

Bank, the property being to be sold now by the trustee under this sequestrated estate. May 23, 1826.

My Lords, I think very considerable doubts might also have been entertained upon the question, whether the Bank were entitled to sue the surety before the time for renewing those bills; but it is unnecessary to enter into that; for considering, as I do, that the surety has been discharged by the conduct of the Bank, by their negligence in not obtaining the charter of confirmation, and not giving notice to them when the transaction came to their knowledge, I think, for these reasons, the interlocutors of the Court of Session cannot be supported, but that they must be reversed. I would therefore propose to your Lordships to reverse this judgment, giving, therefore, the appellant the benefit of that defence he made in the Court below, and which he was, I apprehend, justified in making.

Appellant's Authorities.—2 Ersk. 3. 20.—2. 7. 15.—Thomson, Jan. 29, 1822, as reversed in 1824.—Paisley, Jan. 13, 1779. (8228.)—University of Glasgow, Nov. 18, 1790. (2104, and Bell's Cases, 134.)—M'Lagan and Co., Nov. 19, 1813. (F. C.)

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,
Solicitors.

GOVERNORS OF HERIOT'S HOSPITAL, Appellants.—*Keay—Robertson.*

No. 25.

T. COCKBURN, J. C. MAXWELL, and OTHERS, Respondents.

Superior and Vassal—Servitude.—Held ex parte (reversing the judgment of the Court of Session) that a vassal in an urban tenement is not entitled to retain his feu-duties, on the allegation that the superior has bestowed on him a servitude altius non tollendi over houses on the opposite side of the street, which had been violated—the vassal having been found to have right to enforce that servitude by having the houses reduced in height.

In 1806, the Magistrates of the city of Edinburgh, Messrs Winton and others, and the Governors of Heriot's Hospital, proprietors of ground in the northern part of the New Town of Edinburgh, entered into a contract for laying it out in streets, rows, crescents, &c. agreeably to a ground plan, which each, in regard to their respective properties, became bound to adopt. Among other stipulations, it was agreed, that in no case should the houses in certain streets, and among others, India Street, exceed in height 46 feet, from the level of the street to the top of the front wall.

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1ST DIVISION.

Lord Meadowbank.

In 1807, the lots in India Street (being the property of Her-

May 23, 1826. Heriot's Hospital) were exposed to sale, under articles of roup. These articles made no reference to the contract of 1806, but mentioned the ground-plan, and contained a clause limiting the height of the houses to 46 feet. No offerers appeared at the sale; but in the course of the same year, Wallace, an architect, feued 115 feet on the east side, and 115 feet on the west side of India Street, on the terms and conditions of the articles of roup. Having erected a house on the west side, he sold it to Maxwell, who obtained from Heriot's Hospital, the superiors, a charter, which was subscribed by Wallace as a consenting party, as he had not obtained a feudal title to the subject. By this charter, there was conveyed to Maxwell, 'all and whole the foresaid area, or piece of ground, on the west side of India Street, in the new extended royalty of the city of Edinburgh, consisting of 28 feet in front neat measure, conform to said certified measurement with the buildings erected by the said William Wallace thereon;' and it also provided, that in no case should the walls on the area exceed in height 46 feet from the level of the street. Other houses were erected on the other feus, on the west side of the street, and in like terms conveyed by the Hospital, with consent of Wallace, to Cockburn and others; but in none of the charters was there any express servitude granted to the feuars over the ground on the opposite side of the street, or any declaration that the houses to be there built should not exceed the above height.

Some time thereafter, the ground on the east or opposite side was acquired from the Hospital by Dobson, Traquair, Wallace, and others, builders, on the conditions in the articles of roup; and houses were erected, whose front walls exceeded the limit of 46 feet, although a protest had been taken by Cockburn and others, when this became apparent. These houses were purchased by different individuals.

Cockburn, Maxwell, and others, then raised an action in the Court of Session against the builders of the houses on the east side, and against the Governors of Heriot's Hospital; the summons of which, after reciting the contract of 1806, the articles of roup, the sale to Wallace, and the purchases which the pursuers had made, and that the defenders had acquired areas on the east side of the street, and were bound to perform the several obligations incumbent on the feuars by the articles of sale, proceeds:—'But notwithstanding of their said obligations, true it is, that the said William Traquair and Robert Dobson, William Wallace, and Robert Wright, have not only in various instances contravened and disregarded the same, in spite of

' repeated remonstrances on the part of the pursuers, made un- May 23, 1826.
 ' der the form of notorial protests and otherwise; but the said
 ' superiors have also abetted the said defenders in their unlaw-
 ' ful operations, both by refusing to interfere in preventing the
 ' same, and by themselves or their superintendant expressly
 ' sanctioning in some instances various deviations from the
 ' said stipulations.' The summons then concludes:—' That it
 ' ought and should be found and declared by decree of the
 ' Lords of our Council and Session, that the said William Tra-
 ' quair and Robert Dobson, as a company and as individuals;
 ' William Wallace and Robert Wright, in respect of their ha-
 ' ving committed the foresaid deviations; and also the said Go-
 ' vernors of George Heriot's Hospital, in respect of their having
 ' themselves, or by their said superintendant, sanctioned the
 ' foresaid erroneous plans and other deviations, or otherwise,
 ' have severally been guilty of a breach of the foresaid contract
 ' and articles and conditions of roup; and the said William Tra-
 ' quair and Robert Dobson, as a company, and conjunctly and
 ' severally, as individuals, William Wallace and Robert Wright,
 ' ought and should be decerned and ordained by decret of our
 ' said Lords, respectively, to take down the foresaid houses, se-
 ' verally erected by them on the said areas on the east side of
 ' India Street, and to erect tenements thereon not exceeding
 ' forty-six feet in height from the level of the street, to the top
 ' of the front wall, the said heights to be taken at the middle
 ' of the tenement, and according to plans to be approved of
 ' by the preses of the ordinary committee of the said hospital,
 ' the superintendant of the hospital, and the Dean of Guild of
 ' the city of Edinburgh, and in every other respect in terms of
 ' the foresaid articles and conditions; or at least, the said de-
 ' fenders ought and should be decerned and ordained severally
 ' to take down as much of the foresaid tenements respectively
 ' belonging to them, as will lower the same to the foresaid limits
 ' prescribed as aforesaid: and farther, it ought and should be
 ' found and declared, that the pursuers are entitled to retain and
 ' withhold payment of the feu-duties respectively payable by
 ' them for the said subjects belonging severally to them; and
 ' the said Governors of the said hospital, the superiors thereof,
 ' ought and should be prohibited and discharged from demand-
 ' ing from the said John Clerk Maxwell, or his heirs and suc-
 ' cessors, the foresaid feu-duty payable by him; and the said
 ' Governors, and also the said William Wallace, for all right and
 ' interest he has in the feu-duties payable by the said John Cock-
 ' burn and Mrs Janet Dunlop, pursuers, ought and should be

May 23, 1826. ' prohibited and discharged from demanding payment thereof
 ' from them, or their heirs and successors; and that aye and
 ' until a due and strict observance of the said articles and condi-
 ' tions in every respect is obtained: and the pursuers should not
 ' be liable for interest upon the said feu-duty so retained, but
 ' only from the time that it shall be duly certified to them, that
 ' the foresaid houses have been reduced to the stipulated height,
 ' and are in every respect conform to the foresaid articles of
 ' roup.' Then follows a conclusion for penalties and expenses.

The Governors of Heriot's Hospital in defence stated, that they, as superiors, had no interest to enforce the stipulation relative to the height of the walls of the houses; and that the pursuers had no right to retain their feu-duties.

The Lord Ordinary found, that ' by mutual contract entered
 ' into between the corporation of the city of Edinburgh, the Go-
 ' vernors of Heriot's Hospital, and Messrs Winton and Morison,
 ' in the year 1806, the said parties, in contemplation of streets
 ' and buildings, according to a regular plan, being formed and
 ' erected on the several parcels of ground then belonging to each
 ' of them, agreed to impose, and thereby did impose, on those
 ' several parcels, certain limitations and restrictions, of the na-
 ' ture of negative servitudes on each of their properties, calcu-
 ' lated, if enforced, to improve and to raise the value of the same
 ' respectively: That the rights thereby created were not per-
 ' sonal to the several guarantees, but became part and pertinent
 ' of all and every part of the lands therein referred to, and pass-
 ' ing along therewith to the singular successors of the then pro-
 ' prietors of the said several dominant tenements: That in all
 ' cases whatsoever where rights of this description are constitu-
 ' ted by two or more proprietors in favour of the lands belong-
 ' ing to each other, and the said lands are afterwards split or
 ' divided into different parts or parcels, the owner of each part
 ' or parcel originally acquires the same right to the benefit there-
 ' of which appertained to the whole when in the hands of the
 ' original proprietor; and that he thereby becomes vested with
 ' the same power that belonged to the said proprietor, of enforcing
 ' against the owners of the other lands therein included obser-
 ' vance of all the stipulations of the contract: That when, from
 ' the nature of the servitudes or limitations imposed, the same
 ' would, for the purposes by the contracting parties avowedly
 ' professed, be utterly useless unless the same were observed
 ' and enforced universally over the whole subjects included in
 ' the contract; and where the object of imposing such limita-
 ' tions is to enable the contracting parties to feu out and sub-

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' divide the same into small parcels and portions, and particu-
 ' larly for the formation of streets and squares upon a regular
 ' plan, and that for sums of money, feu-duties, or annual-rents,
 ' greatly larger than the same would have brought had no such
 ' limitations existed; it is and must be implied (no provision
 ' being made to the contrary), that the said parties did thereby
 ' come under a legal and binding obligation not only to enforce
 ' observance of the same as against each other, more especially
 ' at the first formation of the streets and erection of the build-
 ' ings, but to transmit a similar right to those by whom the said
 ' feus or subdivisions might be acquired, as against all and sun-
 ' dry into whose hands soever the said properties, either in whole
 ' or in portions, might eventually fall, and that whether the
 ' same did originally belong to themselves, or to the other par-
 ' ties included in the contract: As also, that where such sub-
 ' divisions have been made and disposed of for the said purposes,
 ' and for sums of money, feu-duties, or annual-rents, of the de-
 ' scription and amount foresaid, payable to parties similarly
 ' situated with those herein before contemplated (and where no
 ' provision is made to the contrary), the said parties originally
 ' contracting, notwithstanding the communication of their right
 ' of enforcing the said limitations and servitudes to those acqui-
 ' ring the said portions of their properties separately, do them-
 ' selves, not only continue bound to enforce observance of the
 ' limitations as before, and more particularly at the first forma-
 ' tion of the streets and erection of the buildings, but must by
 ' law be held to have incurred an obligation to that effect in con-
 ' nexion with and in relation to all and each of their own dis-
 ' ponees or subfeuars: That the said obligation must in such
 ' case be held to have constituted and formed a condition under
 ' which the price, annual-rent, or feu-duty, was agreed to be
 ' paid, and on the failure of the said parties respectively duly to
 ' enforce observance thereof, at least at the first formation of the
 ' streets and erection of the buildings then in contemplation,
 ' that the said disponees or subfeuars must have by law a suffi-
 ' cient right, not only to retain in their own hands whatever
 ' parts of the said price, feu-duties, or annual-rents, due by them
 ' on account of their several portions or subdivisions, may be due
 ' or unpaid, but also to sue for and recover whatever damages
 ' they may be able to qualify as having been created to them by
 ' the neglect of their author, landlord, or superior, in failing
 ' duly himself to implement, or to cause the other parties obli-
 ' gants to implement, the several obligations incumbent upon
 ' them: That the contract (1806) aforesaid not only was not

May 23, 1826. ' resiled from nor annulled by the parties, rebus integris, and,
 ' when alone it was in their power so to have done; but the same,
 ' has hitherto continued unrevoked and uncanceled, and the
 ' obligations thereof are at the present day equally valid, bind-
 ' ing, and effectual, as when originally imposed: That in pursu-
 ' ance of the views entertained by the parties at the date there-
 ' of, the several properties therein included were sold out and
 ' feued for the purpose of forming certain streets and lanes, places
 ' and squares, and of erecting houses thereupon according to
 ' a regular plan or design; and in particular, that the property
 ' then belonging to the defenders, the Governors of George He-
 ' riot's Hospital (and with special reference to which the said
 ' contract is entered into), was, in the year 1807, and years sub-
 ' sequent thereto, sold and disposed of in several portions or
 ' subdivisions for the purposes aforesaid; and amongst others,
 ' for the purpose of forming the street called India Street, in
 ' which the houses belonging to the pursuers have since been
 ' erected: That in the articles of sale then made out by the said
 ' defenders, and in terms of which the several portions of their
 ' property were disposed of, it was, amongst other limitations
 ' and restrictions, specially provided and declared, that in no case
 ' shall the houses to be built thereon "exceed forty-six feet from
 ' "the level of the street to the top of the front wall, the said
 ' "height to be taken at the middle of the tenement, so that the
 ' "whole side walls may be upon one level as well as the roof:"
 ' That by the condition foresaid, not only was the attention
 ' of the pursuers and others acquiring rights to the portions
 ' of the property of the said defenders directed to the corre-
 ' sponding limitation, restriction, or servitude, imposed by the
 ' contract entered into in the year 1806, but the binding and
 ' and effectual nature of the same was thereby recognized and
 ' confirmed: That it is not only not averred, but must be ad-
 ' mitted, that the several portions of the property then and there-
 ' by disposed of to the pursuers and others by the said defend-
 ' ers, were sold, let, or feued for prices, annual-rents, or feu-
 ' duties, greatly exceeding in amount what would have been ob-
 ' tained for the same, had the limitations, restrictions, or servi-
 ' tudes aforesaid, not been previously imposed, held out by the
 ' proprietors, and believed and understood by all concerned to
 ' adhere to every part and parcel referred to in the contract
 ' 1806: That there being in the said articles of sale no provi-
 ' sion to the contrary, it must be held that the defenders, the
 ' Governors of George Heriot's Hospital, not only conveyed to
 ' the pursuers and the other purchasers of the property thereby

' sold, the right of enforcing against all and sundry, into whose May 23, 1826.
 ' hands soever had fallen, or at any subsequent period might
 ' fall, any parts and portions of that property, with reference to
 ' which the said contract of 1806 was entered into, all and each
 ' of the limitations, restrictions, and servitudes aforesaid, and
 ' particularly that above recited; but did thereby themselves also
 ' become bound to enforce, at the formation of the streets and
 ' erection of the buildings then in contemplation, all and each
 ' of the said limitations, restrictions, and servitudes, in consi-
 ' deration of which, chiefly, if not solely, the said purchasers
 ' upon their parts became liable in payment of large sums of
 ' money under the name either of price, annual-rent, or feu-
 ' duty, quite disproportionate to, and greatly exceeding, the va-
 ' lue of the parts and portions acquired by each of them respec-
 ' tively, had no such limitations, as well on the portions con-
 ' veyed to themselves as on those disposed to and acquired by
 ' others, whether forming a part of what belonged to their own
 ' authors, or to the other parties to the said contract, or not, been
 ' imposed, or their observance neglected, or not duly enforced:
 ' That in the charters to the pursuer, John Clerk Maxwell, Esq.
 ' and William Wallace, architect, the author of the other de-
 ' fenders, the whole limitations contained in the articles of sale
 ' aforesaid, and the contract 1806, are expressly repeated: That
 ' in the articles of sale also inserted in the charters aforesaid, spe-
 ' cial provisions were inserted, requiring that the purchasers of
 ' the different portions of the said property should "present ele-
 ' vations of their respective buildings to the Preses of the Ordi-
 ' nary Committee of Heriot's Hospital, and the Superintend-
 ' ent of the said Hospital, for the time being, of their respective
 ' buildings; and also to the Dean of Guild of the city of Edin-
 ' burgh and his Council, the foresaid property being now com-
 ' prehended within the royalty of the city, and shall execute
 ' their said buildings agreeably to the elevations to be appro-
 ' ved of by them; and no buildings shall be begun until such
 ' time as the elevation thereof is approved of in the manner
 ' above mentioned;" and that, from the terms of this provision,
 ' as well as from those of the clause therein also contained with
 ' relation to the plan by which the said defenders expressly de-
 ' clared themselves to be bound to execute the same, in so far as
 ' the Hospital's property extended; and from the nature of the
 ' objects in view, and the great interest which the Hospital pos-
 ' sessed, that the limitations, restrictions, and servitudes afore-
 ' said, should be enforced, the pursuers and all other purchasers

May 23, 1826. ' were entitled to rely upon every legal, necessary, and proper
 ' step being taken by the said defenders for preventing the neglect
 ' or violation thereof, in any particular whatsoever, at the forma-
 ' tion of the streets and erections of the buildings then in con-
 ' templation : That it is not denied that the restriction against
 ' erecting houses,—the front walls of which should not exceed
 ' forty-six from the level of the street, to be measured at the mid-
 ' dle of the tenements,—has been violated by the other defenders,
 ' Messrs Traquair and Dobson, William Wallace, and Robert
 ' Wright, by their erecting the houses complained of to a height
 ' considerably greater : That it is not only not alleged, but ex-
 ' pressly admitted, that no steps whatever were taken by the
 ' defenders, the Governors of George Heriot's Hospital, to pre-
 ' vent the erection and completion of the said buildings, and the
 ' consequent violation of the said limitation, restriction, or ser-
 ' vitude ; but that it is proved by the several instruments of
 ' protest in process, that, as soon as the pursuers were fully cer-
 ' tiorated, and made aware that the said defenders Messrs Tra-
 ' quair and Dobson, William Wallace, and Robert Wright, had
 ' it in contemplation to violate the said restriction or servitude,
 ' due notice was served upon them by the pursuers that they
 ' would proceed to do so, and to complete their tenements re-
 ' spectively at their peril, and that every step would be taken
 ' for enforcing observance of those conditions under which the
 ' property had been disposed of by the Hospital : That the no-
 ' tice so given was sufficient to put the defenders in mala fide
 ' to proceed in erecting their buildings to a height greater than
 ' forty-six feet from the level of the said street, to be measured
 ' from the centre of the building : And therefore found, that the
 ' walls thereof must be reduced to a height not greater than
 ' forty-six feet as aforesaid ; and ordained the said defenders
 ' to state in a special condescendence the measures which each
 ' of them respectively is willing to adopt for reducing the height
 ' of their buildings, in terms of the findings of this interlocutor,
 ' and within what time they will undertake to have the said ope-
 ' rations completed : Found, that the defenders, the Governors
 ' of the said Hospital, by having failed to enforce observance of
 ' the limitation, restriction, and servitude aforesaid, even after
 ' being duly warned that the same were in the course of viola-
 ' tion, have themselves violated the condition under which the
 ' different purchasers acquired their respective feus or portions
 ' of ground : And therefore, that the said John Clerk Maxwell,
 ' being a vassal of the said Hospital, is entitled to retain the

‘ feu-duties due by him, aye and until the observance of the said May 23, 1826.
 ‘ limitation, restriction, and servitude is duly enforced; but found
 ‘ that the other pursuers, John Cockburn, Esq. and Mrs Janet
 ‘ Dunlop, not having completed their titles with the said Hospi-
 ‘ tal, have no right to insist in that conclusion of the summons
 ‘ which has for its object to enforce the right of the said parties
 ‘ to retain the feu-duties due by each of them respectively.’

Traquair, Dobson, and others, the builders, and also the Governors of Heriot's Hospital, presented petitions to the Inner House, and on advising them with answers—

Lord Hermand observed—The defenders are bound by the terms of the charters. The case of Gibson* is not like the present one; and besides, I do not agree with the doctrine there laid down as to plans by the Lord Chancellor. Neither has the case of Burns† any application. Here there was an express contract, by which the houses were to be of a limited height, and the street to be in a certain form. The feuars bought their feus on that faith; and it might as well be pretended, that the superiors could alter the line of the street, as that they could permit an additional storey to be made to the houses. The feuars have an interest to resist this, and to enforce their rights by withholding the feu-duty till they obtain redress.

Lord Balgray.—I view the case in the same light. The contract of 1806 enters very materially into the case. The arrangement was a joint one from the first; and it was not intended for the benefit of the superiors, but of those who should be induced thereby to take feus from them. It was of no importance to the superiors whether the houses were a storey higher or not; but it was a matter of consideration to those who intended to reside in the street. The restraints were therefore intended for the benefit of the vassals; and having taken their feus on the faith that they would be enforced, and having acquired a right to this effect, I apprehend they are entitled to the remedies which they here demand.

Lord Craigie.—I am of the same opinion. Both the intention and the words of the contract are clear. We have nothing to do here with matter of taste. We must enforce a legal obligation, whatever may be the effect of it.

Lord Gillies.—I have great doubts as to the title of the pursuers to insist in the conclusions of their action. None of them

* May 4, 1814, 2 Dow, 307.

† May 4, 1823, 2 Shaw and Dunlop, No. 277.

May 23, 1826. were parties to the contract of 1806. That was an arrangement among other parties. Then they no doubt got feu-charters; and there is a restriction in them as to the height of the houses; but that restriction applies to the houses to be built on their own areas; and there is no servitude *altius non tollendi* bestowed on them as to the houses on the opposite side of the street. There has been no *jus quæsitum* in their favour. The full right remains in the superiors; who, if they chose, might either dispense with or enforce the limitations.

Lord President.—Although I concur in the conclusion at which the Lord Ordinary has arrived, I cannot agree in all his findings, and therefore I think we ought to make an interlocutor of our own. If I am the superior of a piece of ground, and feu it out for houses, and stipulate in the first charter which I grant, that the houses shall only be of a certain height, I thereby unquestionably acquire a servitude *altius non tollendi*, which servitude is for the benefit of the rest of the ground remaining unfeued. When, therefore, I grant a second charter, with a similar restriction, there is in like manner created a servitude over that part, and in favour of the tenement already erected; so that in this way there is created in the progress of feuing a mutual right of servitude in favour of all the different feuars, which each of them is entitled to enforce, even although there shall be no express servitude granted in their respective charters over the houses of their neighbours. Each of the feuars becomes my singular successor in the right of servitude for which I have stipulated. But that is precisely the case here; and any of the feuars are entitled to have effect given to it, both against the other feuars and against the superiors.

The Court therefore found, in reference to the petition for the builders, ‘ That the respondents (pursuers) are in the right of the dominant tenement to the effect of being entitled to and enforcing the servitude in question, and therefore repelled the defences, and adhered to the interlocutor reclaimed against.’

And on the petition for Heriot's Hospital, they found ‘ That the respondents are in the right of the dominant tenement, to the effect of being entitled to and enforcing the servitude in question; and refused the desire of the petition, and adhered to the interlocutor reclaimed against, finding that the said John Clerk Maxwell, being a vassal of the said Hospital, was entitled to retain the feu-duties due by him, aye and until the observance of the servitude is duly enforced; but finding that the other pursuers, John Cockburn, Esq. and Mrs Janet Dunlop, not having completed their titles with the said Hospital, have no right to insist on that conclusion of the summons, which has

‘ for its object to enforce the right of the said parties to retain May 23, 1826.
 ‘ the feu-duties due by each of them respectively, and remitted
 ‘ to the Lord Ordinary to proceed accordingly.’*

The Governors of Heriot's Hospital appealed; † and the respondents making no appearance, the case was heard *ex parte*.

Appellants.— Even if the pursuers had no direct remedy against the builders, they would have had no right to withhold the feu-duties from their superiors. There is no clause in the charters, whereby the appellants became bound to warrant to them, that the front walls of the houses, which were subsequently to be erected on the east side of the street, should not exceed forty-six feet in height. Neither is there any ruling principle of law creating such a servitude. It is true, that when a superior feus a portion of his ground, and imposes a servitude over the portion so feued in favour of the remainder of his property, a second feuar acquiring that remainder will be held to have obtained the benefit of that servitude. But here the pursuers were the first feuars; and if any party acquired a servitude, it seems to be the builders, who feuing secondly gained the advantage of the servitude imposed on the pursuers' area. But although the appellants do not object to the pursuers' right to compel the builders to reduce the height of the houses, yet they cannot allow the principle to be carried the length of authorising the feuars to retain their feu-duty from the appellants the superiors, as a compulsory on the other feuars to adhere to the terms of their charters. Besides, a superior has no interest, and consequently no title to pursue an action to compel a vassal to implement servitudes of this description. The pursuers completely failed in showing that the appellants came under any express agreement on the subject. Neither had the assertion any foundation, that they abetted the other defenders in their unlawful operations. But the pursuers are clearly acting illegally in insisting on retention of their feu-duties, seeing that they have now the remedy in their own hands, and can in their own persons demand directly from the builders the redress which they seek from the appellants as superiors.

The House of Lords declared, ‘ that John Clerk Maxwell is
 ‘ not entitled to retain the feu-duties due by him, as has been

* See 4 Shaw and Dunlop, No. 109.

† Dobson and others did not appeal.

May 23, 1826. ' found in the interlocutors complained of in said appeal; and,
 ' therefore, it is ordered and adjudged that the said interlocutors,
 ' so far as the same are therein complained of, and as is incon-
 ' sistent with this declaration, be, and the same are hereby re-
 ' versed; and it is further ordered, that the cause be remitted
 ' back to the Court of Session in Scotland, to proceed further
 ' therein as is consistent with this declaration, and as is just.'

LORD GIFFORD.—My Lords, there was a case heard before your Lordships *ex parte*—no one appearing on the part of the respondents to support the judgments—the case of the Governors of Heriot's Hospital v. Cockburn. I have had some difficulty in this case, whether I should recommend to your Lordships, at present, to come to any determination on this appeal. But after considering the case for some time, it does appear to me, that taking in view what I shall have to say to your Lordships—the series of judgments which have been pronounced in this case, one against the Governors of Heriot's Hospital, and another against the other parties—that probably your Lordships ought not to object to come to a decision upon the appeal pending before your Lordships.

My Lords, the Governors of Heriot's Hospital are proprietors of a considerable territory, as is perhaps known to some of your Lordships, in the city of Edinburgh; and, amongst others, they are proprietors of a lot on the west side of a street, called India Street, on which the dwelling-house of Mr Maxwell, who is a pursuer in this action, is erected; and they are also proprietors of land on the east side of that street.

It appears, that in the year 1806, the Provost and Magistrates of Edinburgh, who are also proprietors of lands, called Bellevue, and the appellants, who were proprietors of the grounds to the west of those last mentioned, all of which now form the northern part of the New Town of Edinburgh, and of which place India Street is a portion, entered into an agreement for laying out the ground into streets; and among other stipulations they then entered into, there is a stipulation, that the houses in India Street were not to exceed forty-six feet in height, from the level of the street to the top of the front wall. This land was then laid out by ground-plans, into streets, and squares, and crescents; but in the year 1807, the Governors of Heriot's Hospital exposed to sale certain lots in Howe Street, and the whole of the lots in India Street; and in the articles of sale, no reference is made to this contract entered into in 1806. The only reference is to the ground-plan which had been made, which is to show the number of the streets and the squares, and whatever they were, of this property. Upon that occasion, a Mr Wallace, an architect in Edinburgh, not at that sale, but after that sale, agreed to purchase 115 feet on the east side of India Street, and 115 feet on the west side of that street, at a certain sum per foot. He afterwards erected on part of this ground, on the west side of India Street, a dwelling-house, which he sold to Mr Maxwell, who is one of the respondents in this case.

The Governors of Heriot's Hospital having thus disposed of this property, were applied to for a charter by Mr Maxwell, who purchased the property immediately of Mr Wallace. Accordingly the Governors of Heriot's Hospital, on the 16th and 17th May 1820, granted to Mr Maxwell a feu-charter of this house on the west side of India Street, and in this charter there is nothing said of any obligation as to the buildings on the opposite side of the street not exceeding forty-six feet; but there is a condition on the part of Mr Wallace, that he will not erect his house higher than forty-six feet; and there were the usual stipulations in this charter, with regard to the payment of the feu-duty to the Governors of Heriot's Hospital. In that charter, they enter into no obligation that the houses on the opposite side of the street shall not exceed the height I have mentioned. It so happened, that Mr Wallace afterwards erected two other houses on this land which he had so purchased, and, subsequent to the date of the charter granted to Mr Maxwell, houses were erected on the east side of India Street by Mr Wallace and other individuals—Mr Wallace having contracted not only for 115 feet on the west side, but also a portion of the ground on the east side;—and it appears, that some of the houses erected on the east side of India Street have exceeded forty-six feet in height.

Mr Maxwell considered himself aggrieved by the parties having exceeded the height which he conceived they ought not to have exceeded; and he instituted an action against the builders, the proprietors of these houses in India Street, and against the Governors of Heriot's Hospital; by which action he seeks to compel the persons on the opposite side of the street to reduce their houses to the height of forty-six feet; and he seeks also to be relieved from the feu-duty which he had contracted to pay, being in the nature of an annual sum to Heriot's Hospital, until the houses on the opposite side of the street shall be reduced to forty-six feet. This was resisted by the Governors of Heriot's Hospital. They contended, that this gentleman had taken his feu-charter, and must be bound by the stipulations in that feu-charter, in which there were no obligations on the part of Heriot's Hospital to restrict the parties on the east side of the street not to exceed forty-six feet in height; and the persons on the opposite side of the street said that he had no right to interfere. However, on the case coming before Lord Meadowbank, as the Lord Ordinary, he pronounced a very long and elaborate interlocutor; and the result of his findings was, as against the persons on the opposite side of the way, that they must reduce their buildings to a height not exceeding forty-six feet; and he finds, 'that Mr Maxwell, being a vassal of the Hospital, was entitled to retain the feu-duties due by him, aye and until the observance of the said limitations, restriction, and servitude, is duly enforced;' but, that the other parties, not having completed their titles with the Hospital, were not entitled to retain the feu-duties due from them respectively to Heriot's Hospital.

My Lords, this matter was brought before the Court of Session by two petitions, one by the proprietors of the houses on the opposite side of the

May 23, 1826, street, and another on the part of Heriot's Hospital. Now, with respect to the petition of the proprietors of the houses on the opposite side of the street, the Court of Session pronounced this interlocutor. (His Lordship then read the interlocutor.) They therefore found, that against those proprietors on the east side of the street, the respondents were in the right of the dominant tenement—a right which entitled them to the servitude in question—the servitude being an obligation on the part of those persons, not to build their houses higher than forty-six feet.

Upon the petition of Heriot's Hospital they found—(His Lordship here read the interlocutor.) Now, your Lordships will perceive the effect of this interlocutor amounts to this—and to be sure, if it be well founded, it is a very serious finding as it affects the rights of Heriot's Hospital—that Mr Maxwell is not bound to pay Heriot's Hospital any feu-duty which he has contracted and stipulated to pay them, until the parties on the other side of the street have reduced their houses in height to forty-six feet. The consequence of this decision is, that every tenant on that side of the street, holding under Heriot's Hospital, if this decision be well founded—every one of them has a right to say, ' We will not pay our ' feu-duty to you until this has been effected by the tenants on the other ' side of the street ;' and therefore they will be entitled to retain the whole of the revenue in respect of this property, which the Hospital is entitled to receive by the terms of the charter ; and the Hospital is the more aggrieved, because it has been found, that Mr Maxwell has a right to enforce the servitude against the proprietors of the houses on the east side of the street ; and therefore they say, ' it having been found, that under the feu-charter ' granted to you by us, you being in the right of the dominant tenement ' (as they term it), have a right to enforce this servitude against the ' parties holding under feu-charters the houses on the east side of the ' street, why do you seek to retain the feu-duties against us, when the ' Court themselves have pronounced that you have a good cause of action, ' by means of the feu-charter we have granted, to enforce this servitude ' against those residing on the opposite side of the street ?' Upon this ground they have appealed ; and no one has appeared on the part of the respondents to support the judgment below. I confess to your Lordships, that when this case was heard, and since that time, it has perplexed me not a little, in considering whether your Lordships could proceed with propriety upon this appeal, till you knew the final result of the action as regards Mr Maxwell and the inhabitants on the other side, for whether they acquiesced in the judgment below, or not, we know nothing. That action is still pending, and I do not apprehend that the interlocutors against them have yet become final, so as to preclude them from appeal ; but the Hospital say, ' We do not touch the question to be decided be- ' tween Mr Maxwell and the parties proprietors of houses on the east ' side. We are very well satisfied with the decision thus far, that you, ' having the right of the dominant tenement, have the power to enforce ' this servitude against the parties on the other side of the street ; but ' then we say, you ought not to retain your feu-duty against us, because

‘ you have a complete right of action, by means of the right you have May 23, 1826.
 ‘ acquired from us against those parties, and if you have, why are you to
 ‘ retain the feu-duty against us? We have nothing to do with enforcing
 ‘ this servitude. It is to be enforced, if at all, by you. The Court have
 ‘ told you that you are entitled to enforce it, and having told you that, it
 ‘ does appear to us, that it is a hardship upon us to say, that until this be
 ‘ done we shall be deprived of the feu-duty.’

My Lords, this is the mode of argument that is adopted by Heriot's Hospital; but still I thought myself bound to look at the case in this point of view: Suppose it should turn out ultimately, (not that I ought to trouble your Lordships with any opinion on that subject, nor shall I hint any doubt upon the subject,) suppose it should turn out that they had no right—that there is not this servitude as to the tenants on the other side—then I thought it proper to examine, what would be the result of your Lordships' judgment upon the subject of retaining the feu-duties. If you should say that Mr Maxwell has this right of servitude, which can be enforced against the parties on the other side of the street, it does not appear to me, that he would have this right to retain the feu-duties payable by him. If he were to say, ‘ You Heriot's Hospital, in conjunction with other persons, have deceived me, by having lulled me into the
 ‘ belief, that these parties were not to build their houses above forty-six
 ‘ feet in height, and I have taken the charter upon that belief; and think-
 ‘ ing so, I did not call upon the Hospital to insert in their feu-charter the
 ‘ obligation, binding them that these houses should not exceed forty-six
 ‘ feet,’ I apprehend still, his remedy would not be by the retention of the feu-duty, because it would not be a servitude to be enforced against the Hospital; but his remedy would be of a very different nature, for damages, in consequence of Heriot's Hospital, and the persons on the other side, having held out their intention not to build to a height exceeding forty-six feet; because the very ground of proceeding in this cause, on which the Court have held, that Mr Maxwell was entitled to call upon the other parties to reduce the height of their buildings, is, that there was this servitude, which servitude had passed to Mr Maxwell by means of his feu-charter. But then the respondents say, ‘ There being that servitude annexed to this property, and Heriot's Hospital not having enforced it,
 ‘ in conjunction with the other parties who have built houses on the
 ‘ other side not confining their houses to that limit, therefore it is our
 ‘ right to retain the feu-duty until the servitude against the persons on
 ‘ the other side is enforced.’ But the Court have found, that they have this servitude, and that they are entitled to enforce it, without the intervention of Heriot's Hospital, against the inhabitants of the other side of the street; and, therefore, if the present decision is to stand, Heriot's Hospital having done all that was necessary for them to do, to confer the right upon Mr Maxwell to enforce this servitude against the other property, Mr Maxwell has no right to retain the feu-duty. If, on the other hand, he has not that servitude, it is extremely difficult to see upon what ground Mr Maxwell could retain the feu-duty, whatever other right he

May 23, 1826. may have against the Hospital to enforce that stipulation against the inhabitants on the east side of the street, which, he says, operated very much upon his mind when he entered into the contract with Mr Wallace for the purchase of this house.

My Lords, in considering this case, I was bound to look at it with even more than usual attention, inasmuch as no one appeared to support the decision, because your Lordships are well aware, although no one appears to support the decision appealed against, your Lordships cannot thereby necessarily infer that that decision is wrong. There is always a duty to consider whether it be right or wrong, as well where the case is argued by counsel as where it is not; because otherwise your Lordships might reverse that, as wrong, which was a perfectly correct decision. Your Lordships would not presume that the Court below had decided wrong; but when nobody appears to support the appeal, your Lordships do not enter into any discussion, whether they have decided right or not—your Lordships then affirm, without any consideration of the merits of the case, or the illegality or impropriety of the decision pronounced. But it is otherwise where the appeal is brought, and no party appears to maintain the judgment, because your Lordships will not presume that the decision is wrong until that is shown. Your Lordships will therefore take care not to set aside a decision, unless you think that it is wrong. In this case, all that the Hospital complains of is that part of the interlocutor which finds Mr Maxwell is entitled to retain the feu-duties; and nothing I have said here—if it should be communicated to the Court below—ought to have the least effect upon their judgment, as between the other parties. I have been most anxious to guard myself against expressing the slightest opinion whether that is right or wrong. On the contrary, perhaps your Lordships ought to assume it is right, more especially as the Hospital founds upon that decision: They say, ‘ You having held that Mr Maxwell has a right, with respect to the dominant tenement, to enforce the servitude in question, a fortiori we ought to be relieved against that part of the judgment that entitles you to retain the feu-duty. We have granted a charter upon due payment of the feu-duty in question, and we have not stipulated that we will enforce that servitude against the other tenants; but we have given you the power of enforcing it, and the Court say you have the power, and therefore it is inconsistent with that finding to compel us to abstain from receiving the feu-duties, and so entitle Mr Maxwell to pocket the feu-duty until he has enforced that right against the other parties, which he has already established.’ If that should be the opinion of your Lordships, you should preface your judgment with a declaration, that Mr Maxwell is not entitled to retain the feu-duties due from him to the Hospital, as found by the interlocutors complained of; and therefore reverse the interlocutors complained of, so far as the same are inconsistent with this declaration. The cause must be remitted to the Court of Session, to proceed with it as to the other parties; and before I propose that judgment to your Lordships, I will consider the precise terms in which the judgment should be framed, in

order that your Lordships' intention in regard to these interlocutors may be carried into effect, and that there may be no mistake in the Court below; but the result will be, to reverse the interlocutors, so far as they are inconsistent with this declaration. May 23, 1826.

Appellants' Authorities.—2 Ersk. 9. 33.—Brown, May 14, 1823. (2 Shaw and Dunlop, No. 277. p. 298.)

SPOTTISWOODE and ROBERTSON, Solicitors.

Sir JAMES CAMPBELL of Ardkinglass, Bart. Appellant.— No. 26.
Lushington—Keay.

Madame L. TALINE SASSEN and W. M'KENZIE, W. S.
Respondents.—*Jas. Campbell—Robertson.*

Husband and Wife—Aliment—Personal Exception.—Held (reversing the judgment of the Court of Session), 1. That a woman having failed to establish a marriage, —which she alleged was constituted by certain written documents, in which she was recognised as the defender's wife,—was not entitled to found on them to the effect of obtaining a permanent aliment during her life, she being fully aware that they had been given not intuitu matrimonii, but for another purpose, and not alleging that she had been seduced; and, 2. That it is incompetent to award interim aliment in a declarator of marriage resting on the mere allegation of the pursuer, and while no evidence of the marriage has been produced.

IN 1817, Madame Lina Taline Sassen raised an action of ad- May 23, 1826.
herence and aliment against Sir James Campbell, stating, that —
' in the month of May 1804 she was married to the said Sir 1ST DIVISION.
' James Callender, otherwise Campbell, and now designing him- Bill Chamber.
' self Sir James Campbell of Ardkinglass, at St Germain-en- Lord M'Ken-
' Laye, near Paris, and thereafter they lived and cohabited to- zie.
' gether as husband and wife, and there were several children
' born of their marriage, one of whom is still in life.' The sum-
mons then stated, that Sir James had deserted her, and conclu-
ded that he ought to be decerned ' to adhere to and cohabit with,
' treat, and entertain the pursuer in all respects as his wife, and
' to discharge all the duties incumbent on him as her husband;
' and, in case of his non-adherence,' be decerned and ordained
' to pay to the pursuer the sum of £300 sterling of yearly ali-
' ment, and that in advance, at two terms in the year,' &c.

With this summons, she produced a power of attorney, granted in her favour by Sir James, dated Paris, 23d June 1808, in contemplation of her going to Scotland on business, in which