Tuesday, June 20.

SECOND DIVISION.

[Dean of Guild, Kilmarnock.

WYLLIE *v.* DUNNETT.

Property—Building Restrictions—Superior and Vassal—Feu-Contract.

By a feu-charter dated in 1887 the feuar was taken bound, within two years from its date, to erect on the ground thereby disponed a dwelling-house with suitable offices conform to a plan and elevation to be approved of by the superior, and which should cost at least £600, provided always that no buildings of any other description should be built on the ground thereby disponed, and that the ground unbuilt on should be used exclusively as gardens or pleasure grounds or for agricultural purposes, except in such cases as a deviation was specially sanctioned by the superior. A dwelling-house and offices were erected upon the feu in terms of the contract.

In 1899 the feuar desired to build some additions to his out-buildings, including a stable.

Held that the proposed buildings were offices suitable to a dwelling-house, and that the consent of the superior to their erection was not required.

Burgh—Dean of Guild—Nuisance—Jurisdiction.

Questions of nuisance do not fall within the jurisdiction of the Dean of Guild.

In 1887 John Wyllie, merchant, Kilmarnock, feued a piece of the glebe situated in London Road, Kilmarnock, from the minister with consent of the heritors and presbytery. The feu-charter contained the following clause:—"That the said John Wyllie and his foresaids shall be bound, so far as not already done, within two years from the last date of these presents, to erect upon the piece of ground hereby disponed a dwelling-house, with suitable offices, agreeably to and in conformity with a plan and elevation thereof to be approved of by me or my foresaids, and to build said dwelling-house all of stone and lime and covered with slates, and which offices shall be effectually screened from the manse and garden so as to preserve the amenity of the same, and which shall for the actual erection cost at least the sum of six hundred pounds sterling: Provided always that no buildings of any other description shall be built on the ground hereby disponed, and the ground unbuilt upon shall be used exclusively as gardens or for planting or as pleasure-grounds or for ordinary agricultural purposes, except in such cases as a deviation may be specially sanctioned in writing by me or my successor in office and the said heritors and presbytery." Mr Wyllie erected a villa and offices in terms of the feu-charter.

In 1899 Mr Wyllie proposed to making certain additions to the out-buildings, including a pony stable. He submitted a plan of the proposed extensions to the Rev. William Dunnett, the superior. The latter marked the plans as approved, but thereafter on 15th April 1899 he withdrew his consent, giving as his reason for doing so that the neighbours objected to the stable on the ground that it would occasion a nuisance.

Mr Wyllie presented a petition to the Dean of Guild of the burgh of Kilmarnock to grant a lining for the proposed erections. Mr Dunnett and various proprietors of adjoining properties, and the Master of Works, were called as respondents.

Objections were lodged to the proposed buildings so far as they included a stable, (1) by Mr Dunnett on the ground that the plan and elevation had not been approved of by him in terms of the feu-contract, and (2) by two of the adjoining proprietors—John Wilson Wallace and John Turner, on the ground that the erection would be a nuisance to them.

On the 17th May the Dean of Guild (GEMMILL) pronounced the following interlocutor:—"Sustains the objections by the respondent the Rev. William Dunnett, and refuses the prayer of the petition," &c.

Note.—"The superior of the ground on which it is proposed to make the erections specified in the petition has lodged objections and founds upon the clause in the charter granted by him to the petitioner, which is in the following terms"—[*Clause quoted as above*].

"The Court are of opinion that the two years referred to in the said clause having expired, and the plan and elevation not having been approved by the superior, nor specially sanctioned in writing by him or the heritors and presbytery, the superior's objections must be sustained. In this view it is unnecessary to dispose of the objections lodged by the other respondents."

The petitioner appealed, and argued—Under the feu-charter the petitioner was required to erect on the feu a dwelling-house with suitable offices costing a certain sum, and according to plans approved by the superior. This obligation was put upon the feuar in order to protect the feu-duty, and buildings of the nature specified had been erected. Now, after twelve years he desired to add to the offices, and there was nothing in the feu-charter to prevent his doing so. The proposed erections were of the character specified in the feu-charter, and were not in violation of any of its restrictions, and the superior had no right to object to their construction — *Mair's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141. Even if the minister's approval of the plan was required, it had been given in writing, and he was not entitled to withdraw it. The objections of the other respondents to the petition on the ground of nuisance had not been disposed of by the Dean of Guild, but they were referred to as the reason for the superior withdrawing his consent. Objections on the ground

of nuisance were beyond the jurisdiction of the Dean of Guild. An apprehension of nuisance if a stable were built on a feu of this kind was far-fetched, and there was no good reason in law for refusing a lining on such a ground — *North British Railway Co.* v. *Moore*, July 1, 1891, 18 R. 1021.

Argued for respondents—All three respondents were represented by counsel, but the Dean of Guild had only dealt with the superior's objection. The vassal had twelve years ago received the superior's sanction to build a dwelling-house and certain offices in accordance with a specified plan. He had done so, and thus had exhausted his right under the sanction then granted. If he wished now to make some other erections on the feu, he was not entitled to do so without receiving the superior's consent —*Thom* v. *Chalmers* June 25, 1886, 13 R. 1026. It was not a case in which a superior had no interest, because he had an interest to preserve the amenity of his own manse and garden, and also to see that the amenity of the feuing ground was not interfered with. Besides, a stable was not included in offices suitable for a villa such as the one in question. There was no stable on any of the adjoining properties, and the words of the clause in the charter were a limitation to a dwelling-house and offices suitable thereto.

Lord Justice-Clerk—I am quite clearly of opinion that the decision of the Dean of Guild cannot stand. In this case the vassal was taken bound to put up a dwelling-house with suitable offices within two years, and the superior had a right to see that such buildings were erected within that time for the purpose of making the feu-duty secure. Then the buildings were to be erected in conformity with a plan and elevation to be approved of by the superior. Such a clause is in almost every feu-contract, so that the superior may have some kind of check over the character of the buildings put up. I am of opinion that under this charter the feuar was entitled to erect such buildings or offices as he thought proper so long as no objection could be raised by the superior to the character of the buildings thus erected. Buildings in conformity with the provisions of the charter have been erected on the feu, and now after a lapse of twelve years the feuar desires to add a pony-stable to his offices. I think such a building quite consistent with the proper use of the subjects and quite conformable to the terms of the feu-charter. I quite agree with the argument that the superior was entitled to see the plan of the proposed building, so that he might assure himself that it was of the description mentioned in the charter. In this case the building presented no grounds for disapproval on the part of the superior, and it was only after he discovered that the building was objected to by some of the neighbours on other grounds that he withdrew his consent formerly given.

I think the petitioner is entitled to erect this stable and to keep a pony therein so long as he does not cause a nuisance. If he does create a nuisance, the fact that the Dean of Guild has granted this warrant will not affect any questions which may arise upon an allegation to the effect that nuisance is being caused by the use made of the building.

I am of opinion that the Dean of Guild has erred and that his judgment should be recalled.

Lord Young—I am of the same opinion. It was pointed out to us that the Dean of Guild only dealt with the objections of the superior. He sustained these objections and proceeds to say—"In this view it is unnecessary to dispose of the objections lodged by the other two respondents." These respondents are neighbours of the petitioners and objected on the ground that the stable would prove a nuisance to the neighbouring proprietors. These objections not having been disposed of, I asked Mr Reid if he appeared for the other two respondents as well as for the superior. He answered that he did, but said nothing to satisfy us that their objections although not disposed of by the Dean of Guild had anything in them. I think we are in a position to deal with the whole matter. I am clearly of opinion that the objection by the superior is not well founded, and that no other consent over and above that given by him twelve years ago is required with regard to the additions proposed to be made, unless these buildings are of another description to those already sanctioned. I therefore think that the contention that the minister's consent is necessary before any additions to the house or offices can be made is not well founded. Repelling the superior's objections, I think we are in a position to repel the other objections also.

I therefore concur with your Lordship that we should recal the decision of the Dean of Guild and remit to him to repel the objections and grant a lining.

Lord Trayner — I am of the same opinion. The Dean of Guild has refused this application on the ground that the applicant's contract excludes him from exercising the use which he seeks to make of his property, and that he is not entitled to erect anything on the ground after two years have elapsed from the date of his contract. Such a view is, in my opinion, untenable. The purpose of such a clause as the one before us is well known. An obligation is laid on the vassal to erect a certain building on the ground in order to secure the feu-duty. But that is by no means the limit of the vassal's right. He can do with the property what he likes provided that he has put up a building that fulfils the superior's claim. The reference in the deed to approval of the plans by the superior is simply to secure that the house is of such a kind as will safeguard the superior's claim to feu-duty. The clause under consideration has nothing whatever to do with the uniformity of lining or elevation. In this particular case the only obligation on

record is that a house and offices of the value of £600 are to be erected within two years of the date of the contract, not interfering with the amenity of the manse and garden. The vassal has fulfilled that obligation. Then there is a proviso that no buildings of any other description shall be built on the ground except in such cases as a deviation may be specially sanctioned in writing by the superior. This means that if a vassal wishes to erect on the ground a factory or any other building which is different from a dwelling-house or offices, then that being a deviation from the feu-contract, the consent of the superior is required. I think that the vassal did not require the superior's consent for the alterations or additions now proposed, and I agree that on this matter the Dean of Guild has gone wrong.

The objection of the other respondents, although the Dean of Guild has not dealt with it, is fairly enough before us. I think that it is just as untenable as the objection of the superior. There is nothing here necessarily of the nature of a nuisance. But if it does prove a nuisance, the persons injured thereby will have their legal remedy. Nuisance is not a question with which the Dean of Guild is concerned.

LORD MONCREIFF—I agree with all your Lordships that the Dean of Guild's judgment cannot stand. I do not think that we have to deal with the proviso in the latter part of the clause in question. I am of opinion that the stable proposed to be erected is an office, and that the consent of the superior is not required to its erection. If this stable had interfered with the amenity of the glebe, that would have been another matter; but there is no suggestion that it does so. I am therefore of opinion that the Dean of Guild has misconstrued the contract.

Nuisance is a subject with which the Dean of Guild has nothing to do, and I think any objection brought before him on that ground was incompetent.

The Court sustained the appeal, recalled the interlocutor appealed against, and remitted the cause back to the Dean of Guild to grant a lining as craved.

Counsel for Petitioner — Salvesen — M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—James Reid. Agents—Macpherson & Mackay, S.S.C.

Wednesday, June 21.

SECOND DIVISION.

MUNRO'S TRUSTEES *v.* MUNRO.

Succession—Subject of Gift—Bequest of Amount of Capital Required to Yield £120 per annum.

A testator who died in 1885 directed his trustees to keep a sum of money invested safely so as to yield a life interest to his wife of £120 annually, and after her death to realise and divide the investments among his nephews and nieces. The wife did not accept this provision, and after her death the question arose as to the amount of the bequest to the testator's nephews and nieces. The capital required to yield £120 per annum at the lowest rate of interest on trust investments prevailing during the viduity of the wife, and which was obtainable at her death in 1898, was £4000, the capital required to yield £120 per annum upon trust investments according to an average of the rates of interest current during the viduity of the wife was £3521, 4s. 7d., and the capital required to yield £120 per annum upon trust investments according to current rates of interest at the death of the testator was £3500.

Held that the amount of the bequest to the nephews and nieces of the testator was £4000.

By antenuptial contract of marriage dated 30th October 1860 between William Munro and Ann Gray, William Munro conveyed the whole estate that should belong to him at his death to trustees for behoof of his wife in liferent should she survive him, under the declaration that on her death without issue of the marriage his estate should descend to his next-of-kin or to such other party to whom he might bequeath the same.

There were no children born of the marriage. On 8th June 1885 William Munro died survived by his wife Mrs Ann Gray or Munro. In virtue of the conveyance in their favour in the marriage-contract the trustees were appointed Mr Munro's executors, and administered his whole estate.

In 1886 there was discovered a holograph last will and testament dated 12th March 1873 made by Mr Munro. In it he appointed trustees and executors, and made, *inter alia*, the following bequests:—"I hereby authorise my said trustees and executors to pay over to my dear wife Ann Gray immediately, or as soon after my decease as possible, the sum of two hundred pounds sterling for funeral expenses and suitable mournings for herself and other friends of mine who she may wish to see in suitable mourning upon the occasion; and I further desire my said trustees and executors to keep a sum or sums of money invested safely so as to yield a life interest to my