

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

to allow the proposed buildings to be used partly as an office of a wholesale tobacconist and partly as premises for the purpose of spinning tobacco, and that it was not proposed to use in any way the said proposed buildings as a dwelling-house.

The respondent averred, *inter alia*—“The petitioners' proposed alterations contravene the 50th section of the Edinburgh Municipal and Police Amendment Act 1891 by not leaving an open space adjacent to the existing dwelling-house of the extent prescribed or to any extent. It is proposed to alter the existing house for the purpose of still being used as a dwelling-house in the basement, the first and other storeys thereof. The proposed buildings upon the said open space are not saloons. The respondent accordingly objects to the proposed operations as being in violation of the said 50th section.”

The Edinburgh Municipal and Police Amendment Act 1891, by section 50, provides—“Every new house, and any building altered for the purpose of being used as a house, shall have in the rear thereof, or immediately adjacent thereto, an open space at least equal to three-fourths of the area to be occupied by the intended house where such house is not of greater height than four storeys, and where such house shall exceed that height, such open space shall be of equal area with that of such house, and such open space shall be free from any erections thereon other than waterclosets, coal houses, or other conveniences to be used in connection with such house, all which conveniences shall, as to height, position, and dimensions, be erected subject to the consent and approval of the Dean of Guild Court: 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, or under other special circumstances, 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 Court may sanction the erection of saloons upon such open space of such height and construction as to them shall seem proper, such saloons to continue so long only as such building is so used for business purposes: Provided further, that from and after the passing of this Act, all existing houses having any open space adjacent thereto shall, as regards such open space, be subject to the foregoing provisions of this section applicable to new houses to the extent to which such open space is available.”

Upon 14th April 1892 the Dean of Guild (MILLER) pronounced the following interlocutor:—“Having heard counsel for the parties on their plans, pleadings, and titles, and considered the whole cause, Finds that the petitioners' operations are confined to their own property, and can be executed without danger: Finds that the proposed operations are not in contravention of the

provisions of the Edinburgh Municipal and Police Amendment Act 1891, founded on by the respondent, &c.

“*Note.*—The petitioners desire to convert the ground and basement storeys of their house No. 9 Gayfield Square into business premises, and to erect a workshop on the garden ground behind. The respondent objects that the proposed operations would be a contravention of section 50 of the Edinburgh Municipal and Police Amendment Act 1891. . . .

“Section 50 of the Edinburgh Municipal and Police Amendment Act 1891 is in these terms—[*as given above*].

“Now, this is not a ‘new house,’ nor, in the sense of the Act as the Dean of Guild reads it, ‘a building altered for the purpose of being used as a house;’ it is not the ‘conversion of a house into a building to be used for business premises only,’ but it is very like the ‘erection of a house with a shop on the ground floor.’ It is the alteration of a house by converting the ground floor into business premises. The basement plan shows a kitchen and bedroom, and workshop behind; the ground floor plan shows an office and a room and workshop behind; the first floor plan shows a kitchen and sitting-room; and the attic plan shows a bedroom.

“The idea of the Act seems to be that in such a house there is a smaller resident population, and therefore less need of open space. Now, such premises are permitted to have saloons, and, so far as the Dean of Guild is aware, this description is not so appropriated to any particular and different kind of erection as to prevent its application to the long low building which the petitioner desires to erect in his background. He seems therefore to have under this section a direct right to the Dean of Guild's warrant, but even supposing this particular part of the section does not directly apply, the Dean of Guild thinks that in this case the matter of ventilation is left to his discretion. Even supposing this is ‘an existing house having an open space adjacent thereto,’ and that the provisions of this section must apply to it, the Dean of Guild thinks that it would still be open to him to permit the present proposals if he were satisfied that the ventilation of the premises was satisfactorily secured. On the question of ventilation the Dean of Guild has no doubt. The Burgh Engineer has examined the plans, and has made certain suggestions, which the petitioners must carry out as a condition of obtaining warrant. When these are given effect to, the Dean of Guild is of opinion that in view of the general circumstances of this house and its locality, the thorough ventilation of the premises is amply secured.”

The respondent appealed to the Court of Session, and argued—(1) It was competent for him to bring the provisions of the Edinburgh Municipal and Police Amendment Act 1891 under the notice of the Court whether he were injured or not. (2) This was “a house” in the sense of the 50th section of that statute. Under that section it was compulsory that there

should be an open space behind. The Dean of Guild had gone beyond his powers in allowing a building to be erected which would not merely "reduce" that space, but abolish it. (3) Further, the Dean of Guild had not provided for the appellant's ventilation being respected. (4) If this were not "a house," but "a building to be used for business premises," then the Dean of Guild could only sanction the erection of "a saloon," which was a building of one storey, whereas the buildings to be erected were to be of two storeys.

Argued for petitioners—The appellant's averments were irrelevant. (1) He had no right to appear and draw attention to the 50th section of the Municipal Act. (2) He had said nothing about ventilation upon record. (3) But looking at the statute, the Dean of Guild was justified in what he had done, for this was either "a house," in which case he could reduce the open space behind to any extent upon being satisfied that there would still be sufficient ventilation—see *Pitman, &c. v. Burnett's Trustees*, January 26, 1882, 9 R. 444 (Lord President Inglis, 450, and Lord Shand, 452), which related to the corresponding section (163) in the Edinburgh Municipal and Police Act 1879; or this was "business premises," in which case he could grant warrant to erect a saloon, which was really what was to be erected here. (4) As indicated by the trustees in *Pitman's* case, it was only the ventilation of the house to be erected the Dean of Guild had to consider.

At advising—

LORD PRESIDENT—I think this judgment can be supported, and should be affirmed on the ground stated by the Dean of Guild towards the close of his note. He says—"Even supposing this is 'an existing house having an open space adjacent thereto,' and that the provisions of this section (50th) must apply to it, the Dean of Guild thinks that it would still be open to him to permit the present proposals if he were satisfied that the ventilation of the premises were satisfactorily secured." Although this was not a new house, it had an open space adjacent to it, and accordingly under the last proviso of the 50th section the provision in question applied to it. Well, then, the Dean of Guild has proceeded to exercise his jurisdiction under this section, and he does so for the purposes and under the conditions stated in the case of *Pitman*. He has to consider the interests of the ventilation of the house in question, and make up his mind whether it is secured. That is a matter with which the neighbour has nothing to do, and to say, as this appellant says, or said in his original statement, that the proposed building will injure the light, ventilation, or sanitary state of his property is to introduce a question alien to that which has to be considered under the 50th section. Accordingly, I think that so far as this section is concerned, the appellant has no business to interfere, and that his statements are irrelevant.

LORD ADAM, LORD M'LAREN, and LORD KINNAR concurring.

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The Court dismissed the appeal.

Counsel for Petitioners and Respondents—Dickson—Craigie. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent and Appellant—C. K. Mackenzie. Agents—Macandrew, Wright, & Murray, W.S.

Friday, June 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MAGISTRATES OF GLASGOW v. CALEDONIAN RAILWAY COMPANY.

Arbitration—Question to be Decided by Arbitrator in terms of Statute—Exclusion of Ordinary Action.

The Glasgow Central Railway Act 1888, passed for the purpose of permitting the Caledonian Railway Company *inter alia* to construct a railway under a part of Glasgow, provided in section 39 that the company should not at any one time be entitled to enclose for the construction of the railway a greater extent of the surface of Argyle Street than 50 feet long by 17 feet wide with intervals of not less than 200 yards between such enclosure. The Act further provided in section 41, that if the railway company and the Glasgow Corporation should differ as to any of the provisions of that or the two preceding sections, such differences should be referred to the determination of an arbitrator, to be mutually agreed upon by the company and the corporation.

A dispute having arisen between the company and the corporation as to whether the former were entitled to occupy a greater extent of the street than that specified in section 39 of the Act by covering it with materials, &c., beyond the enclosures—*held* that such a dispute was, in terms of section 41 of the Act, a difference to be determined by the arbitrator, and that the Court had no jurisdiction in the matter.

The Glasgow Central Railway Act 1888 (51 and 52 Vict. cap. 194) authorised the Caledonian Railway Company to construct certain railways in tunnel and otherwise throughout the City of Glasgow, and other works in connection therewith. By section 39 of the said Act it is enacted—"Subject to the provisions of this Act, the company may, for the purpose of constructing the railways (whether the same be shewn on the deposited plans as to be constructed in tunnel or otherwise), temporarily cross, alter, break open, stop up, or divert any streets, . . . shewn on the deposited plans and described in the deposited book of reference, and may during such construction, use and appropriate any of the streets, . . . so stopped up or diverted, and may also from time to time during such construction

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