

Thursday, January 27.

FIRST DIVISION.

ARROL V. INCHES AND OTHERS.

*Property—Building Restriction—Common Interest—Law of the Tenement.*

The proprietor of the lower part of a house in town, consisting of the street floor, basement, *solum* on which the house was built, and area in front and behind, projected the street floor toward the street to the limit of his boundary. The proprietor of the upper storeys, whose title expressly excluded him from any right whatever in the lower floors, area, &c., then claimed right to advance his front wall, and rest it upon the projection so made by the proprietor of the lower floors. *Held* that he had no such right, the right of property in the proprietor of the lower floors extending *a celo ad centrum* in the area upon which the projection was built, and being only qualified by the law of the tenement.

Robert Kirk Inches was proprietor of two shops, Nos. 87 and 88 Princes Street, with sunk area in front, the area upon which the house was built, and the back area and buildings upon it. The upper storeys and garrets above Inches' shops formed part of the Balmoral Hotel, and belonged to Archibald Arrol. At one time these properties were held under one title by the late Dr Johnston under a disposition dated 30th April 1808 by the late David Reid in his favour. In that disposition the subjects were described as "All and whole that lodging or dwelling-house, consisting of a sunk storey, three other storeys, and garrets, erected by Alexander Reid, . . . situated upon the north side of Princes Street, . . . with the area whereon the said house is built, . . . as also the back area or ground belonging to the said dwelling-house . . . enclosed with a stone wall, and the stable and coach-house built upon the said back area or ground, and situated behind the said dwelling-house, together with the sunk area, cellars, and pavement above the same in front of the said house." The property was described as bounded "on the south by Princes Street, and on the north by the Meuse Lane."

By disposition dated 10th May 1823 Dr Johnston disposed to George Mylne, "All and whole the two upper storeys and garrets, being the drawing-room, bed-room, and attic storeys of that lodging or dwelling-house, consisting of a sunk storey, three other storeys, and garrets, erected by Alexander Reid, . . . which house and area . . . are bounded as follows, viz., . . . on the south by Princes Street, and on the north by the Meuse Lane; . . . but declaring that the said George Mylne shall have no right whatever to the dining-room storey and sunk storey of the said house, or to the area and cellars in front thereof, or to the area behind the same, or stables and other buildings erected or to be erected thereon."

By disposition dated May 1860 the trustees of the New Club, situated immediately to the east of the property, disposed to Mr Archibald Arrol the upper storeys and garrets, which they had acquired from Mr Mylne. The description of the subjects conveyed was identical with the

description in the disposition to Mr Mylne, except in that it contained this additional clause—"And the said subjects hereby disposed now consist of three storeys and attics, that is, the drawing-room storey, and two storeys and an attic storey above;" and the declaration that "the cornice at the top of the New Club buildings, and the other mouldings on the front, &c., are to be allowed to return on the front of the subjects hereby disposed."

By charter of resignation dated 12th May 1824, following on the disposition by David Reid, the Lord Provost and Magistrates "gave, granted, and in feu-farm, fee, and heritage for ever disposed to and in favour of Henry Johnston, Esquire, surgeon in Edinburgh, and his heirs or assignees whatsoever, heritably and irredeemably, the whole of the said subjects conveyed by the foresaid disposition by David Reid; . . . but excepting always from the dwelling-house above described the two upper storeys and garrets, being the said drawing-room, bed-room, and attic storeys thereof, which was sold and disposed by the said Henry Johnston to George Mylne." These subjects under the above description were conveyed through a series of titles, and ultimately in 1880 became vested in Inches.

Inches applied to the Dean of Guild in the summer of 1886 for warrant to alter his property by projecting the front of his shops, and the warrant was granted by interlocutor dated 15th July 1886.

In the same month Arrol presented a petition to the Dean of Guild for "warrant to remove the front wall and existing oriel window of the drawing-room of the Balmoral Hotel, Princes Street, Edinburgh, situated immediately above the shops Nos. 87 and 88 Princes Street, which shops belong to the respondent Robert Kirk Inches; to erect a new front and oriel window over, and resting upon, an extension of said shops, proposed to be made by said respondent, who is in course of petitioning for the authority of your Lordship to make such extension, his petition being now pending in your Lordship's Court; and to insert iron beams to support the front wall and upper floors of the petitioner's property." He offered in the event of his proposed alteration causing expense to Inches by forcing him to make his projection stronger than would otherwise have been necessary, to pay whatever sum might be required for that purpose.

The petitioner stated that the south boundary of his property was Princes Street, and that the proposed alteration would merely extend his frontage thereto, the north side of Princes Street being demonstrated by the alterations of Inches.

Inches and the New Club lodged answers. They denied that the petitioner's southern boundary was Princes Street, that street being the boundary of the whole property with the area in front, and stated that the proposed operations would extend beyond his southern boundary, not only because the subjects disposed to him were not declared to be bounded on the south by Princes Street, but because also he was under his title (as above quoted) expressly excluded from any right to the dining-room storey and sunk storey, or to the area and cellars in front thereof. The New Club also objected on the ground that under the declaration in the petitioner's title (as above quoted) the cornice at the top of the New Club

buildings, and the other mouldings on the front, &c., were to be allowed to return on the petitioner's buildings, and the petitioner would, if he carried out his proposed alterations, be obliged to remove part of the termination of the New Club balcony, which returned upon his property.

The petitioner pleaded—“(1) The petitioner's property being bounded on the south by Princes Street, and the proprietor of the under part of the tenement having brought forward, or being about to bring forward, the south front of his shops, the petitioner is entitled to improve his property by the alteration now proposed. (2) The proprietor of the dining-room and sunk storeys of a tenement having obtained authority to project his frontage, the proprietor of the upper storey of the same tenement is entitled to obtain authority to make a similar alteration.”

The respondent Inches pleaded, *inter alia*—“(1) The petition ought to be refused with expenses, in respect—1st, The operations for which warrant is craved are not confined to the petitioner's own property; and 2d, the proposed operations would encroach upon the respondent's property and rights.”

The respondents, the trustees of the New Club, pleaded—“(1) The operations in question not being confined to the petitioner's own property, *et separatim*, as these operations would, if executed, be injurious to the property of the respondents, warrant should be refused with expenses. (2) Both under the petitioner's title, which flowed from the respondents, and at common law, the petitioner is not entitled to execute the operations proposed, and warrant should accordingly be refused.”

The Dean of Guild found that the proposed alterations were not confined to the petitioner's own property, and would entail interference with the mouldings of the New Club buildings, and would infringe a condition of the petitioner's title. He therefore refused the warrant.

“*Note.*—The petitioner craves warrant to remove the front wall and existing oriel window of the drawing-room of the Balmoral Hotel, Princes Street, Edinburgh, above the shops belonging to the respondent Inches; to erect a new front and oriel window over and resting upon an extension of said shops, for which warrant has been granted to the respondent Inches by this Court, and to insert iron beams to support the front wall and upper floors of the petitioner's property. The petitioner avers that the disposition in his favour describes his property as bounded by Princes Street, and that the proposed alteration will only extend his frontage to Princes Street, the north side of Princes Street he contends being demonstrated by Inches alterations. The respondent Inches denies that the petitioner's disposition describes his property, or even the tenement, as bounded by Princes Street, and he avers that it is the area in front which must be understood as ‘bounded by Princes Street.’ He avers also that by the titles the property is possessed in the following manner:—the upper flats and attics of the tenement fronting Princes Street by the petitioner, and the area and buildings thereon, except the upper storeys, by the respondent Inches.

“The respondents, the trustees for the New Club, from whom the petitioner acquired his title to the subjects in question, found on a clause

in the petitioner's disposition which declares, *inter alia*, that the mouldings in front of the Club building are to be allowed to return on the petitioner's front, under which burden the subjects were disposed, the said burden to be inserted in the sasine following on the disposition and to be inserted in all future transmissions and sasines.

“There are two series of titles of the subjects in question, and these shew clearly the law of tenement which must be followed in this case. Under these the ownership was admitted to be as follows:—The petitioner is particularly restricted to the upper flats and attics of the tenement, and the respondent Inches possesses the whole of the area with the buildings on it, except the portions of the tenement possessed by the petitioner. As mentioned above, the respondent Inches has obtained warrant to project an extension of his property over the space originally occupied by this area, which by his titles belongs exclusively to him, and it is on this extension that the petitioner claims a right to rest his proposed new front and oriel window.

“The Dean of Guild cannot admit this claim. It might have been otherwise if he had merely proposed to make certain operations on his own property. But he does not propose only to erect a new front and oriel window for his property. He proposes further to rest these on the respondent Inches' proposed projection, and it appears to the Dean of Guild that this would impose a burden on the lower projector to which he is not bound to submit.

“It was also admitted at the debate that if the proposed alterations of the petitioner were carried out, the petitioner would be obliged to remove a portion of the mouldings of the New Club building which now returns on the front of his property. It appears to the Dean of Guild that if this were done the petitioner would infringe a condition of his title.”

The petitioner appealed, and argued—(1) The tenement in question was identical in character with that in the case of *Urquhart v. Melville*, 1853, 16 D. 307, and that on the authority of that case the proprietor of the lower storeys of such a tenement who projects his frontage is bound to support the frontage projected by the proprietor of the upper storeys, so long as the former suffers no injury and the latter acts reasonably. All that the lower proprietor had was a common interest, which would not entitle him to object unless he could show some damage or injury—*Stair*, ii. 7, 6; *Rankine on Landownership*, 558; *Taylor v. Dunlop*, November 1, 1872, 11 Macph. 25; *Calder v. Merchant Company of Edinburgh*, February 26, 1886, 13 R. 623 (Lord Shand's opinion). (2) The condition in the disposition by the trustees of the New Club was not violated, for the moulding still returned, although not to the same extent.

Argued for the respondents—The question fell to be decided on the titles alone. The respondent Inches, as proprietor of the projection on his own ground, had a right *a centro ad eorum*, subject only to the law of the tenement, which, no doubt, would prevent him building on it so as to block up the lights of the petitioner's storeys—*Graham v. Duke of Hamilton*, June 30, 1868, 6 Macph. 965, July 28, 1871, 9 Macph.

(H.L.) 98; *Gellatly v. Arrol*, March 13, 1863, 1 Macph. 592; *Johnston v. White*, May 18, 1877, 4 R. 721. Nor was there any distinction between the back and front in the question of property. There might be in a question of common interest. But property was here the *de quo queritur*. A proprietor had a right of property *a centro ad cælum*, and therefore a right of property in the air above his house, entitling him to raise his house higher; but there was no such right laterally in the cube of air beside his house—*Boswell v. Magistrates of Edinburgh*, July 19, 1881, 8 R. 986; *Heron v. Gray*, Nov. 27, 1880, 8 R. 155. Both those cases were commented on in *Dundas v. Blair*, March 12, 1886, 13 R. 759. The case of *Urquhart v. Melville*, and *Taylor v. Dunlop* had no bearing on the present case. The former was distinguished by the facts that all the property was bounded by the street; that all belonged to the same person, and that it was that person who made the projection. In the latter case there was no competition as to title. It was a mere question as to the amount of the burden upon the subjacent tenement. The *dictum* of Lord Shand in the case of *C Calder v. The Merchant Company of Edinburgh* (*supra*) was to be read with its context, and that context deprived it of any bearing on the present question.

At advising—

LORD PRESIDENT—It appears that in this case the respondent Mr Inches, who is proprietor of the shops on the ground-floor, has obtained authority from the Dean of Guild to build to the front to the limits of his property—that is to say, to the limit of the original area when Princes Street was formed. The petitioner, the proprietor of the upper floors of the tenement, proposes to “remove the front wall and existing oriel window of the drawing-room of the Balmoral Hotel, Princes Street, Edinburgh, situated immediately above the shops Nos. 87 and 88 Princes Street, which shops belong to the respondent Robert Kirk Inches, to erect a new front, and with window over and resting upon an extension of said shops proposed to be made by the said respondent,” . . . and to insert iron beams to support the front wall and upper floor of his property. The Dean of Guild refused to grant the petitioner's application to make this alteration. In order to decide the question it is necessary to examine the titles and to understand the construction of the buildings, and then the matter is free from doubt.

Originally the house belonged to one proprietor, Henry Johnston. The instrument of sasine in favour of Mylne, dated 16th May 1823, proceeds upon the disposition of the entire subjects in favour of Johnston, and Johnston's disposition in Mylne's favour. It narrates the disposition in favour of Johnston as conveying the entire subjects, which it thus describes—“All and whole that lodging or dwelling-house consisting of a sunk storey, three other storeys, and garrets, erected by Alexander Reid” upon such and such a piece of ground. Then follows a description of the measurements. And it goes on—“With the area whereon the said house is built, which house and area thereby disposed measure 27 feet 10 inches in front from east to west, as also the back area of ground belonging to the said dwelling-house enclosed with a stone wall, and the stable and coach-house built

upon the said back area of ground, and situated behind the said dwelling-house, together with the sunk area, cellars, and pavement above the same in front of the said house.” Then follows the description of the entire subject by boundaries, and it is described as bounded “on the south by Princes Street.”

It then narrates the disposition by Johnston in favour of Mylne of “All and whole the two upper storeys and garrets, being the drawing-room, bedroom, and attic storeys of the lodging or dwelling-house particularly before described.” It is the whole house and area whereon the same is built that is bounded on the south by Princes Street. So far the description is very simple.

But there then follows a very distinct declaration that Mylne, the party acquiring right to the upper floors, shall have “no right to the dining-room storey and sunk storey of the said house, or to the area and cellars in front thereof, or to the area behind the same, or stables and other buildings erected or to be erected.” Now, an infetment upon that disposition gives to the disponee the real right to the three floors of the house therein described. But it gives no right of any kind to the street floor, the sunk floor, the area in front, or the area behind. That remains in the person who disposed the house to Mr Mylne; and Mr Inches comes in right of that person. The result is that while one of the parties before us has right of property in the two areas, front and back, the street floor, and the sunk floor, the other party has no right of property in these portions of the subject of any sort. Mr Inches was quite entitled to apply for and obtain authority from the Dean of Guild to build. His property extends *a centro usque ad cælum*. Every such right of property carries a right of this kind.

Whether, notwithstanding the state of the title, the petitioner may project his building over Mr Inches' property is another thing. If Mr Inches' right extended to the building up of the petitioner's lights, he certainly could not. But Mr Inches has no such right, for it would be contrary to the law of the tenement. That question, however, is not before us. It would require a great deal of consideration; and it would require to be considered in the first place by the Dean of Guild.

But that is not before us. The only application before us is to build on the top of Mr Inches' new building, on what grounds I cannot imagine, for the petitioner has no right in that storey at all. I think the Dean of Guild has decided quite correctly, and has stated the proper grounds for his decision.

LORD MURE concurred.

LORD SHAND—There can be no doubt that here we have a quite distinct and somewhat special matter to deal with. The question whether Mr Arrol has or has not right to build out must be taken on the footing that the area, &c., is the property of Mr Inches. That being so, I am clearly of your Lordship's opinion.

The proposal is to build a new front wall and put out an oriel window upon Mr Inches' projection. What Mr Inches does can give his neighbour no additional right. It might have been otherwise if the alterations had been on his own property. On that I reserve my opinion. At present I am not sure that Mr Inches' right of

property in the *solum* would exclude operations of that character. But upon that matter I desire to say nothing at present.

The Court refused the appeal and affirmed the judgment of the Dean of Guild.

Counsel for Petitioner—Pearson—Napier. Agents—J. A. Campbell & Lamond, C.S.

Counsel for Respondent, R. K. Inches—Asher, Q.C.—Graham Murray. Agents—Davidson & Syme, W.S.

Counsel for Respondents, Trustees of the New Club—Asher, Q.C.—Graham Murray. Agents—Russell & Dunlop, C.S.

Friday, January 14.

### FIRST DIVISION.

#### TRUSTEES OF FREE CHURCH V. MAITLAND'S TRUSTEES AND OTHERS.

*Succession—Legacy—Cumulative or Substitutional—Double Legacy—Construction of Will—Evidence as to Testator's Position at Date when Will was made.*

In deciding whether, on the proper construction of a will and codicil, a legacy mentioned in the codicil was intended to be in addition to a legacy of the same amount given to the same legatee by the will—*held* that it was competent to take into account memoranda and states of figures made by the testator shortly before the will and codicil respectively, with the view of knowing what were the facts as to the amount of his estate according to his own estimate at each of those periods, but that it was *incompetent* to take into account similar writings subsequent to the codicil for the mere purpose of drawing an inference as to the testator's intention. *Held* further, on the consideration of the will and codicil taken along with the writings of the testator which could competently be looked at, that in the codicil the testator merely referred to the legacy in question as given by the will, and created a certain life interest in it, and did not intend to give an additional legacy of that amount, and therefore that the presumption for double legacy arising from its being bequeathed in both testamentary papers was overcome.

The late John Maitland, Accountant of the Court of Session, died in 1865. He was survived by his wife, who lived till February 1886. He had no children.

He left a trust-disposition and settlement dated in June 1862, with a holograph codicil dated in March 1864. By the former he provided for (1) debts and expenses, (2) delivery of his furniture, plate, &c., to his widow, (3) payment to her of a legacy of £1000, and to her two sisters of £500 each, and another legacy to a Mr Fraser, which lapsed by his predecease.

*Fourthly*, he provided to his widow a life-ent of the residue of his estate. *Fifthly*, after the death of the survivor of himself and his wife, he directed his trustees to pay,

free of legacy-duty, the following legacies to the parties after named, viz.—“To the said Frederick Charles Maitland, my brother, the sum of £4000; to Mrs Helen Maitland or Hog, my sister, widow of James Maitland Hog, Esquire, of Newliston, whom failing . . . the sum of £4000; to the said Sir Alexander Charles Gibson Maitland, Baronet, my nephew, and the heirs of his body, the sum of £2000; to the said George Ramsay Maitland, and the heirs of his body, the sum of £2000; to the said Keith Ramsay Maitland and the heirs of his body the sum of £2000; to my niece, Mrs Jean Hamilton Maitland or Bulwer . . . the sum of £2000—[*here followed four legacies of £250 each to other relatives*]; and to the General Trustees of the Free Church of Scotland, also free of legacy-duty—(*First*), the sum of £2000, to be placed to the Fund for Aged and Infirm Ministers of the Free Church of Scotland; (*Second*), the sum of £6000, to be employed by them towards the endowment of the Free Church College at Edinburgh, and the free annual proceeds” of which were to be applied by the General Trustees, subject to the directions of the Assembly, either to the librarian of the College, or for lectureships, or as supplementary endowment, with power to the Assembly to alter and vary the application, or add the funds to or merge them in the other endowments of the College, but always so that the money should be applied in connection with the Free Church College at Edinburgh.

In the sixth place he provided for division of the residue of his estate in equal shares to and among Sir A. C. Gibson Maitland, Bart., George Ramsay Maitland, W.S., and Keith Ramsay Maitland, his nephews, and their respective heirs and successors *per stirpes*.

The holograph codicil to the settlement which the testator executed as above mentioned was dated in 1864, and with reference to the settlement of 1862 directed the trustees therein named and designed, and those who might be thereafter named by the testator, or assumed by them, as therein mentioned, “and that, in addition to all sums therein bequeathed by me, and particularly in addition to the sum of £4000 therein bequeathed by me to my brother Frederick Charles Maitland, to pay to him the annual interest on the sum of £6000, and, if they see cause to do so, to set apart the said sum for his life-ent use and behoof, but still so as to preserve the life-ent thereof to my wife Mary Isabella Wood or Maitland in the event of her surviving my said brother; and at decease of both of these life-enters, namely, Frederick Charles Maitland, and, in the event of her survivance, my said wife also, I direct my said trustees, after the death of both these parties, or at my death in case I should survive both, to pay the said principal sum of £6000 to the General Trustees of the Free Church of Scotland for the benefit of the Free Church College in Edinburgh, to be applied in such manner as the General Assembly of the said Free Church may direct.”

On this settlement and codicil a question arose after the death of Mrs Maitland as to the amount bequeathed to the Free Church Trustees. They maintained that they were entitled on a sound construction of the settlement and codicil (in addition to the £2000 legacy for aged and infirm ministers as to which there was no dispute) to (1)