COURT OF SESSION.

Friday, May 16.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

ANDERSON *v.* ABERDEEN AGRICULTURAL HALL COMPANY.

Superior and Vassal—Restrictions and Prohibitions—Cattle Sale-Room—Danger arising from Crowding of Cattle on a Road.

A feu-charter contained *inter alia* the following restrictions:—(1) "Any buildings erected on the said lands and others hereby feued shall be of a neat and suitable description, built of stone or ornamented brick and lime, and slated, and specially all tiled and thatched buildings are expressly prohibited." (2) "With the view of securing the amenity of the feus on the lands of Hilton, the superior shall be consulted in regard to the position of the houses and buildings proposed to be erected, and his approval obtained." (3) "Neither shall he (*i.e.* the feuar) be allowed to carry on on the said lands and others hereby feued, without the superior's written sanction, any nauseous chemical operations, noxious or noisy manufactures, or anything which may be a nuisance or which may occasion disturbance to any of the neighbouring feuars or proprietors."

A hall for the sale of cattle was erected on the ground without intimation to or the leave of the superior, and after it had been completed and had been used for the purpose for which it had been built, an action of declarator and removal was brought by the superior on the ground that the above-narrated conditions of the feu-right had been infringed. It was alleged that the third had been violated, in respect that large numbers of cattle had been brought upon the road outside the hall, thereby creating "a nuisance," or that which might occasion disturbance to the neighbouring feuars or proprietors. In these circumstances, after proof, *held* — (1) that as matter of fact it could not be said that the building was not "neat and suitable;" (2) that the superior not having interfered during the erection of the hall, was barred from interfering after its completion; (3) that the words "anything which may be a nuisance or which may occasion disturbance," &c., must be read in connection with the preceding words "nauseous chemical operations, noxious or noisy manufactures," and be held to apply to operations "*ejusdem generis*," which those in question had not been proved to be.

This was an action of declarator and removal, and alternatively of damages, at the instance of James Anderson of Hilton against the Aberdeen Agricultural Hall Company and John Catto of Cattofield. The pursuer was successor of Sir William Johnston, who was proprietor of the estate of Hilton, near Aberdeen, and who feued certain parts of the estate to Mr Catto in 1862, and another part in 1868.

In both of these feu-charters the following restrictions appeared:—"That any buildings erected on the said lands and others hereby feued shall be of a neat and suitable description, built of stone or ornamented brick and lime, and slated, and specially all tiled and thatched buildings are expressly prohibited; that with the view of securing the amenity of the feus on the lands of Hilton the superior shall be consulted in regard to the position of the houses and buildings proposed to be erected, and his approval obtained; and the said John Catto and his foresaids shall not be allowed, without the written sanction of the superior, to erect any brewery, distillery, workshop or yards for masons, wrights, smiths, coopers, weavers, or candlemakers, nor cracklinghouses or slaughter-houses, nor shall he or they be allowed to carry on on the said lands and others hereby feued, without the superior's written sanction, any nauseous chemical operations, noxious or noisy manufactures, nor anything which may be a nuisance or may occasion disturbance to any of the neighbouring feuars or proprietors, nor shall the said John Catto and his foresaids or his or their tenants sell spirits or malt liquors on the said lands and others hereby feued, or allow the same to be sold, without the consent of the superior, nor shall the said John Catto and his foresaids quarry stones on said lands and others hereby feued except for the purpose of building thereon." In 1877 Mr Catto granted to the Agricultural Hall Company of Aberdeen from his feu a subfeu of a piece of ground, and in the subfeu right he inserted or referred to all the above restrictions. The company thereupon built upon their subfeu a hall for the purpose of holding therein large sales of cattle. These sales were at first unfrequent, but gradually they became much more common. The pursuer objected to this building as being in contravention of the restrictions in three particulars—1st, that the building was not neat and suitable in the sense of the feucharter; 2d, that the approval of the superior had not been obtained to the position of the building; 3d, that the use to which it was put was in contravention of the title. With regard to the third condition of the feu-charter it was averred—"The said use of the defender's ground or of the said building as a place for holding sales of cattle, &c., constitutes a nuisance, and occasions, and so long as carried on will continue to occasion, disturbance to the neighbouring feuars and proprietors. The adjoining lands of Hilton are well suited for feuing purposes. There are also other dwelling-houses in the immediate neighbourhood belonging to other proprietors. The quiet and amenity of the neighbourhood and of the accesses to the said dwelling-houses, including the pursuer's said house of Hilton, are and will be seriously prejudiced by periodical cattle sales on the defenders' said feu. On the days of the sales there are great concourses of cattle, horses, sheep, pigs, and other stock, as well as of cattle-dealers, cattle-drovers, and other persons interested in the trade, and there is frequently much driving of cattle, horses, sheep, and pigs on the said road leading to Hilton House, to the danger and disturbance of the neighbours." The hall was situated within 400 yards of the Kittybrewster Railway station, where immense quantities of

cattle were constantly arriving and being sent away.

The pursuer pleaded, *inter alia* — "1. The erection of the building in question is in violation of the conditions of the said feu-charter, in respect—(1) It is not a neat and suitable building in the sense of the said title; and (2) The pursuer has not been consulted in regard to the position of the said building, nor has his approval been obtained, and he objects to the same. 2. The use of the said ground for the sale of cattle, &c., in the manner condescended on is in violation of the feu-charter, as being a nuisance, and as occasioning disturbance to the neighbouring feuars and proprietors.

The Lord Ordinary (CURRIEHILL) assoilzied the defenders, and appended to his interlocutor a note, which, after narrating the circumstances, proceeded as follows:—"These conditions it is now necessary to examine minutely and in detail. There is no special use expressed to which the subjects are to be applied, and in particular there is no provision that the buildings are to be conform to a specified plan or style and model, or that they shall be used exclusively as dwelling-houses and the like. But there is, in the first place, a declaration that 'any buildings erected on the said lands and others hereby feued shall be of a neat and suitable description, built of stone or ornamented brick and lime, and slated, and specially all tiled and thatched buildings are expressly prohibited.' Now, the pursuer says that the feuars can comply with that condition only by erecting buildings which shall, in the opinion of him as the superior, be neat and suitable, taking into consideration the other parts of the estate which are retained in his hands unfeued. But I am humbly of opinion that that is not the sound construction of the clause. I think the words 'neat and suitable' are explained by the context, and that the buildings will within the true meaning of the clause be 'neat and suitable' if they are built of stone or ornamental brick and lime and slated, and are not buildings with tiled and thatched roofs. Whether a building is neat or the reverse must always be matter of opinion, and the term 'suitable' is a relative term to which there is here no correlative; and unless the clause is to be read as I have construed it there is really nothing in the deed to show what the parties intended. Had the intention been that the buildings should be 'suitable' to any special purpose, such as dwelling-houses, ornamental villas, or the like, it would have been easy to say so. But nothing of the kind has been said. All that has been said is that the buildings shall be 'neat and suitable' if they are built of stone or ornamental brick and lime, and are slated and not thatched or tiled. If the intention was different—if it was what the pursuer alleges it to have been—all I can say is, that the intention has not been effectively expressed, and cannot be inferred from the words employed according to their natural meaning and signification. In short, the superior, if he intended to make himself the arbiter of this question, has failed to do so by the terms which he has employed. The question of 'neatness' is, as I have said, a matter of taste and opinion, and so far as an opinion can be formed from the evidence, I am unable to say that the buildings are not neat, and they are undoubtedly built of stone and lime, and are slated.

"In the second place, it is provided that 'with the view of securing the amenity of the feus on the lands of Hilton the superior shall be consulted in regard to the position of the houses and buildings proposed to be erected, and his approval obtained.' Here I would observe that in nothing I have read either in the former clause or in this clause is there anything said in the way of restricting the feuar to any particular kind of building. 'Houses and buildings' are the general terms used, and unless in so far as prohibited, the feuar is entitled to erect anything he likes, provided it is of stone and lime, and slated, and is not tiled or thatched. But he is to consult the proprietor as to the position in which the building is to be placed, and he is to get approval of the position, but of nothing else. It is true that the defenders did not obtain the approval of the pursuer before the erection of the buildings complained of; and I shall afterwards consider the effect of their failure to do so. In the meantime I shall only say that as no objection has ever been stated by the pursuer to the position of the buildings, it would be most inequitable now to order the removal of the building merely because the approval of the site had not been obtained from the pursuer.

"In the third place, it is provided that the said 'John Catto and his foresaids shall not be allowed, without the written sanction of the superior, to erect any brewery, distillery, workshops or yards for masons, wrights, smiths, coopers, weavers, or candlemakers, nor cracklinghouses or slaughter-houses.' Now, these are buildings the erection of which is expressly and directly prohibited; but every other kind of building not falling under one or other of these categories the feuar is entitled, so far as this charter is concerned, to erect on the grounds feued to him. It is not contended that the building complained of is an erection of any of the prohibited classes. But then the clause goes on to say:—'Neither shall he nor they be allowed to carry on on the said lands and others hereby feued, without the superior's written sanction, any nauseous chemical operations, noxious or noisy manufactures, or anything which may be a nuisance or which may occasion disturbance to any of the neighbouring feuars or proprietors.' That is the second limb of the clause. The first limb was a prohibition against the erection of manufactories; this second limb prohibits the carrying on in any buildings to be erected, or on the grounds, anything of the character of nauseous chemical operations, or noxious or noisy manufacture, or anything that may be a nuisance or occasion disturbance to neighbours. Now, I am humbly of opinion that what is prohibited is the use of the lands feued in such a manner as to make them or the operations carried on in them a nuisance to the neighbours. But it is not alleged that the defenders are carrying on in their building or on the ground feued to them any of the prohibited operations. The building which they have erected is a hall or mart for the sale of cattle, horses, and pigs, the sales being generally held once a-week, and what is complained of is, not that there is any nuisance caused by these sales, or by the congregation of animals upon the grounds feued; what is complained of as being a nuisance is that the public road leading from the railway station at Kitty-

brewster to the hall is on the occasion of these weekly sales sometimes so crowded with cattle that the proprietor of a house on the opposite side of the road, not on the Hilton estate, is afraid to allow his little children to walk upon that part of the road while the cattle are going to and from the hall. But the use which is thus made of the public road is made, not by the defenders, but by the farmers and cattle-dealers who are taking their stock to the sale; and it is a use which they as well as the defenders are entitled to make of the road as members of the public, irrespective altogether of this feu-right. If the public right of the road is abused by the defenders or their customers by crowding the road with dangerous animals the pursuers or the neighbouring proprietors may have such redress as the common law will give. But there is not a tittle of evidence to show that after the cattle have left the public road and entered the defenders' hall, or so long as they are within the defenders' premises, there is any inconvenience or disturbance caused to any human being. And to say that because a gentleman living 500 yards off is afraid to let his infants go out with their nursemaid when a herd of cattle are going into market a nuisance is created within the defenders' buildings or on the ground feued to them, seems to me to be carrying the doctrine of nuisance to an extent to which I never heard it carried in this Court; so far as the proof goes, I have not heard anything that amounts to a nuisance within the sense and meaning of this feu-right. The pursuer therefore cannot, in my opinion, succeed in having the defenders' building removed, or its use as a cattle mart stopped on the ground of nuisance.

"The only question remaining is, whether the defenders got the consent or approval of the superior to the position? In point of fact they did not get that consent. On the other hand, the superior, neither before he raised this action nor even in the course of this action, has ever objected to the position of this Agricultural Hall. He certainly did not object until after the whole building was finished. And it is clearly proved that he, or at all events his agent, who seems to have had full power to act for his client, was all along fully cognisant of the position of the building. It had been begun before the month of June 1877, and at the end of July it had been practically finished. The defenders appear to have been quite willing to meet the views of the superior in point of taste as to the way in which the gables fronting the road should be finished off; but that was entirely a voluntary concession on their part, and as the pursuer did not suggest any alteration the building was completed. But never from the beginning of the correspondence has the slightest objection been taken by the pursuer to the position of the building. The truth is that the pursuer has all along mistaken his powers under the feu-charter. He seems to have imagined that he was entitled to have the plans and specifications of the building submitted to him for his approval, and to veto the use of the building for the purposes contemplated by the defenders. He never had—at all events he never stated—any objection to the building being erected on its present site, and he allowed it to be completed under the notion, erroneous on his part, that he could prevent it from being used as a cattle mart. Under these circumstances, it will not do for the pursuer now to come forward and say at the end of the day—'You erected this building' (which cost £4000) 'without having got my approval of its position, and therefore you must now remove it.' The pursuer is not entitled to allow money to be expended by his feuars in that way, and then come forward and make such a demand.

"As to the pursuer's claim for damages, which is alternative to his claim to have the building removed, it can be maintained only in so far as he can establish violation of the contract and injury sustained by him thereby. But, in the first place, if I am right in holding that the pursuer is not entitled to have the building removed in respect that he acquiesced in its erection on the site which it now occupies, there has been no violation of the contract. And, in the second place, even if it should be held that the strict letter of the contract has been violated by the defender, I am of opinion that the pursuer has entirely failed to prove that he has sustained any damage by the building having been erected where it now stands.

"The pursuer, or rather his author, may have themselves seriously damaged the estate of Hilton by allowing the Police Commissioners to erect public slaughter-houses on the ground feued to Catto, but I have been unable to find in the proof any evidence of damage caused or likely to be caused by the erection of the defenders' hall on the site in question. It is a case of *damnum absque injuria.*

"On the whole matter I am therefore of opinion that the defenders are entitled to be assoilzied from the action, with expenses; but as the interests of Mr Catto and the other defenders are substantially identical, I think that the expenses of the proof should be taxed on the footing that the defence after the closing of the record should have been a joint defence."

The pursuer reclaimed.

Pursuer's authorities—*Walker* v. *Brewster*, Nov. 4, 1867, 5 L.R. (Eq.) 25; *Crum Ewing* v. *Campbell*, Nov. 23, 1877, 5 R. 230; *Campbell* v. *Clydesdale Banking Co.*, June 19, 1868, 6 Macp. 943; *German* v. *Chapman*, Nov. 27, 1877, L.R. 7 Ch. D. 271; *St Helen's Smelting Co.* v. *Tipping*, 1865, 11 Clark's H. of L. 642.

At advising—

LORD PRESIDENT—This action has been brought at the instance of a superior to enforce certain restrictions in a feu-charter, and is directed against a feuar, and also against a disponee of the feuar, namely, the Aberdeen Agricultural Hall Company, who have erected a building said to be in contravention of the restrictions. Now, these restrictions are somewhat peculiar, and in this respect amongst others, that they not only prohibit certain things, each of which is at common law a nuisance, but also certain things which do not belong to that category, and leave unprohibited many other things which it is not even alleged could be excluded by the clause. This is not a clause, such as we have often seen, where the object of the superior is to prevent any building except dwelling-houses. Neither is the clause so expressed as to cover such an intention. It must therefore be taken as clear that buildings other than dwelling-houses may be

erected, and that these may be used for purposes of carrying on any trade or business as long as that trade is not specially or otherwise prohibited. Now this hall has been erected in order that there may be carried on in it sales of cattle, sheep, and pigs. The primary object of the company was to provide a place for carrying on large sales at certain particular and not frequent times; but if the purpose for which the building was erected is not unlawful, the frequency of the sales will not make them illegal.

Having premised these general observations, I must call attention to the terms of the restriction —"That any buildings erected on the said lands and others hereby feued shall be of a neat and suitable description, built of stone or ornamental brick and lime, and slated, and specially all tiled, and thatched buildings are expressly prohibited; that with the view of securing the amenity of the lands of Hilton the superior shall be consulted in regard to the position of the houses and buildings proposed to be erected, and his approval obtained."

As regards the second part of this clause, it is to be noticed that it is not said what is to be the result if the consent of the superior is not obtained. It cannot be assumed, without express words to that effect, that if the building be erected without that consent its removal may be insisted upon, and therefore this clause is not of much consequence to the superior unless he interferes while the building is going on, and stops it somehow until his approval has been given, and even then it must be seen that he could not withhold his consent without some good reason being given.

Then follows this clause—"And the said John Catto and his foresaids shall not be allowed, without the written sanction of the superior, to erect any brewery, distillery, workshop or yards for masons, wrights, smiths, coopers, weavers, or candlemakers, nor crackling-houses or slaughter-houses, nor shall he or they be allowed to carry on on the said lands and others hereby feued, without the superior's written sanction, any nauseous chemical operations, noxious or noisy manufactures, nor anything which may be a nuisance or may occasion disturbance to any of the neighbouring feuars or proprietors, nor shall the said John Catto and his foresaids or his or their tenants, sell spirits or malt liquors on the said lands and others hereby feued, or allow the same to be sold, without the consent of the superior, nor shall the said John Catto and his foresaids quarry stones on said lands and others hereby feued except for the purpose of building thereon."

Now, I am disposed to construe this part of the clause as meaning a prohibition against carrying on noxious or noisy manufactures, and to construe the words which follow as applying to things *ejusdem generis*. The question comes to be, whether the defender contravened any of these restrictions?

As regards these, the first, that this building is not "neat and suitable," has hardly been seriously maintained. It might have been important if the ground had been intended solely for feus of villas of an ornamental character, but it being clear that business premises were allowed, the words "neat and suitable" must be taken to mean neat and suitable for places of that kind, and it is not said that the hall is not neat or suitable for a cattle sale-room.

The second objection is that the site of the building was not approved of by the superior. On this point I have already anticipated the answer, and the superior cannot now be heard to say that the building shall be pulled down.

The third part of the clause then alone remains, and it is by far the most important. The question here is, whether the defenders have done anything which may be a nuisance or occasion disturbance to the neighbouring feuars or proprietors? It is conceded that what the defenders do on their own ground does not create a nuisance; it is not said that any noxious smell or any noise comes from the building, or that the selling of cattle is inconvenient to anyone, but it is alleged that the consequence of the erection on the side of the road of this hall is to make the road be inconveniently crowded with cattle, and disagreeable to persons of a timid disposition, and dangerous to children. The Lord Ordinary says that this cannot be called a nuisance, as "the use which is thus made of the public road is made, not by the defenders, but by the farmers and cattle-dealers who are taking their stock to the sale, and it is a use which they as well as the defenders are entitled to make of the road as members of the public irrespective altogether of this feu-right," and that that is in itself sufficient to settle the question. That is a nice question, and in the view I take of the case it is not necessary to determine it, for it appears to me, that assuming that the restriction is within the meaning of the clause, the feuar would be prevented from making such a disturbance by the traffic of cattle as to interfere with its use for ordinary purposes. But I think the pursuer's case fails in fact. The evidence is very slender indeed, and the passages referred to by his counsel as the strongest were very weak. But further, take into consideration the ordinary use of the road. The road and this feu are in the immediate neighbourhood of Kittybrewster station, which is very near Aberdeen, and where there is a very large traffic of cattle both being sent away and arriving. In short, it is a very great resort of cattle, and the entrance to the hall is only 400 yards from the station. The road cannot therefore be said to be free from invasions of cattle. Then there is another establishment for selling cattle in the immediate neighbourhood, so the road cannot be said to be in the same position as if it was a street or a road in a quiet countryside. The whole district is much frequented by cattle. Keeping this in view, I cannot say that I think that there is any contravention of the restriction.

Further, I cannot construe the words as meaning that anything resulting in a disturbance of any kind will constitute a breach. No one ventures to assert that. The disturbance made by this feuar is in fact just of the same kind as is made by his neighbours—the doing nothing more than others do. What the defender does is perfectly legal at common law, and I think the pursuer fails to show that what he does is contrary to the feu-contracts. For these reasons I agree with the conclusions to which the Lord Ordinary has come, though not on precisely the same grounds, and I think that the defender ought to be assoilzied.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Muirhead—J. P. B. Robertson. Agents—Bruce & Kerr, W.S.

Counsel for Defender (Respondent)—Asher—Mackintosh. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, May 17.

FIRST DIVISION.

LORD ADVOCATE *v.* WOOD AND ANOTHER (PATERSON'S TRUSTEES.)

Revenue—Legacy-Duty—Where Annuities Payable to Heirs of Entailer out of Rents of Entailed Estate—Act 45 *Geo. III. cap.* 28, *sec.* 4.

The Act 45 Geo. III. cap. 28, sec. 4, provides "that every gift by any will or testamentary instrument of any person dying after the passing of this Act, which by virtue of any such will or testamentary instrument shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any moneys to arise by the sale of any real estate, of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act. . . ." *Held* that annuities directed by an entailer to be paid by his trustees to the heirs who should succeed him, and payable out of the rents of the estate, the fee whereof was held under the same deeds by the same persons, were not gifts liable in legacy-duty under that clause.

Observed that to hold such annuities liable in duty would be tantamount to declaring that legacy-duty is exigible on sums of money payable to persons out of the rents of their own estates.

This was an action at the instance of the Lord Advocate on behalf of the Board of Inland Revenue against John Andrew Wood, advocate, and Findlay Anderson, trustees acting under the trust-disposition of the deceased George Paterson of Castle Huntly, Perthshire, dated July 27, 1812, and registered August 15, 1817.

The following narrative of the facts of the case is taken from the note to the interlocutor of the Lord Ordinary (CURRIEHILL):—"In this action the pursuer claims payment of legacy-duty upon certain annuities, payable under the trust-disposition and settlement of the deceased George Paterson of Castle-Huntly (hereinafter called George Paterson the elder) to his son the now deceased George Paterson the younger, and to his grandson, the also now deceased George Paterson, the last of Castle-Huntly. The claim is made under the Act 45 Geo. III. c. 28, § 4, which enacts:—'That every gift by any will or testamentary instrument of any person dying after the passing of this Act which by virtue of any such will or testamentary instrument shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon, or made payable out of any real estate, or be directed to be satisfied out of any moneys to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act.' . . . .

"By marriage-contract dated 30th November 1776, entered into between the said George Paterson the elder and Ann Gray, daughter of John Lord Gray, the said George Paterson in contemplation of the marriage became bound, against the term of Whitsunday 1780, to provide and secure upon land or other sufficient security the sum of £35,000 sterling, and to take the rights and securities thereof to himself and the sons to be successively born of the marriage and the heirs whatever of their bodies respectively, with power to him to restrain and tie up his heirs as to their dealing with said lands by all the fetters of a strict entail. Several children were born of the marriage, the eldest son having been the now deceased George Paterson the younger. By deed of entail dated 27th July 1812, George Paterson the elder, on the narrative of the said marriage-contract, and in implement of the obligations which he had therein undertaken, and for the better preservation of his estate, family, and name, executed a strict entail of his lands and estate therein mentioned (now known under the general name of Castle-Huntly), by which he conveyed the said lands and estate 'heritably and irredeemably to myself in liferent during all the days of my life, and to George Paterson, the eldest son of the marriage between me and the said Ann Gray, and the heirs whatsoever of his body without division, in fee, whom failing to my other heirs after written.' The deed contains obligation to infeft, procuratory of resignation, and precept of sasine, a condition being inserted that the said George Paterson the younger, or the heirs succeeding to the estate, should be bound within a year after the entailer's death to obtain themselves infeft and seised in the said lands and estate. The entail contains the usual prohibition against alteration of the order of succession, and against alienations of the estate, and the contraction of debt affecting the same, but with power to the institute and heir of tailzie to make provisions for their wives or husbands out of the estate by way of locality, and to their children by means of bonds of provision affecting the rents, and a clause to the following effect:—'And in order that this deed of entail and settlement may be more effectual, I hereby bind and oblige myself and my heirs-at-law, and successors whatsoever, to free and relieve my tailzied lands and estates before specified, and the heirs named or to be named to succeed thereto, of and from the payment of