

Saturday, July 10.

SECOND DIVISION.

[Dean of Guild Court  
of Dundee.

BLAKENEY v. RATTRAY'S TRUSTEES.

*Property—Building Restriction—Height of Building in Town—Dundee Police and Improvement Consolidation Act 1882 (45 and 46 Vict. cap. cxxxv), sec. 130.*

The Police Act of a burgh provided for there being a clear space behind every dwelling-house to be erected, and also that "if in any new building the ground floor is designed for and to be occupied as shops . . . the Commissioners [of Police] shall notwithstanding that the building otherwise is intended to be used as a dwelling-house . . . permit the erection of saloons or warerooms in connection with such shops . . . and immediately behind the same, but the level of such saloons or warerooms shall in no case exceed in height the level of the ceiling of such shops." . . . A new building consisted of dwelling-houses above and a shop below, which was divided into two floors. Held that it was lawful to build the saloon up to the level of the upper of these floors.

On 24th March 1886 Thomas Samuel Blakeney, warehouseman, Dundee, presented a petition to the Dean of Guild of that burgh for warrant to erect a tenement to consist of a shop and dwelling-houses, and of a saloon and accessories thereto, upon a piece of ground at the north-west corner of Whitehall Street, which he had feued from the Police Commissioners as local authority of the burgh. The petition was served, *inter alios*, upon Gray Bisset, solicitor, Dundee, and Miss Agnes Rattray, residing at 3 Osborne Place, Dundee, trustees acting under the trust-disposition and settlement of the late James Rattray, jeweller, Dundee, and on Mrs Rattray as an individual, as conterminous proprietors. They lodged objections to the petition. A record was made up.

The defenders averred that the saloon behind their (defenders') building which the petitioner proposed to erect was not according to law, in respect (1) that the level of the ceiling of the proposed saloon would exceed in height the level of the ceiling of the shop on the ground-floor of the petitioner's intended building, and that this was contrary to the provisions of the Dundee Police and Improvement Consolidation Act 1882, sec. 130, quoted *infra*; (2) That the erection of the saloon to the height contemplated would have a prejudicial effect upon the light of their (defenders') property.

The petitioner maintained, *inter alia*, (1) that it was *jus tertii* of the defenders to object to the height of the saloon, they having no right of servitude or other right over the subjects in which the saloon was proposed to be erected; (2) that the Dean of Guild had no jurisdiction to review the Police Commissioners' deliverance as regarded the height of the saloon. He also averred that no damage would be done to the respondents' property, and that as regarded that he was willing

to execute the work to the satisfaction of anyone appointed by the Court. The feu-contract under which the petitioner had feued the land on which he was desirous of building the tenement provided that the buildings should be conform to elevations provided by the Police Commissioners, and to plans to be approved by them, and "without prejudice to what is before written, it is also hereby specially provided and declared, that buildings consisting of shops and flats above, of not more, including said shops, than four storeys in height, with saloons of one storey behind, shall be alone erected."

On 14th April 1886 the Lord Dean of Guild having heard parties, and visited the premises, issued an interlocutor by which he repelled the objections and defences of the respondents, granted warrant to the petitioner to erect the tenement of a shop, and dwelling-houses, and saloon and accessories, mentioned in the petition, as craved, but appointed the work so far as adjoining the respondents' property, to be executed at the sight and to the satisfaction of Alexander Duncan, builder in Dundee.

"*Note.*— . . . The remaining objection applies solely to the saloon, the respondents contending that its height was in contravention of section 130 of the Dundee Police and Improvement Consolidation Act 1882. That section provides, *inter alia*, 'that if in any new building the ground-floor is designed for and to be occupied as shops or business offices, the Commissioners shall, notwithstanding that the building otherwise is intended to be used as a dwelling-house or for dwelling-houses, permit the erection of saloons or warerooms in connection with such shops or offices, and immediately behind the same, . . . but the level of the ceiling of such saloons or warerooms shall in no case exceed in height the level of the ceiling of such shops and offices.'

"Now, on referring to the plans in process, which bear to be approved of by the commissioners, it will be seen that the petitioner in his building intends to occupy the lower portion, consisting of two sections, as a shop, and the upper portion consisting of three distinct flats, as dwelling-houses, and that the level of the ceiling of the saloon does not in point of fact exceed the level of the ceiling of the portion of the building designed for and to be occupied as a shop.

"But it was urged, notwithstanding, that the proviso applied to a shop or office solely and exclusively on the ground floor, and that as in this instance the shop though internally one was divided according to the plans into two floors, the height of the ceiling of the saloon fell to be restricted to the height of the level of the ceiling of the lower floor.

"The question thus raised is not unattended with difficulty, but as every proprietor at common law is unrestricted in the height of his building, any restraint falls to be strictly construed, and to be effectual must in its terms be express and unequivocal. Applying this canon of interpretation, and having in view the declared object of the statute to secure an open space behind new buildings, or portions of new buildings, occupied as dwelling-houses, for ventilation and other purposes, it appears to the Dean that the interpretation urged is too rigid, and that the sound con-

struction is that the level of the ceiling of the saloon must not exceed in height the level of the ceiling of the shop, whether that consists of one or more floors, so long as it is in fact only one shop. In other words, the open space required, and which must be unbuil on by the Act, is opposite that portion of the building designed for dwelling-houses, the object in view being to secure free air and thorough ventilation for the dwellings.

"The plea that the height of the saloon would be prejudicial to the lights of the respondent's property is clearly untenable, as under the provisions of the Act the open space or area has reference solely and directly to the protection of light and air for the benefit of the dwelling-houses in 'new buildings' without regard to the neighbouring properties.

"As the Dean is of opinion that the respondents were justified in appearing in order that the part of the operations in which they were interested might be carried out under supervision, and as various pleas have been advanced that have not been sustained, it has to some extent been a case of mixed success, and therefore expenses have not been awarded."

The defenders appealed to the Court of Session, and argued—The Act contemplated only that the ground floor was to be used as a shop and offices, and any saloon erected behind that part must be of the height of the ceiling of the ground floor only. If any division was made internally, then the saloon must be only of the height of the division. The provision was intended for the benefit not only of the persons living above the shop but also to secure ventilation for the houses round about. Here the saloon was meant to be the height of two floors, and therefore was against the provisions of the Police Act.

The petitioner's counsel was not called upon.

At advising—

LORD JUSTICE-CLERK—I have been unable to discover in what respect it is said there has been a contravention of the 130th section of the Dundee Police Act of 1882. The provisions of that clause are perhaps not of the most lucid description, but the intention and, I think, the result are clear enough. There is leave given to build shops, &c., on the vacant space in question, provided that "if in any new building the ground floor is designed for and to be occupied as shops or business offices the Commissioners shall, notwithstanding that the building otherwise is intended to be used as a dwelling-house or for dwelling-houses, permit the erection of saloons or warerooms in connection with such shops or offices, and immediately behind the same," unless they see reason to determine otherwise; "but the level of the ceiling of such saloons or warerooms shall in no case exceed in height the level of the ceiling of such shops and offices." In the present case there is a shop, and the ceiling of the shop is of the height of two storeys, and this saloon is only alleged to be higher than the ceiling of the shop would have been if the shop had consisted only of one floor. As I understand it, the real meaning of the provision is, that when it is only a shop, the saloon may be as high as the shop. I think the Dean of Guild is right, because in the strictest con-

struction of these words what has been done is precisely in accordance with the terms of the statute.

LORD YOUNG—I am of the same opinion, and think the judgment of the Dean of Guild is right, and clearly so. The clause on which the objection is founded is applicable to every building intended to be used as a dwelling-house, and requires that it should have a clear space behind. But if the building was intended to be used as shops or anything but dwelling-houses the rule as to clear space has no application at all; there is no provision for vacant space behind. But then it occurred to the framer of the Act that buildings might be erected and used partly for one purpose and partly for another; and the part of the clause which is founded upon applied to that case. Of course the reason of the thing would apply to shops on the upper floor and dwelling-houses on the under. The purpose being to secure ventilation of dwelling-houses, if the dwelling-houses were below and the shops above that would be a good reason against an erection behind. But if the shops were below and the dwelling-houses above one might, so far as there were shops, erect saloons behind, leaving the ventilation of the upper portion entirely free. The height does not signify in the least, because otherwise it would be quite irrational. If the height of the shop extended to the very slates, then the liberty to build behind extends to the very slates; and the division of the shop within—whether it had one floor or half-a-dozen floors—was of no matter or consequence to anybody.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The Court refused the appeal.

Counsel for Trustees—Guthrie—Macfarlane. Agents—Henderson & Clark, W.S.

Counsel for Petitioner—D.-F. Mackintosh, Q.C.—Murray. Agent—J. Smith Clark, S.S.C.

## HOUSE OF LORDS.

Tuesday, June 29.

(Before Lord Chancellor Herschell, Lords Watson, Blackburn, Fitzgerald, and Ashbourne.)

ANDREWS AND OTHERS v. EWART'S TRUSTEES.

(*Ante*, May 27, 1885, vol. xxii. p. 60; 12 R. 1001.)

*Trust—Personal Liability of Trustees—Application by Trustees of Capital of One Trust to Restore that of Another where Income of Both Applicable to Same Purpose.*

James Ewart by his will appointed funds to be employed in founding a ragged school. John Ewart subsequently died, and left £7000 to the trustees of James for the same object, but with power, if they considered that the funds of James were sufficient for