be set aside if the second question put to the Court is to be answered in the negative. On the contrary, it appears to me that it can only be by a straining of words out of their ordinary accepted and intelligible sense if vesting *a morte testatoris* is to be held expressed as an intention of the deceased. I go so far with Lord Low as to hold that there may be cases in which the mere use of the word "vest" as applied to a particular event might not be held to be of crucial importance, but that can only be where there are other expressions in the will of such clear import as would create a plain repugnancy if the word "vest" were held to dominate in its ordinary sense. In this case there is nothing to indicate that the testator in declaring that certain provisions should not vest until the occurrence of a certain event meant something different, such as "pay over" or "put into possession." The direction is distinct and positive, and must, I think, receive effect, even although the consequence be contrary to what the testator may have had in his mind, to throw part of his estate into intestacy in the circumstances which have occurred. To hold otherwise would be, in my opinion, to make a different will for the testator than that which he has in fact made—in short, not to carry out an intention which can be spelled out of his deed, but to make a new deed to express what he may have wished to express but has not really expressed by the writing under his hand, which the Court has to construe.

The Court answered the first question in the affirmative, the second question in the negative, and the third question also in the negative.

Counsel for the First and Fourth Parties—Craigie, K.C.—Cochran Partick. Agents—W. & W. Finlay, W.S.

Counsel for the Second Party—Kippen. Agents—Wishart & Sanderson, W.S.

Counsel for the Third Party—Bartholomew. Agent—Robert Cunningham, S.S.C.

Wednesday, July 17.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.

J. A. MACTAGGART & COMPANY *v.* ROEMMELE AND ANOTHER.

Superior and Vassal—Co-feuars—Restrictions on Building—Acquiescence—Enforcement of Restriction by one Feuar against Another—Difference in Position to Enforce of Superior and of Co-feuar.

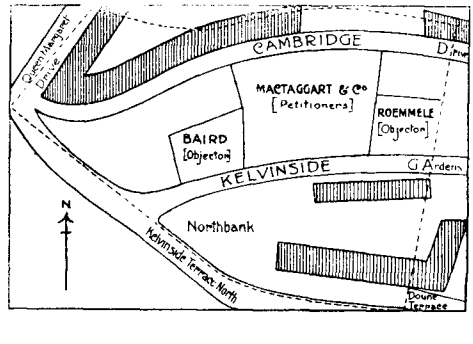
A community of feuars were under a building restriction against the erection on their feus of tenements. Tenements had however been erected on some of the feus though not on any of those forming a block of ground lying between two roads. A petition having been presented for a lining for tenements on feus in this block of ground, the two adjoining feuars objected and sought to enforce the restriction. The one objector had no tenements on any side of his feu, the other had tenements facing his feu on the opposite side of the road, but on no other side. *Held* that neither objector was barred by the acting and acquiescence of himself and his predecessors in enforcing the restriction.

Per the Lord President—"If the superior allows the act of the first offender to pass he must either have willingly allowed it or he must have conceded that all the legitimate interest to stop such acts was gone, whereas the only inference to be drawn from the *non renitentia* of the co-feuar is that he did not consider that *in that instance* his interest was sufficient to warrant his interfering."

Hislop v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571; and *Earl of Zetland* v. *Hislop and Others*, June 12, 1882, 9 R. (H.L.) 40, 19 S.L.R. 680, *applied*.

On 8th May 1906 Messrs J. A. Mactaggart & Company, builders, 65 Bath Street, Glasgow, presented a petition in the Dean of Guild Court there, craving warrant for a lining for, and for authorisation to erect, certain tenements of dwelling-houses on subjects belonging to them in Kelvinside Gardens and Cambridge Drive, Glasgow. Mrs E. E. Roemmele, 34 Kelvinside Gardens, and William Baird, writer, 40 Kelvinside Gardens, proprietors of subjects bounding the petitioners' ground on the east and west respectively, *inter alios*, appeared as objectors, and sought to enforce an alleged restriction against tenements in the petitioners' title. The petitioners and objectors were co-feuars of feus within a certain line (*red* on the plan referred to in the titles, *dotted* on the plan *infra*), and the questions between them came to be reduced to the following plea taken by the petitioners:—"(2) The respondents objections should be repelled and decree of lining granted as craved in respect . . . and (*d*) in any event the respondents are barred by their acting and acquiescence from insisting on them."

The following plan shows the position of the plots of ground, the red line of the titles being dotted, tenemental property within it being hatched, the remainder of the ground being occupied by villas or similar property:—



The Dean of Guild, after a proof, held that the objectors were barred by the actings and acquiescence of themselves or their predecessors from pleading or enforcing the restrictions contained in the petitioners' title, repelled the objections, and granted lining.

The objectors appealed.

The following narrative of the *facts* is taken from the opinion of the Lord President:—"This is an appeal from a decree of lining granted by the Dean of Guild of Glasgow. The petitioners propose to erect tenements upon a piece of land situated between Cambridge Drive and Kelvinside Gardens. This was objected to by several of the petitioners' neighbours as being in contravention of the restriction contained in the petitioners' title. The Dean of Guild repelled the title of all but two neighbours, namely, Mrs Roemmele and Mr Baird, and the other objectors acquiesced in his judgment. As regards Mrs Roemmele and Mr Baird the Dean of Guild sustained their title, and further held that the erection of the tenements in question was in violation of the restriction contained in the petitioners' titles; but in respect that the petitioners pled, plea (2) (*d*), that the respondents were barred by their acting and acquiescence from insisting in the objections, he allowed the petitioners a proof of their averments supporting that plea. The averments, so far as relating to the two objectors, are stated in answer 15 of the petitioners to the objectors' statement of facts as follows:—'Denied. Explained that tenements of four storeys in height have already been erected in Kelvinside Gardens, partly opposite the ground on which the petitioners propose to erect tenements, and also almost wholly opposite the ground owned by the objector Mrs Emilia Elizabeth Bost or Roemmele. . . . Explained further, that in the immediate neighbourhood, on part of said lands on the east of Kelvinside, four-storey tenements have also been erected.'

"Upon the result of that proof the Dean of Guild sustained the plea and granted the decree of lining. Against that interlocutor the present appeal is brought. The objectors, in the original pleadings, stated some objections to the petitioners' title, but before your Lordships they have not argued these questions, and have restricted their argument to the question of whether the Dean of Guild was right in sustaining the plea of "bar." In the same way, the respondents before your Lordships have abandoned all other pleas than that sustained, and in particular they conceded that the objectors, the respondents to the appeal, had, apart from "bar," a good title as co-feuars to insist on the restriction in the petitioners' titles, and that the operations proposed were in violation of these restrictions.

"The question thus raised is an important one, and not directly, I think, covered by decision. It is important, therefore, first to see exactly how the facts stand as to the actings or acquiescence of the objectors, which have, according to the judgment, barred them from insisting on what otherwise would be their right. The community of feuars who are, by the Dean's judgment, agreed in so far by both parties, *in titulo* to mutually enforce restrictions against each other, are the feuars whose feus are situated within a red line delineated on a plan referred to in the titles. It may be described thus: The red line begins at the place called Queen Margaret's Drive. It then goes along Cambridge Drive, and then cuts to the southward at a point which I cannot indicate otherwise than by saying that it goes down past the letter "D" on the plan in process in the word "Drive" of Cambridge Drive, and through the letter "A" of "Kelvinside Gardens." It then comes south to Doune Terrace, and then goes along Kelvinside Terrace North, and finally meets at Queen Margaret's Drive, where it started. It thus includes an area which consists of stances or lines of building ground facing Queen Margaret's Drive, part of Cambridge Drive, part of Kelvinside Gardens, and Kelvinside Terrace North. Now what has happened in the past is this. At the northwest of the ground tenemental erections have been made—that is to say, some have been constructed upon that portion of the ground facing Queen Margaret's Drive and the western portion of Cambridge Drive. Nothing of a tenemental character has been put upon the north side of Kelvinside Gardens, or upon that portion of Kelvinside Terrace North which is found between the end of Kelvinside Gardens and the beginning of Queen Margaret's Drive. A short piece of tenemental building has been erected on the south side of Kelvinside Gardens opposite Mrs Roemmele's villa and a portion of the ground for which a lining is here sought. There are also pieces of tenemental building facing southwards and situated in the south-east corner of the area enclosed within the red line.

"The whole matter may be summarised thus. As far as Mrs Roemmele is concerned she has got tenemental buildings on the opposite side of the street opposite her, but she has got none as her next-door neighbour. As far as Mr Baird is concerned, he has not got any opposite or behind him, and he has got none as next-door neighbour, but there are on various portions, as I have already described, of this area within the red line undoubtedly tenemental buildings. The proposal of the petitioners is to erect tenemental buildings which will be next door both to Mrs Roemmele and Mr Baird, and which will for the first time invade that peninsula of land formed by Cambridge Drive and Kelvinside Gardens coming together, and which at present is entirely dedicated to the original villa buildings which were erected."

Argued for the appellants—The Dean of Guild was wrong, and his judgment should be recalled. He had decided the case rather on his own inspection of the *locus* than on the evidence. There had not been sufficient inactivity on the appellants' part to infer acquiescence and to bar them from enforcing the restriction. The appellants'

interest to object and enforce the restriction when the existing tenements were erected was not so great as their interest to object now, and that made all the difference—*Gould* v. *M'Corquodale*, November 24, 1869, 8 Macph. 165, Lord President Inglis at p. 170, 7 S.L.R. 108; *Liddall v. Duncan*, June 10, 1898, 25 R. 1119, Lord Moncreiff at p. 1131, 35 S.L.R. 801. The interest of a superior, and the interest of a vassal, to enforce conditions, fell into different categories—*Liddall v. Duncan, sup.* Thus the case of *Campbell* v. *Clydesdale Banking Company*, June 19, 1868, 6 Macph. 943, 5 S.L.R. 608, which concerned a superior's interest, was not applicable. Acquiescence in as proximate and in similar operations must be proved—*Stewart* v. *Bunten*, July 20, 1878, 5 R. 1108, Lord Gifford at p. 1116, 15 S.L.R. 730—but here the tenements which it was proposed to erect were less remote and of an inferior character to those in existence.

Argued for the petitioners (respondents)—The whole district had changed its character and become tenemental. The restriction having been generally departed from was not enforceable in individual cases—*Johnston* v. *Walker's Trustees*, July 10, 1897, 24 R. 1061, the Lord Ordinary (Kyllachy) at p. 1069, 34 S.L.R. 791. Having failed to act previously the appellants had lost their interest—*Campbell* v. *Clydesdale Banking Company, cit. sup.* That interest had been that the estate should remain one of villa feus. It was incompetent for them to give up their interest piecemeal, permitting tenements to be erected unopposed in various directions round their feus and standing forth as objectors only when they pleased. Feuars must enforce such a restriction as here always or then not at all. The Dean of Guild was right, and his judgment should be affirmed.

At advising—

LORD PRESIDENT—[*After narrating the facts, supra*] . . . I now propose to examine the authority as to this branch of the law. I do not think it necessary to go through the long series of cases which gradually established the proposition that there might be created by the original act of the superior a right in each of a set of vassals to enforce restrictions in the titles of another vassal with whom they had no direct privity of contract and no direct relation of tenure, because the whole law on the subject may be said to be summed up in two leading cases in the House of Lords, namely, *Hislop* v. *MacRitchie's Trustees*, 1881, 8 R. (H.L.) 95, and the *Earl of Zetland*, 1882, 9 R. (H.L.) 40. These two cases seem to me to lay down with great precision the position of the superior and of the feuar. Thus Lord Watson says of the superior (*Lord Zetland's* case, at p. 47)—"I agree with the Lord Ordinary in thinking that the case of the *Tailors of Aberdeen* v. *Coutts* does determine that wherever a feu-right contains a restriction on property, the superior, or the party in whose favour it is conceived, cannot enforce it unless he has some legitimate interest. But that case does not lay down the doctrine that an action at the superior's instance which merely sets forth the condition of his feu-right and its violation by his vassal must be dismissed as irrelevant because the pursuer has failed to allege interest. *Prima facie*, the vassal in consenting to be bound by the restriction concedes the interest of the superior, and therefore it appears to me that the onus is upon the vassal who is pleading a release from his contract to allege and prove that owing to some change of circumstances any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist. The law was so stated, and in my opinion correctly stated, by Lord Neaves in the case of *Campbell* v. *Clydesdale Banking Company*."

On the other hand, in regard to the feuar, the same noble and learned Lord says (8 Rettie, H.L., p. 102)—"It is necessary to keep in view that when the feuar has a *jus quæsitum*, his title and that of the superior to enforce common feuing conditions are independent and substantially different rights. The title of the superior rests upon contract, a contract running with the estate of superiority, and burdening the subaltern estate of the vassal. The right of the feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement. Consequently he cannot enforce it against other feuars except in so far as he can qualify an interest to do so. Again, the superior's consent to discharge the condition cannot affect the right of the feuar, and as little can the feuar's renunciation of his servitude impair the superior's right to enforce the condition."

The difference in the right which exists in the superior and in the co-feuar seems to me necessarily to affect the character of the acts or omissions which will constitute a bar against them seeking to enforce their rights. It is clear that the actings of the superior cannot bind the co-feuar, and *vice versa*. But the matter goes deeper than that. Observe, for instance, the position which arises in the case of what I may call the first offender—that is, the case of the first feuar contravening the restrictions. The superior may object here at once, for, as Lord Watson says, his interest is *prima facie* conceded, and I am supposing there has been nothing extraneous to destroy the interest which the superior originally had. The superior therefore is clearly entitled to stop him. But with the co-feuar it is otherwise. He cannot stop him unless he can show a proper interest to do so. Accordingly, if the superior allows the act of the first offender to pass, he must either have willingly allowed it or he must have conceded that all the legitimate interest to stop such acts was gone, whereas the only inference to be drawn from the *non renitentia* of the co-feuar is, that he did not consider that *in that instance* his interest was sufficient to warrant his interfering.

I am therefore not surprised to find that, so far as the decided cases were concerned,

there was not produced to us any instance of a decision in which the co-feuar has been held barred from objecting to the contravention by A because he did not formerly object to the contravention by B, the quality of his interest to object to the operations of A and B not being the same. On the contrary, the decisions of *Stewart* v. *Bunten*, and especially of *Gould* v. *M'Corquodale*, go quite the other way. In the case of the superior there were the well-known decisions of *Browns* v. *Burns*, 1823, 2 S. 298, and *Campbell* v. *Clydesdale Bank*, 1868, 6 Macph. 943. But, as I have already pointed out, the superior is in a very different position. In other words, it is much more difficult to affirm that the quality of the superior's interest differs as regards each instance than it is to do so in the case of the co-feuar.

I do not think it necessary to go so far as to say there cannot be an instance where the failure of the co-feuar to assert his right in the case of other co-feuars may not be such as to allow the inference to be drawn that he has totally abandoned the right to enforce. Such an inference could strictly be drawn from the fact of his having himself contravened, and the undoubted acquiescence of his author in the dominant tenement may in this matter be reckoned as his own—*Muirhead* v. *Glasgow Highland Society*, 2 Macph. 420. But once it is settled that the right is a proper servitude on each of the separate feus, it is, to say the least of it, not easy to infer that because A does not stop B he intends to free also C and D.

Applying these views to the facts of the present case, I come to the conclusion that the objectors are not barred from insisting in their admitted right to stop the proposed contravention of the petitioners. The Dean of Guild seems to me to have erred in limiting interest to one consideration only, namely, the uniformity of building in the whole neighbourhood. I do not doubt that that may represent an interest, but it is not the whole interest. A man may, it seems to me, well say—"I do not object to tenements in the neighbourhood; I do object to them next door." I think also that within reasonable limits a man may be allowed to be the best judge of his own interest. Whether the objector Baird could have stopped the erection of the more distant tenements may be doubtful. But, even assuming that he could, I do not think that, if he did not, he thereby forfeited his right to stop them next door. *Tua res agitur paries cum proximus ardet* is, I think, good law as well as common sense.

The position of Mrs Roemmele is more difficult. But I come to the same result. An opposite neighbour is not the same as a next-door one; and after all there is, I think, a legitimate interest in conserving the oasis of ground between Cambridge Drive and Kelvinside Gardens, which is as yet unspoiled by tenemental buildings. In the words of Lord Kinloch in *M'Gibbon* v. *Rankin*, 9 Macph. 432—"The locality must doubtless in its own time follow the fate of most city localities, and do so with that unanimous consent which will get the better of special restrictions. Carlton Place of Glasgow, once well known as the residence of her foremost citizens, must descend to a lower rank and to baser uses, but the time is not to be heedlessly and injuriously precipitated."

For these reasons I am of opinion that the judgment of the Dean of Guild is wrong and ought to be reversed.

LORD M'LAREN—The present case is, by the party maintaining the Dean of Guild's judgment, sought to be assimilated to the case of *Campbell* v. *The Clydesdale Banking Company*, 6 Macph. 943, which was decided on the principle that there had been a general abandonment of the original conditions of feu on the part of the community of feuars. I need hardly say that the case referred to is a very important authority, and, for a period extending to nearly forty years, it has been understood to regulate the rights of a member of a community of feuars who by tacit consent have relaxed the conditions imposed on them by the superior, and have used their property in a way which they conceived to be advantageous to themselves.

But in that case the action was at the instance of the superior, who was not successful in persuading the Court that he had any interest in the matter other than his interest to maintain his security for his feu-duties. I observe that Lord Cowan, who delivered the leading opinion in the case, states that the whole body of feuars were at one in holding it to be for their interest to depart from the building restriction; in repudiating it as neither conducing to their utility nor to the ornament of their several possessions. His Lordship proceeded to observe that the superior's objections on this head had been disproved, and the judgment proceeded on the want of interest on the part of the superior to enforce the building restriction.

Now I am far from saying that in a question of this nature the consent, express or implied, of every individual feuar is a necessary step to the assertion of the right of one of them to vary to some extent the conditions by which he and his predecessors in title were originally bound. In the case of *Johnstone* v. *The Walker Trustees* (24 R. 1061), which came before this Division of the Court, it was assumed that a general departure from a building condition would amount to acquiescence on the part of the community of persons. But this principle, founded as it is on equitable considerations, is subject to a very important qualification, viz., that the inference of general consent or acquiescence is not to be extended to alterations of a different character from those which have been permitted. On this point Lord Adam observes 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. And in my own opinion the principle is stated to be,

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 to which the feuars have presumably consented.

When we consider the facts of the present case I think it may be taken that the appellants were tolerant of deviations from the conditions of feu which did not interfere with their personal comfort or convenience. They were not made parties to the Guild Court proceedings under which power was given to put up tenement or flatted houses within the area of the superiority, and apparently they did not consider that they had such an interest as would justify their intervention. Now I think it would be a very inconvenient—not to say inequitable—rule that a feuar who becomes aware of some infraction of building conditions by a feuar from the same superior, but at such a distance from himself, that the infraction causes no inconvenience to him, must either apply for an interdict or be taken to have waived his right to enforce the condition in question with conterminous feuars or disponees. I am putting an extreme case in order to test the argument, because if in the case supposed the feuar does not lose his right to object by reason of tolerance or acquiescence where his comfort is not affected, then it is a question of degree, or rather a question of fact, in each case, whether his tacit assent or *non-repugnantia* in one or more cases of deviation from the conditions amounts to an abandonment to all intents of his rights in a question with the community.

In the present case I am not of opinion the abstention from legal proceedings on the part of the appellants, in cases where they did not conceive that their interests were affected, amounts to an abandonment of their rights to enforce the building conditions. I gather from the proof that Mr Baird's interest to enforce the conditions against the respondents is stronger than Mrs Roemmele's interest. But as I am not satisfied that in the case of either of the appellants there has been an abandonment of their contract rights, I think they are *in pari casu* in resisting the present application, and that their appeal should be allowed. I may add that having heard your Lordship's opinion now delivered, I desire to concur in it.

LORD KINNEAR—I agree with the opinion given by your Lordship, and have nothing to add.

LORD PEARSON—I also agree.

The Court sustained the appeal, recalled the interlocutor of the Dean of Guild, and remitted to him to dismiss the petition.

Counsel for the Appellants (Objectors)—Hunter, K.C. — Hon. William Watson. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents (Petitioners)—Cullen, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

Wednesday, July 17.

SECOND DIVISION.

MACKINTOSH AND OTHERS (MACKINTOSH'S TRUSTEES) *v.* MACKINTOSH.

Succession — Vesting — Joint or Several Bequest—Accretion—Legacy to a Class—Intestacy.

A testator in his settlement directed —"That the fee or capital of the whole residue of my means and estate shall be held, applied, and paid . . . to and among my six children" (naming them) "and any other children to be hereafter born to me, who may survive me, equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age." He declared that payments of capital to children should be made on the footing of the trustees retaining the full amount of capital which they might think prudent to retain to meet the provisions in favour of his wife; and "that notwithstanding the foregoing provisions as to the period at which children shall become entitled to their shares of capital, my trustees shall have power to make advances of capital to or for behoof of any of my children at an earlier period than the attainment of twenty-five years, and even during minority, for their advancement or settlement in life," &c., "such advances to form deductions from the ultimate shares of the children receiving the same or for whose behoof the same are made." The testator also directed that his trustees should apply the income of the estate, or so much thereof as they thought necessary, for the maintenance, &c., of the children until the payment of their shares as provided. He was survived by his widow and the six children mentioned.

Held (1) that a share of residue vested in each child *a morte testatoris*; and (2) that the executrix of a child, who had survived the testator but died before reaching twenty-five years of age, was entitled, so far as possible, to immediate payment.

Hugh Mackintosh, shipowner, Nairn, died on 19th October 1900, leaving a trust-disposition and settlement whereby he conveyed his whole estate to his wife Mrs Henrietta Isabella Lawton or Mackintosh and others as trustees. He was survived by his wife and also by his six children, Hugh Harold, Charles, Annie Lauder, Margaret Maud, James Lawton, and Jane Lawton. Hugh Harold having died while still in minority, questions arose as to the share of the trust estate destined to him, and a special case was therefore presented.

The parties to the case were (1) the trustees, (2) the five still surviving children, and (3) the widow, who had been appointed executrix to Hugh Harold.