the authorities that the right conferred on Mrs Osborne was a right of fee, when the language of the clause receives its technical meaning and effect. The truster directed his trustees to invest the third of his residue in Mrs Osborne's name, "she to receive the interest or dividends from the same during her lifetime, . . . and at her death the principal to be divided equally among her children, except George and Thomas." This might be regarded as giving Mrs Osborne something more than a liferent by having placed the fee within her power of disposal, or subjected it to the diligence of her creditors. However that might be, taking Mrs Osborne's right at the lowest, it was a liferent to her with a fee to her children not named. Such a destination, according to the rule laid down in the case of *Frog's Creditors*, confers a fee on Mrs Osborne; and accordingly I am of opinion that Mrs Osborne's right under the will before us was a right of fee. It occurred to me in the course of the discussion that this case might be distinguished from the case of *Frog's Creditors*, in respect the destination there was to children *nascituri* in fee, whereas in the present case Mrs Osborne's children were all living at the date of the testator's will as well as at the date of his death, that therefore, although the children were not named, it might fairly be concluded that the persons intended to be benefited as with the fee were present to the mind of the testator, and being persons in whom the fee could vest directly on his death, no difficulty arose on the head of the fee being left *in pendente*, unless held to be vested in the liferenter. But I find that that distinction was suggested and rejected in the case of *Lindsay* v. *Dott*, December 9, 1807, M. *voce* Fiar, App. 1.

The clause in question, however, appears to me to do more than merely confer a fee on Mrs Osborne. Failing her I think there is a substitution of her children. That substitution now takes effect, as Mrs Osborne has done nothing to evacuate the destination in her children's favour. Accordingly, the third party, John M'Clymont Osborne, the only child who survived his mother (except the two who were excluded by name) takes the third of the residue destined to Mrs Osborne and her children. This conclusion is, I think, quite in accordance with what the testator intended, although reached by a means which he had not in contemplation.

The first and second questions in my view should be answered in the affirmative.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD YOUNG was absent.

The Court answered the first and second questions in the affirmative.

Counsel for the Second Parties—H. Johnston—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for the Third Party—Mackay—Moncreiff. Agents—W. & F. C. M'Ivor, S.S.C.

Saturday, February 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BERKELEY *v.* BAIRD.

Property—Mutual Gable—Letter Qualifying Title.

The proprietor of two adjoining building stances erected a house upon one of them, and conveyed the stance with the house erected thereon to A. The north gable of the house was built half upon the one stance and half upon the other, and the disposition declared that that wall was to be a mutual gable. On the day before the disposition was executed the seller wrote to A's agent, "It is of course understood that the unused halves of gables and boundary walls are not conveyed to your client." The seller subsequently sold the vacant stance 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 that A was entitled to recover from B one-half the cost of the mutual gable.

Observed that the letter was quite consistent with the disposition, but that it would not have been competent to refer to it in contradiction thereof.

William Murray was heritable proprietor of two adjoining building stances in Braid Road, Edinburgh, numbered 2 and 3 respectively on a feuing plan.

Having erected a house upon lot 3, he conveyed the stance and the house upon it to Colonel Edmund Robert Berkeley. The north gable wall of the house was built half upon lot 3 and half upon lot 2, and the disposition, dated and recorded 8th June 1888, contained the following description—"All and whole that area or piece of ground . . . marked lot 3 on the plan No. 2 annexed and signed as relative to a feu-contract . . . and bounded the said area or piece of ground hereby disponed as follows, *videlicet*:—'On the north by the area or piece of ground marked lot No. 2 on said plan above mentioned; . . . Together with the whole buildings erected on the said area or piece of ground hereby disponed: Together also with the whole parts, privileges, and pertinents thereof, and the teinds of the same in so far as I have right thereto: Declaring that the gable and walls and parapet walls and railings surrounding the subjects hereby disponed are mutual with the exception of the wall and railing on the east, which belongs solely to said lot 3.'"

On the day before the disposition was executed Mr Murray's agent, John Baird, wrote to the agent of the purchaser, "It is of course understood that the unused halves of gables and boundary walls are not conveyed to your client."

In July 1891 Murray conveyed the unbuilt stance (lot 2) to John Baird, his

agent, and in May 1894 Baird proceeded to erect a house on this ground.

Thereupon Colonel Berkeley brought an action against him for £80, being the cost of one-half of the gable wall which separated the two lots; and pleaded—"(1) The defender having made use of the mutual gable in question, is bound to pay one-half of the cost of its erection. (2) The right to receive payment of one-half of the cost of the gable being a real right passed to the pursuer under the disposition in his favour, and he is entitled to decree therefor with expenses."

The defender admitted that he was utilising the gable, but denied that the unused half of said gable belonged to the pursuer, who had not built it or received any conveyance thereof. He averred that it had continued the property of Mr Murray and now belonged to him in virtue of the conveyance in his favour of lot 2.

He pleaded, *inter alia*—"(1) The pursuer having no title or interest to sue the present action, it ought to be dismissed with expenses. (2) Any claim pursuer might have for half the price of said mutual gable having been discharged by him, the action ought to be dismissed with expenses. (3) The defender being the proprietor of the unused half of mutual gable referred to in the condescendence, he ought to be assoilzied from the conclusions of the action with expenses."

Upon 23rd November 1894 the Lord Ordinary (KYLLACHY) sustained the pleas-in-law for the pursuer, and repelled the defences, except as regarded the question of amount, and on that question remitted to Mr W. Watherston, builder, Edinburgh, to inquire and report as to cost and value of the mutual gable, and meantime granted leave to reclaim.

"*Opinion.*—The position of this case seems to be this—the pursuer obtained from Mr Murray in 1888 a disposition of a building site with the house upon it, the building site being bounded on the north by a certain line shown on a plan, which line ran through the centre of the northmost gable of the house. The northmost gable was therefore built partly on the site disponed, and partly on the adjoining site, which was retained by Murray. In these circumstances, Murray in his disposition declares 'That the gable and walls and parapet walls and railings surrounding the subjects hereby disponed are mutual with the exception of the wall and railing on the east, which belongs solely to said lot 3.' Now, the effect of that declaration is not I think doubtful. It just comes to this—that the wall which was built, as I have said, half on the one side and half on the other, should be a mutual wall, with right to Murray or his successors to use it when building on the adjoining stance, but, on the other hand, with right to the pursuer to claim, when use was made of it, the usual recompense payable to the builder of a mutual wall, viz., half its cost. That is the plain import of the disposition, and unless there is something to qualify the disposition, the result is that Mr Baird (Mr Murray's disponee), who has now built upon his adjoining site, must pay the half of the cost of the gable.

"But it is said that the obligation has been discharged, and the discharge suggested is said to be contained in a certain letter which preceded the disposition. But when we refer to the terms of the letter which is said to have operated this discharge, it comes only to this—'It is of course understood,' writes the seller's agent to the pursuer's agent, 'that the unused halves of gables and boundary walls are not conveyed to your client.' There was there, so far as I can see, no stipulation excluding the usual payment when the mutual wall came to be used. What is stipulated is just what the disposition itself provided, that the conveyance should not extend beyond the middle line of the wall. If the conveyance had extended beyond the middle line of the wall, and had included the whole area on which the wall was built, the result would have been that Mr Baird would not now have been entitled to build upon the mutual wall at all. It was just to make the wall a mutual wall, with all the incidents of a mutual wall, that this stipulation was made. I do not think that this letter at all qualifies the terms of the disposition, even if it was admissible to refer to it for such a purpose, as to which I express no opinion.

"I think therefore that Mr Hunter's client must pay half of the cost of the mutual wall, and I shall accordingly remit to Mr Watherston to make the necessary valuation."

The defender reclaimed, and argued—A proprietor in the position of the pursuer had only a right of property in one-half of the mutual gable with a common interest in the other half. If he had then built the whole wall at his own expense, no doubt he would have been entitled to one-half of the cost when his neighbour came to build—*Law* v. *Monteith*, November 29, 1855, 18 D. 125; *Rodger* v. *Russell*, June 10, 1873, 11 Macph. 671; *Robertson* v. *Scott*, July 9, 1886, 13 R. 1127. But here he had not built the wall himself; he had got the house from the proprietor of both stances, who meant to build immediately on the adjoining stance, and who could not be supposed to have effected a sale which would render him, or as here, his disponee, liable to pay to the purchaser half of the cost of the gable when it was used. The disposition made it clear that the half of the gable standing on lot 2 was not conveyed to the pursuer, and that there might be no mistake the letter referred to was written. The case of the *Glasgow Royal Infirmary*, relied on by the pursuer, was not in point, because there was no reservation there, the whole gable wall being conveyed, and not, as here, merely one-half.

Argued for the pursuer—The Lord Ordinary had stated the law quite correctly, and there was nothing to take this case out of the ordinary rule. But for the reservation contained in the disposition the pursuer could have prevented any use being

made of the gable as being wholly his property. The reservation was inserted to ensure the gable being regarded as a mutual one. It did not take away from the pursuer the right to recover one-half of the cost of its erection when it came to be used by the adjoining proprietor. The case of the *Glasgow Royal Infirmary* v. *Wylie, &c.*, June 15, 1877, 4 R. 894, was entirely in point, for there too the stances had originally belonged to a common author.

At advising—

LORD ADAM—The pursuer and defender are proprietors of adjoining feus marked 3 and 2 respectively on the feuing plan.

Upon the pursuer's feu there is a villa built, and the defender, who is proprietor of the adjoining feu, is now proposing to make use, and is in fact now making use, of its gable in the construction of a house which he is building. This action is brought by the pursuer to recover half the cost of the erection of that gable.

It appears that the pursuer acquired his feu in June 1888, and the defender acquired his in July 1891, both acquiring their feus from a common author Mr Murray. Now, the disposition forming the pursuer's title is expressed thus:—[*His Lordship read the description given above*] That is to say, this disposition contains a declaration that the gable of the house then built was a mutual gable, and the reason of that description is not doubtful. The whole buildings then erected were conveyed, but they did not stand wholly on lot No. 3, inasmuch as half of the gable wall was built not upon that lot but upon lot 2, and it was necessary to make it clear that the disponee did not under the disposition acquire an absolute right of property in the gable. Had he done so that would have had the effect of preventing the defender when he came to build upon his feu making any use whatever of the gable wall, which was not intended. It was to be a mutual gable wall with all the known rights and obligations pertaining to such a wall in urban tenements.

That is clear upon the construction of the disposition, and it is also clear what these obligations are. The cases indeed are so distinct upon this matter that it is unnecessary to refer to them. The pursuer here must allow the defender to use the whole gable, and not merely that half which rests upon his own ground; but then, while that obligation rests upon the pursuer, there is a corresponding obligation upon the neighbouring proprietor who makes use of the gable, to pay to him one half of the cost of the erection of the gable, which he proposes to use.

There is no doubt as to the law relating to gables in urban subjects, and, accordingly, unless there is something exceptional in this case the pursuer must succeed. The specialty here is said to arise from the fact that both pursuer and defender acquired their feus from a common author, who, in disposing of lot 3 cannot be presumed to have intended to part with his right, as proprietor of lot 2, to use the gable without further payment. If Mr Murray intended to reserve such a right he should have done so on the face of the deed, but this he has failed to do. He disposed of lot 3 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 the *Glasgow Royal Infirmary* v. *Wylie*, June 15, 1877, 4 R. 894. There, as here, there was a common author and a mutual gable, and, although in that case there was no declaration on the face of the deed that the gable was to be a mutual gable it was held that the ordinary presumption of law must prevail, and that the party obtaining the disposition was entitled to be reimbursed in half of the cost of the gable when the adjoining proprietor built upon his stance and used the gable. This case is therefore *a fortiori* of that one, because we have here an express declaration that the gable is to be regarded as a mutual one.

Another specialty was said to arise from the terms of a certain letter. The letter is dated the day before the disposition, and if it is to be used as contradicting the disposition I do not think it is admissible for that purpose. But I agree with the Lord Ordinary that it in no way differs from the disposition in its effect. If the buildings already erected had been conveyed absolutely to the disponee it would have enabled him to prevent the adjoining proprietor ever making use of the gable when he came to build on his feu. Accordingly the letter says that "the unused halves of gables and boundary walls are not conveyed," and that is the existing fact.

I am of opinion that the interlocutor of the Lord Ordinary is right, and should be adhered to.

LORD M'LAREN—There appeared at first to be some little complexity in this case, but I concur in thinking that the question before us may be solved upon the principles referred to in the Lord Ordinary's opinion. Mr Bell in his principles lays down the result of the authorities as understood in his time with regard to the legal rights and obligations of two proprietors who have their estates bounded by a mutual gable, each being proprietor of one-half of the *solum* on which the wall rests, with a common interest in the gable placed upon it. That law is applicable here. According to the feuing plan, the boundary-line between these properties is the mean line through the gable wall. In these circumstances the proprietor of both areas conveyed the area on which a house is erected, retaining the other area, and in the conveyance he describes the gable as a mutual gable; accordingly he conveyed the subject with just that right which every proprietor of a mutual gable has—the right to use the gable on making his contribution to the cost of building it, because it is quite settled that where a mutual gable has been erected at the cost of one proprietor, he, or the person acquiring right from him, will

be entitled to receive one-half of the cost of its erection from the adjoining proprietor when he comes to build and as a condition of his using the gable.

The peculiarity here is that the house conveyed was erected by the proprietor of the now unbuilt-on area; but then I think that, when he conveyed it, he conveyed it with every right he had in it, including a right to a contribution to the extent of one-half of the cost of erecting the gable from himself or his successor in title when he came to build and required to use the gable.

It ought not to make any difference in the question of right that in the result it was the person who conveyed away the mutual gable who afterwards came to build against the gable, and who now has to buy back his right to use it when he comes to build on the area which he retained.

I am of opinion that the case is subject to the ordinary principles of law governing the rights of adjacent proprietors, and I agree in thinking that we should affirm the judgment of the Lord Ordinary.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer—Lees—Cullen. Agents—Young & Roxburgh, W.S.

Counsel for the Defender — D.-F. Sir Charles Pearson, Q.C.—Hunter. Agent—Party.

Tuesday, February 19.

FIRST DIVISION.

COCKBURN *v.* COCKBURN'S TRUSTEES.

Process—Expenses—Jury Trial—Abandonment of Case against One of Two Defenders after New Trial Granted.

D. C. brought an action against his brother R. C. and the trustees under the trust-disposition and settlement of his deceased father, for reduction of the said trust-disposition and settlement, and also of a disposition granted by his father in favour of R. C. The issues put to the jury were (1 and 2) whether, the pursuer's father being facile at the respective dates when the deeds were executed, they had been obtained by fraud and circumvention on the part of R. C. and his wife, and (3) whether the disposition in R. C.'s favour was granted in fraud of the legal rights of the other children of the granter. The jury having returned a verdict for the pursuer on all the issues, the Court granted a new trial on the ground that the verdict was contrary to the evidence, and the pursuer thereafter lodged a note restricting his case to the third issue in which the defenders, the trustees under the settlement, were not interested.

Held that these defenders were entitled to the expenses of the first trial and of the hearing on the rule, as the evidence showed that the charges of facility, fraud, and circumvention ought never to have been made.

The late David Cockburn, engineer, Glasgow, on 19th February 1889, executed a disposition of his property and business in M'Neill Street, Glasgow, in favour of his son Robert Cockburn.

On 2nd April 1889 he executed a trust-disposition and settlement in favour of Robert Cockburn, his son, and others, as trustees, whereby he gave the liferent of his heritage (his property being almost entirely heritable) to the wife of Robert Cockburn, and the fee to her children, excluding expressly his other children.

David Cockburn died on 8th March 1892.

On 7th December 1892 an action was raised by Lawrence Cockburn on behalf of himself and his two sisters—the remaining children of David Cockburn—against the trustees under the trust-disposition of 2nd April 1889, and Robert Cockburn as an individual, concluding for the reduction of the two deeds of the 19th February 1889 and 2nd April 1889.

The case was tried before Lord Wellwood and a jury on 20th February 1894 upon three issues. The first and second issues were, whether the deceased David Cockburn was weak and facile at the respective dates upon which he executed the two deeds, and whether they were obtained by the defender Robert Cockburn and his wife through fraud and circumvention, taking advantage of his weakness and facility. The third issue was whether by the disposition of 19th February "the deceased David Cockburn made over to the defender Robert Cockburn the moveable estate and effects conveyed therein in fraud of the legal rights of his children other than the said Robert Cockburn."

A verdict was returned for the pursuer on all the issues, and on 24th May 1894 this verdict was set aside by the First Division, as contrary to the evidence, and a new trial granted.

The pursuer on 31st January 1895 gave notice of trial, which was fixed for 4th March proximo.

On 5th February the pursuer lodged a note in process stating that he "did not intend to prosecute further the present case as regards the first and second issues as adjusted, and that he intended to restrict and hereby restricted his case to the third issue, on which alone he will proceed to trial."

The trustees on 19th February 1895 lodged a note in which they stated that they were interested in the second issue only, and that the withdrawal by the pursuer of this issue amounted to the abandonment of the case against them. They craved the Court to assoilzie them from the conclusions of the summons, "to find the pursuer liable in the expenses of the first trial, and subsequent hearing on the rule