

ing the river was quite within the powers reserved or conferred by that section. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am also of the same opinion. The operations complained of, as explained in the note of suspension and interdict, are entirely on a part of the river between high water-mark and low water-mark. They are really taking place on parts of the river channel as it exists at high-water. Again, there is no taking of ground in property, such as the Clyde Trustees might require to do, for the purpose of a dock or otherwise above high water-mark; nor is there any taking of ground for the purpose of permanent occupation in any sense whatever. The operations entirely consist in the removing of soil by dredging, and the trustees for that purpose do not propose to take or occupy property permanently. The operation being of that kind, it appears to me, as your Lordship has said, that it falls directly under the powers granted to the trustees by the 76th section of the statute. If this were not so, the effect would be entirely to paralyse the trustees in their operations to improve the navigation by deepening the river, for dredging could only take place with the leave of Lord Blantyre or other riparian proprietor whose right of property extends to and includes the foreshore, and if such leave were refused, then dredging would not take place at all.

But if there were any doubt as to the effect of section 76, I think it would be entirely removed when we look at section 84 of the Consolidation Statute of 1858 (21 and 22 Vict., cap. 149), which contains very careful provisions with reference to this very property of Erskine belonging to Lord Blantyre. There are a number of matters dealt with in that section, and dealt with in this way, that the trustees are prohibited from doing certain specified acts or operations *ex adverso* of that property until they have obtained the consent of Lord Blantyre or his successors. But the section concludes with this proviso, notwithstanding prohibitions in other respects—"That it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof within the said limits" (that is, within the limits which had been shown, and were indicated by the number 131 upon the plan lodged with reference to the Act of 1840) "by machinery worked by the power of steam," or other machinery, to the extent authorised by the recited Acts and this Act. That provision seems to make it perfectly clear that the operations here complained of are within the power of the trustees, and it is not only within their power, but according to their duty, to proceed with the deepening of the river for the purpose of navigation.

On these grounds, having regard to the decision of the Court in the former action of suspension on 29th May 1868, and affirmed on appeal, and as I think there is no obligation on the trustees to take land from the complainer for dredging operations in the river channel, and within the parliamentary lines shown on the statutory plan, I am of opinion that this application must be refused.

The Court adhered.

Counsel for Complainer (Reclaimer)—Balfour—J. P. B. Robertson. Agents—J. & J. Ross, W.S.

Counsel for Respondents—Asher—Lorimer. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, March 10.

## FIRST DIVISION.

[Dean of Guild, Greenock.

M'EWAN v. SHAW STEWART.

*Superior and Vassal—Property—Restriction in Feu-Contract.*

A feu-contract provided that houses to be erected on the subjects feued "shall not consist of more than three nor less than two square storeys in height." *Held* that that did not imply a prohibition against the use as attics of the space within the roof above the three square storeys, and that for that purpose storm windows might be thrown out.

*Observed* that an objection at the instance of the superior to proposed erections by a feuar which were alleged to be in contravention of his feu-contract could competently be entertained and adjudicated upon in the Dean of Guild Court.

John M'Ewan petitioned the Dean of Guild of Greenock under the Greenock Police Act 1877 (40 and 41 Vict. c. 193), sec. 281, to obtain sanction for erection of certain dwelling-houses in Bruce Street, Greenock. The Dean of Guild having ordered citation of the Master of Works, and of certain neighbouring proprietors, among whom was Sir M. R. Shaw Stewart, the superior of the ground in question, and the Master of Works having reported that the plans were satisfactory, subject to certain alterations which were then made, objections to the petition were lodged for Sir M. R. Shaw Stewart. The plans showed three square storeys and an attic, with storm windows in the roof. An outside stair gave access to each flat, the top part leading to the attics only. The feu-contract provided that the houses to be erected "shall not consist of more than three nor less than two square storeys in height."

The objector alleged, *inter alia*, as follows—"The plans showed that the said tenement was to consist of three storeys, and also an attic storey, and on considering them, the said factor, on behalf of the objector, disapproved thereof, in respect that they showed attics or an attic storey, and refused to authorise the erection of the said tenement with attics or an attic storey. The said attics consist of possessions of rooms and kitchens, and the objector objects to them on the ground that they would be a violation of the provisions and restrictions in the foresaid feu-contract, and that too many tenants would be crowded in one tenement. The locality is fully built upon, and contains a large population. None of the houses in the section of Bruce Street in which the said piece of ground is situated contain attics. These houses are all only two and three square storeys in height."

The petitioner denied that there was a violation of the feu-contract, and further averred that the superior by permitting the construction of similar flats in numerous neighbouring tenements had waived his right to object.

On 15th December 1879 the Dean of Guild found "that the erection of said building, if sanctioned, would be in violation of the conditions of the feu-contract," and refused the application accordingly. The following note was added:—

"*Note.*— . . . . The Court considers that the plan of the petitioner's proposed building shows what is known as a tenement of three square storeys in height, with the addition of an attic or garret flat above the third storey. This attic flat has a separate stair, it contains two separate dwelling-houses, it has storm windows back and front, and it is intended to be tenanted by two separate families. The plan shows, as a whole, that the tenement which the petitioner proposes to build is meant to contain two separate dwelling-houses on the ground floor, three on the second storey, three on the third storey, and two on the attic or garret flat. The prohibition in the petitioner's title does not seem to have been meant to preserve the amenity of the locality or the ornamentation of the buildings to be erected, but would rather appear to have been inserted on sanitary grounds, and to prevent over-crowding in Bruce Street, which is a comparatively narrow street leading from Inverkip Street by a bend to Roxburgh Street. The Court holds that this attic or garret flat, if allowed to be erected, would be an addition to the three square storeys, would tend to over-crowding, and would be a direct violation of the prohibition contained in the feu-contract. It may be added here, that if every proprietor on both sides of Bruce Street added attics or garret flats to the tenements which have been erected, Bruce Street would come to be seriously over-built and over-crowded, and to that extent might be rendered less or more unhealthy. . . . .

"Bruce Street has been closely built up on both sides, with the exception of the small piece of vacant ground which it is now proposed to cover by the erection of the tenement in question; and it is important to note that there is not one single tenement fronting this section of Bruce Street which extends beyond two and three square storeys in height, and not one of them has an attic or garret flat added above the second or third square storey."

The petitioner appealed to the Court of Session.

Authorities quoted—*Campbell v. Allan*, Dec. 18, 1855, 18 D. 267; *Naismith v. Cairnduff*, June 21, 1876, 3 R. 863; *Campbell v. Clydesdale Bank*, June 19, 1868, 6 Macph. 943; *Fraser v. Downie*, June 22, 1877, 4 R. 942; *Magistrates of Edinburgh v. Macfarlane*, Dec. 2, 1837, 20 D. 156; *Gould v. M'Corquodale*, Nov. 24, 1869, 8 Macph. 165; *M'Ritchie v. Hislop*, Dec. 20, 1879, 17 Scot. Law Rep. 254.

At advising—

LORD PRESIDENT—In this case the Dean of Guild has refused to sanction the erection of a certain building on the ground that it would be in violation of a condition of the feu-contract. The condition is—"That the house or houses to be erected shall not consist of more than three

nor less than two square storeys in height." Now, in building a house of three storeys, it appears to me to be a necessary consequence that unless the roof is to be a flat one, which is an uncommon thing in this country, and to which the fear is not to be held restricted unless it is so specially provided, the building infers the erection also of a sloping slated roof, and, as was remarked by Lord Deas during the argument, the best form of such a roof is that which makes a right angle at the "rigging." If such a roof is made on a house of three square storeys it necessarily follows that there will be a space of easily ascertainable dimensions within the roof itself, not square, but triangular, so to speak; and the real question here raised is whether there is anything in the words of the condition of the feu-contract which I have read to prevent this space from being utilised and occupied as a dwelling-house.

The first observation which occurs upon reading the contract is that it does not prohibit any particular use of any part of the building to be erected. It regards the construction, not the occupation, of the building, and the construction which is specified implies the presence of such a roof and such a space within it as I have described. The house, then, has been so constructed, quite within the words of the clause, as to bring into existence that enclosed and covered space in the roof.

Now, in the absence of any restriction as to occupation of any particular part of the building in a particular way, I cannot see how the superior is justified in saying that the fear shall not utilise and occupy any part of it which is erected quite within the provisions of the clause. If there had been a stipulation for having a flat roof, the question could not have arisen, or if it had been provided that there should be no attic or garret, or that these were not to be used as a dwelling-house. But there is no such stipulation, and if the construction of such a house as this implies a sloping roof, and so an available space above the level of the walls, the superior cannot prevent the use of this for dwelling purposes in the absence of a prohibition against any particular occupation of it.

When we speak of a house of three or of two square storeys, we plainly mean that the mason-work is to be of such a height as to admit of so many storeys within the height of the walls, and I think it is not an unreasonable, but rather the only reasonable, construction of this clause that the number of square storeys is to be not more than three nor less than two. On that ground I cannot sustain the Dean of Guild's judgment.

Something has been said as to the appearance of storm windows on the plan. The main question on the construction of this clause must be considered without reference to these windows, but if the attic storey is to be occupied as a dwelling-house the question arises whether storm windows ought to be allowed. The Dean of Guild has not expressed any opinion on that point. If he had turned his attention to it on the assumption that the attics were to be used as a dwelling-house, I think he would have come to the conclusion that these windows were most desirable. No doubt they are an excrescence on the roof, but they cannot be objected to on the ground of being displeasing to the eye. They are not said to obstruct any person's light, and on sanitary considerations

they are most expedient, affording as they do both light and air to the house. That point, therefore, introduces no element of difficulty.

I think we should remit to the Dean of Guild, with instructions to grant the prayer of the petition if no other objections are stated to it.

LORD DEAS—I have no doubt as to the title of the superior to interfere in a case of this kind; but the question regards the merits of the application, which is to prevent the portion of this building above the square storeys from being laid out in the way shown on the plans. The question is, whether the house, which is in the course of erection, consists of not "more than three nor less than two square storeys?" It is not said that any objection lies against the square portion of this building. The square portion stops at the height of the walls, and it is not said they are raised higher than they ought to be. Above the walls there must be a roof of some sort, and again it is not said that this is not to be a sloping roof, nor that the roof shall not be made with the slope of a right angle at the rigging, which is the best form both for throwing off water and for endurance. It is not the most ordinary way for roofs to be constructed, for it is more expensive than a roof with a less angle, and therefore builders do not often construct them so where a less slope will do, but no one objects to the slope being at a right angle. There stand, then, three square storeys covered by an unobjectionable roof, and the question is, what the proprietor may do under this roof? That he may leave it as it is, with the inside space vacant, is undoubted; the question is, whether he may make apartments within it? If it was so meant, it is argued it should have been so said in the contract. Access to the square storeys and to the roof above is got by an outside stair built on at the back of the house, by which separate access is obtained to each flat. No objection is taken to that; the whole objection is to the attic above, and the Dean of Guild says—"The prohibition in the petitioner's title does not seem to have been meant to preserve the amenity of the locality or the ornamentation of the buildings to be erected, but would rather appear to have been inserted on sanitary grounds, and to prevent overcrowding in Bruce Street, which is a comparatively narrow street;" and he goes on to say that the addition of attics to the houses there would be unfavourable to health. But if there be no objection under the title, then objection on sanitary grounds is purely one, not to the kind of building, but to its occupation in this way—it is not to structure but to mode of occupancy. Now, the general rule is that the right of property implies the right to use the property in the way most beneficial to the subject, so long as the proprietor does not go against any express condition of the title. The whole objection here is to the mode of occupancy, and nothing else.

As to the storm windows, restrictions against them are very common in this city on the ground of amenity, but there are none such in this contract; and supposing the space in the roof to be used for dwelling purposes, I see nothing to prevent the adoption of storm windows. The whole objection is that the feuar is utilising part of what belongs to him in a particular way, against which there is no restriction in his title at all.

I agree in the opinion pronounced by your Lordship.

LORD MURE concurred.

LORD SHAND—I have come to the same conclusion.

I agree with Lord Deas in thinking that the Dean of Guild is entitled to deal with the question here raised. Questions of this kind have more commonly arisen between neighbouring feuars, and the Dean of Guild has decided these. That being so, I think there is no material distinction between such cases and one like the present between superior and vassal. The question is, whether there is an interest in the superior or in the feuar to give him jurisdiction?

In questions of this kind, where the superior gives out the property and retains merely a money payment, the conditions of the contract ought to be strictly construed. The purchaser who gets the subject, gets it for his own, except so far as restrictions are imposed by his title. On the construction of this contract I agree with your Lordships. Even if the word "square" had been absent, I do not think there would have been any difficulty. It is simply the case of a three-storied building in which the proprietor utilises the attic within a roof of ordinary construction. The Dean of Guild in his note indicates that buildings of this height would be objectionable from a sanitary point of view if continued through this street. The Master of Works, however, was called, and no such objection was stated by him. If on further consideration objections shall arise on public grounds in the same view, the matter will be quite open under this decision; but in a question between superior and vassal under this deed, I am of opinion that the restriction is not such as to prohibit the feuar from doing what he proposes to do.

The Court sustained the appeal and remitted to the Dean of Guild to grant the prayer of the petition.

Counsel for Petitioner (Appellant)—Kinnear—Pearson. Agents—Mason & Smith, S.S.C.

Counsel for Objector (Respondent)—Asher—Mackintosh. Agents—Carment, Wedderburn, & Watson, W.S.

Wednesday, March 10.

## SECOND DIVISION.

SPECIAL CASE—THE PERTSHIRE COUNTY ROAD TRUSTEES AND OTHERS *v.* THE COMMITTEE FOR THE PERTH DISTRICT, *ETC.*

*Roads and Bridges Act 1878 (41 and 42 Vict. c. 51)—Disposal of Funds formerly specially applied under Private Act—Repeal of Private Acts.*

The Roads and Bridges (Scotland) Act 1878 (sec. 4) abolished all Local Acts then in force for regulating and maintaining the turnpike or statute-labour roads in the counties of Scotland, and provided (sec. 11)