LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming-note: Adhere to the interlocutor reclaimed against; and decern.

Counsel for the Complainers — Sol.-Gen. Dickson, Q.C. — Guthrie, Q.C. — Sym. Agents—Torry & Sym, W.S.

Counsel for the Respondents—Balfour, Q.C.—Salvesen. Agents — Irons, Roberts, & Company, W.S.

Tuesday, November 30.

FIRST DIVISION.

[Dean of Guild Court, Edinburgh.

SANDERSON'S TRUSTEES *v.* YULE.

Property — Right of Property in Roof of Tenement— Whether Owners of Separate Rooms in Attics Joint-Owners or Separate Owners of Roof.

The proprietor of a flat in a tenement, and of an attic room in an upper storey, presented a petition to the Dean of Guild for authority to construct a storm window in the room. He was bound by his titles "to uphold and keep in repair a proportional part of the roof of the said tenement."

Objections were lodged by two other proprietors of attic rooms. The titles of one contained an obligation "to maintain and uphold the roof," and of the other the burden "of supporting and upholding the roof . . . proportionally with the other proprietors."

It was admitted that the expense of keeping the roof in repair had hitherto been borne by the proprietors of the tenement generally. The respondents objected to the proposed alterations, on the grounds (1) that the roof was the joint property of the proprietors of the attic storey, no one of whom could make any alterations thereon without the consent of the others; (2) that the proposed alteration would increase the burden of upkeep of the roof.

Held (1) that the proprietor of each attic was also proprietor of that part of the roof over his attic; (2) that an increase in the expense of upkeep of the roof was not a relevant objection to alterations which would not interfere with the stability and efficiency of the roof.

Opinion reserved as to whether such increase in the expense of upkeep would be a good objection to a claim against the other proprietors for a proportional share of future repairs.

A petition was presented in the Dean of Guild Court of Edinburgh by the marriage-contract trustees of Mr and Mrs Sanderson, proprietors of certain subjects in 9 Antigua Street, Edinburgh, praying the Court "to grant warrant to the petitioners to construct a storm window in the garret-room, being the innermost upon the east side of the passage leading north from the common stair at No. 9 Antigua Street." The petitioners were proprietors of the dwelling-house forming the northmost half of the third flat or storey above the cellars in the tenement No. 9 Antigua Street, with the attic room described in the prayer of the petition quoted above.

Answers were lodged by Mr Alexander Yule, proprietor of the main-door flat of the tenement, consisting of shops with cellarage beneath, and also of the first flat above it, with a garret in the upper storey.

Answers were also lodged by Mr William Geddes, proprietor of the fourth storey of the tenement, and of two garret rooms immediately above.

The titles of the petitioners and of the two respondents to these subjects contained respectively the following clauses:—

A disposition of the petitioners' property granted in 1805 described the subjects conveyed as "All and Whole that dwelling-house, being the third storey or flat above the cellars in the third tenement built and erected by the said James Moffat and the said James Besillie and his trustees, in that street called Antigua Street, . . . the said dwelling-house consisting of four fire-rooms, kitchen, and closets, with the garret-room in the upper storey, being the innermost upon the east side of the passage, also two cellars. . . . But declaring that the said John Fraser and his foresaids shall in no respect be liable to uphold or keep in repair the roof of the foresaid tenement of which the dwelling-house hereby disponed is a part, in respect that the same is wholly defrayed by the other proprietors of the said tenement."

The description remained unchanged throughout the progress of titles except with regard to the upkeep of the roof.

By a precept of poinding and arrestment in 1812 at the instance of one of the respondent William Geddes' predecessors, "In respect it was not instructed that the whole expense of maintaining the roof in question fell to be defrayed by the other proprietors of the tenement" Fraser was found liable for his proportion of one-fourth thereof.

Thereafter the titles bore that the house was disponed "under the declarations and reservations contained in the previous titles of said subjects; and notwithstanding of such declarations it is hereby specially provided and declared that our said disponees and their foresaids shall be liable to uphold and keep in repair a proportional part of the roof of the said tenement of which the said dwelling-house above disponed is a part."

In the titles of the respondent Yule the subjects as originally conveyed were described as "All and haill that dwelling-house, being the first storey or flatt in the southmost of the three tenements lately built and erected . . . the

said dwelling-house consisting of four rooms, kitchen, and closets, with a garret in the upper storey, being the first upon the right-hand side of the passage, also two cellars, being the innermost cellars under the front of the said tenement, and entry thereto by the common stair; but with the burden of supporting and upholding the roof of the said tenement, proportionally with the other proprietors of the said tenement." This description remained practically unchanged.

In the titles of William Geddes the subjects were described as "All and Haill that dwelling-house, consisting of four rooms with a kitchen, closets, and other conveniences, being the fourth storey or floor of the southmost of the three tenements of houses lately erected; ... as also the two garret rooms immediately above the said dwelling-house, one of these being in the timpany, and to which two garret rooms there is an access from the said dwelling-house by an inner stair, ... and providing and declaring always, as it is hereby specially provided and declared, that she, the said Mrs Patricia Stephen *alias* Blair, and her foresaids, shall be bound and obliged in all time coming to maintain and uphold the one-half of the roof of the said tenement."

It was admitted that the expense of keeping the roof in repair had been borne by the proprietors of the tenement generally. The petitioners averred that the roof, so far as extending above their garret room, was their property subject to the common interest of the other proprietors of the tenement, and that accordingly the erection of the storm window was within their right. The respondents averred that the proposed alterations would be detrimental to their interests and rights of property, and would increase the general burden of upkeep.

They pleaded—"(2) The petitioners having no exclusive right in the roof of said tenement or any particular part thereof, but merely an undivided, common, or joint right therein with this and the other respondent, the petition falls to be refused. (3) The alterations proposed on the roof would increase the burden of its upkeep and repair, which is illegal; the petition should therefore be refused."

The Dean of Guild on 25th February 1897 gave the following finding:—"Finds, under reference to the subjoined note, that the roof and the upper passage of the tenement in question are the common property of the proprietors of the tenement: Finds that the proposed operations would involve interference with the roof and with the upper passage: Finds that the respondents, the proprietors of the tenement other than the petitioner, object to the proposed operations: Therefore repels the pleas-in-law for the petitioner; sustains the objections of the respondents to the proposed interference; refuses warrant and decerns: Finds the respondents entitled to expenses."

Note—"The present question concerns the tenement No. 9 Antigua Street, which consists of three floors above the ground floor and an attic storey, and is possessed as follows—the ground floor and first flat, with a garret in the upper storey, by Alexander Yule; the second flat and one garret by Sanderson's trustees; the third flat and two garrets by William Geddes. A passage running north and south gives access to the attic rooms. The attic room belonging to Sanderson's trustees is the innermost on the east side of the passage. Sanderson's trustees desire warrant to substitute a storm window for the present skylight of their attic room, and to make a water-closet at the end of the passage leading to their attic, opposite the door of the room. [*The latter part of the petition was ultimately abandoned, and accordingly the part of the Dean of Guild's judgment dealing with it is omitted.*] Yule and Geddes object on the ground that both operations would involve interference with common property. ...

"The petitioner claims that the roof is the property of the several proprietors of the upper flat above their respective attic rooms. The Dean of Guild thinks that this view cannot be accepted. He is of opinion that the roof is the common property of the proprietors of the upper flat.

"It will be observed that the titles do not give the right of property in the roof claimed by the petitioner. He can only contend for several property by implication. The Dean of Guild thinks that there is authority for holding that the argument of implication is in favour of common ownership.

"Where the upper flat of a tenement is possessed by one owner, the Dean of Guild thinks it may be assumed that the property in the roof is vested in such owner, and that he may make alterations on the roof, so long as these do not involve danger to the lower proprietors. This result seems to follow from the decision in *Taylor* v. *Dunlop*, November 1, 1872, 11 Macph. 25, and seems to remain unaffected, although the decision is materially modified to the effect that the proprietor of the upper flat cannot add another flat to his holding even although no danger or injury would arise to the lower proprietors—*Watt* v. *Backhouse*, March 18, 1891, 18 R. 766.

"The second class of case common to experience is where the upper flat is owned by one proprietor, but where the lower proprietors share the burden of repairing the roof. In such cases it is true that the proprietor of the upper flat has by his titles only the same kind of right in the roof as the other proprietors—*Watt* v. *Backhouse*, *supra*, per *Lord M'Laren*. But the Dean of Guild ventures to think that the proprietor of the upper flat in such cases might be regarded as the proprietor of the roof with a right of relief against the lower proprietors for the repair of the roof in view of their interest in it. This right to alter the roof would then be limited, not only by consideration of injury to the lower proprietors, but by the possibility of increased burden in way of repair.

"The present case differs from the foregoing examples, and the Dean of Guild is not aware that such circumstances have

been the subject of decision. Here the lower proprietors possess severally the rooms of the attic flat, each proprietor being bound to uphold the roof proportionally. Under what head of property is this roof to be classed? The titles point to the same kind of right in the roof in each proprietor, and the Dean of Guild thinks that the nature of that right is to be ascertained from the nature and object of the roof itself. While the rooms of the upper flat are held under several ownerships, it is not so easy to regard the roof which covers the upper flat as separated into different portions. The rooms are separated into distinct holdings by partitions, but the roof, from its very nature and object, must be regarded as *unum quid*. Accordingly the Dean of Guild is of opinion that the roof of this tenement is the common property of the proprietors, and cannot be altered without joint consent."

The petitioners appealed.

The Court on 17th July 1897 remitted to the Dean of Guild "to inquire whether the proposed alterations on the roof will increase the burden of its upkeep or repair, or will in any other respect prejudice the interests of the respondents."

The Dean of Guild reported that "the proposed alterations on the roof will entail an increase of the burden of its upkeep, and that the occupation of the attics in a common tenement, such as is the one in question, will, in his opinion, prejudice the interests of the respondents, who are proprietors of the other flats of the tenement, by introducing an inferior class of tenants into the property.

"The Dean of Guild further respectfully begs leave to explain that, while warrant was refused in the Dean of Guild Court in respect of the objections of the respondents that the roof and the upper passage of the tenement are the common property of the proprietors of the tenement, the practical aspect of the proposed alterations has not been dealt with, and the Dean of Guild does not think that the sanitary arrangements shown on the plan are such as his Court could sanction, even should the objections of the other proprietors be obviated or withdrawn."

Argued for the appellants—When there was only one proprietor of an upper flat admittedly the roof belonged to him, there being no common property in it among the lower proprietors, but only a right of common interest. But when there were several proprietors of an upper flat, each owning one or more attics, then the roof above each attic belonged to the proprietor of that attic—Ersk. ii. 9, 11; Stair, ii. 7, 6; *Taylor* v. *Dunlop*, November 1, 1872, 11 Macph. 25. If that were so, then each proprietor was entitled to make any alterations on his part of the roof which did not injure the interests of the other proprietors—*Anderson* v. *Dalrymple*, June 20, 1799, M. 12,831; *Denniston* v. *Bell*, March 10, 1824, 2 S. 684; *Murray* v. *Gullan*, March 10, 1825, 3 S. 639; *Gray* v. *Greig*, June 18, 1825, 4 S. 104; *Brown* v. *Boyd*, July 13, 1841, 3 D. 1205. The case of *Watt* v. *Burgess' Trustee*, March 19, 1891. 18 R. 766, differed from this, because there the whole structure was to be altered, while here the alteration was quite a trifling one; and also the terms of the respective conveyances were different. The mere fact that the burden of the upkeep of the whole roof was placed upon the three proprietors in no way proved that each did not own his particular part of it. The terms of the conveyances were consistent with the interpretation that each was bound to uphold only his proportional part of the roof. But in any view the fact that the Dean of Guild reported that the burden of upkeep would be increased had nothing to do with the rights of property in the roof, or with the right of the proprietor to do what he pleased with his property, so long as he did not interfere with the rights of the other proprietors, the efficiency and safety of the roof, &c., which the petitioners would in no way do by their proposed alterations.

Argued for the respondents—1. The petitioners' right was only that of common property in the roof, the roof being in its nature a *unum quid*. This was shown by the method of upkeep, which, as was admitted by the petitioners, had been borne as a general burden by the proprietors, and not defrayed by any particular proprietor for any particular part of the roof. The obligation as to repairs contained in the several titles implied a *pro indiviso* right of property, and was quite inconsistent with the petitioners' theory of divided ownership. Accordingly, no alterations could be made without the joint consent of the proprietors—*Gellatly* v. *Arrol*, 13th March 1863, 1 Macph. 592. 2. Alternatively, the respondents had at anyrate a common interest in the roof sufficient to prevent interference with it. One and all were interested in the maintenance of the roof, and were by their titles bound for the expense of the upkeep. The obligation placed on them was one corresponding with the extent of their ownership in the tenement, not with that in the attics as the petitioners contended. Accordingly any alteration which would increase the burden of upkeep of the roof, was an infringement of the law of the tenement which they were entitled to prevent—*Todd* v. *Wilson*, December 8, 1894, 22 R. 172. 3. In point of fact, even if the petitioners' contentions were correct, the proposed alterations were not entirely on their property, but extended over a part outside it.

At advising—

LORD PRESIDENT—There is direct authority on the question what right in the roof has the proprietor of the uppermost storey of a house divided into flats. Mr Erskine assimilates his position in regard to the roof to the position of the owner of the lowermost storey in regard to that lowermost storey. Each is proprietor, but the lower proprietor is bound to keep up the walls in order to support the upper floors, and the upper proprietor is bound to keep up the roof as the cover of the whole

house. Mr Erskine does not say in words that the roof is the property of the man whose house it covers, but he directly implies it, and he gives to the lower proprietor no more right in the roof than that interest which the upper proprietor has in the walls of the lower part of the house. He treats the two cases as parallel. Then, turning to the case of the highest storey being divided into garrets among the different proprietors of the flats, he says that each proprietor must, by the rule which he has just stated, uphold that part of the roof which covers his own garret. The same implication, of course, applies to that case as to the general case, viz., that the roof is a part of the uppermost storey, and when the uppermost storey is divided each part of the roof is part of that garret which it covers.

The doctrine of the case of *Taylor* is the same, and brings down the law stated by Erskine to the present day. The rule seems in accordance with principle. The result of it is that, apart from stipulation, the owners of the lower storeys can only challenge operations on the roof, which impair its efficiency as a cover of the whole house. On the other hand, apart from stipulation, they are not bound to contribute to the repair of the roof.

Turning now to the titles before us, I find that the garret floor is divided into separate properties. The result of this, if it stood alone, would be, according to the rule which I have stated, that each of the proprietors of the garret storey would have the property of his own part of the roof, and would have to maintain it at his own charges. But the titles go on to impose the burden of maintaining the roof in part on the owners of the lower storeys. I am unable to hold that there is implied in this any transfer or shifting of the rights of property in the roof. In my judgment the proprietor of each garret remains owner of the roof which covers his garret. This being so, he is entitled to make any change on his part of the roof which does not interfere with the efficiency of the roof as a covering to the house as a whole, or with the stability of the rest of the building.

Well, then, what of the change proposed? In its nature it is a very simple and harmless change, and one which is made every day. There is nothing before us to show that it will at all interfere with the stability and efficiency of the roof in its relation to the other parts of the building, or with the stability of the building itself. Accordingly I hold it is within the rights of the petitioners.

The Dean of Guild reports, in very general terms, that the burden of upkeep will be increased; it is not indicated that the increase will be substantial. But it seems to me that an increase in the expense of upkeep is not a relevant ground of objection in the present proceeding. It might or might not be a good objection, in whole or in part, to a claim for a proportional share of some future repairs, that the aggregate cost was increased by reason of this change having been made, and that the lower proprietors were not bound under their titles to this enlarged burden. I pronounce no opinion on those questions, because they are not *hujus loci*. The petitioners must take the risk of such questions. In my opinion, they form no valid objection to the proposed change being made.

It was suggested by the counsel for the respondents that to some small extent the proposed new window encroaches on a part of the roof which does not cover the petitioners' garret. Nothing that I have said would support such an encroachment; and if the respondents are right in their construction of the plans, the plans must be remodelled, so as to limit the operations to the roof covering the petitioners' garret.

Lord Adam—This petition, as I understand, is now insisted in, in so far only as regards the proposed alterations on the roof of the petitioners' property, and I further understand that these alterations are opposed, not at all on the ground that they would impair the stability of the tenement in any way, but because they are said to be an interference with the common property of the petitioners and respondents—the roof being, as the respondents allege, common property—and because the alterations would, in any view, entail an increase of the burden of upkeep of the roof imposed upon the respondents. The Dean of Guild dismissed the petition on the first of these grounds. The Dean of Guild thinks that, where the upper flat of a tenement is possessed by one owner, it may be assumed that the property of the roof is vested in such owner. I think that, if there are no specialties in the titles, the Dean of Guild is right in this, and that it was so decided in the case of *Taylor* v. *Dunlop*, 11 Macph. 25. But the Dean of Guild thinks that the case is different where there is more than one proprietor on the upper storey, and that, in that case, the roof must be regarded as a *unum quid*, and therefore common property. He refers to no authority in support of this proposition, but he says it arises from the very nature and object of the roof. Now, while as a matter of convenience it might be well, as regards upkeep and maintenance, that the roof should be treated as a whole and the expense shared by the several proprietors—still I see no physical difficulty in each proprietor keeping up and maintaining the roof, in so far as above his own property, and if this be so, I see no reason why the ordinary rule of law should not prevail that the roof covering a man's property is as much his individual property as are the walls. There is the high authority of Mr Erskine for this, for he says in treating of the subject (ii., 9, 11), that where the property of the highest storey is divided into separate garrets among the different proprietors, each proprietor must uphold that part of the roof which covers his own garret—the reason why he is bound to uphold that part of the roof being, of course, that it was his individual property.

Unless, therefore, there be something to

the contrary in the titles, I am of opinion that the roof above the petitioners' property must be considered their several property, and not the joint property of themselves and the respondents.

It appears from the titles that the respondent Geddes, who is proprietor of one-half of the upper storey, is bound in all time coming to maintain and uphold one-half of the roof of the tenement, that the appellants are bound to uphold and keep in repair a proportional part of the roof of the tenement of which their property is a part, and that the respondent Yule is also bound to support and uphold the roof of the tenement proportionally with the other proprietors.

It is clear that as regards the matter of upkeep and maintenance the roof is treated in the titles as a *unum quid*, and it is made matter of admission that the expense of keeping the roof in repair has been borne by the proprietors of the tenement generally.

This obligation to keep up and maintain the roof does not seem to me to imply that the roof is treated in the titles as common property, because in that case it would have been unnecessary to insert this obligation, that being the legal result; but if each of the proprietors had a several right of property in the roof, then it was necessary, because each in that case would only have been bound to keep up his own part of the roof. But it does not appear to me to follow, because the proprietors have agreed for their mutual convenience that the roof should be kept up and repaired at their joint expense, that each proprietor should be held to have given up in other respects his individual right of property in the part of the roof which otherwise would have belonged to him. I think, therefore, that there is nothing in the titles inconsistent with the petitioners being the proprietors of that part of the roof covering their property.

But the respondents say that they are entitled to oppose the proposed alterations on the roof because the effect would be to increase the burden imposed upon them of maintaining the roof. I am not satisfied that that is so either in law or in fact. The Dean of Guild has reported generally that the burden would be increased, but he has not told us how or to what extent it would be so. Had it been necessary to consider this objection on the merits I should not have been prepared to act on the Dean of Guild's report without farther information, because the question is one of degree. A slight or unsubstantial increase of the burden might not have availed the objectors, and I cannot help thinking that the increased burden, if any, in this case would have been of a shadowy description, but however that may be, I think the objection is not relevant.

If the effect of the petitioners' alterations be to increase the cost of maintaining the roof, it does not follow that such increased cost will fall upon the objectors. It may very well be that it will fall on the petitioners themselves. But the operations are entirely *in suo*, and I do not think they can be prevented from improving their property merely because of the obligation of joint maintenance of the roof.

LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Dean of Guild: Find that the petitioners are entitled to a warrant to construct a storm window as craved, provided it can be constructed so as not to encroach on any part of the roof which does not cover their own garret: Find no expenses due to or by either party in the Dean of Guild Court: Find the appellants entitled to expenses in this Court, and remit," &c.

Counsel for the Petitioners—Guthrie—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—W. Campbell — Clyde. Agents — J. & A. Hastie, Solicitors.

Wednesday, December 1.

SECOND DIVISION.

[Lord Pearson, Ordinary.

DALGLEISH *v.* RUDD.

Entail—Direction to Entail—Evacuation by Conveyance in Fee-Simple—Whether Contingent Burden on Heirs-Substitute Effectual against Institute to whom Estate has been Conveyed in Fee-Simple.

A testator by his trust-disposition and settlement directed his trustees to execute a strict entail of certain lands in favour of J, his oldest son, and the heirs of his body, whom failing to L, his second son, and the heirs of his body, whom failing to M, his only daughter, and the heirs of her body, whom failing to certain other persons. He further directed that the deed of entail should contain a provision in the form of a real burden that in the event of the failure of M and the heirs of her body, "the heirs succeeding to them or called after them, and the said lands and others, shall be burdened with the payment of £5000" to Mrs R., his sister, and failing her to her children and their descendants equally *per stirpes*.

The institute called in the proposed entail having obtained a decree in terms of the Entail Acts authorising the trustees to convey the said lands to him in fee-simple, and the disposition having been executed in terms of the decree, *held* (*rev.* judgment of Lord Pearson, Ordinary) that the above-mentioned provision had lapsed and was no longer prestable.

By trust-disposition and settlement dated 29th March 1862, and codicil dated 16th