case of palpable and direct evil if we had refused to interfere.

Now, in this case, we have on the face of the petition no allegation of any special evil which we are called on to remedy. We have a narrative of facts, viz., an appointment by the Sheriff under the General Police Act of a place where that Act can be carried into execution, and then a meeting, and a resolution of that meeting, that the Act should be carried out; and the only evil which we can even imply from the statements in the petition is, that Lasswade may be without the benefit of this Act. That does not appear to me to be sufficient to authorise the exercise of our *nobile officium*. It certainly does not amount to a case of necessity.

The not improbable effect of our judgment, were we to grant this application, would indeed be to do violence to the spirit of the Act, which is—that the majority of the householders in any populous place shall determine whether the Act is to be adopted or not. Now, our order would not convoke the same body by any means that passed the resolution affirming the adoption of the Act, and we cannot say that the present electoral body would, like that in 1866, affirm the adoption of this Act at all. I do not say that parties are to be in every case excluded by delay from invoking the exercise of our *nobile officium*, for cases may arise where the public interest would clearly require that we should exercise it; but it is a circumstance of the greatest importance to be considered here, that we could not now place the determination of this question in the hands of the same parties as determined the adoption of this Act, and whose duty it was to have appointed the commissioners.

On the whole matter it seems to me we must refuse the prayer of this petition.

Lord Benholme—While I concur in the result, I cannot say that my opinion is rested on precisely the same grounds, viz., the length of time, the change of circumstances, and the possible injustice which may arise if we do not interfere.

One part of the inhabitants of Lasswade wish this Act of Parliament to be adopted, and the other do not. The majority at the meeting in 1866, who affirmed the adoption of the Act, make a blunder in not, at the same time, appointing commissioners, and they now come to us and wish us to exercise our *nobile officium* and correct that blunder. I do not think our *nobile officium* is intended to cover such a blunder as that. I think there must be something separate from blame to entitle us to interfere. If indeed the blunder had affected public interests we might have done so, but I do not think there is any public interest here, for the householders are divided as to the propriety of adopting this Act. Are we to assist one side merely because their opinion may happen to concur with our own? I do not think we should assist either party.

That is the ground on which I go. It is not so much the injustice done to one party as the inexpediency of assisting the other that weighs with me.

Lord Neaves concurred.

Agent for Petitioner—James Steuart, W.S.

Agents for Respondents—Millar, Allardice, & Robson, W.S.

Saturday, January 23.

CHISHOLM & OTHERS *v.* SCOTT-MONCRIEFF AND OTHERS (TRUSTEES OF TOWN OF DALKEITH).

Agreement — Assessment — Water Duty — Trustees. Circumstances in which *held* that statutory trustees appointed for the purpose of providing funds for supplying water in a certain town were entitled to make contracts with the inhabitants in respect of the *surplus* water.

This was an action of declarator, which sought to have it found and declared (1) that the defenders were not entitled to assess and levy from the inhabitants of Dalkeith any assessment in respect of water supplied by them to such inhabitants, or in respect of permission granted by them to such inhabitants to supply themselves with water by private pipes connected with the defenders' main pipes; or otherwise, that such assessment should be confined within certain limits; (2) That the inhabitants of Dalkeith were entitled, without payment of any water rate or duty, to supply their houses with water by means of private pipes furnished and laid at their own expense, and connected with the main pipes belonging to the defenders, subject always to reasonable control and regulation, and subject also to the condition of not interfering with the due supply of the public wells; or otherwise, that it was *ultra vires* of the defenders to grant to any inhabitant of the town of Dalkeith, either gratuitously or in consideration of the payment of any rate or duty, the privilege or right of supplying his house or premises with water by means of a private pipe.

It appeared from the statements of parties that the defenders were certain statutory trustees appointed under certain Acts of Parliament passed for the purpose of providing funds for paving, cleaning, and lighting the streets of Dalkeith, and supplying the town with water. The funds provided by the Acts for these purposes consisted of a duty of two pennies Scots upon every Scots pint of ale, porter, or beer brewed or vended in the town from the year 1805. However, the trustees have been in the habit of allowing private parties to supply themselves with water by means of private pipes at certain fixed charges, and latterly this charge has been 9d. in the pound on the rental. This was at first in addition to the beer tax above mentioned, which went to keep up the public supply; but in 1847 the power to levy the beer tax ceased, and since that year the whole revenue of the trustees has been derived from the charges made by them for private pipes.

The present pursuers maintained in this action that the power to levy the tax having ceased, the trustees had no power to raise revenue by any other means, and that they were entitled to a free supply from the public sources which had been already provided, so far as they did not interfere with the supply of the general public.

Solicitor-General and Clark for pursuers.

Lord Advocate and Fraser for defenders.

The Court dismissed the action, so far as regarded the first conclusion of the summons, and assoilzied the defenders from the second. Their Lordships held that what the trustees had done, and were doing, was not of the nature of levying a tax at all, but amounted only to making contracts with certain inhabitants for supplying them with the

surplus water at a fixed and reasonable charge. That being so, the first conclusion of the summons was inapplicable to the facts, and unnecessary. With regard to the second conclusion, there was nothing to prevent trustees in the position of the defenders entering into such contracts as those complained of, provided they were confined to their *surplus* water; and that being so, the pursuers, if they chose to have private pipes, were bound to pay for them as they would under any other contract. The second conclusion was therefore bad in law, and from it the defenders were entitled to absolvitor.

A process of suspension pending between the pursuers and defenders relative to the same matter was held to be ruled by the above decision, and the defenders were found entitled to their expenses in both cases.

Agents for Pursuers—Duncan, Dewar, & Black, W.S.

Agents for Defenders—Scott, Moncrieff, & Dalgety, W.S.

Tuesday, January 26.

FIRST DIVISION.

TRUSTEES OF FREE ST MARK'S CHURCH *v.* TAYLOR'S TRUSTEES.

Property—Restriction on Building—Conveyance of Solum—*Servitude—Intended Street.* A feu was described in the feu-contract as bounded on one side by the centre line of a proposed street, to measure 40 feet in breadth, the *solum* up to that line being conveyed to the feuar. The plot of ground opposite was conveyed in similar terms. *Held* that the feuars were not under any obligation to leave each a space of 20 feet in breadth unbuilt on between their properties, there being no stipulation in the titles binding them thereto.

In 1851 Kidson, proprietor of certain land in Glasgow, entered into a contract of ground-annual with the trustees of St Mark's Church, Glasgow, whereby he conveyed to them a plot of ground on the south side of Main Street, Anderston, containing in all 1063 square yards "as the said plot or area is delineated on a plan thereof made out by Andrew M'Farlane, land surveyor in Glasgow, a reduced copy whereof is indorsed hereon, and signed as relative hereto, bounded on the north by the south side of Main Street . . . on the east by the central line of a proposed street, to measure 40 feet in breadth, along which it extends from B to C, 97 feet or thereby."

In 1867 Kidson's trustees disponed to Taylor's trustees a piece of ground, described as bounded on the north-north-east "partly by the south-west side of Main-Street, and partly by the central line of an intended street of forty feet wide, to be called Street."

This was a question, raised by the advocators in the Sheriff-court, and also in the Dean of Guild Court, in Glasgow, as to whether there was an obligation upon the respondents to leave unbuilt on a space of twenty feet, for the formation of a street of forty feet in breadth, between their property and that of the advocator.

The Sheriff-Substitute (GALBRAITH) pronounced an interlocutor in which he "finds that there is no averment upon record, either that the petitioners' author, who is also the author of Taylor's trustees, imposed any restriction against building upon the *solum* of the said intended street in any of the titles, or took himself bound to do so: Finds that the only ground upon which the petitioners' case rests is, that in the title of Taylor's trustees the ground conveyed is described as being bounded by the centre line of an intended street, conform to a plan signed as relative to the disposition: Finds that such reference does not impose either upon Taylor's trustees, or any one holding from them, any restriction as to the use of the *solum* conveyed to them: Therefore assoilzies the respondents from the whole conclusions of the action: Finds the petitioners liable to the respondents in expenses," &c.

The Sheriff (BELL) pronounced this interlocutor: "Finds that the pursuers, the trustees of Free St Marks, whose property bears to be bounded on the east by the central line of said proposed street, have not produced any title whereby a right of servitude is created in their favour over the other half of said proposed or intended street, the central line of which forms the north-west boundary of the subjects conveyed, by the disposition, of which No. 6/2 is an admitted copy, by Kidston's trustees to Taylor's trustees, and by them subsequently conveyed to the defender, Gossman; there being no such real burden created either in the contract of ground-annual, No. 5/5, between the late Richard Kidston and said pursuers, or in the said disposition: Finds, however, that said pursuers rely greatly on the following clause contained in the contract, of which No. 5/3 is an admitted copy, between the common author, Richard Kidston, and the defenders' authors, James and Joseph Taylor, viz.: 'Declaring, as it is hereby provided and declared, that the said James Taylor and Joseph Taylor, and their successors, shall be bound to leave open and unbuilt upon in all time coming the one-half of the said respective streets of forty feet wide, comprehended within the measurement and description of the plot or area of ground hereby sold.' But finds, first, that if the said pursuers' own titles do not secure to them any right of servitude over the half of the intended street lying beyond their own eastern boundary, the defenders' titles, being *res inter alios*, are *jus tertii* to the pursuers; and finds, second, that the above clause of restriction was not imported from the contract of sale into the disposition, No. 6/2, following on said contract, and the obligation imposed by said clause consequently fell and was discharged, or, at all events, ceased to exist: Finds further, and as regards the plan annexed to the ground-annual, No. 5/5, that it is authoritatively settled by the cases of *Barr*, July 12th, 1854, and *Carson, Warren, & Company*, March 13th, 1863, that no obligation is put on the party disponer by the mere exhibition of or reference to a plan, unless it be imported into the contract; and, *a fortiori*, that the exhibition of such a plan cannot give any right to one disponee to insist that another and separate disponee shall be bound by it, notwithstanding that no reference whatever is made to it in his titles, and that there is no evidence of his having ever had any knowledge of its existence: Therefore, as also for the reasons stated by the Sheriff-substitute, adheres *quoad ultra* to the interlocutor appealed against, dismisses the appeal, and decerns."

The petitioners advocated.

CLARK and D. MARSHALL for advocators.

GIFFORD and R. V. CAMPBELL for respondents.

At advising—

LORD PRESIDENT—I cannot say I have any diffi-