ship's judgment. But I think it right to say that I consider the case of *Meikle* as a new departure in our law. If the law of that case is sound we should never have heard of a law-agent's hypothec as an exceptional right. Probably we should never have heard of it at all. But being bound by the judgment in the case of *Meikle*, I agree.

LORD CRAIGHILL was absent on circuit.

The Court pronounced this interlocutor:—

"Find in fact (1) that the defenders are in possession of certain writs, leases, books and other papers belonging to Sir James Dixon Mackenzie, the constituent of the pursuers: (2) Find that the said writs and others passed into the hands of the defender in his capacity of factor for the said Sir James Dixon Mackenzie: (3) That the pursuers' said constituent is indebted to the defender in a balance due in his account of intromissions as factor foresaid: Find in law that in these circumstances the defender is entitled to retain the said writs and others until payment of the balance due to him as aforesaid: Therefore sustain the appeal: Recal the judgment of the Sheriff appealed against, and the interlocutors of 8th November and 11th December 1886, and 21st March 1887, except in so far as in accordance with the foregoing findings: Dismiss the petition: Find the defender entitled to expenses," &c.

Counsel for the Appellants —Sol.-Gen. Robertson—W. C. Smith. Agents—Murray, Beith, & Murray, W.S,

Counsel for the Respondents—Asher, Q.C.—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, November 17.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

SUTHERLAND *v.* HUNTER AND OTHERS.

Property—Title—Alteration of Buildings.

The proprietor of a shop and dwelling-house in an area presented a petition to the Dean of Guild for authority to bring forward his property to the street, by building over the area *ex adverso* of his shop and house. His title was a disposition to "all and whole that shop and dwelling-house in the area of . . . with a cellar in the front area . . . together also with a right . . . to the *solum* of the piece of ground on which the said shop and dwelling-house are built, in common with the proprietors of the subjects above the same . . . together with the pertinents of the said subjects." The burden was imposed upon the disponee of keeping in repair the pavement in the sunk area and the stair leading thereto, he being freed from all share of the expense of keeping up the roof of the tenement, and the pavement and railings in front, by the other proprietors of the dwelling-houses in the common stair of the tenement. The proprietor of an adjoining house in the area, and also the proprietors of cellars, objected to the proposed alterations, on the ground that they were not confined to the petitioner's own property. For the petitioner it was maintained that although not contained *per expressum* in his title, he yet had by implication a right to the *solum* of the area *ex adverso* of his property. *Held* that under his title the petitioner had no right of property in the area, and that the respondents were entitled to object to his making the proposed alterations.

Superior and Vassal—Restrictions on Building—Common Feuing Plan—Loss of Plan—Proof—Onus.

The proprietor of a house with the whole area and cellarage presented an application for warrant to bring forward his property to the street, by building over the area. He held these subjects under a feu-charter dated in 1825, which provided that houses should be erected by the term of Whitsunday 1826 on the ground thereby feued, in conformity to a plan signed as relative thereto. This feu-charter declared that it should not be in the power of the feuar to make any deviation from or alteration of the plan of the tenement, "all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street at the expense of the feuars offending." Objections were lodged by adjoining feuars, who were under the same restrictions, to the proposed alterations, on the ground that they were in contravention of the feu-charter. The feuing plan could not be produced. *Held* that the presumption was that the house had been built in conformity with the original feuing plan, and that, as it had been built since 1826, the *onus* was upon the petitioner to show that the proposed alterations would be in conformity with the provisions of the title. Petition therefore *refused.*

In February 1887 Donald Stewart Sutherland, baker, Edinburgh, presented a petition in the Dean of Guild Court there for authority to make alterations upon certain heritable subjects in Claremont Place. The petition prayed for authority, *inter alia,* "to slap out the front wall of the present dwelling-house No. 2 Claremont Place, on sunk and ground floors, and carry the walls above on new iron beams; to remove the present stone pier at front between shops Nos. 4 and 6A, and substitute two cast iron columns to support the present beams; to lower the ground floor of No. 2 about 2 feet 8 inches, and the area 1 foot 5 inches; to bring forward a new front at Nos. 2, 4, and 6A, by covering over the areas in front, except at the stair to area No. 4, which will be kept back to allow of headroom, and the corner of No. 2, the latter having a new upper flight of steps provided, and the position of present stair covered by a plat; to remove the present brick partition between Nos. 4 and 6A, and carry the partition over an iron beam; to remove a partition in the area and ground floors of No. 2; to build a brick division wall along back of shops and between new fronts; to construct four new water-closets in area for shops, lighted

and ventilated to the open air; to slap three doors and borrowed lights where shown, at Claremont Place, Edinburgh, all as shown on the plans herewith produced."

Mr Sutherland was the proprietor of the houses mentioned in the prayer of the petition under the following titles:—

2A Claremont Place, under a disposition dated 1st and 3rd July 1878 granted by the Improved Edinburgh Property Investment Building Society, with consent of William Fraser, which conveyed to him "All and whole that shop and dwelling-house in the area of No. 2 Claremont Place, with a baker's oven behind the said subjects and the *solum* of the ground on which the oven is erected, with a cellar in the front area, being the eastmost cellar therein and immediately west to the stair leading into the area, and a right of access to the roof of the tenement for cleaning vents, etc., together also with a right in common with the proprietors of the main-door house No. 2 Claremont Place, and the proprietors of the adjoining tenements to the east to the back-green behind the same, and to the *solum* of the piece of ground on which the said shop and dwelling-house are built, in common with the proprietors of the subjects above the same . . . together with the pertinents of the said subjects." The property was conveyed under the burdens and declarations specified in an instrument of sasine in favour of James Sutherland, dated and recorded 9th and 11th January 1826, and those specified in a disposition by James Paris in favour of the said William Fraser, dated and recorded 5th and 17th May 1869. The first of these deeds is more particularly noticed below. The second imposed on William Fraser and his assignees the burden of keeping in repair the pavement in the sunk area and the stair leading thereto, they being freed from all share of the expense of keeping up the roof of the tenement and the pavement and railings in front of the tenement, the same being to be upheld by the proprietors of the dwelling-houses in the common stair of the tenement.

4 and 6A Claremont Place, under a disposition dated in May 1869, which conveyed to him the shop on the street flat, "with the dwelling-house attached, bakehouse, oven, cellar below the area stair, and pertinents . . . and the cellar in the front area being the second from the west end of the said area under the pavement, as also the small dwelling-house in the area underneath the said shop, being the west half of the said area flat in the tenement, with a right of access by the common passage and stair therein . . . and right also in common with the proprietors above and below the subjects to the *solum* of the piece of ground upon which the foresaid shop, dwelling-house, and others are built." This deed declared that the disponee should not be liable for the repair of the roof, railings, or pavement in front of the tenement, but bound him to bear "half of the expense of upholding and keeping in repair the pavement in the sunk area in front of the said tenement and stair leading thereto, and water-closets and water-cisterns in the said area, to which my said disponee shall have right along with the other proprietors in the area."

2 Claremont Place; this lay between the two lots above mentioned, and the street flat, area, and cellarage belonged entirely to the petitioner.

This subject was held under the same feu-charter as the property of the respondents aftermentioned, which was granted by Charles Rae, advocate, and others, trustees of the deceased James Rose, in favour of James Sutherland, and was dated 23d July, 31st August, and 11th November 1825. It contained, *inter alia*, the following clauses —"And it is hereby specially provided and declared that the said James Sutherland shall be bound and obliged against the term of Whitsunday 1826, to complete the houses to be erected on the said area, and that the same shall be in conformity in all respects to the plan and elevation adopted for the said area made out by the said Adam Ogilvy Turnbull, approved by us and signed as relative hereto, strict conformity to which plan and elevation it is hereby agreed may be enforced as the buildings proceed, by application when necessary to the judge ordinary of the bounds; and further, expressly providing and declaring that the said James Sutherland and his foresaids are and shall be strictly prohibited now, and in all time coming, from making shops in the tenements to be erected by him on the said area to enter from Claremont Street, without prejudice, nevertheless, to their having shops in Claremont Place if they shall so incline . . . which provisions, burdens, and declarations are hereby appointed to be engrossed in the instrument of sasine to follow hereon, and in all future transmissions and investitures of the said subjects or any part thereof: To be holden and to hold the said lot or area of ground and tenement to be erected thereon conform to the said plan and elevation, and not otherwise, of and under us . . . And, moreover, it is hereby expressly provided and declared that it shall not be competent to, nor in the power of the said James Sutherland or his foresaids, to make any deviation from or alteration of the plan and elevation above mentioned of the said tenement to be erected on the area hereby disponed, nor to erect any buildings on the back . . . all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street at the expense of the feuars offending—which whole burdens, provisions, declarations, and conditions contained in these presents are hereby appointed to be engrossed in the instrument or instruments of sasine to follow hereon, and in all the future transmissions and investitures of the said area or tenements to be erected thereon, or any part thereof, and if the same shall not be inserted therein, such instrument of sasine and transmissions shall be *ipso facto* void and null, as if the said writing had never been made or granted." The title of the granter of the charter was duly feudalised.

The petitioner pleaded that as the operations in question were confined to his own property, and could be executed without danger, he was entitled to the warrant prayed for.

Answers were lodged for certain of the adjoining proprietors:—(1) W. L. Barbour and others averred that they were the proprietors of six of the cellars in the area entering by the stair No. 2A Claremont Place. The title of the respondent Barbour, which was similar to that of the others, was dated in May 1863, and conveyed the westmost half of the first flat above the street flat of the tenement entering by a common stair No. 1 West Claremont

Street, with a cellar in the area, being the second from the stair leading into said area. Under it the respondent was bound "to bear one-sixth part of upholding the roof of the tenement, common stair, rain-water and other pipes and drains connected therewith, and the railings and pavement in front of the tenement (the pavement in the area where the foresaid cellar is situated and stair leading thereto being kept in repair by the other proprietors of the said tenement)." These respondents averred that they had a right of access to their cellars by the existing stair; they further averred that the petitioner had only a right to the *solum* on which the shops and dwelling-houses were built in common with the proprietors of the other subjects in the respective tenements. (2) Church averred that he was proprietor of a cellar in front of the small houses belonging to the petitioner in the area of the tenement Nos. 4, 6, and 8 Claremont Place, which was the west half of the area flat, and also that he was proprietor of a dwelling-house, which was the east half of the area flat of Nos. 4, 6, and 8 Claremont Place, in which there were cellars, of which certain other respondents averred they were proprietors. Church's title was dated in May 1869, and conveyed the east half of the street or area flat. There were two dwelling-houses in the area "with entry thereto by the stair leading to the said area flat, together with the large cellar in the front area . . . and a right in common to the *solum* of the piece of ground on which the subjects are built . . . together with the pertinents of the said subjects." The disponees were bound to pay half of the expense of repairing the pavement in the area in front of the tenement and stair leading thereto, and were freed from repairing the roof and the pavement and railings in front of the tenement; they had a right of access across that portion of the area which the petitioner proposed to cover in. They averred that this access would be entirely darkened by the proposed operations.

The respondent Thomas Hunter was proprietor of the eastmost half of the first flat of the tenement No. 6 Claremont Place, including a cellar under the pavement in front.

The respondents pleaded—"(1) As the operations in question are not confined to the petitioner's own property, and cannot be executed without danger, the prayer of the petition should be refused. (2) The said operations being in contravention of the provisions contained in the feu-charter, from which the titles of the petitioner and the respondents flow, the prayer of the petition should be refused."

The Dean of Guild on 5th May 1887 pronounced this interlocutor—"Finds, with regard to the petitioner's proposed operations at 2A Claremont Place and 4 and 6A Claremont Place, that these operations are not confined to his own property; and with regard to his proposed operations at 2 Claremont Place, finds that these operations would be an infringement of the conditions of the feu-charter from which the titles of the petitioner and of the respondents flow, and would be injurious to the property of the respondents: Therefore to this extent sustains the pleas-in-law for the respondents, refuses the warrant craved by the petition: Finds the petitioner liable to the respondent in expenses, &c.

"*Note.*—The respondents do not dispute the averments of the petitioner as to the particular subjects possessed by him. Taking them in succession from the west corner of Claremont Place, these consist of a small shop and a house in the area numbered 2A Claremont Place. This area enters by a stair at the corner of Claremont Place, and turns the corner of the tenement into West Claremont Street. It is furnished with cellars, of which the eastmost belongs to the petitioner, the others, both these in front of 2A Claremont Place and those in front of 1 West Claremont Street, belong to the respondent Barbour and others. The petitioner is also proprietor of the main-door house and area No. 2 Claremont Place, and all the cellars in the area. He also owns the two shops 4 and 6A Claremont Place, and the small dwelling-house in the area underneath these shops, these properties 'being the west half of the street and area flat in the tenement numbered 4, 6, and 8 Claremont Place.' This area is also provided with cellars, of which one belongs to the petitioner, and the others to the respondents Church and others.

"The petitioner desires to bring forward the front of his property to the street. The west corner of the proposed new front would occupy part of the site of the present stair leading to the area first named. The petitioner proposes to remove this stair in whole or in part, and to substitute another, a few feet further to the west. He claims a right of property in the said area, his argument being that it is conveyed to him by implication, and that the respondents have only a right of access. The respondents Barbour and others maintain that they have a right of common property in the stair and also in the area.

"With regard to No. 2 Claremont Place, no question arises on this particular ground, because, as before stated, the whole area and cellarage belong to the petitioner.

"At the east end of the suggested new front the petitioner proposes to cover over entirely the area opposite to his property, which, as before stated, is the west half of the street and area flat of the tenement. He contends that he has a right of property in this area, at least in respect of that part of it which is *ex adverso* of his half of the area flat, leaving to the respondent Church the property of the remaining part of the area opposite his half of the area flat. The respondents Church and others claim a right of common property in the said area.

2A Claremont Place — "The Dean of Guild is of opinion that the petitioner cannot be regarded as the proprietor of this area or the stair leading to it. The petitioner does not appear to have any right higher than the respondents so far as the express provisions of the titles go . . . The Dean of Guild was not referred to any authority to show that in circumstances like the present the petitioner's disposition entitled him to be regarded as the proprietor of this area and stair. . .

"The obligation of supporting the pavement of the area and stair seems only an appropriation to him of one of the ordinary burdens of the tenement, reasonable not only in view of his position in the tenement, but also of the fact that he is freed from other burdens affecting it.

4 and 6A Claremont Place—"The petitioner founds his proposals with regard to the east end

of his proposed new front on much the same arguments as those already explained. He claims right to cover over entirely that part of the area which is opposite his half of the area flat. The Dean of Guild is of opinion that the principles he has applied to the west end of the property apply still more strongly to the east end. The respondent Church owns the east half of the area flat of this tenement, consisting of a dwelling-house, and the other respondents who have lodged answers along with him possess cellars in the area. Light and air are admitted to the area by the stair leading to it, and by an open space above the area, which is crossed by a flat leading to the shop 4 Claremont Place, and by horizontal gratings. The east end of the proposed new front would entirely cover over the stair leading to the area (the stair being kept back to allow of head-room), and would only allow light and air to enter to the half of the area by vertical open spaces of about 2 feet high by 5 feet long under the windows of the proposed new front. Undoubtedly less air and light would enter by these than by the present arrangements. . . .

"The Dean of Guild is of opinion that these operations proposed by the petitioner would be contrary to the law of common ownership. But even if there were only common interest in the subjects, the operations would still appear to be illegal—*M'Kenzie* v. *Carrick*, January 27, 1869, 7 Macph. 419; *Bennet* v. *Playfair*, 4 R. 321.

2 Claremont Place—"The Dean of Guild is of opinion, on the authority of the case of *Hislop* v. *M'Ritchie's Trustees*, 8 R. (H. L.) 95, which follows the case of *M'Gibbon* v. *Rankine*, 9 Macph. 423, that mutuality and community of rights and obligations has been established between the parties here, entitling the objectors to claim the benefit of the restrictions imposed upon the petitioner. The question therefore comes to be whether the proposed alterations on No. 2 Claremont Place would amount to a violation of these conditions or any of them.

"The feu-charter, which contains a carefully worded clause of conformity to the plan and elevation adopted for the said area, forbids construction of shops in Claremont Street, but allows shops to be made in Claremont Place. This is followed by another clause forbidding any deviation from or alteration of the plan and elevation above mentioned. There is no objection to the proposed erection of the petitioner, so far as their use as shops is concerned. The respondents object to them as a deviation and alteration of the plan. In point of fact, advantage was taken of the permission to have shops in Claremont Place. These have all generally the same character, and it was asserted by the respondents at the debate, and the petitioner did not deny, that some of them exist now as they were built at first. Neither side can produce the plan, but it seems reasonable to suppose, looking to the clauses of the charter last quoted, that the front elevation of Claremont Place was erected in conformity to the plan referred to. It appears to have existed in its present state for about the last sixty years, and in the whole circumstances it appears to the Dean of Guild to follow that the proposed operations of the petitioner would be a deviation from the original plan.

"In regard to the interests of the respondents to object to the operations, it is undeniable that if they were carried out they would appreciably affect the value of the residential parts of the houses above. The character of the street, and particularly the rest of the tenement, would undoubtedly be altered, and the properties above, whether viewed as selling or letting subjects, would be deteriorated."

The petitioner appealed, and argued—He had a right of property in the areas *ex adverso* of his property at 2A, 4, and 6A Claremont Place, although it was not conveyed to him *per expressum* in the titles. The respondents did not maintain that they had a right of property in the area; it was not for them therefore to question the petitioner's title. Anyone who objected to another changing the condition of a property must have a right of common property in the subject; common interest was not enough, provided the interests of the objector were left untouched. The mere loss of amenity would not entitle the respondents to prevent the alterations if their light and air were preserved. In regard to 2 Claremont Place, the feuing plan had disappeared, and therefore could not be referred to.—Ersk. Inst. ii, 9, 11; *Johnston* v. *White*, May 18, 1887, 4 R. 721; *Barclay* v. *M'Ewan and Others*, May 21, 1880, 7 R. 792; *Calder* v. *The Merchant Company of Edinburgh*, Feb. 26, 1886, 13 R. 623; *Arrol* v. *Inches*, January 27, 1887, 14 R. 394.

Argued for the respondents—The petitioner in this case had not got the right of property in the areas *ex adverso* of 2A, 4, and 6A Claremont Place, with which he was going to interfere. If that were so, then he could not interfere with the area unless with the consent of the other feuars. In the case of 2 Claremont Place, although he had the right of property in these subjects, the proposed alterations would be in contravention of the provisions in the feu-charter.

At advising—

LORD RUTHERFURD CLARK—The appellant here, who is proprietor of certain heritable subjects in Edinburgh, asks for authority to bring forward the premises to the street, or, in other words, to build over the area in front of the subjects. The application is opposed by certain of his neighbours, and the Dean of Guild has refused his authority to the proposed alterations. The question is whether that judgment was well founded.

The property of the petitioner consists of three different subjects—(1) 2A Claremont Place consists of a shop and dwelling-house, and a cellar in the front area. There are other cellars in that area which belong to other parties. (2) No. 2 Claremont Place, which adjoins the last mentioned lot, and which belongs entirely to the petitioner, including the area. (3) Nos. 4 and 6A Claremont Place—These are two shops, and a house and a cellar in the area, but in this area also there are other cellars belonging to the respondent Church and others. The authority which the petitioner desires to obtain from the Dean of Guild is an authority to bring forward his houses to the street, or, in other words, to build over all the areas in front, and his claim to do so rests upon his alleged right to the property of all the areas. I think it was conceded that if he had not the property of all the areas his application is not well founded.

The first thing we must consider is, Has he the

right of property in No. 2A Claremont Place? The title of that subject stands thus. There is conveyed to him—"All and whole that shop and dwelling-house in the area of No. 2 Claremont Place, with a baker's oven behind the said subjects, and the *solum* of the ground on which the oven is erected, with a cellar in the front area, being the eastmost cellar therein and immediately west to the stair leading into the area, and a right of access to the roof of the tenement for cleaning vents, etc., together also with a right in common with the proprietors of the main-door house No. 2 Claremont Place, and the proprietors of the adjoining tenements to the east to the back-green behind the same, and to the *solum* of the piece of ground on which the said shop and dwelling-house are built, in common with the proprietors of the subjects above the same . . . together with the pertinents of the said subjects." Now, it is plain enough from that description that the *solum* of the area is not conveyed to him *per expressum*, but it is said to be implied from the description. I do not think that we can imply any such right of property, and I do not think that any of the cases referred to support such a contention. There is here a definite description of the subjects conveyed, and these consist only of the shop with the *solum* on which it stands, and do not include the *solum* of the area. There is also conveyed a cellar in the area, but there are cellars belonging to other persons in that area, which I think makes it plain that the petitioner is not entitled to claim a right of property in the area itself.

If we next take the titles of Nos. 4 and 6A Claremont Place, we find that with a similar description there is conveyed the shop with the bakehouse, &c. The description is practically the same, and there are other clauses in the deed relating to the petitioner's liability for the expense of upholding the pavement, &c., all of which satisfy my mind that the petitioner has no right of property in the *solum* of this area also.

I think it is quite plain that the application is not well founded, because the petitioner admits that he is not entitled to build over the areas unless they belong to him. No right less than a right of property could sustain such a claim. That would therefore in my view prevent the appellant succeeding so far as relates to Nos. 2A, 4, and 6A Claremont Place.

The other property is in a different position. It is plain that in this instance the petitioner is the proprietor of the cellars and also of the area, and it may well be that he is entitled to bring forward his house to the street so far as regards this part of the subjects, although he is not entitled to do so as regards the other parts. The respondents object to the proposed alterations on the ground that they would be in contravention of the titles on which he holds his property. Referring therefore to the petitioner's title we find this clause—"And it is hereby specially provided and declared that the said James Sutherland shall be bound and obliged against the term of Whitsunday 1826 to complete the houses to be erected on the said area, and that the same shall be in conformity in all respects to the plan and elevation adopted for the said area made out by the said Adam Ogilvy Turnbull, approved by us and signed as relative hereto, strict conformity to which plan and elevation it is hereby agreed may be enforced as the buildings proceed by application when necessary to the judge ordinary of the bounds;" while these conditions are inserted in this and subsequent titles—"And moreover, it is hereby expressly provided and declared that it shall not be competent to, nor in the power of the said James Sutherland or his foresaids to make any deviation from or alteration of the plan and elevation above mentioned of the said tenement to be erected on the area hereby disponed, nor to erect any buildings on the back . . . all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street at the expense of the feuars offending." This right to stop the erection of any building is given to the other feuars, and there are the same restrictions and obligations in their titles. That being so, there is no doubt that the conditions may be enforced against the petitioner if he proposes to violate them—and it is said that he proposes to violate them—inasmuch as the proposed buildings would not be in conformity with the plan referred to. The petitioner, however, says in answer—"You cannot tell if I am violating that plan, because no such plan exists, and if you wish to enforce it against me you must produce it." I cannot think that that is a sound argument. The house has existed for a long time, and presumably it was built according to the titles on which the property was held. I think that the petitioner must show that his proposed work is in conformity with the titles, and consequently that he, and not the respondents, must produce the plan. I think, therefore, that the judgment of the Dean of Guild is well-founded, and that we should dismiss the appeal and affirm the judgment.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD CRAIGHILL was absent on circuit at the hearing.

The Court dismissed the appeal and affirmed the judgment of the Dean of Guild.

Counsel for the Appellant—Rhind—Baxter. Agent—Robert Menzies, S.S.C.

Counsel for the Respondents—Shaw—Dickson. Agents—Cairns, M'Intosh, & Morton, W.S., and Thomas Hunter, L.A.

Friday, November 18.

FIRST DIVISION.

[Sheriff-Substitute at Elgin.

STEPHEN *v.* ANDERSON.

Church—Seat in Parish Church—Allocation—Part and Pertinent—Inseparable from Property.

The sittings in the parish church of a parish partly burghal and partly landward, were allocated as if the parish had been entirely landward, and upon the principle that every proprietor within the parish had a portion