Is there then any legal evidence that the pursuer has discharged the debt? The question on this part of the case was, whether the pursuer had homologated the payments of her annuity to her mother-in-law and accepted them as having been properly made to herself. I have great doubts whether parole testimony is permissible on such a subject. If the payments which the trustees made had been alleged to have been made after the verbal agreement had been come to, that might have been provable by parole testimony, but we have no such case here. The payments were made by the trustees without the pursuer's authority, and the question was whether she had ratified them. I must say again that I have doubts whether parole testimony is competent to prove such a thing, but apart from that I am clearly of opinion that there is not sufficient proof of ratification.

LORD TRAYNER—I agree in the result and in the reasoning. It was admitted that these terms of the annuity were due to the pursuer if they had not been paid; the only question was whether they had been paid. It is clear that there is no competent written evidence of payment, and it was not suggested that they had been paid to herself. The defence was that the trustees had paid the annuity away to somebody else, and that the pursuer afterwards ratified their deeds. I think that that defence fails, and therefore I concur with your Lordships.

The Court recalled the Lord Ordinary's judgment, and gave decree in terms of the conclusions of the summons.

Counsel for the Reclaimer—Asher, Q.C.—Aitken. Agent—W. A. Hyslop, W.S.

Counsel for the Respondent—C. S. Dickson—Grey. Agents—Ronald & Ritchie, S.S.C.

Wednesday, March 18.

SECOND DIVISION.

(Before Seven Judges).

[Dean of Guild Court, Edinburgh.

WATT *v.* BACKHOUSE (BURGESS'S TRUSTEE).

Property — Common Property — Common Interest — Tenement in Burgh — Attic Floor—Roof—Ownership of Roof—Title.

Held that the proprietor of a top flat in a tenement in burgh was not entitled, against the will of the other proprietors, to warrant to dismantle his flat and build two storeys in place thereof, although it was not proved that injury to the flats below would result.

The proprietors of a building lot in burgh built thereon a tenement consisting of a basement and shop flats, and three upper flats. They sold the second flat above the shops and the attic storey, and bound the disponee to relieve them of 1s. of feu-duty, and to pay one-fourth of the expense of upholding the roof. This property was separated, and the attic storey was disponed along with a cellar and right to the water-pipe in common with the other proprietors, under burden of 6d. of feu-duty and one-eighth part of the expense of upholding the roof. The proprietors of the tenement disponed the other flats to other persons with similar titles, and retained a part of the basement in their own hands. The proprietor of the attic craved warrant from the Dean of Guild to turn the attic floor into a square storey and erect another square storey on the top of it. He was opposed by the proprietors of the lower floors. It was reported to the Dean of Guild that if the petitioner took certain precautions no injury would result from the proposed operations to the lower flats.

The Court *refused* the petition, in respect (1)—*dub.* Lord Trayner—that, considered as a question of contract, when the tenement was divided, the bargain of each buyer was for one flat in the tenement, and the petitioner's claim amounted to a claim to more than that; (2) that considered as a question of real right, the proprietor of the undivided tenement, who had a right of indefinite extension of his property, parted with that right in the petitioner's case to the limited extent of conveying to his predecessor one stratum of the property; that a conveyance so defined carried nothing but the property conveyed, the rest remaining with the disponer, against whose will therefore there was no power in the petitioner to extend his right.

Between 1799 and 1804 Mr and Mrs Fell erected a tenement now numbered 13-19 South St David Street in Edinburgh. In 1804 Mr and Mrs Fell sold to John Cockburn "these two dwelling-houses or flatts, being the second flatt above the shops and the attic storey" of this new tenement, "with two cellars and a necessary house, and a right to the water-pipe in common with the other proprietors, under burden of payment of one shilling of feu-duty and a fourth part of the expense of upholding the roof of said tenement." After various transmissions the attic storey was conveyed by the trustees of the late Mordaunt Gray to Thomas Watt, saddler, in 1889, in terms similar to those just above quoted, and the disponee was taken bound to pay sixpence as his proportion of the feu-duty and one-eighth part of the expense of upholding the roof, and to maintain and keep in repair the pavement above the cellar. In 1815 Mr and Mrs Fell sold two of the shops in the tenement to Henry Duncan junior, who was bound to pay a sixth part of maintaining the roof. Of this tenement a dwelling-house and two shops and perti-

nents were retained by the owners and came into the hands of the trustees of Mrs Ann Robinson Fell or Burgess, the representative of the original proprietors and wife of Edward James Burgess of Ireby, Cumberland.

In November 1889 Watt craved warrant from the Dean of Guild to dismantle his attic storey, and to re-build it in the form of a two-storey house. The lower proprietors, except the proprietor immediately below the attic, objected.

The petitioner pleaded—"(2) As the proposed operations are confined to the petitioners' own property, and can be executed without danger, and without infringing the rights of the respondents or any of them, the answers ought to be repelled with expenses."

The respondents (Burgess's trustees) pleaded—"(2) The petition should be refused with expenses, in respect (1st) that the proposed operations encroach on the rights and property of the respondents; (2nd) that the proposed operations are unsafe and dangerous; (3rd) that the petitioner has not produced or condescended on any right or title to execute said operations."

The respondents (Duncan's trustees) pleaded—"(2) The petitioner is not entitled to increase the burden of support at present laid upon the respondents. (3) The petitioner is not entitled to make substantial alterations upon the roof without consent of the respondents."

After a remit to and a report from three skilled members of the Dean of Guild Court, the Dean of Guild on 20th February 1890 pronounced this interlocutor:—"Finds that the proposed operations are confined to the petitioner's own property, and if carefully executed, can be carried out without prejudice to the other portions of the tenement, provided that an inside cast-iron 9 in. by 9 in. beam be introduced over the triplet windows on the third floor; and in respect that the petitioner has now shown on his plans a beam of the specified dimensions and in the specified situation, approves of the plans as altered, repels the pleas-in-law for the respondents: Grants warrant to the petitioner as craved, but on condition that he find caution *de damnis* before extract, &c.

"*Note.*— . . . The petitioner avers that the proposed alterations will not increase the burden of upholding the roof presently imposed on the respondents as aftermentioned, but he offers to relieve them henceforth of the expense of upholding the new roof if warrant for its construction is granted.

"The objections of both respondents are practically identical. They both claim rights of property in the roof, and aver that the petitioner cannot alter it without their consent; they both aver that the weight of the proposed alterations will cause danger to their property; and Duncan's trustees aver that these proposed alterations would prevent them hereafter projecting their property towards the street, or at least would entail additional expense if ever they came to do so.

"The first question in this case appears to be, In whom is the property of this roof vested? The presumption is that the property of the roof is vested in the proprietor of the upper storey—*Taylor* v. *Dunlop*, November 1, 1872, 11 Macph. 25 (*per* Lord President, 32, and Lord Deas, 30).

"The Dean of Guild is of opinion that the terms of the dispositions now to be examined are not so explicit as to overturn the presumption in favour of the state of right laid down in the above-mentioned case.—[*Here followed a history of the tenement and a statement of the titles.*]

"In this state of the titles, Burgess's trustees maintain that they alone are proprietors of the roof. They argue that their authors did not in terms dispone the roof when they parted with the attic flat, and that they took the disponee bound to maintain the roof, which would have been unnecessary if it had been his property. Moreover, they maintain that their attitude in regard to the other proprietors has all along been consistent with this construction of the titles, for they, while themselves contributing to the repair of the roof, have always collected from the other proprietors their contributions for this purpose.

"Duncan's trustees maintain a right of common property in the roof.

"The Dean of Guild is of opinion that neither the claim of absolute property in the roof made by Burgess's trustees, nor that of common property therein by Duncan's trustees, is to be inferred from the provisions of the titles relied on. With regard to the first contention, it appears to the Dean of Guild, on the authority of the case of *Taylor* v. *Dunlop*, that the disposition of the attic flat by the common authors involved a disposition of the roof.

"With regard to the second contention, the Dean of Guild is of opinion that common property is not to be inferred from the fact that the proprietors of the lower flats are taken bound to pay a proportional part of the cost of maintaining the roof. It was just because it was not their property that this obligation required to be imposed upon them. It was of the nature of a burden for behoof of the proprietor of the upper flat—*Barclay* v. *M'Ewen*, May 21, 1880, 7 R. 792 (*per* Lord Gifford, 798).

"But although the several averments of property in the roof appear to the Dean of Guild to be unfounded, it seems clear that the respondents have a common interest therein, and therefore, in view of the averments of danger to the respondents' property from the proposed operations, the Dean of Guild on 6th February 1890 remitted to certain members of the Court and the Burgh Engineer and Master of Works to consider this point in terms of the interlocutor of that date.

"On 13th February 1890 the reporters advised in favour of the proposed operations provided a beam of described dimensions were used in a specified place, and this proviso having been given effect to by the petitioner on his plans, the Dean of Guild has pronounced an interlocutor granting warrant as craved."

The respondents (Burgess's trustees) appealed. After hearing counsel, the Court upon 15th July 1890, in respect of the importance and difficulties of the question, remitted the case to be argued by one counsel on either side before Seven Judges.

The appellants argued—The petitioner could have no right to make the alterations he desired here, as the roof was not his property, but was the common property of each proprietor in the tenement, or at least they all had a common interest in it. Although the proprietor of the attic might be under an obligation to keep up part of the roof, that did not confer any right of property in the roof upon him—*Barclay* v. *M'Ewen*, May 21, 1880, 7 R. 792. The case of *Taylor* v. *Dunlop* was not an authority for the petitioner's contention. The Dean of Guild had misread the case, and it was quite distinguished from this case by the condition of the titles—*Taylor* v. *Dunlop*, November 1, 1872, 11 Macph. 25. Even assuming that the property of the roof was in the appellant, he was still prevented from making the alterations. It imposed a greater burden upon the lower proprietors than they were bound to bear, even if it was not absolutely dangerous to them when precautions were taken. It had been held that the proprietor of an attic could not convert that attic into a garret storey without the consent of the lower proprietors—*Sharp* v. *Robertson*, February 5, 1800, M. No. 3, App., "Property." If the alterations were carried out, there would be great interference with the flues, drains, &c., of the lower storeys, and there was authority for saying that in these circumstances the buildings could not be gone on with—*Gellatly* v. *Arrol*, March 13, 1863, 1 Macph. 592; *Arrol* v. *Inches*, January 27, 1887, 14 R. 394.

The respondent argued—In the case of *Taylor* v. *Dunlop*, cited *supra*, although the Lord President had dissented from the judgment, the Court was unanimous upon the question of the proprietorship of the roof. It had been held that a common interest in the *solum* of the tenement did not entitle the upper proprietor to interfere with the lower proprietor when he as proprietor proceeded to erect buildings upon the area in front of the tenement, as no injury was alleged to have taken place to the upper proprietor—*Johnston, &c.* v. *White*, May 18, 1877, 4 R. 721. The joint-proprietor of a mutual gable was entitled to heighten it, and to do certain operations upon it for his own benefit if he did not injure his neighbour. In this case the Dean of Guild found that no injury would be done to the lower proprietor if certain operations were carried out, which the petitioner was quite willing to do.

At advising—

LORD M'LAREN—The petitioner Thomas Watt is the proprietor of the uppermost or attic floor of a four-storey tenement in St David Street, Edinburgh, and he claims to be entitled to dismantle his dwelling and to rebuild it in the form of a two-storey house, interfering as little as possible with the underlying part of the tenement. The petition is addressed to the Dean of Guild, and is in the usual form, praying for authority to dismantle and reconstruct according to plans to be approved by the Dean of Guild Court.

The application is opposed by the proprietors of the subjacent storeys, and the defences include a denial of the pursuer's right to extend his possession, and an averment that the proposed extension cannot be made consistently with the stability of the tenement.

The Dean of Guild, proceeding in this matter on the report of builders, has found "that the proposed alterations can be carried out without prejudice to the other portions of the tenement," provided certain precautions are used; and having also considered the objections which depend on legal grounds, he granted the desired warrant by his interlocutor of 20th July 1890, being the interlocutor appealed from. In the argument addressed to us it was admitted, or at least assumed, that the walls are capable of supporting the new building, and the appeal was maintained solely on legal grounds.

The rights of the parties so far as expressed in the title-deeds may be very shortly stated. The original feu-right of the tenement is a charter granted by the Lord Provost and Magistrates of Edinburgh in the year 1777, which is said to include other subjects; and on this site, about the commencement of the present century (the exact date being immaterial) the tenement was built by Mrs Margaret Carmichael or Fell and her husband. The tenement was originally constructed for occupation in flats, and it consists of a basement and shop flat, and three upper flats, the uppermost floor only being the property of the pursuer.

By disposition, dated 6th September 1804, Mrs Fell with her husband's consent sold and conveyed to John Cockburn, baker in Edinburgh, "All and whole these two dwelling-houses or flats, being the second flat above the shops, and attic storey lately built by us." The property is then described in terms which it is not necessary to read at length. Cockburn is then put under an obligation to relieve the granters of the payment of one shilling of feu-duty, and as the deed proceeds, "he is likewise to be at one-fourth part of the expense of upholding the roof of the said tenement, being the proportion it has been agreed on he is to bear of the same in all time coming; and is also to be bound to maintain and keep in repair the pavement above his cellars."

The two dwelling-houses or flats thus sold to Cockburn came to be vested in separate owners; and the pursuer's possession is described in the title-deeds as the attic storey with a cellar and right to the water-pipe in common with the other proprietors, together with the whole pertinents thereto belonging. The pursuer's right is then declared to be burdened with the payment of sixpence of feu-duty, and it is declared that he is to be "at one-eighth part

of the expense of upholding the roof of the said tenement, being the proportion it was agreed by said disposition should be borne in all time coming" by the disponees.

It thus appears that the title-deeds of the pursuer's property do not contemplate any extension of the building in a vertical direction; (2) that no right to extend is conferred in express words or by implication on the disponees of the attic-storey; (3) that so far as depends on the title-deeds, the pursuer has only the same kind of right in the roof as the other proprietors, because that right is given to each in the form of an obligation to uphold, which is divisible amongst the proprietors of the different flats approximately in proportion to the values of their several possessions; (4) there is no conveyance of the *solum* to the owners of the flats, and so far as it can be held to exist as a separate subject in this peculiar kind of position of property, the *solum* would seem to remain untransferred in the persons of the heirs or singular successors of the original proprietors of the basement.

If then the proprietor of the attic-floor has the power to build which he asserts, this power or faculty must be vested on some inherent quality of the right of a proprietor of an urban tenement, and not on the title-deeds of his possession, because these deeds give to the pursuer an attic-storey and no more. The difficulty which meets the petitioner in this view of his case is very evident. If the power of extension is a quality of the right, it cannot be confined to the proprietor of the attic, but must belong to all the proprietors within the tenement. That their rights as to extension are identical is easily seen if we consider the case of a tenement which is destroyed by fire or pulled down. In a question of rebuilding, everyone would admit that the tenement must either be rebuilt according to the original design, or that each proprietor should be entitled to duplicate his storey.

It has not been contended by anyone that in the present condition of the building the proprietors of the first or second floor should be allowed to build above the petitioner's floor, and it is materially impossible that they can interject a new storey below the attics. So the condition of the question is, whether the petitioner can insist on a supposed right of adding to his possession under circumstances in which it is impossible that the other proprietors (all having equal rights) should exercise corresponding privileges.

If the question is to be decided by authority, there is a very distinct authority to the contrary in the case of *Sharp* v. *Robertson*, decided in the year 1800. The Faculty report of the case, which is transcribed *verbatim* in Mor. Dic., App. 2, does not say much regarding the grounds of judgment. In this respect the report is not different from the other reports of that period. But I have had the opportunity of reading the arguments in the Faculty Collection of Session papers. These are ably written and instructive, and they prove that the case was argued (and presumably decided) on general principles, and not on the specialties of the particular case. Specialties indeed it had not, no more than the present case. In the absence of any contrary authority, I must hold the decision in *Sharp* v. *Robertson* to be entitled to all the weight due to a precedent in point.

It has, however, been thought desirable that we should consider the present case on its merits apart from authority. The question may be considered from the point of view of contract, or as a question of real right. The former is probably the less influential consideration of the two. Yet it is not undeserving of consideration that when the tenement came to be divided the bargain which each purchaser made was a bargain for one flat in the tenement. The price which he paid was the estimated value of a flat already built; and the price paid for the attic floor in all such cases is less than the price paid for any of the other floors, because the attic-floor from its situation and construction is the least valuable.

But when the question is considered as one of real right, the condition of the case is that the first proprietor of the undivided tenement had, together with the tenant, the right of indefinite extension of his use of this fraction of the earth's surface, upwards and downwards, without any limitations except such as results from physical difficulties. His right to this small area of land was, in law, of the same nature as that of the proprietor of a substantial estate, who may work mines below the surface and build above it as high as he pleases. He parted with that right only to the extent, so far as the petitioner is concerned, of conveying to the pursuer's predecessor in title a stratum of 10 or 12 feet in height defined as a storey in the tenement. I am unable to find in a conveyance so defined any possibilities of extension against the will of the proprietor from whom the conveyance proceeds. The estate of the pursuer is merely a stratum carved out of the larger estate, which extends theoretically from the centre of the earth upwards, and it follows in my opinion that whatever is not conveyed remains with the granter. It is true that the granter is not himself entitled to build above the pursuer's storey. But this disability, as it appears to me, is the result of implied contract, because a proprietor who has sold a subject described as the uppermost of a certain number of storeys could not, without derogating from his grant, put an additional storey on to the tenement. These considerations lead to the conclusion that there can be no expansion of the right of any of the proprietors of the different floors. The representatives of the original granter in the feu-charter, who retain the basement floor, are bound by implied contract, or by warrandice, which is the same thing, from interfering with the property which they conveyed for value to the owners of the upper floors; and the owners of the upper floors are disabled from extending their possessions upwards, because they have no right under their conveyances to anything beyond the particular strata respectively conveyed to them.

I have not overlooked the distinction which is taken in reference to cognate questions between common property and common interest. If it were clearly settled that the interest of the defenders in the roof was only common interest, that would be an important, though in my view not a decisive, argument in favour of the pursuer's contention. But as the nature of the right to the roof has not been itself the subject of an authoritative decision, this undetermined point cannot be used as a step to the solution of any other question. I have therefore considered the question in this action on its own merits, and will only add, that as I read the title-deeds, the pursuer is not able to establish such an exclusive right of property in the roof as would displace the inference resulting from theoretical considerations depending on the way and manner in which the different parts of the tenement have been given off. My opinion is that the interlocutor of the Dean of Guild ought to be recalled, and the prayer of the petition refused.

LORD ADAM—I agree in the opinion that has just been delivered.

LORD YOUNG—I concur generally in the opinion which has just been given by Lord M'Laren. I shall state shortly what is the import of my opinion upon the matter, which I think is sufficient for the decision of the case.

The house in question was built between 1799 and 1804 by Mr and Mrs Fell, who had acquired the property of the *solum*, *i.e.*, the feu, and who built the whole tenement, let me say, in 1804. They sold it to different parties, and eventually the parties to this case acquired different parts of it. Now, I regard this case in the same way as if the original proprietors had sold this garret to the present respondent, the petitioner in the Dean of Guild Court, retaining the rest of the property and the *solum* in their own hands.

In my opinion, when the proprietor of a tenement, containing it may be two or three storeys and an attic, sells the attic, he sells nothing else, and he sells no right to the buyer of the attic to load the *solum* with anything more. I do not think that this case is different from what it would have been if this tenement had consisted of three square storeys only, and the proprietor of the *solum* had sold—as he might have done—the right to some one to erect an attic. The right that was sold in that case would not give the purchaser a right to erect anything else. I think the position of the seller and of his disponee are exactly the same whether he builds an attic and sells it, or whether he sells the right to build an entirely new attic.

I wish only to guard myself from being thought to say anything that would prevent improvements from being carried out on any house. I think that if the proprietor of the *solum* were to object to any of the improvements being carried out on a house which the civilisation of the day thought were proper and expedient improvements, that his objections would be unreasonable and would probably not be carried into effect. But converting a garret into two square storeys is a perfectly different matter from making such improvements, and one that will not be sanctioned here any more at this time than if the Fells had sold the garret directly to the petitioner.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I am able to agree with Lord M'Laren's opinion so long as he puts his decision upon the question of real right. I am not so sure that I agree with the further deduction that warrant for this proposed operation could be refused as being a matter of contract.

The LORD JUSTICE-CLERK concurred.

LORD ADAM intimated that the LORD PRESIDENT, who was not present at the advising, concurred in Lord M'Laren's opinion.

The Court sustained the appeal and recalled the judgment of the Dean of Guild, and remitted to refuse the petition.

Counsel for the Petitioner and Respondent — C. S. Dickson — C. N. Johnston. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Objector and Appellant—Blair—Sym. Agents—Blair & Finlay, W.S.

Thursday, March 5.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

THE NATIONAL BANK OF AUSTRALASIA *v.* TURNBULL & COMPANY.

Bill of Exchange—Proof of Extrinsic Agreement—Bill of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

By sec. 100 of the Bills of Exchange Act 1882 it is provided that in any judicial proceeding in Scotland any fact relating to a bill "which is relevant to any question of liability thereon" may be proved by parole evidence.

The drawees having refused to accept a bill, the payees, who had given value for it, sued the drawers for payment. The defenders answered that the pursuers had entered into a parole agreement to the effect that the said drawees were alone to be liable upon any bills drawn by the defenders upon them, and discounted by the pursuers, on receipt by the pursuers of the endorsed bills of lading of the goods against which the bills were drawn.

The Court, *recalling* an interlocutor of Lord Wellwood's allowing a proof before answer, *found* that the drawers' defence was irrelevant, the Lord President and Lord M'Laren holding that it was incompetent for the defenders to