Saturday, June 8.

SECOND DIVISION.

[Dean of Guild Court, Queensferry.

SMELLIE *v.* GALLON.

Police—Regulation of Buildings—Building near Turnpike Road—Gable Wall and Part of Front Wall Rendered Insecure and Taken Down to be Restored—Road—Street — Turnpike Roads (Scotland) Act 1831 (1 *and* 2 *Will. IV. c.* 43), *sec.* 91—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 158—*Building "Taken Down," "to be Altered," or "to be Rebuilt."*

By section 9 of the General Turnpike Act 1831 it is enacted that no houses, walls, or other buildings above 7 feet high shall be erected without the written consent of the road trustees within 25 feet of the centre of any turnpike road.

By section 158 of the Burgh Police (Scotland) Act 1892 it is enacted that where any house or building has been taken down in whole or in part in order to be altered, or is to be rebuilt, the commissioners may require it to be set back to the line of the street or to such other line as may be fixed by them, the commissioners making full compensation to the owner for any damage he may thereby sustain.

Held that neither of these enactments applied to the case of an owner taking down a gable wall and the adjoining part of the front wall of an existing tenement, which had been injured by operations on an adjoining property, in order to restore them to their former condition.

By section 91 of the Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV. c. 43) it is enacted—"No houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees previously obtained in writing . . . within the distance of 25 feet from the centre of any turnpike road." . . . For this section see Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), Schedule C, and section 123.

By section 158 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55) it is enacted—"When any house or building has been taken down in whole or in part in order to be altered or is to be rebuilt, the commissioners may require the same to be set backwards to or toward the line of the street or the line of the adjoining houses or buildings, or such other line as may be fixed by the commissioners in such manner as the commissioners may direct for the improvement of such street: Provided always that the commissioners shall make full compensation to the owner of any such house or building for any damage he may thereby sustain, which compensation may be settled by mutual agreement, or in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Act is directed to be settled, and shall form a charge against the general improvement rate."

Miss Jessie Dougal Martin Smellie presented a petition to the Dean of Guild Court of the burgh of Queensferry, in which she prayed the Court "to grant warrant to the petitioner to take down the west gable wall and the adjoining portion of the south front wall of the tenement belonging to the petitioner situated on the north side of the High Street of Queensferry, and in place thereof to re-erect a new gable wall and adjoining portion of the front wall of the tenement, and to make the internal and other alterations and buildings necessary, all conform to the plan herewith produced, and also to grant warrant to the petitioner to occupy such portions of the public road or street adjoining for laying down and enclosing the necessary materials for said building as shall seem reasonable."

The petitioner called as respondents—(1) James Gallon, Master of Works of the burgh of Queensferry, for the public interest, and (2) William Alexander Mitchell, the proprietor of the immediately adjoining subjects.

The petitioner, after stating that the subjects belonging to her consisted of a dwelling-house and yard with stabling behind, averred as follows:—"(Cond. 2) During certain operations in the beginning of the year 1899 on the adjoining property belonging to the respondent Mitchell, in connection with the erection of a new hotel, the west gable wall of the property now belonging to the petitioner was wrongfully interfered with and partially taken down without the knowledge or consent or authority of the petitioner or her authors, and a portion of the front wall immediately adjoining said west gable became cracked. The petitioner purchased the subjects with entry at Whitsunday 1899, but only obtained a disposition in her favour in October 1900 on account of the delay caused in having a defect in the seller's title remedied by the seller. Owing to a rule of the Dean of Guild Court of Queensferry, which requires the production of petitioner's title with the petition, the present petitioner was accordingly barred from making application for warrant for the restoration of the subjects, but as she is now infeft in the subjects the petitioner is anxious to restore the said subjects to their former condition, all as shown on the plan produced, and it is necessary that the petitioner should obtain warrant for that purpose." . . .

Both respondents lodged answers, but the answers of the respondent Mitchell were not material for the purposes of this report.

In his answers the Burgh Master of Works did not admit the petitioner's statements, and explained "that the petitioner proposes to take down the buildings at present on the subjects, or part thereof, in order to be altered or rebuilt. Explained further, that the subjects upon which the buildings are proposed to be erected are bounded by and abut on the High Street of the burgh of Queensferry. The said High Street is a road or highway to which the provisions of section

91 of the Statute 1 and 2 Wm. IV. cap. 43, and section 123 of the Act 41 and 43 Vict. cap. 51, apply. The buildings proposed to be erected are 17 feet high, and are within 8½ feet or thereby of the centre of the said street. The petitioner has not obtained the consent of the local authority of the burgh to the erection of the said buildings, but on the contrary the said local authority object to and disapprove thereof. Further, the line of the proposed buildings abutting on the said street is not upon the line of the street or the line of the adjoining houses or buildings, and upon 30th November the Commissioners of the burgh, having previously under section 158 of the Burgh Police (Scotland) Act 1892 passed a resolution to that effect, served upon the petitioner a requisition in the following terms—'The Commissioners of the burgh of Queensferry acting under and in terms of the Burgh Police (Scotland) Act 1892, particularly by section 158, have resolved that the house or building abutting on the north side of the High Street of the burgh belonging to you, the gable of which has been taken down, and which you propose to rebuild in whole or in part, must on being so rebuilt be set backwards to the line of the street there, which is a straight line drawn between a point on the street line or front or south face of the house or building immediately on the west to a point on the street line or front or south face of the house or building immediately on the east of your said property, and the Commissioners require your new building to be set back accordingly." The execution of said intimation and requisition to the petitioner is herewith produced. The building proposed by the petitioner is a building to which the said statutes apply."

The respondent pleaded, *inter alia*—"*Additional*—. . . (2) The proposed buildings being in contravention of the General Turnpike Act and the Roads and Bridges Act mentioned in the answers, and the petitioner not having obtained the consent of the Local Authority thereto, the petition should be dismissed, with expenses. (3) The Commissioners of the burgh having resolved under section 158 of the Burgh Police (Scotland) Act 1892, and having served a requisition upon the petitioner, all as mentioned in the answers, the petition should be dismissed, with expenses."

The petitioner pleaded, *inter alia*—"(3) The Acts of Parliament founded on by the respondent are inapplicable."

On 25th March 1901 the parties lodged a minute to the following effect—"Beyond the productions made which are admitted as probative, and the facts known to the Court and ascertained on inspection and measurement of the subjects in dispute, the parties renounce probation."

On 25th March the Dean of Guild Court pronounced an interlocutor by which, after finding, *inter alia*, that the west gable of the petitioner's tenement had been taken down in the summer of 1899 with the consent or instructions of the petitioner or those acting for her in order to be altered, they sustained Nos. 2 and 3 of the respondents' additional pleas-in-law, refused to grant the warrants craved, and dismissed the petition.

The petitioner appealed, and argued—The Dean of Guild had found in fact that this building had been taken down with the petitioner's consent in order to be altered. This finding was not warranted by any statements on record, and probation having been renounced the Dean of Guild was not entitled to go beyond the facts admitted on record. Section 91 of the General Turnpike Act did not apply to a building re-erected after being taken down in part—*Macdonald* v. *Commissioners of Fort-William*, March 19, 1895, 22 R. 551; *Whyte* v. *Bruce*, March 20, 1900, 2 F. 823. Section 158 of the Burgh Police Act 1892, only applied to buildings taken down in order to be altered. In the present case the building had been damaged, and partly taken down without the consent of the petitioner, and all that she desired was to restore it to its former condition.

Argued for the respondents—The Dean of Guild's findings in fact were in accordance with the minute for the parties, which permitted the Dean of Guild Court to proceed on facts known to the Court. These findings in fact must therefore be taken to be correct. The new wall of the tenement which the petitioner proposed to erect could not be erected within 25 feet of the centre of the road without the written consent of the Local Authority, which the petitioner had admittedly not obtained—*Whyte* v. *Glass*, December 20, 1900, 38 S.L.R. 214. Section 158 of the Burgh Police Act 1892, also applied. In the prayer of her petition, the petitioner asked for leave to make alterations. This conclusively proved that the building had been taken down "in order to be altered." This house jutted into the roadway 14 feet beyond the line of the street, and the Commissioners were entitled to have such an obstruction removed on paying compensation to the owner in terms of the section.

At advising—

LORD JUSTICE-CLERK—In this case the procedure in the Dean of Guild Court has been in some respects irregular. The Court, by the interlocutor and note, plainly dealt with facts which were not in any competent way before it, and made assumptions which the only facts admitted did not justify. The case of the appellant is, that a building belonging to her had by the improper proceedings of a neighbour had a side gable practically brought down, and as a consequence the stability of part of the front affected, and accordingly she applied to the Dean of Guild for authority to take down the broken gable and the adjoining portion of the south front which had been injured, and replace these portions of the building.

The Master of Works resisted the granting of a warrant by the Court, maintaining that as the petitioner proposed to take down her building or part thereof, the

Commissioners of the Burgh were entitled under section 91 of 1 and 2 Will. IV. cap. 43, and the Burgh Police Act of 1892, section 158, to prevent the work, and to insist that the building should be put back from its original line to the new line of the street under the rules laid down in these statutes. He denies the statements of the proprietor as to how the part of the building came to be taken down. This contention the Dean of Guild Court gave effect to, sustaining the second and third additional pleas for the Master of Works, which are as follows:—[*His Lordship read them*]. I am of opinion that in the circumstances neither of these pleas ought to have been sustained. The petitioner was not proposing to take down her building in the sense of the Act. She was only proposing to repair an injury done to part of the building by the action of others. The Master of Works does not aver that the petitioner took down the gable for any other reason than that which she avers. He only says of it, Not known and not admitted. It was for him to raise that question. Further, the building was not to be removed and another substituted for it, nor was any part of it to be made different from what it was before. No doubt a part had to be taken down, just as a part might require to be taken down if a building was struck by lightning or injured by a flood caused by a thunderstorm, or partially destroyed by a fire. But where a part of a building has suffered an injury, it is not the less a work of mere repair, because in order to make what a tradesman calls "a good job," some of the existing structure must be removed and replaced. If what the petitioner avers is true, and there was nothing admitted by her, and nothing averred by the contradictor, or disclosed in what was competently before the Court, entitling the Court to hold the contrary, then the decision of the Dean of Guild Court could not be justified, and the sustaining of the second additional plea would be wrong. But that is just the state of the matter, and the Court had nothing competently before it to the contrary, and therefore I feel bound to hold that the sustaining of this plea was wrong.

The same follows in regard to the third additional plea. The resolution of the Commissioners could not justify the decision of the Dean of Guild Court unless the circumstances were such as to give it validity. Now, the 158th section of the Burgh Police Act relates to two cases, (1) where a building has been taken down in whole or in part in order to be altered, and (2) or is to be rebuilt. The second alternative is not in this case. The house is not to be rebuilt. Therefore the plea must be based on the first alternative. A part of the house has admittedly been taken down, but is it so taken down in order to be altered? Of that there is no trace in the case. The petitioner states that the part taken down because of the injury is to be put up again as it was before, and this is not denied. I therefore think that there was no ground for sustaining this plea.

I would move your Lordships to recal the interlocutor, to repel the second and third additional pleas for the respondent Gallon, and to remit to the Dean of Guild Court.

LORD TRAYNER—The Dean of Guild has sustained the 2nd and 3rd of the respondent's additional pleas-in-law, and dismissed the petition. In doing so I think he has overlooked the character of the petition presented to him. The petitioner is not asking a lining for a new erection; she is asking authority to take down a part of an existing tenement which has been injured by the operations of an adjoining proprietor, and to restore it to its former condition. To such a state of circumstances neither the provisions of the General Turnpike Act of William IV. nor the provisions of the Burgh Police Act of 1892, on which the respondent's pleas are founded, have, in my opinion, any application. The provisions of the former Act have reference to buildings which it is proposed to erect on a site then unoccupied, which is not the case here. The Burgh Police Act (sec. 158) refers to buildings taken down in whole or in part to be altered or rebuilt, and enables the Commissioners to require that the altered or rebuilt premises shall be erected in a line with the line of the street or of the adjoining buildings. But this presupposes I think that that part of the tenement taken down is a part which affects the line of the street, and the removal of which affords reasonable opportunity for altering or rectifying the line, or making a new line. For example, if the whole front wall of a house was taken down with a view to some alteration in the character of the house, the clause might apply. The Commissioners might require the new front wall to be set back. But if a part—say at the top of the front wall—was taken down to be restored—it might be merely a chimney-stack—which had no immediate connection with the line of the street, it would be unreasonable to insist that in these circumstances the proprietor should be called on to take down his building with a view to alter or improve the line of the street. That is really the kind of case we have here. The upper part of the petitioner's gable has been partly destroyed by the neighbour's operations, which have also cracked the front wall. Nothing is proposed to be done in the way of alteration of her building, nor any rebuilding beyond what is necessary as a proper work of restoration.

The Dean of Guild finds as matter of fact that the present condition of the petitioner's property is the result of operations executed with her consent or on her instructions. Even if that were so, it would not alter my view of the case, but I find it difficult to see how the Dean of Guild can issue such a finding as no such thing is averred by the respondent, and is directly contrary to the averments made by the petitioner. I think the appeal should be sustained, and the pleas for the respondent to which I have referred repelled. The case will then go back to the Dean of

Guild as proposed by your Lordship, to be proceeded with.

LORD MONCREIFF — I am of the same opinion, and for the reasons which your Lordships have fully stated.

The Dean of Guild's judgment proceeds on a finding in fact that this house has been taken down in whole or in part in order to be altered. If that were so, the case would appear to fall under the terms of section 158 of the Burgh Police (Scotland) Act 1892. But I find no ground on record for that finding in fact, and there has been no proof. On the contrary, it appears plain that what your Lordships have pointed out happened, namely, that part of the front wall was damaged by reason of operations on a neighbouring property, and that the wall was taken down in order to be put up again. I do not think that that is a case to which section 158 applies.

LORD YOUNG was absent.

The Court sustained the appeal and recalled the interlocutor appealed against, repelled the 2nd and 3rd of the additional pleas-in-law for the respondent Gallon, and remitted the cause back to the Dean of Guild to proceed.

Counsel for the Petitioner and Appellant — Salvesen, K.C. — Kemp. Agents — Whigham & Macleod, S.S.C.

Counsel for the Respondent — Guy. Agents—W. & J. L. Officer, W.S.

Tuesday, June 4.

FIRST DIVISION.

[Lord Low, Ordinary.

CALEDONIAN INSURANCE COMPANY *v.* MATHESON'S TRUSTEES.

Superior and Vassal—Casualty—Composition—Clause of Relief—Implied Entry—Statute—Supervenient Legislation—Obligation—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4.

By disposition granted in 1866, and duly recorded, A acquired on an *a me vel de me* holding the *dominium directum* of certain subjects from B, who held them under C. B bound himself and his heirs and successors (1) to free and relieve A in all time coming "of and from payment of the whole feu-duties and casualties payable by me or my heirs to my superiors" and (2) to enter with the superiors, "and if my heirs and successors shall not so enter," he bound his heirs and successors "to pay the whole composition exigible from" A "on receiving an entry direct from the over-superiors." B died in 1877. Thereafter C demanded payment of a composition from A, who claimed relief from B's testamentary trustees. *Held* (1) that they were not liable under the first branch of the clause of relief in respect that the composition claimed was not a casualty payable by B or his heirs to their superiors; and (2) that they were not liable under the second branch of the clause in respect that the primary obligation upon B's heirs and successors thereunder was to enter with the superiors (the obligation to pay composition being merely accessory in the event of their failure so to enter) and it had become impossible for them to do so owing to supervenient legislation.

Superior and Vassal—Casualty—Composition—Clause of Relief—Statute—Supervenient Legislation—Conveyancing Act 1874 (37 *and* 38 *Vict c.* 94), *sec.* 4.

In 1868 A acquired from B the *dominium directum* of certain subjects by disposition duly recorded. B bound himself and his heirs to relieve A of all casualties due to the superior in all time coming. B died in 1877 after the Conveyancing Act 1874 had deprived A of the power of putting forward B's heir to meet a demand by the superior for composition. Thereafter C demanded composition from A. *Held* (by Lord Low, Ordinary) that B's heir was bound to relieve A of the composition demanded.

In 1866 the Caledonian Insurance Company acquired the *dominium directum* of certain subjects in Edinburgh from Robert Matheson, who held them under the Governors of George Heriot's Hospital. This disposition was duly recorded. It contained the following clause:—"To be holden . . . *a me vel de me* for payment to me and my heirs and successors of one penny Scots money in name of blench farm yearly, and doubling the same at the entry of heirs and singular successors, and declaring that the said Caledonian Insurance Company and its foresaids shall be freed and relieved by me and my heirs and successors, now and in all time coming, of and from payment of the whole feu-duties and casualties payable by me or my heirs to my superiors, as well as from all cess, teinds, minister's stipend, and other public and parochial burdens payable in respect of the said lands or subjects and others, and from all augmentation thereof, all such upper feu-duties and casualties and cess, teinds, and minister's stipends and public and parochial burdens, and all augmentations thereof being payable by me or my foresaids, now and in all time coming, out of the remainder of the foresaid lands belonging to me not hereby disponed. . . . And farther, I bind and oblige myself, my heirs and successors . . . to enter with the superiors . . . And if my heirs and successors shall not so enter, . . . then I bind and oblige myself and my heirs and successors to pay the whole composition exigible from the said Caledonian Insurance Company on receiving an entry direct from the over-superiors, and also the whole feu-duties and casualties which may hereafter become payable by it and them to said superiors."

In 1868 the Caledonian Insurance Company acquired from Robert Matheson the *dominium directum* of certain other sub-