COURT OF SESSION.

Tuesday, May 26.

SECOND DIVISION.

[Dean of Guild, Glasgow.

M'DOUGALL *v.* WHYTE, AND RAESIDE *v.* WHYTE.

Burgh—Police—Regulations as to Air Space in Front of Windows—Glasgow Police Act 1868 (29 *and* 30 *Vict. cap.* 273), *secs.* 370, 372—*Glasgow Building Regulations Act* 1892 (55 *and* 56 *Vict. cap.* 239).

The Glasgow Police Act 1866, by section 370, provides that in the case of apartments used for sleeping in, the windows shall have a certain free air space in front of them. Section 372 of the same Act provides that this regulation shall not apply "to any apartment in a building at the corner . . . of a turnpike road or public street and of another public street, . . . and provided the building in which it is situated does not extend along the narrowest of them for a greater distance than 50 feet." Section 33 of the Glasgow Building Regulations Act 1892 provides —"The free space mentioned in section 370 of the Act of 1866 shall mean space free upwards and outwards . . . and the same free space, measured on and extending outwards over a radius from the window to the distance specified, shall not be available for any other sleeping apartment whose window is not on the same plane, unless such window overlooks a public or private street." This provision is declared not to be applicable "to the back windows in a tenement forming the corner of two streets, or in tenements adjoining and in line with such corner tenement, provided there is left at one gable of each such corner tenement a through space or opening from the street to the back ground 10 feet wide and open for the space of 15 feet upwards."

The back windows of a proposed tenement, forming part of a block at the corner of, and extending along, two public streets, had the free air space required by section 370 in common with the back windows in the wall at right angles. The tenement, which adjoined the corner tenement, extended more than 50 feet from the corner of the streets, its gable being slightly within that distance.

Held that the exception in section 372 did not apply, and that the Dean of Guild had properly refused a warrant—(*M'Dougall's* case).

When, however, a building falls within the exception of section 372, it is not necessary that it should in addition conform to the provisions, as regards corner tenements, of section 33 of the Act of 1892, the purpose of that section being to define the term "free space" in section 370 of the Act of 1866, and not to supersede or repeal the exception provided by section 372 (*Raeside's* case, decided June 13, 1893, see *infra* for opinions).

Thomas M'Dougall presented a petition in the Dean of Guild Court, Glasgow, praying for warrant and decree of lining for the erection of twelve tenements of shops and dwelling-houses of one room and kitchen, and single apartments, on a piece of ground bounded on the north by French Street, on the west by Swanston Street, and on the south by a proposed new street.

John Whyte, Master of Works of the City of Glasgow, lodged the following objections to the plan of the proposed buildings—"The objector submits that the buildings proposed to be erected by the petitioner in French Street, Swanston Street, and a proposed new street, in terms of plans submitted to the Court, will not be in accordance with the requirements of section 370 of the Glasgow Police Act 1866, and section 33 of the Building Regulations Act 1892, in respect that the back windows of sleeping apartments in the tenements Nos. 9 and 11 on ground plan adjoining the tenement at the corner of French Street and Swanston Street, and the back windows in sleeping apartments in the tenements Nos. 1 and 3 on said ground plan adjoining the tenement at the corner of Swanston Street and a proposed new street, have not the free space specified in said section 370 of the first-mentioned Act as defined by said section 33 of the said Glasgow Building Regulations Act." (The objector then set forth the enactments of that section as quoted below.) He further stated—"In the plans lodged in Court the same free space is treated as available for sleeping apartments in the tenements Nos. 9 and 11 adjoining the tenement at the corner of French Street and Swanston Street, the windows of which are not on the same plane, and also in the tenements Nos. 1 and 3 adjoining the tenement at the corner of Swanston Street and said proposed new street, and these windows in both cases overlook a court or area, and not a public or private street. Further, the said buildings do not fall under the provision before referred to in said section 33, for the reason that there is not left at the gables of the corner tenements a through space or opening from the street to the back ground 10 feet wide and open from the height of 15 feet upwards.

From the plan it appeared that the windows in question were in rooms intended to be used as sleeping apartments. It also appeared that the tenement in question, which adjoined the corner tenement, extended more than 50 feet from the corner, although its gable was slightly less than that distance from the corner.

To these objections the petitioner lodged the following answers:—"Admitted that the petitioner does not propose leaving at the gable of the corner tenements proposed to be erected by him a through space or opening from the street to the back 10 feet wide, and open from the height of 15 feet

upwards. . . . Denied that the buildings will not be in accordance with the requirements as to free space of section 370 of the Glasgow Police Act 1866, and section 33 of the Glasgow Building Regulations Act 1892. The buildings are within the excepted cases mentioned in section 372 of the former Act, which enacts that the provisions in sections 370 and 371 shall not apply to any apartment in a building at the corner of a public street and a private street, or at the corner of two public streets, provided such apartment is wholly above the level of the said streets. All the apartments in the proposed corner building are above the level of the conterminous streets."

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.) enacts, section 370—"Except as after mentioned, it shall not be lawful for any proprietor to let, or for any person to take in lease or to use or suffer to be used for the purpose of sleeping in, any apartment . . . unless there be in front of at least one-third of every window in such apartment, including any turnpike road or public or private street or court, a free space equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall." Section 372 provides—"The said provisions shall not apply to the following cases, viz.—To any apartment in a building at the corner of a turnpike road or public street and of a private street, or at the corner of a turnpike road or public street and of another public street, provided such apartment is wholly above the level of the said road and street, and provided the building in which it is situated does not extend along the narrowest of them for a greater distance than fifty feet." And section 364—"Every person who intends to erect any building within the city (not expressly authorised by Act of Parliament) . . . shall make application to the Dean of Guild for a warrant to do so, and shall produce along with such application a plan and sections of each storey of the building which he intends to erect . . . and shall state in such application whether any apartments in the said building so intended to be erected . . . and, if any, which apartments are not intended to be let or used for the purpose of sleeping in, and shall distinguish such apartments on the said plan."

The Glasgow Building Regulations Act 1892 (55 and 56 Vict. cap. ccxxxix.) enacts, section 33—"The free space mentioned in section 370 of the Act of 1866 shall mean space free upwards and outwards beyond any obstruction or impediment from overhanging balconies, and the same free space measured on and extending outwards over a radius from the window to the distance specified shall not be available for any other sleeping apartment whose window is not in the same plane unless such window overlooks a public or private street . . . The provision that the same free space shall not be available for any other sleeping apartment whose window is not on the same plane shall not apply . . . to the back windows in a tenement forming the corner of two streets or in tenements adjoining and in line with such corner tenement, provided there is left at one gable of each such corner tenement a through space or opening from the street to the back ground ten feet wide and open from the height of fifteen feet and upwards."

On 2nd April 1896 the record was closed on the objections and answers, and parties were heard. On 10th April the Dean of Guild (BROWN) issued the following interlocutor:—"Finds that certain of the back windows of sleeping apartments in the tenements marked Nos. 1, 3, 9, and 11 on the plans produced have not the free space required by section 370 of the Glasgow Police Act 1866, and section 33 of the Glasgow Building Regulations Act 1892, in respect that the same free space cannot be treated as available for windows in the tenements Nos. 1 and 3, nor for windows in Nos. 9 and 11, the windows in the two former and the two latter tenements respectively not being in the same plane; with this finding continues the cause, and allows the petitioner, if so advised, to amend his plans."

Note.—"The tenements Nos. 2 and 10, being corner tenements, do not fall within the provisions of section 370 of the Police Act of 1866 as to free space for windows, because such tenements are exempted from section 370 by the provisions of section 372. But the tenements Nos. 1 and 3 are not corner tenements, nor are the tenements Nos. 9 and 11. These tenements therefore fall under section 370, and require the statutory amount of free space. Before the Building Regulations Act 1892 the same free space would have done for Nos. 1 and 3 and for Nos. 9 and 11, but section 33 of this Act provides that the same free space is not to be available for windows not in the same plane, unless the windows overlook a public or private street, which exception, of course, does not apply to the back windows in question. Nor does the petitioner propose to escape the provisions of section 33 by leaving through spaces at the gables of the corner tenements, as mentioned in section 33."

The petitioner having refused to amend his plans, the Dean of Guild on 16th April pronounced an interlocutor refusing the lining.

The petitioner appealed to the Second Division of the Court of Session, and argued—A corner tenement might extend indefinitely along the two streets at the corner of which it is placed—*Assets Company* v. *Lamb & Gibson*, March 6, 1896, 33 S.L.R. 407, *per* Lord Trayner, at page 411. If these were corner tenements, then the case was ruled by *Raeside* v. *Whyte* (*see opinions infra*).

Argued for the respondent—These were not corner tenements. Corner tenements to which the exemption applied could only

extend for 50 feet along the streets at the corner of which they were situated. Section 372—As these were not corner tenements, *Raeside* v. *Whyte, cit.*, did not apply, as all that it decided was that section 372 was still in force, and these tenements were not within the exemption provided by that section.

LORD JUSTICE-CLERK—The question here upon which the whole matter turns is, I think, whether we can hold Nos. 1 and 3, and the corresponding houses at the other end of this street, to be corner tenements, and therefore to come under the exception of the 372nd section of the Act of 1866, which the Court sustained in a previous case as regards the corner of two other streets in Glasgow. In that case we had to consider as matter of fact whether what was shown on the plan was a corner tenement or not, and holding it to be a corner tenement, we held that clause 372 applied to it, and that therefore clause 370 did not apply to it; and as clause 33 of the Act of 1892 was a defining clause, as regards the meaning of clause 370, that that clause also had no application. Now, in this case the question we have to consider is, whether or not Nos. 1 and 3, and the two corresponding numbers at the other end of the street, are or are not corner tenements. If they are corner tenements, the same rule applies to them as was applied in the former case. I can only say that the Dean of Guild has held that they are not corner tenements, and I have no doubt that he is right in that. The corner tenement is shown on the plan, and the lines of these two buildings go outside the corner altogether. There is, of course, a corner formed by the two tenements next the street corner, and the argument Mr Salvesen addressed to us was, that because clause 372 allowed less space for ventilation at the corner than is allowed elsewhere, that that was a reason for extending that privilege outwards, and he seemed inclined to extend it along the whole block. Now, the argument, I think, tells the other way. If a corner tenement, from necessity, is allowed to have less ventilation space, and is still to be sanctioned by the Dean of Guild, then it is for the same reason necessary that the next tenement should not encroach upon that space, which is small enough for the ventilation of that corner tenement. I have no difficulty myself in coming to the conclusion that we ought not to interfere with the Dean of Guild's judgment in this case, and as the whole difficulty can be got rid of by introducing a ventilating space between the buildings, one does not see how there can be any hardship in the matter. But even if there were hardship, these restrictions imposed for the purpose of protecting the health of the inhabitants must be carried out, and I am unable to say that the Dean of Guild here has not fairly carried out his duties under the statute.

LORD YOUNG—I am of the same opinion. Clause 370 of the Glasgow Police Act 1866 is certainly most inartistically framed, for it specifies nothing about the erection or construction of a building, but only provides a penalty for the particular use of buildings of a certain construction with respect to windows. Its language is—"It shall not be lawful for any proprietor to let or for any person to take or lease or to use or suffer to be used for the purpose of sleeping in any apartment," and so on. That is a prohibition against use, and it applies not only to the proprietor, but also to the tenant who uses a perfectly lawful building well and properly erected under the authority of the Dean of Guild in a certain manner. There is a similar provision about the number of people who may lawfully sleep in apartments of certain dimensions, and there are penalties to enforce the prohibition. I think some of the clauses multiply the penalties, so much for every day during which the use continues. All that is very intelligible, but it is a provision about use. But then this by no means artistically framed statute, and another statute to which we were referred—the Glasgow Building Regulations Act—appear to me to indicate pretty distinctly that the Dean of Guild was required, in applications to him, to have regard to these prohibitions about certain uses of apartments constructed in a certain manner. Clause 364, to which we were referred—and it is also very clumsily framed—indicates this satisfactorily enough, notwithstanding the clumsiness of expression, for it provides that any applications for authority to erect a new building, or to alter an old one, shall state which apartments "are not intended to be let or used for the purpose of sleeping in." It is not required to specify the apartments which are to be used for the purpose of sleeping in, but to specify distinctly the apartments which are not to be used for the purpose of sleeping in. But I think it indicates, however unsatisfactorily, that the Dean of Guild is required to take account of the apartments which are to be used for sleeping in, and I propose to assume, although that is a strong way of putting it, that every apartment that is not marked as not to be used for sleeping in is to be used for sleeping in. And indeed the provision in clause 33 of the Glasgow Building Regulations Act of 1892 indicates this pretty satisfactorily also. In this Act, which is a Building Regulations Act, it is provided, in a clause imposing penalties, that the free space mentioned in clause 370 of the Police Act of 1866 "shall mean space free upwards and outwards," and so on. Now, that is the meaning which the Dean of Guild is required to take account of in dealing with applications for lining, and therefore I come to the conclusion that the Dean of Guild was entitled, and we are entitled in reviewing his judgment, to take account of the prohibition against a certain use in clause 370, and of the fact that certain apartments were marked as intended to be used for sleeping, or at least were not marked as not intended to be used for sleeping. And indeed Mr Salvesen said that the applicant to the Dean of Guild here desired him to take that view as really in his interest, for he would not make the

erection if the apartments could not be used as bedrooms, as he says the builder intended. I therefore consider the case in the view which the Dean of Guild has taken of it, and apply my mind to the question, in the first place, whether these are corner tenements —that is, Nos. 1 and 3, and 9 and 11; and in the second place, whether clause 370 applies to them. Now, I am of opinion with the Dean of Guild that they are not corner tenements, and I am also of opinion with him that that clause 370 applies, and that the free space for the back windows required by that clause of the Act is not left, and that therefore the plan will require to be altered in the manner which he suggests before he grants the lining. That is in substance affirming his judgment, and so disposing of the appeal.

LORD TRAYNER—I agree. I think the primary question is to ascertain whether these tenements shown upon the petitioner's plan, Nos. 1 and 3, and 9 and 11, are or are not corner tenements, so as to find out whether they come within the exceptions and privileges of section 372. I am of opinion that they are not corner tenements, and that therefore section 372 does not apply to them. If they are not exempted by section 372, then they fall under section 370, and I agree with the Dean of Guild that the free spaces required by section 370, as defined by section 33 in the Building Regulations Act, are not there, and consequently that the plans are not in conformity with the statutory requirements.

LORD MONCREIFF — I am of the same opinion. I am satisfied that the tenements Nos. 1, 3, 9, and 11 are not corner tenements, and therefore that they cannot get the benefit of section 372 of the Act. I am also satisfied that Nos. 1 and 3 are not in the same plane, and that Nos. 9 and 11 are not in the same plane. None of the back windows in these tenements overlook a public or a private street. Therefore Nos. 1, 3, 9, and 11 are struck at by the 370th section of the Act of 1866, as amended by the 33rd section of the Building Regulations Act of 1892. I am therefore of opinion that the judgment should be affirmed.

The Court dismissed the appeal, and affirmed the interlocutor appealed against.

Counsel for the Petitioner and Appellant —Salvesen—T. B. Morison. Agent—Peter Morison junior, S.S.C.

Counsel for the Objector and Respondent —Lees—Crabb Watt. Agents—Campbell & Smith, S.S.C.

In the case referred to (*Raeside* v. *Whyte*) the following opinions were delivered:—

LORD JUSTICE-CLERK—The appellant here desires to get a lining from the Dean of Guild Court in Glasgow, and the question which has arisen relates to certain windows in the corner of the back part of the tenement he proposes to build. Now, if section 370 applies to the appellant directly, of course there would be an end of the case. He must conform to section 370 if it applies. Now, the first question is, whether that section applies to his tenement? There are certain exceptions made to the application of section 370, and it is conceded that if these exceptions, and in particular the first exception, is in full operation and unmodified, then the provisions of section 370 do not apply to the appellant's tenement. Now, section 370 prescribes that there shall be a certain air space "equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall." But the first exception to the application of that rule is, that it shall not apply to "any apartment in a building at the corner of a turnpike road or public street, and of a private street, or at the corner of a turnpike road or public street and of another public street, provided such apartment is wholly above the level of the said road and street, and provided the building in which it is situated does not extend along the narrowest of them for a greater distance than 50 feet."

Now, it is not matter of dispute between the parties that every word of that applies to the present case, and therefore if this had been a case in which the Dean of Guild had been dealing solely with the Act of 1866, he would have been bound to grant a lining. But then the Glasgow Building Regulations Act of 1892 was passed, and section 33 deals with section 370 by way of defining what is the meaning of free space in the Act of 1866. Now, as regards the definition which is given there, the building which it is proposed by the appellant to erect does not offend against that definition and if that definition is such that the building could not be erected under section 370 it would make no difference, because there would merely be read into clause 370, clause 372, and the first paragraph of it would apply to except the appellant's tenement. But in defining the meaning of free space in the Act of 1866, section 33 further provides that that being the definition it shall still not apply to certain specified cases, and Mr Craigie maintains that these provisions for the purpose of limiting the application of the definition given in the commencement of the section have the effect of repealing the exemption contained in section 372. In the first place, I think it would be a very extraordinary way of repealing an exception provided in favour of persons wishing to build under the Act of 1866, to do so by inference in a proviso which was intended to limit the application of the definitions given in a clause which defines the meaning of the clause to which the proviso applies, and it just comes back to this—that if the Act of 1866, standing by itself, places the appellant in this position—that clause 372 does apply to him, it is impossible to find anything—I can find nothing—in

clause 33 of the Glasgow Buildings Act of 1892 which shall deprive him of the benefit of the exception provided for by the Act of 1866. I do not see that the proviso on which Mr Craigie relies has any relation whatever to clause 372. The Act of 1866 must be looked at by itself, and if the case in question is found to be under the clause 372, we have no need to look to what is the provision or the proper interpretation of these provisions in 370 at all, or whether anything is added to them by the Act of 1892. Holding as I do, without the slightest doubt, that between 1866 and 1892 the Dean of Guild would have been bound to give this appellant a lining under his present application, I hold that the position of the Dean of Guild in the matter is not the least affected by clause 33 of the Glasgow Building Regulations Act of 1892, and that it does not in any way affect the appellant's rights under the first proviso of clause 372, and that therefore the judgment ought to be recalled and the Dean of Guild ordered to give a lining.

LORD RUTHERFURD CLARK—I think it plain that the buildings which the appellant proposes to erect fall under clause 372 of the Act of 1866. Therefore it is equally plain that they are not affected by provisions in the 370th section of the statute of 1866. The only question that remains is, whether the 372nd clause has been repealed or affected by the 33rd clause of the Act of 1892. I am clear that it has not. That clause is a clause of definition only, defining the free space, and making some exceptions from that definition.

LORD TRAYNER—I think the buildings of the appellant fall within the description given in section 372 of the Act of 1866, and it is obvious that if that is so the petitioner is entitled to his lining, unless the Dean of Guild is right in saying that section 33 of the Act of 1892 introduces a new provision in addition to and over and above the provisions as to free space contained in the Act of 1866. That is a reading of the Act of 1892 which I think is absolutely untenable, and as it is the only ground of the Dean of Guild's judgment, I agree with your Lordship that the judgment ought to be reversed.

The Court pronounced this judgment—

"Find that the buildings objected to fall within the exception contained in section 372 of the Glasgow Police Act 1866: Find that the provisions of sections 370 and 371 of said Act, and the provisions of section 33 of the Glasgow Building Regulations Act 1892 do not apply to said buildings: Therefore sustain the appeal: Recal the interlocutor appealed against: Remit to the Dean of Guild to grant the lining craved by the petitioner, and decern: Find the petitioner entitled to the expenses of the appeal and the expenses incurred by him in the Dean of Guild Court in so far as these were caused by the opposition to the prayer of the petition," &c.

Wednesday, May 27.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

M'LAUCHLAN *v.* S.S. "PEVERIL" COMPANY, LIMITED, AND MACGREGOR & FERGUSON.

Reparation—Defect in Plant—Liability of Shipowner to Stevedore's Workman—Liability of Stevedore for Failing to Inspect.

A stevedore's labourer brought actions for recovery of damages for personal injuries, sustained while employed in discharging the cargo of a vessel, (1) against the shipowners, (2) against the stevedore. He averred that while a load attached to the crane was being slung across the hold to a position below the hatchway, it struck slightly against one of the ship's stanchions; that the stanchion was unfastened and only supported in its place by the cargo immediately surrounding it, and that in consequence it gave way and fell upon the pursuer. In the first action the pursuer founded on the alleged defective condition of the stanchion, and in the second, which was laid both at common law and under the Employers Liability Act, he averred that the defect was so patent that the stevedore or his foreman ought to have known of it, and to have secured the stanchion or had it removed. *Held* (1) that the action against the shipowners was relevant; and (2) (*diss.* Lord Young) that the action against the stevedore must be dismissed as irrelevant.

Simpson and Others v. *Burrell & Son*, March 12, 1896, 33 S.L.R. 413, *followed.*

William M'Lauchlan, quay labourer, brought an action against the steamship "Peveril" company, Limited, in which he claimed damages from them for injuries sustained by him while engaged at the Queen's Dock, Glasgow as an employee of Messrs Macgregor & Ferguson, stevedores, in discharging the cargo of the "Peveril," of which the defenders were owners. He averred that on or about 21st January 1896 he was employed near the square of No. 2 hatch in collecting ingots of lead into slings so that they might be dragged under the hatchway by the winch and so up out of the hold, following what was the universal mode of discharging such cargoes in Glasgow. He further averred that another squad of men were similarly employed in another part of the hold, and that while certain ingots of lead were being slung by them they came slightly in contact with some lead surrounding a stanchion of the vessel, and that "notwithstanding that the sling only touched the lead in the slightest way possible the stanchion at once gave way and fell upon the pursuer and broke his leg." He further averred—"(Cond. 3) . . .