against her by the bank for payment of the sum contained in her guarantee, she raised the present action.

The pursuer pleaded with regard to the composition-arrangement — "(5) The defenders' statements can only be proved by writ or oath. (6) The defences, so far as founded on the alleged composition settlement, should be repelled—(1st) In respect the pursuer never accepted said settlement, either directly or through her agent; (2nd) that any acceptance thereof given by Messrs Morice & Wilson was unauthorised by and is not binding on the pursuer." . . .

The defender pleaded — "(6) In respect that the pursuer agreed to the composition arrangement made by the defenders, and that there has been no failure on their part in carrying through the arrangement, the defenders should be assoilzied."

The Sheriff-Substitute, after a proof had been led, found in fact, *inter alia*, that the pursuer had "authorised Mr Wilson (her agent) to agree to this composition on her behalf, which he accordingly did by letter to Messrs Edmonds & Ledingham"; and found in law—"(1) That pursuer is bound to concur in said composition arrangement, having agreed to do so through her duly authorised agent." He decided in favour of the defenders with regard to the other points raised in the case, and accordingly dismissed the action.

The pursuer appealed, and argued — Assuming that the appellant's agent was authorised to accept the composition, the abandonment of a right such as was contained in an agreement to accept a composition must be proved by the writ of a party himself, and the letter of an agent was not enough to bind the principal — Bell's Commentaries, ii. 393 and 398; *M'Gregor* v. *M'Gregor*, June 27, 1860, 22 D. 1264, at page 1268.

Argued for the respondents—The writ of an agent, his mandate being good, as it had been proved to be in this case, was sufficient to bind his principal in a composition arrangement—Bell's Commentaries (*supra*); *Glass* v. *M'Intosh*, May 12, 1825, 4 S. 1. The writ here was required only for the proof of the creditor's accession, not for the constitution of the agreement, and accordingly no special formalities were required.

At advising —

LORD M'LAREN — [*After reviewing the evidence, upon which his Lordship concurred with the Sheriff-Substitute in holding that the pursuer had authorised her agent to accede to the composition arrangement, his Lordship proceeded*] — The only other point in the case is the appellant's plea that accession to the composition agreement can only be proved by writ or oath.

Now, it is a general rule that where writ is required for the proof of an agreement, as distinguished from its constitution, a letter signed by the party or his agent is sufficient. There may be exceptions, but this is not one of them. Accession to a trust or composition agreement is a matter of fact, and no obligatory writing or other formality is necessary to bind the creditor. According to universal practice, the creditor's signature is sufficient evidence of his accession, and where he is represented by an agent, the agent's signature is as good as that of the principal. Assuming that Mr Wilson had his client's authority, which for the reasons stated I hold to have been given, Mr Wilson's letter to Mr Ledingham is in my opinion sufficient to bind the appellant.

No other points were pressed in argument, and my opinion is that we should adhere to the judgment of the Sheriff-Substitute, dismissing the action with expenses in the Sheriff Court.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered to the judgment of the Sheriff-Substitute, and dismissed the action.

Counsel for the Pursuer—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defenders—H. Johnston—W. Brown. Agent—Alexander Morison, S.S.C.

Saturday, July 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

JOHNSTON *v.* WALKER TRUSTEES.

Superior and Vassal—Building Restrictions — Title of Co-Feuars to Enforce Restrictions—Mutuality.

A clause of restriction common to all feu-charters granted by a superior in a certain street, restricted the feuar from converting the house thereby disponed into a shop, and bound him to use it as a dwelling-house only. Each feu-charter commenced with a reference to "the plan and elevation adopted for" certain streets, and set out as the reason for the restriction that the tenement which was already built on the area feued "has been erected in strict conformity to" that plan and elevation. Each title also contained provisions relative to a pleasure ground in front of the subjects, and to the formation and maintenance of the sewers, inferring community of interest and obligation among the feuars with regard thereto. Each title also contained a clause providing that the superiors should have power to vary or alter any of the proposed plans and streets and lanes upon the ground belonging to them which was not built upon at the time of granting the respective feu rights. They contained no special stipulation that the restriction to which each feuar was to submit was to be imposed on

the other feuars. No question as to the restrictions was raised until the ground referred to had been built upon.

Held that according to the intention of the parties the restrictions were imposed for the common benefit, and that accordingly any one of the feuars was entitled to enforce them.

Superior and Vassal—Condition of Feu—Infringement of Condition — Acquiescence

A feu-charter contained a clause restricting the vassal from converting "the said dwelling-house hereby disponed into a shop or shops or warerooms for the sale of goods or merchandise of any description, but that they shall be bound to use the same as a dwelling-house only." Other charters granted by the superior in feuing houses in the same street contained substantially identical restrictions. An action was brought at the instance of a feuar for declarator that the restrictions had been departed from and no longer existed, on the ground that the superior and co-feuars had acquiesced in the contravention of them, and were accordingly barred from insisting in them, and for declarator that he was entitled to convert his premises into a shop and use them as such. It was proved that the premises possessed by him had been for thirteen years occupied without objection as writers' chambers, and subsequently by his author for twelve years as a shop for the sale of millinery and costumes, but that in the latter case there had been constant objections raised by co-feuars to the use of the subjects, and that the superior had authorised them to use his name for taking legal proceedings, which had only been prevented by a compromise under which the proprietor of the subjects undertook that the consent of the co-feuars to his use of the subjects should not be held to prejudice their right to object at any future date. It was further shown that contrary to the terms of the titles there had been erected without objection by the superior or co-feuars dormer windows in certain of the houses belonging to other feuars.

Held (1) that the pursuer had not proved acquiescence in the contraventions of the restrictions as to use, (2) that the abandonment of certain building restrictions did not imply abandonment of all, and that the defenders had not thereby lost the right to object to contraventions of the titles which were not *ejusdem generis* with those acquiesced in.

Stewart v. *Bunten*, July 20, 1878, 5 R. 1108, *approved.*

This was an action at the instance of Peter Johnston, coachbuilder, 22 Coates Crescent, Edinburgh, against the Walker Trustees—the superiors of the property—and against certain co-feuars holding feus from the same superiors, concluding for declarator that "nothwithstanding the terms of the feu-charter, dated 14th, and recorded in the New Particular Register of Sasines, &c., for the sheriffdom of Edinburgh and constabularies of Haddington, &c., 16th, both days of May 1859, granted by Miss Mary Walker of Coates in favour of George John Murray, W.S., Edinburgh, the pursuer, as heritable proprietor of the subjects No. 22 Coates Crescent, Edinburgh, with the parts and pertinents thereof thereby feued, in the first place, is not bound to use the same as a dwelling-house only, and, in the second place, is entitled to possess and occupy the same as a shop or wareroom, or to convert the same into a shop or wareroom, and to possess and occupy them as such;" and for declarator "that any conditions, restrictions, or prohibitions in the said feu-charter limiting the pursuer in his use of the said subjects as a dwelling-house only, or preventing him from possessing and occupying the same as a shop or wareroom, converting the same into a shop or wareroom, and possessing and occupying them as such, have been departed from, and that the defenders and the said other parties, or any one of them, have no right or title to enforce the said conditions, restrictions, or prohibitions against the pursuer." The pursuer's property consisted of the street and sunk flats at the corner tenement of Coates Crescent and Manor Place. Certain of the co-feuars who were called as defenders and lodged defences in the action, viz., the Misses Hofford, were proprietors of the other flats in the same house, while the others, the Misses Cook, were proprietors of the adjoining house, No. 21 Coates Crescent.

The pursuer acquired the subjects in May 1896 from Mr John Aitken, silk mercer. He held them as vassal of the defenders, the Walker Trustees, under the feu-charter, dated 14th May 1859, granted by their predecessor in favour of George John Murray, W.S., which contained the following clause—"And it is hereby expressly provided and declared that as the tenement built on the said area has been erected in strict conformity to the plan and elevation adopted for Coates Crescent and Manor Place (and the plan and elevation of the said tenement now subscribed by me and the said George John Murray as relative hereto), with balconies and iron railings on both fronts thereof, conform to the pattern adopted for said crescent and place, it shall not be in the power of the said George John Murray, or his foresaids, to convert the said dwelling-house and others hereby disponed into a shop or shops or warerooms for the sale of goods or merchandise of any description, but that they shall be bound to use the same as a dwelling-house only; and further, that it shall not be in the power of my said disponee or his foresaids to erect or make common stairs or separate tenements within the said house, nor to make any deviation from or alteration upon the plans and elevations and pattern balconies and iron railings before men-

tioned; with entry at the term of Whitsunday 1859: To be holden and to hold the said subjects before disponed conform to the foresaid plans and elevations, and not otherwise, of and under me, my heirs, successors, and assignees, as immediate lawful superiors thereof, in feu farm, fee, and heritage for ever." The charter also bore to convey—"As also right in common with the whole other feuars from me or my predecessors or successors, of areas or stances in Coates Crescent, to the space or area of pleasure-ground in front of the street way of said crescent, now enclosed with a parapet wall and iron railing, and that as a common property of the feuars in the said crescent, on the conditions and obligations after mentioned; . . . but it is hereby expressly provided and declared that the foresaid dwelling-house and others, with the privileges and pertinents thereof, are hereby disponed, . . . as also under the burden of a proportional part of the expense, along with the other feuars, of keeping the common sewer, and the causeway, and the surface drains and gratings, in perpetual repair and order, all at the sight of the Lord Dean of Guild of the City of Edinburgh for the time being, or other competent authority; and it is also provided and declared that the foresaid area or pleasure-ground in front of the said crescent shall be used allenarly for pleasure or other accommodation of the several feuars and their families, but shall nowise be converted into a common thoroughfare, and that the said space, with the parapet-walls, railings, entries, gravel walks, trees, and grass ground shall be made, preserved, and kept in order and repair at the common and rateable expense of the whole feuars." The tenement of which the pursuer's property formed part was built about 1825, but no charter was granted until that of 1859.

The nature of the present case is fully set out in the following extracts from a joint minute of admissions which was lodged by the parties. They admitted—"(2) That the pursuer presented a petition to the Dean of Guild Court, Edinburgh, of this date, for warrant to remove part of the centre gable and interior partitions on the basement and street flats of the subjects in question and to support the walls and partitions above on cast-iron columns and standards and steel beams, and to construct new w.c. in one of the cellars under the street pavement with new window to area, and to make certain other alterations for the purpose of enabling him to use the same as a carriage saloon or wareroom in connection with his business as a coachbuilder, all as shown on the plans relative thereto lodged in the said Dean of Guild Court; that the defenders, the Walker Trustees, the Misses Hofford, and the Misses Cook, opposed the said application; that the said Court sisted process of this date to allow of this action being raised by the pursuer to determine his rights. (3) That the titles of the compearing defenders, so far as founded upon or referred to, are correctly set forth in the answer for them respectively to the fifth article of the pursuer's condescendence; that the titles of the pursuer, of the defenders Misses Cook, and of the other proprietors in Coates Crescent of their respective properties therein, contain clauses of prohibition against the use thereof otherwise than as dwelling-houses only, and against making any deviation or alteration upon the plan and elevation adopted for Coates Crescent, and pattern balconies and iron railings in front of such subjects in terms substantially identical; that all such titles also contain provisions relative to the pleasure-ground in Coates Crescent and to the formation and maintenance of the sewers, inferring community of interest and obligation among the feuars with regard therto; that all such titles also contain a clause providing and declaring that the superior shall have power to vary or alter any of the proposed plans and streets and lanes upon the ground belonging to them and not built upon at the time of granting the respective feu-rights thereof; . . . . that the whole of the areas known as Coates Crescent and Manor Place was built upon" by May 1854; . . . . "(4) That from 1871 to 1884 No. 22 Coates Crescent was owned by Messrs Dalgleish & Bell, W.S., and occupied by them as writing chambers; that the partners of the firm occupied the subjects during the day as writing chambers; that they did not sleep on the premises; that they maintained resident caretakers (a man and his wife), who occupied the basement portion of the subjects; that the defenders, the Walker Trustees, were aware of, but did not take any steps to prevent, this use of the subjects; and that no change was made upon the house internally or externally during Messrs Dalgleish & Bell's ownership and occupancy thereof, except that upon the front door, which was kept shut, they placed a brass plate upon which was engraved, 'Messrs Dalgleish & Bell, W.S.' (5) That at or about Whitsunday 1884 John Aitken, mentioned on record, acquired the subjects in question from Messrs Dalgleish & Bell, and immediately thereafter began to use the same as a shop or wareroom for the sale of millinery, mantles, costumes, and other goods, which he advertised in the newspapers by the name of 'Manor House,' and in circulars addressed to residenters in Edinburgh as 'Private showrooms for millinery, mantles, and costumes'; that he affixed a brass plate with the words 'Manor House' upon it to the inner door in the vestibule of the subjects; that he painted the words 'Manor House Showrooms' on the windows looking into Manor Place and Coates Crescent, and that those words also appeared on the dwarf blinds of such windows; that the said windows at first were curtained, and were not used for the display of goods; and that he used the basement floor as workrooms for the manufacture of millinery, &c., and painted the words, 'Work rooms' on the outside walls thereof. (6) That several of the proprietors in Coates Crescent objected to such use of the said subjects by the said John Aitken, and that two meetings of such proprietors in connection therewith

(at the first of which the agent of the superiors was present as representing their interests) were held on 23rd December 1884 and 16th January 1885; . . . that thereafter a correspondence took place between Mr Aitken and his agent Mr Lockhart Thomson, S.S.C., on the one side, and a committee of proprietors in Coates Crescent and Mr Ralph Richardson, W.S., their agent, on the other, and that in respect of this correspondence no legal proceedings were then taken; and that the letter of 16th March 1885, referred to in said correspondence, was intimated, and a copy thereof sent to the defenders, the Walker Trustees."

In the letter of the 16th March referred to, Mr Aitken wrote that while advised he was within his rights "if the objecting proprietors abstain from pressing their objections as long as I occupy and use the house as I am now doing, I bind and oblige myself that it will not afterwards be pled acquiescence on their part, and that the respective rights of parties shall be in no way prejudiced thereby. That is to say, it will be quite open to any of the proprietors to adopt whatever proceedings they may be advised to take to have their legal rights determined without my pleading that their being at present passive be construed into consent or approval."

The said minute of admissions proceeded—"(7) That about 28th May 1885 the said John Aitken began to display goods in the east window of the subjects looking into Coates Crescent; that in consequence of his doing so the defenders Misses Cook erected an iron screen upon the westmost railing leading into the doorway of their house No. 21 Coates Crescent; that the said use of the said window by the said John Aitken was objected to by Mr Charles Cook, W.S., as acting for the defenders Misses Cook; . . . . (8) That after 28th May 1885 the said John Aitken continued to use the said subjects for the sale of goods as aforesaid; that he used the whole of the windows of the street floor thereof for the display of his goods; that he affixed a brass plate to the step of the outer doorway of the subjects with the words 'Manor House' engraved thereon; that such use of the subjects was known to the residents in the vicinity as well as to the public generally, and that the subjects during the occupation thereof by the said John Aitken were entered in the valuation roll of the burgh of Edinburgh as showrooms, and assessed as such for rating purposes accordingly. (9) That Miss Christie, the predecessor of the defenders Misses Hofford, was a customer of the said John Aitken, and that she did not take objection at any time to his use of the subjects in question. (10) That on or about 26th December 1885 the said John Aitken obtained a warrant from the Dean of Guild Court, Edinburgh, 'to lower sills of the windows to the south, and introduce new sash and case windows in business premises No. 22 Coates Crescent, all as shewn on plan No. 29 of process,' which is referred to; that the said warrant was obtained in absence, and without the superiors or adjacent proprietors having been called as respondents to the application therefor; that these parties were not aware of such alterations until they had been completed; that upon learning of such warrant having been obtained, and of the alterations thereunder having been made, Messrs W. & J. Cook, W.S., as agents for the defenders Misses Cook, entered into correspondence with the said John Aitken and his agent Mr Lockhart Thomson, S.S.C., relative thereto. (11) That on or about 5th January 1895 the said John Aitken presented a petition to the Dean of Guild Court for leave 'to remove parts of the front wall in area and first flat of No. 22 Coates Crescent, Edinburgh, and insert iron standards and steel beams to carry the wall above, to open out three blind windows in Manor Place front, to extend frontage to Coates Crescent out to front area wall, to form shops one storey high above pavement, to slap internal walls, remove partitions, erect new partitions, and do other work necessary to carry out said alterations, all as shown on plan;' that the defenders the Walker Trustees, as superiors, and the Misses Hofford and the Misses Cook as adjacent proprietors, opposed the petition; that Mr Aitken thereafter abandoned his petition on paying the said respondents' expenses, conform to interlocutor of the Dean of Guild Court of 21st March 1895, and that the said petition, with relative plan and the answers thereto for said respondents, are produced and referred to. (12) That the said John Aitken ceased to occupy the subjects in question and removed therefrom in or about February 1896. (15) That the general feuing-plan of Manor Place and Coates Crescent referred to in the titles of the pursuer and of the defenders Misses Cook and Misses Hofford has been lost. (16) That the following deviations or alterations upon the general plan in conformity with which the houses in Manor Place and Coates Crescent were originally erected have been made and have existed for many years, viz., three dormer or attic windows have been added to the roof of the tenement of which No. 22 Coates Crescent forms part; two dormer windows have been made in the roofs of the dwelling-houses Nos. 4, 6, 7, 9, 10, 13, 16, 17, 18, 19, and 20 Coates Crescent; and that in the case of the dwelling-houses Nos. 8, 14, and 15 Coates Crescent, complete storeys have been added to their front elevation, the additional storey of No. 8 consisting wholly of a stone front, and the additional storey of Nos. 14 and 15 consisting chiefly of timber fronts. (17) That the agents of the pursuer were notified previous to his purchase of said subjects by the agents of the superiors, the Walker Trustees, and by the agents of the defenders the Misses Cook, that any intended use of the subjects for trade purposes would be objected to as an infringement of the feu-charter, and that the pursuer's agents were also informed that proceedings had not been taken to prevent such occupation during Mr Aitken's time in consequence of the undertaking of 16th March 1885, but

the pursuer's agents were not informed of the subsequent correspondence between the agents of the defenders Misses Cook and the said John Aitken, before referred to."

The pursuer pleaded, *inter alia*—"(1) The restrictions condescended upon in the feu-charter referred to having been departed from by the consent or acquiescence of all parties having an interest in the enforcement thereof, the pursuer is entitled to decree of declarator as concluded for, with expenses. (2) The defenders the Walker Trustees as superiors having acquiesced in the occupation and use of the said subjects as condescended upon, are now barred by personal exception from insisting upon compliance by the pursuers with the said restrictions, and *separatim* having now no interest to insist upon the preservation of the said restrictions, the pursuer *quoad* them is entitled to decree of declarator, with expenses. (3) The said defenders having, as condescended upon, consented to or permitted material deviations from and alterations upon the general plan and elevation referred to in the said feu-charter, are not now entitled to enforce observance of the relative restrictions as to use or conversion in the pursuer's title. (5) The proprietors of adjoining properties having no *jus quæsitum* in the enforcement of the said restrictions against the pursuer, and even if they had such a right, the same having been lost by their acquiescence in the said conversion, or in any event by their failure to take any steps in vindication of such right, the pursuer *quoad* them is entitled to decree of declarator as craved."

The defenders the Walker Trustees pleaded—"(4) The alteration on and occupation of his property proposed by the pursuer being in violation of the terms of his titles, and these defenders never having acquiesced in the abandonment on the part of their vassals of the conditions and restrictions contained in their feu-charters, are entitled to absolvitor."

The other defenders pleaded—"(3) These defenders in virtue of their titles and in virtue of the conditions and restrictions contained in the titles of the pursuer and their other co-feuars under the Walker Trustees are entitled to insist on the fulfilment by the pursuer of the conditions and restrictions in his charter."

The Lord Ordinary (KYLLACHY) on 7th January 1897 assoilzied the compearing defenders from the conclusions of the summons.

The pursuer reclaimed, and argued—*As regards the superior*—It was true that his title to defend as arising out of the feu-contract could not be disputed, but by acquiescing in the erection of the storm windows, and by permitting the use of the pursuer's own house for twenty-five years in a manner contrary to the titles, the superior had barred himself from objecting. The fact that he did not object was equivalent to his consent, and accordingly he could not now step in and lend his name to the feuars to enforce these conditions — *Carron Company* v. *Henderson's Trustees*, July 15, 1896, 23 R. 1042; *German* v. *Chapman*, 1877, L.R., 7 Ch. D. 271; *Glover* v. *Coleman*, 1874, L.R., 10 C.P. 108. Accordingly, the superior having consented to these alterations, both in structure and use, had no good grounds for resisting. 2. *As regards co-feuars*—The same argument applied to the question of their acquiescence, assuming that they had a good title to defend. But they had no vested right to insist in the other feuars observing conditions. In a bargain between a superior and a vassal, *prima facie* the contract must be taken as concerning them alone, unless it were clear that they intended that other parties should have an interest in it, *i.e.*, that the restrictions were intended to be for the benefit of all the feuars, and not for that of the landlord. Mere identity of provisions was not enough to prove such an intention nor reference to a plan, unless it could be shown that the plan was introduced as pactional, and referred to in such a way as to make it part of the agreement. There was here no such mutuality of rights and obligations between the feuars either expressly or by implication as would give them a right to enforce the restrictions—*Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95; *North British Railway Company* v. *Moore*, July 1, 1891, 18 R. 1021.

Argued for respondents—1. The superior's title was admitted. As a matter of contract he had bound himself that certain things should be done, and the only plea that could be taken against him was "no interest." The *onus* lay upon the pursuer to show that the superior had lost interest by a material change in circumstances, and that he had failed to do—*Earl of Zetland* v. *Hislop*, June 12, 1882, 9 R (H.L.) 40. Assuming the storm windows to have been contraventions, at most it could only be held that the superior was barred from objecting to similar alterations of structure—*Stewart* v. *Bunten*, July 20, 1878, 5 R. 1108; *Johnston* v. *MacRitchie*, March 15, 1893, 20 R. 539. But the change here proposed being in no way similar, and being most destructive to the value of adjoining property, it was impossible to infer consent thereto. In all cases where a plea of abandonment had been given effect to, the abandonment had been quite general—*Campbell* v. *Clydesdale Banking Company*, June 19, 1868, 6 Macph. 943; *Magistrates of Edinburgh* v. *Macfarlane*, December 2, 1857, 20 D. 156. In any case, "acquiescence" was not a proper plea in this case, for in all cases where it had been admitted that there had been something done by the feuar which could not be undone—*Muirhead* v. *Glasgow Highland Society*, January 15, 1864, 2 Macph. 420. 2. *As regards co-feuars*—The same argument with regard to the plea of "acquiescence" applied, assuming that they had a title. Taking the feuars as a whole, they had in their charters a most clear and binding reference to a common plan of building, showing that the intention was that all should conform to it, and should have a right to complain if a co-feuar did not con-

form. There was something to show that the restrictions were imposed for the benefit of the feuars as well as the superior—*Hislop* v. *MacRitchie's Trustees*, *supra*. It was not the case that to prove this intention the superior must bind himself in so many words to insert the same obligation in every charter. It was enough if there was substantial similarity.

At advising—

LORD ADAM—The pursuer is proprietor of the house No. 22 Coates Crescent. The original feu-charter granted by Miss Walker of Coates in favour of his predecessor in title, George John Murray, which is dated in May 1859, contains a clause in the following terms:—"It is hereby expressly provided and declared that as the tenement built on the said area has been erected in strict conformity to the plan and elevation adopted for Coates Crescent and Manor Place (and the plan and elevation of said tenement now subscribed by me and the said George John Murray as relative hereto), with balconies and iron railings on both fronts thereof conform to the pattern adopted for said Crescent and Place, it shall not be in the power of the said George John Murray or his foresaids to convert the said dwelling-house and others hereby disponed into a shop or shops or warerooms for the sale of goods or merchandise of any description, but that they shall be bound to use the same as a dwelling-house only."

The pursuer has brought the present action to have it found and declared that notwithstanding the terms of the foresaid charter, he is not bound to use the same as a dwelling-house only, and is entitled to possess or occupy the same as a shop or wareroom, or to convert the same into a shop or wareroom, and to occupy them as such; and further, that it should be found and declared that the foresaid restrictions have been departed from, and that the defenders have no right or title to enforce the same.

The parties called as defenders are the superiors, the Walker Trustees, and certain adjoining proprietors, of whom the Misses Hofford are proprietors of an upper flat of the same tenement of which the pursuer's house forms the street and ground flats, and the Misses Cook are the proprietors of the adjoining house in Coates Crescent.

It was not maintained to us that the restrictions in question were in themselves illegal and incapable of being enforced, but it was maintained that the superiors had lost their right to enforce them in consequence of certain proceedings which I shall afterwards have to consider.

As regards the adjoining proprietors, it was maintained that they never had any title to enforce these restrictions, and that if they had had, they also had now lost the right. As regards the matter of title, therefore, the position of the superior and that of the other defenders is different. That of the superior depends upon contract, and it is not disputed that they had a title to enforce the restrictions; that of the other defenders depends on other considerations, and it appears to me that the first question which arises for decision is, whether these other defenders had also a title to enforce these restrictions.

I have already set forth the restrictions or prohibitions in question contained in the pursuer's titles, and I need not repeat them. It is made matter of admission that the titles of the pursuer, of the Misses Cook, and of the other proprietors in Coates Crescent of their respective properties therein, contain clauses of prohibition against the use thereof otherwise than as dwelling-houses only, and against making any deviation and alteration upon the plan and elevation adopted for Coates Crescent, and pattern balconies and iron railings in front of such subjects in terms substantially identical.

It is further admitted that all such titles also contain provisions relative to the pleasure ground in Coates Crescent, and to the formation and maintenance of the sewers, inferring community of interest and obligation among the feuars with regard thereto.

At the date of the original feu-charter granted to the pursuer's predecessor, houses had been built on the whole of the areas in Coates Crescent, and the charter shows that they, including the pursuer's house, had been built in strict conformity with the plan and elevation which had been adopted for the Crescent, and it is because such a common plan had been adopted that the feuar comes under the restrictions in question. Now, we learn from the case of *Hislop* that although the titles of the several feuars contain identical restrictions, that may not be of itself sufficient to infer mutuality of obligation, yet that if it appears that the restrictions are entered into for the benefit of the feus already existing or to be created thereafter, the restrictions may be enforced by each co-feuar. In the case of *Hislop* the Lord Chancellor stated that this mutuality of obligation can only be established by express stipulation in the respective contracts, or by reasonable implication from some reference in both contracts to a common plan or scheme of building. Now, we have in this case what the Lord Chancellor desiderated in that case, viz., a reference to a common plan or scheme of building adopted by the whole feuars.

Further, it appears that the titles of all the feuars contain a clause declaring that the superior shall have power to vary or alter any of the plans and streets and lanes upon the ground belonging to them, and not built upon at the time of granting the respective feu-rights thereof. The inference is that the superiors had not power to vary or alter the plans on the ground built on. At the date of the pursuer's charter the whole of the areas known as Coates Gardens and Manor Place were built upon. The superiors therefore could not vary or alter, or consent to the variation or alteration of the common feuing plan of Coates Gardens and Manor Place. This seems sufficient to show that the common feuing plan was not adopted

in the interest of the superiors alone, but of all the feuars, thereby indicating common right and interest. It appears to me that we have in this case sufficient to imply common interest and common obligation on the part of all the feuars, and that therefore the defenders have a title to insist on the enforcement of the restrictions in question, unless the pursuer can show that they have lost that right.

The grounds on which the pursuer maintains that the defenders have done so (and in this matter I do not think that there is any distinction between the case of the superiors and of the other defenders) are that the restrictions have been departed from by the consent or acquiescence of all parties having interest to enforce them, in respect that they have consented to or permitted material deviations from and alterations upon the general plan and elevation, and have consented to or permitted a use and occupation of the pursuer's premises inconsistent with the restrictions.

The material alterations founded on by the pursuer are that dormer windows have been added to the roof of the tenement of which the pursuer's house forms part, and to the roofs of eleven other houses in Coates Crescent, and that complete storeys have been added to the front elevations of these other houses — one wholly made of stone and the other two chiefly of timber.

The question would seem to be whether these deviations from the building restrictions amount to a total abandonment of them.

I agree with the Lord Ordinary that the consent to the abandonment of certain building restrictions, implied from acquiescence, does not imply consent to the abandonment of all building restrictions which may be imposed upon the feuars. I think that, as stated in *Stewart* v. *Bunten*, the true principle is that the consent implied in acquiescence goes no further than the things acquiesced in, or things *ejusdem generis*, and that it is only when the acquiescence shews a virtual departure from the whole servitude that it will receive such effect. The alterations consented to, or at least permitted in this case, are entirely consistent with the use and occupation of the premises as dwelling-houses only, which was certainly one of the principal reasons for introducing the restrictions, whereas the alterations proposed by the pursuer would convert his house into a shop or warehouse, which, as the Lord Ordinary says, is a contravention of quite a different kind, and one which is specially prohibited.

I am accordingly of opinion that the alterations already made on the buildings do not imply an abandonment of the whole building restrictions, and do not entitle the pursuer to make the alterations proposed by him.

With reference to the use and occupation of the pursuer's premises which are alleged to have been in contravention of the restrictions in question, the facts founded on are that the pursuer's predecessors, Messrs Dalgleish & Bell, W.S., used and occupied them as writing chambers from 1871 to 1884, and that from 1884 until the pursuer purchased them in 1896, the pursuer's predecessor Mr Aitken used and occupied them as a shop.

With reference to the occupation of them by Messrs Dalgleish & Bell as writing chambers, no objection was made to it by either the superior or the feuars. On the other hand Messrs Dalgleish and Bell made no change on the house externally or internally, except that upon the front door, which was kept shut, they placed a brass plate with "Messrs Dalgleish & Bell, W.S." engraved on it.

It appears to me that their occupation of the premises in this way must be ascribed to tolerance merely.

It does not follow that because the superior and feuars allowed Messrs Dalgleish & Bell so to occupy the premises, they were bound to allow any or everybody else so to do. Still less do I think that it is to be inferred from their non-interference with such a harmless and unnoticeable occupation as this, that they must be held to have consented to the conversion of the premises into a shop or warehouse or their use as such.

With reference to the occupation of the premises by Mr Aitken as a shop, the alterations made by him as affecting the appearance of the premises are set forth in the 5th and 8th articles of the joint-minute of admissions. He certainly made it perfectly plain that he was using them as a shop for the sale of millinery, but he made no change on the external or internal structure of the building.

Several of the proprietors of Coates Crescent, among whom were the defenders the Misses Cook, with the consent and approval of the superiors, objected at once to this use of the premises.

A correspondence thereupon ensued between the parties, which it is not necessary to consider in detail. It resulted in a letter of date 16th March 1885 addressed by Mr Aitken to a committee representing proprietors of houses in Coates Crescent, which concluded in these terms, and which was communicated to the superiors:—"It will be quite open to any of the proprietors to adopt whatever proceedings they may be advised to take to have their legal rights determined without my pleading that their being at present passive be construed into consent or approval,"—and it is admitted that in respect of this correspondence no legal proceedings were then taken.

It is perfectly clear that so far from Mr Aitken's use and occupation of the premises as a shop being acquiesced in by the defenders, such use of the premises was objected to and protested against all along. I do not see how implied consent can be inferred in the face of express objection.

The case would have been different if the defenders had stood by and allowed Mr Aitken to incur considerable expense in the conversion of his premises into a shop. In that case I think it is clear that they would

have been barred from objecting to his occupying it as a shop, and if the pursuer had purchased the premises as converted I think he would have been entitled to use them as such. But we have no such case here. Mr Aitken incurred no such expense with the knowledge of the defenders, and the pursuer was informed before he purchased that any use of the premises for trade purposes would be objected to.

I think the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN—I concur in the opinion of Lord Adam, and have little to add. It does not admit of doubt that the superior is entitled to enforce building conditions which he or his authors caused to be inserted in the feu-rights, unless he has debarred himself from enforcing these conditions by acquiescing in alterations of the character described in the summons, or unless he has expressly authorised the particular thing. If the parties were willing to limit the discussion to this question, I should have no difficulty in affirming that it was impossible for the pursuer to obtain decree of declarator in the face of the superior's objections. I shall say nothing on the question of acquiescence or implied abandonment of the building conditions, because I agree with all that Lord Adam has said. The principle to be applied in such questions is, that where alterations or variations of the conditions of the feu-right have been permitted, the presumption is not for abandonment, but only for relaxation of the conditions of feu, according to the nature of the variations which the feuars have presumably consented to.

But then the co-feuars, who are defenders, are not satisfied that their rights would be sufficiently protected by a decree of absolvitor in favour of the superior for all interested. They desire also to have this declarator negatived at their instance, standing on their own rights under their title-deeds. Now, the condition of the right of a co-feuar to enforce a building condition is, according to the highest authority, that he has either obtained from the superior an express authority to enforce the conditions contained in the feu-rights of his neighbours, or that there is such a reference to a common system of conditions in the titles of each of the feuars as makes it clear that these conditions were inserted for their common benefit and not merely for the protection of the superior's rights. The clearest case of such a right accruing to feuars by implication is the case where the superior in each feu-right, or in the case of any particular feu-right, agrees that he shall insert like conditions in all feus hereafter to be granted, because his doing so amounts to a plain declaration that every vassal is to have a right to enforce the common plan or system of conditions. The feuar stands creditor in the obligation to insert such conditions in the feu-rights of his neighbours in order that he may enforce them. There could be no reason for putting the superior under such an obligation unless the vassal was to enforce the conditions agreed to be inserted. But then this is not so strong a case. Still, where a feuar is taken bound to observe building conditions, described as elements of a common building plan which the superior intends to make binding on all the feuars within an area described—this, I consider, is equivalent to a grant to the feuar of a right to enforce the conditions. Obligatory language is not absolutely necessary to give an interest to the feuar, and it may fairly be deduced from the words used in these feu-contracts, that what the feuar is bound to is not the observance of a certain elevation or building plan for the security of the superior's feu-duty, but the preservation of a common building plan for the amenity of the street or place and the convenience of the feuars. According to the opinions delivered in the House of Lords in the case of *Hislop*, the question is reduced to one of intention. Where it is made to appear as matter of intention, or agreement between the superior and the feuar that the feuar shall have the right to enforce the conditions, this suffices for the decision of the question in the feuar's favour.

I agree with Lord Adam that, according to the intention of the parties and their authors, these building restrictions were imposed for the common benefit and with the intention of giving a right to the individual feuar to insist on the fulfilment by others of the system of conditions.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuer — Balfour, Q.C. — Rankine — Wilton. Agents — Jamieson & Donaldson, S.S.C.

Counsel for Defenders — H. Johnston — Constable. Agents — W. & J. Cook, W.S.

Saturday, July 10.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MILLAR'S TRUSTEES *v.* POLSON.

Trust — Personal Liability of Trustee — Culpa lata—Defalcation of Co-Trustee—Failure to Take Proceedings — Onus of Proving No Loss Caused to Trust.

P, a trustee, discovered, in February 1895, that his sole co-trustee E had not lodged in bank on deposit-receipt a sum of £200 of trust money which he had been directed to invest in that manner, but had retained in his own hands £150. He made repeated application to E, both verbally and in writing, to restore the money, but, beyond vague promises that it would be paid if time were given, received no satisfactory explanation. He also allowed E to uplift certain rents due to the trust at Whitsunday 1895, which were retained by him. P was not at first aware, apart