

COURT OF SESSION.

Tuesday, June 14.

FIRST DIVISION.

[Sheriff of the Lothians.]

FORREST v. MANSON AND ANOTHER.

FORREST v. WALKER AND OTHERS.

*Nuisance—Byre within Burgh—Interdict ab ante
—Prohibition in Feu-Charter.*

An action of interdict was brought by neighbouring feuars against a person who proposed to erect buildings for the purpose of carrying on the business of a cowkeeper, on the ground that such a business would necessarily create a nuisance. The feu-charter of the ground on which it was proposed to erect the buildings contained a declaration that the feuar should be bound "not to erect, or allow to be erected, on any part of the ground thereby feued, any house or houses for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars." This condition was declared to be a real burden. The Sheriff granted interdict, after a proof, on the ground that the business of cow-keeping could not be conducted without being a nuisance to the neighbouring feuars. On appeal, the Court, in respect of an undertaking as to the manner in which the business was to be conducted, refused to grant interdict *ab ante*, reserving to the complainers the right to apply at any time for interdict in the event of a nuisance being created.

Nuisance—Dean of Guild—Jurisdiction.

The Dean of Guild having refused a petition for leave to erect certain buildings, on the ground that they would cause a nuisance, the petitioner appealed to the Court of Session. The Court *sisted* the process in order that the respondents in the petition might bring an action of interdict in the Sheriff Court to try the question of nuisance.

In December 1885 a petition was presented in the Dean of Guild Court, Edinburgh, by James Forrest, heritable proprietor of a house, stable, and other property at No. 11 Jordan Lane, Morningside, Edinburgh, praying for authority to make certain alterations and erections on his property. The alterations proposed consisted, *inter alia*, of the erection of a byre and outhouses for the accommodation of twelve cows. The ground upon which the erections were to be made extended to about a quarter of an acre. Plans were lodged showing the character and design of the proposed buildings. The petition was served upon the conterminous proprietors, who lodged answers and objected to the proposed erections on the following grounds:—(1) That the locality was unsuited for carrying on the business of cow-keeping without destroying the amenity of the neighbourhood; (2) that byres and cow-keeping within burgh were nuisances within the meaning of the Public Health (Scotland) Act 1867; and (3) that the construction of the proposed byres and the carrying on of the trade of cow-keeping would be,

as nuisances, a contravention of the feu-charter of the lands on which it was proposed to erect the buildings. The petitioner had, previous to 1885, a licence from the Magistrates to keep six cows. In August 1885 he applied for a licence for twelve cows, which was refused.

By interlocutor of 11th February 1886 the Dean of Guild found, *inter alia*, that by keeping cows the petitioner had caused a nuisance to the residents in the villas in the neighbourhood; that the proposed buildings would continue the nuisance; and that the petitioner's house and garden were held by him under a real burden which prohibited the erection on the ground of any house for the carrying on of any trade or manufacture which might operate as a nuisance to the neighbourhood; and he therefore refused the petition.

The petitioner appealed to the First Division of the Court of Session. After hearing counsel, the Court, on the motion of the respondents, *sisted* process to enable them to bring an action of interdict in the Sheriff Court upon the ground of nuisance.

An action of interdict was accordingly brought, in which the petitioners (the respondents in the preceding action) prayed the Court "to interdict, prohibit, and discharge the defender from erecting, or allowing to be erected, on any part of the ground belonging to and occupied by him, at No. 11 Jordan Lane, Edinburgh, any house or houses, or other buildings or erections, for the purpose of carrying on the trade or business of a cow-feeder or cowkeeper on said ground, and in particular, from making the following or similar alterations and erections on the house, stable, and property belonging to and occupied by him there, viz., taking down and removing present byre and erecting new byre of brick and wood in its stead, to accommodate twelve cows." The petitioners averred that Jordan Lane, where the proposed byre was to be erected, was a *cul-de-sac*, and contained a number of houses and villas; that the keeping of a number of cows, with the necessary removal of manure, would be a nuisance; that the preparing of hot food for the cows would cause an unpleasant odour, while the continuous driving of the cattle to and from the pasture would destroy the amenity of the district; that the nuisance was one which was injurious to health; and that the erection of the proposed byre was in contravention of the Public Health (Scotland) Act 1867, which declared the following among others to be a nuisance:—"Section 16, sub-section (c)—Any stable, byre, pigstye, or other building in which any animal or animals are kept in such a manner as to be injurious to health. Sub-section (d)—Any accumulation or deposit of manure or offensive matter within fifty yards of any dwelling-house within the limits of any burgh, or wherever situated, if injurious to health. Sub-section (e)—Any work, manufactory, trade, or business injurious to the health of the neighbourhood, or so conducted as to be offensive or injurious to health." They further averred that the feu-charter of the lands of Canaan, of which Jordan Lane formed part, contained the following condition, which was declared to be a real burden, and was binding on the respondent "not to erect or allow to be erected, on any part of the ground thereby feued, any house or houses for the carrying on any trade or manufacture which

may operate as a nuisance to the neighbouring feuars."

The respondent averred that in the proposed new buildings every precaution would be adopted to secure that the sanitary arrangements were as perfect as possible; that the cattle previously kept had only passed along Jordan Lane twice in the year, once in the spring when going out to pasture, and once in winter when returning to the byres, and that in the event of the proposed new buildings being erected and occupied they would only be so occupied during the winter and a portion of the spring; that the Cattle Sheds Act 1866 (29 Vict. cap. 17) gave the magistrates ample powers to enforce the keeping in good order of all byres within burgh, and that the interests of the pursuers were thus sufficiently protected. Section 3 of the said Act provides "that the magistrates of royal burghs, and also of parliamentary burghs in Scotland, shall have power to require, and shall require, all cattle-sheds and cowhouses and byres within their burghs to be inspected by an officer appointed by them, and if found to be suitable for such purpose, to be licensed by them for the period of one year; and the magistrates shall likewise have power from time to time to make rules and regulations for the proper sanitary condition of the same, and to fix and determine in each licence the number of cattle which may be kept in each such cattle-shed, or cowhouse, or byre; and if any person shall keep any cattle within any burgh without such inspection and licence, or shall violate any of the conditions of such licence, or any of the rules and regulations made by the magistrates, he shall, on conviction before any two of them, be subject to a penalty not exceeding £5 for each such offence, and a like penalty for every day after the conviction for such offence upon which such offence is continued."

The respondent also averred that in pronouncing the said interlocutor the Dean of Guild did so without warrant or authority, and under an erroneous conception of his jurisdiction.

The pursuers pleaded, *inter alia*—" (1) The subjects belonging to the defender being unsuitable for keeping cows, or for the erection of byres for that purpose, and the situation being unsuitable for carrying on the business of cow-keeping, without destroying the amenity of the district, creating a nuisance, and injuriously affecting the health of the neighbourhood, the pursuers are entitled to interdict as craved. (2) The construction of the proposed byres, and the carrying on of the said trade or business, will be, as nuisances, contraventions of the feu-right of the ground on which it is proposed to erect the byre, and the pursuers are entitled to object to the same."

The defender pleaded, *inter alia*—" (2) . . . The action is premature. (4) The action ought to be dismissed, in respect (1) that the erection of the said proposed buildings is within the defender's rights of property; and (2) that they can be used and enjoyed by the defender without creating a nuisance."

The Sheriff-Substitute allowed a proof, the import of which is as follows:—

It was proved that the respondent had been twice convicted of nuisance in connection with the place, in consequence of the cows he had previously kept on the premises. There was also medical evidence as to the probability

of nuisance in the future.

Dr Thomas Rutherford Ronaldson, deponed—" (Q) Do you think that the erection of a byre in that garden ground which you saw, and the keeping of cows, including the supplying them with food, the taking away of their manure, and so on, would be a nuisance?—(A) I do, most distinctly. In my opinion such a state of matters would certainly destroy the amenity of the place. The manure from ten or twelve cows would accumulate very fast. . . . By the preparation of food for the cows, such as boiling turnips and the keeping of straw, a bad smell is generated—what is called a 'byre smell,' which is certainly offensive."

Dr Littlejohn, Medical Officer of Health for the City of Edinburgh, deponed—" I don't think the ground in question is a proper place on which to erect such a byre. I am certain such an erection would become a nuisance. There would be a bad odour generated from the cows themselves, and also from keeping turnips and straw, and preparing the cows' food. That would be prejudicial to the amenity of the district."

Dr James Alexander Russell, who visited the premises along with Dr Littlejohn, deponed—" I do not think it would be a proper thing to erect such premises. I think they would constitute a nuisance. The keeping of straw and turnips, and the boiling of the food for the animals, will always generate a bad smell. The accumulation of manure from twelve cows will be very considerable. . . . *Cross-examined*—(Q) Assuming that the manure from the cows was removed every day, or twice a day, would it be injurious to health?—(A) Not very appreciably, I think, if removed twice a day, and taken away altogether from the place, but it is difficult to say exactly how far it might be injurious to health."

John Cooper, Burgh Engineer, deponed—" I don't think the place proposed is a proper one on which to erect a byre. I think it would deteriorate the value of the property on each side. It is my opinion that a nuisance would be constituted by the keeping of straw and turnips for the animals, the preparation of their food, and the removal of the manure."

William Hamilton Beattie also deponed—" I think the byre would be a nuisance, both to the proprietors in Nile Grove and to certain contiguous properties in Jordan Lane. Then there is the driving of the cows along Jordan Lane, the conveyance of straw, hay, and turnips, and the continual passing of milk-carts, which will certainly not be convenient things for the neighbouring properties."

For the defence, evidence was led as to the nature of the proposed new buildings. The byre was to be built of brick, and cemented to the height of 7 feet inside; the floors and water-channels were to be of concrete, and the troughs of fireclay. The space per cubic foot was to be in excess of what was required by the Local Authority.

The defender deponed—" I have no intention of taking the cows along Jordan Lane every day. I would only take them that way twice a-year. My cows are put into the byre in the autumn, and they are not taken out again till spring. *Cross-examined*—I propose to remove the manure once a-day, except Sunday."

Dr Stevenson Macadam, City Analyst, examined for the defender, deponed—" Taking into

consideration the nature of the proposed buildings and the situation, I think it is a suitable place for keeping cows. . . . I believe it would not be a nuisance to keep cows there. *Cross-examined*—(Q) You would not choose a residence yourself next door to a byre?—(A) Not if I could help it."

Professor Walley, Principal of the Royal Veterinary College, Edinburgh, deponed—" (Q) You don't think that twelve cows being kept there would be a nuisance if they were properly attended to?—(A) Certainly not, in the proper acceptance of the word nuisance, if the manure was to be removed frequently. *Cross-examined*—There is always a little smell connected with the conducting of a byre, but if the place is properly attended to, the smell is not harmful."

Professor Williams, Principal of the Veterinary College, Leith Walk, deponed—"I think the place is a very good one for such a byre. I don't think there is any chance of a nuisance being created by the keeping of twelve cows there, if the byre is properly constructed and well kept."

William Secular, Inspector of Markets and Byres, deponed—"Assuming that the byre was well conducted, and the manure regularly removed, it would not creat a nuisance in my opinion."

The Sheriff-Substitute (HAMILTON) pronounced this interlocutor on 25th November 1886:—"Finds that the business of cow-keeping which the defender proposes to carry on at his property in Jordan Lane cannot be conducted without being a nuisance to the neighbouring feuars: Finds, therefore, that said business falls within the prohibition in the defender's titles, which is quoted on record: Repels the defences: Interdicts, prohibits, and discharges the defender from erecting, or allowing to be erected, on any part of the ground belonging to and occupied by him at No. 11 Jordan Lane, Edinburgh, any house or houses or other buildings or erections for the purpose of carrying on the trade or business of cowfeeder or cowkeeper in said ground, and decerns: Finds the pursuers entitled to expenses, &c.

"*Note*.— . . . Upon the question of fact raised, which is the material question in the case, the Sheriff-Substitute is of opinion that the weight of evidence is very much in favour of the pursuers' contention that the business which the defender proposes to carry on would, however well-conducted, be a nuisance, and injurious to the health of the neighbouring feuars."

The defender appealed to the Sheriff, who by interlocutor of 31st December 1886 dismissed the appeal.

"*Note*.— . . . The pursuers and defender hold the subjects respectively belonging to them under titles which contain an obligation not to erect on the ground belonging to them 'any house or houses for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars.' It appears to the Sheriff that the question to be decided in this case is, Has it been proved that the business of cowkeeping which the defender proposes to carry on in Jordan Lane could not be conducted without being a nuisance to the neighbouring feuars? The Sheriff is of opinion that this has been proved. In the first place, there is evidence

as to the way in which the defender conducted his business while he had only a licence for six cows; and that evidence shows that the byre was not well kept, and that the defender had been twice convicted of nuisance in connection with the place. In the second place, there is evidence to show that the business of cowkeeping, no matter how well conducted, would, in the locality in question, be a nuisance to the neighbouring feuars. No doubt there is a good deal of conflicting testimony on this point, but the Sheriff concurs with the Sheriff-Substitute in thinking that the weight of the evidence is in favour of the pursuers. Dr Stevenson Macadam, who is the leading witness for the defender, when asked if he himself would choose a residence next door to a byre, says, 'Not if I could help it;' and Professor Walley, another witness for the defender, has to admit, on cross-examination, 'that there is always a little smell connected with the conducting of a byre.'

"In the circumstances, the Sheriff thinks that the pursuers are entitled to the interdict which has been granted."

The defender appealed to the Court of Session, and argued—The present action of interdict was premature; the defender should be allowed to erect the byre he proposed, and if it was found that he did not carry on his business in a proper manner he could be stopped by interdict at any time. The petitioner's witnesses all spoke at the proof of the state of matters as they existed in the past, which the defender was prepared to admit was not satisfactory. It was not to be presumed that in the new buildings a nuisance would be caused. Cowfeeding, and byres within burgh, were not within the category of declared nuisances, like soap-boiling, blubber-works, and slaughter-houses. These were declared nuisances, but there were some trades which were intermediate, and might be nuisances or not according to the mode in which they were carried on. In such cases the Court would hesitate to interdict the industry *ab ante*. Byres were not necessarily nuisances. This idea was negated by the Cattle Sheds Act (29 Vict. cap. 17) and the Public Health (Scotland) Act (30 and 31 Vict. cap. 101). This was the first time it had ever been proposed to interdict the erection of a building because the trade to be carried on in it might be a nuisance. The remedy was only granted when it was clear that a nuisance was inevitable. The titles here gave the pursuers very little more than they had at common law.

Authorities—*Scott v. Police Commissioners of Leith*, May 29, 1830, and March 7, 1835, 8 S. 845, and 13 S. 646; *Swinton v. Peddie*, March 9, 1837, 15 S. 775, and (*remitter*) M'L. & Rob. 1018; *Pattison v. Guildford*, L.R., 18 Eq. 262.

A minute was lodged by the appellant, which was in these terms—"In the event of the said appellant being found entitled to erect a byre, as proposed, upon his property in Jordan Lane, and to keep cows therein, he undertakes that he will not boil or steam turnips to feed his cows upon the premises in Jordan Lane; that he will remove the manure from the said premises once every day, except on Sundays, and that before eight o'clock a.m., and that the carts which remove the manure shall be loaded within his own property. The appellant further undertakes that the cows belonging to him shall not, unless in

exceptional circumstances, pass along Jordan Lane oftener than twice in the year, viz., once in spring, when they go out to pasture, and again towards the beginning of winter, on their return from pasture."

Replied for respondents—They objected to the proposed byre, first, because cow-keeping within burgh was a nuisance at common law, and second, because the erection of a byre upon the ground in question was a contravention of the feu-charter. The evidence showed that cow-keeping was almost certain to cause a nuisance to adjoining proprietors, who were not called upon to subject themselves to this risk, especially with such a clause as there was in this feu-charter. A trade which required Parliamentary regulation and control was just such a nuisance as the feuars were entitled to be protected from, and this was the time (before the buildings were erected) when they were entitled to interfere and have them stopped. In a question as to what was or was not a nuisance, locality was a consideration which had to be kept clearly in view, for what might be deemed a nuisance in the country might not be so considered in town, and *vice versa*. This was a residential neighbourhood, and even if the defender did all he proposed, his trade would still be a nuisance to the neighbourhood. The term "nuisance" had been defined—*Hislop v. Fleming and Others*, December 22, 1882, 10 R. 426, and (*alt.*) 13 R. (H. of L.) 33; *Porteous v. Grieve*, February 23, 1839, 1 D. 561; *Pentland v. Henderson*, March 2, 1855, 17 D. 542; *Trotter v. Farnie*, December 7, 9 S. 144; *Fraser's Trustees v. Craw*, December 1, 1877, 5 R. 290, and 6 R. 451; *Anderson v. Aberdeen Agricultural Hall*, May 13, 1879, 6 R. 901. The prohibition in the feu-charter was intended to strike at all buildings in which the trade which was to be carried on might turn out to be a nuisance. The Public Health Act of 1867 did not sanction the erection of byres within burgh, but finding them there it tried to regulate and control them as far as possible.

At advising—

LORD PRESIDENT—The prayer of the Sheriff Court petition for interdict was in these terms—[*His Lordship here read the portion of the prayer of the petition above quoted*]—That is to say, what the pursuers of the interdict really contend for is, that the proposal of the defender to erect a byre and outhouses for the use of his cattle, and to carry on the business of a cow-feeder, is illegal, and upon that account that he ought to be interdicted.

A proof was allowed by the Sheriff, and the evidence of the pursuers of the interdict came to this, that a building for the housing of cattle within a town is of necessity a nuisance, and upon that account ought not to be allowed. I am not prepared to assent to this as it would be to introduce a novelty into the law as well as into the trade of keeping cows all over the country. To affirm such a proposition would therefore be somewhat startling, and would be a thing which we could not do without very serious consideration. The argument upon this point was not seriously pressed; but what the pursuers rather relied upon was the restriction in the title, which they contended entitled them to have the erection of these buildings interdicted. I take it,

however, that we must start with this as a general proposition, that byres and cow-houses under proper regulations are not only lawful in a burgh, but necessary and expedient, and in proof of this we know that they have been made the subject of statutory regulations.

Thus the Cattle Sheds Act by its 3d section provides as follows—[*His Lordship here read the portion of section 3 of the statute quoted above*]. Now, these are very stringent provisions, and they are well calculated to put a stop to anything like carelessness in the keeping and management of such places.

That such regulations are necessary I can well believe, but the very circumstance that byres and cow-houses are regulated by statute shows that they are recognised as being a convenience if not a necessity within burgh. If, however, a byre or cow-house is kept in such a way as to become a nuisance, it can of course be interdicted, because their common law remedies are open to the neighbouring proprietors, and can at any time be invoked by them.

But the pursuers of this interdict rely chiefly upon the clause in the feu-charter, which is in these terms—[*His Lordship here read the clause quoted above*]. Now, Mr Jameson says that it is absolutely illegal in the defender to erect a building for the carrying on of a trade, which if carried on in an improper manner may become a nuisance. When we have to construe such words as we find here, we should, I think, try to give effect to their fair meaning. It is impossible to construe them absolutely literally, because almost any trade might, by the mode in which it was conducted, become a nuisance, and the effect of such a clause, if too literally interpreted, would be to restrict every kind of trade however harmless in itself, in case, from being improperly conducted, it might become a nuisance. If this was what was intended, and if it was desired to erect only dwelling-houses upon this ground, such an intention ought to have been very carefully expressed, and in different language from what we find here, for the effect of this clause as it stands hardly puts the rights of the feuars higher than they exist at common law.

But it was further urged that up to this time the defender has kept the cows he has fed on his premises in such a way as to be a nuisance to the neighbourhood. That may be so, but he is now as regards these buildings to be under the provisions of the Public Health Act of 1867, and besides he has lodged in process a minute, the terms of which alter very much the complexion of this case.

It must be kept in mind that this is not an action of interdict directed against an existing nuisance; its object is to prevent the erection of a building because the trade which is to be carried on in it may become a nuisance. In what way the building is to be used we cannot at present decide. In his minute the defender undertakes with reference to the building as follows—[*His Lordship here read the minute quoted above*]. Now, if all that is here proposed is fairly carried out, it will go a long way to prevent this byre becoming a nuisance to the neighbourhood, because what the defender offers by this minute to put a stop to are just the very things to which the petitioners chiefly objected. I cannot help thinking that the defender has made a

very fair offer, and that he should be allowed to go on with his building and his business of cow-keeping. It is very clear that if in any way he violates his undertaking an action of interdict will be brought against him at once.

In order to make it quite clear that it is very much in consideration of this undertaking that we recal the interdict, I think we should either embody or make special reference to it in the interlocutor.

LORD MURE—If I were to be of opinion that the findings in the Sheriff-Substitute's interlocutor were established, I should have been disposed to have followed the same course as the Sheriffs have done; but after a careful examination of the evidence, I find that there are a number of contradictions, and that a good deal that is averred has not been proved. Without going into the evidence in detail, I think that it is proved that a byre may be carried on without becoming a nuisance to the neighbourhood. I do not think we should interdict the defender from putting up a building which he undertakes will be free from the objections which the pursuers chiefly urge against it. If he thinks he can do this, I agree with your Lordship that he ought at any rate to be allowed to try.

LORD SHAND—I am of the same opinion, especially keeping in view the defender's minute, and the special circumstances of this case.

The usual case which we have to deal with is that of an interdict sought against an existing nuisance, but what we are here asked to do is to interdict the defender from erecting a building on his own ground because it is expected that the way in which the business is to be carried on in it may cause a nuisance. If there had been nothing in the titles favouring the pursuer's contention I should have had great difficulty in interdicting the erection of a building for carrying on a trade where everything depended upon how that trade was to be carried on.

But the clause in the title has been referred to, and that in my view makes this a somewhat special case. If I had been satisfied, as the Sheriffs have found, that this business of cow-keeping, however conducted, must necessarily result in a nuisance, or would even probably cause a nuisance, I would have been in favour of granting an interdict, but keeping in mind the undertaking which has been given us by the defender, I am prepared to hold that this building is not a nuisance of the kind struck at by the titles.

The question of whether a particular thing is or is not a nuisance must always be a question of circumstances and of neighbourhood, and no one is entitled so to use his property as to injure the health or comfort of his neighbours. If the defender had proposed to boil the food for his cattle on the premises, and to store the manure or to remove it in the manner he has hitherto adopted, then, looking to the nature of the locality, there would undoubtedly have been a nuisance created, but by the terms of his minute the defender has removed that risk, and now, beyond the fact that the cows are there, the neighbours need know little about them.

In these circumstances I do not think that it can be said that a nuisance exists here, either under the title, the statute, or at common law,

and I think we should recal the interdict which has been pronounced.

LORD ADAM—If the pursuers had relied upon their common law rights only in the demand which they have made, I could not have had any difficulty in refusing the interdict craved, because, before I would have been prepared to have granted an interdict *ab ante*, I should have had to be satisfied that this trade could not possibly have been conducted without creating a nuisance. I would have considered that the defender was entitled to be allowed to try what he could do in the way of carrying on his business without offending his neighbours. But then the titles are referred to, and it is urged that they strike at the erection of a building like the present.—[His Lordship here read the clause quoted above.] I think it is impossible to give a literal meaning to these words, because any trade might be so carried on as to cause a nuisance, but at the same time I am inclined to think that this provision gives the feuars something more than their mere common law rights.

Were we to decide against the defender, however, and refuse him the right to build on his ground, there would of course be an end of the case, whereas if we allow him at present to go on with the building he can at any time be stopped by interdict, if it can be shown that by the way in which his business is conducted a nuisance is created.

The Court pronounced the following interlocutor in the interdict case:—

“Find that the building proposed to be erected by the appellant on his property in Jordan Lane, Edinburgh, is intended to be used as a byre or cow-house: Find that the respondents have failed to prove that the carrying on the business of cow-keeping in the proposed building will necessarily be a nuisance: Find that the said business if conducted properly and under proper conditions will not be a nuisance: Recal the interlocutor of the Sheriff-Substitute dated 25th November, and of the Sheriff dated 31st December 1886, and in respect of the undertaking of the appellant contained in the minute for him, refuse the prayer for interdict: Find no expenses due to or by either party, and decern.”

The Court pronounced the following interlocutor in the appeal from the Dean of Guild:—

“Recal the sist contained in the preceding interlocutor, and in respect of the judgment of the Court pronounced this day in the appeal in the relative process of interdict in the Sheriff Court by the respondents against the appellants: Recal the interlocutor of the Dean of Guild dated 11th February 1886, and remit to him to him to proceed with the lining in conformity with said judgment, and decern: Find the appellant entitled to expenses in this Court,” &c.

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