SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

Feoffees of HERIOT's Hospital—*Appellants.*
JAMES GIBSON—*Respondent.*

May 4, 1814.

CONTRACT.—THE MERE EXHIBITION OF A PLAN NO WARRANTY.

THE mere exhibition of a plan of a new street, at the time of the sale of a piece of ground on which to build a house in the line of the intended street, does not of itself amount to a warranty or engagement that all that is exhibited on the plan shall be done, more especially where the purchaser has a distinct contract put into the solemn form of a charter, in which nothing is said about that which he claims merely on the foundation of its having been exhibited on the plan. Thus, where the Governors of Heriot's Hospital, and the Magistrates of Edinburgh, in selling certain lots of ground for building in the line of an intended new street, (York-place,) exhibited a plan of the street and some of the surrounding objects, which represented, or was supposed to represent, certain old buildings (not belonging to the Magistrates or Hospital) as taken down, so as to make the street of equal breadth through its whole extent,—though the feu charters granted to the purchasers contained nothing about any obligation on the grantors to purchase and remove these old houses,—the Court of Session held that the Magistrates were bound to remove them, and to purchase them for that purpose when an opportunity offered of doing so at a reasonable price, and that the purchasers were entitled to retain the feu duty till this was done. But the judgment was in effect reversed on appeal, on the general ground, that the mere exhibition of the plan was no warranty, especially when coupled with the silence of the charters on the point in dispute.

THE Magistrates of Edinburgh intending to continue Queen-street (New Town) on the east to a place called Broughton Loan, procured a clause to

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26 Geo. 3, cap. 113.

be inserted in an Act of Parliament obtained by the city, in 1786, empowering them to make this street, which was to be 80 feet wide, and for that purpose to purchase houses, grounds, &c. This authority to purchase houses was made to expire Jan. 1, 1797, and the Magistrates had not an opportunity of carrying the plan into execution till the authority had actually expired. Afterwards, the Magistrates, and the Governors of Heriot's Hospital, projected a continuation in the line of what is now called York-place as far as their own property extended, making the street 114 feet wide, and a plan of the new street was drawn out accordingly. As part of the property belonged to the town, and part to the Hospital, an arrangement was made, by which the Magistrates were to have the whole of the purchase money of the several areas or lots to be sold for building, and the Hospital to have the feu duty.

Sale of the feus of York-place, and a ground plan referred to.

On the 3d March, 1797, the lots were exposed to sale by public roup, or auction, the articles of which referred to the several lots as marked and numbered on the ground *plan*, which plan itself, though the articles applied exclusively to the lots to be sold, delineated some of the adjoining and surrounding objects. One of the lots was purchased by the Respondent, *Gibson*, for 184 guineas, (which sum was immediately paid to the Magistrates,) and *4l.* 19*s.* annual feu duty to be paid to the Hospital; and he obtained a charter from the Hospital, dated April 15, 1799, in which free ish and entry by York-place were warranted.

Gibson having for eight years together refused to pay the feu duty, on the ground that certain old

houses at the east end of the street, delineated on the plan as intended to be taken down so as to make the street of equal breadth at both ends, had not been removed, the Appellants raised an action of declarator of irritancy *ob non solutum canonem* on the act of 1597, cap. 246, by which it was enacted, that the feuar who failed to pay his feu duty during the space of two years together should lose his feu. The Lord Ordinary (*Glenlee*) ordered a special condescendance of the grounds of the defences to this action, and a condescendance was accordingly given in, stating,—1st, That the feu had been purchased on the faith of the PLAN referred to in the articles of sale, according to which York-place was to be of the same breadth from one end to the other, and from which it appeared, by certain markings, that the old houses at the east end were to be taken down. 2d, That the ground was conveyed in the charter "with free *ish and entry* to the said house "by the street now called York-place." The Defender (Respondent) therefore insisted that he had a right to retain the feu duties till the old buildings were removed, and the street of York-place completed. The answers stated, that there was free ish and entry on the west by Queen-street, and on the east by a passage admitted to be 30 feet wide, but which the Appellants contended was in fact 49 feet at the narrowest. As to the other point, it was answered, that mere lines and markings on a plan could not create an obligation, of which there was not the slightest mention in the articles of sale, in the charters, or any distinct agreement; that it could not have been reasonably conceived that the

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Action against Respondent.

Condescendance.

Answers.

May 4, 1814. Magistrates or Appellants, by such markings, could intend to come under any obligation to pull down houses belonging to individuals over whom they had no control, their power under the act of 1786 having expired: and besides, the markings could not fix the time within which the obligation was to be performed. That the plan comprehended a great part of the New Town, and was intended to exhibit the general effect in case the Magistrates should be enabled to carry into execution certain schemes which they had then in contemplation; and that, supposing an obligation could be inferred from mere markings on a plan, the markings on the plan in question were not such as to raise the inference contended for by the Respondent.

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Feb. 2, 1808. The Lord Ordinary repelled the defences, and found, that unless the Defender paid his feu duties, decree would fall to be pronounced against him; and after two representations, his Lordship decerned against the Defender, but superseded extract, &c.

Feb. 20, March 9, 1808.

Nov. 16, 1808. To these interlocutors the Court of the Second Division adhered. The Respondent reclaimed, and stated a case where the Magistrates had been prevented from going on with certain buildings which they had begun to raise opposite the present line of houses in Prince's-street, because they had represented the place as an open area, or pleasure ground, on a plan exhibited when the sites of the present houses were sold. It was also urged, that the Magistrates had neglected an opportunity that had offered of purchasing the old houses at a reasonable rate. The Court ordered a condescendance as to this latter point, which was given in and answered;

Deas v. Magistrates of Edinburgh, House of Lords, April 10, 1772.

May 23, 1809.

the Appellants contending,—1st, That the question was totally irrelevant; and, 2d, Denying the truth of the allegation. It was likewise argued, that the Appellants were not answerable for the neglect of the magistrates, supposing there had been any negligence; and as to the Prince's-street case, it was different from the present, inasmuch as the property there belonged to the Magistrates themselves. The Court however assoilzied the Defender, and decerned, reserving to the Governors of the Hospital their claim of relief against the Magistrates, and to them their defences.

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July 6, 1809.

The Appellants reclaimed, and offered to prove a new fact which had come to their knowledge,—that the dotted lines, on which the Respondent had so much relied, had been added to the plan in 1799 or 1800. The Court then pronounced the following judgment:—

Nov. 17, 1809.

"Having advised this petition, and in respect "that the interlocutor reclaimed against is founded "on the Magistrates of Edinburgh having failed to "embrace an opportunity which occurred of ac- "quiring, on terms not unreasonable, the property "necessary to complete York-place in the manner it "was held out to the feuars thereof, as destined to "be completed when such opportunity occurred, "and as meant to operate agreeably to the doctrines "of law as to mutual contracts, whereby retention "operates as a compulsitor for implement, and *loco* "*facti imprestabilis succedit dammum et interesse;* "that the interest of the petitioners is involved by "the transactions of the Magistrates; and that the "attempt now to impeach grounds in fact, on which

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"this Court sustained the obligation on the De-
"fenders, is neither made *tempestive*, or in a shape
"entitling it to regard—refuse the petition."

Against these last interlocutors the Appellants lodged their appeal.

Lord Advocate and ——— for Appellant; *Adam* and *Romilly* for Respondent.

The question important on account of the general principle.

Lord Eldon (Chancellor.) This case was important on account of the general principle which it involved; and he was therefore desirous that, before proceeding to judgment, they should see the Prince's-street case, to ascertain whether it had been decided on the points which occurred here. *Lord Mansfield* there spoke of "laying the order of the House "upon the Court below to pass the bill of suspen-"sion, that it might be conjoined with the action "of declarator, and the question of right decided." That appeared to be for the purpose merely of putting the question in a proper shape for the decision of the right. No one however could well doubt what would have been the opinion of that very eminent Judge if the question of right had been then to be decided; yet, with all due deference to that opinion, he should have liked it much better as a law authority if Lord Mansfield had confined himself to the dry question of law, without pressing upon feelings and principles of honour, with which, however familiar they might be to him as a private individual, he had, in judgment, nothing at all to do.

It would be very difficult to sustain the judgment

on the ground on which it appeared now to stand. The question was, Whether the Magistrates were bound to purchase and remove these houses? If they were, they ought to do so, whether the price was high or low; if they were not bound, the offer at a reasonable price made no difference. Unless there was some special Scotch law on that point, the judgment could not stand merely on the ground of the offer at a reasonable price, and the neglect to purchase.

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The judgment of the Court below could not stand on the ground on which it then stood,—viz. the opportunity and failure to purchase.

Then it was said, that there was an Act of Parliament authorising the purchase, and that the plan laid them under the obligation to do so. But there was no such act at the time; it had expired. *Mr. Adam* had said, that it was a private act, and that the Respondent did not know that it had expired. His answer was, that he could not then know that such an act had existed. If he recognized the act at all, he must take it with all its circumstances.

26 Geo. 3, cap. 113.

The Magistrates of Edinburgh, who ought—if it had been so agreed—to have executed this improvement, got the whole of the consideration; the feoffees of the Hospital being entitled only to the feu duty, of which they were at present deprived, without the means in this action of compelling relief from the Magistrates.

But it was perfectly wild to say that the mere exhibition of a plan was sufficient to form a binding contract. One man might purchase on the notion that the intended street would soon be completed; another perhaps with the idea that it would not. But the whole amounted to this,—'You may purchase on the notion that this plan will be executed,

The mere exhibition of a plan cannot form a binding contract.

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The feu charter was the material document.

'but all that we have any thing to do with is our 'contract.' The feuar then enters into a solemn contract, and if his contract contained nothing about this, how could he say that the Magistrates were bound by the plan. The feu charter was the material document here, and must be carefully examined. There might be such an obligation in it as that here contended for, but it appeared to him that the judgment could not rest on the ground which the Court below had taken.

Lord Redesdale. He concurred in all that had been said by his noble friend. The effect of the judgment was, that the Hospital must part with their property without consideration. It was worthy of attention, that the feu charter in several instances entered minutely into particulars, but contained nothing on this head.

The Prince's-street case, Deas v. Magistrates of Edinburgh, did not appear to be a decision on the question of right.

The Prince's-street case would be examined, but that did not appear to be a decision on the point of right. The order was merely to pass the bill, that the right might be put in a shape for being determined.

The terms of the feu grant had been attended to by neither side. It appeared to him that it, by inference at least, excluded this claim; for it contained nothing about it, though it anxiously provided for other particulars of a similar nature.

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Lord Eldon (Chancellor.) After stating the case. At this auction, or roup, various lots were sold, and Gibson bought his at what they called a slump sum to be paid to the Magistrates, reserving the feu duty for the feoffees of the Hospital. Then it was said, that the

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Magistrates were bound to complete the street as exhibited on this plan, and that the feuar was entitled to retain the feu duty till this was done. To be sure, if that was the case, the feoffees were placed in a most improvident situation; for the Magistrates, who were bound to complete the street, were paid the whole of their demand, while the feoffees of the Hospital were to have nothing till they compelled the Magistrates to perform the contract.

When this came before the Lord Ordinary, he was not satisfied that there was any thing that could be called a contract, or any such breach of faith as to preclude the Pursuers from insisting on payment of the feu duty, and therefore he repelled the defences, and, meaning to give the feuar time to pay, that he might not forfeit his feu, found, that unless he did pay, decree *would fall to be pronounced* against him. Two representations having been given in and refused, the Lord Ordinary, in stronger terms, now *decerned* against the Defender, but superseded extract, &c. To these interlocutors the Court adhered, so that the Pursuers had three interlocutors of the Lord Ordinary, and one of the Court, in their favour.

Afterwards, on application to the Court, they ordered a condescendance of the facts which the Defender averred and undertook to prove, with regard to the opportunity the Pursuers had of purchasing the houses in question at a reasonable price, and then pronounced an interlocutor in favour of the Defender, reserving to the Pursuers their claim of relief against the Magistrates, &c. The Appellants

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reclaimed, and offered to prove that certain dotted lines, which had been much relied upon by the Defender as evidence of the contract, had been added to the plan subsequent to the period at which the contract was made. But the Court adhered to its previous interlocutor, stating, that the attempt to impeach the facts on which the Court had proceeded was neither made *tempestive*, nor in a shape entitling it to regard. When Gibson, however, came with this allegation as to the neglect of an opportunity to purchase at a reasonable price, it might have been said, that that too would have been more *tempestive* if it had been brought forward at the beginning. The judgment appeared to rest on this principle,—that if the Magistrates, who had very comfortably got their money, who were not parties to the suit, and who could not by this action be compelled by the feoffees to perform, had neglected a favourable opportunity to purchase, the feoffees had no right to their feu duty. Then it was said on the one side that this neglect was proved, and on the other that it was not; and it was difficult for him to comprehend the nature of the proof. The purchase of two or three floors would hardly have answered the purpose, and in such a case the maxim *Cujus est solum, ejus est usque ad cœlum*, would not apply. But the result was, that they altered the former judgment, and decided for the Defender, reserving to the Pursuers their claim of relief against the Magistrates. This was again brought under review. It had been contended, that certain dotted lines on the plan amounted to a warranty that the Magistrates were bound to execute all

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that it offered to the eye. They offered to prove that these dots were added subsequent to the time of the contract. But the Court refused the petition, on the grounds stated in their interlocutor, (*vide ante.*)

From these two last interlocutors the present appeal was brought. There was a reference to one case where the Magistrates exhibited a plan with a beautiful view of the disposition of the grounds in front of the new buildings to be erected, a thing which was done here every day without any idea that the proprietors were to be prevented from erecting other houses merely by having exhibited a different disposition of the grounds in a picture, unless it were so stipulated in the contracts between the parties. The magistrates,—the ground being their own,—began to erect houses where they had exhibited terraces and walks. An action of declarator was brought to have it declared that the Magistrates were not entitled to erect these new buildings without consent of the feuars, and a process of suspension was also instituted to stop the progress of the work in the mean time. The Court refused to pass the Bill, and the question came to this House, where *Lord Mansfield,* who would be remembered as long as the law of England or of Scotland existed, made a very eloquent speech. But after all that he had *said,* what he *did* was merely to give an opportunity of examining the question of right. He could easily conceive that deference to his opinion had put an end to farther proceedings in that case, the Corporation having been perhaps almost frightened out of their senses by his speech; but still this was no judgment upon the question of

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right, and at any rate there was a material distinction between that case and the present. This was not a case where one restricted himself as to the free use of his own land, but where he was supposed to have become bound, without a special contract to that effect, to make himself owner of the lands of others.

Distinction between this and the Prince's-street case.

He held it in all cases to be dangerous, that when men had put their contracts into the solemn form of a charter, they should look, not at what was contained in that charter, but say that the charter should operate as if a term had been in it which was not there, merely because there had been some representation about such a condition at the time the contract was formed. He held it also to be dangerous to say, when a plan of a beautiful street was exhibited, which could not be completed till certain houses were removed, that the mere exhibition of the plan should be considered as an engagement that all that was exhibited should be done. The plan comprehended a variety of other intended improvements. Was it to be a warranty for the execution of the whole? Or, if not, where was it to stop short? One would naturally say, that merely a hope was held out. But what could be stronger than this,—that the charter expressly provided for many things being done which appeared on the plan? If the exhibition on the plan was a warranty, how came these to form part of the charter?

Dangerous to say, that when a plan of a fine street was exhibited, this should amount to an engagement that all that was exhibited should be done.

As to the point of ish and entry, unless the law was different from that of England with respect to ingress and egress, it appeared that the Respondent had ish and entry according to the engagement in the charter.

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With regard to honour and principle, it belonged to the parties themselves to consider what these required of them. He had only to declare their legal rights, and the judicial man could seldom be sufficiently well informed of motives and circumstances to enable him with safety to go farther. He dared not advise their Lordships to say that this plan was a warranty. The whole amounted to this only,—that the parties might entertain a rational hope that what was exhibited might be done in the course of improvement. But there was no ground to say that this amounted to an engagement that it should be done. With respect to their Lordships' judgment, the more temperate course would be, to remit to the Court below, so as to give the feuar an opportunity of paying the feu duty and keeping his estate.

Dangerous, when parties entered into a contract, to suffer any thing to affect it, about which there was nothing in the contract itself.

Lord Redesdale. It appeared to him to be dangerous, when parties entered into a contract, to suffer any thing to affect it which was extraneous to what was in the contract itself. There was no undertaking by the Governors of the Hospital that this street should be completed, and they could not with propriety have entered into any such undertaking; for the effect would be to deprive them of any benefit from the property, except they compelled the Magistrates to make this street.

If this was matter of contract, the contract was absolute. If they were bound at all, they were bound whatever might be the expense; and how this neglect of opportunity to purchase at a reasonable price came into question at all he could not understand. They were bound, even if the thing had been impossible,—bound so far as to be liable to answer in damages; and it was only in the form

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of damages that the Governors of the Hospital could proceed against the Magistrates. If there was a contract at all, it could not be of the nature supposed by the Court below. But he concurred in the opinion, that the exhibition of the plan was no warranty. At the same time, it was fitting that the Respondent should have the opportunity of preserving his estate.

May 26, 1814. Judgment.

Judgment.—Feu duties, to be paid within a short period, to be fixed by the Court of Session, and remit.

Agent for Appellants, SPOTTISWOODE and ROBERTSON.
Agents for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SIR JAMES GRAHAM and others, Executors of the Will of SIR WELFRED LAWSON, who was sole Executor of the Will of MRS. SARAH AGLIANBY, or LOWTHIAN - - - - - - - - - } *Appellants.*

MAXWELL and others, Representatives of LOWTHIAN - - - - } *Respondents.*

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JUS RELICTÆ.—RES JUDICATA.

To render the matter of a judgment a *res judicata*, so as to make this a valid plea, it is necessary not only that the subject and parties, but that the grounds of judgment, or *media concludendi*, should be the same. Thus, where one