My opinion is that Stark did not become by its erection owner of this gable in its entirety. The one half was built on his own feu, the other half on the adjoining area, which at that time belonged to the magistrates, and so far as built upon ground which was not his he was not the proprietor. The erection of the wall was, I think, on common account. To the extent of a half Stark was proprietor, but to the extent of the other half, which was built not for him but for the owner of the coterminous feu, he was not the proprietor; he had a simple right of exclusive use, or, in other words, of preventing the coterminous proprietor from using the wall till recompense or payment of a half of the cost had been rendered.

In the argument the disposition to the defender was referred to, and seemingly with confidence, on the assumption that this gable was within the description of the subjects conveyed. What was specially referred to was the fact that the boundary on the west was described as being the feus formerly possessed by Robert Watson, and afterwards resumed by the City of Edinburgh, which are the feus now belonging to the pursuer. But those who pointed to this part of the description forgot that the feu formerly belonging to Robert Watson reached to the centre of this gable, and consequently the western half of the gable could not be and was not matter of conveyance. The property of the pursuer, therefore, so far as that depends upon his disposition, ends at the centre of this wall. The western half, to whomsoever it belongs, does not belong to the pursuer upon the face of his title.

The present dispute does not involve questions either of feudal law or of conveyancing. All that has to be determined is whether payment to Stark did not discharge the owners of the coterminous ground of their obligation for recompense. The result is not the acquisition of a right of property in the wall, for that previously existed, but of a right to use the wall upon the consideration that the builder has been recompensed for the expenditure by which the feu was meliorated.

These views, it may be, are in conflict with *dicta* of Judges who have taken part in the decision of controversies arising out of the erection of mutual gables. But they appear to me to be fully warranted by the opinions and by the decision in the case of the *Earl of Moray* v. *Aytoun*, 21 D. 33. The opinion of Lord Neaves in the case of *Rodger* v. *Russell*, 11 Macph. 673, is also in harmony with my views of the law of the case.

I agree with your Lordships in thinking that the appeal against the Sheriff-Substitute's judgment ought to be refused.

Lords Young and Rutherfurd Clark concurred.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellant—Gloag—Begg. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—Guthrie Smith—C. K. Mackenzie. Agents—Duncan Smith & MacLaren, S.S.C.

Friday, July 9.

SECOND DIVISION.

[Lord Lee, Ordinary.

ROBERTSON *v.* DOUGLAS.

Sale—Sale of Heritage—Allocation of Feu-Duty—Superior and Vassal.

An intending purchaser made a written offer to buy a house, "the feu-duty of which is understood to be not more than £4." The offer was accepted. The title shewed that the ground on which the tenement of which the house formed part was built had been feued from the magistrates of Edinburgh by the seller at a *cumulo* feu-duty of £35, 15s. 6d., and that there had been no allocation by the superiors. The buyer refused to take a disposition of the subjects—on which the seller had allocated a feu-duty of £4, and recorded the deed of allocation—on the ground that the superiors refused to grant an allocation except with an additional feu-duty of six shillings, and that he was entitled to require an allocation by the superior of a feu-duty not exceeding £4. *Held* (*diss.* Lord Rutherfurd Clark) that the purchaser was bound to implement the contract in respect the seller had fulfilled his part of the bargain that the feu-duty should not exceed £4, and that there was nothing in the terms of the missives obliging him to get the superiors to allocate.

Alexander Robertson, builder, in 1884 feued from the town of Edinburgh six areas of ground on the east side at the foot of Scotland Street, Edinburgh, the feu-duty for these areas being £35, 15s. 6d. He erected a tenement consisting of two main-door and eight-flatted houses, which tenement was finished in May 1885.

On 3d March 1885 the agents for George Douglas, Portobello, wrote to Robertson with regard to 39 Scotland Street, being one of these main-door houses:—"Dear Sir,—We are authorised by Mr Douglas to offer to you the sum of £490 for the main-door house at the foot of Scotland Street. . . . The feu-duty is understood to be not more than £4. . . . Entry is to be given immediately, and the price to be paid at Whitsunday." Robertson replied—"I hereby accept of your offer . . . and agree to the terms in your offer." Douglas obtained entry in March, but maintained in this action that this was only as a tenant, under an arrangement come to.

In order that the disposition of the subjects might be made out, the title to them was transmitted to the buyer's agents. It was found by them that, as above-mentioned, the house stood on the area feued by the town for a feu-duty of £35, 15s. 6d.

In the disposition sent to Douglas, Robertson allocated on the house a sum of £4 as the stipulated feu-duty, as being the fair proportion applicable thereto of the *cumulo* feu-duty of £35, 15s. 6d. payable to the superiors out of the whole tenement of which the house formed part. The agents for Douglas maintained that having stipulated for a certain feu-duty the buyer was entitled to

have the same allocated by the superior. The charter contained no obligation by the town to allocate the feu-duty. To this Robertson's agents replied — "We do not think that Mr Robertson is under any obligation to obtain an allocation from the superior. All that your client is entitled to demand is that ultimately he will not have to pay anything more than the stipulated feu-duty for his house." Robertson however (without admitting any obligation to do so) applied to the superiors for an allocation of the feu-duty of £4, but they only agreed to grant it on condition of an augmentation amounting to 6s. per annum, which he alleged the superiors refused to commute. Robertson after some negotiation offered to Douglas to deliver the disposition in his favour with feu-duty of £4, and to pay him 25 years' purchase of the augmentation of six shillings, but Douglas refused this proposal.

Robertson raised this action to have Douglas ordained to fulfil the contract of sale contained in the missive offer and letter of acceptance by paying the price with interest from Whitsunday 1885 and taking a disposition to the property.

He stated that he had fairly allocated the feu-duty on the various houses in the tenement, and that the allocation having entered the Register of Sasines, each house was thus burdened with its proper portion of the *cumulo* feu-duty, and the defender was thus secure against having ultimately to pay a larger feu-duty than £4.

The pursuer pleaded—"(1) The defender having under the missives of sale libelled purchased the subjects, he is bound to implement and fulfil the said purchase by making payment of the price and accepting a disposition or other conveyance from the pursuer. (2) The pursuer having rateably apportioned the said *cumulo* feu-duty upon the several houses forming the said tenement, and the deeds of allocation thereof by him having entered the record, the defender is not entitled to demand that the pursuer shall deliver to him an allocation by the superior of the said feu-duty of £4 applicable to his house; *et separatim*, the defender is bound in the circumstances to accept of an allocation by the superior of said feu-duty of £4, and augmentation thereof offered by the pursuer on payment of a sum equal to twenty-five years' purchase of said augmentation. (3) In the event of the defender failing to implement said contract of sale within such time as the Court shall direct, the pursuer is entitled to decree of declarator that the contract is no longer operative or binding on the pursuer, and otherwise as concluded for."

Douglas maintained the position above explained. He also stated that the pursuer had failed to pay the proportion of the cost of a main drain as he was bound to do by his title, and also that by certain letters between the parties the transaction had been cancelled.

He pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) Any contract of sale between the parties having been cancelled by mutual consent, the defender is entitled to absolvitor with expenses. (3) The pursuer having failed to implement his part of the alleged contract of sale, under which the feu-duty of the house in question was to be not more than £4, and the defender was to be entitled to access by the lane above referred to, the defender ought to be assoilzied with expenses. (4) The whole material averments of the pursuer being unfounded in fact, the defender should be assoilzied with expenses."

The Lord Ordinary (Lee) pronounced this interlocutor—"Finds it admitted that the pursuer and defender entered into a contract of sale for the house No. 39 Scotland Street in terms of the missive letters, and that according to said contract the feu-duty was to be 'not more than £4:' Finds (2) that the said house forms a part of certain subjects feued by the pursuer from the magistrates of Edinburgh at a *cumulo* feu-duty of £35, 10s. 6d., and that there has been no allocation by the superiors of said *cumulo* feu-duty: Finds (3) that the feu-duty proposed by the pursuer to be made payable for the said house amounts to £4, but that the superiors refuse to grant any allocation except on payment of an additional feu-duty amounting to 6s. per annum, and that the pursuer has hitherto failed to make any arrangement whereby the feu-duty burdening the same shall be not more than £4: Therefore finds that the pursuer is not entitled *hoc statu* to decree in terms of the conclusions of the summons: But finds that possession of the house has been obtained under the said contract of sale, and that the letters founded on by the defender do not contain any agreement to cancel the said contract: Therefore before further procedure appoints the pursuer to state in a minute to be lodged within eight days in what manner he proposes to implement his obligation under said contract in reference to the feu-duty, and reserves in the meantime all questions of expenses."

The pursuer reclaimed, and argued—He had implemented his part of the bargain in giving a disposition in which the feu-duty was not more than £4. As long as he gave the defender security that he should not be unduly distressed that was sufficient. He was not bound to get an allocation at all from the superiors. The obligation undertaken in the contract was not in any sense an obligation having anything to do with the superiors—*Nisbet* v. *Smith*, June 6, 1876, 3 R. 781, was exactly in point

The defender replied—The whole subjects in the tenement remained subject to the feu-duty unless the superior consented to an allocation, and that had not been done. The bargain implied that he was to be made absolutely safe from being called on to pay more than £4. The case of *Nisbet* v. *Smith* was distinguishable, because in it (1) the purchaser insisted on implementing the contract; (2) the titles were imported into the contract.

At advising—

Lord Justice-Clerk—In this case I have come to the conclusion, not without difficulty certainly, that the pursuer is entitled to prevail. The question is simply this—Robertson, the pursuer, sold a house, No. 39 Scotland Street, Edinburgh, to the defender, and in the missive of sale he explained that the feu-duty was understood to be not more than £4. The pursuer is quite pre-

pared to implement this part of the bargain in so far as his own rights are concerned, but according to the present state of the law the registration of the title operates an entry with the superior. The subject is part of a larger tenement, of which the *cumulo* feu-duty is £35, 15s. 6d., and the question simply is, whether the seller undertook that the feu-duty, in so far as he himself was concerned merely, should not exceed £4, or whether he undertook the same obligation for his superior? The conclusion to which I have come is that the parties did not bargain on any matter not immediately concerning themselves, and therefore that there is no ground for the defence which the buyer here makes. My general opinion is that there is nothing in the terms of the missives which obliges the pursuer to get the superior to allocate the feu-duty. I do not think that that formed part of the subject of the contract. That is my view, though I admit that I have reached it with difficulty.

Lord Young—I am of the same opinion, though I must frankly own that I have reached it without any difficulty. I think that the pursuer is entitled to decree in terms of the conclusions of the summons. The case is this:—The pursuer, a builder in Edinburgh, took a feu from the magistrates of a piece of building ground, the feu-duty being £35, 15s. 6d. He thus became the vassal of the magistrates, and must remain so until he substitute some-one in his place as vassal in this piece of ground. Upon this ground he erected a tenement consisting of two main-door and eight flatted houses, and he sold one of the flats to the defender, the bargain bearing that "the feu-duty is understood to be not more than £4." Now, this house, as I have said, forms one of a tenement of two main-door and eight flatted houses, and the magistrates are not bound to allocate the total feu-duty of £35, 15s. 6d. among these houses; but the pursuer was quite entitled to sell either of the main-door or any of the flatted houses at any feu-duty he pleased. He must remain the vassal of the magistrates at a feu-duty for the whole of £35, 15s. 6d., but he may get as much or as little from the person to whom he sells one or more of the houses as he is able or is desirous of getting. He was quite entitled therefore to grant a conveyance of this house at a feu-duty of £4. He will have to go on paying £35, 15s. 6d. to the magistrates, and the defender £4 to him. No doubt the defender is exposed to the risk of being called on to pay the whole £35, 15s. 6d. to the magistrates if it is left unpaid by the pursuer. He would be liable for more than that. He would be liable for the whole feu-duty which the magistrates pay to Heriot's Hospital, and again for the feu-duty which the Hospital pay to the Crown, if either of these should remain unpaid. It is a feature of our feudal law, which in this matter does press somewhat hardly on vassals, that, unless with the consent of the superior, and of all the superiors, any bit of ground is liable for the whole feu-duty of the feu of which it forms a part should that feu-duty at any time remain unpaid. The law, as I have said, seems to me somewhat extravagant in its care for the rights of superiors in this particular, but at the same time the difficulty is in most cases more fanciful than real, and the apprehension that this property, of which the feu-duty is £4 per annum, is liable for the whole £35, 15s. 6d. is truly fanciful, and was indeed admitted to be so—just as fanciful as the apprehension that the pursuer would be liable to pay the feu-duty of the whole barony of Broughton to Heriot's Hospital should the magistrates fail to do so. That being so, the bargain has I think been completely implemented. The burden of the defender's argument was just this, that £4, 6s. is more than £4. The bargain was that the feu-duty should not exceed £4—then, says Mr Gloag triumphantly, "It has done so, for £4, 6s. is more than £4." The pursuer had no power to make a bargain for the superior. His bargain was that the feu-duty, so far as he was concerned, should not exceed £4, and he has completely implemented that bargain. I am not in the least degree perplexed by the registration of the defender's titles. It is only when the title of his author, the pursuer, is set aside that that becomes of consequence, for the pursuer must remain liable for the whole £35 until the magistrates have consented to an allocation. No registration will make each of the disponees of this tenement liable for the whole £35, 15s. 6d. It must remain so until the magistrates consent to an allocation, and they do consent on condition that the feu-duty in the defender's case is £4, 6s. In order to avoid litigation the pursuer offered the defender twenty-five years' purchase of this difference of 6s. The defender refused this offer, for his purpose is the not altogether laudable one of getting rid of a bargain to buy a house after he has been in occupation of it for some time. It is only a difference of £7 or £8, and I am not sorry that he is not entitled to succeed, but is bound to take the conveyance which the pursuer offers, and has no right to be relieved of his ordinary real property liability for the feu-duty of the whole tenement.

Lord Craighill — The pursuer Robertson feued from the Magistrates and Town Council of Edinburgh in 1884 the piece of ground at the foot of Scotland Street, which is described in the summons, for a feu-duty of £35, 15s. 6d. The purpose for which the ground was acquired was the building upon it of a tenement to consist of ten houses, two of which were to be main-door houses, or houses on the level of the street, and the other eight to be houses entering from a common stair. The *cumulo* feu-duty was to be distributed over those houses in proportions corresponding as nearly as possible to the value of those several subjects. There was no provision in the charter to this effect; the thing was left to be carried out by the pursuer in conformity with the usual practice of builders by whom ground for the erection of a tenement of houses has been acquired. Nor was there in the charter any obligation undertaken by the superiors to approve of the allocation which might be imposed on his superiors by their vassal. They might approve of it, and if they did so their right to the feu-duty from the several houses would be limited to the portion of the £35, 15s. 6d., the allocation of which had thus been confirmed. Without such an arrangement with the magistrates each house in the tenement would be liable in the full feu-duty to the superiors; but each proprietor paying more than his own share would have relief from the other pro-

prietors in the tenement for his share of the excess. There might in these circumstances be trouble beyond what would be necessary had the superiors adopted the pursuer's allocation; but there would be no ultimate loss to any owner, for the one who paid for all to the town would recover from his neighbours their feu-duties, and so be reimbursed of the full amount less the feu-duty charged as a burden upon his own property.

The tenement of houses erected upon this feu was completed early in 1885, and in the beginning of March of that year the pursuer and defender entered into negotiations for the sale and purchase of one of the two street flats This led to a written offer made to the pursuer by the agents of the defender, in which, on the defender's behalf, they offered "you [that is, the pursuer] the sum of £490 for the main-door house at the foot of Scotland Street, as agreed to between you and him [the defender]." There was this clause in the letter, "The feu-duty is understood to be not more than £4." This offer was accepted by the pursuer, and thus a bargain was concluded. Immediate entry was given; the price was to be paid at following Whitsunday, when also the formal disposition was to be delivered. That this disposition might be prepared, the defender's agents applied for the titles of the property, and on 4th May the feu-charter by the magistrates to the pursuer was sent to the agents of the defender, who on 13th May wrote to the agents of the pursuer a letter, in which they said, "We stipulated for a certain feu-duty in our offer; we are entitled to have the same allocated by the superior, and must insist upon this being done." This announcement came as a surprise upon the pursuer. Such an allocation had never been mentioned before, much less had what was asked been made a condition of the bargain, and it is plain from the language of the letter that opposition on the part of the pursuer was anticipated, for otherwise the defender's agents in making their request never would have intimated that "they must insist upon this being done." Nor could opposition have been anticipated unless upon the ground that the allocation by the superior had not been within the contemplation of parties, and was not provided for by their contract. This was the view of the pursuer, and accordingly his agents replied—"We do not think that Mr Robertson is under any obligation to obtain an allocation from the superior. All that your client is entitled to demand is that ultimately he will not have to pay anything more than the stipulated feu-duty for his house." These letters were followed by a long correspondence, in which the pursuer by offering concessions for the sake of peace endeavoured to bring the dispute to an amicable termination. But first on one ground, and then on another, all his proposals were rejected by the defender, the necessary consequence being the institution of the present action.

The question now before us is, What in this matter is the right of the defender, and what the obligation of the pursuer under the clause of the defender's offer, which says that "the feu-duty is understood to be not more than £4?" In other words, is the feu-duty allocated by the pursuer upon the house sold to the defender more than £4 in the sense of the clause of the defender's offer because that allocation has not been confirmed by the superiors? The answer to this question must, I think, be that the feu-duty does not exceed the terms of the contract. The stipulated sum is £4. That is the proper feu-duty with which the house in question has been burdened. The payment of that sum will exhaust the burden effeiring to this particular house, and this appears to me to be all which was involved in the condition expressed in the clause, the meaning of which has come to be in controversy. No doubt the allocation by the pursuer does not affect the rights of the superiors, who, should it be necessary, or should they think fit, are as free as they were before to demand from the owner of the house in question, as well as from the owners of the other houses, their £35, 15s. 6d., less the proportions of that *cumulo* feu-duty, the allocation of which has been approved by them. But the pursuer was not called upon by his undertaking to the defender to treat with the superiors that the defender might be protected against the exercise of the right which they possessed, nor could he have compelled them to confirm his allocation. These were matters outside the contract between the pursuer and the defender. All that was implied in that contract, in so far as the question in controversy is concerned, was that the *cumulo* feu-duty should be distributed over, and the several sums so fixed upon, the houses of the tenement, that ultimately the defender should not have to bear any burden in the name of feu-duty beyond the £4 as to which he made stipulation. This, I think, was what was meant to be and has been provided by the allocation of a feu-duty upon each of the houses, and the recording of the several dispositions in the Register of Sasines. The obligation for payment has thus been rendered a real burden upon the several houses of the tenement.

The case of *Nisbett* v. *Smith*, June 6, 1876, 3 R. 781, appears to me to be full warrant for my reading of the present contract. Distinctions in the circumstances are alleged by the defender, but such as they are they appear to me to be immaterial on the real matter of the controversy. Two particulars are said to be grounds of distinction. The first that in *Nisbett's* case the purchaser insisted for implement of his contract, whereas here the defender is willing, and indeed is anxious, that he should be relieved from his contract. But this difference can have no effect upon the interpretation clause, as to which parties are in controversy. Whether one of the parties insists that the sale shall be carried through, or struggles to be free, the meaning of the words of the clause will be the same. The second particular referred to by the defender is that in *Nisbett's* case the titles of the seller were said to be imported into the contract, inasmuch as they were referred to in the advertisement as in the hands of the exposer's agents. But the intending purchaser did not apply for the titles, nor had he seen them when he sent in his offer for the villa "as advertised." The one case, therefore, is in reality parallel with the other, for though there was no reference to the titles in any advertisement, because no advertisement had been issued, the titles of the pursuer were in reality as much within the command of the defender as were the

titles in *Nisbett's* case within the command of the intending purchaser.

On the whole matter I am of opinion that the defender is attempting to break the contract by which he is bound, and that the pleas he has put forward are unfounded. Decree therefore should be given against him in terms of the conclusions of the summons.

Lord Rutherfurd Clark—This is a very wretched case, and I am very sorry that it should have been presented for our decision, and I regret it the more that I find myself unable to concur in the judgment.

The pursuer is proprietor of certain subjects in Edinburgh, and he entered into a certain contract with the defender, which we are called on to construe. As proprietor of the subjects the pursuer might of course have subfeued them, but the contract into which he did enter with the defender was admittedly a contract of sale—that is to say, a contract by which he undertook to sell a part of the subjects which then belonged to him—and one condition of this sale was that "the feu-duty is understood to be not more than £4;" so that he undertook to sell the subjects, that is, to give a title to the defender, the buyer, the feu-duty in which was not to exceed £4. What feu-duty? Of course it could not be a feu-duty in any sense payable to the pursuer himself, because he was not subfeuing but selling, and a feu-duty is necessarily what is paid to a superior. In short, the subjects were sold on condition that the pursuer undertook that the defender should enter with the superior on the footing of paying a feu-duty of £4 and no more. Now, it is quite clear that as the titles then stood it might be perfectly impossible for the pursuer to give such a title to the defender. The pursuer held the whole subjects at a *cumulo* feu-duty of £35, 15s. 6d., and it might be out of his power to give the defender a title to the subjects sold in which the feu-duty should be £4 and no more, for the magistrates, the superiors, were perfectly entitled to decline to agree to such a condition. But if the pursuer was not able, and is not able, to give a title of which the feu-duty is £4 and no more, then the only consequence is that he is not in a position to implement the conditions on which he agreed to sell the subjects; but the defender did not undertake to buy except on the conditions that he got an entry with the superior, and that at a *reddendo* of £4 and no more. I do not think that the new forms of conveyancing introduced by the recent Acts affect the matter. What the pursuer undertook to give was a conveyance with a double manner of holding, on the procuratory of which the defender was entitled to resign into the hands of the magistrates and get a charter from them with a feu-duty of £4 and no more. I am speaking in the language of the old forms, and the new forms do not deprive the magistrates of the right to refuse to grant such a charter. In short, once one sees that this is a contract of sale not of feu it seems to me impossible to attach any other meaning to it than this, that the feu-duty of which it speaks is a feu-duty payable to the seller's superiors.

It was said that people do not bargain about all the burdens incidental to the feudal tenure. It is quite likely that the incidents of the magistrates holding of Heriot's Hospital, who are said, I suppose accurately, to be the superiors of the magistrates, or of the Hospital's holding of the Crown, did not form part of this contract. These are burdens about which the parties could not possibly be held to deal. What they are bargaining about are the incidents of their relation to the immediate superiors. All the burdens above that remain the same.

My opinion accordingly is that the condition of this contract of sale is that the seller should give the buyer a disposition under which he may enter with the superior at a feu-duty not exceeding £4. He has not tendered such a conveyance. It is quite true that the magistrates are willing to accept a feu-duty of £4, 6s., and that the seller is willing to commute the additional 6s. by paying the buyer a sum equal to twenty-five years' purchase. I do not think that the defender is bound to accept that. I think he is entitled to implement of the contract in accordance with its terms. I do not attach any importance to the fact that he took possession of the subjects. He took possession on the faith of getting a conveyance in terms of his contract, and not getting that I think he is only bound to pay the fair and reasonable value of the subjects for the time they were in his occupation.

The Court pronounced this interlocutor:—

"Find that the defender having purchased the subjects described in the summons under the missives of sale libelled, is bound to implement the purchase by making payment of the price and accepting a conveyance from the pursuer; and that the pursuer having apportioned the *cumulo* feu-duty rateably to the several houses forming the tenement, and the deeds of allocation thereof having been placed on record, the defender is not entitled to require the pursuer to deliver to the defender a deed by the superior allocating a feu-duty of £4 to his house: Therefore recal the interlocutor reclaimed against: Repel the 1st, 2d, 3d, and 4th pleas-in-law for the defender, reserving consideration of the 5th plea: Decern against the defender in terms of the conclusions of the libel."

Counsel for Pursuer—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—Duncan Smith & MacLaren, S.S.C.

Counsel for Defender—Gloag—Begg. Agents—Ronald & Ritchie, S.S.C.

Friday, July 9.

SECOND DIVISION.

[Lord Lee, Ordinary.

WOODS *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Negligence — Railway — Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 40—*Contributory Negligence.*

The Railway Clauses Act 1845 provides that at every level-crossing the railway company whose line crosses the road shall have good and sufficient gates at each side of the rail-