Downie's Curator Bonis v. *Macfarlane's Trustees*, July 20, 1895, 32 S.L.R. 715, where an assignation in trust was held to be irrevocable, for there only a specific sum was assigned, while here it was the *universitas*, and, moreover, in that case there was no option given to the trustees to reconvey the whole subjects to the truster at their discretion. The cases of *Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237; and *Forrest* v. *Robertson's Trustees*, October 27, 1876, 4 R. 22, showed that such a deed as this was not effectual against creditors, and accordingly did not operate a complete divestiture of the truster's estate, and was revocable. There were *dicta* to the same effect in *Williamson* v. *Boothby*, June 11, 1890, 17 R. 927. (2) The evidence showed that the deed had been executed by the truster in essential error as to its meaning and effect, and it therefore should be reduced.

Argued for the respondents (1)—As soon as the deed was delivered it was irrevocable, and the evidence showed it had been delivered. The case was ruled by *Robertson* v. *Robertson's Trustees*, June 7, 1892, 19 R. 849; *Downie's Curator Bonis* v. *Macfarlane's Trustees*, *supra*, and *Turnbull* v. *Tawse*, April 15, 1825, 2 W. & S. 80. The deed had been executed in contemplation of marriage, and accordingly there were rights to be protected, and the Court would not deprive the truster—at anyrate *stante matrimonio*—of the protection she had created for herself. The question whether the deed was good against creditors was quite different from the question whether the truster was at will able to revoke this protection which she had given to herself against the influence of her husband. In the cases of *Williamson* v. *Boothby* and *Mackenzie* v. *Mackenzie's Trustees* quoted by the reclaimer, the deeds had not been executed in contemplation of marriage. The fact that the truster had assigned her *universitas*, and not merely a specific sum, did not affect the argument—*Smitton* v. *Tod*, Dec. 12, 1839, 2 D. 225. (2) The evidence showed the truster was aware of the contents and effect of the deed when she executed it.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary both on the construction of the deed and on the result of the proof. The deed, on the face of it, bears to be a present conveyance of the fee to trustees for persons named, and the trust-estate is not to be affectable by the deeds of the truster. The authorities support the conclusion of the Lord Ordinary, and the power of the trustees to give to the truster part of the capital does not displace that conclusion. The power is absolutely at the discretion of the trustees, who hold for the fiars as well as the liferenter, and the estate is in no sense at the call of the truster.

The facts are such that, of the more delicate questions put to us in argument, none really arise. This is not the case of the granter of a gratuitous deed who has not understood the true effect of her deed. I agree with the Lord Ordinary that the result of the evidence is that the pursuer was properly informed of the effect of the deed, and fully understood it.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer — Salvesen — M'Lennan. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Vary Campbell—Craigie. Agents—Millar & Murray, S.S.C.

Wednesday, December 4.

SECOND DIVISION.

[Sheriff-Substitute at Dundee.

IRELAND *v.* SMITH.

Nuisance—Hen-Run—Interdict.

A person who had constructed a hen-run and hen-house close to a mutual wall about 30 feet from his own house and 5 feet from that of his neighbour, *held* to have occasioned a nuisance dangerous to health, and causing material discomfort to the latter and the inmates of his house, by reason of (1) foul dust blown from the hen-run and hen-house getting into his house and settling in his larder and preventing its use; (2) offensive smells arising therefrom, which rendered it necessary to keep the windows of the house closed; and (3) the noise made by the hens at night and in the morning; and interdict granted against the nuisance.

In August 1895 David Ireland, coal exporter, 12 Douglas Terrace, Broughty Ferry, raised an action in the Sheriff Court at Dundee against James Nicoll Smith, merchant, Home House, Broughty Ferry, in which he prayed the Court "to interdict the defender from keeping cocks, hens, or other fowls or animals in or about his premises at Home House, Broughty Ferry, so as to cause material discomfort and annoyance and be a nuisance to the pursuer and those living in family with him in 12 Douglas Terrace, Broughty Ferry."

Proof was led before the Sheriff-Substitute (SMITH).

The pursuer and defender were proprietors and occupants of conterminous houses in Broughty Ferry facing the river Tay. Each house had garden ground around it. The mutual wall between the properties was about 5 feet from the pursuer's house, and about 30 feet from that of the defender. The pursuer entered into possession of his house at Whitsunday 1892, and the defender began to reside in his house in October of the same year. The windows of the pursuer's larder and some of his bedrooms were on the side of the house next to the mutual wall.

Shortly after the defender entered into the occupancy of his house he constructed a hen-run 40 feet long and 11 feet broad close to the mutual wall, and in this hen-run he erected a hen-house of brick 9 feet high. In this hen-house and hen-run the defender kept fowls, which varied in number from time to time, The greatest number kept at any one time was twenty-six; the number when the action was raised was sixteen. The pursuer remonstrated with the defender for placing the hen-run and hen-house so near the former's house. In July 1895 the pursuer complained to the police authorities of Broughty Ferry of the discomfort and injury caused to him by the defender's keeping the fowls in his hen-run, and the defender was charged in the Police Court with keeping fowls to the annoyance of his neighbours. The defender was ordered to remove the fowls. He put them away, but shortly thereafter substituted a fresh set. Thereupon the pursuer raised the present action of interdict. The pursuer led evidence to show (1) that the foul dust from the hen-run entered his larder and prevented him from using it, and that the offensive exhalations and smells from the hen-run and hen-house rendered it necessary that the bedroom windows overlooking the hen-run should be kept closed; and (2) that the noise of the hens in the early morning prevented himself and his family from sleeping. The defender led evidence to show (1) that the hen-run was kept clean, and that no nuisance was caused by the defender's fowls to the injury of the pursuer or his family; and (2) that the keeping of the fowls caused no material addition to the ordinary noises incidental to the neighbourhood.

On 21st October 1895 the Sheriff-Substitute found that the pursuer had failed to establish his allegations of nuisance, and assoilzied the defender.

The pursuer appealed, and argued—The evidence was sufficient to show that the operations of the defender occasioned a nuisance to the pursuer. They had occasioned great discomfort and danger to the health of himself and the inmates of his house. They had also injured his property, and prevented him from using his larder. He was therefore entitled to interdict—*Brodie* v. *Saillard*, 1876, L.R., 2 Ch. Div. 692; *Tinkler* v. *Aylesbury Dairy Company, Limited*, 1888, 5 Times' L.R. 52. The terms of the interdict asked were the same as those granted in *Fleming* v. *Hyslop*, March 1, 1886, 13 R. (H. of L.) 43.

Argued for the defender—A case of nuisance had not been made out. This was simply a case of a nervous person magnifying and exaggerating the small inconvenience which necessarily arose from the residence of different individuals near one another—*Gaunt* v. *Fynney*, 1872, L.R., 8 Ch. App., opinion of Lord Selborne, L.C., pp. 12 and 13. The decision in *Brodie, supra*, did not apply, as in that case the dwelling-house had been converted from its ordinary and natural uses into a stable, In any event, the Court should not grant so sweeping a remedy as the interdict craved—*Munson* v. *Forrest*, June 14, 1887, 14 R. 802.

At advising—

Lord Justice-Clerk—The parties in this case are the owners and occupiers of houses in Broughty Ferry adjoining each other. The houses are villas, with a certain amount of ground round them, and the pursuer's house is about five feet from the mutual wall between the two. Many of his windows, including his bedroom and larder windows, are opposite to the defender's property. The defender's house stands some distance back from the mutual wall, and next to this wall he has established for a considerable time a hen-house and hen-run, and keeps there sixteen hens or thereby. The pursuer complains that in consequence of two things his comfort in the occupation of his house is being seriously interfered with, and that the health of himself and his family has suffered. The first complaint is that the hen-house and run are kept in such a state that foul dust and an insanitary smell come over the wall into the pursuer's property. The other complaint is that in consequence of the great noise often made by these hens in the morning the rest and comfort of the family are interfered with.

Now, there can be no doubt that if these complaints are substantiated, there is good ground for interdict. The conclusion I have come to is that the pursuer has succeeded in this. The evidence shows that the hen-house and run had not been kept in such a way as to ensure the pursuer reasonably against injury from foul smells and foul matter in a minute state coming over the wall. I am satisfied that it is proved that the larder became unfit to be used owing to foul dust from this hen-run causing impurity and destruction to articles of food. I am also satisfied that, from the unsanitary smell, it became unsafe to leave the bedroom windows open. It is quite true that there was some evidence for the defender of a certain visit paid to the hen-run by sanitary officers, when everything was found perfectly clean and satisfactory. It is not part of the pursuer's case that they were never cleaned, but that they were frequently allowed to be in a foul state. I am of opinion that the pursuer has established his complaint.

The other complaint is as regards interference with rest in consequence of the noise made by the hens. I can quite understand that there may be cases in which a sensitive person may be annoyed where there is really no substantial ground for complaint. But that is not the case here. There is, I think, substantial ground of complaint in this particular.

I therefore come to the conclusion that the Sheriff-Substitute's judgment is wrong, and that we should grant the interdict craved.

Lord Young—I am of the same opinion. I think on the facts, judging by the evidence, that the defender here has set up a hen-house and run at such a place, and so kept it, as to be a nuisance to the complainer, his

neighbour. It was a question of fact, and if facts are proved which satisfy us that a nuisance has been committed, the law follows that we must interdict it.

I cannot refrain from expressing my regret that a dispute of this kind should have arisen between respectable gentlemen who are neighbours. It does not appear to me that the reasonable convenience of the respondent in the use of his property required him to keep his hens so near his neighbour's house. I should have expected that good feeling would have led him to put the run further from his neighbour's house when the inconvenience was pointed out, and that he would thereafter have kept it in better condition. I have not formed a very favourable opinion of the complainer's manner of making the complaint. I think that he might have avoided going to the police, and rather have gone to his neighbour and asked him to be good enough to do what was necessary to remove the nuisance. And I must say, on the other hand, that I have no sympathy with the respondent in insisting in keeping his hens in face of the complaints. I think right feeling should rather have induced him to purchase his eggs in the market if he could not place the hen-run nearer to his own windows and further from his neighbour's than he had done.

The case is disposed of if we are of opinion that, looking to the place and manner of keeping the hens, serious inconvenience and nuisance has been caused.

LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact (1) that the pursuer and defender are proprietors and occupants of conterminous dwelling-houses in Broughty Ferry; (2) that the defender has now, and for some time past has had, a hen-house and hen-run close to the mutual wall which divides the properties of the pursuer and defender; (3) that the said wall is about five feet from the pursuer's house, which directly overlooks it, and that the defender's house is distant from that wall about thirty feet; (4) that at the time this petition was presented, and for some time previously, the defender had, and has now, in the said hen-house and hen-run, hens to the number of sixteen or thereby; (5) that the said hen-house and hen-run have not been kept by the defender with proper care, and have been allowed to get into a filthy condition by the accumulation therein of dust and manure from said hens; (6) that in consequence thereof the said dust and manure have from time to time got into the pursuer's house, and have prevented him from using his larder in said house by said dust and manure settling therein; (7) that from said hen-house and hen-run, and from said dust and manure, there arise offensive exhalations and smells, which occasion great discomfort to the pursuer and the inmates of his house, and render it necessary to keep closed the windows in the pursuer's house overlooking the said hen-house and hen-run; (8) that the cackling of said hens does awaken and hinder from sleeping the pursuer and others living in family with him in his said house; (9) that the dust and manure produced by said hens, and the exhalations and smells proceeding therefrom, are dangerous to the health of the pursuer and other inmates of his house; (10) that the said hens, with the dust and manure, offensive smells, and noise foresaid occasioned by them, constitute a nuisance dangerous to health, and cause material discomfort to the pursuer and the inmates of his house, and prevent him from having the reasonable enjoyment of his own property: Find in law that the defender is not entitled to maintain or continue the said hen-house and hen-run, or keep hens therein, to the nuisance of the pursuer: Therefore repel the defences: Grant interdict in terms of the prayer of the petition," &c.

Counsel for the Pursuer—Lord Advocate, Pearson, Q.C.—Salvesen. Agents—Henderson & Clark, W.S.

Counsel for the Defender—Balfour, Q.C. —Clyde. Agent—J. Smith Clark, S.S.C.

Thursday, December 12.

FIRST DIVISION.

[Lord Low, Ordinary.

CERES SCHOOL BOARD *v* M'FARLANE AND OTHERS.

Superior and Vassal—Competition of Titles —Feu-Disposition—Clause of Warrandice —Education Act 1872 (35 *and* 36 *Vict. c.* 62), *secs.* 38 *and* 39.

A proprietor granted to trustees a feu-disposition of land for the purpose of building a school. The trustees entered on possession of the land, but did not obtain infeftment. They subsequently transferred it, in terms of the Education Act of 1872, to a school board, who also failed to feudalise the title.

The estate from which the feu had been granted passed into the hands of a singular successor, infeft under a disposition containing a clause of warrandice, which excepted from the warrandice "all feu-rights . . . granted by me or my predecessors," but without prejudice to the right of the disponee to "quarrel or impugn the same upon any ground in law not inferring warrandice against me or my foresaids." In a competition of titles be-