In the other set of cases the Court held that the character and use of the subject of valuation must determine the question, and that the supplying of meat and drink was something collateral and external to a railway company's undertaking. That decision may be right or wrong, but it is quite intelligible, and is leagues distant from anything which we have to consider.

I entirely concur with the judgment under review, and with everything said in the Lord Ordinary's note.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—C. S. Dickson—Wilson. Agent—James Hope, W.S.

Counsel for the Defenders—Guthrie—Graham Stewart. Agents—M'Neill & Sime, W.S.

Saturday, December 8.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

TODD *v.* WILSON.

Property—Common Interest.

Held that the proprietor of an upper flat in a tenement was entitled to connect it with the adjoining building by cutting through the gable of the flat, in respect that the proposed operations were entirely *in suo*, and that there was no allegation that they would result in injury to the chimneys of the owner of a lower flat which passed through the gable in question.

Gellatly v. *Arrol*, March 13, 1863, 1 Macph. 592, *distinguished.*

George Todd, wholesale hardware merchant, presented a petition to the Dean of Guild, Glasgow, for authority to make certain alterations upon subjects in Wilson Street, Glasgow, of which he was the proprietor, described as "the flat immediately above the shop No. 10 Wilson Street."

The petitioner proposed to make a connection between the said flat and the house immediately to the east, of which he was also the proprietor, by breaking through the gable wall of the flat (which was not a mean gable, but formed part of the tenement itself) and the gable wall of the adjoining property, and making a doorway or passage between them, his intention being to occupy the flat above the shop No. 10 Wilson Street as an addition to his warehouse, which was situated in the adjoining building.

John Wilson, C.A., who, as judicial factor on the trust-estate of the deceased Thomas Forrest, rope and twine manufacturer, was proprietor of the shop No. 10 Wilson Street, lodged objections. He averred—"(Objection 2) . . . Access to the upper flats of the tenement was obtained by a common stair. . , . The flues from the fireplaces of the objector's shop passed up through the gable forming the eastern wall of the tenement. (Objection 4)The petitioner . . . carries on in the adjoining building the business of a hardware and fancy goods merchant. His stock is of an inflammable description. . . . (Objection 5) From the plans produced with the petition it appears that the petitioner proposes to break through the two gable walls separating his present warehouse from the flat above the petitioner's said shop, to insert in the opening a wide doorway or passage, to shut up the present entrance to said flat from the common stair No. 12 Wilson Street, to occupy said flat as an addition to his warehouse, and to use said passage or opening as the only means of access thereto. The result will be that for all practical purposes said flat will be part of the petitioner's warehouse, and through it the whole of the tenement will be subjected to the same risk of fire as the petitioner's warehouse. (Objection 6) The petitioner further proposes to occupy the flat for the storage of goods. . . . By the bye-laws enacted by the Police Commissioners on 21st November 1892 the floors of warehouses and workshops must be able to carry 224 lbs. per square foot as a safe load. The floors in question are not nearly strong enough."

The petitioner in answer denied that the proposed alterations would lead to any increased risk of fire, and explained that his flat would be shut off from the objector's property by fireproof doors, and that the floor would be strengthened to the satisfaction of the Master of Works.

The petitioner pleaded—"(2) The petitioner being the sole proprietor of the portion of the gable through which the proposed entrance is to be formed, and said alterations being safe, he is entitled to decree as craved."

The objector pleaded—"(1) It is incompetent for the proprietor of one flat of a tenement to connect it with the adjoining building by cutting through the intervening gables. (2) The alterations proposed being unsafe, the petition ought to be dismissed."

Upon 9th July 1894 the Dean of Guild pronounced this interlocutor—"Finds that the petitioner is proprietor of the first flat of the tenement No. 10 Wilson Street, Glasgow, being the flat immediately above the shop in said tenement belonging to the objector: Finds that the petitioner is not entitled to cut through the east gable of the said first flat for the purpose of connecting the flat with the building belonging to him adjoining the said tenement on the east: Therefore sustains the objections and refuses the lining craved," &c.

"*Note.*—This case seems ruled by *Gellatly* v. *Arrol*, 1 Macph. 592. It is true that in that case the chimneys of the lower proprietor were interfered with, while that is not here alleged. But the interlocutor of the Court is expressed in general terms, and unless the petitioner could show that the plan of the original construction of the tenement No. 10

Wilson Street was more favourable to allowing communication with the adjoining building than in *Gellatly* v. *Arrol*, this distinction between the cases seems not material. And the contrary is the fact, for here the tenement in question has a distinct gable from the petitioner's building adjoining, which latter, indeed, fronts to a different street, and it is said that the buildings were even formerly separated by a close. The Judges in *Gellatly* v. *Arrol* apparently all were of opinion that the intention of the builder in substance constitutes the law of such a tenement, while Lords Cowan and Neaves were also of opinion that the increased risk of fire arising from the opening of communication with the adjoining buildings, which was there founded on, as it is here, could not be disregarded. No doubt this risk of fire would be so far reduced by the fireproof doors proposed by the petitioner, though such doors are apt to be left open, but the objector seems within his legal rights in insisting on having a house or shop distinct from the others, so far as consistent with the general plan of the building, as Lord Neaves puts it in *Gellatly* v. *Arrol*. It is unnecessary to consider whether the floor of the petitioner's flat could be sufficiently strengthened for its intended use without unduly interfering with the objector's property."

The petitioner appealed. After some delay had been allowed for inquiry, it was admitted by counsel for the objector, that the proposed operations would not interfere with, nor cause damage to, the flues from the fireplaces in his shop which passed through the gable wall of the petitioner's flat.

Argued for the petitioner—The objector had admitted that the petitioner's operations would not cause any damage to the flues of his shop; the only danger therefore against which he needed to guard were those of fire, and greater traffic by and through the common stair. With regard to the last of these, the petitioner was going to shut up the door leading to his tenement from the common stair, so that there could be no fear from that cause, and in regard to fire, it was a theoretical proposition altogether. There was no reason why a fire should break out because there was a passage between the two houses more than if the passage had not been made; there was therefore no reasonable apprehension of danger or injury which was necessary in point of law as the foundation of an objection—*Gellatly Arrol*, November 13, 1863, 1 Macph. 592, Lord Kinloch, 596. The objector had no right of common property in the walls of the building, but only a right of common interest, and as the petitioner's operations were entirely *in suo* no objection could be taken—*Taylor* v. *Dunlop*, November 1, 1872, 11 Macph. 25; *Wall* v. *Burgess' Trustee*, March 9, 1891, 18 R. 766; *Calder* v. *Merchant Company of Edinburgh*, February 26, 1886, 13 R. 623.

Argued for the objector—The true principle for the decision of this case was that the law of the tenement which was imposed upon it by the original builder regulated the rights of part-proprietors, and, as according to the original design this building was to be a tenement by itself enclosed within its own four walls, no one of the part-proprietors was entitled to alter that condition of things without the consent of the others. In this case the risk of fire was greatly increased by putting another house into connection with this one, and this risk had been considered as a valid objection to such operations as were here proposed—*Gellatly* v. *Arrol*, cited *supra*.

At advising—

LORD TRAYNER—The appellant is the proprietor of certain heritable subjects in Wilson Street, Glasgow, described in the petition as "the flat immediately above the shop No. 10 Wilson Street." He is also proprietor of the tenement, or part of the tenement, immediately to the east of that first mentioned, and he has made application to the Dean of Guild for warrant to carry out certain alterations on these properties conform to plans produced. One of the proposed alterations is to make a connection between the two properties by breaking through a door-way or passage in the gable walls of the two properties respectively, and thus enabling the petitioner to have direct access to the flat above No. 10 Wilson Street from his property lying to the east thereof. The respondent, who represents the owner of the shop No. 10 Wilson Street objects to the proposed alteration on two grounds embodied in his pleas-in-law, which are as follows—"(1) It is incompetent for the proprietor of one flat of a tenement to connect it with the adjoining building by cutting through the intervening gables. (2) The alterations proposed being unsafe the petition ought to be dismissed."

The Dean of Guild has sustained the first of these pleas and refused the lining craved. He has not dealt with the second plea in so far as it covers the other proposed alterations, that being unnecessary in the view on which he has proceeded. I am of opinion that the judgment of the Dean of Guild is erroneous, and ought to be recalled.

The Dean of Guild has proceeded upon the authority of the case of *Gellatly* v. *Arrol*, which he regards as a decision ruling the present case. No doubt that case presented some features of similarity to the present, but the two cases are distinguished by this very material circumstance, that in *Gellatly's* case the interference with the gable which was held to be illegal was an interference which resulted in injury to the vents or chimneys in the gable belonging to the other proprietors; whereas here no such injury is alleged on record, and it was admitted at the bar that no such injury would be inflicted by the appellant's proposed operations. In the opinions delivered by the

Judges in *Gellatly's* case there are other considerations referred to, and which perhaps affected the decision, but the real ground of judgment was that the operations there complained of were an invasion of the legal rights of others. So regarded, the decision in *Gellatly's* case does not rule the present. I am not prepared to admit that the proposition set forth in the respondent's first plea is necessarily and in all cases a sound statement of our law. If it were, it would impose a restriction on the rights of property which, so far as I know, has not yet been imposed by our law,—and a restriction which would prevent a proprietor making a use of his property which might be advantageous to himself and yet in no way injurious to his neighbour. If the gable in question had been the common property of the different proprietors in the tenement, the case would have been different, because there can be no interference with common property except of consent of all the proprietors. Such, however, is not now regarded as the character of the right which the several proprietors of a tenement have in the gable walls of their property, although that view found favour with at least one of the learned Judges who decided the case of *Gellatly*. My opinion is that the operations on the gable proposed by the appellant are operations *in suo*, and, not affecting the rights of any others, ought to be allowed. I should therefore be disposed to recal the judgment appealed against, repel the respondent's first plea-in-law, and find that the appellant is entitled to the lining and warrant prayed for, in so far as concerns his proposed alterations on the gable walls.

As the objection raised by the second plea-in-law covers a matter of fact, set forth in the 6th article of the objections for the respondent, with which the Dean of Guild has not dealt, the case, so far as that point is concerned, will require to go back to him.

The LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

> "Sustain the appeal and recal the interlocutor appealed against; repel the first plea-in-law for the objector; and remit the case back to the said Dean of Guild, and decern."

Counsel for the Petitioner—Ure—Craigie. Agents—J. & J. Galletly, S.S.C.

Counsel for the Objector—Asher, Q.C.—Deas. Agents—Dove & Lockhart, S.S.C.

Tuesday, December 4.

FIRST DIVISION.

M'HAFFIE'S TRUSTEES *v.* M'HAFFIE AND OTHERS.

Succession — Fee and Liferent—Fiduciary Fee—Intestacy.

By *mortis causa* conveyance a testator disponed certain heritable estate to and in favour of his two sons, W. and A., "equally between them, and failing either of them without lawful issue, to the survivor of them, the lawful issue of the predeceaser always coming in place of their parent, in liferent and for their liferent use allenarly, and to their lawful children equally among them, share and share alike, in fee."

A. died in 1891 without having had issue. He was predeceased by W. and by W.'s children, but one of W.'s children left issue, who were alive at A.'s death.

Held (*diss.* Lord Kinnear) that each of the liferenters took a fiduciary fee for his own issue exclusively, and that, A. having died without issue, the share liferented by him fell into intestacy at his death, and belonged to the heir-at-law of the testator.

David M'Haffie, hereinafter called David M'Haffie, *primus*, was the proprietor of several landed estates, including the lands of Skeoch and Overton, in Ayrshire.

By *mortis causa* disposition, dated 4th of June 1833, which remained undelivered at the time of his death, he disponed the said lands of Skeoch and Overton "to and in favour of my two sons, William M'Haffie and Alexander M'Haffie, equally between them, and, failing either of them without lawful issue, to the survivor of them, the lawful issue of the predeceaser always coming in place of their parent, in liferent and for their liferent use allenarly, and to their lawful children equally among them, share and share alike, in fee." William and Alexander M'Haffie were respectively the second and third sons of David M'Haffie, *primus*.

David M'Haffie, *primus*, died in 1837, and after his death an instrument of sasine was expede in favour of the liferenters and their children in terms of the destination.

William M'Haffie, the elder of the two liferenters, died on 23rd October 1890, having had seven children, all of whom predeceased him. One of his children, David M'Haffie, *secundus*, left five children, the eldest being William David M'Haffie. None of the other children of William M'Haffie left issue.

Alexander M'Haffie, the younger of the two liferenters, died on 22nd August 1891, without having had any issue. He was thus predeceased by all the immediate issue of his brother, William.

Questions having arisen with regard to the disposal of the fee of the *pro indiviso* half of the lands liferented by Alexander M'Haffie, a special case was presented by