tire false document, with intent to deceive, was not a relevant charge, and no substantial distinction could be taken between fabricating an entire document and altering an existing one. Each of them was simply a written lie, to use the words of Lord Neaves in *Hinchy*, which is not a point of dittay. Again, the vitiation of a document, which is here charged as a substantive offence, was not an offence at all unless when followed by uttering. It was true that it had been long the practice in cases of forgery to libel the forgery and uttering separately, but it would be dangerous to extend this practice to the innominate offence here charged, where no such practice existed. Again, it was not said that the vitiation was in any essential particular. It might have consisted in the stroking of a *t*.

Answered—It is the known and established style in charges of forgery to libel the forgery and the uttering separately, it being understood that a conviction cannot be obtained unless the forgery is proved to have been completed by uttering. An indictment similarly framed had been sustained in the case of *Brooks*, Dec. 31, 1861, 4 Irvine, 132, where there was a charge of fabricating false writing to be used in a sequestration, followed by a charge of using and uttering. In a very similar case at the last Glasgow Circuit, *Walker* (n. r.), the Court had repelled an objection to the separation of the charges of fabricating and uttering.

At advising—

Lord Justice-Clerk—I am quite satisfied that this indictment should be sustained. The same question was raised at the recent Glasgow Circuit in the case of *Walker*. The panel was charged with fabricating bills and other documents to be used in a sequestration, and with using and uttering the same. Objection was taken to the separation of the charge of fabricating and uttering, and, after consideration by the court, was repelled. Perhaps the more accurate mode of libelling offences of this innominate description is to connect the uttering with the fabricating. If it is desired to meet the case of the fabricator proving not to be the utterer, a second major might be added. But the truth is that a charge of vitiating and altering a receipt for money with intent to defraud is substantially of the same nature as a charge of forgery. It will not be proved, unless in addition to the vitiating there is the fact of use. I think it would be stretching the matter too far to say that because the vitiating is not connected in the major with the uttering, that the charge is not relevant. *Hinchy's* case has been referred to. But there is a manifest difference between the offence charged in that case, concocting false accounts, and the fraudulent vitiation of a writing binding on another person.

Lord Cowan considered the indictment relevant, as framed in the usual style of charges of forgery.

The other Judges concurred.

Counsel for Prosecution—Moncrieff, A.-D.
Counsel for Panel—Campbell Smith.

COURT OF SESSION.

Friday, November 1.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.

MRS JANE ANDERSON GRAHAM OR DUNLOP AND HUSBAND *v.* WILLIAM TAYLOR.

Property—Roof—Common Interest.

A corner house was divided between two proprietors as follows:—One, by virtue of his titles, was the proprietor of the second or upper flat, together with access thereto by a street door and staircase, and part of the cellarage; the other held a conveyance of the area of the house, with the buildings thereon, excepting from the conveyance the subjects conveyed to the former. *Held* (diss. Lord President) that the property of the roof was in the proprietor of the upper flat, and that he was entitled to construct attics and make alterations therein, so long as his operations were not injurious to the proprietor of the rest of the tenement; but *held* that he was not entitled to carry a flue through the staircase wall, he having merely a right of access by it.

The proceedings were commenced by Mr Taylor presenting a petition to the Dean of Guild Court of Glasgow, praying the court to sanction certain proposed alterations and additions to the petitioner's property, which consisted of the upper floor of a house at the corner of Wellington Street and Bath Street, Glasgow. The petition was opposed by Mrs Dunlop, the proprietrix of the lower floor of the same tenement.

The state of the titles of the subjects in question was as follows:—

In 1822 Alexander Campbell, the common author of Mr Taylor and Mrs Dunlop, acquired from Messrs Burn & Forrest an area of building ground in Glasgow, consisting of 1042 square yards 6 feet. Upon this area he erected a tenement, consisting of two square storeys, and a half sunk storey. It appears that the tenement had either been originally built so as to form two houses, or that Campbell altered it so as to form two houses.

In 1830 Campbell disponed to Nathaniel Stevenson "all and whole the second or upper flat of the tenement situated on the north side of Bath Street, and east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor, and plot of ground adjoining to Wellington Street, which belong as parts and pertinents to the said second or upper flat . . . . . declaring that the said Nathaniel Stevenson and his foresaids shall be bound and obliged to maintain and uphold the roof of the said tenement without relief from the proprietor of the lower flat of the same; and that I, the said Alexander Campbell, and my successors in the lower flat of the said tenement, shall be bound to maintain and uphold the pavement and causeway in Bath Street and Wellington Street, opposite to the said subjects, without relief from the said Nathaniel Stevenson or his foresaids; and also declaring that the west gable of the lodging belonging to the said Robert Craig (the proprietor of the house adjacent), so far as attached to the said second or upper flat, shall be mean and common to the said Nathaniel Stevenson and his foresaids, and to the said Robert Craig and his successors, now and in all time coming."

The subject conveyed to Stevenson has now come to be the property of Mr Taylor.

In 1831 Campbell conveyed to Mrs Dunlop's predecessor the whole area, as conveyed to himself, with the buildings thereon, excepting from the conveyance the second or upper flat, which had been conveyed by him to Stevenson.

Between Mr Taylor's ceilings and the roof is an unoccupied space. Mr Taylor proposed to convert this into attics, to be used as rooms in connection with his dwelling-house, and to erect a wooden stair from the upper flat to the attics. He also proposed to convert a portion of the half sunk flat belonging to him into a washing-house with a heating apparatus, and to carry up a flue through the wall of the staircase.

The petition was opposed by Mrs Dunlop, as proprietrix of the rest of the tenement, both on the ground that the proposed alterations would be injurious to her property, and also on the ground of want of title on the part of Mr Taylor to make any alterations in the roof or staircase, his titles not giving him the property, and certainly not the sole property, in either the roof or staircase.

The Dean of Guild Court, after a remit to Messrs Kennedy and Grant, two of their own body, designated as trades-members of the Dean of Guild Court, received a report from them that with certain slight alterations the proposed operations would be unobjectionable. The Dean of Guild Court accordingly sanctioned the operations, and granted warrant for their completion.

Mrs Dunlop appealed to the Court of Session.

Argued for the appellant, that the proprietor of the upper flat of a house had no title to make alterations in the roof without consent of the lower proprietors; *Sharp*, Feb. 5, 1800, M. "Property," App. No. 3. In this case there was also the specialty that Mrs Dunlop was the proprietrix, by her titles, not merely of the lower flat, but of the whole house, except the flat which belonged to Mr Taylor, and the cellarage attached to it. Accordingly, the space between the joists of Mr Taylor's ceiling and the roof, so far from being Mr Taylor's sole property, which could alone entitle him to make alterations therein without consent of Mrs Dunlop, was vested in Mrs Dunlop. In regard to the operations in the sunk storey, Mr Taylor had no property in the staircase, but merely a right of access thereby.

Argued for Mr Taylor, that the proprietor of the upper flat of a house has the property of the roof, just as the proprietor of any other storey has the property of the walls surrounding that storey, subject only to a common interest in the other proprietors which will entitle them to object to operations in the roof injurious to them. Mrs Dunlop has failed to instruct any injury, either actual or probable.

Authorities—Stair, ii, 7, 6; Bankton, ii, 7, 9; Erskine, ii, 9, 11; *Reid*, M. "Property," App. No. 1; *Sharp*, Feb. 5, 1800, M. "Property." App. No. 3; *Stuart*, Feb. 3, 1829, 7 S. 362; *Alexander*, Dec. 12, 1840, 3 D. 249; *Gellatly*, March 13, 1862, 1 Macph. 592.

At advising—

LORD DEAS—(*After a narrative of the facts*)—If the operations in question were in any way injurious to Mrs Dunlop's portion of the tenement, then they cannot be sanctioned, in whomsoever the property of the roof and staircase may be vested. For even though they be Mr Taylor's property, he would not be entitled to make any alteration in them injurious to Mrs Dunlop's part of the tenement, there being in all such cases a common interest in the proprietors. The first inquiry is therefore, Whether the proposed operations are dangerous or injurious to Mrs Dunlop's property? It is necessary to consider separately the effect of the operations in the upper floor and in the cellars. As regards the operations upon the upper floor, the gentlemen appointed by the Dean of Guild Court to inspect the premises are agreed that no danger or injury can result to the tenement below. It would be a strong thing for us to go against a report by persons of such skill and experience, who had the opportunity, which we have not, of seeing the subjects. And, so far as I can form an opinion from the explanations at the bar, I am quite prepared to come to the same conclusion. That being so, the whole question comes to be one of right—In whom is the property of the roof, and of the space between it and Mr Taylor's ceiling? If these are Mr Taylor's property, then he may make any change he likes, not injurious to the tenement below. If they are not his, the proprietor of the tenement below is entitled to object whether injured or not. In regard to the space between the ceiling and the roof, I have no doubt that the property is in Mr Taylor. In the conveyance to Stevenson of the upper storey, I do not think anything special was intended to turn on the use of the words "flat" or "storey." It was plainly enough intended to convey the upper storey in the ordinary way.

This raises a very general question. When a tenement is sub-divided into flats, of which there are innumerable examples in this city, it is perfectly understood that the walls of each flat belong to the proprietor of that flat, and all that the proprietors of the other flats have to do with them is a common interest that any operations on them shall not be injurious to their properties. Now, the west gable of this tenement, in so far as attached to the upper flat, is expressly declared in the titles to be mean and common to the proprietor of the upper flat and the conterminous proprietor. It is clear, then, that any operations by Mr Taylor above his ceiling, as far as that gable wall extends, cannot be objected to, so long as he does not interfere with the roof. But his operations do require him to interfere with the roof. If, then, he has not the property in the roof, then these operations may be objected to even if not injurious.

The material question comes to be—Whether a disposition of the upper storey carries the property of the roof, with the benefits and burdens? The burden of maintaining the roof is expressly laid on Mr Taylor, though I do not attach much weight to that, the main question being the general one, Whether the roof is carried by the conveyance? It is rather remarkable that this should not have been made the subject of express decision in the Courts. My impression is that it was never doubted that a disposition of the upper storey carried the property in the roof. I do not see the distinction in point of law between property in the roof which is above, and property in the walls round about. The roof is just what one might call the upper wall. This is illustrated by this very case. There is a gable at one end, and a pavilion roof at the other. Could it be contended that Mr Taylor is the proprietor of the upright gable and not of the sloping roof at the other end? The conclusion to

which I come is, that the roof is the property of Mr Taylor, and that he is entitled to make any alterations on it not injurious to the property below.

As to the washing-house and flue in connection with the staircase, there is more difficulty. The property of the cellar converted into a washing-house is in Mr Taylor. But in regard to the staircase, which is a building at the end, all that he gets by his titles is a right of access. It is very likely that what was intended to be given to Mr Taylor's predecessor was the stair itself, but the words do not bear out that construction. I am therefore of opinion that Mr Taylor has not the sole property of the staircase. Whether it belongs to Mrs Dunlop or whether it is common, the result is that she has a title to object to the flue being carried up through the wall. Upon this ground, which is entirely a legal ground, I come to a different conclusion from the Dean of Guild in regard to this part of the case.

Lord Ardmillan—Mr Taylor, the respondent, is the proprietor of the upper part of a certain tenement in Glasgow—Mrs Dunlop, the appellant, being proprietor of the lower part of the tenement. I need not again refer to the words of the titles. The two houses do not enter by a common stair. There are separate doors, entering from different streets. They are quite distinct, both in respect of title and in respect of possession.

The first and most important question here raised is, Whether Mr Taylor is entitled to construct attic chambers in the roof, as proposed and explained by him? In disposing of this question, two points are to be considered—1st, Who is the owner of the roof? I am of opinion that in the present case, and looking to the titles of the parties and the nature and position of the premises, the respondent Taylor is the owner of the roof. He is bound by stipulation to maintain and uphold the roof, and I think that the obligation so to maintain and uphold would have rested on him without stipulation, as incident to the ownership of the roof.

In the case of property in a town, divided into storeys or flats, I think that there is a separate property in each flat, but that there is a common interest in each owner, from which emerges a right to each owner to protect that common interest, and to insist that the owners of other flats shall not injure or endanger the property belonging to him. As matter of property, and apart from the equities introduced by the existence of a common interest, the upper flat, or floor, or storey, of this tenement, including, as I think, the roof, belongs to Mr Taylor, just as the lower flat belongs to the appellant Mrs Dunlop. The idea of there being any property or possession above Mr Taylor's house was, I think, not contemplated. But the property, whether of the lower or the upper floor, must be used so as not to injure or endanger the rest of the house. This is quite clear, and has been so decided repeatedly. The existence of a common interest in the tenement imposes an equitable restriction on the owners. Each must use the subject of which each is owner so as to conserve that common interest, which is supported and specially protected by the maxim—*Sic utere tuo ut alienum non lædas*, a sound general rule, and peculiarly applicable to a case of common interest. The limitation of the owner's right is not *in titulo*, but *in utendo*, the use being limited by the equity and the necessity of protecting the interests of the other owners, but the property remaining to all other effects unrestricted. If it appears that the common interests will be injured or imperilled by the operation complained of, the law will restrain the operation; and I think that the party proposing alteration must instruct that the operation does not injure, or create reasonable apprehension of injury.

In this case, I think that Mr Taylor has sufficiently instructed that the operation on his property on the upper floor and attics will not injuriously affect or endanger the appellant's property, or her common interest in the tenement. Perhaps the report by men of skill might have been, in some respects, more explicit, but they appear to have made careful and workmanlike examination, and, taking that report in connection with the decision of the Dean of Guild, I have no doubt that we may rely on it as instructing the absence of actual injury, or of reasonable apprehension of injury. Indeed, the case has been argued at the Bar without serious objection to the report in this respect, and also on the footing of the continued possession by Mr Taylor of the whole subject.

Injury, and reasonable danger of injury, being thus excluded, I am of opinion that, having regard to the state of the facts, the restriction *in utendo* is inapplicable, and that Mr Taylor, as owner of the whole upper part of the tenement, is entitled to make the alteration which he proposes in the attics. On this point I concur generally in the opinion of Lord Deas.

On the second question raised—viz., the proposal to convert a cellar belonging to Mr Taylor into a washing house, and to carry up a flue at the side of the staircase into a chimney at the top of the house—I am of opinion that access by the stair, not an absolute right to the stair, is all that is given to Mr Taylor by his title; but that in any view of the question of property in the stair—whether it is common or separate property—Mrs Dunlop's common interest is sufficient to entitle her to object to the proposed operations in the cellar, and to the carrying of this flue up the staircase, which staircase is intended only for access.

Lord President—I agree with your Lordships that we must assume the operations not to be injurious to Mrs Dunlop's property. This is the result of the report by the men of skill, and no attempt has been made to impugn it. Accordingly, the question before us falls to be considered as one of law. There is a material distinction between the two kinds of operation proposed. The cellar, half underground, is to be converted into a washing-house with a fireplace, and, in order to get rid of the smoke, it is proposed to carry a flue along the cellar and up the wall of the staircase. I agree with Lord Deas that the staircase is not the property of Mr Taylor. I do not go on the ground of injury, for that would be to go against the report. I proceed on the ground that it is the property of Mrs Dunlop, and cannot be used in the way proposed by Mr Taylor, who has only a right of access by the staircase.

As regards the operations in the upper part of the house, I have great difficulty. The case is very peculiar, both in regard to the state of the titles and the nature of the tenement. The common author of Mrs Dunlop and Mr Taylor stood infeft in an area of 1042 square yards, not yet built upon, but intended to be built upon, which formed the corner building stance of Bath Street and Wellington Street. Mr Campbell proceeded to build upon

that area. It is very important to consider the precise nature of the tenement built by him, which previous to the disposition to Stevenson was entirely Mr Campbell's property. He built a house with two fronts, one towards Bath Street and the other towards Wellington Street. That house consisted of two square storeys, viz., a ground or dining-room floor, and the floor immediately above that—that is to say, what is generally called the first or drawing-room floor. Also, below these two square storeys there was a half sunk storey, the upper part being above the level of the street, and the lower part below it. The tenement also contained a space between the joists of the upper or drawing-room floor and the roof, which was capable of being converted into attics, either in connection with the entire house, or in connection with the upper floor, or which might form a separate house of themselves, as Campbell might choose. What he chose to do was this—he divided the house into two houses, one entering from Bath Street, the other, consisting of the drawing-room floor, entering by a staircase from Wellington Street. He assigned a portion of the half sunk storey to each, and left what might have been made into attics unoccupied. Now, the important question comes to be, Whether it was Campbell's intention to leave this space unoccupied, and whether he did in fact leave it unoccupied, and intend it to belong neither to the owner of one house nor the owner of the other, in so far as occupation is concerned? That depends on the nature of the titles. Being himself the owner of the entire tenement, he proceeded to make a conveyance in favour of Mr Taylor's predecessor of "all and whole the second or upper flat of the tenement situated on the north side of Bath Street and east side of Wellington Street." This is a disposition of the seeond flat only. As far as regards the words of conveyance, there would have been no inconsistency for Mr Campbell to have given out at the very same time, as a separate subject, the attic flat, and given to the disponee of that flat access thereto by the staircase from Wellington Street. He did not do so, and he did something which probably prevented him making a separate house of this vacant space. The disponee of the upper floor was taken bound to maintain and uphold the roof. It seems to be thought that this obligation implied a right of property in the roof in the disponee. I think that the reverse is the case. If the disponee was to have the property of the roof, the obligation of maintaining it lay upon him at common law, and required no express stipulation, so that the insertion of the obligation suggests that the roof was not to be the property of the disponee. It is a very natural clause to insert—one intended to provide a distribution of liabilities between the owner of the upper floor and the owner of the lower, the latter being taken bound to maintain the pavement opposite the subjects both in Bath Street and Wellington Street. Now what was the position of Campbell after executing the disposition to Stevenson? His right remained in his original infeftment in the area of 1042 sq. yards, with the buildings erected on it by himself. Whatever was not expressly given out by disposition remained in his hands. It is for that reason that I hold, with Lord Deas, that he remained the owner of the staircase by which the disponee obtained access. The whole use and occupation of the staircase was given to the disponee, but the property of the same remained in Campbell, simply because it was not given out. In like manner, the property of everything above the joists of the disponee's ceiling also remained the property of Campbell. The only thing given out was the second or upper flat, to which alone access was given by the staircase. It is not necessary to consider any general question of law applicable to tenements of this kind. According to my view, the whole case depends on the construction of the titles. But I do not think there is any difficulty in the general law. If an attic floor is given out as a separate estate, there is no doubt that the proprietor of that estate would have the property of the entire roof. But when a person is not in the position of occupying the roof, —*i.e.*, the space enclosed from the weather by the roof—what reason is there for presuming that he is the owner of the roof? The owner of the square storey below the roof has no concern with the roof beyond what the proprietor of any other storey has. The only person who has the property of the roof is he whose house is formed by the roof. Here there is no person in this position, and I think that it was intended from the beginning that there should be no such person. Accordingly, when we come to the conveyance by Campbell to Mrs Dunlop's predecessor, we find that it is not the lower flat which is conveyed, but the entire tenement with the exception of the second floor. Whatever remained in Campbell after the disposition to Stevenson in 1830, was transmitted in 1831 to Mrs Dunlop's predecessor. The conclusion to which I come is, that the owner of the upper floor has no more right (and probably less right) than the owner of the rest of the tenement, to construct a house in the roof. The latter has a much more extensive right, both feudally and in point of occupation. I do not think that Mrs Dunlop would have any right to introduce a new house, and perhaps a new family into the roof. But still less right, on his titles, has Mr Taylor to do this. For if he is entitled to convert the space between his ceiling and the roof into chambers, he must be entitled to sell it, and so convert a house which was intended to have two owners into one with three owners. I am therefore unable to agree with your Lordships as to the operations in the upper part of the house.

The Court pronounced this interlocutor:—

"Alter the interlocutor of the Dean of Guild, dated 28th February 1872, in so far as it approves and authorises the operations proposed to be made by the respondent on the cellar belonging to this property, and the construction of the relative flue and chimney: Find that the respondent is not entitled, as owner of the second or upper floor of the tenement at the corner of Bath Street and Wellington Street, to execute the said alterations: *Quoad ultra*, refuse the appeal, and affirm the interlocutor of the Dean of Guild, and decern: Find no expenses due to either party in this Court."

Counsel for Mrs Dunlop and Husband—Millar, Q.C., and Webster. Agent—James Buchanan, S.S.C.

Counsel for Mr Taylor—Solicitor-General and Moncrieff. Agents—Maconochie & Hare, W.S.