L.R., 12 App. Ca. 409; and if the pursuer had sold the shares to the company she would have remained liable for calls, and might have been called upon to repay the price which she received in the event of the bankruptcy of the company — *General Property Investment Company* v. *Mathieson*, 16 R. 280.

I read the 14th article as if it formed part of the 12th. It is the counterpart of it, and not separable from it. In one view it appears to be a concession to the rejected successor—the company must purchase her shares; but from another point of view the 12th and 14th articles enable the company to force a sale to themselves of a deceased member's shares in every case where they choose, without reason assigned, to decline to register the successor. Thus I think that this part of the contract is one and indivisible, and as the power to the company to purchase its own shares is illegal, both articles 12th and 14th must be read out.

The defenders, however, maintain that assuming that the company cannot purchase its own shares it is entitled to substitute for its obligation to do so an undertaking to find a nominee to take over and pay for the pursuer's shares. The question of law therefore is, whether when a contract or part of a contract is *ex facie* void, because it contains an impossible condition or a condition contrary to law, the party on whom the impossible or unlawful condition lies can, against the wish of the other party, maintain or revive the contract by tendering performance in a manner which is lawful but is not provided for or contemplated by the contract.

Now, however reasonable such a proposal as that which the defenders make may be, I doubt the power of the company to remodel the original articles in this way. If articles 12 and 14 are indivisible, they are void, because on its face the 14th article is unlawful, and the articles do not provide for any alternative mode by which the company may relieve the successor of the shares; because the 59th article which was referred to plainly refers only to a case where the representatives of a deceased shareholder do not come forward and claim the shares or dividends.

In connection with this I observe that in the new articles of association the company considered it necessary to take power to the board to nominate a purchaser in the event of any person proposing to transfer his shares; and it will be seen, if the articles 32 to 38 are examined, that it required a somewhat complicated set of provisions to effect what the defenders now seek to read into the original articles.

Therefore on this point also, although not without hesitation, I think that the pursuer has the best of a somewhat technical argument. The contentions of both parties have been somewhat extreme, but on the whole I think the balance lies with the pursuer and that she is entitled to succeed.

The LORD JUSTICE-CLERK concurred with Lord Trayner.

The Court assoilzied the defenders from the first and second conclusions of the summons, and *quoad ultra* continued the cause. By a subsequent interlocutor, dated 20th July 1900, the Court granted decree in terms of the petitory conclusions, and ordained the defenders to make payment to the pursuer of the sums of £440 and £550 concluded for.

Counsel for the Pursuer—W. Campbell, Q.C. — Duncan Smith. Agent — Thomas Henderson, W.S.

Counsel for the Defenders—Salvesen, Q.C. —T. B. Morison. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, July 20.

FIRST DIVISION.

STARK'S TRUSTEES *v.* COOPER'S TRUSTEES.

Sheriff—Jurisdiction—Heritable Right or Title—Action for Half Cost of Mutual Gable—Sheriff Courts (Scotland) Act 1877 (40 *and* 41 *Vict. cap.* 50), *sec.* 8, *sub-sec.* 4.

The Sheriff Courts (Scotland) Act 1877 provides, section 8, sub-section (4), "Actions relating to questions of heritable right or title . . . raised in a Sheriff Court shall be raised in the Sheriff Court of the county in which the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall be subject to the jurisdiction of the Sheriff and Sheriff-Substitute of such county."

In an action raised in the Sheriff Court of Lanarkshire against a body of English trustees owning property in Glasgow, concluding for payment of half the cost of re-erecting a mutual gable, the defenders pleaded no jurisdiction, and raised a question as to whether the gable in question was in reality mutual, or whether it was not entirely the property of the pursuers. *Held* that the Sheriff had jurisdiction, in respect (*a*) that the question as to the property in the gable was a question relating to "heritable right or title" within the meaning of the sub-section quoted above, and, *separatim*, (*b*) that apart from that sub-section a Sheriff has always jurisdiction in an action directed to recover half the cost of a wall alleged to be mutual between properties situated within his sheriffdom.

Property — Mutual Gable—New Gable in Place of Old Demolished by Judicial Authority — Half Cost of Re-erection — Common Property — Common Interest — Right of Support.

A and B were proprietors of adjoining houses in a burgh. Under A's titles full power was reserved to build a tenement to the south of A's tenement, and to use vents in A's south

wall, and it was declared that A's south wall should be "a mean and common wall to both tenements." B's tenement was built, and the south wall of A's tenement was used as the north wall of B's in virtue of this reserved power. A pulled down his tenement, leaving the south wall standing, B having refused to consent to its demolition. This wall was thereafter discovered to be in a decayed and dangerous condition, and it was consequently demolished by order of the Dean of Guild. The result of the evidence was that the defective condition of the wall was not caused by anything which A had done on his property. A erected a new gable which B used in place of the one pulled down. *Held* (1) that the wall was in law a mutual gable; and (2) that B was bound to pay half the cost of re-erecting it in so far as used by him.

Opinion that A was entitled to take down his tenement without providing substituted support for the mutual gable.

About the end of the eighteenth century the late David Reid, the proprietor of ground at the corner of Argyle Street and Brown Street, Glasgow, built a house of three storeys having Argyle Street as its north boundary and Brown Street as its east boundary. In disponing this house to a purchaser the said David Reid so conveyed it, "with and under the burden and reservation of full power, liberty, and privilege to him to build at any time a tenement fronting Brown Street, leaving an entry or passage from Brown Street of four and one-half feet and from ten to twelve feet high by the back or south side wall of the tenement disponed, and to use vents in the south wall of the tenement disponed, and to join these two tenements from the front of Brown Street backwards, seventeen feet wide," being the width of the then intended tenement without the side walls where these two tenements were to join each other, and in his dispositions the said David Reid declared that the south wall of the corner tenement "so far as the said two tenements will join each other, shall be a mean and common wall to both tenements." The said David Reid subsequently built a house in virtue of this reserved power, in which he used the south wall of the existing tenement as the north gable of the new.

By a series of conveyances the first of these houses became vested in the trustees of the late James Stark, and the second in the trustees under the antenuptial contract of marriage of Mr and Mrs Cooper. The latter body of trustees were all domiciled in England.

In 1897 Stark's trustees resolved to demolish and rebuild their property. They requested Cooper's trustees to vacate their property in order that the mutual wall might also be demolished and rebuilt. To this Cooper's trustees refused to agree. Stark's trustees thereupon proceeded to demolish their own property, leaving the mutual wall standing. On the property being demolished it appeared that the said mutual wall was in a weak and dangerous condition, and on a petition by the interim procurator-fiscal to the Dean of Guild Court, the Dean of Guild granted warrant "to take down the gable referred to." This was accordingly done. In August 1897 Stark's trustees erected new premises together with a new south wall. This wall was built for five storeys. For three storeys it was used by Cooper's trustees as their north gable in place of the one demolished. Stark's trustees then brought the present action in the Sheriff Court of Lanarkshire against Cooper's trustees for payment of £30, 13s., 4d. being one half of the cost of erection of said wall so far as the same was mutual.

Cooper's trustees lodged defences, in which they alleged that the defective condition of the wall was due to the actings of the pursuers or their authors, and denied that the pursuers had judicial authority to pull down the whole wall. They also denied that the wall was a mutual gable.

They pleaded, *inter alia*—"(1) No jurisdiction. (2) The action is irrelevant. (3) The rebuilding of the wall in question not having become necessary through natural decay, the defenders are not liable for any proportion of the cost thereof. (4) The rebuilding of the wall in question having become necessary owing to the acts or default of the pursuers or their predecessors in title, the defenders are not liable for any proportion of the expense thereof. (5) The wall in question having been taken down in whole or in part by the pursuers at their own hands, and without the defenders' consent or the authority of Court, the defenders are not liable for any portion of the expense of rebuilding the same."

On 27th July 1898 the Sheriff-Substitute (STRACHAN) pronounced an interlocutor whereby he repelled the first plea-in-law for the defenders and allowed a proof.

Note.—"The defenders object to the jurisdiction of the Court in this case on the ground that they are resident in England and have no domicile in this sheriffdom. They are owners of heritable property therein, but that they say subjects them only to the jurisdiction of the Court of Session. There are two grounds on which the pursuers maintain that the Court has jurisdiction in this case. In the first place they say that it falls within section 8, sub-sec. 4, of the Sheriff Court Act of 1877, by which it is provided that "Actions relating to questions of heritable right or title or to division of commonties or division and sale of common property raised in a Sheriff Court shall be raised in the Sheriff Court of the county in which the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall be subject to the jurisdiction of the Sheriff and Sheriff-Substitute of such county."

"The defenders deny, however, that there is any question relative to heritable right or title involved in this case. The nature of the action they say must be determined by the conclusions, and in this case the con-

clusion simply is for payment of a sum of money. It is therefore, they maintain, an ordinary petitory action involving no question of heritable right or title. That the conclusion is limited to a decree for a sum of money is no doubt the case, but I am not prepared to hold that that is in itself conclusive on the subject. The nature of the action must, I think, be determined by the ground on which the claim for the sum sued for is based. If the claim sued for is based on an obligation arising out of or connected with a right or interest in a heritable subject, and involves the determination of the extent or effect of that obligation—then in my opinion the action relates to a question of heritable right or title although the conclusion may be limited to the payment of a sum of money. Now, the claim sought to be enforced in the present case is the expenses incurred by the pursuers in rebuilding or restoring a mutual wall of which it is alleged that the defenders as conterminous proprietors are taking the use or advantage, and it appears to me that an action for such a claim is in the words of the statute an action "relating to a question of heritable right or title." The pursuers set forth in their record the titles on which they found as establishing the obligation which they seek to enforce. The titles to the subjects are indeed the very foundations of the pursuers' claim, and I do not see how it can be maintained on the face of this fact that the action in no way relates to a question of heritable right or title. If the pursuers had prefaced the petitory conclusions with a declaratory conclusion to the effect that the wall in question was a mutual wall which had been rebuilt or restored by them, and that the defenders who were taking the use or benefit thereof as conterminous proprietors were liable for a share or proportion of the expense which had been incurred, I do not think it could be possibly disputed that the action was one relating to a question of heritable right or title. But what real difference could that have made on the nature of the action. The ground of liability—the *media concludendi*—would be precisely the same as they are in the case as it now stands. The declaratory conclusion would be nothing more than a formal declaration of the rights and obligations of the parties which are fully set forth in the record as the basis of the pursuers' claim. But the formal declaration is in no way necessary for the determination of the question of liability which must result either in the granting or the refusal of the pursuers' claim, and its absence, therefore, can make no difference in the nature of the action. It is clear I think that the liability for that must depend to a large extent at least on the nature of the wall and the right or interest of the parties therein under their respective titles. And I am of opinion therefore that the action is of such a character as to subject the defenders to the jurisdiction of this Court."

A proof was led, the import of which sufficiently appears from the note of the Sheriff-Substitute, *infra.*

On 30th March 1899 the Sheriff-Substitute pronounced the following interlocutor:—"Finds that the pursuers are proprietors of subjects at the west corner of Argyle Street and Brown Street, and the defenders are proprietors of subjects lying immediately to the south thereof—the said subjects being divided from each other to the extent of 17 feet by a mutual wall: Finds that the pursuers' subjects having become dilapidated and decayed they resolved to take down and rebuild the same, and the necessary plans for this purpose were prepared and sanctioned by the Dean of Guild: Finds that the pursuers proceeded to take down their building leaving a buttress of about 10 feet each side for the support of the mutual wall: Finds that on the pursuer's buildings being taken down it was ascertained that the floor of the basement of the pursuers' property had been excavated, and the mutual wall, which was two feet in thickness, had been underbuilt with a single row of bricks six inches thick: Finds that on this coming to the knowledge of the inspector of works he reported the matter to his superiors, who communicated with the Dean of Guild authorities, by whom a remit was made to Mr Murdoch, builder, to examine the wall in question and report: Finds that Mr Murdoch having examined the premises reported that the underbuilding was quite insufficient for the support of the wall, which was in a dangerous condition and ought at once to be taken down: Finds that the Dean of Guild thereupon granted a warrant for the said wall to be taken down, and that this was accordingly done: Finds that the said wall at the time it was demolished was in a decayed and dangerous condition and no longer could be used with safety as a mutual wall in connection with the said tenements: Finds that the defenders have failed to prove that the said wall was in any way injured or deteriorated in the course of taking down of the pursuers' buildings: Finds that in the course of the re-erection of the pursuers' building the said mutual wall was rebuilt by the pursuers and is now being taken advantage of and used by the defenders or their tenants: Finds that the defenders, as joint-owners of the said wall to the extent to which it is mutual, are liable to the pursuers in the sum of thirty pounds, thirteen shillings and fourpence sued for, being the one half of the expense of rebuilding the same: Therefore decerns against the defenders for payment of the said sum of thirty pounds, thirteen shillings and fourpence," &c.

Note.—"There are a variety of grounds on which it is contended by the defenders that they are not liable for any part of the expense of rebuilding the wall, for the one half of which they are sued in this action. The wall in question it is maintained by them was not a mutual wall, and was not the common property of the pursuers and defenders. The right of property they say was vested entirely in the pursuers, they having only a common interest therein, which consisted in a right to build against the wall and to use the fireplaces and vents therein. That being so, it is con-

tended that the expense of maintaining and the necessary expense of rebuilding the wall fell to be borne by the pursuers as the proprietors thereof, and if they chose in their own interests and to serve their own purposes to interfere with the wall, or make any alterations thereon, they were bound to do so at their own expense. In my opinion, this contention is not well founded. In the titles of the subjects the wall in question is thus referred to—'and the said north wall in which the said vents are inserted, so far as the said two tenements will join each other, shall be a mean and common wall to both tenements.' I have no doubt that the wall there referred to is clearly a mutual wall in the usual sense of the term, and the parties have a common right of property therein.

"But assuming this to be so, it is argued by the defenders that the demolition of the wall having been caused or brought about through the fault or negligence of the pursuers, the expense of rebuilding it falls to be borne by them alone. They allege (1) that there was fault upon the part of the pursuers in depriving the wall of its natural supports without in any way supplying their place, and thereby rendering it dangerous; and (2) in weakening the foundations by lowering the floor of the basement for the purpose of getting cellar accommodation and underbuilding the wall, which was two feet in thickness, with a single row of bricks six inches thick and quite insufficient for the purpose. It is not of course disputed that the pursuers were quite entitled to take down their own tenement, but they were bound, it is said, to have taken the necessary precautions to prevent the mutual wall being injured by their doing so. In particular, after removing the joists and side wall, by which it was supported, they should have shored it up, and this they entirely failed to do. Now it is true that the wall was not shored up, but it is not proved, in my opinion, that it was thereby injuriously affected, or that the want of shoring had anything to do with the wall being taken down. Not one of the witnesses on either side, with perhaps one exception, says that the wall suffered any deterioration while being taken down. In their view, necessary supports for the wall were left, and the work of demolition was carried through in a careful and prudent manner. Even Mr Wylie, who expresses an adverse opinion, does not say that in point of fact the wall was in any way injured or gave way to any extent in consequence of its not having been shored.

"Why then was the wall condemned and taken down? It was done in consequence of the report by Mr Murdoch, a builder, to whom the Dean of Guild Court made a remit to examine the wall, to the effect that the underbuilding was quite insufficient 'to support the wall, which was in a dangerous condition, and should be taken down at once.' Following on this report, a warrant was granted for the demolition of the gable, and this was accordingly done, But is the defective underbuilding, which was the primary cause of the demolition of the wall, an act for which the pursuers are responsible? It was maintained by the defenders that it is because it was done by their predecessors in title. This, however, has not been proved. There is not the slightest evidence as to when or by whom the work was executed—nothing but the merest conjectures. All that is known is that the peculiar kind of brick used in the underbuilding has not been in use for the last forty years. I certainly am not prepared to hold that an act done by some unknown person beyond the memory of man is either fault or negligence for which the pursuers are responsible.

"It appears from the evidence that although the Dean of Guild authorities considered the defective underbuilding to have been sufficient to warrant the demolition of the wall, it must have been otherwise in a weak and decayed condition. It is clear that if it were not so, it would in place of being demolished have been properly underbuilt. This is a very common and easily executed operation, but according to the evidence of the inspector, he would not like to be the person who would attempt to underbuild such a wall. There is some evidence to the effect that the stones were rotten, and the inspector says, that 'apart altogether from the question of underbuilding, I formed the opinion that the wall was certainly dangerous and would justify me in reporting it to my superiors.' The result of the evidence therefore seems to be that the wall was demolished because from its weak and decayed condition it would be dangerous to underbuild it.

"The defenders further maintain, however, that apart from the question of fault or negligence they are not liable for the expense sued for because one of two joint owners is not entitled to impose any burden or expense on the other by any interference with the common property for his own purposes and in his own interest. The wall, they say, before the pursuers interfered with it, was in a perfectly safe and satisfactory condition, and in every respect suitable and sufficient for the purpose it was intended to serve, and the occurrences which led to its demolition were entirely the acts of the pursuers for their own benefit and to serve their own interests. Why then should they be called on to pay the expense of proceedings which they did not desire and in which they had no interest? These considerations do not appear to me to be applicable to the circumstances of this case. In taking down their own property for the purpose of rebuilding it the pursuers were undoubtedly acting strictly within their rights. According to the evidence in doing this they did not to any extent injure or deteriorate the condition of the wall. Their operations disclosed its condition but did not in any way cause it. Now if the result of one of two joint proprietors carrying on perfectly legitimate operations within his own property is to disclose such a defective and dangerous condition of the common subject that it not only can no longer be used for its common purpose but leads to its condemnation by

the public authorities, the expense of restoring it necessarily falls, in my opinion, to be borne by the parties equally. It may be that the defects would not have been discovered had it not been for operations of one of the owners, but that does not appear to me to be material so long as these operations did not cause or lead to the defects. The application of these views to the present case does not seem to me to entail any great hardship on the defenders. In place of the former decayed and defective wall they get the benefit of and are now using the new one erected by the pursuers—and this improvement will no doubt be of material advantage to them or their assignees when they come to dispose of or reconstruct there.

"Another plea maintained by the defenders is that the pursuers were not entitled to interfere with the common property without obtaining judicial authority or their consent, and having done so without obtaining either they have no claim against the defenders for any part of the expense thereby incurred to them. How far judicial authority is required in such a case appears to me to be entirely a question of circumstances. Had the pursuers proceeded at their own hand to take down and restore the mutual wall there would undoubtedly be a good deal to say for the application of the rule contended for by the defenders. But there was nothing of that kind done by them. All that they did was to restore the gable after it had been demolished by the public authorities. That was abolutely necessary to be done at once in the interests of both parties, and in my opinion required no judicial authority. It did not in any way prejudice the rights or interests of either of them.

"It would appear from Rankine on Land Rights that there is no decision or authority in the law of Scotland bearing directly on the question raised in this case, but the learned author in dealing with the Roman and French law on the subject says (p. 570), on the authority of Pothier, 'If repair or reconstruction becomes indispensable through age or mere accident, though the wall be not actually ruinous, each must contribute, and in case of urgency only each may put hand to the work without consulting the other. The inconvenience caused by repair must be borne without indemnification since it results from the nature of things. If, on the other hand, the degradation has been caused by the fault of one of the parties he must bear all the consequences.' This appears to me to support considerably the views I have stated."

The defenders appealed to the Sheriff.

On 26th July 1899 the Sheriff (BERRY) pronounced the following interlocutor:—"Adheres to the interlocutor appealed against down to the words 'examine the wall in question and report.' *Quoad ultra* recals the said interlocutor: Finds that the Dean of Guild thereupon granted a warrant for the said wall to be taken down, but that it is not admitted and is not proved that the warrant authorised it to be taken down beyond what was necessary for the public safety, that is, to an extent lower than about 10 feet from the ground: Finds that the wall was immediately taken down to that extent under the warrant, and that a week or two afterwards it was taken down by the pursuers' builder: Finds that thereafter the pursuers erected a new wall as a mutual gable between the two properties, with a foundation at a lower level than before, and of different thickness and different material from the old wall, and that all this was done without consulting or communicating with the defenders, who are now asked to pay part of the cost: Finds in law that in these circumstances the defenders are not liable to contribute to the cost of what was done without their authority or consent: Therefore assoilzies the defenders: Finds the pursuers liable to them in expenses," &c.

Note.—"The question raised in this case is as to the liability of the defenders to contribute half of the expense of building a mutual wall between their tenement and that of the defenders' which adjoins it to the south in Brown Street. There is a plea to the effect, which was argued before the Sheriff-Substitute, that the wall was the exclusive property of the pursuers, and that the defenders having no more than a common interest in it could not be called on to contribute to the cost of rebuilding it. That plea has not been pressed before me, and I deal with the case on the footing that the wall in question was, as the Sheriff-Substitute found, a mutual gable wall, and so the common property of the two contiguous proprietors. In the beginning of 1897 the pursuers desired to take down and rebuild their property, which they regarded, apparently with reason, as in a decayed condition. The two tenements had been built towards the end of last century, and both had no doubt become much dilapidated. Proceeding on that view, the pursuers addressed the defenders in the beginning of 1897, and according to the evidence of the defenders requested them to concur in taking down and rebuilding their the defenders' tenement, or such portion of it as might be necessary to enable the south, that is, the mutual wall of the pursuers' tenement to be rebuilt of the dimensions suitable for the new building which they proposed to erect. The defenders not being disposed to build or to alter their building in any way, declined the proposal.

"After the lapse of some months, viz., in June 1897, the pursuers proceeded at their own hand to take down their property, with the exception of the mutual gable, which they allowed to stand. While leaving it to stand, they took no steps in the way of shoring or otherwise to prevent its falling. In the course of their operations it was discovered that the gable had been underbuilt at some time in an insufficient manner, the thickness of the underbuilding consisting only of bricks 6 inches in thickness, whereas the wall itself was 2 feet thick. The attention of the City Master of Works was called to the matter, and on

a report to the Dean of Guild from a builder appointed by him that the gable was in a dangerous condition, and should be taken down at once, it was ordered by the Dean of Guild to be taken down, and the order was carried out. The order has not been put in evidence, but the defenders admit in the pleadings that an order was made, although they say that it did not go beyond ordering what was necessary for the public safety. Accordingly, they say that while the wall was taken down to that extent at once, a part of it to the height of one storey was left standing for some weeks, when it was taken down by the pursuers at their own hands without any authority from the Dean of Guild Court. The case was argued on that footing on both sides, and I think it must, as the proof and productions stand, be taken that the facts were as the defenders state. Even were it competent to consider some passages in the proof which since the debate have been brought to my notice on the part of the pursuers as leading to the inference that the order of the Dean of Guild Court must have been for the complete demolition of the wall, there are other passages which seem to point to a different conclusion, as where we find Barlas, the builder, saying that they first took down the wall to within 10 feet of the ground, when it was safe from falling, and that a week or a fortnight afterwards they took it down altogether. In the absence, however, of any direct proof of the terms of the Dean of Guild's order, I do not think we are justified in holding that it went beyond what the defenders say. But be that as it may, I do not think it is material to the case to determine what were the terms of the order made by the Dean of Guild. What happened after the wall was taken down is, in my opinion, sufficient to exclude the pursuers' claim.

"If they had it in view to claim from the defenders a proportionate payment towards the cost of a new wall, they ought to have taken them along with them in what they proposed to do. That from first to last they abstained from doing. Without any communication with the defenders, they proceeded to excavate the ground to a level lower than the old foundation, and laid the foundation for the new wall at that lower level. The cost of this is included in the items to which they call on the defenders to contribute. Further, without consulting or communicating with the defenders, they went on to build the new wall of different thickness and of different material (brick instead of stone) from the old wall.

"Their new building was to be five storeys high instead of three as the old building had been, and they say that the thickness of the gable was dictated by the requirements of the building regulations of the city for a building of the contemplated height. The new material (brick), they maintain, was preferable to stone for a mutual wall with openings for chimneys. They may have been right in their view on these points. It is not necessary for the defenders to show they were wrong. But surely the defenders, if it was intended to hold them responsible for a share of the cost of the new wall, were entitled to be consulted as to its character. No request for their concurrence was made, although there was nothing to prevent the pursuers from communicating with them. There was certainly no express contract on the part of the defenders to share the expense, and I see no sufficient ground for inferring the existence of an implied contract to that effect. The principle of *negotiorum gestio* cannot be appealed to where there is no difficulty in consulting the parties for whom the *negotiorum gestor* assumes to act. Again, there was no such urgency for immediate action as justified the pursuers in taking the matter into their own hands. My conclusion is that they took the risk of the expense on themselves, and that no ground has been shown on which they are entitled to claim proportional reimbursement from the defenders."

The pursuers appealed to the Court of Session, and argued—(1) *On the question of jurisdiction*—The objection to jurisdiction now came too late; an appeal should have been taken from the interlocutor of the Sheriff-Substitute before the proof was led. But the objection was not well-founded. The question raised involved the nature of parties' rights in regard to the wall, *i.e.*, whether, on the one hand, it was a mutual wall, or, on the other, was a wall belonging to the pursuers in which the defenders had a common interest. That was a question of "heritable right or title"—*Lamont* v. *Cunningham*, June 11, 1875, 2 R. 784—within the meaning of section 8, sub-section 4, of the Sheriff Courts (Scotland) Act 1877 (quoted in rubric). *Separatim*, an action for half the cost of building a mutual wall was always competent in the Sheriff Court of the county in which the wall was situated, on the same principle on which it was held that an action for rent was competent in the Sheriff Court even although the defender was a foreigner—*Mouat* v. *Lee*, June 6, 1891, 18 R. 876; *Thomson* v. *Wilson's Trustees*, July 5, 1895, 22 R. 866. The principle that the Court of Session was the *commune forum* of foreigners was explained by Lord Justice-Clerk Inglis in *Pirie & Sons* v. *Warden*, Feb. 20, 1867, 5 Macph. 497, to rest solely on the fact that the Sheriff had not the power of edictal citation. That power had now been conferred upon the Sheriff (39 and 40 Vict. c. 70, sec. 9), and the doctrine was therefore no longer applicable. (2) *On the merits*—The judgment of the Sheriff-Substitute was right. On the titles this was a mutual gable. On the facts the gable was taken down by judicial authority, and not through any fault of the pursuer. If this had been a new gable, it was beyond question that the defenders, on taking the use of it, would have been bound to pay half the cost—*Sanderson* v. *Geddes*, July 17, 1874, 1 R. 1198; *Robertson* v. *Scott*, July 9, 1886, 13 R. 1127; *Berkeley* v. *Baird*, Feb. 16, 1895, 22 R. 372. The same principle applied in the present case. The pursuers were perfectly entitled to pull down their own property, and it was impossible to hold

that by doing so they undertook an obligation to warrant the boundary wall against being pulled down by judicial authority. The maxim *melior est conditio prohibentis* did not apply to the case of mutual gables, which involved a common property of a very special kind. Either party was entitled to make alterations on the gable so long as these were consistent with its inherent nature and purposes—*Walker* v. *Sherar*, Feb. 4, 1870, 8 Macph. 494; *Lamont* v. *Cunningham*, June 11, 1875, 2 R. 784.

Argued for the respondents—(1) *On jurisdiction.*—The Sheriff had no jurisdiction here. The question was not really a question of heritable right or title, which only came in incidentally. The Sheriff Court Act 1877 did not apply to such a case, but only to cases where the main question related to heritable title. Mere possession of heritable property within a sheriffdom did not *per se* render the owner subject to the jurisdiction of the Sheriff in a personal action such as this—*M'Bey* v. *Knight*, Nov. 22, 1879, 7 R. 255; *Commissioners of Pollokshaws* v. *M'Lean*, Nov. 17, 1899, 2 F. 96. The Court of Session was the *commune forum* in a question with a foreigner — *Gillan* v. *Parish Council of Barony Parish*, Nov. 29, 1898, 1 F. 183. (2) *On the merits.*—On the facts the pursuers or their authors were responsible for the defective condition of the old wall. Even if that were not so, the defenders were quite content with the existing wall, and if the pursuers chose to take down their own property, they must do so at the risk of paying the whole expense. The principle of the rights of parties in a mutual wall was, as expounded in *Sanderson* v. *Geddes*, and *Robertson* v. *Scott* (both cited *supra*), that each party was proprietor of a half with a common interest in the whole. In such a position the maxim *melior est conditio prohibentis* applied, and if either party disturbed the gable he did so at his own risk.

At advising—

LORD PRESIDENT—In this action the pursuers conclude for payment for £30, 13s. 4d., being half the cost of re-erecting to the height of three storeys a gable between properties belonging to them and the respondents respectively. Two questions are raised in the case—(1) Whether the Sheriff Court had jurisdiction to entertain the action, and (2) whether, assuming that the Sheriff Court had such jurisdiction, the appellants have made good their claim.

The pursuers are owners of property at the west corner of Argyle Street and Brown Street, Glasgow, and the defenders are owners of property conterminous with and situated immediately to the south of the pursuer's property. Both properties originally belonged to a common author, who about the end of the last century erected a building of three storeys in height on the ground now belonging to the pursuers. In conveying this property (or part of it) the common author reserved full power to build a tenement fronting Brown Street, and to join the two tenements from the front of Brown Street backwards 17 feet wide, being the width of the then existing tenement, and he declared that the wall, so far as the two tenements will join each other, "shall be a mean and common wall to both tenements." The common author also built the property three storeys in height now belonging to the defenders, and connected it with the corner tenement belonging to the pursuers, using their south wall as (according to the pursuers) a mutual wall, and as (according to the defenders) a wall in which the proprietors of their (the defenders') property had a right in the nature of a common interest, or, in other words, a right of support but not of common property. In either view the portion of the pursuers' south wall so used was in fact the north gable of the defenders' property, but I think it was also in law a mutual wall or gable.

In 1897 the pursuers, finding that their property had fallen into a decayed state, resolved to demolish it, but before doing so they proposed to the defenders that they should vacate the houses in their property, which were contiguous, so that the pursuers might also demolish the south wall between their property and that of the defenders, and erect a new wall on its site, but the defenders refused to agree to this. The pursuers accordingly proceeded to demolish their corner property other than the mutual wall, which they arranged should be allowed to stand. As the work of demolition proceeded, however, it became apparent that this wall was in a weak, decayed, and unsafe condition, in consequence of which the Interim Procurator-Fiscal of the Dean of Guild Court of Glasgow for the public interest, on 5th July 1897 presented a petition to the Dean of Guild Court asking the Court to order inspection and report, and to grant warrant to take down or to secure or repair the building or part of it, if reported to be dangerous, and the Dean of Guild, on 15th July 1897, after having received and considered a report by a man of practical skill, granted "warrant to the petitioners to take down the gable in question as recommended." The authority was not, as the defenders allege, merely to take down the gable in so far as it was dangerous—it was "to take down the gable," thereby plainly meaning the whole gable, and this was accordingly done. The pursuers re-erected the gable, which had originally been three storeys high, of a greater height so as to fit it to be the gable of a five storey instead of a three storey building, and also of a somewhat different thickness, the gable being constructed of brick instead of stone as formerly, and the defenders have ever since used, and they still are using, the new gable (which was duly provided with vents for their accommodation) to the full height of their existing buildings, viz., three storeys, and it is only to the cost of it up to this height that the pursuers at present ask the defenders to contribute. I may refer to the case of *Lamont* v. *Cumming*, 2 R. 784, as showing that one of two conterminous proprietors is entitled to raise the height of a mutual gable between their properties.

The defenders' first plea, as already stated, is directed against the jurisdiction of the Sheriff Court, the defenders being resident in England, but both the Sheriff-Substitute and the Sheriff have repelled this plea as I think rightly. Without going into other grounds of jurisdiction there are two which appear to me to be sufficient, namely, (1) that the action relates to a "question of heritable right or title" within the meaning of section 8 (4) of the Sheriff Court Act of 1877; and (2) that the action is directed to recover half the cost of a mutual wall or gable within the sheriffdom. The pursuers allege on record that the gable wall is a mutual wall, and the defenders deny this, maintaining that the wall is wholly built upon the pursuers' ground, and that the right which they (the defenders) have in it is not in the nature of a right of common property, but merely of common interest, *i.e.*, a right to support their building against a wall belonging (as they allege) in severalty to the pursuers. This seems to me clearly to involve a question of heritable right or title within the meaning of the sub-section of the Sheriff Court Act of 1877 above referred to. In the case of *Lamont* v. *Cumming*, already cited, it appears that the pursuers had previously presented a petition for an interdict in the Sheriff Court, which was dismissed on the ground, *inter alia*, that it raised a question of heritable right. This was prior to the passing of the Sheriff Court Act of 1877, which conferred jurisdiction on Sheriff Courts in such cases, but it shows that such a question as that which is raised on the record, and was fully discussed before the Sheriff-Substitute and in this Court, is one of heritable right or title. But independently of this, I think that it would have formed a sufficient ground of jurisdiction that the present action is directed to recover half the cost of a wall alleged to be mutual between properties belonging to the pursuers and defenders respectively within the sheriffdom. It has long been settled that an action for the rent of heritable property within a county may be maintained in the Sheriff Court of the county, and it appears to me that upon principle the like rule should apply *a fortiori* to an action for payment of half the cost of such a wall as that in question—*Mouat* v. *Lee*, 18 R. 876.

But assuming that there was jurisdiction the question remains whether the pursuers are entitled to prevail upon the merits

It is well settled by the custom of Scottish burghs, and the usage which prevails where land is laid out for building under a feuing-plan or scheme, that the owner of a building lot who has in erecting a building on his own ground, constructed the gable to the extent of one-half on property belonging to his neighbour, has a claim against that neighbour when he comes to build against and use the gable, for one-half of the cost of it, and consequently if this question had related to a building erected for the first time by the defenders against the pursuers' wall, which to this extent was a mutual gable, they would not have had any answer to the claim. The defenders, however, maintain (1) that the pursuers were not entitled to take down their building which abutted upon the original gable except under the condition of providing support for it, and (2) that the gable had been weakened by a predecessor in title of the pursuers having underbuilt a part of it with brick so as to deepen a cellar in their property, whereby, as they allege, the stability of the gable was materially impaired. As to the first of these pleas, it is sufficient to say that I am not aware of any authority for the proposition that the owner of such a building is only entitled to take it down subject to the condition of providing substituted support for a mutual gable, and if this were the rule it would go far to render the reconstruction of many buildings impossible. In the ordinary case a well constructed gable to which the neighbour who built second has properly attached his building will stand when the original builder takes down his building with a view to re-erecting it—a thing which is done every day. It further appears, however, that the pursuers did leave parts of their adjoining walls about 10 feet high as buttresses to support the gable when they took their building down, and it seems probable that this would have been quite sufficient support if it had not turned out that the gable was seriously decayed. The second plea, however, requires more consideration, because if it appeared that the pursuers had by any act of theirs materially weakened the gable, it may be that they would only have been entitled to take down their building subject to the condition of providing some support as an equivalent for that which they had improperly withdrawn. The underbuilding in question, however, was not done by the pursuers, nor does it appear by whom it was done. It was evidently very old, and may have been done by the common author before the properties were severed. Its existence was not known to the pursuers till the work of demolition was far advanced, and under these circumstances I do not think they could be held responsible for the undiscovered act of an unknown predecessor in title. Mr Murdoch, the man of practical skill, who reported to the Dean of Guild, appears to have attributed the danger to the underbuilding, but it appears to me, upon the full evidence now adduced, to be proved that the weakness of the gable was not due mainly to the underbuilding. The preponderance of the evidence seems to me to establish that the whole gable was in a decayed and weak condition, and that this condition was not caused, but only disclosed, by what the pursuers did upon their property. If, however, this is so, the relative positions of the parties seem to be much the same as if the gable had fallen from some cause for which neither was responsible. I think that in that event either of them would have been entitled to rebuild it and claim half the cost from the other. I therefore concur in the judgment of the Sheriff-Substitute upon the merits of the case.

With reference to the judgment of the Sheriff, it is to be observed that he adheres to a large part of the Sheriff-Substitute's findings, and that the main ground upon which he arrived at a different conclusion was that it was not proved that the warrant granted by the Dean of Guild (which he had not seen) authorised the gable to be taken down beyond what was necessary for the public safety, *i.e.* (as the Sheriff thought) to an extent lower than about 10 feet from the ground. I understand that the Sheriff-Substitute had seen the Dean of Guild's warrant, though it was not produced in the process before him, but the Sheriff had not power to direct that the Dean of Guild process should be transmitted to him, and we were informed that he was not cognisant of the precise terms of the warrant. We, however caused the Dean of Guild process to be transmitted to this process, and it at once appeared that the warrant was not limited as the Sheriff supposed. I also gather that the Sheriff was mistaken in supposing that what the pursuers did with respect to the wall was done without consulting or communicating with the defenders. For these reasons I am of opinion that the Sheriff's interlocutor should be recalled in so far as it differs from that of the Sheriff-Substitute, and that decree should be given for the sum claimed.

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

The Court pronounced this interlocutor—

"Affirm the interlocutor of the Sheriff-Substitute dated 27th July 1898, and the interlocutor of the Sheriff dated 20th October 1898: Recal the interlocutor of the Sheriff-Substitute dated 30th March 1899, and the interlocutor of the Sheriff dated 26th July 1899, and find (1) that the pursuers are proprietors of the property at the west corner of Argyle Street and Brown Street, Glasgow, and that the defenders are proprietors of property lying immediately to the south thereof; (2) that the properties belonging to the pursuers and defenders respectively are divided to the extent of 17 feet by a mutual wall; (3) that the pursuers' buildings on their said property having become dilapidated and decayed they resolved to take them down and rebuild them, and that the necessary plans for this were prepared and sanctioned by the Dean of Guild Court of Glasgow; (4) that the pursuers proceeded to take down the buildings belonging to them exclusively leaving a buttress of about 10 feet on each side for the support of the mutual wall; (5) that on the pursuers' buildings being taken down it was ascertained that the floor of the basement had been excavated, and that the mutual wall, which was there about 2 feet in thickness, had been underbuilt with a single row of bricks 6 inches thick; (6) that the Inspector of Works reported the matter to his superiors, and that on 5th July 1897 the Interim Procurator-Fiscal of the Dean of Guild Court of Glasgow presented a petition to that Court craving a remit to one or more competent persons to inspect and report upon the state of the said building or the part thereof which appeared to be dangerous, and to grant warrant to take down or secure or repair the said building, or part thereof which might be reported to be dangerous; (7) that on the said 5th July 1897 the Dean of Guild remitted to one or more of Robert Murdoch and John Paterson, builders, Glasgow, to inspect and report as craved; (8) that on 9th July 1897 the said Robert Murdoch reported that he had examined the said buildings along with Mr Whyte, Master of Works; that the said wall or gable had been used as a mutual gable between the said properties; that it had some time ago been underbuilt on the north side with the object of lowering the floor of the basement of the building at the corner of Brown Street and Argyle Street; that the underbuilding was quite insufficient to support the gable, and that in his opinion the gable was in a dangerous condition and should be taken down at once; (9) that on 15th July 1897 the Dean of Guild having considered the said report, approved thereof, and granted warrant to the petitioner to take down the said gable as recommended, and that the said gable was taken down accordingly; (10) that when the said gable was taken down, it was, apart from the said underbuilding, in a weak and decayed condition, and could no longer be safely used as a mutual gable in connection with said buildings; (11) that it is not proved that the said gable was in any way injured or deteriorated in the course of taking down the pursuers' buildings; (12) that the said mutual wall was rebuilt by the pursuers in a manner suitable to make it serve as a gable to the buildings of the pursuers and defenders respectively, and that it has ever since been and still is used as such to the full height of their buildings, being three storeys, by the defenders or their tenants; (13) that the defenders as joint owners of the said gable to the extent to which it is mutual are liable to the pursuers in the sum of £30, 13s. 4d. sued for, being one-half the expense of rebuilding the same to the height of three storeys: Therefore decern against the defenders to pay the said sum of £30, 13s. 4d. to the pursuers: Find the defenders liable to the pursuers in expenses both in this and in the Sheriff Court, and remit," &c.

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