Tuesday, February 7.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COCHRAN AND OTHERS *v.* PATERSON.

Property—Restriction on Height of Buildings—Three Square Storeys but not more in Height.

Feuars from a common superior in a street in burgh were each taken bound to erect on his feu a dwelling-house, "which should be three square storeys above the surface of the ground, but not more, in height, with a half sunk storey." *Held* (following *Campbell* v. *Allan*, 18 D. 67, but *diss.* Lord Young) that one feuar was entitled to interdict another from making alterations on his house which should make it of a height greater than "three square storeys," though they did not amount to the erection of a fourth square storey.

A feu-contract was entered into in the year 1859 between John Ross junior and Thomas Lucas Paterson, proprietors in trust for behoof of themselves and of the heirs of the deceased Robert Paterson, of the lands of Dowanhill, Glasgow, on the first part, and Robert Wylie on the second part, whereby the parties of the first part feued to Wylie a plot of ground numbered eight on the plan of a projected street called Crown Circus. *Inter alia*, Wylie bound himself, and his heirs, assignees, and disponees whomsoever, within a certain period from the date of his entry to the subjects, to erect and finish on the plot of ground feued a "self-contained lodging or dwelling-house, which shall be three square storeys above the surface of the ground, but not more, in height, with a half sunk storey, and shall be of a superior class," &c. The first parties as superiors bound themselves to insert in subsequent feu-contracts similar clauses and conditions, and similar declarations and provisions to those in Wylie's contract. The other plots of ground were thereafter disposed of, plot number 2 being feued to Paterson as an individual, and the provision above quoted was duly inserted in the titles of each, with the exception of number 1 and number 12, which houses were built at right angles to and had no frontage to the circus. Number 2 was the corner house of the circus. That house and the other houses, numbers 3 to 11 inclusive, were all built of three square storeys with half a sunk storey, in terms of the provision to that effect, and on half the thickness of the front wall was built an ornamental stone balustrade.

At various times between 1861, when the majority of these houses were built, and 1880, when the operations complained of in the present case were begun, some of the houses in the circus were slightly altered by the forming of attics in the roofs of certain houses originally built without attics, and the insertion of dormer windows instead of skylights in others which had been built with attics. In particular, No. 3 had its roof raised and an addition made with the effect of causing that house to have a square storey at the back. This alteration was not objected to by any of the feuars. In 1880 Mr Paterson began to alter No. 2 by raising the front wall within the ornamental balustrade 5½ feet above its previous height, with the view of adding large and commodious rooms on the attic storey. He removed so much of the balustrades as would interfere with the windows, which he formed partly in the front wall as thus raised. The effect of this alteration was to make the front walls of the attics beneath the coomb ceiling 6 feet in height instead of as formerly 3 feet 4 inches. At the back the attic storey was made by the alterations completely square, as had been previously done with No. 3 as above mentioned. The proprietors of Nos. 4, 5, 7, 9 and 10 objected to those alterations as injurious to the uniformity and amenity of the circus, and as practically consisting in the addition of a fourth square storey, or, at all events, as making the house more than three square storeys in height with a half sunk storey, in contravention of the titles, and presented this petition to the Sheriff for interdict against such alterations as would make the house "a house of four square storeys, or four square storeys above the sunk or half storey, or one of other construction or elevation than 'of three square storeys above the surface of the ground, but not more, in height, with a half sunk storey.'" They also craved to have the defenders ordained "to restore the said house to the same condition and elevation it was in before his recent alterations, and to make the house one 'of three square storeys above the surface of the ground, but not more, in height, with a half sunk storey.'"

The defender denied that his alterations had the effect alleged, or that they were in contravention of the titles. Further, he averred that the restrictions in the titles had never been rigidly observed, and that alterations of at least equal importance had been made by several of the other proprietors without objection.

He pleaded—"(1) The alterations made by the defender to the house in question being in no way a violation of the title thereto, or of the rights of the pursuers, the defender is entitled to absolvitor, with expenses. (3) As the alterations made by the defender do not affect the houses of the pursuers, but enrich and improve the appearance of the circus, the pursuers have no interest to insist on the conclusions of the petition."

After a proof the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor;—"Finds that the pursuers and defender are proprietors of houses in Crown Circus, Dowanhill, deriving their title from the trustees of the late Robert Paterson, merchant in Glasgow: Finds that it is a condition in the titles of all the feuars in Crown Circus that each feuar should build, erect, and finish on the plot of ground 'a self-contained lodging or dwelling-house, which should be three square storeys above the surface of the ground, but not more, in height, with a half sunk storey,' &c., and that the pursuers have a title to insist in the conclusions of this action: Finds that the defender, in the month of July last, began, and has since completed, certain alterations upon the roof of the house No. 2 Crown Circus, of which he is proprietor, whereby the height of said house is raised 5½ feet above three square storeys in front, and to a greater excess behind, in violation of the said condition: Finds that some years ago the house No. 3 Crown Circus, immediately adjoining the defender's said house, was raised behind so as to make the attic storey partly or altogether a square storey in the back, and that the pursuers did not

object to this alteration: Finds that they are thus barred from objecting to the defender's raising the height of the back wall of his house, so far as that has been done: *Quoad ultra*, finds that the defender has failed to establish facts inferring abandonment by the pursuers of their right to insist on the fulfilment of the said feuing condition: Therefore, and to that extent, repels the defences, and ordains the defender, within four months from this date, to restore the house No. 2 Crown Circus, so far as the front is concerned, as craved in the second part of the prayer of the petition, and decerns: Finds the pursuers entitled to expenses from defender," &c.

He added this note:—"It is not seriously disputed that the titles of the feuars in Crown Circus are such as to give each of them a right to enforce the condition as to the height of their houses. They are a body of disponees from a common author, who was bound to insert, and did insert, in all their titles the condition in question.

"The first position maintained by the defender is, that he has not really infringed the condition as to the height of the houses, and that if he has, he has done so to so slight an extent that the pursuers have no interest to object. I do not think that the defender would contend that if he were to put two additional storeys on his house the pursuers would have no interest to object to that, and therefore I state his argument in this qualified manner. It appears quite plain that none of the previous cases in which the construction of restrictions of this kind has turned upon the definition of square storeys and the utilisation of roof space warrant the alteration which the defender has made. *M'Ewan* v. *Shaw Stewart*, March 10, 1880, 7 R. 682, is the latest, and perhaps the strongest of these cases, but it goes no further than to allow a proprietor restricted to a certain number of square storeys to use the roof space in his tenement by opening windows in the roof, whether lying lights or storm windows, and by making an access by extending an existing outside stair. Here the erection of an upright outside wall, although it is within an ornamental stone balustrade, and is not so thick as the front wall, upon the top of which it is placed, can only be regarded as an evasion of the obligation not to build above three square storeys. That obligation in its natural meaning, or, at all events, according to the meaning the parties have put on it, by the manner in which the houses have been built, implies that there shall be a roof of the ordinary kind rising from the wall-head above the joists of the third square storey. What the defender has done is not perhaps to make an additional square storey, but to increase the square height of his house 5½ feet in front beyond what it was before, and beyond the 'three square storeys in height.' The case of *Campbell* v. *Allan*, 18th December 1855, 18 D. 267, is a clear authority in support of this view.

"It is said that the pursuers have no substantial interest to complain. It humbly seems to me that in the argument—at least in some of the cases in which parties have been fighting against restrictions of this class—too much has been made of this plea of want of interest. It is not always possible to define very accurately what the interest of an adjoining urban proprietor to prevent operations by his neighbours is or may become, and notwithstanding the presumption in favour of liberty, I would almost be inclined to say that where, as here, the obligation is quite distinct, and the connection by vicinity and otherwise very close, it lies upon the proprietor innovating to instruct the objectors' want of interest by very clear evidence. It is enough, however, to refer on this subject to the observation of Lord Kinloch in *Alexander* v. *Stobo*, 1871, 9 Macph. 599-611, that the proprietors 'are all interested in preserving the uniformity of the street, and preventing any unseemly contrast in the style of architecture;' and to the decision in *Beattie* v. *Ure*, 1876, 3 R. 634; and especially in *Stewart* v. *Bunten*, 1878, 5 R. 1108. There Lord Gifford says—'The law sustains it as a sufficient interest that a proprietor in a row of houses wishes them to be maintained so as to show a uniform or symmetrical front or elevation; and if he has aptly and sufficiently stipulated for this in all the titles, it will be given him, though his only interest may be an æsthetical one.'

"Clearly there is nothing like abandonment of the right to insist on adherence to the benefit stipulated for so far as the front elevation is concerned. On the nature of acquiescence or silence inferring such abandonment, and how far its effect extends, reference may be made to the case of *Stewart* v. *Bunten* already cited, as well as to *Gould* v. *M'Corquodale*, 1869, 8 Macph. 165, and other cases mentioned at the debate."

On appeal the Sheriff adhered.

The defender appealed to the Court of Session, and argued—This was a restriction on the use of property, and to be strictly construed. The restriction was meant to prevent there being a fourth square storey, which this was not, except indeed at the back, and that the pursuers were barred from objecting to. This was a fair use of the roof-space, as in *M'Ewan's* case, quoted by the Sheriff-Substitute. At all events, the judgment should be recalled so far as regarded that part of the house No. 2 which had its frontage in another street from the circus.

Authorities—Cases quoted by the Sheriff-Substitute.

The Court made avizandum.

At advising—

Lord Craighill—The facts of this case are not in controversy, and it is not necessary that these should be recapitulated. The questions at issue may therefore be brought at once under consideration. These are thus set forth in the first and third of the defender's pleas—[*reads*].

The Sheriff-Substitute gave judgment for the pursuers, the Sheriff adhered, and hence the present appeal. I think that their interlocutors ought to be affirmed and the appeal dismissed.

The first question is the import of the clause in the feu-charters of Crown Circus, Dowanhill, relative to the dwelling-houses to be erected on the several feus. So far as the height of these houses is concerned, it is declared that every vassal shall be bound to "build, erect, and finish, upon the plot of ground feued, a self-contained lodging or dwelling-house, which should be three square storeys above the surface of the ground, but not more, in height, with a half sunk storey."

Here there are two declarations. The first is that the dwelling-houses to be erected shall be

three square storeys above the surface of the ground; the second, that these houses shall not be more in height than these three square storeys, with a half-sunk storey. The meaning of this clause is now disputed, the pursuers reading it in one way and the defenders in another. But when the contract was made, and the houses were built, there appears to have been no difference of opinion on the subject; the houses, so far as the number of flats was concerned, were alike, the joists for the roofs springing in every instance from the wall at the finish of the third storey. The importance of this is not lessened, but rather increased, by the consideration that on the outer half of the wall there was erected a balustrade 5½ feet high, as a crown or finish to the building. Things so continued for nearly twenty years, when the appellant made the alterations of which the pursuers complain. These are—(1) the building of a wall 4 feet 4 inches high on the inner or unoccupied half of the wall, upon the outer half of which the balustrade stands; (2) the raising of the spring of the joists from its original position to the top of this new wall. The result of these operations, as the pursuers contend, is the violation of the provision that the dwelling-houses upon these feus shall not be more than three square storeys in height from the surface of the ground. Is this a true representation? If it is, there is ground for complaint—otherwise not. A clause of restriction upon the use of property, which this is said by the defenders to be, is certainly not a favourite of the law; but even reading it as it is read by the pursuers, there is nothing in it contrary to law or to public policy. What it contains is simply one of the conditions of a contract, and the duty which has been cast on the Court is to settle its interpretation. The words are to be taken in their ordinary sense, if a special meaning has not been put upon them by the parties, and judgment will be given for him whose reading of the clause shall be thought most consistent with the language of the contract. If the clause shall be considered ambiguous, the doubt will be cast for freedom rather than for restriction; but it is only in this contingency that one party may claim from the Court something that cannot be conceded to the other.

In determining the question in dispute, two things pressed on our attention by the reclaimer must be borne in mind. One is, that there is no limitation of the height of the buildings, which may be raised any number of feet above the ground. But while that is so, there can only be three square storeys in the building. In other words, the square storeys may be of any height, but whatever their height, the three taken together are the measure of the height of the building. This is the contention maintained by the pursuers. The defender, on the other hand, reads the clause as importing that while there may only be three square storeys, the carrying up of the wall to aid in the construction of an attic storey—that is to say, a storey which is not a square storey—is not prohibited, and the admission of the pursuers that a balustrade or a blocking-course may be constructed above the top of the wall of the third storey to serve as a crown or a finish to the building is urged in favour of this interpretation of the contract. And one thing on which the appellant relies is, that there is no provision in the feu-contracts for uniformity of style or structure in the houses. This, however, is only material as showing that even if effect should be conceded to the contention of the pursuers, something not challengeable might be done by which a result as unfortunate to the views of the pursuers would be produced as the alleged departure from the conditions on the observance of which they insist. These things, however, suggest no canon for the interpretation of the clause; much less are they warrant for putting on it another from that which may be thought the natural construction. What, then, is the meaning of the clause in question?

Even apart from the authority to which reference will be immediately made, my inclination would be to adopt the pursuers' construction of the clause in question, because if you take the defender's, the words "in height" are rendered insensible. Had the restriction ended at the word "more," the clause might not perhaps unreasonably have been read as importing that while there were only to be three square storeys, there might also be another which was not square—that is to say, an attic storey, for the construction of which the wall might be raised as far as required above the finish of the third storey. But when it is said that the buildings are to be three square storeys, and not more, in height, this matter appears to me to be a declaration that these being constructed, the height of the wall, so far as the wall is to be of avail for any storey in the building, is determined. In short, you measure height by square storeys, and once you have reached the top of the third you have gone as far as consistently with the contract you can go in raising the wall which is to serve as a wall for any of the storeys of the house. I indicate these views because it is reasonable that the parties should be made acquainted with what I am inclined to consider the import of the clause apart from authority; but the real ground of my judgment on the present occasion is the decision of the Court in the case of *Campbell* v. *Allan*, Dec. 18, 1855, 18 D. 267. The clause which was there construed was the same in substance as the clause which is presented for our interpretation. The decision upon it was given a quarter of a century ago; that decision could not but be known to the parties when they in 1859 entered into the feu-contracts with which we are now concerned. So far as appears, it has been recognised and acted upon ever since, there having been no conflicting judgment by which its authority has been impaired. In these circumstances I think that a decision inconsistent with that which was pronounced in *Campbell* v. *Allan* would be a calamity, inasmuch as inconvenience and confusion not only migh be, but in all probability would be, the result. Uniformity of decision is of the last importance on such a question as the present, and whatever reading we might have chosen had there been no previous judicial interpretation of the clause, that which was so long ago adopted by the Court ought, I think, now to be taken as binding upon all concerned with the present controversy.

The next question is, Whether the pursuers have an interest to insist in their complaint? The reclaimer says that any injury which may be suffered, assuming that there is an infringement, is so shadowy as to be inappreciable, and that as the advantage to him is considerable, the com-

plaint of the pursuers ought not to be entertained. My answer to this plea is (1) that the interest which was sustained in the case of *Campbell* v. *Allan* must be taken to be sufficient on the present occasion; and (2) that where there is a contract by which something is prohibited, the infringer cannot fairly claim to be heard when he asks the Court to deal with a complaint made against him as one in which there is no interest to be protected. That might have been a reasonable consideration when the making of the contract was a matter of negotiation, but the contract having been made, each party is bound to keep within its terms. The pursuers may be thought to be insisting on something which they might well have surrendered, but that is a thing solely for their consideration, and not for the determination of the Court; and faith in contracts would be seriously shaken if a plea of this kind—because many might think the complainers' interest sentimental, and therefore unsubstantial—were to be sustained.

On the whole matter, I concur in the judgments against which the defender has appealed, and am of opinion that the appeal ought to be dismissed.

Lord Young—Neither party founded any argument on the circumstance that the defender was one of two trustees by whom the feu-rights in question were created, and I therefore disregard it as immaterial, and take the defender merely as a co-vassal with the pursuers, which he no doubt is, holding his property by a feu-contract in similar terms to theirs.

Their case against him is that he has violated to their injury a certain condition of his feu-contract in which they are interested as co-feuars under a common superior, and so entitled to enforce. That condition is that the house "shall be three square storeys above the surface of the ground but not more, in height, with a half sunk storey." The expression "square storey" is, we were informed, used in contradistinction to "attic storey" (although the latter does not occur in the title), the former signifying a storey the rooms of which are on the square, in the sense that the walls ascend perpendicularly to the ceilings, and so measure the height of the rooms, while the latter signifies a storey immediately under the sloping roof at the top of the building, so that such height as the rooms have is obtained on one side at least, not by a perpendicular wall, but by a sloping or angled ceiling. It appears that the pursuers and the other feuars have at various times utilised the attic space, so to speak, and made the rooms there more commodious by raising the ceiling and introducing dormer windows, but they justify these improvements, alleging, no doubt truly, that they were made without raising or otherwise interfering with the front wall. Their complaint against the defender is that he has gone a step further, raising the outer wall and bringing his dormer windows more forward than theirs, so that his attic storey is better than theirs, and in fact almost as good as a square storey. The plans and elevations produced show exactly what has been done by the pursuers and defender respectively, and render any explanation or description in language superfluous.

Had there been a contract among the feuars for uniformity of plan and elevation, the pursuers' complaint would have been intelligible, and I collect from the statement of their grievance on record, and many questions put by them in the course of the proof, that this was the view of their case with which they came into Court. There is, however, clearly and admittedly no such contract. The elevations of the houses may in point of style and even line of front wall be as various as the several proprietors please, subject only to this check, which is strictly in favour of the superior and limited to him, that he may disapprove of the plans, which are required to be submitted to him. The only term of the contract in which it is alleged that the feuars are interested *inter se* (so far as the present question is concerned) is that which I have cited, viz., that the houses "shall be three square storeys above the surface of the ground, but not more, in height." But three square storeys is not a measure of height by statute or any rule of the common law, and there is no averment or evidence of local custom. Houses of three storeys are in fact of various heights, so that in going along the streets one observes houses of three storeys which are lower than some houses of two and higher than others of four. Again, the storeys of a house may be, and generally if not always are, of different heights—the height of the upper rooms being usually more or less, but very variously, sacrificed to that of the lower, according to the taste of the builders. All this may be regulated and uniformity secured by prescribing a plan to be followed, but a mere declaration that the houses shall be of three storeys and no more is no limit of height or injunction of uniformity, for it leaves each feuar at liberty to erect his house of any height he pleases, provided he divides it into three storeys and no more, which, however, he may make relatively of any variety of height he fancies. The superior may indeed exercise some control, each feuar being bound to submit the plan of elevation of his proposed building to the superior or his architect for approval. I say "some" control, for an unreasonable disapproval would not be allowed. We are not here immediately concerned with this provision, which is in favour of the superior, and gives no right or title to the feuars against each other. I may, however, observe that it shows that the possibility of variety was contemplated, although it is sufficient that uniformity was not contracted for.

But there being no contract by the feuars with the superior or *inter se* that the buildings should be of a certain height or on a certain architectural plan, the question arises, whether the declaration that each house "shall be three square storeys above the surface of the ground, but not more, in height" is enforceable by the feuars *inter se?* and I am of opinion that it is not. The height of a house being unobjectionable, not being limited by the title, and also the style of architecture, none being prescribed, I see no legitimate interest which a co-feuar has in the number of storeys, which is mere matter of division and arrangement for convenient occupation. I have no occasion to consider how the question would stand between the superior and an individual feuar on their contract. The complaint is by a co-feuar, who must show that a right created in his favour, or rather in favour of his feu, has been violated. Now, I am of opinion that the declaration in question cannot be regarded as a

burden constituted on the property of the defender in favour of the property of the pursuers, and there being no instance in the books, so far as I know, of a similar declaration being regarded as a burden in favour of co-feuars, I am indisposed to go further than we have already done. I think there is no legitimate, indeed no appreciable interest. Nor do I think it material that the superior binds himself in each feu-contract to insert similar clauses and conditions in "the feu-contracts to be granted," for many of the clauses and conditions are manifestly such as the superior alone has any title or interest to enforce, so that the character of each has always to be considered. Thus the obligation to build and pay feu-duty is strictly in favour of the superior, and so not enforceable by any co-feuar. It was conceded in argument, and is indeed too clear to be disputed, that the defender might have raised the wall and roof of his house to the extent he has done (or a greater extent) had his purpose been thereby to improve the third square storey by elevating the ceilings of the rooms, for his house would then have been "three square storeys above the surface of the ground, but not more, in height." But how, I venture to ask, can it concern the pursuers whether his purpose was to improve the third square storey or the attics above it? Nor can any objection be stated to the windows, which may, for anything in the title, be as few or many and of such shape as the proprietor pleases.

The case of *Campbell* v. *Allan*, 18 D. 267, was relied on by the pursuers, but it has obviously no bearing on the question of the pursuers' title. The question there was not with a co-feuar, but with the superior. If that case is supposed to determine that three square storeys is a measure of height by the common law, I cannot accept it, and indeed cannot apply it without knowing the height of the storeys referred to, which the report does not state, and of which I am ignorant—without that I have no standard. If it only decided that the superior had a title to prevent the division of the house (without reference to its height) into more than three square storeys, I have no occasion to consider whether the decision was right or not, there being no such question here.

On the evidence I am of opinion that the defender has not in fact raised his house to a greater height than three square storeys, and that the operations complained of are similar in character and for a similar purpose, although not on the same architectural plan, as those of the pursuers, to which I have already referred. The defender did indeed raise the front wall so as to be a solid screen behind the balustrade, invisible from the ground, and thus without harm to anyone made his attic rooms more commodious—just as the pursuers did theirs, though perhaps less completely. I think the defender's house as it now stands is one of three square storeys with attics, just as that of each of the pursuers' is. Their dormer windows are raised behind the line of the front wall, while the defender's are raised in the line of it. I think this is immaterial—for a prescribed and limited height, had there been such, would have been exceeded by the former as much as by the latter. The whole building might have been thrown back had the proprietor so willed. I am therefore of opinion that the pursuers' complaint is unfounded and ought to be dismissed.

Lord Justice-Clerk—If I could consider the question in this case one which was not concluded by authority, I should have been disposed to agree with Lord Young. But in all material respects the case is identical with that of *Campbell*, to which reference has been made, and the details in so far as they differ from those in *Campbell's* case are more unfavourable. I should have been inclined to read the clause as providing that there should not be more square storeys than three, and that any additional building which did not add a fourth storey, but which was honestly intended to utilise the space embraced within the roof, and not to violate the condition of the feu-right, was not within the prohibition. I also think that restrictions of this kind are now generally admitted to be of very doubtful utility, and as a mere matter of æsthetics a general mistake. But the case of *Campbell* gave a construction to a clause of this kind which was conceived in words almost identical, and the judgment in that case is so expressed as to put that meaning beyond dispute. That judgment related to the feus on the Blytheswood estate, now embracing a large portion of the city of Glasgow. It has been repeatedly founded on during twenty-five years, and never called in question during that period. I have no doubt that the construction thus given to a clause so expressed has been acted on during that period in transactions of great magnitude; nor do I doubt that the judgment was immediately in view when this feu-contract was arranged in 1858, just three years after the case of *Campbell*.

It is true that, as Lord Young has observed, the complainer in that case was the superior, and as far as the questions of title or interest are concerned it has no bearing on this case; nor indeed is this said. But its authority as a canon for construing the prohibition is the only element of any consequence in the present case, and on that point it is conclusive, as the careful expressions in the interlocutor pronounced clearly show.

The Court there find in fact—(1) That the wall of the buildings in question, exclusive of the blocking-course, is of the full height of three square storeys permitted by the feu-contract; (2) That in addition to that height there has been erected a blocking-course of about five feet high; (3) That the use which the advocator is in course of making of the said blocking-course is a perversion of it from its proper use, whereby the square portion of these houses has been raised beyond the height contemplated and permitted by the feu-contract: Find in point of law that the operations complained of were in violation of the feu-contract—and interdict was accordingly granted in that case. I am not prepared to decide otherwise here. I therefore agree with Lord Craighill.

Lord Rutherfurd Clark not having been present at the debate gave no opinion.

The Court refused the appeal and affirmed the interlocutor of the Sheriff.

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