paid within a year, it is stipulated that the former claims shall revive, and may be again insisted in; but if it be paid within a year, then the defenders are to be entitled to a discharge, and all imputations made against them upon record are to be withdrawn. There is a further point which I think is ancillary or subsidiary. It consists in the stipulation that the defenders shall give a power of attorney to the pursuers' agents in Rangoon to bring certain properties to sale, to realise these, and impute them *pro tanto* in payment of the sum in question. It is contemplated that the properties may sell for a sum large enough to meet the whole debt, but that it may also fall short of it. But in either event the condition is that the sum in question is to be paid within a year from the date of the agreement.

The settlement of the account under that agreement must be in Scotland, and consequently Scotland is the *locus solutionis*.

Lord Deas—If I were satisfied that the *locus solutionis* of this contract was in Scotland, I should agree with your Lordship. But it appears to me that on the face of it the *locus solutionis* is in Rangoon, and consequently that the law of Rangoon must apply. I think this agreement is in substance and effect the same thing as if a bill payable in Rangoon had been granted for the sum mentioned. The authorities, I think, go to show that a bill payable in Rangoon would be paid in rupees according to the value current at Rangoon. Although I am not at this moment prepared to go into the authorities, I have always understood since I had occasion to examine them, as discussed in the case of *Don* v. *Lippman* (H. of L.), 2 S. and M. 732, that a bill payable in a foreign country fell to be met in the currency of that country. I cannot distinguish between that case and the present, and I think the law laid down there is applicable.

I may say that the case of *Glyn* v. *Johnston*, June 8, 1830, 8 S. 889, was considered to raise a question of what belonged to the law regulating the nature of the debt itself and what to that regulating the remedy. The Court held that the kind of evidence admissible fell to be determined by the law of England. That judgment followed upon a hearing in presence. Lord Craigie dissented from the judgment, but from the remarks made upon that case by Lord Brougham in deciding *Don* v. *Lippman* it appeared that Lord Craigie had been right in the view which he had taken.

Lord Mure—I agree with your Lordship in the Chair that the interlocutor of the Lord Ordinary should be adhered to. I think that we are dealing with a Scotch contract, and that the pursuers are entitled to be paid in Scotch currency. The contract was made in Scotland. Both parties were in Scotland so far as regarded the settlement of the questions at issue between them in the Scotch Courts. Provision is made in the agreement for a revival of the claims. Where that is done in Scotland with reference to an action depending in the Scotch Courts, one would think that the *locus solutionis* was in Scotland. If nothing had been said about Rangoon, it is quite plain that Scotland would have been the *locus solutionis*. But the provisions as to realising the properties in Rangoon are said to make Rangoon the place of payment. By the second clause of the contract a power is given to sell certain properties in Rangoon, the proceeds of which are to be paid to and retained by certain parties there on the pursuers' behalf. In the event of the properties not realising the £4250, the deficiency is to be made up by the defenders. Supposing the proceeds had not realised the required sum, it is quite clear that they would require to have been paid in the current coin of this country. I cannot hold that Rangoon is the *locus solutionis* of this contract.

Lord Shand—In the view which I take of this case it is quite immaterial what place is the true *locus solutionis*, for I think that the judgment must be the same in either case. But I agree with Lord Deas that the place of payment of the proceeds of the Rangoon property is Rangoon, and the place of payment of the balance is this country. So that the pursuers are entitled to payment of the full equivalent in Rangoon money to the English currency, otherwise the defenders will get an advantage in the settlement to which they are not entitled.

The Court adhered.

Counsel for Pursuer — Gloag — M'Kechnie. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Defenders — J. Burnet — R. V. Campbell. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, March 18.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

EARL OF ZETLAND *v.* HISLOP AND OTHERS.

Feu-Contract—Condition—Interest.

The superior of certain heritable subjects in a sea-port village entered into feu-contracts with certain feuars, there being a condition in each case that it should not be lawful for the vassal "to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses, without the written consent of the superior." Several years after, when the village had become a burgh with important shipping interests, the superior raised an action of interdict to enforce this condition against the singular successors of the original feuars (who had obtained licenses in the Justice of Peace Court to keep public-houses). *Held* that, on the authority of the case of *Coutts* v. *Tailors of Aberdeen*, 13 S. 226, *aff.* 1 Rob. App. 307, the superior had, in the altered circumstances of the burgh, lost any such interest as would entitle him to prevail, and interdict *refused*.

Opinion per Lords Young and Craighill to the effect that such a condition would be effectual in the case of a long lease as distinguished from a feu-contract such as the present.

At the beginning of this century Thomas Lord

Dundas, and his successor Lawrence Lord Dundas, predecessors of the pursuer of this action, granted feu-dispositions of different dates in favour of certain feuars of pieces of ground at Grangemouth, which was then a small hamlet, and of which they were successively superiors. The pieces of ground were to be holden by the feuars of their immediate lawful superior in feu-farm, fee, and heritage for ever, for payment of the feu-duty therein specified, and with and under the burdens, conditions, provisions, and irritancies therein contained. By article second of the said conditions it was declared that it should not be lawful for the feuar, his heirs or assignees, or any tenant or possessor of the buildings to be erected on the said piece of ground, to carry on certain specified businesses, or any other trade, manufacture, or occupation that should be deemed nauseous, troublesome, or dangerous to the neighbourhood by the superior. The said article then proceeded as follows:—"Neither shall it be lawful for the feuar 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."

In 1867 Grangemouth had a population of about 2500 inhabitants, but at the date of this action was a burgh under the General Police Act with a population of more than 5000 inhabitants, with large shipping and other trade. It was built almost wholly on the estate of the Earl of Zetland, who had by succession come to be superior of the feus, and had fourteen licensed houses and shops, consisting of two hotels, seven dram-shops, four grocers' shops, and a restaurant. By decree of special service, dated 1st and recorded on the 19th June 1874, the Right Hon. Lawrence Dundas, Earl of Zetland, completed his title to the estate of his predecessor Thomas Lord Dundas, and so became the immediate lawful superior of the various feus granted in the original feu-charters. Desirous of putting an end to the existence of so many public-houses in Grangemouth, and in order to check the prevalence of drunkenness thence arising, which seriously interfered, as he alleged, with the wellbeing of many of his tenants and feuars, and was prejudicial to the comfort and amenity of his mansion-house, which was within half-a-mile of the town, he resolved to enforce the prohibition contained in the said feu-charters against the sale of malt or spirituous liquors. He thereupon intimated to John Hislop and others, who were in possession at the time of these public-houses, that the above prohibition would be put in force on and after May 15th 1880. Notwithstanding this notice, however, they refused to comply with the prohibition, and accordingly the Earl of Zetland raised a series of actions (which were conjoined) against them for the purpose of enforcing it. The principal action was raised against John Hislop, and in it the pursuer sought to have it declared that neither the defender nor any tenant or possessor of the buildings erected or to be erected on that piece of ground at Grangemouth on the south side of the Great Canal, fronting Grange Street on the north, and containing 945 square yards or thereby, bounded on the east by ground feued to Alexander Lyle, and lying within the barony of Kerse, parish of Falkirk, and county of Stirling, were entitled, without the consent of the pursuer, to sell or retail any kind of malt or spirituous liquors within the said buildings, and further, that the defender should be prohibited and interdicted from selling or retailing any kind of malt or spirituous liquors, or allowing the same to be sold or retailed, within the said buildings.

He pleaded—"(1) The prohibition against the sale of malt and spirituous liquors within the premises described in the summons is a legal condition of the feu, enforcible by the pursuer as superior against the defender as proprietor thereof, and his tenants. (2) The defender having refused to comply with the said prohibition, the pursuer is entitled to decree against him in the terms concluded for."

The defender, on the other hand, averred that he was a singular successor in the subjects, having purchased them in February 1879, after they had been publicly advertised in January and February of that year as containing licensed premises. He paid £3315 for the property along with some adjoining subjects, which was greatly more than he would have paid had there not been a license for part of the premises, and he had besides considerable capital invested in the public-house. He further averred that when the license was originally obtained in 1867 the pursuer's factor attended as a Justice of the Peace and member of the Licensing Court, and concurred in granting the license. In subsequent years his predecessors yearly obtained certificates in usual form under the Public-House Acts, after due notice and opportunity for the pursuer and others to be heard as objectors. Further, that the pursuer and his predecessors had acquiesced in the occupation of the subjects as a public-house for thirteen years. It in no way harmed the property of the pursuer, who besides had no interest to enforce the prohibition.

He pleaded—"(1) The pursuer has no title or interest to sue. (2) The prohibition founded upon does not warrant the present summons, in respect of:—(1st) Consent and acquiescence on the part of the pursuer and his predecessors in the use of part of the premises as a public-house. (2d) Waiver and abandonment by the pursuer and his predecessors for forty years and upwards of the like prohibitions in other feus. (3) The prohibition founded upon is not a real burden, nor is it binding upon the defender as singular successor in the feu. (4) The public-house belonging to and occupied by the defender being kept and used as such under statutory authority, the pursuer has no ground of action. (5) Permission to sell malt and spirituous liquors has been sufficiently given in terms of the feu-contract, and the pursuer is now barred from disturbing the existing use and possession of the premises to the loss and damage of the defender. (6) The prohibition founded upon being inapplicable to existing circumstances in Grangemouth, this action is contrary to the fair meaning and intent of the feu-contract, and cannot be maintained."

The Lord Ordinary (Rutherfurd Clark) found that the pursuer had not set forth any interest to sue this action, and therefore dismissed the action.

He appended the following note to his inter-

locutor:—"The defender holds certain subjects in Grangemouth in feu of the pursuer. He is a singular successor. The original feu-contract is dated in 1814, and it contains a condition that it shall not be lawful to the vassal 'to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses,' without the written consent of the superior.

"It was explained at the debate that Grangemouth, which is a police burgh of considerable size, is built on feus given out by pursuer or his predecessors, and that all the feu-contracts contain a clause the same as that which has just been quoted. The pursuer resolved to enforce the restriction, and in January 1880 he gave the intimation quoted in the condescendence. It appears that some of the feuars have refused to comply, and the pursuer has in consequence raised three actions. The present action is one of them.

"In his condescendence the pursuer does not allege any interest which he has to enforce the conditions of the feu-contract. He simply sets forth his title as superior and his resolution to require the feuars to submit to the restrictions.

"The question has thus arisen, Whether the pursuer has set forth any sufficient interest to sue this action?

"The Lord Ordinary accepts it as law that wherever a feu contains any restriction on property, 'the superior or the party in whose favour it is conceived must have an interest to enforce it.' Such is the doctrine laid down in the case of the *Tailors of Aberdeen* v. *Coutts*, 1 Rob. App. 307.

"Following this view the Lord Ordinary does not think that the pursuer can prevail. The action is not brought to secure any patrimonial benefit, or to avoid any patrimonial loss. It is, as the Lord Ordinary was given to understand, the result of a desire to enforce, at the discretion of the pursuer, a restriction which affects the entire town, not for the sake of the pursuer himself, but to secure the wellbeing of the community. Even this interest is not alleged, but if it were, the Lord Ordinary could not hold it to be sufficient to sustain the action."

The pursuer reclaimed, and argued—If the condition as inserted in the original feu-charter was legal, the superior might now enforce it without showing a patrimonial interest.

Authorities—*Gold* v. *Houldsworth*, 16th July 1870, 8 Macph. 1006; *Ewing* v. *Campbell*, 23d Nov. 1877, 5 R. 230; *Bishop of St Albans*, L. R. 3 Q.B. Div. 359; *Magistrates of Edinburgh* v. *Macfarlane*, 2d Dec. 1857, 20 D. 156; *Stewart* v. *Bunten*, 20th July 1878, 5 R. 1108; *Gould* v. *M'Corquodale*, 24th Nov. 1869, 8 Macph. 165; *Naismyth* v. *Cairnduff*, 21st June 1876, 3 R. 863.

The defenders in reply argued—(1) in point of law—(*a*) The class of cases of which *Ewing* v. *Campbell* and *Stewart* v. *Bunten* were examples could not apply here, as they were all cases in which stipulations had been made for the interest of different feuars. In this case the pursuer was merely stipulating for his own interest as superior, and there was no *jus quæsitum tertio*. (*b*) The interest of the pursuer was a merely personal one, not running with the lands nor affecting singular successors; and therefore (*c*) It was incumbent on him to show a real interest (in the sense of a patrimonial one as opposed to one which was sentimental) in enforcing the condition—*Coutts* v. *Tailors of Aberdeen*, 20th Dec. 1834, 13 S. 226, *aff.* 3d Aug. 1840, 1 Rob. App. 307; *Wilson* v. *Hare*, 1 L.R. Ch. 463; *MacRitchie's Factor* v. *Hislop*, 17th Dec. 1879, 7 R. 384; *Thomas* v. *Hayward*, 4 L.R. Exch. 311; *Browns* v. *Burns*, 14th May 1823, 2 S. 298; *Governors of Heriot's Hospital* v. *Ferguson*, M. 8217, 3 Pat. App. 374. (2) In point of fact he had lost the power to enforce the condition by acquiescence—*Campbell* v. *Clydesdale Banking Co.*, 19th June 1868, 6 Macph. 943; *Fraser* v. *Downie*, 22d June 1877, 4 R. 942.

At advising—

Lord Young—The question here is, Whether a certain condition in a feu-charter is valid and consequently enforceable according to its terms. The subject of the charter is a small piece of ground in the town of Grangemouth, on which a house now stands, and the condition in question is—"Neither shall it be lawful for the feuar 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 question is important as relating to the restrictions which may lawfully be put upon a proprietor with respect to the use of his property. That this is its character is plain when it is considered that a feu by charter or other deed of conveyance is the highest real property title known in law, and if I dwell on this topic for a little it is not because I apprehend that it may be thought to involve any doubtful matter, but because I think the important and practical bearing of it has not always been sufficiently attended to in this class of cases.

I repeat, then, that there is no higher title of property than a feu, and add that it is immaterial to the nature and quality of the proprietor's right whether he holds by virtue of an original charter (*i.e.*, the deed by which the feu was created) or of some subsequent progressive or transmissive deed. The name "feuar," as familiarly and popularly used, is indeed confined, or at least most commonly applied, to small proprietors, as the name "feu" is in the like popular speech confined or usually applied to small properties. But this is mere popular speech, convenient enough if taken only for what it means, and not understood as importing any legal distinction in the matter of title between large and small properties. I need not say to your Lordships that there is no such distinction. *Feudum*, feu, fee are synonymes signifying "property" as distinguished from any inferior title of possession, and it is immaterial to the character and quality of the feuar's (or proprietor's) title whether the subject of it is half a county or half an acre. The name of the right is according to the usage of all languages transferred to the subject of it, and equally applied to both, so that just as houses are called "estates" or "properties," so they are called *feuda*, feus, or fees. Now, all land in this country, whether owned in large or small parcels, is, without reference to the size of the parcels, "holden"—that is to say, is held—by the proprietors as vassals under a superior. Such is our system of real property title. The Crown is the ultimate superior of all

the land of the country, for from the Crown all property in land is assumed to have originally flowed. The simplest case is when the beneficial owner holds immediately of the Crown, but this though common enough is not the most common case, for subinfeudation being universally allowable except when restrained by paction, the greater part of the land of the country is held by the owners immediately of subject-superiors. But whether the Crown or a subject be in any case the immediate superior, the beneficial owner is a "feuar," and his property is a feu, held by him as vassal under a superior. This, indeed, is the Earl of Zetland's "*status*" or condition with respect to all his property in land on the mainland of Scotland—for I do not speak of Zetland, where a different system prevails, at least partially. All I have said only expresses the fact that the feudal law governs land rights in this country, and that the system admits of no distinction whatever between large and small properties.

I therefore regard the defender as proprietor in fee-simple of his ground with the house on it. I do not use the word "simple" as of any virtue with reference to the question in hand, for it applies only to the destination or succession, signifying that it is simple, *i.e.*, not entailed. That the defender is proprietor in fee is the important matter, and with reference to that fact the validity of the condition in question must be judged of.

Now, it is clear law that land may be burdened with any known servitude or (if that expression should be thought too limited as not admitting the possibility of a good servitude which has not hitherto occurred and been sanctioned) any lawful servitude, and that the burden will run with the land into whose hands soever it may pass. But it is, I think, material to notice this important feature of every lawful servitude—that it must be beneficial to some dominant tenement, not necessarily in fact at any particular time, but capable from its nature of being so, and therefore by the fact of its existence adding more or less to the value of the dominant tenement. The servitude *de non ædificando* is the most familiar example.

The case of land parcelled off for building according to a plan with reference to which the lots are sold to several purchasers is peculiar. It has been held that thus, or by the terms of the individual titles flowing from a common superior of contiguous building areas in a street or square, a community may be established among the vassals, so that each shall have a legitimate interest in, and therefore legal title to, enforce the restrictions put upon or obligations undertaken by every other. Wherever it is clear that the parties so intended, and that the feus were taken in reliance on the accomplishment of such intention, I do not doubt that the Court will enforce it. I think, and have at least respectable authority with me, that the principles of the law of servitude are sufficient to support the decisions on the subject, but others think otherwise, and it is unnecessary now to dwell on the subject.

But the power of putting upon land a special and exceptional law to which it shall be subject for ever, or at least so long as some one—not the proprietor for the time—may please to maintain it, is certainly limited. The law, following I believe prevailing public opinion, favours property and proprietory rights as being, although occasionally abused, on the whole greatly beneficial to the community. Accordingly, the general rule is that conditions or limitations in a property title which are repugnant to the common legal notion of property and proprietory rights shall be deemed invalid. Thus, conditions against selling and alienating, burdening with debt, and altering the succession are all bad, for these are common-law incidents of property, and at the common law inseparable from it. I need hardly say that entails prohibiting these things are bad at common law, and stand only on statute and within strictly regulated limits.

The condition here is that spirits and beer and provisions shall not be sold on the property. Now, is this repugnant or not to a right of property? I think it is, and the notion that it is not has, I think, no support by analogy from cases of servitudes or building conditions and restrictions among a community of feuars in a street or square, the general rules and limits of which I have endeavoured to point out as I understand them. If I could think otherwise I should own I have much difficulty in drawing the line at spirits, beer, and provisions, and in finding a satisfactory reason for declining to recognise a prohibition against selling any other commodities, or even against consuming them. I can, indeed, see a distinction when I regard a seller (whether a superior or not) with reference to views of social science, which are certainly respectable and may be sound, but I see none in law. The law imposes restrictions on the sale of intoxicating drinks, and to some extent on provisions also. These I must respect and enforce, but what right has Lord Zetland to increase them beyond the limits of his own property? Within these limits he may prohibit intoxicating drinks and many other things in the exercise of his proprietory rights. To retain this power, however, he must retain his property. Should he sell it, although to be held of himself as superior, he could not, I think, by condition impose on the purchaser the rules of conduct which he approved and had himself followed, and I can find no ground for distinguishing in this matter between a sale of the whole and of a part. It was suggested by way of illustration that a man might have a legitimate interest to prevent a house in a corner of his park from being turned into a alehouse or whisky-shop, and so might effectually restrain a purchaser from him accordingly. I see the interest just as I see an interest to prevent a poacher with dogs and a number of dirty children from taking up his residence in a house standing in a corner of a park, and I allow it to be a good reason why the owner of the park should not part with the property of the house. I am, however, unable to assent to the inference that a title of property may be legally and validly qualified by a condition against poaching or keeping dogs or dirty children. A condition against the sale (or use—for I see no distinction) of drink or provisions is, in my opinion, of the same character in a legal view.

I hardly know whether it is favourable or the reverse to the condition in question that it prohibits certain lawful acts, not absolutely but without the leave and license of the superior, or, in other words, of the former owner, who sold

subject to the condition. The true view probably is that the peculiarity makes no difference, it being clear that the prohibition though ever so absolute might have been permanently removed or temporarily suspended by the party in whose favour it was imposed. Still it illustrates the pursuer's contention, which is, that a seller of land which he conveys with a *de me* holding (I put it so that I may not be supposed to overlook the existence of the feudal relation, though I myself think it is immaterial) may reserve to himself and his heirs for ever a right to control the buyer in his otherwise lawful domestic or business arrangements, licensing them or not as he pleases, and on such terms as he pleases. I think this is an extravagant contention, and altogether repugnant to property. I have said that I think the existence of the feudal relation of superior and vassal is immaterial to the question in hand, and indeed the purpose of my introductory remarks on our feudal system of titles was to explain why I think so. The relation is part of our real property law—so that no property can be had in land without it. It exists with respect to the pursuer himself, for he holds his lands, however extensive they may be, as a vassal under a superior—the Crown or the subject-proprietor of whom his ancestor bought, as it happens, according to the paction they made for an *a me* or *de me* holding. I do not wish to venture on a proposition unnecessarily large for the case before me, but I may state as my present impression that apart from feudal incidents, which are not *hujus loci*, it is immaterial to the validity or invalidity of a burden imposed on land by condition in the title whether the holding is *a me* or *de me* of the granter of the conveyance containing the condition. If it is lawful and not repugnant to property it shall have effect in either case, and otherwise in neither.

I am therefore for affirming the judgment of the Lord Ordinary—not, indeed, because assuming the condition to be lawful the pursuer has no interest to enforce it, but because I think it is repugnant to the right of property granted by the deed that contains it. Were it lawful, the pursuer has an obvious interest in it, apart altogether from his social views—for he might exact an annual payment for a license, or sell a discharge of the burden. I apprehend the Lord Ordinary's meaning is, that this is not a legitimate interest in such a matter, and in this I agree. But I think so on the grounds which I expressed at the outset in noticing the burdens which may legitimately be put on land. A prohibition of building which was not defensible on the law of servitude, as being (or capable of being) beneficial to an adjacent dominant tenement, could not, in my opinion, be sustained by the consideration that the creditor therein might if it were good sell a release from it for a large sum. This stands on the law of property and the rules which prescribe the limits within which owners may be restrained in the exercise of their proprietory rights. The pursuer here has interest enough to support any lawful rights—indeed, he has the most ordinary of all interests, viz., a pecuniary interest; but the right which he claims is, in my opinion, bad as repugnant to the property title of the defender, and involving an illegitimate interference with his proprietory rights. A man may contract himself out of any or all of his rights as a proprietor, but to subject land, no matter of what extent, or even a house, to a special and exceptional law, so that the property of it shall not be attended with the ordinary legal incidents of property, is contrary to the policy of the law. I need hardly say that the proprietor of a house or land may by lease give such right of possession and use as he pleases, prescribing some uses and prohibiting others. The lessor remains the proprietor, which a seller does not, though he may have conveyed the property with a *de me* holding, *i.e.*, so that the buyer holds it of him as superior. His infeftment, indeed, stands to the effect of supporting the superiority, but the property is gone from him and passed to another, with all the rights which the law deems to be inseparable from it, and which it is for the interest of the community should be so. I desire to rest my judgment on this view of the law, rather than on the narrower ground that the pursuer has no interest, which indeed I can only assent to with reference to the rules of law which determine the kind of interest necessary to support a servitude, viz., the possession of a dominant tenement which thereby is or may be benefited. I think, in short, that the condition is such that a legal interest in it cannot exist—not that it may or not as it happens—and that the condition shall have effect or not accordingly. Thinking so, I am of opinion that the invalidity of the condition itself is the right ground of judgment.

Lord Craighill—This reclaiming note brings before the Court an action in which the Earl of Zetland is the pursuer, and John Hislop, Campfield Cottage, Grahamston, and others, are the defenders, and the decree concluded for is to the effect that the defender, or any tenant or possessor of the buildings erected upon the defender's feu, is not entitled without the consent of the pursuer to sell or retail any kind of malt or spirituous liquors out of the said buildings, and that such sale should accordingly be interdicted.

There are before us other three actions of the same nature against other feuars, and the fundamental plea on which issue has been joined is the same in all—Has the pursuer an interest to insist in those actions? That is the question the Lord Ordinary has decided by the interlocutor now submitted to the review of the Court.

The circumstances out of which these litigations have arisen are hardly disputed, and may be easily summarised. The family of Dundas, of which the pursuer is now the representative, have long been proprietors of the estate of Kerse, on the margin of the Forth, in the county of Stirling. In the course of last century portions of this property were feued out from time to time. But in all cases the ground "was given, granted, and disponed, and in feu-farm demitted, from the disponer to the disponee, his heirs and assignees whomsoever, heritably and irredeemably, but always with and under the burdens, conditions, provisions, and irritancies contained in the precept of sasine contained in the feu-charter" upon which the vassals were infeft. These provisions and conditions were declared real burdens, and, as far as their nature admitted, became by infeftment real burdens upon the feus.

The feus in the progress of time increased so

much in number, that from being a hamlet or village, which it was early last century, Grangemouth has come to be a town and seaport of over 5000 inhabitants, and as the charter of every vassal contains the condition which is the ground of the present action, the power of the superior may be easily realised. But until recently there arose no conflict as to its exercise. The views of the superior for the time apparently harmonised with those of the licensing magistrates, and no attempt was made to suppress by the veto of the superior the sale of ales and spirituous liquors in premises licensed by the magistrates. The pursuer, however, when he by succession to the family property became the superior, thought fit to interfere, and called on, not all, but some of those who had been licensed to give up the use of their license, and among those it must be borne in mind were not only the keepers of public-houses but also licensed grocers. Had this demand been obeyed, seven out of the fourteen licensed houses and shops would, as licensed houses and shops, have been closed—a result well calculated to show the importance of the present controversy not only to those who are parties to those actions but the community of Grangemouth. The conclusion to which the Lord Ordinary came is that the condition in question is not one which the pursuer has an interest to enforce against his vassals, and the actions therefore have been dismissed. I concur in this judgment.

That a superior in giving out a feu may by the recognised rules of the feudal system retain important rights in the subject of the grant, and may impose burdens and restrictions upon it, has not been and cannot be disputed. The question is, whether the condition in question is such a restriction? Vexatious and capricious conditions cannot be enforced, nor can a restriction upon property be sustained unless the superior or the party in whose favour it is conceived have an interest to enforce it. This, as the Lord Ordinary points out, is a statement of the law which was given in the opinion prepared by Lord Corehouse, and concurred in by the other judges in the case of *Tailors of Aberdeen* v. *Coutts*, 1 Rob. App. 307; *Browns*, 2 Sh. 261; *Heriot's Hospital* v. *Ferguson*, M. 8217, and it is consistent with all the authorities. The pursuer does not contend that the law thus laid down is not the rule of the law of Scotland. On the contrary, he admits that there must be an interest, and his case is that he has the necessary interest. In considering the merits of this controversy, the condition of the argument is that the *dominium utile* of the feu becomes the property of the vassal. A superior, therefore, in imposing burdens or conditions upon the estate of his vassal imposes conditions upon the property of another. No doubt the radical right remains with the superior, but the estate of the vassal, nevertheless, is his own, and unless so far as effectual stipulation has been made to the contrary, the superior may not interfere with the use which the vassal makes of his property. Analogies, therefore, drawn from restrictions placed by the landlord upon the use of his property by a tenant to whom he has let it can have no application, for a man may, as has truly been said, do as he likes with his own, but he is not entitled in ordinary circumstances to interfere with the use of property belonging to another. This renders inapplicable the case of *Gold* v. *Houldsworth*, 8 Macph. 1006.

It does not appear to me to be necessary to define what are the interests belonging to the superior which may be protected by a clause like that in the charters granted by the predecessors of the pursuer. Were it necessary, I should be disposed to hold that the interest in question must be possessed by the party enforcing it in the character of superior, or, in other words, they must be interests of a proper patrimonial nature. This is the language used by Mr Duff in his work on Feudal Conveyancing, p. 74. All, however, which is necessary to be said on the present occasion is, that any interest put forward by a superior which is not greater than nor different from an interest possessed by any member of the community, is not an interest which can be created a real burden upon the estate of the vassal. All are interested in the good order of a community, and all are naturally desirous that nothing by which this may be disturbed should be sanctioned. But men's views differ as to the way in which results admitted to be desirable can best be obtained, and if feu-charters were to be made the vehicles by which opinions on social questions were to be carried out confusion would be the inevitable result. Were the doctrine contended for by the pursuer to be sanctioned, any man selling a house might subject the property to the burden which the predecessors of the pursuer have endeavoured to impose upon their vassals. A seller of a property has in any social question the same interest as he would have supposing he were a superior giving a feu of the property. This consideration of itself seems to me to show that an interest entitling the superior to enforce such a condition as that in question must be an interest of a different character from that which is possessed by the pursuer.

The authorities cited in the course of the argument seem to me in most cases to point to, and in all cases to be consistent with, this conclusion. In the case of *Browns* it was found that there must be an interest, and in the other cases this was assumed. The apparently adverse decision in the case of *Ewing* v. *Campbell* is not in reality a hostile authority. There the only question which was raised was a question of construction—whether a hydropathic establishment was in the sense of the clause of restriction a public-house. There was no controversy as to the enforcibility of the condition, 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.

On the whole, therefore, and without difficulty, I concur in the judgment against which the pursuer has reclaimed.

I may add, that had it been necessary I should have been disposed to hold that the clause of restriction in the charters founded on by the pursuer was invalid, not merely upon the ground that the superior had no interest, but also on the ground that the restriction was void as being a restriction upon trade, and also as being inconsistent with public policy. These last considerations, however, are not required to be taken into

account on the present occasion, and I mention them only because the mention of them is expedient to show that they have not been disregarded.

Lord Justice-Clerk—I cannot say that I have found this case unattended with difficulty, not so much as to the conclusion which ought to be reached, but as to the precise legal grounds on which that conclusion ought to be supported. We have here four conjoined actions in which, although the facts vary in details, substantially the same questions arise. The defenders in this case are feuars in Grangemouth. Under their rights they all hold of the pursuer as superior of the territory upon which the town of Grangemouth is built; each of these rights contain the same or corresponding prohibitions, and, in particular, in each the feuar is taken bound not to use any building erected on the feu as a public-house, or as a house for eating or refreshment. I do not state the exact words, but that is the substance of the provision. The question now raised is, Whether the superior can enforce this condition against these feuars, who are singular successors?

Taking these feu-rights singly and on their terms, I am of opinion that there is nothing in these conditions which might not be enforced by the superior, or which are in themselves incapable of transmitting against a singular successor. It is not necessary to enlarge on the general rules of our jurisprudence on this head, for they are too well fixed to be the subject of controversy. The nature of a feu-right is surely matter too elementary to admit of doubt. It is a subinfeudation granted mediately or immediately by or from a Crown vassal. The superior remains the owner, burdened by the feu-right; but the *dominium utile*, as opposed to the *dominium directum*, is transferred to the sub-vassal. The superior's right over the property is not and cannot be in any respect one of servitude. His power to introduce such stipulations into the rights of his feuars, and his title to enforce them, depend solely upon his supereminent right in the land, constituted by his own infeftment. The nature and effect of restrictive conditions such as the present contained in parts of the feu was exhaustively considered and explained in Lord Corehouse's opinion in the case of the *Tailors of Aberdeen*, in which the whole Court substantially concurred, which not only places the true doctrine on this head beyond dispute, but supersedes the necessity of any further exposition. When feuars of the same superior endeavour to enforce such restrictions against each other, their *jus quæsitum* has more analogy to servitude; but as between superior and vassal servitude is in no sense the foundation of the right. The enactments of a right of servitude are inconsistent with the relation of superior and vassal.

True, the superior before he can enforce such stipulations must have a legal interest to do so. He has always a legal title, but the Court will not allow him to put such stipulations in force if it be shown that he has no interest—that is, if he be trying to enforce an obligation the fulfilment of which can be of no benefit to himself (it is said patrimonial benefit, and I do not differ), and if it be therefore insisted in, emulously, capriciously, or oppressively. This, however, is a consideration applicable to the circumstances in which the superior attempts to put the clause in force more than to the nature of the condition. The superior has always a title to bind his vassal and his successors, provided the restriction enter the record, and unless the stipulation is illegal, or contrary to public policy, or is in itself incapable of being enforced.

Further, were this a case of a single feu, I am of opinion that this particular condition is not illegal and is capable of being enforced. This was asserted and assumed in the Dunoon case (*Ewing* v. *Campbell*), and the decision is directly in point and to my mind conclusive.

I was surprised to hear it doubted that the case was a direct decision—that a clause to the effect of the present was a legal and enforcible stipulation, seeing one of this nature was not only sanctioned but enforced in it.

The question raised in that case was whether prohibition against using a feu for the purpose of a public-house was contravened by building a hydropathic establishment. The law was assumed to be so clear that even the party impugning the condition did not venture to say that it was not legal in itself or inconsistent with the rights of property, but rested his whole case, as the Court did, on the question whether the building in question came to be within the prohibition. I look upon that case as being all the stronger that the general law was not controverted. It was simply the last of a long series of adjudicated cases on cognate conditions, and its application is clear. The practical dispute whether the hydropathic establishment was a public-house could never have arisen unless the condition was in itself effectual. All these matters are trite law, and in my opinion do not admit of doubt. There is, however, one peculiarity in the present case, and it is one not without significance, namely, that the superior reserves the right to waive the condition, and this shows that the other feuars have no power separately to enforce it against each other. This is material, because it has a bearing on the nature of the interest involved in the right.

In my view, however, the present case ought to be resolved on other grounds. The practical question is, Whether the pursuer is entitled to enforce these stipulations for the purpose of regulating the social condition of a community amounting to 5000 inhabitants, and in fact incorporated under the police statutes and under a municipal management of its own? It is plain enough that the more the operation of these restrictions excludes, the more the superior's interest recedes from, a real patrimonial character, and necessarily approaches the confines of effects which are at war with important social and public interests. In certain circumstances and within certain limits such prohibitions as this regarding the use to which premises are to be put are intended to protect direct patrimonial rights. In particular quarters of large towns, in which the value of premises depends on the use to which they are put, such restrictions often have a direct effect of enhancing the value of the property in the neighbourhood. So a man may reasonably provide in feuing a piece of ground at the corner of his park that it shall not be used as a public-house. No one ever supposed such a condition to be contrary to the principles of

property according to our law; it is entirely in conformity with it, according to rules followed in a long series of authorities. But when one dwelling-house is multiplied into 1000, and 5000 persons are interested instead of one, the matters become very different. As the public interests grow larger the individual interests necessarily grow less. Here I think it has disappeared altogether, and instead of reflecting the patrimonial interest of the superior, represents only individual opinions, philanthropic and social on his part. On the merits of these views of course I say nothing, except that I have quite as much respect for those holding one set of views as for those holding the other. Our opinion on such matters is of no more value, in no respect better, than that of the parties in the case; but I think it is quite clear that we are now asked to enforce this restriction, not for the protection of any property right in the pursuer, but in order to benefit the moral and social well-being of the community of Grangemouth. But this is to enable the pursuer to use his power as superior for the purposes of a benevolent disposition leading directly to collision with the municipal authorities on one hand, and in effect putting it in the superior's power to create a trade monopoly on the other. Now, I think we are not bound to give effect to this clause looking to the admitted object and the necessary result of doing so. Lord Corehouse, in the following passages in his opinion in the case of *Coutts*, expresses the ground of my opinion in the present—"Thus," he says, "it was often a condition in a feu-charter that the vassal should bring all his malt to the superior's brewery to be made into ale, and to have all his iron-work manufactured at the superior's smiddy. These conditions have fallen into desuetude, but they have never been declared illegal by statute. The Court, however, at present refuses to enforce them, as being inconsistent with public policy, for it would be a plain injury to the community if the proprietor of a piece of land would not employ the brewer or the smith whose work he most approved"—(1 Rob. App. 318). Here circumstances have proved too strong for the superior, and the community which he and his predecessors have helped to create has outgrown bonds which might have been reasonable or useful when first imposed but which are unsuited to the times.

I have only to say, in conclusion, that I reserve my opinion on the question whether such cases would be effectual under a long lease. If the term were equivalent to a perpetuity the same result would probably follow.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimer and Pursuer — D.F. Fraser, Q.C.—Hon. H. J. Moncreiff. Agents—H. G. & S. Dickson, W.S.

Counsel for Respondents and Defenders—Solicitor-General (Balfour, Q.C.)—R. V. Campbell. Agent—James Wilson, L.A.

Friday, March 18.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MEIER & COMPANY *v.* KUECHENMEISTER.

Election—Agent and Principal—Suing to Judgment.

A firm of shipbrokers raised an action in Germany against a shipmaster upon certain bills granted by him for advances on behalf of the ship. This action having been dismissed, on the ground that by German law it had not been raised *tempestive*, the brokers raised an action for the amount of the advances against the owners of the ship. It was pleaded that the pursuers had elected to take the master for their debtor. Plea *repelled*, on the ground that there had been no suing to judgment.

In November 1878 the vessel "Jacob Rothenburg," of Rostock, Germany, stranded near Shields. Captain Wilde, the master and one of the owners of the vessel, appointed the pursuers of this action, who are shipbrokers and shipowners in Newcastle-on-Tyne, as brokers, and through them a contract of salvage was entered into under which the vessel was ultimately brought off the ground and taken into Shields in a damaged condition. Various claims for salvage, &c., were settled by the pursuers on the authority of Captain Wilde, and were repaid to them by the owners in December 1878. After that date certain other disbursements on behalf of the ship were made by the pursuers, and for these they received from the captain two bills drawn by him in their favour upon the firm of Küchenmeister & Völling, Rostock, for £200 and £26, 4s. 6d. respectively, both dated 23d January 1879, and both payable at three months after date. Küchenmeister & Völling were the managing owners of the vessel. The firm has since been dissolved, and the defender in this action was one of the partners of the firm. The said bills were duly presented to the drawees, who refused acceptance, and the bills were thereupon presented at the pursuers' instance against the drawer and drawees for non-acceptance and the drawer for non-payment. On 11th February 1880 the pursuers arrested the ship and took proceedings in Admiralty against the shipowners, which were unopposed. Under these proceedings the ship was sold in May 1879, and the pursuers placed to the credit of their account £85, 4s. 11d. derived from the proceeds of the sale. The said bills having matured and been dishonoured on 23d April 1879, the pursuers intimated to Captain Wilde their intention of holding him liable for the amount, and in July 1879 they received from him a payment of £60 to account. The pursuers thereafter raised an action against Captain Wilde, as drawer of the bills, in the German Court of his domicile, for the balance thereon, and obtained judgment against him in the lower Court; but on appeal the judgment was reversed and the action dismissed, on the ground that by German law the suit against the drawer should have been brought within three months from the date of the bills falling due.

The pursuers thereupon raised an action in the