right conclusion—not whether the judgment is opposed to the great weight of the evidence, but whether upon the whole balancing of the evidence the judgment is right or wrong. I must remind my brother Lord M'Laren also that such is the practice not only in this Court but also in the House of Lords in reviewing our judgments. There is no idea of giving more weight to a judgment of this Court in a question of fact than is justified by the evidence after examination by the Court of review, and the whole issue presented to the House of Lords in a case of that kind is whether the judgment of this Court is consistent with the evidence or whether it is not. It certainly would be a very strange result if in reviewing the judgment of the Lord Ordinary we should proceed upon any different principle, and try, as it were, a different issue from that which is in the next stage of the case to be tried in the House of Lords. I apprehend that we must just deal with the evidence in reviewing the Lord Ordinary as the House of Lords deals with the evidence in reviewing our judgment, and then simply say whether the judgment is consistent with and is supported by the evidence or not. I sympathise so far with Lord M'Laren that I should be very glad indeed to see a system established by which, at all events, in a certain class of cases the Lord Ordinary's findings should be final. Indeed, that was at one time proposed, and tried experimentally; but certainly it did not receive much favour from the public or from the profession, and we have heard no more of it since the experiment was tried under Lord Rutherfurd's Act of 1850.

I agree with the majority of your Lordships that we must recal this interlocutor and sustain the defences.

LORD SHAND—As Lord M'Laren has stated some general views upon that matter I desire to say that I entirely agree with what the Lord President has said as to the position in which the Court in reviewing a question of evidence led in the Outer House is placed. We have to deal with the evidence just as the Lord Ordinary dealt with it. He said that, subject to this qualification, which is given effect to here and in the House of Lords, that the very greatest weight is attached to the opinion of the Lord Ordinary in the first instance. If his Lordship expresses an opinion upon credibility, I have scarcely known a case in which that opinion has been disregarded. If, again, it is a question merely of balancing of evidence I say the same thing. I have not known a case where there is at all a balancing of the evidence in which the Lord Ordinary's opinion has been disturbed. But where, as here, the Court comes to the conclusion that the great preponderance of the evidence is against the view of the Lord Ordinary—when that evidence consists of writings which tell their own tale during the whole of the communings of the parties with a distinctness which is much more valuable than parole evidence—I have no hesitation in saying that it is the duty of the Court to disregard the decision of the Lord Ordinary and to give effect to their own views, as we propose to do in this case.

LORD ADAM concurred.

The Court recalled the interlocutor of the Lord Ordinary, and sustained the defences.

Counsel for the Pursuer—Lorimer—Hay. Agent—W. H. Mill, S.S.C.

Counsel for the Defender—H. Johnston—Boyd. Agents—Henry & Scott, S.S.C.

Friday, February 21.

FIRST DIVISION.

[Dean of Guild of Edinburgh.

TURNER *v.* HAMILTON AND OTHERS.

Superior and Vassal—Property—Building Restriction—Right of Superior to Dispense with Restriction.

A proprietor feued out three acres of ground to a building company, who bound themselves to erect on the ground disponed, within a fixed time, buildings of a certain value and kind, conform to a plan annexed to the feu-contract. It was a special condition of the grant that the company, their assignees or disponees, should not be entitled to use the dwelling-houses as shops or taverns without the written consent of the superior, and this provision was to be inserted in all future deeds of transmission.

In accordance with the stipulations in the contract, houses were erected by the company and were sold to various purchasers. The buildings consisted of upper and lower dwelling-houses with separate entrances. The proprietor of certain of the lower dwelling-houses petitioned the Dean of Guild for warrant to alter the same into shops. The petition was opposed by the proprietors of the upper dwelling-houses, but was granted by the Dean of Guild.

On appeal, *held* that one sub-feuar had no right or title to enforce the restriction in the feu-contract against another, in respect that that restriction was personal to the superior alone, and that he had dispensed with it by allowing other dwelling-houses erected on the ground disponed to be converted into shops without objection.

Property—Pro indiviso Proprietor—Right of One Pro indiviso Proprietor to Object to Alterations on the Common Property by the Other.

A building company erected on ground feued to them buildings consisting each of two separate dwelling-houses, the one above the other, with separate entrances. In conveying the lower houses to purchasers, the company only conveyed to them a *pro indiviso* share of the ground on which the

buildings stood along with the proprietors of the dwelling-houses above.

In a petition by the proprietor of certain of the lower dwelling-houses for warrant to make certain alterations thereon, *held* that it was relevant for the proprietors of the houses above the petitioners to object to the application on the ground that the petitioners' operations would involve a considerable excavation of the *solum* on which the buildings stood.

By feu-contract dated 2nd and 8th, and recorded 23rd August 1867, James Walker of Dalry disponed to the Edinburgh Co-Operative Building Company (Limited), three acres of ground, part of the estate of Dalry, in the county of Edinburgh. The subjects were disponed to be held immediately of and under the said James Walker and his heirs and successors in the estate of Dalry, in feu-farm for payment of an annual feu-duty of £150, and under the conditions specified in the contract. One of these conditions was that the company bound themselves and their assignees or disponees "within the space of three years from the term of entry, viz., Whitsunday 1867, "to erect and build upon the ground hereby disponed durable and substantial dwelling-houses of the value of not less than £5250," one-third of the stipulated value of buildings to be erected in each year, "conform to the elevation plan hereto annexed and signed by the parties as relative hereto, and also to maintain and uphold the said dwelling-houses in good condition and repair in all time coming, and which dwelling-houses shall be built with stone and lime and roofed with slates, and shall in all time coming be occupied and used as dwelling-houses only; and the said Edinburgh Co-Operative Building Company (Limited) and their foresaids shall not be entitled to use the same as shops or taverns, or to sell spirituous liquors within the same without the written consent of the said James Walker or his foresaids, with this exception, that the said disponees shall have power to make two shops in the row of houses to be built fronting Dalry Lane." The whole provisions and conditions of said feu-contract were to be *verbatim* inserted or validly referred to in all future deeds of transmission of any part of the said ground under pain of nullity. The elevation plan annexed to the contract showed dwelling-houses of two storeys with slated roofs.

In accordance with the stipulations of this feu-contract, the Edinburgh Co-Operative Building Company built dwelling-houses on the ground feued of at least the required value. The dwelling-houses so built were over 130 in number, and consisted of two storeys and attics; the upper and lower storeys forming separate dwelling-houses, with a main door to each house, those on the ground floor entering from the front—Dalry Road—and those above from Lewis Terrace, by means of outside stone stairs to the back. Each of the lower houses had attached to it in front a small plot of garden ground.

The Building Company thereafter sold the property in separate dwelling-houses, and in the dispositions in favour of purchasers they incorporated the whole conditions of the feu-contract. In conveying the houses on the ground floor to purchasers the company only conveyed to them a *pro indiviso* share of the ground or area on which the dwelling-houses were built, along with the proprietors of the dwelling-houses above.

In 1888 a number of the houses in Dalry Road, namely, Nos. 19, 19a, 21, 23, 25, 27, and 29, which were held by the proprietors under the feu-contract mentioned above, were with the ground in front of them converted into shops without objection on the part of the co-feuars or the superior.

In January 1889 Andrew Scott Turner, who had purchased the dwelling-houses and garden plots in front thereof, Nos. 35, 37, and 39 Dalry Road, which were erected on part of the ground feued under the above-mentioned feu-contract, presented a petition to the Dean of Guild of Edinburgh for warrant to make alterations on three houses "by slapping out the front walls and covering over the plots of ground in front thereof and converting the same into five shops."

The proprietors of the houses in Lewis Terrace, which formed the upper flats of the houses belonging to the petitioner, David Hamilton and others, appeared and opposed the petition.

They stated that the houses in Dalry Road which had already been converted into shops were quite detached from the subjects belonging to them, and separated from them by a roadway 30 feet wide; that the proposed alterations were in direct violation of the conditions of the feu-contract granted to the petitioner's authors—the Edinburgh Co-Operative Building Company—and also of the petitioner's title. They further stated "that the effect of the proposed alterations would be to render their houses uninhabitable during the alterations; that such alterations would seriously affect the structure of the houses by breaking and cracking the walls and plaster, and also affect the foundations of the houses. This was found to be the effect of the operations on the houses above Nos. 19, 21, 23, 25, 27, and 29 Dalry Road, above referred to. Further, if the proposed operations are carried, out the respondents' property will be greatly deteriorated in value."

The petitioner denied these statements, and averred that the restriction in the feu-contract against the conversion of dwelling-houses into shops was personal to the superior, who did not object to the proposed alterations, and that the said restriction had been repeatedly violated, and was no longer a subsisting and enforceable restriction. *Separatim*, that the restriction had been abandoned by the feuars, and the respondents in particular. Further, that the respondents had no right under the feu-contract to enforce its conditions against the petitioner, and had otherwise no interest to do so.

The petitioner pleaded—"(1) The altera-

tions for which warrant is sought being confined to the petitioner's property, and capable of being carried out with safety and without injury to the rights of the respondents, warrant ought to be granted as prayed for. (2) The respondents having no right or interest to insist on restrictions in the said feu-contract, the petitioner is entitled to warrant as craved. (3) The respondents having acquiesced in the violation and abandonment of the said restrictions with reference to other subjects held under the said feu-contract, they are not entitled to plead the said restrictions against the petitioner. (4) The said restrictions being personal to the superior of said subjects, and enforceable by him alone, and he having acquiesced and consented to their violation and abandonment, the respondents have no title to enforce the same."

The respondents pleaded—"(2) The proposed alterations being in violation of the conditions of the feu-contract founded on, warrant to erect should be refused. (4) The effect of the proposed alterations being injuriously to affect structurally and deteriorate in value the respondents' property, warrant should be refused. (5) The petitioner having only a *pro indiviso* right to the ground upon which his houses are built, he is not entitled to alter the buildings or build over the ground without consent of the respondents, and warrant should be refused."

On the 28th March the Dean of Guild pronounced the following interlocutor—"Finds that the proposed operations are confined to the petitioner's own property, and can be executed without danger: Finds that the respondents have neither title nor interest to object to the said proposed operations, therefore repels the pleas-in-law for the respondents; grants warrant as craved: Finds the petitioner entitled to expenses, &c.

"*Note.*—The subjects in question are situated in Dalry Road, in the vicinity of Haymarket Station. At this point Dalry Road runs, roughly speaking, north and south. It was formerly known as Dalry Lane. The ground feued under the feu-contract after mentioned lies on the eastern side of Dalry Road, to which it has a frontage of 333 feet. This frontage is bisected by a lane running eastwards from its junction with Dalry Road. The northernmost half of the frontage was formerly known as Walker Terrace, and the southernmost as Lewis Terrace. The whole frontage is now part of Dalry Road. The houses thereon, which consist of two storeys, with attics, are built in flats, the main-door flats having access by Dalry Road, the upper flats and attics by back stairs to the street behind, which is known as Lewis Terrace.

"The houses along this frontage to Dalry Road were all built with plots of garden ground in front. In the northmost half of the frontage, formerly known as Walker Terrace, these plots of garden ground have all been built over with erections similar to those for which warrant is craved by the petitioner. The plots of garden-ground in the southernmost half of the frontage (formerly Lewis Terrace) are all unbuilt upon. The properties of the petitioner are situated in the southernmost half of the frontage.

"The petitioner is proprietor of the main-door houses, 35, 37, and 39 Dalry Road, and the plots of ground in front. He desires to build over these plots, and to convert his houses into shops. The respondents, Hamilton and others, are proprietors of houses above these main-door properties, and numbered respectively 9 to 12 Lewis Terrace. They object to the proposed operations as infringements of the conditions of the feu, and as injurious to the structure of their properties.

"The title of all the parties hereto flows from a feu-contract between James Walker, Esquire of Dalry, and the Edinburgh Co-operative Building Company, dated the 2nd and 8th, and recorded the 23rd August 1867, whereby Mr Walker, in consideration of the yearly feu-duty of £150 sterling (which, however, was not to be paid in full till 1870) and certain duplicands, feued to the Company three acres of the estate of Dalry. The disponees bound themselves to erect on the ground durable and substantial dwelling-houses of the value of not less than £5250 within three years from the term of entry, one-third of the stipulated value of building to be erected in each year 'conform to the elevation plan hereto annexed, and signed by the parties as relative hereto, and also to maintain and uphold the said dwelling-houses in good condition and repair in all time coming, and which dwelling-houses shall be built with stone and lime, and roofed with slates, and shall in all time coming be occupied and used as dwelling-houses only; and the said Company shall not be entitled to use the same as shops or taverns or to sell spirituous liquors within the same without the written consent of the said James Walker or his foresaids, with this exception, that the said disponees shall have power to make two shops in the row of houses to be built fronting Dalry Lane.' All conditions of the feu-contract were appointed to be inserted or referred to in all future transmissions of the ground disponed, or any part thereof.

"The petitioner is proprietor, under various dispositions, of the houses mentioned above, with a *pro indiviso* share of the ground on which the house is built along with the proprietor of the dwelling-house above, and he is also proprietor of the pieces of garden ground attached to these main-door properties. These dispositions are made under the burdens, conditions, provisions, and obligations contained in the feu-contract.

"As already observed, the obligation of the Company was to build houses of stone and lime and roofed with slate, and of a certain value, conform to the elevation plan annexed to the contract. The plan consists only of a front elevation shewing a row of small two-storeyed houses of stone and lime, and roofed with slate. It is however, the fact that the houses were not erected by the Building Company in strict conformity to this elevation plan. The buildings as erected, and as they now stand, consist

of two storeys, with attics and dormer windows, which constitute a conspicuous departure from the original plan of Walker Terrace and Lewis Terrace."

"Further, the Company were not to be entitled to use the buildings as shops or taverns or to sell spirituous liquors within the same without the written consent of the superior, with the exception that two shops might be built 'in the row of houses fronting Dalry Lane.' But it is the fact, as already explained, that the whole of the northernmost half of the 'row of houses fronting Dalry Lane' has had its front plots built over and its main door flats converted into shops. Now, it may be that the conditions of the feu-charter were intended to operate for the mutual benefit of all the feuars, and be mutually enforceable by them; but it appears to the Dean of Guild that it is unnecessary to consider this question, because even assuming that such mutuality was in contemplation, it seems that the right to enforce the restriction contended for by the respondents has been departed from. The deviation from the plan has existed from the first. This never was a street of houses as shown on the elevation plan. It is not now the same street as it was originally constructed. This is therefore a much stronger case of contravention that that of *Stewart* v. *Bunten*, 5 R. 1108, where the squaring of an attic flat to the back and the erection of storm windows were not held to import acquiescence in the entire abolition of the restrictions. This is not a case of a superior seeking to enforce a condition of his contract, but a case of co-feuars who seek to enforce conditions in regard to one part of the subjects feued which they have omitted to enforce in regard to another part of these subjects. The respondents therefore appear to have barred themselves from advancing their present objections. The Dean of Guild thinks that he has found sufficient authority for this opinion in the following cases:—*Campbell* v. *The Clydesdale Bank*, 6 Macph. 943; *Hislop* v. *M'Ritchie's Trustees*, 8 R. (H. of L.) 95; *Calder* v. *Merchant Company of Edinburgh*, 13 R. 623. Nor does the Dean of Guild think that there is any force in the respondents' argument, that the northernmost half of the frontage is separated from the southernmost by the roadway mentioned above, and therefore that until the present time they had no interest to object to the alleged contravention. The buildings on the frontage practically form one row. The feu-contract treats the subjects feued as a *unum quid*, and specially refers to that part which originally formed Walker Terrace and Lewis Terrace, and now forms part of Dalry Road, as 'the row of houses to be built fronting Dalry Lane.'

"With regard to the superior, the deviation from the feuing plan at the first and the construction of shops in that part of Dalry Road formerly known as Walker Terrace have never been objected to by him. Apparently he has acted as if his only interest was to have a sufficient security for the feu-duty, and this has by no means been diminished by the enlargement of the accommodation of the upper flats or the conversion of the main door flats into shops.

"The Dean of Guild has carefully considered the averments of the respondents with regard to the injury which they allege would result to their properties from the proposed operations. He is of opinion that these averments are entirely unfounded. If carried out in the manner proposed, the operations will not render the respondents' houses uninhabitable; they will not injure the structure of their houses or affect in any way the foundations. There is no danger that the light and air of the respondents' properties will be in any way affected, and assuming it to be the fact that injury to the amenity of the respondents' properties might deteriorate their value, that does not appear to be sufficient to give the respondents a title to object—*Barclay* v. *M'Ewan*, 7 R. 792; *Calder* v. *Merchant Company of Edinburgh*, 13 R. 623."

The respondents appealed, and when the case was being heard were allowed to amend their record at the bar by the addition of the following averment—"The petitioner proposes, as shown upon the plans produced, to excavate the *solum* or part of the *solum* of the area on which the dwelling-houses are built to the depth of three feet or thereby, and such excavation is necessary to enable him to carry out the proposed alterations."

The petitioner was allowed to make the following averment in answer—"The averments in the amendment are denied, subject to the following explanations—The existing houses are entered on the ground floor by steps leading from the front plot. From the top of these steps the flooring is level all the way to the back wall. Under the floor of the back rooms there was constructed as part of the original operations a cellar, about four feet high, which is used for storing coals. Under the floor of the front room there is no cellar but a space partly left for ventilation, and partly filled up with shivers and building rubbish. These it is now proposed to take out and to lower the floor to the level of the floor of the back cellar above mentioned. If this involves excavation of the original surface at all, which is not admitted, it does so only in part, and not to a greater depth than a few inches. The proposed alterations are all above the level of the foundations of the houses."

Argued for the appellants:—(1) *Restriction in feu-contract*—The restriction in the feu-contract of 1867 was presumably in favour of the feuars, as the superior's right was confined to drawing his feu-duty. It was imposed in perfectly valid language. Restrictions validly imposed were just servitudes on the property of one co-feuar in favour of the other co-feuars, and if a restriction was validly imposed as a servitude, the co-feuars might object to its being removed merely by the consent of the superior. The meaning of the clause in the feu-contract of 1867 was that the consent

of the superior was necessary in addition to an absence of objection on the part of the co-feuars—*Dalrymple, &c.* v. *Herdman, &c.* June, 5 1878, 5 R. 847. The reason of the consent of the superior being required was this, that it might still be the interest of the superior, having ground in the neighbourhood to maintain the restriction, even though all the feuars agreed to abandon it. Further, it was not suggested that any written consent had been given. (2) *Pro indiviso right of property*—The operations contemplated involved a considerable excavation of the *solum* on which the house stood. The right of common property possessed by the respondents gave them an absolute right of vetoing any such operations. Even although no interference with the *solum* were contemplated, the respondents had a right to veto any alteration on the house built upon it.

Argued for petitioner and respondent:—(1) *Restriction in feu-contract*—the restriction could be withdrawn by the consent of the superior. That was the only requisite expressed in the contract. The fact that power was given to the superior to dispense with the restriction negatived the idea of mutuality of obligations and right between the co-feuars—*Thomson* v. *Alley and Macllellan*, December 22, 1882, 10 R. 433. (2) *Pro indiviso right of property*—The right was qualified by the fact that the ground was dedicated to building. An action of division and sale was therefore impossible, and accordingly in all matters relating to building rights the ordinary rule must operate. If the petitioner did propose to pare away a few inches of the *solum* on which the house stood, that was a mere incident in carrying out the right which he undoubtedly had to build over the garden ground, and should not be allowed to affect that right.

At advising—

LORD PRESIDENT—The ground on which the houses along what is now Dalry Road are erected originally formed part of Mr Walker's estate of Dalry, and by feu-contract entered into by him with the Edinburgh Co-operative Building Company in 1867 he feued off three acres of this ground. One of the conditions on which the contract was granted was that the feuars should erect durable and substantial dwelling-houses on the ground disponed of not less than a certain fixed value within the space of three years. The houses were to be erected conform to an elevation plan annexed to the contract, and signed by the parties as relative thereto. Houses were accordingly erected along the line of what is now called Dalry Road, and substantially in accordance with the elevation plan. They were built not quite out to Dalry Road, but leaving a space in front, and were so constructed as to be divided into upper and lower storeys, the one being entered in front from Dalry Road, and the other by the back from Lewis Terrace.

The contract contained a certain restriction on the right of the feuars, which was introduced by the superior, it being provided that the feuars should not be entitled "to use" the houses to be built "as shops or taverns, or to sell spirituous liquors within the same, without the written consent" of the superior, with an exception which is not material to the present question. Now, the peculiarity of the clause is that the Co-operative Company are laid under the restriction of not using the houses as shops, &c., except with the written consent of the superior. That exception or reservation is the peculiar feature of the present case as distinguished from any other with which we have had to deal. There is, I think, a reservation of right on the part of the superior to withdraw the restriction as a matter of arrangement between him and the original feuars the Co-operative Company, and therefore it must be read to mean that the superior if he chose to give a written consent to the withdrawal of the restriction in one instance must withdraw it as regards the entire subjects of the contract. Of course it was understood between the parties that the Co-operative Company were to sub-feu the ground disponed in smaller parts, and I do not think that the superior could capriciously grant permission to one of the subfeuars to make a shop or public-house, and refuse it to another, because the stipulation was not introduced with reference to a subfeu, but with reference to the original feuar of the whole subject. The Co-operative Company were forbidden to use the houses as shops or taverns unless with the written consent of the superior, and if this consent was once given I think the restriction went off, and they were entitled to erect shops or taverns on any part of the ground.

That being so, I do not see how it can be maintained here that there is any mutuality of rights and obligations between feuars such as has been held in other cases to have been constituted by the operation of the restriction in the original feu-right, and to have been imposed on all the different feus along with the other rights given out by the superior. Here the superior is not bound to continue the restriction. No doubt the feuars are bound to continue it as in a question with the superior, and to insert it in any sub-feus granted by them which are to be subject to the conditions expressed in the principal contract, but while the subfeuars are under an obligation each to the superior to abstain from using their houses as shops or taverns, the superior himself may dispense with that condition. The condition is one which is undertaken to him only and to no one else.

It appears to me that in every case where there is a community and mutuality of obligation and of right between feuars, the superior must also be bound, and that arises from the existence of a feuing plan, and from a consideration of the whole circumstances under which feus are granted. Suppose a feu is granted to A, and the superior inserts a condition in the title—that is, a condition between A and the superior alone, and no one else—unless the superior is placed under an obligation to insert the condition in the other feus to be

granted by him, and if so, a right is thereby created in the person of each feuar as he takes his feu to found upon the *jus quæsitum* so acquired by him. But where everything is left in the option of the superior to insist upon the restriction or not, there can be no ground of the kind hitherto recognised for holding that the feuars have mutual rights and obligations *inter se* arising out of their feu-contracts. It appears to me clear to demonstration in this case that the feuars with whom we are dealing could not have enforced this restriction as a matter of right against their neighbours. It is said, no doubt, that the restriction remains good unless the superior consents in writing, but I think that the superior having power to dispense with the restriction may abandon it without giving a written consent. It is clear to me that he has done so by what has happened in the other parts of the three acres of ground which have been feued out. In a variety of cases shops have been erected over the ground in front of Dalry Road. It is quite clear that after that has been done without an objection or *repugnantia* on the part of the superior, the superior could not come forward and object to houses in the same three acres being turned into shops, and that disposes of the case so far.

But there is a further complaint made by the appellants that the petitioner proposes by his operations to interfere with the *solum* on which the dwelling-houses are built, and which belongs partly to him and partly to them. The titles of the two parties undoubtedly give them not only the separate dwelling-houses thereby disponed to them, but also a *pro indiviso* share of the ground or area on which the dwelling-houses are built, and that is a peculiarity of the case which certainly distinguishes it, in appearance at least, from any case of the kind previously before us. It is not, I must say, very easy to see what good can come from the conveyance of a *pro indiviso* right in the *solum* to the proprietor of the upper flat unless it be a title to object to such operations as are complained of here. In all other respects he seems to be in entirely the same position as if he had not a *pro indiviso* share of property in the *solum*, but a common interest, *i.e.*, he has a right of servitude of support. But no doubt it may be maintained—and with a good deal of plausible reasoning—that a right of common property having been given to the proprietor of the upper and lower flats, one *pro indiviso* proprietor is entitled to prevent the other from interfering with the subject of the right of common property. It therefore appears to me that the Dean of Guild will require to have his attention called to this feature of the case, and to the averments made on record by amendment since the case has been here, because it is now averred on the one side that the *solum* will have to be removed to a depth of 2 or 3 feet in order to convert the lower part of the buildings into shops or warehouses. Now, I am not prepared to say that the proprietor of the lower half of the houses would be entitled to interfere seriously with the *solum* which he held under a right of common property. On the other hand, it is now averred by the petitioner that the interference with the *solum* will be quite trifling, and amounts to no more than a certain amount of levelling in order to make the building suitable to the purpose for which it is being altered. I think these conflicting averments must be made the subject of some investigation, but I see no reason why the investigation should not be made by the Dean of Guild himself. No one certainly has better means of judging than a man of skill like the Dean of Guild, who himself inspects the ground on which the houses in question are built. I therefore propose that we should recal *in hoc statu* the Dean of Guild's interlocutor, and remit to him with special instructions to investigate the matter referred to, and visit the ground.

The remainder of the case, I think, does not admit of any difficulty at all. It is not disputed that the garden ground is the absolute property of the petitioner, and that he is entitled to build upon it irrespective of any question as to use, and I therefore say no more about that matter.

Accordingly I substantially agree with the opinion of the Dean of Guild, but I think we should make a remit to him in the terms I have suggested.

LORD SHAND—The Dean of Guild in reaching the result at which he has arrived has proceeded on the assumption that the restriction in the titles is effectual so as to be mutually enforceable between the feuars, but he has held that in the circumstances, and in view of the fact "that the whole of the northernmost half of the row of houses fronting Dalry Lane" has had its front plots built over, and its main-door flats converted into shops," the appellants must be held to have abandoned the right to enforce it. The respondent in this Court has maintained an argument which naturally presents itself first for consideration, because he has challenged the right of the feuars to insist upon the restriction in a question with each other.

I concur with your Lordship in the views which you have expressed upon this aspect of the case. If it were clear that the feuars were entitled, looking to the terms of their title, to enforce the restriction, then the question of abandonment would arise. But the first question for consideration is, whether the restriction is enforceable by the feuars *inter se* or not? The words of the restriction are—"The said Edinburgh Co-Operative Building Company (Limited), and their foresaids, shall not be entitled to use the same as shops or taverns, or to sell spirituous liquors within the same, without the written consent of the said James Walker or his foresaids." What is the plain common sense meaning of that restriction? Is it not this, that if the superior gives his consent, then the shops or taverns may be erected? I confess I am unable to read the clause in any other way. It is a restriction which is subject to the condition that if the superior chooses to waive or remove it he may do so. I fail to see how

the feuars can have a right to enforce the restriction, and are nevertheless to be entitled to ignore the condition attaching to it.

In connection with this point I may notice that the terms of the restriction in the present case are different from those in the case of *Dalrymple* v. *Herdman*, 5 R. 847. In that case there were clear restrictions both in regard to the nature of the structure and to the use to which it was to be put, subject to no such power to the superior to relax those restrictions as here occur. In addition, the superior provided by a separate clause that in the event of a violation of the restriction he was to be entitled to claim payment of double of the ordinary feu-duty, which gave him an additional means of enforcing the restriction which might possibly be available to him even if the feuars by common consent abandoned the restrictions *inter se*. But then the feuars, from the absolute terms of the clause, had a right to enforce the restrictions *inter se*. Here I think they have no such right, because it is in the power of the superior to remove the restriction if he pleases.

So standing the title, I think that if it appeared that the superior had not given his consent to waive the restriction the feuars might have been in a position to say to one another—"You shall not use your building as a shop or tavern without the consent of the superior, and until he gives it." But I agree with your Lordship that there is clear evidence before us that the superior has given his consent to the removal of the restriction, not indeed as applicable to the case of the particular shop or shops with which we are here concerned, but as applicable to the whole block of buildings which have been erected upon the subjects feued. As matter of fact, not only have the two shops originally allowed to be erected in terms of the feu-contract been constructed, but other six shops have also been built, and have been in existence without objection for years. This acting on the part of the superior implies, I think, an acquiescence and consent by him to the removal of the restriction generally, which he alone had it in his power to enforce. Accordingly, reading the provision of the feu-contract as applicable to a restriction which the superior may remove if he thinks fit, I think he has so removed or discharged it by consenting to the erection of the shops which have already been put up on the ground. The restriction therefore cannot, I think, be pleaded by one feuar against another.

The second point in the appellant's argument was founded upon the *pro indiviso* right to the *solum* of the ground which is to be found in the appellant's title. The right is one of a very peculiar kind. It is difficult to conceive how it could be vindicated for any valuable purpose, except perhaps in the event, which was suggested, of minerals being found in the subjects. The present case is quite distinguishable from that of *Johnston* v. *White*, 4 R. 721. In that case the Court gave weight to the argument which was founded upon the *pro indiviso* right, but there the ground was unbuilt upon, and by the titles it was provided that it should be kept as an open space. The respondent there was one of several proprietors who was entitled to prevent any building being erected on the ground without his consent. In the present case the *solum* is in conformity with the title, exclusively occupied by a building belonging to the petitioners. I think the whole length to which the *pro indiviso* right on which the respondents found can be carried is, that it gives them a right to object to any material alteration upon the *solum* as now built upon, in which they and the petitioner have a common right. But the petitioner does not propose to make any such alteration. No doubt the respondents state that they do by the plans produced, and in that view I think it right that we should make a remit to the Dean of Guild, so that he may be in a position to check the petitioner's proceedings if he infringes the respondents' rights.

I think with your Lordship that it is desirable that the Dean of Guild should personally visit the premises, particularly looking to the averment that the effect of the operations on the six houses to which I have referred has in each case been seriously to affect the structure of the houses by breaking and cracking the walls and plaster. The Dean of Guild ought to take that matter into consideration, and I do not think that the operations which are contemplated ought to be allowed if the result is to be that the wall in which the parties have a common interest is to be seriously affected.

Upon these grounds I agree with your Lordship that the appeal must be refused, but that a remit should be made to the Dean of Guild in the terms which your Lordship has suggested.

LORD ADAM — The only condition or obligation in the feu-contract which the appellants maintained they had a right to enforce was that which provided that the Co-operative Company should not use their houses as shops "without the written consent" of the superior. Upon the construction of that condition it appears to me that its only meaning must be that the Co-operative Company may use the houses as shops provided they have the superior's consent. This seeems to me the necessary construction of the clause. That being so, supposing one of the feuars produces the written consent of the supeeior to the alteration of his premises, what could another feuar or the other feuars say? With that consent in his possession, a feuar would clearly be entitled to use his dwelling-house as a shop. In that case where would be the mutuality among the feuars? There would be none. It therefore appears very evident to my mind that this condition was introduced into the feu-contract for the benefit of the superior alone, and that it is in his power to dispense with it.

If this is so, I do not see why the ordinary principle should not be applied, that a supe-

rior may abandon a restriction if he thinks fit, and if he does so it comes to the same thing as if the restriction had never been inserted in the feu-contract. Could it be held that a superior who had allowed a number of houses to be converted into shops or used as shops was entitled to insist upon the restriction being enforced in a single instance, when he had already waived it in numerous other cases. That would be entirely out of the question, and I have no doubt that the superior must be taken to have abandoned the restriction. Accordingly I read the condition as if it had been non-existent, and that is an end of the case.

In regard to the argument which has been founded upon the appellant's *pro indiviso* right to the *solum*, my opinion is that in so far as the respondents' premises extend down to the foundation, they are their absolute property, as owners of the lower house, and that within these limits they may do what they please. But they are not entitled to do anything further which may interfere with the *solum*, and that being so, I think it is right that there should be a remit to the Dean of Guild to visit the premises and report, because this is a matter which was not previously before him.

LORD M'LAREN—In this case, and in most of the cognate cases which have been tried, the first and leading question is, whether one of a body of feuars can be restrained from deviating from the conditions of the feu right at the instance of another member of the community of feuars. At a not distant period in our law it was thought that no one but the superior had a title to enforce such conditions, and that a feuar who might feel aggrieved by variations of the conditions of holding affecting the residential character of the locality could only take action against the other feuars with consent and by using the name of the superior. The rule has now been to some extent relaxed, and under certain conditions one of a community of feuars is held to have a title to enforce such obligatory conditions as are presumed to be inserted for the benefit of the community. After some fluctuations of judicial opinion it may be taken to be established by the decision of the House of Lords in the case of *Hislop*, 8 R. (H. of L.) 95, that in order to give such a right to the feuar two conditions are necessary. In the first place, the restriction which is sought to be enforced must be of a strictly obligatory character; and in the second place, it must be one which the Court hold to have been inserted for the benefit of the community of feuars.

In regard to the second condition, there was always more difficulty than in regard to the first. But it has now been determined that a condition is for the general benefit, either where the superior undertakes to insert identical conditions in the titles of the other feuars, or, where the titles of the feuars have a common origin, *e.g.*, where the entire subject is conveyed to a building company who are to give out sub-feus or dispositions containing identical restrictions.

We are here in a case of the latter description, and accordingly no question arises as to the mere title of the respondents in the Dean of Guild process to press their objections. The question in dispute has relation rather to the obligatory character of the restriction which it is sought to enforce, viz., that the houses contemplated in feu-contract shall not be converted into shops. I am far from saying that such a condition may not be enforceable even when the deed may contemplate its ultimate defeasance. For instance, if it were provided in a feu-contract that the building conditions might be varied or relaxed by the superior, but only on a joint representation by the body of feuars, or on a report by an architect or man of skill that the proposed variation would not be prejudicial to the residential character of the place, I think we should hold that the building conditions were obligatory and enforceable according to their terms notwithstanding the provisions as to eventual variation. That is to say, where the superior is to be guided by the wishes of the feuars themselves or is to act according to the best information and advice he can obtain of what is suitable for the locality, I think we should hold that the building conditions might be enforced at the instance of a feuar having an interest in their enforcement. But where the obligation is one that may be enforced or dispensed with according to the pleasure of the superior, I cannot hold that the clause gives rise to any right which the feuars as a body have a title to enforce. It is an obligation which may be terminated at any moment by the consent of the superior, because he is not debarred by any agreement with the other feuars from giving his consent to the desired variation of the conditions of feu.

I therefore concur in the opinion of your Lordships that this is not a case in which the feuars came under a common obligation, or could have understood that they were under any restriction not defeasible at the will of the superior.

Upon the other question in the case I do not propose to add anything to what has been said by your Lordships.

The Court pronounced this interlocutor:—

"Having heard counsel on the record as amended at the bar, together with the plans and other productions, Recal *in hoc statu* the interlocutor of the Dean of Guild dated 28th March 1889, and remit to him to consider the additional averments now added to the record by way of amendment in connection with the titles conveying to the proprietor of the upper flats of the house in question a right of common property in the *solum* on which the said house is built, and to visit the premises, and proceed further as shall be just, and decern," &c.

Counsel for the Petitioner—Sir C. Pearson—Guthrie. Agents—Duncan Smith & Maclaren, S.S.C.

Counsel for the Respondents — Low—Graham Murray. Agents — M'Gregor & Cochrane, S.S.C.

HOUSE OF LORDS.

Monday, February 17.

(Before Lords Herschell, Watson, and Macnaghten.)

SIR A. D. STEWART *v.* KENNEDY AND OTHERS.

(*Ante*, vol. xxvi. p. 338, 16 R. 411.)

Entail—Sale of Entailed Estate "subject to Ratification of Court"—Contract—Alleged Misunderstanding of Conditions—Specific Performance—Entail Amendment Acts 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 4; 1853 (16 *and* 17 *Vict. c.* 94), *sec.* 5; 1875 (38 *and* 39 *Vict. c.* 61), *secs.* 5 *and* 6—*Entail Act* 1882 (45 *and* 46 *Vict. c.* 53), *secs.* 13, 19, 20, 21, *and* 22.

An heir of entail in possession by holograph letter offered to sell an entailed estate at a certain price under the condition that the sale was made "subject to the ratification of the Court." The offer having been accepted, the heir of entail presented a petition to the Court under sections 19 and 22 of the Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), craving the Court to ratify and confirm the contract of sale, and to grant an order of sale of the estate. To this application the next heir lodged answers, and founded on section 22 of the Act of 1882, under which he had a right to object to a sale by private bargain. The heir of entail asserted that in making the aforesaid application, and being ready and willing to take all necessary steps thereunder, he had fulfilled all the obligations under which he had come to the purchaser.

The latter brought an action for declarator that the missives constituted a valid contract, and that the defender was under a legal obligation to apply to the Court for authority to sell and dispone the estate, and for implement of the contract.

Held (*aff.* the judgment of the Court of Session) that the procedure provided by sections 19–22 of the Entail Act 1882 did not apply, and that the defender was bound to present and prosecute a petition under the Entail Amendment Act 1848, sec. 4, and the Entail Amendment Act 1853, and the Entail Act 1882, sec. 13, for authority to sell the estate, with provision for compensating the next heir; and further, that the pursuer should forthwith lodge in process a draft of a disposition by the defender of the estate.

This case is reported *ante*, vol. xxvi. p. 338, and 16 R. 421.

Sir A. Stewart appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, the appellant is the heir of entail in possession of the estate of Murtly and other estates in the county of Perth. On the 19th of September 1888 a contract was constituted between the appellant and respondent by missives in the following terms:—"Dear Sir—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof, for ever, on the basis of 25 years' purchase of the present, or even an appraised valuation of the nett rental thereof as may be ascertained by an agreed appraisement, you appointing one and me the other, and if the two cannot agree a third party to be chosen by the two. Payment to be made in cash unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court. Yours truly, A. D. STEWART." "Dear Sir Douglas—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof, for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at 25 years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto. Yours faithfully, JOHN S. KENNEDY."

It is not in dispute, and indeed could not be, that these letters created a binding obligation on the one part to buy and on the other to sell, but it is equally clear that the sale was "made subject to the ratification of the Court." It is on the meaning of these words that the controversy between the parties arises. In order to make the point at issue clear it is necessary to call attention to the provisions of the law relating to the sale of entailed estates in Scotland.

By the Entail Act of 1848 power was given to an heir of entail to sell the entailed estates, provided he obtained the consent of the heirs of entail if less than three, or of the three next heirs of entail if there were more then in existence, and also obtained the authority of the Court of Session in the manner prescribed by the statute. If these conditions were fulfilled the heir was entitled to make and execute at the sight of the Court all such deeds of conveyance and other deeds as might be