COURT OF SESSION.

Thursday, July 13.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

TROUP *v.* ABERDEEN HERITABLE SECURITIES AND INVESTMENT COMPANY, LIMITED.

Property—Prescription—Title—Possession—Neighbour's Wall Used for Buildings Otherwise on Own Property.

Of two adjoining plots of ground in a town A's plot was in the original grant to C B in 1805 described as "that piece of ground or part of the Longland Croft . . . bounded . . . by the boundary betwixt the Longland and the ground lately feued off by the Master of the Trades Hospital to the Treasurer of Aberdeen, on the east," and D's plot, in a disposition dated in 1868 and recorded in 1889 as "that lot or piece of ground . . . bounded . . . by the ground feued out to the said C B by the Incorporation of Hammermen on the west . . . together with the dwelling-house . . . safe, and other erections thereon, with the pertinents. . . ."

In 1912 A brought an action against B alleging that the latter or his authors had encroached on his property and seeking to have the encroachments removed. It was proved that A's plot had been surrounded by a garden wall built entirely on his own ground, and that B's predecessors had prior to the disposition of 1869 used this wall by building upon it for the construction of their safe or strong room and their back premises and by forming a vent partly in it.

Held that B was entitled to maintain the existing state of matters, on the ground that his plot of ground as possessed on a habile title for the prescriptive period included the alleged encroachments. *Opinions per* Lord Salvesen and Lord Guthrie that, alternatively, he had by prescription acquired a servitude *oneris ferendi*. *Opinion per* Lord Salvesen that where a plot of ground is described as bounded by another it is not a bounding title.

In January 1912 Alexander Troup, wholesale stationer, Aberdeen, *pursuer*, brought in the Sheriff Court at Aberdeen an action against the Aberdeen Heritable Securities and Investment Company, Limited, *defenders*—"(First) to find and declare that the east boundary of the property belonging to the pursuer and situated No. 1 to 15 Diamond Street, Aberdeen, so far as the same marches with the property of the defenders, is the east side of the garden wall and the east side of the east gable wall of the washing-house built on pursuer's said property by his author the deceased Charles Bannerman, advocate in Aberdeen; that the said garden wall and the east gable wall of the said washing-house are the sole property of the pursuer; that the defenders or their authors have illegally and unwarrantably encroached on pursuer's said property (first) by having built the west wall of the strong room of their said property on said garden wall belonging to pursuer to a breadth of 14 inches or thereby for a length of 15 feet or thereby along said wall; (second) by having built the west gable of the back wing of the house on their said property partly on the said garden wall and partly on the east gable of pursuer's said washing-house, to an extent varying from 9 inches to 14 inches or thereby in breadth for a length of 20 feet; and (third) by breaking into the wall of said washing-house and garden wall, and having built therein a vent to a fireplace in a room in the house on their said property; and (second) to ordain the defenders within such time as the Court may appoint to remove all of said encroachments and to restore said garden wall and gable wall so far as the same have been damaged by said encroachments or the removal thereof to a good and sufficient state of repair to the satisfaction of an architect or surveyor to be appointed by the Court for that purpose, and failing the defenders removing said encroachments and restoring the said garden and gable wall to the satisfaction of the said architect or surveyor as aforesaid, to grant warrant to the pursuer to have the whole work of removal and restoration carried out at the cost of the defenders under the supervision of an architect or surveyor to be appointed by the Court; and to find the defenders liable to the pursuer in the costs so to be incurred, and to decern therefor, and to find the defenders liable in expenses, and to decern therefor."

The defenders pleaded—"(2) The defenders and their authors having possessed the subjects before described for the prescriptive period under a habile title ought to be assoilzied. (4) The defenders having acquired by prescription a servitude right of support should be assoilzied."

The titles to the properties, so far as necessary, are given *supra in rubric*, the position of matters as regards the contact of the two properties appears from the *conclusions of the summons* (*supra*), and this position was proved to have existed for many years, certainly from prior to 1868.

On 18th June 1914 the Sheriff-Substitute (YOUNG) pronounced the following interlocutor:—"Finds (1) that the pursuer is proprietor of the subjects forming No. 1 to 15 Diamond Street, Aberdeen, and the defenders are proprietors of Nos. 4 and 5 Union Terrace, lying immediately to the east of pursuer's property; (2) that the garden wall and washing-house, particularly mentioned in the initial writ, were built early last century entirely upon ground which then belonged to the pursuer's author, Charles Bannerman, advocate, Aberdeen, and now belongs to the pursuer as part of his said property; and (3) that the defenders have not proved that for the prescriptive period they have been in the full

and exclusive possession of the walls in dispute—the garden wall and the east wall of the washing-house—and the ground on which these walls are built: Finds and declares that the said garden wall and the said washing-house belongs solely to the pursuer, and that the east boundary of the pursuer's said property, so far as it marches with the property of the defenders, is the east side of the said garden wall and the east side of the east gable of the said washing-house: Finds that the defenders or their predecessors have unlawfully encroached on pursuer's said property (1) by building the west wall of their strong room on the said garden wall to a breadth of about 14 inches and for a length of about 15 feet; (2) by building the back wing of their house partly on the said garden wall and partly on the east gable of the said washing-house to an extent varying from 9 inches to 14 inches or thereby in breadth and for a length of about 20 feet; and (3) by breaking into the wall of the washing-house and into the garden wall, and building a vent for a room in the said back wing: Finds that it is not proved that the encroachments were made with the consent or acquiescence of the pursuer or his authors, but they have allowed the matter to stand over for many years, and removal of the structures which encroach would mean much expense to the defenders without a corresponding benefit to the pursuer: Therefore meantime sists the cause that an opportunity may be had for considering an alternative remedy or some adjustment of the rights of parties."

On 16th October 1914 the Sheriff-Substitute pronounced the further interlocutor:—"On the motion of the pursuer, and in respect no opposition is offered on behalf of the defenders, ordains the defenders, within one month from this date, to remove all the encroachments complained of, and to restore the garden wall and gable wall of the pursuer's property so far as the same have been damaged by said encroachments or the removal thereof, to a good and sufficient state of repair, to the satisfaction of John Cameron, architect in Aberdeen, and failing the defenders removing said encroachments and restoring the said garden and gable wall to the satisfaction of the said architect, as aforesaid, grants warrant to the pursuer to have the whole work of removal and restoration carried out at the cost of the defenders under the supervision of the said architect: Finds the pursuer entitled to expenses on the higher scale, including a special debate fee of seven guineas," &c.

The defenders appealed, and argued—(1) What was alone required of the defenders was uninterrupted possession for the prescriptive period of twenty years of their property as claimed — *Houston* v. *Barr*, 1911 S.C. 134, 48 S.L.R. 262; *Cooper's Trustees* v. *Stark's Trustees*, 1898, 25 R. 1160, 35 S.L.R. 897; *Young* v. *M'Kellar Ltd.*, 1909 S.C. 1340, 46 S.L.R. 952. The safe and back room were erected in 1857 and were to-day as they were then. Any violation of the pursuer's property had thus been acquiesced in, and it was not open to him fifty-five years later to bring a belated challenge. The defenders' title, dated 21st December 1868, contained a description capable of carrying the property as claimed, and must be construed in accordance with the prescriptive possession which had followed; and no reference was possible to titles granted prior to the prescriptive period—*Auld* v. *Hay*, 1880, 7 R. 663, 17 S.L.R. 465; *Forbes* v. *Livingstone*, 1827, 6 S. 167, *per* Lord President Hope at p. 172. The defenders' titles were not bounding titles—*Young* v. *Carmichael*, 1671, M. 9636; Stair, Inst., ii, 3, 26, ii, 3, 73. The case of *Reid* v. *M'Coll*, 1879, 7 R. 84, 17 S.L.R. 56, was not here against the defenders, and in any event it had been doubted in *Education Trust Governors* v. *Macalister*, 1893, 30 S.L.R. 818; see also *Houston* v. *Barr*, *supra*. The cases of *Brown* v. *North British Railway Company*, 1906, 8 F. 534, 43 S.L.R. 327; *Hutton* v. *North British Railway Company*, 1896, 23 R. 522, 33 S.L.R. 357, relied on by the pursuer; *and Meacher* v. *Oliphant*, 1913 S.C. 417, 50 S.L.R. 373, did not apply. The defenders had enjoyed continuous possession of the subjects, and it was not material that the latter were not contiguous with the ground. (2) Alternatively, there being peaceful possession from the date of the erection of the buildings down to the raising of the action and acquiescence in the erection of said buildings, a servitude right of support had been acquired for said erections as in the case of flatted tenements —*Sanderson's Trustees* v. *Yule*, 1898, 25 R 211, 35 S.L.R. 140. If the right of support could be acquired for a whole flat, *a fortiori* could the right of support be acquired for one wall of a flat. The right of the pursuer to have the wall removed had been lost by acquiescence. (3) There had been no interruption—Act 1669, cap. 19; Act 1696, cap. 19; Ersk., iii, 7, 40, 43, 44; Land Registers (Scotland) Act 1868 (31 and 32 Vict. cap. 64), sec. 15.

Argued for pursuer—The defenders' title was a bounding title. The boundary line between the defenders' and the pursuer's lands could still be clearly identified, as the original garden wall was extant. This in itself was enough to prevent the defenders prescribing beyond the line of the boundary —*Reid* v. *M'Coll* (*cit. sup.*); *Brown* v. *North British Railway Company* (*cit. sup.*); *Hutton* v. *North British Railway Company* (*cit. sup.*) The defenders were bound to produce evidence of exclusive possession, and this they had failed to do — *Earl of Fife's Trustees* v. *Sinclair*, 1849, 12 D. 223. The wall in question had belonged exclusively to the pursuer, and the defenders never enjoyed the exclusive occupation necessary to found prescription. The encroachments to which the defenders now wished to ascribe an exclusive right of property were encroachments on the top of the wall, and not in reality on the *solum* under the wall. No encroachments had been made on the *solum*, and therefore there could be no claim of property in respect of erections built on a wall on the top of unviolated *solum*. (2) The law of tenement did not apply. No grant of rights in the *solum*, which the law of tenement presupposed, had been made here — Rankine on Land-

ownership (4th ed.), 662 and 665. No right of support had been established here by the defenders. The servitude of *oneris ferendi* was no more than the natural right of support—*Dalton* v. *Angus*, 1881, 6 A.C. 740, *per* Lord Blackburn at p. 808, *per* Lord Selborne, L.C., at pp. 791 and 793, and *per* Lord Watson at p. 830; *Humphreys* v. *Brogden*, 1850, 12 A. & E. 739, *per* Lord Campbell at p. 756. When the defenders' author built the safe and other erections over the soil belonging to the pursuer said buildings passed to the pursuer as owner. The wall was *pars soli*, and anything built thereon went to the pursuer. (3) In any event there had been interruption—*Earl of Fife's Trustees* v. *Sinclair*, *supra*.

LORD JUSTICE-CLERK—I am of opinion that the proof is sufficient to establish that the eastern boundary of the pursuer's property was originally on the line of the east faces of the washing-house wall, the garden wall, and the stable wall. These walls appear to have been all erected at or about the same time, viz., between 1808 and 1814, and I am satisfied that they were erected by the pursuer's author and on ground which belonged to him. I can find nothing in the proof or titles sufficient to justify the assumption (for it is nothing more) that Bannerman in erecting these walls trespassed to any extent on the ground then belonging to the new street trustees of Aberdeen.

But while this is my opinion I cannot concur in the findings in the Sheriff-Substitute's interlocutor that the defenders have encroached, as the pursuer alleges, on his property so as to entitle him to have these encroachments removed. On the contrary, I am of opinion that the finding in the Sheriff-Substitute's original interlocutor, of 30th May 1912, "that the defenders and their authors have possessed for the prescriptive period under a habile title the subjects which are alleged to constitute an encroachment on the pursuer's property," should be affirmed, and that we should sustain the second plea-in-law for the defenders.

It is really not disputed that the alleged encroachments have existed for more than the prescriptive period. But it is said (*a*) That the defenders' title is a bounding title, and he is seeking now to acquire by prescription what is beyond his boundary. To make this out, however, the pursuer has to go back to the titles in the first or second decade of the nineteenth century. But the defenders take their stand on their title of 1868, recorded in 1889. That title gives the defenders the safe and other erections on the ground. I think that the disposition of 1868 can "be so construed as to embrace the entire subject," including the encroachments complained of, and following what was laid down in *Auld* v. *Hay*, 7 R. 663, and in *Cooper's Trustees*, 25 R. 1160, particularly by Lord M'Laren, I am of opinion that the defence is made good. (*b*) That there has been no possession of the ground under the alleged encroachments. In the strict sense this was not disputed, but the walls complained of have remained as they are now, enjoyed by the defenders as their property with possession of the requisite character and duration. It may be that they have been supported by a wall originally and still belonging to the pursuer or his authors, but in view of the possession enjoyed by the defenders and their authors the pursuer in my opinion cannot now complain of them as encroachments or treat them as other than the property of the defenders.

In my opinion the same principles with the same result apply to the vent. It is possible to have legal property in air space —*Duke of Hamilton* v. *Graham*, 9 Macph. (H.L.) 98—and such property is in my opinion subject to the ordinary legal incidents of property, including its liability to be acquired by prescriptive possession. The defenders of course can only acquire in property what they have actually possessed for the prescriptive period.

The result in my opinion therefore is that the pursuer is entitled to have the eastern boundary of the ground belonging to him declared to be substantially as he desires, but that the defenders, in respect of their prescriptive possession on a habile title, should be assoilzied from the remaining conclusions of the summons.

LORD DUNDAS—[*After referring to the titles and to the evidence in the case*]—I think, therefore, that the pursuer is entitled to have the first and second findings in the interlocutor of 10th June 1914 affirmed.

But assuming this to be so it does not follow that the defenders and their authors must be held to have illegally encroached upon the pursuer's property. The defenders allege that the existing condition of things as regards the walls and buildings has existed for far more than the prescriptive period, and that for more than twenty years prior to this action they have had open, continuous, and exclusive possession of the structures now complained of, and that in virtue of title and infeftment habile as a basis for prescription. It is, therefore, they say, idle for the pursuer to attempt, by reference to his earlier titles—especially to the disposition by Bannerman to Hadden in 1814—or otherwise, to establish that the defenders' title to their land, bounded, *inter alia*, "by the ground feued out to the said Chas. Bannerman by the Incorporation of Hammerman in the West," is truly a bounding title, their western boundary being the east side of the walls erected by the pursuer's authors at the eastern march of his property. I think that as a matter of law the defenders' argument is right, and indeed the pursuer's senior counsel in his speech in reply seemed disposed to concede this, and to base his attack rather upon the special grounds to which I shall presently allude. I do not know that the law on this matter has ever been expressed more correctly and succinctly than it was by Lord M'Laren in *Cooper's Trustees* v. *Stark's Trustees*, 1898, 25 R. at p. 1167—a case decided by seven judges. His Lordship said that "according to the best and most recent legal authorities

on this subject, it would appear that if a party founds on a prescriptive title, and if that title is susceptible of the meaning he puts upon it, or if it can be read in a manner consistent with the possession which has followed upon it, all inquiry into antecedent titles is excluded, whether for the purpose of giving a more limited construction to the grant, or for any other purpose inimical to the prescriptive title which is set up." Now the defenders found particularly upon a disposition, dated in 1868 and recorded in 1889, conveying to their authors all and whole the lands therein described, bounded, *inter alia*, "by the ground feued out to the said Chas. Bannerman by the Incorporation of Hammermen in the West," "together with the dwelling-house and office No. 7 Union Terrace, safe, and other erections thereon, with the pertinents and whole fixtures upon the premises. . . ." They say, and I think rightly, that this title is clearly "susceptible of the meaning" they put upon it, viz., as including the "safe" or strong room, and "other erections," *e.g.*, the western wall of their back wing; that it certainly "can be read in a manner consistent with the possession which has followed upon it," for the description of their western boundary, above quoted, fits accurately with their present contentions, and that "all inquiry into antecedent titles is excluded," *e.g.*, for the purpose of showing—what they deny could, in any event, be shown—that their title was truly limited to land expressly bounded by the eastern side of the pursuer's wall. It may very well be, but the point is not here material, that the position might have been different if the description in the conveyance of 1868 had expressly referred to a particular deed of earlier date, wherein a bounding description had been clearly set forth. Now it cannot be disputed that the physical condition of things, so far as the structures complained of are concerned, has been what it is now for a period of far more than twenty years prior to the date of this action. It seems to me, therefore, that the defenders' case, founded upon prescriptive possession, is conclusive, unless it can be defeated upon one or both of the grounds now to be referred to, which was strongly relied upon by the pursuer's counsel.

It was urged, in the first place, that the defenders' possession had not been exclusive, because, assuming that they had made some use of the wall by their heightening operations, the pursuer and his authors had made as much or more use of it, seeing that it had been built and ever since maintained as the wall of their garden and other premises. I think this reasoning is fallacious. It is not the use or possession of the wall as a wall that is in question, but the possession or enjoyment of the structures in and upon it which the defenders' authors made and which they and the defenders alone have possessed and made use of.

But the pursuer's counsel further argued that the structures forming the subject-matter of the alleged encroachments are not such as could legally be acquired by prescription, because they are not situated upon the *solum* of the earth, but merely built on the top of the pursuer's wall. I am not able to assent to this view. A subject may, I apprehend, be acquired by prescriptive possession though it is not in immediate contiguity with the earth's surface, *e.g.*, any given storey of a house or a part thereof above the ground flat, or a cellar (or the like) below the surface of the *solum*. The subjects which the defenders claim to have acquired in property are not mere sporadic portions or fragments of brick or other building; they are structures made for and enjoyed as the practical back walls of substantial premises. I do not see why such subjects should not be acquired in the same way and by such possession as any other heritable property may be.

I think therefore that the pursuer's case fails as regards his conclusions, declaratory and for removal, with reference to the alleged encroachments first and second specified in his initial writ. I have not hitherto said anything about the "vent," which is founded on as a third encroachment. I confess that I have found great difficulty in understanding clearly from the record or the proof, or (I may add) from the arguments, the exact nature of the operation complained of, or the precise legal grounds upon which it is objected to. I am content, however—the more so as I understand your Lordships are all prepared—to treat this minor matter on a similar footing with the two alleged "encroachments" already specially dealt with, and for similar reasons. I may add that the pursuer's counsel did not press this point with much vigour, though I am not sure that they definitely abandoned it.

If the opinions which I have expressed are sound, it is unnecessary to consider the defenders' alternative case, based upon alleged acquisition, by prescriptive use for forty years, of a servitude right of support. This view is presented on record by a plea-in-law, but so far as I can see by no averments at all. It is indeed inconsistent with the defenders' statement on record that the alleged encroachments are "entirely on the defenders' ground." I doubt whether their case on servitude could in any event have been sustained in this state of the pleadings.

It may be right to add, for the sake of completeness, that the defenders' counsel definitely elected, as I gather they had done in the Court below, to make no counter-suggestion or alternative argument as to any form of equitable remedy as against the pursuer's motion for removal if the Sheriff-Substitute's interlocutors should be otherwise affirmed.

LORD SALVESEN—[*After referring to the titles and to the evidence*]—On the evidence I think that if the question had been raised at the time when the buildings were put up the pursuer's authors would have been entitled to interdict against any use being made of the wall by these buildings, on the ground that the wall was their exclusive property.

Assuming the facts to be as stated, the defenders nevertheless plead that they have possessed these parts of the original wall, which are said to be encroachments, for more than twenty years on a habile title, and have thus acquired a right of property in them by prescriptive possession. The title on which the defenders maintained this argument is the disposition by Patrick Davidson and others to Alexander Davidson and James Garden. That disposition bears to convey the property now called 6 to 7 Union Terrace, and describes the property as being bounded on the west "by the ground feued out to the said Charles Bannerman by the Incorporation of Hammermen." The disposition also expressly conveys "the dwelling-house or office No. 7 Union Terrace, safe, and other erections thereon, with the pertinents and whole fixtures upon the premises." As the buildings in their present state were all then erected, the disposition covers the buildings now on the ground. That they have been exclusively possessed since that date is matter of admission, subject to a contention in law on which the Sheriff-Substitute founds his decision against the defenders, and which was more fully developed in the argument for the pursuers, namely, that exclusive possession was legally impossible, seeing that the part of the wall on which the defenders' buildings rest also serves as a division wall between the properties, and the *solum* on which the wall rests must therefore be held to have been in the joint possession of both proprietors. I find myself quite unable to accept this view. The defenders have had as full possession of the part of the wall which they have used as if it had been built by themselves, and it would not have affected their right of property in the wall even if there had been cellars below which communicated with the adjoining property and had been used solely in connection with it. It is not necessary to the acquisition by prescriptive possession of a right of property in a heritable subject that the *solum* upon which it rests should be possessed *a cœlo ad centrum*. Concrete illustrations of heritable rights which do not need such possession are flatted tenements, which have only a common interest in the *solum* on which the tenement is built, or a line of pipes which only possess by displacement the small part of the *solum* in which they are laid. While the buildings of the defenders rested on the wall in question, the pursuer and his authors were excluded from using that portion of the wall as they might otherwise have done for building upon it. If it were necessary for the decision of this case I should hold that the *solum* of that part of the wall also belongs entirely to the defenders by their prescriptive possession on what I have assumed to be a habile title. The pursuer, no doubt, possessed the other portion of the wall on which there were no buildings, because it was originally built on his ground and continued to serve the purpose of an enclosing wall, but its use as such was in no way impaired by the use which the defenders' authors made of the remainder for the purpose of carrying their buildings.

It was, however, contended that the defenders' title was a bounding title, and so prevented them from acquiring any subject beyond the specified boundaries. The doctrine itself is well fixed in our law, but there is sometimes a difficulty as regards its application and as to what constitutes a bounding title. Here the boundary in the title founded on is simply described as the ground feued out to Charles Bannerman. It may be that this description refers one back to the feu-charter of 1805 in favour of Mr Bannerman, but that does not advance the pursuer's argument, because the eastern boundary of Mr Bannerman's feu is simply described as being the ground feued off by the master of the Trades Hospital to the Treasurer of Aberdeen on a part of which the defenders' property is built. Now when two properties are described as being bounded by each other, the line is not one which can be definitely ascertained from the titles alone even after an examination of the ground itself, and as at present advised I am unable to assent to certain dicta of Lord Justice-Clerk Moncreiff in the case of *Reid* v. *M'Coll*, 7 R. 84. There is no fixed or indubitable line such as, according to Erskine's definition, is necessary for a bounding charter. Such a fixed line need not be anything that is visible upon the ground, for it may be a parish boundary, or a line stretching from one fixed point to another, both outside of the limits of the property. The boundary in this case is just the kind of boundary which is best defined by immemorial possession, and which admits of encroachments by either of the proprietors into his neighbour's property, provided such encroachments have been exclusively possessed for the prescriptive period. The test is whether the ground as possessed fits the description in the title on which possession has followed, and that, I think, is clearly the case here. The case of the *Education Trust*, 1893, 30 S.L.R. 818, is an excellent illustration of the way in which the law, as I hold it to be, has been applied. There is no reason to challenge the soundness of the decision in *Reid* v. *M'Coll*, for Lord Ormidale based his judgment on the facts, holding that prescriptive possession of the ground in dispute had not been established, and in any event because the ground claimed did not fit the description contained in the title. Instead of being bounded, as the title described it, by the lands of A, the claim involved that the ground embraced in the title absorbed the lands of A and was now bounded by the lands of B. I am therefore of opinion on this ground also that the pursuer fails.

A further argument was maintained to the effect that the running of the prescriptive period had been interrupted by a correspondence which took place between the agents of the pursuer's authors and Messrs Davidson & Garden, who represented the then owners of the defenders' feu. In the view that I take of the case this point has no materiality, for the last protest was made in 1873, and there has been much more than twenty years' possession since that date. In

any event, as no notarial protest was recorded, it would seem that the correspondence cannot be founded on as in a question with singular successors like the defenders, who had no notice of it, and acquired on the faith of the titles. The old Scots Act 1696, cap. 19, seems to make this plain.

In the view which I have taken it is unnecessary to consider the alternative argument presented for the defenders that they had, at all events, acquired by prescriptive possession for forty years a servitude *oneris ferendi*. Mr Blackburn, for the pursuer, strenuously argued that the only example of this in Scots law is to be found in the case of flatted tenements. In my opinion this forms a special branch of the law relating to this servitude and is not a pure example of it. A typical illustration of this servitude is just the one we have here, namely, where one proprietor builds on a wall or pillar belonging to his neighbour and partly supports his own buildings thereon. The case of *Dalton* v. *Angus*, 6 App. Cas. 74, was strongly relied on, but so far from supporting the pursuer's argument it negatives it. Lord Chancellor Selborne says—"The servitude so denominated (*ut vicinus onera vicini sustineat*) in the Roman law was exclusively 'urban'—that is, relative to buildings, whether in town or country—and the instances of it given in the Digest refer to rights of support acquired by one proprietor for his building or part of it upon walls belonging to an adjoining proprietor. But, in principle, the nature of such a servitude must be the same whether it is claimed against a building on which another structure may partly or wholly rest, or against lands from which lateral or vertical support is necessary for the safety and stability of that structure." Lord Watson said—"I am unable to regard the right of support of a building, whether lateral or vertical, as a negative easement, and I concur with the observations which have been made upon that point by the noble and learned Lord on the Woolsack, as well as by Lindley and Bowen, JJ. It appears to me to be as truly a positive easement as the well-known servitude *oneris ferendi* when a wall or beam is rested on the servient tenement." In these passages both the noble and learned Lords refer to just such a case as we have here as the most ordinary illustration of the servitude *oneris ferendi*. It is true that there are very few recorded cases where the matter has been discussed, but I think that is easily explained by the unanimity amongst the institutional writers on the subject. For the constitution of such a servitude forty years' possession is still essential, and the period is sufficiently long to give ample opportunity for objection, and it is only after its expiry that the right is constituted and becomes unchallengeable. On this separate ground therefore, had it been necessary, I should also have been of opinion that the defenders are entitled to absolvitor from the operative conclusions of the summons.

LORD GUTHRIE—The defenders on record assert that the wall along their western boundary stands entirely on their grounds. The Sheriff-Substitute devotes the greater part of his opinion to a consideration of the question thus raised, and I agree with him in negativing the defenders' contention, and in holding it established that the wall in question is the wall erected by the pursuers' author Charles Bannerman between 1805 and 1814, and expressly conveyed in his earlier titles. The defenders' case on prescriptive possession and their alternative case on servitude of support, for both of which there are pleas, but in the one case no specific averment and in the other case no averment at all, is dealt with very shortly by the Sheriff-Substitute. Their case on prescriptive possession seems to me attended with formidable difficulties, but on the whole I agree with the result at which your Lordships have arrived. Their case on servitude of support, however, seems to me free from difficulty. It is rejected by the Sheriff-Substitute, first, because it involves a right of support beyond the limit of their property, and second because what is claimed as entitled by prescription to support was originally an encroachment. But these two elements are necessarily present in all cases of alleged servitude of support, whether *oneris ferendi* or *tigni immittendi*. Unless it be held, which I do not think it can, that there is no difference between these two servitudes, the present seems to me a clear case of the servitude of support called the servitude *oneris ferendi*.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutors of the Sheriff-Substitute, dated 18th June and 16th October 1914: Find of new (1) that the pursuer is proprietor of the subjects forming Nos. 1-15 Diamond Street, Aberdeen, and the defenders are proprietors of Nos. 4 and 5 Union Terrace, lying immediately to the east of pursuer's property, and (2) that the garden wall and washing-house particularly mentioned in the initial writ were built early last century entirely upon ground which then belonged to the pursuer's author Charles Bannerman, advocate, Aberdeen, and now belongs to the pursuer as part of his said property: (3) Find further that the defenders and their authors have duly possessed for the prescriptive period under a habile title the subjects which are alleged to constitute illegal encroachments upon the pursuer's property. Sustain the defenders' second plea-in-law: Assoilzie them from the conclusions of the initial writ so far as they seek declarator that the defenders or their authors have illegally and unwarrantably encroached upon the pursuer's property and for removal, and decern. . . ."

Counsel for Pursuer and Respondent—Blackburn, K.C.—Wark. Agents—Alex. Morison & Company, W.S.

Counsel for Defenders and Reclaimers—Chree, K.C.—Dykes. Agents—Martin, Milligan, & Macdonald, W.S.