effect in regard to reclaiming-notes by extending the time allowed for reclaiming, but it is not intended to take away from the latitude in time allowed by the statute.

LORD KINNEAR—I am entirely of the same opinion. It is admitted—and the admission could not have been withheld—that the interlocutor reclaimed against was competently pronounced under section 94 of the Court of Session Act. But if the interlocutor falls under the main provision of the section, why is the provision inapplicable to this reclaiming-note? If there were any doubt on the point, it is completely removed by the later proviso, because the effect of the statute, when the two provisos are taken into consideration, is simply this, that where the Lord Ordinary pronounces an interlocutor in vacation in a case heard during session, a reclaiming-note may be lodged on specified dates, but then, as certain interlocutors can only be reclaimed against with leave of the Lord Ordinary, and the Lord Ordinary may not have thought fit to embody leave to reclaim in the interlocutor, the further proviso is added that in that case leave to reclaim may be granted by the Lord Ordinary on the Bills.

The Court repelled the objections.

Counsel for the Pursuers — Cooper. Agents — John C. Brodie & Sons, W.S.

Counsel for the Defender — J. Wilson. Agents—Davidson & Syme, W.S.

HOUSE OF LORDS.

Thursday, May 12.

(Before the Lord Chancellor, Lords Herschell, Macnaghten, Morris, and Shand.)

BAIRD *v.* ALEXANDER.

Property—Mutual Gable—Recompense for Use of Mutual Gable—Special Agreement.

The proprietor of two adjoining building stances erected a house upon one of them, and conveyed the ground and the buildings erected thereon to A. The south wall of the house was built half upon the one stance and half upon the other, and the disposition declared that the wall was to be a mutual gable. In the missives the subject proposed to be sold was described as "the house No. 8 Braid Road," and shortly before the execution of the disposition the seller wrote to the purchaser—"I should have mentioned in my offer to you of this date (4th February 1891) that the unused half of the gable and boundary walls is not included in the offer."

The seller subsequently disponed the vacant stance adjoining the south gable to B, who proceeded to build upon it and to make use of the wall which had been declared to be a mutual gable.

Held (*aff.* judgment of the Second Division) that A was entitled to recover from B one-half of the cost of the mutual gable. *Berkeley* v. *Baird*, February 16, 1895, 22 R. 372, *approved* and *followed*.

Observed that the terms of the seller's letter founded on as a special agreement were consistent with the terms of the disposition, and that both were consistent with the ordinary rule.

Opinion reserved whether it would have been competent to refer to it as evidence contradicting the disposition.

In the year 1890, William Murray, builder, Edinburgh, was proprietor of a portion of the estate of Plewlands, in the county of Edinburgh. On these lands he proceeded to erect a row of self-contained houses on adjacent lots, marked Nos. 3 to 10 on the feuing plan of the said lands. The south gable of the house upon lot 10, and also the front and back boundary walls, were, in accordance with the usual custom, erected to the extent of one-half their thickness on lot No. 10, and to the extent of the other half on lot No. 11, which was also the property of Murray, and at that time unbuilt upon.

Thereafter Murray conveyed lot No. 10 to H. S. Monteagle, solicitor, Edinburgh, by disposition dated 14th and recorded 16th February 1891. In this disposition the subjects were described as follows:—"All and whole that area or piece of ground, part of the lands of Plewlands, in the parish of St Cuthberts and county of Edinburgh, lying on the west side of the old Penicuik Road, now called Braid Road, as the same is delineated and coloured red and green and marked 'lot 10' on the plan marked 'No. 2,' annexed and signed 'as relative to the feu-contract after mentioned,' viz., a feu-contract of a larger portion of the said lands of Plewlands entered into between the said Scottish Heritages Company, Limited, on the one part, and John Baird, solicitor, Edinburgh, on the other part, dated 1st and 2nd, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh, 7th June 1888; 'together with the whole buildings and other erections erected or to be erected on the plot or area of ground before disponed, the whole parts, privileges, and pertinents thereof, the teinds of the same, in so far as I, the said William Murray, have right thereto, and all my right, title, and interest, present and future, therein: Declaring that the gable, boundary walls, parapet walls, and railings surrounding the subjects before disponed are mutual, with the exception of the parapet wall and railing facing Braid Road, which belongs solely to said subjects.'"

On 4th February 1891, preceding the execution of the disposition, Murray had written to Monteagle two letters containing the offer of the said subjects, which was accepted by Monteagle on the same day. In the first of these he said—"Dear Sir—I hereby offer to sell you the house No. 8 Braid Road, subject to the following condi-

tions:— . . . (4) That I agree to build up the presses and fire-places in south gable, and plaster the same, to repair the front gate, make good the defective flooring boards, put knobs on the dining-room grate, repair all broken glass, repair the dado on the south gable, and repair the broken railing and put handle on the inside of outer door." In the second he said—"Dear Sir—I should have mentioned in my offer to you of this date (4th February 1891) that the unused half of the gable and boundary walls is not included in the offer."

By a series of dispositions lot No. 10, with the house built upon it, was transferred until it became the property of Mrs Bell or Alexander by disposition dated 18th and recorded 20th February 1895. Murray conveyed the adjoining lot No. 11, together with the buildings erected or to be erected thereon, to the appellant by disposition dated 9th, and recorded 10th July 1891, and the appellant feued said lot to John Oliver by feu-charter, dated 23rd, and recorded 27th April 1896. After the execution of said feu-charter, Oliver erected a tenement on lot No. 11, and in doing so utilised the gable erected by William Murray as one of the gable walls of his tenement, and he also utilised the back and front boundary walls as the boundary walls of his ground. Thereafter the respondent, on 2nd December 1896, raised the present action against Oliver concluding for payment of £80, which was stated to be one-half of the cost of the erection of said gable and back and front boundary walls. By the feu-charter, granted by the appellant in favour of Oliver, Oliver bound himself to pay the value of one-half of the gable and boundary walls to the appellant. Prior to the action being raised, Oliver had paid to the appellant the sum of £44, 2s. 2d. as the assessed value of said half of the cost of said gable and boundary walls. On the action being raised, Oliver lodged defences denying the respondent's claim on the ground that the gable had been erected by Murray at a time when he was owner of both lot 10 and lot 11; that he had not conveyed to respondent's predecessor in title, Monteagle, any right to demand payment for the half of the gable erected on lot 11, and that no such right had been transmitted to the respondent.

On 27th January 1897 the Lord Ordinary (KYLLACHY) repelled these defences, and found Oliver liable to the respondent in one-half of the cost of the erection of said gable and boundary walls, and remitted to Mr Watherston, builder, to inquire and report as to the amount thereof. Thereafter Oliver called upon the appellant to protect him from the respondent's claim. The appellant acknowledged his liability to do so, and on 17th February 1897, lodged in process a minute craving to be sisted as a defender in the action, and adopting the defences lodged for Oliver, and further consenting that any decree pronounced should go out against him conjunctly and severally with Oliver. No objection to this course was stated by the respondent, and the appellant was sisted as a defender accordingly. On 19th March 1897 the Lord Ordinary decerned against the appellant and Oliver conjunctly and severally for the sum of £50, 2s. 8d. in full of the principal sum sued for, and found the respondent entitled to expenses.

The appellant reclaimed to the First Division of the Court of Session against the Lord Ordinary's decision. The case was transferred to the Second Division, who on 1st July 1897 adhered to the Lord Ordinary's judgment.

The judgment of the Court was delivered by Lord Trayner, whose opinion is as follows:—

LORD TRAYNER — It is settled by the decision in the case of *Berkeley* v. *Baird*, February 16, 1895, 22 R. 372, that such a title as the pursuer holds entitles her to claim the price or value of the one-half of the mutual gable in question. This the defender, as I understand, does not dispute. But the defender Baird maintains that the pursuer's right has been discharged, and if that be so the defender will be entitled to absolvitor. The defender cited the case of *Robertson* v. *Scott*, July 9, 1889, 13 R. 1127, in support of his view, but no authority whatever is needed to support the defender's proposition if it be well founded in fact. If the right on which the pursuer bases her claim has been discharged, her claim of course cannot be sustained. It lies on the defender, however, to show that the pursuer's right has been discharged. From the statements on record it appears that the pursuer was vested with the right in respect of which she now sues in February 1895. The alleged discharge of that right took place not earlier than 23rd April 1896, when the defender Oliver paid to the defender Baird the price of the half gable. But had Baird any title to discharge the right vested in the pursuer? No such title is averred. Baird acquired the subjects adjoining the pursuer's in 1891, but he did not acquire the right which was vested in the pursuer's author and now in her. Accordingly, Baird could not discharge a right not vested in him but in the pursuer. The case of *Robertson* v. *Scott* differs from the present just at this point. The person who discharges the claim in that case was vested in the right he discharged at the time he discharged it. Baird never was vested with the right which he pretends to have discharged.

The defender's attempt to qualify or restrict the pursuer's recorded title by a reference to the missives which passed between her author in 1891 is not admissible, and it was so decided in *Berkeley's* case.

I think this reclaiming-note should be refused.

The defender appealed against this judgment to the House of Lords, and in the printed case submitted, *inter alia*, the following argument—"The contention of the appellant in the present case is that it is established that there was a special con-

tract between Murray, the builder of the gable in question, and Mr Monteagle, his immediate disponee of lot 10, that Mr Monteagle should acquire no right to the claim of recompense for the half of the cost of the gable mutual to lots 10 and 11, but that said claim should be reserved by Murray. The special contract founded on is contained in missives of sale dated 4th February 1891, which bear expressly that 'the unused half of the gable and boundary walls is not included in the offer' to sell made to Mr Monteagle and accepted by him. This reservation may not be expressed with accuracy, if, as above stated, it be the true legal view of the principle involved that in all cases the builder of a mutual gable acquires, and can transmit to his disponees, a right of property in only one-half of the gable and a common interest in the whole, and that his ground of claim against the proprietor of the adjoining stance is not a right of property but a 'real right' of recompense. There are not wanting, however, judicial opinions of great weight for the proposition that the builder is owner of the whole gable intended to be mutual until it is utilised by the adjoining proprietor, or until his claim against that proprietor is disposed of by him. The opinion of the Lord Justice-Clerk (Lord Moncreiff) in *Robertson* v. *Scott* may be referred to (see also *Law* v. *Monteith*, November 30, 1855, 18 D. 130). In any view, the meaning and intention of the parties in using the words quoted in their missives of sale appears unmistakably to have been that Murray did not intend to sell and Monteagle did not desire to buy or pay for the claim of recompense for the half of the gable and boundary walls which had been erected by Murray on lot No. 11 of the feuing plan already referred to, being the ground now belonging to the defender Oliver. The appellant humbly submits that there is no reason why this express contract should not be given effect to, and, if given effect to in a question between Murray and Monteagle it must also be given effect to in a question with the prepresent respondent, because she did not acquire by the disposition in her favour more than was originally conveyed to Monteagle.

"It is further maintained by the respondent that the missives of sale are superseded by the terms of the formal disposition, dated 14th February 1891, granted by Murray in favour of Monteagle, and that it is not permissible to refer to the missives of sale without contravening the principle that a formal conveyance of heritage supersedes previous communings, established by the case of *Lee* v. *Alexander*, August 3, 1883, 10 R. (H.L.) 91; *Orr* v. *Mitchell*, March 28, 1893, 20 R. (H.L.) 27, and other similar authorities. The appellant humbly submits that the principle referred to has no application to a claim like the present, which, although affecting a heritable subject, is not in itself heritable, but is capable of being transmitted and discharged like any other personal claim for money. Supposing that by missives of sale a sale were concluded of heritage and also of corporeal moveables, and that thereafter a disposition were granted of the heritage, it would be extravagant to suggest that the missives of sale did not remain in full force as regards the corporeal moveables, and the appellant submits that a claim for recompense such as is now in question may equally well stand upon missives, although a formal conveyance has been granted of the whole heritable property actually sold.

"It might no doubt be otherwise if the terms of the subsequent disposition in any way innovated upon or were inconsistent with the provisions of the missives with reference to the claim of recompense, but in the present instance no such inconsistency or innovation can be suggested. The disposition by Murray to Monteagle declares that 'the gable boundary walls, parapet walls, and railings surrounding the subjects before disponed are mutual, with the exception of the parapet wall and railing facing Braid Road, which belong solely to said subjects.' Had a dwelling-house been erected on lot 11 at the date of the declaration, this declaration would have been in exactly similar terms and yet no claim for recompense would have existed, and in this particular case it only expresses what—as was arranged—should be the permanent right of the coterminous proprietors on the footing that no claim for recompense existed in the person of Monteagle and his successors. So far as any such claim is concerned, it has, the appellant submits, the same effect as if Murray had already used the gable at the date of the declaration, or had discharged the claim otherwise. It may be that the terms of the declaration are not conclusive against the existence of the claim in the person of the disponee; but if the view of the learned Judges who have held that, until recompensed, the builder is owner of the whole gable, be sound, the declaration in effect negatives that claim, because it certainly negatives any right of property higher than ownership of half the gable and a common interest in the rest. The respondent in the Court below founded strongly on the judgment in the case of *Berkeley* v. *Baird*, February 16, 1895, 22 Rettie, 372. The appellant submits that the judgment in that case was unsound, and that it should not be followed. The expression there used in a letter written prior to the disposition was 'The unused halves of the gable and boundary walls are not conveyed,' and the Court construed that expression as meaning that no right of property therein was intended to be conferred on the disponee, but not as excluding the intention to convey the claim for recompense. The language may have been inaccurate, but the appellant submits that the meaning of it is clear, and that it could have no other signification but that the claim for recompense was to be excluded from the transaction. But the criticism applied to the words used in *Berkeley's* case does not apply to the words here in question, which are that 'the unused half of the gable and boundary walls is not included in

the offer.' This expression appears to the appellant to convey very clearly that the price offered by Monteagle did not include any consideration for an assignation of the claim for recompense for the unused half of the gable and boundary walls, and that he did not intend to acquire it. The learned Judges in *Berkeley's* case further expressed an opinion against the admissibility of the letter containing the expression referred to. The appellant questions the soundness of this opinion, but in any view it does not cover the present case, where the special bargain excluding the claim of recompense is contained in separate missives of sale.

"The opinion of their Lordships of the Second Division in the present case was delivered by Lord Trayner. In so far as it does not proceed upon the case of *Berkeley* v. *Baird*, it is founded upon what the appellant humbly submits was a misconception of the argument submitted. Lord Trayner regards the appellant as founding upon the payment made by Oliver to him upon 23rd April 1896 as excluding a claim by the respondent, but it was not the appellant's intention to found on this payment. The appellant's argument rests entirely upon the grounds already stated as instructing that the claim of recompense was never assigned to the respondent's author Monteagle, but was retained by Murray, through whom it was afterwards transmitted to the present appellant."

The respondent's contentions were as follows: — "*First*, The clause in the disposition on which the appellant founded is in these words—'Declaring that the gable boundary walls, parapet walls and railings surrounding the subjects before disponed are mutual, with the exception of the parapet wall and railing facing Braid Road, which belongs solely to said subjects,' and his argument was that because the gable and walls are described as mutual the ordinary rule of law is elided. It humbly appears to the respondent that no such consequence follows from the declaration. The gable was in fact a mutual gable, and the boundary walls were mutual boundary walls. They were erected by virtue of and in accordance with the custom above mentioned to the extent of one-half of their thickness on lot No. 10, and to the extent of the other half on lot No. 11, and they were intended for use not only by the proprietor of lot No. 10 but also by the proprietor of lot No. 11, when it should come to be built upon. The declaration was consistent with these facts and was introduced not to alter or affect the common law consequence, but to avoid any dubiety as to the fact of this mutuality, and it was introduced in the interest not only of the respondent but of the proprietor of lot No. 11, whoever he should be, who should build, for it was only by reason of the mutuality that he was entitled to use the gable and division walls or mutual walls for vents, joists, &c., in course of his building. A long chain of decisions has settled that corresponding to this right to use is the obligation to pay one-half of the cost of erection—Bell's Prin. sec. 1078; *Hunter* v. *Luke*, 1846, 8 D. 787; *Law* v. *Monteith*, 1855, 18 D. 125; *Earl of Moray* v. *Aytoun*, 1858, 21 D. 33; *Glasgow Royal Infirmary* v. *Wyllie*, 1877, 4 R. 894; *Berkeley* v. *Baird*, 1895, 22 R. 372. To the latter of these special reference is made, as it is so entirely on all fours with the present case, having arisen indeed with reference to other parts of the same building area, that the Court below could do no more than repeat their judgment. Here, as there, there is no doubt as to the law relating to gables in urban subjects in the ordinary case. Here, as there, the speciality is said to arise from the fact that both parties derive their title from a common author who, it is contended, cannot be presumed, in parting with lot No. 10, to have also parted with the right to use the mutual gable without payment for the purposes of lot No. 11. It was answered there that if Murray the common author intended to reserve such right, he should have done so expressly in his conveyance, but that he had failed to do so. That answer equally holds here. To apply the words of Lord Adam in delivering judgment, *mutatis mutandis*:—'He disposed of lot 10 and the buildings upon it, with all the rights and obligations which would belong to the purchaser as proprietor of a house with a mutual gable not yet built against. That was made clear by the case of *Glasgow Royal Infirmary* v. *Wyllie*, June 15, 1877, 4 R. 894.'

"In the *second* place, the respondent maintains that the alleged missives cannot be looked at to qualify or contradict the disposition in her favour. Her husband, in whose right she stands, bought solely on the faith of the public records, on which he and the respondent, as representing him, were entitled absolutely to rely.

"In the *third* place, the respondent humbly submits that even if the alleged missives could be looked at, they do not on a sound construction amount to any reservation of right such as the appellant contends for."

At delivering judgment—

LORD CHANCELLOR — It appears to me that there is no ground for this appeal. Whatever may be said about the inconvenience of allowing important rights to depend upon an undefined custom, undoubtedly the ordinary and, so far as I can see, the universal custom in Scotland is to assume, where the circumstances are such as we find in this case (indeed the learned counsel for the appellant does not deny that that is the ordinary and customary procedure) that the owner of a plot of land should have (I hesitate what phrase to use) an inchoate right to build against the adjoining house, and if he does so the result is that he is bound to pay half the cost of that which is in truth a subject-matter in which each of the two persons is interested, namely, the gable wall. It would be untrue to say that either of them is vested with half of the wall, because each of them is supposed to possess, and does possess, in right of accommodation and in right of support, the whole wall.

Each of them possesses the whole wall for the purpose of the common occupation and the common advantage or interest which the whole wall confers upon them both.

I am not here to discuss whether it might not have been as well that such rights should be more accurately defined, and should not depend upon a kind of general understanding, but that each conveyance of property under such circumstances should contain a specific statement of the rights supposed to be contained in it. However, it is not for me to criticise that matter now. It has passed into the region of well-understood practice in custom in Scotland, and we have to construe the contracts before us in reference to that well-understood practice and custom in regard to which each of these parties was contracting.

Under those circumstances, while the learned counsel for the appellant admits that that is the universal practice and custom, he suggests two propositions which would take this case out of what is the admitted practice and custom. In the first place, he says that the form of the actual conveyance is one which does not contain this right. In that respect I think what he says is true—it does not contain it; but neither is it inconsistent with it. Then he says that the correspondence, the missives, as they are called, which passed before the actual conveyance, cut down and qualified the ordinary condition of things into a condition of things in which this right to obtain half of the price of building this party wall, does not exist in the present case, whereas it generally would exist. As to that I can only say that apart from the question of whether or not these missives are admissible in evidence, I should have thought that if there was anything in them inconsistent with the conveyance itself they would not be admissible in evidence for any such purpose. Assuming that they are admissible for that purpose it appears to me that they do not in the smallest degree give any foundation for the argument.

The two persons are contracting for the purchase of "the house." Your Lordships will observe the words "the house." The house is one. Of course one part of the house is this wall, which is described as the "mutual" wall, and in the negotiation for the purchase it appears to have occurred to the vendor that if he described it as "the house" he would be selling that which he had no mind to part with exclusively to the vendee. Thereupon he says, "Let it be understood between us that in this bargain I am not including those parts of the house which project beyond plot 10, and which properly belong to plot 11, and though I am describing this as 'the house' which I am selling to you, let it be understood between us that by using that term I do not mean to exclude the possession of this party wall from the person who shall ultimately become the owner and proprietor of plot No. 11, because those parts of the house do project into No. 11, and would according to the ordinary custom become his in the same sense as that party wall is yours." It is true he does not say anything about paying for it, or making a claim—he does not deal with that subject at all. The reason for that I take to be that at all events up to that time the ordinary and regular understanding in Scotland was that the inevitable result of that sort of purchase and sale would be that that incident would become attached to it, and accordingly it is not dealt with. But what is dealt with (and it is very singular to my mind) is this, that although the house is sold as "the house," it is sold as plot 10, expressly excluding any part which would project into plot No. 11.

Under these circumstances, I have not to deal with what has been now established as the practice and custom in Scotland, and what people understand when they make bargains there, just as the custom of a port or any other place in England may be brought in as a regular portion of the contract in this country. In truth, to my mind, exactly on the same footing, the arrangements here made are such as are subject to the well-understood course of practice and custom in Scotland. If that is so, there is nothing unlawful in them, and there is nothing in them which is inconsistent with the deed by which the property itself is passed from the one person to the other.

Under these circumstances it appears to me that the proper inference to be drawn from all these things is that which the Court below did draw, namely, that this property was assigned and conveyed to the person who bought it, subject to this ordinary incident. That being the state of things, it appears to me that there is no ground for this appeal, and therefore I move your Lordships that the appeal be dismissed with costs.

LORD HERSCHELL — I am of the same opinion. I think it has been long settled as the law of Scotland that where the owner of one of several plots of land laid out for building purposes builds the gable wall of his house with the consent of the owner of the adjoining plot, one-half on his own land and the other half on the adjoining land, when the owner of that adjoining plot afterwards makes use of that gable by building upon it, he becomes bound to pay to the owner of the original building one-half of the cost of that gable wall; and that this is a right which attaches not only in the case of the person who originally built the wall, but a right which passes on a disposition of the house to the person ultimately owning it at the time when the adjoining owner builds and makes use of that party wall. That appears to have been settled more than half-a-century ago.

The question subsequently arose in the year 1871 whether this rule applied in the case of a house built where the gable was one-half upon the adjoining projected plot, if at the time when it was built the same person owned both the plot on which the house was built and the adjoining plot. It was then settled by the Court of Session

that the same rule applied, and that in that case also the owner for the time being of the house with the gable was entitled to recover from the person who built upon that gable in connection with his house upon the adjoining plot one-half of the cost of the gable wall.

Now, the law so established has, I may say, not been substantially contested by the learned counsel who opened this appeal at the bar, but it is said in the present case, although the gable wall was built half upon plot 10 and half upon plot 11, and although at the time when the adjoining owner built, the present respondent, the pursuer, was the owner of that house, and although the gable was made use of by the owner of plot 11, there is no liability on the part of anyone to make compensation to the respondent, inasmuch as, it is said, all such claim was excluded by a contract made between the owner of the two plots and the original disponee of plot 10 with the house upon it at the time, or just prior to the time, when that disposition took place.

That is, as I understand, the sole question which has to be determined in the present case, and in considering the documents which passed between the parties just prior to the disposition, the state of the law which I have described must be taken into account, because of course these missives must be read in the light of the law which had been at that time established and settled. I am not going to pronounce an opinion upon the question whether it is permissible to look at these missives at all. It is obviously a matter open to very considerable argument, for this reason, that the missives, in form at all events, purport to be the ascertainment of the subject-matter of the sale, and if the subject-matter of the sale as ascertained by the missives should appear to be something different from the subject-matter of the sale as ascertained by the disposition, I think it is open to a great deal of argument whether you can look at the missives at all, on such a point as that, and whether you are not confined in asking what was the thing disponed to an examination of the disposition itself.

But it does not appear to me to be necessary to express an opinion upon that point, because looking at these missives, and giving them their full effect, I can see no inconsistency between them and the disposition, nor can I find in them any such contract or bargain, even if that contract or bargain would have affected the present respondent, as the appellant's counsel have contended for. It is said that the missives amounted in effect to a bargain that the recompense which ordinarily would become payable upon the owner of the adjoining plot building upon this party wall, shall not in the then case be payable, and that no right to such recompense shall pass to the disponee under the sale. It is not necessary to determine what would have been the effect of such a stipulation if made in terms. That again might have been a matter open to argument. But I cannot so read the missives. The explanation of them is, I think, that which my noble and learned friend on the woolsack has pointed out, that the offer was an offer to sell "the house." Of course, the gable wall was a part of the house—one of the walls of the house. The offer also contained an agreement to "build up the presses and fireplaces in the south gable and plaster the same" and to do certain other repairs. Taking those provisions together, it would have been well open to contention, if there had been nothing more, that the vendor offered to the purchaser the exclusive right to that gable, and therefore would have deprived himself of the power of selling to any subsequent purchaser the adjoining lot upon terms which would enable that purchaser of the adjoining lot to make use for the purposes of his house of that gable. I do not say that that would have been the construction, but at all events one can see that it might plausibly have been contended that it was so. Under these circumstances it seems to me quite natural that he should write what he did:—"I should have mentioned in my offer to you of this date that the unused half of the gables and boundary walls is not included in the offer." What I have stated is, I think, an ample explanation of the language found in that letter, and it is not necessary to have recourse to such an explanation of it as is contended for on behalf of the appellant. Nor do I think that if that which is contended for had been intended between the parties it would have been carried out by the use of language such as is found in that letter, and when one looks at the disposition itself and finds there no reference to any such stipulation or provision, but finds there only a declaration which is quite in accordance, as it seems to me, with the missives, that the gable wall is to be "mutual," there seems to be no justification for the contention that the right which ordinarily would emerge under circumstances similar to those which exist in this case is here excluded by reason of what passed between the parties when these missives were exchanged immediately after the original offer had been made.

For these reasons I think the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN—I am of the same opinion.

LORD MORRIS—I concur.

LORD SHAND—I also am of the same opinion. I think it must be taken that, whether from custom or upon grounds of legal principle, the law is quite settled that in circumstances such as here occurred there is a claim on the part of the person who has acquired property on which he or his predecessor has built a house providing a gable for the adjoining house, to be used by the owner of the adjoining ground—there is a legal claim against that owner to payment for the use of the gable as soon as the use is taken—a payment which, I suppose, substantially comes to the amount of one-half of its cost. When I say "in circum-

stances such as these" I refer to what very commonly occurs in Scotland where a track or block of ground is divided into plots which are sold off from time to time by a builder or other person who has laid them out for building or himself erected buildings on certain of them. This law of course can never give anyone who desires to erect a house upon his own ground a right to occupy a part of his neighbour's ground for the gable of the house which he is so erecting unless he has got the consent of that other person, by specific agreement in writing or by tacit consent, that it shall be so occupied.

It is to be observed that this law operates even if there be no special provision in the deeds giving expression to it. I adhere to the view stated by the Lord President in the case of *The Glasgow Royal Infirmary* v. *Wyllie* in 1877, in 4 R. 894—a decision to which I was myself a party. But in the present case I think it is really not necessary to have recourse to the common law. I regard the provisions of this particular deed—the deed granted by Murray to Monteagle—as giving expression to that law. It is there provided that "the gable boundary walls, parapet walls, and railings surrounding the subjects before disponed are mutual," which, I think, in terms expresses that the mutuality of the right to that gable gives a right to the person who by himself or his predecessor has incurred the expense of erecting it, to have that expense shared when the gable comes to be used by the adjoining proprietor. It is not said that either the pursuer or any predecessor of hers in the ownership of her property has received any payment on this account or for such use.

Now, in that state of matters, the general rule of law, and the terms of the deed alike, giving the pursuer the right she claims, the only question which arises, as I view the case, is whether it can be said that under the missives, which passed between Murray, the original builder, and Monteagle, the original purchaser from him, there was an arrangement made which deprives the pursuer of that right. If these missives had declared expressly that there should be no claim upon the adjoining proprietor for any share of the expense of the gable when that adjoining proprietor thought fit to erect a building upon it, the question would arise whether this was not equivalent to discharge or to payment in such circumstances as occurred in the case of *Robertson* v. *Scott*, 1886, 13 R. 1127. The decision of that case proceeds on the view that anyone acquiring a property having across its boundary a part of a gable which may be used by the conterminous owner when he comes to build, is put on his inquiry as to whether that use has been already paid for, or whether under a concluded agreement the right to that use without payment has been conferred by one *in titulo* to give it, and there is much to be said in favour of the reasonableness of that view. But I agree with your Lordships in thinking that there is nothing in the missives in this case which can be read as amounting to that. It may be that Murray, being a builder and not a lawyer, when he wrote the letter of the 4th February in which he added to his previous offer of the property "that the unused half of the gable and boundary walls is not included in the offer," may have thought that he was thereby providing that there should be no claim for the payment when the gable came to be used in future. If that was in his mind, I can only say I am quite satisfied that it has not received expression so as to produce the result for which the appellant here contends. It must be observed that in the original offer what he did offer was to sell "the house No. 8 Braid Road" which was then on the property fully erected. Those words would not only have covered the house as shown, up to the boundary of No. 10 upon the map, but would have covered the part of the gable outside of No. 10. In the subsequent letter he says—"I should have mentioned in my offer to you of this day's date that the unused half of the gable and boundary walls is not included in the offer"—that is to say, it is not included in the sale—it is not included as part of the subject to be conveyed. But that still leaves open the view which would at common law prevail that the right to the gable should be mutual and should be so described in the conveyance. There is nothing like a provision to the effect that when the gable came to be used the right so to use it should be without payment, and that the disponee under the conveyance should have no claim to any such payment. If that was intended, I should think the missive would have been expressed in very different terms. I find nothing in these missives which would support the appellant's argument.

I have only to add that I agree with the views expressed by the learned Judges in *Berkeley* v. *Baird*, 1895, 22 R. 372, which is substantially this case. I agree in the opinion of Lord Kyllachy, who originally disposed of the case, and the opinions of the learned Judges of the Inner House on appeal.

Upon these grounds I agree in thinking that this appeal must be disallowed.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

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