

found to be contrary to the provisions of the statute—contrary in this sense, that it awarded the pursuer undue compensation. That being so, it does not appear to me to be possible to doubt that the Sheriff-Substitute was right in granting the special warrant which is in question. His only error was in allowing proof, or rather in allowing, as I think he did, a proof going beyond the question of genuineness. It was, I apprehend, his duty, as soon as it was admitted or proved that the agreement was a genuine agreement—genuine in the ordinary sense of the term—to have at once granted his warrant. In other words, he was not, I think, either entitled or bound to go behind the agreement, and after a proof of the whole facts, to consider and decide whether the agreement was consistent with the various decisions of the Courts, English and Scottish, as to the construction of the Workmen's Compensation Act.

It has, no doubt, been argued that when this agreement is examined, not with reference to what appears on its face, but with reference to the whole facts disclosed in the proof, it was an agreement contrary to the just construction of the statute, and therefore as a statutory agreement null and void. But it is, I think, vain to suggest that it was the intention of the statute that questions of this sort should be considered by the Sheriff-Substitute. Against that it seems conclusive that the Sheriff-Substitute performs exactly the same function as the Sheriff-Clerk performs if a written agreement purporting to be signed by both parties is tendered to him to be recorded. The Sheriff-Clerk in such a case would plainly not be entitled or bound to inquire what the facts were, what the workmen's wages were, what his "average weekly earnings" were, or what was the true construction of the statute as applied to these facts. His duty would plainly be to record the agreement *de plano*, and that being so the position of the Sheriff-Substitute differed only in this respect, that there being here no written agreement, but only a verbal agreement, and the parties being in dispute as to whether that agreement was truly made, he (the Sheriff-Substitute) had to be satisfied before he granted his warrant that the agreement was truly in fact made.

I say nothing as to what the result would be if there were a written agreement, and if upon the face of that agreement it appeared that the compensation awarded was beyond the maximum which upon any view of the facts could be awarded to the workman under the Act. In that case a totally different question would arise. Possibly in that case the Sheriff-Clerk might refuse to record, but such a case is not likely to occur, and I reserve my opinion upon it until it does occur.

The LORD JUSTICE-CLERK and LORD STORMONTH DARLING concurred.

LORD LOW had not yet taken his seat in the Division.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and affirmed the interlocutor of the Sheriff-Substitute of 31st January 1905.

Counsel for Appellant—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondents—Dewar, K.C.—A. Moncrieff. Agents—Drummond & Reid, W.S.

Wednesday, October 25.

SECOND DIVISION.

[Dean of Guild Court,
Edinburgh.]

IRELAND v. THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH.

Burgh—Dean of Guild—Building Regulations—Height of Buildings—Side Street—Edinburgh Municipal and Police (Amendment) Act 1891 (54 and 55 Vict. cap. cxxxvi), sec. 44—Edinburgh Improvement and Municipal and Police (Amendment) Act 1893 (56 and 57 Vict. cap. cliv), sec. 34, sub-sec. 5—Edinburgh Improvement and Tramways Act 1896 (59 and 60 Vict. cap. cxxxiv), sec. 87 (7)—Edinburgh Corporation Act 1900 (63 and 64 Vict. cap. cxxxviii), sec. 80.

The Edinburgh Municipal and Police (Amendment) Act 1891, by section 44, subsequently amended by later Acts, provides that the sanction of the Magistrates and Council is required before buildings in any existing street or court be increased in height beyond certain limits. The Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, section 34 (5), adds this proviso—"Provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not, to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council."

The Provost, Magistrates, and Council of the City of Edinburgh opposed the granting of a warrant to erect buildings fifty feet high in a street which, being only 120 feet long, formed a *cul de sac* and was 40 feet wide, on the ground that their sanction (which they had refused) was necessary for building to a height exceeding the width of the street.

Held that the street was a side street within the meaning of section 34, subsection 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, and that the sanction of the Magistrates was not required.

The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 44, provides:—

"Houses or buildings in any existing street or court shall not, without the sanction of the Magistrates and Council, be increased in height above the height of one and a-quarter times the width of the street or court in which such houses or buildings are situate, measuring from the level of the pavement to the ceiling of the highest habitable room; provided always that any existing house or building in any existing street if taken down may be rebuilt to its existing height."

The Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, section 34 (5), provides:—"Sections 42 and 44 of the Act of 1891 are hereby amended as follows:— . . . Sections 42 and 44 shall be read as if the word 'habitable' occurring therein respectively were omitted therefrom, and as if the following proviso were added to each of those sections respectively:—"Provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council."

The Edinburgh Improvement and Tramways Act 1896, section 87 (7), provides:—"Section 44 of the Act of 1891 shall from and after the passing of the Act be read as if the words 'but in no case shall any house or building be erected, raised, or increased to a greater maximum height than 60 feet, measured from the level of the pavement to the ceiling of the highest room, without the consent of the Magistrates and Council,' had been inserted after the word 'room' first occurring in the said section."

The Edinburgh Corporation Act 1900, section 80, *inter alia*, enacts:—"Section 44 of the Act of 1891 shall be read as if the words 'above the height of one and a-quarter times' occurring in the said section were omitted and the word 'beyond' inserted in lieu of the words so omitted, unless in the case of a house or building in an existing street which may be made of the same height as the adjoining houses, but not exceeding one and a-quarter times the width of the said street."

William Adamson Ireland, proprietor of the premises No. 11 Elliot Street, Edinburgh, presented a petition in the Edinburgh Dean of Guild Court, in which he called as respondents, amongst others, the Lord Provost, Magistrates, and Council of the City of Edinburgh, and craved "warrant to remove part of the present building at No. 11 Elliot Street, Edinburgh, and erect a four-storey building with attic floor."

The height of these proposed buildings was originally to be 64 feet, but the petitioner, with the leave of the Dean of Guild, amended his petition by deleting the words "with attic floor" and lodged amended plans, which showed buildings of a height of 50 feet, being one and a-quarter times the width of Elliot Street. The petitioner's

property was situated at the end of Elliot Street, which formed a *cul de sac*, being 40 feet in width, and about 120 feet in length. This *cul de sac* ran off the south side of Albert Street, the width of which was about 60 feet. The Lord Provost, Magistrates, and Council appeared as respondents, and notwithstanding the amendment made, opposed the granting of the warrant; they maintained that their sanction (which they refused to give) was necessary.

The petitioner maintained that their sanction was not necessary for the amended proposal.

The Dean of Guild was of opinion that section 44 of the 1891 Act, as amended by the subsequent Acts above quoted, should read as follows—"Houses or buildings in any existing street or court shall not, without the sanction of the Magistrates and Council, be increased in height beyond the width of the street or court in which such houses or buildings are situate, measuring from the level of the pavement to the ceiling of the highest room, but in no case shall any house or building be erected, raised, or increased to a greater maximum height than 60 feet measured from the level of the pavement to the ceiling of the highest room, without the consent of the Magistrates and Council; provided always that any existing house or building in any existing street if taken down may be rebuilt to its existing height; provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council."

The Dean of Guild granted warrant to the petitioner in terms of the prayer of the petition as amended.

The respondents appealed to the Second Division of the Court of Session.

The respondents and appellants argued—They accepted the effect of the amending statutes above quoted as being to make section 44 of the Edinburgh Municipal and Police (Amendment) Act 1891 read as held by the Dean of Guild. The proviso added to section 44 of the said Act by section 34, sub-section 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, was inapplicable to Elliot Street. The proviso was intended and had been framed to meet such a case as occurred in the case of *Pitman and Others v. Burnett's Trustees* (January 26, 1882, 9 R. 444, 19 S.L.R. 411), where a building extended from a main street through to "a lane or side or back street." Though Elliot Street was a *cul de sac* it was not a side street in the sense of said proviso, which meant and should be interpreted as if it read "provided further that the height of houses or buildings parts of which," &c. The proviso was worded as a restriction, and was so intended, but the petitioner's interpretation made it a relaxation, for by

it a building if in a side street exceeding 40 feet in width might without consent of Magistrates and Council be built above the height of 60 feet, and that, though in streets not being "lane or side or back streets," *i.e.*, in more important streets, buildings might not without consent exceed 60 feet in height.

The petitioner (respondent) argued—The amendments to section 44 of the Edinburgh Municipal and Police (Amendment) Act 1891, which were effected by the Edinburgh Improvement and Tramways Act 1896, section 87 (7), and by section 80 of the Edinburgh Corporation Act 1900, left untouched the proviso adjoined to section 44, by section 34 (5), of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893. The amendment made by the Corporation Act of 1900 was somewhat unintelligible and its effect was doubtful, but assuming the Dean of Guild's reading of section 44 as amended was correct, Elliot Street being only 120 feet in length and being a *cul de sac* was a side street and fell under the said proviso, and the proposed height of 50 feet was less than one and a half times its width, which was about 40 feet. The contention of the appellants that a side street would be in a more favourable position than a larger street only applied to side streets exceeding 40 feet in width, and possibly streets exceeding this width would not be side streets, but in any event statutes in restraint of private rights were to be read strictly and against the framers, whose intentions were immaterial. Alternatively in the event of Elliot Street being held to be not a side street, the respondents pleaded—The Edinburgh Corporation Act of 1900 did not substitute the word "beyond" for the words "above the height of one and a quarter times" in the case of a building in an existing street. Elliot Street was an existing street, and the proposed building was within the limit of one and a quarter times its width.

At advising—

LORD JUSTICE-CLERK—There can be no doubt with regard to these statutes that some of their clauses have been framed in a rather awkward manner, leading to dubiety and to an interpretation being put upon the statute which possibly those who promoted it did not intend. After giving the case the best consideration I have been able to give, I cannot hold that the Dean of Guild was wrong. It seems to me that the interpretation put by him upon the clause is correct. It is as distinctly stated as possible that if a building is in a side street it may be of a height of one and a half times the width of the side street in which it is, and if any person wishes to build to a height greater than that he must have the consent of the magistrates. Now, whatever was intended by the framers of the statute, I cannot see that they have done otherwise than produce a clause under which we must hold that this building may be of a height one and a half times the width of the street, provided we are satisfied that this was a side street.

Now, in the first place, that is a question of fact, and it is a question of fact for the Dean of Guild to decide. In the second place, I cannot see how this street can be held to be anything but a side street for this very simple reason, that of all streets which can be called side streets, a street which is a *cul de sac* must essentially be a side street. It cannot possibly be anything else. It leads nowhere, and no access can be got to the city except at one end. These are my views upon this matter of fact. I see no ground for holding that the Dean of Guild has gone wrong. It would be desirable that these Acts of Parliament should be put into some more intelligible shape than they are at present.

LORD KYLLACHY—I see no escape from the construction which the Dean of Guild has put upon these enactments. The intention of the clause specially in question may be open to doubt, but as to its construction I think there can be no doubt, and therefore, though with some regret, I am bound to concur.

LORD STORMONTH DARLING—I concur. It is very desirable that statutes which impose restraints on the rights of property should be worded as clearly as possible. The municipal statutes applicable to this case are not by any means models of clearness, and it may be that the intention of the framers has not been adequately given effect to, but with that we have nothing to do. The Dean of Guild has held that this is a side street, and, once that appears, there seems to me to be an end of the case.

LORD LOW—I am of the same opinion. I think it is very likely that what was intended when this clause was framed was a provision of the nature figured by Mr Guthrie. But in order that such a meaning may be gathered from the clause, it is evident that a great number of important words have to be read into the clause which are not there, and of course this is quite an inadmissible way of dealing with an Act of Parliament. As the clause stands it exactly meets the present case, because you have a side street and a house being built in a side street, and the clause says in the most distinct terms that in such a case the building shall not be higher than one and a half times the width of the street without the consent of the magistrates. The words exactly apply to this case, and I have no doubt that the Dean of Guild was perfectly right in applying them literally and allowing the lining.

The Court adhered.

Counsel for Petitioner (Respondent)—Solicitor-General (Clyde, K.C.)—W. J. Robertson. Agents—Davidson & Syme, W.S.

Counsel for Respondents (Appellants)—Guthrie, K.C.—J. A. Welsh. Agent—Thomas Hunter, W.S.