The Sheriff-Substitute (Ross) found that the defender had failed to prove that the dam-dyke or weir in question had been used as such by him for a period of forty years; found it proved that in virtue of a clause contained in the feu-charter, dated 5th October 1823, a dam-dyke or weir was used by the defender's authors Sinclair and Thomson, extending from the road as far as a flat rock and touching, but in no way overlapping the said rock; found that the existing weir, as repaired by the defender's author John Thomson, and partly reconstructed by the defender himself, in so far as it extended from the said road to the said flat rock, and touching but without overlapping the same, although in certain respects different from the said weir used by the said John Sinclair, was still within the rights conferred by the said charter, and that the defender was accordingly entitled to make use of the same; found that the defender, in erecting a continuation of the said weir in the river on and beyond the said flat rock, including some stones lying on the top of said flat rock, had acted in excess of his rights under the said feu-charter, and had made an illegal encroachment on the *alveus* or bed of the said river which belonged to the pursuer, and accordingly ordained the defender, within one month from the date hereof, to remove from the bed of the river the whole erection constructed by him there inwards from the said flat rock, including the said stones laid on the top of said rock as aforesaid, or so much of said structure as had not already been carried away by flood in said river, excepting such stones, if any, which although forming part of said structure were not placed there, but were obviously embedded in the river; and failing the defender removing said structure within the said time, granted warrant to the pursuer to remove the same at the defender's expense; further, interdicted the defender from erecting any such works in the bed of the river in all time coming, and decerned.

On appeal the Sheriff-Principal (Forbes Irvine) affirmed the interlocutor appealed against.

The defender appealed, and his counsel intimated that he intended to reserve his right to print the proof, but in the meantime sought a judgment in favour of his operations on a sound construction of the feu-contract.

The Lord Justice-Clerk delivered the opinion and judgment of the Court as follows—Without turning my attention to what course the appellant is going to take in regard to the proof which has been led in this case, I am of opinion that the clause contained in the feu-charter of the 25th October 1823 gives no right to the tenant to make the works complained of here. I am of opinion that the clause operated nothing in regard to the storage of the water. He has only leave to take the water according to its then existing state, and to an extent necessary for the use of his distillery, and by means in use at the date of the feu-charter. It gives no right to increase the storage of the water or to interfere with the existing weir. The clause runs—"together with liberty to use as much of the water of the main stream or river that runs on the west side of the said piece of ground as shall be sufficient for carrying on such works as have been or may be erected thereon by the said John Sinclair or his foresaids." That relates solely to the amount of water they are to use. The clause then proceeds—"to be conveyed in a lead or drain under the road without raising its level"—that is, without raising the level of the road—"to and from the said piece of ground, in the direction and channel in which it is presently and has been used by the said John Sinclair, and not otherwise."

So, then, the reading of the clause is reasonable. This is a feu of the ground near the weir for the purpose of continuing the use of as much of the water of the river as shall be sufficient to carry on the works of the distillery. But it is proposed by the appellant to raise the height and extend the width of the weir. This, which may lead to very serious results, is an innovation not authorised by the clause, and cannot, I think, be allowed. These are my views generally on the question of construction, and I agree entirely with the judgments of the Sheriffs below and the able note of the Sheriff-Depute. Lord Craighill is of my opinion, and Lord Young, who is absent to-day, has intimated, though with more doubt, his acquiescence in our views.

Our judgment, then, on this part of the case will be—"Find that the terms of the feu-charter do not by themselves confer right to perform the operations complained of: Before further answer, continue the cause till next session, that the appellant (respondent) may have an opportunity of printing the proof, if so advised, reserving all questions of expenses."

Counsel for Appellant—Trayner—Alison. Agent—John Gill, S.S.C.

Counsel for Respondent—D.-F. Kinnear, Q.C.—M'Kechnie. Agent—F. T. Martin, W.S.

Tuesday, July 19.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

BOSWELL *v.* MAGISTRATES OF EDINBURGH.

Property—Common Interest—Building—Restrictions—Urban Tenement.

The proprietor of the street and basement flats of a tenement, who was also proprietor of the open space at the back, having craved warrant to erect certain buildings on that space at the back, the proprietor of the flat above that belonging to the petitioner objected (1) that the proposed operations would be injurious to the supply of light and air to his property; and (2) that the proposed buildings would be higher than the flat belonging to the petitioner, and ought therefore to be interdicted. The Court, after a report from a man of skill to the effect that the injury to the respondents' light and air would be inappreciable, *granted* the warrant craved.

In December 1879 Alexander Boswell, trunk maker, proprietor of the street and basement floors of the tenement Nos. 8 and 10 Hanover Street, Edinburgh, and of the back ground be-

hind the same, presented a petition to the Dean of Guild Court for authority to erect certain buildings on the back ground. Besides being proprietor of the street and basement floors, Mr Boswell was proprietor of two attics on the south side of No. 10 Hanover Street.

The City of Edinburgh were proprietors of the flat No. 10 Hanover Street, above the street floor belonging to Boswell. This flat was used by the City as the Lands Valuation Office of the City of Edinburgh. The City of Edinburgh opposed Boswell's application, on the ground that the supply of light and air to the Lands Valuation Office would by the erection of the buildings complained of be injuriously affected. The Dean of Guild refused the application, and Boswell having appealed, the Second Division remitted to the Dean of Guild to visit the premises along with his council and report specifically the grounds on which the proposed erections would materially injure the access of light to the property of the town. The Dean of Guild made this report—"The building in question is proposed to be erected only about twenty-one feet distant from the windows of the property of the respondents, the Lord Provost, Magistrates, and Council, is to extend along the whole length of the said property, and is to be built to the height (measuring to the eaves) of eighteen feet above the level of the sills of the windows of the lowest flat of the said respondents' property, which is occupied as the Lands Valuation Office, and to the height of six feet above the level of the sills of the windows of the respondents' flat immediately above the said offices.

"A back building similar to that proposed to be erected by the appellant has been erected on the back ground immediately to the north of his back ground. This building is of the same height as the appellant's proposed building, and is the same distance from the back windows of the tenement in front of it as the appellant's proposed erection is from the said respondents' property.

"The Court inspected the back rooms in the said front tenement which are on the same level as the Lands Valuation Offices, and found that the said back building materially interferes with the access of light thereto.

"On these grounds the Dean of Guild and his Council have to report that the appellant's proposed erection on his back ground will have the effect of materially interfering with the access of light to the said respondents' property, and that the said lowest flat of the respondents' property in particular will be materially affected thereby."

The Court thereafter, on 21st October 1880, dismissed the appeal and affirmed the judgment of the Dean of Guild.

The present application was made by Boswell for warrant to erect a different building on the back ground belonging to him behind the tenement. The nature of this building will be found described in the interlocutor of the Dean of Guild printed below. The petitioners averred that the erections now proposed to be made by him were such as he was entitled to make, and would not interfere with the access of light or air to the property of the City of Edinburgh. The City of Edinburgh again opposed the application, on the ground that the supply of light and air to the property of the City would be injuriously affected by the operations proposed. It was also maintained by the City that the petitioner was not entitled in a question with them, as the other proprietors of the tenement, and having a common interest with him in the back area, to build to a greater height than the level of his own property. The application was also opposed by James Aitchison, proprietor of certain neighbouring premises entering from a lane which the petitioner's operations were to affect. He objected to certain proposed sunk areas which the petitioner proposed to make.

The City of Edinburgh pleaded, *inter alia*, that warrant ought to be refused, in respect that by the proposed erections the access of light and air to their property would be materially injured. They also pleaded—"(3) *Separatim*, In no view is the petitioner entitled to build on the back area, in which the proprietors of the main or front tenement have an interest, to a greater height than the level of his own property."

The Dean of Guild pronounced this interlocutor: — "Finds that the whole subjects to which this petition relates were included in a feu-charter, dated 28th June 1876, by the Lord Provost, Magistrates, and Council of the City of Edinburgh, to the trustees of John Sutter; that the petitioner is the proprietor of the house or premises 8 South Hanover Street, consisting of the ground and street storeys of the tenement erected by the said John Sutter, with the area at the back of the said tenement, and pump well thereon, together with the sunk area and three cellars under the pavement opposite to the front of the said tenement; that the respondents, the Lord Provost, Magistrates, and Council of the City of Edinburgh, are proprietors of the flat occupied as the Lands Valuation Office, immediately above the petitioner's street storey—part of the said tenement —and entering by the common stair; that on the back area there is proposed to be built by the petitioner, immediately behind the petitioner's street storey, a saloon extending backwards to the meuse lane; that at a distance of 21 feet 6 inches from the back wall of the petitioner's street flat and the flat belonging to the City of Edinburgh there is to be erected over the said saloon an addition of a first floor and attic floor, 19 feet 9 inches higher at the ridge of the roof and 8 feet 9 inches higher at the wall head than the top of the petitioner's street storey; that the saloon, in so far as between the main tenement and the said additional floors, is to be lighted by a cupola, rising about 3 feet above the petitioner's street flat; that the sill of the back windows of the respondent's said flat is about 3 feet above the petitioner's flat, and that the windows are 7 feet in height; that in the opinion of the Court the proposed new buildings would not materially interfere with the light or air of the respondents' said flat; that the proposed building being of a greater height than the street storey belonging to the petitioner, the said respondents would be thereby prevented from extending their flat to the back above the saloon proposed to be erected by the petitioner; that these buildings would thus encroach on the rights of the respondents as proprietors of said flat; that the petitioner is not entitled to build on the back area to a height which would in-

fringe on the rights of the proprietors of the upper flats: Therefore to this effect sustains the defences for the City of Edinburgh; refuses the application," &c.

He added this note—"The second plea for the respondents is to the effect that the proposed buildings would interfere materially with the access of light to their property, and parties were agreed that this question of fact should be the subject of inquiry. It was suggested to the parties that they might have this inquiry made either under a remit to a man of skill or by an inspection by the Dean and his council. Neither party moved for a remit, and both acquiesced in the inquiry being made in the usual way by the Dean and his council, who accordingly visited and inspected the subjects. By a majority they were of opinion that the buildings would not materially interfere with the light or air of the respondents' premises. On this opinion being intimated the agent for the City moved for a remit to a man of skill in respect the opinion was arrived at by a majority, but, in the circumstances stated, this motion was refused.

"In reference to the findings to the effect that the petitioner is not entitled to erect the buildings proposed, which are above the height of his own storey, it is important to observe that as to front areas it has been the practice to prohibit the proprietor of the street flat front building on them above the height of the street flat, and to require that any such erection shall be so made as to admit of the proprietors of the upper flats projecting their front walls on the top of it. This implies that as regards front areas, while proprietors of the upper flats have a common interest in the *solum*, they have also right to appropriate the space *ex adverso* of their respective flats for the purpose of projecting their walls equally with the proprietors of the street flat. This appears to be an equitable adjustment of the rights of the various proprietors in such tenements both as to the front and back areas. No reason was suggested and no authority quoted at the debate to support the view that the proprietor of the street flat should have a right to build to a greater height on the back area than on the front area, or that the proprietors of the upper flats should not have a right to extend their flats to the back as well as to the front. If the right of the street flat proprietor in the back area were to be held as being *a centro usque ad coelum*, qualified only by the right of the upper flat proprietors to light and air, it would follow that no projection to the back, such as a bow window, could be made by them. Even assuming that light and air are not interfered with, it is obvious that a building in a back area, at a distance of 20 or 30 feet from and of equal height with one or more of the upper flats, would, by excluding the view, and by the opening of windows immediately opposite, materially affect the amenity and value of the upper flats of the tenement. The right claimed by the petitioner, if sustained, would thus entitle him to invert and injure the possession of the upper flat proprietors as originally arranged and hitherto enjoyed by them."

Boswell appealed.

Authorities — *Stewart* v *Blackwood*, Feb. 5, 1829, 7 Sh. 362; *Urquhart* v. *Melville*, Dec. 22, 1853, 16 D. 307, *Johnstone* v. *White*, May 18, 1877, 4 R. 721; *Barclay* v. *M'Ewan*, May 21, 1880, 7 R. 792; *Heron* v. *Gray*, Nov. 27, 1880, 8 R. 155; *Scott* v. *Commissioners of Police of Dundee*, Dec. 18, 1841, 4 D. 292.

The Court on 5th July 1881, before further answer, remitted to Mr Burnet, architect in Glasgow, to examine the premises, "and with reference to the points in controversy in this process, to report his opinion whether the operations proposed will injure the light and air of the building of the respondents above that of the appellant, or affect the value of the same, and to accompany his report with any remarks he may consider likely to be of assistance to the Court."

Mr Burnet reported that the proposed operations "would injure the light and air of the buildings of the respondents above that of the appellant, but to so inappreciable an extent as not to affect the value of the same."

He added the following explanations and suggestions:—"1. The proposed back buildings would undoubtedly diminish the light and air of the respondents' property; but the degree of interference would be so slight that, in my opinion, the market value of the property would not be lowered. That value depends in a great measure upon the situation being in the centre of the business portion of the city of Edinburgh. In the event of a sale after the erection of the back buildings, should these be authorised, intending purchasers would not, I think, look upon the property as depreciated by diminution of light and air, as I consider the property would be possessed of these essentials in sufficient quantity for all practical purposes.

2. Such a building stance in Glasgow—that is, a steading stretching from a street to a back lane,—is usually held under a single, not a several ownership. In practice the whole plot from back to front is built over to a uniform height, but for the preservation of light and air a well or court is usually formed about the middle of the property, and the walls around this well or court are mainly of glass. The open space proposed to be allowed in the present case is larger relatively than is left open in Glasgow, while the space for light and air usually allowed in Glasgow is, as a rule, found to be quite ample.

"3. While the above is my opinion, I venture to make the following suggestions, as invited by the Court, with the view to minimising interference with the amenity of the respondents' property, and lessening the chance of injury to it from fire or housebreaking, through the erection of the back buildings, viz.—

"(1) There should be no windows in the wall of the proposed back buildings, facing the back windows of the respondents' property.

"(2) That wall should be entirely faced with white enamelled bricks.

"(3) The roof of the saloon, with its skylights or cupolas, should be placed no higher than the level of the lowest floor of the respondents' property.

"(4) No skylight or cupola should be placed in the roof of the saloon nearer the back wall of the respondents' property than 6 feet.

"(5) The roof of the saloon should be constructed of concrete, for prevention of fire contagion, and laid with white coloured tiles for light and general amenity.

"(6) The ceiling of the ground-floor of the appellant's back building—that is, the portion facing

the lane—might be made lower, say 4 or 5 feet, as this height can readily be spared from the very high ceiling proposed. The height of the building itself would thus be reduced to a considerable extent, without detriment to the appellant, and to the advantage of the respondents' property, in substantially lessening the height of the building opposite their back windows."

The opinion of the Court was delivered by

The Lord Justice-Clerk—The question in this case is, whether the petitioner is entitled to execute the operations for which he craves authority, or whether he is to be prevented from building to a height exceeding that of the flat belonging to him? We have come to the conclusion that there is no ground for such a limitation, and we shall grant the prayer of the petition, subject to the conditions suggested in the report of Mr Burnet. We therefore recal the interlocutor of the Dean of Guild and grant the prayer of the petition.

An interlocutor was accordingly pronounced to the effect mentioned by the Court.

Counsel for Appellant (Petitioner)—Pearson—Dickson. Agent—T. J. Gordon, W.S.
Counsel for City of Edinburgh—Trayner—Mackay. Agent—W. White Millar, S.S.C.

Tuesday, July 19.

FIRST DIVISION.

HALDANE (JUDICIAL FACTOR ON THE GIRVAN AND PORTPATRICK RAILWAY) *v.* GIRVAN AND PORTPATRICK RAILWAY.

(*Ante*, March 18, 1881, p. 451.)

Judicial Factor—Railway—Special Powers—Sale of Line—30 *and* 31 *Vict. cap.* 126, *sec.* 4.

The judicial factor appointed on the undertaking of a railway company under 30 and 31 Vict. cap. 126, sec. 4, does not require special powers in order to enter into negotiations for the sale of the line.

In this case the Court having found "that in virtue of the judicial factor's appointment under the 4th section of the Act 30 and 31 Victoria, c. 126, he is vested with the full and exclusive power of managing the undertaking of the Girvan and Portpatrick Junction Railway Company, under the direction of the Court," . . . . the judicial factor reopened negotiations with the Glasgow and South-Western Railway Company, with the view of arranging a more satisfactory working agreement for the future carrying on of the line. He also consulted with Mr Andrew Dougall, the manager of the Highland Railway Company, as to the terms on which the line was being worked, and as to the course which should be followed in the future for the working of the line in the interests of its creditors.

On 5th May Mr Dougall made a report to the judicial factor, in which he suggested various changes which seemed to him to be calculated to introduce greater economy into the working of the line. As the result of his investigations, Mr Dougall was of opinion that there were two courses open to the judicial factor—"*First*, To arrange with the Glasgow and South-Western Company to work the line at a percentage of the receipts, on the same principle as the Caledonian Company work the Portpatrick line, there being many similar cases in Scotland and England. The amount of the percentage would, of course, form the subject of negotiation. One great advantage of an arrangement of this kind would be that the Glasgow and South-Western would have an interest in developing the traffic of the Girvan Company, as a proportion of any increase would always go to them. *Second*, That the factor should work the line himself by appointing a traffic manager, who could also act as secretary, at a salary for both offices of £250 per annum; also a superintendent of permanent way at a salary of £150 per annum. In this way the traffic would be developed by the company's own officials, while the upholding of the line would be carried on with economy consistent with efficiency. This arrangement would involve making an agreement with either the Glasgow and South-Western or Caledonian, who have the necessary parliamentary powers, for a supply of rolling-stock at so much per train mile, and I should think either of these companies would be ready to do this."

On 24th May the Glasgow and South-Western Company intimated that they were not prepared to enter into any other agreement for working the Girvan and Portpatrick line than a six years' arrangement on a prime cost footing—a prime cost working being much less favourable to the Girvan Company than one by which they should receive a percentage of the receipts. At that date the line was actually being worked by the Glasgow and South-Western Company under an interim agreement which expired on the 31st of July following. In these circumstances the judicial factor presented this note, in which he stated that "The only two courses which appear open to him are—(1) to work the line himself with the necessary assistance for behoof of the Girvan Company, if the funds necessary for so doing can be obtained; or (2) to enter into negotiations for the sale of the line."

The judicial factor stated that he believed that the line would be saleable, and that he had already been informally approached on the subject by a party who proposed to offer for the line.

He stated that "in order to raise money by means of preference debentures, or to sell the line, the judicial factor would require a Special Act or Acts of Parliament, and he now makes the present application for your Lordships' authority to invite and receive offers for the purchase of the line, and then to apply to Parliament for such Act as shall seem in the circumstances desirable."

The judicial factor therefore prayed the Court "to authorise the judicial factor to enter into negotiations for the sale of the line, and to receive offers for the purchase thereof, and thereafter, upon consideration of the result of the said negotiations and the offers received by the judicial factor, as reported by him to your Lord-