Jane L. Crawford are intestate succession of the truster, those members of the family having predeceased the death of their mother without issue.

The Lord Justice-Clerk, Lord Young, and Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the Special Case, answer in the negative the first of the questions therein put; the first alternative of the second question in the negative and the second alternative in the affirmative; the third question to the effect that interest is to be calculated at the rate of four pounds per centum per annum; the fourth question in the affirmative; and the fifth question to the effect that the three shares of residue are to be treated as intestate succession: Find and declare accordingly, and that the sixth question is superseded by the answers to the fourth and fifth questions: Find the parties entitled to payment of the trust-estate of the expenses incurred by them in relation hereto: Remit," &c.

Counsel for First Parties—Moody Stuart. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Party — Cheyne — Sym. Agents—Scott Moncrieff & Trail, W.S.

Counsel for Third and Fifth Parties—Watson. Agent—Graham G. Watson, W.S.

Counsel for Fourth and Sixth Parties—H. J. E. Fraser. Agent—F. J. Martin, W.S.

Counsel for Seventh Party—Begg. Agent—Alexander Morison, S.S.C.

Friday, July 9.

SECOND DIVISION.

[Sheriff Court of Lothians at Edinburgh.

ROBERTSON *v.* SCOTT.

Property—Mutual Gable—Payment—Discharge—Singular Successor of Builder of Gable.

When half the cost of a mutual gable has been paid to the builder of it by the proprietor of the adjoining ground, although he has not yet built on that ground, there is no obligation to pay it over again even to the singular successor of the builder, when the gable comes to be used for a tenement on the adjoining ground.

Observations on the nature of the right of the builder of a mutual gable to be recompensed by the owner of the adjoining feu.

On 2d December 1878 Alexander Robertson, builder, acquired by feu-charter from the Magistrates and Town Council of Edinburgh All and Whole that area of ground, consisting of three lots or building stances situated between Nos. 10 on the east and 14 on the west, Royal Crescent, Edinburgh, "inclusive of the ground occupied by one half of the mutual walls on each side," and it being also provided that "the said disponee [Robertson] shall have right to the mutual gables and walls of the adjoining houses in the Royal Crescent so far as we ourselves would have right to the same, upon the payment of half of the expense of the said mutual gables and walls to the person or persons entitled to claim the same."

The proprietor of the adjoining house on the east, No. 10, was David Scott, C.A. Robertson began building operations, and in so doing availed himself of the westmost gable of No. 10, whereupon Scott claimed to be recompensed for a half of the cost of this gable-wall. Scott had acquired his property in 1874 from William Stark's trustees, and the disposition described the subjects as "All and Whole that area or piece of ground with the dwelling-house, cellars, and others built thereon, being No. 10 of the street called Royal Crescent, Edinburgh, which area or piece of ground is bounded on the east by the centre of a mutual gable and division walls with the dwelling-house No. 9 Royal Crescent; on the west by the feus formerly possessed by Robert Watson, builder, and afterwards resumed by the city of Edinburgh." Robertson believing Scott's demand to be well founded, paid him £74, 15s., being the sum agreed on as half the value of the gable.

In 1885 Robertson raised this action in the Sheriff Court at Edinburgh against Scott for repetition of that sum, with interest from its payment, on the ground that he had ascertained that Stark, the defender's author, who in 1828 erected the gable, had received in 1832 payment of one-half of the price of it from the Magistrates of Edinburgh, and that defender never had any right to the unused half of it, nor any right to demand from the pursuer half of the value of it.

The defender averred—He was only a singular successor of Stark. When the pursuer acquired his feu the defender had a real right in the gable in question, which was on the west of the defender's house. He referred to the disposition by the magistrates to Stark in 1828, in which the subjects belonging to him were described as bounded "on the west by the feus formerly possessed by Robert Watson, builder, but now resumed by the city of Edinburgh." At the date of this disposition to Stark he (Stark) had erected No. 10 with the gable in question, but the pursuer did not acquire his feu till 1878, and up to 1879 no buildings were erected on the adjoining stance to the west of the gable. The defender thus acquired the gable in 1874 along with his house, and had right and title to demand from the pursuer one-half of the price or value when the pursuer came to use it as a mutual gable in 1879. He knew nothing of any transactions between Stark and the magistrates which did not appear in the public records.

The pursuer pleaded—"(1) The pursuer having been induced by the false representations of the defender to pay him the sums condescended on, he is entitled to decree as prayed for. (2) The said payments having been made by the pursuer to the defender in error, the pursuer is entitled to restitution. (3) The defender having no right or title to the said gable, so far as acquired by the pursuer, and no sum being due by the pursuer to him, the pursuer is entitled to decree. (4) The defender had no right or title to uplift or receive the price of the unused half of said gable, in respect that the same was built for the town of Edinburgh upon their ground, and paid for by them, or otherwise the town acquired the

whole rights of the said William Stark therein, by the payment condescended on."

The defender pleaded—"(3) The defender having been proprietor of the whole of said gable at the date the pursuer acquired the adjoining feu, was entitled to receive payment of the price of one-half of said gable when it was appropriated by the pursuer. (4) The defender having been entitled to receive from the pursuer the sum now sought to be recovered, he ought to be assoilzied with expenses."

The defender by minute admitted that the alleged payment had been made in 1832 by the Magistrates of Edinburgh to his author Stark as the value of half the gable in question.

The Sheriff-Substitute (RUTHERFURD), (after findings in fact conform to the above narrative), found in point of law that the "defender was not entitled to exact payment from the pursuer of one-half of the value of the said mutual gable: Therefore repels the defences, and decerns against the defender in terms of the conclusions of the libel."

"*Note.*—This appears to the Sheriff-Substitute to be a very simple case, and he has little to add to the foregoing interlocutor. In towns where continuous streets of houses are being built, the rights of adjoining feuars in their mutual gable-walls are frequently regulated by their titles, but where, as in the present instance, that is not the case, the rule of the common law is, that the proprietor of a lot or portion of ground dedicated to building purposes is entitled to build beyond his own property one-half of the thickness of the gable-wall, and then when this common or mutual gable comes to be made use of by the adjoining proprietor the builder is entitled on the principle of recompense to recover payment from the neighbour of one-half of the cost. This right to recover payment is transmitted by a simple conveyance of the property without any special assignation or conveyance. On the other hand, no assignation or conveyance is required to give the adjoining proprietor a right to use the gable, and in the absence of special agreement the common law rule is that payment need not be made until the use of the wall is taken. Accordingly where the rights of parties are not regulated by contract the presumption is that no payment has been made until that use is taken. (See *Law* v. *Monteith*, 1855, 18 D. 130, *per* Lord Colonsay; *Sinclair* v. *Brown Brothers*, Oct. 19, 1882, 10 R. 45, *per* Lord President and Lord Shand). But any presumption to the effect that payment has been made must yield to the fact if the fact is otherwise, and in the present case it is not now matter of dispute that the defender's author William Stark, the builder of the gable in question, received payment of one-half of the cost in 1832 from the pursuer's authors the magistrates and town council. In these circumstances Stark could not possibly have exacted payment a second time, and neither he nor his trustees could convey to the defender a claim which had been discharged and which had ceased to exist."

The defender appealed, and argued—This gable was within the description of the subjects conveyed to Stark, his author. He had paid a full price for it to Stark; as soon as it was appropriated by an adjacent feuar his claim for recompense arose. It did not emerge until that neighbour began to build. It mattered not that Stark had received payment for one-half of it already from the Magistrates of Edinburgh. Such payment was a personal one and could not affect him. Such payment operated as no discharge. If a payment was to operate as a discharge it must be made by the proper debtor at the proper time. Until the gable was appropriated he was entitled to assume that it was his.

Authorities—*Hunter* v. *Luke*, June 2, 1846, 8 D. 787, *vide* opinion of Lord Jeffrey, p. 790; *Rodger* v. *Russell*, June 10, 1873, 11 Macph. 671, *vide* opinion of Lord Justice-Clerk, p. 673; *Glasgow Royal Infirmary* v. *Wylie*, June 15, 1877, 4 R. 894; *Jack* v. *Begg, &c.*, and *Begg, &c.*, v. *Jack*, October 26, 1875, 3 R. 35; *Earl of Moray* v. *Aytoun*, November 30, 1858, 21 D. 35, *vide* Lord Wood's opinion, 41.

The pursuer replied—When a gable was built by the first feuar it was his sole property to the extent of one-half, and as regards the other half he gave it up to the neighbour who used it on receiving payment of the value of that other half. The claim against an adjoining feuar being truly a claim of the nature of recompense, the idea that the claim was one of real right was excluded. The claim was one, then, of debt, and had been extinguished by the payment already made to Stark.

Authorities—*Earl of Moray* v. *Aytoun*, *vide supra*, opinions of Lord Justice-Clerk and Lord Benholme; *Rodger* v. *Russell*, *vide supra*, opinion of Lord Shand; *Wallace* v. *Brown*, June 21, 1808, M. App. Pers. and Real, No. 4; *Law* v. *Monteith*, November 30, 1855, 18 D. 125.

At advising—

LORD JUSTICE-CLERK—I cannot say that I have found any difficulty in dealing with the question raised here. It is an action brought in the Sheriff Court of the Lothians by a feuar from the town of Edinburgh to recover from a coterminous feuar the amount paid by him, the pursuer, for the use of the coterminous gable, on the ground that this debt, such as it was, had been paid and satisfied by the town of Edinburgh itself prior to the right which they conferred upon the pursuer. In defence it is not denied that this sum was paid, but it is alleged that it was paid to a prior proprietor of the coterminous tenement by whom the gable was built; and the argument which has been submitted comes simply to this, that as between the builder of the mutual gable and the adjacent proprietor who takes the use of it, the debt does not arise until the second proprietor begins to build, and that therefore when the petitioner began to build, he, and he alone, was the proper debtor in that obligation.

The pursuer in 1878 feued from the town of Edinburgh three lots or building stances between No. 10 and No. 14 Royal Crescent, in Edinburgh, and built dwelling-houses on the ground. The immediately adjoining proprietor was the defender, and the pursuer in erecting his houses used the gable which the defender or his author had erected as a mutual gable. The defender's author and the original feuar of the ground adjacent to the pursuer's feu was a builder of the name of Stark, who feued this ground in 1832. While the pursuer's houses were going up the defender made a demand for the value of

half the gable, a demand with which the pursuer complied, not being aware that the amount had been paid by the town to Stark nearly fifty years before. The fact of the payment having been made in June 1832 is admitted by the defender by a joint-minute in process. The object of the present action is to recover back the amount so paid.

The question therefore arises, whether the town, having bargained with the adjoining feuar, and paid this sum in advance before they had feued off the stance immediately adjoining, were not entitled to free themselves and to free their vassals from any further claim in respect of the gable in question, and whether the defender can retain the money which was paid in error for the use of the gable, although he is now satisfied that the claim of debt was made and was extinguished by payment many years ago? I am of opinion that none of the authorities lead to a conclusion so unreasonable and so inconvenient. It is in vain to try to reduce the customary or consuetudinary incident of urban building, which from the necessity or at least the convenience of the situation has grown up in large towns in regard to mutual gables, to anything founded either upon feudal grant or ordinary contract. The right of the first builder of a gable intended to be a mutual gable is full of anomaly. It is one to build on his neighbour's ground without a title, and to become his neighbour's creditor without a contract. When the first feuar builds he is entitled under this customary law to build on his neighbour's ground. He has no title to his neighbour's ground according to the ordinary forms of conveyancing, and he never to the end acquires one. Nevertheless the gable is his gable until somebody else acquires the right to it, and that again is not acquired by any writing or title, but simply by the fact of using the gable as a mutual gable, and erecting the adjoining building in contact with and alongside of it. This is not a right therefore that can be reduced to feudal rules, but the substantial rights enjoyed by each of the adjacent proprietors in a mutual gable are well fixed. The gable remains the property of the man who built it until the adjacent proprietor takes advantage of it by building in his turn. The gable being built partly on the land of the latter implies that he is entitled to take such use, and if he does he thereby incurs the obligation of re-imbursing the original feuar in half of the price. But I do not think it is at all sound to say that the obligation in question is constituted by the use of the gable, or that there is no debt or no contingent obligation until that is done. That is contrary to the good sense and good faith of the proceeding. If the town thought it would enhance the value to the purchaser or feuar of the adjoining stance to clear it of this possible encumbrance by paying up half the price of the gable to the adjoining proprietor, that debt is extinguished and cannot be revived, for the superior was entitled to bargain for his vassal and to communicate to the vassal the ease which he had thereby purchased, and for which he had paid the full price. It was argued that no relation of debtor and creditor existed when this payment was made by the town to Stark. But Stark was master of the whole tenement, and might stipulate about his gable as he pleased. No doubt this payment is not made real, but the right itself is not made real in that sense. It can make no manner of difference that when the first proprietor sold his feu he did not stipulate with the purchaser from him for anything in regard to this debt or obligation. It was extinguished, and when the purchaser acquired possession he came simply into the place of the man to whom the money had been paid. I therefore think it would be contrary to all reason and justice to compel the vassal of the town to pay over again. I see no reason to support it, and although it is quite true that the money value of the gable was paid by the town to the author of the defender, and not to himself, it seems to me that the town were entitled to relieve the ground for their vassal, and that the defender was bound by the satisfaction which was made to his author.

Lord Craighill—I agree with the Sheriff-Substitute in the conclusion at which he has arrived, and in the view both of the facts and of the law which he has presented in his judgment. The facts indeed are not disputed, and the law affecting the subject-matter of suit is really the only thing presented for the determination of the Court. . . . [*His Lordship then stated the facts to the effect above narrated.*]

The defence to the action is that recompense was due to the defender, the right conveyed by his title not being affected by the payment to Stark, the feuar of area No. 10, and the builder of the house of which the gable wall in question is a part. Neither Stark nor any heir or gratuitous disponee of his could succeed in such a claim. So far as they are concerned, the recompense once paid their claim is for ever extinguished. But the defender says that he is a singular successor, that by the disposition to the area and the tenement No. 10 built upon it he acquired a right to the gable wall in its entirety, and consequently he might, just as if recompense had never been rendered to Stark, make good his claim when the pursuer made use of the gable. The right to make such a claim —while existing—there is no doubt runs with the tenement, and consequently the defender has title to make the claim; but is there an obligation to pay, resulting from the use of the gable, if half the cost has been already paid to the defender's author, the builder of his tenement? That is the question which has now to be decided. My opinion is that this question ought to be answered in the negative. The claim is one simply for money, and that claim will be extinguished if half the cost of the gable has been paid to the person by whom the gable was erected. The recompense was due to him. He was the person to discharge, and discharging, what was the result of the payment acknowledged? Those who paid, and those deriving right from those who paid, were thenceforward as free to use the wall as if they or any of them had been the builders. What is said by the defender, however, is that the wall was the property of the builder—that the builder merely by receiving the recompense was not divested to any extent of that property, and consequently that the right as it was in him passed to the defender by the disposition which is his title. Till the wall comes to be used there is, the defender also says, no delivery, and the rights of parties continued as they were when its erection was completed.

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