

Rep., Scotch App. 250; and *M'Cormick & Co. v. Rittmeyer & Co.*, June 3, 1869, 7 Macph. 854, to examine the goods at once on receiving delivery, and if they were found deficient in quality to return them, giving immediate notice to the sellers.

At advising—

LORD PRESIDENT—I think the Sheriff-Substitute and the Sheriff are quite right in their view of the evidence. The fifteen bales in question here were delivered in February, and on examination by the defender in the beginning of March they were found, as the Sheriff-Substitute remarks, “to be composed of inferior materials, and not proper round ropes, and were, to the extent of fifteen bales, tendered to the pursuer early in March, immediately on the defenders becoming aware of their having been delivered and being so defective in quality.” The only other question raised is whether these fifteen bales were in point of fact the goods delivered by the pursuer or by somebody else. Now, I think it clear that these were the goods delivered by the pursuer.

The only point in the case that requires consideration is to make sure that in sustaining the defences here we are not infringing the rule of law as to the duty and the rights of a party who has received goods to which he objects as insufficient in quality. It is the duty of the party who has received such goods immediately to give notice to the seller, and rescind the contract. But the circumstances of this case are very peculiar. This is not an action for the price of goods sold under a certain contract and delivered at once, nor is it even a case of a succession of sales with a succession of deliveries appropriate to them. It is a case of a course of dealing with deliveries at various times. There does not appear to have been any contract or agreement as to the quantity to be furnished or as to the time at which it was to be furnished. In pursuance of this course of dealing, we find that a series of deliveries was made in December 1875 and in February 1876, and the fifteen bales in question are proved, I think, to have been delivered in February, *i. e.*, to have been part of the goods delivered at various times in the course of that month. It is not possible to say at what precise time these bales were delivered. It would be difficult, and it would neither be expedient nor just, to apply the ordinary rules to such a case. There is no precise contract to rescind, and, on the other hand, when a party receives from day to day goods into his premises, it would be hard to require the recipient to examine every bale or barrel to see if the quality of the goods is what it ought to be. I think the rule in such circumstances may very well be relaxed, and that when he comes to inspect the parcels and finds that the quality is bad, he may be entitled to return them. In the special circumstances, I think it is not necessary to apply the rules laid down in the cases of *M'Cormick* and *Couston*.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuer—Balfour—M'Kechnie.
Agent—Thomas Carmichael, S.S.C.

Counsel for Respondent—Trayner—Campbell.
Agent—John Martin, W.S.

Friday, June 15.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THE GLASGOW ROYAL INFIRMARY *v.*

WYLIE AND OTHERS.

Property—Mutual Gable, Liability of adjacent Proprietor to Contribute to Cost of.

Held that a party, whose author has erected a gable-wall between his own property and another subject, is entitled to claim half the cost of its erection from that adjacent proprietor when he uses it by erecting against it a permanent building, although both stances belonged to the same proprietor when the gable was built.

Question whether a proprietor of an unoccupied stance is entitled to erect buildings—however small—against a mutual gable without paying the owner the half of the cost?

This action was raised by the Glasgow Royal Infirmary, proprietors of a three-storey house in Bath Street, against the defenders, who were trustees for the congregation of the Baptist Chapel, occupying the next building stance, for half the value of the mutual gable between the properties.

The defence, as stated *inter alia*, was—“(3) The mutual gable in question was built in or about the year 1852 by George Sharp, the common proprietor of the two lots of ground on either side of the centre line of said gable, and was first used by him as the proprietor of the ground now belonging to the defenders, by his erecting thereon, also in or about the year 1852, a building, of which the said mutual gable formed one of the sides, the vents in the gable being also used in connection with said building. Any claim for half the cost of the mutual gable was therefore extinguished *confusione*. (5) The mutual gable having been used by the defenders' predecessors or authors, there is a presumption of payment by the party who first used it to the then proprietor of the adjoining ground; and, in any event, no liability could transmit against the defenders, who do not represent any of their predecessors in the property, having acquired it by purchase.” The use referred to turned out on the proof to consist in the building of two sheds and a one-storey stable with a flue against the gable-wall.

The Sheriff-Substitute (**ERSKINE MURRAY**) found the defenders liable for half the original cost price, adding this note—

“*Note*.—The Sheriff-Substitute has had considerable hesitation in the case, not so much as to the pure questions of law, but rather as to whether the one-storey buildings constituted a user of the gable, fixing the time of their existence as the period when the half expense might have been demanded; for a chimney of the gable was undoubtedly used to carry off the smoke of the little buildings; but the flue was there before the gable was there. In the case of *Ness v. Ferries* it was held that a person building a three-storey house against a four-storey mean gable was liable in half the original expense of the whole. But

the Sheriff-Substitute can find no authority for holding that such a petty use of the wall as that previously existing here constitutes a sufficient ground for a demand for more than half the original expense."

On appeal the Sheriff (CLARK) adhered, with the variation that he found the original cost of the gable was to be rated at two-thirds of the present value.

The defenders appealed.

Argued for them—It is no doubt law that the proprietor who builds a gable-wall is entitled to demand half of its cost from the adjoining proprietor when he comes to use it (*Hunter v. Luke*, June 2, 1846, 8 D. 787); but here Sharp, who built when proprietor of both stances, could not rear up such a claim against himself. The case would have been a very different one if the rights of parties had to be determined on the footing that the building had not taken place till a later date (*Walker v. Sherar*, Feb. 4, 1870, 8 Macph. 494), for a claim which could not have been enforced against a predecessor cannot be enforced against a singular successor (*Moray v. Aytoun*, Nov. 30, 1858, 21 D. 33). In the case of *MacKenzie v. Mackenzie*, Nov. 18, 1829, 8 S. 74, the defender had actually built the pursuer's house, and in such a way as to be for his own benefit. In *Law v. Monteith*, Nov. 30, 1855, 18 D. 125, and *Rodger v. Russell*, June 10, 1873, 11 Macph. 671, such a claim as this was sustained, but then use had been made of the gable. In *Ness v. Ferries*, May 13, 1825, 4 S. 7, the proprietor of a building that did not make full use of a mutual gable was held liable for half of the expense, and therefore the defenders here were entitled to presume that the expense of the gable had been borne by their author, in view of the use to which he had put it.

At advising—

LORD PRESIDENT—The pursuers of this action, the Royal Infirmary of Glasgow, are proprietors of a tenement in Cambridge Street, Glasgow; the defenders are proprietors of the adjoining tenement. The ground on which the two tenements stand, at one time, before it was built upon, belonged to the same proprietor, Mr Sharp. He had acquired them by different titles. In 1851 he got a conveyance of the subject now belonging to the trustees of the Baptist Church, and in 1852 he got a conveyance of the other subject. While he was proprietor of the whole he built a tenement which now belongs to the Royal Infirmary, with a gable between it and the other subject, and then conveyed that building to the Infirmary's author. He afterwards conveyed the other subject, still unbuild on, to the author of the trustees of the Baptist Church. These trustees are now proceeding to erect a building on their property, and the Royal Infirmary demands one-half of the cost of the gable-wall. Now, there is no doubt that that is a demand that could not be resisted in the general case, but two reasons have been urged to us why it should not be complied with.

The first plea is founded on this specially, that these two tenements at one time belonged to the same person, Mr Sharp, and when he built that gable-wall he could not have laid any obligation upon himself as owner of one to pay half of the expense of the gable—he

could not, in short, have made himself debtor and creditor in the same obligation. But it is not necessary to consider what was the effect of this building while Sharp remained proprietor of both. The question really is, what was the effect of this after Sharp had conveyed the subjects to different persons? When he conveyed the house, he, in my opinion, conveyed with it the right to demand payment of the half of the cost of the gable-wall. That right, I think, passed as a pertinent with the house. If Sharp had remained proprietor of the subject which now belongs to the Baptist Church trustees, he would himself have been liable for half of the cost of the gable when he came to build on it; for he conveyed this building stance on the terms on which such stances in burgh are always conveyed, viz., that when you come to build you will be liable in half the cost of the mutual gable. This objection to the usual rule of liability is unfounded.

Then it is said, further, that the state of the subject when the trustees of the Baptist Church entered into possession of it was such that they were entitled to presume that the debt had been paid, for there were certain buildings already there which took advantage of the gable. No doubt there were certain small buildings there making use to a certain extent of the mutual gable. Now, there may be a question whether the owner of an unoccupied stance is entitled to erect buildings, however small, to take advantage of the gable without settling with the owner of the mutual gable. If the owner of the gable here had come forward at first when these small buildings were being erected, and demanded the half cost of the gable, that might very probably have been successfully urged. I do not desire to say how that might be, but that is not the form of the question presented to us. The question is, whether these trustees are entitled to say that the appearance of the ground entitle them to assume that a settlement had been already made? But the natural inference from the condition of the ground is just the reverse, for no permanent building had yet been erected. I think, therefore, that the Sheriff and Sheriff-Substitute have taken the true view of the case.

LOBDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Appellant—Balfour—Alison. Agent—John Gill, Solicitor.

Counsel for Respondent—Campbell. Agents—Campbell & Smith, S.S.C.