Thursday, June 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

LEONARD AND OTHERS *v.* LINDSAY & BENZIE.

Interdict—Encroachment—Process—Wall Erected in face of Interdict—Competency of Sheriff Obtaining and Acting upon Skilled Reports after Interdict Granted—Removal of Wall Ordered.

The proprietor of a tenement in Glasgow sought to interdict the proprietor of adjoining ground from using or interfering with the wall (not a mutual gable) and "scarcements" of his tenement, or from supporting on it the wall of a tenement which the defender was in course of erecting, and to have an order for the removal of the latter. The pursuer's tenement stood wholly on his own ground, except that the "scarcement" of the foundations projected, in accordance with the custom in Glasgow, upon the adjoining land. The Sheriff-Substitute granted interim interdict, which after a proof he declared perpetual, and ordained the defender to remove his wall, which, notwithstanding the interim interdict, had been since completed. The Sheriff, on appeal, adhered. Extract of the decree was however refused to the pursuer, and the defender failed to take down his wall as ordered. The pursuer having therefore moved formally for authority to demolish the defender's wall, the Sheriff-Substitute, after obtaining two reports from a man of skill, declined to grant such authority. The Sheriff, on appeal, adhered, after remitting to another man of skill, who reported that owing to certain operations executed by the defender on his wall, it caused no appreciable injury to the pursuer's building, though it depended on it for its stability. The pursuer appealed, and the Court (by a majority) *held* that as the fact of the defender's wall resting against the pursuer's wall was not actually injurious to the latter, the Sheriffs were right in refusing to allow the pursuer to remove the wall, and that the remits made by the Sheriffs, after interdict had been granted and the defender ordained to remove his wall, were not incompetent.

Lord Rutherfurd Clark *dissented*, holding that the fact of the defender's wall resting on the pursuer's constituted an illegal encroachment which ought to be stopped, and that though it might be competent for the Sheriffs to refer to reporters to get information necessary to carry out future proceedings, they could not competently use them to alter the views already expressed in their interlocutors.

In 1876 Peter Barr erected a four-storey tenement of shops and dwelling-houses at 24 Bridge Street, Partick. The northmost foundation was built of solid blocks of stone, on the centre of which the northmost gable-wall was erected, there being left projections or "scarcements" jutting out from the foundation into the adjoining property. This adjoining ground then belonged to M'Gregor's trustees, but at the date of this action had come to belong to Messrs Lindsay & Benzie, builders, Glasgow, who in 1883 began to build a tenement of shops and dwelling-houses on it, and in doing so they inserted or rested certain joists, beams, lintels, or other parts of their building into or upon the gable of Barr's tenement, which gable was not built as, and was not, a mutual gable.

Barr, through his factor, objected to their placing their tenement against his gable, and they therefore erected a lining of brick 4½ inches thick, between the chimney breasts which according to their original plan were placed against Barr's gable, and carried this lining or gable-wall to the top of their tenement, and backed their fireplaces and a bedplace with "scones" or thin bricks 1½ inches thick against his gable.

On 16th August 1883 Barr presented against them this petition, the prayer of which was as follows:—"To interdict the defenders from using or interfering in any way with the northmost gable-wall and 'scarcements' of the foundations of pursuer's property situated at No. 24 Bridge Street, Partick, and from supporting or resting on, or fixing into said gable-wall, the front and back walls, partitions, chimneys, joists, lintels, and other parts of the tenement in course of erection by defenders on their property adjoining and immediately to the north of the pursuer's property, or from otherwise invading or encroaching upon the pursuer's said property: And to grant interim interdict: And to ordain the defenders instantly to remove such connections as have already been made with the said gable-wall of pursuer's property, and to restore the wall to the condition in which it was before the defenders' interference therewith: And also to build a separate gable-wall next that of pursuer, or otherwise to support their said tenement so as not to cause injury to that of the pursuer: And failing their removing and restoring and building or supporting as aforesaid within such period as the Court shall appoint, to grant warrant to the pursuer to get the said removal and restoration and building or supporting effected: And to find the defenders liable in the expenses thereof and of this application: Reserving the pursuer's claim for loss or damage already sustained, or which he may yet sustain, in consequence of the defender's wrongous interference as aforesaid."

The pursuers averred—"(Cond. 3) It is averred that it is and was long prior to 1876 the universal custom in Glasgow and other parts of Scotland, and necessary for the stability of the buildings, for one proprietor in building, as the pursuer did, to project the 'scarcements' of the foundations of his building into his neighbour's ground, and only to cut them away when the adjoining proprietor should come to build upon his own ground, and to be allowed to do so should he not be called upon to cut them away. It is also averred that it is the like custom, and necessary for the stability of the buildings, for proprietors like the defenders, in building a tenement such as theirs, after the 'scarcements' of the foundations of their neighbour's property are cut, to lay a separate foundation and

build up a separate gable wall for the support of such tenement. (Cond. 4.) . . . Pursuer, besides acting in accordance with said custom, previous to projecting the said 'scarcements' arranged with the defenders' predecessors, M'Gregor's trustees, to do so, and that the 'scarcements' should be cut away so soon as their successor should come to build upon their property. These 'scarcements' are not fit for being built upon to support said tenement of defenders; and to enable the latter to build a foundation and gable of their own the pursuer has always been willing, and offered before the defenders began operations, to cut away said 'scarcements.' (Cond. 5) The said northmost gable wall of pursuer's tenement is solely erected upon his property, and is only a 'single' gable-wall, and it and the said foundations thereof are only adapted for the support of his own tenement. (Cond. 6) The defenders, however, in erecting their said tenements, are not building any separate gable-wall next pursuer's said gable-wall, but, instead, are using and interfering with the latter, and building upon the 'scarcements' of the foundations thereof, and are supporting, resting, or fixing into the pursuer's said gable-wall the front and back walls, partitions, chimneys, joists, lintels, and other parts of their tenement."

These acts the pursuer complained of as encroachments on his exclusive property, and as causing serious injury thereto.

The defenders denied the existence of the custom averred by the pursuer, and also the alleged arrangement with his predecessors. The defenders removed the joists, beams, or lintels previously inserted in or resting on the pursuer's wall.

The Sheriff-Substitute (GUTHRIE) after a report from a man of skill granted interim interdict as craved, except in so far as the "scarcements" of the foundation of the gable-wall in question are concerned.

The pursuer died in December 1883. His daughters Mrs Leonard, and Mrs M'Culloch, and Jane Barr, who were the fiars of the property built by Barr, he being only liferenter, had previously been sisted as pursuers. Subsequently William Nicolson acquired the property from the fiars, and was sisted as pursuer.

A proof was led, the import of which fully appears in the notes appended to the Sheriff's interlocutors, and in the opinions of the Judges.

On 25th January 1884 the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:— . . . "Finds that it is the usage of Scotland, or at least of Glasgow and the vicinity, for a feuar in building a house in a street to project the scarcement of a gable which he builds within his own ground into the vacant ground of his neighbour, and that he is bound to cut it away when his neighbour comes to build upon his own ground: Finds that when the defenders began to build their tenement they made no provision for erecting any gable, but intended to place their tenement against the pursuers' gable, taking such use of it as they might be allowed by the pursuers' carelessness or ignorance to take: Find that when the pursuers' factor objected to their proceedings, they erected a lining of brick 4½ inches thick between the chimney breasts, which according to their original plan were placed against the pursuers' gable, and having carried this lining or gable wall 4½ inches thick to the top of their tenement, and that they backed their fireplaces and a bed-place with scones or thin bricks 1½ inches thick placed against the pursuers' gable: Find that to a considerable extent this lining rests upon the scarcement of the pursuers' gable which the pursuers were never asked to remove although they were willing to do so, and that it and the said 'scones' or thin bricks lean against and are supported by the pursuers' gable: Find that in the circumstances the pursuers were entitled to have the scarcements cut away, and that it may be injurious to their building to have the defenders' lining or gable and chimney breasts resting thereon, and that the defenders in taking such use of pursuers' gable are encroaching on pursuers' rights, and in respect of the foregoing findings, and for the reasons stated in the note, declares the interdict perpetual, and decerns: Ordains the defenders within six weeks from this date to remove the said linings or gable and chimney breasts under certification.

"*Note.*—The defenders' operation in the premises in Bridge Street, Partick, have raised some questions which it is not quite easy to determine in an entirely satisfactory manner. I think, however, that a safe and just decision is facilitated if we consider how they commenced their proposed building scheme. It is evident from the plan lodged with the Dean of Guild that they did not intend to make any gable of their own, and it is not suggested that they regarded the pursuers' gable as a mutual gable. On the contrary, it provides no chimneys on their side, and the plan shows that they meant from the first to build chimneys against that gable. How they intended to proceed in regard to the spaces between the chimneys does not appear from the plan, or from anything so far as I remember which the defenders have stated either in their defences or evidence; but if I may draw an inference from what they did in certain matters mentioned in Mr M'Cord's report of 20th August, which led to the granting of interim interdict, I should say that they intended to appropriate and use just as much of the pursuers' gable as they could. However this may be, it is necessary to look at what they did rather than what they intended, and the evidence which we have in the latter subject is useful chiefly in considering what remedy shall be applied if they are found to have gone beyond their rights.

"The proof and argument were chiefly directed to two matters—(1) the character of the thin gable or lining which the defenders have actually erected, and (2) the custom in regard to scarcements.

"There is only an apparent conflict of evidence in regard to the usage, and the pursuers' witnesses in my opinion are the more reliable in regard to the character of the work. I take it that the pursuers' evidence embodies the views and practice of the older class of builders and architects who had been in the practice of building houses for living in, while the defenders' evidence for the most part represents the views of those who build houses for selling, and who therefore are favourable, I do not say with conscious unfairness or dishonesty, to any novelty which tends to cheapness and quick returns. I think it is sufficiently proved that the thin lining built up to the height of four storeys by the defenders would be totally unfit for its purpose

but for the contiguity of the pursuers' wall; that the weight of a man or piece of furniture thrown against it, the kick of a foot against the 'scones' which form the end of the bed-place, or the thrust of a poker or a sweep's brush against the back of the fireplaces, would, but for the pursuers' gable, expose the inmates to the breezes of heaven. If this were all, it might perhaps be plausibly contended that the pursuers had not yet suffered any injury; that the defenders had not gone beyond their right in building as they pleased on their own ground, and that while the pursuers may have a claim of damages when damage is caused, they are not entitled to the remedy they are asking here. This argument is unsatisfactory for two reasons. In the first place, because it is not damage or loss which is the foundation of the pursuers' case, but encroachment on his right of property (see the cases cited by Mr Rankine, Land Ownership, 111, 112), and the nature of the defenders' building makes it impossible, without minute and constant inquiry, to discover when this encroachment occurs, and even makes it more than probable that it has already occurred; in the second place, because I am disposed to believe those witnesses who say that this lofty single brick wall cannot stand alone, and that from the first it has been dependent for support on the pursuers' gable. If I am right in holding that the defenders' building is really leaning upon the pursuers' and depending on it for support, it is enough for the determination of the case. But the usage in regard to scarcements has been founded on, and I have also formed an opinion on that subject. The usage as set forth in the interlocutor is beyond all question prevalent in and around Glasgow, if not throughout Scotland, and whether or not it is a practice which could be followed if the proprietor of the adjacent feu should forbid, it is clear that it was adopted by the pursuers in building their tenement with the consent or acquiescence of the defenders' predecessor. That being so, it was clearly the pursuers' duty to cut it away if called on by the defenders, and there can be no doubt that if the pursuers refused or neglected to do so when requested, the defenders were entitled to cut it away at his expense if they deemed it necessary for their use of their own property. The only doubt which exists is as to the defenders' right to build on it if the pursuers did not cut it away. If the pursuers, being called upon to cut it away, had neglected or refused, it may be that the defenders would have been at liberty to put such part of their building upon it as their plans might require, without regard to any mischief that might result to the pursuers' property. But the pursuers were never asked to remove their scarcement, and I am not prepared to say that there is any reliable evidence of the liferenter's acquiescence in the defenders' making use of it as the foundation (for such it is) of their brick gable or lining—certainly there is none of such actings on his part as would be binding on the present pursuers, the fiars. In that state of things I think it might be held that the scarcement is part of the pursuers' property, temporarily projected beyond his boundary in conformity with usage, or at least by the tacit permission of the defenders' authors, and in conformity with the principle of good neighbourhood, and that the defenders were prohibited by the mere principle of exclusive property from using it in any way. But as it is in evidence that the weight of a building upon the scarcement has a tendency to injure the pursuers' building, it is not necessary here to appeal to that principle, and I say that on the ground of probable damage to the pursuers' building the defenders have gone beyond their rights. Interim interdict as to the scarcement was refused in August last, if I remember aright, partly because it was not then clear what the rights of the parties in this respect were, and partly because the building upon it had gone so far as to exclude the remedy of interdict, but at this stage it is necessary to consider the remedy craved. I do not think that the present case is entirely similar in its circumstances to that of *Jack* v. *Begg*, 3 R. 35, where the Court did not go to the logical result of ordering the removal of the buildings wrongfully erected, but allowed them to remain upon equitable conditions, because the defenders are not in my opinion in a position in which they are entitled to much equitable consideration or to anything beyond the strict law, and because there is not here an equitable compensation arising out of the position of the premises which can conveniently be awarded.

"Nevertheless I should have been disposed, following the principle of that decision, to remit to Mr M'Cord or to Mr Binnie to ascertain upon what terms the defenders' building might be allowed to remain, were it not that I presume that the parties wish to have an appealable judgment without further delay. They have it in their own power, if they do not appeal, to settle the question of compensation by reference or agreement."

On appeal the Sheriff on 31st July 1884, for the reasons assigned by the Sheriff-Substitute, adhered to his interlocutor with this variation, that the six weeks mentioned in the Sheriff-Substitute's interlocutor should run from 31st July, the date of his interlocutor.

The pursuers thereafter applied for an extract, which was refused by the Sheriff-Clerk, and this refusal was sustained by the Sheriff-Substitute on the matter being referred to him. No reason for this was stated at the bar. The pursuer thereupon on 29th September 1884 lodged in process this motion — "In respect the defenders have failed to obtemper the order of Court of 25th January, affirmed on appeal on 31st July 1884, and having refused to do so, the pursuers respectfully move the Court to decern against the defenders in terms of the prayer of the petition, or otherwise."

On 13th October the Sheriff-Substitute before answer remitted to Mr Thomson, an architect, to examine the buildings, with special reference to the interlocutors of 25th January and 31st July, and to report what measures required to be taken in order to restore the pursuer's gable to the condition in which it was before the defenders built against it, and to secure it from undue weight or pressure from the defenders' buildings and from the risk thereof.

Mr Thomson reported that certain works had been effected since the 25th January, which in his opinion were sufficient, and that he was further of opinion that there was now no necessity for any measures to be taken in order to restore the pursuer's gable to the condition in

which it was before the defenders built against it.

On 15th January 1885 the Sheriff-Substitute of new remitted to Mr Thomson to report in terms of the former remit to him and with reference to the note.

"*Note.*—It has been found that the defenders have done an illegal act in building against the pursuer's wall in such a way as their house cannot exist as a house without taking an illegal use of the pursuer's gable. The defender's have also refused to implement the Sheriffs' order to remove their lining or quasi-gable and chimney rests, which rest against the pursuer's gable. It is obvious that the defenders have nothing to fight for except to keep their encroachment standing as long as they can, and perhaps they may now be entitled to keep it so, but it is desirable that the pursuer should be allowed, as soon as may be, to enforce his legal rights. He wishes to do so by being authorised to pull down the defenders' gable under a warrant of the Court. I was not satisfied that such a warrant should be granted in the broad terms in which it was asked. Mr Thomson's report does not enable me to grant it in any different terms, and although I think that Mr Thomson has gone beyond the remit to him in reporting as to the defenders' unauthorised operations referred to in my former interlocutor, probably because it was impossible to execute the remit without taking into account these operations, and has fallen short of it in ignoring the last words of the interlocutor remitting, I have come to think that it is inexpedient, if not incompetent, in such a case as this to give a warrant to one party to execute operations of demolition in the property of another, and that it is desirable that this action should if possible now take end, so far at least as this Court is concerned. I think so not not only for the reasons already indicated, but because it may possibly turn out that the pursuer is not without a remedy apart from that which he seeks. In this action he already holds an interdict and a decree *ad factum præstandum*. If the defenders are 'using' the pursuer's wall or 'supporting or resting on it' the front and back walls, partitions, chimneys, joists, lintels, and other parts of their tenement, then the pursuer may proceed against them for a breach of interdict. Other views of the position may also be taken which it is not necessary for me to indicate, but according to which he would not be without redress.

"In the meantime, in order to exhaust the case, I have to request Mr Thomson to report, if possible, whether the result of the defenders' recent operations is that the pursuer's gable is now secure from the risk of undue weight or pressure from the defenders' quasi-gable, *i.e.*, whether the latter has been made capable of standing by itself, and without leaning against the pursuer's gable more than a gable of normal thickness and strength would do."

Mr Thomson then made a second report stating that it was difficult to say from the construction of the defenders' gable that the pursuer's gable was now secure from the risk of undue weight or pressure from it, but he was of opinion that the defenders' gable has been made capable of standing by itself just as well as a gable of normal thickness or strength would do.

On 12th March 1885 the Sheriff-Substitute found that it was not expedient in the circumstances to grant any warrant in the terms of the last alternative prayer of the pursuer's petition; therefore refused the pursuer's motion of 29th September last, and dismissed the petition so far as not already disposed of.

On appeal the Sheriff, *inter alia*, appointed parties to be heard on the question whether the defenders' operations, as appearing from Mr Thomson's report, complied with the terms of the alternative remedy craved in the petition, or whether further operations were still necessary, and as to whether a further remit was necessary.

"*Note.*—The alternative before referred to being part of the pursuer's conclusions, I think it is still open to the Court to fall back upon it, notwithstanding the somewhat awkward position the case has got into. It must be borne in mind that the interlocutors of 25th January and 31st July 1884 were not a decree but simply an order on the non-compliance with which some alternative order or decree would follow."

On 29th July the Sheriff remitted to Mr Carrick, city architect, Glasgow, "to hear parties, examine the pursuer's and defenders' buildings, and report whether in his opinion the defenders' tenement now conforms to the pursuer's demand in the prayer of the petition, namely, 'to support their said tenement so as not to cause injury to that of the pursuer,' and if not, what works are necessary to bring it into conformity with this demand, and the case to be thereafter laid before the Sheriff."

Mr Carrick reported that though the construction of the defenders' gable adjoining the pursuer's tenement was most unsatisfactory, and such as might be described as dependent for its stability on the contiguity of the pursuer's building, it did not cause any appreciable injury to the pursuer's building.

On 26th January 1886 the Sheriff pronounced this interlocutor—"Having heard parties' procurators, and considered the whole cause, in respect of the report (Mr Carrick's), adheres to the interlocutor of the Sheriff-Substitute of 12th March 1885 in so far as it dismisses the action: *Quoad ultra* recals the said interlocutor, and finds defenders liable in expenses down to and including 31st July 1884," &c.

The pursuers appealed to the Court of Session.

Authorities referred to—*Grahame* v. *Magistrates of Kirkcaldy*, Jan. 19, 1881, 8 R. 395, and July 26, 1882, 9 R. (H. of L.) 91; *Jack* v. *Begg*, Oct. 26, 1875, 3 R. 35.

At advising—

Lord Justice-Clerk—This is an important case for the parties, and it has been fully investigated. An elaborate proof has been led, to which the Sheriffs have applied their minds, and after two separate reports they have come to the conclusion that there is no sufficient ground for granting warrant to remove the buildings. I am not going to detain your Lordships by reading the prayer of the petition. It is wide enough to enable us to do justice between the parties, and if we find that the buildings were encroachments on the pursuer's right of property I do not doubt that we have power to order their removal. But the case when we first heard of it presented unusual aspects, because the Sheriff-Substitute

having considered the evidence found that there were encroachments of which the pursuer was entitled to complain and ordered their removal, and the Sheriff-Principal adhered. But for some reason or other no obedience was shown, and the result was that when the case came to be matured the buildings were completed. We now have a motion made for a warrant for their removal. Now, I am not prepared to grant this. I do not think that it is necessary to proceed on the analogy of the cases of *Grahame* v. *Magistrates of Kirkcaldy* and *Jack* v. *Begg* as to the ordering of removal of buildings contrary to law, because I do not think the pursuer has made out his case. The proof relates largely to the question as to the custom in buildings raised upon a neighbour's "scarcements." Though there was shown to have been originally an encroachment on the pursuer's property, that was afterwards removed. But then the next and real question is, whether it was proved in the Court below that the gable ultimately erected exercised unreasonable pressure on the adjoining gable with which it necessarily came in contact? This the pursuer undertook to show, but I am of opinion he has failed to do so. I do not doubt the object the defender had in view was to avail himself as cheaply as possible of the benefit of his neighbour's gable, but the question is whether the pursuer has proved that the defender's gable, sufficient though slender, exercised unusual pressure on his gable. The proof fails here entirely, and therefore I am not disposed to disturb the Sheriff's judgment. In regard to the reports, I am not inclined to subscribe to the proposition that it was beyond the power of the Sheriffs to order them. On the contrary, I think that such reports, even after the proof has been led, may often afford material aid in the ends of justice.

Lord Young—I am substantially of the same opinion. The case which has been argued to us is one of considerable interest and importance though the real matter of dispute is insignificant enough. The complaining petitioner through his counsel admitted very candidly that no danger had been hitherto done, and that there was no substantial ground of apprehension in the future, presenting his case as a violation of legal right by what the Dean of Faculty preferred to express as an encroachment against which he was legally entitled to protection although he had suffered no harm. I think it is proper and necessary to attend to the exact case which is presented by the complainer on record on the matter of mere legal right. He says he built his tenement and dwelling-house in 1876 and that it is entirely on his own property. In doing so he had to encroach on the property of his neighbour by "scarcements," as he built his tenement close up to the margin of that. This was all done without complaint. In 1883 he says that the defenders, who are heritable proprietors of the adjoining property to the north of his property, began to erect on their property a tenement and dwelling-house. The complaint was presented in August 1883, and we must notice that the defender's tenement of a shop and dwelling-house is entirely on their own property, just as the pursuer's is entirely on his. It was not so originally and therefore I am going to make a distinction between the case as it stood originally and as it stands now. It is true the pursuer's tenement is more substantial than the defender's, but the latter is entirely on the defender's own ground, and does not at all cross the boundary line between his property and that of the pursuer. Each built up to the margin of his property, and I suppose the walls are plumb, the one against the other. When the pursuer built his tenement he must have expected that his neighbour could build up to the margin and bring his wall against the pursuer's, for he explains on record:—"It is averred that it is and was long prior to 1876 the universal custom in Glasgow, and other parts of Scotland, and necessary for the stability of the buildings, for one proprietor in building, as the pursuer did, to project the 'scarcements' of the foundations of his building into his neighbour's ground, and only to cut them away when the adjoining proprietor should come to build upon his own ground, and to be allowed to do so should he not be called upon to cut them away."

Now, I quite assent to the law that no man is entitled to encroach—in the sense of trespass—on another man's ground, even to the extent of driving a nail into it. Where two properties adjoin, the division line is imaginary. It is a line which has no breadth. The properties bound each and touch each other below the soil. The territory of each presses against the territory of the other, and above ground the same must occur if both make use of it so as to build up to the margin. It is matter of necessity, and I should think of common knowledge, that if you have a continuous line of houses they lean against each other. It seems then to me an almost extravagant proposition that any proprietor who builds up to the margin of his neighbour's property should complain when the latter does so too on his side. The whole houses in the line of such a street derive support from one another to their common benefit, and there is no invasion of right of property nor any encroachment in the reasonable sense of the term. There is therefore, if that is the case, now no more reason, so far as I have gone, for one to complain than for the other. It was, as I have said, otherwise when the case began, because the defender built on the pursuer's "scarcements," but I assent to the pursuer's proposition (assented to by the defender) that he was entitled to have an opportunity of removing the "scarcements" before his neighbour began building to the margin of his property, and the defenders began their operations before the "scarcements" were removed. To that extent there is ground of complaint. These being there, they together with the building on the scarcements afforded a ground of complaint, and I find no other stated. It is an encroachment on right by building on the scarcements, which the pursuer said he had put on the defenders' land according to custom, as he was entitled to do. In Cond. 4 the pursuer says—"In erecting the said tenement the pursuer built the northmost foundation of solid blocks of stone, on the centre of which the nothmost gable wall was erected, thus leaving projections or 'scarcements' next the defenders' property in accordance with said custom. These 'scarcements' are not fit for being built upon to support said tenement of the defenders." Cond. 5—"The said northmost gable wall of pursuer's tenement is solely erected upon his property, and is only a 'single' gable wall, and it and the said founda-

tion thereof are only adapted for the support of his own tenement." Cond. 6—"The defenders however in erecting their said tenement are not building any separate gable wall next pursuer's said gable wall, but instead are using and interfering with the latter and building upon the 'scarcements' of the foundations thereof, and are supporting, resting, or fixing into the pursuers' said gable wall the front and back walls, partitions, chimneys, joists, lintels, and other parts of their tenements." That is the whole complaint. But admittedly the two grounds of it have been removed. The scarcements were cut away, and now the building rests only on his own ground. The tenement was weakly and unsubstantial, but not more so, I suppose, than any other tenements of a similar kind intended to last only a short time. But whether substantial or not, it was exclusively on its owner's own property, and I cannot concede the existence of a complaint in such a case. I quite admit that if a case could be stated, and were stated, of a building being so erected as to occasion undue and appreciable injury, the Court would give a remedy. But there is no suggestion of it here on record. The matter was gone into in the proof, and the import of that proof is to the conclusive effect that there was no pressure at all, nor support beyond what was natural in houses built in a continuous line. One of the witnesses, M'Cord, depones—"(Q) Do you mean to make out that the defenders' buildings are resting on the pursuer's property besides on the scarcement?—(A) I do not know that you can call it resting, but it is leaning; it is built against it—touching. I cannot say that pursuer's gable is actually supporting the defenders' gable beyond the scarcement." There is therefore nothing peculiar here at all to give ground of complaint. I agree we must refer to the report of the men of skill to whom the remits were made in the Sheriff Court. The first of them says the gable was fitted to stand by itself without support, and does in fact so stand, and the second says that it causes no appreciable injury to the pursuer. I am therefore on the whole matter disposed to find in fact that the building on the scarcements was entered upon when the application was presented, but that the building which is now standing is entirely on the defender's property, and is not an encroachment at all entitling him to succeed in this complaint.

Lord Craighill—I am of the same opinion, and for the reasons which have been already stated so clearly. That there was some cause of complaint when the action was raised is not disputed, for to some effect the defenders were dealing with the pursuer's gable as if it were their own or as if it was a mutual gable. They had built on the scarcements and rested a beam front and back on what was confessedly the pursuer's exclusive property. These causes of complant were admitted, and all was done which was necessary to rectify the error. Then there was another ground of complaint, that this gable was of so flimsy a nature as not to be self-supporting, but on the other hand that it took its support from the gable of the pursuer, whereby the weight was thrown on the latter and constituted an invasion of the pursuer's right of property. It is quite a relevant case, for injury may be done in this way. But then it is disputed by the defenders, and it is necessary before the pursuer can succeed that he prove the case. It is not disputed that the defenders had right to build up to the edge of the pursuer's property. One is in contact with the other. But if there is no more than this—that is, if there is no encroachment—there is no invasion of right. I am of opinion that the pursuer has not proved the averments which he made ground of action.

Lord Rutherfurd Clark—I am sorry I cannot agree in the judgment which is to be pronounced. To my mind it is proved that the defenders intended to make an illegal use of the pursuer's gable at the commencement of their operations. It is not disputed they did thereby place an encroachment on the right of the pursuers, but what they have since done seems to be a device to obtain the same end as was contemplated at first, and the proof satisfies me that in a substantial manner the so-called gable of the defenders has its weight thrown on the pursuers' gable. I confess that though the gable were in perfectly still air, and not deriving its strength from the shelter of the pursuers' gable, I am satisfied on the evidence that it would soon come down, and I cannot doubt on the evidence that it continues to stand by reason of its resting for support from the pursuers' gable. If that is not its present condition, it will soon be in that condition, and such a use is an illegal use, as I think your Lordships are all agreed. The question then is one of fact. On the proof I cannot come to the same conclusion as your Lordships, and therefore I differ in the result. I agree with the Sheriff-Substitute's findings in fact, and therefore it necessarily follows that the gable ought to be removed. With respect to the reports which were obtained, while it might be competent to refer to reporters to get the information necessary to carry out future proceedings before the Sheriffs, I doubt whether it is competent to use the reports to alter the views already expressed in their interlocutors. But that is only by the way, for I think the reports only differ from the judgments in the Sheriff Court apparently, and not really. I think the real substance is not that the gable of the defenders was not resting on the gable of the pursuers, but that the pursuers' gable was strong enough to support the weight of that gable. That is plainly the result of their opinion. That I do not think is a satisfactory solution of the legal question, because if the weight of the defenders' gable is resting on that of the pursuers, it is substantially an illegal use which we are bound to put a stop to. I therefore am of opinion that the Sheriff-Substitute has come to a true conclusion.

The Court pronounced this interlocutor:—

"Find that at the date of the institution of this action the defenders in building the tenement of shops and dwelling-houses mentioned in the record had inserted or rested portions of the structure into or upon the gable of the pursuers' house adjoining, and had erected a lining or gable-wall upon the scarcement of the pursuers' said gable: Find that these operations were encroachments on the rights of the pursuers, and injurious to their property, and that the defenders were, by order

of the Sheriff-Substitute, affirmed by the Sheriff, required to undo them: Find that the defenders removed that part of the said scarcement on which their said lining or gable-wall rested, and also the portion of their building inserted in or rested on the pursuers' gable, and that neither the lining or gable-wall nor any part of their said tenement now rests or presses on the pursuers' gable: Therefore dismiss the appeal; affirm the judgment of the Sheriff appealed against; of new dismiss the petition: Find the pursuers entitled to expenses in the Inferior Court down to and including 31st July 1884: Find the defenders entitled to expenses in this Court."

Counsel for Pursuers (Appellants)—D.-F. Mackintosh, Q.C.—G. W. Burnet. Agents—Fyfe, Ireland, & Mackay, W.S.

Counsel for Defenders (Respondents)—Graham Murray—Dickson. Agents—Dove & Lockhart, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, June 4.

RITCHIE *v.* THE COMMISSIONERS OF POLICE FOR DUNDEE AND ANOTHER.

Justiciary Cases — Road — Tramway — Street Tramways Act 1870 (33 *and* 34 *Vict. cap.* 78), *section* 28—*Dundee Street Tramways, Turnpike Roads, and Police Act* 1878 (41 *and* 42 *Vict. cap. xciv.*), *section* 22.

The Tramways Act of 1870 provided that the road between and adjoining the rails to be laid down by promoters of Tramway Companies should be kept by them in good repair to the satisfaction of the road authority. The Dundee Tramways were taken over by the Police Commissioners of the burgh, who were themselves the road authority, under an Act providing that they should at all times keep in good repair the rails of which the tramways should consist. A ratepayer brought a complaint against them under these statutes and under the Summary Jurisdiction Acts charging them with having wilfully failed to maintain in good order the rails and the roads adjoining the rails, and alleging that there were ruts in the roads beside the rails, and that these rails were above the level of the roads, and the roads and rails were in bad condition and disrepair. *Held* that the complaint was irrelevant, because (1) no allegation was made in the complaint of a specific fault in the condition in which the rails were kept; (2) that the obligation of the Police Commissioners as proprietors of the tramways was to maintain the line to the satisfaction of the road authority, and that the Police Commissioners exercised the functions of both bodies.

Question, Whether a summary prosecution for penalties against the Police Commissioners was competent under the Summary Jurisdiction Acts?

By section 28 of the Tramways Act 1870 it is enacted that "The promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway."

A tramway company was formed which laid tramway lines and worked traffic thereon in the burgh of Dundee. In 1878 there was passed the Dundee Street Tramways, Turnpike Roads, and Police Act, under which the Commissioners of Police of Dundee took over the tramways. Section 22 of that Act provided—"The Commissioners shall at all times maintain and keep in good condition and repair the rails of which any of the tramways shall for the time being consist."

In March 1886 there was brought before the Sheriff-Substitute of Forfarshire at Dundee under the Summary Jurisdiction (Scotland) Acts 1864 and 1881 a complaint at the instance of William Ritchie, hackney carriage driver there, charging the Police Commissioners of the burgh with having contravened The Dundee Street Tramways, Turnpike Roads, and Police Act 1878, section 22, and the Tramways Act 1870, section 28, in so far as they had "wilfully failed" during a period libelled "to maintain and keep in good condition and repair the tramway rails" situated in certain streets of Dundee, and had "wilfully failed to maintain and keep in good condition and repair the portions of the roads between the said tramway rails, and so much of the roads as extend eighteen inches beyond the rails of and on each side of said tramways, whereby the said Commissioners of Police are liable and subject to a penalty not exceeding £5 sterling for every day said tramway rails and said roads have been wilfully allowed by the said Commissioners of Police to remain in a bad condition and state of disrepair."

It was averred in the complaint that "along the whole of the said tramway rails there are deep ruts in the roads to the depth of from one and one-half inches to three and one-half inches, and the rails are raised above the roadway to the extent of from one and one-half inches to three inches, in consequence of which vehicular traffic is greatly impeded in said streets, and the wheels of vehicles get wedged between the said ruts, and great difficulty is experienced in getting such vehicles out of the way of tramway cars and other vehicles, and great damage is done to the axles, wheel tyres, wheels, and springs of such vehicles, which are subject to sudden wrenches when the drivers endeavour to take the said vehicles out of the said ruts, or to cross the said roads, and by all which a great many accidents and considerable damage and annoyance have been caused to the complainer and the other inhabitants of said burgh of Dundee."

The complainer further set forth that being a ratepayer, and having in pursuit of his calling as