course of the argument both parties have admitted that the whole evidence is before us. I agree that the bare fact that a lower rent than that stipulated in the lease appears in the valuation roll is not sufficient to prove that the parties had concluded a different contract from that which appears on the face of the lease, and in the absence of other evidence I agree that the landlord is entitled to rank for the arrears of the rents due to him under the stipulations of the lease.

LORD KINNEAR—I agree entirely with your Lordships, and think the trustee has made no sufficient statement to justify us in remitting the cause back to him. If it had been said that he had now discovered evidence which was not previously before him, that would be a different case, but we have no statement of any specific piece of evidence which would make the case different from what it was when it was previously before him.

The Court recalled the judgment of the Sheriff, and remitted to him to direct the trustee to rank the appellant for the arrears of rent due to him under the lease.

Counsel for Appellant—Craigie. Agents—J. & F. Anderson, W.S.

Counsel for Trustee—Law. Agent—John Rhind, S.S.C.

Thursday June 16.

SECOND DIVISION.

[Lord Low, Ordinary.

MAVOR & COULSON *v.* GRIERSON.

Expenses—Expenses of Process—Tender—Reasonable Conduct of Defender.

A firm of electric contractors raised an action against a person whose house they had lighted with electricity, for £169, 0s. 7d., the balance of their account. After the summons had been signeted, but before it was called, the defender offered the pursuers £155 in full of their claims. This offer was refused. In the defences to the action the defender tendered the pursuers £50 "in full of their claims in this action." The Court in decerning against the defender for payment to the pursuers of £44, 13s. 1d., *held* that the defender was entitled to expenses of process.

In May 1890 Messrs Mavor & Coulson, electric light engineers and contractors, Glasgow, entered into a contract with Henry Grierson, Craigend Park, Liberton, to light his house by electricity at the cost of £1100. This sum was exclusive of mason and joiner work in the engine and battery-house, foundations for engine and dynamo, and of fittings.

The accounts rendered by Messrs Mavor & Coulson for the value of goods supplied and work done amounted to £1471, 14s. 9d. Of this amount Mr Grierson paid £1302, 14s. 2d. in successive payments, the last of which was made on 11th December 1890. Mr Grierson refused to pay the balance of the account until he had inspected the items with Messrs Mavor & Coulson, and got explanations from them, as he held that the work had not been executed in terms of the contract, that it had not been carried out in a satisfactory and workmanlike way, and that part of it was still unfinished.

After a long correspondence between the parties, Messrs Mavor & Coulson raised an action against Mr Grierson for the payment of £169, 0s. 7d., the balance of their account. The summons was signeted on 22nd May 1891.

On 24th June 1891 the defender made an offer of £155 in full of the pursuers' claim. This offer the pursuers refused to accept.

On 15th July 1891 the defender offered to pay the pursuers the whole amount sued for if they would satisfy him that there were 150 electric lights in his house as charged for in the account. The pursuers on 30th July sent to the defender a list showing 150 lights. On 6th August the defender wrote the pursuers stating that an expert had informed him that 18 more lights were charged for than really existed, and asking for an explanation. The only reply to this was a letter dated 11th August 1891 from the pursuers' agents that the pursuers had instructed them to call the summons on the first box-day.

The defender lodged defences, in which he made the following tender—"In order to avoid litigation the defender tenders to the pursuers the sum of £50 in full of their claims in this action."

A proof followed, and on 14th April 1892 the Lord Ordinary (LOW) decerned against the defender for payment to the pursuers of the sum of £128, 4s. 2d. with interest, and found the defender liable in expenses, subject to modification.

The defender reclaimed, and on 16th May the Court recalled the interlocutor of the Lord Ordinary and decerned against the defender for payment to the pursuer of the sum of £44, 13s. 1d.

Counsel were then heard on the question of expenses.

Argued for the pursuers—No expenses should be awarded to the defender. His extrajudicial offer of £155 had not been repeated on record, and therefore could not be looked at, while the offer of £50 in the defences was not accompanied by a tender of expenses down to date, and was therefore of no avail in a question of expenses—*Critchley* v. *Campbell*, February 1, 1884, 11 R. 475; *Gunn* v. *Hunter*, February 17, 1886, 13 R. 573.

Argued for the defender—The Court was entitled to act according to their discretion in the matter of expenses. They could look at the reasonable or unreasonable conduct of the parties to the action and award expenses accordingly — Lord President M'Neill's opinion in *Aitchison* v. *Steven*, November 24, 1864, 3 R. 82. The cases

quoted by the pursuers did not interfere in any way with the discretion of the Court in deciding such questions as the one raised here; in fact these cases were in favour of the defender's present contention. Here the defender's conduct throughout had been most reasonable, and the pursuers had been found entitled to over £100 less than they had been offered by the defender at first. The defender should therefore get his expenses.

At advising—

LORD JUSTICE-CLERK—I do not think it is necessary to go into the difficult question as to whether this matter of expenses can be decided according to some strict rule. I think it is a matter in our discretion to be disposed of according to what we consider the reasonableness of the manner in which parties have acted.

The defender has been successful in largely reducing the pursuers' claim. Now, considering the facts of the case, I think we are entitled to take into account the fact that before the case was proceeded with—before the summons was called—the defender formally intimated his willingness to pay the pursuers a larger sum than even the Lord Ordinary found to be due, and that during the action the defender repeated his offer to pay a sum greater than we have now held to be the amount of his liability. In these circumstances I think we are entitled to hold that this litigation was wholly unnecessary. I think that the defender should not be a sufferer from it, and that he ought to be found entitled to his expenses.

LORD YOUNG—I am of the same opinion. I attach weight to this, that in all the important points of law and fact, in all the material subjects to which the proof relates, the defender has been successful. I agree therefore that he should have his expenses.

LORD RUTHERFURD CLARK—I am of opinion that this is an unnecessary litigation, one which should never have been raised. I am therefore of opinion that the defender is entitled to his expenses.

LORD TRAYNER—I also think the defender is entitled to his expenses. I do not so decide because of the tender which he has made on record, but, following the Lord President's judgment in the case of *Gunn*, because the defender's conduct has been throughout so reasonable that he should be found entitled to his expenses.

The Court found the pursuers liable in expenses.

Counsel for Pursuers—Comrie Thomson—Salvesen. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for Defender—Jameson—G. G. Grierson. Agents—Scott & Glover, W.S.

Thursday, June 16.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

SCOTT'S TRUSTEES *v.* SHAW.

Burgh—Dean of Guild—Edinburgh Municipal and Police Amendment Act 1891, *sec.* 50—*Reduction of Open Space—Discretion of Dean of Guild—Saloon—Ventilation.*

The Edinburgh Municipal and Police Amendment Act 1891, by section 50, provides that "Every new house, and any building altered for the purpose of being used as a house, shall have in the rear thereof" a certain open space: . . . "Provided always, that in any case where the thorough ventilation of any house or building is in the opinion of the Dean of Guild Court otherwise secured . . . the said Court may in their discretion allow the open space to be reduced: Provided also, that in the case of the erection of houses with shops on the ground floor, or of the conversion of a house into a building to be used for business premises only, the Dean of Guild may sanction the erection of saloons upon such open space." . . .

The proprietors of a house presented a petition to the Dean of Guild Court for warrant to convert the ground and basement storeys into business premises, and to erect a workshop on the open ground behind the house. The Dean of Guild granted the prayer of the petition. He also expressed himself satisfied with the ventilation of the house.

Held, aff. the interlocutor of the Dean of Guild, that the building in question rather fell under the 2nd proviso of the 50th section of the statute, in which case the Dean of Guild could grant warrant to erect buildings such as were contemplated here, being of the nature of a saloon, but that even if the building was to be regarded as "a house," the Dean of Guild being satisfied as to the ventilation, could allow the open space behind to be occupied.

Observed that the ventilation to be attended to was that of the building which it was proposed to erect, and not that of neighbouring houses.

Miss Henrietta Balfour Scott and others, trustees of the late Rev. Thomas Scott, minister of the parish of Newton, proprietors of the subjects at 9 Gayfield Square, Edinburgh, presented a petition to the Dean of Guild Court there for warrant to execute certain building operations upon said subjects. The petition was opposed by James Shaw, proprietor of 8 Gayfield Square, and a record was made up, in which the petitioners averred that they craved warrant "to convert the ground and basement storeys of said subjects into business premises, . . . and to erect a workshop on the open ground behind the house." They explained that they intended