another question. Then what I go mainly upon is this, that, even if probative, I agree with your Lordships that it is not a lease, and the defender does not say it is a lease; it is merely an agreement to make and complete a lease, but subject to the condition of its being made and completed prior to Whitsunday 1874. This has not been done, and it is a question whether it can ever be done. The defender has missed his opportunity of having a lease in terms of this memorandum, and I think he ought not to be entitled to remain in possession under such circumstances.

Lord Shand—I am of the same opinion, and if I were to state the grounds of my opinion I should only be repeating what has been stated by your Lordships, and as that would serve no good object I shall simply concur.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the motion for the pursuers, No. 1224 of process, Apply the verdict, and in respect thereof reduce, decern, and declare in terms of the reductive conclusions of the summons: Further, repel the third plea-in-law stated by the defender, and decern in terms of the conclusion for removing: Find the pursuers entitled to expenses since 15th December 1876, the date of closing the record; and remit to the Auditor to tax the account of said expenses and report to the Lord Ordinary: And remit to his Lordship to proceed with the conclusions for accounting, and with power to decern for the said expenses when taxed."

Counsel for Pursuer — Balfour — Robertson — Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender — Kinnear — Asher — Lorimer. Agents—Adamson & Gulland, W.S.

Thursday, June 14.

FIRST DIVISION.

[Sheriff of Renfrew.

M'CARTER *v.* STEWART & MACKENZIE.

Sale—Contract—Rejection of Goods.

Held that the ordinary rule in a contract of sale as to rejection of goods which are insufficient in quality, viz., that the buyer is bound to give immediate notice to the seller and to rescind the contract, may be relaxed in a case where there is a course of dealing between the parties with deliveries from time to time.

Special circumstances where the strict rule of law was held not to apply.

This was an action raised in the Sheriff Court of Renfrew by John M'Carter, marine store dealer, Glasgow, against Messrs Stewart & Mackenzie, paper-manufacturers there, for the price of various bales of "round ropes" alleged to have been delivered in the month of February 1876 to the defenders.

The defenders pleaded—"(1) The goods supplied in the month of February, charged for in the account annexed to the summons as 'round ropes,' not being of that class, but mixed material, of an inferior quality, the defenders are not bound to keep the same, or at least are not bound to pay more than a fair and reasonable price for same; and the fact of the defenders having taken delivery of the said goods cannot operate against them, seeing that they used all practicable expedition in examining the large bales into which the said goods were packed, and acquainting the pursuer of the contents thereof, and offering to return the same, and that the said bales were so packed as to deceive or mislead the defenders as to the nature of their contents on such a casual examination as was possible on delivery being taken."

The Sheriff-Substitute (Cowan) ordered a proof. It appeared that there had been a course of dealing between the parties of some duration, the goods being delivered at various times in various quantities. The Sheriff-Substitute thereafter held that the bales which were found to be of deficient quality were those delivered by the pursuer, and he so far found in favour of the defenders. The Sheriff, on appeal, finding that there was no doubt of the deficiency of the goods, and that they were those furnished by the pursuers, adhered, adding this note:—

"*Note.*— . . . The consequence in law from these facts is, that the pursuer cannot recover payment for an article that, if ordered (about which there is contradictory evidence), was not the article said to have been ordered, unless the defenders have done something which barred them from stating this plea. The last article delivered was upon the 29th February, and the objection is stated on the 3d of March. There was no great delay there in stating the objection; but still it may be argued that each delivery during the month of February must be treated separately, and ought to have been examined at once. The Sheriff is not inclined to hold that there is any specialty in this particular trade which would free the purchaser from his obligation of immediate examination of the article purchased and immediate rejection. It may, no doubt, have been very inconvenient to examine bulky bales at the time of delivery, and before they were needed for manufacture. But this inconvenience is not a sufficient answer for delay in examination and rejection, unless there were specialties in the particular case; and there are such specialties. The bales were so made up that upon opening them the first thing presented was round rope; and any person inspecting would naturally conclude that the whole contents were of the same character and quality, and would not think it necessary to turn out the whole bale. But such was not the case. The round rope was only on the exterior shakings, and inferior materials were in the interior. Again, the delay in examination till the article came to be needed for manufacture was in accordance with the dealing and understanding between these parties. And lastly, no damage or inconvenience has resulted to the pursuer from the delay."

The pursuer appealed, and argued on the question of law that the defender was bound, on the authority of the cases of *Chapman* v. *Couston*, March 10, 1871, 9 Macph. 675, H. of L. 2 Law

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

At advising—

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

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

Lords Deas, Mure, and Shand concurred.

The Court adhered.

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

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

Friday, June 15.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THE GLASGOW ROYAL INFIRMARY *v.* WYLIE AND OTHERS.

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

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

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

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

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

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

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