subject of objection in this case. It was decided in the other Division that the Table of Fees, which limits the charge for expert assistance, did not apply in the circumstances of that settlement. But the situation presented by the present case is essentially different. What happened is that after a proof had been allowed and parties had commenced to make their preparations for that proof they came together and agreed, not that the case should be settled with expenses to one of them, but that the procedure which the Court had ordered, viz., by way of proof, should be abandoned by joint consent and a remit to an accountant substituted for it. In short, the parties mutually agreed to have no proof, and consequently to scrap their preparations for it, and to substitute procedure by way of remit. Remit to an expert dispensed with expert assistance; and it seems to me impossible in these circumstances that Mr Robertson's clients should be held entitled to claim charges which were only justifiable upon the footing that procedure by proof before the Court had been adhered to. If they consented to that method of trying the case being abandoned and another method being substituted for it—for which other method the expenses incurred with a view to the first method could not be utilised — they cannot ask to be treated in the same way as they might have been entitled to be treated if the first method had been adhered to. I do not think therefore that the case of *Clements* has any application. The result is to leave the matter regulated by the Act of Sederunt, and the Act of Sederunt does not warrant the claim which the defenders make.

LORD CULLEN—I concur.

LORD ASHMORE—I concur.

LORD MACKENZIE and LORD SKERRINGTON were absent.

The Court approved the Auditor's report.

Counsel for the Pursuer and Reclaimer—Jamieson. Agents — Drummond & Reid, W.S.

Counsel for the Defenders and Respondents — Graham Robertson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, January 31.

SECOND DIVISION.

[Dean of Guild Court of Glasgow.

DEANS *v.* WOOLFSON.

Property—Common Property—Pro indiviso Proprietors — Rebuilding of Common Stair — Necessary Operation — Right of Co-proprietor to Object—Liability to Contribute.

Two separate buildings in a burgh adjoined a small piece of ground in which the proprietors of the buildings had each an equal *pro indiviso* right of property. An external common stair giving access to the buildings had been built on the ground in 1812, but was burned down in 1919. The proprietor of one of the buildings presented a petition to the Dean of Guild for a decree of lining to rebuild the common stair, in which he averred that he was willing to adjust the new stair so as to suit the other proprietor's building, and denied that he intended to charge his co-owner, who objected to the lining, with one-half of the cost of the rebuilding of the stair. The Dean of Guild granted decree. In an appeal the Court *affirmed* the interlocutor of the Dean of Guild, *holding* that the rebuilding of the stair was a necessary operation not to be stopped by the opposition of the joint owner.

Opinion of Lord Rutherfurd in *Brock* v. *Hamilton*, (1852) 19 D. 701, at 703, *approved.*

Opinion reserved (*per* Lord Sands) as to the liability of the other proprietor to contribute if he found no use for the stair.

John Kirkwood Deans, boot and shoe factor, Glasgow, *petitioner*, presented a petition in the Dean of Guild Court of Glasgow for authority to rebuild a common stair, to which petition objections were lodged by Philip Woolfson, warehouseman, Glasgow, *objector.*

The following narrative is taken from the note of the Dean of Guild *infra*:—"In this case the petitioner avers that he is proprietor of certain subjects at 157 Trongate, Glasgow, and that the respondent Mr Woolfson is proprietor of subjects lying to the west thereof; that the buildings of both petitioner and objector were sometime ago injured or destroyed by fire; that in particular there was injured or destroyed by fire a common stair or staircase on the portion of the subjects coloured dark red on the plan produced; and that the petitioner proposes to rebuild the said stair or staircase, and asks authority to do so. The objector Mr Woolfson avers that the common stair and entry were destroyed by fire about October 1919; that the ground on which the destroyed staircase stood (and on which the staircase now proposed by the petitioner is to be put up) belongs to the objector to the extent of one-half *pro indiviso*; that there is no obligation in the titles by which the petitioner or objector can compel each other to build; and that no lining can be granted affecting the said common ground unless on the application of all the owners thereof, and that the objector refuses to concur in such an application or to give his consent."

The objector and petitioner averred, *inter alia*—"(Objn. 5) Believed and averred that from a perusal of the titles a common stair and entry were erected between 1812 and 1821 and were used by the predecessors of both the petitioner and the objector as such. Further, averred that the said stair and entry were destroyed by fire about October 1919, and that while the ground belongs jointly to the objector to the extent of one-half *pro indiviso*, there is no obligation in the titles by which the petitioner or objector can

compel the other to build thereon, and that no lining can be granted in respect of said common ground unless on the application of the owners thereof, which the objector meantime refuses. The stair proposed is of no use or value to the objector, and the cost thereof under present conditions would be excessive and beyond any actual value it could have to the parties. (*Ans.* 5) The building of the stair between 1812 and 1821 and the destruction of it by fire in 1919 are admitted. *Quoad ultra* denied. In virtue of his title-deeds and at common law the petitioner is entitled to re-erect the said stair, and he cannot be deprived of the use of it by the capricious objections of the objector to concur in the reconstruction. (Objn. 6) It is further averred that the lining as presented shows that the erection now proposed is intended as a stair for the exclusive use of the petitioner's property, and is not, therefore, conforming with the stipulation in the title that the same shall be common to the property belonging to the petitioner and objector respectively and serve for the objector's property. It is also believed that the petitioner, if lining is granted, intends to make the objector pay one-half of the cost of erecting said stair (*Ans.* 6) Denied, and explained that the petitioner's plans are made to conform with the reinstatement of the staircase which was destroyed, and he has without prejudice offered to meet the objector's wishes as far as possible to place the landings where they would accommodate the objector, but Mr Woolfson declines to enter into any working agreement on the subject."

The objector pleaded, *inter alia*—"1 The lining being in respect of common property, the other proprietor of which is not consenting thereto, the same should be dismissed. 2. There being no obligation in the titles on either party to rebuild on this common ground, the petitioner is not entitled to the warrant craved at his own instance or to compel the objector to consent thereto."

The petitioner pleaded, *inter alia*—"1. The objections are irrelevant and should be repelled. 2. The petitioner, with or without the objector's consent, is entitled to reconstruct the staircase common to both."

On 9th June 1921 the Dean of Guild pronounced this interlocutor—"The Dean of Guild sists the case to allow the objector, Philip Woolfson, if so advised, to take proceedings in any competent Court to have the rights of the parties in the premises determined, and appoints the case to be put to the roll of the first Court to be held after one month from this date."

Note.—[*After the narrative supra, and after examining the titles of the parties and dealing with the question whether the case involved a competition of heritable right*]—"On the assumption, however, that the stair passage and solum in question are held by the petitioner and the objector in common property, another question is raised which the Dean of Guild thinks is not appropriate for decision in a process for lining in the Dean of Guild Court—that is, what are the rights and obligations of proprietors in common where buildings held in common have been destroyed and there is no regulation in the titles (which is the position here) as to restoration. It is agreed by both parties that the staircase which served both parties was destroyed by fire. The petitioner proposes to rebuild the common stair so destroyed. He avers, and the objector does not deny (Objection and Answer 6), that he has without prejudice offered to meet the objector's wishes as far as possible to place the landings where they would accommodate Mr Woolfson, but the latter declines to enter into any working agreement on the subject. The petitioner maintains that in virtue of his title-deeds he is entitled to re-erect the staircase with or without the objector's consent, or, alternatively, that the objector is not entitled to withhold his consent to the reconstruction, the petitioner being willing to alter or modify his plans to suit the objector's intended buildings so that persons using the same may have the use of the common stair to be erected. On the law of the matter the objector founds upon the elementary rule that in the case of common property there can be no interference except with the consent of all the proprietors in common. The petitioner, on the other hand, while admitting that elementary principle, founds upon the addendum to the rule stated by Bell in his Principles 1075 (10th ed.), that necessary operations in rebuilding, repairing, &c., are not to be stopped by the opposition of any of the joint owners. The statement in the first edition of Bell (1829), article 273, is that 'necessary operations in rebuilding, repairing, &c., are not thus to be stopt.' In neither the first nor the last edition is there any decision quoted for the statement. But the statement is repeated with approval by Professor Rankine in his work on Land Ownership (see 4th ed., pp. 590 and 591). The Dean of Guild thinks that what he has stated is sufficient to show that the attitude of the objector here raises questions of importance to proprietors in common, and that these are not questions which should be entertained in a Dean of Guild Court process. The Dean of Guild thinks that it is fair to Mr Woolfson that he should have an opportunity of vindicating in an action at law the rights which he claims for a proprietor in common who will not agree either to the restoration of the *status quo* or indeed to any operation, and the Dean has accordingly sisted the case for that purpose. Perhaps the sist may give time for a reconsideration by the objector of the whole position. It is right to add that it was stated at the hearing that for the purposes of a warehouse the petitioner's building requires an outside stair. Some of his flats could not be sub-let if there were no access such as the common stair would provide, and the Master of Works indicated that he would object to a building being occupied as a warehouse where the only access is internal. For the information of the Court of Appeal or any tribunal called upon to deal with this matter the Dean of Guild thinks it right to add that he is advised by his practical lyners, and is himself of

opinion, that there is no foundation for the objection of Mr Woolfson that the proposal of the petitioner as shown on the amended plans involves an encroachment on the objector's exclusive property, or the use of the wall which divides the petitioner's ground, which wall Mr Woolfson claims as his own exclusive property. Further, the Dean of Guild is advised, and is himself of opinion, that the proposed operations of the petitioner (while not restoring, brick for brick, the former staircase, and only providing for the requirements of the petitioner) have been so thought out and planned that on any indication by Mr Woolfson of a more neighbourly attitude his interests could be amply met at little cost."

On 14th July 1921 the Dean of Guild, in respect that the objector had not taken proceedings to have the rights of the parties determined as indicated in the interlocutor of 9th June 1921, recalled the sist and granted the lining craved.

The objector appealed, and argued—(1) The petitioner was not entitled to rebuild the stair. There was nothing to distinguish this case from the ordinary case of common property. Where common property was completely destroyed one of the owners could not compel his co-owner to take part in rebuilding it, or to allow it to be rebuilt. *Melior est conditio prohibentis.* The basis of the rule was that the *status quo* should be maintained. The law of tenements and mutual gables was special and did not apply. An owner of common property had his remedy in an action of division and sale. In the present case the stair had never been dedicated as an access to the petitioner's property at all. It was not the only access to the buildings. Bell's Principles (10th ed.) sec. 1075, and Rankine's Land Ownership (4th ed.) p. 590, were referred to. (2) The Dean of Guild ought not to have sisted the case. Even if he had been right in sisting the case, it was for the petitioner to have brought the declarator as to the rights of a co-owner in the common subject, because (1) the petitioner was the pursuer in the case; (2) the petitioner was founding upon an exception to the general law; and (3) if the objector had brought the declarator it would have been a negative declarator.

Argued for the petitioner—The case fell within the exception to the general rule set forth in Bell's Principles (10th ed.) section 1075, because the petitioner was not going to alter the stair but to rebuild it. Equitable considerations should be given effect to in applying the law—*Miller* v. *Crichton*, (1893) 1 S.L.T. 262; *Brock* v. *Hamilton*, (1852) 19 D. 701, *per* Lord Rutherfurd (Ordinary) at 703. Rankine's Land-Ownership (4th ed.) p. 677, was also referred to.

At advising—

LORD JUSTICE-CLERK—This appeal does not, I think, raise any general question as to what would happen in the case of an entire house being destroyed and requiring to be rebuilt. The circumstances here are peculiar. A small piece of property in a back court was sandwiched in between two separate buildings. It was recognised that a common stair, which would serve the purpose of both of these buildings, would be of great use to the two buildings. Accordingly a common stair was built on this small piece of ground early in the beginning of last century. It remained until early in this century, when it was destroyed by fire. The proprietor of one of these adjoining buildings now wishes to restore the common stair as it was before the fire. We have it explained by the Dean of Guild that if there were no external access by this common stair there probably would be a difficulty in the former method of occupation being permitted by the public authorities. That may or may not be the case. But at any rate the petitioner applied to the Dean of Guild Court desiring to get this common stair restored to the use and purpose to which it was applied before it was destroyed by fire. To secure this, application to the Dean of Guild Court was necessary, for the Dean of Guild regulations in Glasgow require that a lining should be applied for and should be granted in such circumstances. The other joint proprietor lodged answers objecting to the application. The objector maintains that his rights are of this absolute quality, that because this is common property nothing can be done without the joint consent of both the proprietors. He founds on the rule of law that without joint assent nothing can be done to affect the common property in any shape or form.

I think that rule might hold in many cases, probably in the majority of cases, because in most cases there is a remedy available in the shape of an action of division and sale. Here that would not be reasonably fair to the parties at all, because the result might be that this petitioner, who desires really to get his property restored to the condition in which it was before the fire took place, might have this small piece of ground carried away from him by an outside purchaser or have to pay a much enhanced price for it in order to get the same accommodation as he had before.

The rule as to what the objecting joint proprietor's rights are is, in my opinion, pleaded much too high by Mr Hunter. The opinion of Lord Rutherfurd to which we were referred seems to show quite clearly that equitable considerations have to be applied in such cases as this. Professor Bell, who apparently is the only writer who has dealt with this subject, states an exception to the absolute rule. He says—"The exception to this rule is that necessary operations in rebuilding, repairing, &c., are not to be stopped by the opposition of any of the joint owners." That seems a most proper and equitable consideration, and one which ought to receive effect just as Professor Bell states it.

In my judgment the Dean of Guild has adopted the proper course here. Whether it was necessary for him to give an opportunity to the objector to vindicate his rights up to the measure he urged them or not is a different matter, but he gave him that

opportunity, apparently being of opinion that in the circumstances of this case the burden of vindicating his rights up to that extent must lie upon the objector and not upon the petitioner, whose only desire was to restore things to the *status quo ante*. Whether it was necessary for the Dean of Guild to do that or not we need not consider; he gave the objector an opportunity of doing so and the objector declined to avail himself of it. Where a common proprietor desires to have a building restored to the condition in which it was before the fire and does not make any demand for a contribution from his co-proprietor, and states further that he is willing to consult his co-proprietor as to the adjustment of the new common stair, so that if and when he wishes to use it he may find it suitable for his property, I think that the petitioner is entitled to get the lining he asks, and that the Dean of Guild was right in holding that the proper thing to do was to allow the joint proprietor who desired to restore the building to get it restored, and was right in granting the lining and the necessary warrant to allow the operations to be carried into effect.

LORD ORMIDALE—I agree that the Dean of Guild was right in granting the lining which he was asked to grant. In coming to that conclusion I do not think it is necessary to lay down any general rule of law, for the circumstances are very special. The common property which is the *de quo* had been occupied as a staircase from 1812 down to about 1920, when it was destroyed by fire. I am not at all certain that in seeking to restore it the petitioner in the Dean of Guild Court was really seeking to interfere with the common property. On the contrary, it appears to me that in a very true sense the respondent in the Dean of Guild Court by venturing to oppose its restoration was really interfering with the common property in question. Whether that be so or not, looking to the nature of the subject and to the fact that this small portion of common property has been used from the year in which the staircase was erected as a means of access common to the two adjoining tenements, and not being in the position of the perfect house to which we were so often referred (quite rightly) by Mr Hunter by way of illustrating his argument, the exception stated by Professor Bell in the 1075th section of his Principles, to the general rule *melior est conditio prohibentis*, is in my opinion applicable. I am not surprised that there should be an exception to that rule, and further, the opinion of Lord Rutherfurd to which we were referred shows that there is room for equity in dealing with this subject. I am satisfied that if we were not able to give the petitioner the relief which he seeks a very grave inequity would arise. I think the petitioner here is asking a lining for no other purpose than the rebuilding of the subjects in the sense in which that term is used by Professor Bell. Accordingly the Dean of Guild was warranted in giving the lining he was asked to give.

LORD SANDS—I agree. This is not a case of a separate and independent property. It is quite clear from the titles of 1812 and 1822 and what we know of the history since that this piece of ground was dedicated to serve as the site of a common stair for the two buildings. It was not intended as property to be held and enjoyed separately; its use was ancillary to the use of the respective buildings. What the objector here proposes is really to prevent the property now being used for the purpose for which it was intended and to serve which this joint ownership was created. I have only to add—and I think your Lordships are all agreed—that no question of liability for contribution here arises. It may be—I express no opinion on the question—that the appellant if he finds no use for the stair will be under no liability to contribute.

LORD DUNDAS was absent.

The Court affirmed the Dean of Guild's interlocutor and dismissed the appeal.

Counsel for the Appellant (Objector)—Hunter. Agents—Laing & Motherwell, W.S.

Counsel for the Respondent (Petitioner)—Hon. W. Watson, K.C.—Jamieson. Agents—Auld & Macdonald, W.S.

Wednesday, February 1.

FIRST DIVISION.

WEBB (ARCHIBALD HALL & COMPANY, LIMITED, IN LIQUIDATION), PETITIONER.

Company—Winding-up—Appointment of Committee of Inspection — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 188 (2) *and* (3).

A creditor of a company in voluntary liquidation, acting on behalf of the creditors and with consent of the liquidator, presented a petition under section 188 of the Companies (Consolidation) Act 1908 for the appointment of a joint liquidator and of a committee of inspection. No answers were lodged. The Court *granted* the application.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 188—"(1) Every liquidator appointed by a company in a voluntary winding-up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held. . . . (2) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and if the creditors so resolve an application may be made accordingly to