BURNTISLAND WHALE FISHING COMPANY, JAMES FARNIE, and others, Appellants.—*Lord Advocate, Mr. F. Pollock, and Mr. Mac Niell.* No. 50.

WILLIAM TROTTER and others, Respondents.

Nuisance—Interdict.—**Found (affirming the judgment of the Court of Session), that it is competent to grant interim interdict prospectively against boiling whale blubber in the neighbourhood of a burgh.**

Oct. 1, 1831.

2D DIVISION. Bill Chamber. Lds. Fullerton, Balgray, and Cringletie.

WILLIAM TROTTER and others presented a bill of suspension and interdict to the Court of Session, stating that they were proprietors in fee or in life-rent of very valuable property in the burgh of Burntisland and its immediate vicinity; that Farnie and others had formed themselves into a whale-fishing company, and had recently begun to erect storehouses and boiling houses upon certain premises in the town for the purpose of storing and converting into oil the whale blubber the produce of their fishing; that this would form an intolerable nuisance, and therefore praying for interim interdict, and that the bill should be passed. In support of this they rested mainly on the case of Dowie v. Oliphant, 11th December 1813. Farnie and others admitted that they had formed a company, and were in the course of erecting buildings for the purpose alleged, but they denied that in the circumstances the boiling of whale blubber would constitute a nuisance, and that the respondents were entitled to object to it. They stated that numerous works equally if not more offensive had existed for time immemorial at Burntisland, that the contemplated operations were to be carried on adjacent to the harbour and close to the sea shore, and the works were to be formed in such a manner as to prevent any noxious effects being experienced. Although therefore they had no objection to the bill being passed to try the question, yet they contended that interim interdict ought not to be granted, because this would be to prohibit that which was prospective, and as to which no evidence had or could competently be taken till after the bill was passed, and therefore it would rest entirely upon a mere hypothetical assumption of the truth of that which was denied. Lord Fullerton passed the bill, but refused

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to grant interim interdict. Trotter and others did not reclaim against this judgment, but allowed the bill to be taken out of Court by a certificate of non-signeting, and thereafter presented another bill, on advising which Lord Balgray granted interim interdict, and appointed it to be answered. The case having thereafter come before Lord Cringletie, he reported the bill and answers to the Court, accompanied by the subjoined note.*

The Court appointed Farnie and others to give "in a minute "stating in detail in what manner they propose carrying on the "operation of boiling whale blubber, and what plan they mean "to adopt by which a nuisance may not be created by them."†

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* The Lord Ordinary is not moved by the cases quoted by the respondents, Young v. Bowie, 20th Nov. 1824, and 29th May last, Scott v. the Commissioners of Police in Leith. In both these cases the question was, whether the matter complained of was a nuisance or not? If the nuisance be not admitted, or be not notorious, the Court will not grant an interdict till the grievance be ascertained. But the boiling of blubber, or even the keeping of it, unless in vaults, as observed by Mr. Rennie, it being a putrid matter, has been recognized by the Court as a nuisance in the case of Dowie v. Oliphant, 11th December 1813, and an interdict was there granted by the Lord Ordinary on advising the bill, and affirmed by the Court. Were it therefore beyond all doubt that the boiling house in question would be a nuisance, the Lord Ordinary would have no hesitation in pronouncing an interdict on this bill, and the difficulty arising from the forms of the Jury Court would not move him, seeing there is no use for proving to a jury what is notorious to and admitted by all the world. But the documents, printed and written, which the Lord Ordinary has seen, incline him to let the Court see them, and judge of the propriety of an interdict at present, for it is admitted the bill should be passed to try the question. The Lord Ordinary has been often at Burntisland, but cannot admit the purity of the air being contaminated by nuisance. Curing herrings is to prevent putrescence, which creates offensive odours, and cannot be a nuisance if the offal be not left to putrify. What the soap-boiling may have been he knows not, as it has ceased long ago. He must add his concurrence with the complainers in the doctrine, that because there may be one or two nuisances in a place, that is no reason for multiplying them. There appears also doubt whether the second bill is competent, it not having been offered to the Lord Ordinary of the next week after Lord Fullerton. A reclaiming note may cure this defect in form.

† *Lord Justice Clerk* observed.—As to the question of competency, I am of opinion, that as the complainers dropped the former bill, they are entitled to begin de novo. The former bill does not now exist. This is a fresh process.

Lord Glenlee concurred.

Lord Cringletie.—On the merits, I agree in opinion with what has been said by the dean of faculty, that every question of nuisance must be regulated and determined by the locality and the degree of what is stated to be the nuisance. Questions of this sort, in the general case, are proper to be tried by a jury, but there are others, again, where the intervention of a jury is not necessary. If, for example, a slaughter-house

They accordingly did so, and stated that they proposed to have a cistern in the form of a vault, for the reception of the refuse

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for cattle were erected in St. Andrew's Square, it would not be necessary to remit the question, whether it was a nuisance or not, to the trial of a jury, because the common sense of every man would convince him that there it would be a nuisance. Interdict in such a case might very properly be granted at once. But then, what is a nuisance in itself is not a nuisance every where. Works of great public utility are very often of an obnoxious and offensive description; but then, unless we are to prohibit them altogether, it is evident that they must be built somewhere. Much will depend, in many cases, on the mode in which the buildings are constructed. In the case of Dowie, a house for boiling blubber, placed in a particular situation, was found to be a nuisance. But that case was decided in 1813, and since that time many manufactories have arisen which were not then known, and numerous improvements on the manufactures which were then carried on have taken place. Now it is quite possible that there may be a mode of correcting that which would otherwise be a nuisance. Mr. Rennie gives us a good example when he cites the instance of a chimney of a steam-engine of a great public work, the smoke proceeding from which would prove a nuisance if not from its extreme height of 130 feet, and the good management of the fire, which render it as inoffensive as any ordinary chimney. As to the case of Dowie, it must be remarked that a boiling house, when proposed to be erected near to the middle of the town of Kirkaldy, was found to be a nuisance, but that when placed at the end of the town and near to the sea shore, it was found not to be a nuisance at all. Now is it not, with respect to the latter circumstance, very much the same case here? The boiling house is built on a projection into the sea, and when the wind is east or west or north, the whole smoke is blown down upon the sea. Again, it may have been or may be so constructed as not to be a nuisance at all. It is said that the blubber is allowed to get into a putrid state, and that it must therefore be oppressive and a nuisance; but we find, from Mr. Rennie's report, that it may be so stored in vaults as to be no nuisance; if so, then the only other things which could prove a nuisance would be the smoke and the effluvia arising from the boiling of the fish. But are we to decide without evidence, that, in the particular spot chosen for the boiling house, the boiling will be a nuisance? We find that some of the neighbouring proprietors will not submit to the erection; but, on the other hand, we find some acquiescing, and others perfectly willing that it should be erected. Now, how can we know at present whether it may not be so constructed as not to be a nuisance? Mr. Rennie informs us that there are several erections of a similar kind near to the town of Deptford, and other places in a populous neighbourhood, and that he never heard them complained of. His opinion is as good as ours, and I think it would be hard to decide without experience, and, on the assumption that the boiling house would prove a nuisance, to grant the interdict. There is only a single whale to boil, and the boiling of that single whale will afford a sufficient experiment to enable the parties to judge whether the boiling be a nuisance or not, and supply us with proper evidence on which the question may be decided. If the boiling should not prove a nuisance, I do not see why the company should not boil all the whales in Greenland. At present, I do not think that we are in a state to grant the interdict.

Lord Glenlee.—It is settled law, by the case of Dowie, that the boiling of whale blubber is a nuisance, and there the interdict granted was perpetual. If any statement were made, or minute lodged, specifying the causes why any after injury could

Oct. 1, 1831. after boiling, built inside the boiling house, close covered in and regularly emptied early in the morning; that the boiler would

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not be sustained, it might be proper to refuse the interdict in hoc statu. This course was followed in the case of Scott. The party complaining alleged a nuisance, but the party complained upon expressly disclaimed any intention of using the property in such a way as to give origin to a nuisance. In consequence of this qualification the interdict was refused, reserving to the party who apprehended the nuisance to apply for the remedy of an interdict whenever the nuisance should actually occur; but that was on the ground of an express disclaimer by the party who was alleged to be about to commit the nuisance. It is said that it is hard for the company to be kept from boiling blubber, and that the proposed boiling would do no harm. Now, if any qualification of intention, or any specification of the mode by which the boiling would not prove a nuisance, had been made, we ought not, perhaps, to grant the interdict; but here I find nothing of the kind. The company assume the summum jus in their answers, and argue that they are entitled to boil blubber when and how they please. But in law their argument is not correct; it is fixed law that the boiling of whale blubber is, ipso facto, a nuisance. How, then, can we judge that it will not prove a nuisance by any new invention or process of manufacture? The proper way would be to pass the bill to try the question of right, and to continue the interdict against actually boiling blubber in the meantime. The interdict sought is, perhaps, too extensive, but that is a point which cannot well be determined until the bill is passed. As to this, it is plain that we must have farther evidence.

Lord Justice Clerk.—I feel considerable difficulty in the present case, owing to the decision pronounced in the case of Dowie. By that case the law has been fixed to be, that the boiling of whale blubber is a nuisance. We cannot interfere with the authority of that case; but the question for our consideration seems to be, whether it is in all respects similar to the present, or can afford a precedent exactly in point? There may be a great difference between the two cases, from the locality chosen for the erection of the boiling house and other causes. The work here is built at an extremity of land projecting into the sea; and I observe from the papers before me that the site is stated to have been formerly occupied with works for the curing of herrings, certainly an offensive operation, both from the smoke and from the stench of the putrid offal which is collected. This consideration may be of some weight; but the main thing seems to be, whether the work, by its local position, comes within the sphere of the decision in Dowie's case? On this point I have had great difficulty. How, if we grant the interdict and afford no data for evidence, is the question of nuisance to be tried? Witnesses might be brought forward to swear hypothetically, but to what result would their hypothetical opinions on oath lead? They might, no doubt, swear to local distances, or to the current or direction of the wind in particular seasons, or the jury might obtain a view to enable them to judge of those localities; but still the evidence of actual injury to the neighbourhood by boiling would be wanting. It would be hard, without doubt, to subject the neighbours to an intolerable nuisance; but, on the other hand, we see that the company have built houses, that they are ready to go to work, that they have only a single whale to boil, and that the operations of one day will enable us to judge with more certainty of the nature of the erection, and of its effect on the neighbourhood, than if we had before us 500 hypothetical opinions. I am therefore for refusing the interdict in hoc statu, and passing the bill under a qualification expressed exactly in the terms used in

be capable of boiling thirteen tons at once, that the boiling would commence at a very early hour in the morning, and that the oil would not be drawn off till the afternoon, when the boiler would be cold; that the flues and chimneys would be three times higher than those in common use, and that the boiling operations would be carried on under cover with ventilators in the roof and at the cold season of the year. Trotter and others objected, that these precautions were insufficient; and on resuming consideration of the cause, the Court (7th December 1830) passed the bill, and continued the interdict in the mean time in so far as regards the boiling whale blubber in the premises in question.* Oct. 1, 1831.

Farnie and others appealed.

Scott's case, reserving to the complainers to apply for an interdict whenever any injury shall be actually done. This, I think, will afford a complete protection to their property, and we should then have evidence on oath with regard to the actual facts, to enable us to judge whether there was a nuisance or not. With regard to Dowie's case, it affords an authority with which we ought not rashly to interfere; but there is certainly nothing which can enable us to say, in this state of the case, that it bears directly upon the present. In that case it was found that a boiling house, proposed to be erected in the vicinity of villas and gardens, was a nuisance; but, on the other hand, the two boiling houses erected near to the edge of the harbour of Kirkaldy were not found to possess that character. Every thing was made to depend upon the local position of the work. But there is also this other particular to be attended to—that it was pleaded that Oliphant and others had no interest to litigate the question, as they had, by the recommendation of the Lord Ordinary, selected a spot equally commodious for their work, close upon the beach or sea-shore near to the harbour. Situated in the middle of the town, the work would have been a nuisance; but when the work was, at the recommendation of the Lord Ordinary, removed and brought down to the sea-shore, there was then no nuisance whatever.

Rutherford.—That recommendation was made under the expede letters.

Lord Justice Clerk.—I am aware of that; but until we have evidence that Mr. Farnie's boiling house is in all respects as injurious as Oliphant's in Dowie's case, we would not be warranted in granting the interdict. I am therefore for refusing the interdict, reserving to the complainers to apply for an interdict the moment any nuisance shall actually commence. By doing so they will sustain no injury.

Lord Glenlee.—I do not see much objection to following this plan, and imposing limitations, as in Scott's case.

Lord Justice Clerk.—It would be hard to put down the work upon mere experimental opinions, especially as it is alleged, that by the way in which the building is constructed, and the mode in which the company propose to carry on their operations, no nuisance will be committed.

* *Lord Justice Clerk.*—I have read the minute and answers in this case with very great attention, and have come to be of opinion, taking all circumstances into view,

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Appellants.—The sole question is, whether the interim interdict ought to be granted, for the appellants have never objected to the bill being passed, that it might be ascertained by expe-rience whether the operations were of the nature of a nuisance; but the effect of the interim interdict is to prevent any investi-gation into the facts, because the appellants are prohibited in the meanwhile from boiling whale blubber, and this even although they should do so by means which would altogether exclude the idea of nuisance. The case of Dowie affords no authority for granting an interim interdict, for in that case the interdict was not granted till after the bill had been passed, and till after the parties had, on the recommendation of the Court, erected their boiling establishment at a place different from that where they originally proposed to do so, and where

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that the interdict ought to be imposed. We see that it has been positively decided, and is now fixed law, that the boiling of blubber in the vicinity of dwelling houses is a nuisance, and being so, I do not see how we can allow the respondents to com-mence operations. In the case where that decision was pronounced the interdict was declared perpetual; and considering this, and looking to all the circumstances of the case, I do not think that we would be warranted in removing the interdict, especially as no great injury will be done to the respondents. The bill will be passed, and the substantial right deliberately tried. I do not say that every inhabitant of a house must come forward; but when we see so many proprietors complain, and when we find them suing immediately to prevent the commencement of a nuisance, I think that we are bound to protect them by the imposition of an interdict, and that it will not do to wait, or to withhold it until they are actually disturbed by the experiments of the respondents.

Lord Glenlee.—If the interdict were confined to the actual operation of boiling, I think it should be granted. With the property, in other respects, the respondents may do as they please.

Lord Cringletie.—If the facts in the minute for the respondents (appellants) were admitted, our clear course would be to refuse the interdict. But then these facts are disputed; they are mere averments denied, and met by other statements of a very different kind. It was observed by the dean of faculty, that the Kirkaldy boiling house, in the spot to which it was removed, was, both by its local position and con-struction, much more offensive than this; but the observation is not at all to the point, unless it were admitted; it is a mere averment, denied on the other side, and in these circumstances I do not think we are at liberty, with the case of Dowie before us, to refuse the interdict.

Lord Meadowbank.—Looking at the case of Dowie, I think we must continue the interdict; but I must say that I do not see where whale blubber could be boiled, if not on the sea shore. As to this, however, which touches the merits of the case, I do not at present give my opinion.

Lord Justice Clerk.—We understand the interdict is to be against the boiling alone.—9 *Shaw & Dunlop*, p. 144.

consequently they had no interest to resist the interdict being granted. Besides, in that case the place pointed out by the Court corresponds precisely with the site of the buildings proposed to be erected by the appellants, both being on the seashore. At all events, the interdict ought to have been so qualified as not to prevent the appellants from boiling the blubber in such a way as to remove all objection to it as a nuisance. Oct. 1, 1831.

Lord Chancellor.—My Lords, I do not think it necessary to trouble the counsel on the other side for any arguments. The judges in the Court below appear to have paid very great attention to this case, and their ultimate decision is entitled to the greatest respect, inasmuch as it was reluctantly come to, under the pressure of what they deemed the law and practice of Scotland, in respect of this interim order, before the matter is actually done—before the noxious erection is actually made. This is a branch of the law of Scotland which, like many other parts of the system, is derived from the civil law. According to the maxim of that law, a party was enabled to erect a building if he gave ample security that he would, at his own proper charge, pull it down in case it was deemed a nuisance. Proceeding on that wholesome and convenient rule the Scotch law has a process which we have not, enabling the nuisance prospectively to be met. Their lordships, in applying the rule to this case, at first differed materially; but in the end they were unanimously in favour of the present party who presses this interim interdict—the complainers, Mr. Trotter and others. Their Lordships were doubtless moved by a consideration of the proposed expedients for preventing the smell; I have looked at them, and I am quite of the opinion which the learned judges seem unanimously to have come to, that they are very fantastical—that they give no sort of security against the probability of the smell continuing. I should say, on the contrary, that any thing less likely to prevent it I cannot easily imagine. And there is not much of difficulty or hardship about this, for the Court will allow the parties, undoubtedly, on a new application, to make experiments; they will allow them to try this on a smaller scale or on a larger scale; they will allow them to try all the suggestions of the moment; and when they try them, if they will do, they may go before a jury. All this interim interdict does is to prevent things being done which are noxious to the neighbourhood until that question be tried. I am not at all satisfied that is not just the season to try it in that way by experiments; whereas according to the argument of the appellants, you are to have the nuisance existing probably for a year or two, and you are to have a great number of the king's subjects an-

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noyed, their lives perhaps not shortened, but their comforts abridged, for that time; whereas, with an experimental process, you have what may be considered a sufficient security for no injustice being done. On the whole, therefore, I advise your Lordships that this interlocutor should be affirmed. I shall look into the papers as to the question of costs; but parties need not be put to the expense of another attendance. I will let Mr. Courtenay know the result.

Lord Chancellor.—My Lords, in the case of Burntisland Company and Trotter, I have on a former occasion expressed at length the reasons on which I advised your Lordships to affirm the judgment. I only resume the question of costs; and I think, on looking into the case, which I have done diligently, that I ought to advise your Lordships to add to the judgment, "with 200*l.* costs."

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed, with 200*l.* costs.

Appellants' Authorities.—Scott, May 29, 1830; 8 S. & D. 845; Young, 20th Nov. 1824; 3 S. & D. 307; Swan, 4th March 1830; 8 S. & D. 637; Balleny, 3d Feb. 1813 (F.C.)

Respondents' Authorities.—Henry, 24th Feb. 1750 (13,159); Kinloch, 9th Dec. 1756 (13,163); Robertson, 2d March 1802 (No. 3. Ap. Pub. Police); Palmer, May 1794 (13,188); Kell, 2 July 1814 (F. C.); Lander, 16th June 1815 (F. C.); Jameson, 24th June 1800 (No. 4. Ap. Property); Scott, 5th July 1810 (F.C.); Dowie, 11th Dec. 1823 (F.C.); Thomas, 15th Dec. 1807 (No. 5, Ap. Pub. Police); Chanly, 5th July 1808. (No. 6. ibid.)

RICHARDSON and CONNEL—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.