

Wednesday, June 21.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

MELDRUM AND ANOTHER v. MONTGOMERIE & FLEMING.

*Superior and Vassal—Feu—Building Restrictions—Mutual Contract—Special Reservations in Superior's Favour.*

By feu-contract it was declared that the feuars should not erect upon their feus any buildings except superior villas, and that the same restrictions should apply to the property unfeued within 100 yards of the feus already given off, the superiors reserving to themselves right to erect "all buildings deemed necessary by them in connection with any buildings presently erecting or that may be erected upon any part of the said lands."

Held (1) that this was a mutual contract under which the superiors not only were bound to put the same restrictions upon the ground within 100 yards of that already given off if they feued it, but were themselves restricted from erecting upon it any building which their vassals could not erect upon their feus unless such building fell under the special reservation; and (2) that a brick building with a wooden erection adjoining, used in connection with the estate for occasional meetings between one of the superiors and the surveyor, or for keeping surveying instruments, but which had not been put up in connection with any building then in course of erection, and not used in connection with any buildings presently erecting, did not fall within the reservation.

Robert Meldrum, writer, Glasgow, and Mrs Macarthur were proprietors of two contiguous feus in Kirklee Road, Kelvinside, Glasgow, granted in 1886 and 1887 respectively by Miss Montgomerie, Moffat, and J. B. Fleming, writer, Glasgow, surviving trustees for the Kelvinside Estate Company as superiors. The feu-contracts were in similar terms, and contained the following stipulations:—"Declaring, as it is hereby expressly provided and declared, that the said second party [the feuars] and their foresaids, and the tenants and possessors of the said piece of ground hereby feued, or of the buildings erected or to be erected thereon, shall not have power to exercise or carry on, erect, or set down, and they are hereby expressly prohibited, interdicted, and discharged in all time coming from exercising, carrying on, erecting, or setting down upon or within the said piece of ground hereby feued, or any part thereof, or the houses or buildings erected or to be erected thereon, or any of them, any trade, business, process, occupation, work or manufacture of any kind or description whatsoever, and from using the said piece of ground, or any part thereof, for any

other purpose than for the erection of a private self-contained villa, to be used and occupied solely as a private self-contained dwelling-house for the residence of one family only, and for no other use or purpose whatsoever, without the express consent in writing of the said first party [the superiors] or their successors in the superiority of the said piece of ground hereby feued; and, in particular, but without prejudice to the foresaid generality, from exercising or carrying on, erecting or setting down upon or within the said piece of ground hereby feued, or any part thereof, or the buildings erected or to be erected thereon, or any of them, any trade, business, process, occupation, work or manufacture of brewing, baking, distilling, tanning, calico printing—[here follows a most comprehensive list of prohibited occupations]—or shop or warehouse, or place for the sale of goods or commodities of any kind, or public work, or manufactory of any kind, or yard for masons, wrights, smiths, plumbers, coopers, or other trades, . . . which declaration and prohibition shall be and is hereby created a real lien, burden, and servitude upon and affecting the said piece of ground hereby feued, and the buildings erected or to be erected thereon, in favour not only of the said first party and their heirs and successors, but also of their and their predecessors, feuars and disponees, past and future, in the said lands and estate of Kelvinside, and each of them, and the same shall be and is hereby constituted a real lien, burden, and servitude upon the other parts of the said lands and estate of Kelvinside still belonging in property to the said first party, lying within 100 yards of the said piece of ground hereby feued in favour of the second party and their successors therein; and the said first party bind and oblige themselves and their foresaids to insert a similar declaration and prohibition in all dispositions and feu-rights to be hereafter granted by them, of other parts of the said lands and estate of Kelvinside, still belonging to them, lying within 100 yards of the said piece of ground hereby feued . . . Providing always, that if the said declaration and prohibition shall at any time be discharged by the said first party or their foresaids, in whole or in part, as affecting the said piece of ground hereby feued, they shall *ipso facto* be entitled in like manner to discharge the same to the same extent as affecting the said other parts of the said lands and estate of Kelvinside, lying within 100 yards of the said piece of ground hereby feued; expressly reserving always to the said first party and their foresaids full power and liberty at any time to grant permission and authority to any of their feuars or disponees to erect churches, schools, halls, or other public buildings, on any part of the said lands and estate of Kelvinside, or to use or occupy any lodging, villa, dwelling-house, or other buildings already erected on any part of the said lands and estate of Kelvinside for any of these purposes, notwithstanding the above declaration and prohibition; and expressly re-

servings also to the said first party and their foresaids full power and liberty, by themselves or their tenants, to open and work quarries within the foresaid 100 yards of the said piece of ground hereby feued, and to erect and use steam-engines, steam-cranes, and all buildings and machinery deemed necessary by them in connection therewith, or in connection with any buildings presently erecting or that may be erected upon any part of the said lands and estate of Kelvinside, notwithstanding the above declaration and prohibition."

Mr Meldrum and Mr Macarthur objected to a brick building with a wooden erection adjoining, which they alleged that the superiors had erected in contravention of their feu-contracts upon ground still unfeued within 100 yards of their feus, and which were not used or required in connection with the opening or working of any quarries, or the erection of any buildings on the estate of Kelvinside, but were used by joiners of the name of Marshall. Upon the Kelvinside trustees refusing to remove these buildings, they brought an action of declaration in 1891 against the said trustees to have it found and declared "(1) that the defenders are bound to implement, fulfil, and observe the whole terms and conditions of the feu-contracts; . . . (2) that the buildings recently erected by or with the consent of the defenders . . . have been erected and are occupied and used in contravention of the terms of the said feu-contracts; (3) that the defenders are bound forthwith to remove the said buildings: And further, it having been so found and declared, or whether it shall be so found and declared or not (1) the defenders ought and should be decerned and ordained, by decree foresaid, forthwith to remove the said buildings."

The defenders pleaded, *inter alia*,—" (3) The said buildings not having been erected or used in contravention of the feu-contracts founded on, the pursuers are not entitled to have the same removed or to have their present use interdicted."

The Lord Ordinary (KYLACHY) allowed a proof from which it appeared that the buildings objected to had been erected by the Caledonian Railway Company to replace a small estate office they had taken down in the course of extensive operations, that they were of an insignificant character and were chiefly used for occasional meetings between Mr Fleming and the surveyor or other persons about the estate, that surveying instruments were sometimes kept there, and that Marshall, a joiner in the service of the Kelvinside trustees, at times worked at repairs, &c., within these buildings. It was proved that no quarry had been opened or permanent building erected since 1890. Mr Fleming deponed that the buildings would be useful in future building operations, while a skilled builder deponed to these erections being quite unsuitable on account of their limited size for use in connection with such operations.

Upon 21st December 1892 the Lord Ordinary (KYLACHY) pronounced the following

interlocutor—" (1) Finds, decerns, and declares, in terms of the first declaratory conclusion of the summons: (2) *Quoad* these second declaratory conclusion, Finds, decerns, and declares, in terms thereof, so far as regards the office or store forming the westmost of the brick buildings mentioned on record, and the wooden store or workshop situated behind the same: and (3) Finds that the defenders are bound forthwith to remove the said office and store, and wooden store or workshop: And decerns and ordains the defenders to remove the same forthwith accordingly," &c.

"*Opinion*.—The question in this case has now come to be confined to the brick building and store behind, which are admittedly not used by the railway company, and which the pursuers describe as a 'joiner's workshop and store, occupied by the firm of Marshall & Company, joiners.'

"The proof lately led related entirely to these buildings, and I have now to decide whether they have been erected in contravention of the pursuers' feu contracts.

"There is no doubt that both erections are within 100 yards of the pursuers' feus, and supposing that to be important, I think it is also proved that they are appreciably injurious to the amenity of the pursuers' villas. Further, they are clearly not self-contained dwelling-houses or offices of self-contained dwelling-houses, so as to be outwith the terms of the prohibition upon which the pursuers found.

"The defenders, however, say that the buildings in question are 'estate buildings,' forming a store or workshop in connection with the feuing of the estate, the repair of farm buildings, and the erection of future buildings by future feuars.

"Mr Fleming, whose evidence I accept, explains that since April 1890 the witness Marshall has been a joiner in the defenders' employment, although doing odd jobs for others; that the store (a wooden building) was erected in 1891 as a substitute for a former joiner's shop which had been taken down, and the office (a brick building) was erected by the railway contractor in 1890 as a substitute for an old building used as an estate store at Bellshaugh.

"In these circumstances the defenders contend that both erections fall within the exception or reservation in the feu-contract which provides that notwithstanding the above declaration and prohibition the superior shall have 'full power and liberty by themselves or their tenants to open and work quarries within the foresaid one hundred yards of the said piece of ground hereby feued, and to erect and use steam-engines, steam-cranes, and all buildings and machinery deemed necessary by them in connection therewith, or in connection with any buildings presently erecting or that may be erected upon any part of the said lands and estate of Kelvinside.'

"The question, therefore, which I have to decide is, whether the buildings complained of fall within this reserved power. I am of opinion that they do not. I do not say that the point is free from doubt, but I do not think that the exception above

expressed covers buildings of the description of those in question—buildings used for general estate purposes, and not erected or used in connection with particular buildings erecting at the date of the feu-contract or since erected on the estate.

"I rather think that the exception or reserved power only applies to such buildings as are proper adjuncts either of the quarries referred to or to the self-contained dwelling-houses erected in compliance with the conditions of the feu, including, of course, offices for such dwelling-houses, and also such temporary structures as may be required in the process of building. It cannot, I think, be said that the erections complained of are of that character.

"It is admitted that since sometime before 1890 no feus have been given off or buildings erected on the estate, and there are no buildings which are now in contemplation.

"I must therefore, I think, grant the pursuers decree in terms of their summons, in so far as regards the brick office or store and the wooden shed or store mentioned on record."

The defenders reclaimed, and argued—

(1) The superiors were under no restriction. It was intended to create a real burden upon the lands of the feuars, and whether that was effectually done or not—probably not—it was they alone who were under an obligation not to put up certain erections. The superiors truly only bound themselves to put similar restrictions upon future feuars. They did not restrict themselves while the ground remained unfeued. In case of doubt the law was in favour of freedom. Further, they had the power of giving themselves consent in writing to erect such a building, or of discharging the prohibition in their own favour if that were necessary. But (2) the buildings in question were saved by the express reservation inserted by the superiors in the feu-contracts. They were "deemed necessary by them in connection with buildings that may be erected upon the estate of Kelvinside." It would be too narrow a meaning of the reservation to say that such buildings must be in connection with buildings actually in course of construction. The superiors contemplated building operations in connection with the estate in the near future, when they would find the buildings objected to very useful. The buildings were at present not used as a joiner's shop or wright's yard, but for estate purposes, although Marshall might work in them.

Argued for respondents—(1) This was a mutual contract under which, fairly construed, the superior could not erect any building on ground unfeued within 100 yards of his feuars' villas, which they could not erect on their feus unless it fell under the express reservation. (2) This was not such a building as his feuars could erect. (3) It fell under the class of buildings specially prohibited, being of the nature of a shop or wright's yard. (4) The superior could only free his ground still unfeued by freeing the pursuers' feus. (5) The building

did not fall under the reservation. It had not been built "in connection with any buildings presently erecting," and there were no such buildings now in connection with which it could be used. A possible use in the future did not justify its continuance.

At advising—

LORD PRESIDENT—I think the Lord Ordinary's judgment here is sound. Under the contract which is set out on record the feuar is prohibited from using ground except for "the erection of a private self-contained villa for the residence of one family only, and for no other use or purpose whatsoever without the express consent in writing of the superior." Then without prejudice to the generality there is a long and very comprehensive catalogue of things which are specially prohibited.

The clause founded on by the pursuers provides that this "declaration and prohibition shall be and is hereby created a real lien, burden, and servitude upon and affecting the said piece of ground hereby feued . . . and the same shall be and is hereby constituted a real lien, burden, and servitude upon the other parts of the said lands and estate of Kelvinside still belonging in property to the superior lying within one hundred yards of the said piece of ground hereby feued."

Now, without inquiring what the operating effect of that clause might be in a question with third parties, we have to consider whether this is not a mutual contract, under which the superior is bound to abstain from doing, within a hundred yards of the ground feued, what he has prohibited his vassal from doing upon the feu. I am of opinion that his obligation squares and is identical with that of the vassal. He is only to do within that limited area what it is lawful for the vassal to do upon his feu subject to certain exceptions. He has expressly reserved to himself the right "to open and work quarries within the hundred yards of the ground feued, and to erect and use steam engines, steam cranes, and all buildings and machinery deemed necessary therewith, or in connection with any building presently erecting or that may be erected upon any part of the lands and estate of Kelvinside." Now, I think in the first place that these words point to such buildings and machinery as may be necessary for the erection of villas or the like upon ground belonging to the superior, and with that observation I turn to see how the place in question has been and is at present being used. There is in fact no building going on just now, nor has any building been erected since the putting up of this place with one or two unimportant exceptions. It is also of consequence to observe that this place was not erected in connection with any building then being put up, but to take the place of another building used for estate purposes which had been destroyed. One or two passages in the evidence show in what way it has actually been used. Mr Potts says that he used to meet Mr Fleming there for the purpose of going over

estate plans, and that he used to keep his surveying instruments there. Marshall says he occasionally used it for executing repairs connected with the estate; and Mr Fleming himself rather relies upon the use he may come to make of it in the future than upon any great use he has made of it in the past. Unfortunately for the potential uses which it is said to possess, Mr Brand, a gentleman of large experience in such matters, says it would not be suitable for builder's purposes, being much too small. We have, then, these three facts before us—First, it was not put up in connection with any specified or definite buildings then being erected; secondly, it has been chiefly used as an office in which conferences with regard to the welfare of the estate might be held; and thirdly, it is not suitable for use in future building operations. Any evidence of repairs and the like having been executed in it is very slender, and without minimising Marshall's work there, it seems to have been very limited in amount, and to have consisted chiefly of repairs. But its existence there as a joiner's shop or builder's yard cannot be justified merely because feuars upon the estate must occasionally resort to builders or joiners. The argument, that builders' or joiners' shops if in some way connected with the estate fall under the reservation is clearly untenable. We therefore come back to the construction of the clause adopted by the Lord Ordinary, and which I think is the sound one. His Lordship seems to me to have taken a lower view of the evidence than he need have done, for it appears to me to be negative the use of this place either *in esse* or *in posse* falling under the clause of reservation relied on by the defenders.

LORD ADAM—This is a mutual contract which we have to construe. There are certain restrictions placed upon the feu. The kind of villa he is to erect, and what he may and what he may not do is laid down. Notwithstanding Mr Craigie's argument, I am clearly of opinion that the superior has come under the same or, if your Lordships prefer it, similar restrictions with regard to the land remaining unfeued as he has imposed upon his existing feuars. There is no doubt one way by which he may free the land, namely, by first freeing the pursuers' feu, and to the extent he frees these feu, and to that extent alone, he may free his own lands.

That being so, all that remains for consideration is the true meaning of the reservation in the superior's favour. I agree with your Lordship in thinking the Lord Ordinary is right in holding that the buildings the superior may erect must be in connection with buildings actually in course of erection, and that it will not do to show that the buildings—shops it may be—have some connection with the estate.

LORD M'LAREN—The building complained of consists of a small apartment which seems to have been used chiefly for meet-

ings between the superior and his surveyors, and for holding tools, and it is situated within one hundred yards of the vassals' feu. Probably it is convenient for the purposes of estate management, but that will not give the superior right to have it there if he has bound himself to refrain from putting down any buildings except for certain specified purposes, and it does not fall within the purposes enumerated.

I think we have here a mutual contract in which the superior begins by putting his feuars under restrictions, enumerating particularly a long list of trades which are not to be set up upon the ground feued. The superior then binds himself to place the same restrictions upon all the feu he may grant so as to give his feuars a right to enforce the restrictions to which they are themselves subjected. The superior does not by express words bind himself not to build except under the same restrictions, but he does so inferentially, because he reserves power to do certain things. He thus puts himself, with regard to the things not reserved, under the same disability as his feuars. His reserved rights include the right of quarrying, of erecting machinery necessary for quarrying, and of putting up such temporary buildings as may be useful in the erection of permanent buildings upon the feu. It is plainly implied, I think, that such temporary structures are to be removed after the buildings have been completed. But really that point does not arise here, for I agree with your Lordships that on the evidence the building here is not of the kind which the superior could under his reserved power put up.

Beyond the one hundred yards limit the superior may erect such a building, but I think the complainer is entitled to object to its erection within that limit and to have it removed.

LORD KINNEAR—I only heard part of the argument and therefore prefer to take no part in the judgment.

The Court adhered.

Counsel for Pursuers and Respondents—Dundas—Wilson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defenders and Reclaimers—Sym—Craigie. Agents—H. B. & F. J. Dewar, W.S.