stitute to proceed with the proof in terms of his interlocutor of 22nd April last, and decerned.

Counsel for Pursuer—Jameson—Blair. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders—Kennedy. Agent—Malcolm Graham Yooll, S.S.C.

Friday, July 3.

FIRST DIVISION.

[Lord Kincairney Ordinary.

TAYLOR'S TRUSTEES *v.* M'GAVIGAN.

(*Ante* p. 569.)

Property—Common Property and Common Interest — Joint Servitude — Common Right to have Back Area kept Open — Acquiescence.

The titles of the proprietors of the ground and upper flats of a tenement, derived from a common author, gave them substantially identical rights in the court or area behind the tenement, including the servitude "that no building shall be erected on the area behind the said tenement nearer the outside wall thereof than 19 feet, and that the said space of 19 feet all along the length of the said tenement shall be kept open and unbuilt upon in all time coming, in order to preserve the back lights of the foresaid shops so disponed." For a long period prior to 1883 the proprietors of an upper flat were in use to hoist goods by means of a block and pulley, in connection with which there was a projecting structure supported by an iron pillar resting on the back area. In 1883 this hoist was replaced by an enclosed hoist, the cage of which ran upon four posts resting on the back area and acting as guides. These posts were connected by cross-bars forming a fence to the hoist.

In 1893 the proprietors of the ground flat brought an action for removal of the hoist, in which the defenders pleaded (1) that the structure did not interfere with the back lights of the pursuers' flat, and (2) that there had been acquiescence in the use of a hoist. *Held* (*reversing* the judgment of Lord Kincairney) that the pursuer was entitled to decree, on the ground (1) (following *Bennett* v. *Playfair*, Jan. 24, 1877, 4 R. 321) that the parties having merely a common interest or servitude, neither was entitled to interfere with the enjoyment of the other; (2) that it was immaterial whether the back lights were interfered with, the servitude being one to have the ground kept open; and (3) that even if any right had been acquired by the use prior to 1883, this did not cover the extended use made subsequent to that date.

Process—Sheriff—Reduction—Competency—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 64, 65, 66, 67—*Act of Sederunt* 10*th March* 1870, *sec.* 3, *sub-sec.* 5.

Held (by Lord Kincairney, Ordinary, and acquiesced in) that the Court of Session Act has not made incompetent the reduction of an extracted Sheriff Court decree.

Opinion (by Lord Kincairney) that it was not incompetent to include in the summons of reduction declaratory conclusions other than those in the Sheriff Court petition in order to elucidate more clearly the rights of parties.

Expenses—Sheriff—Decree of Absolvitor—Reduction.

The defenders in a Sheriff Court action having obtained decree of absolvitor, the decree was extracted by them before the pursuers had lodged notice of appeal to the Court of Session. The pursuers thereupon brought an action of reduction of the Sheriff's interlocutors, in which they were defeated before the Lord Ordinary, but were successful in the Inner House. The pursuers maintained that the defenders were only entitled to such expenses as would have been incurred had they appealed under the Court of Session Act 1868.

Held that the pursuers were entitled to their expenses in the Inner House and in the Sheriff Court.

The trustees of the late William Taylor, jeweller, Glasgow, were the proprietors of a shop on the street floor, with sunk shop underneath, at 64 Argyle Street Glasgow. John M'Gavigan and James Carrick were the proprietors of the first and second flats respectively in the same tenement.

The different parties derived their rights under dispositions from a common author in 1803, and in each of their titles there was practically the same clause with regard to an area behind the tenement. The clause in the original dispositions was as follows:—The granter disponed "the right to the use of the pump-well in the back court of the foresaid tenement in common with the other proprietors and possessors thereof: And also the following servitude over the back area to the north of the said tenement, viz., That no buildings shall be erected on the area behind the said tenement nearer the backside wall thereof than 19 feet, and that the said space of 19 feet all along the length of the said tenement shall be kept open and unbuilt upon in all time coming in order to preserve the back lights of the foresaid shops so disponed."

For many years the upper floors were used for business purposes; and, for the raising and lowering of goods, a brick structure—known as a hoist—was provided, which projected outwards above the back window of the lower proprietors' shop, and was supported at one point by an iron column fixed in the ground. In 1881, when Mr Taylor died and his trustees became proprietors of the street and sunk shop, this projection was closed at its base immediately above their property by an extension of the flooring of Mr M'Gavigan's

property, and the goods were raised and lowered by means of a rope and pulley outside the hoist. In 1883 alterations were made on the construction of the hoist, the base being taken away and wooden supports being fixed in the area to serve as guides for a cage, by which the goods were raised from the ground inside the hoist instead of outside as formerly. Two of the posts were placed close against the wall on either side of the window of the back shop belonging to the lower proprietors, while the other two were some 4 or 5 feet out from the wall, and crossbars were put up between them forming a fence.

On 10th October 1893 Mr Taylor's trustees presented a petition in the Sheriff Court of Lanarkshire against M'Gavigan and Carrick, craving for declarator that they were "in right of a real servitude whereby they are entitled to have the court or area of ground lying immediately to the back of the shop . . . to the extent of 19 feet kept open and unbuilt upon in all time coming . . . as also that the building or erection . . . is a contravention of the right of property of the pursuers in the said shop and pertinents, and of the servitude right attaching thereto." The summons further concluded for removal of the erection and for interdict.

The pursuers averred that the alterations in the hoist injured the lights of their shop, and that the working caused injury and annoyance to their tenant; and pleaded that the hoist, at least as regarded the additions and alterations, was a contravention of their rights of property or servitude, and that accordingly they were entitled to decree.

The defenders pleaded that there was no contravention of the pursuers' rights, and further that they had acquired a prescriptive right to the use of the hoist, and that there had been acquiescence by the pursuers.

The Sheriff-Substitute (SPENS) after a proof on 3rd March 1894, assoilzied the defenders, finding that "the pursuer has failed to prove that there has been any material interference with the servitude of light possessed by the pursuers."

The Sheriff (BERRY) on 1st December 1894, adhered to this interlocutor.

On 26th December the defenders took extract of this interlocutor, without waiting to have the Auditor's account of expenses approved, and decree pronounced in terms thereof. Objections were subsequently made by the pursuers to the Auditor's report, which were repelled by an interlocutor of the Sheriff-Substitute dated 22nd January 1895. The pursuers appealed to the Sheriff, who on 12th March 1895 dismissed the appeal as incompetent.

The defenders on 28th March obtained extract of these last two interlocutors.

On 4th April the pursuers raised an action in the Court of Session concluding for reduction of the interlocutors pronounced in the Sheriff Court, and for declarator, interdict, and removal. Some of the declaratory conclusions of the summons in this action were different from and additional to the conclusions in the petition in the Sheriff Court.

The pursuers narrated the condescendence and proceedings in the Sheriff Court action, and averred that owing to the action of the defenders in obtaining immediate extract of the Sheriffs' decrees, they had been unable to bring these under review by way of appeal, that the decree on the merits having been one of absolvitor they could not do so by way of suspension, and that accordingly they were obliged to do so by way of reduction.

The defenders pleaded, (1) and (2), that the action was incompetent and irrelevant, and further *res judicata*.

The Lord Ordinary (KINCAIRNEY) on 9th August repelled the first two pleas, and reserved consideration of the third.

Note.—"In this action parties were heard in the Procedure Roll on the defenders' preliminary pleas. It is an action of reduction of decrees of absolvitor, pronounced by the Sheriff-Substitute and Sheriff of Lanarkshire, in an action brought in the Sheriff-Court by the pursuers against the defenders, and of decrees dealing with the expenses of process—all these being extracted decrees. The summons repeats the conclusion in the Sheriff Court petition, and concludes for payment of the pursuers' expenses in that Court. There are certain other conclusions which were not in the Sheriff Court petition, and there are relative averments not made in the Sheriff Court. The parties have not been heard on the merits nor on the mode of procedure, it being judged more expedient that the questions raised by the preliminary pleas should be disposed of in the first place, all the more that it was not easy during the last days of session to find time for a satisfactory debate on the merits, embracing, of course, a debate on the proof led in the Sheriff Court.

"The defenders' first plea is that the action is incompetent. They maintained that the effect of section 64 of the Court of Session Act of 1868, which abolishes the process of advocation, and sections 65 and 66, which substitute a note of appeal, was by implication to supersede and abolish the process of reduction as a process of review of a Sheriff Court decree. They founded also on section 67, which makes appeal incompetent after the expiration of six months from the date of a final judgment, and also on the Act of Sederunt, 10th March 1870, section 3, subsection 5, which provides for the finality of a Sheriff-Court judgment in the case of an abandoned appeal.

"It may be admitted that a reduction is a very inconvenient process for reviewing a Sheriff Court decree, and I think that for a considerable time back such actions have not been common in practice. Still, of course, the defenders did not dispute that, prior to 1868, an action of reduction was a mode of taking a Sheriff-Court judgment to review, just as distinctly recognised as an advocation, and there are several reported cases about such reductions, the chief question in such cases being whether it was competent to review by reduction an

unextracted Sheriff Court decree; on which point, it may, I think, be said to have been determined that, in general, a reduction of a Sheriff Court decree which had not been extracted was incompetent (as decided in *Buchanan* v. *Lumsden*, March 2, 1837, 15 S. 958, and *Scoullar* v. *M'Lachlan*, March 29, 1864, 2 Macph. 955); but that a reduction might be sustained if the decree was not extractable, as in *Holmes* v. *Tassie*, January 19, 1826, 6 S. 394, and *Jack* v. *Umpherston*, March 11, 1837, 15 S. 833.

"But the defenders contended that this was altered by the Act of 1868. They referred to *Tennants* v. *Romanes*, June 22, 1881, 8 R. 824, and *Thomson* v. *King*, January 19, 1883, 10 R. 469, which were cases in which appeals were disallowed as beyond the dates for appeal, and argued that such questions would have been idle if, after the time for appeal had expired, it was still competent to bring a reduction. I do not need to solve the question whether, after six months from the date of a final decree, and when it was protected by lapse of time from an appeal, it could be brought up by a reduction if it were extracted. I do not suggest any doubt about that, but no such question arises. And with regard to the general point raised by the defenders, I have no difficulty in repelling their argument, and in holding that the substitution of an appeal for an advocation has no effect or bearing on the process of reduction as a mode of review. There are no words in the statute to suggest that it was intended to affect reductions. A right of access to the Court of that kind cannot be taken away by implication, for which indeed I see no ground—*MacLachlan* v. *Rutherford & Company*, June 10, 1854, 16 D. 937; *Marr & Sons* v. *Lindsay*, June 7, 1881, 8 R. 784.

"Further, the competency of a reduction of Sheriff Court decrees has been recognised since the Court of Session Act, in the sense that no doubt has ever been cast on it. In *M'Leod* v. *Collier*, November 9, 1869, 42 Scot. Jurist 62, Lord Ormidale decided that a reduction was competent in a case where a suspension might also have been competent. The competency of a suspension of an extracted Sheriff Court decree in the general case was recognised in *Watt Brothers* v. *Foyn*, November 1, 1879, 7 R. 126, although it was held that a Sheriff Court judgment final under the Act of Sederunt, 10th March 1870, could not be reviewed in any form. In *Weir* v. *Tudhope*, June 14, 1892, 19 R. 858, no doubt was expressed as to the competency of a reduction, and in *Mackenzie* v. *Munro*, November 10, 1894, 22 R. 45, a Sheriff Court decree by default was reduced. The new Style book retains a style of a reduction of a Sheriff Court decree on its merits—Juridical Styles, vol. iii, pp. 86, 87.

"I cannot therefore doubt that a reduction of an extracted final judgment of a Sheriff is still competent; although it may be true that it is now rarely met with in practice.

"The repetition in the conclusions of the summons of the prayer of the petition is no doubt competent and proper—Juridical Styles, vol. iii. (1828), p. 233, and recent Juridical Styles *ut supra;* and possibly it is necessary—*Ramsay* v. *Bruce*, November 30, 1849, 12 D. 243. So also I have no doubt of the competency of the conclusion for the expenses in the Sheriff Court. It is warranted by the style books and was contained in the summonses of reduction in *Bisset* v. *Anderson*, March 9, 1849, 11 D. 1015, and *Friend* v. *Skelton*, March 2, 1855, 17 D. 548, to the session papers of which cases I have been referred.

"The defenders further maintained that the Sheriff Court judgments must be reviewed and considered on the pleadings and proof led in the Sheriff Court, that the introduction of new conclusions and new averments was incompetent, and that there could be no further proof. The pursuers did not refer to any precedent for the form of summons which they have adopted. Even, however, if it should be held that these new conclusions could not be entertained, that would not make the action incompetent. But, as at present advised, I do not see why it should be incompetent to conclude in one summons that the Sheriff Court judgment should be set aside, and then that (they being removed out of the way) further declaratory findings should be pronounced in order to elucidate more clearly, if necessary, the rights of the parties. I think the form of process is competent, although it may not be convenient. I do not know whether any further proof is necessary in order that these conclusions may be dealt with, nor do I decide whether any proof ought to be allowed before the action is exhausted as a process of review. That will be for subsequent consideration. The defenders maintain that there was really nothing new in the additional conclusions and averments, and that these were only inserted in order to fortify the Sheriff Court case, for which purpose it was maintained they could not competently be used. This matter was not fully discussed, nor was the pursuers' demand for a proof precisely formulated; and I think I can do no more at present than decide that the action cannot be dismissed as incompetent. The conclusions of the summons are so verbose that it is not very easy to see what the new point is which is meant to be introduced. It seems to regard a sunk shop and sunk cellar not specially referred to in the Sheriff Court action.

"I am, on the grounds explained, of opinion that the defenders' first plea cannot be sustained. The second plea that the action is irrelevant seems out of place in defence to an action brought for the purpose of review. The third plea, *res judicata*, can only come into play if the decrees in the Sheriff Court be not reduced. It must in the meantime be reserved. The pursuers maintained that it should be repelled, on the ground that a decree in the Sheriff Court can never be pleaded as *res judicata* in the Court of Session, founding on a dictum by Erskine to that effect (E. iv. 3, 7). But having regard to the cases in note (b) in Mr Nicolson's ed., vol. ii, 1142, and also to ordinary practice, I am not

prepared to act on that dictum and repel the plea of *res judicata*. If the Sheriff-Court judgments be not *res judicata*, there would have been no necessity for bringing this reduction." . . .

On 8th January 1896 the Lord Ordinary—on the merits—repelled the reasons for reduction, and assoilzied the defenders from the reductive conclusions, reserving the question of expenses.

Note.—"By interlocutor of 9th August 1895, I repelled the defenders' first plea that the action was incompetent, holding that in the circumstances the interlocutors in the Sheriff Court might be competently reviewed in an action of reduction, and indicating an opinion or impression that it was not incompetent to append additional conclusions, and to make averments applicable to these conclusions. At the beginning of the Winter Session the case was restored to the Procedure Roll, and parties have since been heard on the merits.

"I think that in further dealing with the case I must first of all dispose of the conclusions of reduction—that is to say, I must review the judgments of the Sheriff-Substitute and Sheriff; and as the pursuers did not move for any additional proof—as might have been competent in order to the determination of the questions raised in the Sheriff Court—I must consider the judgments now submitted to review with reference to the record and proof in the Sheriff Court.

"I have found the case to be of some difficulty, although it is of slight importance. The Sheriffs, while treating the case with much care, have regarded it as of little consequence or of none; and have held that the pursuers have been complaining of operations which did them no material harm. The dispute is certainly one which such near neighbours ought without difficulty to have settled amicably and without the cost of a law-suit. After careful consideration I have come to the conclusion that the judgments in the Sheriff Court are well founded. In the notes appended to their judgments the Sheriff-Substitute and Sheriff state so distinctly, and in my opinion with such accuracy, the facts of the case, that it is unnecessary that I should do more than express my concurrence, and indicate very briefly the views which occur to me in reference to the law which appears to be involved.

"At the outset it is necessary to keep in view that the operations of which the pursuers complain are not new independent operations, but are only modifications of a previous state of matters; and what the pursuers require to show is, not that the hoist to which they object, as it is used, is contrary to their rights and productive of injury, but that the change which the defenders effected in 1883 is illegal and injurious.

"For a long time before 1883 the defenders and their authors were in the habit of taking their goods into their warehouses by the back windows. They did so by means of a hoist, not extending downwards below the floor of their flats, but supported on an iron pillar resting on the area or court at the street level, and by a block and tackle by which the goods were lifted from the court. This block and tackle projected about five feet from the back wall, but when the defenders' goods were raised by it they passed the back window of the pursuers' shop, temporarily obscuring it to a slight degree as they passed. The defenders say that this method of using the court and their back windows had continued for forty years, but the precise period does not signify in this case, seeing that the right of the defenders to convey their goods to their warehouses in that manner is not challenged. What was the nature of the right which the defenders thus enjoyed? It was a right of ish and entry to their warehouses by the court and by the windows, and just as clearly a right of ish and entry as if the entry had been by a door. They made use of this entry without any objection by the owner or owners of the court, and as must be held, with their tacit acquiescence, and what the defenders did in 1883 was to modify, and make more convenient for themselves, their mode of exercising their right of entry by their windows. To effect this a two-fold operation was required, the erection of four posts fixed in the court, and the adjustment within the four posts of a cage, in which the goods might be raised. The cage, however, in this case passed close by the back wall and by the window of the pursuers' back shop, whereas formerly the bales of goods passed at a distance of five feet from the window.

"This alteration is the whole subject-matter of the complaint by the pursuers in the Sheriff Court. The case must be viewed on the assumption that the defenders had a right to carry their bales of goods past the pursuers' window in conformity with their former practice. If that were not so, the question would have been totally different. The Sheriff and Sheriff-Substitute are of opinion that this modification on the defenders' mode of entry does the pursuers no material injury, and I am not prepared to dissent from that opinion. The pursuers represent that the cage may be put to a use which may affect them materially; as, for instance, if the defenders should allow the cage to rest for a period of time against their window. The defenders might have subjected them to a similar annoyance, although certainly less in degree, when they used their block and tackle. But if that should happen, the question will arise whether the pursuers cannot prevent an unfair and unreasonable use of the hoist, and nothing in this judgment will prejudice that question.

"The pursuers further say that the four posts with the cage inside is a building, and is in breach of the servitude over the space of 19 feet from their back wall conferred by their titles. Now, I agree in the opinion of the Sheriff and Sheriff-Substitute, that the interference of these posts with the access of light to the pursuers' shop is infinitesimal and immaterial. There is no evidence that it has ever necessitated more

frequent use of artificial light. On the question whether these four posts with the cage inside ought to be regarded as a building, no authority affording any assistance was quoted. But holding that a clause imposing a servitude must be construed strictly and *in dubio* in favour of freedom, I am of opinion that they did not constitute a building in the sense of the clause in the titles. On these grounds I am of opinion that the pursuers have failed to show that the interlocutors in the Sheriff Court are erroneous on the merits.

"Entertaining these views, I do not require to consider the defenders' plea of acquiescence, but I doubt whether the proof is sufficient to support it."

On 25th January the Lord Ordinary sustained the plea of *res judicata* "as against the conclusions of the summons so far as founded on the pursuers' right of servitude over the back court," and found that "so far as the conclusions of the summons against the defenders, and in reference to the operations complained of, are based on a different *medium concludendi*, they are not supported thereby," and accordingly assoilzied the defenders and found them entitled to expenses.

On 7th March the Lord Ordinary approved of the Auditor's report of the defenders' account.

The pursuers reclaimed, and the defenders having objected to the competency of the reclaiming-note the Court on 21st May repelled the objection (*ante*, p. 569).

Argued for reclaimers—The defenders by their action in 1883 had taken exclusive possession of what was common property. The change made in that year was a very material one, and it could not be said that since then the area had been "open and unbuilt upon" as the pursuers had a right under their title to insist that it should be. They were equally entitled to a right in the back area in any question with the defenders, and accordingly whatever that right might be they were entitled to prevent its violation—*Stewart, Pott & Company* v. *Brown & Company*, October 15, 1878, 6 R. 35; *Bennet* v. *Playfair*, January 24, 1877, 4 R. 321; *Mackenzie* v. *Carrick*, January 27, 1869, 7 Macph. 419; *Argyllshire Commissioners of Supply* v. *Campbell*, July 10, 1885, 12 R. 1255. It was not legitimate to inquire, as the Sheriffs had, into the amount of damage and injury caused by the defenders' operations; their action was either legal or illegal, and if under the titles it were illegal the pursuers were entitled to decree. In the cases of *Russell* (*infra*) and *Boswell* (*infra*) cited by the defenders, the question was between a proprietor and other persons with a servitude of light, but in the present case the question was between two persons holding a joint servitude right. Moreover the words of the restriction in *Russell* were that there was to be no building "so as to prejudice the light," while here the restriction was absolute.

Argued for respondents—There had been no objection made prior to 1883, the defenders having all along exercised their right of taking in goods, and the question therefore was whether this alteration in 1883 amounted to "building" in the sense of the titles, which it certainly did not, but merely to an alteration in the method of exercising their acknowledged right of ish and entry. No material interference had been made with the pursuers' rights, and accordingly they were not entitled to rely on a prohibition which was only intended to prevent real injury. The true criterion in such cases was whether material damage would be caused by the operations complained of—*Russell* v. *Cowpar*, February 24, 1882, 9 R. 660; *Boswell* v. *Magistrates of Edinburgh*, July 19, 1881, 8 R. 986; *M'Gibbon* v. *Rankine*, January 19, 1871, 9 Macph. 423. The case of *Stewart, Pott & Company* (*supra*) really confirmed this view, for there interdict was only granted because the passage in dispute really was obstructed by the respondents' proceedings. In any view the pursuers and their authors had acquiesced in the defenders' use up till 1883, and there being no real change in it could not now object—*Muirhead* v. *Glasgow Highland Society*, January 15, 1864, 2 Macph. 420.

At advising—

LORD PRESIDENT—There has been a great deal of procedure in this case, and the question at issue has to a large extent been obscured by the artificial way in which the questions have been raised. But turning to the rights of the parties I look at the title of the two litigants. Now, so far as the ground or area behind their house is concerned, the rights of the pursuers and defenders are identical. They are neither of them proprietors of this back court or area, but they both have interests therein, and substantially the same interests are defined in the two sets of titles. The main point to be attended to is that, on the face of both their titles, the space of 19 feet all along the length of the tenement is to be kept open and unbuilt on in all time coming, in order to preserve the back lights. Now, down to 1883, the court—by which I mean the surface of the court—was certainly open and unbuilt upon. The operations now complained of make it impossible for anyone to say that the court is open, in the part where this structure has been erected. That part of the court is not now open but is enclosed; and it was admitted that suppose anyone desired to go right up to the pursuers' window he could not do so because he would be encountered by this wooden erection.

Now, it seems to me that that is the turning point of the case. The person who has erected this structure has, as I have said, no rights of property in the court, and accordingly this is not a case where there is a presumption in favour of a proprietor having a free use of his property against one who is a servitude holder—both the litigants being servitude holders. Accordingly it seems to me that the principle upon which the case must be decided is that laid down in *Bennet* v. *Playfair*, which I think is very much in point, for

there the Court, treating the rights of parties which were, as in this case, the same, described them as rights of common interest or servitude, and held that neither party had a right to interfere with the enjoyment of the other. Now, as I have pointed out, the result of the encroachments is that this part of the court has ceased to be open. It must also be observed, though I think this is not essential, that the wooden supports necessarily—though to a small extent—interfere with the light of the pursuers' window. Accordingly, I think the pursuers are entitled to have the structure removed. To summarise, it is put up by a person having no right to do so, it interferes with the openness of the court, and to a corresponding extent it is an invasion of the rights of the pursuers as appearing on their title.

How to apply that view of the rights of parties to the present case is a little difficult, but, first, the interlocutors in the Sheriff Court must be swept aside, because though the case was nominally presented to the Sheriff Court as one of servitude, yet the Sheriff was asked to order the removal of the structure, and so I do not think we could leave that series of judgments standing by which he has refused to do so. Then, as regards the Lord Ordinary's interlocutors, I think they must all go, and the remedy of the pursuer would seem to be a declarator, an order for removal, and an interdict confined entirely to the structure below, which gives rise to the suit.

LORD ADAM—[*After narrating the titles of the parties and the facts as given above, his Lordship proceeded.*]—The first observation I have to make is that it appears to me that the change which took place in 1883 was a very material one, having this element in it, that whereas prior to that date there was no erection whatever on the area of this ground, subsequently there has been this permanent structure. That change accordingly makes it impossible to say that since 1883 the defenders have been exercising a right previously existing.

Now, I am willing to treat the case on the ground that there is no distinction between what has been called the sunk area and the rest of the area behind the tenement, but that they are all to be considered as composing the area described in the titles. We must observe, however, in the first place, that this is not a question between the proprietor of the area and someone having a servitude right. The rights of the two parties are identical, and the right of the defenders to set up this structure—if such right there be—is merely one of usage.

But in the next place, I think that whether or no we were dealing here with different proprietors, the result would be the same, because it is a condition of the title granted by the pursuer that no building should be erected within 19 feet of this tenement.

It is said that there is a difference, because there is inserted the reason for this stipulation, viz., "in order to preserve the back lights of the foresaid shops." But that does not appear to me to limit in any way the absolute right and obligation to keep the back area open for the space of 19 feet. I think the obligation is quite a different one from that in the case of *Russell* v. *Cowpar*, where the words used were "so as to," and it was held that if the erection were such as not to interfere with the lights of the dominant tenement, the obligation in the titles was fulfilled.

Accordingly, I think on this ground that no question arises here as to whether the defenders' operations materially interfere with the pursuer's rights; there is no question of materiality in their interference with the defenders' legal rights as defined in their title.

If that be so, there is I think an end of the case, for the fact that the pursuer has allowed the structure to remain for twelve years is nothing more than sufferance and non-interference, and does not make it too late, when the question is raised by a person having the right to do so, to have the structure removed.

LORD M'LAREN—It may be that the matter of which the pursuers complain resolves itself into a small interference with their comfort or legal rights, but in justice to them it must be observed that they raised the question before the Sheriff, who has jurisdiction, either under 1 and 2 Vict. if it is treated as one of servitude, or under the Sheriff Court Act of 1878 if it is one of heritable right of less value than £1000. It is in consequence of the views successfully maintained by the defenders before the Sheriff and the Lord Ordinary that the pursuers have been under the necessity of coming here.

The infringement of right of which they complain arises from the fact that under their title, and that of the defender, which flow from a common author, they each have equal rights to a back court or area, through which they have access to their respective storeys, and in which they have a certain interest reserved by the title. Now, on a fair construction of these titles, it seems to me that the proprietor had parted with all his substantial interest in the area, reserving only a naked right of property, and that he gave equal rights to the different persons in the titles flowing from him, which are carefully defined. It is provided that a certain space shall be kept open and unbuilt upon in all time coming, "in order to preserve the back-lights." Now, the specification of a reason for the obligation does not, in my judgment, detract from its generality. Therefore it seems plain that the proprietor could not consistently with these rights put up any structure whatever, temporary or permanent, on this area, nor could he give a right to do so to any of his feuars. But the case for the defenders does not rest on any right which they purport to have received from the original owner, nor is it a case of setting up any superior or older title. Their right in the common property is identical with that of the pursuers. I think that in all cases of equal rights, any one of the community is entitled to maintain the

existing state of possession as against all the others. It is said that the right claimed by the defenders had begun in a lesser right of use, *i.e.*, of raising goods by means of a block and tackle, which had been unchallenged for so long as to deprive the other feuars of their right of interference. That may be so, but then any right which the defenders acquired was nothing more than a right to put forward a plea of bar against others seeking to interfere with them, and such a plea can never be extended, as I think, beyond the original use. The conversion of this simple expedient into a regular mechanical lift occupying a definite space, and at times blocking up the window, seems to me to be a distinct extension of the use, and it is impossible for them to justify it consistenly with the rights of the other owners of the joint servitude over the Court.

LORD KINNEAR concurred.

The pursuers moved for expenses in the Outer and Inner House on the ground that they had been successful, and that the action of reduction had been caused by the defenders having taken extract of the Sheriff's decrees hurriedly so as to prevent the pursuers appealing. It was competent in a reduction to ask for the whole expenses—*Bisset* v. *Anderson*, March 9, 1849, 11 D. 1015. The defenders argued that the pursuers were only entitled to the expenses they would have got if they had appealed—*Tennents* v. *Romanes*, June 22, 1881, 8 R. 824.

The Court recalled the Lord Ordinary's interlocutors of 8th and 25th June and 7th March 1896; reduced, declared, and decerned in terms of the reductive conclusions of the summons; found and declared that neither of the defenders had any right or title to erect a hoist or to erect guide-posts upon the top of the sunk area or upon any part of the back court below the level of the original basement floor of said hoist as it existed prior to the year 1883; and ordained the defenders to remove so much of the said guide-posts and other connections as are contiguous to or *ex adverso* of any part of the pursuers' back wall below the said basement-floor of the hoist; and granted interdict against the renewal of the structure. The Court found the defenders liable in the expenses in the Sheriff Court and Inner House.

Counsel for the Pursuers—Ure—M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Defenders — Sol.-Gen. Dickson — Younger. Agents — Carmichael & Miller, W.S.

Tuesday, July 7.

FIRST DIVISION.

[Sheriff of Forfarshire.

WATSON (FRASER'S TRUSTEE) *v.* FRASER.

Bankruptcy — Sequestration — Trustees' Power of Recovering Documents—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 91.

The trustee on the sequestrated estate of a wine and spirit merchant who was tenant of a public-house, *held* entitled, under the 91st section of the Bankruptcy Act 1856, to production and delivery of the bankrupt's permit book and certificate of licence.

This was an appeal presented by Hugh Hayes Watson, trustee on the sequestrated estate of Mrs Jane Fraser, who carried on business as a wine and spirit merchant in a public-house of which she was tenant, against certain deliverances of the Sheriff-Substitute (SMITH) at Dundee in the statutory examination of the bankrupt.

The deliverances appealed against were as follows—"At Dundee, 24th June 1896, in presence of John Campbell Smith, Esquire, Advocate, Sheriff-Substitute of Forfarshire at Dundee. Present . . . Compeared the bankrupt, Mrs Jane Fraser, who being solemnly sworn and examined, depones, . . . The agent for the trustee moved that the bankrupt be ordained to deliver up the permit book. *Deliverance.*—The Sheriff-Substitute ordained the bankrupt to allow the trustee to have access to the permit book on all occasions desired by him when it was necessary that he should have the use of the permit book in order to obtain information in regard to the estate: *Quoad ultra* refused the motion. . . . (*Q*) Are you willing to give up your certificate of licence to the trustee? *Deliverance*—Question disallowed."

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 9, enacts—"The bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of account, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same, or copies thereof, to be delivered to the trustee."

Argued for the appellant—(1) The trustee in bankruptcy was entitled to the permit book, for that alone would enable him to check the transactions of the bankrupt, who was still carrying on business. (2) He was also entitled to the bankrupt's certificate of licence, which formed part of the assets of the estate, and which would be transferred under section 19 of the Home Drummond Act (9 George IV. cap. 58) to the purchaser of the business from the trustee—*Clift* v. *Portobello Pier Company*, Feb. 10, 1877, 4 R. 462. The certificate was a mere accessory of the lease and the good-