

Argued for the petitioners—The shares for which the petitioners had subscribed the memorandum of association were “issued” to them within the meaning of section 25 of the Companies Act 1867 immediately upon the registration of the company—*Dalton Time Lock Company v. Dalton* (1892), 66 L.T. 704. Consequently no contract had been filed in terms of that section at or before the issue of the shares. It was therefore necessary, and in the circumstances equitable, that the petitioners should be authorised to file a memorandum as provided by the Companies Act 1898. There was no difficulty in identifying the shares in respect of which relief was sought, as the whole shares of the company had been subscribed for in the memorandum, and were still held, with the exception of those transferred by Mrs Waddie to her husband, by the original subscribers. The present case was distinguished from *Jarvis & Company, Limited* [1899], 1 Ch. 193; and was ruled by *Whitehead & Brothers, Limited* [1900], 1 Ch. 804.

The Court pronounced the following interlocutor:—

“Direct a memorandum in writing in the form in the appendix to the petition specifying the considerations for which the said shares were issued to be filed with the Registrar of Joint-Stock Companies in Scotland within twenty-one days hereof, and on such memorandum being filed, appoint that it shall, in relation to the whole 3000 shares in Waddie & Company, Limited, operate as if a sufficient contract in writing, within the meaning of section 25 of the Companies Act 1867, had been duly filed with said registrar before the issue of such shares, and decern.”

Counsel for the Petitioners—Lorimer—J. B. Young. Agent—A. C. D. Vert, S.S.C.

Thursday, December 20

FIRST DIVISION.

[Dean of Guild, Glasgow.]

WHYTE v. GLASS.

Police—Regulation of Buildings—Building near Turnpike Road—New House on Old Site—Road—Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV. c. 43), sec. 91—Glasgow Police Act 1866 (28 and 29 Vict. cap. cclxxiii.) sec. 366.

Section 91 of the Turnpike Roads (Scotland) Act 1831 enacts “that no houses, walls, or other buildings shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made within the distance of 25 feet from the centre of any turnpike road.”

Held (distinguishing Macdonald v. Commissioners of Fort William, March 19, 1895, 22 R. 551) that this section prohibits the erection of new buildings within 25 feet from the centre of a turnpike road, even although the site upon which it is proposed to build has been recently occupied by buildings which were erected before the passing of the Turnpike Roads Act 1831.

This was an appeal from the Dean of Guild Court at Glasgow.

The following narrative of the facts is taken from the opinion of the Lord President:—“The respondent, who is proprietor of certain subjects fronting Rutherglen Road, Glasgow, presented a petition to the Dean of Guild Court there in which he stated that he intended to take down the buildings at present on the ground, and to erect in their place two new tenements of shops and dwelling-houses three storeys in height, all as shown on the plans produced, and he craved the Dean of Guild to authorise the proposed buildings.

“The appellant, the Master of Works for the City of Glasgow, lodged objections, in which he stated that the respondent proposed to erect the buildings sixteen feet from the centre of Rutherglen Road, which is a turnpike road, whereas the buildings should (the appellant maintained) be erected twenty-five feet from the centre of that road, in terms of the Turnpike Roads Act 1831, section 91, and the Glasgow Police Act 1866, section 366.

“In answer to these objections the respondent, while admitting that he proposed to erect the buildings sixteen feet from the centre of the Rutherglen Road, which he admits to be a turnpike road, stated that the buildings at present on his ground are old buildings which were erected long prior to the passing of the Turnpike Roads Act 1831, and that the proposed new buildings would not be nearer to the centre of Rutherglen Road than the existing buildings, but would be on the same building line. He pleads that section 91 of the Turnpike Roads Act 1831, and section 366 of the Glasgow Police Act 1866, founded on by the appellant, apply only to sites which have never been built upon, and have no application in the present case.

“The Dean of Guild has in effect sustained this plea, repelled the objections, and granted warrant to the respondent to erect the buildings specified in the petition.”

Section 366 of the Glasgow Police Act (28 and 29 Vict. cap. cclxxiii.) enacts—“The Dean of Guild shall not grant a warrant to erect any building except a stone wall not exceeding six feet in height” . . . “within thirty feet of the centre of any portion of a turnpike road within the city,” . . . “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.”

Section 91 of the Turnpike Roads (Scotland) Act 1831 is quoted in the rubric. For this section see the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), Schedule C. and section 123.

Argued for the appellant—It could not be contended that the Turnpike Roads Act in terms made any distinction between new and old sites, and it was obvious that the objects of the Act would be defeated if it were permissible to pull down an old building which was within 25 feet of the centre of the road, and to erect a much higher one in its place. The contention must therefore rest on the authority of *Bruce v. Whyte*, March 20, 1900, 2 F. 823, and *Macdonald v. Commissioners of Fort-William*, March 19, 1895, 22 R. 551. The case of *Bruce* was easily distinguishable, because what was proposed to be done there was not to erect a new building, but to alter and add to an old one. That was no authority in the present case. If necessary, the decision in *Macdonald* was challenged. But it could also be distinguished, because it appeared from the opinion of the Lord Justice-Clerk, p. 552, that the present question though mentioned was not argued.

Argued for the respondent—The question turned on the construction of section 91 of the Turnpike Roads Act, to which section 366 of the Glasgow Police Act referred. That section was not intended to affect sites already built on. For that proposition the case of *Macdonald v. Commissioners of Fort-William*, cited *supra*, was a direct authority, and was a *fortiori* of the present case. *Whyte v. Bruce*, cited *supra*, was also in point, for if, as was held there, you might convert a mere wall into a three-storey house without infringing the provisions of the section, it would seem to follow that you might replace an old building by a new one. The general policy of Acts of this kind was to make regulations for building on new sites and not on old ones—*Pitman v. Burnett's Trustees*, January 26, 1882, 9 R. 444; *Chapman v. Robinson*, November 6, 1858, 28 L.J. Mag. Cases, 30, where an analogous provision of an English statute was so construed.

At advising—

LORD PRESIDENT — [After stating the facts]—The provision of section 91 of the Turnpike Roads Act 1831 is that “no houses, walls, or other buildings above seven feet high shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made within the distance of twenty-five feet from the centre of any turnpike road,” and the important general question now raised is, whether that section only prohibits the erection of buildings within the specified distance from the centre of a turnpike road where no buildings existed on the ground at the time when the Act of 1831 was passed, and does not apply to any case in which buildings existed on the ground at that date but have been subsequently removed.

The prohibition in section 91 is expressed as a universal negative, no such restriction of its scope as is contended for by the respondent is to be found in it, and I am unable to see any sufficient reason for holding such a restriction to be implied. The section does not require that buildings

already existing within the specified distance of the centre of the road shall be removed, but its prohibitory words appear to me to apply universally where there is no building on the ground at the time when the question arises and it is proposed to build—whether there has or has not previously been a building there. All the reasons which have been suggested for the prohibition appear to me to apply as strongly to ground on which there were buildings in 1831 as to ground which was then unbuild upon, whether it was subsequently built upon or not.

In this connection it is to be observed that while the words “enclosures and plantations” in section 91 are qualified by the adjective “new,” no such qualification is attached to the words “no houses, walls, or other buildings above seven feet high”—a difference which seems to me to emphasise the universality of the words last quoted.

The Dean of Guild's judgment appears to have been founded mainly if not solely upon the decision in the case of *Macdonald v. Commissioners of Fort-William*, 22 R. 551, which he says seems conclusive in favour of the respondent's construction of the section. Upon referring to that case, however, it will be seen that the question upon which I have just expressed an opinion was not raised in it. The Lord Justice-Clerk said in his judgment—“Mr Thomson has argued the case upon the footing that the section would not apply supposing that buildings were taken down and rebuilt immediately for the purpose of improvement and renewal. He maintained, however, that according to the ‘rules of good sense,’ as he phrased it, the section would apply to cases where there had been an interval between the demolition and reconstruction of buildings—what interval he did not specify.” The decision was that section 91 did not apply to the site of a house which had been demolished thirty years before. As the point upon which the determination of the question in this case should, in my judgment, turn, was not raised, or if raised was given up in that case, the decision pronounced in it cannot be an authority upon that point. The respondent also relied upon the case of *Pitman v. Burnett's Trustees*, 9 R. 444. The question in that case, however, turned upon a different statutory enactment, viz., section 127 of the Edinburgh Municipal and Police Act 1879, upon the terms of which the Court considered it to be clear that it was intended to apply only to the case of streets and courts referred to in the three preceding sections—that is to say, new streets and courts. The decision has not, in my judgment, any bearing on the present case. The respondent also founded upon the recent decision in *Bruce v. Whyte*, 2 F. 823, as supporting his contention, but that decision is not in point, inasmuch as it related, not to the “erection” of new buildings (*i.e.*, to building from the ground), but to the “alteration” within the meaning of the Glasgow Police Act 1866 of existing buildings.

Another example of the kind of policy which appears to have dictated section 91 of the Turnpike Roads Act of 1831 in its application to such a case as the present, is to be found in section 162 of the General Police and Improvement Act of 1862 and section 158 of the General Police Act of 1892, which require that when a house projecting beyond the line of a street is pulled down with a view to its being rebuilt, the proprietor shall set the new building back as specified in that section.

If the views now expressed in regard to the construction and effect of section 91 of the Turnpike Roads Act of 1831 are correct, it follows that section 366 of the Glasgow Police Act 1866 prohibited the Dean of Guild from granting warrant to erect any building except a stone wall not exceeding six feet in height within twenty-five feet from the centre of Rutherglen Road, and that his interlocutor of 7th August 1900 should be recalled, and the cause remitted to him to give effect to the restrictive provision contained in section 91 of the Turnpike Roads Act of 1831. The distance mentioned in section 366 as applicable to the case of turnpike roads is thirty feet, but it concludes with the words "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," and a building could have been erected twenty-five feet from the centre of the road in question without contravening section 91 of the Turnpike Roads Act 1831, which applied to it.

LORD M'LAREN—I agree with your Lordship, and have very little to add. Looking to the plain and literal meaning of the General Road Act, there is an unqualified prohibition against the erection of buildings within a prescribed distance of the centre of the road unless the consent of the road authority has been previously obtained. That is sought to be qualified upon an enactment to the effect that it is not to apply to the case of a building erected upon a site which has been previously built over. I think it is a safe rule in the construction of statutes that an artificial construction or limitation, not founded on what the statute states, never can be introduced except to avoid some inconsistency or ambiguity which would arise on a comparison of the enactment with some other enactment in the same statute. If that be a sound rule, then it follows that there is no room for the construction of the enactment which we are here considering; it must receive full effect. One other observation occurs to me, although I do not rely very much upon it. If the motive of the enactment be the convenience of giving access of light and air to the road by prohibiting the erection of structures which would exclude light and air, then the reason applies just as much to areas that have been covered with buildings as to those which have never been built over. It would be a very strange way of carrying

out the spirit of the Act to pull down a one or two-storey house and erect one of five or six storeys in its place.

LORD KINNEAR—I have had the advantage of reading your Lordship's opinion, and I entirely concur.

LORD PRESIDENT—Lord Adam, who is engaged in another Court, asks me to say that he has also read my opinion, and entirely concurs in it.

The Court sustained the appeal, and remitted the case to the Dean of Guild.

Counsel for the Appellant—Shaw, Q.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—W. Campbell, Q.C.—Cooper. Agents—Henry & Scott, W.S.

Friday, December 21.

SECOND DIVISION.

CRAWFORD v. ADAMS.

CRAWFORD v. DUNLOP.

(*Ante*, June 12, 1900, vol. 37, p. 767, and 2 F. 987.)

Expenses—Several Defenders—Joint Trial of Actions against Separate Defenders—Separate Defenders with Same Counsel and Agent—Pursuer Successful against One and not against Other—Reparation—Slander.

A pursuer, founding upon slanders contained in certain letters written by a law-agent on the instructions of his client, sued both the client and the law-agent in separate actions for damages. Each defender lodged defences, and separate issues were allowed, but the actions were sent for jury trial together, and the defenders were represented by the same counsel and agents at the trial. The verdict in one action was for the pursuer, in the other for the defender, and the successful party in each case was found entitled to expenses.

Held (1) that in the action in which the pursuer was successful he was entitled to his whole expenses; and (2) that in the action in which the defender was successful, the defender was entitled to his whole expenses down to the date of the trial, but only to one-half of his expenses after that date.

These cases are reported *ante*, *ut supra*.

The Court having allowed issues against both defenders, the actions were remitted for jury trial together. Both the defenders were represented at the trial by the same counsel and agents. In the action against Adams the pursuer obtained a verdict with £50 of damages. In the action against Dunlop the jury found for the defender. The Court applied the verdicts, and found the successful party in each case entitled to expenses.