firming the other creditors to the general assets. And then there may still be a difficulty with respect to the legatees. June 5, 1818. MORTGAGE.—VOLUNTEER.

What I propose to your Lordships then is to affirm this decree, with a declaration that the affirmance is without prejudice to any question with other creditors besides the Respondents who represent the mortgagee, or between the Appellant and the legatees. This declaration can do no harm; and if the real meaning of the decree should be that to which in construction it is liable, it may be important to declare that our affirmance is without prejudice.

Decree AFFIRMED, with declaration as above.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GORDON—*Appellant.*

MARJORIBANKS and others—*Respondents.*

THE erection of a kitchen, billiard room, and a covered passage on the back area of a house in St. Andrew's Square, Edinburgh, opposed on the ground that it would be contrary to the original plan of the new town, and a nuisance. The feu charter contained several restrictions, but none as to building on the back area. Held by the Court of Session that the buildings might legally be erected, on the ground, as it was understood, that the erection would be no material deviation from the original plan. The judgment affirmed in Dom. Proc. Feb. 9, 16, 1818. PLAN.—CHARTER.—CONTRACT.

Feb. 9, 16, 1818.

PLAN — CHARTER — CONTRACT.

The *Lord Chancellor* being of opinion that the mere exhibition of a plan was not a contract or engagement, that all that was there represented would or must be done or adhered to, unless specially referred to as stated in his judgment, *post*.—(*Vid. ante Gibson v. Feoffees of Heriot's Hospital.* Vol. 2. 301.)

Question at issue.

THE question in this case was whether the proprietors of a house in St. Andrew's square, Edinburgh, were entitled to erect a kitchen and other offices according to a plan in process on the back area of their house. The building was opposed on the allegations that it was contrary to the original and general plan of the new town of Edinburgh, and that it would be a nuisance to the neighbourhood; both which allegations were denied, and it was also contended that the mere exhibition of the plan was no restriction, the feu charter containing no such restriction nor any reference to the plan as a restriction in this particular.

Plan 1767.

The magistrates of Edinburgh, before feuing out the ground on which the new town is built, procured a plan delineating the intended streets and squares, and marking out, by letters, the different areas to be feud. The front row, or lines for the fronts of the houses, were delineated on the plan; and the back areas were marked as pieces of vacant ground, shaded green; the ground being then in grass or tillage. The plan was engraved and published.

House feued to Lord Ankerville, 1784;

The area marked letter N. in the plan, on the south side of St. Andrew's square, was in 1784,

feued by the magistrates to David Ross, Esquire, afterwards Lord Ankerville, and purchased from his trustees, in 1809, by a club of gentlemen called the New Club; and the rights taken in the names of the Respondents as their trustees. The charter granted to Mr. Ross proceeding on the narrative of his having paid the sum of 230*l.* "as the rated "purchase money of 42½ feet of ground of area, "letter N. lying on the south side of St. An- "drew's square," dispones to him, "his heirs and "and assigns whomsoever, heritably and irredeem- "ably, all and whole the said 42½ feet in front of "area, letter N., lying on the south side of St. An- "drew's square, &c." The charter, like the charters of the other feuars in the square, besides conveying to each of the feuars his house, cellarage, and back area, granted as common property, "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 for the "pleasure, health, or other accommodation of the "feuars or their families, but no way to be converted "into a common thoroughfare, or used to any other "different purpose whatever." With respect to the other parts of the subjects disponed, viz. the dwelling-houses, cellarage, and back ground of the areas, there is no restriction in the charters, except upon the right "to subfeu, sell, or dispose of "*all or any part* of the piece of ground before dis- "poned, *or house or others built thereon*, to be

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PLAN.—CHARTER.—CONTRACT. purchased by the New Club, 1809. Feu charter.

Restrictions.

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" held of them or their heirs, or of any other in-
" terjected superior, but allenarly to be held of and
" under us and our said successors in office, as su-
" periors, in all time coming." In every other re-
spect the charters respectively declare, that, with re-
gard to the space feued, it should be lawful for the
proprietor " to exerce any other act of ownership
" which may not be inconsistent with the manner
" of holding hereby prescribed ;" but under this de-
claration, " that if the said David Ross, Esquire, or
" his foresaid, 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 restricted."

Mr. Ross built in the front of his area a house with a series of closets behind it, reaching to the second story of the house, and about six feet above the highest part of the wall which divides his area from the adjacent property. He also, in his back area, built a coach-house and stables, above which there were two apartments, intended for servants, and a hay-loft. One of these apartments, in the end of the coach-house next the Appellant's property, had a chimney. But neither the Appellant's uncle, the late Baron Gordon, nor the Appellant's father, ever complained of the smoke from this chimney.

In like manner, the other proprietors on the

south side of the square built on each of their lots large houses, together with stables, coach-houses, and such other buildings on their back areas as they respectively found requisite.

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The house having been purchased by the club, in order to render it suitable for the purposes for which it had been purchased, various repairs and a few alterations were necessary. In particular as it had been built at a period when water-closets were not in use in Edinburgh, it was necessary to erect these conveniences on the area immediately behind the house. The Respondents, accordingly, proceeded to make these erections behind the house; and they ordered the surface of their back area to be lowered, so that the roofs of their new erections might not be higher than the wall betwixt their ground and the ground belonging to the Appellant's father, the late Mr. Gordon. But a bill of suspension and interdict was presented by Mr. Gordon. The Ordinary on the bills ordered the bill to be answered, and in the mean time granted the interdict. The Respondents petitioned the Court against the interlocutor, maintaining their right of building on the back area, but stated that they had then no intention of erecting any thing more than a staircase and closets of the height of the mutual wall. The bill and interdict were refused in so far as regarded these buildings; but the bill was passed *quoad ultra* in order to allow the suspender an opportunity of trying the right to erect on the back area buildings higher than the common wall; and the Respondents were therefore interdicted for a short time from building higher than the wall.

Alterations made on the property by the Respondents in 1809.

Dispute between the parties in 1809.

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But the time was suffered to expire without further proceeding.

1813. Buildings on the back area.

In 1813, the club resolved to turn the stable and coach-house into a kitchen, billiard room, and warm baths, which were to communicate with the main-house by a covered passage running through the middle of the back area. A plan of the new erections was produced in process, the ridge of the buildings (now finished according to that plan) not being more than six feet higher than the lowest part of the mutual wall. The Respondents presented a petition to the Dean of Guild craving leave to erect the new buildings, which petition was served on Dr. Gregory and Mr. Gordon, the proprietors of the adjoining houses. Dr. Gregory made no objection. Mr. Gordon objected, on the grounds before mentioned, that the buildings would be contrary to the original plan of the town, and a nuisance.

Nov. 18, 1813. Sentence of the Dean of Guild.

The Dean of Guild pronounced the following interlocutory order: "The Dean of Guild having "considered the petition 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 is 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 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 deviation from the general plan has taken
" place, the same has either arisen from the consent
" of conterminous heritors, or from not being op-
" posed by the public or those having interest
" therein in proper time. Finds, however, that
" no material deviation or inconvenience will arise
" from the proposed change on the buildings be-
" longing 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 ex-
" ceed that of the garden or division-wall, and de-
" cerns."

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The now Respondents presented a bill of advocation to the court of session, complaining of this sentence of the Dean of Guild, in so far as it 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 restraining them to the height of the common division-wall between theirs and Mr. Gordon's property.

And Mr. Gordon thereupon presented his bill complaining of the sentence so far as it repelled the objection to the proposed buildings as a nuisance, and granted warrant to the Respondents to make the alterations and additions craved by their petition,

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conform to the plan exhibited by them, though with the condition annexed as to the height of the passage.

These mutual bills of advocation being passed, the cause was argued before the Lord Alloway, Ordinary, who conjoined the processes, and made avizandum to the Lords of the First Division, appointing the parties to prepare and print memorials to be reported to the Court.

March 10, 1814.
Interlocutor appealed from.

The Lords of the First Division pronounced the following interlocutor: "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 en- "titled 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, and in "the advocation at the instance of Charles Gordon, "find, decern, and declare, in terms of the inter- "locutor of the Dean of Guild."

From this judgment the Appellant, who sisted himself as a party on his father's death, appealed.

Mr. Brougham (for Appellant). 1st. The magistrates had no right, consistently with their own charters to others, to give leave to erect these buildings; and that raises the question, whether the original plan is to be taken into account at all. With respect to that question, I refer to the case of *Deas v. Magistrates of Edinburgh*, in 1772, when L. Mansfield moved the judgment of this

house, which was considered below in *Gibson v. Feoffees of Heriot's Hospital*, as a decision on the merits, and as settling the law on the subject: and in a recent case *Deuar v. Young*, 1814, this is the view that was taken of the case of Deas. The decision in *Deuar v. Young* is in our favour; and is a decision on the very question.

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Gibson, *ante*, 2 vol. 301. Riddel v. Moir, 1801. Campbell v. Lindsay, 1803.

They said they had a right to do every thing not prevented by their charter. But the charter refers to the plan; and it is clear that by the plan the back area was to be kept open. *Gibson v. Feoffees of Heriot's Hospital* was a distinct case. In that case there was no reference whatever in the charter to the plan; and the objection was that the magistrates had not fulfilled their part of the contract, to which it was contended they bound themselves by the exhibition of the plan; and in deciding *Deuar v. Young*, the Judges had the case of Gibson in their eye.

Mr. Adam. We obtained a right of servitude by our charter, by which we are entitled to prevent the erection of these buildings; and any other contrary grant is illegal. But we contend also that the magistrates did not grant any inconsistent charter. There is no writing on the plan, and it is to be judged of by the view; and the plan, which lay for inspection at the time of entering into the contracts, applies to the back area as well as to the front; and so it was considered in *Deuar v. Young*, and —— *v. Campbell*, Nov. 1815; and a copy of L. Mansfield's judgment in the case of Deas was before the Court.

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The magistrates were not at liberty to alter the plan. They may perhaps say that the plan shows only the original intention of the magistrates: and that they were to be governed only by the charter. But there is a special reference to the plan in the charters; and, if they adopt it for one purpose, they must take it for all purposes. They admit that they are bound by it as to the front of the house, and they must therefore take it as their rule in every other particular: and the violation of the contract in one point is no reason for violating it in any other point. They infer from the clause in the charter by which they are allowed "to "subfeu, sell, or dispose of all or any part of the "piece of ground, house, or *others*, built thereon, "&c." that it was intended that the back area should be built upon. But the word *others* does not bear out that argument; and it is a forced inference. They also rely on the clause stipulating that "if the premises should be converted into "breweries, &c." the magistrates should not be "liable to multures, &c." But that gave authority neither to build nor to convert into breweries; but only, provided that in case the premises should be converted into breweries, the magistrates should be free from certain consequences. (*Lord Eldon*, C. Do you contend that according to the original plan this was always to remain a garden. The case set up here is only this—that they should not build higher than the division wall. But how were they permitted to build at all, if by the plan this was always to be a garden?) We carry it farther, that they were not permitted to build at all. The

colour showed that it was not to be built upon. True, stables, &c. had been built there; and it was not thought of any consequence to prohibit them, as they were only of the height of the wall, and did not obstruct the light. But that is no reason for not insisting upon the right, when the contract is violated in a more injurious manner. In *Deuar v. Young*, the Court seems to have considered the plan as the common agreement; and yet in that case, there was no reference to the plan; so that our case is stronger. The case of —— *v. Campbell*, decided in 1815, is also in our favour. The buildings are, besides, a nuisance.

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Lord Advocate (for Respondents). The only restrictions in direct terms are the conditions under which they were to be at liberty to subfeu and convert the premises into a brewery, and the provisions with respect to the area of the square. There is nothing in the charter to prevent the erecting of buildings on the back area. But they say there is in some particulars a reference to the plan; to which we answer in the words of one of your Lordships in the case of Gibson, that it would be dangerous when men put their contracts in the solemn form of a charter, to consider that as a condition of the contract, about which there was some representation when the contract was entered into, but which was not mentioned in the charter.

Gibson ante. 2 vol. 312., 313.

But supposing the plan could be taken into account, nothing appears on the face of it respecting the height of the wall: every case they cite is totally subversive of their own argument. Deci-

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sions are referred to for the purpose of showing that *no building could be erected, except where it is marked out on the plan* that a building is to be erected. But every one of the cases recognize the right *to build on the back area*, if the building is not carried higher than the division wall. The plan says that there shall be *no building* on the back area; but the cases say, "you may build "there up to the height of the wall." In the case of Deas there was no decision by this house on the merits. It was merely remitted in order to try the question of right: and the Courts *have deviated from the plan;* for they allow buildings up to a certain height, restraining them therefore only as to the *height*, to which the plan has no reference. In the cases of *Reid v. Neils*—*Strachan v. Wardrop*, and *Sim v. Anderson*, it was held that buildings might be erected on the back areas.

Sir S. Romilly. They have in their favour only the letter *N.* and a green colour. It is clear from the charter, and even from the conditions and restrictions in it, that it was understood that they might build on the back area; but *their* argument is that some clauses ought to be struck out, and others substituted which are not there, merely on account of the green colour on the plan.

They argue that the parties ought to be governed by the plan, and that *no buildings at all* should be erected on the back area: and next they say that the buildings are a nuisance, independent of the plan. With respect to the first point, they rely on the case of Deas, in which an interdict against building on the ground in front of Princes-street

was refused below. That was reversed by this House in order to give an opportunity to try the question of right. The judgment of this House in that case was said below to have established this, that the plan was the common law of the city of Edinburgh, and that the magistrates were bound to make good their representations in the plan. *By the plan*, the ground in front of Princes-street was to be converted into *gardens*, *terraces*, and pleasure grounds. *Did* they then make good, or were they required to make good, that representation? No such thing. The magistrates were restrained from building upon it; and that was all. That decision could not make the plan the common law of Edinburgh. Common law was common usage, and it certainly had been common to build on these back areas. The restrictions, when intended, were put in express words. There was no pretence for the allegation that the buildings were a nuisance, independent of the plan.

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Mr. Brougham (reply). There were obvious reasons for expressing the restrictions as to the interjecting of any superior, and relieving the magistrates from certain claims, without excluding other restrictions. They interfered only for their own interests. (*Lord Eldon*, C. Coach-houses and stables were generally built on these areas.) That was by sufferance. (*Lord Eldon*, C. One of the Judges (Lord Meadowbank), a great authority, speaking of the case of Deas, says, that he held it to be the common law of the city of Edinburgh.) He may have alluded to the custom. True, build-

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ings up to the height of the wall were suffered by Gordon to be erected without opposition, because no serious inconvenience resulted from them. But now it was become a matter of serious inconvenience. Upon their argument there was nothing to prevent them from erecting buildings on the back area as high as the club-house. That, they may say, would obstruct the light; but so does any building beyond the height of the wall, *pro tanto*; and we have a right to prevent their building an inch above it. All the feus are referrable to the plan, which is therefore part of the feus. What prevents their erecting buildings in the front? They must refer to the plan. A servitude may be inferred where it is not mentioned in the titles. Deuar prevented an appeal by paying the costs, but did he suffer the other party to build? (*Lord Eldon*, C. If the inspection of the plan can raise a contract, then all the houses ought to be of an equal height; and all the walls likewise; and there ought to be no buildings at all on these areas.) One has a servitude that another's wall should not be higher than his own; but, in order to object with effect, he must have an interest: he must show that his light is obstructed, and that is a question of fact. If he is not injured, he could not object to a remote wall being higher. But they have not only raised their buildings considerably higher than before, but have put three times the weight on the party wall; and we have a right to prevent the weight as well as the height. The whole principle of the civil law with respect to servitudes shows it: and even if they had a right

to build to a certain height, it does not follow that they had a right to build beyond it.

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Lord Eldon, (C.) This case which originated in a dispute between a club, called the New Club, proprietors of a house in St. Andrew's Square, and the proprietor of an adjoining house, comes here by appeal from two interlocutors of the First Division of the Court of Session. The first and principal interlocutor is this. "Upon 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 Marjori- "banks and others, *find* that they are entitled to "erect the passage to their proposed kitchen, bil- "liard-room, and baths, of the height and dimen- "sions *as the said passage is delineated in the plan* "*in process*," I request your Lordships' attention particularly to these words, "and decern accord- "ingly: 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."

The other interlocutor related merely to the expenses.

When I called your Lordships' particular attention to the words "as the said passage is delineated "in the plan in process," I did so for the purpose of bringing under your notice the distinction between these interlocutors and that of the Dean of Guild. That magistrate having considered "the "petition for the managers of the New Club, with

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" the answers thereto for Charles Gordon, Esquire,
" 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 is
" 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 ap-
" pearance, 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 deviation from this general
" plan has taken place, the same has either arisen
" from the consent of the 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 inconveni-
" ence will arise from the proposed change on the
" building 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 this 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.*" Now the distinction is in the parti-
cular language by which they declare the right of
the members of the club to build. The Court of
Session declares their right to build their passage
as delineated in the plan in process, that is, in some

parts higher than the division wall. The Dean of Guild was of opinion that they were not entitled to build higher than the wall. Feb. 16, 1818.

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The question arises out of a claim on the part of the club to build on the area behind their house, according to a plan delivered. That was opposed on two grounds, as was stated; 1st. That the buildings would be a nuisance; and certainly if the Appellant was well founded in that, he had a right to abate the nuisance. It appears hardly possible to make out the objection on that ground. But the principal question is, whether, regard being had to the original plan of the town, each heritor could maintain the proposition that the conterminous heritors had come under an obligation not to build on the back areas. The original plan is one delineating the streets and squares of the intended town, and scites of the houses; the areas of the feus being coloured green, and marked with letters; and, without entering into the question with respect to the magistrates, the question here is, whether as between the heritors themselves there is such a reference to the plan as that the law can infer the existence of contracts between the parties that the ground should always be kept in the state in which it was delineated on that plan. With respect to St. Andrew's Square, we are told that the plan represents the scite of the house, and that all the rest is to be kept free; that is, not covered with buildings. But what further information was given by the plan which communicated nothing as to the areas, except in so far as it represented the ground as in grass, we have not learned at our bar. It is stated in the cases

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here, that the plan did not represent even the depth of the houses; and it was also stated that, although the areas have been separated by division walls, there is nothing in the plan to show that they were to be so separated: nothing to show that the walls were to be any particular height, or that they were all to be of the same height.

Charter.

The charter now belonging to the club was granted to Mr. Ross, afterwards Lord Ankerville, which refers to the lot marked letter *N* in the plan, the adjoining lots being in the same manner, I presume, marked with the letters M and O: I mention this charter rather as evidence of the understanding between the magistrates and the feuar, than as a thing which is to bind the several heritors as between themselves; for the question here is not with the magistrates, but the question is whether the transactions as to that plan have been such as that it can be legally inferred that the several heritors have contracted with each other in such a manner as that each has a servitude over the property of the rest, so as to give him a legal right to restrain them from making that use of their property which otherwise they would be entitled to make.

Looking at the charter then first as evidence of the understanding between the magistrates and feuar, it conveys, besides the house, cellerage, and back area, "the whole space of ground within the "line of the street-ways of the square as now level-"led 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 condi-"tion that the aforesaid space be used, allenarly,

" for the pleasure, health, or other accommodation " of the feuars or their families; but no way to be " converted into a common thoroughfare, or used " to any other different purpose whatever." So that, the plan representing the square in front, the charter grants that, but under the restriction to be used in the manner mentioned. With respect to the other parts of the subject disponed, the dwelling house, cellarage, and back ground, there is no restriction, except on the right " to subfeu, sell, or dispose of " all or any part of the piece of ground before dis- " poned;" and then follow words from which the Respondents have drawn an inference in their favour, " or house *or others* built thereon." On the one side they ask, if it was not intended that there should be any building but the front house, what was the meaning of the words " *or others* built thereon?" And on the other side they answer that they may mean *appurtenances*, and not detached buildings. But still the Respondents may say, that this is a question to be determined between them and the conterminous heritors, and not between them and the magistrates. And indeed after having said " all or any part of the piece of ground before " disponed," the other words might have been left out, so that, in Scotch, as well as in English instruments of this kind, there may be surplusage.

Then there is another clause of the charter declaring that it shall be lawful for the proprietor " to " exerce any other act of ownership which may " not be inconsistent with the manner of holding " hereby prescribed," but under this declaration, " that if the said D. Ross or his foresaids shall con-

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" vert 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 feud, 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 restricted." Here therefore they contemplate that the subjects built upon the premises might be converted into breweries: and I mention this for the sake of two observations, 1st. That, let the meaning of this be what it may, the question which we have to decide is, not, I repeat it, a question with the magistrates, but one between two conterminous heritors; and then, if the original plan exhibited is the rule of good faith and obligation, it is, after this, the most surprising thing in the world, in fact I mean, if when they are feuing out these pieces of ground in this case and others, it should be supposed, without a word said about it in the charter, that there was an understanding that these areas were to remain gardens for ever, separated by walls of which there was no exhibition on the plan either as to their height, or even as to their existence at all.

Let it not be supposed that I disregard the taste and the beauty of the city of Edinburgh. Far from it; I saw it once when it was less beautiful and elegant than it is now; although it was even then a very striking and beautiful object. But I say, as I said on a former occasion, that whatever may be due to the taste and beauty of the city of Edin-

burgh, we are not here to support them at the expense of the legal rights of the parties, nor to carry our respect and regard for taste and beauty so far as to establish a contract where there is no such thing.

Mr. Ross, as is stated in these papers, built a series of closets behind the house six feet above the highest part of the division wall, and also a coach-house and stables on the back area: and this was not found fault with. Then see how you are to account for it, if there was to be no building at all on the back area, that these coach-houses and stables were built there: (and I wish to know also what they saw on the plan to constitute an obligation to keep one part of the area uncovered, and to show that there was no obligation not to build these closets on the other part of the area:) and yet this was done very generally. Then by what authority were these water-closets built on the back area? But the necessity for these things was such that I do not think that much stress can be laid upon the circumstance.

This feu was purchased by a club of gentlemen, consisting of 300 members, among whom were probably some of the faculty of advocates, and, I am sure, some of the learned judges; for, I observe, the Lord Ordinary declines pronouncing any interlocutor, on the ground of his being a member: and, considering the character of those who compose this club, it cannot be supposed that they conceived they were violating the common law of the city of Edinburgh when they set about these alterations.

The club did not want the coach-house and

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stables, and they proposed to convert them into a kitchen, billiard-rooms, and baths; and connect them with the house by means of a covered passage: and they intended at first that the passage should not be above the height of the mutual wall. Afterwards they found it expedient that it should be a little higher; but it never struck them that, if the passage were not higher than the mutual wall, it could be any breach of obligation with respect to the conterminous heritors. But how that understanding, as to the height, could be represented on a plan where every thing was left vacant; and how it could be inferred from such a plan that some descriptions of buildings might be erected and not others, is, perhaps, more than one can well conceive.

It appeared then that afterwards they found it convenient to have a higher passage. The wall itself, being built on sloping ground, was higher at the end next the houses; and, in order to keep the passage as low as they well could, they began by lowering the ground in the area. The building consisted of two stories, there being a passage from the lower story to the ground offices, and another passage above, forming a direct communication from the main house to the baths and billiard-rooms, &c. Gordon, it appears, did not choose to submit to this; since it was at least unpleasant, if no nuisance; and whatever one may think of the generosity and honourable feeling of waiving a right, I say again, that in a court of judicature we have nothing to do with that: for we are not here to decide what persons may be expected to do from

taste and honourable feelings, but what are their contracts and obligations in law; and if Mr. Gordon can by law destroy these buildings, he is doing nothing but what he is fully entitled to do.

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On the other side of this club-house is the house of Dr. Gregory, whom I understand to be the very eminent physician of that name, one not likely perhaps to be disposed to acquiesce if this had been a nuisance. He, it seems, made no objection; but a most ingenious reason is assigned for his acquiescence. Mr. Gordon objected on account of the smoke, and, considering that the club consisted of 300 gentlemen, some of whom might be often amusing themselves at billiards, there might be some reason to object to the noise also; and if there was much festivity, not only the smoke, but the smell also from the kitchen, might be unpleasant. But it was ingeniously argued that Dr. Gregory had no such reason to object, because, as his house is on the east or west side, whichever it is, the wind at Edinburgh generally blows from such a quarter, that the noise, smoke, and smell, all go to Mr. Gordon, and not to Dr. Gregory.

The Court was of the opinion which has been stated, on the ground, as I understand it, that there was no material deviation from the plan in this instance, and that this was no nuisance; and that there was nothing in the plan which prevented the erecting of these buildings. Mr. Gordon has no building on *his* back area. But the same inference, as far as depends on the plan, must arise, as to the areas behind Princes-street: and he has a coach-house and stables behind Princes-street.

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How they got there, if inconsistent with the plan, we do not know; but he covenants that they should not be higher than the division wall; and how is that special covenant consistent with the alleged effect of the plan, which, it is said, prohibits their being carried higher? If the plan prevented the building them higher, it is hardly possible that the magistrates should have taken him bound by a separate contract not to build higher.

But it is a different question whether the heritors have not so contracted between themselves, as to enable one to compel the others to refrain from building in this way. I understand that where a Scotch servitude exists it must be expressly created; and then see what the plan is: and here I am obliged to say, subject to all the censure to which I may be exposed, and I do not know that I ought to consider that as worthy of much attention. But I do not hesitate, because I most sincerely think it is my duty, to say, that to infer such a contract from the exhibition of such a plan, would be as violent a stretch in judicature as ever I met with in the course of a long professional life. I do not mean to say that there may not be a plan, of such a nature, and exhibited in such a manner, as to point out their rights to various parties, and to constitute the ground of contract and obligation between them; but the plan must speak intelligibly what is meant. Take the case of Butterworth for instance. In that case there was a plan pointing out clearly the obligations imposed on the party. He signed the plan, and the charter referred to the plan so signed; and then it was impossible that he

should be permitted to diminish the value of the houses that others might build. But how do the circumstances bear upon a plan which shows nothing beyond what the charter professes to regulate? And where not a syllable is said in the charter about the matter, you are to infer, 1st. That the heritors may divide the ground into separate areas; and *that* you *may* infer, since it is so convenient for them to enclose their ground. But the plan says nothing about the mode of enclosure; that the wall of A. should he of the same height as the wall of B.; or the wall of B. of the height of the wall of C.; or any or all of them, of any given height; and unless it is a common obligation, how can the argument be supported as to the obligation between any two of the heritors?

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In the case of the Feoffees of Heriot's Hospital, speaking of the case of Deas, in which this House proceeded, on the advice of a noble person, of whom I again say, that, as long as the law of Scotland or of England exists, his name will be pronounced with respect and veneration; a noble person, who for some time exclusively managed the business in Scotch causes here, which I do not think a happy condition of this House; in that case, I thought it my duty to say that, with which, if said in his presence, he would not have been offended; always speaking with the respect and deference due to so great and exalted a character, that, although his intention was not to alarm, I was so infirm, that if I had been one of the corporation of Edinburgh, I should have been alarmed. And your Lordships will pardon me if I take the liberty

Gibson, *ante* 2 vol. 301.

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again to say, that his speech is addressed a great deal too much to the taste and honour of parties, instead of dwelling upon their contracts, and following the steps of that correct judicial path within which a Judge is by his duty confined. As to an observation made with respect to the case of the Feoffees of Heriot's Hospital, that the judgment of this House in that case was one to be obeyed, not to be followed, I must take the liberty to say that this would be a course which, if pursued, would call for some attention. For, although every Court may say, that if a case varies in facts and circumstances, it is at liberty to found upon these different circumstances; I do not recollect that it ever fell from a Judge in this country, that he would obey the judgment of this House in the particular case, but not follow it in others. That is not a doctrine to which we are accustomed.

That case, although it justly called for observation on what had been said in the case of Deas, was determined on a different ground. The property there belonged to the magistrates and feoffees of Heriot's Hospital, and the feuar was to pay what was called the slump sum to the magistrates, and the feu duty to the hospital. A plan was at that time exhibited, by which the ground was represented as clear from certain old houses. The magistrates were empowered under an act of parliament to purchase the houses; but before they did so, the act and authority expired. The trustees called for the feu duty, and the feuar answered, "No—the plan held out that certain old houses "were to be removed, and they are not removed;

"and therefore I am not bound to pay." I was weak enough to think that it was clearly impossible to support that plea. If he had a right to have the houses removed he might call on the magistrates to remove them; but why not pay the feu duty to the feoffees of Heriot's Hospital? No man can be more ready than I am to admit that it is difficult for the mind of an English lawyer to deal with Scotch law, especially the law of entails; and, judging from what was this day read at your bar, it seems to be no less difficult for the mind of a Scotch lawyer to deal with English entails; the similarity of names producing a notion that there is more similarity in fact than there actually is. And it was for that reason, from an anxiety to guard against English impressions, that I was desirous to examine that case with the most vigilant attention. But I do say, that unless we covenanted with the Duke of Bedford that he would not build so as to deteriorate our view, we could not prevent him from so doing upon the ground of an exhibition of a plan from which we might understand that he intended to act differently. If the transaction relative to the plan mentioned in the case of Deas, had been such as clearly to render it the foundation of a contract between the parties; and the plan had been of such a description, and had been exhibited in such a manner, as to point out their obligations, in a way that could not be mistaken, then the faith as pledged ought to have been kept. But if that was the representation, how was it that the plan

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was not executed. In that very case of Deas, in 1772, five years after the first exhibition of this plan, which had been supposed to have created the common law of the city of Edinburgh, the proceeding in this House was so far a reversal of the opinion of the Court of Session, which had held that there was no such understanding. It seems most strange, that if this plan created the common law of the city of Edinburgh, if it was so clearly a ground of contract, that it was almost nefarious to attempt to act in opposition to it; that five years after the Court of Session, before its division, should have been of opinion that there was no such contract; and that subsequently, although one division was of opinion that there was such a contract, the other division thought there was not.

I also thought and ventured to say in that case that the question of right had not been decided in this House in the case of Deas, and my authority for that was the very words of Lord Mansfield, who spoke of "laying the order of the House on the "Court below, to pass the bill of suspension that "it may be conjoined with the action of declara-"tor, and the question of right decided:" from which I understood that it had not then been decided.

Vid. ante, vol. ii. p. 305.

Now with respect to the walls, if they were entitled to separate their back areas, where is the evidence as to the mode in which this was to be done? It was admitted that the walls had been built of different heights. Where is the evidence

that they should be only six feet high, or that they might not be raised to ten feet, or what is the intermediate height? Where is the evidence that they should be of equal height, or that they must exist at all? So again on the plan the back area appears to be vacant, or in the state of a garden; and yet, there coach-houses and stables were generally built; and there is so much of admission that these might be built, and of the height of the wall, if not of a greater height: and where is the evidence as to the height of the wall which is to regulate that of the coach-houses and stables? In short every step we take inferring contracts and negative servitudes, leads us into difficulties. I say that the very circumstance of the taking of special obligations, not only from an individual feuar, but from all of them, as to the square or ground in front, while there is no such obligation as to the ground behind, does appear to me to raise an inference, not that there was any restriction as to the use of the back areas, but that there was none.

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This is the opinion which I offer to your Lordships. I do not profess to have much taste; but if I had, I should not think myself at liberty to indulge it at the expense of doing that which is consistent neither with law nor the contracts of parties. On these grounds my opinion is that this judgment ought to be affirmed.

There is one point however which has not been explained. The wall is common property, and it was stated here that not a word was said below as

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to the point whether these buildings placed a greater weight on the wall than the old buildings did. The judgment however may be affirmed with a qualification as to that.

It having been intimated to the House on behalf of the parties, that they did not wish that the point as to the weight on the wall should be noticed, the judgment was simply AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CAMBPELL and another—*Appellants.*
STEIN—*Respondent.*

March 2, 16, June 5, 1818.

SOLICITOR.—PRESCRIPTION.—SHIP'S HUSBAND.—SHIP REGISTRY.

SOLICITOR in London brings his action against his debtor in Scotland for costs incurred in the conduct of an appeal in Dom. Proc.

The action, in which the costs were incurred, was originally brought in the Admiralty Court to recover the amount insured upon salvage for a recapture made by the ship Diana, of which Yelton, Ogilvie, and Stein, the Respondent, were the owners; Stein being however one of the registered owners only for security of a debt due to him from Ogilvie. Pending the suit before the Judge Admiral the Diana was sold, and the debt paid to Stein. Stein's name was, however, continued in the subsequent proceedings in the Court of Session and House of Lords. Yelton, the ship's husband, by letter to the agent in Scotland, stated it to be Mr. Stein's request that a particular