[1*st May*, 1849.]

HENRY INGLIS, W. S., Edinburgh, *Appellant.*

DAME EUPHEMIA H. BOSWALL, of Blackadder, and the Scottish Equitable Life Assurance Society, *Respondents.*

Servitude.—The benefit of a servitude in favor of one urban tenement over another, is not lost to the dominant tenement by the fact of the servitude having been omitted to be inserted in the titles of the servient tenement for a period exceeding forty years.

Ibid.—Terms of clause in a charter creating a servitude held not to create it for the personal benefit of the then present owners of another tenement, but for the perpetual benefit of the tenement into whosesoever possession it might come.

Ibid.—User, as a painter's shop, of buildings which had been erected in the back area of a dwelling-house, under a restriction not to build on the area any other buildings except stables, coach-houses, and other offices; held not to be such an adverse possession, though continued beyond forty years, as would work off the servitude and entitle the party to erect buildings beyond the limits allowed by the restriction.

IN the year 1780 Meason agreed to feu from the magistrates of Edinburgh a piece of building-ground on the north side of St. Andrew Square, upon which four dwelling-houses were subsequently erected, forming Nos. 26, 27, 28, and 29 of that Square.

Meason subfeued one stance to Sir John Pringle, who built a house for his own residence, which formed No. 27 of St. Andrew Square, and by progress came to be vested in the Respondents. Upon one of the remaining stances Meason built a house, forming No. 26 of St. Andrew Square, and in the area behind the house he erected a coach-house and stables entering

from a Meuse Lane, which ran along the northern boundary of the area. This house, No. 26, Meason retained for his own occupation. The remaining two stances he sold to Brough, and to enable him to make up a title he transferred to him his right under the agreement with the magistrates of Edinburgh, upon terms disclosed by the charter which Brough obtained immediately from that corporation, and to be now noticed.

Brough erected two houses, forming Nos. 28 and 29 of St. Andrew Square, upon the ground so acquired by him, and on the 16th March, 1781, he obtained from the magistrates of Edinburgh a charter which, after a recital containing these expressions,—"The said Gilbert Meason, esquire, having made "an agreement with John Brough, wright in Edinburgh, with "a view to preserve the lights of his own house, and of the "house built by Sir John Pringle, and disponed to the said "John Brough the remainder of the said lots, measuring in "front to St. Andrew's Square forty-five feet, in which dis-"position it is provided that the said John Brough, his heirs "or assignees, should not erect any houses or buildings upon "that part of the said lot so disponed to him, excepting the "said houses or buildings were agreeable to a plan subscribed "by the said Gilbert Meason, esquire, and him as relative to "the said disposition;" disponed the land to Brough, his heirs and assignees, "under the express burden, that the said John "Brough and his foresaids shall, in all time coming, maintain "and uphold, upon their own expenses, the arches of the said "cellarage, and communication with the common sewers, and "also the pavement covering the same; but always with and "under this restriction and servitude in favour of the said "Gilbert Meason, esquire, and Sir John Pringle, that the said "John Brough and his foresaids shall not make any alteration "upon the buildings already erected by him, so as to alter the "present outward appearance, but agreeably to the said dis-"position granted by the said Gilbert Meason, esquire, and "plan signed by him and the said John Brough relative

" thereto, that they shall erect no other buildings of any kind " upon any part of the said areas, excepting stables and coach- " houses, or other offices to be built in a line with the coach- " house and stable belonging to the said Gilbert Meason, " esquire, on the south side of the Meuse Lane, the ridges of " which stable, coach-houses, or other offices, are to be from " four to six feet lower than the ridge of the said Gilbert " Meason, esquire, his said coach-house and stable, and to con- " tinue the said coach-houses, stable, and offices, when built, at " the same height in all time coming."

In February 1782, Brough disponed one of the houses, which formed No. 29 of St. Andrew Square, to the Earl of Buchan, under a condition that the Earl, his heirs, &c., " shall " not erect any other buildings, of any kind, on any part of the " said background, except stables, coach-houses, and other " office-houses." In September 1782, the Earl of Buchan obtained a charter from the magistrates under the procuratory of Resignation in Brough's disposition, which contained the following clause:—" But always with and under this restriction " and servitude, in favour of Gilbert Meason, esquire, merchant " in Edinburgh, and Sir John Pringle, now James Veitch, " esquire, of Elliock, one of the senators of the College of " Justice, as coming in his place,—That the said David Steuart, " Earl of Buchan, and his foresaids, shall not make any " alterations upon the buildings already erected by the said " John Brough, and now belonging to him, so as to alter the " present outward appearance, but agreeable to a disposition " granted by the said Gilbert Meason, esquire, to the said John " Brough, and plan subscribed by them as relative thereto: " that they shall not erect any other buildings, of any kind, " upon any part of the said last-mentioned areas, excepting " stables and coach-houses, or other offices, to be built on a " line with the coach-house and stable belonging to the said " Gilbert Meason, on the south side of the Meuse Lane, the " ridges of which stables, coach-houses, or other offices, are to

"be from four to six feet lower than the ridge of the said "Gilbert Meason, his said coach-house and stable, and to "continue the said coach-houses, stables, and offices, at the "same height, in all time coming." The sasine expede by the Earl upon this charter, which was duly recorded, contained a repetition of the clause just quoted *in ipsissimis verbis.*

In 1787 the Earl of Buchan disponed the same house to Ramsay by deed, taking the disponee and his heirs, &c., bound not to "erect any other buildings, of any kind, on any part of "the said background, except stables, coach-houses, or other "offices;" and a charter expede by Ramsay contained a repetition of this clause.

In 1800 Ramsay disponed the house to trustees, "with and "under the burdens and restrictions contained in my own, "and my predecessors' charters and infeftments of the same." In 1808 Ramsay's trustees disponed to Bell, with a condition not "to erect any other buildings, of any kind, on any part of "the said background, except stables or other office houses;" and a charter expede by Bell contained the same condition.

Subsequently the house passed to Messrs. Law, and was purchased from them by the appellant. Under what conditions these two parties acquired title did not appear.

In the year 1789 Ramsay, the then proprietor, erected a coach stable and other offices on the area behind the house No. 29. About the year 1808 this stable and offices were applied to the purposes of a painter's shop, and they continued to be so used thenceforth until the purchase of the house by the appellant. These buildings were nineteen feet three inches high, and thirty-six feet five inches deep, and the breadth of open area between their south wall and the north wall of the dwelling-house was sixty-four feet five inches.

In the month of May 1845, the appellant applied for leave to convert the painter's shop into chambers, to be used by him in his professional occupation as a writer to the signet, according

to a plan which shewed that the existing height of the buildings would be continued, but that their breadth would be increased about eleven feet, thereby reducing the space between their south wall and the north wall of the dwelling-house to fifty-three feet five inches.

This application was opposed by the respondent, as proprietor of the house No. 27, upon the ground that the proposed alterations would be an infringement of the servitude in favour of the respondent's house, created by the charter obtained by Brough in 1781, which she insisted she was entitled to enforce.

The Dean of Guild granted warrant to make the alterations proposed by the appellant. The respondent carried the matter by advocation to the court of session, and the Lord Ordinary (Cunninghame) on the 17th February, 1846, pronounced the following interlocutor:—"Advocates the cause: Finds "that the new buildings proposed to be erected by the respon- "dent are contrary to the express terms of the servitude in the "titles of his predecessors, which the advocators have a legal "right and interest to enforce; and on that ground remits the "case to the Dean of Guild, with instructions to recal his "interlocutor, and to refuse the warrant as at present craved "by the petitioner: Finds the advocators entitled to expenses, "as the same may be taxed by the auditor, without prejudice "to the petitioner applying for such warrant to alter or recon- "struct the buildings on his back-ground as may be consistent "with the said servitude, and to the advocators their answer to "such application as accords, and decerns." And on the 10th March, 1847, the Inner House, upon a reclaiming note by the appellant, adhered to the Lord Ordinary's interlocutor.

Sir F. Kelly, *Mr. Rolt*, and *Mr. A. M'Neill* for the Appellant.

I. The object of the restriction was to preserve the line of the Meuse Lane, not by preventing the parties from encroaching

upon the lane, but by preventing them from retiring back from its line. The alteration which the appellant proposes was not in contemplation when the restriction was imposed, and therefore is not embraced by its terms. Indeed Meason had no interest, as the respondent has not, to prevent the alteration, for if allowed it will in no degree interfere with the prospect from the respondent's house, or impair its amenity. For this reason, if there be a doubt as to the construction of the clause, the benefit of that doubt should be given to the appellant.

II. The restriction is in its terms personal to Meason and Pringle—it is not given to them, their heirs and assigns, although these expressions are used in the dispositive clause. This use of the words in one part and dropping them in another shews an intentional change of expression, and the titles prove that the charter was so understood, for while they contain an assignment of the other obligations they do not contain any of this obligation in particular. The restriction therefore was intended merely as a personal benefit to Meason and Pringle so long as they should live.

[*Lord Chancellor.*—Do you say that the restriction would fall on the death of Meason and Pringle, though it was for the benefit of their houses and was for all time coming ?]

Yes, and it might well be so. Parties might covenant for that and pay a less price than would have been asked had the restriction been perpetual. The burden was imposed upon Brough and his heirs in all time coming ; but the benefit was not given for all time coming : if that had been intended, heirs and assignees would have been introduced.

III. If the restriction had been regularly inserted in the various transmissions it might have been binding, although it had been omitted from the infeftments, and thus had not entered the record ; but when the conveyances and the infeftments for a period exceeding forty years did not disclose the servitude, a purchaser was entitled to consider that the title was as free as

the deeds and the records shewed it to be. Were this otherwise no purchaser could be in safety that a restriction of this or any other kind might not be raised up against him, although it had been constituted more than a century before, but had dropped out of the titles. By positive prescription, therefore, the land was freed from the servitude. It must be admitted that a negative servitude cannot be lost by nonuser, but an alteration in the terms of the instruments of title after a certain date, as occurs in this case, may shew a title opposed to and destructive of such a servitude. But moreover, there was here adverse enjoyment sufficient of itself to do away the servitude, for while the restriction is to use the buildings as stables and other offices the enjoyment of them for upwards of forty years has been as a painter's shop.

Finally, the respondent is barred by her own acts from founding upon the servitude, for she or her authors have infringed the servitude imposed in their own title by erecting buildings in the back area, which come even nearer to the north wall of her house than the alterations proposed by the appellant will come to the north wall of his house. This, on the authority of Walker *v.* Renton, 3 Sh. 650, is sufficient to deprive her of any right to insist against others for the benefit of the servitude.

Mr. Bethel and *Mr. Gordon* for the Respondent—cited Greene *v.* Fergusson, Wilkie *v.* Scott, Cleland *v.* Mackenzie, Mearns *v.* Massie, 5 Dec. 1800, *Hume's Cases*, 736.

LORD CHANCELLOR.—Several points have been raised in support of the appeal in this case which have been very elaborately and very ably discussed, but upon consideration of the case there does not appear to me to be sufficient ground to maintain the appeal or to shew error in the decisions of the court below.

INGLIS *v.* BOSWALL.—1st May, 1849.

The first point turns upon the construction of the charters. It is said that the right construction, assuming this party to be bound by the charters of 1781 and 1782, is that the charter of 1781 does not contain a reservation which operates to the benefit of any persons who take except Gilbert Meason and Sir John Pringle, those being the parties who were at that time the proprietors of the houses which were to be protected by the provisions of the charter.

Now it appears to me that that is contrary to the obvious meaning of the charter itself. It recites the title that Meason had obtained from the corporation of Edinburgh, and that Meason had made an agreement with Brough with a view (this was the object) to preserve the lights of his own house and that of Sir John Pringle, to whom part of the property had been agreed to be conveyed. That was the object of the charter. There can be no doubt that it was for the benefit of Meason and Sir John Pringle, as proprietors of those houses, the object being to preserve the lights of the houses, and the names of the parties were introduced only as descriptive of the premises intended to be protected by the reservation.

Then it provides that it should be "under the express "burden that the said John Brough and his foresaids shall in "all time coming maintain and uphold upon their own expense "the arches of the said cellarage and communication with the "common sewers, and also the pavement covering the same; "but always with and under this restriction and servitude in "favour of the said Gilbert Meason, Esquire, and Sir John "Pringle, that the said John Brough and his foresaids shall "not make any alteration upon the buildings already erected "by him."

Now the benefit of that is said to be confined to Meason and Pringle, the object being to preserve the lights of their houses, and the argument is that the lights were to be preserved only for the benefit of those individuals; and assuming

that they had in any way ceased to take benefit by the house, there was no longer any restriction upon using the adjoining premises in a different manner from what was mentioned in the charter for the purpose of protecting the lights of those two houses.

It appears to me perfectly obvious that the houses were to be benefitted, and not the individuals. If that be so, of course that argument entirely fails. That is the opinion I should form from the language of the instrument itself. But we find that practically it is the construction that has been put upon it by the parties themselves, because we find that Sir John Pringle ceased to occupy the premises. Then we have Sir James Pringle, and by the charter of 1782 there is this reservation: "But always with and under this restriction and "servitude in favour of Gilbert Meason, Esquire, merchant "in Edinburgh, and Sir John Pringle, now James Veitch, "Esquire, of Elliock, one of the senators of the College of "Justice, as coming in his place," that is, coming in Sir John Pringle's place; and then, on the 5th of April in the year 1784, we find, "But always with and under this restriction and "servitude in favour of Gilbert Meason, Esquire, merchant "in Edinburgh, and Sir John Pringle, now James Veitch, "Esquire, of Elliock, one of the senators of the College of "Justice, as coming in his place." Therefore the construction and the contemporaneous construction put upon this instrument by the parties themselves appears to be entirely consistent with the obvious meaning of the language used in it. Consequently, upon that part of the case and the points that were made upon it, I have no doubt that the object of this provision was a restriction for the benefit of those two houses.

The next point is that the right so created for the benefit of these two houses has been lost, because it does not appear to have been repeated after the year 1784 in the subsequent instruments executed, not by the parties claiming the benefit of the right, but by parties deriving title from those who took

the land subject to the right, and who in dealing with that land have not referred to the terms of the original charter as to the reservation, and which were "that they should erect no "other buildings of any kind upon any part of the said areas, "excepting stables or coach-houses, or other offices to be built "upon a line with the coach-house and stable belonging to the "said Gilbert Meason;" the terms in the subsequent instruments being, "that they shall not erect any other buildings of "any kind on any part of the said back-ground except stables, "coach-houses, or other office-houses;" these terms containing the restriction as found in the charter, but not limited and restricted in the way they were by the first charter.

Now it is argued that the party who has disposed of property, reserving a certain servitude over it in favour of other property, will lose the servitude if the parties claiming the premises subject to the servitude, without his concurrence, without his presence, and contrary, of course, to his interest, should omit to put upon the register by which they have to make out their title all the reservation to the full extent to which it appeared in the original charter. If that is the law, it appears to me to be a very hard law, and very destructive of those rights which a party may think it convenient and proper to reserve to himself; because the individual not being a party to these transactions, knowing nothing of them, has no means of knowing the way in which the other parties may think proper to make out their title. He has done all he could to preserve his rights; he has registered the deed containing those rights. And those other parties having omitted to search the register now make this claim. If that be the law, all I can say is, one would expect to find some very distinct and decisive authority in favour of a proposition which takes away the rights of a party, not by any act of his own, but by the acts of another who has not taken all those steps which ought to have been taken for his own safety. But having

attended to what has been argued and the authorities which have been referred to, I must say that I have heard no authority to establish such a proposition as that which has been contended for.

It is very difficult to say what the party having the right could have done if he had searched and found that this deviation in the title had taken place. There is no doubt that he would be well entitled to contend that those rights could not be interfered with by others unless something had passed adverse with respect to himself about those rights. Now here that is not contended for, because in point of fact there has been nothing adverse. All that has been done is something inserted in the titles rather short of the restriction for his benefit. Is it to be supposed that because the right which he claimed has not been dealt with by the parties in a mode inconsistent with that right, because he has not had the opportunity of enforcing it (it not having been infringed to the extent which is now sought), that therefore he has no means of protecting it? But suppose the restriction had not been departed from, and the premises had remained as they were contracted to be by the original charter, can it be contended that a party loses his right merely because no opportunity has arisen for his exercising it? I am not aware that that is the law either in this or any other country, nor has any authority been produced to support such a proposition.

With regard to the remaining point as to the description of the locality, there was a sort of attempt made to support the argument upon the ground that this place called the Meuse Lane was not a public road, and might be part of the property included in the grant. That, however, it is quite obvious could not be, because it is described as one of the bounds of the property just as much as Saint Andrew's Square is. It is clear that the Meuse Lane is not part of the property included in the grant, which is bounded on the north side by

INGLIS *v.* BOSWALL.—1st May, 1849.

Queen Street, on the east side by Saint Andrew's Street, on the south side by the Meuse Lane, and on the west by property sold by Brough to Dr. Hunter. Well, then, the provision is "that they shall erect no other buildings of any kind upon any "part of the said areas excepting stables and coach-houses, or "other offices to be built in a line with the coach-house and "stable belonging to the said Gilbert Meason, Esquire, on the "south side of the Meuse Lane."

Now it is obvious from this that Meason had at that time built the coach-house and stables, because they are referred to as existing buildings, and they were on the south side of the Meuse Lane, and that formed no part of the property in the grant. It is said that the words "to be built in the same line "with the coach-house and stable belonging to Meason," meant on the same line towards the Meuse Lane. If that were so, it would be a very senseless and a very useless reservation. The party had the land up to the Meuse Lane; he had no more. If the party had brought the building somewhat back (a circumstance not very likely), how would that have benefitted any other party, or been an injury to any other party, provided there was no restriction as to occupying the whole of the area between the Meuse Lane and the backs of the houses? The object was to preserve the area between the back of the houses and the stables, and also to limit the height to which the stables were to be carried. Now that object is distinctly attained provided the buildings should be in a line with those at the back of Meason's house, because the clause referred to all the area between the house and the stables; and it was intended that that area should all be of equal extent, and that the stables should all be at the same distance from the houses. I therefore consider that "Meuse "Lane," as introduced here, was merely descriptive of the place where Meason's stables were erected, shewing that they were erected at the Meuse Lane. And then it is provided

that any building erected shall be in the same line. That I conceive to be a construction that may reasonably be put upon the words "side of the lane," that is, the side which is towards the houses. That is exactly the line which is proposed to be evaded, and the objection is (whether it is more or less convenient I do not know) that what is proposed to be built would have the effect of extending the line of building nearer the house than the back of Meason's building.

Other points have been raised, which have been so far explained in the course of the discussion as to make it not necessary now to advert to them, particularly with regard to what Lady Boswall may have done at the back of her house.

Then comes another point which was relied upon by Mr. Rolt, and that is as to the use to which the premises at the back of the appellant's house have been applied. He says they have been applied not for the purpose of a coach-house, but for the purpose of a painter's shop. Now I find no restriction in the charter as to the use of these premises; nor was it the object of the charter so to provide. The object was to restrict buildings coming within a certain distance or approaching within certain limits of the backs of the houses. For that purpose the charter restricts the liberty both as to the building towards the house and as to the height. There is nothing else. And the buildings being kept within the limits prescribed by the charter, I see nothing to entitle the parties to say that the restriction has been departed from because these premises have been appropriated to other purposes than coach-houses. Indeed it would be very hard if they were not to be allowed to apply them to some other purpose. There are certain trades that are very noxious that parties are always prohibited from carrying on; and if that had been so here, possibly it might have been considered as a departure from the restriction in the charter, which was for the purpose of preserving the amenity of the houses. Then there being no

restriction in the charter that these premises are only to be used as coach-houses, it does not appear to me that anything that has taken place can possibly operate against the rights of the party who claims the benefit of this restriction in the charter.

For these reasons it appears to me that the Lord Ordinary's interlocutor pronounced below is correct, and ought to be affirmed.

LORD BROUGHAM.—My Lords, not having heard the whole of this argument as it has gone on, I shall decline giving any opinion, and shall only observe that as far as I have heard it I fully concur in the opinion which has been expressed by my noble and learned friend on the woolsack.

LORD CAMPBELL.—My Lords, I have heard the whole of the arguments in this case, and I concur entirely in the view which has been taken by the noble and learned Lord on the woolsack, and I do not think it is necessary to add anything to what he has said.

It is ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

LAW, HOLMES, ANTON, and TURNBULL—DUNLOP and HOPE, Agents.