House of Lords, 10th July 1817.

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THE DUKE OF BUCCLEUGH *v.* HYSLOP.

This case was also remitted for reconsideration; and is reported in the second appeal, along with the whole other cases in the Neidpath and Queensberry entails, in 1819. *Vide infra.*

JOHN GORDON, Esq. of Cluny, . . *Appellant;*

JOHN MARJORIBANKS, FORBES HUNTER BLAIR, and WM. HAGGART, Esqs., Trustees for the New Club, . . } *Respondents.*

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GORDON *v.* MARJORIBANKS, &C.

House of Lords, 18th February and 2d March 1818.

BUILDING PLAN—DEVIATION—CHARTER—NUISANCE.—Held (1.) That the respondents, proprietors of a house in St Andrew Square, were not prevented from erecting on their back area the buildings in question, by the original plan of the new town of Edinburgh. (2.) That they were not restrained, by their charter, from making such erections; and (3.) That the proprietors on each side of the respondents' property, had no right to restrain them either on the ground of nuisance, or on the ground of holding any servitude, legal or conventional, over them.

The district of the city of Edinburgh, which is called the New Town, was begun to be erected in the year 1767. The grounds on which this new city was proposed to be erected, belonged to the Corporation of Edinburgh, who caused a plan to be made, in which, as the appellant stated, the great object was, to avoid the inconveniences experienced in the Old Town, by the buildings being crowded together, and a free circulation of air thereby prevented. Spacious streets and squares were delineated, and the spaces or lots on which the buildings were to be erected, were marked on the plan by letters, to which reference was made, in the conveyances to the purchasers of the several lots. This plan was engraved and published in every way possible, and universally understood, as showing how the new buildings were to be carried on, and the open spaces left.

That which is now called St Andrew Square, was first built, and in the centre of it a considerable space was left railed in from the circumjacent street, which was to be common to all the proprietors of houses in the square. Divided from this area by the streets, were the grounds on which the

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houses were to be erected in a line, and behind each a certain space marked in the plan, as open or garden ground, extending to a back street or lane called the meuse.

Among the houses first erected on the south side of St Andrew Square, was one built by David Ross, Esq., and in the charter or conveyance of the ground by the Corporation to him, the property was thus described:—"All and whole "forty-two and a half feet, in form of area, letter N, lying "on south side of St Andrew Square, in the new extended "royalty of the city of Edinburgh," whereupon there was then erected a large lodging, which lodging or ground is bounded on the east by the Earl of Northesk's feu, on the west by the ground feued by Alexander Gray, Writer to the Signet, and now belonging to Cosmo Gordon, Esq., one of the Barons of Exchequer, on the south by the meuse lane, and on the north by the street, on the south side of said square, opposite to the said lot of ground. This lot and the house built upon it, was, a few years ago, purchased by a society of gentlemen, in number exceeding 300, calling themselves the New Club, the rights being taken in the names of the respondents in this cause, as trustees for the New Club.

Adjoining, on the west (as is above stated), is the lot on which Alexander Gray built a house, which came to be the property of Baron Gordon, and on his death descended to Charles Gordon, Esq. of Cluny, the father of the appellant, and it was thus described in the charter or conveyance by the Corporation:—"All and whole that piece of ground or area "upon the south side of the square now known by the name "of St Andrew Square, within the said extended royalty, "upon which the said Alexander Gray has now erected a "dwelling-house, four stories in height, containing fifteen "fire rooms besides a kitchen, garrets and cellars, within the "same; and has also built five cellars or vaults under the "pavement, in front of the sunk area of said building or "dwelling-house; and has likewise enclosed the back part of "the foresaid area, lying to the south of said house, and laid "out the same as a garden, which property is bounded," &c.

Between the back areas or garden ground of each of the properties, there was erected a common wall of separation.

At the bottom of the area or back ground of the property of Mr Ross (now the respondents), he erected a coach-house and stables. Whether he could do so, the appellant stated, might have been questioned, but as the height was moderate,

no objection was made by the adjoining proprietor at the time. Mr Baron Gordon, likewise built stabling, &c., but he did not encroach on the original area, purchasing ground further south for that purpose, on the opposite side of the meuse lane.

Mr Ross' property having been purchased by the Club, in 1809, they applied to the Dean of Guild (to whom the regulation of the buildings in the city appertains), "for leave to "erect certain works on the back area or garden, representing "that they had no intention of erecting either kitchens or "billiard-rooms, but that their buildings were to be confined "solely to a staircase and three water-closets, which, instead "of covering the whole of the garden, will not extend over "a tenth part; the roofs of which, as they were not to rise "above the level of the wall, could be attended with no pos-"sible inconvenience to any person; and there was no possible "danger of their emitting smoke of any description whatever."

Leave was accordingly given.

It appearing, however, to the respondents, that other buildings than those enumerated in their application to the Dean of Guild, might be more to the convenience and advantage of the New Club, they presented a second application to the Dean of Guild, praying that instead of the buildings above-mentioned, they might be allowed to convert the stables which the original proprietor had erected at the bottom of the garden, into a kitchen and servants' rooms, and above these to build a billiard-room, warm baths with dressing-rooms, &c., and the present question regarded the right of the respondents to build these in the back area of the house, according to the plan in process.

The appellant's father appeared before the Dean of Guild, and opposed this application on the ground that the intended building was contrary to the original plan of the New Town of Edinburgh, and would be a nuisance.

The Dean of Guild pronounced this interlocutor:—"Repels Nov. 18, 1813.
"the objection that the use to which the proposed buildings
"are to be put, is of the nature of a nuisance: Finds, that
"when the ground on which the New Town is built was
"feued, a regular plan was laid down, in which the health
"and comfort of the inhabitants appears to have been con-
"sulted, by disposing of the back ground into areas for pro-
"motion of a free circulation of air, and adding beauty to
"the appearance, as well as affording convenience to the in-
"habitants, and from which plan no deviation ought to have
"been permitted. Finds, that in cases where any material

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" deviation from the general plan has taken place, the same " has either arisen from the consent of conterminous heritors, " or from not being opposed by the public or those having " interest therein, in proper time. Finds, however, that no " material deviation or inconvenience will arise from the pro- " posed change on the buildings belonging to the pursuers, " therefore, grants warrant to them to make the alterations " and additions craved, conform to the plan marked as relative " hereto, under the special exception and condition, that the " height of the passage to the proposed kitchen, billiard-room " and baths, does not exceed that of the garden or division " wall, and decerns."

The respondents presented a bill of advocation to the Court of Session, in so far as the interlocutor prevented them from raising the building which was to form the passage from the house through the garden to the proposed kitchen to the height they intended.

And Mr Gordon then presented also a bill of advocation so far as the interlocutor repelled the objection to the proposed buildings as a nuisance, and granted warrant to the respondents to make the alterations and additions craved.

The respondents contended that they were not prohibited, either by their title-deeds, or by the plan of the New Town of Edinburgh, from erecting the buildings in question; and that it was not a nuisance which the conterminous heritor is entitled to oppose. They further contended that the only restriction in the charter had reference to the space of ground in the middle of the square enclosed with rails; and that it further allowed the proprietor " to exercise any other act of " ownership, which may not be inconsistent with the manner " of holding hereby prescribed."

The Lord Ordinary (Alloway), reported the case to the First Division of the Court, who pronounced this interlocutor:

Mar. 10, 1814. —" Find that they (respondents) are entitled to erect the " passage to their proposed kitchen, billiard-room and baths, " of the height and dimensions as said passage is delineated " in the plan in process, and decern accordingly; and in the " advocation at the instance of Charles Gordon, find, decern, " and declare in terms of the interlocutor of the Dean of " Guild: Find the said Charles Gordon liable in the expenses " of process; allow an account thereof to be lodged, and " remit the same, when lodged, to the auditor of Court to " tax and report."

At this time the appellant's father died, and he was sisted

as a party to the process, whereupon, and upon production of the account of expenses, and the report of the auditor thereon, they decerned against the appellant for the amount.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—It is contended, on the part of the respondents, that they are at liberty to erect any building on their property, or make any use of it they please, so far as not expressly restrained by the conditions of the original grant, and not inconsistent with the common law respecting nuisances which may be abated. But the appellant is entitled to assume, in terms of the sentence of the Dean of Guild, confirmed by the Court of Session, and not appealed from: "That when the ground on which the New "Town of Edinburgh is built was feued, a regular plan was "laid down, in which the health and comfort of the inhabi- "tants was consulted, by disposing of the back grounds into "areas for the promotion of a free circulation of air, and "adding beauty to the appearance, from which plan no "deviation ought to have been permitted; and when any "deviation has taken place, it has been by consent, or owing "to inadvertence." The respondents, therefore, are not at liberty to avail themselves of deviations which may have occurred in other instances, or to resort to general rules as to the use which may be made of unlimited property, if these could support their plea. The plan to which the Dean of Guild refers, is recognised in the charter to Mr Ross, in whose place the respondents now stand, granting to him the area marked by the letter N, which is unintelligible without the plan, and necessarily makes that plan a part of their title, as much as if, in fact, it had been annexed to the grant; and by that plan it is proved that the back areas of the buildings were to remain open as garden ground. The erection even of stables and coach houses is a violation of it, and can only be accounted for in the way the Dean of Guild does. Various cases have occurred, in which the Court of Session has enforced the adherence to the original plan, and restrained buildings contrary to it, and some of these cases are precisely analogous to the present. That certain restraints and conditions were imposed by the grant or charter, does not justify the inference that in all other cases the grantees were at liberty to make what use of their property they pleased, consistent with the general law. These conditions respected the tenure and the use of the main buildings only.

Riddell *v.* Moir, June 1808; M. Sy. "Property," No. 3, Note 1, Campbell *v.* Lindsay, Feb. 17, 1803, Fac. Coll., vol. xiii., p. 192; Lord Robertson *v.* Reid, M. Sy. "Property," No. 3, Note 2; Young and Co. *v.* Dewar, Nov. 17, 1814, Fac. Coll., vol. xviii., p. 23.

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2d, The Dean of Guild so far restrained the respondents as to confine the height of the proposed passages from the main house to the kitchen, billiard-room, baths, &c., to that of the common division wall between the properties of the appellant and respondents; but the decree appealed from allows these passages to be raised for a certain length, five feet or upwards above the wall, thereby overlooking the appellant's garden, and exhibiting an appearance of the ugliest kind. It is admitted that the respondents have no right to raise the wall itself, and the appellant submits, that neither have they any right to erect buildings any higher than it, to his injury and inconvenience, nor indeed to erect buildings of any kind on that part of the ground marked on the feuing plan, as a garden or flower-plot.

3d, The proposed buildings, and the use they are avowedly to be put to, must be a pernicious nuisance to the neighbourhood, and the appellant's premises in particular. The smoke and vapours from the kitchen of a tavern, and from the baths, &c., must be destructive of the comfort of the inhabitants of the appellant's house, and injurious to their health. The noise of the cooks, scullions, and servants, resorting and working in the kitchen and other apartments proposed, must be extremely troublesome, and it requires no proof what sort of neighbourhood billiard-rooms, filled by the members of the New Club after dinner, will make, when every word and every stroke may be heard in the adjoining garden.

4th, This case is not to be judged of by the rules respecting nuisances, defined by common law or general decisions. The Dean of Guild of Edinburgh, as in other burghs in Scotland, has a discretionary power to regulate buildings, &c., within the royalty, and is not tied down by any rule, but is to study the general good and convenience, *vide* Bankton, B. iv. tit. 26, § 2. The sentences of the Dean of Guild are no doubt subject to the review and control of the Court of Session, as the decrees of that Court are to the review and control of your Lordships' house. Your Lordships are, therefore, to judge of this case with the same latitude that the Dean of Guild had; and if you are satisfied that the permission which has been granted is improper, and that it must tend to the discomfort of the appellant and the vicinity, and be a bad precedent, it is of no consequence though a thousand instances are produced of the same things being done in other places, if sanctioned by every Court of the kingdom, when objected to. The real question here is, Whether it would be right or proper to

allow the New Town of Edinburgh to be crowded with buildings of all descriptions, as much as the Old Town was or is? Whether what was so universally complained of, and so noxious, understood to be happily avoided by the plan of the New Town, shall now be exhibited there, in all its deformity, and with all its bad consequences?

Pleaded for the Respondents.—On the charter. In deciding on the import of the charter, a court of law could not consider as unnecessary, any clause which, in any respect, tended to point out the powers conferred on the grantee, or the restrictions imposed on him by the charter. In the present case, the clauses quoted from the charter, show that, besides building houses on the front of their areas, the feuars, at the time of granting the charters, were supposed to have a right, not only to erect other buildings, but even to establish a brewery. But, further, the case does not rest merely on the charter containing no prohibition against building on the back areas; for it is evident from the charters of the parties, that wherever the Town intended to prevent buildings, this was done with the most anxious care. Accordingly, by a special clause in the charter, it is distinctly declared that it shall not be in the power of the feuars to do anything with the area of the square itself, or to convert it to any purpose whatever, except the use of the families themselves, for pleasure, health, or accommodation. By the charter in favour of Baron Gordon, there was conveyed to the Baron, not merely the house and area in St Andrew Square, but also a stable and coach-house, together with five feet of ground for a dunghill, lying upon the north side of an area in Princes Street, immediately opposite to the Baron's dwelling-house, and area in St Andrew Square, but the one charter or the other does not restrain the exercise of the full right of property in all other respects.

2d, Plan of the New Town. The appellant next stated that this erection was contrary to, and a deviation from, the plan of the New Town. But it is quite clear, 1st, In point of fact, that that plan was never intended to prevent or restrict the right of building in back areas; and 2d, In point of law, no restriction or obligation could be reared up against them by mere reference to a plan, without being inserted in their charter.

The appellant's father did not refer to any case, except the noted case of Deas *v.* Magistrates of Edinburgh, decided by this Most Honourable House. That case, however, was

Vide ante, vol. ii., p. 259.

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totally different from the present. As the appellant's father founded his objections to the respondents' operations chiefly on the plan of the New Town, and as he referred to the case of Deas, the respondents suppose the appellant will produce engravings of the plan on which he founds, and of the plan referred to by Lord Mansfield in deciding the case of Deas. The respondents aver that your Lordships, on inspecting the engravings of those two plans, will be satisfied of the difference between the present case and the case of Deas.

The case of Deas regarded ground in the front of Princes Street, which, in the plan exhibited to the different feuars, had been delineated and laid out as pleasure grounds; the north loch, then and still a nuisance, being represented in this plan in the agreeable form of a canal, with walks, terraces, and rows of trees, on each side.

As to the objection stated on the ground of nuisance, that is perfectly unmaintainable.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

" My Lords,*

" There is another cause which stands before your Lordships for judgment, and, as the attention of your Lordships is not at this moment engaged, with your permission, I will avail myself of this opportunity to state what has occurred to me upon the subject. It is the case of Gordon *v.* Majoribanks; it is, in truth, a cause between Mr Gordon and the members of the New Club at Edinburgh. The case is brought before your Lordships by an appeal from the judgment of the First Division of the Court of Session, contained in certain interlocutors which have been made the subject of discussion at your Lordships' bar, and which I shall have occasion to state presently; the principal interlocutor first appealed from, being an interlocutor of the Court of Session, to this effect, upon the report of the Lord Alloway, and having advised the memorials for the parties, 'the Lords advocate the process, and in 'the advocation, at the instance of Mr John Marjoribanks and 'others, find, that they are entitled to erect the passage to the 'proposed kitchen, billiard-room, and baths of the height and 'dimensions as said passage is delineated in the plan in process.' Your Lordships will allow me to call your particular attention to these words 'of the height and dimensions as said passage is' delineated in the plan in process, and decern accordingly; and in 'advocation at the instance of Charles Gordon, find, decern, and 'declare in terms of the interlocutor of the Dean of Guild, find

* Taken from Mr Gurney's Short-hand Notes.

'the said Charles Gordon liable in the expenses of process; allow 'an account thereof to be lodged in the usual manner, and remit 'the same when lodged to the auditor of Court to tax and report.' The second interlocutor is an interlocutor, which only states those expenses, and directs Mr Gordon to pay those expenses. From these two interlocutors, the present appeal is brought before your Lordships.

"When I call your Lordships' attention to the words, 'that they 'are entitled to erect the passage to the proposed kitchen, billiard-'room, and baths, of the height and dimensions as said passage is 'delineated in the plan in process, and decern accordingly,' I do it for the purpose of pointing out a distinction between the language of this interlocutor, and the language of the judgment of the Dean of Guild, from whom the cause was advocated on both sides. *That* magistrate states, that 'having considered the peti-'tion for the managers of the New Club with the answers thereto, 'for Charles Gordon, Esq., replies, duplies, triplies, titles, and 'whole process, and also visited the premises, repels the objection, 'that the use to which the proposed buildings are to be put, is of 'the nature of a nuisance: Finds, that when the ground on which 'the New Town was built, was feued, a regular plan was laid down, 'in which the health and comfort of the inhabitants appear to 'have been consulted, by disposing of the back ground into areas, 'for the promotion of a free circulation of air, and adding beauty 'to the appearance, as well as of affording convenience to the 'inhabitants, and from which plan no deviation ought to have 'been permitted: Finds, that in cases where any material devia-'tion from the general plan has taken place, the same has either 'arisen from the consent of conterminous heritors, or from not 'being opposed by the public, or those having interest therein, in 'proper time: Finds, however, that no material deviation or in-'convenience will arise from the proposed change in the buildings 'belonging to the pursuers; therefore, grants warrant to them to 'make the alterations and additions craved, conform to the plan 'marked as relative hereto, under the special exception and con-'dition, that the height of the passage to the proposed kitchen, 'billiard-room, and baths, does not exceed that of the garden or 'division wall, and decerns.'

"Now, my Lords, the distinction between the two is contained in the particular language to which I called your Lordships' attention used in the interlocutor of the Court of Session, by which they declare the title of the plaintiffs to erect the passage 'of the height and 'dimensions, as said passage is delineated on the plan in process.' If this be correct, they would be entitled to erect it, in some respects, which I shall point out to your Lordships presently, higher than the garden or division wall; the Dean of Guild being of opinion, that they might make the alteration and additions 'under

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'this special exception and provision, that the height of the 'passage to the proposed kitchen, billiard-room, and baths, does 'not exceed that of the garden or division wall.'

"My Lords, the question between the parties arises out of a claim which the respondents made to build in the back area of a house they have in St Andrew Square, in the New Town of Edinburgh, a kitchen and other offices, according to the plan in process; this, as it has been represented to us, was opposed, on two grounds, the one, that building it according to the plan in process would be a nuisance, and certainly at law, independently of the specialties of this case, as arising out of the original plan of the New Town of Edinburgh, there can be no right to the respondents to put a nuisance in the neighbourhood of Mr Gordon, but he would have an extremely good title, to have it (if a nuisance) abated; but it does not appear to me that the Court of Session, or the counsel at the bar, have been very able to make out this to be a nuisance. I shall have occasion, presently, to state to your Lordships more particularly what has passed upon it; but the principal question is, Whether, regard being had to what your Lordships have heard, as to the original plan of the New Town of Edinburgh, by reason of what passed as to the form of that original plan, a party can be understood to have come under an obligation, not to the Magistrates of the town of Edinburgh, but to what are called here, the 'conterminous heritors,' not to build upon the area which stands behind this house?

The Question.

"My Lords, this plan, as it has been represented to us, is a plan delineating certain intended streets and squares, which are marked out by letters. As your Lordships will recollect, the particular feu of this party, is marked out by the letter N; different areas which were to be feued, were also marked out; and without now entering into a question, which would lead to a very great deal of discussion, whether there might not have been some plan, that would have evidently shown to a great variety of persons, what was expected of each of them, under that plan; I apprehend that the question in each particular case, must be, Whether the nature of that particular plan, and the transactions with reference to that particular plan, were such that the law would infer, where nothing is said about it, that there was a contract as between each and every of the persons who meant to deal upon the foundation of that plan, to keep the property in all respects, according to the exhibition or picture of it made in that particular plan?

The Plan.

"My Lords, we are told, that when St Andrew Square was to be built, the plan contained merely the sites of the buildings, and that with respect to all the rest, it was left as land apparently not to be covered; that all which the plan showed beyond this, was there delineated as grass; and that *that* plan was altogether silent

(if I may use such a word as silent, with regard to a plan) as to what was to be done with the areas behind the houses, except, that it represents those areas as being in grass; I think, further than that, we have not learned by the arguments at our bar.

" My Lords, it is stated in the cases which have been laid before you, that the plan did not represent even the depths to which the houses were to be built; it is stated to you, that although the areas in each lot that was feued, were to be separated from each other, the plan did not represent that they were to be separated from each other by walls, nor is it stated to you that the walls throughout the whole of the back part of this side of St Andrew Square, I mean those walls, which separate one conterminous heritor from the others, were to be built of the same height, or that the plan represented that they were to be built of any particular height, and much less of the same height. I mention these circumstances as the grounds of some observations I shall have occasion to make.

" My Lords, the charter under which this New Club claims, was a charter granted to Mr Ross, 'on the narrative of his having 'paid the sum of £230 sterling as the rated purchase money of $42\frac{1}{2}$ 'feet of ground of area, letter N, lying on the south side of St An- 'drew Square, and it dispones to him, his heirs, and assignees 'whomsoever, heritably and irredeemably, all and whole the said '$42\frac{1}{2}$ feet in front of area, letter N, lying on the south side of 'St Andrew Square.' This is, undoubtedly, the description of the lot; it certainly *refers* to the plan, and it does not appear to me possible to say, that the language of the charter contains more than that the property feued was lot N, between the neighbouring lot marked O, and the neighbouring lot marked M, which are described to be of the same size, and which I have taken the liberty to mention to your Lordships. The Charter

" My Lords, I mention the contents of this charter, rather as evidence of what the understanding between the parties at the time these transactions passed was, than as being the contents of that instrument which is to bind the conterminous heritors as between them and the Magistrates of Edinburgh; for it is not a question as between the Magistrates of Edinburgh and the persons who have taken these feus from the magistrates, but a question as to what is the faith which is to be represented as pledged by these heritors to each other, from which, one can infer, that they have gained what I may call a servitude upon the property of each other, and that these heritors have a legal right, upon this notion of good faith, to prevent a man from making every use of his property, which he may by law be entitled to, unless there are what in Scotland may be termed negative servitudes. There are legal servitudes, and there are conventional servitudes arising out of contracts; and the question is, Whether, from the transac-

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tions of these individuals with respect to this particular plan, to which I wish to confine myself in all I am stating, they can be said to have contracted with each other, to create these negative servitudes, to restrain each other from making that use of their land, which, independently of that contract, they would, by law, be entitled to?

"My Lords, the charter, taking that as evidence of the understanding of the parties, at the time, I will mention to your Lordships, describes as the subject of the grant, 'the whole space of 'ground within the line of the street, ways of the square, as now 'levelled and enclosed by a parapet wall, and iron rail, and that 'as a common property, with the several feuars around the square. 'But under the condition, that the aforesaid space be used 'allenarly,' which means, I suppose, 'for the pleasure, health, or 'other accommodation of the feuars or their families, but in no 'way to be converted into a common thoroughfare, or used to any 'other different purpose whatsoever,' so that the plan laid before those several undertakers to build, representing the square in front, grants this square as the common property of all that build the houses, but to be used only for the health, accommodation, or pleasure of the feuars and all their families; but with respect to the areas behind the houses, it does not say one single word on that subject, and as to other parts of the subject, namely, 'the 'dwelling-houses, cellarage, and back ground of the areas,' there is no restriction whatever in the charters, as we are told, except upon the right 'to subfeu, sell or dispose of all or any part of 'the piece of ground before disponed;' and then follow the words —upon which one of the parties at your Lordships' bar has laid great stress, the other saying that there is no stress whatever to be laid upon them—'or house or others built thereon, to be held 'of them or their heirs, or of any other interjected superior, but 'allenarly to be held of and under us, and our said successors in 'office, as superiors in all time coming.' Now, on one side, it is said, here is a right given to 'sub-feu, sell or dispose of all or 'any part of the piece of ground before disponed, or house or 'others built thereon.' Why, say they, if there is nothing to be built thereon but the house, what is the meaning of the words, 'house or others built thereon?' to which the other party answer, It is true there is the word 'others,' but it may mean appurtenances, thereby giving it a meaning which will account for its being inserted without its being specified to be detached buildings; and, at all events, they say, that although this charter gives a power to sell or dispose of the house and others built thereon, still, whether that power was legal, with respect to the conterminous heritors, will be a question to be determined; and I admit, that it is still a question to be determined. The question is not between the Magistrates of the city of Edinburgh and this per-

son, but between all the contractors, whether they purchased with these servitudes. Indeed, these words 'with others built 'thereon,' may be left out of this charter; because, when they have 'sub-feued the piece of ground before disponed,' the 'piece 'of ground' must include the site of the house, and the others built thereon, consequently, they might refer to those curtilages which we find referred to in Scotch, and very often in English conveyances.

"Then there is another clause in the charter, 'that it should 'be lawful for the proprietor "to exerce," that is, exercise any 'other act of ownership which may not be inconsistent with the 'manner of holding hereby prescribed, but under this declara- 'tion, that if he or his foresaids shall convert the subjects built 'upon the piece of ground hereby feued into breweries, or do 'any other act or deed to infer a claim of thirlage, they are to 'free and relieve us and our successors in office, the piece of 'ground hereby feued, and feu-duty payable for the same of and 'from the payment of all multures which can be claimed furth 'thereof, as payable to any mill 'to which the same may have 'been astricted.' Now, though dwelling-houses were to be built in part of the front of St Andrew Square, they contemplated even that there might be a brewery built upon the premises, and I only mention this, for the purpose of making this remark, which is only a repetition of what I have said over and over again before, but I mention it not only for the purpose of saying, that let the meaning of the charter be what it may, between those who granted and those who took the charter, *that* will not decide what are the rights of the several contractors, as between each other, if it can be said that their variance from the plan has produced a sort of breach of good faith; but I mention it as the most surprising thing in the world, if it was the general understanding of the Magistrates of Edinburgh, when they were feuing out this property, and if it was the general understanding of all parties, who were taking this sort of property from them, that this individual, and the other persons who were taking charters, like the present charter, should have supposed, that, without one single word said in the charter with reference to the use to be made of the back areas, there was a general understanding among all persons granting and taking those charters, that these were to remain gardens for ever, separated from each other by walls, of which there were no exhibition on the plan, which walls were not provided for, because they were not mentioned in the plan at all, and when, in point of fact, these areas have been dealt with, as your Lordships will see presently.

"Now, my Lords, do not let any one suppose, that I disregard what has been said, on which great stress has been laid, on the qualification of men of taste in the city of Edinburgh; far from it.

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I had once the pleasure of seeing that city when it was by no means so handsome as it is now, but it was, even then, I thought, one of the most striking and most beautiful places, especially where the New Town was built, that, perhaps, I ever beheld; but I must say, whatever may have been said in this place, and whatever my wishes may be, about taste and beauty, I come here to determine, what are the legal rights of men, and not to gratify taste, or to enhance the beauty of any city whatever, at the expense of laying down in judgment, that there has been a contract between parties, where I am satisfied, there has been no such thing.

"My Lords, after Mr Ross had got this charter, as it is stated to us, on what authority I do not know, but as it is stated to us, in the paper in my hand, he built in the front of his area a house with a series of closets behind, which, it is stated, reached to the second storey of the house, and about six feet above the highest part of the wall, which divides his area from the adjacent property. These closets, it is represented, were not found fault with at the time, and your Lordships will perceive, it very naturally happened that such should be built, but how one is to account for it, if there was this general understanding, that there were to be no buildings upon these areas, I really do not know, natural as it was. It happened, also, that in this city of Edinburgh, as you see in London, at the bottoms of areas, or gardens, coach-houses and stables have been built, one storey or two stories high. Now, I should be extremely glad to know what it was, in this plan, which these undertakers or builders saw, that could induce them to suppose, that they were under an obligation to keep one part of the area uncovered, and yet that they were not under any obligation to abstain from the building of coach-houses and stables, in another part of the area, and that this has been done very generally has also been represented to us.

"My Lords, I should wish here to omit referring to a circumstance that I see is stated in the case;—perhaps it bears, too, somewhat upon the question between the parties, that is this, that this plan for the improvement of Edinburgh having been formed in the year 1767, at the time the use of water-closets was not known in the principal city of the northern part of this kingdom, without the least authority for it, as far as we have heard from this plan, those buildings were erected in these areas without them, for want of those water-works which have since been introduced inside the house. I suppose there was such an absolute necessity for some of those conveniences, that that is the reason they have not been adverted to.

"My Lords, this house having been purchased for the purpose of carrying on a club, which club, I perceive, consists of about 300 members, and amongst these 300 members, as is extremely

natural, I have no doubt some of the Faculty of Advocates, and I am perfectly sure some of the learned judges; for, I observe, that the Lord Ordinary declines to give an opinion, because he is a member of the club; but when you come to consider the number of the gentlemen who form this club, and the character of many of them who form it (the most respectable), it appears to me rather a surprising thing, that it should be understood to be the law of the city of Edinburgh, that nothing could be built in the areas behind these houses. The club, consisting of 300 proprietors, set about these alterations which I am about to mention to your Lordships. My Lords, the club, of course, did not want, for most of the gentlemen, I dare say, who composed it, had these conveniences elsewhere—the club did not want stables and coach-houses, and they therefore thought of converting the stables and coach-houses into billiard-rooms, into baths; and as it was no longer absolutely necessary to have exposed to public view those buildings which had hitherto supplied the place of water-closets, they now employed their water-closets to supply a place for these buildings, and proposed to have two or three water-closets, likewise, under the roof of these buildings.

The fact is here mistaken by the short-hand writer. Note by S. and R. the Solicitors.

" My Lords, in order to do this, they seem, at least, to have intended,—certainly, I think, that must be admitted,—not to carry the passage which was to go from the centre of the house to the centre of the coach-house and stables, above the head of the division wall,—that was their first intention; however, they thought afterwards they should be much better accommodated if that passage was carried higher. It seems never to have struck any of them, nor any body else, that if they did not carry it higher than the walls of the conterminous heritors, it would be any breach of faith; but how it was to be collected from a plan which represented every thing as vacant, and how that could be understood to be the exhibition of an instrument which was to leave you at liberty to put some erections upon the premises, but not to put other erections upon the premises, and *that* understanding was so plainly expressed as to amount to a legal contract between the parties, it is somewhat difficult to understand,—certainly more difficult to understand than I know how to deal with. It appeared to them afterwards, however,—they having got, in truth, authority from the Dean of Guild to erect, though not to erect higher than the walls,—it appeared to them afterwards, that it would be more convenient to them to have a passage, which must be admitted to be somewhat higher at the one end, and considerably higher at the other, the wall being, I understand, on a sloping ground, and being higher near the house than near the stables. The way they set about it, my Lords, was this, they wished to have one passage above another, and in order to have the lower passage as low as they could well have it, they began lowering the ground in the

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area, meaning that the persons who went through the lower passage, should go from the lower story of the house itself, that is, the ground offices to the ground offices of this building, which had before been a coach-house and stable. They then set about adding another passage above that passage, and by making a communication between the windows of the dining-room and that passage, they were to go along the higher passage into the higher rooms of that building, which had been the coach-house and stables. The reason of their doing that was this, that if they had a right of access to these, they either must have had an outward access by steps, up to the upper part of the building, which would have been an additional building upon the area, and an additional building which must have been above the height of the wall in order to enable them to get to the upper part of the premises, or they must, in the lower part of the premises, have appropriated a part of that space which they meant to set apart for baths and other conveniences, for the purpose of making a staircase in the inside of the premises, which would have been giving away part of that billiard-room, in which the members of this New Club were to amuse themselves up stairs, and they thought it better, upon the whole, to raise this passage, and by means of that to communicate to the upper and under stories of this building.

"My Lords, this gave very great umbrage; and your Lordships will find from the papers, Mr Gordon did not choose to submit to it, and in truth, if it was no nuisance, strictly speaking, still, if it was a thing which was unpleasant, nay, I go a great deal farther, if they had no right so to build, whatever individuals may think about persons proceeding to insist upon their legal rights, although the waiving them might occasion no inconvenience to them, or injury to them, except to promote the convenience and the pleasure and comfort of their neighbours, yet I say again, in a court of justice, we have nothing to do with that; for the question before us, upon all occasions is, not what men of taste or men of honour are to do, but what is the contract between the parties and their true right in point of law? I desire, therefore, to have it understood, that if Mr Gordon can make out his right to destroy this passage altogether, in this Court, at least, we have no right to say that he was doing anything but what he was fully entitled to do.

"My Lords, there lived on the other side, however, of the house which was devoted to this club, a gentleman of the name of Dr Gregory, whom I have always understood to be a physician of very great eminence (I take it to be *that* Dr Gregory, though I am not sure I am right); and when we have this case disposed of as a nuisance, I do not think that any person can say, that Dr Gregory had any interest in having that building there, though

I see it is slyly insinuated that a *physician* could have no great interest to oppose *that* which would affect the health of his neighbours, but there is a most ingenious reason given for Dr Gregory's not making the same objections which Mr Gordon does. Mr Gordon objects that he may suffer by the smoke of the chimneys and the noise, I do not know whether he might not object to that very well; if these 300 gentlemen are to go and play at billiards near to the room where he is sleeping, he may have reason to complain of the noise, and if there is a good deal of festivity, not only the smoke, but the smell of the kitchen may be offensive; but it is well argued that Dr Gregory has no such reason to complain, because the house stands on the east or the west side of this house, I forget which, and that the wind at Edinburgh always blows from such a quarter, that the noise and the smell of this club-house, must be carried to Mr Gordon, and none of it to Dr Gregory. That is the account they gave of it in that respect.

" My Lords, the Court of Session was of the opinion I have mentioned to your Lordships, that is to say, I understand them to have been of opinion, that this was no material deviation from the plan, that it did not amount to a nuisance, and that there was nothing in the transactions with respect to that plan which prevented the owners of this house from building in the back area, as they thought proper to build. Mr Gordon has no building, I understand, at the bottom of his area; but, my Lords, there is a circumstance which is very material with respect to that, for, whatever might be the import of this plan, as manifesting that there was some faith, out of which you were to imply a contract with respect to St Andrew Square, the same must arise in respect of houses in Princes Street. Now, Mr Gordon appears to be the owner of a coach-house and stables at the bottom of the areas in Princes Street, how these coach-houses and stables got there, if so much is to be inferred, as is contended, I do not know; but if we are to believe these papers, Mr Gordon was obliged to come into covenant that he would not raise these coach-houses and stables higher than they were. Now, how is that consistent with their being built at all, and how is it consistent with the fact that he was prevented by a covenant he entered into, from carrying them higher? I say, my Lords, therefore, when this was taken to be a question between the Magistrates of Edinburgh, and the feuar, on the exhibition of the charter, under which he claims, the moment *that* is seen, *cadet questio;* where is the evidence that the feuar was under any obligation at their instance, to refrain from building on this area? But it may be a very different question as between the feuars amongst themselves, provided you can infuse into their charter, without a single word being contained in the charter, an obligation that they shall refrain, at the instance of

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each other, and that they be compelled at the instance of each other to abstain from building upon these areas.

"My Lords, I have before me a book on the Scotch law, which speaks of these servitudes as not to be inferred, unless they are expressly created; and therefore you are to look at this plan, and see what it is, and I do desire,—I am obliged to do it at the risk even of all the censure with which what I state may be received elsewhere,—a censure that I lay aside, as not worthy of much regard. It is my duty to speak my sincere opinion here, and I do not hesitate to say, that to infer such a contract as this, from such a plan as this, and from such transactions as have taken place in that plan, would be as violent a proceeding in judicature as, in the course of a very long life, I have ever witnessed. What is the plan? I do not mean to say that where a plan is held out, in the execution of which various persons are to be engaged, that *that* plan may not, of itself, point out to every individual who is to engage, not only what is to be his contract, with reference to the party he engages with, but also with all other parties, so as to constitute a ground for the Court's inferring that he has contracted, and that he ought to conform himself to all contained upon the face of that plan; but then the plan must speak out in intelligible language, or in such language, that it cannot be mistaken. I will take the case of *Butterworth*, there is a highly finished plan in the front, I mean in point of elegance of architecture, and the parties signed the plan which contained a representation of the building, and then they had their charter referring to that plan so signed; it was impossible to say, that a man who built the middle house of the three, could be permitted, having entered into that agreement, to injure the neighbouring houses on each side by a projection of his own, that would be destroying the whole of the plan. How does that bear upon the circumstance of a plan which represented nothing but houses built in front of St Andrew Square, where the charter provides, that the square shall be kept open and properly dealt with, and that *that* property shall be enjoyed only in such a way as shall conduce to the health and accommodation of all of them, and where not one syllable is said as to what shall be done with the ground behind the houses, that being exhibited simply as a plot of grass?—that you are to infer from all that—What? first, that the conterminous heritors may divide this into areas—*That* you may infer, because, where the plan states the contents of each man's feu, it would be a little too harsh to say, that a man should not enclose it though for his own benefit, but the plan says nothing of the *mode* of *enclosure;* the plan does not say, that A shall build his wall of such a height, and that B shall not build to a greater, or C shall not build to a less height, and, unless there was an agreement between these conterminous heritors to keep that space all open, how can you say there was an agree-

Butterworth *v.* Dirom, &c. June 2, 1812; Mor. Sy., No. 3, Note 6; also Hume's Coll. of Sess. Papers, vol. cxvi., which case had reference to a deviation from the plan of the houses in Charlotte Square.

ment as between two individuals, that they shall not build, each on his own side? It does appear to me, I confess, a thing perfectly impossible so to hold.

"My Lords, a case was stated to your Lordships, I mean the case of Deas *v.* the Magistrates of Edinburgh, which was heard in 1772, in presence of a noble and learned Lord, who then sat in this House, of whom I have often, not only taken the liberty, but done the justice to say, that as long as the law of Scotland exists, and as long as those possessing a profound knowledge of it are looked up to, the name of My Lord Mansfield will be viewed with veneration and respect. But, my Lords, in the case of the feoffees of Heriot's Hospital, I did take the liberty of saying *that*, which, if I had had the honour of sitting in the House at the same time, with that noble Lord, I should have said in his presence. The noble Lord, at that time, certainly almost exclusively disposed of all the questions relative to the law of Scotland in this House. My Lords, I am one of those who must state freely that I do not think *that* a happy constitution for any Court of Justice; but, if I had been here, I would have taken the liberty to state to that noble Lord, in his presence—always speaking with that respect and deference which must be due from such an individual as I am, to a man of so great and exalted a character as belonged to him, that, though the judgment he delivered was not intended to alarm the Corporation of Edinburgh, I, at least, am a man so infirm, that I could not have heard it, if I had been one of the Corporation of Edinburgh, without feeling it had that effect upon me. Your Lordships will pardon me, if I take the liberty again of saying that *that* judgment contains a great deal of attention to persons of taste, and to convenience; too much (if I may say so) regard being had to the act of the legislature which imposed no such conditions, as might, from such allusions, be supposed to be contained in it. I think, that in dwelling too much on that which was to be expected from the honour and character of parties, instead of standing on the legal rights of one party, and the legal obligations of another party, it steps a little aside from the legal subject of consideration of the learned judge.

Deas *v.* Magistrates of Edinburgh; *vide ante*, vol. ii., p. 259.

Heriot's Hospital *v.* Gibson Dow, vol. ii., p. 301.

"My Lords, with respect to the case to which I allude of the feoffees of Heriot's Hospital, I shall say nothing as to the observations which have been made upon that subject. It may be the opinion of some, that the decisions of this House are to be *obeyed*, but not to be *followed*; but, my Lords, I must take the liberty of saying this, that the interests of the subjects of this country would be in a situation, that would stand in great peril, if a doctrine of that kind were to be avowed and adopted; because, although, my Lords, every Court that I have ever set my foot in, in this part of the island, has considered, where there are circumstances in subsequent cases, varying the facts, from those which appeared in

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former cases, the Court is at liberty to judge upon the subsequent case, so formed of different circumstances, without being bound by such decisions; yet, noticing what has passed in the House of Lords, I do not think it ever fell from the mouth of any English judge, that when there was no difference of circumstances he would obey in the particular cases in which the House had given its judgment, but would *not follow that* in after decisions. That is not the doctrine to which we have been used in this country. But really, my Lords, that case of the feoffees of Heriot's Hospital, although it may raise an observation upon Deas' case, might have been, and was determined on grounds, which did not at all interfere with that case. What was the case of Heriot's Hospital? The Magistrates of Edinburgh and Heriot's Hospital had each a property in the site of a street; a price was paid for the lot; it was feued out by the Magistrates of Edinburgh, and the feuar was to pay a feu-duty to Heriot's Hospital, as a consideration for his feu right. At the time that this transaction took place, there was a plan drawn out, and the Corporation of Edinburgh had an Act of Parliament, which enabled them, during a limited time, to purchase some small tenements, which stood on a particular spot of ground, so as to form the street, in the handsome way they desired. That Act of Parliament having expired, the magistrates no longer had that power under the Act of Parliament. The feoffees of Heriot's charity demanded the feu-duty, the answer given by the tenant, was, that he would not pay the feu-duty, because that plan having held out that the street was to be so and so constructed, and those old buildings not being purchased by the corporation, he ought not to be called upon to pay the duty, and on that occasion, I confess, I was weak enough, to be clearly of opinion, that it was impossible for him to maintain that plea. If this person had any right to call upon the magistrates to remove these buildings, he should have called upon the magistrates to remove the buildings, but how could that entitle him to object to pay the feu-duty to Heriot's Hospital? and I was weak enough too, to say, if you hold out a plan, that means no more than this is what I propose to do, if I can accomplish it, it is for you to engage, if you please, upon the presumption that it will be executed.

"My Lords, we have been hearing to day about Scotch entails and English entails, and no man is more ready than I am to admit that it is an extremely difficult thing for the mind of an English lawyer to deal accurately and properly with matters of Scotch entail, and I am perfectly sensible, that we often fall into error by supposing there is more similarity between these tenures than there really is, and it is not to be wondered at; for we have had stated to us from the bar this very day, by Mr Grant, most eminent as a Scotch lawyer, what was an English entail, and I was under the necessity of asking Mr Grant, whether that was an English

entail, as that was not my idea of it; and so with respect to the Scotch law, to apply this to questions that come before us.—I think it my duty, and have always said so, to keep in view the distinctions between the laws of the two countries, and perhaps, if I have been remarkable for any thing in the course of my judicial life, it is for the care and vigilance I have used to keep my own mind on Scotch judicature, free from English impressions, and for that reason, I looked for fear I should be misled by my English notions; for I feel it impossible to contend with respect to English law, that if the Duke of Bedford, for instance, or any body else, laid out a plan of such a place as Gower Street, with areas and gardens behind, unless we put his Grace under covenant that he would not spoil our prospect, we would come into a court of justice, and say do not let the Duke of Bedford make the best use he can of his property. I thought it might be otherwise in Scotland; and I was readily disposed to believe it might be otherwise; and if the plan shown in Deas' case, was one, that pointed out to every person who dealt with the Corporation in such a manner, that they could not mistake it, what they were to do, and what they were not to do, the faith of each of these heritors must be considered as pledged to each other.

"But, my Lords, it may be asked, if that faith is created, how came it that no attention has been called to it till this very day? That very case of Deas is evidence, that there was no such contract understood, for that rested on grounds of inference from facts such as occur in almost every case. The plan was laid down in the year 1767; the case of Deas in this House was in 1772, only five years afterwards, and yet it is supposed, that the exhibition of that plan in 1767, had created, what is called in the books before us, the common law of the city of Edinburgh, and had created an exception in every heritor, that no one should do any act which would spoil the picture which had been drawn; and yet, the case of Deas in this House, was a reversal of the judgment of the Court of Session, which had held there was no clear understanding. To be sure, my Lords, it is a most extraordinary circumstance, if there was such a clear breach of good faith in that case; if there was so clear a contract as it has been represented to be; if, in truth, there was so clear an understanding, that it might have been, perhaps, even then, represented as quite wild for any man to think, as I thought in the case of the feoffees of Heriot's Hospital,—it is most extraordinary, if this constituted the common law of Edinburgh, that the Court of Session, sitting within five years afterwards, should have held that there was no such contract, and no such understanding that there was such a contract, and that then this House, knowing much better what the common law of Scotland was, should have held, that there was such an understood contract, so it is in the present instance; here

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This had reference to the Heriot's Hospital case, and the present, which were decided by different Divisions of the Court.

is one Division of the Court of Session of opinion there is such a contract, and the other Division is of opinion, that there is no such contract. I take the liberty of asking, for the benefit of my fellow-subjects, whether it is an expedient mode of distributing justice, to say, that you will infer contracts as having been clearly entered into, when, in the first instance, the Court of Sesion, not as yet divided into two divisions, did not judicially think there was any such contract, and when at this day that Court, now separated into two Divisions, think, the one Division, that there was, and the other Division, that there was no such contract.

"My Lords, I would also beg leave to apologize, if I misled your Lordships, when I ventured to think in that case of the feoffees of Heriot's Hospital, that the question of right had not been determined in the case of Deas, by stating that the remit to the Court of Session was, that they should pass the bill of suspension, and join in the action of declarator, in order that the question of right might be tried, for those are the very words which induced me to believe that the question of right was not decided. I did state, certainly, at the time, that no person could doubt what Lord Mansfield's opinion would have been, if there had been no proceeding but the bill of suspension; but when his Lordship was of opinion that the bill of suspension should pass, and the cause should be remitted to the Court of Session, and the action of declarator joined, in order that the action of declarator should be decided, that certainly supposed that the action of declarator had not been decided, but in that I might be mistaken.

"My Lords, to illustrate this a little more, I should be glad to know, if these heritors in St Andrew Square, were at liberty to separate the area of one conterminous heritor from the area of another conterminous heritor, where am I to find the contract as to that separation? It is admitted that they did build separation walls of different heights; now, I will take this club house, with Mr Gordon on the one side, and Dr Gregory on the other; where is the evidence that the new club or Mr Ross, from whom they purchased, could say to Mr Gordon, I will separate my area from yours, by a wall six feet high, but that he might go to Dr Gregory and say, your area and mine shall be separated by a wall ten feet high? How can it be contended, on the other side, if Mr Gordon could not complain that the wall which separated Mr Ross and Dr Gregory, was four feet too high, that he has a right to complain of some intermediate wall being built, which is too high? Where is there to be found, in this plan, or any part of this plan, any evidence that the conterminous heritors ever came into a contract with each other, that they would build their separation walls of equal height, or that they would build any separation walls at all? So, my Lords, I say the plan exhibited a piece of vacant ground, but that it was to remain vacant ground without

separation walls, I admit could not be. Then, how does it happen that all these stables and coach houses have been built? and in the next place, how does it happen that in the cases you find so much admission, that all this vacant ground might be covered over with any buildings whatever, provided they were not higher than the conterminous walls?

"Now, I will put another question. If a proprietor was at liberty, with the consent of his neighbours on one side, to build a wall six feet high, and was not at liberty, because his neighbour on the other, would not allow a wall more than four feet high, what was to be the height of the buildings? In short, difficulties present themselves over and over again, when you are *inferring* contracts, in order to impose negative servitudes, which, like all servitudes, legal or conventional, are not to be raised up by implication, but to be inferred only, where it is clearly and manifestly shown to be the intention of the parties. I say, further, that the circumstance of all those persons who took the feus, taking the charter with an obligation as to what they were to do, with respect to the front square, and with no contract whatever in that charter as to the ground behind, the question not being as between the magistrates and the persons who took the feus, but with the persons who took the feus as between themselves, there being this agreement as to the ground in front of St Andrew Square, but no restriction as to the areas,—there being this evidence of fact to oppose to the evidence which arises from the mere exhibition of this plan, as I have represented, it does appear to me to afford very strong ground, *not* that there was such a contract between the feuars, but that there was *no* such contract between the feuars.

"My Lords, I offer to your Lordships this opinion, not because I like to give it, because, though I do not pretend to much taste, I know there are those in your Lordships' House, who have much taste, and if I could secure, by the administration of such law as I am authorized to administer, all the beauty which is wished to be concentrated in Edinburgh; and if I could withdraw from it, all inconsistent with the beauty which still remains, I should be glad to do it, but I cannot do it at the expense of stating to your Lordships, *that* which I do not believe to be law, nor of stating *that* which I think is nothing like law. Upon this ground I have felt myself called upon to express the opinion which I have done.

"There is one point only which I do not think is explained; and if the parties wish to have any inquiry into that, I do not know how it can be withheld. The wall which divides the property, is the common property of the two conterminous heritors, and the one has no right to lay a greater burden upon that wall, than the contract between him and the other conterminous heritors will enable him to do. It was stated by the Lord Advocate, here at the bar, that not one single word had been urged in the Court

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below, whether the billiard-rooms, baths, water-closets, &c., did not lay a much greater onus upon the wall than the old stable and coach-house; but that is a matter of controversy in the papers, and if it is wished there should be further inquiry on that, I do not see how it can be resisted. It is upon this ground I offer to your Lordships, with this qualification, my opinion that the decision of the First Division of the Court of Session is right in this particular case, not that I do not say there has been no plan, but that I cannot infer that which is desired from the plan, and if, to-morrow, any intimation is made to me on the subject of this inquiry, whether it is necessary it should be prosecuted or not, we may then affirm, or so far reverse the judgment, as your Lordships may then be advised, and with that intention, I shall move your Lordships that this matter shall be postponed till to-morrow morning."

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Henry Brougham, W. G. Adam.*

For the Respondents, *Sir Saml. Romilly, Fra. Horner, Adam Duff.*

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WADDELL, &C. v. WADDELL.

GEORGE WADDELL of Ballochnie, and WILLIAM WADDELL, W.S., now of Easter Moffat, ... } *Appellants;*

MISS JEAN WADDELL of Easter Moffat, . *Respondent.*

House of Lords, 9th, March 1818.

LIFERENTER AND FIAR.—A testator left his sister the liferent of his heritable estate and his moveables, burdened with payment of "*all his* lawful debts," &c. The fee of this property, together with his moveable debts he left to the appellants. The moveable estate left to the sister fell far short of paying the deceased's debts: Held her entitled to relief from the fiar, in so far as these debts exceeded the personal effects left her. Reversed in the House of Lords.

By the settlement of the deceased William Waddell, of Easter Moffat, he conveyed the fee of his heritable estate, and of his moveable debts, which might belong or be due to him at his death, to the appellants, in certain proportions. To the respondent he conveyed the liferent of these subjects, and the property, or *ipsa corpora* of the moveables in his actual