



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 24  
CA44/19

Lord Justice Clerk  
Lord Menzies  
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

LEAFREALM LAND LIMITED

Reclaimer

against

(1) THE CITY OF EDINBURGH COUNCIL; (2) THE RAEBURN PLACE FOUNDATION;  
and (3) RAEBURN PLACE DEVELOPMENT LIMITED

Respondents

**Reclaimer:** Lake QC, R Anderson; Gilson Gray LLP

**First Respondent:** Barne, QC; Morton Fraser LLP

**Second & Third Respondents:** Mure QC; CMS Cameron McKenna Nabarro Olswang LLP

30 April 2021

**Introduction**

[1] The reclaimer seeks review of the Lord Ordinary's interlocutor of 18 March 2020 in which, following proof, she assoilzied the defenders in the reclaimer's action seeking declarator and interdict. The action, which was brought in the commercial court, concerns green space to the north alongside Comely Bank Road, Edinburgh which has been used for

sporting activity for more than a century, and a development adjacent thereto by the second and third respondents.

[2] The green space in question is in the ownership of the Edinburgh Academical Club, to which it was disposed in 1979 by the Grange and Academical Trustees, the southernmost boundary thereof being marked by the north face of a wall along Comely Bank Road. This wall had been built in 1912 in terms of a Minute of Agreement entered into between the first respondent's statutory predecessor, the Lord Provost, Magistrates and Council of the City of Edinburgh, the Grange and Academical Trustees, and the Edinburgh Academical Club. In terms of the Minute of Agreement, the latter entities agreed to "give up" a six foot strip of land for the purposes of road widening, and the former undertook to remove the existing boundary wall, referred to as the old estate wall, and erect a new one.

[3] The principal issue in dispute on the pleadings related to ownership of the *solum* of the 1912 wall. The reclaimer maintained that the southern boundary of the six foot strip was the south face of the old estate wall. The reclaimer avers that the 1912 wall (which was demolished in 2014) was built not on the six foot strip, but to the north of it, on land which was at the time owned by, and which remained in ownership of, the Grange Trustees, until disposed to the reclaimer in 2018. A plethora of other issues was raised and argued before the Lord Ordinary, the primary ones being (i) whether the 1912 deed operated as a conveyance of the six foot strip; (ii) whether there exists a public right of access over it at common law or under statute, the first respondent being the roads authority in terms of the Roads (Scotland) Act 1984 for the City of Edinburgh; (iii) whether the 1912 deed was apt as a basis for prescriptive acquisition; (iv) the validity and effect of a 2018 disposition by the Grange Trustees to the reclaimer purporting to dispose an area of land which allegedly includes the *solum* of the 1912 wall.

[4] The significance of the issues, put bluntly, is that should there be a “gap” as submitted for the reclaimer, this would form a ‘ransom strip’ over which access would be required for the purposes of the development.

[5] A great deal of time was spent at the proof seeking to establish the location of the old estate wall, and leading expert evidence about its position *vis a vis* the 1912 wall, the six foot strip, and the land now owned by the Edinburgh Academical Club. The Lord Ordinary concluded that determination of the primary issue could be resolved on a proper construction of the 1912 deed, and that the remaining issues, including the expert evidence, did not advance matters. She concluded that the 1912 wall was built wholly on the six foot strip; and that there was no scope for any gap capable of constituting a ransom strip. She proceeded nevertheless to address the remaining issues on an *esto* basis, in lengthy appendices to her opinion, noting that in the majority of these she would have rejected the reclaimer’s arguments. The one point where she favoured the reclaimer’s approach related to a submission for the first respondent that the six foot strip and the *solum* of the 1912 wall vested in its predecessors in terms of section 191 of the Edinburgh Corporation Order Confirmation Act 1967. That issue is the subject of a cross-appeal.

### **The factual background**

[6] The green space to the north of Comely Bank Road in Stockbridge in Edinburgh has long been used as playing fields for a number of clubs. The Edinburgh Academical Cricket Club occupied the playing field lying to the north of Comely Bank Road. In 1882, a number of the sporting clubs (the Grange Cricket Club, the Edinburgh Academical Cricket Club, the Coates Curling Club and the Edinburgh Lawn Tennis Company Limited as they all then were) who used the green space and had separate leases from the same landowner formed a

trust, the Grange and Academical Trust, to purchase the land they used as playing fields.

The provisions of the trust deed included:

“First. The said Trustees shall hold the property conveyed to them in trust for the several Clubs and Company before named as at present possessed by them respectively, and shall continue to let to them the grounds at present in their occupation at the rents and on the terms on which they hold or would have held the same under the Leases thereof, where such Leases exist [...].

...

Ninth. In the event of the whole debt on the said grounds and others being eventually cleared off, it shall be in the power of the said Trustees or their successors in office either to dispoise and make over the various respective grounds and others to the respective Clubs or Company now occupying the same or to their successors therein or to retain same in their own hands.”

[7] The fields and grounds as defined were duly purchased in 1882. In 1912, the council being desirous of widening the road, the Minute of Agreement referred to above was entered into.

[8] The Minute, dated 26 and 31 July 1912, was recorded in the General Register of Sasines on 2 August 1912. It bore a 10/- stamp duty.

[9] The key provisions of the 1912 deed are as follows:

“WHEREAS the first and second parties are proprietors and tenants respectively of certain subjects situated on the north side of Comely Bank Road, Edinburgh, known as the Academy Cricket Field; And Whereas the third parties are desirous of effecting a widening of said street of Comely Bank Road *ex adverso* of said subjects and have approached the first and second parties with a view to their giving up a portion of said subjects for road widening: AND NOW SEEING that an arrangement has been come to between the parties in regard to said widening and that it is expedient that such arrangement should be reduced to writing: Therefore the parties hereto agree as follows ...

FIRST. Without any price being received by them therefor, the first and second parties for their respective rights and interests hereby give up for the purpose of widening the street of Comely Bank Road ... a strip of ground six feet in width along the whole frontage of said Academy Cricket Field to said road, as the said strip of ground is delineated and coloured pink on the plan annexed and signed as relative hereto which strip of ground forms part and portion of ALL and WHOLE the fields

and ground [there then followed a full conveyancing description of the lands which had been the subject of the 1882 disposition].

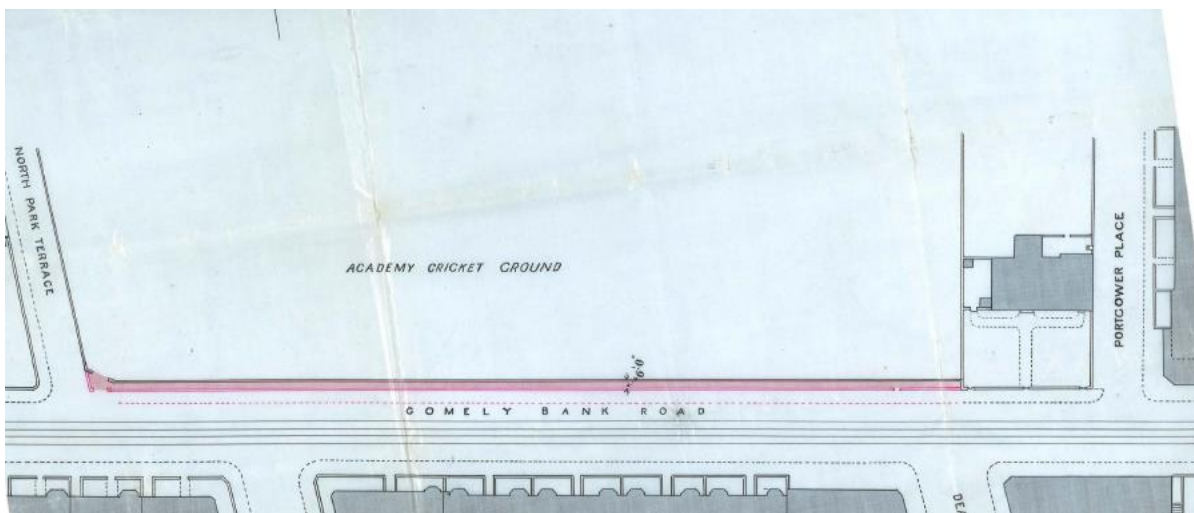
SECOND. The third parties shall remove the existing boundary wall on the said strip of ground, and shall thereafter erect a new boundary wall along the frontage of said Academy Cricket Field to Comely Bank Road, as widened. The said new wall shall be six feet in height from the level of the pavement of Comely Bank Road, with a pointed serrated surmount for the prevention of climbing, and the surface of the wall to Comely Bank Road shall be smooth faced. The said new wall shall be built in a substantial manner and in accordance with the plan already submitted to and approved of by the first parties. The third parties shall provide a cart gateway and gate (suitably protected to prevent climbing) in said new wall, opposite the place where the present gate and gateway are. The whole operations mentioned in this Article shall be carried out at such time as shall be most suitable to the first and second parties.

THIRD. The said new boundary wall with the foresaid cart gateway and gate shall after completion be maintained by the third parties at their own expense in all time coming.

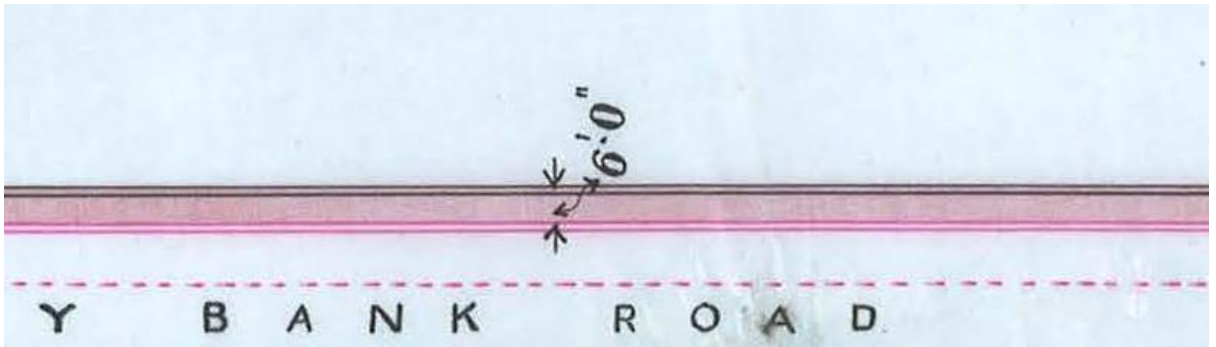
FOURTH. The third parties shall erect along a line three feet on the field side of said wall a substantial screen of steel standards and strong wire netting to the satisfaction of the second parties. The said screen shall be of such height, not less than six feet from the top of the said new wall as the second parties may specify. The said screen shall after erection be maintained in all time coming by the second parties.

LASTLY. The parties hereto certify that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value of the consideration exceeds £500; and the consent to the registration hereof for preservation."

The plan referred to in clause first is represented below:



A larger scale version of that part of the plan which has the writing in black inscribed on it was also produced:



The old estate wall was demolished and the 1912 Wall was erected. Minutes of the Edinburgh Academical Club of 5 December 1912 recorded this and state that “the work had been substantially done and satisfactory in every way, and had been carried out by the end of September”.

[10] In 1979 the Edinburgh Academical Club called on the Grange Trustees to grant a disposition in its favour of the land which it occupied. The resulting disposition defined the south border of the land conveyed as bounded “on or towards the south by the north face of the boundary wall separating the subjects hereby disposed from Comely Bank Road, Edinburgh”.

[11] An Ordnance Survey Map from 1895, produced to a scale of 1:500, showed the old estate wall as a virtually straight line parallel to Comely Bank Road, subject to a deviation just to the west of the approximate mid-point of the wall. This deviation suggested a degree of “bowing” to the south, which on the evidence was to a maximum of 1 foot 6 inches in a wall with a width of 1 foot 8 inches: in other words, the deviation at no stage exceeded the width of the wall. There was evidence that the result of this caused the wall to execute a curve along its extent. In 2000 a topographical survey of the 1912 Wall was prepared by GL Survey. The 1912 wall was demolished in 2014, on grounds of safety.

[12] The 2018 disposition by the Grange Trustees in favour of the reclaimer has not yet been registered, although it has been submitted for registration. The land conveyed is described as follows:

“ALL and WHOLE that strip of ground..., shown delineated in red on the plan annexed and signed as relative hereto and situated generally along the north side of Raeburn Place/Comely Bank Road, Edinburgh, and bounded on the north by subjects disposed by Disposition (herein called the ‘1979 Disposition’) by [the Grange Trustees]..., along which boundary it extends on the line of the north face of a wall now or formerly situated on the subjects hereby disposed (being the wall situated on the subjects hereby disposed at the time of granting of the 1979 Disposition); on the east partly by ground pertaining to the Raeburn Hotel, Raeburn Place/Comely Bank Road, and partly by ground within the pavement of Raeburn Place/Comely Bank Road, Edinburgh (including that part of the pavement which comprises ground formerly pertaining to the said Hotel); on the south by ground now situated within the pavement of Raeburn Place/Comely Bank Road, Edinburgh; and on the west by North Park Terrace, Edinburgh ...”.

In fact, the plan referred to in this deed does not seem to contain an area delineated in red; there is a red line half way through the north pavement of Comely Bank Road. There is no delineation to the north. Apparently the delineation was meant to be reflected along one of the black lines shown to the north of the area in question. Along with the 2018 disposition the Grange Trustees granted to the reclaimer an assignation of their rights under the 1912 deed, in terms which clearly indicate that the land referred to in the 1912 deed and the 2018 deed were understood to be the same. In the pleadings however, the reclaimer asserts that the 1912 wall was built to the north of the 1912 strip, and as the Lord Ordinary highlighted, it is necessary for success of the reclaimer’s case to establish that the strip and the wall were separate entities.

[13] In July and August 2018 Edinburgh Academical Club granted two ground leases in favour of the second respondent in respect of the land owned by the club; and the second respondent sub-let the land to the third respondent, to facilitate the development in respect of which building works commenced in December 2018.

[14] In the event that the court considered there to be an ambiguity as to the extent and location of the given-up land, there was a certain amount of evidence as to the information which would have been in the knowledge of the relevant parties at the time, as well as subsequent actings in respect of the strip.

[15] The minutes of a meeting of the City's Streets and Buildings Committee of 2 February 1912 record receipt of a letter from the Grange Trustees indicating their willingness to give up a strip of land for street widening on condition that the council erect a new wall along the new line of frontage, built to certain specifications, and on further conditions, the second of which specified that the site of the proposed wall does not encroach further than six feet on the academy side "from the north side of the existing wall". Conditions three, four and five largely specify what became the second, third and fourth clauses of the 1912 Minute. The first condition was that the council did not ask for a conveyance, or, if a conveyance was required, that the council accepted the trustees' title to grant same. The Lord Ordinary refers to this as the granter's stipulation. The minutes record that the committee resolved to recommend to the Magistrates that they accept the proposal, and further record that the Magistrates and Council resolved as therein recommended.

[16] The minutes of a meeting of the Edinburgh Academical Club on 29 February 1912 record that the plans as submitted at the last meeting, in regard to the wall "under proposals submitted by the Grange and Academical Trust", and approved by the Academical Club committee, had also been approved by the town council.

[17] The minutes of a meeting of the Edinburgh Academical Club on 5 December 1912 confirmed that "the wall had been constructed and that the work had been substantially done and satisfactory in every way".



### **The Lord Ordinary's opinion**

[18] The Lord Ordinary concluded *inter alia* that the characterisation in the 1912 Minute of the 1912 Wall as a "boundary wall" was fatal to the claimer's case. On the basis of the terms of the 1912 Minute and the plan attached thereto, she concluded that the given-up strip stretched from the north face of the 1912 Wall, to the north face of the old estate wall. The 1912 wall was thus wholly within the 'given up' strip, whereas the old estate wall had been outside it. On this basis, there was no scope for a putative gap or strip of land to exist between the boundary of the Academical Club's land and the given-up strip. The factual premise upon which the claimer's case had been based, that the 1912 wall and the given-up strip were entirely separate and distinct had not been established. In reaching this view as a matter of construction of the 1912 deed, she had not required to rely on the expert evidence, which had been of little assistance.

[19] The Lord Ordinary made avizandum on 11 October 2019. Over 5 months later on 18 March 2020 she issued her opinion. The entirety of the document issued by the Lord Ordinary runs to 94 pages. It is not easy to follow. This is largely because of the unusual and confusing structure that the Lord Ordinary chose to adopt, although there are other problems with the document, including factual errors. The first part of the document, which the Lord Ordinary describes as the "body" of her opinion, comprises 53 paragraphs set out over 36 pages. There follow 3 appendices (A, B, and C) extending in total to 97 paragraphs set out over 58 pages.

[20] We regret to say that we have been unable to understand why the Lord Ordinary chose to set out her views in such a disorganised and prolix way. Her approach has

resulted in the opinion and its lengthy appendices being exceptionally difficult to follow . The document is far too long. Especially in the commercial court, opinions should be succinct and focussed. It is well-known that this is what the business community expects from the court. Elaborate, discursive and academic treatises are unhelpful and inappropriate. At times the opinion is well-nigh impenetrable due to its confusing structure and repetitiveness. No opinion issued by the court should contain lengthy appendices dealing with substantive issues.

[21] All that is determined in what the Lord Ordinary described as the main body of the opinion is the conclusion from the terms of the 1912 deed that the 1912 wall was not built on the given-up strip, and that there was no gap of the kind contended for by the reclaimer . As a result she considered that the expert evidence provided little assistance to the central factual issue that fell to be determined. Whilst these conclusions were sufficient for the reclaimer's action to fail, the Lord Ordinary nevertheless proceeded to consider the remaining issues, which, for reasons which are entirely unclear, she spread over three separate appendices to her opinion. The status of these appendices is obscure, and the Lord Ordinary does not elucidate on this. She states that in deference to the evidence led at proof and the detailed submissions advanced, she deals with these at appendix C. In fact the evidence is split over the appendices. Appendix A contains a lengthy recital of the evidence of Mr McCreadie, and Mr Laird, witnesses put forward as skilled witnesses for the reclaimer and the developers respectively. That evidence is however assessed in some respects in both Appendices A and C. At no point does the Lord Ordinary deal with the reclaimer's objection to the evidence of Mr Laird, premised on the submission that he was not qualified

to give expert evidence. In the main body of the opinion there is occasional reference to evidence summarised in Appendix A, but there is no reference to the purpose or content of Appendix B, which essentially contains a narrative of the evidence of witnesses to fact and expert witnesses other than those already mentioned. It concludes with a short paragraph on credibility stating that no real issue of credibility and reliability was raised “in respect of these witnesses”. Even more oddly, Appendix C does not simply address arguments on an *esto* basis, but includes conclusions on a number of issues of law, the most critical being whether the 1912 deed operated as a conveyance as well as further discussion of some aspects of the evidence.

[22] In the appendices the Lord Ordinary purported to conclude *inter alia* that (i) the 1912 wall was erected under the first respondent’s statutory powers for road widening; (ii) the 1912 Minute had the effect of conveying the strip to the first respondent’s predecessors; and in any event, although not determinative of the case, their title “would undoubtedly have been fortified by prescription”; (iii) from the date of its construction the 1912 wall served a retaining function, and protected road users against the differential in levels: the pavement could not have been extended in the way that it was without the wall; (iv) irrespective of the effect of “listing” of the road, the 1912 wall was part of the road for the purposes of the Roads (Scotland) Act 1984; and (v) that the reclaimer would not be entitled to declarator of ownership on the basis that its title was not registered, and moreover the vagueness of the description of the subject matter militated against the likelihood of the disposition being accepted for registration.

[23] Had it been necessary to do so the Lord Ordinary would have found that there was a right of access and a public right of passage over the *solum* of the 1912 Wall arising from its

status as part of the road; and in any event that such rights existed as a result of the effect of orders under section 56 of the 1984 Act made in 2017.

### **The reclaiming motion**

[24] The claimer submits that the Lord Ordinary erred in both fact and law in a number of respects in reaching her decision. The primary grounds are that she erred in concluding that the 1912 wall was within the given-up strip, and that the 1912 deed operated as a conveyance. Extensive and detailed grounds of appeal were advanced setting out the alleged basis for the arguments that the Lord Ordinary had erred on these matters. It was also maintained that she had erred (i) in concluding that the wall was part of the road; (ii) that there was a right of access/passage over the *solum* thereof; (iii) as to the effect of the section 56 orders; (iv) in concluding that the claimer was not entitled to declarator of ownership; and (v) in stating that the first respondent had acquired title to the *solum* of the 1912 wall by means of positive prescription. A series of alternative findings which should be made was set out in the written submissions for the claimer.

[25] All three respondents resist the reclaiming motion submitting that the Lord Ordinary was entitled to reach the conclusions that she did. The first respondent council advances one ground of cross-appeal, on an *esto* basis, namely that in the event that the council did not own the given-up strip, the effect of section 191 of the Edinburgh Corporation Order Confirmation Act 1967 was to vest title in the council of the land that had been ceded to it in terms of the 1912 Minute, and the Lord Ordinary erred in concluding otherwise.

### **Submissions**

[26] Full written submissions were provided by each party. We do not repeat these: the

content of these will be apparent from the discussion which follows. Whether each issue raised requires to be addressed hinges on the view we take as to the primary issues arising in the case.

## **Analysis and decision**

### *A preliminary matter*

[27] As we have noted above, our attention was drawn to a number of errors in the Lord Ordinary's opinion. It is clear that some of these are merely typographical, for example the reference to a measurement being between 6ft 6" and 6ft 8" when it should have been between 6ft 6" and 8ft; or the wrong date attached to an Act of Parliament. Two of these errors merit further examination however. The first led to a submission that the Lord Ordinary misunderstood the evidence, and the approach at proof, since she appeared to consider that the primary issue raised in proof related to establishing the position of the 1912 wall. It was submitted that although there was evidence about this, there was little dispute over it, the physical location being apparent from the 2000 survey.

[28] It is true that at paragraph 27 of the Lord Ordinary's opinion she records that "The focus of the proof was on the evidential conundrum of how to prove the precise location of a no longer extant wall (ie the 1912 Wall)"; and comments at Paragraph 19 of Appendix A, that "if the point of the exercise is to identify the 1912 Wall", identifying the position of the old estate wall from the 1895 OS Map was not the best starting point. It was also suggested in paragraph 21 of the opinion that the principal factual dispute related to the physical location of the 1912 wall. However, we are satisfied that the Lord Ordinary fully understood the nature of the factual dispute, and that the issue was not the physical location of the wall *per se*, but whether it had been built on the given-up strip. The reference to

physical location of the wall in paragraph 21 occurs in a sentence which goes on to make it clear that the issue was the position of the wall “relative to the 6 foot strip”. At paragraph 7 of her opinion she noted that amongst the most contentious issues at the proof was “whether the 1912 Wall was built on the 1912 Strip (as the defenders contend) or to the north of the 1912 Strip (as the pursuer contends)”. It is clear that she understood this to be the issue, as can be seen from references at paragraphs 12, 17, 18 and 19 of her opinion. In paragraph 27 she refers to the starting point of Mr McCreadie’s evidence as being to seek to locate the line of the old estate wall, plot it, and essentially work back from that in respect of the location of the strip, as the basis for his opinion that the 1912 wall had been built to the north of the strip. A section of her opinion, starting at paragraph 35 has the heading “Was the 1912 Wall included within the pink area comprising the 1912 Strip?”. On a fair reading when the Lord Ordinary refers to determining the location of the 1912 wall, she was using that concept as a shorthand for the issue, at the heart of the reclaimer’s case, whether the 1912 wall had been built on the given-up strip. Although she could have expressed herself with greater clarity we are satisfied that this is what she meant when talking about establishing the location of the 1912 wall, and that she had not misunderstood the point at issue.

[29] The second error which merits further discussion relates to the terms of the 1912 deed itself, specifically clause First thereof. We deal with this when we address the issue of whether the deed operated as a conveyance.

### *Interpretation of the 1912 deed*

(i) *The plan and clause First*

[30] The Lord Ordinary drew conclusions from the terms of the deed itself, and the plan attached thereto. From these she concluded that the plan clearly showed the strip, and the 1912 wall as part of it. The clear, and subsequently, accomplished intention was that the new wall should be the boundary wall of the playing fields, replacing in that capacity the old estate wall. These are conclusions which in our view were perfectly open to her.

[31] The primacy given by the Lord Ordinary to the plan was in our view appropriate. It is quite clear that in order to identify the strip of land which was being given-up, clause First, the operative clause so far as the grant of the land is concerned, draws the reader's attention to the plan, wherein the strip is "delineated and coloured pink". The exact dimensions and location of the strip are not otherwise set out in clause First, so the plan is an essential means of identifying this. Examination of the plan shows clearly that the given-up land extends from the north face of the old estate wall to the north face of the 1912 wall, i.e. to the boundary of the land now owned by the Edinburgh Academical Club. The 1912 wall is clearly shown as being wholly within the pink strip; whereas the old estate wall is shown outwith it, as can be seen by the absence of shading at the two entrance areas. The Lord Ordinary noted, at paragraph 35 of her opinion, that the most compelling factor related to the arrows shown on the plan, indicating the north and south points of the given-up strip. These clearly show – and in submissions her conclusions on this were not contested – that the strip extended from the north face of the old estate wall to the north face of the new wall, in other words to the boundary of the land now owned by the Edinburgh Academical Club. There is a third arrow, which draws attention specifically to the area between the other two arrows, that is, to the space between the north face of each wall, which identifies that space by numerals as the given-up land. Thus, on examination of the plan which parties had signed as relative to their agreement, the position seems entirely clear. The agreement was

that the 1912 wall was to be built in a straight line on the given-up strip to form the new boundary of the Academical Club land from its north face. Moreover, it is clear that the old estate wall was not part of the given-up strip.

[32] The reclaimer submits that despite this the court should reach a different conclusion, largely because of (a) the terms of clause second; and (b) the inference it seeks to establish from the evidence of Mr McCreadie.

(ii) *Clause Second*

[33] The submission was that, notwithstanding what appears on the plan, in providing for the erection of a new boundary wall, clause Second recorded that the city should remove the existing boundary wall “on the said strip of ground”, and replace it with a new boundary wall “along the frontage of” the academy field. It was submitted that this showed that the reliance placed by the Lord Ordinary on the plan could not be justified. This clause suggested that (a) the old estate wall was part of the given-up strip; (b) the southern face thereof must therefore have been the extent of the land owned by the trustees; and (c) the 1912 wall was to form the new boundary, which would be marked by the south face of that wall. Given that the land conveyed to the Edinburgh Academical Club in 1979 extended only to the north face of that wall, it followed that – even without reliance on Mr McCreadie’s evidence – the 1912 wall was built on land which was neither part of the strip nor part of the land now owned by the Academical Club. It was part of land still owned by the Grange Trustees, who were entitled to dispoise it to the reclaimer. This argument, it was submitted, was fortified by the use of the word “frontage” which implied the edge of the property owned by the Grange Trust. From the recital the land owned by the Trust is noted as “certain subjects situated to the North side of Comely Bank Road, known as the Academy Cricket field”. Taken with the reference in clause First to the “frontage” of



the property with the road, it was submitted that this meant the wall must have marked the boundary, in the sense that the subjects extended to the south side of the old estate wall.

[34] We do not accept that submission. We consider that neither the word “on” in the first line of clause Second, nor the word “frontage” carry the weight suggested for the reclaimer, when viewed in the context of the deed and plan as a whole.

[35] It should be noted that the 1882 deed by which the land in question was originally conveyed to the Grange Trust does not specify that the south face of the old estate wall was the boundary of the land. In fact the old estate wall is not mentioned at all. The disposition merely identifies the fields occupied by the various clubs as the land disposed, with certain buildings. A plan is attached but is in black and white and any delineation or shading is impossible to identify. Unlike the 1912 plan, it is not signed. The burdens clauses refer to maintenance of certain walls to the east, north and west boundaries, but make no mention of any wall to the south or obligations thereon. There is no support for the reclaimer’s argument that the boundary of the Trust land must have been the south face of the old estate wall. Thus, instead of accepting the 1912 plan, the reclaimer is driven to a somewhat elaborate reliance on the recital in the 1912 deed, and the interpretation it chooses to give to the word “frontage” as a necessary means of building up its submission that the south face of the old estate wall was understood to be the relevant boundary. The reclaimer submitted that the Lord Ordinary’s conclusion would lead to the *solum* of the old estate wall being “marooned”, but in the absence of any evidence as to the ownership of that wall – of which there was precisely none – that does not follow.

[36] It was submitted for the reclaimer that the effect of the Lord Ordinary’s decision was that at the time of the 1912 deed, the extent of the given-up land could not have been known. We reject that argument, which again essentially requires the plan to be ignored. Both the

plan and the deed made it clear that the new wall as shown thereon was to be the new boundary; one can infer that the position of the wall within the strip was understood to be the location where it would be built. The terms of clause First identify the plan as indicating the position of both the strip and the new boundary. The whole purpose of the shading, delineation, annexation, and signing of the plan, under a legend confirming that it is the one referred to in the deed, must be to emphasise its importance in this respect. The fact that a plan such as this could not be registered at the time is irrelevant to its importance or its status as the means by which the subject matter of clause First is to be identified.

[37] There was a suggestion that there must have been another diagrammatic plan showing the location of the wall, since clause Second stated that the wall “shall be built in a substantial manner and in accordance with the plan already submitted to and approved by the parties”. In our view it would not make sense for there to be a second diagrammatic plan; the plan referred to in clause Second must refer to a non-diagrammatic plan, a specification of the materials, method etc to be used in its erection. Should there be an ambiguity about this it is made quite clear by reference to the terms of the minutes of the streets and buildings committee of the council on 2 February 1912 in which they recorded and agreed the Trust’s stipulation that the wall be built “in a substantial manner in accordance with the plan submitted”.

(iii) *The mapping exercise*

[38] The reclaimer also sought to displace the conclusions which appear to arise on the face of the deed and the plan by trying: to establish, from mapping, the position of the old estate wall (again on the assumption that the wall had been part of the Edinburgh Academical Club property); to identify a line from the south of that wall six feet in the direction of the playing fields; to impose the position of the 1912 wall, taken from a variety

of sources on top of the mapping carried out so far; and so seek to demonstrate that the 1912 wall had not been part of the given-up strip, and that there was a gap between the strip and the 1912 wall which was part of the property purportedly conveyed to it in 2018. The Lord Ordinary concluded that the results of this exercise were not evidentially sound, and could not displace the clear inference apparent on the face of the 1912 deed. In our view, without going into the details of the evidence led, she was entitled to do so, and for reasons which did not depend on reliance on any disputed evidence from Mr Laird. There may no doubt be criticisms made of both witnesses who gave evidence on this issue, but so far as the claimer's witness is concerned it is necessary to note, as the Lord Ordinary did, that the assumptions upon which he proceeded were that the given-up land was to be measured from the south face of the old estate wall, and that the line thereof had to follow precisely the line of the old estate wall, assuming also that the position of that wall in 1912 was as shown on the 1895 Ordnance Survey map of the area. Although this was his assumption, Mr McCreadie also suggested that the 1912 plan had been traced from an updated version of the 1895 OS map held by the council. What that updated map might have shown was not the subject of evidence.

[39] In our view, having regard to the terms of the 1912 deed and plan the Lord Ordinary was entitled to consider that the assumptions underlying the evidence of Mr McCreadie were erroneous. Much was made in his evidence of the fact that on the 1895 OS map, the old estate wall was not entirely straight, there being some deviation to the south in the centre of the wall, as noted above. There was however evidence before the Lord Ordinary that at both the east and west extremities the distance between the north face of the 1912 wall and the presumed position of the north face of the old estate wall (which walls were of differing widths) was in fact 6ft. The Lord Ordinary was entitled to find that: (i) the parties

to the 1912 Minute intended that the strip be measured from the north face of the old estate wall; (ii) the parties were content to assume, for the purposes of the 1912 Minute, that the old estate wall was straight; (iii) the intent of the 1912 Minute was that the new boundary wall was to be built on the strip and in a straight line. She was also entitled to conclude that these intentions had been given effect to. In essence her view was that the reclaimer's pursuit of absolute precision in identifying the location of the old estate wall was artificial and unachievable in practical terms. The 1912 deed and plan indicated where the wall was to be built. There is no basis for asserting that what had been intended and agreed per the 1912 deed had not been satisfactorily achieved. Had there been any ambiguity or doubt about that the evidence confirms that this was the case. A minute of the Edinburgh Academical Club committee of 5 December 1912 recorded that the wall "had been constructed, and that the work had been substantially done and satisfactory in every way".

### *Extrinsic evidence*

[40] The parties were, it seems, in agreement that in the event that the 1912 deed was ambiguous to the extent of the grant contained therein it would be permissible for the Lord Ordinary to look at elements of extrinsic evidence. All parties however submitted that there was no such ambiguity, although for different reasons. They also differed on the question whether extrinsic evidence could be examined in the absence of ambiguity, senior counsel for the reclaimer submitting that the authorities relied on by the respondents, properly examined, rested on the existence of an ambiguity. We do not require to address that issue. We have agreed that there was no such ambiguity. However, had we been satisfied that there was an ambiguity, in our view such extrinsic evidence as there was supported the respondents' arguments. That evidence included:

(a) What was referred to by the Lord Ordinary as the grantor's stipulation. This was the concern of the Edinburgh Academical Club that it did not lose more than six feet from its playing fields. This is recorded in the Minute of the streets and building committee of 2 February 1912, as having been set out in a letter to the council from the Grange Trust, specifying that "the site of the proposed wall does not encroach beyond six feet on the Academy field from the north side of the existing wall." This is entirely consistent with the measurement of the strip being taken from the north face of that wall, not the south as the reclaimer contended.

(b) The minutes of the Academical Club dated 23 November 1911 and quoted in the minutes of a meeting of the Grange Trust of 30 November 1911 recorded the resolution "that the club should give six feet off the south side of the field." This was approved by the Grange trustees. This suggests that both the trust and the club anticipated that the strip would be measured from the north side of the existing wall.

(c) The minute of the Academical Club dated 5 December 1912, referred to at paragraph [9] above.

(d) A plan appended to missives in 1913 relating to ground held by Somerset Cottage (currently the Raeburn House Hotel), also in relation to the road widening scheme, suggests that the measurement between the north face of the old estate wall and the 1912 wall, at its east end where it abuts the Somerset Cottage property, was six feet. The plan is consistent in all respects with the respondents' argument.

(e) It may be noted that in the disposition of 1979 the property disposed to the Club was described as bounded by the north face of the 1912 wall. If the position of the trustees was as now indicated, and as suggested by the 2018 deed, there would have been no reason for them not to dispose the property up to the south face of the wall, particularly as they were

in receipt of the opinion of senior counsel (J T Cameron QC) indicating that, in terms of clause nine of the trust deed, they had no power to refuse to convey the ground occupied by any of the constituent bodies to those bodies, as long as the debt had been paid off. In granting the 1979 disposition in the terms in which they did, the trustees must have considered that the trust did not own the 1912 wall.

### **The 1912 deed as a conveyance**

[41] In her analysis of whether the 1912 deed operated as a conveyance, the Lord Ordinary made a clear error as to the wording of the deed. The error had no bearing on the Lord Ordinary's determination in respect of the primary reasons for her decision, as given within the opinion itself, since this error did not feature in the analysis she conducted there. However, it did have a bearing on her assessment of whether the deed was a conveyance. Although her conclusion on this matter appears in Appendix C, it is framed as a positive finding (para 16, Appendix C). Moreover, it seems to us to be an issue of some centrality to the principal dispute in the case.

[42] The wording of the 1912 Minute of Agreement has been noted above. At paragraph 13 of Appendix C, dealing with whether the deed operated as a conveyance, the Lord Ordinary stated:

“The most compelling factor, in my view, is the language used in the operative clause (Clause First): this provided that the 1912 Strip was “given up in all time coming”.

[43] Clearly, that does not reflect the wording of clause First. Nor is this simply a slip of the pen, since further within the same paragraph the Lord Ordinary states

“... the 1912 Strip was being given up “in all time coming”. That language is inimical to the granters retaining any interest...”.

[44] This can only be read as a further reference to clause First. Finally, at para 14 the Lord Ordinary says

“I find that the language used - “given up in all time coming” - constituted an unqualified ceding of the granters’ rights to the 1912 Strip”.

[45] Given the use of quotation marks, this cannot be explained away as a mere infelicity of expression, as with the issue over the location of the 1912 wall. However surprising it may seem, it cannot reasonably be said that the Lord Ordinary was only drawing an inference from the deed as a whole. The reference to clause First, and the analysis which the Lord Ordinary drew from the wording thereof, as she understood it, suggest that she was proceeding on the basis that the deed specifically records that the land was “given up in all time coming”. That is simply not correct. The clause provides that the parties involved agree to “give up for the purpose of widening the street” the strip in question. The phrase “in all time coming” occurs in the third and fourth clauses of the deed, in respect of the obligations undertaken by (a) the council to maintain the new wall; and (b) the Edinburgh Academical Club to maintain the screen to be built on their land. The error is difficult to understand. The real issue, however, is whether the error is such as to vitiate the Lord Ordinary’s decision. It clearly does not affect her assessment of the extent of the land referred to in the deed, or the location of the 1912 wall thereon. As to the issue of the deed as a conveyance, whilst this aspect of the Lord Ordinary’s reasoning cannot be upheld, we do not consider that this affects the overall decision that the deed operated as a conveyance, with which we agree. The submission for the first respondent, recorded at paragraph 5 of Appendix C, included the argument that the deed was a valid conveyance “as it intended to create permanent rights that existed “in all time coming”. We agree that this is a correct interpretation of the deed taken as a whole. The phrase “give up” is one which implies

relinquishment or abandonment. The relinquishment or abandonment was not operating in a general or unspecific sense but for the purpose of the council's road widening scheme: in other words, it was being given up to the council. The capacities in which the land was given up were occupier (Edinburgh Academical Club), but also owner (Grange Trustees). Further obligations created in the deed were that the council would erect a new boundary wall, to a specification which suggests permanence. They undertook to maintain this "in all time coming", which again suggests permanence. The screen to be erected on the playing field side of the boundary wall was to be maintained by the club, again "in all time coming". All of this suggests permanence, and the intention that the wall would become the permanent boundary of the property owned and occupied by the trustees and the club for all time coming.

[46] Had the Lord Ordinary predicated her conclusion on such an approach, namely that it was a reasonable inference from the deed as a whole, rather than being specifically stated, that the strip was being given up for all time coming, that could not have been disputed, and the outcome would have been no different.

[47] On the other arguments respecting whether the deed operated as a conveyance we consider that the Lord Ordinary was entitled to reach the conclusions which she reached. Both sides sought to rely on the absence of any reversion as supporting their arguments. In our view it is essentially neutral in the circumstances of this case. The fact that the deed is a tripartite one was argued for the reclaimer to point away from a conveyance, but it is not unknown for such deeds to be tripartite, and in the context where the Grange Trust was a bare trust in respect of which, for the land in question, the Academical Club was the beneficiary, the involvement of both makes perfect sense, having regard to the differing capacities of those involved and their inter-dependency.



[48] It is true that the word “dispone” was not used in the deed. The reclaimer relied upon an observation in Reid’s “The Law of Property in Scotland” (1996) that the word dispone, whilst not essential, was always used. Nevertheless there was agreement between the parties that the word dispone was not a necessary adjunct to a conveyance, so its absence only throws us back on the terms of the deed as a whole, to determine its effect and in particular whether there was an intention to transfer the property. We have already referred to the inference of permanent intent to alienate which we consider arises on the terms of the document.

[49] The fact that the 1912 deed was not in the standard form of a conveyance, standard clauses whereof were absent, is equally not conclusive in favour of the reclaimer. A date of entry would have been implied under s 28 of the Conveyancing (Scotland) Act 1874, and simple warrandice would also have been implied (Gretton and Reid, Conveyancing, 5<sup>th</sup> Edition at paragraph 20-09). It is noteworthy that apart from referring to the plan for the parameters of the strip, the deed provides a full conveyancing description of the larger parcel of land of which it was part. This would hardly have been required had the deed not been meant to operate as a conveyance, and was only intended to transfer a right *in personam*. In addition, the fact that the deed was recorded in the Register of Sasines is also of significance, as an indication that it was understood to have an effect on real rights.

[50] The Minute of Agreement was stamped in accordance with a stamp duty appropriate for a conveyance or transfer. It comes within a section relating to a “conveyance or transfer of any kind not hereinbefore described”, in other words a conveyance or transfer which was neither on sale or in security. The final clause of the deed states:

“The parties hereto certify that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or

value, or the aggregate amount or value of the consideration exceeds £500; and they consent to the registration hereof for preservation.”

[51] The purpose of such a certification was to meet the terms of section 73 of the Finance Act 1910 which increased the stamp duty payable where the conveyance or transfer was part of a larger transaction or series of transactions. This is again consistent with the correct interpretation of the deed being that it operated as a conveyance.

[52] There is no doubt that the council had the power to acquire by conveyance land it wanted for the purpose of road-widening, should it determine to follow such an approach. We do not read the Lord Ordinary’s reference to this issue as stating other than that, in the context at least of her discussion of whether the deed was a conveyance, to acquire land for road-widening was within the powers of the council, a matter which in any event was not disputed.

[53] It is clear that there had been a concern about whether the Grange trustees had power to grant a conveyance. At a meeting of the trustees on 30 November 1911 this issue was the subject of extensive discussion, it being suggested that what was proposed involved disposing of trust property, with a question arising as to the competence of so doing. The result of this discussion was that it should be suggested to the council that it should not seek a conveyance or “that if a conveyance be required, that the town accept the trustees’ title to grant such”. This does not justify the assertion that the deed cannot be viewed as a conveyance. In the first place, the discussion was clearly in terms of anticipated alienation; and in the second, it is clear that a conveyance would be given if the council wished, as long as the council accepted the trustees’ title to grant the same. The involvement of both the trustees and the beneficiary in the resulting deed makes further sense in this context, as a sensible precaution against future challenge.

*The 2018 disposition*

[54] The final issue for our consideration relates to the 2018 disposition. The argument was advanced on behalf of the respondents that even if the 1912 deed operated as a transfer of the strip, the 2018 deed did not confer on the reclaimer title to seek declarator that there was no right of access over the strip and to seek interdict. The respondents argued that an unregistered disposition did not transfer ownership and further that the 2018 disposition and accompanying plan were not in a form that would be accepted for registration by the keeper of the registers.

[55] As the Lord Ordinary noted (paragraph 41, Appendix C):

“To be registrable in the Land Register the land must be shown on a scale plan with suitable markings that meets the Keeper’s technical specifications. The purpose is to enable the land to be identified and plotted with sufficient precision on a cadastral map. Measurements may not be necessary in instances where the boundaries are otherwise shown by reference to known physical features or is (sic) otherwise identifiable, eg by reference to adjacent titles, and which might be capable of articulation with the requisite precision, particularly if the overall area is given ...”.

She noted that Guidance had been issued by the keeper in respect of registration in respect of an undefined boundary, such as (at the very least) the southern edge of the 2018 disposition, which provided that such a boundary must be accurately fixed to existing detail by metric measurements shown on the plan. The plan contains no such measurements. An area is marked out by co-ordinates A-B-C-D but no measurement is indicated between any of these co-ordinates. The southern boundary is simply given as ground situated “within the pavement”.

[56] No independent experts were led on this matter. There was evidence from two solicitors. Mr Jennings had acted for Leafrealm in the matter of the 2018 disposition and Mr Baynham was the Leafrealm company secretary. They had generally not had experience of registration being rejected. However, both recognised that there were certain issues with

the plan attached to the 2018 disposition. Mr Baynham recognised that there were no metric measurements on the plan. Mr Jennings recognised that there was also a lack of precision in respect of the west most boundary. Mr Baynham had not known of the Keeper's Guidance on the issue of measurements until the week before the proof, so could not have taken it into account at the time of his statement, which formed his evidence in chief. He did however acknowledge that the plan did not follow the guidance.

[57] The Lord Ordinary was careful to express only a provisional view on the question of the likelihood that the keeper would accept the document for registration. She was entitled to consider the question to be a speculative one. The plain fact of the matter is that the disposition is unregistered, and in terms of section 50(3) of the Land Registration (Scotland) Act 2012, an unregistered disposition does not transfer ownership. The Lord Ordinary was right not to seek to pre-empt a decision of the keeper by a finding in favour of the reclaimer.

[58] On the primary issues the reclaiming motion must fail, and the subsidiary issues relating to prescription, vesting of a road, the effect of listing, the extent to which a wall can be part of a road, the effect of the retaining function of the wall, the effect of the section 56 orders, the questions of public right of passage, and whether the reclaimer would be entitled to interdict in the terms concluded for do not arise for consideration. Nor does the point raised by the first respondent in the cross-appeal.

[59] We shall therefore refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary.