

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

Register of Sasines, but are also hereby appointed to be validly and sufficiently referred to in the future charters, and other writs or deeds of transmission of the said subjects, otherwise the same shall be null and void.' Said prohibition affects the ground on which the petitioners propose to build, as well as the ground on which the respondents' houses are built. The proposed buildings are in contravention of said feu-disposition, in respect they are intended to be a distillery or part thereof, and to be used as such, and the petitioners are thereby barred from carrying into effect the proposed erections. Said objection appearing *ex facie* of the titles produced, this Court has jurisdiction to consider and dispose of the same."

The petitioners answered—"The respondents' titles are referred to, beyond which no admission is made, and with reference to the allegations of the respondents, it is denied that the erections proposed by the petitioners are in contravention of their rights. Denied that it is proposed to use the alleged buildings either for a distillery or a brewery or other manufacture or chemical process which will prove a nuisance or injurious to the neighbourhood. *Quoad ultra* the allegations of the respondents are denied."

The respondents pleaded—"The proposed operations being in contravention of the said feu-disposition the petition ought to be dismissed with expenses."

Upon 29th October 1891 the Dean of Guild pronounced this interlocutor—"Finds that the petitioners crave warrant to take down certain old buildings on their property at Sciennes, Edinburgh, and to erect on the site buildings five storeys in height to be used as bonded warehouses, malt-barns, and relative stores: Finds that the proposed operations are confined to the petitioners' own property, and can be executed without danger: Finds that the petitioners and respondents hold under the conditions of a feu-disposition granted by Messrs G. & M. H. Crichton in favour of Alexander Thomson Blair: Finds that the said deed declared that it should 'not be lawful to the said Alexander Thomson Blair or his foresaids to erect or carry on upon the subjects or any part thereof any . . . distillery, brewery, or other manufacture or chemical process of any kind which may be nauseous or noxious to the inhabitants of the neighbourhood: Finds that the proposed operations would not constitute a contravention of this condition: Therefore repels the pleas-in-law for the respondents, grants warrant," &c.

The respondent appealed, and argued—The averments of the appellant coupled with the plans produced disclosed a contravention of the feu-contract. The proposal was admittedly to extend the existing distillery. In any view, a malting business was a work of the kind struck at by the feu-contract. If the Court did not dismiss the petition *de plano*, at all events the appellant was entitled to an inquiry either by proof of his averment or by a remit to an architect. There was not here

any question as to the Dean of Guild's jurisdiction in cases of nuisance nor as to what was the use to which the premises were to be put; the matter was one of the construction of a definite prohibition in a feu-disposition which the Dean of Guild was bound to inquire into—*Robertson v. Thomas*, June 17, 1887, 14 R. 822.

Counsel for the respondent were not called on.

At advising—

LORD JUSTICE-CLERK—In my opinion there is nothing in the record to suggest that the petitioner, the respondent in this appeal, is going to do anything which would call for the interference of the Dean of Guild from a sanitary point of view. In my opinion also there is nothing to show that what he proposes to do is in violation of the restrictions of the feu. It is not, I think, necessary to go into that matter. I think that the appeal should be dismissed.

LORD YOUNG—I am entirely quite of the same opinion. The Dean of Guild understands what malt-barns, malt-deposits, and malt-kins are. He can have what assistance he needs in finding that out, and he informs us that the buildings are not to be used as a distillery or brewery, but as "bonded warehouses, malt-barns, and relative stores." Now, we must take that, and indeed there are no averments to the contrary.

It is stated that these buildings include malt-barns, malt-deposits, and malt-kilns, which are essential parts of a distillery or brewery. No doubt they may be necessary in the sense that they are useful for the convenient carrying on of a brewery or distillery, but they are not in themselves a brewery or distillery. The provision of empty barrels to be used for the purposes of a distillery is a necessary part of a distillery business, but it would not be a violation of the condition in the feu-disposition if these empty barrels were placed upon the bare ground; and if the proprietor of the distillery proposed to erect a building in which he might put these empty barrels for protection I do not think it would be open to any objection in the Dean of Guild Court.

On the other hand, if any use is made of these buildings which is nauseous and hurtful to the neighbourhood in the meaning of this disposition, then it may be stopped, but not in this proceeding in the Dean of Guild Court.

LORD TRAYNER—I concur. The appellant's defence to the petition in the Dean of Guild Court is, that the ground upon which the petitioners propose to erect the buildings described in their application is held under certain restrictions, one of which is that the feuar shall not erect any brewery or distillery upon it. Now, I do not find that the defender, the appellant here, has averred that the proposed buildings are contrary to the restriction in the feu-disposition. He says, no doubt, that they are

“essential parts of a distillery or brewery.” But there may be buildings which are necessary for carrying on the business of a distillery or brewery, and which are nevertheless not used for such a business at all. The appellant cannot effectually plead the restriction in the feu-title unless he can aver that the proposed buildings come within the description of the things prohibited. He does not do so.

If at anytime the buildings now objected to should be used for purposes which are in distinct breach of the restriction in the petitioners' feu-disposition these may be stopped, but as the case stands at present I am of opinion that the judgment of the Dean of Guild is right.

The Court dismissed the appeal.

Counsel for the Appellant—Dundas—A. S. D. Thomson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Sol-Gen. Graham Murray, Q.C.—W. C. Smith. Agent—P. Morison, S.S.C.

## HIGH COURT OF JUSTICIARY.

Monday, December 14.

(Before the Lord Justice-Clerk, Lord Adam, Lord M'Laren, Lord Trayner, Lord Wellwood, Lord Stormonth Darling, and Lord Low.)

IRVING v. PHYN.

*Justiciary Cases—Salmon Fishing—Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97), sec. 7—Weekly Close-Time.*

The Salmon Fisheries (Scotland) Act 1862, sec. 7, provides that the weekly close-time for net-fishing shall continue from six o'clock on Saturday night till six o'clock on Monday morning. Where owing to a state of the tide which occurred once a fortnight, fishermen were unable to put their net out of fishing order at six o'clock, and did not do so till eight o'clock, keeping them out of fishing order till eleven o'clock on Monday morning—*held* that the provision of the statute must be complied with literally, that the fishermen ought to have put their nets out of order at the latest opportunity prior to six o'clock, and that accordingly they were guilty of a contravention.

*Osborne v. Anderson*, November 4, 1887, 1 White 497, commented upon and distinguished.

Mrs Mary Graham or Irving, widow, residing at Loch, William Graham Irving, residing at Stormont Cottage, and John Irving, residing at Rigg, all in Gretna Parish, Dumfriesshire, tenants of the Loch Salmon Fishings in the Solway, were convicted before the Sheriff-Substitute at

Dumfries upon a complaint under The Summary Jurisdiction (Scotland) Acts 1864 and 1881, and The Criminal Procedure (Scotland) Act 1887, at the instance of Charles Steuart Phyn, Procurator-Fiscal of Court, against them, charging them with having, on the evening of Saturday, 13th June 1891, and within or during the weekly close-time for the district of the river Annan—*first*, omitted to have a clear opening of at least four feet in width from top to bottom made and kept free from obstruction in the pouches, traps, or chambers of two stake nets placed in the Solway Firth, at a part thereof in the parish of Dornock, Dumfriesshire, opposite the farm of Wyllies, in the parish and shire last mentioned, and within the said district of the river Annan; and *second*, omitted or failed to have raised and tied to the upper ropes, or lowered and tied to the lower ropes, the pouches, traps, or chambers of seven fly nets placed in the Solway Firth aforesaid, three of them at that part thereof in the said parish of Dornock opposite the said farm of Wyllies, and the remaining four of said nets at that part of the said firth in the parish of Gretna and said shire opposite the farm of Baurch in the said parish of Gretna, and all within the said district of the river Annan, so as effectually to prevent the capture or obstruction of salmon by said nets, contrary to The Salmon Fisheries (Scotland) Act 1868, section 24, and sections 1 and 2 of the bye-law Schedule D annexed to the said Act, whereby the said Mary Graham or Irving, William Graham Irving, and John Irving are each liable to forfeiture of the said nets, and to a penalty not exceeding £10 for each weekly close-time during any part of which either of such omissions has occurred in respect of each net, to which the proof of either of such omissions applies, and for the expenses of prosecution, and failing payment of said penalty and expenses, to pouncing for recovery thereof, in terms of said Act of Parliament, or to imprisonment, in terms of the sixth section of The Summary Jurisdiction (Scotland) Act 1881.

They appealed upon a case stated. The case set forth—“The facts proved in evidence (which were not denied) were, that, on the date libelled, the tide was at high water about 5:30 p.m.; that this state of the tide occurs about the hour mentioned on a Saturday in each fortnight; that at 6 p.m. on said day the appellants could not fish and open the nets, so as to comply with the provisions of the bye-law to said Act; that the soonest time at which they could fish and put the nets out of fishing order was about eight o'clock of said night, at which time the said nets were opened, as provided by said bye-law; that the earliest time at which they could have been, and were put into fishing order on the following Monday morning was about 11 a.m.; that the space of time during which the nets were thus out of fishing order was upwards of thirty-six hours; that in order to have ensured the nets in question not being in fishing order after 6 p.m., when such a state of the tide occurs on a Saturday, they would have