by evidence. He says that it cost him £10 a-year. He puts a brother fisherman into the witness-box, who estimated the outlay for a boy in that rank at £11 or £12 a-year. I can only say that if the son of a fisherman at Wick costs his father £11 or £12 a-year, fishing at Wick must be a much better trade than is generally supposed. But the claim for £66 is quite capable of probation, and requires probation. It was not to be presumed like the other. It was for the pursuer to show that he had disbursed the money for maintenance, education, and clothing of the boy. There is not a tittle of evidence for any of these items. The boy says that he was to a great extent able to maintain himself, and no attempt is made to shake his evidence. But this is not necessary for the defender's case, and I am willing to leave it out of account. The burden lay on the pursuer, and it is no very heavy burden, to prove that he made the disbursements. The presumption is the other way. It is natural to suppose that when the boy came to that age he was able to do something for himself.

LORD DEAS—I think that both parties behaved very well before they got into this unfortunate litigation. The letters of the defender are creditable to him, and, on the other side, the woman and her husband behaved well to the boy, and he seems to have got a very fair education. But this action cannot succeed. There is no doubt that £4 a-year is a reasonable aliment for the first seven years, and, moreover, I think that it was agreed on. When we come to the end of the seven years, there is not just the satisfactory proof of the defender's offer to take the child that might be desired. I think that the wife was unwilling to part with the child, and the husband, much to his credit, was willing to indulge her; and so the matter was allowed to drop.

LORD ARDMILLAN and LORD KINLOCH concurred.

Defender assoilzied.
Agent for Pursuer—J. A. Shield, S.S.C.
Agent for Defender—William Mitchell, S.S.C.

Thursday, February 23.

SECOND DIVISION.

YOUNG *v.* GUTHRIE.

Property—Gable—Conterminous Proprietor—Superior and Vassal. The superior of two conterminous feuars bound each of them to build a house within two years after acquiring the feu, and to gable together. *Held* that one feuar who had built a house had no right to compel his neighbour, who had not built a house, to pay half the expense of the mutual gable, and that the obligation to build was enforcible by the superior only.

This was an action by James Guthrie, builder in Stirling, against William Young, residing in Stirling, concluding for payment of £37, 18s. 2½d., being a half of the expense of the north gable of a dwelling-house, and of £7, 14s. 5½d., being a half of the expense of the garden wall running westward in a line with said gable, lying on the south side of Cowane Street in Stirling, both gable and wall having been built by the pursuer, and they and the relative ground being marked No. 40 on the plan of the lands there of Cowane's Hospital in Stirling, and belonging to the pursuer. The defender had acquired right to the piece of ground next to the pursuer's feu, but had erected no building upon it. The defender's author had acquired the piece of ground at a public sale from Cowane's Hospital, conform to articles of roup and minutes and additions thereto, in 1852. By these articles of roup and additions, and minute of sale annexed thereto, it was provided that a dwelling-house should be built on said lot within two years after, and it was also provided that the houses to be erected should gable together.

The Sheriff-Substitute (SCONCE) found—"That the pursuer's house is in the contemplated position, and that the defender is bound to gable with him; and further, that as by the articles the feuars are bound to gable together, and that as the pursuer has, in pursuance thereof, erected a mutual gable between the defender's lot and his, he has a good title to sue for half gable; that the conditions of sale being that the lots shall be sold for building purposes, and that the purchasers of lots shall erect dwelling-houses within two years; and the defender is now bound to pay the pursuer for the half of the said mutual gable. As to the half of the boundary walls claimed, that the fence stipulated in the articles and minutes, and even in the pursuer's own disposition, being a hedge, the defender is not liable to the pursuer in half of the expense of the walls which he has thought proper to build, and assoilzies the defender from the claim therefor."

The Sheriff (BLACKBURN) found—"That on a sound construction of the original articles of roup of 1802, as altered and added to by subsequent minutes, and in particular by the minute of roup of 11th February 1837, the defender is not bound to build on his said lot within any limited time, and therefore finds that he is under no special contract with the pursuer at present to pay for the said mutual gable; and to that effect and extent alters and recalls the interlocutor of the Sheriff-Substitute appealed against; and *quoad* the pursuer's present claim for payment of the half of the expense of the mutual gable, sustains the defender's appeal, and dismisses the action."

The pursuer appealed.

GUTHRIE SMITH and R. V. CAMPBELL for him.

SHAND and ASHER for respondent.

The following cases were referred to in the discussion:—*Earl of Moray*, 21 D. 33, Bell's Dec. (Ross), p. 403; *Wilson*, H. L., 12th July 1870; *Thorburn*, 10 S. 822; *Law*, 18 D. 125.

At advising—

LORD BENHOLME—Both the pursuer and defender may be stated to be conterminous feuars under a feuing plan granted by the patrons of Cowane's Hospital. This feuing took place under articles of roup in 1802, which contain the following condition in the 5th article—"That the purchasers shall be obliged within two years after their entry to build upon each of the lots feued by them respectively a neat dwelling-house, covered with Easdale slates, at least two storeys high, with hewn doors and windows, and to have entries through the middle of them to the ground behind, where all dung-steads are to be kept. That the houses shall be built fronting the street, and gabelling together agreeable to the plan; and failing of the feuars building a house upon each lot, and laying out the ground in manner foresaid, their lots shall revert to the hospital, and be at the disposal of the patrons, and

the feu-rights shall *eo ipso* be void and null, and the feuars shall forfeit £10 sterling for each lot, and the expense of a process of a declarator, if found necessary." Now, this feuing went on, and various minutes were subjoined to the articles. It was contended that, in virtue of these minutes, the original condition, that the feuars were to be bound to build within two years, had been abandoned. I am of opinion that this contention is not well founded. The original condition of building within two years remained the basis of the feuing.

Now, both the pursuer and the defender were expressly under this condition, but it is a condition in favour of the patrons, subject to any alteration they may make, and enforcible only by them. There is also this stringent alternative, that if the condition is not complied with the lots are to revert to the hospital.

The whole case depends on the question whether such a condition, of which it cannot be said that the patrons were bound to insert it in all their future grants, can be enforced by each feuar against the others. I am of opinion that it cannot. There is no such community of interest as would enable the feuar to say, "I shall put myself in the place of the patrons, and, though they may not be willing to enforce it, I will." There is no *jus quæsitum* to maintain the integrity of the plan.

There is nothing in the feu-right which enables me to arrive at the conclusion that the superior was bound to maintain the feuing plan. The patrons saw cause to make changes in the plan; this was quite within their power. Now, it appears to me that the power of the patrons to make changes is exclusive of the idea that the condition was enforcible by one feuar against the others. If, then, it be true that one feuar could not force another to build, to what does the case come? Can the pursuer rest his claim for the one-half of the expense of the gable on his right at common law, though advantage has not been taken by building on it? That being clearly impossible, the only basis for such a claim would be contract; but where no such contract exists, and where the party sued cannot be compelled to do the thing which would make him liable, I think the basis of the right is wanting. I am of opinion that the interlocutor of the Sheriff should be affirmed, though on grounds somewhat different from those on which he has proceeded.

The other Judges concurred.

Agent for the Appellant—Alex. Cassels, W.S.

Agent for the Respondent—William Mitchell, S.S.C.

Thursday, February 23.

STUART *v.* MORISON.

Teinds—Valuation—Res Judicata. It was decided in a process of locality that certain lands, "part of the Barony of Naughton," were valued. *Held* that this formed *res judicata* to the effect that these lands were valued, whether they were part of the Barony of Naughton or not.

This question, along with some others relating to the description of certain lands, arose in the locality of Balmerino, between Mr Stuart of Balmerino and Miss Morison of Naughton, and related to the lands of Wester Kilburns or Preston's Kilburns, extending to about eight acres, and belonging to Miss Morison of Naughton.

The Lord Ordinary (GIFFORD) repelled the objection of Mr Stuart, and added the following note, which explains the question.

"The objector, Mr Stuart, maintains that these lands are unvalued, and have improperly been omitted from the state of teinds and scheme of locality.

"The answer for Miss Morison and her curators is, that the lands in question are part of the lands and barony of Naughton, and were valued with the lands of Naughton, and with the other lands contained in the valuation of 22d February 1637. By that decree of valuation the whole lands of Naughton and certain other lands were duly valued, and by instrument of sasine in favour of Mr Hay, by whom the valuation was led, the lands of Naughton are shown to have included, *inter alia*, the lands of Brownhills, Galohill, Galray, Scurr, *et* Kilburns, and various others, all united into the barony of Naughton. It is further maintained by Miss Morison and her curators that it is *res judicata* in the present process, by a judgment of Lord Ardmillan of 20th March 1857, affirmed by the Inner House 9th July 1858, that the lands in question are valued by the valuation of 1637, and that it is now incompetent to open up the question. The Lord Ordinary is of opinion, though not without considerable hesitation, that Mr Stuart's objection is excluded by the judgments of 1857 and 1858, and by what has taken place in the present process of locality.

"(1) In the record made up between the Lord Advocate and Miss Morison in 1855, the Lord Advocate, as representing the Crown, maintained that Miss Morison's whole lands stated as in Balmerino 'have never been valued;' and then an enumeration is given of various lands, and *inter alia*, 'Kilburns (including Preston's feu).' The question was thus distinctly raised, whether Kilburns, including Preston's feu (that is, the subject in question), was or was not valued. Now, Lord Ardmillan found, on 20th March 1857, that the various lands mentioned, and specially the lands of Kilburns, are included in the decree of valuation of 1637, and this interlocutor was affirmed. It was thus fixed that Kilburns, including Preston's feu, was a subject the teinds of which were valued, and yet this is the very point which the objector wishes to try over again. The expression in the interlocutor, that the lands are parts of the barony of Naughton, was not intended as a limitation of the finding, so as to leave it open to maintain that any or that all of the lands were not parts of the barony.

"No doubt the present objector was not a party to the former record, but the Crown had a title to try the question (as was expressly found), and tried it fairly and deliberately in this very process, to which the present objector or his predecessor was all along a party. The judgment was undoubtedly binding on Miss Morison, and, the Lord Ordinary thinks, on all the heritors. It would lead to a strange result if every separate heritor was entitled to try the same question over again as to the same lands, and to obtain, it may be, different decisions.

"It may be true that the particular point or plea which the objector now seeks to raise was not argued by the Lord Advocate. This, however, does not appear. It certainly might have been argued, and the present objector, if he was not satisfied with the pleadings, should have himself appeared and supported the objection. On the whole, the Lord Ordinary thinks it would be unsafe to allow the question now to be reopened. It is quite fixed that a judgment in one process of locality forms *res judicata* in all subsequent localities in the same