

C. Smith, and A. J. Young. Agents—M'Call & Armstrong, S.S.C.

Counsel for Respondents—Lord Advocate (Young) and Marshall. Agents—Gibson & Strathern, W.S.

Tuesday, January 27.

FIRST DIVISION.

[Lord Mure, Ordinary.]

JOHN STEWART v. JAMES MEIKLE.

Building Ground—Construction of Sewer.

The *ex facie* absolute owners of a building subject in Glasgow, which they really only held in security under a latent obligation to reconvey, gave off certain plots of ground under contracts of ground-annual, whereby the feuars were bound to maintain the common sewer opposite their own houses, but not to pay for its original construction, which had been constructed by the *ex facie* owners at the real owner's expense.—*Held* that the owner to whom the remainder of the subject had been reconveyed, under deduction of the building lots already given off, had no claim against the feuars for the cost of the construction of the sewer.

The pursuer in this action was heritable proprietor of the lands of Violet Grove, Glasgow, from previous to the year 1859 till March 1873. During the greater part of that period, viz., from March 1859 till January 1873, the property was held by the City of Glasgow Bank on a disposition *ex facie* absolute; but in reality in security. On these lands was formed a street called Cedar Street, built by the pursuer, and for the accommodation of the feuars; he also formed a sewer along it.

The defender acquired two stances in this street by contracts of ground annual from the City of Glasgow Bank, who, as above mentioned, were *ex facie* absolute owners, and connected his drains with the sewer—no demand being made by the Bank for any part of the cost of the construction of the sewer. The Bank afterwards reconveyed the remainder of the subjects to the pursuer, and he raised this action against the defender, concluding for £33, 8s. 2d., as his share of the cost of forming the sewer.

He pleaded—“(1) The said sewer having, in accordance with the universal custom in Glasgow, been so constructed by the pursuer as to be capable of being used as mutual and common, and the defender having, in building on his property, availed himself of said sewer, and connected his drains therewith, he is bound to make payment to the pursuer of one-half of the cost or value thereof, so far as it extends opposite his frontage, with interest as concluded for. (2) The defender being resting-owing to the pursuer in the sum concluded for, the pursuer is entitled to decree therefor, with interest and expenses as libelled.”

The defender pleaded—“(1) No title to sue. (2) The statements in the condescendence are irrelevant and insufficient to warrant the conclusions of the summons. (2) The defender having acquired the right of property and use of said sewer from his authors, who held the same *in pleno dominio*, he is liable no further in connection therewith than is expressed in his titles from them, which do not impose on him liability

for the expense of its construction. (4) The defender's authors having paid the expense of constructing said sewer, so far as opposite his premises, and he having acquired right from them *justo titulo* the pursuer can have no claim against him. (5) The pursuer's averments being unfounded in fact and untenable in law, the defender should be assoilzied, with expenses.”

The Lord Ordinary pronounced the following interlocutor:—

“16th September 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process—sustains the third plea in law for the defender; assoilzies him from the conclusions of the action, and decerns: Finds the defender entitled to expenses; of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax and report.

“*Note.*—It is not disputed that the defender in this case has connected the drains of the houses erected by him with the sewer to which the present action relates, which is situated beyond the boundaries of the property belonging to the defender; and it is very distinctly proved that this sewer was constructed by the pursuer when the ground belonging to him was at first laid out for building purposes, and with a view to its being used as the main common sewer for the street in question. In these circumstances, it appears to the Lord Ordinary—and that apart altogether from any evidence of usage or custom—that when a party in the position of the defender acquires a feu upon property so laid out for building, and without any permission, express or implied, from the party then in right to feu the ground, connects the drains of the tenement erected by him with the main sewer, he might be compelled, as contended for by the pursuer, in an action at the instance of the granter of the feus, either to pay a proportion of the expense of making the sewer, or to discontinue the use of it.

“That, however, in the view the Lord Ordinary takes of this case, is not the position of the defender. Because, at the date when he acquired his feu and connected his drains with the sewer, the City of Glasgow Bank were *ex facie* the absolute proprietors of the whole ground, including that in which the sewer was constructed, and were in a position to grant the defender permission to use the sewer in connection with the portion of the property sold to him. And, having regard to the terms of the contract of ground-annual founded on in defence, it appears to the Lord Ordinary that the deed is so worded as to give, by necessary implication, permission to the defender to use the sewer, as he is by that deed taken bound to pay one-half the expense of maintaining the sewer in good order and repair in all time coming in so far as opposite the steading conveyed to him. But the omission in this deed to impose any obligation on the defender to pay any part of the expense of constructing the sewer is, in the opinion of the Lord Ordinary, of itself sufficient to lead to the inference that the expense was covered by the price paid for the feu, and that the right to use the sewer was, on this footing, communicated with the right to the ground, which, it appears from the evidence, it is in some instances the practice in Glasgow to do. And even if the words of the conveyance were not sufficient to lead to this inference, the evidence of the agent who acted for

the defender when the draft contract was adjusted shows that the question was under consideration of the Bank at the time the feu was granted; and that, while in the original draft of the feu-contract it was proposed to charge the defender with a share of the expense of constructing the common sewer, that was objected to on the part of the defender as not being covered by the agreement, and that the clause was altered so as to limit the obligation to the expense of maintaining the sewer. This evidence was objected to as contradicting the written contract, but as it appeared to the Lord Ordinary to be explanatory of a matter not made clear by the terms of the contract, rather than contradictory of those terms, he did not consider that he would be warranted in rejecting it."

The pursuer reclaimed.

At advising—

LORD PRESIDENT—My Lords, the sum in dispute in this case is a small one, but the question which it raises is not unimportant, and the judgment which we pronounce will be widely applicable in building cases of this description. If I had any doubt what that judgment should be I would have advised your Lordships to take some time for consideration, but I entirely agree in the view taken by the Lord Ordinary. It appears to me to be quite plain that the ordinary practice in Glasgow—and I suppose in many other towns,—is that when the owner of building ground is giving it off for that purpose he prepares the ground himself and provides each street with a sewer. The expediency of such a course is obvious, and there cannot be a doubt that substantially that is what was done here; but the expense of making the sewer would be useless if the parties who occupy the building lots did not communicate with it, and it would be a great disadvantage if any one of the houses did not communicate with it, and the disadvantage would extend to the whole street to which the sewer is necessary in a sanitary point of view. It is also quite reasonable that an arrangement should be made by which each feu should contribute towards the expense of making the sewer, and that arrangement is part of a well established practice, and the only question is, how that burden should be laid on the purchaser. It ought to be settled at the time when the contract is entered into, for that is a payment which is to be made once for all, and is not an annual payment. Sometimes it is taken into consideration in fixing the amount of feu duty, in other cases, when ground is sold off it can be done at the same time, and it might be arranged that, independently of the feu contract, feuars should be made to pay down their share at the time the contract was entered into. The thing might be done in any of these ways. But if the right is once given without demand for present payment, and without any burden laid upon the subject, I do not know how it can be done afterwards. Now that appears to me to be the position of the present case.

In the contract of ground annual the defender stipulates to pay a certain amount and he gets a title, and he is also bound to maintain the sewer along with the other feuars, but not a word is said about paying for its original construction, nor was any such demand made upon the defender when he got his title. It appears to me, putting out of view the peculiarity of the Bank's position in reference to the obligation to reconvey to the pursuer, that when the owner of building ground sells, giv-

ing to the purchaser the right to connect with a sewer, and fails at the time to make any claim for payment of its cost, it is impossible to make such a demand afterwards. Now let us see what was the position of the party from whom the defender acquired his right. The Bank was in no other position than any other owner. They had a title *ex facie* absolute. It is true they had a latent obligation to the pursuer, but so far as third parties could tell they were absolute owners; they dealt with the defender as such, and so they must be considered as ordinary owners. There is a peculiarity beyond that, which is that the sewer was made while the Bank were *ex facie* owners, at the pursuer's expense. Now the construction of the sewer just made the Bank proprietors of it as they had been of the ground before its construction, and, being so, they were entitled to give it off to the defender, which they did by plain implication on the face of the title. I quite agree with the Lord Ordinary. I may just add that I do not rest on the evidence of the agent nor on the draft, both of which I consider quite incompetent.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard Counsel on the reclaiming-note for the pursuer against Lord Mure's interlocutor, dated 16th September 1873, Adhere to the said interlocutor, and refuse the reclaiming-note; find the defender entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Rhind. Agent—W. Officer, S.S.C.

Counsel for Defenders—W. Watson, and Goudy. Agents—Fraser, Stodart & Mackenzie, W.S.

Wednesday, January 28.

SECOND DIVISION.

[Lord Gifford, Ordinary.]

GILLESPIE v. MILLER & CO.

Contract—Sale—Conditions—Insurance—Profit—Vendor and Purchaser.

A certain mineral, stored in heaps, was sold under an agreement whereby the purchasers and the vendor were to divide any profits from a resale at a price above a fixed amount per ton. The purchasers insured, and, a fire having consumed one heap, entered into an arrangement with the Insurance Company to take over the whole of the mineral, consumed and unconsumed, for a certain sum.—*Held*, in a question with the vendor, that the purchasers were liable to him in one-half of the sum so obtained from the Insurance Company in so far as it exceeded the amount per ton agreed on between them.

This case came up by reclaiming-note against an interlocutor of Lord Gifford, of date 21st November 1873. Mr Gillespie of Torbanehill, the pursuer, in the course of the year 1871 entered into an agreement with the defenders, Miller & Co., by which he sold them 35,000 tons of Torbanehill