

of an immediate conveyance. The reporter has already shown, he thinks, that the whole corporation of heirs is represented by the petitioner and the three next heirs whose consent he has got. It was the next heirs who would have been benefited by the £6125 having been paid out of the accumulated income in place of being made a burden upon the fee of the estate, but as the persons who at present are the three next heirs are satisfied on this point, there seems to be no one else who has any interest or title to object. And this seems to be in accordance with other recent decisions, more particularly the case of the *Hon. Atholl M. Forbes of Bruar*, in which your Lordship said — 'It appears to me that the only reasonable way of dealing with the Rutherford Act is to give effect to its provisions in the circumstances existing at the time when these are appealed to. This I take to be the principle on which the Court proceeded in deciding the case of *Preston Bruce*, March 6, 1874, 1 R. 740.' To this decision the First Division adhered June 29, 1888, 25 S.L.R. 592."

On 9th November 1888 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor: — "Having considered the petition and the report by Mr H. B. Dewar, No. 24 of process, Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt: Interpones authority: Grants warrant to and authorises and ordains Peter Miller, writer, Linlithgow, as trustee under the trust-disposition and settlement of the late Francis William Clark of Ulva, of date the 15th February 1865, with relative codicil, dated 15th June 1875, to dispense and convey to the petitioner in fee-simple, for the absolute use and behoof of himself and of his heirs and assignees, the estates of Ulva and others, as described in the said trust-disposition and deed of settlement, but subject to and under the real burden of (1st) the existing heritable debt thereupon of £7900 interest and penalties; (2nd) the sum of £6000 and corresponding interest and penalties of a provision in favour of the daughters of the late Sheriff Francis William Clark, the petitioner's sisters; (3rd) a yearly annuity of £10 to the testator's sister Elizabeth Clark or Bruce; (4th) a yearly annuity of £10 to the testator's sister Johanna Anderson Clark; and (5th) a yearly annuity of £9 sterling to the testator's sister Henrietta Clark or Graham; and to execute and deliver at the sight of the reporter such dispositions and conveyances as may be necessary for conveying and transferring the said estates and others to the petitioner and his heirs and assignees whomsoever absolutely in fee-simple, and such a bond and disposition in security; and remits to the reporter to see such a disposition and conveyance or dispositions and conveyances as well as a bond and disposition in security over the estates of Ulva and others about to be disentailed in favour of the daughters of the said deceased Sheriff Francis William Clark for £6000 with interest thereon and penalties, but postponed to a sum not exceeding £1140 about to be secured thereon by the petitioner, prepared and delivered; and to see such a disposition and conveyance and such a bond and disposition in security duly re-

corded in the appropriate register of sasines, and to report; and decerns; but supersedes extract of the decree until a certificate under the hand of the reporter be lodged in process that satisfactory evidence has been produced to him that the personal debts and arrears of annuity, amounting together to £732, 17s. 5d., and the legacy of £105 mentioned in his report, have been paid and discharged."

Counsel for the Petitioner—Low. Agents—W. & J. Cook, W.S.

Thursday, December 20.

FIRST DIVISION.

[Dean of Guild, Edinburgh.]

LEITH AND BREMNER v. W. & J. KIRKWOOD.

Burgh—Dean of Guild Court—Jurisdiction—Nuisance—Interdict—Erection of Byre in Burgh.

Warrant for the erection within burgh of a byre for the accommodation of thirty cows was opposed on the ground that it would create nuisance, and the Dean of Guild sisted process to allow the objectors to bring an interdict. This not having been done, the Dean of Guild recalled the sist, and granted warrant in terms of the prayer of the petition. On appeal the Court (following the case of *Manson v. Forrest*, June 14, 1887, 14 R. 802) of new sisted process to allow the objectors to apply for interdict.

Opinion (per Lord President) that while the Dean of Guild may refuse a lining where a proposed structure is only adapted to the purposes of a trade which has been specified by law as a nuisance, it was expedient that a question of nuisance should not be tried in the Dean of Guild Court.

In May 1888 Walter Kirkwood and John Kirkwood, builders, Edinburgh, presented a petition in the Dean of Guild Court, Edinburgh, craving warrant to erect on ground belonging to them at Canaan Grove, Eden Lane, byres and other necessary buildings for the accommodation of thirty-two cows.

The petitioners averred that when they acquired the premises in 1887, they were then used as byres for the accommodation of twenty-four cows, and the subjects had been occupied in that way for more than twenty years. They proposed to remove the old byres, and to build others of an improved construction; to keep the new buildings of such a height as not to be noticeable by adjoining proprietors; and to regulate the drainage according to the most improved sanitary principles. The petitioners also alleged that the entrance to their ground was by Eden Lane, and that none of the compearing respondents had any material interest therein.

Answers were lodged by Mrs Margaret Forbes or Leith and Dr Bruce Allan Bremner, adjoining proprietors, who averred that the contemplated byres and manure heaps would be within a short distance from their respective mansion-houses, and that their grounds would be overlooked and

deteriorated in value. The district was residential and adapted for feuing, but the proposed erections would create a nuisance, and would interfere with feuing and affect the health of the neighbourhood, and the cows passing up and down the lane would be a danger to the inhabitants. By the conditions of feu in the petitioners' titles, which formed a real burden on their property, it was provided that no houses were to be erected for the carrying on of any trade which might operate as a nuisance to the neighbouring feuars.

Under the Public Health (Scotland) Act 1867 the following are, amongst others, declared "a nuisance"—Section 16, sub-sec. C—"Any stable, byre, pig-stye, or other building in which any animal or animals are kept in such a manner as to be injurious to health." Sub-sec. D—"Any accumulation or deposit of manure or other offensive matter within fifty yards of any dwelling-house within the limits of any burgh, or wherever situated, if injurious to health." Sub-sec. 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."

The respondents averred that the erection of the proposed buildings, and the use to which they were admittedly to be put by the petitioners, would be a nuisance within the meaning and intention of the said Public Health (Scotland) Act 1867.

The petitioners pleaded, *inter alia*, that the defences raised questions which were not within the jurisdiction of the Dean of Guild Court.

The respondents pleaded, *inter alia*—" (3) The effect of the erection and use of the proposed buildings being to create a nuisance to the respondents' property, destroying the same as a residential property, seriously affecting the amenity of the property, and being detrimental to health, warrant to erect the same ought not to be granted. (4) The proposed buildings and business intended to be carried on being nuisances in the sense of the statute before mentioned, warrant to erect the same should be refused. (5) The construction of the proposed buildings, and the carrying on of the said business, being contraventions of the feu-right of the ground on which it is proposed to erect the buildings, warrant to erect the same should be refused."

On 9th August 1888 the Dean of Guild (GOWANS) pronounced the following interlocutor and note:—"Finds that the answers of the respondents raise questions which are not within the jurisdiction of the Dean of Guild Court: Therefore sists the process, to allow the respondents, or either of them, to apply for an interdict against the erection of the proposed buildings, if so advised, reserves all questions of expenses, and decerns.

"*Note*.—Messrs W. & J. Kirkwood, builders, Edinburgh, are proprietors of certain house property and ground known as Canaan Grove and Wood Grove, Eden Lane, Edinburgh, and having an extent of about two acres. Eden Lane, which is a *cul de sac*, runs down almost the entire west side of this property, and close to its southern extremity gives entrance to certain buildings which occupy the extreme south-west corner of the petitioners' property. These buildings are now, and have been for many years,

occupied as byres for the accommodation of twenty-four cows. In the wall which forms the southern extremity of the lane there is a private back-entrance to Streatham House, the property of the respondent Dr Bremner. This lane also contains various villa residences. The southern boundary of the petitioners' property is a high wall, dividing it from the grounds of Canaan Lodge, the property of the respondent Mrs Leith.

"The petitioners crave warrant to erect byres for thirty-two cows, with cart-shed, stable, storage and other appropriate accommodation, on the south-east corner of their ground, and on their completion, to remove the buildings hitherto used for a like purpose on the south-west corner of the property, with exception of a timber erection.

"The respondents have lodged answers objecting to the erection of the byre. While Dr Bremner in particular objects to the effect on Eden Lane, and Mrs Leith avers that her house will be only thirty yards distant from a proposed manure pit in connection with the byre, in many particulars their objections are identical. They aver that the proposed operations will prejudice the amenity, the feuing value, and the salubrity of their respective properties. They further state that the erection of the byre will be a nuisance to the neighbourhood and injurious to health. They also found upon the following condition both in the petitioners' titles and in their own—'Not to erect or allow to be erected on any part of the ground hereby feued any house or houses for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars;' and upon the provisions of the Public Health (Scotland) Act, 1867, sec. 16 (c) (d) (e), which declare certain things to be nuisances.

"So far as the objections on the ground of amenity are concerned, the Dean of Guild does not consider that the respondents' answers are well-founded. If the erection of a byre is not prohibited, and is in itself lawful, it could not be prevented merely because it might prejudice the amenity of neighbouring properties.—*Barclay v. M' Ewen*, 7 R. 792.

"With regard to the other grounds of objection, the petitioners plead, 'The defences raise questions which are not within the jurisdiction of the Dean of Guild Court;' and in the circumstances of this case the Dean of Guild has sustained this plea.

"It was argued to the Dean of Guild that he had jurisdiction in the matter of nuisance, which was a part of the subject of neighbourhood, and that if he thought that the proposed operations, in the use to be made of them, would prove a nuisance, he could stop them, or order them to proceed upon conditions. In support of this contention the respondents relied on a series of decisions beginning with *The Magistrates of Stirling v. The Sheriff*, 1752, M. 7584. In that case an inhabitant of Stirling raised the side wall of his house, whereby he interfered with a servitude acquired by his neighbour, who complained to the Sheriff. The Sheriff sustained his own jurisdiction, and the Magistrates successfully brought a declarator 'that by virtue of their erection the sole and only jurisdiction in all questions concerning building houses within burgh, taking

down and rebuilding thereof, servitudes thereon, and marches and boundaries of the same, belonged to them excluding the Sheriff.' But in that case there was an allegation of direct fault in the structure of the building, and there was no question of the use to which the building was to be put. In *Fleming*, 1750, M. 13,159, the Dean of Guild, on the petition of a lower proprietor, forbade the future letting of an upper floor to a fencing-master, on the ground of nuisance arising from noise. In *Proprietors of Currubber's Close v. Reoch*, February 26, 1762, M. 13,175, a wright's shop had been burned, and with it neighbouring houses in a crowded close. The wright proposed to rebuild as before. It was held that the shop was in the circumstances a public nuisance, as being liable to fire, and that the Dean of Guild must deal with it. In this case the question of nuisance was directly connected with questions involving the structure of the building in dispute. In *Buchanan*, M. 13,173, a Dean of Guild had ordered the removal of watershades from the front of houses, on the ground that they encroached on the streets, deformed the same, and proved a nuisance to the general public. His proceedings were sustained. Analogous to these are the cases of *Varry v. Thomson*, M. App., *voce* Public Police, No. 4, and *Charity*, M. App. Public Police, No. 6. But all these cases were the subject of judicial consideration in *Donaldson v. Pattison*, Nov. 14, 1834, 13 S. 27, and that with a result hostile to the view contended for by the respondents. *Donaldson* was in the habit of raising goods by cranes to his upper storey from the pavement close to the front wall. *Pattison*, his next neighbour, obtained interdict from the Dean of Guild on the ground that the pavement was obstructed to his prejudice. It was held that the Dean of Guild could not competently entertain the petition, as the subject-matter of the nuisance was not of an architectural nature, and therefore did not fall within his province. Lord Mackenzie explains his reasons for considering that the Dean of Guild's jurisdiction was excluded, and after examination of the cases cited above he refused to accept the plea that the Dean of Guild could consider not only the structure of a building but also the use of it if that was illegal. In the case of *Fleming* his Lordship noted that the point of jurisdiction was never raised, while in the other cases not only was illegal use complained of, but also illegal construction of a building.

"So far as the Dean of Guild is aware, there is no other case where the point now under consideration has been the subject of direct decision, but there are more recent cases where important statements have been made as to the law on this head. In *Cobville v. Carrick*, July 19, 1883, 10 R. 1241, warrant was craved for the erection of a hall behind a house in a street. The house had been used as a school for many years, and the hall was intended as an adjunct thereof. The titles allowed the feuars to build at the back such offices as they might consider necessary for additional convenience, but forbade shops, warehouses, or trading places. The Dean of Guild refused the petition. It was held that the hall was an office necessary to the petitioner's convenience. In the course of his opinion the Lord Justice-Clerk said:—'If the only question is as to a right to use the proposed building in a particular way, I greatly doubt

whether the Dean of Guild has any authority to deal with that matter.' Lord Young, *inter alia*, said, 'I am clearly of opinion that the Dean of Guild has nothing to do with the use to which buildings are to be put.'

"The case of *Manson v. Forrest*, June 14, 1887, 14 R. 802, presents many analogous features to the present, but it does not throw much additional light upon the question of jurisdiction. In that case the erection of a byre was objected to as a nuisance, but interdict was refused because the petitioner undertook so to manage his business as to prevent the possibility of nuisance. The question of jurisdiction was argued to the Court at an early stage of the case, and the rubric of the case certainly asserts that the Court doubted the Dean of Guild's jurisdiction to entertain this question, but there is no expression of opinion on this point. It is the fact, however, that process was sisted by the Court on the motion of the respondents, who sought to uphold the Dean of Guild's jurisdiction.

"The more recent case of *Robertson v. Thomas*, 14 R. 822, is more in point. A petitioner proposed to make a large increase of a stable which stood in the centre of a thickly populated square of houses. It was chiefly objected that this would result in nuisance from smell and noise, and in an increased danger of fire. The Dean of Guild allowed a proof in order to ascertain whether the matters embraced in these objections, when established, would or would not be of a character with which he could competently deal. The petitioner appealed on the ground, *inter alia*, that the Dean of Guild had no jurisdiction as to the use of a building or as to a mere question of nuisance. But the Court (Lord Rutherford Clark *diss.*) refused the appeal, on the ground that it was expedient that the facts should be ascertained before determining whether the subject-matter of the objections was within the Dean of Guild's jurisdiction.

"In this case the Court practically reserved all questions of competency, and it appears to the Dean of Guild that this decision is no qualification of the doctrine that he cannot competently consider a simple question of nuisance, or a question as to the use to which a building is to be put. The whole object of the inquiry in that case was to ascertain whether the facts were such that the Dean of Guild could deal with the objections raised. The Lord Justice-Clerk, *inter alia*, said:—'I am clearly of opinion that there are cases of nuisance, and cases as to the use of buildings, which cannot come under the jurisdiction of the Dean of Guild, because they do not involve questions of the character for which he is the proper judge, but that, on the other hand, it is no answer to say what the appellant says here if the nuisance is connected with a structural alteration of the building itself, and the use is the use of that building.'

"In the present case the respondents' contention amounts to this, that the Dean of Guild has jurisdiction where the use of a building would naturally, if not necessarily, occasion nuisance. The Dean of Guild does not concur in this view. It appears to the Dean of Guild that he has only authority in the matter of nuisance, when by the circumstances of the particular case that matter is connected with questions involving the structural arrangements of the building for which war-

rant is craved. He thinks that these elements do not appear in the present case.

“The Dean of Guild ought to add, that after visiting the premises, and after full consideration of the plans, he is opinion that the petitioners' proposed operations are confined to their own property, and are structurally of a satisfactory nature.

“The lane, which gives access to various properties, is a *cul de sac*. It is only twelve feet wide, and thus too narrow to admit of two carts or cabs passing each other in it. The cartage for byres for thirty-two cows will be considerable, and will obstruct ordinary traffic.”

On 23rd August the Dean of Guild sisted the cause for one month from that date, and on 25th October he pronounced the following interlocutor:—“The respondents having failed to apply for interdict on the ground of nuisance, on the motion of the petitioners recalls the sist: Finds that the proposed operations are confined to the petitioners' own property, and can be executed without danger: Finds that the proposed premises are structurally of a satisfactory nature: Finds that the objections of the respondents on the ground of amenity are irrelevant for the reasons explained in the note to the interlocutor of 9th August last: Therefore repels the pleas-in-law for the respondents, grants warrant to the petitioner in terms of the prayer of the petition and of the plans therewith produced, which are docketted as relative hereto: Finds the respondents liable to the petitioner in expenses,” &c.

The respondents appealed to the Court of Session, and argued—The proposed building would be a nuisance both at common law and under the Public Health Statute 1867, which by section 16 prohibited any accumulation of manure within fifty yards of any dwelling-house. In the present case it was proposed to make a manure-heap within thirty yards of Mrs Leith's house. The Dean of Guild must look to the nature of the building, and the use to which it was obviously to be put. Under the petitioners' title he was prohibited from erecting any such buildings as he here proposed. There was no case in which it had been expressly decided that the Dean of Guild had no jurisdiction to consider the question of nuisance within burgh.

Counsel for the respondents were not called on.

At advising—

LORD PRESIDENT—I think that in this case we ought to follow the same course as was taken in the case of *Manson*. I am not disposed to lay down any very stringent or definite rule as to how far the Dean of Guild in a question of lining is entitled to entertain such an objection as is here taken on the ground of nuisance. I can understand that in such cases as those to which Mr Innes has referred, when certain kinds of works have been ticketed by law as nuisances, the Dean of Guild may refuse a lining, because the structure is only adapted to the purposes of an unlawful trade. But in regard to the other cases which have been referred to, and are quoted in the note to the Dean's interlocutor, I am not disposed to do anything which would lead to an extension of the jurisdiction of the Dean of Guild. Questions of nuisance are often of very great delicacy, and raise points of law which re-

quire the intervention of higher courts than that of the Dean of Guild. Such questions are among the enumerated cases which are sent to trial by jury, showing plainly the intention of the Legislature that they are of such importance that they ought to be brought before the highest tribunal only. I think that is very sound, and for these reasons, while I am not disposed to do or say anything which would appear to extend the jurisdiction of the Dean of Guild, I am not disposed to attempt to define the precise limits of that jurisdiction, because that is often a very difficult matter, and will in almost all cases depend upon circumstances. But apart from the ground of incompetency, I have no doubt that expediency requires that a question of nuisance should be tried elsewhere. I therefore think that we ought to sist this process in order to enable the appellants to bring an interdict against the erection of these buildings.

LORD MURE concurred.

LORD SHAND—I quite agree with the course which your Lordship proposes, and to the views which your Lordship has expressed. It does not appear from the reports that questions of this kind have been tried in the Dean of Guild Court for a long time, and it is not desirable that they should be dealt with there. The circumstances here are somewhat different from what they were in *Manson's* case, and the question between the parties is a very proper one for raising under an action of interdict in this or the Sheriff Court.

LORD ADAM concurred.

The Court sisted process to allow the appellants to raise an action of interdict against the erection of the buildings objected to, reserving the question of expenses.

Counsel for the Appellant Mrs Leith—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Appellant Dr Bremner—Brodie Innes. Agents—Richardson & Johnston, W.S.

Counsel for the Respondents—Mackay—H. Johnston. Agents—Menzies, Coventry, & Black, W.S.

Thursday, December. 20.

SECOND DIVISION.

[Sheriff of Forfar.]

CUTHBERT v. WHITTON AND OTHERS.

Property—Mutual Wall—Common Author.

The proprietor of two adjoining houses, by his settlement, left one to one daughter and the other to another daughter. The conveyance of each house was in similar terms, and each was described as bounded by the other. The gable wall of one house formed part of the back wall of the other.

In an action of declarator by one of the daughters against the other, held that in the absence of any evidence to the contrary in the titles this wall must be presumed to be mutual.

John Galloway, plumber, Arbroath, was pro-