the feu-rights shall *eo ipso* be void and null, and the feuars shall forfeit £10 sterling for each lot, and the expense of a process of a declarator, if found necessary." Now, this feuing went on, and various minutes were subjoined to the articles. It was contended that, in virtue of these minutes, the original condition, that the feuars were to be bound to build within two years, had been abandoned. I am of opinion that this contention is not well founded. The original condition of building within two years remained the basis of the feuing.

Now, both the pursuer and the defender were expressly under this condition, but it is a condition in favour of the patrons, subject to any alteration they may make, and enforcible only by them. There is also this stringent alternative, that if the condition is not complied with the lots are to revert to the hospital.

The whole case depends on the question whether such a condition, of which it cannot be said that the patrons were bound to insert it in all their future grants, can be enforced by each feuar against the others. I am of opinion that it cannot. There is no such community of interest as would enable the feuar to say, "I shall put myself in the place of the patrons, and, though they may not be willing to enforce it, I will." There is no *jus quæsitum* to maintain the integrity of the plan.

There is nothing in the feu-right which enables me to arrive at the conclusion that the superior was bound to maintain the feuing plan. The patrons saw cause to make changes in the plan; this was quite within their power. Now, it appears to me that the power of the patrons to make changes is exclusive of the idea that the condition was enforcible by one feuar against the others. If, then, it be true that one feuar could not force another to build, to what does the case come? Can the pursuer rest his claim for the one-half of the expense of the gable on his right at common law, though advantage has not been taken by building on it? That being clearly impossible, the only basis for such a claim would be contract; but where no such contract exists, and where the party sued cannot be compelled to do the thing which would make him liable, I think the basis of the right is wanting. I am of opinion that the interlocutor of the Sheriff should be affirmed, though on grounds somewhat different from those on which he has proceeded.

The other Judges concurred.

Agent for the Appellant—Alex. Cassels, W.S.

Agent for the Respondent—William Mitchell, S.S.C.

Thursday, February 23.

STUART *v.* MORISON.

Teinds—Valuation—Res Judicata. It was decided in a process of locality that certain lands, "part of the Barony of Naughton," were valued. *Held* that this formed *res judicata* to the effect that these lands were valued, whether they were part of the Barony of Naughton or not.

This question, along with some others relating to the description of certain lands, arose in the locality of Balmerino, between Mr Stuart of Balmerino and Miss Morison of Naughton, and related to the lands of Wester Kilburns or Preston's Kilburns, extending to about eight acres, and belonging to Miss Morison of Naughton.

The Lord Ordinary (GIFFORD) repelled the objection of Mr Stuart, and added the following note, which explains the question.

"The objector, Mr Stuart, maintains that these lands are unvalued, and have improperly been omitted from the state of teinds and scheme of locality.

"The answer for Miss Morison and her curators is, that the lands in question are part of the lands and barony of Naughton, and were valued with the lands of Naughton, and with the other lands contained in the valuation of 22d February 1637. By that decree of valuation the whole lands of Naughton and certain other lands were duly valued, and by instrument of sasine in favour of Mr Hay, by whom the valuation was led, the lands of Naughton are shown to have included, *inter alia*, the lands of Brownhills, Galohill, Galray, Scurr, *et* Kilburns, and various others, all united into the barony of Naughton. It is further maintained by Miss Morison and her curators that it is *res judicata* in the present process, by a judgment of Lord Ardmillan of 20th March 1857, affirmed by the Inner House 9th July 1858, that the lands in question are valued by the valuation of 1637, and that it is now incompetent to open up the question. The Lord Ordinary is of opinion, though not without considerable hesitation, that Mr Stuart's objection is excluded by the judgments of 1857 and 1858, and by what has taken place in the present process of locality.

"(1) In the record made up between the Lord Advocate and Miss Morison in 1855, the Lord Advocate, as representing the Crown, maintained that Miss Morison's whole lands stated as in Balmerino 'have never been valued;' and then an enumeration is given of various lands, and *inter alia*, 'Kilburns (including Preston's feu).' The question was thus distinctly raised, whether Kilburns, including Preston's feu (that is, the subject in question), was or was not valued. Now, Lord Ardmillan found, on 20th March 1857, that the various lands mentioned, and specially the lands of Kilburns, are included in the decree of valuation of 1637, and this interlocutor was affirmed. It was thus fixed that Kilburns, including Preston's feu, was a subject the teinds of which were valued, and yet this is the very point which the objector wishes to try over again. The expression in the interlocutor, that the lands are parts of the barony of Naughton, was not intended as a limitation of the finding, so as to leave it open to maintain that any or that all of the lands were not parts of the barony.

"No doubt the present objector was not a party to the former record, but the Crown had a title to try the question (as was expressly found), and tried it fairly and deliberately in this very process, to which the present objector or his predecessor was all along a party. The judgment was undoubtedly binding on Miss Morison, and, the Lord Ordinary thinks, on all the heritors. It would lead to a strange result if every separate heritor was entitled to try the same question over again as to the same lands, and to obtain, it may be, different decisions.

"It may be true that the particular point or plea which the objector now seeks to raise was not argued by the Lord Advocate. This, however, does not appear. It certainly might have been argued, and the present objector, if he was not satisfied with the pleadings, should have himself appeared and supported the objection. On the whole, the Lord Ordinary thinks it would be unsafe to allow the question now to be reopened. It is quite fixed that a judgment in one process of locality forms *res judicata* in all subsequent localities in the same

parish.—See *Blantyre* v. *The Earl of Wemyss*, 22d May 1838, 16 S., 1009.

"(2) The Lord Ordinary also attaches great weight to the admission made by the common agent in his answers to Miss Morison's condescendence, lodged in 1843, in which the common agent expressly admits that Preston's feu (the lands in question) was a 'part of Naughton, and valued in 1637, along with the other parts of that estate.' Great weight has been given to admissions by a common agent, who, without any express authority, can bind all the heritors, as was held by the House of Lords in *Hopetoun* v. *Ramsay*, 22d March 1846, 5 Bell's Appeals, 69. The Lord Ordinary is not satisfied with the objector's answer to this, that the objector is not a mere heritor, but titular of part of the parish, and that as titular the common agent did not represent him. The Lord Ordinary thinks that the common agent represents all who have a common interest in the allocation of the stipend, and, among others, the titular or titulars, who have often a vital interest in the allocation, and who are really the heritors, or the heritable proprietors of the teinds. Of course, there are many cases where the titular's interest is opposed to that of the general heritors, and then he appears for himself. The common agent in the present case was really acting for all concerned. Anciently the titular himself used to prepare the locality, and the practice of electing a common agent superseded this."

Mr Stuart reclaimed.

ROBERTSON for him.

SHAND and WEBSTER for the respondent.

The Court adhered, holding that Lord Ardmillan's judgment had decided these eight acres to have been valued; that the words in that interlocutor, "part of the barony of Naughton" were descriptive and not taxative, and that his Lordship's finding, that "the lands condescended on" were valued, made it necessary to look to the condescendence, where the eight acres were included under the general name Kilburns. They held that, the Lord Advocate having had a title to try that question on behalf of the Crown, it could not again be raised by Mr Stuart, who was a party to the locality.

LORD NEAVES differed, holding that Lord Ardmillan's interlocutor was ambiguous,—that in a question of *res judicata* it must be construed strictly, and without reference to its probable intention, and that its terms were not inconsistent with Mr Stuart's interpretation. His Lordship held, further, that it was necessary that the same *media concludendi* should have existed in the former question, which was not the case here, it having been then erroneously supposed that there was only one Kilburns, whereas here the allegation was that there were two.

Agents for Mr Stuart—W. H. & W. J. Sands, W.S.

Agents for Miss Morison—R. & J. A. Haldane, W.S.

Friday, February 24.

FIRST DIVISION.

SPECIAL CASE—ROBERT MORTON AND JOHN GARDNER.

Process — Jurisdiction — Privative — Competency— Special Case—Public-House Act. A lease of a public-house incorporated *verbatim* as conditions of the lease the whole conditions of the statutory certificate (25 and 26 Vict. c. 35, schedule A, No. 2), so far as they should be binding by public law. The landlord and tenant presented a Special Case, in which a certain sale by the tenant was set forth, on the facts of which parties were agreed, and the Court were asked to decide whether the sale was a breach of the "certificate and lease." The Court (*diss.* Lord Kinloch) *held* the question incompetent, and *dismissed* the Special Case, on the ground that the construction of the Public-House Statute was exclusively appropriated to other Courts, and although in certain cases, in order to determine the civil rights of parties, it was competent and necessary for the Court to decide *incidentally* a point not within their jurisdiction, it was incompetent to decide the point where its decision was the sole exercise of jurisdiction craved, and where parties were under no necessity of resorting to this Court.

The nature of this Special Case will appear from the opinion of the Lord President.

M'LAREN for Morton.

The SOLICITOR-GENERAL and SCOTT for Gardner.

At advising—

LORD PRESIDENT—The first party to this case, Mr Robert Morton, is a wholesale wine and spirit merchant in Glasgow, and also proprietor of a house in Broomielaw Street, which is let as a public-house to the second party, Mr John Gardner, on a lease for four years from Whitsunday 1870. The peculiarity of the lease is that it incorporates the whole provisions of the statutory certificate which requires to be obtained by a public-house keeper, being No. 2 of schedule A annexed to the Act 25 and 26 Vict. c. 35. The conditions of the certificate are specially made conditions of the lease, but only in so far as they are at the time binding as public law. The lease goes on to stipulate—"And this lease is entered into on the express condition that if the said John Gardner do any thing contrary to or in violation of the said conditions either specially or generally before set forth, according to the true intent and meaning which the same have in the Acts of Parliament relative to the respective matters contained in the said general or special conditions before written or referred to or in his certificate, then, whether there shall have been or be any complaint by the Procurator-Fiscal or any other person or not, this lease shall, at the end of one month from the date of a written notice by the said Robert Morton or his foresaids to the said John Gardner or his foresaids, of his intention to avail himself of the consequence of any contravention of any one or more of the conditions of this lease, *ipso facto* become null and void, without the necessity of a declarator or other process of law, and the said John Gardner may be instantly thereafter ejected from the said shop or premises, and he binds himself and his heirs to remove accordingly; but it shall be in the option of the said Robert Morton and his foresaids, instead of enforcing the said *ipso facto* forfeiture of the lease as a direct consequence of any such contravention, to interdict the said John Gardner and his foresaids from continuing such contravention either as a violation of this lease or as a violation of the statutes or laws of the land." It is stated in the Special Case that on the 10th September 1870 (the lease having been signed ten days before), a sale