death after fulfilling the two first purposes of the trust, and decern." . . . .

Counsel for Trustees — Salvesen. Agent — J. Smith Clark, S.S.C.

Counsel for James Cowan (Heir-at-Law) — D.-F. Mackintosh, Q.C. — Sym. Agent — D. Milne, S.S.C.

Counsel for Henry Cowan and Others (Next-of-Kin)—Pearson—Hay. Agents—Reid & Guild, W.S.

Saturday, March 19.

SECOND DIVISION.

THE MAGISTRATES OF EDINBURGH *v.* COWAN.

Property—Building Restriction — Superior and Vassal—Prohibition—Obligation—Feu-Charter.

A feu-charter provided that the vassal and his heirs and assignees should be bound to erect upon the feu within a certain time buildings of a specified character and of a specified value. The obligation as regarded value having been fulfilled, the vassal proposed to erect upon part of the feu still unoccupied buildings which were not of the specified character. *Held* that he was entitled to do so, as the terms of the feu-charter could not be construed to express a prohibition against erecting buildings not of the specified character after buildings of the specified value had been duly erected.

By a feu-charter dated 31st March and 4th April, and recorded 12th July 1876, the Magistrates and Town Council of Edinburgh, as governors and administrators of Trinity Hospital, disponed to William Beattie, and his heirs and assignees whomsoever, a piece of ground adjoining the Easter Road and lying between the proposed continuation of Albert Street and the Granton branch of the North British Railway, as delineated on a plan relative thereto, but always under certain conditions, declarations, and irritant and resolutive clauses, and, *inter alia*, (1) that Beattie and his foresaids should, within eighteen months from the term of entry, "erect and constantly maintain on the said piece of ground buildings of the value of £6000 at least, and within the further period of another eighteen months additional buildings of the value of another £6000, making in all buildings of the value of £12,000 at least, which buildings shall consist of a range of four-storey tenements similar to those already built in Albert Street, on the frontage along the continuation of Albert Street and Easter Road, and of workshops or public works on the remainder of the said piece of ground not occupied by said tenements, or shall consist of tenements fronting Albert Street and Easter Road as above, and the space behind may be occupied by similar tenements having a frontage to cross streets running southwards from Albert Street, which tenements or workshops or public works, and all other buildings at any time to be erected on the said piece of ground, shall be built according to a plan and elevation, and such cross streets laid out according to a plan to be submitted to and approved of by the said Lord Provost, Magistrates, and Council, and their successors in office, governors and administrators foresaid." Then followed a clause declaring that the charter and all that had followed on it should be null in the event of failure to erect "buildings as stipulated for as aforesaid." The third clause contained, *inter alia*, this other condition—"The said William Beattie and his foresaids shall also be bound to form and constantly maintain a foot-pavement and water-channel, with proper gratings and connections to drains where necessary, in front of the houses to be built on the said piece of ground facing the continuation of Albert Street, Easter Road, and other streets of the same description as those already formed in Albert Street, to the satisfaction of the City Superintendent for the time being, the foot-pavement towards Easter Road being formed within the area of the said piece of ground hereby disponed to the extent of 8 feet."

In April 1877 Beattie by feu-charter disponed to James Cowan part of the ground acquired from the Magistrates with and under, *inter alia*, the conditions specified in the feu-charter by the Magistrates to Beattie. The obligation on Beattie to erect buildings of the value of £12,000 was by the feu-charter to Cowan imposed upon him to the extent of £4000. Cowan built a row of four-storey tenements on his ground fronting Albert Street, and partly fronting Easter Road, with a pavement and water-channel in front of them, and he erected stabling behind them. These buildings were of the stipulated value of £4000, and it was not disputed in this process that both Cowan and Beattie had fulfilled their respective obligations to erect buildings of the specified value.

The question in this case related to buildings which Cowan proposed to erect on the remainder of his ground fronting Easter Road, the erection of the buildings above mentioned not having occupied all his ground. This remaining ground was separated from Easter Road by a high wall. Behind this high wall he proposed to erect on his remaining ground buildings of one-storey in height, of brick, with slated roofs, and to be used as stables.

The Magistrates, as superiors, opposed the application on the ground that the proposed buildings would be a contravention of the conditions contained in the original feu-charter to Beattie, and would injure the neighbouring property. They maintained that Cowan was "restricted to build a range of four-storey tenements similar to those already built on the frontage along the continuation of Albert Street and Easter Road," and was bound to leave 8 feet of his property fronting Easter Road for a foot-pavement. They also averred "that the reference in the feu-charter granted by the respondents as to the minimum value of the buildings to be erected on the ground feued did not affect the character of the buildings which were to be erected along the continuation of Albert Street and Easter Road, all of which were to consist of a range of four-storey tenements."

On 9th December 1886 the Dean of Guild pronounced an interlocutor finding that the operations were confined to the petitioner's own property, and could be executed with-

out danger, and that the proposed buildings were not a violation of the feu-charter granted by the Magistrates, and granted warrant as craved.

"*Note*—[*After stating the facts and contentions of parties*].—The Dean of Guild is of opinion that the nature of the obligation specified in the charter declaring the conditions of the grant was to build within a certain time houses of a certain architectural character, and to the value of £12,000, on the frontage along the continuation of Albert Street and Easter Road, and all these requirements have been observed, thereby securing the feu-duty to the respondents. It may be that the respondents meant that after these were built all other houses to be built in Easter Road should be of the same character, but the charter does not say so either in this clause or, as will appear directly, in the other clauses of conditions. On the other hand, all that is actually stipulated for is a range of buildings of £12,000 value, and the respondents must have known that such a sum would only provide buildings of such a character on a part of the frontage of the area disponed, and ought to have expressed clearly their intention that even after the stipulated buildings were built none were to be erected on the rest of the frontage but buildings of a similar character.

"If this is so in regard to the first of these clauses, the question comes to be, Is there anything in the other clauses of the charter to support the respondents' contention that the petitioner can build along the Easter Road nothing else than four-storey houses as aforesaid? The second clause of the charter is an irritant clause declaring that the feu shall be forfeited 'if the said William Beattie and his foresaids shall fail to erect on the said piece of ground buildings as stipulated for.' Now, this draws back to the first clause of the deed, which certainly stipulates that the buildings shall be of four storeys, but also that they shall be of the value of £12,000, the proportion of which transmitted against the petitioner he has more than made good.

"The Dean of Guild is of opinion that there is nothing in this clause to extend the view of the disponee's obligations which he has already expressed. The third clause provides in certain proportions for the expense of forming roadways and drains therein. By this clause also Beattie is bound to form and maintain foot-pavement and water-channel in front of the houses to be built on the said piece of ground facing the continuation of Albert Street, Easter Road, and other streets, like those already made in Albert Street, the foot-pavement towards Easter Road being kept 8 feet within the area of the ground disponed.

"So far as the petitioner's range of building turns into Easter Road this condition has been implemented, but it will be observed that the clause only demands that the pavement shall be laid 'in front of the houses to be built,' leaving it to be determined by the first of the clauses prescribing the nature of the buildings what the character and extent of the buildings are to be.

"In the view which the Dean of Guild has taken of the titles, the use which the petitioner now proposes to make of his ground cannot be considered a contravention of the conditions of his grant."

The respondents appealed to the Court of Session, and argued — The true reading of the charter was that all along the frontage of the ground feued buildings should be erected of four-storey tenements on the model of those already built in Albert Street. That was to preserve the uniformity of the street. The first clause of the charter was a prohibitory clause so far as regarded the erection of any other kind of building than four-storey tenements. The statement in the clause regarding the value of the buildings was to be read as parenthetical, and if it were deleted the clause plainly was prohibitory as regarded the character of the whole buildings. The clause as to the necessity of laying down the pavement also showed that this was the meaning of the first clause, and the whole meaning of the charter was so plain that the Court ought to give effect to the contention of the appellants even if the words did not expressly prohibit the petitioner from erecting any other buildings than four-storey tenements.

Argued for the petitioners—The clause in the original feu-charter was not a prohibitory clause, but one of obligation. It obliged the petitioner to erect buildings of a certain value on his feu; that was to secure the feu-duty. After the buildings had been erected the vassal was at liberty to deal as he pleased with the rest of the feu, either to erect any kind of buildings on it or to leave it unbuilt. These were distinct and well-known prohibitory clauses, and if these were not inserted in the feu-charter, then, in a question between superior and vassal, restrictions on the vassal's liberty to deal with his feu could not be read into the charter—*Russell* v. *Cowpar*, February 24, 1882, 9 R. 660. As regarded the footpath, it was only necessary to make a pavement in front of the buildings if these were four-storey tenements. The petitioner did not dispute that if he *de facto* came to put up such tenements he might then be obliged to form the footpath.

At advising—

Lord Justice-Clerk—In this case I see no reason for differing from the judgment of the Dean of Guild, and therefore I think we should adhere to that judgment.

Lord Young—I have had some difficulty as regards this case. I think, however, that the whole matter is rightly put by the Dean of Guild's Assessor when he says—"It may be that the respondents meant that after these were built all other houses to be built in Easter Road should be of the same character, but the charter does not say so." I cannot resist the argument that that was the intention of the framers of the charter, but we are not at liberty to regard the intention of the framers apart from the words of the charter, and the charter does not express that view clearly. I therefore think we should adhere to the judgment of the Dean of Guild Court.

Lord Craighill concurred.

Lord Rutherfurd Clark—I cannot find in this deed any prohibition such as that on which the appellant in this case must rely. Any such prohibition must be clearly expressed, but I doubt if there is any expression of prohibition in the deed at all. It is said that we may gather what may have been the intention of the framers of

the deed, and from that intention may gather what the deed proposed to do. I do not think that is a mode of construing a feu-charter to which we are accustomed. There is nothing in favour of such a mode of construing a charter; on the contrary, the rule is in favour of liberty to the vassal. All clauses of prohibition must be strictly construed. As to the footpath, I do not here either find any clause of prohibition on which the appellant may rely. It may be that there is a necessity for the respondent to lay down a footpath in front of tenements if he ever builds them, such as are conditioned in the deed, but until he does that I do not think he need to lay down any footpath.

In conclusion, I desire to say that I think the note of the Assessor is not only well put, but is good law.

The Court adhered.

Counsel for Magistrates—Comrie Thomson—Darling. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Petitioner — Pearson — Low. Agent—Donald Mackenzie, W.S.

Saturday, March 19.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STEEDMAN *v.* STEEDMAN.

Process—Act 48 *Geo. III. cap.* 151, *sec.* 16—*Reponing—Expenses—Husband and Wife.*

The 16th section of the Act 48 Geo. III. cap. 151, provides that "If the reclaiming or representing days against an interlocutor of a Lord Ordinary shall from mistake or inadvertency have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs; but declaring always, that in the event of such petition being presented, the petitioners shall be subjected in payment of the expenses previously incurred in the process by the other party." Where a husband had obtained decree of divorce against his wife, and she had from mistake allowed the reclaiming days to expire, she was reponed without payment of expenses, the Lord President *observing*, that while undoubtedly in the ordinary case a person must before being reponed pay his previous expenses, that rule did not apply to the case of husband and wife. If it did, the wife would have been entitled to demand that her husband should furnish her with the means.

Authority cited — *M'Ra* v. *Birtwhistle's Trustees*, March 11, 1831, 9 S. 582.

Counsel for Defender (Reclaimer) — Hay. Agent—James Skinner, S.S.C.

Counsel for Pursuer (Respondent)—Dickson—Forsyth. Agent—N. B. Constable, W.S.

Saturday, March 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BLACK *v.* JEHANGEER FRAMJEE & COMPANY.

Expenses—Arrestment on the Dependence—Ship.

Held that the expense of arresting a ship on the dependence and dismantling her under a warrant of the Lord Ordinary on the Bills was not a part of the ordinary expenses of process to be allowed against a defender, and was rightly disallowed by the Auditor.

Thomas Black, sailmaker and ship-store merchant, Greenock, made furnishings to the owners of the ship "Huron" in the year 1886 to the value of £190, 2s. 10d. On 8th September 1886 he used arrestments to found jurisdiction by arresting the "Huron" in Lamlash Bay, where she was then lying. On the same day he raised an action against Thomas Bryson, the master of the ship, for payment of the account, and the owners, Jehangeer Framjee & Company, East India merchants, London, having sisted themselves as defenders, defended the action. Arrestments were used by the pursuer on the dependence.

As the vessel was lying in Lamlash Bay, and was ready for sea, the pursuer applied to the Lord Ordinary on the Bills for warrant to remove her to a safe harbour and dismantle her, and the Lord Ordinary on 9th September granted warrant to remove her to Greenock and dismantle her. This warrant was carried into execution at a considerable expense.

On 8th October 1886 the owners applied for loosing of the arrestments on the dependence.

The Lord Ordinary on the Bills loosed the arrestments on condition of the defenders consigning £400 to meet the pursuer's claims. This £400 was not consigned. Instead of making the consignation the owners, Jehangeer Framjee & Company, endeavoured to get the vessel released by means of an extrajudicial tender. They applied to the pursuer Black for his account of expenses, and the parties agreed to have this account taxed by the Auditor of the Court, which was done on the 12th of October 1886. The amount of the account was £199, 11s. 9d., but the Auditor taxed it at the sum of £21, 7s. 7½d. The sum which was disallowed, and for which the Auditor expressly reserved the claim of the pursuer, was composed of items of expense attending the arrestments, removal of the vessel to a safe port, and there dismantling her. The Auditor in the taxation of the account held that these were not expenses of process, and therefore must be recovered in some other way.

On the 15th October 1886 the defenders tendered payment of the sum concluded for, viz., £190, 2s. 10d. with interest thereon, and the taxed expenses, £21, 7s. 8d. This tender was declined. Thereafter they again applied to the Lord Ordinary on the Bills to discharge the arrestments on the dependence on consignation of the said sums of £190 and £21, but the Lord Ordinary on the Bills refused to make any further order.

The case was argued in the Court of Session