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SECOND DIVISION.

[Dean of Guild Court, Glasgow.

WALLACE *v.* NISBET.

Burgh—Dean of Guild—Building Regulations — Height of Building — Warehouse Erected on Ground Belonging to One Owner Abutting on Two Streets—Glasgow Building Regulation Act 1900 (63 *and* 64 *Vict. c. cl*), *secs.* 60 *and* 62.

The Glasgow Buildings Regulation Act 1900 enacts — Section 60 — "(1) After the passing of this Act no building . . . . shall, except with the consent of the Corporation, be erected in, on, or adjoining any street, of a greater height than the distance between the building lines of such street and one-half more of such distance." . . . Section 62—"Where any building is erected or intended to be erected so as to front or abut upon more than one street the height of the building shall be regulated by the widest of such streets, not only so far as such building abuts or will abut upon such widest street, but also so far as it abuts or will abut upon the narrowest of such streets to a distance of 50 feet from the side of such widest street: Provided that where the whole of the ground upon which any building of the warehouse class is erected or intended to be erected belongs at the passing of this Act to one owner, nothing in this section shall prevent such building from being carried over the whole area to the height determined by the widest of such streets."

Sauchiehall Street and Sauchiehall Lane, Glasgow, run parallel to one another, the former being 70 and the latter 10 feet in width. At the passing of the Act A was the owner of a steading of land between the two streets, which consisted of a square piece of ground facing Sauchiehall Street and extending 50 feet southwards, and an oblong piece of ground facing Sauchiehall Lane and extending 40 feet northwards, these two pieces of ground not lying directly back to back, but being connected at the south-east and north-west corners respectively by a strip of land four feet wide. The piece of ground facing Sauchiehall Street had a building on it, while the other piece of ground and the connecting strip were unbuilt upon.

In 1904 A presented a petition to the Dean of Guild for authority to erect on the unbuilt-on piece of ground facing Sauchiehall Lane and on the connecting strip a building of the warehouse class 53 feet in height, the plans showing that the building proposed to be erected and the existing building on the piece of ground facing Sauchiehall Street were to be used as warehouse premises connected throughout. The Master of Works objected, on the ground that the height of the proposed building must be determined by the width of Sauchiehall Lane, and therefore exceeded the statutory limit, viz., one and a-half times the width of the lane.

The Court *granted* the lining, *holding* that the proviso in section 62 of the Act applied, and that the height of the proposed building fell to be regulated by the width of Sauchiehall Street.

Servitude—Negative Servitude—Light and Air—Implied Grant—Adjoining Building Lots Derived from Common Author.

A and B were the proprietors of adjoining properties in Glasgow, derived from a common author. A presented a petition to the Dean of Guild for authority to erect certain buildings on his property. Objections were lodged by B, who relied on an implied grant of a negative servitude of light and air, which he maintained was necessary to the use and enjoyment of his property.

The Court *repelled* the objection on the ground that a negative servitude could not be constituted without an express grant.

Inglis v. *Clark*, December 7, 1901, 4 F. 288, 39 S.L.R. 193, *followed*.

Sauchiehall Street and Sauchiehall Lane are two streets in Glasgow running parallel to one another, east and west, the space between them being about 90 feet in width. Sauchiehall Street is about 70 feet broad and Sauchiehall Street Lane 10 feet. Pitt Street crosses both streets at right angles.

At the passing of the Glasgow Building Regulation Act 1900 William Wallace was the owner of land lying between Sauchiehall Street and Sauchiehall Lane, forming in terms of his titles one steading of ground. It consisted of (1) a square piece of ground situated at the corner of Sauchiehall Street and Pitt Street, facing Sauchiehall Street, and extending 50 feet southwards towards Sauchiehall Lane, and bounded on the south and east by separate plots of ground belonging to the trustees of the deceased William Fleming Gallaway, (2) an oblong piece of ground facing Sauchiehall Lane and extending about 40 feet northwards, and bounded on the west and north by the before-mentioned plots belonging to Gallaway's trustees, this piece of ground being thus more than 50 feet from Sauchiehall Street, and (3) a strip of land, four feet broad, connecting the southeast corner of the square piece of ground facing Sauchiehall Street with the northwest corner of the oblong piece of ground facing Sauchiehall Lane. The piece of ground facing Sauchiehall Street had a building on it but the other piece of ground and the connecting strip were unbuilt on.

Wallace and Gallaway's trustees were thus adjoining proprietors both in Sauchiehall Street and Sauchiehall Lane, each owning the subjects situated behind his neighbour's property. But while the property of Gallaway's trustees was divided into two lots, that belonging to Wallace, by reason of the connecting strip of land, formed one lot, and was so treated in the titles. The whole of these three lots were derived from a common author in terms of a contract of ground-annual dated 23rd and 28th December 1846, and recorded 18th January 1847.

In the beginning of 1904 Wallace presented a petition to the Dean of Guild Court, Glasgow, for authority to erect on the unbuilt-on oblong piece of ground facing Sauchiehall Lane, and on the connecting strip, a building of the warehouse class 53 feet in height. The plans lodged by the petitioner showed that the building proposed to be erected and the existing building on the square piece of ground facing Sauchiehall Street were to be used as warehouse premises connected throughout.

Thomas Nisbet, Master of Works for the city of Glasgow lodged objections to the petition in the following terms:—"Objection 4—The proposed building is 53 feet in height, which is much higher than the distance between the building lines of the said lane [Sauchiehall Lane], and one-half-more, and is a contravention of the said Glasgow Building Regulations Act 1900, section 60. Objection 9—The distance of the new building proposed to be erected is greater than 50 feet from either Sauchiehall Street or Pitt Street, and any powers which the petitioner might have to erect a building higher than that in relation to the lane, which is the narrowest of the three streets, are limited to a distance of 50 feet from the widest street, in terms of said Glasgow Building Regulations Act 1900, section 62."

The provisions of the Glasgow Building Regulation Act 1900 (63 and 64 Vict. c. cl), sections 60 and 62, are quoted in the rubric.

Objections were also lodged by Gallaway's trustees. They averred—"(Stat. 8) The petitioner asks authority from the Court to erect on said back ground a warehouse to be used by him in addition to the buildings erected on the same plot, and the effect of the proposed erection is to injure the building belonging to the objectors situated in Sauchiehall Street by destroying the light and ventilation which said building has hitherto derived from the said back green (the ground facing Sauchiehall Lane) situated immediately behind it, and is a violation of the mutual rights and obligations contemplated by the said contract of ground-annual and imposed upon the various plots of ground, whereby said back green should remain open and unbuilt upon."

The contract of ground-annual contained no provisions expressly conferring or imposing any servitude rights or obligations in support of the objections of Gallaway's Trustees, who relied on an implied grant.

The petitioner pleaded—"(1) The petitioner being proprietor of the subjects in question is entitled to decree as craved. (2) The petition should be granted, with expenses against the objector the Master of Works, in respect . . . (c) That the buildings are not, so far as regards height, in excess of the statutory maximum, being within the exception contained in the proviso to section 62 of the said Act."

The objector the Master of Works pleaded—"(4) The height of the building being in excess of the statutory maximum the petition cannot be granted."

The objectors Gallaway's trustees pleaded—"(1) The objectors having acquired under the common title a servitude of light and ventilation, the petitioner is not entitled to

erect the buildings in question, and the petition should be refused, with expenses. (2) The buildings proposed to be erected by the petitioner being an infringement of the common title, and an interference with the objectors' rights, including the rights of light and ventilation, the petition should be refused, with expenses. (3) The objectors having an implied servitude of air and light over the back green, upon which the petitioner proposes to erect buildings which would destroy said implied servitude, the petition should be refused, with expenses. (4) It being necessary to enable the objectors to have the use and enjoyment of their property that the back green in question should remain open and unbuilt upon, and the various parties having recognised this right, which the petitioner now seeks to abrogate, the petition should be refused, with expenses."

On 3rd May 1904 the Dean of Guild (LORD INVERCLYDE) pronounced an interlocutor which, after findings in fact, proceeded in the following terms:—"Finds in law (1) that the objectors Gallaway's trustees have instructed no right to a servitude of light and air over and upon the back portion of the petitioner's property now proposed to be built on, and that the petitioner's proposed operations are not in violation of any of the provisions of the said contract of ground annual; . . . (3) that section 60 of the said Act applies to subjects which front or abut on one street only, and is not applicable to the present case; (4) that the building proposed to be erected does not fall within the main enactment of section 62 of said Act, but falls within the proviso in that section: Therefore repels the objections stated for Gallaway's trustees and for the Master of Works, and grants warrant to the petitioner to erect the building specified in the petition."

Note.—"The Dean is of opinion that the lining here asked for falls to be granted.

"At the debate the objectors Gallaway's trustees moved for a proof to substantiate their averments of injury mentioned in the seventh finding in fact in the foregoing interlocutor. They did not maintain that the contract of ground annual in question expressly conferred any servitude of light and air upon them, but they contended that such a servitude being necessary for the use and enjoyment of their properties, the back portion of the petitioner's ground should remain open and unbuilt upon, and that they must be held to have a servitude of light and air by implied grant. A servitude of light and air is a negative servitude, and the Dean is bound to hold that such a servitude can be constituted only by express grant. It is true that, as maintained for Gallaway's trustees, the opinions of Lord Chancellor Campbell and Lord Chelmsford in the case of *Ewart* v. *Cochrane*, March 22, 1861, 4 Macq. 117, are in terms general enough to warrant the application of the doctrine of implied grant to all servitudes; and Lord M'Laren in *Shearer* v. *Peddie*, July 20, 1899, 1 F. 120, 36 S.L.R. 930, says he is disposed to give the doctrine a liberal application to grants of land in this country; but in each of these cases the servitude under discussion was a positive servitude, and, as has been remarked, 'judicial opinions must always be read with reference to the concrete facts to which they apply.' The case of *Heron* v. *Gray*, November 27, 1880, 8 R. 155, 18 S.L.R. 113, has been more or less satisfactorily explained as a decision on that branch of law called the law of the tenement, and it was not argued that this case involved any such law. If this is a case of implied servitude only, then the Dean must follow the judgment of the majority of the Court in the case of *Inglis* v. *Clark*, December 7, 1901, 4 F. 288, 39 S.L.R. 193, and hold that a servitude of light and air cannot be established by implied grant. The objectors pointed out that in the case of *Metcalfe* v. *Purdon*, January 31, 1902, 4 F. 507, 39 S.L.R. 378, a case in which the point of implied servitude was raised, a proof was allowed. It seems to the Dean that that case could have been decided on several points without a proof, and while the Court of Session followed the Sheriff's decision upon the result of the proof, there is no suggestion in the opinion of the Lord President that a proof was desirable or necessary, the ground of the Sheriff's decision being sufficient for the disposal of the case. . . .

"The Dean is also of opinion that the objections of the Master of Works fall to be repelled. . . . "The Master of Works maintains that if Sauchiehall Lane be a street within the meaning of the Act then the proposed building is struck at by part 6 of the Act, which deals with the height and cubical extent of buildings. Section 60 enacts that 'no building . . . shall . . . be erected in, on, or adjoining any street of a greater height than the distance between the building lines of such street and one-half more of such distance.' The fact that the front portion and the back portion of the petitioner's ground are connected by such a narrow neck or passage gives the Master of Works some reason or justification for maintaining that in reality the back portion of the petitioner's property is a piece of ground by itself, that the new building will be practically a separate building, and will therefore abut only on Sauchiehall Lane, and that, as it will be much higher than one and a half times the width of that lane, it is struck at by section 60. But the front and back portions of the petitioner's property form a *unum quid*. They are parts of one steading, and not separate entities. Now, section 60 does not in express terms contemplate a piece of ground abutting on more than one street. Section 62 contemplates and provides for that. It enacts that 'where any building is erected or intended to be erected so as to front or abut upon more than one street, the height of the building shall be regulated by the widest of such streets, not only so far as it abuts or will abut upon such widest street, but also so far as it abuts or will abut upon the narrowest of such streets to a distance

of 50 feet from the side of such widest street.' That section clearly contemplates a piece of ground fronting or abutting on one or more streets, and if the section had stopped there, and the proposal had been to cover the whole ground with buildings, the restrictions contended for by the Master of Works in article 9 of his objections would have applied. But section 62 has this proviso, 'Provided that where the whole of the ground upon which any building of the warehouse class is erected or intended to be erected belongs at the passing of this Act to one owner, nothing in this section shall prevent such building from being carried over the whole area to the height determined by the widest of such streets.' It is not disputed that the existing building and the proposed building are buildings of the warehouse class. It is not disputed that the whole of the ground belonged at the passing of the Act of 1900 to one owner. The conditions of the proviso are accordingly satisfied in this case, and the Dean therefore holds that it applies, and that the height of the building falls to be regulated by the width of Sauchiehall Street, the wider of the two streets on which the petitioner's property abuts."

The objectors appealed.

Argued for the objector and appellant the Master of Works—The height of the proposed buildings fell to be regulated by the width of Sauchiehall Lane, in terms of section 60 of the Act. The proviso in section 62 did not apply. The plot facing Sauchiehall Lane was quite distinct from that facing Sauchiehall Street. Further, the buildings on the two plots were not erected at the same time.

Argued for the objectors and appellants Gallaway's trustees—Though a negative servitude could not be implied, and had to be constituted by grant—*Inglis* v. *Clarke*, December 7, 1901, 4 F. 2851, 39 S.L.R. 193—the grant constituting such a servitude might be implied from the titles and relative plans, as it was in the present case according to their averments. They were entitled to proof in order to substantiate the averments.

Counsel for the petitioner and respondent were not called upon.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the Dean of Guild has arrived at the right conclusion. The contention for the Master of Works is that the respondent's proposed building will exceed the height to which it is limited by the Glasgow Building Regulations Act 1900. I agree with the Dean of Guild that the proviso to section 62 of the Act applies. The whole property in question belongs to one owner, and belonged to one owner at the time when the Act was passed, and he does not propose to do more than the proviso allows him to do.

The neighbouring proprietors, Gallaway's trustees, object on the ground that they have acquired under the common title a servitude of light and ventilation. It is clear that there is no ground in law either for this latter claim or for their other claim to an implied servitude of air and light. The mere fact that the appellants have built up to the extreme edge of their own property, and have placed windows on their gable, could not be ground for holding by implication that a grant of servitude existed. There is not, so far as I can see, any ground for the appellants' contention.

I am therefore in favour of affirming the Dean of Guild's interlocutor.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF—I agree. The objection by the appellants Gallaway's trustees, as stated in their eighth statement of fact, is an objection that the proposed buildings will injuriously affect buildings, belonging to them and already existing, by shutting out light and air. I am afraid that the appellants are precluded from maintaining that objection by the decision in the case of *Inglis* v. *Clarke* (1901, 4 F. 288), in which it was held by the majority of this Court that a negative servitude could not be constituted without an express grant. I was in the minority in that case, but of course I accept the decision as binding. I would only add that this is by no means a favourable case for the application of the doctrine of implied grant, because the appellants seem to have built up to the verge of their own property, thereby shutting out light and air from any buildings that might be erected by their neighbours.

On the only other objection—that for the Master of Works—I have nothing to add. I think the case falls within the proviso in section 62 of the Glasgow Building Regulations Act 1900, because at the date of the Act this property was admittedly all the property of one owner, and therefore the restrictions in the earlier sections of the Act do not apply to it.

The Court dismissed the appeal and found in fact and in law in terms of the interlocutor of the Dean of Guild.

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