

The Court found in answer to the first question of law in the case that the rent referred to was payable to the first party, answered the second question in the affirmative, and decerned.

Counsel for First Party—Macphail, K.C. — Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Second Party—Cooper, K.C. Dallas. Agents—Forbes, Dallas, & Co., W.S.

Tuesday, July 9.

FIRST DIVISION.

[Dean of Guild Court at Glasgow.

SOCIETY OF PROPRIETORS OF ROYAL EXCHANGE BUILDINGS, GLASGOW, LIMITED *v.* COTTON.

Property—Servitude—Non altius tollendi—Title to Enforce—Interest.

Proprietors of a large piece of ground disposed a portion of it to A. By the disposition a servitude *non altius tollendi* was constituted over A's portion in favour of the remainder. They subsequently disposed to B a portion of the remainder immediately *ex adverso* of A's portion. The distance between the buildings on these two portions was 60 feet.

Held that singular successors of B, as owners of their property, had a title to enforce the servitude; that the relative situation of the two properties was in itself sufficient to qualify an interest in B's successors to do so; and that it was not necessary for them to show that any special damage or injury would be done to their property by a proposed contravention of the servitude by successors of A.

On 22nd March 1911 the Society of Proprietors of the Royal Exchange Buildings, Glasgow, Limited, *petitioners*, presented a petition to the Dean of Guild, Glasgow, for authority to make certain alterations and additions on their property situated in Royal Exchange Square, Glasgow. The petition was opposed by Miss Mary Smythe Cotton and Miss Eliza Cotton, *objectors*, as proprietresses of property situated immediately *ex adverso* to the north of the petitioners' property.

The following statement of *facts* is taken from the interlocutor of the Dean of Guild, dated 25th April 1912—" . . . The Dean of Guild *finds in fact* (first) that the petitioners are proprietors of the property situated in Royal Exchange Square, Glasgow, bounded on the north by the property of the Royal Bank of Scotland and the property of the objectors the Misses Cotton, on the east by Queen Street, and on the south and west by the property of proprietors called as respondents but not appearing: (Second) That the peti-

tioners ask authority to make certain alterations on and additions to their property . . . : (Third) That the granting of authority is opposed by the objectors the Misses Cotton on the ground that the property of the petitioners is subject to the servitude *non altius tollendi*, under which the petitioners are not entitled to raise their buildings as they are proposing to do without the consent of the objectors, and also on the ground that in respect of the restrictions contained in the titles of the petitioners and objectors the petitioners are not entitled to make the proposed alterations on or additions to their buildings without the consent of the objectors: (Fourth) That in 1827 the properties of the petitioners and the objectors belonged to the Royal Bank of Scotland: (Fifth) That by contract of sale in that year entered into between the Royal Bank of the first part and the predecessors of the petitioners of the second part, the first party thereto undertook to deliver to the second party thereto a valid disposition of the subjects now belonging to the petitioners, and that in the said contract of sale it was provided that for the mutual accommodation of both parties in securing light, air, access, and amenity to their respective properties, the second party thereto should be bound to lay off certain spaces on the north and south boundaries of the subjects to be disposed to remain vacant and unbuilt upon in all time coming for the use, benefit, and advantage of the respective properties, the parties being bound at mutual expense to convert the vacant spaces into a carriageway and pavement, all as therein mentioned, it being declared that the tenement then existing on the said ground and then occupied by the Royal Bank as an office, which tenement and ground formed the subject of sale, should not thereafter be raised to a greater height than it was at that time unless for the sake of a centre cupola or ornament to be approved of by the Royal Bank, and that the side walls and west-end front of any building to be erected on the west of the then existing tenement should not exceed 40 feet in height, excepting a space in the centre thereof not exceeding 35 feet in width, which might be raised to the height of the then existing bank, unless it should be deemed advisable to carry the new erections 2 feet higher for the sake of architectural effect or ornament, and unless the same should be first approved of by the Royal Bank; and it was also, by the said contract of sale, declared that in like manner the buildings to be erected by the said Royal Bank or their successors upon their property fronting, *inter alia*, the north of the area which formed the subject of sale should form a handsome range of buildings not exceeding three storeys in height above the sunk storey, unless where it might be deemed expedient and proper to carry the said buildings higher for ornament or architectural effect, all as more fully set forth in the said contract of sale: (Sixth) That by the said contract of sale

it was declared that these 'provisions and declarations, with the servitudes, restrictions, and conditions before written, shall be, as they hereby are declared to be, real burdens and liens affecting the subjects hereby sold in so far as applying to them, and also affecting the subjects belonging to the said Royal Bank adjacent, in so far as applying to them, and shall as such be inserted in the disposition to be granted by the said first party or his constituents to the said second party or their aforesaid, and in any disposition to be granted by him or them of any part of the said subjects adjacent, and in the infetment on the disposition aforesaid, and in the whole other dispositions, charters, and infetments of the said premises, otherwise the dispositions, charters, and infetments in which they may be wholly or partly omitted shall be void and null:.' (Seventh) That after the said contract of sale had been entered into, but before the execution of the disposition and contract of ground annual to be presently mentioned, the parties to the said contract of sale arranged and agreed on various modifications and alterations on certain of the provisions, conditions, and other regulations contained in the said contract of sale, but that these modifications and alterations are not maintained by either the petitioners or the respondents to affect the question now in dispute: (Eighth) That by disposition dated 12th November 1833, granted by the Royal Bank in favour of the predecessors of the petitioners, the property forming the subject of the before-mentioned contract of sale was disposed to the predecessors of the petitioners, and that in the said disposition the servitudes, restrictions, &c., before mentioned were repeated *ad longum*, and it was therein set forth that whereas 'the provisions, conditions, and other regulations contained in the said contract of sale, except in so far as above recited, or as are to be hereinafter repeated, were abandoned by all concerned, buildings satisfactory to and having the sanction of all parties having been erected by our said dispoones and the ornamental covering to the east having been given up for a portico; and whereas it is necessary in terms of the said contract of sale that the provisions, declarations, burdens, servitudes, restrictions, and conditions contained therein and above recited, and as now explained, should be imposed as real burdens and liens affecting the said subjects hereby disposed, and the subjects bounding the plot or area of ground hereby disposed on the north, south, and west belonging or which belonged to us, and of which the plot or area of ground hereby disposed is a part. Therefore it is provided and declared that the whole provisions, declarations, burdens, servitudes, restrictions, and conditions before recited and as above explained are and shall be real liens and burdens affecting the subjects hereby disposed, in so far as applicable to the subjects hereby disposed, and affecting also the subjects belonging or which

belonged to us bounding the plot or area of ground hereby disposed on the north, south, and west in so far as applicable to the said surrounding subjects, and in so far as applicable to the said respective subjects, shall as such be inserted in the instruments of sasine to follow hereupon, and in any disposition to be granted by us of any part of the said subjects adjacent, and in all the other and future infetments, dispositions, and conveyances of the whole or of parts of the said respective subjects, and in the instruments of sasine to follow thereon, in so far as applicable to the said respective subjects, under the pain of nullity': And the said disposition further provided and declared, *inter alia*, that the buildings already erected on the ground purchased from the Royal Bank by John Smith, situated on the north side of the said Square, should be maintained and upheld in exact conformity with the then existing elevations thereof, and other provisions were inserted 'so as the whole buildings around may harmonise and have one entire and uniform appearance on each side of the said Square in all time coming,' and that by instrument of sasine, dated and recorded B.R. (Glasgow) 18th January 1834, the predecessors of the petitioners were infet in the subjects before mentioned, and that in the said instrument of sasine the provisions, declarations, servitudes, restrictions, and conditions as set forth in the before-mentioned disposition are repeated *ad longum*: (Ninth) That the ground purchased from the Royal Bank by John Smith, situated on the north side of the said Square, referred to in the before-mentioned disposition, was conveyed to the predecessors of the objectors by a contract of ground annual, dated 1st, 19th, and 20th August 1835, entered into between the Royal Bank of Scotland, with consent of John Smith on the one part, and Mrs Elizabeth Wignall or Smythe and others on the other part: (Tenth) That by the said contract of ground annual it is declared that the second party thereto should always be entitled to the benefit of the privileges or burdens stipulated or imposed in the contract between the Royal Bank and the Exchange Company of 1827 above mentioned: (Eleventh) That infetment in favour of the said Mrs Elizabeth Wignall or Smythe and others followed on the said contract of ground annual conform to instrument of sasine, dated 17th and recorded P.R. (Regality of Glasgow, &c.) 26th September 1835, in which instrument of sasine the provisions, declarations, &c., in the said contract of ground annual are repeated *ad longum*; and that the objectors have now right to the said subjects conveyed by the said contract of ground annual: (Twelfth) That the proposed operations of the petitioners for which authority is asked will raise the height of the petitioners' buildings and alter the style and elevation of these buildings and will contravene the restrictive provisions before mentioned; but that the objectors do not aver that the proposed operations of the petitioners will in

any way damage or injuriously affect the property belonging to the objectors. . . .”

The objectors pleaded, *inter alia*—“(1) The averments of petitioners are irrelevant to support their conclusions. (2) In respect of the servitude *non altius tollendi*, under which the petitioners are in a question with the objectors, the petitioners are not entitled to raise their buildings as they are proposing to do without the consent of the objectors.”

On 25th April 1912 the Dean of Guild pronounced this interlocutor—[After the findings in fact narrated above]—“Finds in law that as the objectors do not aver that the proposed operations of the petitioners will, if carried out, damage or injuriously affect the property belonging to them, they are not entitled to object to these proposed operations being carried out: Therefore sustains the plea-in-law for the petitioners that the objections are irrelevant: Repels the objections and grants the lining craved. . . .”

Note.—“The parties were heard upon an open record, and in the course of and at the conclusion of the debate the agent for the objectors was asked whether he wished to add to the objections an averment or averments to the effect that the proposal of the petitioners if carried out would damage or injuriously affect the property belonging to his clients; but he declined to do that, and maintained that it was not necessary in order to entitle him to plead servitude or real burden to say that he would be injured by a contravention of the servitude or real burden. The Dean is advised that that position is not sound. It is trite law that to enforce a real burden interest is necessary, and as regards the position under servitude proper the Dean of Guild thinks it only necessary to refer to the case of *The Braid Hills Hotel Company, Limited v. Manuels*, 1909 S.C. 120. There the matter is put in this way by the Lord President—‘If you find a known servitude in the titles of a servient tenement, I think in order to show a title to sue you have only really got to discover two things. You have, first of all, got to discover from the servitude itself that there is a proper dominant tenement. Nobody coming forward without something to which he can appeal as a proper dominant tenement would have a title to enforce this right. And then, secondly, over and above that, he must also of course show interest, or else he will fail on the well-known doctrines laid down in the case of *Gould v. M’Corquodale* (8 Macph. 165), where it was held that the servitude was perfectly well constituted, but that if the pursuers could not show an interest their right to enforce it fell.’ It is to be noted that in the case of *Gould v. M’Corquodale* the proprietor pleading the servitude expressly averred that the buildings there proposed would injuriously affect his property; and in the case of *Cowan v. Stewart*, 1872, 10 Macph. 735 (founded on by the objectors here), injurious interference with the lights of the complaining proprietor is expressly

mentioned in that proprietor’s answers. It may be that the provisions founded on here do not on the ground suggested by the Lord President at the end of his opinion in the *Braid Hills* case constitute a servitude proper. If they do not, then the objectors are thrown back upon real burden. Their pleas-in-law deal only with real burden and servitude, and an averment of damage or injurious affection being necessary in either case the Dean has sustained the petitioners’ plea that the objections are irrelevant. It may be, of course, that the respondents declined to aver damage or injurious affection, because they may not be confident that they would be able to prove, if a proof were allowed, or to convince a practical Court, that there would be damage. The Dean is very familiar with the neighbourhood and the properties of the parties, but he has thought it better not to apply his mind to that matter at present. He will deal with the points involved if and when the question comes before him.

“The cases cited by the parties at the debate were—by the objectors, *Cowan v. Stewart*, quoted *supra*; and by the petitioners, *MacTaggart v. Roemmele*, 1907 S.C. 1318, and *Hishop v. MacRitchie’s Trustees*.”

The objectors appealed, and argued—The case should be remitted to the Dean of Guild to refuse the lining. The petitioners were not entitled to make the proposed alterations on their building without the consent of the objectors. The objectors’ case was not founded on a *jus quæsitum tertio*. It was founded on contract. The restriction had been placed on the lands, and when restrictions were so placed they transmitted with the lands, so that singular successors in the lands for the benefit of which the restrictions had been imposed were entitled to enforce them. They were in much the same position in that respect as a superior. Since their case was founded on contract, it was not necessary for the objectors to qualify an interest. In any case the *onus* was on the petitioners to show that the objectors had no interest. They had not averred that the objectors had no interest, nor that there had been any change of circumstances. That being so, the objectors were in as good a position now to enforce the restriction as the Royal Bank or their immediate successors were in to do so immediately after the disposition had been granted to the predecessors of the petitioners in 1833. There was no doubt that the Royal Bank had an interest at that date to enforce the restriction. Counsel referred to the following cases:—*Nicholson v. Glasgow Asylum for the Blind*, 1911 S.C. 391, per Lord President at pp. 399 and 400, 48 S.L.R. 272; *The Braid Hills Hotel Company, Limited v. Manuels*, 1909 S.C. 120, 46 S.L.R. 113; *MacTaggart & Company v. Roemmele*, 1907 S.C. 1318, per Lord President at p. 1322, 44 S.L.R. 907; *Mayor, &c., of Bradford v. Pickles*, [1895] A.C. 587, per Lord Watson at p. 597; *Finnie v. Glasgow and South-Western Railway Company*, August 13, 1857, 3

Macq. 75, per Lord Chancellor and Lord Wensleydale. Even if it were necessary for the objectors to qualify an interest, the relative situation of the two properties, being *ex adverso* of each other, was in itself sufficient for that purpose—*Gould v. M'Corquodale*, November 24, 1869, 8 Macph. 165, 7 S.L.R. 108, per the Lord President and Lord Deas. It appeared from the petitioners' own plan that the two properties were so situated with regard to each other.

Argued for the petitioners—Whether this was a case of a servitude, a real burden, or a right founded upon a *jus quaesitum tertio*, it was necessary for the objectors to qualify an interest. Title alone was not sufficient—*Maguire v. Burges*, 1909 S.C. 1283, per the Lord President at pp. 1290, 1291, 46 S.L.R. 925. The interest must be not merely general but substantial—per Lord Deas in *Gould v. M'Corquodale*, *cit. sup.*, at p. 171, and Lord President in *Maclaggart & Company v. Roemmele*, *cit. sup.*, quoting Lord Watson in *Hishop v. MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571; Rankine, Law of Land Ownership, 4th ed. pp. 473, 474. The objectors had not averred any special damage or injury which would be done to their property by the proposed alterations of the petitioners. The cases of *Nicholson v. Glasgow Asylum for the Blind and Braid Hills Company, Limited v. Manuels*, cited by the appellants were distinguishable.

At advising—

LORD KINNEAR—I am unable to agree with the Dean of Guild in this case, and I think that his decision cannot be upheld.

The case begins with an application for a lining at the instance of the proprietors of the Royal Exchange Buildings of Glasgow, who desire to make certain proposed additions and alterations upon their buildings according to a plan. Certain proprietors of the property lying immediately to the north of the Exchange Buildings object on the ground that they have a right of servitude against raising the Exchange Buildings higher than they are at present, which would be violated were the lining to be granted. The Dean of Guild has repelled the objections and granted the lining.

The first question, therefore, to be considered is whether the objectors have a substantial right and interest to enforce the servitude against the building. Now that depends upon the title of the petitioners. We have on record a history of the title, from which it appears that the former proprietors of the ground now belonging to the Royal Exchange and of some adjoining ground entered into a contract of sale with the persons whom the present petitioners now represent, and the record sets forth at some length certain conditions which were contained in the contract of sale for the purpose of imposing mutual servitudes, conditions, and restrictions, upon vendor and vendee. It is not really material to

examine the terms of the contract, because it is completely superseded by the disposition which was granted by the sellers to the buyers. But then that disposition narrates at full length all the conditions contained in the contract and imposes them upon the disponees. Therefore there is no inconvenience in taking the terms of the condition which is the subject of consideration from the contract, because it is printed at full length, whereas we have got only excerpts from the disposition before us.

I take it therefore without going into the matter in any more detail, that the disponers set out in the first place that for the mutual accommodation of both parties in securing light, air, access, and amenity to their respective properties, they conveyed to the disponees under certain restrictions. To come to the particular restriction that is now applicable—"that the side walls and the west-end front of any buildings to be erected to the west of the said building should not exceed 40 feet in height, excepting a space in the centre thereof not exceeding 33 feet wide, which might be raised to the height of the then bank, unless it should be deemed advisable to carry the said new erections 2 feet higher for the sake of architectural effect or ornament."

The application to the circumstances is this, that at the time of the sale a certain portion of the ground was occupied by the disponers as the Royal Bank Buildings, and the restrictions began, in the first place, by saying that that portion is not to be raised to a greater height than it was at the time except for a certain purpose; and then it goes on to impose the restriction which I have read as to the building to be erected on the remaining ground, which, as a matter of fact, formed a continuation of the buildings already erected belonging to the Royal Bank. The material point is that these restrictions are in terms made real burdens affecting the subjects thereby disposed.

That restriction, however, was imposed, as I have already said, as part of an arrangement whereby restrictions were to be imposed in like manner upon ground retained by the sellers, because the whole restrictions on the buildings were set out to be for the mutual accommodation of both parties in the respect specified. And, accordingly, the disponers, in laying these real burdens upon the subjects disposed, undertook also that they should burden the subjects which they still retained in the same way.

Now if nothing had followed upon that disposition by way of explaining the full extent and meaning of the restriction, the only question that could have been raised would have been whether, upon a fair construction of the disposition, the restrictions imposed upon the disponees were intended for the benefit of the disponent personally or for the benefit of his property. And I apprehend there cannot be the slightest doubt, upon the construction of the disposition, that the object was to make restrictions upon the property sold

for the benefit and advantage of the property which was not sold but still retained, into whose hands soever it might come. There is nothing personal between disponent and disponent, but there is a real burden imposed upon the subjects preventing the erection of buildings above a certain height for the benefit of a certain specified tenement. Now that is simply the servitude *altius non tollendi*.

The question whether the present owners are entitled to enforce it would *prima facie*, to my mind, depend upon whether they are singular successors of the disponents in the property for the benefit of which the servitude was laid on—in other words, are they now the proprietors of the dominant tenement, because the moment it is settled that the burdens are intended for the benefit of a property and not for the benefit of a person, you have then in that specific property all that is necessary to constitute a right of servitude.

But then the appellants rely further upon the terms of their own title, and I think their argument upon that point was perfectly legitimate, although I am not prepared to say that it was absolutely necessary for the establishment of their right, because they say that when the disponents, the Royal Bank, came to sell to them or their predecessors the property on the north of the Royal Exchange Buildings, they in the first place assigned to them their rights in the burdens and restrictions imposed on the property previously sold to the predecessors of the petitioners; and in the second place they imposed burdens, conditions, and regulations for the purpose of restricting building upon the property sold and now belonging to the appellants in performance of their obligation to their previous disponents whose property they had made subject to the same restrictions.

I cannot say that there seems to me to be any question, in that state of the titles, that the appellants have a right and title to object to the lining in respect that it violates restrictions imposed upon the subjects themselves for the benefit of the property belonging to them. I think the Dean of Guild has so far accepted this view, because, after setting out in somewhat more detail than I have done the condition of the title, he goes on to find "That the proposed operations of the petitioners, for which authority is asked, will raise the height of the petitioners' buildings, and alter the style and elevation of these buildings, and will contravene the restrictive provisions before mentioned." I do not think that that finding was seriously challenged by the respondents, who otherwise are maintaining the Dean of Guild's judgment. But then he goes on to say that the objectors do not aver that the proposed operations of the petitioners will in any way damage or injuriously affect the property belonging to the objectors, and then he finds that as they do not make that averment they are not entitled to object to these proposed operations being carried out.

That, at first sight, appears to be a finding rested upon a technical point of pleading rather than anything else; but it is obvious, on reading the Dean of Guild's judgment, that he had no intention of proceeding upon any such ground as that, but that he intended to decide, as matter of substantial right, that the objectors could not prevail in this objection, because they had no interest to maintain the restrictions. Now I apprehend that there can be no question—it is perfectly well-settled law, and indeed is elementary and fundamental, that there can be no effective prædial servitude in favour of anybody who has not an interest to enforce the restrictions which the servitude creates. The servitude must be for the benefit and advantage of a dominant tenement, and unless it can be shown that the enforcement of it is for such benefit there is no effective servitude. But that there is a right in the proprietor of the dominant tenement appears to me to be made clear upon the statement of the facts to which everybody has agreed. It depends upon the relation of two pieces of ground to one another. The appellants' ground lies to the north of the area occupied by the respondents' buildings. The two lines of buildings are separated by a space of 60 feet from building line to building line. The appellants' ground is directly opposite the building which it is intended to raise, and upon that statement alone it is to my mind obvious that there is a sufficient interest to support a servitude *non altius tollendi*. That is the benefit to these specific buildings which the servitude was intended to protect.

That that is an interest recognised by law is beyond all question. It is not open to dispute. It is indeed so obvious and clear an interest that the servitude, being one of the known servitudes, might have been imposed upon the servient tenement by instruments which did not enter the infertments at all or did not enter the records, just because the mutual interests of the owners of buildings, separated from one another by a narrow space in a town, are so clear and notorious that a purchaser must take into account the probability of such an interest having been protected by a servitude, and must make his own inquiry as to the existence of such a servitude, although he finds no notice of it on the records if he is to escape the burden which it imposes.

I am therefore of opinion that there is really no ground for the Dean of Guild's rejection of the objections on the ground of want of interest.

But then it was said that, besides the general interest which is necessary to support a servitude or to support a right to enforce a building restriction which is founded upon *jus quæsitum tertio*, or again, to support a real burden, you must have, over and above, an interest which enables the complainer to show that there is some special damage or injury to be done to his property in the actual circumstances of the case by the erection of the

building of which he complains. I am not aware of any authority or any reason to support that argument. I think it was founded altogether upon a misleading practice of picking out a single sentence from a judgment without reference to the circumstances or the context in which it was said, and founding upon it as if it had been propounded as a solitary dogma to be followed in all cases without qualification.

The cases in which it has been held that, notwithstanding an apparently well-constituted servitude or real burden, the person founding upon it could not be allowed to enforce it in respect of no interest have, as I think, been resolvable, all of them, into the question whether the particular thing complained of was or was not within the scope of the servitude, or whether the complainers' tenement was so placed as to be exposed to the mischief which the servitude was intended to guard against. I see no authority for holding that you have first to find that there is a sufficient interest to support a real burden or a servitude, and then affirm that in the special circumstances of the case the party in whom that interest is vested will suffer some special damage if it is not enforced. If he has a right recognised by law, it is for him to consider whether in any particular case he will enforce it; and I cannot hold that any court of law or Dean of Guild Court can have any authority to decide that if in the whole circumstances it appears that the thing he complains of will do him no serious harm and will be for the benefit of his neighbours, therefore it is not to be enforced.

I think that is brought out very clearly in the case to which the Dean of Guild refers us, namely (although we had a long series of decisions quite properly brought before us, I think it is enough to refer to this one), *Gould v. M'Corquodale*, November 24, 1869, 8 Macph. 165, 7 S.L.R. 108, where Lord President Inglis laid down the doctrine very clearly. In that case it was said that a singular successor had not an interest to enforce a certain restriction against building. The Lord President said that he thought that the title did effectually create a servitude *altius non tollendi* in favour of the property on the south of Fox Street (the street in question) as a burden on the subjects on the north. Then he goes on to say—"To what extent such a restriction can be enforced is another matter"—whether the right thus given could be enforced all along the side of the street, that is, enforced not only in favour of the subjects directly on the south as against subjects directly on the north, but against other subjects further along the street which did not face the servient tenement, and he says—"I am inclined to think that in the case of a servitude *altius non tollendi*, if the owner of the dominant tenement had no interest to enforce it, the Court would not be disposed to sustain it if nimiously sought to be enforced *in emulationem vicini*"—that is, they would not enforce a restriction which hurts the

servient owner and does not benefit the dominant owner.

But then his Lordship goes on to say—"But that question does not occur here, for the buildings objected to are *ex adverso* of the advocator's property; and therefore if this servitude is good for any purpose, it must be effectual to keep down the height of the buildings opposite the ground belonging to the advocator." I think that sentence is directly applicable to the present case. If the servitude is good for any purpose—and it is conceded that it is a good servitude—it must be effectual to keep down the height of the buildings which are directly opposite the buildings belonging to the appellants and which the respondents propose to raise beyond the permitted height. But I think the force and extent of the doctrine of interest the Lord President was there explaining is brought out very clearly by another point in the case, because it was said that the dominant owner in that case had lost his right by allowing buildings to be erected at a different part of the street, and upon that question the Lord President says—"It must be shown (1) that Gould had a title to object, and (2) that he had as good an interest to object to these buildings as he has in the . . . case" actually in question, "for," he says, "I do not understand anyone being bound by acquiescence to allow the erection of buildings which obstruct his light merely because he has made no objection to buildings erected at a distance which do him no harm. If no harm was done him by the buildings, it would be embarking in a very foolish litigation if he attempted to stop them. It therefore appears to me that the plea of abandonment cannot be sustained. Even if Gould had a right to object to the previous buildings, he had comparatively little interest; he has an obvious interest now." This only shows, that although a servitude may be expressed in terms for the general benefit of a certain estate, it may still be a question whether a particular house within the protected area is so situated as to take any advantage from the restriction.

Now in the application of that judgment I think that the buildings proposed to be erected run counter to the purpose for which the restriction was laid on the respondents' land, because what was intended to be secured to the appellants' property was that the space already open for air and light in front of their buildings should not be diminished or restricted by the erection of higher buildings on the opposite side of the street.

I am therefore of opinion that the Dean of Guild's judgment must be recalled, and that we should remit to him to sustain the appellants' objections and to refuse the petition.

LORD JOHNSTON—I think that this is a case of proper servitude, and that it is better to treat it as such, and not to allow the question at issue to be confused by

reference to the law of real burdens or of mutuality of restrictions, although I am far from saying that the case might not also be decided on these latter considerations had it be necessary. There is a clear servitude *altius non tollendi* created on the petitioners' property as servient tenement in favour of the remaining property of the Royal Bank, the petitioners' authors, and every part of it, into whosoever hands it might come, as dominant tenement. It is none the less a servitude that a counter servitude was imposed on the dominant tenement in favour of the servient. The objectors are in right of part of the Royal Bank's remaining property, and are therefore entitled to enforce the first-mentioned servitude against the petitioners. The Dean of Guild has, I think, misapprehended the reference by your Lordship in the chair in a recent case to the case of *Gould v. M'Corquodale*, November 24, 1869, 8 Macph. 165, 7 S.L.R. 108, and perhaps still more misapprehended that case itself. In that case the Lord President (Inglis) certainly says that he was "inclined to think that in the case of a servitude *altius non tollendi*, if the owner of the dominant tenement had no interest to enforce it, the Court would not be disposed to sustain it." This is not in itself a very decided statement. But the Dean of Guild has not observed that it was conditioned by his Lordship thus—"if nimirously sought to be enforced *in amulationem vicini*." And Lord President Inglis goes on to say, in words which exactly cover the present case—"That question does not occur here, for the buildings objected to are *ex adverso* of the advocator's property, and therefore if this servitude is good for any purpose it must be effectual to keep down the height of the buildings opposite the ground belonging to the advocator."

But the Dean of Guild also consults the objectors on the ground that they did not aver, and in fact refused to be drawn into averring, that the petitioners' proposed operations would, if carried out, injuriously affect their property. I think the objectors were right in the attitude they maintained. The words of Lord Watson in the *Earl of Zetland's case* (9 R. (H.L.) at p. 47, 19 S.L.R. 680) are as applicable to the case of co-dispensees as to that of superior and vassal. The *onus* lies upon the dispennee who is pleading a release from his obligation to allege and prove that his co-dispensee's interest to enforce it has ceased to exist, and not on the latter to allege and prove his continuing interest.

For these reasons I agree with your Lordship that this appeal should be sustained.

LORD MACKENZIE—The objectors here are proprietors of property immediately *ex adverso* of the existing Royal Exchange Buildings in Glasgow. They contend that there is in the title of the petitioners a servitude *altius non tollendi*, which they as owners of the dominant tenement are entitled to plead. It was admitted that what is proposed to be done would be a

contravention of the restrictions in the petitioners' title.

It appears to me that a servitude was well constituted by the terms of the disposition granted by the Royal Bank in favour of the petitioners' predecessors, and that it was conceived in favour of the property now owned by the objectors. We are informed in the pleadings in this case that the whole provisions, declarations, servitudes, restrictions, and conditions contained in the contract of sale entered into in 1827 between the Royal Bank of Scotland and the petitioners' predecessors are repeated *ad longum* in this disposition. The contract of sale proceeds on the narrative that it was for the mutual accommodation of both parties in securing light, air, access, and amenity to their respective properties, first, that spaces of a certain width should be laid off on the north, south, and east sides of the property conveyed which were to remain vacant and unbuild upon in all time coming for the use, benefit, and advantage of the said respective properties—the parties being bound at mutual expense to convert the vacant spaces into a carriageway and pavement. Then follows a provision in regard to the height of the buildings, and, as I read the deed, this also was for the mutual accommodation of both parties in securing light, air, and amenity to their respective properties. In the contract of sale the restriction is (1) as regards the existing building, which it was provided should not be raised to a greater height than it was then, unless, for the sake of a centre cupola or ornament to be approved of by the first party, and (2) that the side walls and the west end front of any buildings to be erected to the west of the said building should not exceed 40 ft. in height, excepting a space in the centre thereof not exceeding 35 ft. wide, which might be raised to the height of the then bank, unless it should be deemed advisable to carry the said new erections 2 ft. higher for the sake of architectural effect or ornament, and unless the same should be first approved by the first party. As the disposition was granted after buildings satisfactory to and having the sanction of all parties had been erected by the petitioners' predecessors, the servitude was made applicable to the buildings which had been erected. By the contract of sale it was provided by the same clause that "in like manner" the buildings fronting each of the north, south, and west sides of the plot or area of ground should form a handsome range of buildings not exceeding three storeys in height above the sunk storey, unless where it might be deemed expedient and proper to carry the said building higher for ornament or architectural effect. It was declared by the disposition that the whole of the provisions, declarations, burdens, servitudes, restrictions, and conditions should be real liens and burdens affecting the subjects. By these provisions, in my opinion, an effectual servitude was constituted in favour of the objectors' property. It was

one of the known servitudes, *altius non tollendi*, and imposed a valid restriction on the petitioners' property. The objectors as owners of their property have thus a title to plead it. It does not appear to me to be necessary that they should have any assignation from the Royal Bank, who made the original contract with the Royal Exchange Company. In the contract of ground annual dated in 1835, under which the objectors' authors acquired right to the property, it was provided that these predecessors should be always entitled to the benefit of the privileges or burdens stipulated or imposed by the contract of sale above referred to. This clause does not appear to me to make the objectors' case better or worse. Their right is as owners of a dominant tenement, and is independent of assignation.

The petitioners, however, argue that the objectors do not aver any damage or injury which will be done to their property by the operations proposed, and are therefore not entitled to plead the servitude. There is no allegation by the petitioners of any change of circumstances. If therefore the petitioners' argument is good now, it must have been equally good immediately after the disposition was granted in 1833. The petitioners say the *onus* is upon the objectors. In my opinion the petitioners' predecessors when they accepted the disposition in 1833 of the servient tenement conceded that the owners of the dominant tenement had an interest to enforce the restriction. It is for the petitioners to aver and prove facts and circumstances sufficient to show that that interest has now been lost. This they are unable to do. The facts speak for themselves. The petitioners' property is to the south, that of the objectors is immediately *ex adverso* to the north. The distance between is only 60 ft. In these circumstances it would be out of the question to say that a servitude *altius non tollendi* is not a benefit to the objectors' property. It is plain that they have an interest, and can therefore enforce the servitude against the petitioners.

The LORD PRESIDENT, who was present at the advising, gave no opinion, not having heard the case.

The Court pronounced this interlocutor—

“Recal the interlocutor of the Dean of Guild, dated 25th April 1912, and remit to him to sustain the appellants' objections, and to refuse the petition, and decern. . . .”

Counsel for the Petitioners—Constable, K.C.—C. H. Brown. Agents—Forrester & Davidson, W.S.

Counsel for the Objectors and Appellants—Dean of Faculty (Dickson, K.C.)—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Friday, July 12.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LANARK COUNTY COUNCIL v.
MOTHERWELL MAGISTRATES.

Process—Sheriff—Burgh Extension—Special Case—Competency of Stating Case after Findings Issued by Sheriff—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 96—Motherwell Burgh Extension Act 1908 (8 Edw. VII, cap. lix), sec. 17.

Section 50 of the Local Government (Scotland) Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903, provides that the sheriff when making an adjustment of financial relations, consequent on the extension of a burgh, shall be deemed to be a single arbiter, and that he may state a special case on any question of law for the opinion of the Court.

Objection having been taken to the competency of such a case on the ground that it was too late, *held* that the fact that the Sheriff had issued certain findings did not render the case incompetent, he not having given judgment or pronounced any final award.

Johnston's Trustees v. Glasgow Corporation, 1912 S.C. 300, 49 S.L.R. 269, distinguished.

Local Government—Extension of Burgh—Inclusion of Part of County—Adjustment of Financial Relations—Method of Adjustment—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 96.

By section 50 of the Local Government (Scotland) Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903, it is provided that in default of agreement between the burgh and the county as to the adjustment of financial relations, consequent on the extension of the boundaries of the burgh, the adjustments may be determined by the Sheriff as arbiter.

Held that in making the adjustment the arbiter was not bound to proceed on the basis of (a) an apportionment of the debt existing at the date of the annexation according to the rateable values of the annexed and remanent areas; (b) a payment by the burgh of the proportion of said debt efferring to the area annexed; and (c) an adjustment of the properties and of the payment, if any, to be made in respect of the transfer or retention thereof; but that he was entitled to adjust matters on the basis of payment by the burgh of (a) any debt efferring to the property taken over along with the area annexed, (b) a sum in respect of the debt on buildings outside of the area annexed,