

executors that they have interests which conflict with their duty to the executry estate, but it is different where they bind themselves to use their powers for one party and against the estate. That is a wrong position for them to be in, and the Court has no option except to give effect to an application for their recal and for the appointment of a judicial factor.

LORD KINNEAR—I concur. The appearance for the widow at the bar is conclusive against continuing the executrices in office.

The Court recalled the interlocutor of the Lord Ordinary, and appointed a judicial factor.

Counsel for Petitioners and Reclaimers—Comrie Thomson—W. Campbell. Agent—R. C. Gray, S.S.C.

Counsel for Mrs Christie and Others—Jameson—F. T. Cooper. Agents—Henry & Scott, S.S.C.

Counsel for Mr and Mrs Craik—D.-F. Balfour, Q.C.—C. J. Guthrie—J. C. Watt.

Thursday, December 17.

FIRST DIVISION.

THE LORD ADVOCATE v. THE DUKE OF HAMILTON.

(*Ante*, p. 213.)

Process—Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—48 Geo. III. c. 151, sec. 15.

In an action by the Crown for legacy-duty and inventory duty the defender objected that the property in question had never vested in his ancestor, and therefore was not subject to taxation, but the Court decerned in terms of the summons, and ordered accounts to be lodged in order that the amount of the duty exigible should be ascertained.

The defender applied for leave to appeal to the House of Lords, on the ground that the sequel of the case would consist of an accounting, and was entirely separable from the questions which had been decided, and that the judgment of the House of Lords, even if affirmative, might affect the treatment of the said accounting. The Court granted leave to appeal.

In the case of the Lord Advocate v. The Duke of Hamilton (reported *ante* p. 213), their Lordships of the First Division, on 1st December 1891, pronounced the following interlocutor—“The Lords having considered the reclaiming-note for the defender the Duke of Hamilton, against the interlocutor of Lord Wellwood, dated 11th June 1891, and heard counsel for the parties, Adhere to the said interlocutor: Refuse the reclaiming-note: Find the respondent entitled to additional expenses since the date of the interlocutor reclaimed against:

Remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses.”

The defender presented a petition to the First Division under the Act 48 Geo. III. cap. 151, sec. 15, praying for authority to appeal the interlocutor above quoted, and that of the Lord Ordinary of date 11th June 1891, to the House of Lords, the conclusions of the action not having been exhausted by these interlocutors.

Argued for him—This was a case in which an appeal at the present stage ought to be allowed. If the decision of the Court was affirmed a long and expensive inquiry, involving an accounting extending over a considerable period of time would have to be entered upon, while if the decision was varied or reversed a different period would be embraced in the accounting, or an accounting might be avoided altogether. The questions decided by the Court were large and important, and might be fairly viewed as the main principles of the case, while those which remained, though of importance to the parties, were really questions of detail, and were entirely separable from those decided by the Court. The question whether an appeal ought to be allowed at the present stage being a matter for the discretion of the Court, the circumstances of the present case were particularly favourable.

Argued for the respondent—Inquiry before the Lord Ordinary would in any event be necessary in order to ascertain the value of the articles liable in duty, and to determine the amount for which decree would be given in respect of legacy-duty on the present Duke's succession. Liability for this was not disputed, but the amount fell to be ascertained. Even if the present appeal was successful there were questions in regard to that legacy-duty which might form the subject of a second appeal, the possibility of which always weighed with the Court in considering an application like the present. It was argued also that certain of the articles were heritable in their nature, and that legacy-duty could not be claimed in respect of them, and it was also a matter of dispute whether the value of the articles was to be taken at the time of their sale, and according to the price which they realised, or as at the death of the defender's father Duke Archibald, when they were valued for inventory purposes by the trustees. These were questions which would affect the money value of the decree to be pronounced, and they should be determined before any appeal was allowed in order to obviate the possibility of a second appeal—*Stewart v. Kennedy*, February 26, 1889, 16 R. 521.

At advising—

LORD PRESIDENT—I think that this is a case in which we should grant leave to appeal. The questions which we have decided are large and important questions, and are entirely separable from what might be called the sequel of the case. No doubt,

in point of pecuniary importance it will have its own magnitude, but that is after all more magnitude of detail, and looking to the size of the questions raised on this record, to their legal character, and to their independence of what is to follow, I think that the present is a suitable subject for appeal. Moreover, the treatment of the matters of detail which would follow supposing our judgment were affirmed, might perhaps be regarded by the parties in a different and perhaps more businesslike way once that question was decided. Upon the whole, I think we should best exercise our discretion by granting leave to appeal.

LORD ADAM—I am of the same opinion. There is no doubt that the principle to be kept in view in the general case is to avoid two appeals to the House of Lords; that is the main consideration. And if one saw one's way to a speedy and not a troublesome ascertainment of the state of the accounting, probably it would be right not to allow an appeal. But I agree with your Lordship that as we have settled the main principles of this case, which are quite distinct from the part with reference to an accounting, and seeing that whatever way our judgment goes in the House of Lords there must be inquiry more or less, we should grant leave to appeal.

LORD M'LAREN—I concur. I think that the question sought to be appealed is a very proper subject of appeal to the House of Lords in itself, and then I agree with your Lordship that if the matter of principle were settled, there is a certain probability that the parties might come to terms, and that the inquiry referred to might become unnecessary. If we refused leave to appeal the inquiry would go on, because it would not be possible to come to any agreement till the principle of the agreement is determined.

LORD KINNEAR—I am of the same opinion.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Macphail.
Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Young.
Agent—The Solicitor of Inland Revenue.

Thursday, December 17.

SECOND DIVISION.

[Dean of Guild Court,
Edinburgh.]

FINNIE v. ANDREW USHER &
COMPANY.

*Burgh—Dean of Guild—Feu-Contract—
Conditions—Contravention.*

The owner of a distillery in a burgh petitioned the Dean of Guild for warrant to erect "bonded warehouses,

malt barns, and relative stores" on adjoining ground which was held under a feu-disposition prohibiting the erection of "any distillery, brewery, or other manufacture or chemical process of any kind which may be nauseous or noxious to the inhabitants of the neighbourhood."

In a question with a co-feuar, held that the proposed buildings would not constitute a contravention of the condition of the feu.

Messrs Andrew Usher & Company, wine merchants and distillers, Edinburgh, proprietors of the Edinburgh Distillery, in the Sciennes, possessed also ground immediately adjacent thereto, and in June 1891 they presented a petition to the Dean of Guild Court for warrant to "erect on the said piece of ground buildings five storeys in height, to be used as bonded warehouses, malt barns, and relative stores." The petition was opposed by Alexander Finnie, the proprietor of a backgreen adjoining the ground in question.

He averred—"The erections proposed by the petitioners consist of malt barns, malt deposit, and malt kiln, which are to be placed at a distance of 23 feet 8 inches directly opposite from the back of the respondents' property, and also of bonded stores or warehouses. Said malt-barns, malt deposit, and malt kiln are essential parts of a distillery or brewery. The malt-barn is used for the process of germinating the grain before it is put into the kiln, and the malt-kiln is used for the purpose of taking off the moisture. After the malt is taken off the kiln it is placed into the deposit. There cannot be malt-barns without a kiln and a deposit to put the malt in after it is kiln-dried. The erections proposed by the petitioners are in contravention of the titles which are common to them and the respondents. The petitioners are feuars with the respondents and their authors under feu-disposition by Messrs George Crichton and Michael Hewan Crichton, goldsmiths and watchmakers in Edinburgh, in favour of Alexander Thomson Blair, builder, No. 138 Causewayside, Edinburgh, dated 14th, and recorded in the General Register of Sasines applicable to the county of Edinburgh, for preservation and publication, the 20th, both days of April, 1876; and the petitioners, as well as the respondents, are, under the titles in their favour herewith produced, subject to the prohibitions, burdens, and conditions contained in said feu-disposition. Said feu-disposition, which has been produced and is referred to, contains, *inter alia*, the following prohibition:—'Declaring further, that it shall not be lawful to the said Alexander Thomson Blair, or his foresaids, to erect or carry on upon the said subjects, or any part thereof, any soap work, candle work, slaughter house, skin work, distillery, brewery, or other manufacture or chemical process of any kind which may be nauseous or noxious to the inhabitants of the neighbourhood thereof. . . . All which conditions, provisions, and declarations shall not only be recorded in the