their old cans and frames, so as to have their premises cleared for the pursuer, and that on getting three days' notice of the time when the premises should be clear the pursuer should proceed to fit up the new machinery, and should have the same completed and ready for working within a fortnight after the premises had been cleared." That is a more precise contract than the original one. No doubt it is a verbal one, but it seems to me that it comes in place of the original one, and it was a contract first modified by the alteration as to size, and then as to time, so that the contract is one consisting of the original letters, of the letters of November, and of the verbal agreement, and unless the pursuer can show that he has performed *that* contract, he cannot recover. I think that brings the case under the authority of *Johnston*. I agree with the Lord Ordinary.

LORD DEAS—I agree with a great deal of what your Lordship has said. If the provision as to time in the written agreement had stood, there can be no doubt that the pursuer must have been held not to have performed his work in time. However, the parties seem to have changed that and to have substituted for it a *reasonable* time, and I agree with your Lordship that if the time had been fixed originally as a *reasonable* time, damages could not have been pleaded by way of exception. I am disposed to think that, even then, though the damages were not pleadable by way of exception, if a counter claim had been brought and the two actions had gone on simultaneously, and stood at the same point, the question would have stood in much the same position.

LORD ARDMILLAN—This is not a mere question of compensation, but rather arises out of the enforcement of a mutual contract, and I think the violator of that contract cannot enforce it against the other party. If the contract had borne that the machine was to be put up by a given day, and the contractor had not done so, he could not have enforced the contract. No doubt indulgence was granted for a time, but the matter was not allowed to rest on mere reasonableness; the pursuer was bound to finish within a fortnight—a definite date. I think the defender is entitled to plead his claim of damages against the pursuer's claim for the contract price.

LORD MURE—I concur, and on the same grounds.

LORD PRESIDENT—I cannot agree in attaching the importance to a counter action which Lord Deas does. If the defenders' claim is not pleadable *ope exceptionis*, there is no defence to the contractor's claim.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Peter Macbride (pursuer) against the interlocutor of Lord Shand, Ordinary, of date 6th April 1875, Adhere to the said interlocutor, and refuse the reclaiming-note; find the pursuer liable in expenses since the Lord Ordinary's interlocutor, and remit to the Auditor to tax the account of the said expenses, and report to the Lord Ordinary; and remit the cause to the Lord Ordinary, with power to his Lordship to decern for the expenses now found due."

Counsel for Pursuer—Dean of Faculty (Clark), Q.C., and Trayner. Agents—Frasers, Stodart, & Mackenzie, W.S.

Counsel for Defender—Solicitor-General (Watson), Q.C., and Balfour. Agents—J. & R. D. Ross, W.S.

Friday, June 11.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

NEIL LAMONT *v.* DANIEL CUMMING.

Property—Mutual Gable.

Held that when a proprietor has built the gable of his house half on his own and half on his neighbour's ground, the latter is entitled to all reasonable use of the gable, such as making vents and fire places therein, and building it higher.

The pursuer of this action was proprietor of a house in Renfrew, and his object was to have it declared that the west gable of his house was his exclusive property, or otherwise that the gable was a mutual gable, and that his neighbour on the west had acted illegally in making openings for joists therein, by raising the height of it, and altering the chimneys.

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—

"*Edinburgh, 4th January* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and whole proceedings, Finds that the pursuer is not the sole and exclusive proprietor of, aad has not the sole right to and interest in, the west gable of the house belonging to him, situated on the south side of the High Street of Renfrew, and described in the summons: Finds that said gable is a mutual gable, and is the common property of the pursuer, as proprietor of said house, and of the defender, as proprietor of the subjects adjoining said gable on the west: Therefore decerns and declares in terms of the alternative declaratory conclusion of the summons to that effect: Finds that the operations of the defender complained of in this action were not illegal or unwarrantable: Assoilzies the defender from all the other conclusions of the action, reserving to the pursuer any claim competent to him against the defender for payment of part of the value of said mutual gable, and to the defender his defences thereagainst as accords, and decerns: Finds the defender entitled to expenses: Appoints an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and to report.

"*Note.*—In this action, as amended, the pursuer, who is proprietor of a house in the High Street of Renfrew, adjoining on the west certain subjects belonging to the defender, seeks to have it declared that the west gable of his house belongs to himself as sole and exclusive owner, and that the defender has no right or title to said gable; or alternatively, that the gable is a mutual gable between the properties of himself and of the defender; and in either event he seeks to have it declared that cer-

tain operations by the defender in and upon said gable were illegal and unwarrantable, and to have the defender ordained to restore the gable to its original condition.

"The defender has all along maintained that the gable is a mutual mean gable, and he denies that the operations complained of were unlawful, and he alleges that they were not injurious to the pursuer.

"The first question to be decided is, 'Whether the west gable of the pursuer's house is his sole and exclusive property? or whether it is a mutual mean gable between him and the defender?' I am of opinion that it is proved that the gable is a mutual mean gable, one-half being built upon the pursuer's property, and the other half upon the defender's.

"The pursuer's property is situated on the south side of the High Street of Renfrew. It consists of a building of two storeys, containing houses and shops, with a yard or garden behind, extending to the wall of the churchyard. The property appears from the titles to have belonged upwards of a century ago to Robert Somerville, and thereafter to John Somerville, Provost of the burgh of Renfrew. It was afterwards acquired by Robert Dunlop in 1808, about the time when the house presently existing was built, and it now belongs to the pursuer by a regular feudal progress. The property is described in the disposition in favour of Dunlop (dated 18th and 20th May 1808), as follows, viz., 'All and Whole that new built tenement of houses, and ten loomed shop, with the yard at the back thereof, of a breadth equal to the length of said tenement or thereabout, and extending southward to the kirkyard dyke, presently occupied by Alexander Buchan, and others, lying upon the south side of the High Street of the burgh of Renfrew, and bounded by the tenement and yeard disponed by us to Robert Buchanan, grocer in Johnston, on on the east; the said kirkyard dyke on the south; and the dwelling-houses belonging to Robert Knox, and others, on the west, and the said High Street on the north parts.'

"The defender's property is situated at the corner of the High Street and of the church vennell, or or as it is termed in some of the titles, 'the High Street leading to the church.' It is on the west of and immediately contiguous to the pursuer's property, and it is part of the subjects 'belonging to Robert Knox, and others,' which are said in the pursuer's titles to form the west boundary of his property.

"It appears from the defender's titles that in 1772 Robert Knox was the proprietor of certain subjects which extended along the High Street, and lay between the church vennell and the property belonging to the heirs of Robert Somerville, and now to the pursuer. The houses extended from the corner of the High Street to the north gable of William Menzies' house, and their front entrance was from the church vennell. Behind these houses, and behind them and the pursuer's property, there was a byre and a close about 12 or 13 feet wide. The description of the property, as contained in Robert Knox's sasine, which is dated and recorded in the Burgh Register of Sasines 28th November 1772, is as follows, viz.:—'All and Haill that forehouse or tenement of land and byre fronting the same, with the close and empty ground lying betwixt the said close and the High Street leading to the church, with the stone dyke builded fronting the said High Street, with the liberty of building to the north gavill of William Menzies his new house, as the same are now builded into one tenement, lying within the burgh of Renfrew, and bounded by the lands sometime pertaining to Robert Morris, and now to the heirs of Robert Somerville on the east, the lands disponed by the said William Menzies to the said Elliot Menzies on the south, the church vennell on the west, and the High Street of the said burgh on the north parts, with the whole parts, pendicles, and pertinents of the same.

"The property referred to in the foregoing description as 'William Menzies his new house' was situated immediately to the south of Robert Knox's property, and came into the possession of James Gardner, by whom the same was in 1818 conveyed to Alexander M'William, in whose disposition they are described as follows:—'All and Whole these three thatch tenements and pertinents thereof lying within the burgh of Renfrew, and on the east side of the street leading to the church, as presently possessed by William Douggery (and others), bounded betwixt the lands or yard, sometime belonging to Provost John Somerville, on the east, the property purchased by Adam Stewart on the south, the street leading to the church on the west, and the tenement of Robert Knox on the north part.'

"These two subjects above described, viz., Robert Knox's property and Gardner's property—thus occupied the space enclosed by the pursuer's house and back yard on the east, by the Church Vennel or Church Street on the west, by the High Street on the north, and by Adam Stewart's property on the south. Both of these properties were recently acquired by the burgh of Renfrew for the purpose of improving and widening the streets of the town. And a narrow stripe of ground facing the High Street, and a somewhat broader stripe facing Church Street, having been retained by the burgh, the remainder of the ground was recently sold, and has now come to belong to the defender Daniel Cumming, the Provost of the burgh. The defender's property thus consists of the part of Gardner's property which adjoined the pursuer's back yard, and of the part of Robert Knox's property which adjoined the pursuer's house, excepting the narrow stripe at the north end thereof retained for the improvement of the High Street.

"The proof, so far as relating to the condition of Robert Knox's property and its mode of occupation, goes back nearly to the beginning of the present century. Robert Knox, who was proprietor in 1772, was sometime after 1808 succeeded by a son named Michael, who does not seem to have made up any title to the property, although he and his family continued to possess and occupy it, and the said Michael was succeeded by his son, also named Michael, who was in possession of the property for forty or fifty years prior to 1870. He made up his title to the property by cognition and sasine, as heir of his grandfather Robert Knox, and in 1870 he sold it to James M'Culloch, from whom it was purchased by the burgh, as already mentioned. The houses on the property were then very old thatched houses, fronting to Church Street, but with a back door opening into the close which is mentioned in the titles as being part of the property, and which lay between the old houses and the pursuer's west gable. At the north end of the close, and facing the High Street, there stood for many years—indeed, beyond the

memory of living witnesses—a small house, which probably was the byre mentioned in the title deeds, but which for half a century was used by the successive members of the Knox family as a flesher's shop. It was knocked down by M'Culloch a few years ago. To the south of that flesher's shop there was also erected, about thirty or forty years ago, a small wooden shed, which was used by Michael Knox as a slaughter-house. The flesher's shop and wooden shed were low buildings of not more than seven or eight feet in height, and both are proved to have been rested against the west side of the pursuer's gable, and to have been more or less attached to that gable. And in the gable were fixed numerous iron and wooden dooks or pins for the use of the proprietors and occupants of these erections. In short, the gable of the pursuer's house has from time immemorial been used as the gable of such erections as the defender and his authors found it convenient to have on their ground, and it has served all the purposes of a mutual mean gable.

"If, in point of fact, that gable was built half upon the pursuer's ground and half upon the defender's ground, it is clear that it must be a mutual mean gable, and that the defender is entitled to use it as such whatever claim the pursuer may have against him for a proportional part of the value of the wall. The pursuer admits that the defender's property comes up to the west side of the gable, and the defender maintains that the pursuer's property extends no further westward than the centre line of the gable. The debateable ground is therefore the west half of the gable, and the question comes to be, 'What is the precise boundary line between the properties of the pursuer and defender?'

"The answer to this question must be looked for in the first instance in the titles of the parties. The titles of the defender give no definite information on the point. They describe the property as consisting of 'a forehouse or tenement of land, with byre fronting the same with the close, &c.,' and as bounded on the east 'by the lands pertaining to the heirs of Robert Somerville,' *i.e.*, the property now belonging to the pursuer. The description, however, implies that the byre and the close lay between the 'forehouse or tenement,' and the pursuer's property—in other words, that the pursuer's east boundary was not actually in contact with Robert Knox's dwelling-house, but was a line between his property and Robert Knox's 'close.' The titles of the pursuer, on the other hand, simply describe his property as bounded 'by the dwelling-houses of Robert Knox and others on the west.' Now, reading the two sets of titles together, I think that the fair meaning of them is that the west boundary of the pursuer's property was not the actual gables of the houses of Robert Knox and others, but the dwelling-houses and pertinents of these parties, which pertinents, as the titles of Knox at least show, consisted of a close between the houses and the pursuer's property.

"But if there be any ambiguity in the titles, the possession which has followed on these titles must next be examined, not necessarily for the purpose of establishing in either party a prescriptive right to the gable, but for the purpose of showing how the parties have by their actings explained the boundary. Now, three things are established by the proof, oral and documentary, all of which are of importance. These are—

"(1) That the gable of the pursuer's property was erected not later than 1808.

"(2) That the pursuer's back yard has ever since the gable was built been enclosed by a dyke running southward from the south end of the gable to the churchyard, and that the west face of that dyke is in a line, not with the west face, but with the centre line of the gable; and,

"(3) That the defender's authors have all along possessed the ground on the west up to the said gable and dyke, and have used the gable as a mutual gable.

"But if the west face of the dyke (all of which is admittedly built on the pursuer's own ground) is the west boundary of his yard, and I think there can be no doubt upon this point, a strong presumption is thereby raised that the west boundary of his house is the centre line of the gable. And upon this point much light is thrown by the pursuer's own titles, in which his back yard is said to be 'of a breadth equal to the length of said tenement or thereabout, and extending southward to the kirk-dyke.' The precise length of the pursuer's tenement, namely, its length from east to west, is not stated in the titles. As, however, the yard was of very much greater length than breadth, its 'breadth' spoken of in the titles meant its dimensions from east to west at the back of the house. The meaning plainly was that the back yard was to be of the same width as the space contained between the east and west boundary lines of the ground belonging to the pursuer, and occupied by his house and shops, thereby implying that the east and west boundaries of the yard were to be simply continuations of the boundary lines of the house lot. The dyke enclosing the yard was originally built about the date, or soon after the date, of the erection of the house in 1808, and it must be held that it was built on the utmost verge of the pursuer's property. But its west or outer face, which is thus the west boundary of the yard, is in a line with the centre of the gable. The inference thus seems to be inevitable that the centre line of the gable was the true west boundary of that part of his property on which his house was built. If this is the correct view of the facts, it follows that the gable, to the extent of twelve inches, namely, its westmost half, has been built beyond the limits of the pursuer's property and on the defender's ground.

"And I think it is no less clear from the proof that the wall was truly built as a mutual gable for the use of both properties. The houses on the defender's property were old, mean and delapidated. The situation, however, was a good one for buildings of a better class, being at the corner of the High Street and Church Street, and nothing could be more natural than that the pursuer's author in building his new house in 1808 should contemplate the erection of a new house on the ground of his neighbour Robert Knox, and should, either with or without the sanction of Knox, have erected his gable half on the ground of each, in order eventually to serve as a mutual gable. And that such is the true state of the case is, I think, placed beyond doubt by the fact, that although no fire places or vents were made in the west half of the gable, a recess was left on that side, on the level of the second storey, plainly for the purpose of being used as a press when a house should be built on the defender's ground. The recess was obviously not intended for and could be of no possible

use to the pursuer's house. It was indeed stated by one of the pursuer's witnesses (Dr Pattison) that an outside stair at one time existed, leading up to that recess, which was used as an access to the pursuer's second storey. But that statement not only is entirely uncorroborated, but is disproved by the evidence of other witnesses of the pursuer; and by the real evidence supplied by the gable itself, which shows that the recess never was and could not have been used as a door into the pursuer's house, because the part of the wall which forms the back of the recess is coeval and continuous with the rest of the gable, and has never been disturbed since its original erection.

"I am therefore of opinion that the gable is a mutual gable, and is the common property of the pursuer and of the defender.

"The question, however, still remains, 'Whether the operations of the pursuer upon the gable were illegal and unwarrantable?' What he seems to have done is this, he has built a two storey house on part of his ground, and he has inserted some joists in the gable to support the floor of his second storey; he has also turned the recess in the gable into a fire place, and he has slapped a vent in the gable from that fire place to the chimney head. And as his house is a few feet higher than the pursuer's, he has raised the height of the gable. In doing so he had to remove temporarily a few of the slates of the pursuer's roof, but these were carefully replaced. I think it is proved that all the operations have been well executed, and that they have caused no injury or damage to, and that they in no way endanger the safety of the gable, or any other part of the pursuer's property. It appears to me that the defender has in no way exceeded his legal rights, and that he was fairly entitled to do what he has done. This is not a case, such as has often occurred, of a conterminous proprietor, or of one of several proprietors of a tenement laid out in flats, making important alterations on a mutual wall or common stair, where these have been originally designed and constructed as part of the conterminous subjects, or of the flatted tenement. Here the pursuer's author has thought fit to build partly on his neighbour's ground and partly on his own, a wall as the gable of his own house, but which he knew and intended should afterwards be used as the gable of his neighbour's house when such should be built. But as a gable without joist holes, and without a fire place and vent, is of little use, and as the first builder has no right to limit his neighbour (unless by paction, which is not here alleged) as to the height to which he shall afterwards carry his house, it would be altogether inequitable to hold that the neighbour, when he came to make use of that gable, should be debarred from making (consistently with safety) all the necessary fire places, vents, and joist holes, or from raising the wall to a reasonable height. The defender has here done nothing more, and I can see no ground for holding that his operations are illegal, or for ordering the gable to be restored to its original condition. Whether the pursuer may or may not be entitled to claim from the defender any part of the value of the gable of which he has now made use is a question not *hujus loci*, and the claim is accordingly reserved in the interlocutor.

"I ought to add, that my opinion on the whole case has been formed irrespective altogether of the proceedings of the Dean of Guild Court of Renfrew and his lyners, who seem to have given a deliverance that the gable was a mutual mean gable. The regularity of these proceedings appears to me to be questionable, and the jurisdiction of these persons to decide such a question is, I think, more than doubtful, but it is unnecessary in the view which I take of the case to consider these matters."

The pursuer reclaimed, and pleaded:—"(1) The whole of the west gable of the houses on the pursuer's property being situated on and being his exclusive property, he is entitled to decree as concluded for. (2) In the event of the said gable being found to be mutual betwixt the pursuer's and defender's properties, the pursuer is entitled to decree as concluded for in that event in respect the said operations are in excess of the rights of an owner of a mutual gable, and are wrongful and illegal."

Argued for him—This being a mutual gable, neither party had a right to heighten it. There was a distinction between common interest and common property; the former gives no title to object except in the case of reasonable apprehension of danger or loss; in the case of the latter no alteration at all can be made except by mutual consent.

Authorities—*Begg* v. *Jack*, Jan. 10, 1874, 1 Ret. 366; *Dow and Gordon* v. *Harvey*, Nov. 9, 1869, 8 Macph. 118; *Walker* v. *Sherar*, Feb. 4, 1870, 8 Macph. 494; Bell's Prin., 1075, 1086; *Anderson* v. *Dalrymple*, 1799, M. 12,831; *Reid* v. *Nicol*, 1799, M. App. Property 1; *Sanderson* v. *Geddes*, July 17, 1874, 1 Ret. 1198; *Wallace* v. *Brown*, M. Personal and Real, App. 1.

The defender pleaded:—"(1) In respect that the Magistrates of Renfrew, who are at present feudally vested in the subjects in question, have not been called jointly and severally with the defender, the action should be dismissed. (2) In any event, the said Magistrates should have been convened for their interest in that section of the gable coloured grey on the plan, to which the defender makes no claim, and has not affected. (3) The Dean of Guild and Lyners of Renfrew having by deliverance duly pronounced after hearing the pursuer held the gable in question to be a mean or mutual gable, the said deliverance ought to have been first set aside and reduced, and the present action is accordingly premature or incompetent. (4) The gable in question being a mutual gable, the action should be dismissed. (5) The pursuer's whole averments and pleas being groundless and untenable, the defender is entitled to absolvitor with expenses."

Argued for him—The cases concerning common stairs or passages or walls have no application. There was no restriction in the titles on the defender's right. The pursuer had to a certain extent acquiesced by allowing the work to go on so long without raising an interdict, which would have been his proper remedy.

Authorities—*Gould* v. *M'Corquodale*, Nov. 24, 1869, 8 Macph. 165; *Pollock* v. *Turnbull*, Jan. 16, 1827, 5 S. 195; *Warren* v. *Marwick*, June 13, 1835, 13 S. 944; *Gellatly* v. *Arrol*, Mar. 13, 1863, 1 Macph. 592; *Murray* v. *Johnstone*, Nov. 4, 1834, 13 S. 119; *Alexander* v. *Couper*, Dec. 12, 1840, 3 D. 249.

At advising—

LORD PRESIDENT—The pursuer of this action is proprietor of a house in Renfrew, the west gable of

which is the subject in dispute. He maintains in the first conclusion of his summons that it is his own, but his second conclusion is that it is mutual, and on that footing he asks to have it found that the defender's operations on it are illegal. The Lord Ordinary has held that the pursuer has not an exclusive right of property in it, and in that view I concur. It depends to a great extent on the evidence, and it would be mere waste of time to go into that. We must therefore hold that the gable was a mutual gable in the ordinary sense of that term, *i.e.*, that it was built according to the practice common in Scotch burghs, half on the one property and half on the other. The only question is whether the operations of the defenders were illegal and unwarrantable or "in excess of the rights of an owner of a mutual gable." Now what is alleged against the defender is that he has built upon the ground to the west of the gable, and has used it as the east wall of his house; that he has built higher, and that he has inserted joists in the gable to support a second storey; that he has turned a recess in the gable into a fireplace, and made a vent; and then, his own house exceeding the pursuer's house in height, he has heightened the gable. That exhausts the pursuer's grounds of complaint, and the question is whether these things have been done in excess of his right. We must remember that this gable was built a very considerable time ago, when the defender had no intention of building on his own ground, but still it was built—one-half on his ground—on the footing that it was to serve as a mutual gable. Now, viewed as a mutual gable, it was erected in rather a peculiar way, for the pursuer built it without vents or fireplaces on his neighbour's side. The recess which has been spoken of was only intended for a press, and so if the second builder was entitled to have a fireplace or a use corresponding to that of the first builder, he must by some means have a fireplace and vent. But at the outset we are met by the pursuer with the contention that the principle of law forbids that. He says that where there is a right of common property in a gable or anything else, neither the one proprietor nor the other may interfere with the subject in any way without the consent of the other. Now that proposition is far too broad; such a rule is repugnant to common sense and common practice, especially in the case of such a subject as a gable. When the second builder builds and uses the gable he must interfere with it of necessity. It is in vain to say that there is any such absolute rule, but the truth is that a gable is somewhat different from other common property. When it is originally built, the party who builds it is the only person who is in the beneficial enjoyment of it; the second party has a right *in futuro* only. Now that is rather a curious state of things—the one man is using the gable as the actual wall of his house; the other views it as a wall which he will be entitled to use when he does build. The man who builds the gable does so, as a rule, behind the back of the adjoining proprietor, who takes for granted, and is justified in doing so, that the gable will be so built as to afford him the usual accommodation; but if he does not find that, he then for the first time must adjust his right. If the first builder has so built the gable that it cannot be used as a gable, there must be some remedy for that. The second builder is entitled to insist on its being an available gable; in what way he can enforce that right is a different question, and whether he is entitled to do it at his own hand I give no opinion. *In re communi melior est conditio prohibentis*—but that is not the case here. The pursuer made no application for interdict. He sees the thing done, and then brings this action of declarator; that is a very different thing. As I said before, it seems to me that the erection of a fire-place and vent, if it does not actually injure the defender, is a matter of right. There can be no community of property if there is not equality of right, and it is when the second proprietor comes to build that the respective rights of the parties must be adjusted. I have thought it right thus to explain the grounds of my judgment, because there does not seem to be any express authority, and that remark applies also to the only remaining point, whether the second builder is entitled to increase the height of the gable. That is a question which must arise every day, at least the thing is done every day. These things may have been done by agreement, because the parties were reasonable, and I suppose that must be the account of it, but it never has been made the subject of decision. If the second builder must build a new gable, or limit the height of his house, the first man who builds in a street could settle for all time coming the limit of height for the whole street. On the other hand, suppose a man at one end builds a house of three storeys, and the man at the other end builds one of two, that leads to a result which is ludicrous. In seems to me that it necessarily follows, from the undoubted maxim that the owner's right is *a centro ad coelum*, that he is not to be restrained by the mere fact that his neighbour has built a gable wall. To reconcile the two rules I have mentioned there is only one way, and we must hold, with the Lord Ordinary, that the second builder may raise the gable to the height of his own house, always of course subject to the condition that his doing so does not involve risk to his neighbour. I have no difficulty at all in agreeing with the Lord Ordinary.

Lord Deas—I see in the report of *Begg* v. *Jack* I made an observation that the question of the right of anyone to interfere with a mutual gable did not appear to have been made the subject of decision, and that it was curious that that should have been so, but I am inclined to think that the sound inference is, that the right of each proprietor to make all reasonable use of the gable has never been disputed. It must either have been understood that each party had such a right, or there must have been a far greater number of reasonable people in the world than one could have supposed possible, for the thing has been done over and over again. I think it has always been matter of common understanding; there can be no other principle than that each may make any reasonable use of the gable which is not dangerous or hurtful to his neighbour. It is a material fact here that no injury whatever is averred on record.

Lord Ardmillan—I have no doubt at all about the first point, that the pursuer is not the sole proprietor of this gable. Assuming the gable to be a mutual gable, a question of importance arises, but I have no doubt of the defender's right. The raising of the wall is a different question. If it cause injury, danger, or reasonable apprehension,

the party may be interdicted, but nothing of the kind is alleged here.

LORD MURE—The pursuer's argument has proceeded on a misapprehension of the principle laid down by Mr Bell. As I read the passage, I think the important words are "if not necessary." The words refer to common walls and passages, and the breaking out of a door may not be necessary, but the opening of a chimney in a gable is necessary, and is a fair and reasonable operation in itself.

The Court pronounced the following interlocutor:—

"Their Lordships having heard counsel on the reclaiming note for the pursuer Neil Lamont against Lord Curriehill's interlocutor, dated 4th January 1875, recall the said interlocutor in so far as it reserves to the pursuer any claim competent to him against the defender for payment of a part of the value of the said mutual gables, and in place thereof reserve to the pursuer any pecuniary claim competent to him against the defender in respect of his making use of the said mutual gable. *Quoad ultra* adhere to the said interlocutor, and refuse the reclaiming note; find the defender entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Rhind and Asher. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Defender—Solicitor-General (Watson), Q.C., and Brand. Agent—A. Kirk Mackie, S.S.C.

Tuesday, June 15.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

EARL OF BREADALBANE *v.* JAMIESON.

Statute 1592, *c.* 12—*Mines and Minerals—Precious Metals.*

Where mines and minerals were transferred by the Crown to the owner of the lands containing them, and a general conveyance (in which the mines were not excepted) was subsequently made of these lands by the owner—*Held* that the general conveyance carried with it the right to all the minerals contained in the lands conveyed.

This was an action of declarator and reduction at the instance of the Right Honourable Gavin Earl of Breadalbane and Holland against George Auldjo Jamieson, chartered accountant in Edinburgh, judicial factor on the trust-estate of the late Most Honourable John second Marquess of Breadalbane, to have certain deeds set aside, and to have it declared that the pursuer was proprietor of all the mines and minerals within his lands.

The facts of the case and the state of the titles are fully set forth in the note to the Lord Ordinary's interlocutor, as follows:—

"*Edinburgh*, 13*th February* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, productions, and whole process—Finds and declares that the pursuer has the sole and exclusive right to the mines of gold, silver, lead, copper, and tin, and of other metals and minerals within the lands and earldom of Breadalbane, and the other lands and estates formerly belonging to John Lord Glenorchy, afterwards third Earl of Breadalbane, and to possess and enjoy the same under and in virtue of his rights and titles to the said lands and earldom of Breadalbane and others, and decerns: Reduces, decerns, and declares in terms of the reductive conclusions of the summons, except in so far as the same are directed against the Crown charter in favour of the said John Lord Glenorchy, and his heirs therein mentioned, dated on or about 1st March 1742, and the sasine following thereon, being the writs first and second sought to be reduced, and, as regards these writs, dismisses the action, and decerns: Finds the defender George Auldjo Jamieson, as judicial-factor on the trust-estate of the late Most Honourable John second Marquis of Breadalbane, liable in expenses to the pursuer; appoints an account thereof to be lodged, and, when lodged, remits the same to the Auditor of Court to tax and to report.

"*Note.*—The Earl of Breadalbane, the pursuer of this action, is proprietor of the lands and earldom of Breadalbane. He succeeded to the estates on the death of his father, the sixth Earl, and made up titles thereto as heir of taillie and provision to his father, under an entail executed by the third Earl of Breadalbane in 1775. He recently disentailed the estates under the authority of the Court of Session, so that they now belong to him in fee-simple.

"The heir of entail in possession of the estates immediately before the pursuer's father was John fifth Earl and second Marquis of Breadalbane, who died in 1862, leaving a trust-disposition and settlement, dated 26th November 1847, by which he conveyed to trustees all and sundry lands, estates, mines, leases, and heritable subjects then belonging or which should belong to him in fee-simple at the time of his decease These trustees having all failed, from death, non-acceptance, or resignation, the defender Mr Auldjo Jamieson has been appointed by the Court to be judicial factor on the trust-estate of the Marquis. The lands and estates forming the earldom having been held by the Marquis under the fetters of a strict entail, these passed to the pursuer's father as the next heir of entail, and now belong to the pursuer as already explained but Mr Jamieson maintains that the mines and minerals within the said estates were not entailed, and that they form part of the fee-simple estates of the Marquis, now vested in him as factor, and he has accordingly intimated to the pursuer that he intends forthwith to enter upon the lands forming the original earldom of Breadalbane, and to open up and work the mines and minerals therein.

"The pursuer, on the other hand, maintains that the mines and minerals belong to him, as the proprietor of the estates, and he has raised the present action against Mr Jamieson as judicial factor, for reduction of the titles under which the defender claims the mines and minerals, and for declarator of his own right to these subjects.

"It is necessary carefully to examine the titles of the parties in order rightly to understand the questions which are now presented for decision.