

the sale of a particular quantity or weight of Scotch pig-iron, or of pig or bar iron generally, or of iron of any sort *in specie*. It is a different sort of contract altogether. If the contract had simply specified Scotch iron of the best quality, then any Scotch iron of the best quality, without reference to the purpose for which it was to be used, would have satisfied the contract. But when we are dealing with castings the case is quite different, because a casting is made for the purpose of being used for some particular apparatus or machine. It must take a particular form, and that form specifies the purpose for which the casting is to be used, and accordingly in this contract the purpose is very clearly explained. The casting is to be of the form of a still, and the still is ordered for the purpose of distilling oil from rosin, and therefore the castings must be of such a quality as will be suitable for that purpose. The nature of the contract makes it imperative that the castings must be of such a quality, and consequently in construing the contract so far I require no evidence whatever. At the same time the evidence, which in your Lordship's view is necessary, is to be found extremely well stated in what Mr Stevenson says—"In dealing with what is best quality or not best quality you always do so with reference to the purpose to which the iron is to be applied. To say 'of best quality,' apart from a consideration of what it is to be used for does not mean anything at all." That being so, the question comes to be whether the defenders did supply castings of the best quality suitable for the purpose for which they were intended?

Now, on this point Mr Adamson, one of the defenders, states very distinctly that the stills were made of No. 2 Langloan and No. 3 Gartsherrie in equal proportions, and it is not disputed that if he had been supplying pig-iron that combination would have been a perfectly good fulfilment of his contract, or if he had been supplying bar-iron, without reference to the purpose for which it was ordered, that such a mixture would probably have been equally suitable in that case also; but the complaint of the pursuers is that No. 2 Langloan and No. 3 Gartsherrie does not make a combination which is suitable for castings intended to withstand great heat, and it is on this point that the controversy arises. Mr Adamson says—"No scrap-iron was used. The addition of well picked Scotch scrap would have made the metal a good deal harder. If the metal which we did use had been twice melted it would have been made perhaps closer, and possibly harder. Hardness is not necessarily consistent with closeness. (Q) But it would have made the metal harder if twice run?—(A) Yes." So that, upon his evidence, it is clear that he was quite aware of the difference that would be produced by one or other of two alterations in the quality of the iron used—namely, either by the addition of scrap-iron or by having the casting twice run. Now, the question on the evidence is, whether in order to produce the article which was specified in the contract it was not necessary to have had one or other of these things done to make the iron suitable for the purpose, and I agree that the preponderance of the evidence is clearly in favour of the pursuers' contention that the castings furnished were unsuitable for the purpose for which they were intended. I agree therefore in the main ground of the Lord Ordinary's judgment

when he "Finds that these stills, which had become useless as aforesaid, were composed of iron not suited for the purpose intended by the contracting parties, viz., stills requiring the application thereto of great heat."

I do not think that it is necessary to say much on the defenders' third plea-in-law, that "the pursuers having accepted delivery of the articles supplied, and having used the same for a considerable time without objection, are barred from now rejecting them or claiming damages," because I think that such a plea is not applicable to a case of this kind except under very peculiar circumstances. Goods of this kind, delivered for a particular purpose, to be set up and used in a manufactory or in the shape of machinery, cannot be tested without a considerable amount of use, and if within a reasonable time of the discovery of a defect intimation of that defect is made to those who had supplied the goods, I think that that is all that can be expected. The judgment of the Court will therefore be to adhere to the interlocutor of the Lord Ordinary with expenses.

LORD DEAS was absent.

The Lords adhered.

Counsel for Pursuers—Trayner—Murray.
Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders—Lord Advocate (Balfour, Q.C.)—Pearson—Dickson. Agents—J. & A. Hastie, S.S.C.

Thursday, January 26.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

PITMAN AND OTHERS v. SANDFORD AND OTHERS (BURNETT'S TRUSTEES), AND OTHERS.

(*Ante*, July 7, 1881, vol. xviii, p. 659, 8 R. 914.)

Statute—Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. 132), secs. 127, 129, and 163—New Streets—Height of Houses in Existing Streets—Ventilation.

Held that the 127th section of the Edinburgh Municipal and Police Act applies only to new streets.

The 129th section of the Edinburgh Police Act provides that "houses or buildings in any existing street or court shall not be increased in height above the prescribed height of one and one half times the width of the street or court in which such houses or buildings are situated, without the sanction of the Magistrates and Council." A house in an existing street was to be rebuilt so as to extend back to a narrow meuse lane. *Held* that with reference to this provision the house was to be considered as entirely within the street which it faced on the other side from the meuse lane, and its height both to the back and to the front regulated accordingly.

Question—Whether a house might be situated in two streets within the meaning of the above provision?

Held that regulations provided by the 163d section of the Edinburgh Police Act with re-

ference to ventilation are matters committed to the sole discretion of the Dean of Guild, with the exercise of which the Court will not interfere unless an error of a flagrant kind has been committed.

Question—Whether the 163d section applies to houses in existing streets.

Opinion (per Lord Shand) that a neighbour is not *in titulo* to object to a building upon the ground of non-compliance with the provisions of this section.

Jurisdiction—Dean of Guild—Competition of Heritable Right.

Held that where one party impugns the title of his opponent, but does not himself allege a heritable title, there is no competition of heritable right sufficient to exclude the jurisdiction of a Dean of Guild.

The previous stage of this case was formerly reported, *ante*, July 7, 1881, vol. xviii. p. 659, 8 R. 914. The Court there held that there was no such competition of heritable right as was sufficient to exclude the jurisdiction of the Dean of Guild, and remitted the case for further procedure. At that date neither party claimed a right of property in the ground in dispute. The petitioners, Pitman and others, subsequently produced a disposition in their favour by the heir-at-law of Robert Burn, who feued the ground belonging to the petitioners from the Magistrates and Council in 1787. The respondents maintained that this disposition was granted *a non domino*, the *solum* of the lane in question having, as the respondents averred, remained the property of the Magistrates and Council; but the respondents did not themselves claim a right of property in the lane, either as representing the Magistrates and Council or otherwise. They nevertheless contended that there was such a competition of heritable right as should exclude the jurisdiction of the Dean of Guild; and this formed the first of the questions now to be determined.

The other questions depended on the construction of certain sections of the Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii). By the 127th section of that Act, 1879, it was enacted "that it shall not be lawful to form or lay out any street or court unless the same shall be of a clear width of at least 20 feet, measuring from the house or building, or intended house or building, therein, or to erect any house or building in any street or court which shall be of greater height than one and one-half times the width of such street or court; and in no case shall any house or building be of greater height than 60 feet, without the consent of the Magistrates and Council, which height shall be measured from the level of the street or court in front to the eave of the roof; and there shall not be more than one habitable storey in any part of the roof of any new house: Provided always that where a house or building shall be situated so as to abut on two streets or courts of different levels, the height shall be measured from the street or court which lies on the higher level." By section 129 of the same Act it was further enacted "that houses or buildings in any existing street or court shall not be increased in height above the prescribed height of one and one-half times the width of the street or court in which such houses or buildings are situate, without the sanction of the Magistrates and Council;" and by the interpretation clause,

section 5th, the word 'street' "is declared to include, *inter alia*, "any street, square, close, wynd, alley, highway, lane, road, or thoroughfare, or other public passage or place, and "court" is declared to "include any court or passage used solely for foot passengers, and open and accessible to the public from a street or private street, and forming a common access to lands and heritages separately occupied."

With reference to these provisions the respondents averred that "the height to which the petitioners propose to increase their property towards Princes Street is 15 feet in excess of the 60 feet mentioned in the said 127th section, and the height of their property towards Rose Street Meuse Lane, which is 22 feet wide, and the private lane or passage to the west, which is 7 feet wide, is proposed to be not less than 68 and 70 feet respectively to the eaves as already averred. There at present exists on the petitioners' property facing Rose Street Meuse Lane, a stable. It is proposed to demolish the said stable, and to erect upon its site buildings which shall form part of the said Club House, and the height is to be limited neither by the former height of said stable, nor by one and one-half times the width of Rose Street Lane, nor even, as already averred, by 60 feet from the ground. The petitioners have not procured the sanction of the Magistrates and Council of the City of Edinburgh thereto."

The petitioners in answer explained "that section 127 does not apply to the present case, but only to new streets and buildings formed or laid out after the passing of the said Act. The height of the petitioners' building, upon a fair construction of the said Act, falls to be measured from the street in which it is situated, namely Princes Street, and when so measured, it is less than one and one-half times the width of that street." The respondents further stated that they had applied for the sanction of the Magistrates and Council, but had received no answer.

The 163d section of the same Act provided—"Every new house shall have in the rear thereof an open space adjacent thereto, at least equal to one-half of the area to be occupied by the intended house, and such space shall be free from any erections thereon other than water-closets, privies, ash-pits, coal-houses, or other conveniences for the use of 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 cases where the thorough ventilation of such house is otherwise secured, or under other special circumstances, the said Court may allow the open space to be reduced in limits; provided also that in cases of conversion of a house into a building for business premises the Court may sanction the erection of saloons upon such open space, of such height and construction as to the Court shall seem proper, such saloons to continue so long only as such building is so used for business purposes."

The respondents, with reference to this provision, averred—"The petitioners have not left an open space or court in rear of their proposed buildings equal to one-half of the area thereof above required, although, from the unusual height of their proposed buildings, and the confined nature of the site, surrounded on all sides by other buildings, it is essential for proper lighting and

ventilation that such open space shall be provided. The buildings proposed to be erected by the petitioners on the present open space behind their property are not to be for business premises, but are of the nature of dwelling-house property."

The petitioners answered—"Ample provision has been made for the thorough ventilation of the building. A large court or well is to be formed upon the centre of the east boundary and between the front and back portions of the buildings, while a smaller well or court is to be formed on the west boundary, and on the same side there will always be in addition the open lane of 7 feet wide. The said two wells will be connected with each other and with the streets at the back and front by air trunks, so as to create a constant current, and so prevent any stagnation of air in the wells or courts."

The respondents pleaded, *inter alia*—" (1) The proposed buildings being in excess of the maximum height allowed by sections 127 and 129 of the Edinburgh Municipal Act, 1879, as condescended on, the petition falls to be refused. (2) The application to the Dean of Guild Court cannot be insisted in nor granted until the consents and sanctions of Magistrates and Council, specified in said Act, have been obtained. (3) The proposed buildings being in violation of the restrictions imposed by section 163 of said Act as condescended on, and of the rights of the respondents as conterminous proprietors, and as holding along with the petitioners from a common author, the petition falls to be refused."

The Dean of Guild (HUTCHISON) authorised the petitioners to take down the existing buildings and to proceed with the erection of the front buildings facing Princes Street, and *quoad ultra* continued the cause, adding this note to his interlocutor:—"It was contended for the respondents that the proposed front buildings being of greater height than 60 feet, the petitioners required, under section 127 of the Edinburgh Municipal and Police Act 1879 (42 and 43 Victoria, chapter 132), to obtain the consent of the Magistrates and Council to the erection of the buildings.

"It was maintained by the petitioners that the 127th section of the Act does not apply to existing streets but to new streets, and that therefore the consent of the Magistrates and Council is not required to entitle them to erect a building in Princes Street of more than 60 feet in height.

"The three sections of the Act immediately preceding the 127th section apply expressly to new streets or courts only, and provide for the laying out thereof under the supervision of the Magistrates and Council. These sections apply specially to the width, levels, and drainage.

"The 127th section appears to be intended to apply to the streets and courts referred to in the three preceding sections, although the word 'new' is not repeated in it. The first clause of the section as to the width of any street or court to be formed is obviously to be so applied, and the succeeding clauses of the section limiting the height of the houses are, it is thought, to be read as applicable only to the same streets or courts.

"The provision of the 129th section that houses in any existing street or court shall not be increased in height above one and a half times the width of any street or court, also indicates that the preceding sections 124 to 128 refer only to new streets."

Thereafter, the disposition by the heir-at-law

Burn having been produced, the Dean of Guild repelled the pleas-in-law for the respondents in so far as not already disposed of, and granted warrant to take down the existing buildings and to erect new buildings, in so far as warrant had not been granted by the previous interlocutor. He added this note:—"The respondents do not now claim a right of property in the lane running north and south on the west of the proposed buildings, and the petitioners have produced a disposition of the lane in their favour by the heir-at-law of Robert Burn, who feued the ground belonging to the petitioners from the Magistrates and Council in 1787. It was maintained for the respondents that the lane belonged to the Magistrates and Council and not to Mr Burn. The drains, areas, and door proposed to be constructed by the petitioners in the lane do not interfere with any right of access or servitude over the lane which the respondents have in connection with their properties, and no objection has been stated by the Magistrates and Council.

"The respondents also maintained, on the 129th section of the Police Act of 1879, that the proposed building to the back being in height more than one and one-half times the width of Rose Street Lane, the sanction of the Magistrates and Council is requisite. The front of the proposed building is in Princes Street, and the back is in Rose Street Lane. The former buildings in Rose Street Lane on the site of the club were a stable on the west and a house used as part of the Alma Hotel on the east. The ground at the back is held under the same title as the ground in front. If the height of the back building is to be regulated by the width of Princes Street, the proposed height is not open to objection. Although the building proposed from Princes Street to Rose Street Lane is of unusual width, it is thought that it is to be held within the meaning of the Act as situated in one street, viz., Princes Street, and not as situated both in the front street and back lane.

"The respondents also founded on the 163d section of the Police Act of 1879, which provides for an open space behind every new house, on which no erection shall be made except such as are specified, and with the approval of the Court. The section, however, provides that in cases where the thorough ventilation of such house is otherwise secured, or under other special circumstances, the Court may allow the open space to be reduced in limits. The arrangements for the thorough ventilation of the building, and for leaving spaces in the centre as shown on the plans, are in the opinion of the Court sufficient, and a reduction of the open space prescribed by the Act has therefore been allowed."

The respondents appealed.

Authority—*Carswell v. Nith Navigation Commissioners*, October 28, 1878, 16 S. L. R. 15, 6 R. 60.

At advising—

LORD PRESIDENT—When this case was before us in July last we recalled the interlocutor of the Dean of Guild, in which he had found that a question of heritable right had arisen in the process which it was necessary to have cleared by a declarator before he could proceed to exercise jurisdiction. We were all of opinion that there was no such question, because a question of heritable right, arising in an inferior Court, which

stops the exercise of the jurisdiction of that inferior Court, means a competition of heritable right—in other words, a competition of title. As the case then stood there was no competition of title, because neither the one party nor the other had any title to the ground of the lane regarding which this dispute has arisen. The case differs now in some respects from the case as it was then presented, because the petitioners have obtained what they allege to be a good title to the *solum* of the lane, but still there is no competition of heritable right, as there is but one title—be it good or bad—the title of the petitioners. The respondents have no title whatever to the *solum* of the lane—as we held formerly they have merely a right of passage through the lane. They have, however, again brought the case before us on the ground that there is a competition of heritable right sufficient to exclude the jurisdiction of the Dean of Guild, but it appears to me that the objection to his jurisdiction is just as ill founded as in the previous stage of the case. The case of *Carswell v. Nith Navigation Commissioners*, decided in 1878, is a very good example of a case in which there was a title on the one side but no title on the other, and where the plea of the party who had produced no title was merely an objection to the title of the party who had produced one. That is not a competition of title. And so in the present case, which must be dealt with on the footing that one party has produced a title to the *solum* of the lane, while the other party has a right of passage in it and nothing more, it is not at all necessary for the decision of the case to say that the petitioners' title should be a good title—it is sufficient that the respondents have produced no title. I cannot doubt, therefore, that the Dean of Guild was perfectly right when he proceeded to hold that what the petitioners proposed to do in regard to this lane, in erecting their new buildings, was a legitimate exercise of their title, and not inconsistent with, or calculated to encroach on or stop, the exercise of the right of passage which alone belongs to the respondents. On this point, therefore, I have no difficulty in affirming the judgment of the Dean of Guild.

Of the other points in the case two have been practically settled by the concessions of the respondents. In the first place, the complaint that the proposed building would interfere with a mutual wall which divides the property of the appellants from that of the respondents no longer exists, as the respondents have stated that they do not intend to interfere with the wall. The other point relates to the cornices, and this also the respondents do not insist in, so that the only questions which remain to be decided are those which arise on the clauses of the Edinburgh Municipal Act of 1879.

In regard to the 127th section, I think it sufficient to say that I agree with the view which the Dean of Guild has taken of it. He says—"The 127th section appears to be intended to apply to the streets and courts referred to in the three preceding sections, although the word 'new' is not repeated in it. The first clause of the section, as to the width of any street or court to be formed, is obviously to be so applied, and the succeeding clauses of the section limiting the height of the houses are, it is thought, to be read as applicable only to the same streets or courts."

Indeed, the appellants were so satisfied that this was the true view that the argument against it was hardly pressed.

The next question arises on the 129th section, and this requires a more careful consideration. Under this section it is provided "that houses or buildings in any existing street or court shall not be increased in height above the prescribed height of one and one-half times the width of the street or court in which such houses or buildings are situate, without the sanction of the Magistrates and Council." Now, this provision undoubtedly applies to houses and buildings in existing streets, and I cannot doubt that what is provided is that such houses or buildings shall not be increased beyond a certain height, whether they are existing houses or buildings in existing streets, or entirely new houses or buildings which have been erected in place of old houses which have been pulled down—in neither case are they to rise above a certain height without the sanction of the Magistrates and Council. Therefore the provision is plainly applicable to the case which we are now dealing with. But what is the street or court according to the width of which the height of the house is to be regulated? Now, whether a house may be situated in more streets than one it is hardly necessary to consider in the abstract. There may be, there often are, such houses—corner houses, for instance. It cannot be disputed that there are fair reasons for considering the corner house in the present case to be of this class, for it is bounded on the west by Castle Street and on the south by Princes Street; and very possibly there may be houses which are situated in two streets that lie parallel to one another. If the house is of such dimensions as to reach the whole way back from the one street to the other it would be very difficult to say that it is not situated in both streets. But this is not the kind of case which the Act appears to provide for at all. The section seems to contemplate that the house or building should be situated in a street, but not in more than one street. Without, however, deciding as to the height of houses which are plainly situated in more than one street, I have no hesitation in saying that the buildings which it is here proposed to erect, which front Princes Street and have their back to Rose Street Lane, are, within the meaning of the 129th section situated in Princes Street, and therefore that their height must be regulated by the width of that street in which they are so situated. I therefore think that the objection arising on this section of the statute is not well founded.

There remains only the objection on the 163d section, which provides—"Every new house shall have in the rear thereof an open space adjacent thereto, at least equal to one-half of the area to be occupied by the intended house, and such space shall be free from any erections thereon other than water-closets, privies, ash-pits, coal-houses, or other conveniences for the use of 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 cases where the thorough ventilation of such house is otherwise secured, or under other special circumstances, the said Court may allow the open space to be reduced in limits, provided also that in

cases of conversion of a house into a building for business premises the Court may sanction the erection of saloons upon such open space, of such height and construction as to the Court shall seem proper, such saloons to continue so long only as such building is so used for business purposes." Now, I am inclined to hold that this section applies only to houses built upon ground which has not hitherto been built on. I mean houses built on a part of the territory of the burgh which has not hitherto been laid out in streets. But it is not necessary to decide that question. It is quite plain that when the Dean of Guild is called on to act under this section he is to consider the interest and benefit of the house that is being built, so as to secure its proper ventilation, because if he is satisfied that the ventilation of the house is fairly provided for he may dispense in a great measure with the rule laid down in this section. It would be extremely difficult to hold that anyone else has a right to interfere in the matter. It is not necessary to get the consent of the Magistrates and Council. The determination of the question is left entirely in the hands of the Dean of Guild, who is to exercise his discretion in the matter. Now, in the present case the Dean of Guild has applied his mind to the question, and has found that the open spaces left in the area of this building are sufficient for ventilation purposes. They are not very large certainly, but the Dean of Guild has expressed the opinion that they are sufficient, and when he has decided such a matter of practical skill the Court would be very slow to alter what he has done. It would only be an error of a very flagrant kind which would induce the Court to reverse the determination of the Dean of Guild, provided he has acted within the jurisdiction conferred on him by the statute. And he having decided that the ventilation in the present case is sufficiently well provided for, I take leave to doubt the right of the appellant to interfere in the matter. That being so, I think that the judgment of the Dean of Guild on this point also should be affirmed.

This disposes of all the objections taken to the Dean of Guild's warrant, and I therefore think that the appeal should be refused.

LORD DEAS—I am very clearly of opinion that there is no good objection to the jurisdiction of the Dean of Guild. When there is a competition of heritable titles to property he is not a proper judge of that, but it is within his jurisdiction to construe titles where it is undoubted that there is no such competition. The utility of his Court would be altogether destroyed if that was not within his jurisdiction. Now, while these matters are within his jurisdiction—and some of them are within his skilled discretion—he is also entitled to construe this Act of Parliament, in the first instance at least; and I am humbly of opinion that in the present case he has rightly construed these sections. He has construed section 127, and I am of opinion rightly; and he has construed section 129, and I am again of opinion rightly. This house is situated in Princes Street. There may be houses which are situated in two streets. The example of corner houses is a palpable example of that, and I do not say that there are not also houses which are in one street to the back and in another to the front. But the par-

ticular house with which we are now dealing is situated in Princes Street, and not in any other street. Then as regards the question of ventilation under the 163d section, I am of opinion that the Dean of Guild is right here also. It is within his power and discretion to decide this matter, and I think we ought not readily to touch what he has done.

LORD MURK—In deciding the former appeal in this case we held that there was no such competition as to an heritable right of property then raised as could lead to the exclusion of the jurisdiction of the Dean of Guild. The question now to be disposed of is, whether the production by the petitioners of a title obtained since the date of that decision, which gives them the *solum* of the ground on which the back lane referred to in the titles is situated, has raised any such question? I am of opinion that it has not. The notarial instrument as it stands proves that the petitioners have now a good title to this lane, and although the respondents deny its validity, they do not assert that they have any new title of their own to the ground. There is therefore no competition of heritable rights in the proper sense of these words. The case of *Carswell*, to which your Lordship has referred, rules that distinctly; for it was there decided to be essential to the existence of such a competition that there should in the ordinary case be an adverse or competing title on the part of the respondents—not a mere assertion that someone may have an adverse right, which is all the respondents here allege.

On the questions raised under the statute I think the Dean of Guild has taken a correct view of the matter, both as to the height of the buildings and the restriction of the area. I concur therefore with your Lordship in thinking that the appeal should be dismissed.

LORD SHAND—I have come to be of the same opinion on all points.

The question of title affects only the operations on the one side of the intended buildings. The petitioners propose to open a door through the wall leading into this lane, for the convenience of their new buildings, and they also propose to put certain pipes in the wall, and to insert gratings in the floor of the lane, and if the petitioners are the proprietors of the *solum*, and the respondents have merely a right of passage, these operations are plainly within the power of the petitioners, as none of the operations will interfere with the use of the lane as a passage. It is said that there is here a competition of heritable right, but I am of opinion that there is no such competition. I think that the case is substantially ruled by the case of *Carswell*. The petitioners have produced a title from the heir of the person who gave the respondents their right of access. But the respondents do not say that they themselves are the proprietors of this lane; they merely deny the title of the petitioners, and allege that the Magistrates and Council are the true proprietors. Now, I do not say that there might not have been a competition of heritable title if it had been said that the Magistrates and Council were actually pressing their rights, or had permitted the respondents to do so. But what we have here is a good *ex facie* title, and against that only the allegation that the true title is in someone else, while that someone else is refraining from making any claim.

Then, on the construction of the different clauses of the statute, I do not mean to say anything further on the 127th section. As to the 129th section, it appears to me that the point in dispute is as to where this house is situated within the meaning of that section. It rather appears to me that there may be cases in which houses or buildings may come to be situated in two streets. For instance, a house in Heriot Row may be made to extend back to Jamaica Street. The case may arise hereafter as to whether such a building may be put up with the same height behind as to the Heriot Row frontage. But it is not necessary to decide that question here, because the statute gives no materials for saying to what depth a house may go without affecting its position as in one street only. Taking this house as it is, only partially facing Princes Street, and with its back on Rose Street Lane, I agree with the Dean of Guild that it is to be treated as in one street only, namely, Princes Street, for the purposes of this Act.

With regard to section 163, I am not sure that I concur with your Lordships in thinking that it does not apply to new houses such as we have here—that is, new houses built on ground which has been partly built on before. I rather think that such buildings are new buildings within the meaning of this section. But that question is not essential to this case, for, in the view I take, it is obvious that the 163d section was not intended to provide something for the benefit of the neighbours, but was intended to make provision for the sanitary condition of the house itself. Two things clearly point that way. One is that the Dean of Guild is authorised to dispense to a great extent with the open space in cases where the thorough ventilation of the house is otherwise secured, or under other special circumstances, and the other proviso is, “that in cases of conversion of a house into a building for business premises the Court may sanction the erection of saloons upon such open space of such height and construction as to the Court shall seem proper, such saloons to continue so long only as such building is so used for business purposes,” showing that when the house is again resumed as a dwelling-house the Dean of Guild is to look at the building to see that it is provided with the means of ventilation required for inhabited houses. Now, it appears that not only are there these open spaces, which certainly do not look very large, but there are also other arrangements for the ventilation of this intended building, and that being so, I should think it sufficient even in a question with the authorities. But it is not a question in which the neighbours have any right to interfere. It is not very easy to say what the words “rear thereof” mean. If as good ventilation is secured in front, or in the inside of the house, it is difficult to see what these words are intended to effect. They seem to me to be of very little weight. But, on the whole matter, I think the respondents have no title, because this 163d section does not deal with the rights of neighbours.

The Lords adhered.

Counsel for Petitioners (Respondents)—J. P. B. Robertson—Murray. Agents—Smith & Mason, S.S.C.

Counsel for the Respondents (Appellants)—Mackay—Guthrie. Agent—James M’Caul, S.S.C.

Tuesday, January 31.

FIRST DIVISION.

[Lord Adam, Ordinary.]

HUNTER v. HUNTER-WESTON.

Entail—Irritancy—Surname and Arms of Entailer—Lyon-King-at-Arms.

In a deed of entail, if it is intended that the heirs succeeding to the entailed estate should bear the surname and arms of the entailer, and no other surname and arms, it is necessary that the word “only” or other restrictive words should be added.

The Court will assume the correctness of a patent of arms granted by the Lyon-King-at-Arms unless regular proceedings have been taken for setting it aside.

An entailed estate was held under the condition, duly fenced by irritant and resolute clauses, that the heirs succeeding to the lands should “be obliged to use, bear, and constantly retain in all time coming after their succession the surname of H. and the coat-armorial of the family of H.; and the husbands of all female heirs succeeding to the estate shall also be obliged to assume, use, bear, and constantly retain the same surname and arms.” In 1810 the entailer obtained from the Lyon-King-at-Arms a patent authorising the use of certain arms, and these the entailer continued to use till his death in 1862. His successor in the entailed estate continued to use the same arms till 1865, when, on a petition presented by him, the Lyon-King issued another patent authorising the use of different arms. In 1880 a female heir succeeded to the estate, and she being married to an Englishman, had the arms of the family of H. as in the patent of 1865 duly quartered by authority of the Garter and the Lyon-Kings with those of her husband’s family. She and her husband made use of both of their surnames, placing that of the husband last. In an action of declarator of irritancy by a succeeding heir of entail, who did not propose to institute regular proceedings to have the patent of 1865 set aside as incorrect—held that there had been no contravention of the conditions of the entail either as regards the arms or the surname of the entailer.

The family of Hunter of Hunterston or Hunterston was a family of great antiquity in the county of Ayr, and had been in possession of their estate and had borne the name and designation of Hunter of Hunterston at all events since 1374, when William Hunter obtained a charter from King Robert II. In 1796 the estate of Hunterston was in possession of the then heiress and representative of the family Miss Eleonora Hunter, the male line having previously failed. She married her cousin Robert Caldwell, and by their contract of marriage, which was dated the 28th day of May 1796, she conveyed the Hunterston estate to Robert Caldwell and herself in conjunct fee and liferent for her own liferent use allanarly, and to the heirs of their marriage, whom failing to the other heirs therein called to the succession (with this provision, that Robert