the payment of the aliment originally decerned for.

Doubts having been suggested as to the competency of this petition—

LORD PRESIDENT—I may state that at first I had some doubts as to the competency of the present proceeding. It is undoubtedly the practice to proceed by way of suspension, but in the old case of *Maclachlan* v. *Campbell*, May 25, 1809, F.C., a wife used caption against her husband for arrears of aliment. He presented a bill of suspension, which was refused on the merits. He also pleaded "that his funds had turned out much less than was supposed at the time of modifying the aliment, and that he was unable to pay it." The Court did not think that that appeared from his statement, and they also seem to have indicated an opinion that it was doubtful whether suspension was the proper form of raising the question, and that it "should have been brought forward by a petition to the whole Court, which it was open to the suspender to give in, since the decree of aliment was only *in hoc statu*." I think therefore that the present petition is a competent proceeding.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court granted interim liberation on caution.

Counsel for Petitioner—Dickson. Agents—J. & J. Ross, W.S.
Counsel for Respondent — Baxter. Agent—Andrew Fleming, S.S.C.

Tuesday, July 19.

SECOND DIVISION.

[Sheriff Court of Argyllshire at Tobermory.

ALLAN *v.* CAMPBELL.

Feu-Contract—Construction.

Terms of a feu-contract which were *held* to bar the feuar in an attempt to alter a weir with a view to convey an increased supply of water therefrom to his distillery.

By feu-charter dated 25th October 1823, John Sinclair of Lochaline obtained from "The British Society for Extending the Fisheries and Improving the Sea Coast of the Kingdom," a feu of a lot of ground at Ledaig, Tobermory, of which they were then heritable proprietors, for the purpose of erecting a distillery and other public works thereon, "together with liberty to use as much of the water of the main stream or river that runs on the west side of the said piece of ground as shall be sufficient for carrying on such works as have been or may be erected thereon by the said John Sinclair or his foresaids, to be conveyed in a lead or drain under the road, without raising its level, to and from the said piece of ground, in the direction and channel in which it is presently and has been hitherto used by the said John Sinclair, and not otherwise." John Sinclair erected the distillery and used it in terms of this feu-charter till 1854, when he disponed the subjects to John Clark junior, thread manufacturer, Milend, Glasgow, who again in 1863 disponed them to John Cameron Thomson. In 1870 they were made over to John Patten, W.S., Edinburgh, from whom finally they passed to Neil M'Nab Campbell, surgeon, Oban, with entry as at the term of Martinmas 1876, conform to disposition granted in his favour by the said John Patten.

This action was brought by Alexander Allan, Esquire of Aros, Tobermory, heritable proprietor of the estate of Aros, Tobermory, and as the lower proprietor of the river of Tobermory, which flows through his lands for more than a mile before discharging itself into the sea, to have the said Neil M'Nab Campbell and all those whom he might employ interdicted from erecting or constructing any works on the bed, run, or sides of the river of Tobermory, and to have him ordained to restore the said bed, run, or sides of the said river to the state in which they were before the operations complained of were begun.

In support of this action the pursuer averred that the defender had without right or title erected a dam or waterway, altogether 20 yards in length, running in a slanting direction in the bed from the right bank across the river, having its commencement at a point in the river 120 yards above the bridge of Tobermory. The works commenced with a sluice at the entrance to the lead or drain across the road, and extended into and beyond the centre of the river to a much higher level than the highest part of the lead or drain aforesaid. The lower side of the waterway wall so erected had been extended across the river to the bank on the opposite side of the river, thereby throwing the whole water in dry weather into the lead or drain. These erections interfered materially with the natural run of the water, and prevented the fish from getting up the river. He pleaded—"(1) The defender having no right or title to erect any works in the bed or at the side of the said river, interdict falls to be granted against him as prayed for. (2) The defender having no right as aforesaid, decree to remove the works complained of, and to restore the bed of the river to the state in which it was before the same were begun, falls also to be granted against him as prayed for."

The defender, on the other hand, averred that his operations were altogether confined to the lead, which had been used since time immemorial as aforesaid. The right to the water supply for the distillery works was a heritable right of great value to him. He pleaded (1)—"The defender, as heritable proprietor of the distillery works and others aforesaid, having acquired right to the use of the water of the Tobermory river so far as he requires the same for said works, and having right to complete the repairs necessary to convey the same to the said works by the channel and lead which has hitherto been used for that purpose, the present action, which is raised to interpel his so doing, should be dismissed with expenses. (2) Apart from the direct grant of the use of the water from said river, the defender, by himself and his predecessors, had by force of time, for more than the prescriptive period, acquired a servitude right to said water, and to convey the same as hitherto to the distillery work."

The Sheriff-Substitute (Ross) found that the defender had failed to prove that the dam-dyke or weir in question had been used as such by him for a period of forty years; found it proved that in virtue of a clause contained in the feu-charter, dated 5th October 1823, a dam-dyke or weir was used by the defender's authors Sinclair and Thomson, extending from the road as far as a flat rock and touching, but in no way overlapping the said rock; found that the existing weir, as repaired by the defender's author John Thomson, and partly reconstructed by the defender himself, in so far as it extended from the said road to the said flat rock, and touching but without overlapping the same, although in certain respects different from the said weir used by the said John Sinclair, was still within the rights conferred by the said charter, and that the defender was accordingly entitled to make use of the same; found that the defender, in erecting a continuation of the said weir in the river on and beyond the said flat rock, including some stones lying on the top of said flat rock, had acted in excess of his rights under the said feu-charter, and had made an illegal encroachment on the *alveus* or bed of the said river which belonged to the pursuer, and accordingly ordained the defender, within one month from the date hereof, to remove from the bed of the river the whole erection constructed by him there inwards from the said flat rock, including the said stones laid on the top of said rock as aforesaid, or so much of said structure as had not already been carried away by flood in said river, excepting such stones, if any, which although forming part of said structure were not placed there, but were obviously embedded in the river; and failing the defender removing said structure within the said time, granted warrant to the pursuer to remove the same at the defender's expense; further, interdicted the defender from erecting any such works in the bed of the river in all time coming, and decerned.

On appeal the Sheriff-Principal (Forbes Irvine) affirmed the interlocutor appealed against.

The defender appealed, and his counsel intimated that he intended to reserve his right to print the proof, but in the meantime sought a judgment in favour of his operations on a sound construction of the feu-contract.

The Lord Justice-Clerk delivered the opinion and judgment of the Court as follows—Without turning my attention to what course the appellant is going to take in regard to the proof which has been led in this case, I am of opinion that the clause contained in the feu-charter of the 25th October 1823 gives no right to the tenant to make the works complained of here. I am of opinion that the clause operated nothing in regard to the storage of the water. He has only leave to take the water according to its then existing state, and to an extent necessary for the use of his distillery, and by means in use at the date of the feu-charter. It gives no right to increase the storage of the water or to interfere with the existing weir. The clause runs—"together with liberty to use as much of the water of the main stream or river that runs on the west side of the said piece of ground as shall be sufficient for carrying on such works as have been or may be erected thereon by the said John Sinclair or his foresaids." That relates solely to the amount of water they are to use. The clause then proceeds—"to be conveyed in a lead or drain under the road without raising its level"—that is, without raising the level of the road—"to and from the said piece of ground, in the direction and channel in which it is presently and has been used by the said John Sinclair, and not otherwise."

So, then, the reading of the clause is reasonable. This is a feu of the ground near the weir for the purpose of continuing the use of as much of the water of the river as shall be sufficient to carry on the works of the distillery. But it is proposed by the appellant to raise the height and extend the width of the weir. This, which may lead to very serious results, is an innovation not authorised by the clause, and cannot, I think, be allowed. These are my views generally on the question of construction, and I agree entirely with the judgments of the Sheriffs below and the able note of the Sheriff-Depute. Lord Craighill is of my opinion, and Lord Young, who is absent to-day, has intimated, though with more doubt, his acquiescence in our views.

Our judgment, then, on this part of the case will be—"Find that the terms of the feu-charter do not by themselves confer right to perform the operations complained of: Before further answer, continue the cause till next session, that the appellant (respondent) may have an opportunity of printing the proof, if so advised, reserving all questions of expenses."

Counsel for Appellant—Trayner—Alison. Agent—John Gill, S.S.C.

Counsel for Respondent—D.-F. Kinnear, Q.C.—M'Kechnie. Agent—F. T. Martin, W.S.

Tuesday, July 19.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

BOSWELL *v.* MAGISTRATES OF EDINBURGH.

Property—Common Interest—Building—Restrictions—Urban Tenement.

The proprietor of the street and basement flats of a tenement, who was also proprietor of the open space at the back, having craved warrant to erect certain buildings on that space at the back, the proprietor of the flat above that belonging to the petitioner objected (1) that the proposed operations would be injurious to the supply of light and air to his property; and (2) that the proposed buildings would be higher than the flat belonging to the petitioner, and ought therefore to be interdicted. The Court, after a report from a man of skill to the effect that the injury to the respondents' light and air would be inappreciable, *granted* the warrant craved.

In December 1879 Alexander Boswell, trunk maker, proprietor of the street and basement floors of the tenement Nos. 8 and 10 Hanover Street, Edinburgh, and of the back ground be-