

petitioners who under the provisions of the Act is entitled to object to the reduction, that either his consent to the reduction has been obtained, or his debt or claim has been discharged: Confirm the resolution set forth in the petition, that the capital of this Company be reduced from £50,000 to £34,500, and divided into 5750 shares of £6 each, and approve of the said reduction of capital accordingly: Approve of the minute of the said reduction also set forth in the said petition: Appoint the petitioners to register this interlocutor or order and the said minute with the Registrar of Joint Stock Companies in Scotland, upon production to him of this interlocutor, or of a copy thereof certified by the Clerk of Court, and the delivery to him of a copy thereof and the said minute: Appoint the petitioners to publish notice of such registration in the *Glasgow Herald*, *North British Daily Mail*, and *Scotsman* Newspapers, within seven days from the date of said registration: Authorise the petitioners to discontinue the addition to their name of the words 'and reduced,' after the lapse of fourteen days from this date, and decern."

Counsel for Petitioner—R. V. Campbell. Agent—David Cook, S.S.C.

[R., Clerk.

NOTE.—This is the first petition under this section of the Act which has been presented to the Court of Session. In England several applications of this kind have been made, and certain rules laid down by the Courts to regulate the procedure.

The following cases may be cited—*Sharp v. Stewart & Co.*, 5 L. R., Eq., 155; *Telegraph Co.*, 10 L. R., Eq., 384; *Credit Foncier Co.*, 11 L. R., Eq., 356; *Estate Co.*, 5 L. R., Ch. App., 407.

Tuesday, June 3.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

GIRDWOOD v. PATERSONS.

Title—Boundary—Possession—Singular Successor—Proof.

In a case where the owner of a sunk flat had granted permission to his tenants, who also occupied the shop above, to encroach on the window space which lighted the sunk flat, subject to the condition that the window should be restored on demand to its former state—held that this agreement was binding on singular successors to the shop on the ground that they could only possess what their title gave them, and that possession must be determined by proof.

This action was raised by Mr R. Girdwood against George Paterson and spouse, and the object of it was to have the defender ordained to restore the window of the sunk storey in Bank Street, Edinburgh, belonging to the pursuer, to the state in which it was before the year 1858. At this time the pursuer was proprietor of the shop No. 2 Bank Street, and of the ground flat entering from Morocco Close, which was lighted by a window looking into Bank Street, and was immediately below the shop No. 1 Bank Street, which is now

the property of the defenders, but was at that time the property of Mr Peter Mackinlay, and was occupied by the firm of D. & P. Mackinlay, drapers, who were also tenants of the pursuer's sunk flat under their own shop. In 1858 the level of Bank Street was lowered, and it was found expedient to lower the sill of Messrs Mackinlay's shop window, but this could only be done by encroaching on the height of the sunk storey window immediately below it. The pursuer gave leave for this encroachment to be made to the extent of about 15 inches, but only on condition that the window should be restored to its original condition whenever he should require this to be done. Mr Mackinlay sold his premises in 1867 to John Stevenson, and the defenders bought them from him, and they resisted Mr Girdwood's demand to have his window restored to its former condition. It was pleaded for them, *inter alia*, that—"3. It is incompetent for the pursuer to prove, excepting by writ, that any part of the shop, No. 1 Bank Street, as now possessed by the defenders or their tenants, is the property of the pursuer. (4) The pursuer cannot prove, excepting by writ or by the defender's oath, the agreement which he avers to have been made to restore the window to its alleged original level. (7) The pursuer having permitted the defenders' authors to possess and occupy said shop in such manner as to lead the public and the defenders to believe that their right of property was co-extensive with their possession, and the defenders having in said belief (which was not contradicted by the titles), purchased and paid for the said shop, the pursuer is barred from insisting in the present action against them."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 17th December 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process, Finds (1) That in the year 1858 the pursuer was proprietor of the shop No. 2 Bank Street, Edinburgh, and of the ground flat or sunk storey of the tenement entering from Galloway's or Morocco Close, with certain exceptions, and that Peter Mackinlay, a partner of the firm of D. & P. Mackinlay, drapers and outfitters, was proprietor of the shop No. 1 Bank Street, consisting of a front and back shop; (2) That the said firm of D. & P. Mackinlay were tenants in 1858 of the whole foresaid subjects, their lease of the pursuer's subjects being for ten years, from Whitsunday 1858; (3) That the pursuer consented, in or about the year 1858, to the alteration by the said firm of D. & P. Mackinlay, upon the window of the room in his ground flat or sunk storey, which is situated below the shop No. 1 Bank Street, Edinburgh, which now belongs to the defenders, upon the condition that the said window should be restored by the said D. & P. Mackinlay to its original size and position in the front wall of the tenement whenever he should require this to be done; (4) That the said alteration was effected immediately, or soon thereafter, upon the said condition, for the purpose of enlarging the window of the shop No. 1 Bank Street; and (5) That in executing the said alteration, 15 inches were taken from the top of the pursuer's said window, and that the window of the shop No. 1 Bank Street was proportionally enlarged: Finds that Peter Mackinlay, one of the partners of the said firm, and proprietor of the shop No. 1 Bank Street, never acquired any right as heritable pro-

priest to the portion of the pursuer's foresaid window and ground flat or sunk storey which has, under the foresaid agreement and condition, been encroached upon for the purpose of enlarging the window of the said shop, and that the defenders, as the singular successors of the said Peter Mackinlay, never acquired right thereto: Finds that the pursuer is entitled to have the window of his ground flat or sunk storey altered and restored to the size, height, and level in the front wall of the tenement in which it was in or about the year 1858, previous to the foresaid alteration, and decerns: Reserves consideration of the question whether the said restoration falls to be made at the expense of the pursuer or at the expense of the defenders, and appoints the cause to be put to the Roll, with a view to farther procedure.

"*Note.*—The property both of the pursuer and of the defenders forms part of that corner tenement fronting the Lawnmarket and Bank Street, Edinburgh, erected by Andrew Irving. The defender's property consists of the shop and back shop, No. 1 Bank Street, which was conveyed by the Magistrates and Town Council, and Andrew Irving, to George Strachan, in 1800, and which has been transmitted to the defenders by a regular progress of titles. The pursuer's property consists of the shop No. 2 Bank Street, and also of the dwelling-house or tavern, with cellarage and pertinents, forming the ground flat or sunk storey situated under the shops of the said tenement, with certain exceptions, and entering from Galloway's or Morocco Close. The pursuer acquired these subjects in 1857. In 1858 Peter Mackinlay, a partner of the firm of D. & P. Mackinlay, general drapers and outfitters, was proprietor of the shop No. 1 Bank Street, and the firm of D. & P. Mackinlay were tenants of the said shop No. 1 Bank Street, and also of the pursuer's shop No. 2 Bank Street, and ground flat or sunk storey, under a lease for ten years from Whitsunday 1858. The level of Bank Street had been lowered by the Improvement Commissioners, and the window of the shop No. 1 Bank Street was not well suited to show off shop goods. But it could not be lowered and enlarged without encroaching upon the window of the room in the pursuer's ground flat, which was situated immediately below the shop window. This window, as is proved, was originally constructed in the front wall of the tenement, which is 2 feet 6 inches or thereby thick, so that the top thereof was 15 inches or thereby above the level of the floor of the shop No. 1 Bank Street. In these circumstances, the firm of D. & P. Mackinlay applied in 1858 to the pursuer, their landlord, for his permission to encroach upon his window and room in the ground flat, so that they might enlarge the window of the shop No. 1 Bank Street, and bring it nearer the level of the street. The pursuer consented thereto, upon the condition, as is clearly proved, that his window should be restored to its original height and position in the front wall of the tenement whenever he should require this to be done. Upon this condition the firm of D. & P. Mackinlay enlarged the window of their shop No. 1 Bank Street, by taking 15 inches off the height of the pursuer's window, and extending their shop window downwards so as to include within their shop window the said 15 inches, and the space behind the same, which was part of the pursuer's ground flat.

"In the year 1864 Messrs D. & P. Mackinlay proposed to the pursuer that Mr Stark, ironmonger,

should become the tenant of his shop and ground flat. To this the pursuer consented, and an agreement was entered into, which was signed by D. & P. Mackinlay, whereby it was provided 'that if necessary Mr Stark must give every facility to Messrs Girdwood and Mackinlay to alter the window of No. 1 Bank Street when required.' A lease of the said subjects for ten years from Whitsunday 1865 was thereupon granted by the pursuer to Mr Stark, in which a similar provision was inserted.

"Thereafter, in 1867, the pursuer raised an action against the firm of D. & P. Mackinlay, and against Peter Mackinlay, for the purpose of obtaining decree, ordaining them to restore his window to its former height and position, and interdicting Peter Mackinlay, as proprietor of the shop No. 1 Bank Street, from selling or disposing the same until the pursuer's widow should be restored. Inhibition was raised on the dependence of this action, which was executed on 3d, and recorded on 17th May 1867. The pursuer obtained decree in absence in this action on 24th February 1871. On 25th February 1867 the defenders' predecessor, John Stevenson, purchased the shop No. 1 Bank Street, conform to missives of sale interchanged by him and Peter Mackinlay of that date, and his title was completed by disposition dated 31st May, which, with warrant of registration, was recorded in the Burgh Register of Sasines on 30th September 1867. The defenders purchased and acquired the said shop from Stevenson, conform to disposition dated 13th, and with warrant of registration recorded in the Burgh Register of Sasines on 20th May 1870.

"Such being, as the Lord Ordinary conceives, the facts established by the proof, he is of opinion that the pursuer is entitled to have the window of his room below the defenders' shop restored to its former size and position in the front wall of the tenement. Neither Peter Mackinlay, nor the defenders as his successors, ever acquired right to that portion of the pursuer's window and ground flat into which the window of the shop No. 1 Bank Street had been extended by the firm of Messrs D. & P. Mackinlay with the pursuer's consent, under the temporary agreement between them. Peter Mackinlay acquired right to, and was infet in, the shop No. 1 Bank Street, precisely as it stood when conveyed in 1800 to George Strachan, the donee of the Magistrates and Andrew Irving. He never had, and neither he nor his donee Stevenson could convey, any right of property in that part of the tenement in which the pursuer's window was originally constructed, and in which it was situated previous to the temporary alteration by D. & P. Mackinlay. The property thereof, and right thereto, belonged to and remained vested in the pursuer, and he is entitled to vindicate the same. It is proved that the diminution of the window seriously affects the light of the pursuer's low room, and that the portion of the tenement in question which originally was included in and formed part of the pursuer's low room is of considerable value.

"Further, John Stevenson, the donee of Peter Mackinlay, was well aware of the pursuer's claims in regard to the said window and portion of the tenement before he purchased the shop No. 1 Bank Street. So also was the defenders' agent, Mr James Paterson, before the disposition in their favour was executed and the price paid, and both of them relied upon the absolute warrantance of their predecessor as regards that matter."

"Edinburgh, 11th January 1873.—The Lord Ordinary having heard counsel, ordains the defenders, at the sight of Mr William Watherston, builder in Edinburgh, to remove or alter the window of their shop No. 1 Bank Street, Edinburgh, in so far as it encroaches on, or interferes with, the window of the pursuer's ground flat and sunk storey beneath the same, as found by the preceding interlocutor; by consent of the pursuer, Finds that the expense attending such removal or alteration falls to be paid by him, and decerns."

The defenders reclaimed.

At advising—

LORD PRESIDENT.—The interlocutor of the Lord Ordinary gives a clear and exhaustive account of the facts of the case, and I am of opinion that the legal inference his Lordship has drawn from the facts is a correct one. It must be assumed from the circumstances before us that the arrangement between the pursuer and the Mackinlays in 1858 was entered into for the purpose of giving light to the shop. That was more necessary than afterwards, when the level of Bank Street had been lowered in consequence of the operations of the Improvement Commissioners. There is distinct evidence that in 1858 the alteration was made by the Mackinlays when they were occupants of both the shop and the sunk floors. This could only have been done with the consent of the proprietors of both. We have evidence that it was done with such consent, and that a very natural condition was added, viz., that whenever the pursuer required, the window in his premises should be restored to its former size, height, and level. Now it is said that the defender as a singular successor is not bound by that arrangement. Certainly that is so; but that is not the form of the question before us. The question is whether that part of the building upon which the alteration was made is the property of the pursuer or of the defender. If the titles settle that question we can look no further. But then they don't settle that. They only tell the length and breadth superficially, and refer to former possession. It might be said that we don't require to have that boundary—the boundary between the upper and lower floors—set forth, because the joists are there the natural boundary. Here, however, there is not such a boundary, because the property of the lower proprietor now extends 11 inches above that natural boundary, and formerly extended above it to a greater extent. The boundary, therefore, is undefined, and where a necessity arises for determining such a boundary I know of no mode of doing so except by proof of possession. The question turns into a case of disputed boundary, just as if a march fence had been removed. That being so, I am of opinion that the proof is quite clear, and that the Lord Ordinary's judgment is correct.

The Court adhered.

Counsel for Pursuer—Marshall and Mair. Agents—Skene, Webster, & Peacock, W.S.

Counsel for Defenders—Solicitor-General (Clark) and Balfour. Agents—Dewar & Deas, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, June 4.

WALKER v. BATHGATE.

Appeal—Salmon Fisheries Act, 1868—Expenses.

The appellant was charged with a contravention of the Salmon-Fisheries Act, but the Procurator-Fiscal, after examining three witnesses, abandoned the case. The Sheriff-Substitute refused to give expenses against the Procurator-Fiscal; but, on appeal, held that it was competent under the Act to award expenses; and appeal sustained, with expenses.

This was an appeal from a judgment of the Sheriff-Substitute of Peebles, in a question of expenses, arising in the trial of a complaint under which the appellant had been charged with a contravention of the Salmon Fisheries Act 1868, in respect that upon a certain occasion he had been guilty of fishing with salmon roe in the Tweed. When the complaint was brought before the Sheriff-Substitute three witnesses were examined by the Procurator-Fiscal (the respondent), and at the conclusion of their examination he abandoned the case. Thereupon, Walker's agent asked for expenses against the Fiscal, Mr Bathgate; but the Sheriff-Substitute intimated that, while he felt that it was a case for expenses, he had no power under the Act to give them. This finding was appealed to the Circuit Court at Jedburgh, whence it was certified to the High Court of Justiciary.

It was argued for the appellant that the complaint against him had been brought under the Summary Procedure Act of 1864, the 22d section of which bore that no expenses in case of an acquittal could be awarded against a public prosecutor, unless power to that effect were given in the Act, contravention of which was libelled. The Sheriff-Substitute had held that there was no such authority given by the Salmon Fisheries Act of 1868, or any of the Tweed Fisheries Acts. The appellant argued that the Sheriff was in error in that view. It was maintained, in the first place, that in this case the respondent had been really and truly in the position of a private complainer merely; and, in the next place, and more strongly, that taking Mr Bathgate to have been in the position of a public prosecutor, there was authority in the Tweed Fisheries Act of 1857 to award expenses against him, as asked in this case. That Act contained a provision for expenses against the accused in the event of a conviction, and, by implication, in case of an acquittal against the prosecutor. There was nothing in it to prevent the awarding of costs, as at common law and usage, against the prosecutor in case of an acquittal; and, unless the respondent could show that there was, he had no case.

Appellant's authorities—*Wilson v. Morison*, 2 Broun, 231; *Christie v. Adamson*, 1 Irvine, 293; *Scott v. Everett*, 15 D. 288.

It was argued, on the other hand, that the respondent had been undoubtedly in the position of a public prosecutor in this case. Expenses had only been awarded against the public prosecutor acting, not in his official capacity, but practically as a common informer. Also, under the 22d sec-