

CALENDAR
v.
EDDINGTON,
EDDINGTON
v.
MORISON'S
TRUSTEES.

1826.
July 19.

PRESENT,

LORD GILLIES.

CALENDAR v. EDDINGTON, EDDINGTON v.
MORISON'S TRUSTEES.

Damages for injury done to a house by improperly excavating the foundation of an adjoining house; and a consent that an action of relief should be disposed of, as if a verdict had been returned for the defenders in it.

AN action of damages for injury done to a house in Edinburgh, by making a sunk story to the immediate adjoining house; and an action of relief against the persons who feued the ground, as by the plan the defender, Eddington, was bound to make a sunk story.

DEFENCE for Eddington.—That he carried on the operations within his own premises in a proper manner, and any injury following must have arisen from the insufficiency of the pursuer's gable.

For Morison's Trustees.—If any injury was done to the house it was not by operations sanctioned by them.

ISSUES.

“ Whether (in summer, or the beginning of
“ autumn 1825,) certain operations were im-
“ properly carried on by the defender, or those

“ acting under his authority, by digging or ex-
 “ cavating the ground adjoining to, or in the
 “ immediate neighbourhood of a house, the
 “ property of the pursuer, situated in West
 “ Maitland Street, in the city, or in the county
 “ of Edinburgh, whereby the said house was
 “ injured or deteriorated, to the loss and da-
 “ mage of the pursuer ?

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In the action of relief.

“ It being admitted that the pursuer feued
 “ from the defenders a piece of ground in
 “ West Maitland Street, Edinburgh, immedi-
 “ ately to the west of a house, the property of
 “ Sharp Callender, pursuer in a summons of
 “ damages, in relief of which this action has
 “ been raised ; and that, by the minutes of
 “ contract, the pursuer became bound to erect
 “ a dwelling-house, according to a plan there-
 “ in referred to ; and that the said tenement
 “ should consist of a sunk storey and three
 “ stories above the same ; and that the pursuer
 “ did on or about

“ proceed to excavate the said
 “ ground, for the purpose of executing the
 “ sunk storey aforesaid :—

“ Whether the said operations were carried
 “ on in a proper and workmanlike manner, and

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“ in the manner the least calculated to injure
 “ the adjacent tenement, the property of the
 “ foresaid Sharp Callender? And whether the
 “ said operations produced damage to the said
 “ Sharp Callender, for which the defenders are
 “ bound to relieve the pursuers?”

Robertson opened the case, and stated the facts, and that the defender must not only repair the house, but pay damages for the permanent injury done to it.

A report by tradesmen admitted in evidence and read to the Jury, the witnesses swearing that the contents were true.

Certain persons who had been called to inspect the house made a report of their opinion, which was read without opposition, the witnesses swearing that it was a true report.

Jeffrey for the defender, said, That the jury would have to decide on contradictory evidence of opinion. The operations were sanctioned by the individual who now holds the situation of Dean of Guild, and the defenders were bound by their feu-contract to make them. The injury may have been occasioned by other causes; and as the operations were cautiously carried on, the defender is not liable; and this being *damnum fatale*, the injury must lie where it falls.

Robertson v.
 Strang, 12th
 May 1825. 4 Sh.
 and Dun. 6.

Cockburn.— I willingly free the defender from

intentional misconduct. All I say is, that he did me an injury which in law is improper conduct. But he was also guilty of negligence.

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LORD GILLIES.—It is now my duty to assist you in considering this case, and my duty is easy, as the case is simple. There is no doubt that the operations of the defender occasioned damage, and severe damage to the house of the pursuer, which was exposed to serious danger. As damage was done I think there is little doubt that the operations were improper. The Dean of Guild was of a different opinion, from a great majority of the witnesses, who think the excavation might have been made without injury; and Mr Burn, (against whose opinion I could give little weight to the others,) says it might have been done with ease and perfect safety. I think, on the whole, you will be satisfied that the operations were improperly carried on, and that they caused the damage.

The difficulty of the case is the amount of damage. The pursuer was deprived of the use of his house, and it will require a considerable sum to repair the house, but I cannot think this is a case for *solatium*.

Verdict.—“For the pursuer, damages L.400.”

MILLAR AND
HUSBAND,
v.
FRASER.

A consent was given, that the action of relief should be disposed of as if a verdict had been returned for the trustees.

Cockburn and Robertson for Callender.

Jeffrey and More, for Eddington.

Buchanan and Gibson-Craig, for Morison's Trustees.

(Agents, *C. C. Stewart*, w. s., *H. Graham*, w. s., and *Gibson, Christie, & Wardlaw*, w. s.)

INVERNESS.

PRESENT,

LORD PITMILLY.

1825.
October 25,
and 1826,
July 20 and 21.

Finding as to the
date at which a
legatee died.

MILLAR AND HUSBAND v. FRASER.

AN action by the daughter of a legatee under a will to recover a legacy of L. 500 left to her mother.

DEFENCE.—No title is produced. All the legacies were paid and settled twenty years ago, soon after the death of the testator.

ISSUES.

“ It being admitted that the late Simon Fraser, Esq. of Dominica, executed a will or tes-