must be made out on the strength of the evidence of the party who alleges it.

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Verdict—"For the defender."

Jeffrey, D. F. and *Shaw,* for the Pursuer.
Hope Sol.-Gen., Forsyth, and *Cockburn,* for the Defender.
(Agents *A. P. Henderson,* and *Daniel Fisher.*)

PRESENT,

LORD MACKENZIE.

1830.
Feb. 22.

HATTON *v.* PEDIE.

Findings for the defender on questions as to the obligations by a superior in a town to make up a street, &c. to his vassal.

THIS was an action of damages by a feuar in Edinburgh against his superior, for not making up a street,—for neglecting to adjust the boundary of the feu with a neighbouring property,—for delay in furnishing a plan of the houses to be erected.

DEFENCE.—The pursuer was bound to make up the street opposite his own feu, and there is no practice laying it on the defender. The defender gave the pursuer the full extent of ground purchased *within* his own property. The defender furnished a plan which was not objected to till this action was brought.

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ISSUES.

1. and 2. Whether the defender wrongfully failed to make up the street opposite the unfeued stances in the street, in breach of the original agreement and a subsequent promise?

3. and 4. Whether he promised, and wrongfully failed, to make up the road opposite the ground feued by the pursuers? And whether the pursuer made it up, and the defender wrongfully removed it?

5. and 6. Whether the defender wrongfully failed to adjust the march,—and promised, but failed, to put the pursuer in possession on 2d May 1825?

7. Whether he failed to furnish the plans.

Rutherford opened for the pursuer, stated the facts, and contended—That a person feuing ground was bound to make up a street, and give access to it. By the conduct of the defender the pursuer has been kept eighteen months out of possession.

A report by an architect read to prove that he made such a report.

When a report by Mr Brown, the architect, was produced,

Cockburn objected.—This is not evidence.

Rutherford.—We are entitled to read this, to prove the report made, as it is admitted to

be genuine, though it may not prove the facts stated in it.

LORD MACKENZIE.—You may read it to that effect.

Evidence of practice admitted as to a matter not provided for in a contract.

When evidence was tendered of the practice of superiors making up the street opposite unfeued stances,

Cockburn objects.—This is incompetent, as there was here a written contract, and that contract provides that it is to be done by the feuars.

Bell.—The only obligation on the feuar is opposite his own feu, and the superior is bound to give free ish and entry, and by the universal practice he is bound to do what common sense shows to be necessary.

Cockburn.—The objection here does not relate to the obligation on the defender to give access, but to laying on him additional obligations by the practice of other builders.

LORD MACKENZIE.—There was no understanding by the Court that this was excluded by the issues given; on the contrary, it is left open. A case has occurred not provided for by the contract. This is a forced street, and each feuar is bound to make it up opposite to

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his own feu. If the whole had been feued, then each was bound to make it opposite his feu, but here it is not all feued, and this case is not provided for in the contract. As it is not in the contract, it is left to the understanding between the parties, and in proof of this, evidence of the practice may be given. It might be argued without proof of the practice, but the practice may be proved in aid of the contract.

Incompetent to prove a substantive promise as to land by a letter to which no written answer was returned.

A letter by the feuars, to which no written answer was returned by the defender, was rested on in proof of the promise in the second issue.

Cockburn.—A verbal communing is not binding in reference to land.

Bell.—This is an accessary obligation, and a subsequent promise to execute what he was previously bound to execute.

LORD MACKENZIE.—This is admitted to relate to the promise in the second issue, and I think it inadmissible, as it is incompetent to prove a substantive promise by parol. Receiving this would be admitting proof of an agreement by a party in his own favour.

Cockburn opened for the defender.—The

pursuer when he took this feu saw that the space was open, and must have laid his account with inconvenience till his houses were completed. It is said the pursuer had right to this by practice; but he has only proved that the street must be made when the houses are inhabited, and that till then, access is all he can claim, and he had access. The cellars opposite were begun as soon as the pursuer made his. You must attend to the terms of each issue, and not say generally whether you give damages.

Bell, in reply, stated the facts, and said, The defender is bound either to build the cellars, or form a road opposite the unfeued stances,—to adjust the boundary, that the pursuer may get a mutual gable,—and to furnish a plan. He acted wrongfully in reference to the pursuer, as he did him a positive wrong; and it is not necessary to make out that he acted culpably or maliciously.

LORD MACKENZIE.—Much time has been occupied in this case, and I shall therefore proceed at once to the issues.

That the pursuer was to build, must be found in the affirmative. Much evidence has been

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given on the latter part of the issue, as to the defender building the cellars; but there is no clause in the contract binding him to do any thing where the ground is not feued. When a contract is vague, proof of a universal practice by superiors is material in construing the contract, but in this case you will have to consider whether more is proved than that a superior makes the street when the houses are ready for living in, and whether, till then, the pursuer can claim more than access, which was given in this case. There is strong reason for the practice, and I conceive the law is the same as the practice, and that in this case the defender was bound to give a road, but as the house was not built, that he was not bound to make a street. There is contrary evidence as to the state of the road, which you must consider. There was a total failure of evidence on the second issue, and on the third the question is on the failure by the defender. On the fourth, I do not think much injury was done.

On the fifth, two views of the contract may be taken, the one that the defender was to give the feu as soon as the neighbouring proprietors agreed to settle the march, and no time is limited,—the other is, that it was to be done immediately. It appears to me that this is an un-

dertaking to settle it with little delay. He was bound to settle it in reasonable time, or to give some other line, and pay the damage of the change. The line was not fixed, but on the other side it appears that the pursuer took possession. He has got the same quantity of ground, but says he is deprived of a mutual gable, which was shown on the plan; but you will observe that the feu is said to be bounded by a line, and the defender stipulates that he is not bound by the plan beyond his own property, and he did not warrant a mutual gable. On the sixth issue, there is a failure of evidence; and on the seventh, the only delay after demand is from August to March, and no damage has been proved as arising from it.

You will return specific answers, finding for the pursuer or defender on each issue, and if you find for the pursuer on any, you will fix the damages.

Verdict—"For the defender on all the issues."

R. Bell and *Rutherford*, for the Pursuer.
Cockburn and *P. Robertson*, for the Defender.
(Agents, *H. Fotheringham*, W. S., and *James Pedie*, W. S.)