and maintained as public roads, we find it very difficult to apply those clauses to the new territory which is brought within the sphere of the jurisdiction of the Corporation of Glasgow by the Act of 1891. In the absence of any definition which is capable of being clearly applied to the present case for the purpose of distinguishing private and public roads, it seems to me to be necessary that we should know something more of the history of the road in question, who it belonged to, and its successive transfers from one public body to another, or, it may be, to private proprietors. Until we get all the information available of this kind under the allowance of proof which your Lordship has proposed, I really think it would not be possible to arrive at a clear decision on the question whether the road in question is properly a private or a public road.

Therefore I agree with the decision proposed.

LORD KINNEAR—I agree with your Lordships. The first finding of the interlocutor under review, upon which all the subsequent findings and the ultimate decerniture must rest as their indispensable foundation, is—"Finds that at the passing of the City of Glasgow Act 1891 extending the boundaries of the city, Balgrayhill Road was not a public road vested in or maintained by the authorities of the county of Lanark." Now, that appears to me to be a finding in fact, and whether it is well-founded or not in fact is the question to be determined, and which cannot possibly be determined without the proof which the Dean of Guild has refused to allow.

I agree with your Lordship for the reasons which you have stated, and which I think it quite unnecessary to repeat, that the averments of fact which the appellant has made are perfectly relevant if they can be made out.

The Court pronounced the following interlocutor:—

> "Sustain the appeal, and recal the interlocutor of the Dean of Guild dated 30th June 1892 appealed against: Allow the appellant a proof of his averments on record, and to the respondent John Lang a conjunct probation, said proof to proceed before one of the Judges of this Division on a day to be afterwards fixed: Find the appellant entitled to expenses," &c.

Counsel for the Appellant—H. Johnston—Moconochie. Agents—J. & F. Anderson, W.S.

Counsel for the Respondent — Lees. Agents—Campbell & Smith, S.S.C.

Thursday, February 2.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

FEARN *v.* GORDON & CRAIG.

Agent and Client—Reparation—Sale of Heritage—Search for Incumbrances—Liability of Law-Agent.

Certain heritable subjects were sold by private bargain on the terms contained in a missive of sale, dated 4th October 1882. The conditions in the articles of roup, drawn up a short time before, when the property was offered to public roup, were imported into the missives. One of the articles provided, *inter alia*, that offerers should be held to have satisfied themselves as to the sufficiency of the title-deeds, and should have no right to require searches for incumbrances, nor to retain any part of the price on account of the existence of burdens. The purchaser, after paying part of the price, employed a firm of law-agents, who, after receiving the missives and other titles, prepared a disposition in his favour which was duly executed and recorded, and then paid the balance of the price to the seller's agent. They did not suggest to the purchaser that the records should be searched, and took no means to satisfy themselves that the property was free of burdens.

In 1892 it was discovered that the property was burdened with a bond and disposition in security for £300, granted by the seller in 1872, and duly recorded.

The purchaser thereupon brought an action against the law-agents to have them ordained to disburden the property of the bond in question. *Held* that the defenders were bound to purge the record.

Observed that it is the duty of a law-agent, though not employed to buy, but only to prepare a disposition or complete a purchaser's title, to make a search for incumbrances, unless he receives his client's express instructions to dispense with a search, any local custom to the contrary notwithstanding.

In October 1882 James Fearn, innkeeper, Brechin, purchased the property then known as the Prince of Wales Hotel, Brechin, from Charles D. Talo, who had owned and conducted it for several years. The offer and acceptance were contained in a duly attested missive of sale in the following terms—"Charles D. Talo. Sir—I hereby offer to purchase your property of the Prince of Wales Hotel, River Street, Brechin, with dwelling-houses adjoining, all as lately offered by you to public roup on the 12th day of September last, on the following conditions, viz.—1. I agree to all the conditions of the articles of roup signed by you on said 12th day of September, on the understanding that all the grates, gasfittings, gasaliers and brackets, and all the shelving in the

shop and cellars, both of wood and stone, are included in the purchase by me, as well as the boilers and fittings in the washing-houses. 2. I will take by valuation of neutral men, and pay the price at my entry, the poultry houses and clothes poles in the garden. 3. On these conditions I offer the price of £1375 stg., payable in terms of said articles of roup, viz., £300 within 14 days after this date, and the balance at 11th November next, when my entry is to take place.—Your obedt. servt., JAMES FEARN."

"*Brechin, 4th Octr.* 1892.—I accept the foregoing offer.—CHARLES D. TALO."

The articles of roup referred to in the missive could not be found, but it was admitted they were drawn up in the form in ordinary use in Brechin. The following was the material clause—"And it is hereby expressly provided and declared that the purchaser and offerers, by offering at the public sale, shall be held to have satisfied themselves as to the sufficiency and validity of the title-deeds and of the exposer's right to the said subjects, as also as to the rental, value, and extent of the said subjects, the amount of feu-duty, and the whole burdens and servitudes affecting the same, and shall not have right to object to the same or any of them thereafter, or to require further titles, or searches for incumbrances, upon any ground whatever, nor to require the exposer to settle with the superior for any composition or other payment which may be due in respect of his implied entry or otherwise, nor to retain any part of the price on the allegation or pretext of any error, defect, invalidity, informality, or deficiency of the said title-deeds or others, or on account of any misunderstanding, error, or alleged deficiency in rental, value, or extent, or under-statement of the said feu-duty and burdens, or existence of burdens thereon, or any other ground whatever, it being expressly declared that the said subjects are not exposed by description, measurement, or contents, but *tantun et tale* as they stand in the person of the exposer."

Mr Fearn employed Messrs Gordon & Craig, solicitors, Brechin, who received the whole title-deeds and prepared and caused to be recorded a disposition in his favour, without having a search for incumbrances made. They paid the balance of the price to the seller's agent on 11th November 1882, £300 having been paid by Fearn himself on 24th October 1882. They charged and were paid the usual *ad valorem* fees on the transaction.

Fearn discovered early in 1892 that at the time of the purchase the heritable subjects were burdened with a bond and disposition in security for £300, granted by Charles D. Talo in favour of Alexander Bell Kydd, dated the 17th and recorded the 23rd day of December 1872. In 1873 the trustees of William Hunter acquired right to the said security, and in May 1892 they demanded payment from Fearn of the principal sum with interest from Whitsunday 1883, and thereafter commenced proceedings to bring the property to a sale. Fearn then intimated a claim against the seller Mr Talo, under the warrandice in his disposition, but found that he was in such reduced circumstances that it would be useless to take any proceedings against him.

In the present action Fearn sought to have Gordon & Craig decerned and ordained to disburden the subjects belonging to him of the bond in question on the ground of breach of professional duty and negligence, in respect that they failed to obtain an unburdened title before paying the price, and neglected to have the records searched in order to ascertain whether there were any incumbrances affecting the property.

The pursuer stated that he employed the defenders to complete his title to the subjects and to pay the price to the seller, and that the existence of the incumbrance was apparent on the face of the record.

The defenders answered that they were only employed to prepare the disposition, the terms of the transaction having been already arranged by the pursuer. They explained that in Brechin the practice with reference to purchases of heritable property was for the seller to stipulate and the buyer to agree that no search should be given. They averred that the seller's agent assured the pursuer at the time of the sale that there were no burdens over the property, and that he accepted that assurance, and told the defenders that, and that he had agreed to dispense with a search.

Proof was led on 14th December 1892.

The pursuer Fearn deponed—"I don't remember seeing the articles of roup of the property at that time. I was not told what was in them. They were not read over to me. At the time I entered into this transaction there was nothing said as to the title that I was to get to the property. (Q) Or about what encumbrances there were over the property?—(A) There was no word of encumbrances at all. . . . I called for Messrs Gordon & Craig about that same time to ask them to attend to the completion of my title. It was Mr Craig whom I saw on that occasion. I told him I had bought the property, and asked him if he would make up my title, and he was quite agreeable to do it. When I went to him I had not the missive of sale or a copy of it with me. I did not tell him what was in it; he said he would get all that from Mr Whitson. (Q) Did you have any conversation with Mr Craig at that time as to the burdens or bonds that were over the property that you had bought?—(A) They were never spoken about at all. I did not say to Mr Craig at that time or at any time that Mr Whitson had assured me there were no burdens over the property. (Q) Or did you say that you had accepted Mr Whitson's assurance that there were no bonds?—(A) It was never brought up at all; it was never asked. (Q) Did you tell Mr Craig that you had agreed to dispense with a search for encumbrances?—(A) I never heard tell of a search till this affair broke out

we never had any talk about that. I did not know there was such a thing. . . . *Cross.*—I saw Mr Talo about the property in Brechin once or twice. (Q) Did he not say anything about taking over the property subject to the bond?—(A) He never mentioned about a bond. (Q) Did you not think of asking whether the property was bonded?—(A) I thought if it had been bonded I would have been told. I did not ask if the property was bonded, because I thought it would be clear, or else he would tell me. . . . *By the Court.*—When I went to Messrs Gordon & Craig in connection with making up my title I told Mr Craig that I had bought Talo's property, and that I had been recommended to them (Messrs Gordon & Craig) to make up my title. Mr Craig said he would be very glad to do it. That was all that passed so far as I remember. He arranged to see Mr Whitson about getting the titles; he said he would see Mr Whitson and get everything."

The defender Craig deponed—"I understood that our duties in connection with the transaction were simply to prepare a conveyance and see that the titles were got. (Q) Were you told by Mr Gordon, your partner, what you were expected to do?—(A) In the first place he merely handed me the letters which he got from the pursuer, and asked me to apply for the titles and prepare the conveyance. I did not see pursuer thereafter on the subject. So far as I am aware, I did not see the pursuer before the settlement of the price of the property. The bargain between the pursuer and Talo had been concluded about three weeks before our services were asked. I was informed that £300 had been paid to account of the price. On writing to Mr Whitson I received the whole of the titles from him. They included certain articles of roup and relative missives. I think I must have looked at them. I don't remember whether the articles of roup contained any stipulation as to the state of the titles and searches. In Brechin the usual practice is to dispense with searches in connection with such transactions. It is the exception in Brechin to stipulate for searches. I would not consider myself justified in granting a search or searching myself for a purchaser unless expressly authorised by him. . . . I think a 40 years' search in 1882 would have cost nearly £10. I think the cost is £5 now. We would have charged *ad valorem* fees for drawing the conveyance whether there was a search or not; that is the invariable practice. . . . *Cross.*—(Q) When you paid over the balance of the price did you know whether the property was burdened or not?—(A) I thought it was free, but I did not actually know. The pursuer had evidently accepted Mr Whitson's assurance. I understood that he had been assured by Mr Whitson that the property was free. It is very common for one agent to give an assurance to another; and in this instance the purchaser had been in direct contact with the seller. *By the Court.*—I understood that the pursuer had been satisfied. *Cross (continued).*—I assumed I was not to make any search of the record. (Q) Did you apply your mind to the question whether it would be prudent to get a search?—(A) No. (Q) Did you discuss the matter with your client?—(A) I cannot say that I ever saw the pursuer to discuss it with him. (Q) Did you take any means to satisfy yourself that the property was unburdened?—(A) No. I fancy the titles that I had shewed the way the thing stood."

The seller's agent William Whitson deponed—"So far as I recollect, I did not read over the articles of roup to him (the pursuer) or explain what was in them. At the meeting when the bargain was completed in my office I don't think there was anybody present but the pursuer and Talo and myself. (Q) So far as you recollect, was anything said at that meeting about the bond affecting the property?—(A) I have no recollection whatever of that. (Q) Did you give any assurance to the pursuer with regard to the encumbrances affecting the property?—(A) No, to the best of my recollection. I was never asked about it as far as I recollect. I am sure I did not say to the pursuer that there were no burdens over the property. I knew there were three bonds upon it. (Q) Is it the case that the pursuer accepted an assurance from you that there were no bonds?—(A) I have no recollection of giving such an assurance."

The Lord Ordinary (KYLLACHY) pronounced this interlocutor:—"The Lord Ordinary . . . decerns and ordains the defenders to disburden the heritable subjects in question in terms of the first conclusion of the summons, and that within one month from the date hereof, and continues the cause: Finds the pursuer entitled to expenses, &c.

"*Opinion.*—Mr Dickson has said all that can be said on behalf of the defenders, and I am far from doubting that this is a very hard case, inasmuch as the defenders must suffer from what was perhaps a comparatively venial breach of professional duty upon their part. I think it probable that the truth of the matter was that they never doubted Mr Whitson—that is, that they never supposed that Mr Whitson would sell a property without disclosing the burdens, and the whole burdens, upon it.

"But what I have to do is to try the law, which I think in such cases is quite settled, and it is this, that a law-agent is bound when employed to carry through the conveyancing connected with the purchase of heritable subjects, to see that his client gets a good and unburdened title. That is admitted, and cannot be disputed to be the ordinary rule of law, and therefore really the only question which has been argued here is as to whether there has not been in the relations of the parties some waiver of the right which the client thus had at common law, and upon that matter all I can say is that I am not satisfied upon the evidence that the pursuer here waived his rights either as against the seller or as against his agent. It has been suggested that upon the just construction of these articles of roup the client waived his right

to obtain a substantial title and unburdened subject. I do not so read the articles. I cannot doubt that if it turned out that the seller had no title at all, or if it turned out that the property was burdened with one or more bonds, the purchaser would have had relief as against the seller. Further, I can find nothing in the evidence to support the view that the purchaser, either for the sake of economy or for any other reason, absolved the law-agent whom he employed from the duty of seeing that the subjects were not burdened. It is quite true that in the articles of roup he had waived his right to demand searches from the seller, but that merely meant that he waived his right to have such searches at the seller's expense, leaving it entirely open how he should protect himself against the existence of burdens, and upon that matter his agent was bound to advise him. If his agent had put the matter before him and had told him the danger of taking these things for granted, and the pursuer had had his eyes open, and resolved to take his risk rather than be at the necessary expense, the agent would have been free, but failing such a dispensation from the client, and a dispensation obtained in full knowledge of the risk run, the agent must, I think, be liable according to the ordinary rule.

"As to the precise remedy which the pursuer seeks, I do not doubt that it is here rightly stated, and that the defenders having been responsible and bound to purge the burden in question, must now be decerned to disburden the property, and must produce a good discharge such as the pursuer can put on record. I therefore see no good reason why I should not pronounce decree in terms of the first conclusion of the summons, and in the meantime continue the cause in order to see whether the defenders perform this obligation, or whether it will be necessary to proceed under the alternative conclusions."

The defenders reclaimed, and argued—This bargain was completed under the conditions in the articles of roup which bound the purchaser to take the property as it stood. The Lord Ordinary was wrong in reading the articles as merely exempting the seller from exhibiting a search, but laying the duty of searching the record on the buyer's agent unless he had special instructions from his client to dispense with a search. The agent was entitled on seeing such a clause in the articles, to assume that the purchaser had satisfied himself as to the title. The question was, what was the agent employed to do? Here the client completed the purchase and employed the agent only to execute a conveyance in proper form and to see it put on record; in these circumstances the client must be held to have represented that he had made inquiries and was reasonably satisfied as to burdens, &c. To hold an agent bound under such a limited employment to give advice to his client as to the sufficiency of the titles on pain of liability if anything turned out to be wrong, would be a great extension of a law-agent's liability. The following authorities were referred to—*Graham* v. *Hunter's Trustees*, 1831, 9 S. 543; *Campbell* v. *Clason*, 1838, 1 D. 270—*rev.* H. of L., May 30, 1845, 17 Jurist, 500; *Donald's Trustees* v. *Yeats*, 1839, 1 D. 1249; *Wallace* v. *Fisher & Watt*, November 4, 1870, 9 Macph. 75; *Stirling* v. *M'Kenzie, Gardner, & Alexander*, December 7, 1886, 14 R. 170; *Currors* v. *Walker's Trustees*, January 25, 1889, 16 R. 355.

Argued for pursuer—The defenders were bound to see that the pursuer got a good property title free of burdens. The defence that they were only employed to prepare a disposition was disproved; but if it were not, the cases showed that where the employment was merely to carry out a conveyance, the agent was bound to ascertain by a search whether the property was free of incumbrances. This case fell far short of any case where the agent had been held to have properly dispensed with a search. In *Fea* v. *Macfarlane*, June 4, 1887, 24 S.L.R. 628, the agent explained the meaning and use of a search to the client, and it was deliberately resolved upon by the different parties not to go to the expense of a search. If the burden had been discovered at the time, the purchaser could not have been forced to take the property; notwithstanding the clause in the articles of roup, he would have got relief on the ground of essential error or fraud. The literal meaning of such a clause must be subjected to interpretation, it could not be said that the buyer was bound to carry through the contract if there were no title at all.

At advising—

LORD PRESIDENT—I am of opinion that the Lord Ordinary is right and that no other result could be reached. The facts are comparatively simple. The pursuer, an innkeeper at Brechin, buys hotel premises for £1375, and employs the defenders to "make up his title" or to "prepare a conveyance"—whichever form of language is best established by the evidence—and in my opinion there is not much difference between them. The defenders made no search of the records, and thus failed to discover the existence of a bond of £300 which burdened the property. The practical result is that the pursuer has to pay not £1375 but £1675. The bargain is contained in the missive of sale dated 4th October 1882, where he offers —[*His Lordship quoted the missive*].

It is admitted by counsel for the defenders that in the ordinary case if a law agent is asked to prepare the deeds necessary to complete a contract or sale of heritage, he is bound to have a search made, or to have specific instructions that it should not be made. That law was very clearly laid down, and the line of the discussion showed that the rule was well settled in the conduct of business.

The precise phraseology of the instructions in this case was much canvassed. It seems to me that the version preferred by the defender, "to prepare a conveyance," runs this case right up to the case of *Graham* which was quoted at the bar. That was a case of a loan, not a purchase, but Mr Dickson admitted the analogy; and the in-

struction to the law-agents was to prepare the necessary deeds. The Lord President (Hope)—said "At one time I doubted whether the employment of the agents to prepare the necessary deeds did not limit them solely to the function of executing a bond and infeftment. But the fair import of their employment certainly was to make an effectual security."

In this case to "prepare a conveyance" means much the same as to "make up a title," and I therefore hold that the instructions here were to take the steps necessary for giving the pursuer for £1375 a house free of burdens. Counsel for the defenders attempted to shelter themselves under the somewhat peculiarly expressed articles of roup. These conditions however are merely imported into the missive, and cannot alter its essence, which was to sell the house for £1375. But if the argument on the articles of roup means anything, it must mean either that the articles of roup were the reason why the search was omitted, or else that no damage resulted from the omission, for the purchaser was bound to take the property burdened. Now it is a question of fact why the defenders did not have the records searched; and the partner examined does not say that it was because of the articles of roup, but on the contrary that it was because agents in Brechin are not in the way of asking for searches, and that it did not occur to them in this case to be necessary.

As regards the other suggested answer, I think that is a bad argument in law. I cannot hold that the seller was entitled to force this property on the purchaser burdened with a bond for £300 merely because he says he did not agree to give a search. I therefore think we must proceed on the well-settled general rule that the agent must either make a search or get special instructions to dispense with a search.

LORD ADAM—I am of the same opinion. There is no doubt that when an agent is employed by a purchaser to make up a title, there is involved a duty either to make a search or to communicate with his client and explain the nature and objects of a search, and obtain from him a dispensation. As to this general duty there is no dispute.

I also agree with your Lordship that it makes no difference that the actual terms of the instructions are to "prepare a disposition in my favour." Where a lawyer has a conversation with his client and is instructed to prepare a disposition, it would be absurd to draw the inference that he is to prepare a writ and make no further inquiries, but simply see that the disposition is in form. Whichever words were used makes no difference; to my mind the one thing means neither less nor more than the other. Nor do I think that it makes any difference whether the agent was employed to make the purchase or not. If the client himself undertakes the purchase, there is no less or different duty on the agent to see that a valid title is got.

The question then is, is there here anything special to take this out of the ordinary case? The evidence is quite clear to the effect that nothing was said about burdens. Fearn says he asked no questions because he thought he was buying a property clear of encumbrances; nor, it is clear, did the agent either ask any questions, and he tells us the reason why he did not do so. The practice in Brechin is for agents to trust each other, and make no inquiry in connection with such transactions. That trust may be well-founded in 99 cases of 100—but then this is the 100th case. Mr Craig chose to rely on the other solicitor's word, and made no inquiries; does that make any difference in a question of his liability? I think not.

It is said, further, that the clause in the articles of roup which has been referred to entitled the defenders to assume that the pursuer did not intend that there should be a search for encumbrances. I do not think that Mr Craig was entitled to draw that conclusion. I read it as entitling him only to conclude from that that there was nothing said either as to burdens or no burdens. I therefore concur with your Lordship.

LORD M'LAREN — The main defence is that the solicitors were only employed to prepare a conveyance, and had no duty to advise as to encumbrances.

A law-agent is not an artificer to carry out mechanically the instructions of his client. He is a legal adviser as well as an executant. The client in general is no more capable of telling his lawyer how to proceed in the business for which he is employed than a patient is able to tell his physician or surgeon how to operate.

Accordingly, when a purchaser employs a conveyancer, he is not expected to tell the solicitor what deeds he is to prepare, and what inquiries regarding previous transactions are necessary. It is for the solicitor to tell him what is necessary to be done to make a title to the property.

I assent to the view that there are cases where something which is strictly necessary to a title may be dispensed with, on the ground that the cost would be disproportionate to the value of the property. The title may be technically incomplete, and it may be a question whether the expense of an action of adjudication should be incurred, when it may be that possession, continued for one or two additional years, will make a prescriptive title. In such cases I should say that the point ought to be brought under the notice of the client. If the advice given be reasonable with reference to the circumstances, and the client accepts it, the solicitor is absolved, although through some unforeseen occurrence the property should be evicted.

That was the principle of my decision in the case of *Fea* v. *Macfarlane*, which was referred to at the bar.

It was suggested by the defenders that this transaction was to be completed on the footing of it being a case of the purchase of an estate with all faults. Now, in order to give any validity to such a defence it must come up to this, that under the

articles of roup the purchaser could have no redress, even if the existence of the encumbrance were discovered before the completion of the transaction by payment of the price. But as the existence of this encumbrance was of necessity known to the seller, any attempt on his part to take advantage of the stipulations in the articles would be a manifest and transparent fraud, and in such a case it would be impossible to hold a purchaser to his bargain if he took proper measures for avoiding the contract. I cannot regard this as a case of the sale of a subject with all faults. The very peculiar stipulation in the articles of roup ought perhaps to have aroused the suspicion of the professional advisers of the purchaser, and in any case it was their plain duty to take their client's instructions as to whether he desired to have a search for encumbrances.

On these grounds I agree with your Lordships in thinking that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR concurred.

The Court refused the reclaiming-note and adhered to the interlocutor of the Lord Ordinary with additional expenses.

Counsel for the Pursuer and Respondent—W. Campbell—Wilson. Agent—R. C. Gray, S.S.C.

Counsel for the Defenders and Reclaimers—C. S. Dickson—Cook. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, January 26.

SECOND DIVISION.

[Lord Low, Ordinary.

MACGREGOR *v.* NORTH BRITISH RAILWAY COMPANY.

Act of Parliament—Construction of Statute—Servitude—Lands Clauses Consolidation Act 1845 (8 *Vict. cap.* 19), *secs.* 17, 83, *and* 84—*Notice—Compensation.*

A proprietor of certain subjects *ex adverso* of East Princes Street Gardens, Edinburgh, held them under a feu-right granted in 1779 by the Corporation of Edinburgh, in which it was stipulated that these gardens should "be kept and preserved in perpetuity as pleasure ground."

In 1844 the North British Railway Company, with the authority of Parliament, constructed a railway through the valley between the Old and New Town of Edinburgh, and in 1891, being desirous of widening their line they obtained an Act of Parliament for that purpose. By that Act they were authorised to take a limited and defined portion of the gardens from the Corporation for the purposes of their railway. The Act contained the following proviso—"Nothing contained in this Act shall prejudice or affect the rights of servitude, or other rights of the Corporation, or of the vassals of the Corporation, in virtue of their title-deeds."

Held (1) that this proviso did not prohibit the railway company from exercising any of the powers conferred by their Act if in the exercise thereof the foresaid rights of servitude were in any way prejudiced, but that it was to be read as preserving all the rights of the Corporation and the vassals, in so far as these had not been expressly affected by the Act; and (2) that no notice, in terms of the Lands Clause Consolidation Act 1845, section 17, required to be given, or compensation in terms of section 83 and 84 of that Act required to be paid to the proprietor of the dominant tenement by the railway company before entering upon the portion of the gardens which the Act authorised them to take.

By feu-charter dated 24th March 1779 the Magistrates and Council of Edinburgh feued to Alexander Reid, mason, in Edinburgh, a piece of ground bounded on the south by Princes Street—"Declaring always that the ground lying to the south, betwixt Princes Street and the lake called the North Loch, is and shall remain in all time coming as is directed by the decreet-arbitral pronounced by Mr David Rae, advocate, dated the 19th, and registered on the Books of Council and Session the 20th days of March 1776." By his decree-arbitral Mr Rae found (1) that what are now known as the East Princes Street Gardens should, down to the verge of the North Loch, "be kept and preserved in perpetuity as pleasure-ground," and "remain in all time thereafter as pleasure-ground for the benefits of the inhabitants;" (2) "that the foresaid space or piece of ground so to be kept as pleasure-ground, shall be dressed up at the expense of the Town Council as soon as may be, . . . and in the dressing of the ground that the Magistrates and Town Council . . . shall be liable to no further expenses than what may necessarily arise from humouring the natural lying and situation;" and (3) that "the ground formerly occupied by the North Loch should be dressed up by forming a canal and making up the banks in a decent manner."

The restriction thus placed on the use, by the Magistrates, of East Princes Street Gardens was recognised and enforced by various Acts of Parliament, dating from 1816 to 1889. By these Acts it was declared that it should not be competent to the Magistrates or any other person, without the sanction of an Act of Parliament obtained for the express purpose, to erect buildings opposite Princes Street eastward of the Mound, or to discharge any restrictions regarding buildings contained in any feu-right, and that unless such sanction was obtained, the whole of the ground should be used as an ornamental area in all time coming. It was further enacted, *inter alia*, "any one or other of the proprietors or householders within the bounds of police of the said city for the time being"