

*mons and Others*, December 18, 1897, 14 Times L.R. 150, Darling, J., decided a case in favour of the defender in accordance with *Flood v. Allen*, although the element of conspiracy was involved. I am therefore of opinion that the first defenders are not liable in damages for procuring the hostile action of the second defenders.

"There is an additional conclusion, the consideration of which, with a view to distinctness, I passed over. It is that it should be found and declared that the first-mentioned defenders illegally conspired to induce, and did illegally induce, certain hide-merchants to refrain from purchasing hides, tallow, and other articles from the pursuers. It is averred (Cond. 9) that the first defenders did this by threatening the hide merchants with a withdrawal of all their custom unless they agreed to decline to do business with co-operative societies; that is to say, that the first defenders intimated that they would not deal with these hide merchants unless they ceased to deal with the co-operative societies. That averment seems to state a case not materially different from the case in reference to the salesmen. It appears to me to be also ruled against the pursuers by the cases of the *Mogul Steam Shipping Company* and *Flood v. Allen*.

"On the whole, I have come, after anxious consideration, to the conclusion that, assuming all the pursuers' averments, except perhaps their averment, too vague for relevancy, about threats said to be employed by the first defenders, it does not appear either that what the salesmen were induced to do was illegal or in breach of the pursuers' rights, or that the acts of the first defenders in so inducing them or in inducing the hide merchants to cease their purchases from the pursuers were wrongful acts involving liability for damages; and that the defenders must therefore be absolved.

"I have experienced considerable difficulty in deciding the questions in this case, but I cannot think that any good could possibly result from allowing a proof. There is truly nothing to inquire about, and a proof would leave the facts substantially as they appear on record. I am by no means indifferent to the importance of the case, and it may be that the result at which I have arrived is not altogether desirable. It is a very serious matter that one of the gates of the country, so to speak, should be closed against a considerable class of the people, and that the trade in foreign cattle should be somewhat artificially diverted and confined. I do not know whether harm is caused or not; but if there be, I am unable to see that it can be remedied as matters stand except by legislation or (a point on which I express no opinion) by regulations of the Local Authority; unless, indeed, the fleshers' combination can be met by some counter plan, or can be checked by the force of public opinion."

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—G. Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—Dean of Faculty Asher, Q.C.—Salvesen—W. Campbell—Wilson—Clyde—Hunter. Agents—D. L. Addison Smith, S.S.C.; Donaldson & Nisbet, S.S.C.; Reid & Guild, W.S.; Dalgleish & Dobbie, S.S.C.

Friday, February 2.

## OUTER HOUSE.

[Lord Kincairney.]

### SHARP v. SOMERVILLE.

*Burgh—Dean of Guild—Jurisdiction—Structural and Non-structural Alterations—Edinburgh Municipal and Police Amendment Act 1891 (54 and 55 Vict. cap. cxxxvi), secs. 48, 49, 56, and 59.*

A party obtained warrant from the Dean of Guild Court for the execution of certain specified alterations on his premises conform to plans lodged. He was afterwards convicted, at the instance of the procurator-fiscal of that Court, of having deviated from the plans according to which he obtained his warrant, and fined £10. In a suspension of a charge for this penalty the procurator-fiscal alleged deviations in five particulars, four of which, though involving deviations from the plans submitted, were alterations of a non-structural character, for which no warrant had been asked or granted, while one was a deviation in the execution of an alteration for which a warrant had been obtained. *Held* (per Lord Kincairney) (1) that the suspender was entitled to make the alterations alleged, so far as non-structural, without warrant; (2) that he did not limit his rights by applying to the Dean of Guild Court for warrant to make other alterations, and by lodging plans in pursuance of that application; and (3) that with respect to the remaining alteration on a particular for which warrant had been obtained, it did not appear that the Dean of Guild would, in respect of that deviation alone, have inflicted a penalty of £10. The suspension was therefore granted.

*Process—Suspension—Competency—Dean of Guild Court.*

*Question:* (per Lord Kincairney), Whether it was competent to bring a judgment of the Dean of Guild Court under review by a suspension of a charge for a penalty inflicted.

The facts of this case are fully stated in the opinion of the Lord Ordinary.

On 2nd February 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the operations complained of by the respondent as Procurator-Fiscal of the Dean of Guild Court of Edinburgh, and enumerated in the third article of the statement of facts appended to the complaint by the said respondent against the complainer, were not deviations from the

warrant granted in favour of the complainer by the Dean of Guild Court for alterations as craved by him, dated 28th May 1896, or from the plans submitted to the said Court which showed the said alterations, and were not in contravention of the 59th section of the Edinburgh Municipal and Police Amendment Act 1891, other than the operations specified in the fourth place in the foresaid statement of facts: Finds that the imposition of the penalty of £10 by the said interlocutor was unwarranted by the said statute: Therefore suspends *simpliciter*," &c.

*Opinion.*—"By interlocutor pronounced in the Dean of Guild Court on 18th March 1897 the Dean of Guild found that the complainer Robert Sharp had, in making certain alterations on his premises in Leith Street, deviated without warrant from the plans sanctioned by the Court, and imposed on him a penalty of £10, and the complainer has brought up the judgment for review by a note of suspension as of a threatened charge for payment of the penalty. There is no doubt that a judgment of the Dean of Guild Court is subject to review by this Court; but such judgments have hitherto been usually, if not always, appealed to the Inner House, and this note of suspension strikes me as somewhat of a novelty. The respondent, however, declined to plead on record that it was incompetent, and that being so, I do not think that I need pursue any doubt upon this formal matter further, but may decide the question as it has been laid before me.

"The circumstances in which the judgment has been pronounced are as follows—On 28th May 1896 Sharp, the present complainer, presented a petition to the Dean of Guild and his Council, in which he craved a warrant to make the following alterations on his premises in Leith Street, viz., (1) To remove the present shop fronts, (2) to insert cast-iron stanchions and steel beams, (3) to erect new shop fronts, (4) to lower the level of ground and basement floors, and (5) to put in a new wooden floor in the one case, and concrete and cement in the other, all as shown in plans produced. The petition, it will be observed, craved authority to do the things enumerated as they were shown in the plans, but did not crave authority to do any other things whether shown in the plans or not. On 22nd May 1896 the Dean of Guild granted warrant 'in terms of the prayer of the petition and of the said plans.'

"The complainer has executed the alterations authorised, or is in the course of doing so, and no exception whatever is taken by the Dean of Guild as to the manner in which these particular alterations have been executed, with the exception of one of them, viz., the lowering of the basement floor, which has, it is said, been excavated to a depth exceeding by nine inches the depth shown on the plans.

"When Sharp had executed or was executing the alterations authorised, a complaint was presented against him by the Procurator-Fiscal of the Dean of Guild Court, which prayed for interdict, and also for the imposition of a penalty on the com-

plainer for having altered the structure of his premises otherwise than in conformity with the warrant of the Court, or for having deviated from the plans according to which he obtained the warrant, and it prayed for an order on the complainer to alter the premises so as to bring them into conformity with the warrant.

"The alleged deviations from the warrant and plans alleged by the Procurator-Fiscal in his statement of facts were four, which may be stated in an abridged form, thus, (1) whereas the plans showed cellars on the sunk floor, these had been converted into rooms connected with a shop above; (2) a stair had been made from the shop to these rooms which was not shown in the plans; (3) the plans showed that a partition adjoining a water-closet was to be removed, thereby improving the light and ventilation of the water-closet, whereas it had not been removed, or, if removed, replaced; and (4) prismatic lights had been introduced on the pavement which were not shown in the plans. These deviations or some of them had appeared to the Procurator-Fiscal to be objectionable and unsanitary, his chief objection seemingly being to the conversion of what were shown on the plans as cellars (and which were in a situation not unsuitable for cellars) into rooms, for which their position was unfitted.

"On adjustment of the record an additional complaint was made, which was that the floor of the basement flat had been lowered nine inches below the level shown in the plans passed by the Court. A record being made up, the interlocutor now brought under review was pronounced after inspection. It is not necessary to quote its precise terms. It is thereby found that there had been deviations without warrant from the plans sanctioned in respect of all and each of the heads of complaint, and the single penalty of £10 is inflicted in respect of all these deviations or contraventions.

"The Dean of Guild added a note to his judgment in which he gives what appear very weighty and sensible reasons for his objections to the alterations which the complainer had made or to some of them, and if he had power and competency to prevent them, I do not see any reason to question the propriety of doing so.

"The complaint as to lowering the floor of the basement flat, added after the petition had been brought into Court, stands in a position different to that of the other four alleged contraventions, and it will be convenient to deal with it separately, and to consider the complaint in the first place as if it embraced only the other four items of complaint. Now, about these the thing to be remarked is this—that they have apparently no relation to the alterations for which authority is craved. It is not said that they have. What is said is that they are alterations from the state of the premises as exhibited on the plans. Further, they are all internal alterations, and I think, having particularly in view the judgment of the Court in *Macgregor v.*

*Somerville*, 7th November 1889, 17 R. 48, they cannot be held to be structural.

"The question is, whether the Dean of Guild had power to impose a penalty on the complainer on account of his construction of these alterations. Of course his power, if any, is statutory, and it depends admittedly on the 48th, 49th, and 59th sections of the Edinburgh Municipal and Police (Amendment) Act 1891, which are quoted by the defender in the record, and especially on section 59. These clauses provide for the proceedings in the Dean of Guild Court, the application for building a house, for alterations of its structure, or for certain changes in the mode of its occupancy, which changes are particularised. This case regards only alterations on the structure of an existing house. The provisions of the sections so far as relevant to this case are in substance as follows—Section 48 provides that the petitioner shall lodge a petition for a warrant, which shall set forth a description of the intended alterations, and shall be accompanied with a plan of the site, and also the streets, &c., on which the property abuts, 'and also plans, sections, elevations, and such detailed drawings as are necessary to show the height and mode of the structure and arrangement of the intended' . . . alteration, and the drainage thereof. This section then contains a clause which has no direct bearing on this case, but which it may be as well to quote as illustrative of what should be shown in the plans—'And in respect to any building, such plans shall show the arrangements for ventilation and heating and the provision intended to be made for ingress and egress.' The complainer complied with this section.

"Section 49 provides for notice of the petition to the Burgh Engineer, and for a report by him to the Court, and it empowers the Dean of Guild to refuse a warrant for the alteration proposed until the 'Court is satisfied that the plans provide suitably for strength of materials, stability, mode of access, light, ventilation, and other sanitary requirements, and are otherwise in conformity with the provisions of the Edinburgh Municipal and Police Acts.' This section does not apply directly, because the Dean of Guild did not refuse but granted the warrant craved, only it is said that this warrant was granted in reliance that the plans would not be altered.

"Section 59, on which alone the judgment of the Dean of Guild of necessity rested, provides as follows—'Every person who shall erect or begin to erect any house or building, or alter the structure of any existing house or building, or use for human habitation any building not previously so used, or alter the mode of occupancy of any existing house, in such a manner as will increase the number of separate houses or occupiers without a warrant or otherwise than in conformity with a warrant of the Dean of Guild Court, and every person who shall in the erection or alteration of any house or building the erection or alteration of which has been sanctioned by the Dean of Guild

Court, deviate from the plan or plans and section or sections, elevation or elevations, and detailed drawings so sanctioned, or shall in the erection or alteration of any house or building, in any way contravene the building rules of this Act, shall be liable to a penalty.' The question is, does this section sanction the imposition of a penalty in this case?

"A considerable part of this section does not apply to this case. Nothing about the erection of new buildings or about the altered use of the house applies. Neither is it said in this case that there has been any deviation from the building rules. No part of the section applies except the words which relate to the alterations of houses. The rest of it may be left out of consideration. Now, if these provisions be omitted, what remains of the section is substantially the same as section 162 of the Edinburgh Municipal and Police Act of 1879. The differences are not material. Now, that section was authoritatively construed—see *Somerville v. M'Gregor*, November 7, 1889, 17 R. 49, a case affected, no doubt, by the introduction into the new Act of the provisions as to the use for human habitation of a building not previously so used, as to increase of separate houses or occupiers, but otherwise never questioned nor open to question. It is a judgment which necessarily construes also section 59 of the later statute so far as it is applicable to the present case. I do not refer to the detailed judgments, but it results from them very clearly that the alterations complained of, other than the lowering of the basement floor, were not structural alterations, but were alterations which the complainer might have made without the authority of the Dean of Guild, that is to say, had he made no application to the Dean of Guild. Hence it cannot consistently with that decision be affirmed that the complainer has altered the structure of his house without a warrant or otherwise than in conformity with a warrant, and indeed the judgment does not affirm that he did so, but only that he deviated from the plans, and the question is therefore reduced to this, whether, when such owner of a house craves warrant to make certain alterations on his house and submits a plan of the premises, he is thereby barred from making any alterations on his premises as shown on that plan other than those for which authority is asked, although they are such as he might have made of his own authority and without the warrant of the Dean of Guild had he presented no petition. I do not so read the statute. I consider that a petition submits to the Dean of Guild only the proposed alterations, and nothing else about the building for the alteration of which he asks no warrant. If after obtaining the warrant of the Dean of Guild he makes other alterations in the structure such as he was not entitled to make without authority, he will come under the penal provisions of the Act. But if the unauthorised alterations which he makes are such as the Dean of Guild has no concern with he will not thereby incur any penalty.

There is no restriction on his power in the statute except what is made by the new or special provisions which have been referred to. The statute speaks of deviation 'from the plan or plans and section or sections, elevation or elevations, and detailed drawings so sanctioned.' I can have no doubt that the plans mentioned are the plans of the works for which warrant is asked, and not the plans of the site which may contain many other parts of the building which the owner may not mean to alter, or for the alteration of which he may consider that he does not require a warrant.

"Had the complainer made the alterations complained of before he presented his petition, the Fiscal of the Dean of Guild Court would have had no power to intervene, however objectionable he may have thought them. The Dean of Guild says in his note that if these alterations had been intimated before he granted the warrant he would have insisted on better provisions being made for light and ventilation, but unless he had power to prevent the alterations apart from the petition, I am unable to see that the petition conferred such power.

"It seems to me that a warrant of the Dean of Guild Court in such cases increases the power of the petitioner but does not diminish it, neither can I see that it necessarily puts the petitioner under the obligation to carry out all or any of the improvements for which he asks warrants, although it may be that he will not be allowed to carry out one authorised alteration without carrying out another connected with it.

"Two cases of much importance bearing on the question have been decided since this complaint was brought before the Dean of Guild, and one of them since his judgment was pronounced—*Saltoun v. The Magistrates of Edinburgh*, March 19, 1897, 24 R. 832, and the other *Macgregor v. The Magistrates of the Burgh of Leith*, June 8, 1897, 24 R. 971. The former case related chiefly to section 49 above quoted, and to a question of light and ventilation, and it was held that the building with which the Dean of Guild was concerned was that for which warrant was craved, and that he was not entitled to refuse a warrant on the ground that the proposed additions would interfere with the light and ventilation of the existing buildings.

"In *Macgregor v. The Magistrates of Leith* the magistrates were held not entitled to refuse a warrant for the alteration of a house on the ground of defects in the ventilation of the house proposed to be altered. The Lord President observed that the question before the Court (*i.e.*, the Dean of Guild Court) was the merits of the alteration, not the merits of the house apart from that alteration. It is true that the cases depended on the 167th section of the Burgh Police Act 1892; but the provisions of that Act and of the Act of 1891 do not materially differ.

"For these reasons and on these authorities I am of opinion that the alterations complained of, except the lowering of the basement floor, were such altera-

tions as the complainer had power to make without the sanction of the Dean of Guild, that his power in that respect was not restricted by the presentation of his petition, that the Dean of Guild had no power to oppose the works of which he complains, however objectionable they might be from a sanitary point of view, and that there was no warrant in the statute for the infliction of a penalty for these alleged contraventions.

"But I reserved consideration of the alleged contravention of lowering the basement floor, which is in a different position. Assuming the facts stated by the Procurator-Fiscal, I think it must be admitted that the alteration of the basement floor was a structural alteration. Warrant for it was expressly craved, and it is said that it was executed otherwise than in accordance with the warrant, or that it was a deviation from the plan, which exhibited the alteration for which warrant was asked. The complainer Sharp maintained that this particular complaint was incompetently introduced into the case, and was not embraced in the prayer, because it was added after the Fiscal's complaint was in Court. No authority was quoted in support of this contention, and I am unable to sustain it. I think that the words of the prayer were wide enough to embrace it. Then it was said that the complainer had asked to be allowed a proof, but that proof had been refused as contrary to the general practice of the Dean of Guild Court and to the general theory of procedure in that Court. I am certainly not prepared to sustain this objection. I am at a loss to know what the complainer wished to prove, and I am clear that no ground has been made out for interfering with the decision of the Dean of Guild Court on this point, and I refer to the opinion of Lord M'Laren in the case of *Lord Saltoun*. I therefore am unable to hold that the Dean of Guild was wrong in holding that in respect of that head of complaint (that is, the fourth) there had been a contravention of the statute. I think he was wrong as to the four complaints, but right as to one, that one not being apparently a contravention of importance. I cannot assume that the Dean of Guild would have inflicted a penalty of £10 for that single contravention, or any penalty. Nothing but this question of penalty is brought before me, and it seems to me that as the infliction of the penalty proceeded on grounds which were in my opinion to a great extent erroneous, it cannot be sustained, and that the only possible course is to suspend the charge. I do not say what other remedy the respondent may have on account of the contravention of warrant in regard to the basement floor."

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Agent—Thomas Hunter, W.S.