within the triennial period, and if so, it enabled the pursuers to prove the debt *pro ut de jure* in any subsequent process—*Dunn* v. *Lamb*, June 14, 1854, 16 D. 944; *Eddie* v. *Monkland Railways Company*, July 5, 1855, 17 D. 1041, *per* Lord Wood, 1046, and Lord Cowan, 1048. [It is unnecessary to report the argument on other questions raised in the case.]

Argued for the defenders—The Lord Ordinary was right. The action here had been dismissed against the defenders, and though, no doubt, proper pursuit during the triennium barred the plea of prescription, and though the mere lodging of a claim in a multiplepoinding, for example, was held to be tantamount to pursuit, it was a well-settled principle that an action which had failed or which was abandoned did not operate as such a bar—*Gobbi* v. *Lazzaroni*, March 19, 1859, 21 D. 801.

LORD KINNEAR—I think the Lord Ordinary is quite right in holding that the plea founded on the Act 1579, c. 83, cannot be repelled at present. It is not disputed that the debt sued for is one which falls within the scope of the statute, and it follows that it cannot be proved otherwise than by writ or oath unless the pursuers are in a position to found on the American decree either as a new constitution of the debt, or as satisfying the condition of the statute that it must be sued for within three years. In this view I think the course taken by the Lord Ordinary is perfectly right in all other respects, but I am not satisfied that his Lordship's judgment is equally well-founded, in so far as it repels the fifth plea, and decides at this stage that the averments in support of that plea are irrelevant. The way in which the Lord Ordinary deals with this plea is this—He says if the pursuers fail to set up the judgment of the American Court as a ground of debt, then they will be unable to use the judgment for any subordinate purpose, because his Lordship says if the defenders are reponed against it, so as to bring up the merits of the claim, he does not see how the action in which it was obtained can be held to bar the plea of prescription. I am not prepared, as at present advised, to affirm that view. I think it is quite settled that there may be an action in which a party may be allowed a proof *pro ut de jure* after the lapse of the statutory period of three years, provided he has made a competent claim in a previous competent action within the statutory period, although that claim shall not have been pursued to a successful issue. I think that there may be pursuit within three years in the sense of the statute so as to exclude its application altogether although the pursuer may not have obtained a decree in his favour. This is decided in *Dunn* v. *Lamb*, 16 D. 944, and that decision has been followed in subsequent cases. The claim, no doubt, must have been brought in a competent action, and one in which the creditor might have succeeded in getting judgment in his favour, but nevertheless it might turn out that his proceeding has been ineffectual, and he has not obtained a judgment in his favour, without bringing him within the terms of the statute as a creditor who had not produced his claim within the statutory period of three years. Whether that principle would or would not apply in circumstances which it may be conjectured are likely to be those of the present case I do not inquire. But I am not prepared to decide that an action in a foreign court which has ended in a decree in absence may not be a pursuit in the sense of this statute, even although it is not conclusive on the merits. Neither do I decide the contrary. I think it is enough that we cannot see at present that it is absolutely certain that the American decision, assuming it to be ineffectual as a judgment, may not be good as satisfying the condition of the Statute 1579, c. 83. For that reason I think it is premature to decide with the Lord Ordinary that no use can be made of the American judgment except on the assumption that it must be a valid and effectual decision.

In my opinion, therefore, we ought to adhere to the Lord Ordinary's judgment, except so far as he finds that the pursuers' averments are not relevant to support the fifth-plea-in-law. I go no further in proposing that we should make that exception than to say it is not at present clear to my mind that there may not be a case in which the pursuer might be able to found on this American decision, although it turns out that it was not a valid decree in all respects and for all purposes.

LORD ADAM, LORD M'LAREN, and LORD PRESIDENT concurred.

The Court adhered to the interlocutor reclaimed against, with the exception of the finding as to the relevancy and sufficiency of the pursuers' averments to support their fourth, fifth, and sixth pleas-in-law; varied the said finding by omitting therefrom the word "fifth": *Quoad ultra* adhered.

Counsel for the Pursuers—Baxter—Ralston. Agent—George A. Munro, S.S.C.

Counsel for the Defenders—Salvesen. Agents—Simpson & Marwick, W.S.

Friday, June 10.

SECOND DIVISION.

[Dean of Guild, Edinburgh.

LIDDALL *v.* DUNCAN.

Superior and Vassal — Restrictions on Building—Common Plan—Restrictions not Appearing ad longum in Register of Sasines.

A contract was entered into in 1806 between (1) the Magistrates of Edinburgh, (2) the superiors, and (3) the owners of certain lands now forming part of the New Town of Edinburgh, whereby it was agreed that these lands should be feued out for the purpose of

being built upon conform to a common plan and subject to certain specified building restrictions, and that these restrictions were to be imposed as real burdens upon the feuars. This deed was not registered in the Register of Sasines. In 1807 a further contract was entered into between the superiors and owners of the lands, in which the nature of the building restrictions was generally indicated, and the common plan was referred to, but the restrictions were not set forth *ad longum*. This deed was registered in the Register of Sasines. The restrictions were not set forth *ad longum* in any deed which was registered in the Register of Sasines. The lands were feued out and built upon, but the titles granted to the feuars only contained a reference to the restrictions as contained in the contracts above mentioned, and as shown on the plan. *Held* that the restrictions could not be enforced either by co-feuars or the superiors against a singular successor in one of the feus, in respect that they had not been validly constituted real burdens on the feu-rights.

Superior and Vassal — Restrictions on Building—Contravention—Acquiescence. The houses in a street were built in accordance with a common plan and in accordance with a contract which provided that there should be open areas with railings between the houses and the street. The houses were originally built and occupied as residences, but in the course of time many of the ground-floor houses came to be used as shops, plats being put over the areas and the railing being removed. In one case a shop front had been built out some distance beyond the original building line. The owner of a ground-floor house in the street, which had for some time been used as a shop, proposed to bring out the front wall of the shop 3 feet 3 inches beyond the original building line. These premises were situated about 100 yards, and in a different division of the street, from the shop where similar alterations had been already effected. *Held per* the Lord Justice-Clerk, Lord Young, and Lord Trayner (Lord Moncreiff reserving his opinion) that (1) co-feuars owning the houses immediately adjoining the premises proposed to be altered as above described, and also (2) the superiors of the lands, were barred by the changes which had already taken place in the street from objecting to the alterations proposed.

William John Norbray Liddall of Navitie, Advocate, Edinburgh, presented this petition to the Lord Dean of Guild of the City of Edinburgh and his Council, in which warrant was craved for making certain alterations upon subjects in Dundas Street, Edinburgh.

The following statement of the facts is in substance taken from the note appended to the Dean of Guild's interlocutor:—"The petitioner is proprietor of the shop No. 2 Dundas Street, comprising a ground floor slightly below the level of Dundas Street, and a sunk floor, with the cellarage area and others thereto pertaining, all at present occupied by his tenants Messrs Brockley & Stewart, florists. The property forms part of the corner tenement of Dundas Street and Heriot Row, and faces Dundas Street. The petitioner desires to take out a stone pier and insert malleable steel beams and cast-iron standard to support wall above at No. 2 Dundas Street, and to bring out the shop front a distance of 3 feet 3 inches from the front wall of the tenement, all as shown on the amended plan produced with the petition. The operations proposed are admittedly *in suo*, and the Dean of Guild finds that they can be carried through without danger, and, apart from legal considerations, may be authorised. The petition is opposed by (1) William Threipland Duncan and the Misses Duncan, who are the proprietors of the main-door premises 1 Heriot Row, and who own the flat on the level of the petitioner's shop and to the south thereof, and also the flat immediately above the same; (2) Mrs Macdonald, who is the proprietrix of the first flat immediately over the premises owned by the first respondents, and entering by the common stair 2 Heriot Row; (3) Mr Matthew Pollock Fraser, who is proprietor of the two flats above Mrs Macdonald's flat, entering by the said common stair; (4) Miss Watson, proprietrix of No. 4 Dundas Street, the property immediately to the north of the petitioner's shop, consisting of two storeys and a sunk storey; (5) Mr John Porteous, who is proprietor of the two storeys above Miss Watson's property, entering by the common stair No. 8 Dundas Street; and (6) the Governors of George Heriot's Hospital, who are the superiors of the petitioner's and respondents' properties, as well as of the whole district between and including Dublin Street on the east, Howe Street on the west, Abercromby Place and Heriot Row on the south, and Fettes Row on the north. The respondents plead that the proposed alterations are disconform to and in contravention of the conditions of the petitioner's titles, that the author of the petitioner and of the respondents were parties to certain contracts under which both the petitioner's and the respondents' properties were built, that these contracts are binding on the petitioner and the respondents, and that the respondents have a title to enforce the stipulations contained in the said contracts. The respondents further object that the petitioner is excluded from making the alterations on the plea of *res judicata*."

The petitioner pleaded—"(3) The conditions and restrictions as to buildings under the contracts of 1806 and 1807 never have been validly constituted a burden over the petitioner's property, and do not affect same. (5) The contracts of 1806 and 1807 and plan having been abandoned, or at least frequently disregarded and departed

from in material particulars, their provisions are inoperative and cannot be enforced. (6) The respondents having consented to or acquiesced in the deviations from said contracts and plan condescended on, are now barred from objecting to the warrant craved."

The history of the ground on which the petitioners' and the respondents' properties are built, so far as bearing on the present case, is shortly as follows:—In 1805 the ground on which the subjects are built belonged in property to George Winton and others, who were vassals of Heriot's trustees. At that time the lands adjacent to Winton's feu were owned by Heriot's trustees and the City of Edinburgh. By agreement dated 12th, 13th, and 28th February, and registered in the Burgh Court Books of Edinburgh 3rd March 1806, Messrs Winton, Heriot's trustees, and the City of Edinburgh agreed to feu out their respective grounds, being the whole lands lying between and including Mansfield Place, Bellevue Crescent, London Street, Drummond Place, and Dublin Street on the east; Abercromby Place and Heriot Row on the south; Church Lane and the west end of Gloucester Place on the west, and Cornwallis Place, Summerbank, Royal Crescent, Fettes Row, and Royal Circus on the north; in streets, rows, crescents, &c., conform to a plan which was subscribed by the parties with reference to said contract. The said contract contained a series of stipulations with regard to the height of the houses in the different streets, the height of the roofs of the houses, and on other matters regarding the mode and style of building in the different streets. In particular, it limited the height of the houses in Heriot Row and west end of Abercromby Place to 2 storeys, exclusive of a sunk storey, and to a height of 33 feet in front above the level of the street excepting the projecting house, which should be of such a height as should be afterwards agreed on, not exceeding 51 feet from the level of the street to the ridge of the roof or platform. It further provided that the buildings in Northumberland Street should not exceed 33 feet above the level of the street in front, and should consist of only two storeys, exclusive of a sunk storey.

The agreement also provided, *inter alia*, as follows:—"(*Fifth*) That the houses in all the foresaid places, except in Jamaica Street, London Street, King Street, Dublin Street, Scotland Street, Nelson Street, Duncan Street, Dundas Street, Pitt Street, Howe Street, Saint Vincent Street, and India Street shall be built as follows:—The sunk storeys shall be of broached ashler or rock work, and all above to be polished droved or broached ashler, and shall have blocking courses 15 inches high, and the slates not to project above 3 inches over the said blocking courses; (*Sixth*) That in the foresaid places there shall be sunk areas in front of all the houses with a good iron railing and foot pavement, of the following dimensions, to wit, that in Drummond Place, Circus, Royal Crescent, Fettes Row, Mansfield Place, Bellevue Crescent, Cornwallis Place, the sunk area shall be 12 feet in breadth at the projecting houses, which are allowed to project 18 inches on the said sunk areas, and the side pavement shall be 10 feet in breadth; that in Northumberland Street the sunk area shall be 8 feet, and the side pavement shall be 7 feet wide; that in Cumberland and Spencer Streets the sunk area shall be 7 feet, and the side pavement 5 feet wide, and in Jamaica Street there shall be no sunk areas, but a side pavement of 6 feet wide."

By the said agreement it was further provided that the ground marked on the plan for stables should be applied to no other purposes than for stable and coach-houses or washing-houses, or other offices for the use of the occupiers of the front tenements alone. The parties to the said contract further consented to the royalty of the city of Edinburgh being extended over the whole of the grounds. The parties further bound and obliged themselves, their heirs, disponees, or assignees "to form and execute the streets therein referred to agreeable to said plan, subject only to such alterations as might afterwards be suggested by either of the parties as an improvement, provided that such alterations should be approved of by certain parties therein specified."

At the time of the said contract Messrs Winton and others, vassals of Heriot's Hospital, paid their feu-duty in grain. In 1806 they applied to their superiors, Heriot's Hospital, to have their grain feu-duty changed into a money feu-duty. The Governors of Heriot's Hospital agreed to this being done, and a contract dated 20th and 25th and recorded in the Particular Register of Sasines for Edinburgh 28th, all days of April 1807, was entered into between the Governors of Heriot's Hospital and Messrs Winton for, *inter alia*, the carrying out of the said purpose. The said contract of 1807 proceeded on the narrative, *inter alia*, that "a ground plan having been made out . . . for building upon the grounds" in question, "by which plan the whole grounds" in question "is laid down in regular streets, rows, crescents, and squares, and the said parties having approved of said plan agreed to enter into a regular contract to build upon their respective properties conform thereto." The contract, besides providing for the feu-duty payable by Messrs Winton being paid in money, also further provided that the ground owned by the Messrs Winton was to be sold for the purpose of erecting buildings thereon agreeable to the foresaid ground plan and relative contract of 1806, and that no intermediate superiority should be created between the person in right of the property and the Governors of the Hospital, and that the charters of the building ground should specify the sums of feu-duty and composition agreeable to a scale mentioned in the said contract of 1807, and should contain clauses agreeable to the tenor of the said contract, which together with the other contracts entered into between the parties to the 1807 contract and the city of Edinburgh should be specially referred to in said charters. By the 1807 contract the Messrs Winton further

bound and obliged themselves, their heirs and successors whomsoever, to dispone the foresaid building ground for the purpose of erecting houses thereon conform to the contract of 1806 and plan before mentioned, to be holden of the Governors of Heriot's Hospital allenarly, and that the charters should contain clauses agreeable to the terms of the 1807 contract, which with the contract of 1806 should be specially referred to in the charters under pain of nullity, and should be obligatory on the vassals in the foresaid ground. By the said contract of 1807 the whole stipulations, conditions, and obligations therein contained were declared real burdens upon the Messrs Winton's ground.

By contract of sale dated 30th March, 18th and 20th April, and 28th May 1807, the Messrs Winton sold to John Hamilton, architect in Edinburgh, the stances upon which the petitioner's and respondents' property now stands, binding and obliging themselves and their heirs and successors to infeft and seise the said John Hamilton to be holden of and under the Governors of Heriot's Hospital for payment of a certain feu-duty, and for performance of, *inter alia*, the obligations contained in the contracts of 1806 and 1807. The said John Hamilton took infeftment in the said ground by instrument of sasine dated 29th May, and recorded 9th June 1807. This instrument of sasine contained a clause to the effect that the said contract of sale was entered into with and under the burden, *inter alia*, of the other burdens and conditions therein expressed, all which are thereby declared to be real burdens on the subjects thereby disponed. The titles both of the petitioner and of the respondents, other than the reepondents the Governors of Heriot's Hospital, flow from the said John Hamilton. The titles of the petitioner's authors all refer to the burdens and conditions expressed in the said contract of 1807. Charters of confirmation were granted to predecessors of the petitioner by the Governors of Heriot's Hospital on 30th December 1824 and 3rd June 1841. These charters refer to the conditions expressed in the said contracts of 1806 and 1807. The title of the petitioner himself is an extract registered disposition and settlement by William Liddall of Findaty in favour of the petitioner, by which the premises in question were conveyed to him with and under the burdens, conditions, and declarations so far as still subsisting and applicable thereto, specified and referred to in a certain notarial instrument in favour of Thomas Mackenzie, W.S., one of the intermediate owners between John Hamilton and the petitioner. The burdens, conditions, and declarations referred to in the said notarial instrument are those contained in the contract of 1806 and 1807, and in the contract of sale between Messrs Winton and John Hamilton.

The titles of the respondents, other than the Governors of Heriot's Hospital, contain similar references to the conditions of the 1806 and 1807 contracts.

The respondent Miss Watson's title was a disposition by the petitioner's author William Liddall dated in 1882, which was granted with and under the burdens, &c., specified and referred to in the notarial instrument in favour of Thomas Mackenzie, mentioned *supra*.

There was no deed recorded in the Register of Sasines in which the provisions of the contract of 1806 were set forth *ad longum*. The plan referred to in that contract and in the contract of 1807 was lost.

The Dean of Guild and his Council had, with the consent of all parties, visited the *locus*. They found that in different parts of the area included in the said plan and dealt with in the said contracts of 1806 and 1807 alterations of more or less importance had been made upon the buildings originally constructed in conformity with the said plan. In Howe Street, which is the next street west of and parallel to Dundas Street, the areas in front of the buildings had in many places been covered over with plats, in other cases shop fronts had been projected over parts of the areas, and storeys had been added to some of the houses in Heriot Row, while in Abercromby Place storeys had been added to some of the houses in breach of the contract of 1806, and in one case a porch had been thrown over an area. In Dundas Street itself in several cases the areas had been covered by plats, many of the ground-floor houses had been converted into shops, and shop windows had been substituted for the smaller windows suitable for dwelling-houses. In one case, Sinclair's, the area had not only been covered by a plat and the railings removed, but a shop-front had been projected from the former building-line to the extent of about 3 feet 3 inches. Sinclair's property was rather more than 100 yards from the petitioner's, and was in the part of Dundas Street lying to the north of Northumberland Street. It was consequently not in the same block of buildings as the subjects belonging to the petitioner. In another case in Pitt Street, which is a continuation in a straight line of Dundas Street, the Royal Bank had projected a portion of the front of what was formerly a main-door house for a distance of 3 feet 3 inches over the area. Restricting himself to Dundas Street alone, the Dean of Guild found in fact "(*a*) that the main-door houses, which were originally intended to be residential, have been largely converted into places of business, and principally into shops; (*b*) that considerable alterations have been made by way of substituting large shop windows for small dwelling-house windows in the main-door premises in the street; (*c*) that in several instances, including the petitioner's, the areas provided for in the contract of 1806 have been covered up by plats, and the railings provided for by the said contract have been removed; and (*d*) that in one case—Sinclair's—a shop front has been projected more than 3 feet over the area, and that in other cases, including the petitioner's, shop fronts have been constructed, which though not projecting so much as

3 feet, still project beyond the original building line of the street."

On 27th January 1898 the Dean of Guild issued the following interlocutor—"Having visited the premises, finds that the petitioner under his titles would not be entitled to the warrant asked, and that the respondents William Threipland Duncan and the Misses Duncan, Mrs Macdonald, Matthew Pollock Fraser, John Porteous, and Miss Watson, under their titles as co-feuars, and the respondents the Governors of George Heriot's Hospital, as superiors of the petitioner's property, have a title to object to the petitioner's proposed alterations, but finds that the plan under which the petitioner's and the respondents' (other than the Governors of George Heriot's Hospital) property was built, and the contracts of 1806 and 1807, have been materially deviated from in Dundas Street, and that in law the whole of the respondents are now barred from insisting against the petitioner on the continued observance of the said plan or of the conditions of the said contracts: Therefore grants warrant to the petitioner in terms of the prayer of the petition as amended by the minute for the petitioner lodged 5th October 1897, and of the amended plan therewith produced, which is docqueted as relative hereto, and decerns, and finds no expenses due to or by either party."

Note.—[*After narrating the facts as to the parties and the titles*]—"The effects of the contracts of 1806 and 1807 has been discussed by the Court of Session in the case of *The Magistrates of Edinburgh* v. *Macfarlane*, 20 D. 156. Among other things that case decided that it was intended by the contract of 1806 and relative plan that Dundas Street should be built with areas in front of the houses. It was further decided by that case that a vassal holding property in Dundas Street under titles similar to the petitioner's, and flowing also from the Messrs Winton, could not make a similar alteration upon his property to that now proposed by the petitioner. That case seems to have been decided by the Court of Session principally upon the fact that Macfarlane was bound by a personal contract with the Governors of Heriot's Hospital, he having two years before the date of his application received a charter of confirmation from them which referred to the conditions of the 1806 and 1807 contracts. The specialty of a charter of confirmation having been granted to the petitioner is not present in the present case, and could not be so, as the petitioner has acquired the property since 1874. But the Dean of Guild is of opinion that the petitioner in the present case is on his titles alone as much debarred from making the present application as was Macfarlane. The Dean of Guild is of opinion that the petitioner's title contained such a reference to the conditions of the contracts of 1806 and 1807 as would prevent the petitioner from departing from the plan on which Dundas Street was constructed.

"The petitioner, however, pleads that the plan of 1806 and the conditions of the contracts of 1806 and 1807 have been materially departed from, and that the respondents have lost any right which they might have to object to his proposed alterations. This plea is primarily a plea in fact."

[*The Dean of Guild then stated the facts as to the locus above set forth*]—"With reference to the case of Sinclair, the respondents maintain (1) that it is over a hundred yards from the premises owned by the respondents other than the Governors of Heriot's Hospital, (2) that it was only made in 1896, (3) that they had no notice of the intention of the proprietor to make the alteration, and (4) that it was only made after the owner of the premises had come to terms with the feuars in the neighbourhood. With reference to these objections, the Dean of Guild, while not of opinion that a deviation from a general plan of a large area of ground at one point will relax the building restrictions for the whole ground, thinks that as Sinclair's premises are in the same street as the petitioner's, and are not much over a hundred yards from them, and can be seen in the same line as the petitioner's, the deviation from the original plan which has been allowed in Sinclair's case prevents the further enforcement of the plan against the petitioner. He is of opinion that the respondents George Heriot's Hospital, who are superiors of Sinclair's property as well as of the petitioner's, cannot now object to the petitioner's proposed alteration, having in view the departure from the original plan which they have not prevented in Sinclair's case, and that the other respondents in this petition having under their titles a right to insist against deviations from the original plan, and not having insisted in the alterations at Sinclair's, cannot now seek to enforce the observance of the plan in the case of the petitioner. In short, the respondents cannot pick and choose whom they will enforce the restrictions against, and whom they will allow to depart from them. The fact that Sinclair only carried through his alteration after settling with the feuars in his immediate neighbourhood does not seem to the Dean of Guild to affect the question, because that settlement could not affect the present respondent's rights to come forward and object to Sinclair's proposals. In the whole circumstances of the case, therefore, the Dean of Guild is of opinion that the present application must be granted."

The respondents appealed, and argued—(1) It must be conceded that the restrictions did not appear *ad longum* in any deed which was registered in the Register of Sasines, but they were sufficiently indicated in a deed which was so registered, and to a great extent they must have appeared *ex facie* of the plan. (2) Even if, however, the restrictions had not been constituted real burdens, they were nevertheless binding upon the petitioner. Where lands in a town were feued out for the purpose of building in conformity with a common plan, the co-feuars were bound to one another, as well as to the superior, not to deviate from that plan or to make

alterations on the houses after they were erected in contravention of the plan—*Magistrates of Edinburgh* v. *Macfarlane*, December 2, 1857, 20 D. 156; *Cockburn* v. *Wallace*, July 1, 1825, 4 S. 128 (the judgment of the Court upon this point being acquiesced in, and consequently not affected by the decision of the House of Lords on appeal—2 W. & S. 293); *Alexander* v. *Stobo*, March 3, 1871, 9 Macph. 599, where the decision in *Macfarlane, cit.*, was recognised as authoritative, *per* Lord Ardmillan at page 605, *per* Lord Kinloch at pages 609-10; *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R., H.L. 95; *Johnston* v. *The Walker Trustees*, July 10, 1897, 24 R. 1061; Rankine on Land Ownership (3rd ed.) 414. No doubt the plan here was lost, but it was to be presumed that the buildings had been erected in conformity with it, and it lay upon the petitioner to show that the proposed alterations were not disconform to it — *Sutherland* v. *Barbour*, November 17, 1887, 15 R. 62. In *Macfarlane, cit.*, both the co-feuars and the superiors were held to have a title to object to the alterations. There was no personal contract between the co-feuars. This showed that the personal contract was not the sole ground of judgment. Here both the superiors and the co-feuars appeared to object to the alteration proposed. [LORD YOUNG referred to *Johnston* v. *MacRitchie*, March 15, 1893, 20 R. 539.] In that case no doubt was thrown upon the superior's title to object to alterations. The onus of showing that the superior had lost his interest to enforce a restriction lay upon the vassal contravening it—*Earl of Zetland* v. *Hislop*, June 12, 1882, 9 R. (H.L.) 40, *per* Lord Watson at page 47. This case was not only ruled by *Macfarlane, cit.*, but that case was a decision upon the very same point as was now submitted for judgment. The only difference was that there had been more transmissions of the property, and that now it was not competent to obtain a charter of confirmation. If it had been competent the petitioner would now have had a charter in the same terms as Macfarlane, and he would have been bound to accept such a charter. It was not intended by the abolition of writs by progress to free feuars from obligations which would have been binding upon them under the old system. The objector Miss Watson was in a specially strong position, because her title flowed from the petitioner's own author, and the petitioner was barred from questioning the validity of a restriction which bore to be imposed by a title which his own ancestor had granted. (2) The objectors were not barred from opposing the proposed alterations on account of any previous alterations which had been allowed in the street. Most of the alterations which had been allowed were prior in date to the decision in *Macfarlane, cit.*, and they were not considered sufficient to bar the objectors in that case. Between that date and the date of Sinclair's operations there had been only four alterations. Since Sinclair's operations there had been none. In that case the present objectors had no notice of the proposed alterations. Further, it was to be noted (1) that Sinclair's was the only previous alteration in Dundas Street which involved an alteration of the building line of the street, which was what the petitioner proposed to do here, and (2) that Sinclair's premises were not in the same division of the street as the petitioner's. In order to support the plea of acquiescence in such a case as the present the operations relied upon must (1) have been sufficiently close to cause harm or inconvenience to the objectors and to give them a reasonable interest to object—*Gould* v. *M'Corquodale*, November 24, 1869, 8 Macph. 165; *Fraser* v. *Downie*, June 22, 1877, 4 R. 942; and (2) must have been *ejusdem generis* with those proposed—*Stewart* v. *Buntees*, July 20, 1878, 5 R. 1108; *Johnston* v. *The Walker Trustees, cit., per* Lord Adam at page 1073. Neither of these conditions was fulfilled here, because plats and the like alterations were not *ejusdem generis* with an alteration in the building line of the street, and alterations in another division even of the same street were too far away. See *Fraser* v. *Downie, cit.*

Argued for the petitioner and respondent — (1) No restriction was imposed by the contract of 1806 upon Dundas Street. Dundas Street was not mentioned by name. Even if the clause relied upon applied to Dundas Street, it only referred to the area and railings. The area had now been nearly entirely covered over with plats, and the railings had nearly wholly disappeared. The result was that the only restriction applicable had been departed from to such an extent as to be no longer binding. (2) Apart from this argument, however, the restrictions were not binding upon singular successors. They had never been validly created real burdens. The contract of 1806, which was the only deed in which they appeared *ad longum*, was never registered in the Register of Sasines. The contract of 1807, which was so registered, merely referred to them by reference to the contract of 1806. This was not sufficient—Menzies' Lectures on Conveyancing (3rd ed.), 603, 604; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 32, which repeated the enactments contained in the earlier Conveyancing Acts — *Duke of Argyle* v. *Creditors of Barbreek*, February 13, 1730, M. 10,306 (where the prohibitory and irritant clauses were in the charter but not in the sasine, whereas here the restrictions were not in any deed forming part of the progress of titles) — *Tailors of Aberdeen* v. *Coutts*, August 3, 1840, 1 Rob. 296. No restrictions had been validly imposed upon the feuars by the contract. All that was done was that Winton and the others personally contracted that these restrictions should be imposed. The division of the property among the feuars could not *ipso facto* impose a restriction upon any one feuar in favour of others. The case of *Macfarlane, cit.*, was decided upon the ground that there was direct personal contract between the superiors and the feuar. See *per* Lord J.C. Hope at pp. 169 and

174, and *per* Lord Cowan at p. 175. Miss Watson was in no better position than the other objectors. Her title contained no effectual reference to the restrictions. (3) The objectors were barred by acquiescence. The whole character of the street had changed. The restriction at most was that there was to be an area and railings. This had been wholly departed from, and the proposed alteration of the building line was no more a contravention than placing plats over the area and removing the railings. In the case of *Fraser* v. *Downie, cit.*, the kind of alterations referred to were internal alterations, whereas here Sinclair's alterations were external. Not much over 100 yards divided Sinclair's property from the objectors.

At advising—

LORD JUSTICE-CLERK—The petitioner in this case desired to obtain the authority of the Dean of Guild for certain alterations on premises in Dundas Street, Edinburgh, by which his shop front would be brought out a few feet over the space in front of the building which had formerly been an area. The superiors and certain neighbouring feuars have appeared to oppose, on the ground that the petitioner is bound by certain conditions contained in a contract dated in 1806 between the superior and the then feuars. The Dean of Guild has sanctioned the proposed works.

There is here no personal contract by which the petitioner is bound. The sole contention against the petitioner is that there are restrictions in the titles of the nature of real burdens by which the petitioner is precluded from placing buildings where he now proposes to place them.

The ground on which the Dean of Guild has decided in favour of the petitioner is that the respondents, both the Governors of Heriot's Hospital and the neighbouring feuars, have suffered in the past other feuars in the neighbourhood to make such substantive deviations from the uniformity of front and front areas, that they cannot now object to the petitioner's proposed alterations. I should be slow to propose that the Court should interfere with the decision of the Dean of Guild Court in such a matter, turning as it does on question of fact, into which he and his advisers have made investigation and satisfied themselves. But having the description of what has been done, I would be prepared to say that I agree with the Dean of Guild in his opinion. That view would be in itself sufficient for the disposal of the case. But I am further of opinion that the petitioner is entitled to prevail on a ground which the Dean of Guild has not given effect to, viz., that the real burden on which the respondents in the petition found, did not duly enter the record. This upon the decided cases precludes the enforcement of them against the feuar unless he has taken himself personally bound to their fulfilment. I am therefore of opinion that the decree granting a lining is right and ought to be adhered to.

LORD YOUNG concurred.

LORD TRAYNER—I agree with the Dean of Guild in thinking that the building restrictions which the appellants seek to enforce have been so persistently and openly violated for some considerable time past that they cannot now be enforced. But I more than doubt the soundness of the judgment appealed against, in so far as it holds that the appellants are *in titulo* to enforce the restrictions as against the respondent. So far as we have seen, the restrictions in question have never entered the Register of Sasines, and if so, then they are not binding upon singular successors, which the respondent is in a question with the appellants.

LORD MONCREIFF—I agree in the result at which the Dean of Guild has arrived, but I think that the safer and simpler ground of judgment is to sustain the third plea-in-law for the petitioner, which is to the following effect—"The conditions and restrictions as to buildings under the contracts of 1806 and 1807 never have been validly constituted a burden over the petitioner's property, and do not affect the same."

It does not admit of dispute that the conditions and restrictions which the respondents and appellants now seek to enforce against the petitioners have never been recorded in the Register of Sasines. No doubt the contracts of 1806 and 1807 are referred to in the petitioners' titles as containing them, but nothing but full insertion in the sasine, or reference to some recorded instrument which contains such conditions, will suffice. It is therefore plain that the respondents, who are co-feuars, are not entitled to insist on those conditions being enforced. The superiors might have had right to object, notwithstanding the non-insertion of the conditions in the recorded sasine, if the question had arisen with their immediate grantee, as was the case in *The Magistrates of Edinburgh* v. *Macfarlane*, 20 D. 156. But the petitioner is not in that position, he is a singular successor—and he has not obtained a charter of confirmation from the superiors as had the respondent (in the advocation) in that case. Thus he is not personally bound to observe the conditions as in a question with the superiors.

Even if I were of opinion that the superiors would otherwise have been in a position to enforce the conditions, I am disposed to think that as they have allowed the original scheme of the contracts of 1806 and 1807 to be so widely and substantially departed from they are now barred from insisting in them. In some respects, in my opinion, this plea of bar in respect of acquiescence in a general departure from feuing restrictions is more easily pleaded against the superior than against a co-feuar, because there may be many cases in which a co-feuar may have no immediate interest to object to a departure from the feuing scheme or plan—as for instance, where the operations are in another street or another division, while the matter cannot fail to have been brought to the notice of the

superior, whose interests range over the whole of the ground feued. There can be no doubt that here the original scheme contained in the contracts has been widely departed from throughout the area in question, especially in the north-running streets, including Dundas Street, and this in the knowledge of the superiors.

But there has been no marked departure from the conditions as regards an alteration of the kind contemplated by the petitioner in the particular division of Dundas Street in which the petitioner resides; and therefore in the light of some of the decided cases I should have felt some difficulty in sustaining the plea of acquiescence against adjacent feuars if I had been of opinion that they otherwise had a right to insist upon the conditions. Holding, as I do, that they have no such right, the conditions never having entered the record, it is not necessary to say more upon that subject.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Sustain the third plea-in-law for the petitioner: Remit to the said Dean of Guild to grant warrant of new to the petitioner in terms of the prayer of the petitioner as amended by his minute, No. of process, lodged 5th October 1897, and amended plan No. of process, and decern: Find the petitioner entitled to expenses in this and in the Inferior Court, and remit the same to the Auditor to tax and to report to the said Dean of Guild, to whom grant power to decern for the taxed amount thereof."

Counsel for the Petitioner—W. Campbell—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—R. L. Orr—M. P. Fraser. Agents—Duncan & Hartley, W.S.

Friday, June 17.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CAIRNS *v.* CLYDE NAVIGATION TRUSTEES.

Reparation—Master and Servant—Negligence of Servant—Liability of Master for Fault of Servant while Working for Another Person.

A labourer engaged in loading a ship at a harbour was injured by the fault of the craneman "slewing" round the crane instead of lowering as ordered by the stevedore. The loading or discharge of vessels at the harbour was regulated as follows:—All the cranes belonged to a body of Navigation Trustees, and the men who worked these cranes were appointed and paid, and could be dismissed only by them. When the owners of a ship wished to load or unload the vessel they applied to the trustees for an order for a crane and craneman. On receiving this order they delivered it to the stevedore whom they had instructed to load or discharge their vessel. The stevedore showed this order to the crane superintendent, who appointed a man to work the crane allotted to the shipowners. If the craneman refused to obey the stevedore's orders, neither the latter nor the shipowners could dismiss him; their only remedy was to complain to the trustees, who might, as they thought right, either retain the same craneman at the crane or replace him by another of their own selection.

Held that on the occasion in question the craneman was the servant of the Navigation Trustees, and that the latter were liable in damages for the injury caused through his fault.

While Francis Cairns, quay labourer, Dundee, was working on 27th January 1897 in the hold of the steamship "Ardgowan," which was being loaded in the harbour at Glasgow, he was injured by being crushed by some steel plates, owing to the fault of the craneman, who "slewed" round the crane bearing the steel plates instead of lowering it as he was ordered to do by the stevedore.

Cairns brought an action for £250 damages against the Trustees of the Clyde Navigation, averring that the craneman was their servant.

The defenders denied that they were responsible for the accident, on the ground, *inter alia*, that the craneman on the occasion specified was not their servant, but was under the orders and control of the stevedore engaged by the shipowners to load the ship.

The pursuer pleaded, *inter alia*—"(1) The defences are irrelevant. (2) The pursuer having been injured in the manner libelled, through the negligence of the defenders' servant, is entitled to compensation for said injuries from the defenders."

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant and insufficient to support his pleas-in-law. (2) The pursuer having had no contract with the defenders, and the latter having no duty to perform towards him, the defenders should be assoilzied with expenses. (3) The accident to the pursuer not having been caused by the fault of the defenders, or those for whom they are responsible, the defenders should be assoilzied with expenses."

On 7th April 1897 the Sheriff-Substitute (BALFOUR) dismissed the action as irrelevant, and on 23rd November the Sheriff (BERRY) adhered.

The pursuer appealed to the Court of Session, and on 27th February 1898 the Second Division of the Court sustained the appeal, recalled the interlocutor appealed against, and of consent allowed a proof before answer.

Lord Moncreiff heard the proof, which