrument of sasine in favour of his author were declared obligatory on him; and he was taken bound, in so far as not already implemented, to fulfil the conditions contained in the original contracts which led to the constitution of the feu-right, and which were referred to by the dates of their execution and registration. It was held vain for the vassal to resist fulfilment of conditions to which he had subjected himself on the face of his own title.

How different are the circumstances attending the title here to be construed. The condition attempted to be enforced was not made to affect the grant, while other conditions are made to do so; and this against the vassal, in whose title from first to last the condition is not once mentioned, nor the articles of roup and relative plan and elevation noticed, in name even, far less referred to as obligatory. And this, too, by superiors who granted a renovation of the feu, by a charter of resignation which does not contain this restriction on the real right.

Entertaining these views of the proprietary rights of the respondents, in a question with their superiors, I do not think that the coterminous proprietors occupy any better position. They are undoubtedly entitled to insist in proceedings (even if the superiors had not been parties) to the effect of enforcing all conditions legally incumbent on their co-proprietors in common with themselves, and by departure from which injury will be suffered by them; but to no other effect: And had the action, *e.g.*, regarded the square or area declared to be the common property of the feuars, and to be kept up at their joint expense, the case would have been quite different. For as regards the matter in hand in this discussion, there is no room for implying either a joint contract among the feuars, or the constitution of a real servitude.

On this part of the argument, the case of *Butterworth* (1812) was referred to by the appellants. But, in the first place, the action there was directed against one of the original purchasers, and had regard to the erection of the original buildings, which, as matter of personal obligation, he was bound to erect in accordance with the plan of elevation referred to in the articles of roup, which by his subscription he had expressly bound himself to observe. And, in the second place, having regard to the æsthetic grounds on which the decision, to some extent at least, in this Court proceeded, it is not an authority to which much weight can be attached, in a question affecting the legal rights of the respondents as singular successors. Such considerations, indeed, seem to have been specially in the view of Lord Eldon when he remarked in his judgment in 1818 (4 Dow's Appeals, p. 106), "that whatever may be due to the taste and beauty of the city of Edinburgh, we are not here to support them at the expense of the legal rights of the parties, nor to carry our respect and regard for taste and beauty so far as to establish a contract where there is no such thing."

On the whole, I am of opinion that the appeal should be dismissed.

Agent for Appellants—James Mylne, S.S.C.
Agents for Respondents—Ronald & Ritchie, S.S.C.

Wednesday, December 21.

FIRST DIVISION.

MACBEAN *v.* NAPIER.

Liability—Contractor—Clause. Circumstances in which a building contractor was held not liable for damage in consequence of the subsidence of a gable, his employer having appointed an inspector, and the inspector having approved of the work done and the manner of performing it, and it being shewn farther that the foundations, for which the contractor was not responsible, were at fault.

A general clause in a contract as to alterations held only to cover such alterations as were in the contemplation of parties, and not all alterations of every kind.

This was an appeal from the Sheriff-court of Aberdeenshire, and from the record made up in that Court it appeared that the defender Macbean had employed the pursuer Napier, a builder in Aberdeen, to build him a house in Market Street of that town. The defender employed no architect, but himself arranged about the plans and specifications, and entered into the contract with Napier, which consisted of an offer and acceptance in the following terms:

"5 *Spa Street, Aberdeen, Aug.* 14, 1868.
"Mr D. M'Bain.

"Dear Sir,—I hereby make offer to execute the messon, carpenter, slater, plumber, and plasterer and bell-hanger work, also good grates, and Venetian blinds for front windows, *and one for the back, and finish all to your satisfaction*, for the sume of Twenty hundred pounds sterling, say £2000 stg.—I am, &c. CHARLES NAPIER.

"*Aberdeen*, 14 *Aug.* 1868.
"Mr Charles Napier, Builder, Spa Street, Aberdeen,

"Dear Sir,—I hereby accept your offer of £2020 sterling to build my house in Market Street, according to plans and specifications, and in addition to supply all grates, and Venetian blinds for eleven windows, and also anything necessary to complete the work not mentioned in the specifications to be done free of any extra charge.—Yours truly,

"DONALD MACBEAN."

It will be observed that the sums mentioned in these two letters do not coincide; but it was explained that the additional £20 in the acceptance

was the result of a verbal agreement after the offer was made, and had reference to the modification imported into the contract by the last clause of the acceptance. To superintend the execution of the work, the defender employed an inspector, with full powers of control, and, at the same time interfered a good deal himself during the execution of the contract.

The pursuer now sued for the balance due him of the contract price, and for his account for extra work and furnishings connected with the building of the said house, after deducting payments to account. The pursuer's averments were—"(1) That on or about the 14th day of August 1868 the pursuer contracted with the defender to build the house now belonging to him, in Market Street of Aberdeen, according to certain plans and specifications, at the agreed-on price of £2020 sterling. (2) That the pursuer accordingly erected said house, and, in the course of its erection, was ordered by the defender, or his inspector, to perform the various extra works detailed in the statement annexed to the summons, amounting to £204, 8s. 9d. sterling, which extra works were performed by the pursuer accordingly. (3) That the amount of said contract price, and the price of said extra works, are together £2224, 8s. 9d. sterling, to account of which the pursuer has received from the defender the sum of £1681 as credited in the account annexed to the summons, leaving a balance of £543, 8s. 9d. sterling still due to the pursuer by the defender." Mr Macbean's defences consisted of certain objections to the work done, and deductions claimed therefor. His averments on the different heads were as follows:—"(1) On 26th May 1869 a petition, herewith produced, was presented to the Dean of Guild of Aberdeen by Mr Douglas, proprietor of the ground immediately south of the defender's feu, craving that the defender should be ordained to take down or render secure the south gable of his house, which was alleged to be in an insufficient and dangerous state. The Court remitted to Messrs William Henderson and William Smith, both architects in Aberdeen, who, on 5th June 1869, lodged a report, herewith produced, stating, *inter alia*, that the defender's house was off the perpendicular to an extent ranging from two to seven inches, that the south gable bulged outwards in the middle to the extent of about five inches, and that it would not be advisable to take band in the said gable. Rather than pull down the south gable, a joint-minute, dated 9th July 1869, herewith produced, was prepared and lodged in the process before the Dean of Guild. By this minute the defender is taken bound to pay the expense of an extra gable to be built by Mr Douglas, and also to pay for the ground taken from Mr Douglas, in consequence of the defender's house encroaching on his feu, and the expenses incurred by him thereanent, in consideration of which Mr Douglas agreed to discharge the said action, and to pay to the defender whatever sum would have been payable by him for taking band in the gable of the defender's house, if the gable had been constructed originally so as to allow such band to be taken. By letters, dated 31st May, 1st and 8th June, and 1st, 2d, and 5th July 1869, from the defender's agents, and of which copies are herewith produced, the pursuer was duly advised of the said proceedings, and intimation was given to him that he would be held liable for any loss or damage the defender might sustain; but he took no measures to render the defender's house sufficient, or to obviate Mr Douglas's complaint. The extra gable is not yet completed, nor the charges arising from these proceedings ascertained, but the whole expenses connected therewith will fall to be deducted from the contract price of the house in question. . . . (2) The pursuer was bound to furnish joists and beams of American pine for the front shops, but he has put in white wood instead. The difference in price is £17, which falls to be deducted from the contract price. The inspector, if he gave such orders as the pursuer asserts, had no power to deviate from the specifications. He was never authorised by the defender to make new contracts for him. . . . . (3) The pursuer undertook that the workmanship and the materials generally should be equal to any house in Market Street, yet he disregarded that condition, and, among other instances, put sheet glass in the windows fronting Market Street instead of plate glass. The defender objected to this, and the pursuer employed Messrs J. & S. Fyffe, glaziers, to change the glass, and it was changed accordingly; but Messrs Fyffe have now raised an action against the defender for the difference in value between plate glass and sheet glass, and also for work which comes under the contract between the pursuer and defender. The pursuer is bound to relieve the defender of that claim, and the amount, £72, 14s. 4½d., together with all expenses connected therewith, must be deducted from the contract price. (4) Several of the lintels and window sills are cracked and unsafe, but have not been removed and replaced. This must be done at the pursuer's expense, or deduction given from the contract price therefor."

There were also one or two other objections admitted by the pursuer.

On 11th May 1870 the Sheriff-Substitute (COMRIE THOMSON) pronounced an interlocutor in these terms:—"Finds, as matter of fact, that the pursuer contracted with the defender to build a house for him in Market Street for £2020 sterling, according to plans and specifications: That the plans and specifications in process are those according to which it was agreed by the parties that the house should be built: That it was in the specifications stipulated that the work should be performed 'in a substantial and tradesmanlike manner, to the entire satisfaction of the employer, or any competent person whom he may appoint as inspector:' That the defender appointed the witness James Anderson as inspector: That the house has been built to the satisfaction of the said inspector; and that the defender also expressed himself as satisfied with the building and with the inspection thereof, until the dispute to be afterwards noticed arose between him and the adjoining feuar Douglas: That in all the particulars in which the specifications were departed from, the pursuer was acting by the directions and with the authority of the defender, as communicated to him by the inspector: That the defender authorised and knew of the extra work sued for; and that the same was done and is correctly charged: That the south gable of the house sunk and bulged to some extent: That the cause of the said sinking and bulging was the softness of the foundation: That by the specifications it is provided that the contractor 'will excavate the whole area of the buildings to the depth necessary, and sink the trenches for the foundations to the depth shown on sections, and farther if required to procure a firm founda-

tion:' That the pursuer, with the view of getting a firm foundation, went six feet lower than shown on the sections, being to the same depth as the foundation of the next house to the north: That in doing so, and in going no lower, he had the sanction of the said inspector: That the adjoining proprietor to the south (Douglas) refused to take band in the defender's south gable, and took proceedings against him in the Dean of Guild Court: That after sundry procedure, in the course of which the defender maintained that the said gable was sufficient, and denied that he had encroached on Douglas' feu, the defender agreed to pay the expense of an extra gable to be constructed by Douglas, and also compensation for the ground which had been taken by him from Douglas' feu: That the pursuer was no party to these proceedings: That the defender has failed to prove in this process that the expense to which he has been put in consequence of his said agreement with Douglas was occasioned by the failure of the pursuer to perform his contract with him, or that the pursuer was to blame for two inches being built upon which did not belong to the defender: Therefore repels the defences; and appoints the case to be enrolled that parties may be heard on the application of these findings; and as to the liability of the pursuer to replace the lintels alleged to be broken, and for further procedure."

He afterwards, on May 18th, pronounced another interlocutor decerning *ad interim* for £450, and ordering the pursuer to replace the broken lintels before farther procedure in the case.

To both of these interlocutors the Sheriff (JAMIESON) adhered on appeal.

The defender thereupon appealed to the Court of Session.

SOLICITOR-GENERAL and BIRNIE for him.

WATSON and KEIR, for the respondents, were not called upon.

At advising—

LORD PRESIDENT—I am quite satisfied with the interlocutor of the Sheriff-Substitute in this case, of date 11th May last. I think it is well founded, and clearly expressed. At the same time, I have some feeling for the defender, against whom the judgment has gone. However, all the mischief that has happened to him has been his own doing. When a man who has spent his life in a different employment makes up his mind to build an expensive house, and sets about it in the way that Mr Macbean did in this case, he can expect nothing else than what has happened to Mr Macbean. He does not employ a professional architect, and though he does employ a clerk of the works or inspector, he chooses a man, however honest and cautious—and he certainly was that—still of no position or reputation in the trade. Now, this is just one of those pieces of absurd folly for which a man always suffers in the end. It is just like a man trying to get on without professional advice from a physician or a lawyer in their peculiar branches. And what does he do besides, he puts himself into the hands of a tradesman of no very high rank in his line of business, and all the check he places over him is the appointment of the inspector already mentioned. Now, seeing that Mr Macbean went about the building of his house in this fashion, and acted entirely as though he desired to be his own architect, making not only the preliminary arrangements, but also ordering alterations and additions during the execution of the work, and in fact acting just as we would expect a person to have acted who had set out in the manner that he did, the question now comes to be whether he has made out by his proof in this action any of the objections to the contractor's accounts which he has undertaken to substantiate. The first and most serious objection is that made to the south gable of the house, and no doubt there has been serious subsidence there. But we must ascertain the cause of this subsidence, and see whether the contractor is responsible for it. Now, if we examine the proceedings which took place in the Dean of Guild Court between Mr Douglas, the conterminous feuar, and Mr Macbean, we see, first, that the building along the line of this south gable was an encroachment upon the next feu; and second, that the said gable was both insufficient and insecure. On the first head there appears to be no attempt to make the contractor liable; and as to the second head, the fault seems to have arisen entirely from the nature of the foundation. The foundation was admittedly soft, and consequently the contractor went down a great deal farther than he was bound to do; whereupon the inspector, after a careful investigation, was quite satisfied, and directed the contractor to proceed accordingly. The foundation turned out, after all, to be insufficient, but that is not enough to subject the contractor in liability. It is farther necessary to observe that the defenders' idea of the insecurity of this gable and the reasons and liability therefor, are quite different now from what they appear to have been at the raising of the action against him in the Dean of Guild Court by Mr Douglas. There is there no communication with Mr Napier until after defences are lodged. These defences are a total denial of the facts alleged; and the case ultimately comes to a compromise, in which Mr Macbean departs from the position he took in his defences. Now, without impugning for a moment the propriety of the agreement come to in that case, it is clear that there was much probability in the position originally assumed by Mr Macbean, and it is clear that he has now quite turned round. This first objection, therefore—namely, that to the insufficiency of the south gable—I think we cannot listen to. As to the remaining objections, I think it is clear from the proof that the substitution of white wood for yellow pine was made with the defender's sanction. I think it is equally clear that we have no means of judging as to the objection to the glass, for there is really no proof whatever on the subject. And as to the extra work done, that is even in a worse position, because the account is sworn to by the pursuer himself and the inspector; and though their evidence is contained in a very few words, there was no attempt upon the defender's part to contradict it, though it was open to him to do so either on cross-examination or by leading farther evidence. I see no reason, therefore, for disturbing the Sheriff-Substitute's interlocutor.

LORD DEAS—I agree with your Lordship that the case has been well disposed of by the Sheriff-Substitute. The main thing that we have to consider is the consequence of the admitted sinking of the gable wall, and the liability attaching to parties therefor. Now I may say, at the outset, that I give the defender the full benefit introduced into the contract by the qualification in his acceptance of the pursuer's offer. The pursuer is clearly a man of no great education, and though

the offer and acceptance contain some inconsistencies, I am willing to take the two together as constituting the contract between these parties. As to the particular objection before us, then, it is plain enough that the gable did sink, and one of two mistakes must have been made—either the builder did not go far enough down with his foundation, or he did not use large enough stones for it. However he did what he was directed by the inspector, and he did moreover more than he had contracted to do. The result shows that the inspector was mistaken, but that was no fault of the builder. Now, the latter not only went down farther than he was bound to do, but he made no extra charge for doing so, in consequence of the above-mentioned clause in the acceptance—similarly he makes no extra charge for several other items of extra work. Of course, a fair and reasonable construction must be put upon such a clause. It does not follow that because it exists in the contract, that therefore everything which is extra work is not to be charged for, but only everything which comes fairly under the original contract, and was omitted from the specification, either accidentally or of necessity, as for instance the renewing or replacing of the broken lintels, which, whether they broke from the subsidence of the gable, or from intrinsic fault, or partly from both, the Sheriff was quite right in requiring the builder under the contract to repair. The Sheriff-Substitute has been, I think, perfectly consistent throughout in this matter, and I think him right, not only in this more important objection to the gable wall, but also in his disposal of the other and minor objections.

LORDS ARDMILLAN and KINLOCH concurred.

Agent for the Appellant—James Webster, S.S.C.
Agent for the Respondent—G. Roy, S.S.C.

Thursday, December 22.

GASKELL, DEACON & CO. *v.* MACKAY.

Sale—Agent and Principal—Mora—*Delegation.* An agent intimated to G. D. & Co., his principals, a sale of goods to M. Thereupon G. D. & Co. confirmed the sale by sending a contract note to the agent, to be handed to M. The contract note bore that the goods would be delivered from time to time during three months. M. having received the contract note, returned it to the agent, denying that he had ordered the goods. The agent failed to communicate with G. D. & Co.; and about a month after M. received the invoice of the first instalment. Though it was obvious that the agent had failed in his duty; and although M. was otherwise aware of his untrustworthy character, he was nevertheless induced by him to sign a delivery order for the goods in the agent's favour, on the representation that they would be stored by him for G. D. & Co's. behoof. The successive cargoes, as they arrived, were dealt with in the same manner. The agent took possession of the goods without communicating with G. D. & Co.; sold them and appropriated the price. About three months after the transmission of the contract note, G. D. & Co. sent M. an account for the first two cargoes; in answer to which he wrote a letter expressing surprise, and withholding all information by which the goods could be traced. *Held* that though M. might not have given an order for the goods, he had nevertheless by his conduct incurred the liabilities of a purchaser.

Farther, *held* that this liability was not discharged, though G. D. & Co. made no claim on M. till nearly five months after the date of the last mentioned letter, by which time the agent had become insolvent; and though at one time they seemed disposed to take the agent as their debtor, they having been mislead by M's. letter, as well by the agent; and at its date having been unacquainted with certain previous dealings of M. with their agent, which afterwards came to their knowledge, and which threw a strong light on the present transaction.

This was an appeal from the Sheriff-court of Glasgow. Gaskell, Deacon & Co., manufacturing chemists, near Warrington, sued Alexander Mackay, muslin manufacturer, Glasgow, for the sum of about £443, as the price of certain quantities of bicarbonate of soda, furnished by them to Mackay during the months of July, August, and September 1868.

For the sale of their goods in Glasgow, Gaskell, Deacon & Co. employed an agent named Money. On the 11th June 1868 Money, apparently without consulting Mackay, ordered 1000 kegs of bicarbonate of soda in his name from his principals, Gaskell, Deacon & Co. The latter immediately sent a contract note to Money, to be handed to Mackay. The note was in the following terms:—

"*Alkali Works, Widnes,*
"*near Warrington, 12th June* 1868.

"Alex. Mackay, Esq., Glasgow.

"Sir,—We have this day agreed to deliver to you, through our agent William Money, Esq., 1000 1¼ kegs bicarbonate of soda at £11, 5s. p. ton. F.O.B. at Liverpool, for delivery in equal monthly quantities during July, August, and September. Terms, cash in one month, less 2½ per cent.—and on the following conditions—During this contract, whenever the works or manufactory of either party, or the pits, mines, or quarries, whence they usually obtain their fuel or raw material, are entirely or partially stopped by fire or accident, or by any strike of work-people, this contract, during such stoppage, is to be in abeyance to the same extent as the stoppage.—Yours respectfully,

"(Signed) GASKELL, DEACON, & Co.,
"*p.* JNO. HOWARD."

Mackay having received the note from Money, took it back to him, marking in pencil on it, "This is a mistake, this is not for me. I never ordered it." Money did not communicate this rejection to his principals, and soon after they forwarded to Mackay an invoice for 200 kegs as a first consignment of the soda. Mackay took the invoice to Money, and asked for an explanation. The conversation that passed between them is given by Mackay as follows:—"I went to Money with the invoice, and asked him what was the meaning of that coming to me. Before he had time to answer me, I said I would return the goods. He said I could not do so, as it would incur additional freight and other charges. I still insisted that I would return them. He said he would not allow it, and that he could put the goods in store with other goods he had of Gaskell & Deacon's, and would write to Gaskell & Deacon, and explain that he had received them."

Mackay soon afterwards received a notice from