The parties, viz.,—(1) The testamentary trustees of Col. Stopford Blair; (2) The marriage-contract trustees of Mr and Mrs Heron-Maxwell; (3) Mr Heron-Maxwell as administrator in law for Margaret Emily Heron-Maxwell, his youngest child,—presented a petition under 22 and 23 Vict. c. 63.

SOLICITOR-GENERAL and MARSHALL, for the second and third parties, argued that the word "children" in codicil of 1857 must receive the same meaning as in the will itself, where the word undoubtedly meant the whole children of the marriage, whether born before the testator's death or not. The provisions of the will in regard to annuities, and especially the bequest of £8000 by the second codicil, which was not to be paid till Mr Heron Maxwell's death, showed that the testator contemplated a long continuance of the trust created by his will, and removed any presumption in favour of limiting the bequest of £1000 each to the children in existence at his death, which might have arisen had he directed immediate distribution of his estate.

SHAND and BALFOUR, for the first parties, maintained that the bequest of £1000 each was limited to the children in existence at the death of the testator; *Davidson's Trustees*, 15th July 1871, 9 Macph. 995; *Wood*, 18th January 1861, 23 D. 338; *M'Dougall*, 6th February 1866, 4 Macph. 372.

The Court answered the first alternative in the affirmative, and the second in the negative.

Agents for First Parties—Tods, Murray, & Jamieson, W.S.

Agents for Second and Third Parties—J. C. & A. Steuart, W.S.

Friday, May 31.

SECOND DIVISION.

GRAY *v.* MALLOCH.

Servitude.

Clause in titles of urban subjects, by which servient tenement was debarred from erecting any other buildings on any other part of said tenement, *Held* to constitute a servitude of light and access, and not to prevent the construction of underground passages or alterations on the existing buildings not injurious to dominant tenement.

This was an appeal from a decree of lineing by the Guild Court of Glasgow, granted on a petition presented by Charles Malloch, glass merchant, 12 Croy Place, Glasgow, against certain parties, including Colin Campbell Gray, merchant in Glasgow, and praying the Court to line the petitioner's property, and to authorise them to erect the buildings, and execute the operations, all as shown by plans produced. The petitioner set forth that he owned certain subjects on east side of Miller Street, Glasgow, and forming Nos. 62 and 66 of that street, and that he proposed to make alterations on the back buildings of said subjects; to connect the front buildings with the said back buildings, and to connect both back and front buildings with his property to the north by means of passages underground and openings in the walls, as shown on ground and elevation plans produced. To this petition answers were lodged by Colin Campbell Gray, proprietor of the two upper storeys of Nos. 62 and 66 Miller Street, an apartment at the foot of the staircase leading up to the said two flats, a cellar, and two sunk cellars under the said two flats, the one going through the other in the back building behind the said tenement, together with a coal cellar in south-west corner of said back buildings. He pled (1) that the proposed alterations and erections, being in violation of the conditions in the joint titles to their respective subjects, and to an agreement between their predecessors, the prayer should be refused; (2) that the proposed alterations would materially interfere with and alter the respondent's rights in the subjects, and endanger the stability of his property. This plea, however, was not insisted on at the bar.

The common title was a disposition dated 20th December 1791, which declared that the front of said tenement "shall be composed of ashlar work, and shall consist of a half sunk storey and two square storeys, and garrets, and no more, but may be of a less composition or size." By disposition dated 30th July 1798, the common author conveyed to the predecessor of the respondent the two upper flats and the cellars of said tenement, with the declaration "That I, and all other persons acquiring right from me, shall have no right of opening or entry into the foresaid staircase leading up to the said two flats or storeys, or any access thereby; and further, that we shall be prohibited and debarred from erecting at any time hereafter any other building on any other part of the foresaid steading of ground, than those at present thereon, or of raising the back buildings thereon higher than they presently are, except that we shall have liberty to raise the foresaid back building three feet above its present height, which is 26 feet above the ground, and in these terms the said Robert Gray shall have a right of servitude over the remaining parts of the said steading for the preservation of the lights of the subjects before disposed, and which is now conveyed to them."

In the year 1802 the respective predecessors of the petitioner and respondent executed an agreement, which was recorded in the Burgh Register of Sasines, by which, with the view of avoiding misunderstanding relative to the execution of proposed buildings by Thomas Graham, the petitioner's predecessor, a ground plan of the proposed buildings was approved of, on the express condition of the said Thomas Graham becoming bound to observe the conditions after expressed, "which he hereby accordingly binds and obliges himself, his heirs and successors in said property, to fulfil and perform, as follows, viz., the said Thomas Graham, for himself and his foresaids, renounces and for ever gives up the right or liberty of raising the foresaid back building and cellars aforesaid higher than 26 feet, and shall and hereby does confine the said intended building and roof to the height of 26 feet above the level of the court, along the whole extent of said steading; and in like manner the said Thomas Graham renounces the liberty of laying a staircase to the foresaid back buildings; and in general the said Thomas Graham binds and obliges himself and his foresaids not to make any building or erection whatever on the foresaid close, other than those now agreed to.

On 3d January 1872, the Dean of Guild granted decree of lineing.

The respondent appealed.

WATSON and PATERSON, for him, maintained that the object of the servitude was to preserve intact the character of both dominant and servient tenements, and that the buildings proposed to be

made below the street level were erections struck at by the clause in the titles. Authorities cited—Bell's Prin. 994; *Boswell* v. *Inglis*, 6 Bell's Ap. 427; *Magistrates of Edinburgh* v. *Paton*, 20 D. 731.

Solicitor General (CLARK) and LANCASTER for the Petitioner.

The Court unanimously dismissed the appeal, on the ground that the object and intention of the servitude created here was to preserve light and access to the dominant tenement, with which the proposed buildings did not interfere; and that there was no allegation of risk or danger to the dominant tenement by the alterations proposed.

Agents for Appellant—J. & A. Peddie, W.S.
Agent for Respondent—J. Walls, S.S.C.

Tuesday, June 4.

FIRST DIVISION.

ROWE *v.* ROWE.

Interdict—Judicial Factor—Partnership.

One of three partners in a firm resolved to bring the co-partnery to a termination, and sent his co-partners written formal intimation to that effect. On the same day he presented a petition to the Sheriff, craving interdict against the other two partners from disposing of the company's property, using the firm name, &c., and for the appointment of a person to wind-up the company. The Sheriff, of consent of parties, appointed advertisement, and remitted to an accountant to wind-up the company's affairs; and, in respect of these appointments, found it unnecessary to grant the interdict craved. The Court affirmed the judgment of the Sheriff.

John Rowe and his two sons, Gavin Rowe and Thomas Rowe, carried on business together in co-partnery as manufacturers in Glasgow, under the firm of John Rowe & Sons, of which they were the sole partners. One of the sons, Gavin Rowe, resolved to bring the co-partnery to a termination, and to retire from the firm, and required the other partners to unite with him in joint measures for that purpose; and accordingly, on 17th January 1872, he gave formal written intimation to his partners. Upon the same day he presented a petition to the Sheriff, in which he craved—"1st, For interdict against the other two partners from disposing of any portion of the company's property, from collecting any debts due to it, from undertaking any obligations in its name, or from signing the name or firm of the co-partnery; and, 2d, For the appointment of a person to take possession of the company's property, with powers to collect and discharge accounts, to realize the assets, to pay debts, &c., and to divide the balance among the partners."

The Sheriff-Substitute (LAWRIE) pronounced the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators, refuses, *in hoc statu*, the motion for interim interdict."

Against this interlocutor the petitioner appealed to the Sheriff (GLASSFORD BELL), who pronounced this interlocutor:—

"*Glasgow*, 18*th April* 1872.—Having heard parties' procurators, and resumed consideration of the whole process, recalls the interlocutor appealed against: Finds that the pursuer and defenders have been for several years past partners, carrying on business in Glasgow as manufacturers, under the firm of John Rowe & Sons, and that the said Gavin Rowe has, by letter dated 17th January 1872, intimated his retirement from said business as at that date: Finds that it thus becomes necessary that due provision should be made for the winding-up of said business, and the valuation of the company's estate, and the division thereof among the partners according to their respective rights and interests: Appoints, of mutual consent, the parties to concur in advertising the dissolution in the *Gazette* and local newspapers, as also to wind up the business with all convenient speed, and to complete the unexecuted orders: Further, and also of consent, remits to Mr William M'Kinnon, accountant in Glasgow, to collect all debts due to, and, so far as the assets will allow, pay all debts due by, the said firm; to regulate the custody of all monies that have been or may be collected belonging to the firm; to adjust and balance all the books thereof; and to apportion the profits or losses to the partners in accordance with their respective rights: Further, and in respect of the above appointments, Finds it unnecessary to grant the interdict craved: Finds no expenses due; and decerns."

The petitioner appealed.

R. V. CAMPBELL for him.

TRAYNER, for the respondents, cited *Collins and Feely* v. *Young*, 14th March 1853, 1 Macq. 385.

At advising—

LORD PRESIDENT—The prayer of this petition consists of two parts—1st, For interdict against the other two partners; and 2d, For the appointment of some one to take possession of the company's property, &c. As regards the first part of this prayer, there is no doubt that it is competent before the Sheriff, and it is also quite clear that under the circumstances he could not grant it.

As regards the second part of the prayer, I have great doubts as to its competency. If the appointment had been necessary to save from immediate destruction the assets of the company, the Judge Ordinary might have interposed a temporary arrangement. But this was not the case here, and the second part of this prayer appears to be in substance a prayer for the appointment of a factor on the estate, and that is not competent to the Sheriff.

But there is here a petition before the Court which is in part competent, and the Sheriff has pronounced an interlocutor, and, by consent of parties, arranged to do a certain thing, which may be of great use. Now I am not disposed to allow the appellant to escape the consent which he gave in the inferior Court, merely because he has come to think differently; and as to the contention that he did not consent, I take the interlocutors of the Sheriff as settling that point.

I therefore am of opinion that we should refuse this appeal, and leave either party to proceed to get a judicial factor appointed, if they should think fit.

LORD DEAS—I entirely agree with your Lordship. There is no doubt as to the consent of parties—the Sheriff's interlocutor is final upon that point. Such being the case, I do not think we have much to do with the question of the competency of part of the petition, for that does not touch the binding nature of an agreement between the parties.

LORD ARDMILLAN—There are two prayers in