be assignee, but that he meant the provision in favour of his wife to be confined to the moveable estate and to the liferent use allenarly which he had specially given her in all his houses except one, and that it was not according to his intention to confer upon her the fee of the house, the title to which he took in the usual terms of style to himself and his heirs.

Therefore on the whole matter I agree with your Lordship.

LORD RUTHERFURD CLARK—I am also of opinion that the interlocutor of the Lord Ordinary should be affirmed, but my opinion is based entirely on the reasons which his Lordship gives in his note, to which I have nothing to add.

LORD CRAIGHILL, who was absent at the debate, delivered no opinion.

The Court adhered.

Counsel for Pursuer—Gloag—J. A. Reid. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Defender — Campbell Smith — Rhind. Agent—J. B. W. Lee, S.S.C.

Thursday, July 19.

SECOND DIVISION.

[Dean of Guild, Glasgow.

COLVILLE *v.* CARRICK AND OTHERS.

Property—Feu-Contract — Building Restrictions —"Offices"— School.

The titles of the houses in a street in a town contained a condition, which duly entered the record, that the proprietors of the houses should have power to erect on the back-ground "such offices as they might consider necessary for additional convenience," not exceeding a certain height. One of the proprietors desired to erect on the back-ground a hall, not exceeding the stipulated height, for the purposes of the school kept by him. *Held* that the proposed building was an "office" within the meaning of the condition.

A similar hall having been in existence at the back of the next house (which had also come into the petitioner's possession) for more than twenty years—*opinions* that, in any view, the other proprietors were barred by acquiescence from challenging the proposed alterations.

Dean of Guild—Jurisdiction.

The question whether the proposed use of a building is legal under the titles—the building itself being not prohibited by them —is outwith the jurisdiction of the Dean of Guild.

The steadings in the street consisting of self-contained dwelling-houses, and known as Newton Place, in the burgh of Glasgow, were all derived from a common author. The various titles contained similar conditions and restrictions intended to secure the uniformity and amenity of the street, and, *inter alia*, it was provided that "the walls enclosing the back-ground of the steading should not exceed in height 16 feet, but the said disponees and their foresaids should have full power to erect on said back-ground such offices as they might consider necessary for additional convenience, on this express condition, that walls of such out-buildings are in no case or on any account to rise higher than 16 feet, and their extreme height should not exceed 22 feet . . . . and as they (the houses) are intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading-places of any description, nor should common stairs be erected, nor the house be divided into flats upon any pretext whatever."

In 1860 Miss Barbara Nicolson acquired the house No. 14 Newton Place, having previously occupied the same for many years as tenant. From the beginning of her occupancy to the date of this action the premises had been occupied by Miss Nicolson as a boarding-school and day-school for the education of young ladies. In 1862 Miss Nicolson, finding her business increasing, applied to the Dean of Guild Court for a lining, craving to be allowed to erect additional buildings on the back-ground, to be used for the purposes of her school, which was granted. The adjoining proprietors were called in that proceeding. These buildings still remained at the date of this application. In 1867, the business of the school still increasing, Miss Nicolson found it necessary to extend her premises, and acquired the house No. 15 Newton Place. The whole premises had, at the date of this action, been for many years occupied for the purposes of a school without any objections on the part of the adjoining proprietors.

In 1882 Nos. 14 and 15 were acquired by James Colville, who presented this petition to the Dean of Guild craving leave to take down the existing wall at the back of the house No. 14 Newton Place, and to erect a large hall at the back of the houses Nos. 14 and 15, and also to make other slight alterations on the houses. The proprietors of several of the adjoining houses opposed the petition, on the ground that "the buildings proposed to be erected on the back-ground are objectionable, in so far as they do not consist of offices for the accommodation of a dwelling-house, but of a large hall covering the entire area of the back-ground, and intended to be used, not as offices for or as part of the accommodation of the dwelling-house, but for the purposes of a school, or other purposes of business."

The petitioner pleaded—"(1) As the proposed operations will not be injurious to the public, nor to the conterminous proprietors, the petitioner is entitled to decree as craved. (2) The proposed alterations as restricted not being in contravention of the title-deeds, the lining ought to be granted. (3) Respondents are barred *personali exceptione*, having acquiesced for many years in the occupation of the petitioner's premises as a school."

The respondents pleaded—"(1) The proposed alterations upon the dwelling-house claimed by the petitioner being in contravention of the stipulations of the titles, and the respondents having a material interest to object to said alterations, the petitioner is not entitled to obtain warrant to execute the same. (2) The buildings proposed to be erected upon the back-ground of the lodging claimed by the petitioner being in contravention of the titles, and injurious to the respondents, the petitioner is not entitled to warrant as craved."

The Dean of Guild refused the prayer of the petition.

The petitioner appealed, and argued—(1) The only restrictions contained in the feu-contract were against the erection of "shops, warehouses, and trading-places." A boarding-school did not come under this category of restrictions. Structurally, therefore (and it was only questions of structure which the Dean of Guild could competently determine), the alterations craved were unobjectionable. *Ewing* v. *Hastie* (*infra*) did not apply. The case of *Murison, supra*, p. 820, was exactly in point. (2) The respondents were barred by their acquiescence for twenty years in the use of the petitioner's premises as a boarding-school.

The respondents replied—The alterations proposed shut out light and air, and therefore the respondents had a real interest to object to them. A boarding-school was not an "office" in the sense of the word used in the titles. The Dean of Guild had a right to and frequently did inquire as to the proposed use of a building.—*Morrison* v. *M'Lay*, July 1, 1874, 1 R. 1117. (2) The fact of acquiescence in the use of a particular building did not bar them from objecting to an extension of it—*Ewing* v. *Hastie*, Jan. 12, 1878, 5 R. 439; *Ewing* v. *Campbell*, Nov. 23, 1877, 5 R. 230.

At advising—

LORD JUSTICE-CLERK—I think that in so far as this case turns upon the question as to whether the building which the appellant proposes to erect is an office, it is precisely the case which we decided the other day. This building is an adjunct of a dwelling-house, and the question as to how it is to be used does not in the least affect the question of structure. In my view it is enough to decide this case that it is not alleged that anything in the structure of this proposed building is a contravention of the prohibitions contained in the petitioner's title-deeds. It is said, indeed, that the building is to be used as a school, but that question is not truly raised under this petition. The Dean of Guild has only to inquire if the structure of the building is at variance with the prohibitions contained in the petitioner's title, but with objections to the use to which the building is to be put the Dean of Guild has nothing whatever to do.

That is the general view which I take of this case. Whether it is incompetent for those in the position of the respondents to object to a proposal for giving a little more room to the scholars at the petitioner's school is another question, and one upon which I do not desire at present to enter. My impression, however, is that the past acquiescence destroys the interest to enforce the prohibition, and if so, that any extension of the use is covered by that acquiescence. In the circumstances I am of opinion that we should recal the interlocutor appealed against, and remit to the Dean of Guild to grant the prayer of the petition.

LORD YOUNG—I am of the same opinion, and I think that this case is a very clear one of its class. The title contains the following restriction:—"The said disponees and their foresaids should have full power to erect on said back-ground such offices as they might consider necessary for additional convenience, on this express condition, hat the said walls of such out-buildings are in no case or on any account to rise higher than 16 feet, and their extreme height should not exceed 22 feet"—that is to say, the square walls are not to exceed 16 feet in height, and the top of the roof is not to be more than 22 feet high. That is the only restriction in reference to the structure of the buildings to be erected upon this back-ground. Now, the petitioner, who is the proprietor of the tenement, comes to the Dean of Guild with this statement:—"The petitioner intends to take down the existing hall at the back of the house No. 14 Newton Place aforesaid, and erect a large hall at the back of the houses Nos. 14 and 15 Newton Place aforesaid, and also make other slight alterations on the houses, all as shewn on the plans herewith produced." There was an objection to the plan produced, but that has been obviated by the petitioner undertaking to limit the height of the building in terms of the restrictions in his title-deed.

The only other objection to the proposed buildings is as follows:—"The buildings proposed to be erected on the back-ground are objectionable in so far as they do not consist of offices for the accommodation of a dwelling-house, but of a large hall covering the entire area of the back-ground, and intended to be used, not as offices for or as part of the accommodation of the dwelling-house, but for the purposes of a school, or other purposes of business." Now, that objection is founded, not on the clause in the title with which alone the Dean of Guild has any concern, but upon another clause limiting the use to which buildings erected upon this plot of ground are to be put. That is a matter with which I think the Dean of Guild has no concern. The buildings are quite unobjectionable with reference to the clause first read, for they conform in height to the restrictions in the petitioner's title. But it is suggested that if he gets this larger building in substitution for the smaller hall, he will use it in the same manner as he or his author has used the smaller hall and front tenement for 20 years, *i.e.*, as a school, and that thereby the structure itself becomes objectionable. I have already indicated that, in my view, irrespective of 20 years' use and acquiescence therein, this objection is not one for the Dean of Guild Court. The clause here founded upon is—"As they are intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading-places of any description, nor should common stairs be erected, nor the house divided into flats upon any pretext whatever." Now, it is said that here there is a restriction against the use of the buildings as a school. If it were necessary to determine that question, I am very strongly of the opinion that there is here no restriction against such a use of the building. It would require some very special words to prevent such a familiar use of a dwelling-house. I think that there is no such restriction here, and that in that respect this case is clearly distinguishable from that of *Ewing* v. *Hastie* cited in the discussion. Much stress has been laid upon the extent of the use, and that is of itself sufficient to show how unfitted this question is for discussion in the Dean of Guild Court. The Dean of Guild cannot measure the extent of the use. But I am clearly of opinion that the Dean of Guild has nothing to do with the use to which the building is to be

put, and that if he had, the proposed use is altogether unobjectionable. I think, therefore, that the judgment of the Dean of Guild ought to be recalled, and the case remitted to him to grant the prayer of the petition on condition that the petitioner agrees to restrict the height of the proposed building to the limit allowed by his title.

LORD CRAIGHILL—I arrive at the same conclusion, and that without any difficulty. It seems to me that the proposed building is an office within the meaning of the petitioner's title. In that view, and knowing what we decided two days ago, I have no hesitation in saying that I think this question is now foreclosed. I am not in the least moved by the argument that the building is to be used as a school. The tenement has been used as a school for twenty-three years, and nothing has hitherto been said against the legality of such use. I think, therefore, we are entitled to say that this new building is to be a conveniency for a use already acquiesced in, and in itself quite proper. Lastly, I think that were we to begin with the question as to whether under the title the houses themselves can lawfully be used as boarding or day-schools, I am of opinion that there is no limitation by which that use could be excluded.

LORD RUTHERFURD CLARK—I am of opinion that the petitioner is entitled to proceed subject to the proposed restriction as to height. I think it right, however, to guard myself by stating that this alone is the ground of my opinion. The feuars have power to erect such offices as they consider necessary or convenient. I read that as meaning such offices as may be necessary or convenient for the uses to which the buildings may lawfully be applied. Now, I find that these buildings have for twenty-three years been used as a school, and it is admitted on the other side that in respect of acquiescence that must now be considered a legal use. That I understand is not disputed, and if it were so, I should be disposed to regard such an attempt as hopeless. It follows, therefore, in my opinion, that the feuar is entitled to erect any buildings which may fairly be taken to be additional conveniences for the use of the front buildings. I wish to say that I do not desire to express any further or other opinion than that which I have just pronounced.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, sustain the same, Recal the judgment appealed from: Remit the cause to the Dean of Guild with instructions to proceed with the lining in conformity with the dimensions stipulated in the titles of the property: Find the petitioner entitled to expenses in this Court: Remit the same to the Auditor to tax and to report, and decern."

Counsel for Appellant — Mackintosh — Ure. Agents—Macbrair & Keith, S.S.C.

Counsel for Respondents—R. V. Campbell—Lorimer. Agents — Maitland & Lyon, W.S. — Campbell & Smith, S.S.C.

Friday, July 20.

FIRST DIVISION.

[Lord Lee, Ordinary.

AYR ROAD TRUSTEES *v.* W. & T. ADAMS AND BLYTH & CUNNINGHAM.

Process—Reclaiming Note—Extract.

In an action against two sets of defenders, an interlocutor was pronounced decerning against one set but assoilzieing Messrs B. & C., the other defenders, and finding them entitled to expenses. This interlocutor was reclaimed against, but the pursuers intimated that they did not intend to object to the interlocutor in so far as it assoilzied Messrs B. & C. B. & C. accordingly had their account of expenses taxed, and on their motion the Lord Ordinary approved of the Auditor's report on their account, and decerned for the amount of their expenses as taxed. This interlocutor the extractor refused to extract, on the ground that the process was in the Inner House. The Lord Ordinary reported the cause, and the Court *authorised* the extractor to extract the interlocutor.

In an action at the instance of the Ayr Road Trustees against W. & T. Adams, contractors, Callander, and Blyth & Cunningham, civil engineers, Edinburgh, the Lord Ordinary (ADAM) on 20th March 1883 pronounced this interlocutor:— "Decerns against the defenders W. & T. Adams, and William Adams and Thomas Adams, the individual partners of the said firm, for the sum of one thousand pounds sterling: Further, assoilzies the defenders Blyth & Cunningham, and George Cunningham and Benjamin Hall Blyth, the individual partners of the said last-mentioned firm, from the whole conclusions of the action, and decerns: Further, finds the said Blyth & Cunningham, and George Cunningham and Benjamin Hall Blyth, entitled to expenses," &c.

The pursuers reclaimed.

On 10th April the pursuers' agents intimated by letter to the agents for Messrs Blyth & Cunningham that they did not intend to object to this interlocutor in so far as it assoilzied their clients.

In the pursuers' reclaiming-note Messrs Adams were titled defenders and respondents, while Messrs Blyth & Cunningham were titled defenders only. Messrs Blyth & Cunningham in consequence of the intimation that the interlocutor was not to be challenged as regarded them, lodged an account of their expenses, which was audited—the pursuers, who were represented at the audit, getting several items struck off.

Thereafter Messrs Blyth & Cunningham enrolled the case for the purpose of getting the account approved of. On 27th June 1883 Lord Lee, for Lord Adam, pronounced an interlocutor approving of the Auditor's report, and decerning for the expenses as taxed. This interlocutor the extractor refused to extract on the ground that the process was in the Inner House.

Messrs Blyth & Cunningham having brought the matter before the Lord Ordinary, his Lordship reported it to the First Division.

At advising—