

Tuesday, March 20.

FIRST DIVISION.

WHYTE v. BRUCE.

Burgh — Police — Building Restrictions — Statute - Labour Road — Alterations on Existing Buildings—Glasgow Police Act 1866 (28 and 29 Vict. c. cclxxiii.) sec. 366.

Section 366 of the Glasgow Police Act 1866 provides that "The Dean of Guild shall not grant a warrant to erect any building except a stone wall not exceeding 6 feet in height within 20 feet of the centre of any portion of a statute-labour road within the city." *Held* (1) that a road proved to have been originally a statute-labour road was not excepted from the provisions of this section by being included as a public street in a register of public streets made up under the provisions of local Acts applicable to Glasgow; and (2) that the restrictive provisions of the section did not apply to an alteration of and addition to buildings exceeding 6 feet in height which had existed without challenge for a number of years.

Statute — Local and Personal Acts — Construction.

Observed (per Lord President) that section 366 of the Glasgow Police Act 1866 should be construed in accordance with the rules applicable to private Acts, in the case of which the benefit is given to those who might be prejudiced by the exercise of exceptional restrictions.

In February 1899 John Wilson Bruce, proprietor of subjects situated in North Woodlands Road, Glasgow, applied to the Dean of Guild for a lining authorising him to make certain alterations on these subjects. John Whyte, Master of Works, Glasgow, lodged objections in the following terms:—"The petitioner having altered the plans lodged by him in process, now proposes to erect on ground situated on the south-east side of North Woodside Road a building on the top of a wall on the side of said road as shown on the said plans. That building is not to be 20 feet from the centre of said road, which is a statute-labour road, and should when built upon be kept of the width of 20 feet on each side of the centre thereof as provided for in section 366 of the Glasgow Police Act 1866. The lining should accordingly not be granted on the line of the road shown on said plans."

In his answers Mr Bruce made the following statement:—"These present buildings do not conform to the provisions of section 366 of the Glasgow Police Act 1866, on the assumption that North Woodside Road is a statute-labour road, which the petitioner does not admit. The wall referred to by the respondent in his objections is the outside wall of the existing buildings, which varies in height, but at all points considerably exceeds in height 6 feet, which is the limit fixed by section 366 of said Act. The roof of said buildings rises higher than the outside wall."

He pleaded—" (1) *Esto*, that North Woodside Road is a statute-labour road, the statutory provisions as regards the distance at which buildings can be erected from the centre of the road not having been hitherto observed, the respondent is barred from objecting to the buildings now proposed to be erected. (2) The statutory provisions apply only to new enclosures. (3) The objections are irrelevant."

A proof was allowed.

From the evidence it appeared that the North Woodside Road was in the early part of the century maintained by the Statute-Labour Trustees of the Barony Parish of Glasgow. Excerpts from the minutes of that body relating to expenditure on said road were produced, and a map, of the year 1846, in which it was marked as a statute-labour road. Parties were agreed that by the extension of the boundaries of the city the jurisdictions and authorities of the Parish Road Trustees were transferred to the Commissioners of Police of the City of Glasgow, and that now (1899) North Woodside Road is, at its junction with the New City Road, a public street under the Glasgow Police Act of 1866.

With regard to the state of the existing buildings on the site in question the following evidence was given:—"The buildings at present consist on the east of a two-storey block with a lean-to adjoining. The height of the two-storey building to the wall-head is fully 18 feet, and to the ridge of the roof 26 feet 6 inches. That building comes out to the building line of the street. The rest of the buildings are one storey in height. The wall facing the street runs from on an average of about 8 feet in height. These are the walls of an ordinary span-roofed building. I think at the present time these buildings are vacant; they were vacated recently. Up to this application I am informed that they were used as an aerated water manufactory and previous to that as a laundry. I understand the two-storey building, which still remains, and the one adjoining on the west, were erected there in 1861. The rest of the buildings were erected since then."

The various sections of the Glasgow Police Act which were referred to are quoted in the opinion of the Lord President, *infra*.

A question was also raised, and considered in the proof, as to the ownership of a certain part of the subjects, 11½ square yards in extent, which it is not necessary further to refer to.

On 6th July 1899 the Dean of Guild (GRAHAM) pronounced the following interlocutor:—"Finds (1) that the petitioner is proprietor of a plot of ground at the south-east corner or junction of New City Road and North Woodside Road, in the City of Glasgow; (2) that the petitioner asks for authority to make certain alterations and erections upon his said property, as these alterations and erections are shown on the plans and sections in process; (3) that the 11 and 5/9th square yards, part of the said plot of ground mentioned in the proceedings, is

the absolute property of the petitioner, and has not been dedicated to public use, and is not subject to any servitude or right of passage; (4) that the petitioner's proposed erections and alterations, so far as extending along North Woodside Road, are nearer to the centre of that road than 20 feet; and (5) that North Woodside Road at the point in question is or was, until taken over by the Corporation of Glasgow, a statute-labour road; and with these findings in fact, and under reference to the annexed note, repels the objections stated for the Master of Works, and grants warrant to the petitioner to make said alterations and to erect the additions, all as delineated on the plans which are signed as relative hereto, but under the condition that the proposed operations are executed in a tradesmanlike manner: Finds the Master of Works liable to the petitioner in the expenses caused by his opposition," &c.

Note.—"The petitioner asks for authority to make certain alterations and erections upon property belonging to him at the south-east corner or junction of New City Road and North Woodside Road, in the City of Glasgow. The petition is opposed by the Master of Works. . . . He points out that the petitioner proposes to erect on his ground on the south-east side of North Woodside Road a building on the top of a wall on the side of said road; that that building is not to be 20 feet from the centre of North Woodside Road; that that road is a statute-labour road, and that it should therefore, when buildings are erected, be kept of the width of 20 feet on each side of the centre thereof as provided by section 366 of the Glasgow Police Act 1866, and he accordingly objects to the lining being granted on the line shown on the plans. . . . The objection involves, first, the matter of fact whether North Woodside Road was a statute-labour road; and second, the construction of section 366 of the Glasgow Police Act of 1866. The parties were not agreed upon the question of fact, and a proof has been led upon it. The agents seem to be agreed that no list or schedule of the statute-labour roads in the district has been made up, and in any case it has not been shown that the road is mentioned in any list or schedule as a statute-labour road, but it appears to the Dean of Guild that it has been clearly shown by the plan and by the minutes that North Woodside Road at the point in question was under the charge of and maintained by the Statute Labour Trustees of the Barony Parish of Glasgow. The Dean of Guild therefore holds it proved that the North Woodside Road at the point in question was a statute-labour road. That makes it necessary to construe section 366 of the Glasgow Police Act 1866. That section is as follows:—"The Dean of Guild shall not grant a warrant to erect any building except a stone wall not exceeding six feet in height within twenty feet of the centre of any portion of a statute-labour road within the City, or within thirty feet of the centre of any portion of a turnpike road within the city which is relinquished

by the trustees thereof, and is assumed by the Board as a public street under the powers of this Act, unless the said building could have been erected within a less distance of the centre of such turnpike road without contravention of the Acts relating to the said road."

"A question very much the same as that which now arises for decision was before the Court recently (5th June 1899) in the case of *Lyon v. Whyte*, and there the Dean of Guild held that the point was covered and ruled by the case of *Macdonald v. The Commissioners of Fort-William*, March 19, 1895, 22 R. 551, and granted the lining. It seems to the Dean of Guild that the question involved in the present application, too, is substantially covered by *Macdonald's* case, and he has therefore repelled the second objection stated for the Master of Works, and granted the lining with expenses. It was stated at the bar that *Lyon's* case is under appeal. The question involved is important, and it will be satisfactory to have it decided by the Supreme Court.

"The Dean of Guild may point out that the present application is in terms one for authority to make alterations and erections, and that section 366 of the Glasgow Police Act does not expressly at least deal with alterations. In other sections—for example in section 365 and in section 367—the Act deals in terms with erecting or altering buildings."

The Master of Works appealed, and argued—(1) It was proved that there was originally a statute-labour road, and it did not lose that character by becoming a public street; (2) being a statute-labour road the restriction of section 366 of the Glasgow Police Act 1866 applied to the present buildings. The proposed alteration involved practically an entirely new building in defiance of the statutory restriction. The case of *Macdonald v. Police Commissioners of Fort-William*, March 19, 1895, 22 R. 551 (where it was held that in spite of a similar restriction in the Turnpike Roads Act 1831, buildings might be erected on a site where it was proved that buildings had formerly been) was wrongly decided. It was, besides, distinguishable, in respect that it was decided under a different statute, and only upheld the right to repair old buildings by new, while the present case was practically a proposal to replace a boundary wall by new buildings. A wall was not, in cases like the present, to be regarded as a building at all—*Haig v. Henderson*, June 12, 1890, 8 S. 918; *Partick Police Commissioners v. Great Western Steam Laundry Co.*, Jan. 27, 1886, 13 R. 500; *Schultze v. Magistrates of Galashiels*, May 14, 1895, 22 R. (H.L.) 70. The Dean of Guild as a judicial officer could not be affected by a plea of *mora*.

Argued for the respondent—(1) It was not proved that this ever was a statute-labour road; if it was, it ceased to be so on becoming a public street. (2) Section 366 of the Glasgow Police Act 1866 must be construed strictly, and *contra proferentes*, like

other local Acts passed on an *ex parte* statement. So construed, it prohibited the erection of new buildings, not the alteration of or addition to old ones—*Macdonald v. Police Commissioners of Fort-William, ab supra*, was exactly in point, and should be followed.

At advising—

LORD PRESIDENT—The respondent Mr Bruce is proprietor of a plot of ground at the south-east corner of New City Road and North Woodside Road in the City of Glasgow, and being desirous to alter certain existing buildings, and to erect certain additional buildings upon that ground, he applied to the Dean of Guild Court of Glasgow for a lining authorising him to do so. The appellant Mr Whyte, who is the Master of Works of the City of Glasgow, objected to the respondent's application being granted upon two grounds—(1) that it would involve an encroachment to the extent of 11 and 5/9th yards on the footpath of a public street; and (2) that the proposed buildings would be within 20 feet from the centre of North Woodside Road (which he alleges to be a statute-labour road), contrary (as he maintains) to the provisions of section 366 of the Glasgow Police Act 1866.

The Dean of Guild decided against the appellant on both points, holding (1) that the 11 and 5/9th yards of ground is the property of the respondent, held by him free of any servitude or right of public use; and (2) that although North Woodside Road at the point in question is, or was until taken over by the Corporation of Glasgow, a statute-labour road, this does not disentitle the respondent to obtain a warrant to execute the proposed building operations, and he accordingly granted warrant to the respondent to do so.

The appellant does not now insist in his objection relative to the 11 and 5/9th square yards of ground, but he appeals against the judgment of the Dean of Guild in so far as it sanctioned the proposed building operations.

Section 366 of the Glasgow Police Act 1866, upon which the appellant's second objection is founded, is in these terms:—“The Dean of Guild shall not grant a warrant to erect any building except a stone wall not exceeding 6 feet in height within 20 feet of the centre of any portion of a statute-labour road within the city, or within 30 feet of the centre of any portion of a turnpike road within the city which is relinquished by the trustees thereof, and is assumed (by the Magistrates and Council) as a public street under the powers of this Act, unless the said building could have been erected within a less distance of the centre of such turnpike road without contravention of the Acts relating to the said road.”

Two questions arise under this section—(1) whether North Woodside Road is a statute-labour road within the meaning of the section; and (2) whether, assuming that it is, the section requires the Dean of Guild to refuse to grant warrant for the building operations proposed by the respon-

dent. The Dean of Guild decided that North Woodside Road is a statute-labour road within the meaning of section 366, but that the section does not in the circumstances require him to refuse the warrant sought by the respondent, and I think that his judgment is right on both points.

I understand it not to be disputed that down to the year 1846 the road now known as North Woodside Road was a statute-labour road, under the management of the Statute Labour Trustees of the Barony Parish of Glasgow. The boundaries of Glasgow for police purposes have been from time to time extended, and by the Local Act of 6 and 7 Vict., cap. 99 (1843), section 14, it was declared that the lands annexed to the royalty of the city for purposes of police by the Act therein mentioned should, “in respect of statute labour and the conversion thereof, remain a part and portion of the Barony Parish of Glasgow,” and that the Act should not interfere with the powers of the Statute Labour Trustees of the Barony Parish, including the power to levy a statute labour assessment.

By the Act of 9 and 10 Vict. cap. 289 (1846), section 37, it was declared that from and after the first election of magistrates and councillors under it, the reservation of the powers of the Statute Labour Trustees of the Barony Parish of Glasgow with regard to the levying, managing, and applying the statute labour and the conversion thereof within the limits therein mentioned, should be repealed except to the temporary effect therein stated; and by section 39 it was enacted that the assessments, rates, and duties for statute-labour purposes authorised to be levied by the Act therein mentioned, and the Act 9 and 10 Vict. cap. 239, within the limits of the Act so far as not included within the royalty of Glasgow, should not be leviable for the financial year of the Statute Labour Trustees of the Barony Parish current at the passing of the Act, but that the same should be ascertained, laid on, collected and recovered for the year to commence on the expiry of the said year, and for all subsequent years, in the same manner and by the same ways and means in all respects as the assessments, rates, and duties are authorised to be levied and recovered for the said purposes within the royalty of Glasgow by the Act therein mentioned.

The effect of these provisions appears to me to have been to empower the municipal authorities of Glasgow to levy the statute-labour assessments thereafter in respect of, *inter alia*, North Woodside Road, and I understand that they have done so ever since.

It was maintained by the respondent that the fact of North Woodside Road having under the City Local Acts become a public street prevents it from being a statute-labour road in the sense of section 366 of the Act of 1866, but this argument does not appear to me to be well founded. The Local Act of 25 and 26 Vict. c. 204 (1862), sec. 284, and the Act of 1866, secs. 281 and 282, provide for making up a register of streets,

and I understand that from 1862 North Woodside Road has appeared in that register, but section 4 of the Act of 1866 defines "public street" as meaning "any road, street, lane, vennel, wynd, alley, bridge, quay, passage, square, or other place within the city, used either by carts or foot-passengers, which has been maintained by the police and statute-labour committee, or which is by this Act, or shall hereafter in pursuance thereof be, declared to be a public street," and I understand that the Police and Statute-Labour Committee administer the statute-labour assessment, and also that the North Woodside Road has been maintained by that committee, presumably, in part at least, out of the statute-labour assessment, which they are authorised to levy. It was maintained by the respondent that it did not appear by what authority the road was administered from 1846 to 1862, but I think it is proved that it was during that period under the charge of the Statute-Labour Department of the City of Glasgow.

It appears from the demand-note annually issued by the collector of assessments of the City of Glasgow, and relative receipt, that one of these still levied is "the statute-labour assessment," which I understand to include that assessment as applicable to North Woodside Road. For these reasons I consider that that road (although it has not since 1846 been under the administration of the Statute-Labour Trustees of the Barony Parish) is still a statute-labour road within the city in the sense of section 366 of the Glasgow Police Act 1866.

The remaining question, assuming that North Woodside Road is a statute-labour road within the meaning of section 366, is, whether the declaration in that section that "the Dean of Guild shall not grant a warrant to erect any building, except a stone wall not exceeding 6 feet in height, within 20 feet of the centre of any portion of a statute-labour road within the city," precluded the Dean of Guild from granting the authority which he has granted to the respondent to execute the building operations above mentioned. North Woodside Road is at the place in question 30 or 31 feet in breadth, and the line of the existing buildings on the respondent's ground is such that the enforcement of the restriction would infer his keeping his proposed buildings back about 5 feet from or within that line, thereby depriving him of about 112 square yards of building ground and deranging his whole plans.

The respondent acquired the ground in question by purchase in November 1897, and at that time the occupation of the part of it which fronts North Woodside Road appears to have been as follows:—The ground was then, as I understand, walled off, as it still is, from North Woodside Road throughout its whole length, and certain buildings then existed, as they now exist, upon it. At the north-east end there was a covered shed; next to the south-west, a two storey block with its gable abutting upon North Woodside Road; next a wall running along the street with a one-storey

block attached to it behind, covered by a double roof; next to the south-west a continuation of the wall, with a covered shed and other accommodation attached to it behind. The whole of the walls along North Woodside Road are much above six feet in height (the limit mentioned in section 366), the average height being about eight feet. The respondent proposes to build on the top of the present main wall so as to more than double its height, making it a two-storey building, and opening out windows in each of these two storeys to North Woodside Road. The very important general question thus arises whether, where buildings have been for many years erected and maintained along the line of a statute-labour road in the City of Glasgow of a height much greater than six feet without objection by any public authority or private person, the restrictive provision of section 366 must be applied to them by the Dean of Guild when the owner applies for authority to make any alteration upon them, and I agree with the Dean of Guild in thinking that it does not.

It is, in the first place, to be observed that the section is framed in the form of a direction to the Dean of Guild not to grant a warrant "to erect" any building except a stone wall not exceeding 6 feet in height within 20 feet of the centre of any portion of a statute-labour road, and the natural construction of this provision seems to me to be, that where there is not already a building, the Dean of Guild is not to sanction the "erection" of one within the specified distance from the centre of the road.

Apart from the light to be obtained as to the meaning of section 366 from a comparison of its terms with those of the other sections to be immediately noticed, a restrictive condition of this kind would not, upon a reasonable construction, apply to the alteration of buildings which have long been erected and maintained without objection to a height exceeding that specified in section 366, and this view derives confirmation from the terms of the other sections dealing with the erection, alteration, and use of buildings. The sections are contained in Part XXVII. of the Act, which is headed—"Buildings, their erection, alteration, and use." Throughout these sections the words "erect" or "erection" when alone used appear to mean build from the ground, *i.e.*, the construction of a new building as distinguished from the alteration of an existing one, and that when a provision is intended to relate to "alteration" as distinguished from new construction this is unequivocally expressed. Thus section 364 declares that "Every person who intends to erect any building within the city (not expressly authorised by Act of Parliament), or to alter any such building," &c., distinguishing "erection" from "alteration;" and in like manner section 365 enacts that "any person who erects, or who alters in any of the respects hereinbefore mentioned, any building within the city shall be guilty of a Dean of Guild offence;" while section 367

provides that "the Dean of Guild shall not grant a warrant to erect or alter any building unless and until he is satisfied" on certain points. So that the distinction between "erection" and "alteration" (including, of course, "addition") is consistently maintained throughout, and section 366 applies only to "erection" and not to "alteration."

It does not precisely appear when the different buildings which the respondent now proposes to alter were originally erected, but the Ordnance plan of 1871 (founded on a survey of 1857) shows that the two-storey building, which still remains, and the old one adjoining it on the west, were then already erected. The disposition in favour of the respondent's author dated 13th October 1868, and plan annexed, also prove that at all events the two-storey block and the building to the west were then on the ground, and probably also the wall fronting North Woodside Road, although the one-storey buildings behind that wall seem to have been erected at a subsequent date.

It appears to me, however, that the important question is not whether the buildings were or were not erected at the date when the Act of 1866 passed, but whether they have existed and been used without challenge for a number of years prior to the time at which it is proposed to make the alterations upon them. The effect to which the section is pleaded by the appellant would place an embargo upon the alterations and improvement of urban property, which it appears to me should not be done unless it is authorised in the clearest terms. The General Statute-Labour Act 1845 (8 and 9 Vict. c. 45) contains no proper restriction of the height of buildings at the sides of statute-labour roads, nor does it appear that any such restriction existed in any local statutory labour Acts applicable to North Woodside Road while it was under the charge of the Statute-Labour Trustees of the Barony Parish. Under these circumstances it appears to me that the Act of 1866 should be construed in accordance with the rules applicable to private Acts, in the case of which the benefit of any doubt is given to those who might be prejudiced by the exercise of exceptional restrictions. There are other provisions in the Glasgow local Acts for securing light and air by which proprietors are restrained from building beyond a height having a certain relation to the width of the street, but no question as to any of these arises in the present case.

The Dean of Guild in his judgment refers to the case of *Macdonald v. Commissioners of Fort-William*, 22 R. 551, which is in any view *a fortiori* of the present case in favour of the views now expressed. The question there arose under section 91 of the Turnpike Roads Act 1831, which corresponds to section 366 of the Glasgow Police Act of 1866, although the language is not identical, and the Court held that it did not apply to a building proposed to be erected on the site of a house which had been demolished thirty years before. In that case the circumstance that the ground had been un-

built on for thirty years was not held sufficient to let in the application of the Act. If this view is correct it appears to me that still less should such a restrictive condition be applied to alterations upon existing buildings.

I may add that although many Scotch local Turnpike Road Acts contained not unfrequently provisions similar to those of the General Turnpike Roads Act of 1831, I am not aware of any case in which any such provisions have been held to apply to additions to or alterations upon existing buildings above the statutory height.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR, who was present at the hearing, was absent at the advising.

The Court refused the appeal.

Counsel for the Appellant—Shaw, Q.C.—Lees. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Young—M. P. Fraser. Agent—T. Mackintosh, W.S.

HOUSE OF LORDS.

Monday, November 20, 1899.

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Morris, Shand, and Brampton.)

GREVILLE-NUGENT *v.* GREVILLE-NUGENT'S TRUSTEES.

(*Ante* January 25th 1898, S.L.R. vol. xxxv. p. 361, 25 R. 475.)

Fee and Liferent — Minerals — "Open Mines."

In a question under a settlement between the *fiar* and *liferenter*, the rents derived from mines open at the date of the settlement belong to the *liferenter*, and it is immaterial whether the mines were opened by the settlor or by his predecessors in the estate.

A wife, by antenuptial marriage-contract in English form conveyed certain lands belonging to her to trustees, who were directed to sell the lands on the request of the spouses or the survivor of them, or after the death of the survivor, at their own discretion. The trustees were to hold the proceeds arising from the sale, and pay the "annual income" to the wife during her life, and after her death, on certain conditions, to her husband. After the death of the husband and wife the trustees were to hold the trust estate and annual income thereof for the children of the marriage as the parents should appoint.

It was further provided, that until the estate should be sold the trustees should have power "in the meantime to lease the unsold parts . . . for the best rent that can reasonably be gotten,