lease the tenant cannot grant an assignation of the lease to anyone, and therefore the landlord asks authority to turn him out of the shop. In my opinion the trustee was a most proper person to be entrusted with the duty of carrying on this business.

I have stated that in my opinion the tenant was entitled to do as he did, but if it is the pursuer's contention that the tenant must personally attend to the business, what does the tenant say when he is called into the case. Here is his averment—"The defender is now willing, if required, to take personal possession and management of the said shop, and carry on the said business." That, then, is his position. What does the landlord say to that? His reply is found in the correspondence—"Mr Dewar, of course, does not recognise the trustee in any way, and he directs me to remind you that assignees, legal or conventional, are excluded by the lease as tenants, so that the lease has been forfeited. He is resolved that the present state of matters shall no longer continue, and his interests as landlord are daily suffering. He has instructed me to ask that the trustee now formally give up the shop, hand him the key, and clear out the premises so that he may let the place to a new tenant." All these statements by the landlord are upon the footing that the tenant by getting into bankruptcy and granting a voluntary trust-deed, and appointing the trustee as manager of the business, had forfeited the lease, and therefore that the trustee and all the stock in the shop should be put out, so that he may take possession.

I do not think that that is a rational position. There is no question of assignee or sub-tenant, there is nobody here pretending to be an assignee or sub-tenant, there is only the trustee who says that he is merely managing this business for the tenant and his creditors. Nevertheless it is in these circumstances that the landlord asks for and obtains a warrant to eject the tenant from this shop upon the ground that he has forfeited his lease, as the Sheriff-Substitute has found in his interlocutor of 5th November 1892, not following his opinion, as I gather, but in carrying out the decree of the Sheriff-Principal upon 18th October.

I do not enter into the question which might arise at common law whether it would be a reasonable thing for the landlord of this shop to insist upon the tenant being personally at the shop to carry on the business; it is not the same as an agricultural subject. The question is not now before us, and if it was I should be inclined to hold that the tenant was not bound to give his personal attention to the shop; but if it should be decided to the contrary the tenant says he is quite willing to come, so that the landlord can make no objection on that account. The Sheriff-Substitute has held that the lease is at an end, and has granted the prayer of the petition. I am of opinion that the tenant by his actings did not put an end to the lease, so that that interlocutor must be recalled. Therefore I am of opinion, and with clearness, that the pursuer is wrong upon the merits of the cause, and upon that ground agree in your Lordship's judgment.

LORD RUTHERFURD CLARK—I think that there was an agreement between the parties, and that we ought to give effect to it.

With regard to the matters referred to by Lord Young I wish to express no definite opinion. We have had no proof. But the facts as stated by the trustee himself lead me to think that he was in possession as assignee. If so, he could not in my opinion have maintained his possession as against the landlord. If the tenant had been in possession the landlord could not object.

LORD TRAYNER concurred.

The Court pronounced this interlocutor:—

"Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute of 27th September 1892: Recal all the interlocutors in the cause pronounced subsequent to the said interlocutor: Of new dismiss the action," &c.

Counsel for Appellant—C. S. Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Respondent—M'Kechnie—G. Stewart. Agent—James D. Turnbull, S.S.C.

Thursday, December 15.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

SANDEMAN AND OTHERS (SANDEMAN'S TRUSTEES) *v.* BROWN AND OTHERS.

Property and Contract—Ground-Annual—Building Restrictions—Contravention.

A contract of ground-annual of building lots in a crescent declared that the disponers should not feu or sell any part of their ground for the erection of buildings of a style or class inferior to those to be erected on the lots. The disponers conveyed another part of their ground under burden of the whole conditions contained in the contract of ground-annual, and under the further declaration that the disponees should not be entitled to erect or carry on upon the same certain specified works, "or any other works or occupation which should be considered nauseous or injurious" by the disponers and their successors or the adjoining proprietors, and although the same should not be legally deemed a nuisance.

In a question with certain proprietors of dwelling-houses in the crescent, *held* that the disponees of the second portion of ground were not entitled to

erect thereon premises consisting of a four-stalled stable, loose box, office, and covered shed, with boiler-house and dung-pit, in respect they were buildings of a style and class inferior to the buildings in the crescent.

Opinion (*per* Lord Young and Lord Rutherfurd Clark) that the proposed premises were also in contravention of the restrictions, because open to be considered nauseous or injurious to adjoining proprietors.

The ground in Glasgow upon which two rows of residential houses, known as Holyrood Crescent and Lansdowne Crescent, were built was originally part of the Blythswood estate. It was held as one lot in 1820 by William Drury. In 1856 William Drury's trustees conveyed it to James Bunten and George Lamb as trustees for themselves, and James Bunten junior and William Lindsay Lamb. These trustees proceeded to feu out the ground now forming Holyrood Crescent, and by contract of ground-annual between them and Archibald Blair, wright and builder in Glasgow, they disponed to him two steadings marked 7 and 8 on the feuing plan. The contract was dated in June 1859 and contained the following declarations—"Declaring further that the second party and his foresaids shall be bound and obliged, as he hereby binds and obliges himself and them, to erect and finish on or before the term of Whitsunday 1860, on the said two steadings of ground hereinbefore disponed, two self-contained two-storey lodgings or dwelling-houses, conform to plans and elevations made out for the same, so that the same may be respectively capable of yielding a yearly rent equal to at least double the amount of the ground-annual respectively payable therefrom as above specified . . . which lodgings or dwelling-houses shall be built in a substantial manner of stone and lime, and covered with slate, and the front walls thereof shall be of polished ashlar of a white pile and of a good quality: Declaring that the second party and his foresaids shall be at liberty to put attic storeys on the said lodgings if they shall consider it expedient to do so, and it shall not be in the power of the second party or his foresaids to erect behind the said lodgings any buildings other than the usual offices necessary for the use of the tenants therein, and which offices shall in no case be built higher than one storey of 16 feet to the top of the walls, with an ordinary roof. . . . And it is hereby further declared that the said first parties shall not feu or sell any part of their said remaining ground, of which the subjects hereinbefore disponed form part as aforesaid, for the erection of public works or for the erection of buildings of a style or class inferior to those to be erected on the steadings hereinbefore disponed, with the exception of flatted tenements of a good class, not exceeding three square stories: Declaring further, as it is hereby provided and declared, that the said second party and his foresaids shall not be entitled to erect or carry on, in or upon the foresaid subjects above disponed, any steam engine, foundry, sugar, candle, soap, smelting, indigo dyeing, glue, or nail works, or any other works or occupation which shall be considered nauseous or injurious by the said first parties and their foresaids or the adjoining proprietors, although the same ahall not be legally deemed a nuisance, in whose favour it is hereby declared that this provision shall operate as a real lien and servitude upon the said several steadings of ground above disponed in all time coming." Houses were erected on these lots in conformity with the said plans.

In August 1862 Bunten and Lamb deponed to Dugald and Nathaniel Miller, builders in Glasgow, a triangular piece of ground lying at the back of Holyrood Crescent, and separated from the back of Lansdowne Crescent by a meuse lane 10 feet in breadth as described upon an accompanying plan. This piece of ground was disponed under "the whole burdens, reservations, conditions, provisions, restrictions, prohibitions, clauses irritant and others specified and contained in" various deeds including the contract of ground-annual between Bunten and Lamb and Blair already cited. The deed further declared—"But declaring, as it is hereby expressly provided and declared, that these presents are granted, and the said subjects disponed with and under the further declarations that our said disponees and their successors in the said portion of ground hereby disponed, shall not be entitled to erect buildings thereon having more than two storeys, nor exceeding in height 20 feet from the level of the ground . . . Declaring also, as it is hereby specially provided and declared, that our said disponees and their foresaids shall not be entitled to erect or carry on, in or upon the subjects above disponed, any steam-engine, foundry, sugar, candle, soap, smelting, indigo dyeing, glue, or nail works, or any other works or occupation which shall be considered nauseous or injurious by us and our successors or the adjoining proprietors, although the same shall not be legally deemed a nuisance, in whose favour it is hereby declared that this provision shall operate as a real lien and servitude upon the said portion of ground above disponed in all time coming." This triangular piece of ground was afterwards disponed to Archibald Sandeman and others, trustees of the deceased John Sandeman. In 1889 Sandeman's trustees made an application to the Dean of Guild Court in Glasgow for permission to erect certain buildings upon this piece of ground, but their application was refused.

In September 1892 Sandeman's trustees and James Somervell, Esq. of Sorn, Ayrshire, presented this petition in the Dean of Guild Court for a lining for proposed premises, consisting of a four-stalled stable, loose-box, office, and covered shed, with boiler-house and dung-pit. This was served upon the feuars living in Holyrood and Lansdowne Crescent, who lodged objections.

The principal objection was as follows,

stated by the feuars in Holyrood Crescent —"10. The buildings which the petitioners propose to erect on the said piece of ground consist of a five-stalled stable, with corresponding lofts and with dwelling-houses above. There is also a washing-house, a receiving-house, a dairy, and an office shown on the said plan, it apparently being the intention of the proprietors to use the premises as a dairy and stable for cattle and horses. The said buildings do not consist of dwelling-houses, to which the ground is restricted, and they are of a height exceeding twenty feet from the level of the ground. The said buildings, if erected, would greatly darken the adjacent houses, and would obstruct the free current of air to and from the same. There is also provision in the plans for a dung-pit of considerable extent, and unpleasant odours will be emitted from said dung-pit, which will injuriously affect the amenity of the district, and be a source of discomfort to the neighbouring proprietors. The said buildings are really of the nature of 'works or occupations,' which the objectors consider to be nauseous to the amenity of the district, and of the nature of a nuisance within the terms of their title."

In answer it was explained that cattle were not to be kept in the buildings, that there were stables connected with the ground acquired under the original titles, and that no nuisance of any kind would be created.

The petitioner pleaded—"(2) The buildings in question not being an infringement in any way of the petitioner's title, the application ought to be granted, with expenses. (3) The buildings in question not creating a nuisance, and not being inconsistent with the use to which the whole ground is destined, the application should be granted, with expenses."

The respondents pleaded—"(2) The present application should be refused, in respect (*a*) the proposed buildings exceed 20 feet in height; (*b*) they are of a style or class inferior to those erected on the ground originally held by Bunten and Lamb; (*c*) the occupation of the premises would interfere with the amenity of the respondents' houses, and their proposed use would be of the nature of a nuisance; (*d*) that openings in the wall forming the west boundary of the meuse lane are prohibited. (3) The buildings proposed to be erected on the said ground being in violation of the restrictions contained in the petitioners' title, the petition should be refused, with expenses."

Upon 10th November 1892 the Dean of Guild (GUTHRIE SMITH) pronounced this interlocutor:—"Finds that the petitioners propose to build on the triangular piece of ground shown on plans produced, lying between and to the back of first-class self-contained lodgings in Holyrood and Lansdowne Crescents, erections consisting of a five-stalled stable, cow-shed, dairy, office, &c., with small dwelling-house above, for the purpose of carrying on a public dairy business: Finds that the said piece of ground was, *inter alia*, disponed to the petitioners' authors under the condition that no buildings were to be erected thereon of a style or class inferior to those erected on steadings No. 7 and 8 Holyrood Crescent, and under the further special provision and declaration that they should not be entitled to erect or carry on, in or upon the said triangular piece of ground, any steam-engine, foundry, sugar, candle, soap, smelting, indigo, dyeing, glue, or nail works, or any works or occupation which should be considered nauseous or injurious to the adjoining proprietors, although the same should not be legally deemed a nuisance, in whose favour it was declared that said provision should operate as a real lien and servitude upon the said triangular piece of ground in all time coming: Finds that the proposed erections are in contravention of the foresaid condition, provision, and declaration, not only in respect of their being buildings of a style and class inferior to the foresaid buildings in Holyrood Crescent, but also as being a large public stable, cow-shed, and dairy premises, which are alleged by the objectors, and clearly considered by the Dean of Guild and his liners as injurious to and affecting materially the amenity of the houses on either side thereof: Therefore refuses the craving of the petition for lining of said erections, and finds the petitioners liable in expenses to objectors A. Brown and others (Holyrood Crescent proprietors), &c.

"*Note.*—The Lord Dean of Guild has personally inspected the ground proposed to be built upon, and is quite satisfied as to the injurious character of the erections proposed, and having looked at the plans in a previous application for lining before Dean of Guild Walls in 1889, which was refused by him, is of opinion that the plans in the present case are even more objectionable than those proposed in 1889."

The petitioner appealed, and argued—It could not have been intended that the buildings to be erected upon this triangular piece of ground should be of the same kind as specified in the original feuing contract, because they were not intended to be set side by side with these steadings but to be built at the back of them, and on property bounded by meuse lanes. The original feu-contract prescribed that the buildings to be erected on all the ground were not to be inferior to those mentioned in the deed, and it allowed offices to be built at the back of the residential houses. The proposed buildings must be compared with the offices, and as they were not inferior to these they fulfilled all that was made necessary by the restrictions in the original deed. The Dean of Guild had gone beyond his province in refusing a lining to these buildings as nauseous, his duty was only to see to the healthiness and security of the structure, the question of nuisance must arise in another way—*North British Railway Company* v. *Moore*, July 1, 1891, 18 R. 1021. The use to be made of the buildings after they were erected could not be considered by the Dean of Guild, so that the question of whether the neighbouring feuars con-

sidered the dairy, &c., as nauseous although not legally a nuisance could not be considered at this stage—*Colville* v. *Carrick, &c.*, July 19, 1883, 10 R. 1241. The ground upon which the Dean of Guild put his judgment was that this proposed building would spoil the amenity of the district, but loss of amenity was not a sufficient ground for the Dean of Guild refusing a lining—*Barclay* v. *M'Ewen*, May 27, 1880, 7 R. 792. The only things that the neighbouring feuars were entitled to look upon as nuisances were manufactories analogous to the list set forth in the deed or which were injurious to health.

The respondents argued—The restrictions were quite plain. They were contained in the feu-contract granted to Blair and incorporated by reference into the appellant's title. On no part of the ground belonging to the sellers and as yet unfeued was a house to be built of an inferior character and value to the house the feuar was taken bound to build. It was not alleged that the buildings the appellant proposed to put up were of the same character and value as those in Holyrood and Lansdowne Crescent. These restrictions were incorporated in the appellant's title, and gave the neighbouring feuars a right to object to what was in violation of their rights — *Morrison* v. *M'Lay, &c.*, July 1, 1874, 1 R. 1117; *Robertson* v. *North British Railway Company*, July 18, 1874, 1 R. 1213. A very small interest entitled the feuar to object to the proceedings of another—*Beattie* v. *Ures*, March 18, 1876, 3 R. 634. The feuars were unanimously of opinion that the operations proposed to be carried on here would be nauseous to them; they were supported in that opinion by the authority of the Dean of Guild, who was a practical man, and charged with the duty of seeing that only buildings proper for the city were erected; it could not therefore be said that the objection was unreasonable. If the amenity of a residential locality like the crescents in question was injured, that was sufficient to render it a nuisance to the inhabitants under the clause in this deed.

At advising—

LORD JUSTICE-CLERK—I think that this is rather a hard case for the appellant. This piece of back ground lies between three meuse lanes which form a triangle behind certain streets. The owner naturally wishes to make some use of it, and probably the only use which he can well make of it is some use similar to that for his right to which he is contending in this process.

Two objections are made. The first is an objection that under his the appellant's own title he has no right to erect the buildings in question, because they are of a style and class inferior to those to be erected at the date of the title on these streets to which I have alluded. The second objection is founded on a clause also in his title, declaring that he shall not be entitled to carry on "any works or occupation which shall be considered nauseous or injurious" by the disponers or their successors "although the same shall not be legally decerned a nuisance."

Now, I think it unnecessary to decide the case on the latter of these objections. To begin with, I do not think the facts are sufficiently agreed on. The Dean of Guild says in his judgment that it is proposed to erect a five-stalled stable, cowshed, dairy, office, &c., with small dwelling-house above, for the purpose of carrying on a public dairy business."

We were assured, however, that it was never intended to keep cattle at the spot in question, and I think that is important. A dairy is not necessarily a nuisance or injurious to neighbours. It may be kept without being so, although, on the other hand, it may be kept so as to be a great nuisance. And it is the same with the case of a stable.

I therefore return to the first point as that on which the case ought to be decided. I think that the clause in the appellant's title is too distinct and clear to admit of doubt that it forms a good ground for the judgment of the Dean of Guild. It is in these words—"And it is hereby further declared that the said first parties," the respondent's predecessors, "shall not feu or sell any part of their remaining ground, of which the subjects hereinbefore disponed form part as aforesaid, for the erection of public works, or for the erection of buildings of a class inferior to those to be erected on the steadings hereinbefore disponed, with the exception of flatted tenements of a good class not exceeding three square storeys, and excepting also from the above restriction the ground fronting the Great Western Road and Napiershall Street, which they and their foresaids shall be at liberty to use or feu or sell for the erection of dwelling-houses and shops or others." Now, I think that that clause—which is made the more emphatic by the only two exceptions admitted by it—makes the case quite clear against the appellant. It practically means in this case that he cannot build upon this piece of ground. It is a restriction upon the appellant in favour of the proprietors in these streets.

The only important argument advanced for the appellant upon the point was that these objecting proprietors have themselves the right to build stables adjoining the meuse lane, and that the appellant is doing something of the same kind, and reference was made to the clause providing that the appellant's author should not have power to erect other than the usual offices, "which offices shall in no case be built higher than one storey of 16 feet to the top of the walls, with an ordinary roof." But I think that the respondents' argument is a conclusive answer. They say that that clause affects height and height only, and has no bearing upon the prohibition against the "erection of buildings of a style or class inferior" to the respondents' buildings. There is no style prescribed in the titles for the back offices, and therefore where style is spoken of, it cannot be in regard to these offices.

On these grounds I am for affirming the Dean of Guild's judgment.

LORD YOUNG—The part of Glasgow in question is a residential part, not a business part. It appears from the deeds which have been laid before us that in 1860, when this ground began to be feued out for building, care was taken to insure that only dwelling-houses of a certain class should be erected upon a certain piece of ground belonging to the person who was feuing out the lands. He desired that the dwelling-houses to be erected upon his ground should be of a certain style and class. The feuars on the other hand were desirous and were interested in having those who might also feu from the proprietor prohibited from using the ground for certain purposes to which objection might be taken. While the conveyancing is not good I think this restriction is sufficiently made in the clause which your Lordship read. It follows upon an obligation imposed upon the disponees to erect dwelling-houses of a certain class and according to certain plans. It is as follows—"It is hereby further declared that the said first parties shall not feu or sell any part of the said remaining ground of which the subjects hereinbefore disponed form part as aforesaid for the erection of public works or for the erection of buildings of a style or class inferior to those to be erected on this steading hereinbefore disponed." Now I cannot read that as meaning anything other than this—"you are not to feu out the rest of the ground for other purposes than these to which you have obliged us." And then come the two exceptions—[*His Lordship read the remainder of the clause*]. Now, I think that it is impossible to read in a third exception to the effect that the appellant is also to be at liberty to employ a piece of the ground in erecting a dairy—even an inefficiently conducted dairy. He is not to go into trading with the land and carry on what is called in ordinary language a public dairy.

I suggested to the Dean of Faculty during the argument the question whether if such a thing had been proposed to the feuars when they took these feus they would have been willing to take them. The only answer which I obtained was that no such proposal was made, and that it is impossible to say that any feuar would have objected to the use of the ground which is now proposed if he had known of the proposed use when he took his feu. But the same answer might have been made if what was proposed had been the erection of a public slaughter-house. We must take a reasonable view of the restriction, and that leads to the result that people who have stipulated that the ground shall be occupied by dwelling-houses of a certain class did not mean and intend that the subjects should be used for purposes of trade.

I therefore agree that the judgment of the Dean of Guild should be affirmed.

I may add that I do think that there is any case here for looking upon the appellant as a subject of compassion. This triangular piece of ground is unfitted for the erection of dwelling-houses of a specified class. But when the appellant's authors divided out their ground the arrangement of it which they made was their own arrangement, and it is no hardship if they are held to it. That being sufficient for the case, I need give no opinion upon the clause declaring that the appellant's author "shall not be entitled to erect or carry on in or upon the foresaid subjects above disponed, any steam engine, foundry, sugar, candle, soap, smelting, indigo dyeing, glue or nail works, or any other works or occupation which shall be considered nauseous or injurious by the said first parties and their foresaids or the adjoining proprietors, although the same shall not be legally declared a nuisance." I am not prepared to say that that clause might not be sufficient for the respondent's purpose. The proposed buildings are not indeed of the nature of some of the things which the conveyance has superfluously named. It is that superfluity which leads to difficulty and trouble. But I think it is a legitimate and reasonable construction that such trade buildings as are proposed might reasonably be held injurious to the adjoining proprietors within the meaning of this clause. It is to be noticed that that is the opinion of the Dean of Guild, a practical man. But it is unnecessary to decide this point.

LORD RUTHERFURD CLARK—I am of the same opinion. There is sufficient for the judgment in the clause relating to the class of building. As to the other point it is not necessary to decide upon it. But my impression at present is that the respondent's argument on this question also is sound.

LORD TRAYNER concurred.

The Court refused the appeal.

Counsel for the Appellant—D.-F. Sir C. Pearson, Q.C.—Dean Leslie. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Salvesen. Agents—Simpson & Marwick, W.S.

Friday, December 16.

FIRST DIVISION.

HALCROW *v.* SHEARER.

Process—Diligence—Report by Procurator-Fiscal.

The pursuer in an action of damages for slander alleged that he had been dismissed from the police force of a county in consequence of false statements regarding his conduct made by the defender. The defender in answer averred, *inter alia*, that the pursuer had not been dismissed in consequence of any statements made by him, but in consequence of a report made by the procurator-fiscal of the county, to whom the police committee had re-