COURT OF SESSION.

Tuesday, December 15.

EXTRA DIVISION.

EDINBURGH MAGISTRATES *v.* TRUSTEES OF CHURCH OF ST JOHN THE EVANGELIST.

Superior and Vassal—Building Restrictions—Prescription—Feu-Charter—Ultra vires.

By an Act passed in 1816 the Magistrates of Edinburgh were empowered to allot certain portions of ground at the west end of Princes Street for the erection of a chapel thereon. The 3rd section of the Act made it unlawful for the Magistrates "to erect or sanction the erection of any building whatever other than the said chapel on any part of the ground belonging to the community of the said City on the south side of Princes Street . . ." By charters dated 1817, 1818, and 1834 the Magistrates feued different pieces of the ground to which the Act referred, to trustees, who erected a chapel thereon. There were no restrictions against building having any bearing on the point at issue in any of the charters. In a special case, brought to determine whether the trustees were entitled to build a vestry on the ground feued, *held* that the trustees, holding on a complete and independent title possessed on for more than the prescriptive period could not now be restrained from building the vestry because of the restriction in the Act of 1816.

The Statute 56 Geo. III, cap. xli, entituled, "An Act to enable the Lord Provost, Magistrates, and Council of the City of Edinburgh to carry into effect certain purposes in regard to the erection of a chapel at the west end of Princes Street, and for effecting certain improvements in the neighbourhood thereof, and in other parts of the extended royalty of the said city," enacts—Section 1—". . . That it shall and may be lawful to the Lord Provost, Magistrates, and Council of the said City of Edinburgh to allot and set apart so much of that piece of ground at the west end of Princes Street, in the extended royalty of the said city, belonging in property to the community of the said city, and at present occupied as a nursery for trees, as shall be sufficient for the erection of a chapel or place of religious worship thereon, by such persons as shall contract and agree with the said Lord Provost, Magistrates, and Council, for making such erection accordingly, and for completing the other works hereinafter directed to be completed in regard to the same; and the persons so contracting and agreeing with the said Lord Provost, Magistrates, and Council shall be and be held to be the proprietors of the chapel so to be erected as aforesaid. . . ."

Section 3—"And be it enacted, that it shall not be lawful to, nor in the power of the said Lord Provost, Magistrates, and Council, or their successors in office, to erect or sanction the erection of any building whatever other than the said chapel hereinbefore authorised to be erected on any part of the ground belonging to the community of the said city on the south side of Princes Street, excepting a gardener's or keeper's lodge, or hot-houses or conservatories, in such place or places as the said committee of proprietors of houses and areas in Princes Street, to be appointed as hereinafter mentioned, shall appoint."

The Lord Provost, Magistrates, and Council of the City of Edinburgh, *first parties*, and the trustees in whom the site and fabric of the Church of St John the Evangelist (formerly known as St John's Chapel), Edinburgh, was at the time vested, *second parties*, presented a Special Case for the opinion and judgment of the Court.

The following *narrative* is taken from the opinion of Lord Dundas—"The second parties to this Special Case are proprietors in trust of, and feudally vested in, certain ground at the west end of Princes Street, Edinburgh, on part of which stands the church of St John the Evangelist. The ground is shown on plan No. 1, prepared for and forming part of the case, and is bounded on the north by Princes Street, on the east by an entrance to St Cuthbert's burial ground, on the south by the said burial ground, and on the west by Lothian Road. It forms part of subjects purchased in 1716 by the first parties—the Lord Provost, Magistrates, and Town Council of Edinburgh—which were then known as Bereford Park, and are now (speaking roughly) Princes Street Gardens so far as lying west of the Mound. The land now belonging to the second parties was acquired by their predecessors in office by feu-charters granted by the first parties in 1817, 1818, and 1834; the original disponees were duly infeft in these years, and they and the second parties have continuously possessed the ground ever since. The second parties propose to erect upon a portion of their land, hatched pink on the said plan, a building to be used as clergy and choir vestries in connection with St John's Church. It might be difficult, but is in my view unimportant, to determine under which of the feu-charters the second parties hold that portion of their ground. The first parties state that they do not approve of the proposed building, and object to its erection."

The *feu-charter*, dated 21st May 1817, proceeded on the narrative that the first parties by an Act of Council, dated 30th August 1815, on the application of trustees for the said church, had agreed to grant a feu to the applicants of "so much of the nursery ground at the west end of Princes Street as would answer for the site of said chapel on condition of their freeing the town of all risk of challenge on account of the grant, and paying therefor a feu-duty of one shilling sterling yearly, provided always that the plan would be submitted to the Magistrates and Council before any building was commenced." It narrated the first two sec-

tions of the said Act of Parliament. The plan of the said chapel was duly submitted to the first parties, in terms of the provisions of the charter, and was approved by them.

The feu-charter dated 29th April 1818 proceeded on the narrative of the first charter, and on the further narrative that "certain of the proprietors of the said chapel afterwards having applied to our predecessors in office for an additional piece of ground . . . for the purpose of constructing a dormitory."

The feu-charter dated 2nd and 16th September 1834 proceeded on a narrative that an offer had been made for the ground on behalf of the trustees of St John's Chapel, and it might be gathered that the ground was to be used as a burial ground, but this was not stated.

The following *questions of law* were submitted—"1. Is the erection of the proposed building a contravention of (*a*) the Act of 1816, or (*b*) of any of the charters of the ground now belonging to the second parties? 2. Should the preceding question be answered in the affirmative, are the first parties by their acquiescence in the actings of the second parties or by their own actions barred from now founding on the provisions of the Act of 1816 or of the said charters?"

Argued for the first parties—As a result of the decisions in *Deas* v. *Magistrates of Edinburgh*, 1772, 2 Pat. 259, and *Heriot's Hospital* v. *Gibson*, 1814, 2 Dow 301, it was doubted if the Magistrates of Edinburgh might or might not authorise buildings south of Princes Street; they accordingly applied for and obtained the Act of 1816 (56 Geo. III, cap. xli). The doubt had now been set at rest—*Macgregor* v. *North British Railway*, January 26, 1893, 20 R. 300, 30 S.L.R. 404—but still the Act of 1816 regulated the powers of the Magistrates in regard to feuing. The Act was a public statute (sect. 18). Further, its terms were incorporated in the charters. So the second parties must be held to have taken the ground subject to the restrictions against building contained in the Act. Even if the first parties had previously permitted trifling infringements of these restrictions, that did not prevent them from opposing an important infringement. Still less could the previous actings of the first parties help to construe the meaning of the restrictions in the statute, for where the meaning of a statute was clear no *contemporanea expositio* could alter it—*Walker's Trustees* v. *Lord Advocate*, 1912 S.C. (H.L.) 12, 49 S.L.R. 73. In any case, in the charters the disposition was specifically stated to be for a special purpose, and accordingly it could be inferred in law that it was not to be put to any other use—*Waddell* v. *Campbell*, January 21, 1898, 25 R. 430, 35 S.L.R. 351. The proposed vestries did not fall within the category of buildings contemplated by the charters.

Argued for the second parties—As the first parties were seeking to restrict the free use of property, the *onus* was on them to establish that the restriction was effectual against the second parties. The Act of 1816 only imposed restrictions on the first parties, not on the ground, and did not prohibit alienation. Consequently the terms of the Act could not affect the second parties, whose rights must be ascertained entirely from the terms of the charters. The charters contained nothing which could be construed as a prohibition against erecting the proposed vestry. In any event, the vestry was merely an enlargement of the existing church within the meaning of the Act of 1816—*Rector of St Margaret's* v. *London County Council*, 1909 Probate 310; *London County Council* v. *Dundas*, 1904 Probate 1. Further, even if it was *ultra vires* of the Magistrates to grant an unrestricted feu to the second parties, the charters were *ex facie* valid, and the second parties had held on them for more than the prescriptive period and so had justified their title—*Buccleugh* v. *Cunyngham*, November 30, 1824, 5 S. 57.

At advising—

LORD DUNDAS—[*After the narrative above quoted*]—The case has been brought in order to ascertain whether or not the erection of the building would be a contravention of the feu-charters, or any of them, or otherwise contrary to law. My opinion upon that question is in the negative.

The contention of the first parties was based primarily and mainly upon the terms of an Act of Parliament passed in 1816 (56 Geo. III, cap. xli), which are so far as material printed in the case. The purpose of the Act was, as its title indicates, "to enable the Lord Provost, Magistrates, and Council of the City of Edinburgh to carry into effect certain purposes in regard to the erection of a chapel at the west end of Princes Street, and for effecting certain improvements in the neighbourhood thereof, and in other parts of the extended royalty of the said city." The contemplated "chapel" was the church now known as St John's. It appears that in 1815 a committee of gentlemen had applied to the Magistrates for a grant of a site for their proposed chapel; and the Magistrates had agreed to the application, provided that the plan should be submitted to them before any building was commenced; and a plan was accordingly submitted on 6th March 1816. Section 1 of the Act provided that it should be lawful to the Magistrates "to allot and set apart so much of that piece of ground at the west end of Princes Street . . . at present occupied as a nursery for trees as shall be sufficient for the erection of a chapel or place of religious worship thereon by such persons as should contract and agree" with them thereanent, who should be the proprietors of the chapel; and that it should be lawful to the Magistrates to convert the remainder of the said piece of ground into a public burial ground, provided that the burial ground should not be brought nearer to the walls bounding the said piece of ground on the north and east than certain specified distances, and that no addition should be made to the ground to be occupied as a burial ground so as to increase its extent in any time thereafter.

Section 2 of the Act provided that the proprietors of the chapel to be erected on the said piece of ground presently occupied as a nursery for trees should be authorised and required to enclose the same on the side next to Princes Street with a parapet wall and iron railing of the same form and description as that thereinafter directed to be made by the proprietors of houses and areas in Princes Street on the south side of that street; and to enclose the remaining sides of that part thereof not to be converted into a burial ground, lying to the east of the chapel, in such form and manner as should be agreed upon by and between the proprietors of the chapel, a committee of proprietors of houses and areas in Princes Street to be appointed, and the Magistrates; and such parapet wall and railing and other enclosing walls and railings should be maintained and upheld, and the part of the said ground not to be converted into a burial ground should be laid out and kept up as a shrubbery and plantation in all time coming, all on the proper charges and expenses of the proprietors of the chapel. Section 3 enacted that "*. . . quotes v. sup. . . .*"

I did not understand the first parties to contend, what clearly could not be maintained with success, that section 3 had the effect of imposing upon the land any real condition or restriction against building. The enactment is that it shall not be lawful for the first parties "to erect or sanction the erection of any building whatever other than" those mentioned. The Legislature's prohibition is directed against the Magistrates, and can have no application to the case of a third party holding an independent title fortified by prescription, who is under no restraint in the use of his ground except such as may have been imposed upon him by the terms of his own grant. It may very well be that a grant made by the Magistrates containing no building restriction might have been successfully challenged, as *ultra vires* of the granters by anyone having a title and interest to raise the question within the years of prescription. But we have here no such question to consider. The second parties have possessed the whole of their ground upon their charters and sasines for far more than the prescriptive period, and cannot (as seems to me) now be restrained from building unless by the terms of their own charters.

The argument of the first parties, so far as based on the terms of the feu-charters alone, apart from the Act of 1816, was not very strenuously advanced. It seems to me to derive no support at all from any of the three deeds unless from the earliest of them, dated 1817. The narrative of that feu-charter recounts the application to the superiors by the committee of gentlemen "appointed to carry into execution a plan for building a new chapel;" the agreement of the superiors, by their Act of Council dated 30th August 1815, "to grant a feu to the petitioners of so much of the nursery ground at the west end of Princes Street as would answer for the site of said chapel . . ., provided always that the plan should be submitted to the Magistrates and Council before any building was commenced, and that . . . the remainder of the ground should, if the Magistrates and Council see it proper to convert it to that use, be appropriated as a burial ground;" that the predecessors in office of the granters, "the better to enable them to carry into effect the foresaid grant in regard to the erection of a chapel at the west end of Princes Street," applied for and obtained the said Act of Parliament, and the first and second sections of the Act (but not the third) are set forth at length. The dispositive clause bears to be "in implement of our Act of Council, and as empowered by the foresaid Act of Parliament," and conveys to the disponees the piece of ground first described, "with the chapel or place of worship now erecting on the said piece of ground, in terms of the Act of Parliament, to be now and in all time coming called St John's Chapel;" and also "that part of the said nursery ground which is not to be converted into a burial ground, but is in terms of the said statute to be laid out and kept as a shrubbery or plantation in all time coming," with a declaration "in terms of the said statute" of the obligations about parapet walls and railings incumbent upon the disponees. I am unable to hold that there is anything in this feu-charter to prevent the second parties from erecting the building which they propose to erect, supposing that the site of it formed part of the ground thereby conveyed. The first parties contended that the references in the feu-charter to the Act of 1816 showed that the feuars were well aware of its terms, and knew that it was *ultra vires* of the Magistrates to give out the land without definitely imposing on the feuars the restrictions as to building contained in the Act; but this argument is in my judgment unavailing in a question with the second parties, who now hold the land upon a complete and independent title fortified by prescription. If authority be needed for this view, it is, I think, to be found in the case of *Buccleugh* v. *Cunyngham*, (1826) 5 S. 57, which was referred to and commented on by the Lord Ordinary (Moncreiff) in *Tayport Land Company, Limited*, (1895) 23 R. at p. 289.

The second feu-charter, dated in 1818, makes no mention at all of the Act of 1816, but narrates the earlier feu-charter, and an application on behalf of the proprietors of the "chapel," agreed to by the superiors, for an additional piece of ground at the east end "for the purpose of constructing a dormitory," and dispones in consideration of a payment of £500 the piece of ground upon which the disponees "have lately constructed a dormitory," to be holden of and under the granters in feu-farm for ever. The third and last feu-charter, dated in 1834, conveyed a further piece of ground to the trustees without any reference to the Act of 1816 and with no restriction in regard to building.

I reach, therefore, the conclusion that there is nothing either in the Act of 1816 or in the feu-charters to prevent the second parties from erecting the proposed building upon their ground. I think we ought to

answer the first question put to us in the negative, and find it unnecesary to answer the second question.

LORD MACKENZIE—The question in this Special Case is whether the Lord Provost, Magistrates and Council of the City of Edinburgh, who are the first parties, are entitled to prevent the second parties, the trustees for the church of St John the Evangelist, Edinburgh, from building a vestry on ground to the south of the existing church. The first parties object in the public interest to the proposed building.

The first parties are the superiors, and the second parties are the vassals, as regards the whole subjects situated at the west end of Princes Street in which the latter are infeft. The first of these titles is the feu-charter of 1817, which contains a grant of lots 1 and 2 as shown on the plan No. 1 of process, a plan prepared for the purposes of this case. On lot 1 what is described in the title as St John's Chapel was built. It is common ground that the place where the proposed vestry is to be erected is not on lot 1, being excluded by the measurements in the description, and it is not on lot 2, which is to the east of lot 1. The second title is the feu-charter of 1818, by which an additional piece of ground situated immediately to the east of the chapel was granted for the purpose of constructing a dormitory. This is lot 3 on plan No. 1 of process. The dormitory was erected partly on lot 3 and to a small extent on lot 2. The third title is the feu-charter of 1834, which contains lot 4 on the plan No. 1 of process. I understood that it was conceded, and in any event I hold it established that lot No. 4 includes the ground on which it is proposed to build the vestry. The feu-charter of 1834 is an unrestricted title. It may be that the general tenor of the grant shows that lot 4 was intended for burial ground, but there is no express restriction of it to that use only. The predecessors in office of the second parties were duly infeft thereon upon 29th September 1834, and they and the second parties have for the prescriptive period had uninterrupted possession of the area in dispute. The ground on which it is now proposed to build is part of a terrace running east and west to the south of St John's Church. This terrace is supported on arches with burial vaults. The building necessary for the construction of this terrace was completed between the date of the first feu-charter, 21st May 1817 and 19th March 1818. Sales of these vaults were made by the second parties from 1818 onwards. In 1881 the second parties erected a chancel with choir rooms at the east end of the chapel on lot 1, partly on lot 2, and partly on lot 3. The first parties did not object. There are no express provisions or restrictions in any of the titles except in the charter of 1817, and these relate to matters which have no bearing on the present case. They provide for the erection of a parapet wall and iron railing, and for keeping the burial ground fifty feet away from the north boundary.

The right of the second parties would therefore, in my opinion, be undoubted to build the vestry upon the site proposed were it not for the terms of the Act of 1816, which furnish the first parties with the argument they have submitted. Before adverting to the statute, it is to be observed that there is no reference to it in the feu-charters of 1834 or 1818. It is referred to in the feu-charter of 1817, sections 1 and 2 being narrated. It is not these sections on which the first parties found, but section 3. That section is not narrated in the feu-charter of 1817. Further that feu-charter is not the title which contains the ground in dispute in the present case.

It was argued that the Act of 1816 is by section 18 to be deemed and taken to be a public Act, and that therefore if it contains provisions prohibiting the erection of buildings of the character proposed on the ground in question, then, notwithstanding the fact that there are no building restrictions in the titles, the statute law must prevail. According to the first parties' contention the Act of 1816 overrides the feudal title. To this the first answer is that there is no prohibition against alienation in the Act, that there is nothing in the Act to prevent the Magistrates granting an *ex facie* valid irredeemable title to lot 4. Even if there were, the effect would merely make the grant one flowing *a non habente*, which would be quite good as the foundation of a prescriptive right. The Magistrates did grant such a title by the feu-charter of 1834; possession has followed upon it, including the building in 1817 and 1818 of the terrace without objection on the part of the Magistrates; and therefore the second parties have by prescription an absolute and unrestricted right to the ground in question. This ground of judgment, which proceeds on the view that section 3 of the Act did impose a restriction on the land so long as it remained the property of the Magistrates, is sufficient for the disposal of the case.

There is a second answer, as to the soundness of which it is not necessary to pronounce an opinion, which is that any restriction contained in section 3 applies not to the land at all but only to the Magistrates so long as they continue to hold the land. There are strong grounds, looking to the language of section 3, for holding that no restriction is put on the land. The whole theory of the Act seems to have been that the Magistrates would never dispone, but continue to hold the ground while allowing it to be used for certain purposes. On this view the restrictions were applicable so long as the ground continued to belong to the community, but had no application when the ground ceased to belong to it. If the arguments for the second parties on this point were held to be sound it might be said to have an application to ground which is not in dispute in this case. As therefore it is not necessary to express an opinion upon it, I refrain from doing so.

The answer to the first question should, in my opinion, be in the negative. This supersedes the necessity of considering the second.

LORD CULLEN—The first parties to this case are the Lord Provost, Magistrates, and Council of the City of Edinburgh. The second parties are the trustees of the Church of St John the Evangelist situated at the west end of Princes Street, in whom are vested the site and fabric of the church with ground adjoining. These subjects are held in feu of the first parties as after mentioned.

The second parties propose to erect on the south side of the church a building to be used as clergy and choir vestries. The first parties object to its erection as being in contravention of an Act of Parliament set forth in the case and hereafter referred to. According to their contentions stated in the case they also object to it as forbidden by the terms of the second parties' titles, but as the result of the discussion which we heard it is, I think, clear that their objection must rest on the said Act.

This Act, passed in 1816, related to ground on the south side of Princes Street which the first parties had acquired by purchase in the year 1716, and of which the subjects held by the second parties form part. By section 1 it was enacted that the first parties might "allot and set apart" so much of the ground as should be sufficient for the erection of a chapel or place of worship thereon by such persons as should contract with them for making such erection, which persons were to be deemed to be the proprietors of the chapel so erected. It was further thereby enacted that it should be lawful to the first parties to convert the remainder of the ground into a public burial ground.

Section 2 imposed obligations on the proprietors of the chapel as to enclosing and laying out the ground allotted and set apart for the chapel.

Section 3 is in the following terms:—[*quoted supra.*]

It is not clear, on the terms of section 1, whether it was contemplated that the first parties, in exercising the power to "allot and set apart" ground for a chapel should alienate the ground to the persons erecting the chapel. There is, however, nothing in the case to show that the first parties did not possess power to alienate the ground. What they did, following on the Act, was in the first instance to grant a feu of certain ground as set apart by them for the chapel in favour of the second parties.

The feu-charter was granted in 1817. It proceeds on a recital of sections 1 and 2 of the Act of 1816 and dispones two areas of ground in feu for a nominal feu-duty of one shilling per annum. The first of the two areas was disponed "with the chapel or place of worship now erecting on the said piece of ground in terms of the said Act of Parliament." The charter laid on the feuars the obligations as to enclosing, &c., contained in section 2 of the Act. It did not further express restrictions as to building on the ground feued.

In 1818 the first parties granted a second feu-charter to the second parties in consideration of a price of £500 and a feu-duty of 1d. Scots yearly, if asked only. This feu was granted primarily in order to furnish in title a site for a dormitory which had, prior to the date of the charter, been erected at the east end of the chapel. The ground was conveyed along with the dormitory standing on it, but comprised more than the site of the dormitory. The charter proceeds on a reference to the granting of the charter of 1817. It does not recite the Act of 1816, and it expresses no restrictions as to building on the ground feued.

In 1834 the first parties, with consent of the trustees for the creditors of the city of Edinburgh, granted a third feu-charter in favour of the second parties, in consideration of a price of £1500 and a feu-duty of ten shillings per annum. The ground thereby feued lay to the south and south-east of the site of the chapel. The charter contains no reference to the Act of 1816, and imposes no restrictions of any kind as to the erection of buildings on the feu.

The second parties were infeft in the first of the three feus above mentioned in 1817, in the second feu in 1829, and in the third feu in 1834, and since these periods they have been in continuous and peaceable possession of the respective feus in virtue of their infeftments.

The parties have found it impossible, owing to the lapse of time and absence of definite plans, to ascertain under which of the feu-charters above mentioned the ground forming the site of the proposed new building falls. They agree in stating (art. 15) that it is either (1) on part of the feu of 1817 and part of the feu of 1818, or (2) on the feu of 1834. Now as the considerations applicable to the three charters respectively may possibly differ, I take the case on the footing that the site of the new building is part of the feu of 1834.

The feu-charter of 1834, as I have mentioned, gives the second parties by its own terms an absolutely unrestricted title to the ground thereby feued. The first parties, accordingly, are not in a position to refer their present objection to the charter. They found it on section 3 of the Act of 1816. That section made it unlawful for the first parties "to erect or sanction the erection of any building whatever, other than the said chapel hereinbefore authorised to be erected, on any part of the ground belonging to the community of the said city on the south side of Princes Street excepting a gardener's or keeper's lodge," &c. Now this provision does not seem to me to be so expressed as to impose directly on the ground a restriction *non ædificandi* in all time coming. It lays a disability on the first parties. It may have been framed on the assumption that the ground would always remain vested in the first parties for behoof of the community of the city. But the Act does not prohibit alienation, and it has not been maintained by the first parties that they were not *in titulo* to grant the feus of the ground here in question. On the footing, however, that section 3 only imposed a disability on them as distinguished from a perpetual restriction on the ground itself, they argue that it was thereby made *ultra vires* of them to grant an unrestricted title such as the charter of 1834, inasmuch as the omission to insert therein a restric-

tion on building was in effect, they say, a sanctioning of erections on the ground, contrary to the provisions of the Act. I do not think it necessary to express an opinion on this contention. *Esto* it is well founded I think the second parties have a good answer to it. They hold an *ex facie* valid irredeemable title to the ground comprised in the feu of 1834, followed by infeftment, and by possession on that infeftment for upwards of eighty years. It seems to me, therefore, that their title to the ground is a good prescriptive title according to its terms, which embody no restriction on building. It is true, as the first parties pointed out, that a person holding an unrestricted title to land may nevertheless be subjected by statute to restrictions in the use of it, as by familiar provisions in burgh Acts. But the application of this argument to the present case depends on what is the construction to be given to section 3 of the Act of 1816. If it falls to be read as a prohibition of building on the ground in all time coming in whose hands soever and by whatsoever title the ground may come to be, the first parties would, no doubt, be right. I am, however, unable to give this effect to it. It is so expressed, in my opinion, as only to limit the powers of the first parties in dealing with the ground, which is a different thing; and I do not think it is legitimate to infer a perpetual restriction on the ground which the Act does not seem to me to express. If the second parties had obtained in 1834 an unrestricted conveyance of the ground contained in the feu of 1834 *a non habente potestatem*, had taken infeftment and possessed thereon for the prescriptive period, I am unable to see how the disability of the first parties contained in section 3 could have been pled against such prescriptive title; and the second parties cannot be in a worse position because their charter was granted by the true owners in excess of their powers if it was so granted.

The Court answered the first question in the negative, and found it unnecessary to answer the second question.

Counsel for the First Parties — Cooper, K.C.—W. J. Robertson. Agent—Sir Thomas Hunter, W.S.

Counsel for the Second Parties—Fleming, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

VALUATION APPEAL COURT.

Tuesday, December 8.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

THE DEE SALMON FISHERIES COMPANY, LIMITED *v.* ABERDEEN ASSESSOR.

Valuation Cases — Value — Fishings — Salmon Fishings Let for Rod Fishing only, at Nominal Rent—Payment Received for Abstaining to Net—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 42.

Salmon fishings on the lower reaches of a river which had for a number of years been fished by net, and had stood in the valuation roll at a yearly value of £75, were acquired by a company incorporated for the purpose of regulating and improving the fishing. In consideration for abstaining from fishing by net, the company received a sum of £100 per annum from the upper proprietors of salmon fishings on the river, but it let the rod fishing at a rent of £2, 10s. per annum.

Held, in an appeal, that the assessor was right in disregarding the rent received for the rod fishing and entering the subject at the rent at which it might reasonably be expected to let, viz., £75.

Elgin Assessor v. *The Duke of Richmond and Gordon*, March 10, 1905, 7 F. 424, 42 S.L.R. 512, *distinguished.*

Aberdeenshire Assessor v. *Cowdray*, 1911 S.C. 970, 48 S.L.R. 395, *commented on.*

Opinions that the words in section 42 of the Valuation of Lands (Scotland) Act 1854 "from which revenue is actually derived" did not apply to fishings.

The Valuation of Lands (Scotland) Act 1852 (17 and 18 Vict. cap. 91), enacts—Section 42—". . . The expression 'lands and heritages' shall extend to and include all lands, houses, shootings, and deer forests (where such shootings and deer forests are actually let), fishings, woods, copse and underwood from which revenue is actually derived." . . .

At a Court of the Magistrates of the City and Royal Burgh of Aberdeen, held at Aberdeen on the 10th day of September 1914, the Dee Salmon Fisheries Company, Limited, *appellants*, appealed against the following entry in the valuation roll of the burgh for the year ending Whitsunday 1915:—

Description.	Situation.	Proprietor.	Occupier.	Yearly Rent or Value.
Ruthrieston fishings, comprising salmon fishings Strip of river bank and salmon fishers' bothy	River Dee at Ruthrieston	The Dee Salmon Fisheries' Company, Limited, *per* Messrs Davidson & Garden, Secretaries, 12 Dee Street, Aberdeen	Vacant, £68, 19s. Proprietors for Arch. Powrie, salmon fisher, &c., £2. Proprietors for T. N. Clapperton, £2, 5s. Proprietors for Henry Robertson, £1, 16s.	£75