part of one of the clauses in the feu-contract. The provision is in these terms:—"For which causes and on the other part the second party hereby binds and obliges himself and his heirs, executors, and successors whomsoever, conjunctly and severally, to content and pay to the said parties of the first part, and their successors or assignees whomsoever, the said yearly feu-duty of £250 hereinbefore stipulated," and other obligations.

Now, if this clause had stood, as it usually does, without the words "conjunctly and severally," it is not suggested that anybody would have been bound but such parties as are usually bound in a feu-contract. The obligation upon the party himself, his heirs, executors, and successors, bound the feuar himself in a payment of feu-duties so long as he lived, and after his death it rendered his heirs and executors liable for arrears, and made his successors in the feu responsible for all future duties. But the introduction of the words "conjunctly and severally" into this clause materially alters the number of persons affected thereby; for a conjunct and several obligation of necessity binds a plurality of persons, each to perform the whole obligation. The parties are bound, each for the whole, and it is in the option of the creditor in the obligation to enforce the whole obligation against any one of those so bound. In other words, all are liable *singuli in solidum*, and therefore whenever these words occur the parties bound in the same obligation must be bound to the same extent, and jointly as well as severally. In an ordinary feu-contract the vassal is liable in feu-duties so long only as he holds the lands, and when he parts with them his successor in the feu undertakes the liability; the heirs and executors of the original vassal are liable only in arrears, because they were only bound severally; and successors in the feu could not be called upon for anything for which the original feuar was liable.

In the present case, however, the result of the interpretation which must be put upon the words "jointly and severally" is that the original feuar and his representatives are to continue liable for the feu-duty along with the proprietor of the the lands, and that a personal obligation has been thereby undertaken which is not terminated or affected by a notice of a change of ownership under the statute. According to the ordinary form of such a clause, the obligations are all "several," but under this clause they are "conjunct and several," which in other words means that the whole parties are liable for the same feu, and exactly in same amount.

That being so, it is clear, as the Lord Ordinary says, that the obligation against the original feuar and his heirs and executors is perpetual, and that his heirs and executors are to be liable equally with the successors in the feu.

I do not suppose that the original feuar in any way realised the burden he was undertaking, but looking to the nature of the obligation imposed by the words conjunctly and severally, I have come to be of opinion that the Lord Ordinary is right in the opinion which he has expressed, and I cannot find any flaw in his argument.

Lord Mure—I am of the same opinion as your Lordship. It is quite plain, I think, that the words "conjunctly and severally" bring in as liable for this feu-duty a different and very much wider set of persons than such as are usually brought in under the terms of an ordinary feu-charter. Nor, I think, does it make any difference that the obligation is not made effectual by a separate bond, as was done in the case of *The King's College of Aberdeen* v. *Lady James Hay*, 1 Macq. 596, to which we were referred in the course of the discussion, for the contract must be viewed as a whole, whether the obligation be undertaken in one or in separate deeds. The effect of the words "conjunctly and severally" must be to make the heirs and executors of the original feuar liable for this feu-duty equally with the successors in the feu.

Lord Shand—The obligations undertaken in this feu-contract are, no doubt, of a most serious character, for it is only too clear that the original feuar cannot free himself or his representatives from the burden which it imposes. The words "conjunctly and severally" are, I think, susceptible only of the meaning contended for by the pursuers, and I have come to be of this opinion after a most careful examination of the deed, to see whether any less burdensome interpretation could be put upon them. The only meaning which can be attached to the words "conjunctly and severally" is that the original feuar and his successors in the feu, or the heirs and executors of the original feuar, and his successors in the feu, are each to be liable for the feu, and each *singuli in solidum*. With the personal obligation expressed in such unusual terms, I feel shut up to the construction adopted by the Lord Ordinary. I cannot, however, agree with him when he says to attain the present result the proprietor "could adopt no form of words more clear or effectual for that purpose than those which are employed in the obligation in question," but I do agree with him in thinking that the words used are effectual to bind the feuar and his personal successors conjunctly and severally with his successors in the feu.

Lord Deas was absent.

The Court adhered, and remitted to the Lord Ordinary to decern in terms of the conclusions of the summons.

Counsel for Pursuers — Mackintosh — Hay. Agent—J. Smith Clark, S.S.C.

Counsel for Defenders — Gloag — Strachan. Agent—Alexander Gordon, S.S.C.

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*Wednesday, February 27.*

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

### SIMPSON *v.* MASON AND M'RAE.

*Superior and Vassal — Servitude — Agreement —* Rei interventus—*Decree of Removing.*

Two proprietors were for each other's benefit restricted by their titles from building above a certain height. They entered into negotiations for the departure from these restrictions and the substitution of others, and while the agreement between them remained

in draft unexecuted, one of them, in the knowledge of the other, erected buildings of a nature inconsistent with the old and consistent with the proposed servitude, incurring great outlay in doing so. *Held* that the agreement was completed *rei interventu*, and that the proprietor so acting was entitled to have it declared that the subjects were disburdened of the old and burdened with the new servitude, and to have decree of removal of certain buildings erected by a tenant upon the ground of the other, which were inconsistent with the new servitude.

By feu-contract dated 8th September 1803, Samuel Gilmore, ropemaker in Edinburgh, disponed to James Balvaird and his spouse, in joint fee and liferent, for her liferent only, a piece of garden ground at the south side of Gilmore Street, Edinburgh. The deed contained the following mutual provisions:—"That it shall not be in the power of the said James Balvaird or his foresaids to erect any house, wall, or building of any kind upon the garden ground above disponed higher than a wall of seven and a half feet; and the said Samuel Gilmore hereby binds and obliges himself, his heirs and successors whomsoever, in like manner they shall erect no house, wall, or building of any kind upon that part of his ground which lies between the garden ground hereby conveyed and the property belonging to the Governors of James Gillespie's Hospital [higher] than ten feet on the north wall of that ground, over which ground the subjects above disponed are hereby declared to have perpetual servitude to the effect above written." By a feu-contract in 1802 Gilmore disponed to Miss M. and Miss H. Scott another piece of ground adjoining that last-mentioned. There were similar mutual restrictions as to the height of buildings which might be erected by them, and by Mr Gilmore on the piece of ground lying between theirs and Gillespie's Hospital. By another contract of feu the Misses Scott acquired another piece of Gilmore's adjoining ground under similar mutual restrictions.

Peter Simpson, S.S.C., the pursuer of this action, acquired in 1875 these three pieces of ground feued by Gilmour. W. G. Mason, the defender, was proprietor of the ground between these pieces of ground and the Gillespie's Hospital ground. The other defender M'Rae was his tenant.

Shortly after Mr Simpson acquired the subjects he entered into negotiations with Mason with the view of removing, if possible, the restrictions existing in the feu-contract, and referred to above, and thereby rendering the lands more valuable for the purpose of building. The proposal was that the old restriction should be abandoned, and mutual new servitudes created against erecting any buildings on the ground except self-contained dwelling-houses, or dwelling-houses not inferior to those in the neighbourhood. The proposal made was embodied in a draft-letter which was to be granted by Mr Mason, and which was prepared by his agent Mr Romanes, S.S.C., and forwarded to Mr Simpson for revisal. Mr Simpson, by letter to Mr Romanes, dated 18th February 1876, agreed to the terms of said letter, and undertook to grant one in similar terms to Mr Mason. The draft-letter was in these terms:—"*Edinburgh, 7 Nelson Street, February* 1876.—— Dear Sir, — With reference to the mutual servitudes and restrictions over the pieces of ground at Gilmore Place and Gillespie Street, and to the south thereof, belonging to you and Mr Mason, or possessed by either of you, or to which either of you may acquire right, against building thereon beyond a certain limited height, I have to say, on the part of Mr Mason, that he is quite willing that these servitudes and restrictions should be held as mutually abandoned and departed from; and on that footing Mr Mason has no objections to the buildings which you propose to erect on your ground; it being understood that any building to be put by either party or their successors upon any part of the grounds over which the servitudes and restrictions were created are to be self-contained dwelling-houses, or dwelling-houses of a description similar or not inferior to those in the neighbourhood.

The execution of the proposed letter of agreement was delayed pending a dispute between Mason and the superior, but the pursuer, as he averred in this action, proceeded to obtain from the superior, in consideration of an increased feu-duty, a discharge of the original servitude, and erected certain self-contained dwelling-houses on the ground belonging to him at a cost of upwards of £9000. Mason's subjects were at that time held for him by trustees till he should attain 25 years of age, which he did in 1877, but in 1876 his trustees obtained a feu-disposition from the superior, in which the superior's interest as superior in the servitude was discharged.

Mason, by lease dated 8th and 9th May 1878, let to Duncan M'Rae, joiner and builder, the lands belonging to him. The lease contained a clause "that the tenant shall not erect any buildings on the ground to the west of a line running south, in continuation of the line in front of the present houses in Gillespie Street, that would be in violation of the servitudes affecting the ground referred to, or parts thereof: And further, it is hereby stipulated and agreed that the said Duncan M'Rae and his foresaids shall be bound, whenever required, to remove any such buildings as may have already been, or may at any time hereafter be, erected by him in contravention of the above-written stipulation and prohibition, or in violation of the servitudes above referred to: And it is also hereby, as it was by the said missives of lease, stipulated and agreed, that the garden ground adjoining the said house No. 6 Gillespie Street, and also the separate garden before referred to, as the same existed at the date of the foresaid missives of lease, shall continue to be used and properly cultivated as garden ground during the whole currency of this lease; and the tenant shall not be entitled to use the same for any other purpose."

On 29th March 1883 M'Rae presented a petition in Mason's name to the Dean of Guild Court, and a warrant was granted to build on the ground let to him a stable of sixteen stalls and two loose-boxes, a smithy, and a shed at the end. The petition was not served on Simpson, and the fact that warrant for the buildings had been granted was not brought to his knowledge till some time later. He at once called upon Mason to remove the buildings, and to grant a document containing a formal discharge

of the former servitudes, and a constitution of the new one proposed in the draft-letter, that the houses to be erected should be self-contained dwelling-houses of a description not inferior to those in the neighbourhood. This was refused, on the ground that as the servitudes had not been given up at the time of M'Rae's lease, it had been stipulated therein that he should not erect anything in contravention of them, and that he ought to be ordained to remove anything he had erected in contravention of them.

Simpson accordingly raised the present action against Mason, and also against M'Rae, in which he sought to have it found and declared (1) that the pieces of ground belonging to him were free of the old servitudes restricting building above a specified limited height, and were burdened instead with a servitude restraining the building of dwelling-houses not self-contained or which were inferior to those in the neighbourhood; (2) that the defender Mason's subjects were in like manner disburdened of the old and burdened with the new servitude just mentioned; (3) Further, that the stables and shed complained of by him were a contravention of the pursuer's servitude over the ground, and that the defenders were bound to demolish and remove the same. There were alternative conclusions on the footing that the old servitudes still subsisted, and that the defenders were not entitled to erect buildings contravening them.

The pursuer averred that he would not have erected the dwelling-houses at the cost of £9000 but on the footing that the old servitudes were to be abandoned and new mutual servitudes constituted to preserve the amenity of the ground. He also alleged that the defender Mason knew he was proceeding to build in reliance on the foresaid agreement, and he allowed him to build the dwelling-houses referred to without making any objections. He further averred that the brick stables and byre erected by the defender M'Rae were in contravention of the servitude, and were causing him great loss, as the value of his houses was deteriorated, and the amenity of the ground destroyed for building purposes.

The defender Mason averred that in 1876 the pursuer made overtures both to his own superiors and to Mr Romanes, as agent for the proprietor of the subjects now belonging to the defender, with a view of having the servitudes discharged, but averred that no agreement was ever concluded on the matter; he admitted that he took no objection to Simpson erecting the buildings above referred to. He further alleged that his tenant M'Rae presented the petition to the Dean of Guild Court without his consent or knowledge, and that the stables thereafter erected were put up without his authority, and he admitted that they were in contravention of the provisions of the feu-contract.

The defender M'Rae averred that as Simpson was not a conterminous proprietor no service of the petition was required upon him; further, that he was under the belief that all the servitudes had been removed. He also averred that the pursuer's son-in-law lived quite close to where the buildings were being erected, and that the pursuer frequently passed the place and saw what was going on, and never informed him of the alleged servitude, or warned him against proceeding with the proposed buildings.

The pursuer pleaded—"(1) The said servitude having been validly constituted, or at any rate the agreement for the constitution thereof having been validated *rei interventu*, the pursuer is entitled to decree in terms of the declaratory conclusions, with expenses. (2) The erection of the said buildings being in contravention of the foresaid servitude, the defenders ought to be ordained to remove them. (3) *Separatim*, In the event of the foresaid servitude not having been validly constituted, the pursuer is entitled to decree in terms of the alternative declaratory conclusions, and the defenders ought to be ordained to take down the said buildings as concluded for."

The defender Mason pleaded—"(1) The proposed agreement to discharge the original servitudes over the subjects mentioned in the summons not having been completed, the pursuer is not entitled to decree in terms of the first two declaratory conclusions of the summons."

The defender M'Rae pleaded—"(3) The said buildings having been erected by this defender in *bona fide*, with the knowledge and acquiescence of the pursuer, he is not entitled to decree against the defender for the removal thereof."

On 24th November 1883 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"Finds (1) that it is not established that the properties of the pursuer and the principal defender are disburdened of the original servitudes against building, and are burdened with new real servitudes in the terms sought to be declared by the 1st and 2d conclusions of the summons: Finds (2) that the pursuer has, in the knowledge and with the consent of the principal defender, laid out his property for building, and has erected self-contained dwelling-houses thereon; and therefore Finds (3) that neither party is entitled, in a question with the other party, to found on the original servitudes contained in the title-deeds to the effect of restraining the erection of self-contained dwelling-houses: Finds (4) that it is not established that the said original servitudes are unconditionally discharged: and Finds (5) that the pursuer is entitled to have it ascertained by agreement or declarator what are the conditions and restrictions with reference to building which affect the estates of each of the parties in favour of the other: Appoints the case to be enrolled for further procedure under this finding: Further, finds (6) that until the institution of this action no steps were taken by either party to have the building conditions in question ascertained and reduced to writing; and that in such circumstances decree ought not to pass against the defenders for the immediate demolition of the buildings complained of, &c.

"*Opinion.*—The pursuer and the principa defender are proprietors of adjacent subjects in Edinburgh, part of a property originally known by the name of Gilmore Park, and, as I understand, they hold of the same superior. By the original feu-contract, dated 8th September 1803, the pursuer's author came under an obligation to the superior not to erect any building on the garden ground thereby conveyed exceeding 7½ feet in height; and the superior came under a reciprocal obligation not to erect any building exceeding 10 feet in height over a certain part of his property therein described.

"By the feu-contracts set forth in the second condescendence, similar obligations were under-

taken by the superior and feuar respectively, the limit in these cases being 10 feet for both parties. The principal defender is a singular successor of the superior in the subjects to which the superior's obligation applies; and it is admitted that it was the intention of the contracting parties to constitute servitudes *altius non tollendi* according to the tenor of the obligations. The second defender is the first named defender's tenant in the subjects.

"Such being the relations subsisting between these adjacent estates, the pursuer and the principal defender through their agents entered into correspondence in the intention, as I conceive, on both sides to discharge the servitudes reciprocally affecting their lands, and to enter into a substituted agreement for the appropriation of these lands for the purposes of building. It is stated that the consent of the superior was given to the discharge of the servitudes so far as he was concerned. Since that consent was obtained, the pursuer has, as he states, erected dwelling-houses of a superior class upon his property, and he complains that the defender's tenant has erected stables on part of the ground originally affected by the servitude, contrary to the agreement or negotiation which took effect in 1876.

"The parties having concurred in asking me to dispose of the case on the statements on record without a proof, I shall not attempt any formal review of the facts of the case, but will indicate briefly the grounds of my judgment:—

"1. I find that the defender, by his own admission, is under an equitable obligation to execute a regular agreement to the effect contained in his agent's draft letter of 6th February 1876 (Cond. 4), such agreement to take effect from this date.

"2. I find that the defender was not entitled to do any personal act contrary to the tenor of the said letter, knowing, as he did, that the pursuer had acted in conformity with it. But

"3. I find that no real servitude has been constituted so as to affect parties deriving right from the principal defender, and therefore that his tenant, the second named defender, is not bound to remove the temporary buildings complained of.

"4. I find that the omission to execute a regular agreement creating servitudes is not imputable to the defender, but was the joint act or neglect of the parties, and consequently that the principal defender ought not to be responsible in warrandice for the past acts of his tenant, but should grant warrandice against any future acts of the like kind, and should also come under an obligation to restore the ground at the termination of the current lease.

"5. There are no conclusions for the execution of an agreement, but if the parties acquiesce in this judgment, I shall delay putting it in form to allow of a proper agreement being executed, and reserve my judgment on the question of expenses."

The pursuer reclaimed, and argued—Either the original servitudes or the substituted agreement must exist. If the former, then the buildings objected to were a contravention of the original servitudes by being much too high; if the latter, then the buildings are not dwelling-houses as was contemplated. In either case the pursuer was entitled to decree. But further, there was *rei interventus* here, for not only did the pursuer purchase a discharge of the old servitudes by an increased feu-duty, but he proceeded to erect houses at a cost of £9000 upon the faith of the agreement; and all this was known to and acquiesced in by the defenders. The effect of the Lord Ordinary's judgment would be that there would be no existing servitudes. The pursuer never acquiesced in the erection of the stable, but it was only when they approached completion that he realised their true character.

Argued for respondent Mason — Although he was most anxious that the agreement should be carried out, yet as a matter of fact it never was completed, and there was no agreement capable of being reared up by *rei interventus*.

Authority—*Rankine* v. *M'Gibbon*, Jan. 19, 1871, 9 Macph. 423.

Argued for respondent M'Rae — Pursuer was barred by acquiescence from insisting in his demands.

At advising—

Lord President—I cannot concur in the Lord Ordinary's interlocutor in this case, but think, on the contrary, that the pursuer is entitled to have judgment substantially in terms of the conclusions of the summons.

The correspondence which took place between the pursuer and the agent of the defender Mr Mason in February 1876 establishes, I think, what the intention of the parties was, and this intention was postponed as regarded its complete execution through Mason's agent thinking that some difficulty might arise regarding a small piece of ground about which he was in correspondence with Messrs Hope, Mackay, & Mann, W.S. In his letter of 17th February 1876 he says—"I have your letter of yesterday's date, and have to remind you that I mentioned that negotiations were going on between me and Messrs Hope, Mackay, & Mann with reference to a piece of ground claimed by them for their client, although the same has been possessed by my clients and their predecessors for more than forty years—part of the subjects to which the mutual servitudes apply. As I mentioned, I was in hopes of hearing from Messrs Hope, Mackay, & Mann, in answer to a proposal I made to them, written a day or two after I saw you last week; and I was desirous of having that matter settled before dealing further with the servitudes. If, however, I had not heard from them by Tuesday last, I was to consider whether the intended arrangement between you and my clients might not be so put as not to prejudice my clients' position as in a question with Hope, Mackay, & Mann's client. Now, I have not yet heard from them. And with every wish to carry out the intended arrangement with you, I do not see that I can well do so without prejudicing my client's position with them, until some arrangement with them is concluded. At the same time, I send you for consideration the draft of such a letter as I would be disposed, on the part of Mr Mason, to give you if the question with H. M. & M.'s client were settled, on the understanding, of course, that you give a similar letter to me on behalf of Mr Mason in exchange; or perhaps a joint letter in duplicate, on 6d. agreement stamps, might be better. —Yours, &c." And accordingly the draft of the proposed letter is sent, and it expresses in very

clear terms the agreement of the parties to abrogate the existing servitudes, and to substitute for them certain new servitudes, which were, 'that any buildings to be put by either party, or their successors, upon any part of the grounds over which the servitudes and restrictions were created, are to be self-contained dwelling-houses, or dwelling-houses of a description similar, or not inferior, to those in the neighbourhood." Mr Simpson's answer to this proposal is dated the following day, and is in these terms—"I am quite agreeable to the terms of the dft. letter, and that the same should be in duplicate on an agreement stamp, and I hope you will see your way to granting it. As explained to you verbally, I cannot see that the granting of that letter will in the least affect Mr Mason in his negotiations with Messrs Hope, Mackay, & Mann, for they already know of the servitudes, and of the possibility of their being removed."

Now, it seems to me that the only thing which prevented the parties from signing and completing this agreement, and so abrogating the servitude, was this supposed difficulty regarding Hope, Mackay, & Mann's client, which Mr Simpson said he could not see, and which, for my own part, I cannot see either, but it is a matter of little moment now, as the difficulty appears to have been removed, and therefore the only thing that suspended the operation of this agreement is no longer in existence.

If the matter had rested here without *rei interventus* following on the draft letter, the agreement would of course have been binding on neither party, but then we have, as I think, as complete a case of *rei interventus* as possibly could be stated in articles 5 and 6 of the condescendence. In article 5 there is the following averment—"Mr Mason proceeded to obtain a discharge by the said Mr Napier (that is, Hope, Mackay, & Mann's client) in so far as his interest as superior of the subjects belonging to Mr Mason's said trustees was concerned. Said discharge was contained in a feu-disposition by the said Mr Napier in favour of the said trustees dated 2d May 1876, and recorded in the division of the General Register of Sasines applicable to the county of Edinburgh 9th May 1876." Now, this is admitted to be a complete solution of the only difficulty which stood in the way of the contemplated agreement being completed, and as a matter of fact the defender Mason in his answer to this article admits that the pursuer acted as if the proposed agreement had been completed. Then in article 6 the pursuer goes on to say that "in reliance upon the said agreement as a discharge by Mr Mason of the servitudes created by the said feu-contracts, and as a valid constitution of the foresaid servitudes over Mr Mason's ground in favour of the subjects belonging to the pursuer, the pursuer agreed to pay to the testamentary trustees of the late Mr Gilmore, the superiors of said subjects, an increased feu-duty in respect of their discharging the said original servitudes so far as their interest as superiors was concerned."

Now, that is one act directly proceeding from the draft-letter, and plainly to be ascribed to the agreement contained in it, for it is clear, I think, that Simpson would never have consented to pay an increased feu-duty to obtain that discharge from the superior of his right to insist upon the old servitudes unless he had relied upon that letter as a discharge of these old servitudes in so far as Mr Mason was concerned and a substitution of the new servitudes, and it is admitted that there was such an agreement between the pursuer and his superior. Then, further, the pursuer says that he "thereafter erected upon the said subjects ten self-contained dwelling-houses, similar and not inferior to those in the neighbourhood, at a cost of upwards of £9000." It is quite clear that these buildings could not have been erected so long as the old servitudes existed, while, on the other hand, they were quite in keeping with the new ones proposed in the draft agreement; and it is further to be observed that no objection was at any time taken by the defenders to these dwelling-houses while they were in the course of erection, and really I cannot conceive a stronger case of *rei interventus* than that now laid before us. In these circumstances I am of opinion that the draft-letter of 17th February 1876, being followed by *rei interventus*, must be held as binding upon the parties, and that the pursuer therefore is entitled to declarator in terms of the first two conclusions of the summons.

Then comes the case of the defender M'Rae. He gets possession of a portion of Mr Mason's ground in lease for a period of 21 years from May 1877, and in that lease Mr Mason wisely makes provision for the observance of the servitudes. He provides that "the tenant shall not erect any buildings on the ground to the west of a line running south in continuation of the line of front of the present houses in Gillespie Street that would be in violation of the servitudes affecting the ground referred to, or parts thereof: And further" (which is rather a new thing in a lease of the kind), "it is hereby stipulated and agreed that the said Duncan M'Rae and his foresaids shall be bound, whenever required, to remove any such buildings as may have already been, or may at any time hereafter be, erected by him in contravention of the above-written stipulation and prohibition, or in violation of the servitudes above referred to." Now, the servitudes referred to are, of course, the existing servitudes, whatever they have been, upon the ground as constituted by the agreement between the pursuer and Mr Mason, and the tenant is then bound even if he has erected buildings and completed them to remove them if required. They are not to remain till the end of the lease; on the contrary, he is bound and agrees when required to remove the buildings if they turn out to be in contravention of the servitudes. Now, I think an averment of acquiescence in such circumstances would require to be a very pointed and a very clear statement indeed, and one that can leave no doubt whatever on the mind of anyone that the pursuer really intended to consent to these buildings being erected, and being allowed to continue until the termination of the lease; and I can only say that in the statement which we have before us in the answer to the 7th article of the condescendence, I look in vain for any such statement. No doubt it is said that while these buildings were in course of erection the pursuer was going about the place, and had occasion to visit his son-in-law, who lived there, and must have seen what was going on. Be it so, he could not say what the building was to be while in course of erection. The course of

erection of a building of this kind is not a period of a great deal of time. Buildings of this description are run up very rapidly, and besides that it appears to me to be extremely difficult to say that the mere standing by and seeing a building of this kind put up expresses an acquiescence in its permanent position. Besides, there were the terms of the lease, which stipulates that the tenant shall remove it when required, and therefore I think the averment of acquiescence is not relevant in the circumstances of the present case, more particularly when it is considered that no notice was given to the pursuer by M'Rae that he was about to erect a building of that kind, and that the decree of lining of the Dean of Guild Court was obtained in a petition and proceedings in the name of Mason, and not of M'Rae at all, so that the building by M'Rae was a thing of which the pursuer had never any notice at all. I am therefore for repelling that plea of acquiescence, and that being so, I do not very well see how M'Rae can resist the conclusion for removal of the building. I think the pursuer is entitled to have decree of removing as against him. He does not now ask for decree of removal of the building as against Mason, although that is asked in the summons undoubtedly. But he does not now ask that there shall be decree of removal against Mason, and therefore I think there is no further difficulty about that.

Then comes the question of expenses. Now, I think the parties—the pursuer and the defender Mason— were very near coming to an arrangement which would have prevented the necessity of these servitudes being made the subject of dispute at all, but unhappily they did not quite arrive at that, and I cannot say that the fault was all on one side, or that it was chiefly on the side of the pursuer. I think what the pursuer has been found entitled to is a declarator that the old servitudes were abolished, and that the new servitudes created by the draft-letter followed by *rei interventus* are operative. Now, most certainly, Mr Mason did not concede that to the pursuer before he came into Court. Now, the letter which is particularly founded on by Mr Low is dated 15th June 1883. He states his position thus—"If you have resolved to take proceedings against Mr M'Rae, it rather appears to us that the proposed arrangements between you and Mr Mason should remain for the present *in statu quo.*" That was not a position with which the pursuer was bound to rest satisfied, but he proceeds—"or otherwise, if the agreement between you and Mr Mason is to be completed now, that it must be on the distinct understanding that Mr Mason is not to be prejudiced thereby, nor involved in litigation either with you or with M'Rae. To keep Mr Mason free from disputes with Mr M'Rae, it may be necessary to provide that Mr M'Rae's rights and interests under the lease granted to him in 1878 should not be prejudiced or affected by any agreement between you and Mr Mason to be entered into now." Here it will be observed that the only thing that is conceded upon the part of Mr Mason is that the agreement to discharge the old servitudes and create new ones shall be concluded and made effectual as from the date of this letter. Now, that is not what the pursuer is entitled to, and it is not what he has obtained by the judgment of the Court which we are about to pronounce. Further, it is in breach of Mr M'Rae's rights and the provisions of his lease—that is to say, the new servitudes are not to affect Mr M'Rae, because his lease was entered into before the agreement constituting these new servitudes was completed, and that also is inconsistent with what the pursuer has got by the judgment we are about to pronounce. But still further, although Mr Simpson's proposal on the other hand was not perhaps all that one could have wished, inasmuch as he desired to take decree *ad factum præstandum* against Mr Mason, and did not abandon that contention till the case was before us, and I think he was not entitled to a decree *ad factum præstandum* against Mr Mason, it should not have been asked; yet although that is so, it is to be observed that when the action came into Court Mr Mason contended that the agreement to take one class of servitudes for the other was not binding or effectual at all, and that he was not going to give effect to it now, as he offered to do before he came into Court, and he now maintains that the pursuer is not entitled to decree in terms of the first two declaratory conclusions of the summons; that is his main contention, and he not only maintained it, but maintained it so earnestly and so successfully that he obtained the judgment of the Lord Ordinary in his favour. Unfortunately for him, however, that judgment has been altered, and must be followed with the usual finding of expenses when a party has maintained a defence that ought not to have been stated, and therefore I think that expenses must follow as a matter of course. Mr Mason, has unfortunately for him, been unsuccessful in his contention, and I am therefore for repelling it, recalling the Lord Ordinary's interlocutor, decerning in terms of the declaratory conclusions, and decerning against Mr M'Rae in terms of the conclusions of the summons for removing.

LORD MURE concurred.

LORD SHAND—I am of the same opinion.

The Lord Ordinary says that he was asked to dispose of the case without any proof, and in those circumstances I think the due effect has hardly been given by him to the averments and admissions of parties. The case turns entirely, I think, upon *rei interventus*, for there can be no question as to the terms of the agreement, which are quite clearly expressed, and which provide that only dwelling-houses are to be erected. I agree with your Lordship in thinking that in the present case *rei interventus* is very complete. Mason comes to an arrangement with the superior by which the old servitudes are to be abolished, and Simpson attains the same result by payment of an additional feu-duty. This is followed by the erection of valuable buildings by Simpson, of a character such as could not have been put up if the old servitudes had subsisted. I also agree with your Lordship that the averment of acquiescence made by M'Rae is not relevant. M'Rae found on the face of his lease express prohibitions against the erection of buildings in violation of existing servitudes, and when he proposed to put up certain structures he took care to call no one who had any interest to object, and he obtained the necessary authority to build, from the Dean of Guild, under a wrong name.

As to the buildings erected, they are admittedly of a class inferior to those in the neighbourhood. Certain communications are alleged to have passed between the pursuer and M'Rae, but even if M'Rae proved all that he alleges, it would not in my mind amount to a relevant case of acquiescence.

Lord Deas was absent.

The Court pronounced the following interlocutor:—

"The Lords having considered the cause and heard counsel for the parties on the reclaiming-note for Peter Simpson against the interlocutor of Lord M'Laren of 30th November last, Recal the said interlocutor: Find, declare, and decern in terms of the first two declaratory conclusions against the defender Mason: Decern against the defender M'Rae in terms of the conclusions for removal as restricted per minute No. 49 of process: and as regards the alternative conclusions of declarator and removal, dismiss the action and decern," &c.

Counsel for Pursuer—Scott—Thorburn. Agent—Party.

Counsel for Defender Mason—Low. Agents—Romanes & Simson, S.S.C.

Counsel for Defender M'Rae—Strachan. Agents—Duncan, Smith, & Maclaren, S.S.C.

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*Thursday, February 28.*

## FIRST DIVISION.

[Sheriff of Forfarshire.

### PHILLIPS AND ANOTHER *v.* NICOLL AND ANOTHER.

*Reparation—Domestic Animal—Owner's Liability to take Proper Precaution for Safety of Public.*

Where the owner of a cow which was being taken through the public streets in circumstances under which it might have been expected to become excited and furious, had not taken special precautions for the safety of the passers-by—*held* that he was liable in damages to a person who had been injured by the cow.

This was an action of damages for personal injuries at the instance of Mrs Phillips, wife of James Phillips, insurance superintendent, Dundee, with consent of her husband, against James Nicoll, Millgate, Arbroath, and David Harris, butcher, there.

The facts of the case were stated by the Sheriff-Substitute (Robertson) in his interlocutor as follows:—"Finds in fact that on the 9th August 1882 the female pursuer while walking in Hill Street, Arbroath, was injured by a cow belonging to the defender Nicoll: Finds that Nicoll's servant had charge of this animal, and was taking it through the streets of Arbroath from the slaughter-house to a byre belonging to the defender Harris: Finds that the cow was in an excited and dangerous state, and required to be conveyed through the public streets with more than ordinary care: Finds that the animal was secured by a rope and halter, but that this mode of securing it was not sufficiently effective, in consequence of which it broke away from the defender's servant and ran at a furious pace upon the pavement of Hill Street: Finds that the female pursuer was either knocked down or was trampled upon by it, and sustained severe contusions on the side and leg, and that she was confined to bed for a fortnight, during which time she suffered severe pain: Finds in law that a master is liable for any carelessness of his servant in conveying an animal through the public streets, as also for the sufficiency of the tether and mode of securing the animal: Finds in fact and law that the precautions taken for the safe transit of the cow in question were not sufficient to relieve the defender Nicoll of all responsibility: Finds, therefore, that damages are due to the pursuers; assesses these at £25." He assoilzied the defender Harris.

On appeal the Sheriff (Trayner) recalled this interlocutor and assoilzied the defenders.

"*Note.*— . . . In a case like the present it is necessary for the pursuer to establish that the injury complained of arose out of some fault or negligence on the part of the defender. Such fault or negligence I cannot find established. The case presented by the pursuer is that the cow in question had become excited or infuriated in the shambles or byre adjoining the shambles, where it had been kept the night before the accident, and that being infuriated or excited when it left the shambles on the 9th of August, it was driven along the public street without sufficient precaution having been taken to prevent it injuring the passers-by. There are then two questions to consider, (1) Was the cow excited or infuriated when it left the shambles? and (2) if so, Was it sufficiently secured to make it safe to lead such a cow through the public streets? The evidence chiefly relied upon by the pursuer is that of the inspector of markets and slaughter-houses in Dundee [David Knight], who says (1) that cows brought to the shambles 'are apt to get excited after smelling the blood and offal in the slaughter-house, and I have often seen them infuriated;' and (2) that he 'would not consider an animal taken from the slaughter-house to be secured with merely a halter and a rope. I should recommend it to be tied at the head and feet.' This evidence (although proceeding from a witness of great experience in the matter to which he is speaking, and perfectly reliable) stands alone and without corroboration. But giving it the same effect as if spoken to by half-a-dozen witnesses, it amounts to this (on the first question), that animals are 'apt' in the circumstances described to become infuriated, and often do so. Plainly the effect spoken to is not invariable although frequent. Now, turning to the rest of the evidence, I find no proof whatever that the night's lodging in the byre adjoining the shambles had this effect upon the cow in question. The pursuers do not attempt to prove that when the cow left the shambles or byre on the morning of the 9th August it was excited or infuriated, or indeed was in any state which would suggest to the person having charge of it that it required any unusual care to be taken in order to prevent it doing injury to others. It is proved (1) that the cow was quiet before it went to the shambles, (2) that it was quiet immediately after