itself is of comparatively easy application. The subject of the gift is to be chargeable with duty unless the *bona fide* possession and enjoyment of it shall have been assumed by the donee, and retained by him to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. Applying these words to the admitted facts, I hold that the whole claim for duty on this head should be sustained.

The Court pronounced this interlocutor—

"Affirm findings (1) and (2) in said interlocutor; *Quoad ultra* recal finding (3), and in place thereof find that the provisions of the Finance Act 1894, section 2, sub-section 1, head *b*, and of the Finance Act 1900, section 11, do not apply so as to make the entailed lands and others subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart; and find further that settlement estate duty is not payable in respect of the entailed estate, but that succession duty is payable: Recal finding (4), and in place thereof find that the provisions of the Finance Act 1894, sec. 2, sub-sec. 1, head *c*, do not apply so as to make the furnishing and plenishing in the mansion-house of Ardwell subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart: Further find that Mrs Ommanney M'Taggart's share of the accumulations of the income arising from the residue of Sir John M'Taggart's trust estate from and after 13th August 1888 is subject to estate duty as property passing on her death: Find no expenses due to or by either party, either in this Court or in the Outer House, and remit to the Lord Ordinary in Exchequer Causes to proceed as may be just."

Counsel for the Reclaimers and Defenders—The Dean of Faculty (Campbell, K.C.)—Clyde, K.C.—Earl of Cassilis. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents and Pursuers—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue.

Wednesday, March 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GRANT *v.* CITY OF EDINBURGH AND OTHERS.

Property—Common Property—Clause Prohibiting Pro Indiviso Proprietor from Suing a Division.

A feu-charter contained a grant of a *pro indiviso* share of certain subjects with a clause prohibiting the feuar from suing a division. *Opinions* that the prohibiting clause was of no effect, at least as against a singular successor in the feu.

Property—Common Property and Common Interest—Rights of Proprietors—Square and Street Held in Common Property by Proprietors of Adjoining Houses—Conveyance of Square and Street to Improvement Trustees—Extinction of Common Interest.

In the feu-charters of the houses round a square there was conveyed to the individual proprietor by bounding titles (1) his house and (2) in common property the street and garden ground in the centre of the square. The individual proprietors sold their interests in the street and garden ground to Improvement Trustees.

Held (1) that the individual proprietors in addition to their interest as *pro indiviso* proprietors had had a common interest in the street and garden ground, but (2) that such common interest had been extinguished by the conveyances of the common property to the Improvement Trustees.

Property—Common Property—Rights of Proprietor—Servitude—Sale of Interest in Common Property with Restriction on Use—Validity of Restriction.

The individual proprietors of a subject held in common property, by separate conveyances sold their interests to trustees stipulating that the subject should not be built upon. *Held* that, at least as against a singular successor of the trustees, the restriction was of no effect inasmuch as it was not competent for a *pro indiviso* proprietor to impose a servitude *non aedificandi* on the common property, and consequently that one of the former proprietors had no title to prevent building over part of the subject.

On 5th February 1904 John Grant, bookseller, 31 George IV Bridge, Edinburgh raised an action against (1) the Provost, Magistrates, and Councillors of Edinburgh, (2) the Incorporated Edinburgh Dental Hospital and School, (3) John Falconer King, analytical chemist, Edinburgh, and (4) the Governors of George Heriot's Trust. In it he sought to have it declared, *inter alia*, "(*first*) That the pursuer, as proprietor of the subjects known as 31 and 33 George IV Bridge, Edinburgh, and the south portion of the tenement known as 35 George IV Bridge there, and the possession had by the pursuer's authors and by him under his and their titles, is entitled to erect on that area or piece of ground immediately to the south of the said subjects, situated between the southern wall thereof and the northern boundary of Chambers Street, . . . buildings rounded on an angle similar to that of the tenement now existing on the east corner of Chambers Street, within the City of Edinburgh, and according to plans and elevations submitted to and approved by the said defenders, the Lord Provost, Magistrates, and Councillors of the City of Edinburgh."

The pursuer, *inter alia*, pleaded—"(3) The opposing defenders have no right, title, or interest to oppose the declarator concluded

for. (4) The defenders the Lord Provost, Magistrates, and Town Councillors of the City of Edinburgh, are barred *personali exceptione* from opposing the declaratory conclusions of the summons."

The defenders the Incorporated Edinburgh Dental Hospital and School stated that they had an agreement with the pursuer that if the above declarator was granted he should only exercise the rights declared with their consent and concurrence, and subject to that restriction concurred in moving the Court to grant the declarator.

The defenders George Heriot's Trust, *inter alia*, pleaded—"(4) The present defenders having a right of property in common with others in the area of ground referred to in the summons, the pursuer is not entitled to decree of declarator as craved. (5) The area in question being affected by a real condition prohibiting division or building, the pursuer is not entitled to decree of declarator as craved. (6) *Separatim*, the present defenders being in right to enforce a servitude *non ædificandi* affecting the ground in question, the pursuer is not entitled to decree of declarator as craved."

The following narrative of the facts of the case is taken from the Lord President's opinion:—"This is an action of declarator at the instance of John Grant, proprietor of heritable subjects presently known as 31 and 33 George IV Bridge, and it seeks to declare the pursuer's right to build on the strip of ground 41 feet in length and 39 feet in breadth, or thereby, which lies between his premises and Chambers Street. The defenders called were the Lord Provost, Magistrates, and Town Council of Edinburgh, being the successors of two bodies of Improvement Trustees, the Governors of George Heriot's Trust, Mr John Falconer King, and the Edinburgh Dental Hospital, these parties between them representing the whole proprietary interest in Brown Square as will be presently explained. The pursuer's contention was resisted only by the two first-mentioned defenders. The Lord Ordinary repelled the defence as far as proposed by the Lord Provost and Magistrates, and they have acquiesced in that interlocutor, but he sustained the defence for Heriot's Hospital, and it is against that interlocutor that this reclaiming note is taken.

"The facts of the case are not very intelligible without a plan, but they may briefly be stated as follows:—In or about the year 1760 the ground in question which formed portion of a piece of land known by the name of 'Society' was acquired by an Edinburgh builder of the name of Brown. Upon this ground he constructed a square of houses with a pleasure ground enclosed by railings in the centre to which he gave the name of Brown Square. He had seemingly got orders for most of the houses before he embarked in his speculation, and having constructed them and having laid out the street and pleasure ground, he granted dispositions to the various purchasers. I shall presently advert to the titles which were given, but in the meantime it is enough to say that the ten purchasers who got dispositions from Brown, and whose houses, marked from 10 to 19, formed the west and north of the square, between them possessed all right to both street and garden of the square. In 1827 an Act of Parliament was passed which constituted Improvement Commissioners, who, *inter alia*, were empowered to form what is now known as George IV Bridge. In order to do this they acquired the whole of the west side houses of Brown Square, and also the westmost of the northern side, No. 15. This, therefore, left the only other proprietors Nos. 16, 17, 18, and 19. George IV Bridge was formed on a higher level than Brown Square. Its parapet railing formed the west side of Brown Square which otherwise, except the slicing off of a minute corner in the north-west angle, remained unaltered. In 1867 another Improvement Act was passed. The Commissioners were the Lord Provost and Magistrates of the City of Edinburgh, but although they were treated at that time as a separate body, *qua* Improvement Trustees, it is not matter of controversy that the present Lord Provost and Magistrates have by subsequent legislation in them all the rights and are subject to all the liabilities which pertained to the Improvement Trustees of 1827 and 1867. The purpose of the Act of 1867 was, *inter alia*, to form what is now known as Chambers Street, connecting the line of the Bridges on the east with George IV Bridge on the west. Chambers Street as executed is situated so far on the ground formerly occupied to the south of Brown Square including the whole of the central pleasure ground. By this time, 1867, the state of the proprietorship of Brown Square was as follows:—No. 16 being the westmost house but one on the old north side, plus a portion of old No. 15, was in the hands of Miss Currie and others, No. 17 was in the hands of Bartholomew, No. 18 in the hands of M'Caskie's Trustees, and No. 19 in the hands of Crombie. All else was in the hands of the Lord Provost and Magistrates as successors of the Improvement Trustees of 1827. Accordingly, the Lord Provost and Magistrates took conveyances of their rights in the Square from the various parties residing in it. I shall advert particularly to this hereafter, but it is sufficient now to say that in each of the conveyances so taken the Lord Provost and Magistrates bind themselves not to object to each of the proprietors bringing forward the line of his building to Chambers Street which now occupied the area of the old pleasure ground, and which thus formed a means of access to the other streets of the town. None of them did so at that time, and the piece of street between the old pleasure ground railing and the houses was rearranged by the Magistrates on a slope so as to accommodate itself to the altered level of Chambers Street."

The original disposition of No. 19 Brown Square by Brown, which was to one David Dalrymple, advocate, is, so far as necessary,

given in the opinion of the Lord President, *infra*.

The disposition dated 13th and recorded 14th May 1873, granted by Crombie, the then proprietor of No. 19 Brown Square, and author of the defenders, George Heriot's Trust, in favour of the Improvement Trustees of 1867, ran thus:—"I, John Crombie, dyer in Edinburgh, in consideration of the sum of £100 sterling paid to me by 'The Trustees under the Edinburgh Improvement Act 1867,' do hereby sell, alienate, dispone, convey, assign, and make over from me, my heirs and successors, to the said Improvement Trustees, their successors and assignees for ever, according to the true intent and meaning of the said Act, heritably and irredeemably, All and Whole the street and also the enclosed green area or pleasure ground situated in Brown Square, as shown on the plan annexed and signed as relative hereto, in so far as the same belongs to me in common with the other proprietors thereof, which street and green area or pleasure-ground are distinguished on the plan referred to in the said Improvement Act by the No. 71, Area I., together with all rights and pertinents thereto belonging, and all such right, title, and interest in and to the same as I and my foresaids are or shall become possessed of or are by the said Act empowered to convey, which subjects and others are parts of All and Whole that house or tenement of land in the Society, or Brown's Buildings, of Edinburgh, and ground whereon the same is built; enclosed green area or pleasure-ground, all situated in the county of Edinburgh, more particularly described in the instrument of sasine in my favour, dated the 12th and recorded in the Particular Register of Sasines, Reversions, &c., within the sheriffdoms of Edinburgh, Haddington, Linlithgow, and Bathgate, the 13th days of June both in the year 1835, but always with and under the burdens, conditions, provisions, restrictions, and declarations specified, contained or referred to in my titles to the said subjects and others so far as the same are now applicable, and also under the real burdens following, *videlicet*, that the ground hereby disponed shall only be used by my said disponees and their foresaids for the purpose of forming a roadway or street betwixt South Bridge Street and George the IV Bridge in virtue of said Improvement Act, all as shown on said plan, but they shall not be entitled to build upon the same, nor shall my said disponees or their foresaids be entitled to object to me or my successors in the said house building upon the intermediate ground between the said new street and the said house, but the plans and elevations of any buildings so to be erected shall be submitted to my disponees for their approval before execution. . . ."

On 10th November 1904 the Lord Ordinary (KYLLACHY) pronounced this interlocutor —"Finds that the authors of the pursuer were in 1874 proprietors of certain buildings at the north-west corner of Brown Square, which buildings occupied in whole or part the sites of the two houses formerly Nos. 15 and 16 Brown Square, and had a frontage to Brown Square comprising the whole frontage of the said house No. 16 and part of the frontage of the said house No. 15: Finds that as such proprietors, and as possessing or being held to possess in common with the other proprietors on the north side of the Square proprietory rights and interests in (1) the street (or pavement and causeway) on the north side of said Square, and (2) the enclosed pleasure ground then forming the centre of said Square but now incorporated in the new street called Chambers Street, they (the pursuer's authors) did by disposition dated in December 1874 and January 1875, dispone to the Edinburgh Improvement Trustees acting under the Improvement Act of the year 1867, their whole right and interest in the said street and pleasure ground, and did so in consideration (1) of a pecuniary payment, and (2) of certain reserved rights and privileges including (*a*) a restriction against the said trustees either building on the said street—that is to say, the said carriageway and pavement—or using any part of the common ground to which the disposition applied otherwise than for the purpose of forming the said proposed street now called Chambers Street, and (*b*) an engagement by the said trustees to permit or at all events not to object to the pursuer's said authors and their successors bringing forward their buildings at any time they should think fit to the north building line of Chambers Street, being a line substantially coincident with the northern boundary of the said pleasure ground forming the centre of the Square: Finds that the pursuer now proposes and has brought the present action to declare his right to bring forward the said buildings now belonging to him to the said north building line of Chambers Street, and that the other proprietors in Brown Square, with the exception only of the defenders the Governors of Heriot's Trust, who now own the house at the north-east corner of the Square, make no objection to his doing so: Finds, however, that the pursuer's said proposal is opposed by (1) the Magistrates and Town Council of Edinburgh as claiming a right of property in the ground proposed to be occupied; and (2) the said Governors of Heriot's Trust as claiming right under their titles to prevent building upon any part of the said street or pleasure ground formerly belonging in common property to them and the other proprietors in Brown Square: With respect, however, to the opposition of the said Magistrates and Town Council, Finds (1) that the Improvement Trustees under the Act of 1867 (being the Magistrates and Town Council acting separately in that capacity) had full power under said statute, and in particular, *inter alia*, under sections 16, 25, and 30 thereof, to make as part of the transaction by which they acquired the ground necessary for the construction of Chambers Street the arrangements with the pursuer's authors and the other proprietors on the north side of Brown Square which they in fact

made; and in particular had full power to make it part of the consideration agreed to be paid to the pursuer's authors for their interest in the said ground, that the pursuer's said authors should have right without objection by the trustees or the public to bring forward their buildings to the line of Chambers Street, and thereby to close up that part of Brown Square, to the same effect as if the trustees themselves had done so at the time or afterwards; Finds (2) that in any event the objection now taken by the defenders, the Magistrates and Town Council, is barred and excluded by the said arrangement having been made, and still being a condition of the title under which the said Improvement Trustees held, and the said defenders now hold, part of the ground, now and for the last thirty years, occupied by Chambers Street; Finds (3) that the said objection is further barred and excluded by the terms of sections 114, 115, and 116 of the Act 52 and 53 Vict. cap. 106 (passed in the year 1889), whereby, *inter alia*, the Improvement Trust of 1867 was brought to an end, and its undertaking transferred to the Magistrates and Town Council, and whereby the latter became, *inter alia*, liable to fulfil the whole obligations undertaken by the Improvement Trustees so far as then unimplemented; Finds therefore that the only objection to be considered is that of the defenders, the Governors of Heriot's Trust, but with respect to said objection finds that on the just construction of the said defenders' titles, and of the disposition executed by their author John Crombie in favour of the Improvement Trustees, dated in May 1873, the defenders' said authors retained, and the defenders as his successors still retain, not only as against the Improvement Trustees and the other defenders, but as against the pursuer and the other proprietors in Brown Square, a common interest, equivalent to a servitude *non ædificandi*, sufficient to entitle them to prevent the bringing forward of the pursuer's houses, or the other houses on the north side of the Square, beyond the present line of the sunk area walls of the said houses; Finds accordingly that without the consent of the said defenders (the Governors of Heriot's Trust), the pursuer's proposed operations cannot proceed: Therefore, and in pursuance of the foregoing findings, repels the defences stated by the Magistrates and Town Council, and as against them declares and decerns in terms of the conclusion of the summons; on the other hand, sustains the defences of the defenders, the said Governors of Heriot's Trust, and assoilzies these defenders from the conclusions of the summons, and decerns."

The pursuer reclaimed. The defenders, the Provost, Magistrates and Councillors of Edinburgh, acquiesced in the Lord Ordinary's judgment. The defenders, George Heriot's Trust, appeared in support of it.

Argued for the reclaimer—The present owners of No. 19 were really claiming a servitude *non ædificandi*. No such servitude existed, nor could any evidence of it be found in the titles. The burdens referred to in the disposition by Crombie to the Improvement Trustees as being in his titles, and subject to which the property was conveyed, were the common property rights which had all perished, as the town took the property for its improvement scheme free from all burdens. The reservation made as to not building was merely *quoad* the trustees who purchased, and not *quoad* the other proprietors. There was no *jus quæsitum* here. A *pro indiviso* proprietor could not in selling his share create a servitude over the rest of the property—not at least without consent of all the other *pro indiviso* owners. The Improvement Trustees acquired the whole interest of all the *pro indiviso* owners, so that no rights were left in any of the former owners. The respondents therefore had no title to object. No independent servitude was ever created in favour of each house. The common interest of all to have the ground kept open disappeared by the act of the proprietors themselves in selling the common property to the Improvement Trustees.

Argued for the respondents—The Improvement Trustees acquired the right of the various proprietors at different times. There was no wholesale transaction with the *pro indiviso* owners. The proprietors did not dispone all their rights. The ground to the north of that acquired by the Improvement Trustees was reserved. The foundation of the respondents' title was the disposition to David Dalrymple. By that disposition a servitude *non ædificandi* was created over the common property. The respondents were in right of that servitude along with the Improvement Trustees—*Governors of George Watson's Hospital* v. *Cormack*, December 14, 1883, 11 R. 320, 21 S.L.R. 237. The various proprietors in Brown Square had more than a mere servitude; they had a common interest in the garden ground and street, entitling them to have it kept in that condition. That common interest was not conveyed to the Trustees. It was reserved to the effect at least of entitling any one of them to prevent the ground being built on. That was equivalent to a servitude *non ædificandi*. That was obviously the plain meaning of the conveyance to the Trustees. The dispositions were to be interpreted equitably, and not in a technical sense. No. 19 therefore had a servitude over the common property, and over Nos. 15 and 16 to the effect at least of preventing the ground being built on. The conveyances might not have created servitudes *de novo*, but they certainly reserved what were equivalent thereto. The following authorities were referred to —*Tailors of Aberdeen* v. *Coutts*, December 20, 1834, 13 S. 226, *aff.* 3rd August 1840, 1 Rob. App. 296; *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571; *Johnston* v. *The Walker Trustees*, July 10, 1897, 24 R. 1061, 34 S.L.R. 791; *North British Railway Company* v. *Park Yard Company, Limited*, June 20, 1898, 25 R. (H.L.) 47, 35 S.L.R. 950; Bell's Principles,

sec. 994; *Mearns* v. *Massie*, December 5, 1800, Hume's Decisions, 736.

At advising—

LORD PRESIDENT—. . . [*After narrating the facts as given supra*]—. . . The pursuer is the singular successor of Currie. He proposes now to avail himself of the arrangement with the Lord Provost and Magistrates and to put his house forward, and this he has been found in a question with them entitled to do. The defenders, Heriot's Hospital, are the successors of Crombie. They object, and their right to do so has been affirmed by the Lord Ordinary. At first sight it seems difficult to see the defenders' interest to take up this point. Their own access to Chambers Street and thence to the town in general is in no ways interfered with. It is said that the proposed building will block the oblique view of George IV Bridge, and I think the Dean added, the setting sun. That is true, but the right must be judged of by the rights in Brown Square, and it is only a supervening accident that by the formation of George IV Bridge they had an uninterrupted prospect in that direction, as when their rights were constituted the prospect was blocked by the west side of Brown Square. Their only remaining interest, therefore, seems to consist in the right of emerging into Chambers Street by going, not straight up in front of their own door where the gradient is good, but by going *via* the north west-corner of the old Square, a proceeding which cannot save an inch of distance and substitutes a very bad gradient for a good one. Yet, slender as the interest is, it is enough if the title is sufficient, though in reality it is too clear to be misapprehended that their real interest arises from the fact that they are interested in the Heriot Watt College at the east which has no legal right in the matter. The question is one of title and one of great nicety and difficulty. Now, the state of the title at the formation of the Square is accurately set forth in the joint minute which parties lodged before the second discussion. That minute sets out that by contract of feu of certain dates in 1760 and 1762, James Brown, wright in Edinburgh, acquired "all and haill those parts and portions of Society whereon the ten houses of Brown Square were afterwards built," from Jean Hamilton and John Cleghorn. By the feu contract it was provided that "it should be lawful to the said James Brown and his foresaids to divide, sell, and dispose of the subjects thereby feued out and buildings erected thereupon in parcels," and there were certain provisions about feu-duties with which I need not trouble your Lordships. James Brown, in accordance with this provision, conveyed the ten houses erected by him on the feu to certain parties. In the minute there follows a narration of the original disponees of each of the houses numbered one to ten, with which I need not trouble your Lordships. The general scope of the titles is there set out, but I shall take that in a moment when I come to look at the particular title which was the title of the author of the complainer here. Each of the ten disponees, in exercise of the right conferred upon them by the feu contract, obtained from the superior a charter in his favour containing the provisions of the disposition on which it followed, and upon the precepts contained in the said charters instruments of sasine were expede, and those instruments of sasine contained prohibitions which I shall in a little notice. The precise form of the title may be conveniently taken from the title to David Dalrymple, who is the author of the opposing party, Heriot's Hospital. David Dalrymple's title has somewhat unfortunately not been printed, because, as I shall have occasion presently to remark, at the first stages of this case the parties really pled upon the wrong deed, but it is for all practical purposes sufficiently set forth in article 3 of the statement of facts for the Governors of Heriot's Hospital, which is printed in the record. That disposition is this—"All and haill that house or tenement of land in the Society or Brown's Buildings of Edinburgh, and ground whereon the same is built, with the fore and back courts and buildings thereon and two cellars below the street on the front of the said house, and whole parts, pendicles, and pertinents thereof as the same is presently possessed by the said Mr David Dalrymple himself within the town and territory of Edinburgh and sheriffdoms thereof, now bounded and described as follows, viz.—By the passage or vennel leading from the Society to the closes called Robertson's and Scott's closes upon the east, the yard belonging to the representatives of Thomas Smith, brewer, on the north, the large house or tenement with the said buildings presently possessed by, and the property of, Mr John Swinton, advocate, on the west, and the new street on the front of the said buildings on the south part." I call your Lordship's attention to that because you see that this title begins with a conveyance of the house proper by what is indubitably a bounding charter, and the south boundary is the new street. Therefore the conveyance of the house is undoubtedly exclusive of the street. But then it goes on with a further conveyance, "As also I hereby sell and make over in favour of the said David Dalrymple and his foresaids in common property with the other proprietors of the said new buildings, the said new street and enclosed green or area of pleasure ground fronting the same in proportion to his share of the separate property before disponed, bounded as follows," and then the boundary there is given, and a north boundary, which is equivalent of course to the south boundary of the house that had just been disponed, is "by the parapet wall and iron rails in the front of the said buildings on the north." The conveyance then goes on "with all right, title, interest, claim of right, property, possession," and so on. It then proceeds to say that these are conveyed under the declaration that "it shall not be in the power of the said Mr David Dalrymple or his foresaids to pursue for a division of

or build upon the said common property, it being agreed to by all parties concerned that the same shall remain an open area in all time coming." Now, that title (and all the other titles as I have already said were in similar terms) shows perfectly clearly what was the scheme of conveyancing under which these properties were granted and this ground laid out. The scheme was to give each house as separate property, and to give it as a subject with bounding titles, excluding by the boundaries the idea of any property in the street effeiring to the house. On the other hand, the middle ground, consisting of the street and pleasure ground, was given to all the proprietors in common. That ground again being described by boundaries excluded any idea of property effeiring to it outside the boundaries. But the property was common property. Now, clearly so long as it remained common property there could be no alteration in the scheme of its occupation, because, of course, it is familiar law that where property is held in common you cannot alter that property by disposition or otherwise without the assent of all the common proprietors. They must concur in any act done to the common property, and accordingly it made a complete protection for each of the owners, *pro indiviso*, of this common property against any action of the others which would alter the *status quo*. The framers of this disposition went one step further. They seemed to have considered that although that was so while it remained common property, yet it was incumbent upon them to prevent a change from its being common property, and accordingly they put in as a real burden this clause which I have already referred to, "It shall not be in the power of the said Mr David Dalrymple or his foresaids to pursue for a division." I have no doubt whatsoever that that clause is a nullity, although I am not altogether so surprised to find it in a conveyance of this date, because it is quite certain—as I think Lord M'Laren drew attention to in the course of the debate—that before the days of Mr George Joseph Bell the law of Scotland upon the law of common property, common interest, and joint property as distinguishable from each other was not very accurately understood, and it is the fact—as indeed our attention is called to the fact by Mr Bell himself—that the institutional writers treated these subjects somewhat inadequately. But the subject is quite well understood now. It was made very clear by Mr Bell and it has been elucidated since his day by frequent decisions, and I have no hesitation in saying that to give a thing in common property and at the same time to say that you are not to pursue a division is an impossibility according to the law of Scotland, just as great an impossibility as to give a person the property in fee and at the same time to tell him that he is never to dispose of it. The position of common property is very peculiar, because all the owners hold together in common, and they have, if I may so express it, a metaphysical right in every minutest atom of which the property is composed; and as it would be from the motive of public policy an absolutely cumbrous state of matters to keep for perpetuity where the particular joint proprietors may in time coming be each represented in their interests by a plurality of persons, the law of Scotland has always held that the state of joint property may be brought to an end at the instance of any one of the joint proprietors pursuing a division or a division and sale. Therefore I have no doubt that that provision that was put in was bad. At the same time I have equally no doubt that the scheme for practical purposes was effectually carried out, because there was another result which, I think, flowed in law. Side by side with common property, there is another right well known now to the law of Scotland which is denominated common interest. The whole matter of common property and common interest is most carefully explained by Mr Bell, and the passage in which he deals with the subject is sec. 1086 of his Principles. He there says—"A species of right differing from common property takes place among the owners of subjects possessed in separate portions, but still united by their common interest. It is recognised in law as 'common interest.' It accompanies and is incorporated with the several rights of individual property. In such cases a sale or division cannot resolve the difficulties which may arise in management; but the exercise and effect of the common interest must, when dissensions arise, be regulated by law or equity"; and then he gives as an illustration the common law in regard to flatted tenements in Edinburgh. I think that although he gives that illustration it is only an illustration, and I think that the learned editor in modern times, Sheriff Guthrie, who has edited with great advantage to the profession Bell's Principles a great many times, in the addition which he puts to that section—which of course is an addition in which he purports to give what Mr Bell himself would have given if he had seen the later decisions—puts it quite rightly and accurately represents the law. The addition which he puts is this—"Where neighbouring owners or tenants have a common interest in anything, as in a road giving a common access or an area or green for light and common use, their rights are ruled on similar principles—that is to say, by the titles constituting their rights as interpreted by law or equity. Anyone of the community is entitled to maintain the existing state of possession against the others." I think that, as I say, is an accurate description, and I think that this position emerged out of these titles, although, as I say, I do not think that it was a position which the framers so well understood as they did the question of common property. In the familiar instance which has often come before the Courts, that of laying out of squares, the property remains in the superior, and yet each of the feuars who have no property in the square has a common interest in the square; and I do not doubt that the same result follows in law

where the only difference you make is that the property of the square instead of being in the superior is held in common property by the feuars themselves, because held in common property by the feuars themselves as here it is a perfectly separate property. It is a property in which each individual owner is only partially interested because he is only a *pro indiviso* proprietor; and therefore I see no difficulty in law in holding that the result of these titles was not only to create a right of common property in the square and the street, but also to create a right of common interest in the individual houses in the square and the street. I think a very appropriate illustration of this doctrine is the case of *Mackenzie* v. *Carrick*, reported in the seventh volume of Macpherson. It is an important case in my view, because, as I shall presently explain, I think in this case a great deal, if not everything, turns upon the true appreciation of what precisely was the true legal character of this right. The rubric of that case is as follows—"Certain feuars of urban subjects were bound by their titles to leave 'a lane or passage of the breadth of 12 feet' along the east side of their respective feus, for the use of themselves, the other feuars, and the neighbourhood. Each proprietor was taken bound to causeway the portion of the lane on his own feu. *Held* that a feuar who was proprietor of subjects on each side of the lane was not entitled to erect a bridge over it." Now, your Lordships see there, so far as the abutment of the legs of the bridge was concerned, the feuar was in perfect right, because he had the property on both sides of the lane; but he had projected a bridge over the lane, and had done it in such a way as not in any way to interfere with the use of passage; and therefore the question truly came to be whether the right was a right of servitude or a right of common interest. If it had been a right of servitude, the operation could not have been objected to, because no one said that he put the bridge at such a low level that any ordinary traffic such as goes through towns could not perfectly well have used the lane. Accordingly, the Lord Justice-Clerk, in delivering the judgment of the Court, said—"The question is, under that obligation was there created a mere right of servitude, or a right of a higher kind? I think there was not a mere right of servitude. It is frequently most difficult to distinguish, in a case of conventional servitude, between a right of servitude and a right of property, and in the treatise of Pardessus on Servitudes (sec. 231, vol. i, 525) he tells us that the first duty of a judge is to ascertain the intention of parties—a matter of difficulty from different words having equivocal meanings." His Lordship then goes on to notice the various meanings of the words "passage" and "lane" and comes to the conclusion that the right in question was one of common interest and not a mere servitude. Accordingly, following that case, I think that here there was created by this conveyance these two rights, not inconsistent, but having this effect, that even although that clause against division, as I have already said, was bad, I think the practical end was attained in the other way, and I think that the interest of the feuars here was just the same as that of the feuars in the case of *Mackenzie* v. *Carrick;* or if one wishes another illustration, just the same sort as was illustrated in a case which was quoted to us, namely, the case of *Watson's Hospital* in 11 R. 320, the only difference there being that the garden ground in that case did not belong in common to the various house proprietors, but remained the property of the superior.

Well now, that being, as I read it, the state of the title at that time, what is the next step. The next step of course is what happened in 1867. Then, as I have already recited to your Lordships, the improvement body, by this time the Magistrates, approached these various proprietors and proceeded to acquire from them their rights in order to make the street. I do not think that you can take these transactions quite apart. I think you must take the transactions as they were, as a whole, but still for the moment, not looking at anybody's title except the opposing person's title, what do we find there. I think I told your Lordships that by 1867 the present proprietors Heriot's Hospital, or the David Dalrymple of the title I have just been examining, were represented by John Crombie. Now, Mr Crombie's disposition in favour of the Edinburgh Improvement Trust is to be found in the appendix, and it runs thus—In consideration of a certain sum "I do hereby sell" &c. "all and whole the street and also the enclosed green area or pleasure ground situated in Brown Square, as shewn on the plan annexed and signed as relative hereto, in so far as the same belongs to me in common with the other proprietors thereof, which street and green area or pleasure ground are distinguished on the plan referred to in the said Improvement Act by the No. 71, Area I, together with all rights and pertinents thereto belonging. . . ." Now, a subordinate question was raised by the parties upon the mere terms of the disposition. When you look at the plan which is annexed to that disposition there is a red dotted line upon it, denoting the northmost extremity of the street which was then in embryo, namely Chambers Street, and parties contended that the words "as shewn upon the plan annexed and signed as relative hereto" meant that the disposition was limited to the portion of ground which ended, so to speak, with the north of Chambers Street, and that it did not include the portion of ground which was between the new north of Chambers Street, or the old railing of the north side of the green enclosure which is the same thing, and the houses themselves. I think it sufficient for me to say that I think that proposition cannot be supported. One cannot look at the plan without seeing that that red line is not put there as a boundary line at all to limit or tax the words of the disposition, but that it is merely put there for what it purports to be, namely, an in-

dication of where Chambers Street is going to go. The whole plan bears that out, and I do not need to insist on the matter. Therefore I come without hesitation to the view that the disposition is "all and whole the street and the enclosed green area in as far as the same belongs to me in common with the other proprietors thereof." In other words, it is a disposition out and out of his whole rights under David Dalrymple's conveyance which represented the ground held in common—that portion of territory delimited in the original disposition by means of boundaries—excluding the house but comprehending the whole of the garden ground and the street. By so doing, what did he do? Crombie, it seems to me, parted with his whole interest, and he therefore not only, as everybody admits, gave up such rights as he had as a common proprietor, because after this conveyance he was a common proprietor no longer, but he also, it seems to me, as clearly gave up the right that he had, in my view of the titles, of common interest, and for this very good reason that by his own act the subject of the common interest had perished so far as he was concerned. He had given it up and given it away to somebody else. Accordingly, stopping for a moment at that dispositive clause it seems to me that Crombie after that was naked as regards all interest either of common proprietorship or of common interest so far as this centre space and the street were concerned. But then there is another clause which of course one must give effect to. He goes on to say—"And also under the real burdens following, *videlicet*, that the ground hereby disponed shall only be used by my said disponees and their foresaids for the purpose of forming a roadway or street betwixt South Bridge Street and George IV Bridge in virtue of said Improvement Act, all as shown on said plan, but they shall not be entitled to build upon the same, nor shall my said disponees or their foresaids be entitled to object to me or my successors in the said house building upon the intermediate ground between the said new street and the said house." Now, those are two perfectly different conditions. The first seeks in words to impose a servitude *non ædificandi* upon what he was conveying. I said a moment ago that I thought at the first aspect of this case the parties had taken a quite wrong view of the title, because such argument as we had at that time was directed to the supposed effect of this servitude. From the outset I had the greatest difficulty in understanding how, consistently with the law of Scotland, there could be said to be created a servitude *non ædificandi* upon a *pro indiviso* right, and I therefore was not surprised at the further hearing to find that the learned Dean of Faculty refused to argue that point, because upon principle it seems to me abundantly clear. It all flows from what I have already had occasion to advert to, namely, the peculiar metaphysical right that a *pro indiviso* proprietor has along with all the others in each atom of which the ground is composed. It is an obvious absurdity to suppose that he, the owner of that metaphysical right, can constitute a servitude *non ædificandi*, which is nothing if it is not real as against metaphysical. He has no possibility of affecting anybody's property against his own, and what would be the sense or the use of a servitude *non ædificandi* over the metaphysical conception of the piece of property belonging to him, the other pieces which go to make up the whole being *ex hypothesi* free. It is perfectly clear that the right of a *pro indiviso* owner is so peculiar that only certain things can be done with it, and I notice that with that unconscious accuracy that great writers like Mr Bell sometimes have—when perhaps they are not actually thinking of the thing at the moment—Mr Bell in his description of common property, section 1073, speaks of it thus—"Although the whole subject cannot be disposed of otherwise than by mutual consent, each joint-owner may sell his own *pro indiviso* right, the purchaser coming into his place. The right may also be adjudged to the same effect." I say unconscious accuracy, because there, you observe, he stops at conveyance and what comes to compulsory conveyance, adjudication, and he does not seem to have an idea that you could in any way burden or affect it in a way which would be practically meaningless, unless you could also affect the rights of your co-proprietors. No doubt that sentence of Mr Bell is not exhaustive, and there is no doubt that to the words adjudge and convey you may also perfectly well add the words "dispose of in security." In point of fact there is at least one reported case which gives an illustration of that fact, and that is the case of *Schaw* v. *Black*, reported in 16 Rettie, 336. *Schaw* v. *Black* is a very illustrative case as showing the principles upon which all this depends, because I think the judgment of Lord Kinnear in that case really takes precisely the same view of these rights as I do, and although Lord Kinnear's judgment was in that case reversed, I do not think the reversal affected the soundness of the principles laid down in the judgment, because the reversal went upon a specialty which does not seem to have been argued before his Lordship. Lord President Inglis and the other Judges of this Division at that time were very careful to say that they decided the case upon the specialty altogether, and did not in any way controvert Lord Kinnear's views. In that case there had been a bond and disposition in security constituted by the owner of a *pro indiviso* right, and the creditor raised an action of maills and duties in which he concluded for the share of the rents that effeired according to the proportion of the *pro indiviso* right of his cedent. The tenants did not object to pay, and the other parties did not object that he should be paid, and the only person who lodged defences and objected to the action going on was the granter of the bond and disposition in security. Now, Lord Kinnear held that the peculiarity of the position of a *pro indiviso* owner was this, that he really could not do anything

without the assent of the other proprietors, and that therefore as they were not the co-pursuers in the action, the action must be dismissed. The Inner House, without, I think, in any way controverting the accuracy of Lord Kinnear's views as to the situation upon the title, pointed out this, which did not seem to have been argued before his Lordship, namely, that all the other parties here consented—that is to say, they were in the same position as if they were pursuers—and the only person who objected being the debtor under the bond and disposition in security, it was not in his mouth to raise any of these objections. Now, that appears to me perfectly sound, and, accordingly, it seems to me that you can only do with the *pro indiviso* right any operation which deals with that *pro indiviso* right alone. Take the case of a bond and disposition in security or a real burden for a sum of money. There is no difficulty, however many changes the property may go through, in always holding that these burdens affect your own share, because, supposing there is an action of division, as always must be competent, there is no conveyancing difficulty in holding that the real burden or the bond and disposition in security, which began life by sticking to the *pro indiviso* right, may go on with the same reason to stick to the right which the person gets instead of the *pro indiviso* right, namely, the right to a certain separate share of the property. But how can you apply that to a thing like a positive servitude. Supposing you have a piece of land in *pro indiviso* property and go through an action of division in the old style, what would happen? What was done was that you had a scheme of division which a jury settled, and after the lots had been settled as representing the various *pro indiviso* interests, lots were drawn and the particular piece of property which came to belong to any *pro indiviso* owner in severalty was settled by lot. Could there be a more absurd result than that this so-called positive servitude, which is of no use, unless it is one over the property as a whole, then came to apply to the particular lot which came to belong in severalty to the old *pro indiviso* proprietor—a lot which might be at the other end of the territory as far as the separate property was concerned. Therefore for all these reasons I think it abundantly clear that this clause in the disposition of 1873 did not effectuate a servitude. Now, that being so, it seems to me that the objector's title here is gone. It may be said that it was a foolish conveyance in 1873, upon the views that I have taken, because, as he had parted with the street in front of his own house, he might have had it occupied by buildings, and not have been able to get into his house at all. The answer to that is a practical one. He knew perfectly well whom he was parting to—to a body of Improvement Trustees—and also, as far as they were concerned, he took them bound, as in a question with them, that he himself would be allowed to build on the piece of street exactly opposite his own ground and come out to Chambers Street. I am quite aware that upon the principles of conveyancing that would not be a good real right, for the reasons I have already stated, available as against somebody else, if the Improvement Trustees had afterwards been able to dispone; but as a practical matter it was quite good enough, because nobody supposed that the Improvement Trustees were going to build houses on the north part of Brown Square, and as far as they were concerned he bound them to allow him to bring his house forward whenever he chose.

I am bound to say that I am fortified in this judgment, which of course has necessarily proceeded upon very technical lines, when I look at the equity of the matter. I have rested my judgment, as I think I am bound to do, on a matter of title, entirely upon the titles and nothing else; but if I do look at the correspondence which has been produced in the proof here and see what happened, I can perfectly well see that the whole of these three north proprietors were making a bargain at that time by which it was contemplated that they should be able to bring their houses forward. Indeed this very clause in Crombie's disposition allowing him to bring his house forward is in one sense perfectly inconsistent with the idea that he thought he was going to be prevented by any of the other proprietors on the north side, and he cannot object, I think, if the same law is applied to him as he would have wished to apply to them.

Upon the whole matter therefore I hold that the objector here fails, and that the pursuer is entitled to his declarator. I do so to summarise my judgment in a single sentence, because I think that the original title consisted in a disposition of common property, the right to which has obviously gone by the conveyance of 1873, and that the other right that there was, was not an independent servitude in favour of the houses held in particular property, but was a right of common interest, the subject of which was also equally parted with in 1873, and that therefore upon the whole matter the pursuer is entitled to the declarator which he seeks.

LORD M'LAREN—For my part I do not doubt that the thing called common interest has subsisted in Scotland for as long as there have been cities and towns in this country, because we know that it has been the habit of proprietors in our burghs to build their residences *in strata* one over the other, and no one has ever supposed that the proprietor of the lower flat was entitled to remove a part of a gable with the effect of bringing down the house of his neighbour above him. I think there is also abundant evidence that common interest in a subject lying outside the structure or tenement also existed, because in our time we have numerous examples of ancient paved courts in which the owners of the surrounding houses have severally a right which would prevent encroachment on the court by any proprietor whoever he might be. But this case illustrates or proves that

towards the end of the eighteenth century, when there came to be a great deal of building in this city, conveyancers were somewhat at a loss, in endeavouring to secure the right of their clients to the curtilage of the ground attached to a street, to know to what legal category they ought to refer that right—a right which as a practical thing was perfectly well known and which the law recognised. In some cases it was thought that it came under common property, in others servitude, and again it was sometimes referred to the category of real burden. In the present case the garden of Brown Square was conveyed to the owners in common property. Agreeing with your Lordship, I think no distinction can be taken between the case where the curtilage of the street is vested jointly in the proprietors and the case where it is reserved to the superiors. The legal title to the property must be vested in some one, but then whoever has it is affected by the rights of all the proprietors of the street who have interest in this garden or curtilage. Now, the attempt was unsuccessfully made to assure the right of common property against intervention by going through the form of making the proprietor renounce his right to sue a division. Such an obligation might possibly be binding on the original grantee and his heirs, but certainly could not be enforced against a singular successor, because it is an obligation of the same class as the condition *non alienandi sine consensu superiorum*, which by Act of Parliament is declared to be of no effect. I think the attempt to class such rights as servitudes has not been very successful, because in the case of a servitude each person who is interested in the subject that they are to enjoy in common has a right dependent upon and limited by his own titles, and the rights of different owners in the subject that they are to possess in common might be different, whereas the peculiarity of the description of right which we call common interest is that the rights of all the persons who have it are equal. Then I say nothing about real burdens, because that is rather a name descriptive of an encumbrance than of a condition qualifying the right of the legal owner of the estate. It was due to Mr Bell that this sort of right came to be recognised as a thing *sui generis* to which the name common interest was given—a right which, though not falling under any of the categories I have referred to, was a restriction upon the use of property which the law would recognise. While it is necessary that the property of the garden should be vested in some one—and I think it was perfectly proper from the point of view of a conveyancer to vest the garden ground in the proprietors—there is in the title of each a clear indication that this garden was intended to be maintained in perpetuity for the benefit of all, and that in my opinion is sufficient to give rise to the right of common interest which, as is now admitted, belonged to all the proprietors of the houses in the Square. That being so, the Improvement Trustees purchased from the different proprietors their rights in the garden and the road. But for the Parliamentary powers which the Improvement Trustees possessed, that purchase would have done no good. It would merely have vested them in the legal title to the ground, but they would have been affected by the common interest, and no alteration could have been made upon it without the consent of the householders. But then this body of Trustees when they became purchasers were enabled by their Act of Parliament to take the property, paying compensation of course, free from these conditions. They proceeded to make Chambers Street, taking as much of the ground as they wanted for that purpose, and the part of the garden which remained in their hands was the subject of an arrangement of the nature of a compromise, the Trustees on the one hand undertaking not to build upon the ground, and on the other not to object to the proprietor of the house building upon the ground *ex adverso* of his house. It seems to me that the result of this arrangement is that the common interest which the proprietors had in the garden ceased by reason of their conveyance to a body who had statutory powers to take the property free from conditions, and the rights of the proprietors now depend entirely upon the terms of the contract with the Trustees, which binds those Trustees not to object to building on the ground. It follows, in my opinion, that Mr Grant is entitled to build, as he proposes, *ex adverso* of his house. I do not enter more fully into the question because I concur in all respects with the judgment which has been delivered by your Lordship in the Chair.

LORD KINNEAR—I also agree entirely with what your Lordship has said, and I only add that I think that when the titles have been clearly understood as your Lordship has explained them, the question at issue really comes to depend upon a very narrow point indeed, and is capable of being simply stated. The grounds upon which the Governors of Heriot's Hospital object to the pursuer being allowed to build in the way he proposes are stated in the Lord Ordinary's interlocutor, and I do not think they can be more effectively stated than in his finding that by the conveyance by Mr John Crombie in 1873 to the Improvement Trustees, he retained, and the defenders as his successors still retain, not only as against the Improvement Trustees, but as against all the proprietors in Brown Square, a "common interest, equivalent to a servitude *non œdificandi*, sufficient to entitle them to prevent the bringing forward of the pursuer's houses or the other houses on the north side of the Square beyond the present line of the sunk area walls of the said houses." The only criticism I should venture to make upon that statement is that a common interest is one thing, and a servitude *non œdificandi* is another and different thing in law, and it is not quite clear to my mind whether his Lordship meant to say that the legal right in the defenders

was one of common interest on the one hand or of servitude on the other. The question whether there was retained by Crombie in his disposition any common interest or any servitude which would enable him to prevent the other proprietors on the north side of the Square building must depend upon the terms of the title which he granted to the Improvement Trustees; but then, of course, the true meaning and effect of his conveyance to the Improvement Trustees must depend in the first place upon what was the nature of his own right in the subjects conveyed. Therefore, I venture to think, the point really comes to depend upon a comparison between the title given to Crombie and the title given by Crombie to the Improvement Trustees, in order to see whether Crombie had vested in him any right in the street or public garden over and above the right which he expressly conveyed to the Improvement Trustees, or, in other words, whether he divided the right in which he was originally vested in the street and public garden, retaining part of it for himself and conveying another part of it to the Improvement Trustees. Now, that depends in the first place upon the nature of Crombie's title, which your Lordship has examined, and therefore I do not think it necessary to go into it more closely than to say that it is to my mind perfectly clear on a construction of these titles that there are two entirely separate and distinct subjects given by Brown to Mr David Dalrymple, Crombie's author. In the first place, he gives a separate and exclusive right of property in the house or tenement of lands on the north side of the Square, specially described in the conveyance, bounded by the street upon the south; and in the second place, he conveys a totally different kind of right, a common right along with the other proprietors in the street and enclosed green or area of pleasure ground bounded by his house. Nothing can be clearer upon the description of the title than the distinction between these two rights—an exclusive right of property in the house which stops at the street, and a common right of property in the street and enclosed green or area of pleasure ground bounded by his house. What then did Mr Crombie convey to the Improvement Trustees? It appears to me, upon a fair construction of his title, that it is not open to question that he gave them all the right of common property that he had exactly as it stood in him, whatever the nature of that right was. What he had in common with the others was the right of common property in the street and pleasure ground, and what he dispones to the Improvement Trustees is just the street and enclosed area or pleasure ground "in so far as the same belongs to me in common with the other proprietors." Now, I think that upon the execution and delivery of that conveyance Crombie was absolutely divested of all right of property in the common subject, the street and the pleasure ground, and that his disponees were vested in his place. I do not think it necessary to consider, for the purpose of determining what really was conveyed, the particular method by which the right given to Crombie and his authors in the street and pleasure ground was intended to operate. It was a common right of property in terms; and although I quite agree with your Lordship that the framers of the conveyance did not very distinctly understand what the distinction between common property and common interest was, and also that for the purpose of maintaining unaltered the particular mode of occupation and enjoyment contemplated, there was attached to the right of property a condition against division which would probably have been ineffectual, still the fact remains that the right vested in Crombie was a right of property in common with others, that the property was still undivided, and that the entire right as it stood in him was conveyed by Crombie to the Improvement Trustees, he reserving absolutely nothing to himself from the conveyance. Now, that would make an end of the question were it not that he goes on to attach a condition to the conveyance, and I rather think that it must be upon that condition the Lord Ordinary has proceeded when he found that Crombie had retained a "common interest equivalent to a servitude *non ædificandi*." There is nothing else but the condition to suggest it. But there was no right of any kind in him which he could retain if he conveyed away the street and pleasure ground, because his own right stood upon a mere conveyance of the street and pleasure ground in common property with others, and that is exactly what he gave to his disponees. If, therefore, he has a servitude by virtue of this condition, it is not a right already vested in him apart from the right of property which he conveys away, but a new right which he stipulates for himself—a new right of servitude in which his house is to be the dominant tenement and the common property which he is conveying is to be the servient tenement. The condition is that the street and pleasure ground are conveyed under this burden among others, that the ground disponed shall only be used by the disponees and their foresaids for the purpose of forming a roadway, "but they shall not be entitled to build on the same, nor shall my said disponees or their foresaids be entitled to object to me or my successors in the said house building upon the intermediate ground between the said new street and the said house." Now, that is said to constitute a servitude *non ædificandi* which forms a good and effective burden upon the land conveyed. I think the answer as your Lordship has given it is perfectly clear. What was conveyed was nothing but a *pro indiviso* right in common ground, and it is a legal impossibility for one of several *pro indiviso* proprietors to impose a servitude on the common property. That arises of necessity from the nature of the right which is vested in him, and in your Lordship's exposition of that right I entirely concur. If he and his co-proprietors were part owners, so that each had a title in himself to his own share, it would be

simple enough for each by his own separate act to burden his own share with a servitude or with any other liability which could be made effectual upon land. But *pro indiviso* proprietors are not part owners but joint owners; and since each and all of them are proprietors of each and every part of the subject held in common, it is impossible to impose a servitude upon their separate rights since they have no separate right, and just as impossible for one by his own separate act to impose a servitude upon the common property. The only way of creating a servitude on property held on these terms is by the whole proprietors combining and imposing a burden, not upon their rights *pro indiviso*, but upon the subject itself. That one *pro indiviso* proprietor out of a number should, by a conveyance of his own interest in the common property, create a servitude by contract with his disponee, either upon his own interest which he is giving away, or upon the common property, is, in my opinion, for the reasons your Lordship has given, a legal impossibility.

The conclusion I come to is, in the first place, that there was no separate and independent right of servitude vested in the proprietor of Mr Crombie's house over the common property, but merely a right of common property, and in the second place, that when he conveyed his whole right of property in the street and pleasure ground it was impossible for him to create over that subject a servitude in favour of his own house or in favour of any other dominant tenement. On the whole matter therefore I entirely concur with your Lordship.

LORD PEARSON—I concur.

The Court pronounced this interlocutor—

"Recal the said interlocutor in so far as it finds with respect to the objection of the defenders the Governors of Heriot's Trust, 'that on the just construction of the said defenders' titles and of the disposition executed by their author John Crombie in favour of the Improvement Trustees, dated in May 1873, the defenders' said author retained, and the defenders as his successors still retain, not only as against the Improvement Trustees and the other defenders, but as against the pursuer and the other proprietors in Brown Square, a common interest equivalent to a servitude *non ædificandi* sufficient to entitle them to prevent the bringing forward of the pursuer's houses or the other houses on the north side of the Square beyond the present line of the sunk area walls of said houses;' and in so far as it 'finds that without the consent of the defenders the Governors of Heriot's Trust the pursuer's proposed operations cannot proceed,' and in so far as it 'sustains the defences of said Governors, and assoilzies them from the conclusions of the summons,' and finds them entitled to expenses: *Quoad ultra* adhere to the said interlocutor, and further repel the defences stated for the defenders the Governors of Heriot's Trust, and find, declare, and decern against the defenders in terms of the conclusions of the summons, but under the declaration always that any rights hereby declared in favour of the pursuer shall be exercised by him only with the consent and concurrence of the defenders the Incorporated Dental Hospital and School and their assignees and successors in title: Find the pursuer entitled to expenses as against the defenders the Governors of Heriot's Trust, but excluding therefrom the expenses so far as caused by the opposition of the Magistrates and Town Council of Edinburgh; and remit the account of said expenses to the Auditor to tax and to report," &c.

Counsel for the Pursuer and Reclaimer—Clyde, K.C.—Guthrie, K.C.—T. B. Morison. Agents—Somerville & Watson, S.S.C.

Counsel for the Defenders and Respondents The City of Edinburgh—W. J. Robertson. Agent—Thomas Hunter, W.S.

Counsel for the Defenders and Respondents The Dental Hospital—A. Moncrieff. Agents—Stuart & Stuart, W.S.

Counsel for the Defenders and Respondents The Governors of George Heriot's Trust—Dean of Faculty (Campbell, K.C.)—C. D. Murray. Agent—Peter Macnaughton, S.S.C.

Thursday, March 15.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

JOHNSTONE *v.* HENDERSON.

Process—Caution for Expenses—Reclaiming Defender—Trust Deed for Behoof of Creditors Granted after Reclaiming.

A defender in an action reclaimed and subsequently executed a trust deed for behoof of creditors. On the trustee's refusal to sist himself in the action, the pursuer, in a note, craved the Court to ordain the reclaimer to find caution for expenses. The Court *refused* the prayer of the note.

On 17th May 1905 Alfred Johnstone, stockbroker, 10 St Andrew Square, Edinburgh, raised an action against William Henderson, 12 Affleck Street, Aberdeen, to recover a sum of £499, 2s. 5d., which he averred and pleaded was the balance due to him on the purchase and sale of certain stocks which he had carried through for the defender. By interlocutor dated 1st December 1905 the Lord Ordinary (ARDWALL) granted decree in favour of the pursuer for the sum sued for with interest and expenses. Against this judgment the defender reclaimed on 15th December 1905, and on 29th December he granted a trust deed for behoof of creditors. On 30th January 1906 the trustee intimated to the respondent's agents that he would not proceed with the reclaiming note nor sist himself as a party thereto.