documentary evidence demand, but for reasons which will appear my opinion may be very shortly stated.

I shall consider first the question of damages. The hypothesis is that the defenders, by fraudulent representations, or by concealment amounting to a partial and untrue representation as to the credit and solvency of Barber, induced the pursuers to enter into an agreement whereby the pursuers undertook to make Barber an immediate advance, without security, of a sum not exceeding £6000, and also to make further advances in the ordinary course of business against bills of lading. The pursuers advanced the full sum of £6000, and during a course of business extending from the year 1889 to 1894 they accepted Barber's drafts against bills of lading. The result was an ultimate loss, as appearing in their ledger account, of £10,500. This sum is claimed from the defenders as damages, on the ground, as I understood the argument, that the pursuers are entitled as against the defenders to be restored to the position they occupied before the agreement was made.

In my opinion, the principle of restitution is incapable of being applied to a claim of this nature, and no authority for such an extension of the principle was or could be cited. My view may be illustrated in this way. The purpose for which the defenders were consulted was to assist the pursuers in coming to a decision whether they would be safe in making an advance of £6000 to Barber without security. Now, if the defenders had guaranteed Barber to that amount, £6000 would be the limit of their responsibility however large the ultimate deficit might be in the trading account which followed on this advance. But the argument is that because the defenders did not guarantee Barber but only made untrue representations as to the state of his account with them, they are to be liable in the whole ultimate loss arising on a course of trading extending over a term of years. There are two answers to this view, the one theoretical and the other practical. In the first place, it involves the paradox that the liability resulting from a representation should be greater than the liability consequent on a guarantee; secondly, the sum which a banker or a mercantile agent advances without security may be held to be advanced in reliance on representations as to the credit and solvency of the debtor; but what he advances upon ordinary mercantile security, such as bills of lading, must in ordinary circumstances be taken to be advanced upon his own judgment as to the state of trade and the sufficiency of the security. Especially is this the case where the advances extend over a period of years during which the conditions of the case are necessarily altered, so that the alleged representations cannot justly be held to have any application to the circumstances of the debtor at the times when the successive advances are made.

What I have said may be applied with a slight variation to the case made against the defenders in respect of their having entered into an agreement with Barber to pay them so much a year to account of his debt. If it could be established that the defenders had received payments from Barber which were not taken out of profits, I think the pursuers would have a good claim to have these sums restored to the debtor's estate, on the ground that the defenders had agreed not to take payment out of grass purchased with the pursuers' money. But it was admitted at the bar that the proof did not contain materials for proving that such payments were made out of stock. I understood the Dean of Faculty to disclaim any argument founded on the immediate advance of the £6000, and leading to an alternative claim of special damage of that amount. I was anxious that this view should be left open for our consideration, because my difficulties as to the question of damage would not affect a claim thus limited. But no such claim has been made or argued, and I shall give no opinion regarding it.

In what I have said I have not answered the question of fact, whether the defenders, while professing to make a full disclosure of Barber's indebtedness to them, concealed the existence of debt amounting to about £16,000.

Now, with my view of the duty of a judge, I never would give an opinion that a party was guilty of fraud in an action in which such a finding could not be followed out to an effective conclusion. As I am unable to accept the theory of estimation of damages which the pursuers have put before us, and no other claim is open to our consideration, I prefer not to express an opinion on the issues of fraudulent concealment.

I concur in the judgment proposed, assoilzieing the defenders, on the ground that on the facts as stated the pursuers are not entitled to the remedy of restitution, and that no other relief is claimed.

LORD KINNEAR—I agree with your Lordship in the chair and with the Lord Ordinary.

The Court adhered.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Sol.-Gen. Dickson, Q.C.—J. Wilson. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Balfour, Q.C.—Ure—Napier. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, December 8.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

THE ASSETS COMPANY, LIMITED v. OGILVIE.

Process — Declarator — Competency of Declarator not Concluded for.

In an action of declarator where the Court were of opinion that the pursuer was not entitled to decree to the ful

extent concluded for, and where the pursuer declined to restrict the conclusions of the summons, the Court (*reversing* Lord Kincairney, Ordinary) *granted* a restricted declarator within the limits of the conclusions.

Superior and Vassal — Restrictions in Building — Construction of Terms "Character and Design."

In 1872 the City of Glasgow Bank feued out a portion of their lands for the purpose of forming a street called Carlton Terrace. The titles of the lots feued contained the following conditions — (1) The feuar bound himself within a year to erect "a good and substantial dwelling-house," which would yield a rental equal to double the ground annual; (2) The front of the house or houses so to be erected was to be placed on the building line, and in every respect erected and finished in conformity with the design and building-plans specially designated, and so as not to be inferior in character or design to the houses already built, the superior obliging himself and his successors to take their disponees in the other steadings fronting Castle Terrace bound to observe similar conditions, and to maintain and erect houses not inferior in character and design to the houses built as aforesaid; (3) The superior bound himself and his successors to insert in all future conveyances of his lands similar conditions to those aforesaid. The said design and building plan showed self-contained dwelling-houses of a superior kind, and the houses erected were in conformity with them.

In an action of declarator brought in 1895 by the Assets Company, who were the universal successors of the Bank, and bound by all their obligations, *held* (1) that, under the titles, the superiors were bound by the conditions which they undertook to impose on their disponees; but (2) that the conditions did not imply that self-contained dwelling-houses only should be erected.

In 1872 the City of Glasgow Bank feued out to several disponees by various contracts of ground-annual different lots of the lands of North Woodside, situated in the West of Glasgow, for the purpose of forming, *inter alia*, a street called Carlton Terrace. The contracts of ground-annual contained the following conditions—"(*Second*) The said" disponee, "the second party and his foresaids, shall, so far as not already done, be bound and obliged, within one year from and after the date hereof, to erect and finish on the said steading of ground hereby disponed a good and substantial dwelling-house of stone and lime, covered with slates, and with polished ashlar fronts, and the back wall of striped ashlar, and which house shall yield a yearly rent equal to at least double the amount of the said ground-annual payable therefrom, and to maintain and uphold and, if necessary, repair and rebuild the said house, so that it shall be in such good order and repair as will make it yield the said rent in all time coming; (*Third*) The front of the house or houses to be erected on the said steading hereby disponed shall be placed upon the building line, and in all parts and portions thereof shall be built, erected, and finished in every respect in conformity with the design and building plans exhibited by the said Bruce Miller to Alexander Stronach, the manager of the said bank, and approved of by him, and so as not to be inferior in character or design to the plans exhibited to and approved of by the said Alexander Stronach, with reference to the steadings of ground already built upon, part of said lands, or to the houses already erected on said steadings, the first party (the City of Glasgow Bank) and their foresaids being bound, as they hereby bind and oblige themselves and their successors, to take their disponees in the other steadings fronting Carlton Terrace, already built upon or yet to be built upon, bound to observe similar conditions, and to maintain and erect houses not inferior in character and design to the houses built as aforesaid; (*Fourth*) No back house or back buildings or erections of any kind shall be erected on the said steading of ground, other than a washing-house and stable and coachhouse, greenhouse, coal-cellar, and ashpit, and such buildings to be erected shall not be built higher than one storey, and shall not exceed 10 feet in height in the side walls and 15 feet in height to the ridge of the roofs, and it is hereby specially provided and declared that the smoke emanating from any of such buildings or erections and others shall be conducted and carried away by means of vents, to be constructed by and at the expense of the said disponee and his foresaids in the back or gable walls of the front tenements, and it shall not be lawful to nor in the power of the said second party and his foresaids, or of the tenants or possessors of the said subjects, to erect, build, or use upon the same any steam-engine or any sugar-house, or any buildings or works for the purposes of tanning leather, making candles, soap, or glue, singeing of muslin, or making or preparing of vitriol or cudbear, or to erect any kind of chemical works, glass-works, dye-works, foundries, or smelting-houses of iron, lead, brass, or other metals, or forges for making cast or bar iron, or for the manufacture of nails or rods, or for making bulky articles of iron or other metals, or to carry on any of these trades or occupations thereon, or in general to erect any buildings or to carry on any trade, employment, or operations on the premises which shall be hurtful to the houses belonging to the said first party or their disponees in the neighbourhood, or noisome to the proprietors or inhabitants thereof, in whose favour it is hereby declared that the foregoing provisions shall operate as servitudes upon the said plot or area of ground above disponed in all time coming; . . . and further, declaring that the second party and his foresaids shall be bound in building on the said steading of ground to adhere to the general feuing-plan

of the said lands of North Woodside; . . . and the first party hereby bind themselves and their successors to insert in all future conveyances to be granted by them or their foresaids of their said lands of North Woodside, as shown on the said feuing-plan, similar conditions, provisions, obligations, and others as herein expressed." The plans mentioned in article 3 of the contract showed self-contained dwelling-houses of a superior kind, and the houses erected were in conformity with these plans.

In June 1895 the Assets Company, Limited, who were the universal successors of the City of Glasgow Bank, and by the terms of the City of Glasgow Bank Liquidation Act 1882 liable for all the obligations of the said bank, raised an action against, *inter alios*, William Ogilvie and the other proprietors of the lots forming Carlton Terrace, for ascertainment of the building restrictions applicable to the lands of North Woodside. The pursuers concluded, *inter alia*, for declarator that they were entitled to erect on the lands of North Woodside, including the lots unfeued by them in Carlton Terrace "tenements of dwelling-houses, or tenements of dwelling-houses and shops, or such other buildings as they think fit, provided that such tenements or buildings are not inferior in character and design to the houses already built upon the said subjects."

The defenders, the proprietors of the lots in Carlton Terrace, pleaded, *inter alia*, "3. On a sound construction of the contracts of ground-annual and dispositions above mentioned, the defenders should be assoilzied."

On 20th December 1895 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor containing the following findings:—"(6) Finds as regards defenders, who are feuars or disponees of portions of the said subjects in Carlton Terrace, that the pursuers are bound by the conditions and restrictions which by the rights and titles granted to the said parties the granter thereof undertook to impose on his disponees: (7) Finds that before disposing further of the action as laid against the said last-mentioned defenders, it is necessary to ascertain if possible what the general feuing-plan is which is referred to in the said rights and titles: Therefore allows the pursuers and the said last-mentioned defenders a proof with a view to the identification of the said feuing-plan, the pursuers to lead in the proof. . . .

Opinion.—. . . "That leads to the consideration of the case against the feuars in Carlton Terrace, as if the action had been raised against them only. The conditions in their contracts are set forth in statement 3 for the defenders Ogilvie and others. The clause is long and rather complicated. [*His Lordship here referred to the clause quoted in the narrative.*] It was argued that this clause does not restrict the superior himself in building on the ground, but only binds him to impose restrictions on his feuars. I am prepared to repel that argument, and to hold that the superior is himself bound by the restrictions which he undertakes to impose on his disponees, and it may be of use to pronounce a finding to that effect. But beyond that I am unable to go. I am not in a position to construe the clause, because parties are not agreed as to the general feuing-plan to which it refers. I cannot in this question with the Carlton Terrace feuars assume its identity with the reduced feuing-plan signed with reference to Baird and Brown's feu-disposition. There is not in this case any question about the right of a feuar to enforce conditions in other feu-rights, but only as to his right to enforce the obligations undertaken by the superior in his contract with himself."

The pursuers presented a reclaiming-note in which they brought under review certain other findings in this interlocutor—(see 33 S.L.R. 407). They did not challenge findings (6) and (7), and these were adhered to on 6th March by the Second Division.

The necessity of leading proof with a view to the identification of the general feuing-plan was obviated by a joint-minute agreeing to a certain plan as the plan referred to in the titles. Afterwards, by interlocutor of 9th June 1896, a proof was allowed as to what the plan showed, from which it appeared that it was a general ground-plan of the lands of North Woodside and Kelvinholme, including the subjects in question, and showed the ground laid out in terraces and streets, with building lines, but indicated nothing as to the character of the houses to be erected.

On 18th July 1896 the Lord Ordinary pronounced the following interlocutor:—"Finds that the conclusions of declarator are inconsistent with the conditions and restrictions which by the rights and titles granted to the proprietors in Carlton Terrace the granter thereof undertook to impose on his disponees in the lands of North Woodside: Therefore assoilzies the defenders from the conclusions in the summons, and decerns."

Opinion.—. . . "The first question is, what are the conditions which the pursuers by the title-deeds now under consideration bound themselves to impose on their disponees? It is sufficient to refer to the conditions in the Carlton Terrace titles. Now, the clause is long and complicated and confused, and as ill-drawn as possible.

The clause is divisible into two parts. By the first part it is declared (1) that the disponee shall be bound within a year from the date of the contract to erect a 'dwelling-house' of the character and quality described; (2) that the front of the house or houses to be erected 'shall be placed upon the building-line, and in all parts and portions thereof shall be built . . . in conformity with the design and building-plans exhibited by the said Bruce Miller to Alexander Stronach, the manager of the said bank.' It is not necessary to quote the rest of the clause about these buildings. But it proceeds 'The first party (*i.e.*, the bank) and their foresaids being bound, as they hereby bind and oblige themselves and their successors, to take their disponees on the other

steadings fronting Carlton Terrace already built upon, or yet to be built upon, bound to observe similar conditions and to maintain and erect houses not inferior in character and design to the houses built as aforesaid.' This is a clause of restriction in reference only to Carlton Terrace, not the rest of North Woodside. This clause may perhaps not mean that the clauses in the new dispositions should be absolutely identical with those quoted; but I think that, fairly construed, it does mean that they shall be substantially the same, and that they shall at least stipulate that dwelling-houses shall be erected on the remaining stances, and that a building-line shall be preserved.

"Considering that the question is merely a question between two contracting parties, I fail to see why this clause should not be binding on the pursuers if it be intelligible at all. It was their bargain—they chose to make it—that they should insert such conditions in the dispositions of the remaining stances in Carlton Terrace. I am unable to see why they should not be held to their bargain. The present defenders, who are owners of houses in Carlton Terrace, no doubt relied on it when they made their purchases. There might be a question whether one disponee could enforce the conditions against another. But where is the question whether a disponee could enforce them against the disponer? I think the clause must be held obligatory if it be intelligible. Now, it has been decided that, if the disponer obliged himself to impose these conditions on the disponees, he imposed them on himself.

"Pausing at this point, the question is whether the declaratory conclusions are consistent with their conditions. I cannot see that they are. The declarator asked is extremely wide. It is really a conclusion that the pursuers are entitled to erect whatever buildings they please, provided they are not inferior in character and design to the houses already built on the subjects. Such a declarator would enable them to disregard the building-line of Carlton Terrace, and it would enable them to build shops where dwelling-houses are stipulated for. I cannot but think that it would be against the good faith of the contract with the proprietors of the houses in Carlton Terrace, to fill up the vacant stances with tenements and shops. It is true that the declarator would be quite consistent with the clause so far as I have considered it, if Carlton Terrace were excepted. But I have not been asked to pronounce a declarator excepting Carlton Terrace. The decision against *Lamb and Gibson* and *John and James Anderson* (reported March 6, 1896, 23 R. 569, and 33 S.L.R. 407) does not seem to affect this question, because of the marked difference between the provisions of the dispositions.

"The clause proceeds to mention other conditions. It contains important restrictions as to back buildings on the steadings, which I take to be material to the general plan; and certain other obligations, which I need not mention specially because they seem reconcileable with the declaratory conclusions; and there is the declaration 'that the second party and his foresaids shall be bound in building on the said steadings of ground to adhere to the general feuing-plan of North Woodside,' and there follows the obligation to insert in all future conveyances of the lands of North Woodside, as shown on the feuing-plan, similar conditions, &c.

"Now, as the obligation on the disponee in this contract measures the obligation to be imposed on other disponees, it seems to follow that the pursuers are here bound to impose on their future disponees of any part of North Woodside an obligation to adhere to the general feuing-plan, and, by force of the interlocutor already pronounced, this infers that the pursuers are themselves bound to observe the general feuing-plan.

"But then it is said that it has already been decided in the question with Lamb and Gibson that an obligation to observe a feuing-plan was not binding on the pursuers, and it is argued that it follows that in this question with the terrace proprietors an obligation to observe the general feuing-plan must be held equally ineffectual. I feel that this argument is embarrassing, but it appears to be an argument from one finding in an interlocutor against another, and I think I cannot but hold that seeing that the pursuers are bound to impose this obligation on their disponees, they are bound by it themselves. I think I would contradict the finding in the previous interlocutor, which relates to the present proprietors if I did not hold that.

"It is to be observed, however, that the general feuing-plan is materially different from the feuing-plan referred to in Lamb and Gibson's disposition. It shows not only the lines of the terraces and the roads and ornamental ground, but also the various stances, and it was to explain the various lines shown on the plan that the evidence was led.

"I do not clearly see why, when a party binds himself to abide by a general feuing-plan, he should not in a question with the person with whom he contracts, so long as the plan has not been infringed on, be held to his bargain, and looking to the differences between the contract and the plan in this part of the case, and in that relating to Lamb and Gibson, I do not think I am bound to hold—and indeed I do not think I can hold—that the pursuers are not bound by the general feuing plan.

"The question remains, however, what is it that the general feuing plan indicates, and what is the obligation which an adherence to it involves? This is the subject-matter of the proof. On this point, however, I think there is little to be said. I think the proof is of no great value, and weighing the evidence on both sides, I am satisfied that the plan does not indicate with sufficient distinctness, for the imposition of a building restriction, that nothing but dwelling-houses were to be permitted on the line of Carlton Terrace and Gardens and Doune Terrace and Gardens. In particular, I am not satisfied that an obligation to adhere to the plan involves a prohibition

against tenements of dwelling-houses or tenements of dwelling-houses with shops, and if the pursuers had asked only for a declarator that the titles did not prevent them from building tenements of dwelling-houses and tenements of dwelling-houses and shops on their lands, I do not say that that might not have been granted. Such a declarator would leave untouched all the conditions of the deed. It would only involve an interpretation of the plan. But that is not the nature of the pursuers' demand in this action. They ask a declarator which would in truth free them from the conditions of the contract altogether, and enable them to disregard the building line shown on the plan, and also all the restrictions and conditions in reference to the back buildings.

"The pursuers declined to restrict their conclusions, but it was suggested that I might give decree under such qualifications as I considered imposed by the contract. But I do not think I can be called on to do that.

"My view is, that while the pursuers may not be restricted from building tenements of dwelling-houses or of dwelling-houses with shops, except on Carlton Terrace, as to which there is, in my opinion, such a restriction, they are bound to adhere to the building lines shown on the plans, and to conform to the conditions as to back buildings. But I have not been asked to embody these opinions in a decreet of declarator. The result is, in my opinion, inevitable, that the present defenders are entitled to absolvitor." . . .

The pursuers reclaimed, and argued—(1) As regards the obligation to build "a good and substantial dwelling-house," this included a tenement of dwelling-houses. Building restrictions were not to be interpreted strictly. If tenements were to be prohibited, the word "self-contained" would have been inserted before dwelling-house in the title. If tenements of houses could be built, shops also could be erected as parts of the tenements. (2) As regards the third clause, this clause required the houses to be built in Carlton Terrace to be erected, "so as not to be inferior in character and design" to the houses already built. Did that clause exclude the erection of shops? No, because there was no restriction as to the use of the houses in the contract of ground-annual, and the use of a building as a shop was primarily a question of use. There was no restriction in the titles against showing, by the structure of the tenement, that buying and selling were carried on therein. While still adhering to their demand that they were entitled to erect "tenements of dwelling-houses and shops," they were quite willing that the decree to be pronounced should secure to the defenders any right which they might possess, to enforce any of the other conditions, provisions, and obligations imposed on them, the pursuers, by the titles granted in favour of the defenders or their authors. This could be done by the Court without any formal restriction of the conclusions of the summons being required.

Argued for the defenders—(1) The defenders were required to build a good and substantial dwelling-house. This condition was also required to be inserted by the superiors or their successors in all future conveyances of their lands of North Woodside. A good and substantial dwelling-house meant a self-contained dwelling, and should not be held to include a tenement of dwelling-houses, and least of all a tenement of dwelling-houses and shops. (2) The superiors were taken bound not to erect houses inferior in character and design to those already built. No houses had been already built except self-contained dwelling-houses. This conclusively excluded the building of tenements and shops, as to do so would hurt the amenity of the locality, and be a total divergence from the condition in the title.

At advising—

Lord Justice-Clerk—The pursuers in this case do not now insist on declarator in the full terms of the conclusions of the summons, but are willing, if they can obtain a judgment on the main point at issue, which regards the character of the buildings they are entitled to erect, that the rights of the defenders as regards the line of buildings, erections on back ground, &c., should be reserved. But they adhere to their demand for a declarator of their right to erect tenements of houses and shops on the lands in question, and this is resisted by the defenders, who maintain that only self-contained dwellings may be erected.

On the question whether houses of the tenement class may be erected, if similar in style and design to those already on the ground, I have come to the conclusion that there is nothing in the conditions to prevent the pursuers from having their right to do so declared, and that if in the words of the deed "good and substantial dwelling-houses of stone and lime, and covered with slates" are erected, that would be within the feuars' rights, although the buildings were so arranged internally that the different flats could be inhabited as separate houses.

Upon the question whether shops may be erected as part of the buildings, I have, as regards Carlton Terrace, had very considerable difficulty and doubt, but I have come finally to the conclusion that the terms of the feu-contract are such as not to warrant the erection of buildings other than dwelling-houses, and that any plans which would present an external appearance inconsistent with the expression "dwelling-house" would not be in conformity with them.

Lord Trayner—I am not prepared to dispose of this case in the manner in which the Lord Ordinary has disposed of it. His Lordship has assoilzied the defenders from the conclusions of the summons altogether, because he is of opinion that the pursuers are not entitled to a decree to the full extent concluded for, and because the pursuers declined to restrict their conclusions. It is clear from the opinion of the Lord Ordinary that he thought the pursuers were en-

titled to a decree of declarator somewhat within the terms of the conclusions, but because they have asked more than they were entitled to, and would not ask less, he has refused them everything. I say I am not prepared to deal with the case in this way, but, on the contrary, prepared to give the pursuers such a declarator within the limits of their conclusions as they may have established their right to have although their demand is for something more. Apart from this difference as to the mode in which the case should be dealt with, I concur generally in the view of the Lord Ordinary (as appears in his opinion) as to the extent of the pursuers' rights. The main contention on the part of the defenders was that the pursuers were restrained under their titles from building anything upon the ground in question except self-contained dwelling-houses. This argument was maintained on a construction of the clauses contained in the ground-annual between the City of Glasgow Bank (the pursuers' author) and John Charles Robertson, the defenders' author, dated in August and September 1872. The import of these clauses may be shortly stated thus—(1) Mr Robertson bound himself within a year to erect "a good and substantial dwelling-house" which would yield a rent equal to double the ground-annual; (2) the front "of the house or houses" so to be erected was to be on the building line, and in every respect erected and finished in conformity with the design and building plans specially designated, and so as not to be inferior in character or design to houses already erected in Carlton Terrace; and (3) the first party, that is, the pursuers' authors, obliged themselves and their successors to take their disponees in the other steadings fronting Carlton Terrace bound "to observe similar conditions and to maintain and erect houses not inferior in character and design to the houses built as aforesaid."

From a consideration of these clauses it appears that the only obligation imposed on the disponers was to take their disponees bound to observe similar conditions to those imposed on Mr Robertson, and to erect and maintain houses not inferior in character and design to those already built in Carlton Terrace. I assume, with the Lord Ordinary, that the disponees were themselves bound to observe similar conditions to those they had undertaken to impose on their disponees. Beyond this it is not pretended that under the clauses I have referred to there is any obligation on the disponers (now represented by the pursuers) which restrains them from the freest use of their property. The extent of their restriction, therefore, is to be found in the restriction placed on Mr Robertson—the restrictions on Mr Robertson and the pursuers are co-extensive. Now, Mr Robertson was bound in the first place to erect a "good and substantial dwelling-house." The defenders say that this means a single self-contained dwelling-house, which they define to be a house fitted for the occupation of one family. The first answer to that is that the defenders read into the deed a qualification which is not there. The descriptive phrase "self-contained" was well-known and in common use at the date when the ground-annual was executed, and presumably would have been used had it been intended to put on Mr Robertson the restriction which it implies. But in the next place, the opening words of the second clause (as quoted by me above) evidently contemplate that Mr Robertson would or might build more than one house upon the ground disponed to him. But further, suppose that Mr Robertson had erected a semi-detached villa there, good and substantial in itself, and yielding a rental of at least the double of the ground annual, could it have been reasonably maintained that he had gone beyond his right or failed to fulfil his obligation? I think not; but yet such a building would not have been within the defender's definition of a self-contained dwelling-house, for it would have been one fitted for the accommodation of and would have been occupied by two families. The defender's main contention therefore seems to me to be unsound. This leads chiefly to the question whether there is any restriction on the pursuers disentitling them to build tenements of houses, and I am of opinion that there is not. If it cannot be affirmed that the pursuers by the terms of their titles are restrained from building any but self-contained dwelling-houses, there is no restraint upon them building any other kind of dwelling-house they please. To revert to the illustration I have already given, if the pursuers are at liberty (as Mr Robertson was in my opinion) to build a house for the accommodation of two families, they are equally entitled to build a house to accommodate four or six families. And if they are at liberty to build two houses (as in a semi-detached villa) alongside of each other, why may they not build two or three houses, the one on the top of the other, which is just a tenement of dwelling-houses. Such tenements, however, must be on the existing building line of Carlton Terrace, and not be inferior in character and design to the houses already built there. These limitations I understand the pursuers are willing to observe.

There remains the question whether the pursuers are entitled to build in Carlton Terrace a tenement of houses, the lower or ground floor of which should be occupied as shops. On this question there is more room for doubt. Shops and dwelling-houses are certainly not the same thing. But the same premises occupied by one tenant may be both house and shop—the shop in front, the dwelling-rooms behind. The defenders admit that if the pursuer built a tenement of dwelling-houses their tenants may without objection exhibit in their windows, either on the ground floor or above, articles of merchandise for sale. If it is only built as a dwelling-house it may be used as a shop. A shoemaker or a tailor may carry on his calling at the front window of his house, and have his signboard above it

without objection. But what is that after all but a shop. I fail to see any interest which the defenders can qualify to maintain such a restriction, if such a restriction exists, it being one so easily evaded. But in truth I think the objection resolves itself into one as to the use to which the building can be put; and I think there is no restriction imposed on the use by the clauses I have referred to. There is in another part of the deed an express restriction as to the erection of factories, &c., or to the carrying on of certain trades, but this restriction the pursuers do not wish to violate. On the contrary, they expressly stated that such restriction is to be observed, and they are willing to take their declarator subject to it. The Lord Ordinary seems to be of opinion that the pursuers are entitled to build tenements of houses with shops, and I am rather inclined to agree with him. But I do not press that view, as I understand your Lordships are of a different opinion.

LORD MONCREIFF—As regards the steadings fronting Carlton Terrace, I agree with your Lordships that there is not sufficient warrant in the feu-contract, to restrict the pursuers to erecting self-contained dwelling houses.

I think they are entitled to erect tenements of dwelling-houses not inferior in character and design to the houses already built. But I do not think they are entitled to build shops. Reading the second, third, and fourth heads of the contract, I think it is stipulated with sufficient distinctness to be binding upon the pursuers that the houses to be erected by them or their disponees on steadings fronting Carlton Terrace shall not only be placed on the same building-line as those already erected, and be not inferior in character and design to them, but shall, externally at least, be dwelling-houses, the object of the stipulation being to preserve the residential appearance of the locality.

It may be that when tenements of houses are erected they may be used as shops. The contract does not contain any general prohibition against such a use, and the provisions of the fourth head of the contract are by no means inconsistent with it. But as regards Carlton Terrace, I do not think that the pursuers are entitled to a decree which would enable them wholly to disregard what I take to be the contract of parties as to the external appearance of the buildings.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Find and declare (1) that as regards that part of the subjects described in the conclusion of the summons, of which the pursuers are proprietors, fronting Carlton Terrace, the pursuers are entitled to erect thereon tenements of dwelling-houses, provided that in doing so they observe the existing building line in front, and that the houses so to be erected are not inferior in character and design to the houses already built and forming part of said terrace: Reserving to the defenders any rights which they may have to enforce any other conditions, provisions, and obligations imposed on the pursuers or their authors by the titles granted by them, or either of them, in favour of the defenders or their authors: *Quoad ultra* dismiss the action."

Counsel for the Pursuers—Balfour, Q.C.—Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for the Defenders—Guthrie—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, December 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

A *v.* THE NORTHERN ACCIDENT INSURANCE COMPANY, LIMITED.

Insurance—Accident Insurance—Proof—Confidentiality—Medical Etiquette—Accidental Blood Poisoning in course of Medical Practice.

A policy of insurance against, *inter alia*, accidental blood-poisoning was issued to a medical man. In an action on the policy by the insured, it appeared that while he was performing an operation on the uterus of a woman he cut his finger. About a fortnight afterwards he developed a sore upon the finger, the nature of which was disputed, and at the same time showed secondary syphilitic symptoms. The pursuer averred that he had been inoculated through the cut in his finger by this patient, but led no evidence to show that she was suffering from syphilis.

Medical evidence was led by the defenders to show that it was contrary to experience that secondary symptoms should develope within fourteen days of inoculation. The pursuer refused to give the name of the patient, on the ground of professional etiquette.

Held that he had failed to prove that the blood-poisoning had been accidentally contracted in the course of his professional duty—*diss.* Lord Young, on the ground that the parties must be held to have contracted in view of the known rule of professional etiquette, and that on this footing the pursuer had sufficiently proved his case.

This was an action brought in the Sheriff Court at Glasgow by a doctor of medicine in Glasgow, against The Northern Accident