husband's predecease; and I do not know that, even on the question of construction, it is immaterial to observe that this is not a will but a marriage-contract, in which the wife is settling funds on the children of the marriage, but is also stipulating for the right of disposing of these funds at her own pleasure in the event of there being no children. When the wife in making a settlement of this kind stipulates that she shall be entitled to dispose of the funds by will, in one event if there are no children of the marriage, and in another event if there are no children or issue of children, I cannot on the ordinary principles of construction suppose that she does not intend to distinguish between the two cases. It is not necessary to speculate as to her reasons for making such a distinction. She has stipulated for an absolute right of disposal in the event of her predeceasing her husband and there being no children of the marriage, and it appears to me that the contrast between this clause and the later clause only goes to enforce the obligation of abiding by the literal interpretation of the words used in each.

On the question of construction, therefore, I agree with your Lordship, and I also agree that it is unnecessary to determine the larger question whether the *conditio si sine liberis* can properly be applied to the construction of a marriage-contract in any case. But I desire to add that if the rule were applicable at all, of which I am not satisfied, it appears to me to be very questionable whether such a provision, if it should be held to include grandchildren, may not be testamentary, and therefore revocable in so far as their interests are concerned, although it would certainly be pactional in so far as regards the immediate children of the marriage.

The Court recalled the interlocutor of the Lord Ordinary, decerned in terms of the conclusions of the summons, and appointed the expenses of both parties to be paid out of the trust funds in the hands of the defenders.

Counsel for the Pursuers—Rankine—Wilson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Defenders—M'Kechnie—Peddie. Agents—Macandrew, Wright, & Murray, W.S.

Saturday, December 20.

FIRST DIVISION.

ALLAN AND OTHERS *v.* WHYTE AND OTHERS.

Property—Dean of Guild—Glasgow Police Act, secs. 367, 370—*Free Space.*

The Glasgow Police Act, by sec. 367, provides that "The Dean of Guild shall not grant warrant to erect or alter any building unless or until he is satisfied . . . that every apartment, except those distinguished on the plan as not intended to be let or used for sleeping in, is of such size, and has one or more windows, with such free space in front of every window thereof, as to be in conformity with the provisions hereinafter contained;" and by sec. 370 certain regulations are prescribed for determining the necessary free space in each instance, but there is no provision that the free space required must extend over the exclusive property of the builder.

In an application for a lining, it appeared from the plans that while the necessary free space in fact existed, it was obtained only by adding to the free space over the builder's own property that which existed over unbuilt-on ground belonging to neighbouring proprietors; and the Dean of Guild thereupon refused a lining, "in respect the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (secs. 367 and 370) to entitle him to use the room or kitchen, marked A on said plans, as a sleeping apartment." An appeal from this decision was *sustained*, but *observed* that the case would be different if there was an immediate prospect of building upon the unoccupied space of the neighbouring proprietor.

Dean of Guild—Refusal of a Lining—Competency of Appeal—Glasgow Police Act, secs. 277, 273.

Held that a process of lining in the Dean of Guild Court was a common law proceeding, and therefore that the right to review the judgment of the Dean of Guild therein was specially reserved by sec. 273 of the Glasgow Police Act, and not excluded under sec. 277.

This was an appeal by G. & G. Allan, builders, Glasgow, and George Allan and Gavin Allan, the individual partners of that firm, and William G. Wilson, also a builder in Glasgow, against a decision of the Dean of Guild of the city of Glasgow. The appellants were proprietors of certain subjects situated upon the west side of Armadale Street and south side of Garthland Drive, Dennistoun, Glasgow, and they proposed to erect upon their property certain buildings, the plans of which were duly lodged in the Dean of Guild Court with a view to a lining being obtained. The petition to the Dean of Guild was upon 4th October 1890 ordered to be intimated to the neighbouring proprietors, but none of these appeared to oppose the application. The Dean of Guild, however, on 28th October pronounced the following interlocutor:—"Having resumed consideration of this case and relative plans, as now amended, and heard the agent for the petitioner, in respect the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (secs. 367 and 370) to entitle him to occupy the room or kitchen, marked A on said plans, as a sleeping apartment: Refuses the lining craved, reserving to the petitioner to renew

his application when by such alteration of his plans the said free space shall be secured, or on his undertaking that the said room shall not be occupied as a sleeping apartment." Sections 367 and 370 of the Act are quoted in the opinion of the Lord President.

It was matter of admission at the bar that although the appellants had not upon their own ground the requisite free space under the Police Act, the statutory space did in fact exist *ex adverso* of the window of the proposed sleeping apartment, because adjoining the appellants' ground there was unoccupied ground of other proprietors, which, added to the amount of free space upon the appellants' own ground, gave more than the Act required. The facts are otherwise set forth in the opinions of the Court.

An objection was taken to the competency of the appeal.

Argued for respondent—By sec. 277 of the Glasgow Police Act the procedure relative to appeals was regulated. The presenting of the petition was the initiation of "proceedings in pursuance of this Act," and if no record was made up, the right of appeal was taken away. Here no record was made up, and therefore no appeal was competent under sec. 277.

Argued for appellants—The appeal was competent under sec. 277. The phrase "proceedings in pursuance of this Act" in that section was a phrase referring to what are known as guild offences, which are summarily dealt with without any record being made up, and which are not applicable. Otherwise, and specially in the case of proceedings competent at common law (which application for a lining was), the right of review was unrestricted, being expressly reserved under sec. 273.

At advising—

LORD PRESIDENT—This petition from the Dean of Guild Court does not bear to be under the authority of any Act of Parliament; it is an ordinary lining, and that is a proceeding which falls under the Dean of Guild's jurisdiction at common law. As I follow the clauses of the statute laid before us, all the ordinary remedies, including rights of review, competent at common law are reserved, and although the proceedings under the statute are in certain circumstances final, a proceeding which a party is entitled to take at common law is certainly not one of those proceedings falling within the provisions of the statute which excludes review.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The competency of the appeal was sustained.

Argued for appellants—The appellants had not free space to the amount required upon their own ground, but added to the free space on the neighbouring ground they had enough. There was nothing in the Act to say that the free space must necessarily be upon the applicant's own ground. Sections 367 (last paragraph) and 370 contemplated free space being reckoned which was not on the proprietor's ground, but consisted of the area occupied by "turnpike roads and public and private streets and courts." But, further, there was power under the Act to disqualify an apartment as fitted for sleeping accommodation in the event of the free space becoming subsequently diminished, and this would appear upon the petition of the neighbouring proprietor for a lining, so there could be no danger in qualifying the apartment *ad interim*.

Argued for respondent—Section 370 permitted free space over "turnpike roads," &c., to be reckoned, because in such cases there was no chance of subsequent building—the space was permanently guaranteed. To grant the present application would be to sanction an apartment which might by immediate building be rendered unfit for sleeping in.

At advising—

LORD PRESIDENT—The Dean of Guild appears to have gone too fast here, for he has applied secs. 367 and 370 of the Glasgow Police Act to a case which in its present state admits of no such application. The 367th section of that Act provides that the "Dean of Guild shall not grant warrant to erect or alter any building unless or until he is satisfied that the plan and sections which are signed with reference to such warrant . . . make satisfactory provision with respect . . . that every apartment, except those distinguished on the plan as not intended to be let or used for sleeping in, is of such size and has one or more windows, with such free space in front of every window thereof, as to be in conformity with the provisions hereinafter contained." This refers to the 370th section, which provides, "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 one-third at least of its height is above the level of the turnpike road or public or private street or court adjoining or near to it, and 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."

Now, the plan lodged by the appellant discloses frankly that he intends the apartment he is about to erect to be used as a sleeping apartment, and the question is, whether there is anything in sec. 370 to prevent him in existing circumstances from using or letting it for that purpose? The provision that he is not to use the room as a sleeping apartment "unless one-third at least of its height is above the level of the turnpike road or public or private street or

court," is a most intelligible one, for every building must have an access to it from some public or private street or court, and the statute takes as the basis of measurement the level of the street or court, or whatever it is from which access is had to the building. And again, the provision as to free space in front of at least one-third of every window is equally clear; the required free space may include any turnpike road or public or private street or court, but there is nothing about excluding any other free space.

The question therefore is, whether or not there is in the present case a free space such as is required by section 370, and I do not understand that to be in dispute as things at present stand. There is ground adjoining the apartment which is proposed to be erected which affords that requisite space, and even although it may be built upon, as has been argued, the fact remains that it is not built upon now, and there is no reason for supposing that it will be in the immediate future. Therefore, in my opinion, the proprietor has a perfect right to use the proposed room as a sleeping apartment. Indeed, I cannot see how he could be prevented doing so unless it fell within the prohibition in the statute. The interlocutor of the Dean of Guild bears that "in respect the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (sections 367 and 370) to entitle him to occupy the room or kitchen, marked A on said plans, as a sleeping apartment, refuses the lining craved." . . . Now, I understand these words to mean that the petitioner has not as his own property, or has not the command in permanency of the free space required, but that is not the provision of the statute. It only requires that at the time when the room is being used as a sleeping apartment it shall have a certain free space behind or adjoining it, and at the moment that free ground comes to be built upon, if it is ever built upon, then will arise the question of whether there is sufficient free space; if there is not, it will be the duty of the Dean of Guild, on the application of the procurator-fiscal, to prohibit its use as a sleeping apartment, but until that occurs I do not see how the statute can be enforced.

The lining, as I understand it, is otherwise unobjectionable, for the Dean of Guild reserves "to the petitioner to renew his application when, by such alteration of his plans, the said free space shall be secured, or on his undertaking that the said room shall not be occupied as a sleeping apartment." Now, I do not think he was entitled to demand any undertaking under the circumstances that this should not be used as a sleeping apartment, and I therefore think that unless there is some other objection against the lining the interlocutor should be recalled. The statute makes matters very secure for the future, for the moment the requisite free space ceases to exist there may be a prohibition of this room as a sleeping apartment—a prohibition fenced with very severe penalties.

LORD ADAM—The only reason given by the Dean of Guild for refusing this lining is "that the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (sections 367 and 370) to entitle him to occupy the room or kitchen, marked A on said plans, as a sleeping apartment;" and these words are in the circumstances intelligible only if "free space" means free space on the petitioner's own ground. But these are not the words of the Act. The obligation contained in the Act is that there shall be in front of each window a certain free space, but not necessarily on the builder's own ground, as is clear from the words, "including any turnpike road or public or private street or court." That being so, and there being at present the necessary free space in front of this property, I see no reason for refusing the application.

It appears, further, that the construction which the Dean of Guild puts on the Act cannot be the correct one, for if the Act makes it indispensable that the free space shall be on the builder's own ground the Dean of Guild has no power to dispense with that provision, and yet he reserves "to the petitioner to renew his application when, by such alteration of his plans, the said free space shall be secured, or on his undertaking that the said room shall not be occupied as a sleeping apartment." Well, suppose the erection is proceeded with on the faith of this undertaking, how is it to be enforced? I see no means of doing it, and the Dean of Guild would simply be passing the lining on the faith of an undertaking which might be disregarded next day. I am therefore of opinion that there being the requisite free space at present, there is no reason for refusing this lining, and the statute makes clear provision for the event of that free space not being preserved.

LORD M'LAREN—The principle on which our judgment proceeds is, I think, in agreement with the terms of the 370th section of the Police Act, which relates to applications to the Dean of Guild Court of Glasgow.

The Dean of Guild in determining the question of air-space is to take account of property *ex adverso* of the windows, although not belonging to the proprietor of the new building. Provided that this is unoccupied space—space on which no buildings are in course of erection, or are likely to be immediately erected—the purpose contemplated by the statute is satisfied, and with reference to that purpose it is immaterial to whom the vacant ground belongs. I only add this observation, that if there were depending at the same time an application from the proprietor of the unoccupied ground for authority to build on this ground, or if it was brought to the knowledge of the Dean of Guild that it was in immediate contemplation to build on such ground, these are circumstances which would be taken into account in disposing of the application. It would certainly not be proper to grant a warrant for the use of an apartment as a sleeping place in the know-

ledge that the ground shown on the plan as air-space was about to be built upon. But except in that somewhat exceptional case, I am of opinion with your Lordship that it would be a too strict construction of the statute to reject the plans on the ground that the sleeping apartments do not contain the requisite air-space when in point of fact there is unoccupied ground belonging to a different proprietor *ex adverso* of the proposed tenement.

LORD KINNEAR—I am of the same opinion. The Dean of Guild has refused the lining "in respect that the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (sections 367 and 370)," but I understand it to be admitted that that statement is not strictly accurate except on a certain special construction of the Act, and that the petitioner has as a matter of fact at present sufficient free space to satisfy the statute. But it is said that he may be deprived of this by his neighbour building up to his march, and the Dean of Guild appears to base his refusal on this, that the free space is required by the statute to extend over the exclusive property of the builder. If that were so, the Dean of Guild would have no discretion in the matter, nor any power to dispense with this requirement such as is implied in the reservation in his interlocutor. If the Dean of Guild had reason to think that what is now free space would shortly be occupied by buildings, then a different question would arise, but one not touched by our judgment.

The Court sustained the appeal.

Counsel for the Appellant—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondent—D.-F. Balfour, Q.C.—Maclaren. Agent—

Thursday, January 8, 1891.

SECOND DIVISION.

OVENS & SONS *v.* BO'NESS COAL GAS-LIGHT COMPANY.

(*Ante* p. 112, November 19th, 1890.)

Expenses—Counsel's Fee for Discussion upon Reclaiming-Note—Auditor's Report.

The Auditor reduced the fees sent to senior and junior counsel for discussion upon a reclaiming-note, from eight guineas and six guineas to six guineas and four guineas respectively. The Court *approved* of the Auditor's report —*dub.* Lord Trayner, who thought that for such a trifling difference the agents' discretion should not be interfered with.

The pursuers and reclaimers in this case were successful in the Inner House. Their agents had sent fees of £8, 8s. and £6, 6s. to senior and junior counsel respectively for the discussion upon the reclaiming-note. These fees the Auditor of Court reduced to £6, 6s. and £4, 4s. respectively.

The reclaimers lodged a note of objections to the Auditor's report, and argued that in such a small matter the Auditor should not have interfered with the agents' discretion, which had been properly exercised. The fees sent were quite reasonable in the circumstances.

At advising—

LORD JUSTICE-CLERK—I do not think that in this case the Auditor's report should be interfered with. I quite concur in the opinion that as a general rule the report of the Auditor should not be interfered with. Determining in what cases fees should be allowed and fixing their amount are the essential duties of the Auditor. I would not lay it down as a universal proposition that in no cases we should interfere with his report. In certain special circumstances the interference of the Court might be rendered necessary. But a much stronger case would require to be shown than a mere difference of opinion as to £2, 2s. or £3, 3s. in the amount of certain fees. I therefore think we should not interfere.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I do not dissent, but I should like to add a word, as I have expressed elsewhere my opinion to a different effect, and I should not like it to be supposed, as it might be supposed if I were silent, that I have seen any reason to alter that opinion. I think it right at all times to pay the greatest respect to the Auditor's opinion on questions of accounting. He is officially appointed for the purpose of deciding such questions, and his duty is discharged exceedingly well. But on such a question as the amount of the fees to be sent to counsel, the agent in my opinion has a great discretion, and in my experience for thirty years this discretion has not been abused. I have come to be of opinion that in a matter of two or three guineas the Auditor should not interfere with that discretion. On the other hand, where—and I am not imagining a case, but putting a case I have known in practice again and again—a fee of forty or fifty guineas had been sent to counsel for a jury trial and the Auditor was of opinion that only one of twenty-five or thirty should have been sent, then in my opinion he would be right in reducing it, but in a case where he thinks six guineas should have been sent instead of eight, I do not think he should interfere with the discretion of the agent; it seems what I have called "cheeseparing" to do so.

The Court approved of the Auditor's report, and allowed £2, 2s. to the respondents as expenses for the discussion.

Counsel for the Objectors—Salvesen. Agents—Smith & Mason, S.S.C.

Counsel for the Respondents—Wilson. Agents—J. & A. Peddie & Ivory, W.S.