

Counsel for the Pursuer—Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Ure, K.C.—Grierson. Agent—James Watson, S.S.C.

Friday, June 12.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

STREET v. DOBBIE.

Superior and Vassal—Feu-Contract—Stipulations—Buildings—Iron Foundry—Obligation to Erect “Substantial Stone or Brick Buildings for the Purpose of an Iron Foundry”—Enclosing Walls not all of Stone or Brick.

By a feu-contract the feuar was taken bound, *inter alia*, to erect within a specified time upon the ground feued “substantial stone or brick buildings for the purpose of an iron foundry” of a specified value. In an action of declarator of irritancy at the instance of the superior against the feuar on the ground that he had failed to implement the condition of the feu-contract as to the erection of buildings, it was proved that the defender had erected a foundry which satisfied the requirements of the feu-contract as to value, and having a middle wall, a back wall, and a chimney and furnace of brick, but with three of its outside walls composed of iron pillars and wood. It was proved that other foundries in the neighbourhood were built in the same manner. *Held* (aff. judgment of Lord Kincairney, Ordinary) that the pursuer had failed to prove any contravention of the conditions of the contract, and that the defender was entitled to absolvitor.

This was an action at the instance of John Shepherd Street, brick manufacturer, Inverkeithing, against James Dobbie, ironfounder, Banknock Foundry, Hollandbush, in which the pursuer, as superior of certain lands feued to the defender as vassal, concluded for declarator of irritancy of the feu-contract in respect that certain conditions therein contained had not been implemented, or otherwise that they had been contravened by the defender.

The feu-contract between the pursuer and defender, which was dated July 1899, contained, *inter alia*, the following clauses:—“(First) the second party (the defender) and his foresaids shall be bound to erect within five years from the term of Martinmas Eighteen hundred and ninety-six, and thereafter to uphold and maintain in good order and repair in all time coming, and when necessary to rebuild upon the said plot or area of ground substantial stone or brick buildings for the purpose of an iron foundry, and if desired by the second party or his foresaids substantial dwelling-houses of stone or brick, and said buildings shall have slated, tiled, or iron

roofs, and shall be of a value sufficient at all times to yield a free yearly rental according to the valuation roll equal to not less than triple the amount of feu-duty exigible from said portion of ground as after provided: Declaring, as it is hereby expressly provided and declared, that in the event of the second party or his foresaids failing to comply with the conditions, declarations, restrictions, obligations, and others before inserted as to erecting and maintaining buildings on the said portion of ground or as to repairing or rebuilding, or in the event of his or their contravening any of the conditions, declarations, restrictions, obligations, and others before written, then and in the option of the first parties or their successors these presents and all following hereupon shall become *ipso facto* void and null, and the second party and his foresaids shall amit, lose, and forfeit all right and interest in said portion of ground and buildings thereon, which shall thereupon revert and belong to the first parties and their foresaids free and disencumbered of all burdens whatsoever.” . . .

The defender had erected a dwelling-house on the feu, to which the pursuer took no objection.

The defender had also erected certain buildings for the purposes of a foundry. These buildings were as follows:—A brick gable wall was erected at one end of the foundry, and from it another brick wall was erected in the middle of the foundry to the other end. There were also a chimney stalk, boiler seat, and engine seat, and a furnace, all of brick. The outside walls of the foundry other than the gable referred to consisted of iron columns about 10 feet apart, upon foundations of brick or concrete, the spaces between the iron columns being filled in with wood. It appeared that the other foundries in the neighbourhood were built in the same manner and that none of them were enclosed by four brick or stone walls.

The pursuer maintained that the foundry building erected by the defender was not such as to be sufficient implement of the conditions of the feu-contract, in respect that it ought to have had, but had not, its four side walls composed of brick or stone.

The feu-duty payable by the defender was £12 *per annum*. The foundry was entered in the valuation roll as of the yearly value of £40, and the dwelling-house of the yearly value of £20.

The pursuer pleaded—“(1) The defender having contravened the conditions and obligations of the feu-contract condescended on, and having forfeited his right and interest thereunder, the pursuer is entitled to decree of declarator as craved, with expenses.”

The defender pleaded—“(3) The pursuer’s averments, in so far as material, being unfounded in fact, the defender should be assolizied with expenses.”

On 29th January 1903 the Lord Ordinary (KINCAIRNEY), after a proof, pronounced an interlocutor in the following terms:—“Finds it not proved that the defender has

contravened the conditions in the feu-contract libelled: Repels the pleas-in-law for pursuer and sustains the third plea-in-law for defender: Assoizies the defender from the conclusions of the summons, and decerns."

Opinion.—"The sole ground on which the pursuer seeks to irritate the defender's feu, doubtless with the effect of acquiring the buildings on it, is that the four walls which enclose the premises in which the defender conducts his business are composed of iron pillars and wood, and not of brick or stone. No other breach is alleged. It is not said that if these walls had been built of brick or stone any irritancy would have been incurred. Therefore the pursuer has to establish that the defender has incurred an irritancy by failing to do something which the contract does not expressly require. It is inferred from the clause which requires that buildings shall be put up for the purposes of a foundry. But the inference appears to be inadmissible. There is a considerable amount of brick building in the place. There is the mid brick wall and the back wall, and there are other brick buildings. Notably there is the chimney and the furnace. These are absolutely necessary for a foundry; but it is clear that four brick walls are not. Apparently they would be disadvantageous, and in this sort of business it is very convenient to have the boundaries such as may be removed when increased business requires increased space. The contract does not stipulate for enclosing buildings, but only for such buildings as are necessary for or appropriate to a foundry. Now I have no exact knowledge, judicial or otherwise, about the buildings required for a foundry; but I do know from the proof that none of the foundries in this neighbourhood—and there are many—have the space which is used in them enclosed by four brick walls, and in fact that they are one and all of them just like the defender's. I cannot hold that an obligation to put up buildings for a foundry can be construed as an obligation to put up a foundry different from all the other foundries in the district. I am therefore of opinion that the pursuer fails on the question of construction of the contract. He draws an inference from the contract which I think it will not bear."

The pursuer reclaimed. The nature of the arguments presented for the reclaimer and the respondent is sufficiently disclosed in the Lord Ordinary's opinion.

LORD JUSTICE-CLERK—I agree with the interlocutor pronounced by the Lord Ordinary. The question in this case is whether the pursuer is entitled to declarator of irritancy of the feu on the ground that the defender has contravened the conditions in the feu-contract. It is alleged that the defender has failed to erect buildings of the kind required. He has erected a foundry and a dwelling-house, the assessed rentals of which are £40 and £20 respectively. He has thus fulfilled the condition that the value of the buildings erected shall be sufficient to yield a free yearly rental according

to the valuation roll of not less than triple the amount of the feu-duty, which is £12. But it is said that the foundry is not a "substantial stone or brick building," inasmuch as the sides are constructed of iron pillars, the spaces between them being filled in with wood. But it is not denied that the back wall and the partition wall are built of brick, and the Lord Ordinary has found—and I agree with him—that the buildings are in all respects such as are usually put up "for the purpose of a foundry." I am accordingly of opinion that the buildings fulfil all the conditions imposed by the feu-contract and that there is no ground for the contention of the pursuer.

LORD YOUNG concurred.

LORD TRAYNER—I am of the same opinion and I think that the Lord Ordinary's construction of the feu-contract is right. The obligation on the defender is to erect "substantial stone or brick buildings for the purpose of an iron foundry." This does not bind him to put up four brick walls which—as the Lord Ordinary says—are not necessary for a foundry. The back and partition walls of the foundry in question are built of brick, and I understand that it is quite usual in erecting buildings of this class not to build any other walls of brick, the side walls being left open or made of wood in order to allow for a possible extension of the foundry. There is no doubt that the assessed rental of the buildings erected is amply sufficient to satisfy the condition in the feu-contract as to their value. This being so, and the buildings being for the purpose of a foundry and built of brick so far as is necessary and usual for that purpose, I can see no ground for the pursuer's contention.

LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—Wilton. Agents—Wishart & Sanderson, W.S.

Counsel for the Defender and Respondent—Campbell, K.C.—Guy. Agents—Carmichael & Millar, W.S.

Saturday, June 20.

SECOND DIVISION.

[Sheriff Court at Hamilton.]

M'DONALD v. SMELLIE.

Reparation—Negligence—Duty to Public—Dangerous Animal—Dog—Dog Known to be Dangerous to Children though not Vicious.

In an action by a father for damages for the death of his child from the effects of the bite of a dog, held that it was sufficient for him to prove that the dog had acted on previous occasions in a way dangerous to children, and that