Tuesday, June 10.

SECOND DIVISION.

[Lord Shand, Ordinary.

RUSSELL (WILSON'S TRUSTEE) *v.* RODGER.

Sequestration—Preferable Claim—Mutual Gable.

Claim on a bankrupt estate for one-half the expense of erecting a mutual gable which had been built upon by the bankrupt—*held* to be a preferable claim on the estate.

The appellant in this suit, John D. Rodger, builder, feued a piece of ground at Dalry, Edinburgh, under a feu-contract entered into between himself and James Steel, builder, containing an obligation that "the gables of the tenement to be erected shall be mutual gables, and shall be built to the extent of one-half of the thickness thereof on the ground hereby feued, and to the extent of the other half on the ground adjoining the same on the north and south respectively; and the cost of erecting the said gables shall be borne equally by the feuars, to whom they shall belong in common, but no part shall be borne by the said James Steel and his foresaids." The feu-contract also contained a declaration that the obligations, provisions, declarations, reservations, restrictions, and irritancies contained in it shall be real liens and burdens affecting the piece of ground disponed and buildings erected and to be erected thereon.

The appellant built, in terms of the contract, a tenement of dwelling-houses, which was finished and ready for occupation at Whitsunday 1872. The area of ground immediately to the south of appellant's ground was feued by Alexander Wilson, a builder in Edinburgh, under a contract containing similar obligations and declarations as to the gables to those contained in the contract of the appellant before mentioned; and Wilson erected a tenement thereon against the southern gable put up by the appellant. In October 1872 Wilson became bankrupt, and was sequestrated. The trustee on his sequestrated estates entered into possession of the said tenement, which at that time was roofed in, and he finished the work. No payment of the price of the gables had been made by Wilson previous to his bankruptcy, and Rodger lodged a claim to be ranked preferably on the estate for £84, 7s. 5d., being one-half the cost of their erection. This claim was disallowed by the trustee, who reserved to Rodger to lodge an ordinary claim.

The Lord Ordinary, on appeal, pronounced the following interlocutor:—

"*Edinburgh, 12th May* 1873.—The Lord Ordinary having considered the cause, sustains the appeal, recalls the deliverance of the respondent as trustee on the sequestrated estate of Alexander Wilson complained of, and remits to him to sustain the claim of the appellant to be ranked preferably on the sequestrated estate for the sum of £84, 7s. 5½d. claimed, and decerns; finds the appellant entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and to report.

"*Note.*—In the ordinary case, the person who builds a mutual gable in compliance with the usual stipulations in his feu-contract does not thereby add to his neighbour's property to the extent of the building erected on the ground adjoining his own, for the maxim *inædificatum cedet solo* does not apply. He has right to the whole wall or gable, subject to an obligation to give to the adjoining proprietor, in return for payment of one-half of the total expense, a right, not to the part of the wall built on his ground, but a common or *pro indiviso* right to the whole wall. The adjoining feuar is entitled, when he requires it, to make use of the common gable for the purposes of his building, but it is a condition of this right that he shall pay the one-half of the expense when required to do so. The right of the proprietor who erects the gable is real. It is transmitted by a simple conveyance of the property, and does not require a special assignation or conveyance. Again, any assignation or conveyance in favour of the adjoining proprietor is unnecessary in order to give him right to use the gable. The payment of one-half of the expense, or a discharge of his liability therefor, granted by the proprietor of the adjoining property, by whom the gable has been built, or by his successor in the property, gives a title to the gable as common property, and to the use of it accordingly. The law, as thus stated, is settled by the cases cited by the parties in the course of the argument in the present appeal, viz., *Wallace* v. *Brown*, June 21, 1808, Mor., Personal and Real, Appendix, No. IV.; *Hunter* v. *Luke and Others*, June 2, 1846, 8 D. 787; and *Law* v. *Monteath's Trustees*, Nov. 30, 1855, 18 D. 125.

"It seems to follow from what has been now stated that while, on the one hand, a party about to make use of a gable built by the adjoining feuar can acquire right to do so by payment of half of the total expense, on the other hand, the proprietor who built the gable is not divested of that real right until payment be made to him of the half of the expense, or until in some way he has discharged the adjoining feuar of his liability to make such payment, and consented to the appropriation of the gable and to the adjoining feuar acquiring a *pro indiviso* right of property in it.

"Applying these principles to the present case, the Lord Ordinary is of opinion that the decision is not attended with difficulty. The appellant, who built the gable as a mutual gable in terms of the obligations imposed on him in his feu-contract, has not received payment of any portion of the expense; and, in the opinion of the Lord Ordinary, he remains the proprietor of the whole gable until that expense is paid to him. It was maintained for the trustee on the bankrupt's estate that the claim is one of recompense, and that the appellant having allowed the gable to be made use of, can only rank as an ordinary creditor on the bankrupt's estate for the half of the expense claimed. The Lord Ordinary cannot adopt this view. Payment has not been made, and it is not said that liability for the amount has been expressly discharged. In a question with the bankrupt, the appellant is not bound to part with the property for a composition on his claim, or for anything short of full payment of the half of the expense of the building. The trustee is in no better position. He enters to possession of a building which has, no doubt, been roofed in, but which was yet in an unfinished condition, for it appears from the joint minute of admissions, No. 12 of process, that the respondent 'has since proceeded with the internal finishing thereof.' The Lord Ordinary cannot see that in this state of matters the appellant, either by his actings or acquiescence, has done anything which has transferred a *pro indiviso* right to the gable to

Counsel for Appellant—Strachan. Agent—W. Manuel, S.S.C.

Counsel for Trustee—Pattison. Agent—J. Somerville, S.S.C.

Wednesday, June 11.

SECOND DIVISION.

[Lord Ormidale.

WEST LIMERIGG COLLIERY COMPANY *v.* ROBERTSON.

Obligation—Contract—Implement—Counter Claims.

A colliery company contracted to supply for steamers 400 to 500 tons of coal per month for six months, payment to be made monthly. After two months a dispute arose to which month a certain delivery was imputable. The defenders having refused to pay for the delivery of the two preceding months,—*held* that they were bound to implement the contract to this extent, and that they were not entitled to go elsewhere for coals and charge the price against the sum due to the pursuers, who had not declined to fulfil their obligation.

This case came up by reclaiming-note against the Lord Ordinary's (ORMIDALE) interlocutor. The summons concluded for the several sums of £164, 19s. 2d., £64, 11s. 4d., and £133, 14s. 8d. respectively, with interest and expenses. On 5th March 1872 a contract was entered into by Mr Simpson, for the Limerigg Colliery Co., and Mr Robertson in the following offer:—"I beg to confirm having sold to you to-day, for 6 months, dating from 1st of present month, say 4 to 500 tons per month of West Limerigg steam coal, delivered alongside of your steamers at Broomielaw, Glasgow, at the rate of (12s. 1d.) twelve shillings and one penny sterling per ton of 20 cwt., less 5 per cent. discount. In the event of steam coal being reduced, say 6d. per ton, to Messrs Handyside & Henderson (Messrs R. Baird & Co.'s price to regulate), you to have a discount of 7½ per cent., but no further discount to be given let prices fall what they may during the six months. Cash to be paid one month after each shipment." This offer was formally accepted on March 6th by a letter also produced in process. No coals were ordered or delivered in March. In April the defender ordered and took delivery per 'Crusader' of $232\frac{1}{20}$ tons. In May he ordered and took delivery

per 'Mirfield,' . . .	$250\frac{2}{20}$ tons.
and per 'Violet,' . .	255
and per 'Venezia,' . .	25
Total for May,	$530\frac{2}{20}$

This was in excess of the contract quantity, but the pursuers, as they had the coals at the time, agreed to let the defender have them. He, however, requested other 220 tons to be delivered in May at Grangemouth, but this the pursuers refused, the order being both as to its amount and the place of delivery unwarranted by the contract. On 17th June the defender wrote the pursuers—"Please note 250 to 260 tons Limerigg steam coal will be required at Broomielaw for 'Crusader,' about this day week." And this order he subsequently increased to from 350 to 360 tons. The pursuers accordingly sent forward their trucks with coals to the College depot of the Railway Company, with a view to their being carted thence to the Broomielaw for delivery. On arrival at the College depot the defender could not take delivery of the coals owing to there not being clear wharfage access to the vessel, and the trucks were detained several days, causing a stoppage of the pits and serious loss. The pursuers alleged that the defenders were not ready to take any of them till Friday and Saturday 28th and 29th June, when he took 112½ tons, and refused to take any more. The remainder of the coals the pursuers had forwarded to College depot were afterwards taken delivery of in July, and were invoiced as part of the July delivery. In addition, on 26th June the defenders wrote—"Please forward, in addition to what is already ordered, 200 tons best Limerigg steam coal, this week certain. I will instruct M'Gill as to delivery." In July the defender, on being applied to for payment of invoice No. 1 (the first of the conclusions of the summons), which was then nearly three weeks past due, insisted on having the 233 tons in invoice No. 3 (viz. £133, 14s. 8d.), and the additional 200 tons above mentioned, reckoned as June shipments, and to have 500 tons in addition to these quantities delivered in July, and refused payment of the past due invoice. The pursuers averred that none of the vessels for which the defender nominally purchased coals were in Glasgow during the months of July or August 1872, except the "Crusader," which left on 5th July for Odessa.

The defenders stated that the coal bought by the defender was to supply steamers whose arrivals were irregular, and that he only refused to pay for the coals delivered already to him when the pursuers intimated their intention to make no further deliveries. He then intimated that he had been obliged, and would be obliged, to supply himself in the market, and at advanced rates. The result was, that after crediting the pursuers with the price of the coals received, and the quantity the defender was entitled to get, and debiting them with the price of the coals purchased in their place, there remained a balance due to the Coal Company of £15, 18s. 2d. A cheque for this balance was, on 16th August 1872, sent by the defender to the pursuers, but was returned by them.

The pursuers pleaded—(1) That the goods of which the prices are sued for having been sold and delivered by them to the defender, the price being resting-owing, they were entitled to decree, with expenses. And (2) The statements and pleas of the defender being unfounded in fact and in law, the defences ought to be repelled.

The defender pleaded *contra* that (1) The pursuers, having violated their contract with the defender, were not entitled to obtain implement of his part of the same. And (2) The pursuers having refused to deliver coal to the defender in terms of their contract, and having thus compelled him to purchase elsewhere at increased prices, the defender was entitled to withhold payment of the sums sued for, and to apply the same in the said purchases, and should be assoilzied, with expenses.

After a proof, and hearing counsel, the Lord Ordinary (ORMIDALE) pronounced (on 23d November 1872) the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof:—Finds it proved that under the