no evidence that it was his intention or object to inflict it. Then in 1877 we find threats of very serious violence indeed used. The question I put to myself then is this—Is it safe for this woman to live in the same house with her husband, or will the result of her doing so not probably be some very aggravated act of violence? It would be a very serious matter if we were to order these married persons to live together, and then some act of violence, which I need not particularise, were to occur. I think that the acts spoken to make it dangerous for these parties to live together, and therefore I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—In an action for the separation of man and wife on account of maltreatment there is not the same room for the plea of condonation as in an action for divorce on the ground of adultery. On the contrary, we are entitled and bound to look to the whole previous history of the married persons. Taking this case in that view, it is right and proper that these parties should be separated. If we were to decree that the wife should go back to her husband, we have no guarantee that some very serious evil might not result. It is quite plain that this woman was in apprehension—reasonable apprehension—of the safety of her person and life. An individual of such a temper as was displayed by her husband might very well on the next occasion go a step further, for there is no indication that he was gaining command of his temper as he grew older. Perhaps that was not to be expected. One thing that satisfies me of her being in bodily fear is the anxiety she displayed that his mother—her husband's mother—should not leave the house.

Lord Mure—This case is an important one and a delicate one, but I see no reason to differ from the result arrived at by the Lord Ordinary and your Lordships.

There is a considerable interval between 1870–71 and 1876–77, when the final disputes arose, and there is a gap in the evidence as to the married life in that period. The facts proved to have occurred previous to 1870 would have warranted a separation. The facts said to have occurred since that are not so distinctly proved. The Lord Ordinary says he thinks the more serious of these acts is not made out. I am disposed to take a different view. It is really a matter for inference whether it was through the direct act of the defender that the pursuer got her arm severely injured, and whether accordingly that gave ground for reasonable apprehension that similar acts might occur again. His account of it—that as she was going out of the room he accidentally shut the door on her arm—is extremely improbable, and I think that if that act of violence is proved, then upon the authorities we have violence of a character sufficient to create a reasonable apprehension of danger, and to justify the pursuer in taking the step she has done.

Lord Shand—The peculiarity of this case is that parties after quarrelling with each other were re-united in 1871 and lived for a considerable time without any open scenes of violence. Now I entertain no doubt that it is impossible to shut one's eyes to what had occurred before this in order to get a true view of the more recent acts of violence. The inference I draw from the proof is that the pursuer had reason to dread from past acts of violence that some new act might readily occur tending to severe bodily injury, and accordingly I think she was justified in doing what she did.

As to the amount of aliment awarded by the Lord Ordinary, I think that is reasonable, especially having regard to the fact that the defender has recently been relieved of a burden of £50 payable by him to his mother.

The Court adhered.

Counsel for Pursuers—Trayner—J. A. Reid. Agent—Henry Buchan, S.S.C.
Counsel for Defender — Asher — Thorburn. Agents—Boyd, Macdonald, & Co., S.S.C.

Saturday, July 20.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

STEWART *v.* BUNTEN AND OTHERS.

Property—Restriction against Building above a Certain Height—Right to Enforce where other Restrictions departed from.

If a proprietor in a row of houses wishes their symmetry in height or otherwise to be maintained, and if there is a sufficient stipulation to this effect in his title, it will be enforced though the restriction be no longer necessary or reasonable and the interest to enforce it be merely æsthetical, and it will be no good answer that other building stipulations equally enforceable have been contravened without exception being taken, for in such a case acquiescence goes no further than the thing acquiesced in.

This action was raised by John Stewart against James Bunten and others, and the summons concluded for declarator that the pursuer was "entitled to raise the three lodgings in Bath Street, Glasgow, Nos. 156 to 164 inclusive, belonging to him, to the height of three square storeys, besides a sunk storey in front, by building an additional storey or part of a storey thereon," and that the defenders "had no right or title to prevent him from so raising the said lodgings and building the said additional storey or part of a storey thereon."

James Croil in 1829 had acquired in feu from the Blythswood trustees a steading of ground on the south side of what afterwards formed one of the divisions of Bath Street, Glasgow. That ground was afterwards occupied by seven houses, of which the westmost belonged to the defender Bunten (who alone appeared), while the pursuer Stewart was proprietor of three, being the three eastmost but one. They had been erected about 1830. The two corner houses were of three storeys and one sunk storey to the front. The five centre houses were of two storeys to the front and a sunk storey. The height of all to the back was the same, viz., four square storeys. Croil had sold the whole steading to James Auchie, but the latter had never made up any feudal title except to the eastmost stance. Auchie had sold the remaining stances to John

Galbraith, who with his consent had obtained a title through Croil or his trustees.

The titles in favour of Galbraith contained the following condition, viz.—"Declaring that in respect it was provided by the missives of sale between the said trustees of the said deceased James Croil and the said James Auchie that the houses to be erected in the compartment on the north side of Bath Street, and bounded by Campbell Street on the east and Main Street on the west, should not exceed two square storeys in height and a sunk storey, without upright or storm windows in the front garrets: But with the privilege to the said James Auchie of raising either the two centre houses of said compartment or one house at each end thereof to the height of three square storeys besides a sunk storey, the houses so to be raised having each a front of from 45 to 47 feet or thereby: And in respect that not only the said James Auchie was to be taken bound in the disposition to be granted by the said trustees of the said deceased James Croil in his favour, to the steading at the east end of said compartment to raise the house to be erected by him thereon to the height of three square storeys besides a sunk storey, having a front of 46 feet, including the west mean gable thereof, of which one foot in thickness is the proportion of said mean gable belonging or to belong to the said John Galbraith junior, but also that the said obligation was to be declared in said disposition to be granted by the said trustees of the said deceased James Croil to him a real lien and burden affecting the said steading, so the said John Galbraith junior should be obliged in erecting houses on that part of the said compartment disponed to him to conform to the said stipulation in said missive in so far as the same is applicable thereto, which declaration should be a real lien and burden affecting the whole ground of said compartment in all time coming."

The same titles also contain certain conditions which, *inter alia*, declared—"That the houses to be erected on the lands above described fronting Bath Street should all be built of smooth stone ashlar, and should not exceed three square storeys in height in front besides a sunk storey. . . . Which conditions and provisions in regard to the width of said street called Bath Street, height and description of the houses and sunk areas, laying of pavements, making a common sewer in said street, and causewaying the same, the said deceased James Croil did by becoming a party to a feu-contract of a steading of ground lying upon the south side of Bath Street, entered into between the present Parliamentary trustees upon the estate of Blythswood and Andrew Whyt, merchant in Glasgow, and Margaret Whyt, residing there, bind and oblige himself and his successors to perform and fulfil."

The defender Bunten's title, which was the earlier of the two, was also derived from Galbraith. The titles all contained clauses similar to those above quoted as applicable to the several stances which Galbraith gave off.

The height of the seven houses to the back was four full storeys, none of them being sunk owing to the slope of the ground.

The pursuer further averred—"(Cond. 4) Various alterations have from time to time been made on the said buildings. The central lodgings in the compartment were originally built without storm windows, but from time to time storm windows were introduced into them, and they all now have storm windows to the front; and three or four years ago the proprietor of the eastmost lodging built on the back ground belonging to it, fronting Campbell Street and Sauchiehall Lane, a building six storeys high above the level of the lane, so as to form part of and be used in connection with the front lodging, and the whole has since been occupied as and now forms Macrae's Hotel; and he also altered the front elevation to Bath Street by removing the front door steps and making the entrance on the level of the street, and widening considerably the front door. These different alterations were made without objection on the part of the proprietors of the other six lodgings, who, on the contrary, acquiesced therein."

The defender answered—"(Ans. 4) Admitted that there were no storm windows on the roofs of the five central houses as originally erected, and that they have since been introduced. Explained that the front walls of the range were in the original construction carried above the roof, and that the new windows are not visible from the pavement in front. They are not really storm windows, as at their greatest height they are not more than one foot above the roof. There are no storm windows in the defender's house. The alterations on the eastmost tenement are admitted. The building to the back is of the same height as the tenement originally was and still is. The defender's property, being the westmost tenement, was not affected by the operations at Macrae's Hotel, and the said operations were not in violation of any restriction in the titles. There is no restriction against building on the back-ground."

It was further averred by the pursuer—"(Cond. 7) . . . Moreover, the pursuer is at present in the course of erecting, without any challenge or objection from the said defender or anyone else, buildings on the back-ground belonging to his lodgings of four square storeys in height, to be occupied in connection with the front lodgings as counting-houses and business premises; and he is also without challenge altering the elevation and general appearance of his lodgings by changing the position of some of the doors, and by putting in additional entrances and otherwise."

To this the defender answered—"(Ans. 7) Denied. The pursuer is violating the restrictions in the titles in accordance with which the houses in this division of Bath Street were originally built. Their height to the back was not disconform to the titles. The said restrictions have not been departed from or abandoned, and there is no restriction against buildings on the back-ground."

The defender averred that the appearance of his house would be injured by the alterations, which would spoil the uniformity of that portion of the street, and destroy the character and amenity of the locality.

The pursuer pleaded—"(1) The pursuer is entitled to decree as concluded for, in respect that by raising his lodgings to three square storeys in front, besides a sunk storey as proposed, he will not be guilty of any violation of the titles upon a sound construction thereof. (2) Assuming the defender James Bunten's construction of the titles

to be correct, he is not entitled to enforce compliance with that construction in respect—1st, The provisions of the titles so construed were departed from and abandoned by common consent in the original erection of the houses; and 2d, the said provisions have been departed from and abandoned by the alterations and erections subsequently made as above condescended on. (3) The pursuer is entitled to have decree of declarator as concluded for, in respect that the proposed alterations will be in no way injurious to the defenders or their property, and that they have no interest to object to the same."

The defender pleaded—"(1) The pursuer being bound in terms of his titles not to build to a greater height than two storeys and a sunk storey, the defender, who holds under a similar restriction from a common author, is in the circumstances entitled to prevent the pursuer disregarding the said restriction. (2) The defender having neither contravened the said restrictions himself nor acquiesced in alterations by others that affect his own property, is not barred from enforcing the restriction."

The Lord Ordinary (RUTHERFURD CLARK) after proof, pronounced an interlocutor assoilzieing the defender from the conclusions of the action, and added this note:—

"*Note.*—The question in this case is, Whether the pursuer is by his titles restricted from raising the houses belonging to him to the height of three square storeys; and whether the defender Mr Bunten is entitled to enforce the restriction, if any such exists? . . . . .

"The pursuer contends that the only conditions by which the feuars are bound to one another are those by which they are, *inter alia*, restricted from building to a greater height than three square storeys besides a sunk storey, and that the condition on which the defender founds was inserted in favour of Auchie only and his successors in the eastmost house. There are no doubt two sets of conditions in the several titles which are not in all respects consistent. But it appears that those to which the pursuer refers as the measure of the mutual rights of the feuars were inserted in implement of the obligations which had been undertaken to the Blythswood trustees. It does not follow that the proprietors were not in a question among themselves to be put under greater restrictions.

"It seems to be clear enough that the purpose of Croil, the original feuar of the whole steading, was to secure a certain uniformity in the height of the buildings. The conditions to effect this object would have been inserted in the conveyance to Auchie if a feudal title had been made up in his person to the whole steading. But as the steading came to be divided into two lots, the conditions were inserted in the titles which were granted to Auchie on the one hand, and to Galbraith on the other. When Galbraith came to subdivide the part which he had acquired, the conditions were inserted in the titles which he granted to the several purchasers. Thus they affect the several subjects for a common end in which all the proprietors are interested. Hence, in the opinion of the Lord Ordinary the pursuer's title restricts him from increasing the height of his houses as he proposes, and the defender has a right to enforce the restriction."

The pursuer reclaimed.

Authorities cited—*Dalrymple*, June 5, 1878, 15 Scot. Law Rep. 588 (and cases there cited); *Robertson* v. *North British Railway Company*, July 18, 1874, 1 R. 1213.

At advising—

LORD GIFFORD—In this case the pursuer seeks to have it declared that he is entitled to raise his three dwelling-houses or lodgings in Bath Street, Glasgow, to the height of three square storeys in front besides a sunk storey, and that the defenders, who are the other proprietors in the same block of buildings, are not entitled to prevent him from doing so. This conclusion is resisted by the defender Mr Bunten, who is the proprietor of the westmost house in that compartment of Bath Street, and the questions are—First, Is the pursuer effectually prohibited from building as he proposes by the terms of the title-deeds under which the various subjects are held; and second, and assuming that the restrictions in the title were originally effectual, have they been relaxed or departed from in consequence of the actings of the proprietors or of deviations from the original building plan acquiesced in by all concerned.

Questions of this kind not unfrequently arise in all our leading cities in consequence of the change of circumstances which affects particular localities, and in consequence of the different uses to which from time to time it becomes expedient to apply the buildings. What was originally intended as a private and residential street becomes gradually more suited for and more occupied as business premises or even as shops and warehouses. Restrictions as to building or prohibitions against altering external appearance or elevations which were quite proper and suitable in a private residential street become wholly inapplicable when the street is occupied as shops or as warehouses, and in such cases generally all idea of enforcing the original restrictions is given up by common consent.

Cases of nicety and difficulty generally arise when the street is in what may be called a transition state, partly invaded by chambers and offices or by hotels, or even by shops, but still partly occupied as private dwellings. Or again, partial deviations from the original plans have been made and acquiesced in, and questions of great nicety frequently arise as to how far such partial deviations affect or limit the prohibitions originally constituted.

For myself I must say that the present case is one of the most difficult of this class which I remember to have encountered. My opinion upon it has vacillated more than once, and it is with much hesitation that I have ultimately come to be of opinion that the Lord Ordinary's interlocutor is right, and ought to be adhered to. I do not disguise that I would very willingly have come to an opposite conclusion, for I think it is pretty evident that the restrictions originally imposed in the titles have ceased to be either necessary or reasonable, and that it would conduce to the interest of the whole proprietors and enhance the value of their properties, including that of the defender himself, if the restrictions were found to be at an end.

But I feel myself restrained from giving effect to such considerations. If I find a lawful restriction lawfully and effectually imposed by the contract of the parties or of their predecessors in the

subjects, I am bound to give effect to such restrictions though they may now appear to be harsh or unreasonable, unless there exist legal grounds upon which I can hold that the restrictions have been relaxed or departed from, and it is just here that I think the pursuer's case fails. Assuming that the restrictions were originally validly imposed, and looking to the series of decided cases, I think that there is hardly enough here in warranting the Court to hold that these restrictions have been departed from, and are no longer binding.

The title-deeds in the present case are peculiarly difficult to read, and the narrative of the restriction contained in the printed infeftment is intricate and perplexing, but I agree with the Lord Ordinary that a valid restriction was imposed to the effect that the houses in the compartment of Bath Street now in question "should not exceed two square storeys in height and a sunk storey without upright or storm windows in the front garrets, but with the privilege of raising either the two centre houses of said compartment or one house at each end thereof to the height of three square storeys besides a sunk storey." These are the words of the restriction, and I do not think that their efficacy is impaired by the occurrence in another part of the deed of a prior restriction which had been imposed by a prior title applicable to a larger subject, that the houses "should all be built of smooth stone ashlar, and should not exceed three square storeys in height in front besides a sunk storey." The imposing of the lesser restriction in the early title did not prevent the proprietor, who himself was under the earlier restriction, from imposing a more stringent restriction upon his own disponee, and I think this was what was done. Croil's trustees, who were not entitled to build higher than three square storeys and a sunk storey, took their disponee Galbraith bound not to build higher than two square storeys and a sunk storey, excepting the two centre houses or the two end houses, in the proprietor's option. This option was exercised in the actual building of the block, for it was actually built the two end or corner houses each three square storeys with a sunk storey, while the five centre houses were built a storey less in height—that is, they each consisted of two square storeys with a sunk storey, and so the block of building was finished in accordance with the original plan.

I am also of opinion that there is sufficient mutuality between the different proprietors of the various houses, whether of the two end houses or of the five centre houses, to entitle any one of them to enforce the restriction, so far as legally imposed, against any of the others. This was plainly intended, and I cannot sustain the pursuer's contention that the only party who was entitled to enforce the restriction was Auchie, the proprietor of one of the end houses, being the house at the other end from that of the defender. There would be no sense or meaning in a restriction like this, and no reason can be given why the title to enforce the restriction should be confined to one of the end houses alone. The titles of each house separately contain the restriction, and it is in all of them declared "a real lien and burden affecting the whole ground of said compartment in all time coming." I think therefore that the restriction *valeat quantum* is a restriction for mutual benefit, and that it is pleadable by the proprietor of any one house in the compartment against the proprietor of any other house therein. I come therefore to the conclusion, that looking at matters as they stood at the date when the block of houses was originally built, the restriction in question was validly imposed upon the proprietors of all the houses, and that any one proprietor could then have enforced it against any of the others. So stood matters in 1829 when the buildings were being erected.

The next branch of the inquiry is, Has the restriction validly created in 1829 been relaxed or destroyed by anything which has since taken place? and this is the real and most formidable difficulty in the case. I shall mention *seriatim* the points founded on by the pursuer, and in a very few words indicate the grounds which lead me, but very reluctantly, to think that they do not amount to a departure from the restriction.

First—When the block was originally built, the five centre houses, though only two square storeys and a sunk storey high in front, had all of them four square storeys behind—that is, what was an attic storey in front was made a full square storey behind. The pursuer pleads that this of itself abandoned the restriction. I can hardly think so. It seems to be a very usual practice to build dwellings which to the eye are a storey higher behind than in front. The effect is to make the top storey half square—that is, square to the back, but with a sloping roof in front. This is seldom objectionable, and it did not affect what seems to have been chiefly in view, the front appearance of the block of dwelling-houses. I do not think that the joint-agreement to allow the back attics to be square would entitle any of the proprietors to raise his frontage as high as he pleased, and to disregard altogether the restriction then newly imposed.

Second—The next innovation was the converting of what had originally been flat windows in the roof of the front attics into upright or storm windows. This was done in all the five centre houses apparently not very many years after they were originally built. Now, this was a direct contravention of the restriction, which expressly bore that the houses should be "without upright or storm windows in the front garrets." So far the restriction seems to have been relaxed of consent of all parties. But although this is an important step in the pursuer's favour, I am unable to hold as a proposition applicable to such cases that the concession of a part is the same as the concession of the whole. I think acquiescence in its nature goes no further than the thing acquiesced in. It does not in general infer consent to anything different, and especially to anything which may be far more objectionable. It is said the storm windows were screened by a parapet, and did not offend the eye, and this seems to have been so; but I think it is enough for the present to hold that acquiescence in storm windows does not import a consent to build the whole house a storey higher, or—for it would come to that—to add two or three storeys to its original height.

Third—The next thing founded on is that the back-ground behind many of the houses has been gradually covered with buildings, some of them of a height considerably exceeding that of the front tenements themselves. It is impossible not to feel the weight of this consideration, not only in

itself, but as altering the whole character of a residential locality. But then I fear its weight is greatly taken off by the circumstance that there is no restriction in the titles against building on the back-ground. There is no express prohibition against such buildings, and although the pursuer argued with considerable force that there was an implied prohibition or understanding against them, yet in a matter like this, which is *stricti juris*, mere implication would not be enough. The back buildings alone would not remove a limitation affecting the front ones.

Fourth—It is said the aspect and uniformity of the block has been changed and destroyed by the conversion of the eastmost corner house into a hotel. It is explained that the main access to the hotel has been lowered to the level of the street, that ornamental balustrades, prominent lamps, and similar alterations have been erected so as to catch the eye and attract the attention of the public to the hotel, and so on, and that this spoils the uniformity or symmetry of the whole block. This seems true, but it was hardly maintained that upon the terms of the title-deeds any of these alterations could have been prevented by any of the neighbouring proprietors, and if this be so, then the circumstances referred to only lessen the defender's interest to enforce the restrictions in the titles. And so

Fifth—The pursuer objects that Mr Bunten has no interest to enforce the restriction even supposing it to be validly imposed by the titles. Now, I confess that the defender's interest to enforce the restriction does not appear to be very great. I do not think that the value of the defender's property would be materially affected though the whole centre houses were raised to the front so as to be one storey higher than they at present are. And I am disposed to lay out of view the somewhat fanciful interest which it is suggested the defender might have if at any time hereafter he should wish to strike out a window in his eastern gable overlooking his neighbour's roofs. But this is hardly the legal aspect of the case. I think the law sustains it as a sufficient interest that a proprietor in a row of houses wishes them to be maintained so as to show a uniform or symmetrical front or elevation, and if he has aptly and sufficiently stipulated for this in all the titles it will be given him though his only interest may be an æsthetical one. I do not think we could repel the defences on the mere ground of want of interest to defend.

Lastly—The pursuer has urged that even if his objections to the enforcement of the restriction are insufficient taken singly and separately, still when taken together they are more than sufficient completely to destroy the restriction and to bar the defender from now enforcing it.

Now, here the case for the pursuer is certainly very strong, and it is not without hesitation, and I repeat not without regret, that I have ultimately come to hold that, notwithstanding all that has happened, the limitation in the titles restricting the front height of the centre houses is still in force. In regard to most of the circumstances founded on by the pursuer it is to be observed that they are not really contraventions of the titles; they are not things to which the defender could have successfully objected, and therefore his acquiescence in them—I mean the acquiescence of the defender or his predecessors—cannot legitimately be founded on as inferring a departure from the express conditions of the titles. The defender and his predecessors acquiesced in these things simply because they could not help themselves, and not at all because they intended to waive any rights secured to them by their infeftments. The only circumstances, I think, on which the pursuer can truly found as indicating relaxation of the restrictions are—First, the upright storm windows, and second—and this is more than doubtful—the original erection of the dwellings with a square storey to the back instead of attics. But it would be very dangerous to lay down a rule that a party holding a restriction against his neighbour building in a certain way or to a certain height cannot relax that restriction in the least degree without abandoning it altogether—cannot even tolerate small storm windows which are almost entirely concealed by the front parapet without by such tolerance enabling his neighbour to build to what height he pleases. This would not be a reasonable doctrine, and it is not supported by any of the cases. The real principle seems to be that acquiescence goes no further than the things acquiesced in, or things *ejusdem generis*, and it is only when acquiescence shows a virtual departure from the whole servitude that it will receive such effect.

I think therefore that if we were to hold the restriction in the titles in the present case as abandoned, we would be going further than the Court have ever done in similar cases. Very little more might have done, and yet I feel myself compelled to hold that, although seriously shaken, and perhaps very nearly gone, the building restriction made a real burden by the titles is still enforceable, and I feel bound to adhere to the Lord Ordinary's interlocutor.

Lord Ormidale and the Lord Justice-Clerk concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Keir. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders (Respondents)—M'Laren—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Saturday, July 20.

SECOND DIVISION.

[Sheriff of Berwickshire.

STOTT *v.* FENDER AND CROMBIE.

Partnership—Implied Partnership—Share of Profits.

T was sequestrated, and two cautioners in a cash-credit bond lost money by his failure. After he had been discharged, one of the cautioners becoming security for payment of the dividend, he recommenced business, calling himself "T & Co." Money was again advanced to him upon a cash-credit with another bank, the same parties being cautioners. With the funds thus raised the former bond was cleared off. All the profits of the business were to be paid in to the credit of the second cash-credit, and all the