From anything I have heard I should not have been prepared to remove the trustee as having been guilty of any breach of trust such as to call for that proceeding. But we cannot shut our eyes to the facts which have supervened. The fiar is sole trustee, while the petitioner is the liferenter, and for the time the sole beneficiary. We must have regard to the nature of the estate. It consists apparently of a considerable amount of property of different kinds in the town of Hamilton, some of it not of the best class, but all of it yielding a certain rental. It is quite obvious that questions must arise from week to week or even from day to day as to the amount to be spent on the upkeep and repair of such property, and these questions of what is or what is not proper expenditure must arise as between the liferenter and fiar. Therefore I agree with your Lordship that we should appoint a factor without removing the trustee.

As your Lordship has pointed out, we are not interfering with a trust in which everything has gone on as the truster contemplated. The truster obviously thought that it would be administered, in the first place at all events, for the benefit of the liferenter, and it was not at all in his view that it should be administered solely by the fiar as sole trustee. The fact is that the liferenter was, in the contemplation of the truster, to be the factor. The truster also, as was right, appointed the fiar, who had an interest in the estate, one of the trustees, but only one of several, for he conjoined three others with him. But what has since taken place has led to the result that the fiar has been left in the sole management and control of the trust-estate, and has thus been put in a position of conflict with the liferenter. Now that, as we have seen, there have been and may be constant disputes as to what is or what is not proper expenditure, I agree with your Lordship that it is for the advantage of the estate that the present course of management should be put an end to and a judicial factor appointed.

LORD M'LAREN—When the ownership of property is such that one individual has usufruct for life, and another has the fee or reversion, the kind of management which the law prescribes is one which entitles the liferenter to administer the estate during his life for his own benefit, he being at the same time under obligation to keep the subject in repair as a matter of duty to the fiar. In this case, by arrangement between the limited owner and the fiar, this state of matters is reversed, the fiar is administrator of the estate for the benefit of the liferenter. But the trust was not put into its present position with a view to the existing character of the interests arising under it, but under an arrangement by which the petitioner was to draw a fixed annuity out of the trust-estate. Now, there are no ulterior interests to be protected by this trust, nor is the circumstance that the trust has been put under the management of the son a consequence of any change on the beneficial interests of the two parties to it. It is purely a trust for administration, leaving the essential rights of the parties untouched. In such circumstances I agree with your Lordships that the trust ought to be continued only so long as the administration is satisfactory to the parties concerned. I do not think that we have any precedent directly in point, because this is a very unusual arrangement that a liferenter should put the management of property into the hands of the fiar. But we have precedents which are applicable in principle, and particularly in the case of marriage-contract trusts, where it is quite settled that the spouses may revoke the appointment of trustees and appoint new trustees in whom they have confidence. Now, in this case the liferenter was so far committed to the principle of neutral management that he could not very well be allowed to take the estate into his own hands, and all that we can do is to put the estate under neutral control.

LORD KINNEAR concurred.

The Court sequestrated the estate, and appointed John M. Macleod, C.A., Glasgow, as judicial factor.

Counsel for the Petitioner—Strachan—Crabb Watt. Agent—James Gibson, S.S.C.

Counsel for the Respondents—W. Campbell. Agents—Bruce & Kerr, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

JOHNSTON AND ANOTHER *v.* SAWERS-MITCHELL.

Burgh—Dean of Guild—Building Restrictions—Building Plan—Jus quæsitum tertio—Acquiescence—Servitude—"Vents."

A superior feued three building areas in a proposed street to two persons "according to a ground plan and elevations of the said street and intended buildings prepared by Patrick Wilson." The feuars, among other restrictions and conditions, were forbidden either to build on the plots of ground in front of the areas, or to build on the back ground buildings with fireplaces or vents. All these prohibitions and conditions were appointed to be engrossed in the sasine and in all renovations of the feu-right. This appointment was duly observed.

The feuars bound themselves to build houses on the areas conform to Wilson's plan, and agreed that all operations should be conducted under inspection of Wilson. There was no direction that these obligations should enter the sasine, and accordingly they did not appear either in the sasine or in subsequent titles.

Houses were built on the areas feued,

and the street was completed under titles with similar provisions.

Alterations were made from time to time on the front elevations, and, in particular, certain dormer windows were erected on two of the houses without objection.

The singular successor of one of the original feuars desired, *inter alia*, to reconstruct his attic flat as a square storey, and to erect buildings at the back with ventilators. The neighbouring feuars maintained that these proposals were excluded by the restrictions of the feu.

The Court *affirmed* the Dean of Guild's interlocutor granting warrant for the operations.

The Lord Justice-Clerk was of opinion (1) that in consequence of the alterations acquiesced in, it was no longer open to the feuars to plead the restrictions of the feu-charter; and (2) that "vents" meant chimneys, and did not include ventilators.

Lord Rutherfurd Clark held that the restrictions if duly imposed had not been departed from, but that the prohibition against building any other kind of house than that prescribed was not inserted for the common benefit of the feuars, and that it was enforceable only by the superior.

Lord Trayner concurred with the Lord Justice-Clerk and with the latter part of Lord Rutherfurd Clark's opinion.

Lord Young *dissented*, on the ground that the restrictions had not been abandoned, and that the obligation to build houses of a particular construction implied an obligation to maintain that construction, and that this restriction was a servitude on each of the feuars in favour of all the others.

By feu-contract dated in 1824, Joseph, Charles, and George Archibald feued to Mrs Shillinglaw and William Scott, copartners under the firm of Shillinglaw & Scott, builders, Edinburgh, three building areas or lots of ground of the west row of the new street called Archibald Place, as delineated "according to a ground plan and elevations of the said street and intended buildings prepared by Patrick Wilson, architect." The feuars were prohibited from erecting buildings of any kind whatever on the plots of ground in front of the houses to be erected except parapet walls and railings for enclosing and dividing these plots, "to which effect the whole feuars of Archibald Place are hereby declared to have a servitude over the said plots of ground, and they are likewise hereby expressly prohibited and debarred from erecting buildings of any kind on the back ground to the west of the dwelling-houses built, or to be built, on the lots of ground hereby feued which shall have fireplaces or vents of any kind therein, or the roofs whereof shall rise above the soles of the windows of the principal entrance floor of said dwelling-houses. . . . And also declaring that the said Mrs Elizabeth Cooper or Shillinglaw and William Scott, and their aforesaid possessors of the ground hereby feued, shall be, as they hereby are, perpetually limited and restricted from converting the houses built or to be built on said areas into shops or public ware-rooms for business or handicraft of any kind, from baking or brewing for sale, and from retailing of goods or vivers of any sort or denomination therein, and in general from using the property in any way whatever that may be offensive or tend to create any nuisance to the street or neighbourhood." The feu-contract then went on to declare that the feuars were bound to acquiesce in and contribute to the expense of carrying out any improvement which the majority of the proprietors should consider advantageous, "all which conditions, provisions, and declarations are hereby appointed to be engrossed in the instrument of sasines to follow hereon, and in all the future renovations of this feu-right." This appointment was duly obeyed.

The feuars bound and obliged themselves "immediately to erect and finish a handsome dwelling-house on each of the three areas hereby feued, in the precise situation, and of the dimensions and style of building exhibited on the aforesaid plan and elevations of the said new street, which are subscribed by them as relative hereto." It was provided that all operations should be carried on open to the inspection and correction of the said Patrick Wilson, to secure that they should be executed agreeably to the said plan and elevations, and in perfect accordance with the objects thereof. There was no direction that these obligations should enter the sasine, and they did not in fact enter the sasine.

The street was erected in accordance with the conditions and the plans, and consisted of a short row—about 60 yards in length—of houses of two storeys and attic flats, with sloping roofs and skylight windows.

From time to time alterations were made in the front elevation of the houses, which are sufficiently described in the Dean of Guild's note.

In 1892 Charles Johnston was proprietor of No. 6 Archibald Place, the middle feu of the three formerly disponed to Shillinglaw & Scott. He sold his feu to the Royal College of Physicians, contingent upon getting authority for them to carry out the alterations they desired to make. Johnston and the College therefore presented a petition to the Dean of Guild Court for warrant to erect a building of one storey to form an experimental laboratory on the vacant ground at the back; to make certain internal alterations on the ground floor and the first floor, and to convert the attics into a square storey. All the alterations were to be made with the view of adapting the house "for a laboratory for scientific research."

The neighbours on each side of No. 6, Miss Mary Sawers-Mitchell, proprietrix of No. 8, and Miss Euphemia Dawson MacRitchie, 4 Archibald Place, lodged objections on three grounds—They objected, *in toto*, to the use to which it was proposed to put

the house, and in any case to the substitution of the square storey for the attic flat, and to the proposed ventilators on the roof of the building behind.

The petitioners pleaded—"(1) The petitioners are entitled to warrant as craved, in respect that the proposed operations are confined to the petitioners' own property, and that the same are a lawful exercise of their right of property. (5) Assuming that the plan produced was binding upon the original feuars, the same has been departed from in material respects, and cannot now be enforced by the respondents against the petitioners."

The respondents pleaded—"(2) The plans lodged by the petitioners in accordance with which they crave warrant to erect the experimental laboratory mentioned in the petition, being in direct contravention of the conditions and restrictions contained in the feu-contract of the ground on which the property is erected, they are not entitled to warrant as craved, and the same ought to be refused. (3) The use to which the petitioners propose to put the proposed buildings being in direct violation of the feu-contract, and being of such a nature as will be offensive, and tend to create a nuisance to the neighbourhood, the same should not be sanctioned. (4) The alterations proposed to be made on the existing building being in violation of the feu-contract, and not being properly adapted for the purpose for which they are intended, the prayer of the petition ought to be refused."

Upon 24th November 1892 the Dean of Guild pronounced this interlocutor:—"Finds that the operations of the petitioners are confined to their own property, and can be executed without danger: Further, finds (1) that the objects for which it is proposed to alter the petitioner's house are not included in the uses of the property, which are prohibited by the superiors; (2) that the proposed ventilators on the building behind are not forbidden by the conditions of the feu, and even assuming them to be forbidden, that the respondents have no interest to object thereto: (3) Finds that by the conditions of the feu the petitioners are forbidden from altering their attic as they propose, but that the restrictions in the title have been so relaxed or departed from by the deviations from the original building plan acquiesced in by all concerned, that the petitioners are now entitled to alter their attic flat as they propose."

"*Note.*—[*After statement of the facts and the terms of the feu-contract*]—The Dean of Guild thinks that up to this point in the case he is bound to conclude that an action for the enforcement of the restrictions of the feu-contract would be competent by one feuar against another. There are several considerations which combine to lead to this view. Similar restrictions were imposed on all the body of feuars; these conditions have been inserted in all renewals of the feus in question; the plan by which building was regulated was made a part of the contract, and from the whole scope of the deed it appears to the Dean of Guild that the body of feuars in Archibald Place were intended by the superiors to be, and were actually constituted, a community with mutual rights and obligations —*M'Ritchie's Trustees* v. *Hislop*, 7 R. 392, 8 R. (H. of L.) 102.

"In this view the Dean of Guild must proceed to consider the three grounds on which the respondents base their objections. First, they allege that to alter this house from a dwelling-house into a laboratory for scientific research would be a violation of the restriction which prohibits them from converting the houses 'into shops or public warerooms for business or handicraft of any kind, from baking or brewing for sale, and from retailing of goods or vivers of any sort or denomination therein, and in general from using the property in any way whatever that may be offensive or tend to create any nuisance to the street or neighbourhood.' Now, it is apparent that this tenement, if altered as proposed, will not fall under any of the specified classes of premises which are forbidden by this clause. What the superiors were apparently anxious to prevent was the dedication of any of the houses to the purposes of trade, and as the house, if altered, will be devoted to scientific and not to commercial ends, the Dean of Guild is of opinion that its use will not be a violation of this restriction. It was also argued that the purposes for which it is proposed to use this house would create a nuisance. The Dean of Guild is not competent to deal with the question of nuisance as so raised—*Kirkwood's Trustees*, 16 R. 255. If the buildings are permitted, and nuisance does arise, the respondents will still have a remedy open to them.

"In the second place, it is proposed that the roof of the building on the ground behind should be fitted with ventilators of the ordinary kind, about 18 inches high, and with lattice sides. It is objected that this would be a violation of the restriction which forbids houses on this part of the property 'which shall have fireplaces or vents of any kind therein.' No fireplace is shown in the plan. The proposed back building would be heated by pipes. The question is, Are those ventilators 'vents'? The Dean of Guild thinks that the prohibition applies to chimneys in any form, and therefore that it would not include ventilators. The word is used in close connection with the word 'fireplaces;' besides, the ordinary meaning of the word 'vent' in Scotland is 'chimney,' and probably this was more certainly its meaning at the date of the deed. What, in the opinion of the Dean of Guild, the superiors desired to forbid, was any form of a passage for smoke or steam, whether by flue, or stove-pipe, or chimney-can, and accordingly he dismisses the second objection for the respondents. It is explained that this building on the back would not be used as a chemical but as a bacteriological laboratory. It is well known that for work of such a kind the purest of air is essential.

The respondents at first supposed that they were threatened with the offensive smells which often attend chemical experiments. All ground for this apprehension appears to be removed, and the Dean of Guild fails to see what interest the respondents have to object to ventilators of apparently harmless character. If nuisance were to ensue, the respondents could still object.

"The remaining ground of objection is the proposal to substitute the square storey for the attic flat. This proposal is certainly contrary to the original elevation; as already explained, the Dean of Guild thinks that this plan was effectually made part of the contract, and the whole question here is, whether the respondents are in a position to plead this plan, or whether, as the petitioners assert, they have lost their right by acquiescence in departures therefrom.

"The departures are admitted to be correctly specified in a minute of amendment for the petitioners, and fall into two classes —viz., alterations on the roof, and on the fronts of the tenements. The latter consist of the substitution of doors for windows and *vice versa*. The former include two dormer windows projected from the roof of No. 2, one dormer window on No. 14, and numerous skylights in several of the houses. The alteration of the doors and windows do not much affect the general appearance of the houses and street. They are, of course, apparent when the plan is compared with the existing street, but the Dean of Guild is of opinion that if these were the only alterations on which the petitioners could found, they would not be sufficient to imply acquiescence in a more serious and conspicuous alteration of the elevation. In *Magistrates of Edinburgh* v. *Macfarlane*, 20 D. 156, tacit abandonment of the feuing conditions was not inferred from deviations such as these. In that case front doors had been converted into shops, and 'plats' had been thrown over areas to form accesses; but projections of the front had been of a very limited kind, and only in the way of architectural embellishment. There had not been anything like such an extensive deviation as was proposed in that case—viz., the projection of the front of the tenement, as high as the roof of the first floor, into the area, to more than one-half of its breadth. The petitioners' proposals were accordingly disallowed. A question like the present is always one of degree, and this is well illustrated by the case of *Macfarlane*. Alterations on the front had been many and various, but the dimensions of the street—its length, its breadth, the size and character of the houses, all combined to render the alterations comparatively unnoticeable, and therefore harmless, but a projection of the two lower storeys of a house towards the street would have been a violent and startling transgression of the building line, and was accordingly forbidden.

"But the Dean of Guild thinks that a different case is raised here by the dormer windows. He is of opinion that in the circumstances of this case there has been such abandonment of the restrictions imposed by the elevation plan as to bar the respondents from objecting to the petitioners' proposals. The Dean of Guild believes that he has authority for this conclusion in the case of *Stewart* v. *Bunten*, July 20, 1878, 5 R. 1108. In that case the feuars in a street were entitled either to build the two houses at the ends of the street, or two houses in the middle, to the height of three square storeys, and they chose the former alternative. The proprietor of the three centre houses sought to raise them higher by an additional storey. The proprietor of one of the end houses was found entitled to stop him, although, contrary to the conditions of the feu, storm windows had been erected in front, and the attic storey had been squared to the back.

"Now, Lord Gifford indicates that the chief object of the restrictions in the feus of this street was to preserve the front appearance of the block of dwelling-houses. As a matter of fact, that appearance had never been destroyed or even affected by the forbidden storm windows, and therefore it was still open to the defender to object to a proposal which would have so largely affected the uniform design of the street. The Dean of Guild ventures to think that if in that case the departures from the prescribed elevation had destroyed or materially affected the front view of this street, the result of the case would have been different.

"In the present case there can be no doubt that what the superiors had chiefly in view was the front appearance of the block of dwelling-houses, and as originally provided for by the conditions and the plan, and as originally erected, Archibald Place was a short street of about 60 yards in length—easily seen at one view, and consisting of a block of plain but tasteful second class dwelling-houses. But, in the opinion of the Dean of Guild, the uniformity and symmetry of the street have been entirely abolished by the dormer windows erected on No. 2 and No. 14 Archibald Place. The moment the street is entered these projections are the first objects that catch the eye and arrest the attention. The balance of the building scheme has been quite destroyed, and the effect produced is awkward and rugged in the extreme. Accordingly, it appears to the Dean of Guild that the object of the conditions has been abandoned, not only by the transgressors and their immediate neighbours, but by all the feuars in the street, for, as explained before, the street is so short that a deviation from the building line on the part of one would affect not only conterminous proprietors, but all the owners of property in the block.

"Accordingly, the Dean of Guild is of opinion on this part of the case, that although by the conditions of the feu the petitioners are prohibited from altering their attic as they propose, still the restrictions in the title have been relaxed or departed from by the deviations from the

original building plan, acquiesced in by all concerned."

The respondents appealed to the Court of Session, and argued—There was an obligation upon each feuar by the terms of his feu-contract to erect a building upon his plot of ground in accordance with the feuing plan prepared by Patrick Wilson. It was true that this obligation was not made a real right in the sense that it was not declared necessary to enter the sasine as some of the earlier obligations were, but the petitioner here was founding upon the original charter, and according to authority a singular successor—as the petitioner was—was bound by the conditions of the original charter although all the stipulations had not entered the record, so that the superior could have enforced this stipulation—*Stewart* v. *Duke of Montrose*, February 15, 1860, 22 D. 755—*aff.* March 27, 1863, 1 Macph. (H. of L.) 25; *Hope* v. *Hope*, February 20, 1864, 2 Macph. 670; *Earl of Zetland* v. *Hislop and Others*, June 12, 1882, 9 R. (H. of L.) 40. If the superior could have insisted upon this obligation, then any of the feuars could insist upon it if the superior had given them mutuality by the terms of the feu-contract. He had done so here. The same obligations were put upon all the feuars, and although this particular obligation did not enter the record it was a stipulation in the original charter by which all the feuars were bound. As the superior therefore had put this burden upon all the feuars, the fact that the restriction did not enter the record could not take away the *jus quæsitum tertio* from the other feuars, as that depended upon the intention of the original grant. In the third place, this application was uncalled for, because the alterations formerly made in the front of the houses did not change their character as the proposed alterations would do, and were not such a change from the original plan as entitled the applicant to say that the other feuars had acquiesced in the change of the plan—*Stewart* v. *Bunten*, July 20, 1878, 5 R. 1108.

The respondents argued—There was no mutuality upon the feuars here. Certain restrictions were put upon them as to building upon the front and back plots of ground, and these were made real by entering the sasine, but the declaration as to what kind of a house must be built upon the feu was a purely personal obligation, and did not enter the sasine, so that even if the superior could have objected to the proposed change in the front of the house, the co-feuars had no right to object. It was merely an implied obligation to maintain the house originally built in the same manner in all time coming, and from all that was said in the deed the feuar could have fulfilled his obligation to the superior by building a house according to the plan, and afterwards pulling it down and building one according to another elevation—*Croall* v. *Magistrates of Edinburgh*, December 20, 1870, 9 Macph. 323; *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141; *Marquis of Tweeddale's Trustees* v. *Earl of Haddington*, February 25, 1880, 7 R. 620; *Barr* v. *Robertson*, July 12, 1854, 16 D. 1049. The Dean of Guild, who was a practical and experienced man, had visited the locality, and come to the conclusion that the putting up of the dormer windows referred to had completely taken away the appearance of the place as designed upon the original plan. The neighbouring feuars had made no objection to these windows, and they must therefore be barred by acquiescence from objecting to the proposed alterations.

At advising—

LORD JUSTICE-CLERK—This question relates to the claim of the Royal College of Physicians as proprietors of a house in Archibald Place, Edinburgh, as singular successors of one of the original feuars to make certain alterations upon the property, so as to enlarge the house and to make it available as a laboratory for scientific purposes. They propose to convert the attics into a square storey.

It will be convenient, first, to state the facts. As yet no proprietor in this street has added to the height of the front walls, but in various instances dormer windows have been put into the attic flats to increase the accommodation, with the result of altering the appearance of the houses. It is said that there has been in consequence an abandonment of the original plan, and that the restrictions of it cannot be enforced. I have given careful attention to the proposal, which is one upon a matter which is always to some extent one of circumstances and degree. It is one upon which I think the judgment of the Dean of Guild, who is a practical man, and who visits the buildings, is always deserving of much attention. His view in this case is that the "uniformity and symmetry of the street have been entirely abolished by the dormer windows erected on No. 2 and No. 14 Archibald Place," and that the feuars have already allowed the general aspect of the buildings to be materially altered. I am much impressed by that, and I have come to the conclusion that the Dean of Guild is right upon that point, and that his judgment should be affirmed in that respect.

The other question is a larger one. It is raised entirely between the singular successors of the original feuars, and the superior takes no part in it. It arises on a construction of the titles, and it is, whether assuming that the original plan is not abandoned, the restriction to which the objectors appeal can be enforced. The feu-contract is specific as to many of its prohibitions. The feuars are restricted from erecting anything on the front ground except parapet walls, from erecting buildings on the back ground having fireplaces and vents, or whose roofs rise above the soles of the windows of the principal entrance floor, and from converting the houses into shops or places of trade, business, or handicraft. These restrictions are express, and are to enter the sasine. But the alleged restriction on which the objectors found is inferential, and it is not

appointed to enter the sasine. The feuar was taken bound "immediately to erect and finish a handsome dwelling-house on each of the three areas hereby feued, in the precise situation and of the dimensions and style of building exhibited on the aforesaid plan and elevations of the new street, which are subscribed by them as relative hereto." Now, I think that there is a reason for this difference, and for not appointing this direction to enter the sasine. It might be quite proper and desirable to prevent certain objectionable erections or uses of the buildings, but it might not be desirable or intended to prohibit for ever any alteration of the buildings whatever. I conclude that the feuars are not bound by this condition never to alter the frontage or elevation of the buildings after they have been erected.

It only remains to notice the objection taken to the ventilators which it is proposed to insert in the roof of the building which is to be erected on the back ground. These are objected to on the ground that the feuar is prohibited from having "vents" in any building so erected. But "vents" must be taken in the ordinary sense in which that word is used in such a connection in Scotch documents, viz., chimneys. I hold that the restriction does not apply to arrangements for securing proper ventilation.

I move that the Dean of Guild's judgment be affirmed.

LORD YOUNG—It is certain that if the owner of the ground upon which this street Archibald Place is built had granted a title to the original feuars without any restriction therein by reference to a building plan or any other way, that the disponee in this case would have been at liberty to use the feu purchased by him in any lawful manner he thought proper — to erect upon it a building of any description or of any height he pleased, provided he kept within the limits of the feu-charter. But the case was argued before the Dean of Guild and before us, to a certain extent at least, on the footing that the title to the ground did contain certain restrictions and limitations in favour of the other feuars by reference to a feuing plan and elevations, and that these restrictions and limitations were binding upon singular successors unless they had been abandoned and destroyed by changes which had been allowed to take place with consent of the feuars.

It was argued for the applicants in the Dean of Guild Court that the plan originally laid down had been departed from, and that the restrictions in the original title were no longer to take effect by reason of that departure. No doubt restrictions of this kind in a feu-charter may be abandoned by a departure therefrom, made and consented to by all the parties interested, but in all cases of the kind when that happens the restrictions are gone altogether, and the title stands as if there were no restrictions in it at all.

Now, the restrictions in the contracts applicable to Archibald Place are alleged to have been departed from in many ways, eight in all I think, but most of them are such as putting a door instead of a window, or putting a flight of stairs up to the door, but the Dean of Guild says in regard to all of these alterations, with the exception of the dormer windows, that they are "comparatively unnoticeable and therefore harmless." Now, I should think that restrictions on building in a feu-contract cannot be altogether struck out and rendered of no effect by alterations which are "unnoticeable and therefore harmless." I think that language of the Dean of Guild is quite proper and applicable to all the alterations mentioned in this list with the exception of the dormer windows.

The Dean of Guild says, however, that in his opinion a different case is raised by the dormer windows. I may therefore limit my observations to the alteration made by putting in the dormer windows. It may be noticed that there are not many of them, there are only three, two in the house at one end of the street, and one in the house at the other end. Now I may remark with reference to these windows that the putting of dormer windows into a sloping roof is not a structural alteration at all. It does not occur to my mind that when the proprietor of a house puts up dormer windows, that he would require to get the sanction of the Dean of Guild Court to do so, as he would if he were making a structural alteration on his house. I am assuming the validity of the restrictions in the feu-contract, and if no sanction was required to put up the windows, I do not think that we can hold they were swept away because no objection was made to the erection of the windows.

I think it would be a serious thing for us to approve of a proposition like this. Let the feuing plan be as distinct as you please, that the houses to be built are to be only of two storeys, let it be as plain as you like what the style of the houses is to be, if the feuars are not constantly on the outlook to see that one of their number does not put a dormer window in the roof of his house and to object at once, the building plan and the restrictions in the contract are gone for ever, and the neighbour who put up the dormer windows is entitled to put up a square storey instead of a sloping roof. If he is entitled to put up one square storey, why is he not at liberty to erect two or three if he pleases? Where is he to stop? I think this would be a very dangerous notion to encourage in the interests of good feeling and good neighbourhood which prevail even in districts where there are very severe restrictions upon building in the titles. I should not therefore be prepared to assent to the view of the Dean of Guild that the restrictions in the title have been departed from because no objection was made by the other feuars to the erection of these dormer windows. I do not think that the alteration is of such a kind that it must be objected to at once, with the penalty that if it is not objected

to the feuars lose all right to object to any alteration in the subjects.

The case is then diverted to this point, whether the restrictions on building, if there are any in the feu-contract, are of such a kind that they must enter the sasine in order to be of any validity. It was agreed that under the present law they must enter the sasine, because now sasine is taken by recording the whole deed, though it was not so at the time the original feu-contract was granted, but a servitude is not a burden in restraint of the rights of a proprietor that must necessarily enter the sasine. What is the whole object of the sasine? It is publicity. A positive servitude may stand upon prescription alone—*i.e.*, if the use of the servient tenement is allowed for a certain number of years, that is supposed to be enough notice of the servitude without any grant or other title in writing. A negative servitude cannot be constituted by usage, it must be constituted by grant. This grant is usually contained in the title of the servient tenement, but it may be outside it in another deed, and it need not enter the sasine. It is described in Bell's Prin. sec. 994—[*Here his Lordship read the section*].

Now, what is the meaning of the reference to the building plan and the language used in referring to it in this feu-contract. The language I refer to is that brought under our notice in the original feu-contract for the ground which the present applicants wish to get. The parties bind themselves "immediately to erect and finish a handsome dwelling-house in the precise situation, and of the dimensions and style of building exhibited in the foresaid plan and elevations of the said new street, which are subscribed by them as relative hereto." I venture to ask, can anyone doubt what was the meaning and intention of the parties to this contract when they used these words, because we must give effect to the true meaning and intent of the parties in construing this deed.

I cannot give any countenance to the view that according to the truth of this contract the parties meant to say that the feuars were taken bound to put up buildings in conformity with the feuing plan, but that when once the buildings were put up the feuar's obligations ceased because there is no stipulation in the deed that he shall uphold them. Is not that obligation of upholding implied? Is it not a necessary implication from the language used in the deed? Can we say that the intention of parties was that when once the buildings were erected they could be immediately pulled down again? Is it not rather that the feuar must put up such buildings as are prescribed by the feuing plan, and can put up no other? I think this is simply a restriction and limitation upon the feuar that he shall not be at liberty to put up a house of any other description than what is expressed by the feuing plan and elevation. Is not that a servitude? Not the obligation to build the house, but the obligation not to build anything else. If the obligation is to build a house only of two storeys, that is a restraint upon him from building one of three storeys, that is a servitude. Lord Watson, in the decision in *Hyslop's* case, calls it a servitude, and the same phrase is used in *Croall's* case. In that case there was no restriction on building in the title, there was no reference to a feuing plan, the only thing that could be founded on was a condition in the articles of roup that the purchaser should build upon the feu a house according to a particular elevation. That was a restriction in the articles of roup, but in the disposition to the purchaser following upon the sale there was no mention of that condition, therefore there was no restriction in the title. That is not the case here. The title of each feuar in this street contains the language I have referred to as constituting a restriction upon the title.

Let me put an illustration. A conveys to B a field, and the restriction in the title is that the field is to be always kept in grass, but B is permitted to erect in one corner of the field a cottage of only one storey high and according to a signed plan, but he is put under an obligation to build the cottage—would not that be a servitude in favour of A? I think that any obligation to do a certain thing which implies that nothing else but that certain thing is to be done implies that that is to be a servitude.

I think that this was a servitude on each of the feuars who took up this piece of ground in favour of all the other feuars not to put up buildings of any other kind than that stipulated for by the feuing plan and elevations as stated in the feu-contract, and I cannot by reason of the erection of those dormer windows say that any feuar is entitled to alter the plan of his house so as to erect any kind of building he pleases.

LORD RUTHERFURD CLARK—By feu-contract, dated in 1829, there was feued out to two persons three building areas in "the said new street called Archibald Place." On each of these areas a house has been built conform to a plan prepared by Patrick Wilson, architect. The parties to this case are each of them the owner of one of these areas, being singular successors of the original feuars. The respondents are the owners of the central area.

The feu-contract sets out that the superiors had resolved to feu certain subjects belonging to them for building a street or place to be called Archibald Place, according to the plans and elevation of Mr Wilson, and that the feu was given out in the execution of this purpose. The feuars are placed under certain restrictions and conditions. They are prohibited from building on the plots of ground to the east of the areas feued, "to which effect the whole feuars of Archibald Place are hereby declared to have a servitude over the said plots of ground." They are further prohibited from erecting on the back ground any building which shall have fireplaces or vents therein, or higher than the soles of the windows of the entrance floor, and

from converting the dwelling-houses into shops, &c. There are other prohibitions and conditions appointed to be engrossed in the instrument of sasine, and in all other renovations of the feu-right. This appointment has been duly observed.

On the other hand, the feuars bound themselves to build a handsome dwelling-house on each of the areas, conform to Mr Wilson's plan, to enclose the plots in front of the dwelling-houses with a parapet-wall and iron railing; and for the purpose of securing that the whole of the said operations shall be executed according to the said plans and elevations, and in perfect accordance with the objects hereof, it is agreed that they shall all be carried on open to the inspection and correction of the said Patrick Wilson. No attempt has been made to make these obligations real. There is no direction that they shall enter the sasine. Accordingly they do not enter, and they are not contained in the titles of the respondents who are singular successors.

The respondents desire to add an additional square storey to their house. The question is, whether the appellants have a right to object. Their case is founded solely on the obligations which I have just recited from the feu-charter.

I do not agree with the Dean of Guild. I do not think that the restrictions if duly imposed have been departed from. I have therefore to determine the rights of the parties before us by reference to their titles.

As I have said, the case of the appellants depends on the obligation undertaken by the original feuars to build these houses in conformity to Wilson's plan. In form the superior is the sole creditor in that obligation. But the appellauts contend that it is to be read as implying a prohibition against building any other kind of house, and that it was inserted for the common benefit of all the feuars in order to secure the uniformity of the street. I cannot so hold. Whatever the obligation may import, I think that no one can enforce it except the superiors. It is true that the superiors had the purpose of securing uniformity in the buildings, but I do not think that they have communicated to the feuars any right by which they can preserve that uniformity. The rule is that no restrictions are binding on singular successors unless they enter the record, and the appellants could not cite any case in which neighbouring feuars were allowed to found on personal obligations of this character. In the case of *Croall*, 9 Macph. 323, Lord Cowan said—"The condition or burden must be made not merely to affect the vassal personally, but his right to the subjects as a condition of the grant, and unless it be so constituted as to enter the instrument of sasine and appear on the records, it will be ineffectual against purchasers and creditors".

Relying on the cases of *Stewart* v. *Morton* and *Hope* v. *Hope*, the appellants argued that inasmuch as the obligation is contained in a feu-contract it is a condition of the feu, so that the superior can enforce it against a singular successor. That may be true. But I do not see how a feuar can use the right of the superior. I do not think that the superior can be held as stipulating for the other feuars so as to acquire a right for them. In my opinion this cannot be effectually done unless the obligation or restriction enter the record, and unless it be made evident that it is intended for the benefit of the whole feuars. In this case these conditions are not satisfied, while we see that certain other restrictions do enter the record, some of which are declared to be for the benefit of the whole feuars. Further, the obligation is undertaken by a single feuar, and so long as he had not parted with any part of the feu, it would, if not limited to the superior, be necessarily confined to the feuars of the other areas. The division of the feu may increase the number of the obligants. It cannot increase the number of the creditors. The sucessors of the original obligant may become debtors in his obligation, but I do not see how they ever become creditors in the very obligation in which they are debtors.

So far, I do not understand that there is any difference of opinion amongst us. But it is said that the obligation creates a negative servitude, and that such a servitude is effectual against singular successors, although it does not enter the record. I doubt very much whether any servitude is created, but if there be, we must keep in mind the conditions under which alone the appellants could take benefit by it.

The rule that negative servitudes are effectual without entering the record applies only to the known servitudes. The only servitude of this class which might be created by the obligation on the feu-contract would be the servitude *altius non tollendi*. But I think that this servitude relates to the height and not to the form of the building; and the respondents do not purpose to build higher than the present roof. If we were to assume that the obligation amounts to a servitude against altering the plan and elevations—without considering whether such a servitude can have a legal existence—it would not avail the appellants, for it is certainly not one of the known servitudes.

Again, if a servitude be created, it follows the entire area in the feu-contract is the servient tenement. The dominant tenement is some other part of the superior's property. The servient tenement has been divided, and the several parts will remain under the same servitude. But it is to my mind impossible that by reason of the division any part of the servient tenement can become a dominant tenement.

LORD TRAYNER—I agree with your Lordship in the chair in thinking that the ground on which the Dean of Guild has proceeded in giving judgment against the appellants is well founded, and sufficient for the decision of this case. But I also agree on the ground of judgment stated by Lord Rutherfurd Clark.

The Court adhered to the Dean of Guild's interlocutor.

Counsel for the Appellants—W. Campbell—Graham Stewart. Agents—Irons, Roberts, & Company.

Counsel for the Respondents—H. Johnston—C. K. Mackenzie. Agent—A. Sholto Douglas, W.S.

Thursday, March 16.

FIRST DIVISION.

SEDDON, PETITIONER.

(*Ante*, vol. xxix. p. 100, and 19 R. 101.)

Minor and Pupil—Maintenance and Education—Payment of Trust Funds belonging to Children Resident with Father Abroad.

A father domiciled in a foreign country, by the law of which he was not the legal guardian of his children's estate unless so appointed by the Court, presented a petition for himself and his pupil children, craving the Court to ordain Scots testamentary trustees, who held a fund belonging to the children, to pay to the petitioner for their behoof part of the annual revenue of the fund. The application was concurred in by the trustees. The amount of the fund was about £8000, and the annual income over £300. The Court at first refused to grant the order craved, on the ground that the children had no legal guardian, but on the father being appointed guardian of his children's estate by the court of the country in which he resided, the Court *ordained* the trustees to pay him a sum of £278 which he had expended for the children's behoof, and thereafter to make him an annual payment of £150 for their maintenance and education.

In September 1891 Thomas Rowley Seddon presented a petition on behalf of himself and his two pupil children, craving the Court to ordain certain Scots testamentary trustees, who were in possession of a fund belonging to the children, to pay him for behoof of his said children the whole or a part of the annual income of the fund. The application was concurred in by the trustees.

The fund had been liferented by the children's mother, who died on 13th May 1891. It had not been realised, but was estimated at between £7500 and £8500, and the free annual income at between £300 and £400. The petitioner was in this country at the date when the application was presented, but was about to return to New Zealand, where he had resided for thirteen years. He was domiciled either in England or New Zealand. He stated that he was "not at present in a position out of his own funds to maintain and educate his said children suitably to their position." The children were respectively three and one year old.

By the law of England and New Zealand a father is not the legal guardian of his children's estate unless he is so appointed by the Court.

On the 13th November 1891 the Court refused to grant the order craved, but intimated that they would be prepared to reconsider the application on being informed by the petitioner that steps were being taken to have the children provided with a legal guardian.—(*Ante*, vol. xxix. p. 100.)

On 25th March 1892 the petitioner was appointed by the Supreme Court of New Zealand, Canterbury District, guardian of the estates of his children during their respective minorities or until further order, and thereafter he renewed the application made in the foresaid petition.

He stated that he had expended the sum of £278 for the maintenance and travelling expenses of the children between 13th May 1891, the date of their mother's death, and 14th November 1892, the date of their arrival in New Zealand, and he expressed the desire that he should be paid this sum, and a further sum of £150 yearly from and after 14th November 1892 out of the income of the fund held by the trustees. He further stated that the trustees had no objection to his being allowed a liberal allowance for the maintenance and education of his children, and that they approved of the payments suggested.

The Court pronounced this interlocutor:—

"Authorise and ordain the trustees acting under the trust-disposition and settlement of the deceased Stephen Adam, mentioned in the petition, to make payment to the petitioner out of the income of the estate in their hands, as trustees foresaid, belonging to Richard Stephen Rowley Seddon and Helen Priscilla Seddon, the petitioner's children—First, of the sum of £278, being the outlay made on account of the said children from 13th May 1891 to 14th November 1892; and second, of the yearly sum of £150 as from and after the said 14th November 1892 for the maintenance and education of the said children until the further orders of the Court: And further, authorise and ordain the said trustees to make payment out of the said income of the expenses incurred in the present proceedings," &c.

Counsel for the Petitioner — Adam. Agent—Arthur Adam, W.S.
