

John Spencer, photographic warehouse, Glasgow, the defender did falsely and calumniously say that he had found out a fine thing in connection with his (the defender's) place; that it was no wonder he was poor, as he had been robbed for months; that he had found as much stuff in the pursuer's place, taken from his, (the defender's) place, as it had taken three men to carry away; that Cox was then in jail; and that the pursuer would be in that night: meaning thereby that the pursuer, along with the said Joseph Laurie Cox, had been engaged in robbing him, the defender, and would be criminally apprehended that evening; or did use words to the same effect, of and concerning the pursuer—to the loss, injury, and damage of the pursuer?"

Damages laid at £500.

BLACK and GUTHRIE for pursuer.

WATSON and GLOAG for defender.

The jury unanimously returned a verdict for the defender on all the issues.

Agent for Pursuer—L. Mackersy, W.S.

Agents for Defender—Wilson, Burn, & Gloag, W.S.

Saturday, February 22.

## SECOND DIVISION.

RICHMOND v. SHAW AND SONS.

*Property—Right to cover over a Passage—Servitude—Interdict—Declarator.* Circumstances in which held that the respondents had failed to establish a right of property so as to entitle them to cover over a passage, and that the right of the complainer was that of a mere servitude. *Observed*, that the respondent's contention could only be made good in an action of declarator; and that a doubtful title could only be pleaded in the Inferior Court to the effect of a possessory judgment.

This is an advocacy from the Sheriff-court of Renfrewshire. The case originated there by a petition and interdict at the instance of William Beatty Turner, now insisted in by the advocator. The petition contained the following statement and prayer:—

"That the petitioner, the said William Beatty Turner, is heritable proprietor of a tenement situated on the north side of and fronting Hamilton Street in Greenock, and which adjoins another tenement belonging to the respondents, situated on the north side of the same street, and on the east side of Harvie Lane in Greenock.

"That by the petitioner Mr William Beatty Turner's title-deeds he is also heritable proprietor of the one-half of the close, offices, and cellars, and of the like just and equal half of the ground behind the said two tenements, which were at one time the joint property of Alexander Sinclair and Robert Sinclair, merchants in Greenock; and the said William Beatty Turner has also right to a passage or entry, described in said title-deeds as of 8 feet wide from the lane on the west, now called Harvie Lane, to the common passage or entry to the dwelling-houses of the said Robert Sinclair and Alexander Sinclair from the north; which dwelling-houses are now the said subjects, or part of the said subjects above mentioned as belonging to the said William Beatty Turner and the respondents; and

said subjects belonging to the petitioner William Beatty Turner, and the said passage are specified and described in the instrument of sasine in his favour herewith produced, recorded at Glasgow in the Particular Register of Sasines for Renfrewshire, &c., on the 21st day of May 1849.

"That the respondents are in the course of erecting a large building on their portion of said ground situated behind the said front tenements whereby they have encroached upon the above specified breadth of the said passage from Harvie Lane, particularly at the entrance thereof from that lane, where they have set down a wall of said building four inches or thereabout upon the breadth of the said passage, thereby narrowing the same at that place to 7 feet 8 inches or thereabout.

"That the said passage being the property of or at least common to both the petitioner William Beatty Turner and the respondents equally, for free ish and access to and from the ground and subjects belonging to them respectively, not only for foot passengers, but for carts, cars, waggons, and other carriages, neither the one nor other of the said parties have right to build, arch, or cover over the same, as will appear from the title-deeds of said subjects belonging to the said parties respectively, and particularly from those belonging to the said respondents, which they are now called on to produce.

"That notwithstanding thereof, the said respondents have extended a beam or lintel across or between the side walls of the door or gateway at the entrance of the said passage from Harvie Lane, and about nine feet high from the ground, and they have built a stone wall, several feet in height, upon the said lintel or beam.

"That the respondents are also about to roof, cover, or build over the whole length of the said passage from Harvie Lane to the petitioner William Beatty Turner's said subjects, at a height from the ground of only twelve feet or thereabout; whereby, and in consequence of the small height of the foresaid lintel, carts, waggons, or other vehicles, with loads thereon, of a greater height than twelve feet or even of nine feet, will be prevented from going to or from the petitioner's said subjects, and the said passage will be considerably darkened, and the free ventilation of air for drains or water-courses will be interrupted, and the petitioner William Beatty Turner's said subjects will be, in consequence thereof, greatly injured and depreciated.

"That the said William Beatty Turner has right, along with the respondents, to the foresaid other common passage or entry above mentioned, as leading to the said Robert Sinclair and Alexander Sinclair's dwelling-houses from the north, and which is situated on the south side, and near the east or south-east end of the foresaid passage from Harvie Lane, and he has exclusive right to the walls and subjects extending therefrom to the south-east corner of said last mentioned passage.

"That there is, and has been from time immemorial, a gate entrance to his own subjects exclusively in and through a wall extending across the said end of said passage; and although that wall belongs exclusively to him, and is built on his own ground, yet the said respondents have, within the last two or three days, built several feet of a brick wall upon the same in order to enable them to cover in and enclose the said passage even at that wall, and along part of the petitioner's subjects which adjoins thereto, and they are in the course of blinding or buiding up a window partly belong-

ing to the petitioners in a wall on the south side, and near the said end of said passage.

"That there is another wall belonging to the petitioner William Beatty Turner extending northward from the wall of his said gate entrance, along a cellar or warehouse also belonging to him; which wall is also on his ground, and had served as a mean or party wall between that cellar and a cellar claimed by the respondents which they have lately pulled down and removed.

"That they, the respondents, have lately, by operations on their said subjects, pulled down or perforated and cracked or rent part of the said last mentioned mean wall, whereby its stability is endangered, and they have also thereby damaged another wall belonging to the petitioner adjoining thereto.

"May it therefore please your Lordship to grant warrant for immediately interdicting, prohibiting, and discharging each of the said William Shaw, James Shaw, and William Shaw junior, respondents, and Robert Kirk, builder in Greenock, and all others employed by the respondents from building or otherwise encroaching on the above mentioned breadth of the foresaid passage from Harvie Lane, described above and in the said title-deeds as of eight feet wide, and from roofing, covering, or building over the same, and from otherways obstructing free ish and access to and from the petitioner William Beatty Turner's said subjects through the said passage as aforesaid; and in so far as the respondents have already covered or built over the said passage or part thereof, or narrowed or encroached on the foresaid breadth thereof by building, joisting, lintelling, or making other obstructions thereon, or over the same, or over the entrance thereto from Harvie Lane as aforesaid, to decern and ordain them jointly and severally forthwith to take down and remove such building, lintelling, or other obstructions: Farther, to decern and ordain them immediately to pull or take down and remove the brick wall erected by them upon the petitioner's foresaid wall at the east or south-east end of said passage, and to open up the foresaid window or part thereof which they built up as aforesaid, and also to build up, repair, and render sufficiently safe and stable, or if necessary to pull down and rebuild the foresaid party wall and the wall adjoining thereto, which they damaged or impaired as above mentioned: And find them jointly and severally liable in the expenses of this application and subsequent procedure, and reserve to the petitioner William Beatty Turner his claim and right of action against the respondents for all loss and damage sustained or to be sustained by him in consequence of their foresaid operations; or do otherwise in the case as to your Lordship shall seem proper, and decern."

After advising a long proof, the Sheriff-Substitute (TENNENT) pronounced the following interlocutor:—"The Sheriff-substitute having heard parties' procurators on the merits of the cause, Finds that the lots of ground which are now possessed by the petitioner and the respondents originally formed one lot, which was fued by John Moody from Lord Cathcart in the year 1777; that it was dispomed by Moody to Robert Sinclair and Alexander Sinclair, and by them or their trustee to Archibald Sinclair, by whom it was exposed to

public sale, under articles of roup dated 29th day of July 1788: Finds that the said lot of ground is described in said articles of roup as garden ground, together with the house, closs, offices, and cellars lately built upon said piece of ground, and presently possessed by the said Robert and Alexander Sinclair, and is farther described as amounting in measure to eighteen falls and one-ninth part of a fall: Finds that said ground was exposed by the said Archibald Sinclair in two lots, which are described as follows in the articles of roup:—"Lot first shall consist of all and whole that house presently possessed by Robert Sinclair, merchant in Greenock, of the just and equal half of the closs, offices, and cellars, which were the joint property of the said Robert Sinclair and Alexander Sinclair, and of the like just and equal half of the ground behind the same, reserving a passage or entry of eight foot wide from the lane on the west to the common passage or entry to the dwelling-houses of the said Robert Sinclair and Alexander Sinclair from the north:" Finds that the second lot is described as follows:—"Lot second shall consist of all and hail that house presently possessed by Alexander Sinclair, late merchant in Greenock, of the just and equal half of the closs and offices, and of the like just and equal half of the ground behind the same, with the liberty and privileges of the foresaid passage:" Finds that the said first lot, being the westmost, was purchased at the sale by Gregor Macgregor, and that a disposition to said lot was granted to him by the said Archibald Sinclair: Finds that lot second mentioned in the articles of sale, being the eastmost lot, was bought by Duncan Campbell; and finds that these parties thereafter, on 31st October 1785, entered into a submission, on the narrative that they did 'purchase two tenements of land, with office-houses and ground at the back thereof, from Archibald Sinclair, and that a dispute has arisen betwixt the parties respecting the division of said back ground:' Finds that upon the 16th June 1786, the arbiters pronounced the following decree-arbitral under said submission:—"We find that a passage of eight foot wide shall be taken off the lot of back ground belonging to the heirs of the said Gregor MacGregor, from his gate to the said Duncan Campbell's property, and that afterwards the remainder of the ground should be equally divided and for this purpose we did appoint James Wilson, mason, and Archibald Ritchie, wright here, to line off and stake a passage of eight feet from the gate or entrance to the said Gregor MacGregor's back ground to the beginning of the said Duncan Campbell's property, thereafter to measure the remainder with the dykes, and to divide the same equally betwixt the said Duncan Campbell and the said Gregor MacGregor's heirs; and the said James Wilson and Archibald Ritchie having laid off a passage and divided the back ground accordingly, &c., we decern and ordain that the boundaries as now marked shall be the boundaries betwixt the foresaid properties in all time coming:" Finds that the respondents, Messieurs William Shaw & Sons, by the disposition in their favour by Dr Ninian Hill, dated 17th April 1865, received a conveyance of, *inter alia*, 'All and whole the westmost half or other part and portion belonging to me,' 'of all and whole that piece of garden ground lying upon the north side of that street lately opened in Greenock, leading from the square there to the kirk burn now called Hamilton Street, of the following mensurations,' &c., and amounting, the whole of the said piece of 'garden ground in measure to eighteen

falls and one-ninth part of a fall, &c., and bounded as follows,' &c., 'but excepting and reserving from the subjects hereby conveyed the rights of the proprietors of the eastmost half of said original subjects in and to a passage of eight feet wide through the back ground of the subjects before disposed as specified in a decret-arbitral' above mentioned: Finds that the first or westmost lot of ground, now the property of the respondents Messieurs Shaws, is described in the original titles quoted above, not by any specified boundaries, but by measurement, as one half of the lot of ground which was vested in Archibald Sinclair, reserving the passage of eight foot wide from Harvie Lane to the houses of Robert and Alexander Sinclair: Finds that a dispute having arisen between the two disponees of Archibald Sinclair with regard to the division of the ground, they entered into a submission, under which the arbiters having first lined off and staked a passage of eight feet wide from the gate or entrance to the property, now the respondents', to the beginning of the petitioner's property, they then divided the remainder of the said back ground equally betwixt the said two parties: Finds that it is proved that the lot of ground, the property of the respondents, is, after deducting the contents of the eight foot passage, a little more than a half of the original lot as it was possessed by Archibald Sinclair; and that it is also, with said deduction, slightly larger than the lot belonging to the petitioner: Finds that the reservation in the petitioner's titles of the said passage of eight feet wide, confers upon him a title to object to the proceedings complained of: Finds that the descriptions of the subjects in the titles of the respondents do not embrace the said eight foot passage, and that they have not produced or founded upon any title under which they can claim possession of the *solum* of the said passage: Therefore interdicts, prohibits, and discharges Messieurs William Shaw, James Shaw, and William Shaw junior, and Robert Kirk, builder in Greenock, and all others employed by the respondents, from building or encroaching on the said common passage, and from roofing, covering, or building over the same, and from otherwise obstructing free fish and access to and from the petitioner's said subjects, through the said passage: Farther, decerns and ordains the respondents to take down and remove the brick wall erected by them upon the wall at the east or south-east end of said passage: Finds Doctor Archibald Fullerton Richmond, as coming in place of the petitioner, entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court, to tax and report, and decerns."

The Sheriff (FRASER) altered this interlocutor, finding that the respondents were proprietors of the passage in question, and that the advocator had only a right of servitude. The Sheriff added the following note to his judgment:—

"This was a case for oral hearing and for personal explanations, and not for written pleadings. Even with the aid of the amended plan and the photographs the Sheriff has found it a troublesome case.

"Having arrived at the conclusion that the passage in question is the property of the respondents, subject to a servitude of access in favour of the petitioner, the question then becomes narrowed to this, whether the proposed operations of the respondents upon their own property will interfere with reasonable access to the petitioner? The

property of this ground must be in some one. The petitioner clearly has got no conveyance to it, and it cannot be said that Archibald Sinclair, who sold the subjects in 1783, remained the proprietor of it, and did not dispose it along with the rest of the lot of ground. It is within the description of the subjects conveyed to the respondents, and the reservation in their title is a reservation of a right or privilege of access in favour of another property. The passage is not excepted from the conveyance. The Sheriff does not attach much importance to the fact that without the passage the respondents have got more ground than the half of the 18 falls. Old measurements very frequently are found to vary from modern measurements. Everything depends upon the care with which the measurements have been taken; and nothing can better illustrate this than the fact that both parties here have got more than one-half of the 18 1-9th falls.

"The respondents have a most material interest in getting this passage arched over, because they will thereby be enabled to have one block of building instead of two detached buildings. The owner of the servient tenement is entitled to all the uses of his property consistent with the preservation in a reasonable way of the servitude in favour of the dominant proprietor. For example, in the case of a road, 'the owner of the servient may enclose the ground through which the road passes, provided he leave a stile at each end of the enclosure for the foot passage (Ersk. 2, 9, 12; Bell's Prin. 987). He may substitute one road for another if equally convenient (Bruce 14,525; *Ross v. Ross*, 14,531). Gates may be erected by the owner of the servient tenement (Wood, 9th March 1809, F.C.), and in *Allan v. Provost and Bailies of Rutherglen* (4 Paton's Appeals, 269), the very point involved in this case was determined by the House of Lords, and the decision states the principle according to which the Sheriff decides. It was there found that the proprietor of lands on both sides of a servitude road 'was not entitled to erect an arch over the footpath so as to injure it by rendering the footpath dark and wet below the arch, or a low, dark, and dirty passage, but might erect an arch to connect the ground on both sides fifteen feet in length and seven feet four inches in height so as not to produce these injurious effects.'

"The question, then, comes to be, whether proposed operations of the respondents, as these are limited and explained by the respondents' procurator on pages 18 and 25 of the proof, would deprive the petitioner of his right of access. Of course the passage will be darker and the ventilation will be less free, and these would be important considerations if the property to which it is an access were mainly used as a dwelling-house, which it is not. It is situated in a quarter of workshops and manufactories. The smell from the tanwork cannot be increased by arching over the passage. A passage twelve feet high is a fair and reasonable access, and the ventilation will be kept free by the passage being open at both ends. In short, no case has been made out upon the proof of such inconvenience to the dominant proprietor as to deprive the servient proprietor of the use of his property that he proposes to make.

"The Sheriff cannot decide any question of heritable right, and the finding in the foregoing interlocutor to the effect that the respondents are proprietors of the *solum* of the passage is merely intended as the basis for disposing of the question

of interdict. In the case of *Ferrier v. Walker* (14th Feb. 1832, 10 Shaw, 317) it was held that in a possessory question interdict should be granted against any encroachment upon a passage, although ample space for ish and entry were left. The Sheriff does not understand this decision as laying down any general doctrine to the effect that in every case where the question of property is disputed an interdict must be granted against the proprietor who proposes to make the least alteration or change upon the former state of things, and that no such change can be effected without clearing up the question as to the ownership by an action of declarator.

"As to the wall, the evidence goes to show that it is a mutual or mean wall. It is not very satisfactory or clear, but such as it is it leads to this conclusion.

"The respondents having thus been so far in the wrong, neither party has been found entitled to expenses."

The petitioner advocated.

D.-F. MONCREIFF and N. C. CAMPBELL for him.

WATSON and R. V. CAMPBELL in answer.

At advising—

**LORD JUSTICE-CLERK**—This case originated in an application to the Sheriff of Renfrew to interdict, *inter alia*, the covering of a passage of which it was affirmed that the applicant and his predecessors had been in possession for eighty years. The object of the respondents was said to be, to rest a building, of considerable elevation, on the archway which was to cover the passage.

The petition was presented by Mr Turner, the then proprietor of the subjects in connection with which the passage was used. It is now insisted in by the advocator Mr Richmond, who has acquired Mr Turner's rights.

Certain matters of dispute between the parties were settled in the course of the litigation. There remains the question as to the rights of the respondents to construct the archway. The complainer stated that the passage had been, until the operations were begun, open to the sky; that the operations would deprive it of light, impede ventilation, and render it subject to bad and unhealthy smells. He alleged that the proposed height of 12 feet was insufficient for the convenient use of vans, carts, &c., which were required for the use of the premises to which it led. Other averments were made of alleged prejudice to uses to which the passage was said to have been applied, but these averments did not go to show injury to the subject as a passage. The respondents affirmed that, as the passage was to be covered not its whole extent, but only partially, there would be no deprivation of light; that the air would not be vitiated; that the only smells were caused by the discharge of liquids in the form of drugs thrown from the back premises, which were used in connection with an Apothecaries Hall; and that the height proposed was ample to secure the ish and entry of carts. They further affirmed that the covering of the passage was nothing new, and that it had been covered at one time by canvass, and thereafter by a zinc roof so stable that four men upon one occasion actually stood on it.

So far as relates to the averment of previous roofing, it turns out in the proof that there was for some years actually such a roof as is described; but that the roof was put on while the proprietor of the one subject was tenant of part of the other, and that the operation had been done by permission of

the party acting for the proprietor of the tenement, and under conditions of removal. The erection was temporary, and subject to be removed. I therefore consider that there is really nothing in the fact of the previous roofing over of the passage. As to the facts otherwise, the respondents maintained that they were owners of the passage, that the right in the passage held by the complainer was a right of servitude only, and that the proposed arch, not really interfering with the use of the servitude, was to be justified as an exercise of the right of property, the servitude right being really kept entire.

The Sheriff has held, altering the judgment of his Substitute, that the respondents are owners, and the advocator the holder of a right of servitude merely.

I feel myself constrained to differ from the Sheriff. I hold that the respondents have not succeeded in establishing that they are absolute and exclusive proprietors of the passage, and that the complainer stands in no better position than that of owner of a servitude over their property. It is certain that the complainer had a right of some sort in this passage, and that he and his predecessors had enjoyed it free and unobstructed for a period greater than the long prescription. To alter the actual state of the passage by covering it over with buildings, is an operation of a character which can only be justified by a clear title of property, and before commencing such an operation the title should be free from ambiguity.

I do not affirm that the respondents are not proprietors. The question as to the right of property is attended with difficulty. They may succeed in a process framed to try such a question that they have the right to which they pretend, but before we can come to any such conclusion it appears to me that we must have better evidence than is now before us.

We have not a full production of titles, but we learn from the documents before us that the ground on which the houses of both parties, and the ground on which this passage rests, was feued as a single subject in July 1778; that it came as an undivided property into the possession of Robert Sinclair and Alexander Sinclair, who were brothers, and in business together; and that it got, in the same state of an undivided subject into the hands of the trustee for the creditors of Robert and Alexander, and got by disposition from him in that condition into the person of Alexander Sinclair.

Alexander Sinclair exposed the subjects for sale in 1783 in two lots. Robert Sinclair was in possession of one house, Alexander Sinclair of another. Lot first consisted of "All and whole that house presently possesst by Robert Sinclair, merchant in Greenock, of the just and equal half of the closs, offices, and cellars which were the joint property of the said Robert Sinclair and Alexander Sinclair, and of the like just and equal half of the ground behind the same, reserving a passage or entry of 8 foot wide from the lane on the west to the common passage or entry to the dwelling-house of the said Robert Sinclair and Alexander Sinclair from the north; lot second shall consist of All and Hail that house presently possesst by Alexander Sinclair, late merchant in Greenock, of the just and equal half of the closs and offices, and of the like just and equal half of the ground behind the same, with the liberty and privilege of the foresaid passage."

The terms of these articles of roup are founded

on as contrasting the intended position of the proprietors of the two lots. It is not, of course, on articles of roup, but on the titles of parties executed on the completion of the transaction of sale, that the rights of the parties must depend. But in order that the view of the respondents should be given effect to, it would require to be clear that the rights were to be given in subjects then divided and of ascertained extent. To establish the relation of dominant and subservient tenement, the tenements must be separate. No one portion of a subject held in undivided property can be servient to another. So far as I can gather from these articles, the houses alone were separate. The back ground was conveyed to both in terms very appropriate to property held *pro indiviso*, and not at all likely to be used as to subjects distinct from each other, and having boundaries by which they were separated. If so, the reservation was one from the conveyance of the respondents, and not of a right of servitude. This is very strongly confirmed by the early title produced by the complainer which contains a reservation (p. 11) "of a passage or entry of 8 feet wide from the lane on the west to the common passage or entry to the dwelling-house of the said Robert Sinclair and Alexander Sinclair from the north."

This is in terms of a conveyance of "a just and equal half of what had been the joint property of Robert and Alexander Sinclair." The disposition of the authors of the respondents is *totidem verbis* the same. It is impossible to overrule the terms of the disposition by the articles of proposed roup. It is an entire subversion of the principles of feudal law to do this. Both titles in their expression are in precise conformity with the assumption of a *pro indiviso* right in the two proprietors, and a reservation of a portion of that *pro indiviso* ground to be used as a passage for both. The passage is described as leading "to a common passage;" and one would say that such a reservation must mean a reservation to both of the parties who are interested in that common passage.

It is suggested that the title of 1798 may be different in its terms from former dispositions. I cannot take that for granted. I do not think it likely—it is against all presumption—but if the respondents can make that out in a proper process it will aid him. At present I must deal with the acquisition of a subject according to the state of the titles as they are shown to us as titles to a subject then held *pro indiviso*, in which both sets of titles have reservations in terms precisely the same as to this passage.

The decret-arbitral of 1786 confirms this view. The arbiters called upon to settle the disputes of these two parties take off or reserve the ground for the passage, and then divide in exactly equal parts. This is done: and the Act is conclusive, to my mind, of this, that this passage was, before the act of division, taken off, reserved and excluded. The respondents seek to get the entire half allotted to them as the half to belong to them, and this excluded passage to the bargain. That is not a division into equal parts, but a division on unequal principles. The respondents rely on the expression that the passage "shall be taken off the lot of back ground belonging to the heirs of the said Gregor M'Gregor from his gate to the said Duncan Campbell's property." The expression is used by arbiters, who cannot be presumed to have mastered the previous titles, and whose province it was not to determine rights of property. The expression I hold capable

of being construed as that portion of the back ground which is behind Gregor M'Gregor's house, and which I have no doubt might then—except in so far as concerned the passage—be in the possession of his heirs. I do not attach much importance to what, consistently with the nature of the deed, was a mere description of locality. The act itself of separating the passage before dividing seems to me of the greatest importance—the mere phraseology of the clause of description of the passage is of little importance.

The later title of the respondents (p. 10 F G) excepts and reserves "from the subjects hereby conveyed the rights of the proprietors of the eastmost half of said original subjects in and to a passage of 8 feet wide." This is not, I think, the reservation of a mere right of way in a third party. It is a reservation "from the subjects hereby conveyed." It is a reservation *in* and *to* a passage. The expression seems to import a right greater than that of a way over a portion of ground. The result is, that while right "in" and "to" this passage upon the face of the existing title of the respondents themselves to be vested in the complainer. If there is a higher right in the complainer than a mere servitude of way—if the respondents have not shown that they are owners of the *solum*, the operation cannot be justified. The result is an alteration of the judgment of the Sheriff.

LORD COWAN concurred.

LORD BENHOLME dissented, and agreed with the Sheriff.

LORD NEAVES concurred with the majority.

Agents for Advocate—M'Ewen & Carment, W.S.  
Agent for Respondents—A. K. Mackie, S.S.C.

Saturday, February 22.

#### WILSON v. MAGISTRATES OF MUSSELBURGH.

*Feu-Contract—Clause of Relief—Public Burden.* Circumstances in which held (repeating the judgment in *Scott v. Edmond*) that an obligation of relief from public burdens in a feu-contract applied only to such burdens as were imposed in virtue of law existing at the date of the contract.

This was an action at the instance of Miss Margaret Wilson, of Olivebank, against the Magistrates of Musselburgh, and the summons concluded to have it found and declared that the defenders were bound to free and relieve the pursuer of all cess, ministers' stipend, and all other public burdens whatever, payable or which might be demanded furth of the lands of Olivebank held by her, and fued from the said burgh; and also to have the defenders decerned to make payment to the pursuer of the sum of £337, 10s. 3d., being the amount of public burdens paid by her and her predecessors, whom she represented, from Whitsunday 1843 to Whitsunday 1866.

The question arose under a feu-contract, dated in 1765, by which the Magistrates of Musselburgh feued to the pursuer's author the lands of Olivebank for the yearly feu-duty of £22, 4s., and which contained a provision that the said feu-duty should be "in full of all cess, ministers' stipends, and all other public burdens whatever, payable or which may be claimed or demanded furth of the said lands hereby fued; of all which the said Magistrates and treasurer, for themselves and in name foresaid, bind and oblige themselves and their suc-