Friday, May 18.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

JOHNSTON *v.* WHITE.

Common Interest—Area—Common Property.

Held that the right of proprietors of the upper flats of a tenement in the area attached to the tenement is one of common interest only, giving them right to object to any building operations thereon by the proprietor of the ground-floor (who alone has a right of property in the area) that are to the injury of their property.

This was an appeal from the Magistrates of the City of Edinburgh, who have over those parts of the city lying, as the tenement referred to in this case did, outside the bounds of the ancient royalty, the jurisdiction of the Dean of Guild.

The petitioner, a grocer, occupying premises at the corner of Nicolson Square and Nicolson Street, presented a petition to the magistrates craving leave to make certain alterations on his property, and additions to it. The petitioner was proprietor of the floor on a level with the street and of the cellarage in the sunk flat. He proposed to cover over the area in front of his premises, and to extend his shop-front over it. The respondents were proprietors of the flats above the shop, and objected to the proposed operations, as tending to interfere with their rights as conterminous proprietors. The dispositions from which the rights of the petitioner and respondents respectively arose were nearly of the same date, the tenement having previously been occupied as a self-contained dwelling-house, and conveyed to the petitioner, besides the ground-floor and cellarage, a right "in common with the other proprietors of the tenement, of which the subjects hereby disponed form a part, to the *solum* of the ground on which the same is built, and whole rights, pertinents, and privileges belonging to the subjects hereby disponed;" to the respondents, besides the upper flats, "a right in common with the other proprietors to the area on which the said dwelling-house stands." There was no allegation of use of the area except by those on the ground-floor, and there was no access to it except through the petitioner's shop. The magistrates found that the area was common property, and that the petitioner was not entitled to build thereon without the consent of the respondents.

The petitioner appealed, and argued—There is a right of property in the area conveyed in his titles to the proprietor of the lower flat, and the right of the upper proprietor is merely one of common interest. The distinction between common interest and common property is a familiar one laid down by the authorities—Erskine, ii. 9, 11; Bell's Principles, 1071, 1075, 1086; *Anderson* v. *Dalrymple*, M. 12,831. And where such a common interest exists the proprietor of the lower tenements is entitled to make any alterations or additions on his own property that do not injure his superincumbent neighbours—*Dennistoun* v. *Bell*, March 10, 1824, 2 Sh. 784; *Murray* v. *Gullan*, March 10, 1825, 3 Sh. 639; *Stewart* v. *Blackwood*, February 3, 1829, 7 Sh. 362. The absolute property of the *solum* in the proprietor of the lowest storey is qualified by the interest that the other proprietors have in it—Lord Glenlee's opinion in *Stewart* v. *Blackwood*, *supra*, and Lord President's opinion in *Gellatly* v. *Arrol*, March 13, 1863, 1 Macph. 599. In the case of *Urquhart* v. *Melville*, December 22, 1853, 16 D. 307, the Court went a step further, and laid down that the proprietory right of any proprietor of any storey extends outwards to the limits of the property still burdened by his neighbours' common interest. That is the common law, which is further illustrated by the cases of *Brown* v. *Boyd*, July 13, 1841, 3 D. 1205, and *Lamont* v. *Cumming*, June 11, 1875, 2 Rettie, 784. The respondent has not here acquired any further right than that given him by the common law, and the petitioner is therefore entitled to build on this area in so far as his neighbours are not injured thereby.

Argued for the respondents—By the terms of the titles a right of common property in the area, *i.e.*, the whole plot of ground on which the house stands, as well as that portion in front of the sunk storey, was conferred on the respondents. Whatever right the petitioner has is identical with that of the respondents. There is therefore in this case a specialty not found in the other cases of proprietors of tenements of this description. In the case of *Melville* v. *Urquhart*, which the petitioner founds on, the operations on the lower storey had been executed, and by one who was at the time proprietor of the whole tenement. Its authority therefore was of no value in the present case, where there is at least a conflict of interests, if not a divided property, and where the operations have not yet been begun.

At advising—

Lord President—The tenement to which this question refers was originally built as a dwelling-house, and was at the south-east corner of Nicolson Square, fronting both Nicolson Square and Nicolson Street. It was conveyed to other parties some time ago—at what time does not precisely appear—and the street-floor and the sunk flat came to be occupied as a shop with storage and cellarage, and the upper floors as separate dwelling-houses. The petitioner here is proprietor of the shop and sunk floor along with the area and cellarage; the respondents are proprietors of the upper floors. The proposal of the petitioner is to project the shop-front outwards to the wall of the area. To this the respondents object, and their objection in the Magistrates' Court was confined to this, that they were the common proprietors of the area over which the petitioner proposed to build. The magistrates have sustained that plea, and have found that, "according to the titles of the two parties, the area in question is common property, and that the petitioner is not entitled to build over it without the respondents' consent." The question raised before us is whether this finding is correct in law, or whether the right that the respondents have is a common interest and not a common property. I am of opinion that on the authority of the decided cases the respondents have not a right of common property, but merely a common interest. The right of property in this storey and the area is in the petitioner, subject to the common interest of the respondents. The effect of that will be to recall

the operative part of the magistrates' order dismissing the petition, and it will then be for the magistrates to proceed on the footing that the right is a right of common interest, and they will still have to determine whether the proposed operations are injurious to the respondents' interests. To ascertain that there must be an investigation, which must be made by the magistrates, and as there is no averment of injury to the respondents' property nor plea to that effect, in order to lead to investigation the record must be opened up and some such averment and plea introduced. That may be done either in this Court or it may be remitted to the magistrates to do so.

Lord Deas concurred, observing that the question of injury to the respondents, who had a common interest, was the only question in the case.

Lords Mure and Shand concurred, remarking that the difficulty of the case was occasioned by the peculiar terms used in the titles, which seemed at first sight to convey more than a common interest which belongs by common law to proprietors in such a position as the petitioner and respondents here.

The respondents amended the record by adding an averment to the effect that the proposed alterations would injure their property, and pleading that, all parties having a common interest in the area, the petitioner should not be permitted to execute them.

Thereafter the following interlocutor was pronounced:—

"Recal the interlocutor of the Magistrates of 25th August 1876: Find that the area in question is not the common property of the petitioners and the respondents, but that it is the property of the petitioners, subject to a right of common interest in the respondents: Allow the respondents to add to the record the averment and plea-in-law now proposed; and the same having been made at the bar, hold the same as part of the record, and remit to the Magistrates to proceed farther in the matter of the petition as shall be just and consistent with the above finding: Find the appellants entitled to the expenses incurred by them in this Court, allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Petitioner—Asher—J. P. B. Robertson. Agents—Keegan & Welsh, S.S.C.

Counsel for Respondents—Moncrieff. Agent—James W. Moncreiff, W.S.

Friday, May 18.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

ROBB *v.* EGLIN.

Process—Sheriff—Decree by Default—Reponing—Sheriff Court Act 1876, *secs.* 20 *and* 33.

It is competent to appeal to the Court of Session for the purpose of being reponed against a decree by default pronounced by the Sheriff-Substitute, even before the expiry of the period within which it is competent to appeal to the Sheriff-Depute.

This was an appeal from the Sheriff Court of Lanarkshire in an action by James Robb, residing in Glasgow, against William Eglin, boot and shoe factor there, to recover the sum of £250 alleged to be due by the defender to the pursuer. The case was ordered to the Debate Roll in the Sheriff-Court of 27th February 1877, and when the case was called on that day no appearance was made for either party, and the Sheriff-Substitute, as directed by section 20 of the Sheriff Court Act of 1876, dismissed the action, finding no expenses due to either party.

The pursuer did not appeal to the Sheriff, but on the 10th March, while an appeal to the Sheriff was still competent under sec. 33 of the above Act, he appealed to the Court of Session.

It was stated in the Single Bills that at the time that the debate should have taken place in the Sheriff Court the process had been borrowed up to be transmitted to Edinburgh and produced in a Court of Session action pending between the same parties, which was set down for trial on the 8th of March.

The pursuer argued that the appeal was competent, and cited *Morrison* v. *Walker*, June 24, 1871, 9 Macph. 902.

The Court, in respect of the authority above cited, held that the appeal was competent, and reponed the appellant on payment of £3, 3s. of expenses to the respondent. They further remitted the cause back to the Sheriff-Substitute to be proceeded with.

Counsel for Appellant—Wallace. Agents—J. & A. Hastie, S.S.C.

Counsel for Respondent—Rhind. Agent—R. P. Stevenson, S.S.C.

Saturday, May 19.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

NIBLOE *v.* VICKERS AND MANDATORY.

Process—Sheriff Court—Decree by Default—Reponing—Expenses.

An action of accounting was brought in the Sheriff Court in 1875, and after protracted delays on both sides the defender in 1877 failed under certification to attend adjourned diets for examination of havers. The Sheriff