meaning of the Act seems to be that all salmon-fishing with these engines is prohibited, and that all fishing with these engines for other fish is prohibited if it be to the prejudice of the heritors. Accordingly, the *gravamen* of the offence where it is admitted that the accused was fishing for sparling or other white fish is that it should be to the prejudice of the heritors. It was said by counsel for the complainer that the charge of using unlawful nets to "the prejudice of the heritors having rights of salmon-fishing" was not inserted, because if it had been made it would have been necessary to prove it, and it is very difficult to prove it. But that is a concession that prejudice to the salmon fishery is not a necessary consequence of the use of the nets in question for white fishing; for otherwise proof that the nets were used at all would be proof of the prejudice. I do not think that the difficulty of proving the *gravamen* of a statutory offence is sufficient justification for a conviction without proof or even averment.

The Court answered the question in the affirmative and refused the appeal.

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

Counsel for the Respondent — A. M. Anderson. Agent — W. R. Mackersy, W.S.

COURT OF SESSION.

Friday, July 17.

FIRST DIVISION.

COMMISSIONERS OF QUEEN STREET GARDENS *v.* HUNTER.

Property—Gardens between Two Streets—Liability for Assessments — Buildings Erected on Back-Green—3 Geo. IV. (Personal and Local), cap. 28.

By a private Act of Parliament, providing for the purchase and upkeep of gardens between two streets, it was enacted that the expense of upkeep should be met by an assessment on the proprietors of houses or tenements in these streets. It was also enacted that every person should be deemed and taken to be the proprietor of a house in these streets "who is or shall be proprietor of a house, flat, or floor of a house, tenement, or area in Queen Street or Heriot Row, if the area itself, or any of the windows of the buildings erected thereon, shall point or open towards Queen Street or Heriot Row, although the door or entrance into such house, floor, or tenement shall not be situated in either of the said streets."

Upon two of the original feus the proprietors erected houses fronting Queen Street. Subsequently the proprietors of these feus built other premises on the back-greens, occupied as a bookbinding establishment, and substantially distinct from the houses, without any frontage to Queen Street, and with an access to a lane behind.

In a special case between the commissioners of the gardens and the proprietors of these two feus, *held* that the assessment for the upkeep of the gardens was not leviable on the whole rental of the subjects comprised in the original feus, including the bookbinding premises erected on the back-greens, but was leviable only on the rental of the houses opening on or overlooking the street.

This was a special case presented by William Ellis Gloag and others, commissioners of the centre district of Queen Street Gardens, Edinburgh, first parties, and William Hunter, William Hunter junior, and Norman Mitchell Hunter, as trustees for their firm of William Hunter & Sons, bookbinders, 28 Queen Street, second parties, raising a question of the construction of the Act 3 Geo. IV. (Personal and Local) cap. 28, entituled "An Act for regulating, maintaining, and improving the premises in the City of Edinburgh termed Queen Street Gardens."

The question raised by the case was whether the proprietors of two houses in Queen Street were liable to assessment for the upkeep of Queen Street Gardens upon the valuation of premises erected by them upon the back-greens of the houses, and entering from the lane at the back.

The Act, after providing for the purchase of the gardens, their division into districts, and the election of commissioners by whom they should be managed, contained the following provisions:—"And be it further enacted, that the price or prices of any grounds which may be purchased as aforesaid, and the expense of enclosing, levelling, and laying out the same, shall be assessed by the said district commissioners, within their respective districts, as follows: . . . the assessments on the proprietors of houses or tenements shall be defrayed by annual payments on the rentals of such houses or tenements, according to the valuation by which the police assessments of the said city for the time being are or shall be imposed, or according to the valuation by which the house duty is or shall be imposed, or according to the extent of the fronts of such houses or tenements, as the said commissioners shall deem expedient. . . . And be it further enacted, that the said district commissioners shall respectively have power to direct in what manner the said gardens and the grounds which may be purchased in virtue of this Act, after the same shall have been inclosed and laid out, shall be kept and managed, and to appoint clerks, cashiers, or collectors, and to employ gardeners and labourers for the purpose of dressing and keeping the same in order, and to assess the expense which may be necessary for this purpose on the proprietors in the same way and by the same proportion as they are hereby empowered to assess for the purchase of the same. . . . And be it further enacted, that every person shall

be deemed and taken to be a proprietor of a house in Queen Street or Heriot Row, and subject to the provisions of this Act, who is or shall be proprietor of a house, flat, or floor of a house, tenement, or area in Queen Street or Heriot Row, within the boundaries and limits aforesaid, if the area itself, or any of the windows of the buildings erected thereon, shall front or open towards Queen Street or Heriot Row, although the door or entrance into such house, floor, or tenement shall not be situated in either of the said streets.'

The facts raising the present question were set forth in the special case as follows:—"On 10th July 1822 a meeting of the commissioners of the centre district was held, at which they expressed and minuted an opinion and recommendation that the valuation by which the police money was levied should form the rule for all assessments to be made under the Act, as being the most equitable and least intricate that could be adopted. This recommendation was homologated at a meeting of proprietors on 10th July 1822. At a further meeting of the commissioners, on 3rd October 1822, a scheme of assessment was approved of and directed to be intimated, with a view to its being levied at the following Martinmas, and the assessment was levied in accordance with this scheme. This scheme includes the two dwelling-houses, Nos. 28 and 29 Queen Street, included in the centre district at police valuation rentals of £140 and £130, and assessed for sums of £16, 16s. and £15, 12s. The garden ground was acquired at the end of the year 1822. At the date of said scheme the said houses were private residences, with back-greens which were bounded on the south by a meuse lane which is now termed North-West Thistle Street Lane. . . . The second parties, . . . as trustees for their firm . . . are the present proprietors of the said two houses Nos. 28 and 29 Queen Street, Edinburgh, both entering from Queen Street, and of the pieces of ground behind the same. The second parties have their offices in the house No. 28 Queen Street. The house No. 29 Queen Street is let separately as offices. The houses Nos. 28 and 29 Queen Street were at the date when the Act was passed, and continued until the operations of the second parties, to be separated from the back-greens between them and North-West Thistle Street Lane by an area 8 feet or thereby in width, and a parapet wall with an iron fence or railing thereon. The access to said back-greens from the houses was by the back doors of said houses, which opened into said areas, and by a flight of steps, the areas being lower than the back-greens by about 6 feet. The second parties have built on the back-greens behind said houses premises in which their bookbinding business is carried on. These premises are entirely separate and distinct from the houses forming Nos. 28 and 29 Queen Street, and have their entrance from North-West Thistle Street Lane. The second parties, for their personal convenience, have placed a covered gangway or bridge, 3 feet 6 inches in width, of wood, between their office in the house No. 28 Queen Street and the said bookbinding premises. Except for the personal use of the members of the second parties' firm and their clerks and managers between their office and works, the said gangway is not used. It would be practically impossible to conduct the bookbinding business in said premises without an entrance to North-West Thistle Street Lane. Although the said William Hunter has had buildings erected on the back-green of No. 28 Queen Street since 1867, and has since occupied the same as workshops, it was only in 1899 that the commissioners for the first time claimed the right to levy assessment in respect of the buildings on the back-greens."

The first parties contended that in allocating the assessment for the upkeep and maintenance of the gardens, which by the Act is to be assessed on the proprietors in the same way and in the same proportion as was provided with regard to the assessment for the purchase thereof, they must, in the case of the subjects belonging to the second parties, include in their roll of rental for assessment the police rental of the whole subjects on the pieces of ground described in the said feu-charters, and which in the year 1822 were included in the district liable to assessment for the acquisition and subsequent upkeep and maintenance of the centre district gardens, and that the district commissioners can take no cognisance of any divisions of the said piece of ground by sale or otherwise, or of any artificial barriers which have been put up by the second parties or their predecessors so as to separate into two or more portions the original stances conveyed by said original titles of Nos. 28 and 29 Queen Street respectively, or of any door or entrance having been made to any part of said plot of ground or to any buildings erected thereon, said door or entrance not being in Queen Street.

The second parties contended that the commissioners were not entitled to assess upon the back greens or buildings erected thereon in respect that upon a sound construction of the Act of Parliament no power is conferred upon them to include said subjects in their assessment, and accordingly that the commissioners should exclude from the rental liable to assessment as aforesaid all the premises and buildings erected on the said back greens, so far as these have their sole or principal entrance from North-West Thistle Street Lane, and restrict the assessment to the rental of the two buildings, originally dwelling-houses, entering from Queen Street.

The following questions of law were stated:—"(1) Is the assessment for the upkeep and maintenance of the centre district gardens of Queen Street leviable on the whole police rental of the subjects comprised in each of the original feus of 28 and 29 Queen Street, Edinburgh? Or (2) Is the assessment aforesaid leviable only on the rental of the buildings 28 and 29 Queen Street, Edinburgh, and opening on or overlooking that street?

The first parties argued that the assess-

ment was laid on the area, and therefore that all buildings on that area were liable, whether their windows fronted the street or not. They cited *Glasgow City and District Railway Company* v. *M'Brayne*, May 31, 1883, 10 R. 894, 20 S.L.R. 602.

The second parties argued that the proprietor of an area was only liable as such so long as the area was unbuilt upon. Once buildings were erected, liability to assessment depended on whether these buildings had a frontage to Queen Street or not.

LORD PRESIDENT—The question in this case depends upon the application, to an admitted state of facts, of the provisions of the Act 3 George IV. (Personal and Local), c. 28. By that Act it is, *inter alia*, provided "that every person shall be deemed and taken to be a proprietor of a house in Queen Street or Heriot Row, and subject to the provisions of this Act, who is or shall be proprietor of a house, flat, or floor of a house, tenement, or area in Queen Street or Heriot Row within the boundaries and limits aforesaid, if the area itself, or any of the windows of the buildings erected thereon, shall front or open towards Queen Street or Heriot Row, although the door or entrance into such house, floor, or tenement shall not be situated in either of the said streets."

The plain object of this enactment is to make proprietors who have an outlook to Queen Street or Heriot Row contribute to the upkeep of the gardens. The question therefore in my judgment comes to be whether the back buildings fronting Thistle Street Lane, to which this case refers, have windows of which it could be predicated in any reasonable sense that they front or open towards Queen Street. This could only be said of a building which is behind the houses fronting Queen Street if it could be held that the back building is either a part of the front house or of its curtilage. If that was the real character of the building, I should be prepared to hold that the existence of buildings in front and to the north of it looking into Queen Street would not prevent the proprietors from being liable for the assessment in question. In other words, if the space behind was occupied by buildings incidental to the use and enjoyment of the front house, I think the statutory condition of liability would be fulfilled. I say nothing against the view that the owner of buildings, forming a unit as regards their use and occupation, would be liable if the front windows looked out to Queen Street, however far backwards the building might extend to the back. In this case the back space is occupied by a book-binding establishment three storeys in height, which extends across the backgreens of Nos. 28 and 29 Queen Street, and has its entrance from North-West Thistle Street Lane. Apart from the accident of Messrs Hunter having their offices in two rooms in No. 28 Queen Street, which is connected by a gangway with the book-binding premises behind, the owners or occupiers of Nos. 28 and 29 would have been trespassers if they had gone into the back premises, and *vice versa*. In this case therefore there are buildings in front occupied independently as offices entering from Queen Street, and manufacturing premises at the southern end of these buildings entered from another street. It seems to me to be impossible, in these circumstances, to say that the buildings behind front or open towards Queen Street.

In accordance with this view we find that the buildings are separately entered for police assessments, and by our judgment we merely extend the same principle or rule to assessments for the upkeep of the gardens.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I agree. I think, as your Lordship has said, that in construing this enactment we have a definition of who were to be considered as proprietors of houses for the purposes of the Act. It seems to me that the area is to be taken into account as long as there are no buildings upon it. The moment that buildings are erected, the area, as distinguished from the buildings erected upon it, ceases to be the subject of assessment, which then comes to depend upon the buildings erected. No doubt when the proprietor of the area built on it a house fronting Queen Street or Heriot Row, the area, so far as it remained unoccupied, might, as your Lordship has suggested, be regarded merely as a curtilage of the house, or if it were occupied by outhouses for purposes incidental to the use of the house, such vacant ground or outbuildings might add to the value of the house as a subject for assessment. But I cannot see anything to prevent a proprietor (assuming there was nothing to the contrary in his title) from building one house fronting Queen Street and another house in his back-green fronting a new street. If he used his property in this way, the first house would have windows fronting Queen Street and the second house would not. He would be the proprietor of a house fronting Queen Street and of another which did not front Queen Street, but a totally different street, such as Thistle Street or Thistle Street Lane. He would be liable to the assessment for maintaining Queen Street Gardens in respect of the first house, and not liable in respect of the second. The argument to the contrary seems to me to be founded on the use of the term "area," and to give to that word a much wider and more extensive significance than it will legitimately bear. It is argued that once you have an area fronting Queen Street, any buildings on that area must be liable to assessment in whatever way they may be built, and whether the buildings front Queen Street or not. The logical result, from which Mr Rankine did not shrink, is that if the ground extended a little further to the south, all the houses in Hill street would be liable to be assessed for the gardens, as houses fronting or having windows in Queen Street, although it were certain that they fronted in a different direction, and that Queen Street could not be seen

from their windows. When it is asked why the liability which once attached to the area should be withdrawn when buildings are erected upon it, the answer is simply because the statute says so. It provides that the moment a building is erected on the area its liability for assessment depends upon whether its windows front on Queen Street or whether they do not.

I may observe that it is stated in the case that the buildings in question were erected in 1867, and it was not for more than thirty years, in 1899, that anyone ever thought they were liable for assessment. That is not conclusive against the claim which is now made, but it seems to me not immaterial as bearing upon the question of fact, whether the new buildings are a part of the original house, because the only way in which they could have escaped assessment before was that it was seen by everybody, and by the Commissioners themselves that they were separate buildings. It is true that they are connected with the original house by a gangway, but that gangway, which could be taken down at any moment, does not prevent them from being separate buildings. I therefore agree with your Lordships that the second question in the case should be answered in the affirmative.

The Court answered the second question in the case in the affirmative.

Counsel for the First Parties—Rankine, K.C. — Younger. Agents — Forman & Bennet Clark, W.S.

Counsel for the Second Parties—Solicitor-General (Dickson, K.C.)—W. L. Mackenzie. Agents—Fletcher & Baillie, W.S.

Wednesday, January 28.

FIRST DIVISION.

[Lord Low, Ordinary.

HARVIE *v.* ROBERTSON.

Prescription — Long Prescription — Nuisance—Lime-Burning—Non valens agere —Pursuer during Period of Prescription not Actually Inconvenienced by Nuisance—Pursuer Himself Committing Nuisance.

In an action of declarator and interdict alleging a nuisance by burning lime, the defender having pleaded prescription, the pursuer replied that up to a date a few years before the date of the action, when the pursuer's grounds were built with dwelling-houses, he and his authors had used their ground for an oil-work, and in consequence suffered no immediate damage or inconvenience from the lime-burning carried on on the defender's ground, and therefore would not have been entitled to object thereto. *Held* that this was not a relevant reply to the plea of prescription, in respect that a proprietor is always entitled to object to any illegal use by a neighbour of his lands which is calculated to reduce the value of such proprietor's lands either immediately or in the future.

Held also (*per* Lord Low, Ordinary, and *acquiesced in*) that it was not a relevant reply to a plea of prescription in a case of nuisance to aver that the pursuer had during the period of prescription been himself committing a nuisance on his own lands, in respect that the fact of his doing so would not have disentitled him from bringing an action.

Observations on the plea of *non valens agere.*

This was an action of declarator and interdict at the instance of William Harvie, proprietor of a plot of ground in Anderson Street, off Gallowgate, Glasgow, against Archibald Robertson, lime merchant, Glasgow, the proprietor of an adjoining plot of ground lying immediately to the north of the pursuer's property.

The pursuer concluded (1) for declarator that the business or operation of lime-burning intended to be carried on by the defender upon his plot of ground would constitute and be a nuisance to the pursuer as owner of the tenement of dwelling-houses erected on the pursuer's plot, and to the tenants and occupants of the same; and (2) for interdict against the defender from carrying on the business of lime-burning on his property.

The defender pleaded, *inter alia*—"(3) *Separatim*, the defender having a prescriptive right to carry on the business of lime-burning on the ground in question is entitled to be assoilzied."

Proof was allowed and led.

The defender's property had been used for lime-burning for a period materially exceeding forty years, and there was no evidence that the kilns caused any more discomfort or inconvenience now than they did at any time during the last forty years.

In 1897 a tenement of dwelling-houses had been erected on the pursuer's plot. Prior to the erection of the pursuer's tenement his plot had been used for an oil-work.

In answer to the plea of prescription put forward by the defender the pursuer maintained in the Outer House that he could not have prevented lime-burning being carried on during the prescriptive period, because during that period he and his authors were using their plot for an oil-work, which must have been as great a nuisance to the neighbourhood as the lime-kilns. In the Inner house this contention was abandoned, but the pursuer maintained that as long as his plot was being used for an oil-work he and his authors could not have objected to their neighbour burning lime, inasmuch as the offensive fumes did no harm to the pursuer's plot so long as it was merely used for an oil-work, and that prescription could not run against him so long as he was sustaining no immediate injury.

On 20th February the Lord Ordinary (Low) pronounced the following interlocutor:—