

cross appeal be varied as follows: after (that the de-
fender has) leave out (condescended on acts of homo-
logation) and insert (alleged matter) after (sufficient to)
leave out (remove) and insert (answer).

1772.

DEAS, &C.
v.
MAGISTRATES
OF
EDINBURGH.

For Appellant, *Al. Forrester, Dav. Rae.*

For Respondent, *Ja. Montgomery, Al. Wedderburn.*

JOHN DEAS and Others, Feuars in Prince's Street, within the Extended Royalty of the City of Edinburgh, and Proprietors of Houses there,	}	<i>Appellants;</i>
The LORD PROVOST, MAGISTRATES, and COUNCIL of Edinburgh,	}	<i>Respondents.</i>

House of Lords, 10th April 1772.

This was a bill of suspension and interdict applied for by the proprietors and feuars of the houses in Prince's Street, against the Magistrates and Town Council of Edinburgh, to interdict and prohibit the building and erecting houses opposite their feus, in Prince's Street gardens, then called the North Loch, in violation of the Plan and sales of these feus, and of the original proposals and resolutions of the Magistrates, held out, and agreed to, by them, in granting their feu rights. These resolutions were embodied in the acts of Parliament obtained for extending the royalty, which stated and described the objects to be, "to enlarge and beautify the town, by opening new streets to the north and south, removing the markets and shambles, and turning the North Loch into a canal, with WALKS AND TERRACES ON EACH SIDE." And the plan drawn out and adopted by the Magistrates and shewn to the feuars showed these grounds (Prince's Street gardens) so laid out for pleasure grounds and walks.

The Magistrates, in advertising the feus, further assured the feuars, that on taking the feus in Prince's Street, they would obtain the same, with perpetual right over the grounds between their feus and the Canal, or North Loch, under the proviso, that no building should be erected there.

On the faith of this *Plan* and these resolutions, the appel-

1772. lants took feus in Prince's Street. The writings which passed between the parties, merely referred to the plan; but the subsequent CHARTER which followed, did not confer any privilege or right over the Prince's Street gardens, and was silent on the subject.

DEAS, &c.
v.
MAGISTRATES
OF
EDINBURGH.

In the present interdict, the Magistrates accordingly maintained that their charter or feu-right, not containing any right or privilege of the kind claimed, it was open to them to feu out these grounds for building.

The Lord Ordinary (Monbodo), reported the case to the Court, who remitted to his Lordship, with instructions to refuse the bill. The Lord Ordinary, of this date, refused the bill accordingly.

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—The *Plan* of the streets and squares upon the extended royalty of Edinburgh, was the proposition of the Town Council of the city to the public. It supplied the place of a written obligation in point of form, and required only acceptance upon the part of any purchaser to make it binding. The appellants, when they purchased feus agreeably to this *Plan*, purchased an indiscriminate interest and servitude over every other part of the property described upon it, opposite to their feus, down to the North Loch. The Magistrates, therefore, had it not in their power to deviate from that Plan in the smallest degree, by selling building feus on the grounds of the North Loch. This Plan is not to be viewed as a mere voluntary act. It was made and designed in terms of original proposals entered into, many years previously, in regard to the improvement of the city, on the faith of which two acts of Parliament had been obtained, extending the royalty. The appellants did not treat on the footing of the act of council. They never saw it: and, therefore, they were entitled to rely on the plan, and the Magistrates were bound to conform thereto.

Pleaded for the Respondents.—The present bill of suspension is brought as incidental to their declaratory action. Whatever the issue of this action may be, the question of right must remain entire. In regard to the question itself, it appears from the writings produced, that in granting the feus, the Magistrates were to have right and liberty to build, limited only in one particular,—namely, the distance from the houses built in Prince's Street. The act of Council, in which this article is contained, is the basis of all the grants.—It is specially referred to in the *plan* so much insisted on by the

appellants, and recognized by many of the deeds between the parties ; and it contained the conditions of the feus sold to the appellants. It is therefore a mere pretence, to say that the appellants bought on the faith of the *plan*,—as the *plan* does not preclude the Magistrates from building on that ground, or establish in them a servitude over it. Far less does their charter, which is the limit and measure of their right, confer on them any such servitude.

1772.

DEAS, &c.
r.
MAGISTRATES
OF
EDINBURGH.

After hearing counsel, Lord Mansfield spoke :—

LORD MANSFIELD.

My Lords,

“ The question now heard at your Lordships' bar, respects an injunction (interdict) granted by the Court of Session in Scotland, upon complaint of several gentlemen of Edinburgh, against certain buildings now erecting upon the ground of the late extended royalty. —The plaintiffs say that these buildings are prejudicial, not only to their private property, but to the public, who are interested in the late proposed improvements of that city, and entitled to watch over the execution of them. The Court of Session refused to continue this injunction, and to grant interdict, and against that judgment the plaintiffs now stand appellants at the bar of this House.

“ I well remember, my Lords, some years ago, when the situation and improvement of this part of the kingdom came to be generally wished for and considered ; I well remember, I say, being greatly affected by the description of the inconveniences attending the capital of North Britain. This description, your Lordships have now partly heard in the case of the appellants, and, I am well informed, it is not exaggerated. I saw with pleasure many noble lords and gentlemen of the first rank, interest themselves in the matter ; and this pleasure was not diminished, by the incorporation of Edinburgh taking the lead, and giving a proper example of zeal and activity. This procedure was what it ought to have been. It gave hopes of success, and marked the character under which these gentlemen were appearing. Persons of the first rank were invited to join them, artists of the first ability to furnish them with the model, and a national contribution was proposed for defraying the expense. Committees were held, money was subscribed, and at last the attention of all parties turned to the capital improvement—the extension of the royalty upon the grounds toward the north, and the erection of a new city upon these grounds ; for this purpose an act of Parliament became requisite. and was obtained by application of all concerned. I remember, my Lords, being active in bringing this bill about, although several objections possibly lay against it ; a noble Lord, now no more, had determined to oppose it ; nay, a noble Lord (Abercorn) who now hears me, meant to support this opposition. One of these objections has this moment occurred to me: The inhabitants of the extended royalty were to be excluded in the representation of the

1772.

 DEAS, &c.
 v.
 MAGISTRATES
 OF
 EDINBURGH.

city, and yet lie open to be taxed by the old corporation; this was, and perhaps justly, deemed unequal and unconstitutional; yet under *such colours*—under such specious appearances, was the matter dressed up to me; and so much was my opinion heightened of the persons into whose hands this trust was to be committed, so much, I say, were all these things impressed upon me, that I prevailed with those noble Lords to withdraw their opposition to the bill, which otherwise would not have passed into a law; and a great boon it was to the corporation of Edinburgh.

“ These gentlemen, thus aided by the nation, and empowered by the legislature itself, continued to proceed in the character expected of them. In their case, now presented to your Lordships, you are told, that after consulting with several persons of distinction and taste, they had fixed upon the general form of a plan offered them by an ingenious artist. Amongst the people of distinction and taste, there were my Lord Alesmere, my Lord Kames, my Lord Advocate for Scotland, Mr. Commissioner Clerk, and, among other artists, the Messrs Adams no doubt. By these gentlemen, several alterations and improvements were made to this plan, and an advertisement was published by the Corporation, informing the public, that they had that day finally adjusted the Plan of the New Town, which was to lie open at the Council Chamber, for the inspection of such as inclined to become feuars.

“ In consequence of this, the appellants and others came, they viewed the plan, and chose situations for their intended houses.

“ The line of buildings termed Prince’s Street seemed soon to fill up, for a very obvious reason: The whole grounds to the south of this line were left as an open area in the plan, and delineated as pleasure grounds: The lake, or North Loch, formerly a nuisance, is there thrown into the agreeable form of a canal, with walks and terraces on each side.

“ The plan now in my hand surely ascertains every circumstance or form, better than any writing in the world,—it speaks to the eye, it presents a picture, which no verbal description can afford. So far, therefore, as appeared from the plan, it was unnecessary upon the part of the plaintiffs to propose a question; it only remained to know what was to be paid by each person for the site he had chosen. This was done by a scheme entered in a book, and this scheme made relative to the plan. By both these completely satisfied, they paid their money, and have *bona fide* upon the faith of what happened, erected houses in a manner, and at an expense, even superior to the idea of the public. After some time, the plaintiffs were surprised by the appearance of buildings upon the ground, which they always supposed destined to the health and beauty of the place; and in place of terraces and walks upon the North Loch they find a new street amaking in its way, as a peculiar favourite of the corporation, under the name of Canal Street. These gentlemen immediately bring the complaint before the corporation; they appeal to the *plan*, and

pray to be informed how such an infringement could ever be imagined, far less carried into execution ;—or how the town could allow themselves to act against the good faith of the public and express terms of their sale. Now, my Lords, what answer did the corporation make to all this;—‘ Plan!’ say they, ‘ Why, gentlemen, you have egregiously deceived yourselves, that is not the plan at all.’ ‘ No!’ say the plaintiffs, ‘ Where is it then?’ ‘ Here,’ replied the corporation, ‘ in an act of our Council of such a date.’ ‘ Did you never see that before, gentlemen?’ ‘ No, indeed,’ rejoined the feuars, ‘ we never did.’ ‘ Impossible,’ continue the magistrates; ‘ You are men of business, your receipts for the money bear the date of this act; and it is vain to say you could so far neglect, or impose upon yourselves. Why, you are to have no canal, no walk, no terrace, no pleasure ground. Here is Canal Street! there is a coach house! there a butcher’s shop! there a tallow-chandler!!’

“ Can your Lordships approve the conduct of this corporation on the contemptible idea upon which this conduct has been endeavoured to be justified? The plaintiffs, I am told, are men of character, and they are men of business, able and eminent in their profession. I say it, my Lords, and I am proud to do so in this house, that no class of men in this nation act with more openness, more generosity, more implicit confidence, than men of business do, when satisfied with the honour and probity of their parties. I have known many a noble Lord in this house, and sure I have done so myself, subscribe an hundred deeds without throwing our eye upon a single line of them; and why? Because we were well apprised and fully convinced of the honour and integrity of those who put the pen in our hands. The plaintiffs, my Lords, did not consider themselves as dealing with a committee of city lands, whose business it might be, to turn every inch of ground to immediate profit; they were dealing with the first corporation of North Britain—a corporation acting in concert, I may say, with the nation itself. I should not, my Lords, have been surprised, although the plaintiffs on this occasion really had trusted a great deal. When a plan lay upon the table, and the faith of the corporation was pledged to the public, that this plan was finally adjusted; where lay the trust in contracting upon the terms of that plan? or where lay the trust in enrolling themselves as tenants of the city, at a certain sum for the present and time coming? I confess, my Lords, I would have enquired no farther; I should never have thought of examining this act of Council. I would have considered it as a form necessary in the procedure of a body corporate, and never suspected that it contained any reservation or alteration of the plan itself, or even a single word expressed or implied contrary to that plan. I mean, my Lords, I would not have suspected that there lay concealed a low device, unworthy of the meanest committee of city lands in the nation. I need not, my Lords, go far for instances of a contrary and much more

1772.

DEAS, &c.
v.
MAGISTRATES
OF
EDINBURGH.

1772.
 DEAS, &C.
 v.
 MAGISTRATES
 OF
 EDINBURGH.

honourable conduct, not only observed by bodies politic, but by private proprietors, in the environs of this great city. Lincoln's-Inn-Fields was planned by the celebrated Inigo Jones, and will ever do honour to the memory of that great architect; the area or contents of this square is indeed of great extent; the property of it never was conveyed to any individual; but, in terms of the plan, it has been faithfully dedicated to its original use, dressed up into pleasure grounds, and left open for the health, the prospect, and convenience of all the proprietors around. Should the representatives of the first undertaker, upon supposition that the property of this large piece of ground vested in him, now pretend to raise new buildings, would he not be prevented by every inhabitant? Would not each person tell him that they had a previous and common right over all this ground, annexed to their property, which could not be impaired or defeated at any period whatever? And would not every judge, not only grant an injunction against such an attempt, but give judgment for the inhabitants? In vain would the respondents set forth that the area in Lincoln's-Inn-Fields was too great a waste for this great city, and that certain buildings might be erected, and persons accommodated, without actual detriment to the old inhabitants in point of health or light. If this was allowable, a prodigious sum might be raised by my Lord Grosvenor; he might raise a new line of buildings in that large square, without shutting up the windows or doors of any part of it; nay, he would leave more light and more space to the former houses than is enjoyed by any street in London. But I dare presume his Lordship never entertained an idea of this kind.

“ Indeed, so sensible are the corporation of Edinburgh of the extravagance and injury of their own proposition, that they have made a merit of *limiting* the *chimney-tops* of the new houses to a *level with Prince's Street*. But are the plaintiffs to be left tenants at will to them, for the light, the prospect, and conveniences they have purchased? If they are so, it must be their own fault indeed. This, my Lords, brings me to observe, that if, after all, in the question of right remaining to be tried, it shall appear that the plaintiffs were properly apprised of these acts of Council; or, in other words, the different *plan* there laid down acceded to by them; the action, no doubt, will admit of a different consideration. The respondents, in the meantime, complain that there can be no other positive proof, except by reference to their oath. I am of a different opinion, because I see an easy remedy. It is admitted the plaintiffs are men of character and honour. In the Court of Chancery of this kingdom, a party is always entitled to an answer upon oath, without any special reference. I know indeed, that by the Roman law,⁵ a reference binds the party who makes it; and the terms of the oath are decisive. But I also know from experience, the great utility of requir-

1772.

DEAS, &c.
"."
MAGISTRATES
OF
EDINBURGH.

ing an answer upon oath. Without such reference the party may refuse it; if he does so, the judge will presume against him. Suppose no such answer is demanded of the plaintiffs, I believe they will not refuse it; and if their answer is negative, I should also incline to believe it, though the respondents, after this, might be at liberty to establish the contrary against every proof they have to offer.

“ To me, my Lords, it appears from every circumstance at the time, that the plaintiffs neither knew nor apprehended any intention upon the part of the respondents of deviating from the plan finally adjusted; nay, I believe the corporation itself meant nothing of the kind at the time. Even the words of the reservation itself are sufficient to convince me; *as it is not intended at present* (say they) to feu out the ground between the south street and the North Loch. I should be glad to know what the gentlemen meant by the words *at present*? Such words were unnecessary, because the plan itself speaks this intention. Had it been marked on that plan that houses and not pleasure grounds were intended upon this area, then indeed the obligation proposed to the feuars would have been in their favour: but the feuars, I suppose, will accept of no such obligation; it would indeed require strict legal words to qualify a plan so finally and formally adjusted; for the corporation expressing themselves, *that if houses were afterwards built there, was supposing in themselves a right without reserving it*;—a right which they had disposed of by their plan—a right which they are now unable to prove with the knowledge, far less the consent, of their party.

“ In this matter, my Lords, I consider the corporation of Edinburgh merely as a committee of city lands, but I would have that corporation remember that their *character* is different. If a mere committee for enriching this corporation, what title had they to a national contribution? What title to the interposition of the legislature? What the purpose of calling to their assistance noblemen of the first rank in the nation?—of advising with people of distinction and taste? No, my Lords, these things speak the gentlemen’s meaning at the time. Of a sudden, however, forgetful of their character, they sink into a burgh committee—*profit* is the word—the elegance of their first plan is thrown away. *Canal Street* appears! I should be glad to know whether the gentlemen of taste I have mentioned, my Lords Alemore and Kaimes, Mr. Commissioner Clerk, and Mr. Adams, were consulted about these new erections, which I am told vie in deformity with those of the Old Town. Nay, I would ask the standing counsel at the bar, if they were advised? I have not heard them say so.

“ I could say a great deal more upon this subject, but I do not choose it; and I hope we shall hear no more of the matter. Let me earnestly recommend to this corporation to call to their aid the same assistance they set out with; let them consult with their standing

HIS MAJESTY'S
 ADVOCATE
 v.
 HAY, &c.

counsel, what may be for their honour, what for their interest, neither of which they seem for sometime to have understood. I give my opinion, therefore, my Lords, for continuing this injunction (interdict), not only on the plain and open principles of justice, but from regard to the public, and from regard to this misguided corporation itself.

“ I therefore move to reverse the judgment of the Court of Session, and, in the technical terms of that country, to lay your order upon the Court to pass the bill of suspension, that it may be conjoined with the action of delarator, and the question of right decided.”

It was therefore ordered and adjudged that the interlocutors complained of be *reversed*; and it is further ordered, that the Court of Session do pass the bill of suspension that the question of right may be decided, when the suspension shall be joined with the action of declarator.

For Appellants, *Al. Wedderburn, Ar. Macdonald.*

For Respondents, *Ja. Montgomery, Henry Dundas,
Dav. Rae.*

(M. 11,276.)

His MAJESTY'S ADVOCATE, on behalf of His	}	<i>Appellant ;</i>
Majesty and the Public, - - -		
JEAN HAY, Widow of John Cuthbert of Castlehill, and her Children, - - -	}	<i>Respondents.</i>

House of Lords, 24th April 1758.*

WADSET—PRESCRIPTION—INTERRUPTION.—A bond was granted to a party, and had lain over until within a few months of 40 years, when decree *cognitionis causa*, followed by decree of adjudication, were obtained. A claim was made on this debt 40 years after the date of this adjudication: Held, that calling the creditor in an action of reduction, declarator, and extinction of the debt, raised by a co-creditor, to which the debtor was no party, within the 40 years, and appearance of the creditor made therein, with production of his bond and adjudication to support his debt, were not sufficient to interrupt the negative prescription, in terms of the statute thereanent.

The respondents were claimants on the forfeited estate of Simon Lord Lovat, who was attainted in 1747.

* This and the following case omitted of their proper dates.