The pursuer reclaimed.

MILLAR, Q.C., and BALFOUR for him.

The SOLICITOR-GENERAL (CLARK) and ORPHOOT for respondent.

At advising—

LORD JUSTICE-CLERK—One question of considerable interest was very learnedly argued at the bar, namely, when the subject of a sale is evicted from the purchaser, and its value is less at the date of eviction than at the date of the sale, whether the purchaser's claim against the seller under his warrandice is to be measured by the value at the date of eviction, or by the price which was paid?

This seems to have been an old, and, indeed, an unsettled controversy among the civilians, Pothier and the more modern commentators supporting the purchaser's claim for the price, while Domat, following the older writers, limits his demand to the value of the property at the date of eviction.

I do not find that the point has ever been directly decided in our own law; but the tendency of all the authority we have points to the opinion of Pothier as the better; and I have found no case in which less than the price has been awarded on eviction. Amid the conflicting texts in the Roman law, that on which our jurists have mainly relied is to be found in the 19th Book of the Digest, t. 1, law 11, § 18, which lays down the principle thus: "Neque enim bonæ fidie contractus hac patitur conventione, ut emptor rem amitteret, et pretium venditor retineret." So that even when there was an agreement that nothing was to be due on eviction, that was construed not to extend to the price, but to extend only to profits and damage. Craig refers to this authority, B. 2, T. 4, ẓ 9, in regard to such stipulations. He says: "In hac facti specie acquitas naturalis prevalet, ut qui alienam pecuniam recepenit eam, fundo evicto, restituere cogatur, non obstante pacto convento;" and he quotes a case between Lord Leven and Wood of Largo, in which he says the point was raised, although not decided. But whether it is received among us or not, he professes himself ignorant.

Stair, Erskine, and Bell all deal with this matter, and their views substantially coincide. "Warrandice," says Lord Stair (2, 3, 46), "hath no farther effect than what the party warranted truly paid for the right, whereby he was, or might be, distressed, though less than the value of the right warranted." He continues: "This will not hold in warrandice of lands;" and he explains what he means by saying that in land "the buyer is not obliged to take the price he gave." The passage will not bear the construction the defender tried to put on it, that the purchaser took the risk of a fall in value; although some words, without the context, may seem to point in that direction. It plainly means that warrandice in sales of land implies an obligation to restore the price on eviction, and all loss over and above.

The passage in Erskine bears out this view, although his words also are ambiguous (*quotes* Ersk. 2, 3, 30).

Mr Bell in his Principles says, "The purchaser is entitled to demand the whole worth of the subject at the date of eviction, and not *merely* the sum which he has paid."

In all these passages the price paid is assumed as the rule in bargains as to moveables, and, as I read them, in bargains about land the price and all damage over and above; and that on the principle that in no case can a seller be permitted to retain the price of that which he had no power to sell. I may refer to the cases of *Thomson*, reported in Broun's Sup., 5, 569; and *Houston*, M. 16,619, as rather assuming than deciding the law in this sense; and to a very important opinion of Lord Moncreiff in the case of *Galloway*, reported in 1 D. 74; in which, under a clause of warrandice limited to the price paid, he refused to impute the rents drawn prior to eviction to extinguish any part of the obligation.

I am unable, therefore, in any view, to concur with the finding of the Lord Ordinary, that the value at the date of eviction, though less than the price, is the true measure of the seller's obligation under his warrandice. If the question lay between assuming the price as an arbitrary liquidation of the damage, or simply finding the purchaser entitled to recover such loss as he could establish, I should have more difficulty. But the inclination of my opinion is, that warrandice in the contract of sale implies an obligation in the case of eviction to render back the price for which no equivalent was given, whatever farther claims it may confer upon the purchaser.

I do not know, however, that it is necessary for us to decide this abstract point. The circumstances of the case are very special, and were, I think, too little attended to in the debate. When rightly considered, I think they afford a solution of this question quite satisfactorily.

[His Lordship having given the narrative quoted *supra*, proceeded]—

I am of opinion, in this state of the fact, that the defender is bound, under the warrandice, to take back the subjects on the terms which in that event he will be entitled to demand from the heir-at-law, as a condition of ceding possession; and that on re-conveying the subjects, and the several rights over them, and assigning his rights under the judgment in question, the pursuer is entitled to decree in terms of the conclusions of his summons. The restitution will thus be substantially complete, and the pursuer will be kept, as he is entitled to be, *indemnis*.

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defender—Adamson & Gulland, W.S.

Tuesday, December 20.

MAGISTRATES OF EDINBURGH *v.* CROALL.

Feu-Charter—Condition—Record—Singular Successor. The superiors of a piece of ground in the city, in the original feu charter bound the feuar to erect houses thereon, conform to certain conditions which appeared in the articles of roup, under which the ground had been sold, and imposed certain other burdens and conditions. The precept and instrument of sasine contained mention of these express conditions, but no reference to the articles of roup or any conditions about the building of the houses contained in them. *Held* that the conditions in question, which bound the original feuar to erect houses conform to a certain plan, contained in the articles of roup, not having entered the record, were not binding upon singular successors.

This was an appeal from a decision of the Dean of Guild in an application made to the Dean of Guild Court by Messrs J. & R. Croall, proprietors of 21

Charlotte Square, for the purpose of obtaining the sanction of that Court to certain alterations which they desired to make upon that property, with the view of turning it into a manufactory or show-room for carriages, &c.

The facts of the case were as follows:—"On the 10th day of April 1805, the Lord Provost, Magistrates, and Town Council of Edinburgh exposed to public roup and sale, under certain articles and conditions of that date, nine lots or areas for building on in Charlotte Square, which is within the extended royalty of the city of Edinburgh—five lots, viz., Nos. 11 to 15 inclusive, both being situated on the south side, and four lots, viz., Nos. 18, 23, 24, and 25, being situated on the west side of the square. By the third article of the said articles and conditions it was provided, 'That the whole houses to be erected on the several lots shall be built on a regular plan, conform to an elegant elevation by the late Mr Robert Adam, architect, and the whole of the fronts, the plain as well as the ornamental parts, to be done of polished Craigleith, Craigcrook, Redhall, or Ravelston stone; that William Sibbald, the city's overseer, is to furnish the builders with working elevations and a set of moulds drawn at large for the different mouldings, for which each purchaser shall be bound to pay for each five guineas, along with the purchase-money, the under part of the building in the sunk area below the rustic work to be rock work, and the courses of the ashlar above the belt of the rustic work shall be 14 inches high; and that the whole range of building may be properly connected, the ashlar is to be tusked 6 inches at the least, which will preserve an uniformity in the heights of the courses, the chimney stalks to be agreeable to the chimney stalks already built in the square, and the whole of these to range in a direct line in front, and by no means to come nearer the front than the edge of the platform.' By the fourth article of the said articles and conditions it was provided 'That the depth of the projecting houses shall not exceed 54 feet, and the intermediate ones 50 feet; and it is expressly declared that none of the purchasers shall have it it in his power to stake off his ground, but when the foundation is cleared out, the said William Sibbald shall attend for that purpose, and likewise for the purpose of ascertaining the levels;' and by the seventh article of the said articles and conditions it was, *inter alia*, provided 'That the purchasers, along with the judge of the roup, shall immediately, on the conclusion of the roup, subscribe the foresaid elevation and ground plan, as relative to the foregoing articles, and the purchasers shall also subscribe a docquet to be subjoined to the minutes of roup, obliging him, her, or them to stand to and implement the premises.' Several of the said lots were sold on the 10th of April 1805, but in consequence of no offer having been made for others, and among them lot No. 18, the sale, as regards them, was adjourned to the day of . On 12th April 1808, James Bryce, then painter, Edinburgh, addressed to the then city chamberlain a letter in the following terms:—'I hereby offer to feu from the Right Hon. Lord Provost, Magistrates, and Town Council the two lots of grounds lying upon the west side of Charlotte Square still undisposed of, and to pay an annual feu-duty of 6s. sterling per running foot of front for the same. I also bind myself to repay the expense of cellarage, &., already incurred, as also the proportion of enclosing and dressing the Square, and in every other manner to conform to the articles of roup that these lots were formerly exposed by.' The said offer was considered at a meeting of the Town Council, held on 13th April 1808, when it was agreed to grant a feu of the foresaid two lots of ground for payment of the feu-duty, and on the terms before mentioned. On 30th May 1810, the said James Bryce addressed a petition to the Town Council, stating that John Hay Forbes, Esquire, advocate, was jointly concerned in the buildings erected on the said lots, and craving the Town Council, as superiors, to pass an Act of Council, authorising a charter to be expede in favour of the said John Hay Forbes, of lot No. 18, being one of the two lots acquired by the said James Bryce as aforesaid, to be held on the same terms as held by the said James Bryce. This request was complied with by the Town Council at a meeting held on the 30th day of May 1810, on condition of the said John Hay Forbes 'making payment, and performing the obligations incumbent on the said James Bryce.' A feu-charter was accordingly granted by the Lord Provost, Magistrates, and Town Council, which was signed by the said James Bryce, in token of his consent, in favour of the said John Hay Forbes, of the said lot No. 18. The said feu-charter is dated the 13th day of June 1810. It proceeds on the narrative, that 'Whereas by Act of Council of the 13th day of April, in the year 1808, our predecessors in office granted to James Bryce, painter in Edinburgh, a feu of those two lots of ground lying upon the west side of Charlotte Square, then undisposed of, at an annual feu-duty of six shillings sterling per running foot of front for the same, the said James Bryce being bound to repay the price of cellarage, &c., already incurred, as also the proportion of enclosing and dressing the Square, and in every other manner to conform to the articles of roup on which the areas in said square were sold, bearing date the 10th day of April, in the year 1805, and registered in the Burgh Court-Books the 30th day of April following;' and on the further narrative of the said Act of Council, dated the 30th day of May 1810, the Council agreed to transfer the foresaid lot No. 18 to the said John Hay Forbes, Esquire, and to grant him a charter thereof, on condition of the said James Bryce signing the same in token of his consent, 'and that the said John Hay Forbes should be bound and obliged to make payment and perform every obligation incumbent on the said James Bryce by the articles of roup before mentioned,' and on that narrative, *inter alia*, the said Lord Provost, Magistrates, and Town Council gave, granted, and disponed to and in favour of the said John Hay Forbes, his heirs and assignees, all and whole the foresaid lot of building-ground."

The precept of sasine and the subsequent instrument of sasine contained no reference to the obligations which were contained in the feu-charter of conforming in every manner to the conditions of the articles of roup. The only declaration relative to the use of such buildings is contained in the original charter, and is repeated or referred to in the subsequent sasines, in the following terms:—"and lastly, it is hereby declared that if the said John Hay Forbes, Esquire, or his foresaids, shall convert the subjects created, or to be built upon the ground before disponed, into breweries, or do any other act or deed to infer a claim of thirlage, they are to free and relieve us and our successors in office, the ground and others before described, and feu-duty payable for the same, of

and from the payment of all multures which can be claimed furth thereof as payable to any mill to which the same may have been astricted."

Thereafter, on 27th May 1819, the said John Hay Forbes disponed the said piece of ground to Mrs Balfour in liferent, and Miss Anne Balfour in fee.

The ground and house erected thereon, after passing through various hands, finally became the property of the respondents upon 1st April 1870.

The DEAN OF GUILD pronounced this interlocutor and note:—

"*Edinburgh, 28th October* 1870.—Having heard parties' procurators on the question of procedure, and resumed consideration of the cause on the points previously debated—in respect that the respondents now decline to avail themselves of the opportunity afforded to them of establishing by declarator their claim to restrain the operations for which warrant is desired; and having regard to the opinion formerly expressed that the petitioners have a *prima facie* right and title to alter the plan and elevation of their tenement,—Recalls the sist granted by interlocutor of 14th July 1870, and grants warrant, in terms of the prayer of the petition, as restricted by the minute and plan recently lodged, Nos. 33 and 34 of process, and decerns; and finds the respondents liable in expenses, subject to modification, in respect of the petitioners havine materially altered their plans; modifies the same to one-third of the taxed amount; and remits to the clerk of Court to tax the same, and to report.

"*Note.*—Reference is made to the note appended to a previous interlocutor in explanation of the views entertained by the Court. The defences may be resolved into two distinct grounds, the one at the instance of the superior, founded on the obligation to build in conformity with a prescribed plan; the other at the instance of the proprietors of the square, and especially the conterminous proprietor, Dr Smith, founded on common interest, arising from community of architectural design. It has never yet been decided that an obligation to build according to a plan prescribed by the superior operates as a restraint against alterations in all time coming, and it would be unfortunate if such a doctrine should prevail. Superiors, in prescribing plans for building, look mainly to what is required at the time, and generally, if a suitable building is erected, their purpose is satisfied, and therefore they do not usually require any guarantee against alterations. In cases where alteration is prohibited in express terms, the prohibition of course receives effect. Such cases, though not very common in Edinburgh, have occasionally come before this Court. With regard to the defence founded on community of design; while it has great weight, the Court would rather not give any opinion upon it. Their duty is to carry out the law as fixed by the decisions of the Superior Courts. The point now raised is one of novelty and difficulty, and until the right contended for by the respondents has been established by a higher authority, the Court does not feel at liberty to refuse the application."

The Magistrates of Edinburgh and the conterminous proprietor appealed to the Court of Session.

SOLICITOR-GENERAL (CLARK) and ASHER, for them, contended that the original conditions applied to singular successors as well as to representatives of the original feuar. *Gordon* v. *New Club*, 16th February 1818, 6 Dow. Rep. 110.

SHAND and BALFOUR, in answer, admitted that restriction might be made to affect singular successors, but they must enter the record and be made public. *Coutts* v. *Taylors of Aberdeen*, 1 Robs. Ap. 296. The condition must be directed against the subject, not against the grantee and his heirs, and must appear in the sasine. *Heriot's Hospital*, 2 Dow Ap. 301; *Gordon* v. *New Club*, 6 Dow 87; *Walker* v. *Renton*, 11th March 1825, 3 S. 650 and 458; *Pollock* 5 S. 195; *Cumming*, 12 D. 1258; *Glasgow Jute Co.* v. *Carrick*, 8 M. 93.

At advising, the judgment of the Court was delivered by

LORD COWAN—A question of importance, not less to the parties than to the law of real property, has been raised by the discussion under this appeal.

The respondents are proprietors of an area or piece of ground in Charlotte Square, with the dwelling-house and other buildings erected thereon, having purchased the same from the former proprietor, conform to disposition duly registered on 1st April 1870. The appellants are—(1) The Lord Provost, Magistrates, and Council of the City—the superiors of the said area or piece of ground; and (2) Certain parties, proprietors of other areas, and dwelling-houses and buildings in Charlotte Square. The application to the Dean of Guild by the respondents was to have his sanction to certain alterations on the elevation and structure of the dwelling-house belonging to them; and the question is, whether, having regard to the title-deeds under which they have acquired the property, the permission obtained from the Dean of Guild to make the proposed alterations is within their power as proprietors, and consistent with the legal rights of the parties severally by whom the application is opposed?

The ground now covered with the buildings forming Charlotte Square, on the south and west side, was exposed to sale by the City in April 1805, under articles and conditions which are referred to in the record. One of these conditions (the 3d) is to the effect that the whole houses to be erected should be built on a regular plan, conform to an elevation by Mr Adam, architect; and the whole of the front—plain as well as ornamental parts—to be of polished stone from one or other of the four quarries mentioned; and conform to working elevations to be furnished by the city's overseer,—with certain other provisions to secure that the whole range of buildings might be properly connected, and a uniformity preserved in the heights of the courses. And by article 6th it is provided that, upon the payments stipulated being made, and the articles being implemented by the purchasers, the exposers should be bound to deliver a feu-charter to each purchaser "containing the same clauses as are inserted in charters granted to the feuars of the extended royalty;" and, with regard to the area or piece of ground in the centre of the Square, which was to be preserved as "common property, for the accommodation, pleasure, and health of the several feuars around the same,"—it is provided that the said charter shall contain a declaration that the foresaid space shall be used allenarly for the pleasure and health of the feuars and their families, and noways be converted into a common thoroughfare, or used to any other purpose whatever." The purchasers, by the 7th article, were taken bound to subscribe the elevation and ground plan, as relative to the articles of roup.

The original purchaser of the area or piece of

ground in question was James Bryce, painter, Edinburgh, from whom the same was acquired by Mr Hay Forbes (Lord Medwyn); and in his favour the city granted feu-charter, dated 13th June 1810. This deed narrates—(1) The agreement to feu the area by the city to Mr Bryce, and the obligation incumbent on him to pay the expense of cellarage, &c., and of enclosing the square, conform to the articles of roup specifically referred to; (2) the subsequent agreement by the city, on the application of Mr Bryce, to give a charter to Mr Forbes of the lot of ground in question, with the buildings erected thereon, on condition of Mr Bryce signing the same in token of his consent, and of Mr Forbes undertaking the obligation "to make payment and perform every obligation incumbent on Mr Bryce by the articles of roup;" and (3) that the city were satisfied, from a certificate by their overseer of public works, and from other evidence, that the several articles of roup and various payments incumbent on Mr Forbes had been duly made, all as specifically set forth, and of which they acknowledge receipt. On this narrative, the city disponed in perpetual fee and heritage, "to and in favour of the said John Hay Forbes, Esq., his heirs and assignees whomsoever," the lot of building ground in question; "but always with and under the express burden and condition that the said J. H. Forbes and his foresaids shall in all time coming maintain and uphold, upon their own expenses, the arches of the said cellarage and communications with the common sewers, and also the pavement covering the same;" and then, as regards the area of the square, it is disponed to Mr Forbes and his foresaids, in common with the whole other persons feuars of areas around or upon the square, "under the following conditions:"—viz., That the same should be used solely for the pleasure, health, and other accommodation of the feuars and their families, and that the same should be preserved and kept in order at the common expense of the feuars. The charter then sets forth that the subjects should be held of and under the city, as immediate lawful superiors, for payment of the feu-duty therein stipulated, and subject to the declaration that it should not be competent, or in the power of Mr Forbes and his foresaids to sub-feu or sell the subjects to be held of him or them, but allenarly of and under the city as immediate superiors in all time coming; but in all other respects it is expressly declared that the feuar and his foresaids may exercise any act of ownership not inconsistent with this manner of holding. This declaration follows:—"That if the said Mr Forbes or his foresaids shall *convert* the subjects erected or to be built upon the ground before disponed into *breweries*, or do any other act or deed to infer a claim of thirlage," they are to free and relieve the city of the consequences specified. And, lastly, it is provided, "which burdens, conditions, declarations, and provisions before recited are hereby appointed to be engrossed in the instruments of sasine to follow hereon, and in all the future renovations of this feu in favour of heirs or disponees."

The precept of sasine authorises infeftment under the express burden and condition that Mr Forbes and his foresaids should maintain and uphold the arches of the cellarage, communication with the sewers, and pavement, and likewise the area of the square to be held in common property, as said is, "and that under the burdens and conditions, and with the privileges before specified. Then, in strict conformity with the charter and precept,—without any reference to the articles of roup,—the instrument of Sasine which followed sets forth the burdens, conditions, declarations, and provisions, subject to which the charter disponed the subjects to Mr Forbes, his heirs and successors. These conditions, therefore, and no other, entered the record and were published. No reference is made to the plan and elevation of Mr Adam, or to the other stipulations regarding the erections on the ground of the feu (all of which had been complied with in the erection of the buildings), as binding *in futuro* upon heirs or singular successors in any respect or to any effect.

The successors of Mr Forbes were Mrs Balfour for her liferent and Ann Balfour in fee; and under the precept contained in the disposition in their favour, of date June 1819, and of the disposition and assignation by them to Mr Dempster of Skibo,—the City, by charter of resignation, dated May 1832, disponed the subjects in the precise terms of the charter in favour of Mr Forbes,—subject to the same conditions and provisions, and no other, and upon that charter Mr Dempster was infeft; he thereafter conveyed the subjects to the author of the respondents. No other renovation of the feu has taken place.

Before adverting to the legal principles on which, as it appears to me, this case must be decided, I have thought it right thus consecutively to trace the progress of titles, and to state generally their contents. And as much of the argument of the appellants was based upon the articles of roup and stipulations therein inserted, as to the elevation, plan, and structure of the buildings on the feu, it is all-important towards forming a just estimate of the weight to be attached to this argument, to have in view, as matter of fact, that the only reference to the articles of roup throughout the progress of titles is to be found in the *narrative* of the charter granted to Mr Forbes by the city in 1810. Neither the dispositive clause of the charter, nor the instrument of sasine which followed on the precept, nor any one of the subsequent title-deeds—not even the charter of resignation proceeding from the City itself in 1832—is expressed in such terms as to show that any other conditions or burdens affected this property than those engrossed in the infeftments and published to the world,—among which is certainly not included any condition with regard to the plan and elevation or structure of the buildings to be erected on the feu.

That the respondents are entitled to assert and vindicate all the proprietary rights of a singular successor or purchaser of this area or piece of ground is incapable of dispute. They have purchased the property on the faith of the real right in the person of their authors, as published on the face of the records. There may exist personal obligations capable of being enforced against their authors, or some of them. With such obligations the respondents have no concern. The feudal right to the subjects of their property must be shown, on the face of their title and of the records, to have been legitimately affected by such obligations or burdens, ere they can be enforced against the existing proprietors. This principle holds in questions which may arise between superior and vassal. The condition or burden must be made, not merely to affect the vassal personally, but his right to the subjects, as a condition of the grant; and unless it be so constituted as to enter the in-

strument of Sasine, and appear in the records, it will be ineffectual against purchasers and creditors. Otherwise, such obligations, as Mr Bell explains, are merely personal, and can serve only as the ground of a personal action.

Let it be considered how the state of the titles in the present case bear on the general principle. Ground intended for building is exposed to public sale under certain articles of roup, and a plan and elevation are referred to, in conformity with which the houses to be built on the ground are to be erected; and when this and certain other conditions are complied with, the exposers of the ground bind themselves to grant a feu-charter, subject to certain conditions, intended permanently to affect the grant in favour of the purchasers. But the limitation of the real right must be looked for in those conditions, which are thus made to affect the grant to the feuar, his heirs and successors. Personal obligations imposed on the purchasers, conditional to their right to have charters from the superiors, and not made to affect the grant itself, can be of no avail against purchasers and singular successors, however binding on the original feuar personally. Was the stipulation, then, in this case, as to the buildings to be erected on the feu, left as matter of mere personal obligation, or was it so constituted as to be a condition of the grant by entering into the infeftment, and so being published to the world, thus constituting a perpetual real restriction on the proprietary right of all parties becoming proprietors of the ground?

The respondents contended that the terms of the articles of roup were so expressed as to make the stipulated compliance with the plan and elevation—even had it appeared in the titles and on the record—to have regard only to the first buildings erected on the feu; and for this construction of the articles it cannot be disputed there are at least plausible, if not altogether satisfactory grounds. But whatever may be said for this view, the conclusive answer is, that it is not declared to be one of the conditions of the grant to be inserted in the charter and titles following thereon. The stipulation is left to affect merely the original purchaser at the roup, as a condition, without compliance with which the charter agreed to be given by the sixth article of roup could not have been obtained. Every stipulation in the preceding articles being complied with, the exposers bound themselves to give a charter, subject only to those conditions and declarations set forth in the sixth article. This, accordingly, was complied with to the letter in the actual charter obtained by Mr Forbes in 1810. It is not, therefore, of much moment to determine whether the obligation as to the elevation and structure of the houses, according to a plan—(which plan, it may be noticed, has not been produced, and was stated at the debate to be lost),—is to be held fully satisfied by compliance therewith in the first erection of the houses. It is enough for the respondents to say that it has not been made a real condition of the grant so as to limit and restrict their proprietary rights.

While this view affords a satisfactory defence for the respondents, I must remark that their contention appears to me supported by considerations of great wieght—(1) The very fact of neither the articles of roup nor the plan and elevation being referred to, and of the alleged permanency of the obligation to comply therewith in all time coming not being secured by its insertion among the other conditions which are made to affect the real right, seems to indicate that it was to be held satisfied by the first erection being conform thereto; (2) one of the conditions inserted in the charter relates to the *conversion* of the buildings into a distillery, which strongly points at its being in the power of the feuar, or his successor, thereafter to alter the elevation and structure of the buildings; and (3) in the feu-charter obtained by Mr Forbes, while the narrative refers to the articles of roup as personally binding on him and his author James Bryce *nominatim*,—it is only when we come to the grant of the subject, and the conditions imposed and intended to affect the grant, that we have the disposition and relative conditions given to and made to affect Mr Forbes himself, "*his heirs and successors.*"

The appellants contended that, this being a question between superior and vassal, the obligation as to compliance with the plan and elevation must be held to be binding on the pursuer in all time, although not so constituted in the charter as to enter the infeftment of the vassal. I do not know of any decision of the Court which can be held to sanction this proposition. Even in those cases where, as between superior and vassal, a plan has been alleged to be binding on singular successors, the argument has always been based upon the ground of its being more or less distinctly referred to in the original constitution of the feu and in the title-deeds following thereon. And the judgments pronounced by the House of Lords in the case of *Gordon* v. *The New Club*, as also of *Gibson* v. *The Feoffees of Heriot's Hospital*, demonstrate how little effect on the proprietary rights of singular successors is to be ascribed to the mere exhibition of a plan, or reference thereto elsewhere than in the body of the charter as a condition of the grant. This is well shown in all the cases which have recently occurred. To take the Blythswood feus as an illustration: The Court here gave effect to conditions in the case of *Harvey* v. *Campbell*, because of their being embodied in the constitution of the feu and made real burdens or conditions; but the lawfulness of these conditions being by the House of Lords considered doubtful, the cause was remitted for consideration. And so in the recent case of *Campbell* v. *The Clydesdale Banking Company*, the conditions which the superior desired to have enforced,—and which had reference, as in this case, to the elevation of houses according to a plan,—were declared real liens and burdens in the feu-rights; and to these effect was not given by the Court, because of the superior having tolerated a departure from them in the case of the other vassals in the same street. This likewise was the *species facti* in the leading case of *Coutts*, to which reference was made at the debate. I apprehend it, therefore, to be clear that the superior cannot enforce any conditions which have not been made to affect the real right conveyed by the original charter.

Reference was made by the appellant to the case of *Stewart* v. *the Duke of Montrose*, decided in this Court on 18th February 1860, and affirmed in the House of Lords. It does not seem to me that the decision in that case has any application to the question here involved. The origin of the right was a mutual feu-contract in which, as conditions of the grant, certain obligations *hinc vide* were undertaken, all of which entered into the constitution of the feudal right. These were held to be binding as between superior and vassal in all time,

be the superior who he may, or the vassal who he may. One of the obligations undertaken by the superior was to relieve the vassal of certain burdens on the lands and teinds. This was held to be enforceable against the superior by the vassal at the time, although he had no special assignation to the obligation of relief in any of the successive titles of the progress which connected him with the vassalage. Had we to deal in this case with an inherent condition declared to affect the subject of the feu, this decision might have been referred to as an authority by the superior; but not as the case actually stands. Another decision was referred to—*M'Farlane* v. *Magistrates of Edinburgh*, 2d December 1857—but which, when examined, affords anything but an authority for the contention of the appellants. The conditions as to building, which were enforced by the Court, were inserted in the original constitution of the feu, and were validly imported into the title of the party against whom they were enforced. In the completion of his title he had obtained a charter of confirmation, in which the whole conditions in the instrument of sasine in favour of his author were declared obligatory on him; and he was taken bound, in so far as not already implemented, to fulfil the conditions contained in the original contracts which led to the constitution of the feu-right, and which were referred to by the dates of their execution and registration. It was held vain for the vassal to resist fulfilment of conditions to which he had subjected himself on the face of his own title.

How different are the circumstances attending the title here to be construed. The condition attempted to be enforced was not made to affect the grant, while other conditions are made to do so; and this against the vassal, in whose title from first to last the condition is not once mentioned, nor the articles of roup and relative plan and elevation noticed, in name even, far less referred to as obligatory. And this, too, by superiors who granted a renovation of the feu, by a charter of resignation which does not contain this restriction on the real right.

Entertaining these views of the proprietary rights of the respondents, in a question with their superiors, I do not think that the coterminous proprietors occupy any better position. They are undoubtedly entitled to insist in proceedings (even if the superiors had not been parties) to the effect of enforcing all conditions legally incumbent on their co-proprietors in common with themselves, and by departure from which injury will be suffered by them; but to no other effect: And had the action, *e.g.*, regarded the square or area declared to be the common property of the feuars, and to be kept up at their joint expense, the case would have been quite different. For as regards the matter in hand in this discussion, there is no room for implying either a joint contract among the feuars, or the constitution of a real servitude.

On this part of the argument, the case of *Butterworth* (1812) was referred to by the appellants. But, in the first place, the action there was directed against one of the original purchasers, and had regard to the erection of the original buildings, which, as matter of personal obligation, he was bound to erect in accordance with the plan of elevation referred to in the articles of roup, which by his subscription he had expressly bound himself to observe. And, in the second place, having regard to the æsthetic grounds on which the decision, to some extent at least, in this Court proceeded, it is not an authority to which much weight can be attached, in a question affecting the legal rights of the respondents as singular successors. Such considerations, indeed, seem to have been specially in the view of Lord Eldon when he remarked in his judgment in 1818 (4 Dow's Appeals, p. 106), "that whatever may be due to the taste and beauty of the city of Edinburgh, we are not here to support them at the expense of the legal rights of the parties, nor to carry our respect and regard for taste and beauty so far as to establish a contract where there is no such thing."

On the whole, I am of opinion that the appeal should be dismissed.

Agent for Appellants—James Mylne, S.S.C.
Agents for Respondents—Ronald & Ritchie, S.S.C.

Wednesday, December 21.

FIRST DIVISION.

MACBEAN *v.* NAPIER.

Liability—Contractor—Clause. Circumstances in which a building contractor was held not liable for damage in consequence of the subsidence of a gable, his employer having appointed an inspector, and the inspector having approved of the work done and the manner of performing it, and it being shewn farther that the foundations, for which the contractor was not responsible, were at fault.

A general clause in a contract as to alterations held only to cover such alterations as were in the contemplation of parties, and not all alterations of every kind.

This was an appeal from the Sheriff-court of Aberdeenshire, and from the record made up in that Court it appeared that the defender Macbean had employed the pursuer Napier, a builder in Aberdeen, to build him a house in Market Street of that town. The defender employed no architect, but himself arranged about the plans and specifications, and entered into the contract with Napier, which consisted of an offer and acceptance in the following terms:

"5 *Spa Street, Aberdeen, Aug.* 14, 1868.
"Mr D. M'Bain.

"Dear Sir,—I hereby make offer to execute the messon, carpenter, slater, plumber, and plasterer and bell-hanger work, also good grates, and Venetian blinds for front windows, *and one for the back, and finish all to your satisfaction*, for the sume of Twenty hundred pounds sterling, say £2000 stg.—I am, &c. CHARLES NAPIER.

"*Aberdeen*, 14 *Aug.* 1868.
"Mr Charles Napier, Builder, Spa Street, Aberdeen,

"Dear Sir,—I hereby accept your offer of £2020 sterling to build my house in Market Street, according to plans and specifications, and in addition to supply all grates, and Venetian blinds for eleven windows, and also anything necessary to complete the work not mentioned in the specifications to be done free of any extra charge.—Yours truly,

"DONALD MACBEAN."

It will be observed that the sums mentioned in these two letters do not coincide; but it was explained that the additional £20 in the acceptance