before the Lord Ordinary the maintenance of the child did not enter into his consideration. The respondent maintains that she is entitled to aliment for this child, and as a general proposition it is difficult to resist that claim, because additional expense has been caused to the respondent, but the mode of enforcing this claim raises a question of nicety. She resorted to the Sheriff and asked an award of aliment at the rate of £12 a-year for ten years from the date of the child's birth, and the Sheriff-Substitute issued a decree which is said to be in terms of the prayer of the petition. Whether he intended to do so admits of doubt; but I do not think that in any view we can adhere to the interlocutor as it stands. He fixes the inlying expenses at £4, and so far there cannot be any complaint, but the amount of aliment he gives for the child is £12 per annum with interest, and he decerns against the defender "as craved." Do these words "as craved" apply to the interest only or to the whole prayer of the petition? I think they must have been intended to apply further than the interest, because the prayer is that the said sum shall be paid monthly, and the Sheriff ordains that the aliment he allows shall be paid monthly just as the prayer demands, and if the words "as craved" must be held to apply to that, there is good reason for saying that they must be held also to apply to the term of ten years mentioned in the petition. However that may be, the Sheriff ought not to have granted aliment for ten years. His position in regard to jurisdiction involves a delicate question as to his judicial functions. No doubt one difficulty common in such cases is absent here, for separation has been granted by the proper consistorial Court. But still there is a difficulty in the Sheriff's dealing with the matter except as an interim arrangement, for in all questions between husband and wife the consistorial court is the proper *forum*, and the Sheriff can only interfere in cases of immediate necessity. The necessity in this case is limited to this, that some small sum should be awarded to let the wife maintain the child, but that may be liable to be interfered with by circumstances. Any alteration in the father's circumstances would be a ground of interference. So would an application on his part for the custody of the child. It is indispensable that every decree of this sort should bear on the face of it that it is merely *ad interim*, and a decree for ten years is not so, and I think that no term should be fixed but this, that aliment shall go on for the meantime but be terminable by any event which shall take the burden off the mother in any way. In regard to the amount, I think the Sheriff has been too extravagant. The wife has been already granted £40 per annum out of her husband's income which is little more than £100 a-year. Now, I am disposed to deal with this as an application for aliment additional to the allowance already granted in respect of the birth of the child rather than as an entirely separate action. Looking at it in that view, I think £7 per annum in addition would be a fair amount.

Lord Deas—It is an important fact that the wife got a judgment finding her entitled to separation foom her husband, for she thereby stands in such a position that there is no obstacle to this action in connection with the fact that she is his wife. I agree that the main construction of the Sheriff's power of awarding aliment to the child is that it is only *ad interim* so long as there is no change of circumstances calling for interference. For if it were to happen that the child could be claimed by the father, or if there were any alteration in the father's circumstances, then the decree would cease to be operative. In the meantime, although in this case the Sheriff has a right to interfere, he has only the right to interfere *ad interim*. He cannot fix a sum to be payable for a term of years. That would be adding materially to the provision already made, and I agree with your Lordship that the wife has substantial aliment from the husband already.

Lord Mure and Lord Shand concurred.

The Lords pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 28th October 1881: Decern against the defender for £4 sterling, as the amount of the pursuer's inlying expenses: Further decern against the defender for payment of aliment for the child borne by the pursuer at the rate of £7 per annum, payable monthly in advance, and beginning the first monthly payment on the 29th March 1881, with interest at the rate of 5 per cent. on each monthly payment from the time when the same falls due till payment is made, but declaring that the said decree for aliment is *ad interim*, subject to recal or rearrangement by this Court when any alteration of circumstances arises; find the pursuer entitled to expenses in this Court and in the Sheriff Court."

Counsel for Appellant — Guthrie Smith — Pearson—Kennedy. Agent—John Gill, S.S.C.

Counsel for Respondent—Brand—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Friday, February 24.

FIRST DIVISION.

[Dean of Guild of the Royal Burgh of Dundee.

RUSSELL *v.* COWPAR AND ANOTHER.

Property—Restriction—Servitude—Clause.

A restriction on a right of property will not be inferred, but must be clearly expressed; and where a clause may fairly bear either of two interpretations, that will be most readily adopted which is in favour of a proprietor's free use of his property.

Subjects in a town were held under a disposition which declared "that the said R and his heirs and assignees shall not be allowed to erect any buildings on any part of the said yard so as in any way to prejudice the lights of the other storeys of the said feutenement, but to use the same for a garden only." The proprietor having proposed to erect certain buildings thereon was opposed by the owners of the "other storeys." The Dean of Guild, himself an architect, being of opinion that the proposed buildings would

not prejudice the objectors' light, granted warrant for their erection. The objectors having appealed, appeal *refused*, on the principle above stated.

By disposition dated in September 1878, James Thomson Russell, hotel-keeper, Dundee, acquired from Macnaughton's trustees, *inter alia*, the following subjects in Dundee:—"Second, All and Whole that piece of ground . . . measuring 10 poles and 18½ yards imperial measure or thereby, together with the buildings and erections thereon, consisting of a bakehouse lying immediately to the west of Malthouse Close, sometime occupied by Peter Anderson, baker; a billiard-room immediately to the south of said bakehouse, in connection with and communicating with the Royal Hotel" (the property of the said J. T. Russell) "by an entrance over the said Malthouse Close; and the tenement of three stories situated to the south of said billiard-room, occupied as dwelling-houses by, now or lately, James Thomson and others, tenants; which subjects are bounded as follows, viz.:— . . . And which subjects hereby disponed are part and portion of All and Whole the ground storey of All and Whole that tenement of land built by Alexander Robertson, merchant, and which was formerly old walls, together with the yard and bakehouse built on the said yard; . . . but under the declaration, so far as applicable to the said subjects secondly hereby disponed, that the said James Thomson Russell and his heirs and assignees shall not be allowed to erect any buildings on any part of the said yard so as in any way to prejudice the lights of the other storeys of the said fore-tenement, but to use the same for a garden only." . . .

Russell brought this petition before the Dean of Guild of the burgh of Dundee for warrant and authority to take down two buildings, consisting of a laundry, wash-house, stock-room, and billiard-room, all standing on the said subjects so disponed to him, and on their being taken down, to erect, partly on their site and partly extending into the yard also disponed to him, buildings consisting of a laundry, washing-house, stock-rooms, billiard-room, and other accommodation in connection with his hotel premises. Service of the petition was craved upon the various proprietors of subjects conterminous with the petitioner's said property. Answers were lodged for two of these, viz., Mrs Elizabeth Cowpar and Mr Crichton, who were proprietors respectively of the third and second storeys from the ground of the said tenement of land built by Alexander Robertson, of the ground storey of which the subjects disponed to Russell, the petitioner, formed part, as above narrated.

Both the petitioner and the respondents derived their title to their respective subjects from a common author, viz., the town of Dundee. In the disposition, granted in the year 1779 by the said town to William Henderson, baker in Dundee, the petitioner's predecessor, the following clause occurred:—"Declaring alwise, as it is hereby expressly provided and declared, and appointed to be engrossed in the infeftment to follow hereupon" (which infeftment duly contained the declaration), "that the said William Henderson, his heirs and assignees, shall not be allowed to erect any buildings on any part of the said yard so as in any way to prejudice the lights of the other storeys of the said tenement, but to use the same for a garden only." And the disposition granted on the same day by the town to John Small, the objector Crichton's predecessor, contained this corresponding declaration:—"Declaring alwise, as it is hereby expressly provided and declared, that William Henderson, baker in Dundee, his heirs and assignees, to whom the lower storey of the said tenement, the yeard to the southward thereof, and bakehouse therein, is this day disponed, shall not be allowed to erect any buildings on any part of the said yeard, so as in any way to prejudice the lights of the subject hereby disponed or the other storeys, but to use the same for a garden only."

The respondents averred—"(Stat. 3) The said yard is held by the petitioner or other proprietor thereof under, and their right and title to the same is burdened with, the condition and servitude that the said petitioner or other proprietor shall not be allowed or entitled to erect any buildings on any part of the said yard so as in any way to prejudice the lights of the subjects before prescribed belonging to the respondents, or of the other storeys of the tenement, and that the said yard shall be used for a garden only. (Stat. 4) The said condition and servitude so imposed on the said yard and proprietors thereof is conceived in favour of, and conferred as a right upon, *inter alia*, the subjects before described, belonging to the respondents, and the respondents, as proprietors of the said subjects, have a right and title to insist upon said condition and servitude being preserved and maintained, and to prevent any act or acts which may be in breach of, or may interfere or infringe upon, the same. (Stat. 5) The operations proposed by the petitioner will be prejudicial to the rights of the respondents' said subjects, and be an encroachment on the said yard and its use as a garden only, and said operations will also be in direct breach of, and an interference with, and an infringement upon said condition and servitude, and the said rights of the respondents as proprietors of the dominant tenement, which rights are of great value."

The petitioner stated that his proposed operations would not prejudice the lights of the respondents' tenements, and that buildings already existed, and had for more than forty years existed, on the so-called garden ground. It appeared that the proposed new buildings would extend further into the said yard than the line of the existing buildings for a space of about 27 feet in length and 10 inches in breadth, but that the front line of the new buildings would not project so far as to be in any degree *ex adverso* of the respondents' property.

The Dean of Guild, after hearing parties, and having visited the premises, pronounced an interlocutor repelling the objections, and granting warrant as craved by the petitioner.

He added the following note:—[*After narrating the state of titles of parties, &c.*]—"The original constitution and validity of the above servitudes, which have been made real and appear in the titles of both the dominant and servient tenements, if these respondents have sufficient interest to enforce them, cannot well be disputed. But the petitioner contended that the servitudes did not apply to the 'yard' or ground on parts of which he intended building, or at all events that the servitudes having already been infringed

by the erection of certain buildings on the yard and the raising of the original bakehouse, they had thereby been wholly extinguished.

"Upon the first of these points, viz., the identity of the yard, there seems to be no reasonable doubt. . . .

"On the remaining point, it was manifest at the visitation, from the appearance and age of the petitioner's buildings, that a portion of one of them, viz., the original bakehouse, had been raised, and that other two buildings to the north thereof had been erected on the yard since the constitution of the servitudes in 1779; but assuming that this had been done with the respondents' knowledge or by acquiescence, which was disputed—and the fact has not been investigated—it would rather appear that while this might perhaps be a sufficient answer to any demand for removal of the alleged encroachments, it is no good reason why a further infringement of the servitudes should be permitted, nor does it appear necessarily to lead to the result contended for, viz., that by a partial infringement the servitudes have now been wholly extinguished.

"But however this may be, the main questions involved appear rather to be, what is the true or correct interpretation and effect of the restrictions, and whether respondents have such an interest as to be entitled to enforce them?

"That the bakehouse was situated somewhere on the restricted yard is clear enough from the description in the titles. It is there explicitly referred to as built 'on the yard,' and it is not open to doubt that what is now an old three-storey tenement at the southern extremity of the petitioner's subjects is the original bakehouse, which has at some remote period been heightened.

"The prohibition itself is not unqualified. It does not in terms absolutely prohibit 'all buildings,' but is merely directed against erecting any building on any part of the yard 'so as to prejudice the lights' of the second and other storeys of the dominant tenement, although in addition it is declared that the yard is to be 'used for a garden only.'

"Now, the object and intention of the restriction thus apparently is the preservation of the lights of the second and other storeys of the tenement, and to this extent and effect at least the respondents, as owners of these storeys, have a clear and undoubted interest.

"Dealing, therefore, with the question of light alone in the first instance, the Dean, from inspection of the plans in process and perusal of the record, as well as by judicial visitation, and from his own professional knowledge, has satisfied himself that the proposed buildings, which are not placed *ex adverso* of the storeys of the dominant tenement, if sanctioned, will not appreciably injure or in any way prejudice the lights of these storeys.

"But there still falls to be noticed the concluding portion of the restriction, viz., the provision that the disponee shall 'use the same' (meaning the yard) 'for a garden only;' and in the view which the Dean feels himself constrained to take of the authorities it is imperative on the respondents to show, which they have not done, that they have interest to enforce the restriction, or that such restricted 'use' would be of advantage to the dominant tenement. The law is thus stated by Erskine, b. 2, t. 9, sec. 33:—'As all servitudes are restraints on property, they are *stricti juris*, and so not to be inferred by implication. Neither does the law give them countenance unless they have some tendency to promote the advantage of the dominant tenement.' In *Heriot's Hospital* v. *Ferguson*, 1773, M. 12,817, *affd.* 3 Paton 674, the ground was allowed to be covered with buildings notwithstanding a provision in the feu-right in these terms—'That it shall not be leisom to dig for stones, coal, sand, or any other thing within the said ground, nor to use the same in any other way than by the ordinary labour of plough or spade.' In *Dennistoun* v. *Thomson*, 22d November 1872, 11 Macph. 121, Lord Ardmillan, who delivered the judgment of the Court, observed that restrictions on the use of property cannot be easily implied nor enforced without clear and strong reasons, nor without a legitimate interest to sustain the plea for restriction.' Reference may also be made to the prior cases of *Frame* v. *Cameron*, 21st December 1864; *Gould*, 24th November 1869, 8 Macph. 165; and *M'Gibbon*, 19th January 1871, 9 Macph. 423, as illustrating the point under consideration.

"Applying the law as thus laid down, the Dean, in the whole circumstances of the case, is of opinion that the petitioner is entitled to prevail, and he has accordingly granted the warrant now sought." . . .

The respondents appealed to the Court of Session, and argued—The proposed operations would be injurious to them, both as affecting their light, and as increasing the extent of building in the neighbourhood. This gave them an interest sufficient to entitle them to object—*Alexander* v. *Stobo*, March 3, 1871, 9 Macph. 599; *Earl of Zetland* v. *Hislop*, March 18, 1881, 8 R. 675; *Magistrates of Edinburgh* v. *Macfarlane*, Dec. 2, 1857, 20 D. 156. The clause of restriction was absolute in its terms, and the proposed buildings would be clearly in violation of its intention. In any view, the Dean of Guild was not in a position to decide the case without further inquiry, and before the petition could be granted a remit should be made to a man of skill to examine and report—*Boswell* v. *Magistrates of Edinburgh*, July 19, 1881, 8 R. 986.

The petitioner replied—The interest of the respondents to object was merely nominal, as the proposed buildings would not injuriously affect their light, nor appreciably encroach on the open ground. The Dean of Guild's professional opinion on this matter was of great weight. And on a construction of the titles they could be fairly read as in favour of the petitioner's contention, and the Court would never, unless of necessity, construe a title so as to restrict a proprietor's use and enjoyment of his own property—*Heriot's Hospital* v. *Ferguson*, 1773, M. 12,817, 3 Paton's App. 674 (and other cases referred to by Dean of Guild). In point of fact the ground in question had not been used as "a garden" within the memory of man.

At advising—

Lord Mure—In this application the petitioner asks the authority of the Dean of Guild to take down certain buildings belonging to and presently occupied by him, which are described as "consisting of a laundry, washing-house, stock-room, and billiard-room," and which are situated behind

certain houses in the Nethergate of Dundee, and alongside the petitioner's hotel, between which and the said buildings the Malthouse Close intervenes. They are described as buildings made on a yard acquired by him in 1878, and he asks authority, after having taken them down, to erect other buildings substantially on the site of the old ones, though differing in this, that they would be encroachments to the extent of about 10 inches along a distance of 27 feet on the west side of this yard. The clauses of the title under which the petitioner holds these subjects are very fully set forth on the record. It appears that in the disposition in favour of the petitioner's author, William Henderson, and also in the title derived from the same ultimate common author, the town of Dundee, by which the respondents held their subjects, there is a clause by which a prohibition is imposed on the owner of this ground in the matter of building. That clause is correctly quoted by the Dean of Guild, and it is in these terms:—"Declaring alwise, as it is hereby expressly provided and declared, and appointed to be engrossed in the infeftment to follow hereupon (which infeftment duly contained the declaration), that the said William Henderson, his heirs and assignees, shall not be allowed to erect any buildings on any part of the said yard, so as in any way to prejudice the lights of the other storeys of the said tenement, but to use the same for a garden only."

The application is appointed to be served on the different parties named in the prayer of the petition, including the present appellants Mrs Cowpar and Mr Crichton, for whom objections were lodged in the Inferior Court. The Dean of Guild has substantially found that the clause I have quoted does not altogether prohibit building on the property, but that the respondents have an interest to oppose the application, and might do so successfully if they could prove that injury to the lights of their property would arise from the execution of the petitioner's proposed operations, but as he is satisfied that no such injury would be sustained, he has repelled their objections and granted warrant as craved by the petitioner. Against that deliverance the present appeal has been brought, and the question is, whether the Dean of Guild has taken a correct view in holding, first, that there is no absolute prohibition against the erection of buildings on this ground? and second, whether, assuming there is no direct prohibition, he is right in holding that the respondents' property would not be appreciably injured by the execution of the proposed operations? The clause which is relied on by the appellants is certainly peculiarly worded, and it is contended for them that under its terms the petitioner is bound to use his subjects "for a garden only.' But I am unable to come to that conclusion. I think we must apply the well-known principle of law, that a restriction on a right of property to be effectual cannot be implied, but must be distinctly and clearly expressed. The case of *Heriot's Hospital*, referred to by the Dean of Guild, and also in the argument before us, laid down that rule very clearly. On the construction of the title, therefore, I agree with the result arrived at by the Dean of Guild. The only other question is, whether the tenements belonging to these objectors would be prejudiced in the matter of light by the buildings to be erected? and on that point the Dean of Guild, who is a professional man, after examining the place, has given it as his professional opinion that no injury will be done to the light, and I think that, as the question is one so well suited to the eye of an architect, there is no necessity for any further inquiry about it. I am for refusing this appeal.

Lord Shand—I agree with your Lordship. I think it is satisfactorily established that the proposed buildings will not interfere with the objectors' light, for in a case like this it is not a question of a slight interference with the light for a few minutes in the day, but of a substantial and permanent depreciation of it, which I am satisfied will not here occur. The frontage of the proposed building will, as we see from the model, be within the front-line of the dominant tenement—that is to say, the new building will be to no extent *ex adverso* of the dominant tenement, and the nearest point to it will be distant about 29 feet. The Dean of Guild has expressed a clear opinion on this matter in his note. Now, there may be cases in which the question is one of nicety, where the Court would not be satisfied with such an expression of opinion, but would order a remit to an architect. But this is not one of these exceptional cases; and I think the question here is quite a fair one for the judgment of the Dean of Guild, who is himself a professional man. I think we may take it, therefore, that no appreciable injury will be done to the appellants' light.

The next question is, Can the appellants under the terms of the clause in question which your Lordship has quoted, prevent the petitioner from erecting buildings here at all? On the general law I have no difficulty. A person acquiring property is entitled to the free use of it, unless specially restrained. But such restrictions are not to be lightly implied, nor will they be imposed unless clearly and directly expressed. Now, if it was intended by this clause absolutely to prohibit buildings on any part of the ground, that surely might have been easily and effectually expressed, which does not seem to me to have been done as the clause now stands. What was intended was, in my opinion, that the lights of the dominant tenement should be protected, and the words "but to use the same for a garden only" were, I think, mainly expletive of the prior words, and controlled by the clearly expressed intention as to the light. I think this is the reasonable and fair construction of the clause, and that the Dean of Guild is right in holding that there is here really only one substantive prohibition and not two. If there had not been these words "so as in any way to prejudice the lights," the appellants' position might have been different, for he might have contended that the clause could not fairly be construed as referring to lights only, but must be taken in reference also to air, amenity, and so forth; but as the words are here we cannot take these other elements into consideration. On the whole matter, and without saying more, I am of opinion that the Dean of Guild's interlocutor should be affirmed.

Lord Deas—[*After stating the nature of the case, and narrating the clause in the disposition*]—The whole question is one of the construction of this clause. Now, it has been decided by a

long series of cases that where a party has a right of property in subjects, as Mr Russell here has, any restriction on his use thereof is not to be implied, but must be clearly and distinctly expressed. The case of *Heriot's Hospital*, as decided in the House of Lords (1774, 3 Paton 674), has often been referred to as a strong example of that doctrine. I have been in use so to refer to it myself for nine-and-twenty years. We cannot go back on that case. But it may be enough to say that if there are here two ways of construing this clause, that which is unfavourable to the restriction should be adopted, for the whole series of cases leads to this result, that where either of two constructions can fairly be put upon words, that one should be preferred which does not lay a restriction upon a man in the use of his own property. I do not rest my decision very much on the case of *Heriot's Hospital*, for that was one between superior and vassal, while this is a question between one proprietor and another. But I think the principle which I have stated is one clearly recognised in our law, and sufficient for the decision of this case.

Then, as to the question of light, I agree with your Lordships in thinking that we should give great weight in that matter to the expressed opinion of the Dean of Guild, who is a professional man, and has given us the benefit of his professional opinion. On the whole matter, I am for refusing the appeal.

The LORD PRESIDENT was absent.

The Lords refused the appeal.

Counsel for Objectors (Appellants)—Mackay—Hay. Agents—Leburn & Henderson, S.S.C.

Counsel for Petitioner (Respondent)—D.-F. Macdonald, Q.C.—J. P. B. Robertson. Agent—J. Smith Clark, S.S.C.

Friday, February 24.

FIRST DIVISION.

[Sheriff of Aberdeen.

MARTIN AND OTHERS *v.* BOYD.

Principal and Agent—Heritors—Clerk—Property of Documents.

A person appointed by the heritors of a parish to collect an assessment imposed by them upon themselves for repair of the parish church, formed a scheme of rental, and engrossed it in a book, which contained, besides a statement of the amount of sums collected, accounts of his expenses and receipts. *Held* that as the book was made in the service of the heritors, and paid for by them, it was their property, and could not be retained by the person so employed by them after the completion of his task.

On the 24th August 1864, at a meeting of the Presbytery of Deer, and of certain of the individual heritors and feuars of the parish of Peterhead, it was resolved that Mr William Boyd, solicitor in Peterhead, should be appointed to collect an assessment to meet the expenses which had been incurred in making certain repairs on the church. The assessment was to be laid on the landward heritors and the owners of these feus and houses in the town of Peterhead upon which the assessment for building the parish church had been levied. The terms of Mr Boyd's appointment by the said meeting were as follows:—"And the said heritors and feuars now present, and the agents, doers, and representatives for absent heritors and feuars, with concurrence of the Presbytery, thereupon appointed and hereby appoint William Boyd, solicitor in Peterhead, to be the collector of said assessment for the heritors and feuars liable therein, craving the Lords of Council and Session, and other judges and magistrates competent, to interpone their authority, granting letters of horning, decrees, and all other executorials and action necessary in form as effeirs to pass in his name."

In order to facilitate the collection of this assessment the defender made up in a book a statement showing the persons whom he held to be liable for it, and of the sums payable by each according to his rental. There were also inserted statements of the sums collected, and some receipts in his favour for payments made by him.

In February 1878 Mr David Martin was appointed clerk to the heritors, and in January 1881 he was instructed to collect a certain assessment imposed by them. He applied to Mr Boyd for delivery of the former rental and scheme of division, but this was refused, on the ground that the book containing it was the property of Mr Boyd and not of the heritors.

In these circumstances the present action was raised in the Sheriff Court of Aberdeen and Kincardine at Peterhead, by David Martin, as clerk to the heritors, and by certain of the heritors, for the purpose of having Boyd ordained to give up the document in question.

The pursuers pleaded that the rental and scheme of division engrossed in the said book having been made in their service, and paid for by them, was their property.

The defender pleaded—"The whole transactions relative to the collection of assessments made by the defender having been brought to an end many years ago, the present body of heritors as a *quasi* corporation have now no interest in them, or in the records of them made by the defender." He denied that the book was the property of the pursuers, and claimed it as the only means he had of vouching for the due and proper administration of his duties.

The Sheriff-Substitute (COMRIE THOMSON) having heard parties' procurators, allowed the following minute to be lodged in process—"In terms of the suggestion by the Court, the defender hereby states his willingness to allow the pursuers to take a copy to be certified by him of the book referred to on record, and that at the sight of the Clerk of Court, the defender's sole object being that he shall not be deprived of the possession of the said book as contended for by the pursuers." By a subsequent interlocutor, in respect of the offer made by the defender in the said minute, he found it unnecessary to pronounce any order on the merits of the dispute, and added the following note:—

"*Note.*—The defender seems to have good grounds for his refusal to part with the *ipsum corpus* of the book in question, and if the pursuers accept the offer he has now made they get practically all they are entitled to."