Lord Ormidale—I concur. The first consideration is, that the Commissioners acquired a title to the water and did purchase from the respondent a certain quantity of this water. The respondent knew the purpose of the purchase, and if so, it is clear there was an implied obligation on his part to do nothing to defeat the object of the Commissioners, and we have the conveyance which is "according to the true intent and meaning of the said Acts."

Has the respondent done anything to pollute the water? Now I do not think that a mere suspicion of that would be sufficient to sustain the action, but on looking at the proof I think sufficient appears to shift the onus which was on the petitioners to shew that something deleterious has been put into the water. Thus, the onus was shifted on the respondents to shew that notwithstanding that the water was wholesome and there was no possibility of injury resulting from these operations, and this he has failed to do.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the appeal, sustain the same; recal the judgment complained of; and having considered the proof, find it established by the proof that the appellants have been in use at intervals to wash sheep in the Loch of Lochrutton, which had been previously dipped with solution composed partly of arsenic; find that this use of the loch is illegal and inconsistent with the rights acquired by the respondents; therefore interdict, prohibit, and discharge the appellants Walter M'Culloch and James Smith, and all other tenants of the estate of Hills, their servants and dependants, from washing sheep in the Loch of Lochrutton, or other water-works belonging to the respondents, or otherwise fouling the water under their charge, and decern; reserving to the respondents all claim of damage against the appellants for fouling the said water aforesaid, and also reserving all competent proceedings against the appellants for recovery of the penalties incurred by them, or either of them; find the appellants liable in expenses in both Courts, and remit to the Auditor to tax the same and to report."

Counsel for Appellants—Marshall and Moncreiff. Agent—George Wilson, S.S.C.

Counsel for Respondents—Watson and Johnston. Agent—John Galletly, S.S.C.

Friday, June 5.

FIRST DIVISION.

BANKS & COMPANY *v.* WALKER.

Servitude, Constitution of.

Circumstances in which *held* that a servitude *altius non tollendi* had been constituted.

Servitude—Altius non tollendi.

A small building or cellar erected against the back wall of a house was subject to a servitude *altius non tollendi*. *Held* (*diss.* Lord Deas) that the owner of the said building was entitled to raise a chimney thereon up the wall of the adjoining house to a height sufficient to insure that it would be practically useful.

This was an appeal from the Dean of Guild Court, in the following circumstances:—

Messrs Banks & Co., printers and engravers, were proprietors of the tenement No. 10 North St David Street, Edinburgh (the house next the corner house of St David Street and Queen Street) with the back ground and certain buildings erected thereon, and Mr Walker was proprietor of the tenement No. 2 Queen Street, with the back ground. These two properties met in the back ground, and both Messrs Banks and Mr Walker held upon a singular title. Formerly these houses belonged respectively to Messrs William & George Veitch, and to Mr Gordon, and in 1777 these parties entered into a contract. This contract proceeded on the narrative that the said William and George Veitch were willing to give to the said Alexander Gordon a right to part of their ground or area behind their house, upon the terms and conditions therein mentioned; and, *inter alia*, on the condition—*First*, That the Veitchs and their successors, proprietors of the said house in St David Street, "shall have a servitude or *jus prospectus* 17 feet along their back wall, from the northmost point, over the said area to be given up by them to the said Alexander Gordon, and also over his own area to the extent of 10 feet further, extending in whole to 16 feet from their back wall, within which space the said Alexander Gordon should not be at liberty to erect any building or other incumbrance to interrupt the light to the back windows of the house built by the said William and George Veitch . . . *Fourthly*, That the said William and George Veitch do not mean to comprehend under the ground to be given by them to the said Alexander Gordon as aforesaid that piece of ground or area lying behind their house, extending about 5 feet along the wall adjoining to the southmost end of the said area which the said Alexander Gordon is to have right to as aforesaid, which piece of ground they reserve to themselves, and engage within four months from this date (30th January 1777) to erect a small building or cellar thereon, the whole breadth of the said piece of ground, in which they are to be at liberty to put one window looking into the said Alexander Gordon's back ground, but the said small building or cellar is only to be one storey in height. *Fifthly*, That the said William and George Veitch shall have right to the stones in the wall betwixt the said Alexander Gordon's area and that area which they are now to give him, which they are to make use of in erecting the said small building or cellar upon the piece of ground reserved."

By this contract, upon the subsumption that Mr Gordon was willing to accept of the back ground from William and George Veitch upon the said terms and conditions, "the said William and George Veitch on their part, in implement of the said agreement, disponed and conveyed to the said Alexander Gordon the said northmost end of the said back ground or area behind their said house, consisting of about 17 feet in length and 6 feet in breadth;" and they also obliged themselves and their successors "within the said period of four months, to erect the said small building or cellar, not above one storey in height, upon the southmost part of the said area, the whole breadth thereof; declaring always, as it is hereby expressly provided and declared, that these presents are granted by the said William and George Veitch under the

burden of the reservations, provisions, and conditions before-mentioned, and no otherways."

For these causes, and on the other part, Mr Gordon not only accepted the right to the back ground, under the reservations and upon the terms and conditions before expressed, but also, in implement of his part of the said agreement, he thereby disponed and conveyed to the said William and George Veitch, and their heirs and disponees, "the said servitude or *jus prospectus* for 17 feet along their back wall from the northmost part, and 16 feet backwards over the said Alexander Gordon's back ground or area." And he likewise disponed to them, "all right he has to the stones in the wall betwixt the area formerly belonging to him and that now conveyed to him by the said William and George Veitch, but which stones they are to make use of in erecting the said small building or cellar before mentioned."

In terms of this agreement the Messrs Veitch erected a small building (about 8 feet by 5 feet), at the back of their house.

Messrs Banks & Company being desirous to convert the small building or cellar into a boiler house for the purposes of their business, found it necessary in order to carry out their scheme to build a chimney and to carry it up the back wall of their house, which was four stories in height, they therefore brought a petition before the Dean of Guild to obtain permission to do so.

The petition was opposed by Mr Gordon.

The petitioners pleaded—"(1) The petitioners are entitled to warrant as craved, in respect that the proposed operations are all within the property of the petitioners, and that the same are a lawful exercise of their right of property. (2) The respondent, Mr Walker, has neither title nor interest to oppose the erection of the smoke-flue, in respect that his titles give him no right to restrain the petitioners from making such an erection, and that the said erection does not encroach upon any right of the respondent, and is not prejudicial to his interest; and he should be found liable in expenses to the petitioners."

The respondent pleaded—"(1) What is craved by the petitioners being in contravention of the conditions prescribed in their title, and in particular in the contract before specified, the prayer of their petition should be refused, with expenses. (2) The proposed vent or smoke-flue being an encroachment upon the respondent's rights in the premises, and its erection being prejudicial to his interests, warrant to erect the same should be refused, and the respondent found entitled to expenses."

The Dean of Guild pronounced the following interlocutor:—

"*Edinburgh, 11th December* 1873.—The Dean of Guild having considered the closed record and productions, and heard parties' procurators, Finds that the contract between Alexander Gordon and William and George Veitch, dated 30th January 1777, does not purport to be the constitution of a servitude *altius non tollendi* over the piece of ground on which the petitioners' flue or chimney stalk is intended to be erected: Finds it not proved that such a servitude was constituted; Therefore repels the respondent's pleas in law, and in respect the petitioner's plans appear to be otherwise unobjectionable, grants warrant in terms of the prayer of the petition and relative plans, and decerns: Finds the respondent liable to the petitioners in the expenses of process from the date of his appearance; and remits to the clerk of Court *qua* Auditor, to tax the account thereof when lodged, and to report.

"*Note*—Referring to the condescendence and answers for an explanation of the local situation of the petitioners' and respondent's subjects, and the state of their respective titles, it may be stated that in the argument on the closed record the respondent's objections were confined to the subject of the petitioners' proposal to erect a chimney-stalk or flue upon the main wall at the back of his tenement in St David Street. The objection was founded on the terms of a contract between Alexander Gordon and William and George Veitch, dated 30th January 1777, whereby Messrs Veitch, the predecessors in title of the petitioners, disponed a part of the area behind their houses in St David Street to Mr Gordon, the predecessor in title of the respondent, and at the same time came under an obligation with reference to the remainder of the said area, which they reserved to themselves 'to erect a small building or cellar thereon the whole breadth of the said piece of ground, in which they are to be at liberty to put one window looking into the said Alexander Gordon's ground, but the said small building or cellar is only to be one storey in height.' The words quoted occur in the narrative of the deed. The words used in the obligatory clause are—'And they also oblige themselves and their foresaid, within the said period of four months, to erect the said small building or cellar, not above one storey in height, upon the said southmost part of the said area the whole breadth thereof.' The parties are at issue as to whether the words in the first quoted passage express a continuing obligation not to build anything exceeding one storey in height; or whether they express merely a positive obligation to occupy the piece of ground by a cellar or other building of the specified description. In the view which the Court is disposed to take of the legal effect of this clause, this is a question which could only have arisen between the parties to the agreement, or their heirs. There may be cases where an obligation to erect a building of a specified description would, by implication, bind the granter and his heirs not to remove that building, or to replace it by one of greater size or altitude, but the question here is with a singular successor of the obligant, and the argument is that there is not only an implied obligation but a servitude against building higher. No authority has been cited to the effect that a servitude may be constituted by implication: that an obligation to build to a limited extent should be converted by a legal construction into a perpetual prohibition against building to a greater extent. The Court is the less disposed to entertain such a construction of the clause because it is apparent from the other clauses of the deed of 1777 that the parties were quite aware of the difference between a personal obligation and a servitude, and knew to make use of the latter word when their intention was to constitute a perpetual restriction on the use of property. See the clause of servitude at the top of page 7 of the agreement."

The respondent appealed.

Argued for him—By the contract of 1777 a servitude *non altius tollendi* was established over the

small building at the back of the petitioners' house, and that servitude was violated if any portion of that building was raised higher than one storey. Again, the contract was that the building was to be a cellar, and the petitioners had no right to turn it to a totally different use. At all events, they had no right to turn it to a use which necessitated a violation of the servitude.

Argued for the petitioners—Even if there was a servitude *altius non tollendi* over this small building, the erection of a chimney was not a violation thereof, which merely prevented the whole building being raised to a greater height than one storey.

At advising—

LORD PRESIDENT—The respondents in this appeal are proprietors of the house No. 10 North St. David Street Edinburgh, with the back ground. This house is situated next the corner house of St. David Street and Queen Street. Then the next house, No. 2 Queen Street, is the property of the appellant, who also has the back ground. The properties of the respondent and appellant meet in this back ground. This petition was presented to the Dean of Guild by the respondents in this appeal for authority "to construct a vent or smoke-flue from the small office-house in the rear basement of the tenement No. 10 North St. David Street, to be carried up against the back wall of the tenement to the top of the chimney-stalk upon the back wall." To this Mr Walker objects as being a violation of a servitude created by a contract between the predecessors of the parties to this case in 1777. The parties to this case--Mr Walker, and Banks & Company—are singular successors of the contracting parties in 1877.

In the first place, then, we must ascertain what is the nature of the servitude created by that contract. The object of the contract was to give Mr Gordon, who was proprietor of No. 2 Queen Street, an addition to his back ground, and to secure to Messrs Veitch, who were proprietors of No. 10 St. David Street, a servitude of prospect not only over the ground conveyed by them to Mr Gordon, but also over part of the ground which Mr Gordon possessed before. This was effected by a conveyance on both sides of a portion of the back ground. Now there are certain clauses in these conveyances which are said to create a positive obligation on Messrs Veitch to erect a building on a piece of ground reserved by them, and also to bind them never to alter that building either by heightening it or by converting it to a different use from that specified. The words in the deed which are founded on in support of the contention are, first, the following in the narrative clause—"That the said William and George Veitch do not mean to comprehend under the ground to be given by them to the said Alexander Gordon, as aforesaid, that piece of ground or area lying behind their house, extending about five feet along the wall adjoining to the southmost end of the said area which the said Alexander Gordon is to have right to as aforesaid, which piece of ground they reserve to themselves, and engage within four months from this date to erect a small building or cellar thereon, the whole breadth of the said piece of ground, in which they are to be at liberty to put one window looking into the said Alexander Gordon's background, but the said small building or cellar is only to be one storey in height." Then, again, in the obligatory part of the deed we have these words "the said William and George Veitch oblige themselves and their foresaids within the said period of four months to erect the said small building or cellar, not above one storey in height, upon the said southmost part of the said area, the whole breadth thereof." And again, in a later part of the contract we find this clause:—"The said Alexander Gordon dispones to them all right he has to the stones in the wall betwixt the area formerly belonging to him and that now conveyed to him by the said William and George Veitch, but which stones they are to make use of in erecting the said small building or cellar before mentioned."

Now it appears that the premises then belonging to Messrs Veitch are now put to commercial purposes, and that there is not only the original building, but an additional building on the back ground not conveyed. "The small building or cellar" was constructed, in terms of the contract, of one storey in height, and Messrs Banks & Co. do not purpose to raise the building to a greater height than one storey, but to carry up a chimney to the top of the adjoining house, which is four storeys in height. The object of carrying the chimney up to the top of the house is clearly in order to ensure its venting properly, and the reason for building a chimney at all is that Messrs Banks want to convert the small building into a boiler house.

The next question is, whether the construction of the chimney is a violation of the servitude. The Dean of Guild has found that there is no servitude. I cannot agree with that. There is a clear servitude of the nature of *altius non tollendi* in regard to this small building. That building is only to be one storey, and if the proposal had been to put another storey upon it, that would have been a direct violation of the terms of the contract. But the construction of a chimney is a very different matter. I cannot find anything in the contract to prevent the proprietors having a fire in the small house. If they can have a fire they can also have a chimney. If, then, they are to have a chimney, it must necessarily be higher than the roof of the building—how much higher is a question of circumstances, and must always depend for one thing upon the height of the adjoining houses. But the chimney must be so constructed as to be practically useful.

But it is contended that the conversion in the use of the small house is inconsistent with the contract. The building is described in the contract as a "small building or cellar," and the appellants contend that that implied a restriction of the use of the building to such purposes as are proper to a cellar. If so, that is not a servitude but a restriction on the uses of property, and no such restrictions are binding against singular successors unless they enter their titles. So, even if that is the meaning of the contract, it is not binding against the Messrs Banks. But I don't think that that is the meaning of the contract. I am of opinion that the proposal of the Messrs Banks is not inconsistent with the servitude, so I am for refusing the appeal, and substantially adhering to the judgment of the Dean of Guild.

LORD DEAS—The question here is in reference to negative servitude, alleged to have been constituted by the contract of 1777. Now it is settled that a negative servitude constituted in such

a way is binding upon singular successors, and we may therefore look upon the contract of 1777 as if it had been made between the parties to this case. Your Lordship has already explained the nature of that contract,—it was one of mutual concession, and equal value was given by each party. In the contract a servitude *altius non tollendi* was established in favour of Mr Walker over the cellar built behind Messrs Banks' house. I agree with your Lordship that there is in the contract no restriction as to the use to which this building is to be put, so far as consistent with giving effect to the servitude *altius non tollendi*. But the building must not be heightened, and if the proprietor cannot have a fire in the building without violating that condition, then that is a use to which they cannot put the building. I cannot see the distinction between raising the building by a chimney and raising it in any other way. If, in order to have a practically effective chimney it was necessary to have it the full size of this small building, could it be contended that it would not be a violation of this servitude to raise such a chimney to the height of four storeys? Where there is a servitude not to raise a building, the obligation is not to raise any part of it, and chimneys are included in such a servitude as well as anything else. I do not see anything in this contract to show that the restriction does not include a chimney. This building was a cellar of small size, not a dwelling-house, and not capable of being made one, and the agreement was that this cellar was not to be raised higher. I fail to see how raising a chimney on part of the building is not a violation of that agreement, just as much as raising the whole structure would be.

It is said that Mr Walker has no interest to maintain this right. I think he has. There are already buildings behind his house obstructing the light and air, this proposed chimney would do so still further, so I think that Mr Walker has a clear right to insist upon this servitude being maintained.

LORDS ARDMILLAN and JERVISWOODE concurred with the Lord President.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Dean of Guild complained of: Find that the chimney proposed to be erected by the respondents is not inconsistent with the right of servitude constituted in favour of the appellant by the contract of 30th January 1777; therefore remit to the Dean of Guild of new to repel the appellant's pleas, and grant the warrant prayed for by the respondents (petitioners)," &c.

Counse for Petitioners—Dean of Faculty (Clark), Q.C., and Marshall. Agent—W. Saunders, S.S.C.

Counsel for Respondent—Solicitor-General (Millar), and Duncan. Agent—Party.

Friday, June 5.

FIRST DIVISION.

[Lord Mure, Ordinary.

RITCHIE *v.* ROSS AND OTHERS.

Husband and Wife—Trust Settlement—Divorce—Provisions to Wife.

A husband by an irrevocable and delivered trust-disposition and settlement provided an annuity for his wife (from whom he was living separate on account of her intemperate habits) in case of his death. Six weeks afterwards he brought an action of divorce on the ground of adultery against his wife, and obtained final decree. *Held* that by this decree the said annuity was forfeited.

This action was brought by Mrs Christian Mary Carmichael or Ritchie against Sir David Ross and others, the trustees and executors nominate of the deceased George Ritchie of Hill of Ruthven, in the following circumstances.

The pursuer was married to Mr Ritchie in 1852, and about 1868 they were separated on account of the intemperate habits of the pursuer. In 1870 the pursuer brought an action of adherence and aliment against her husband, which was compromised, and on 22d November 1871 Mr Ritchie brought an action of divorce on the ground of adultery against the pursuer. In this action of divorce the Lord Ordinary granted decree on 28th February 1872, and the pursuer reclaimed. Mr Ritchie died on 27th June 1872. On 27th May 1874 the First Division adhered to the interlocutor of the Lord Ordinary granting the divorce, the trustees of Mr Ritchie having been sisted as respondents in the reclaiming note.

On 6th October 1871 Mr Ritchie had executed a trust-disposition and settlement in favour of Sir David Ross and others, the defenders, to whom he disponed his heritable and part of his moveable property for the purposes therein set forth. The third purpose of the deed was as follows:—"Thirdly, in respect that I have agreed to pay and will myself continue to pay during my life to Mrs Christian Mary Carmichael or Ritchie, my wife, so long as we live separately as at present, the sum of two hundred pounds sterling yearly, ... and I wish the same to the extent aftermentioned to be continued to her after my death so long as she survives me. I direct and appoint my said trustees after my death, from the dividends of the stocks hereinafter assigned and conveyed to them, to pay to the said Mrs Christian Mary Carmichael or Ritchie an annuity of one hundred and fifty pounds sterling, ... and I further direct my said trustees to allow her the sum of thirty pounds sterling for mournings on the occasion of my death; and further, as it is my wish that the said Mrs Christian Mary Carmichael or Ritchie shall not return to the Hill of Ruthven after my death, I hereby direct my trustees not to permit her to reside there, and to take all steps necessary to secure this; which annuity in favour of my said wife shall be in lieu of all terce of lands, legal share of moveables, and everything that she *jure relictæ* or otherwise could ask, claim, or crave of me, my heirs, executors, or representatives through my death in case she shall survive me. And which annuity I consider to be an ample aliment for her in her position and habits of life, and that a larger income would not be for her advantage, and which provision in favour of my said wife is hereby declared to be purely alimentary, and not to be assigned by her or attachable by her creditors."

The said deed was rendered on 24th October 1871. Mr Ritchie had also, on 26th October 1871, executed a testament disposing of the rest of his moveable property, on the narrative that by the trust disposition he had already divested himself