ment of money is untenable. I am also of opinion that section 12 of the Act of 1880 is entirely outside this question. That section provides means for putting the property of the bankrupt into safe custody, and the necessity for its operation will in general arise only before a trustee has been appointed. But assuming that it may be put in force by a trustee after confirmation, this is not an application for custody but for payment of money. In considering whether the decree should stand, it must be kept in mind that unless other creditors come forward this is, as I have already said, practically a decree for payment of one creditor, and for such a decree no precedent has been shown to us.

The Court recalled the Sheriff-Substitute's interlocutor dated 3rd November 1902.

Counsel for the Appellant—Party.

Counsel for the Respondent — S. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Wednesday, December 10.

SECOND DIVISION.

[Dean of Guild Court, Dunbar.

KERRIDGE *v.* GRAY AND OTHERS.

Superior and Vassal—Building Restrictions — Restriction not to be Departed from without Consent of Superiors — Evidence of Superiors' Consent — Right of Co-Feuars to Enforce Restrictions inter se in Absence of Written Consent by the Superiors.

Certain lands were held under a feu-charter which provided that the feuar should be bound to erect upon the ground feued buildings of a specified description "of stone and lime, and covered with asphalt, . . . provided always that no buildings of any other description shall be built on the ground hereby disponed without the consent of us" (the superiors), the ground unbuilt upon to be used exclusively for specified purposes, "unless a deviation shall be specially authorised in writing by us" (the superiors). The vassal applied in the Dean of Guild Court for authority to erect an annex, not of stone and lime, to existing buildings. The proprietors of adjoining feus held under the same superiors on the same conditions objected to the proposed erection. The superiors did not intimate any objection. The Dean of Guild refused the application, in respect that the superiors' consent in writing was necessary, and had not been obtained.

Held, on the construction of the feu-charter, that the superiors' consent in writing was not necessary.

Held further (*per* the Lord Justice-Clerk) that the co-feuars had no title to enforce the restrictions.

Opinion (*per* Lord Trayner) that assuming the superiors' consent to be necessary, it was sufficiently evidenced to the Dean of Guild for the purposes of procedure in the Dean of Guild Court by the fact that they did not appear to object.

This was an appeal from a decision of the Dean of Guild Court at Dunbar, whereby that Court refused an application by Mrs Jane Kerridge, Kerridge's Hotel, Dunbar, for warrant to erect certain buildings on a piece of ground situated in Bayswell Park, Dunbar, being the ground occupied by Kerridge's Hotel, to be used as a hotel annex for kitchen and other purposes.

The lands upon which Kerridge's Hotel stood, and upon which the petitioner proposed to build, were conveyed to her predecessor, by Thomas Moncrieff Williamson and two others as trustees of the Bayswell Park Company, by a feu-charter, which provided, *inter alia*, as follows:—"*Second*, that our said disponee shall be bound within one year from the date of these presents to erect and complete, so far as not already done, upon the piece of ground hereby disponed, a dwelling-house and offices, all of stone and lime and covered with asphalt, the plans for which have been exhibited to and approved of by us as trustees foresaid, provided always that no buildings of any other description shall be built on the ground hereby disponed without the consent of us as trustees foresaid or our foresaids, and the ground unbuilt upon shall be used exclusively as gardens or for planting, or as pleasure grounds, unless a deviation shall be specially authorised by us or our foresaids as after-mentioned, and our said disponee and his foresaids shall be bound and obliged to uphold and maintain the said buildings and offices in good and complete repair in all time thereafter, and not to use the same for any other purpose than that for which they were erected as hereinafter specified, or for similar purposes, except with the consent in writing first had and obtained of us as trustees foresaid or our foresaids."

The building for which the petitioner sought the sanction of the Dean of Guild was a wooden structure.

Objections were lodged by Eliza Gray and Catherine Gray, 9 Bayswell Park, Dunbar, and others, the prorietors of feus in Bayswell Park, all holding under the same superiors and subject practically to the same conditions as the petitioner.

The objectors averred—"The proposed erection is in direct contravention of the terms of the feu-charter under which the ground is held. In particular, the proposed building was never sanctioned by the superiors, and it is not of stone and lime and covered with asphalt as stipulated in the feu-charter, but it is an old wooden hut which is believed to have been formerly used for the temporary accommodation of railway or other labourers."

The petitioner averred in answer—"The erection in question, which is of a temporary nature, is being put up with the

consent of the superiors, subject to their supervision."

The petitioner pleaded—"(1) The objectors have no *locus standi* and no title to sue, and the objections should be dismissed."

The objectors pleaded—"(1) The building which the petitioner proposes to erect being in direct contravention of the conditions and restrictions contained in the feu-charter of the ground on which the same is to be built, she is not entitled to warrant as craved, and the same should be refused. (2) The said conditions and restrictions being common to the whole feus in the said lands, and having been imposed for the benefit of the whole body of feuars, the respondents have a title and interest to enforce the same."

T. M. Williamson, writer, Dunbar, one of the trustees of the Bayswell Park Company, and therefore one of the common superiors of the petitioners and objectors, was present in the Dean of Guild Court as the petitioner's agent.

On 5th May 1902 the Dean of Guild Court refused the petition.

Note.—"The building for the erection of which warrant is craved is described in the prayer of the petition as a 'hotel annex' for kitchen and other purposes.' The petition does not condescend on the building material of the proposed erection, but it was stated on record for the objectors that the 'proposed building was an old wooden hut, which is believed to have been formerly used for the temporary accommodation of railway or other labourers.' This is not denied by the petitioner, who produces in process the feu-charter granted in favour of her predecessor, and in which is laid down the following condition, viz.—[*The note then set forth the passage quoted above from the feu-charter*]. From the above it appears to the Court that the superior's consent in writing is necessary to the proposed erection. No such consent appears in process, and the Court accordingly has no option but to refuse warrant, as the proposed erection is undoubtedly against the petitioner's own title."

The petitioner appealed to the Court of Session, and at the calling of the appeal produced the consent of the superiors in writing.

Parties then agreed to the case being sent back to the Dean of Guild.

The appellant moved for expenses.

The respondents opposed the motion, and argued—The judgment to be pronounced of consent would proceed upon writing produced subsequently to the date of the decision in the Dean of Guild Court, and that being so the respondents were entitled to expenses. The Dean of Guild had proceeded on the ground that the conditions of the feu were inserted for the benefit of all the feuars, subject to the superiors' power to consent to a deviation from the conditions. The only habile mode of proving the consent of the superiors in the Dean of Guild Court was by writing. Though one of the superiors had been present at the discussion he could not consent for all. Therefore writing was essential as evidence of consent, though not as a formality. It was to be inferred from the insertion of the conditions in all the feus that they were inserted for the benefit of the feuars and could be enforced by them *inter se*—*Johnston* v. *The Walker Trustees*, July 10, 1897, 24 R. 1061, 34 S.L.R. 791. The necessity for writing as evidence of the superiors' consent to a deviation from the conditions was a protection, which the feuars were entitled to insist upon. It was within the jurisdiction of the Dean of Guild to deal with the conditions of the feu, and if his interpretation of these conditions was wrong no expenses should be found due to or by either party.

Argued for the appellant—The conditions of the feus could not be regarded as mutual between the feuars seeing that they could be dispensed with by the superiors. It was no part of the respondents' contentions in the Dean of Guild Court that writing was necessary, as appeared from their pleas. Of the three co-superiors one had been present at the discussion, and the fact that he did not object should have satisfied the Dean of Guild that the superiors consented. The feu-charter expressly stipulated for written consent where that was intended, and there was no stipulation that the consent required by the petitioner should be in writing. Even if written consent was necessary as between superior and vassal, the co-feuars had no title to insist upon it. Therefore, apart from the fact that written consent had been produced, the appeal should be sustained with expenses.

LORD JUSTICE-CLERK—We have heard a discussion which was necessary if the question of expenses was to be left to our decision, and that although the general merits require no decision by us, as the objection to the judgment appealed against has been set aside by the fact that the written consent of the superior is now in process. The question for us to consider is whether the Dean of Guild was right in his judgment. He must have proceeded on the first two pleas for the respondents, viz., (1) that the building proposed to be erected was in contravention of the conditions of the feu-charter, and (2) that said conditions being common to the whole feus in the said lands, the respondents have a title and interest to enforce them. Now I think that both these pleas are bad. When the Dean of Guild proceeded on the clause which he quotes, I think that he dealt with matters of law, and dealt with them wrongly. When he said "From the above it appears to the Court that the superior's consent in writing is necessary to the proposed erection," I am of opinion that he erred; and when he held that the respondents had a good title to object I think that he erred again. In these circumstances I am in favour of giving the appellant the expenses of the appeal. *Quoad ultra* the case must go back to the Dean of Guild Court.

LORD YOUNG—As I have already indicated, I think there should be no finding in the matter of expenses. The Dean of Guild refused the application for a lining on the ground that the superior's consent was necessary, and I think it was his opinion that it should be in writing, but the principal point was that the superior's consent is necessary, with this addition, that the objectors were entitled to plead that his consent was necessary and there was no evidence of it. The first question for him was whether there was a community of feuars. We know very well cases in this Court and in the House of Lords, which are not always in accord, as to the rights conferred on feuars or a community of feuars to object to anything being done. That is a nice question, and we have not had it argued here. Whether the superior's consent is necessary or not is a very nice question, and I do not think we are in a position to decide that. When the case was called here the superior's consent was given in writing, and it appears to me unnecessary to have the question argued whether his consent is necessary, and if so whether it must be in writing. The consent has been given, and given in writing. My suggestion was that any necessity of determining the right of co-feuars to object if it was not given, and whether it was necessary that it should be in writing, has been removed by the production of his consent in writing. Now, in a motion for expenses we are asked to decide these two questions. Certainly there was no evidence before the Dean of Guild of any consent—nothing was produced in process to show that the superior had ever given his consent. If consent was necessary—and the Dean of Guild thought so, and we are not deciding anything to the contrary—the only course for him would have been to allow a proof. Now, I never heard of a case where proof by parole was allowed of a superior's consent to a particular building being put up, and I do not think in any case in this Court, if we held the superior's consent necessary that we should have allowed a proof on the questions whether it had been given or not or whether it should have been given in writing or must be assumed to have been refused. That is my view now, but I put my opinion on the ground that upon production of the superior's consent in writing both parties agreed to the Dean of Guild's interlocutor being recalled and the case being sent back to him, and that should be done, in my view, without subjecting either party in expenses.

LORD TRAYNER—The Dean of Guild has refused the application of the appellant on the ground that what she asks authority to do is against the terms of her own title, in respect that (as the Dean of Guild reads that title) "the superior's consent in writing is necessary to the proposed erection," and "no such consent appears in process." Now, it may not be necessary to determine whether the consent of a superior, in circumstances such as those presented here, must be in writing, or may validly and sufficiently be given verbally. But in order to determine whether the Dean of Guild's judgment is right or wrong we must, as it appears to me, determine whether he is right or wrong in his construction of the appellant's title. His judgment proceeds upon that construction and upon no other ground. I have no doubt that his construction is wrong. The title does not require the written consent of the superior as the condition on which alone the appellant can proceed to the erection of additional buildings on her feu. I am not at present prepared to admit that the appellant needed any consent from the superior for the proposed erection. But assuming that his consent was needed, I should have thought that sufficiently evidenced, to the Dean of Guild at least, by the fact that the superior did not appear to object. The Dean of Guild is not charged with the duty of protecting the interests of a superior who does not appear to defend them for himself. If the consent was not, by the terms of the title, required to be in writing, no such writing required to be produced, and the Dean of Guild was wrong in refusing the application in respect of such non-production. Had the Dean of Guild's view of the title been the right one, I think he should have called on the petitioner to produce the written consent which he regarded as necessary rather than *de plano* to refuse the application. On the whole matter I concur in the view that the Dean of Guild's interlocutor should be recalled and the respondents found liable in expenses.

LORD MONCREIFF—I agree with the majority of your Lordships that the case must go back to the Dean of Guild and that the appellant should get her expenses. The Dean of Guild has refused the petition on the ground that the buildings in the annex are not of stone and lime and not in accordance with the conditions in the titles. His opinion proceeds on the construction of that clause in the title which says "that no buildings of any other description shall be built on the ground . . . without the consent of us (the superiors)." The sole ground of his judgment is that consent of the superior in writing is required as a condition-precedent to the construction of any building not of stone and lime. I think that is a wrong construction, and as it is the sole ground of judgment I agree with the majority of your Lordships.

The Court pronounced this interlocutor—

"Recal the interlocutor appealed against: Repel the first and second pleas-in-law for the respondents: Remit the cause back to the Dean of Guild to proceed: Find the appellant entitled to expenses in this Court, and remit," &c.

Counsel for the Petitioner and Appellant—Clyde, K.C.—Guy. Agent—A. C. D. Vert, S.S.C.

Counsel for the Respondents—Campbell, K.C.—Hunter. Agents—Carmichael & Miller, W.S.