Lord Rutherfurd Clark—I am of the same opinion as Lord Young.

The Lords recalled the Lord Ordinary's interlocutor and gave decree in terms of the declaratory conclusions.

Counsel for Pursuer—Solicitor-General Asher—Lang. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders — Mackintosh — W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Saturday, May 20.

FIRST DIVISION.

DOWDY *v.* M'FARLANE.

*Process — Jury Trial — Enumerated Cause — Special Cause—*6 *Geo. IV. c.* 120, *sec.* 28—29 *and* 30 *Vict. c.* 112, *sec.* 4.

A hotel-keeper brought an action for damages against his landlord, alleging that he had let other premises belonging to him, and situated immediately above those let to the pursuer and used by him as an hotel, to persons who so occupied them as to cause a nuisance to the pursuer. The pursuer alleged that the defender was proprietor of these premises, or at least had sole management and control of them, and was the person most materially interested in them, the same being held in trust for the firm of which he was a partner. The defender averred that the subjects in question belonged to another person altogether. *Held* (*aff.* judgment of Lord Adam) that the pursuer was not entitled to an issue on these averments, the vague nature of his averments as to the character in which the defender was alleged to be responsible for the nuisance complained of being sufficient "special cause" for having the case tried by proof instead of jury trial.

In this action Robert Dowdy sued Daniel M'Farlane for £500 in name of damages caused by an alleged nuisance to the hotel kept by him, for which he maintained that the defender was responsible. The pursuer averred that he took the premises (a flat in Greenside Street, Edinburgh) which formed his hotel from the defender, the proprietor of the premises, for ten years from Whitsunday, at an annual rent of £100, and that the premises were let expressly for use as an hotel. He averred further—"(Cond. 3) The defender is also proprietor of the flat immediately above the pursuer's said hotel. If, as is stated in the answer, the defender is not formally the proprietor of the said upper flat, he at least, during and subsequently to the year 1880, had the sole management and control of, and was the person most materially interested in, the said upper flat, the same being held in trust for his firm of D. & H. M'Farlane, grocers and wine merchants, 2 Greenside Street, Edinburgh, of which he is the principal, and his brother Henry M'Farlane the only other partner. At or about Whitsunday 1880, and after he had entered into the said lease with the pursuer, whom he assured that the said upper flat and his other properties in the stair would only be let for ordinary dwelling-houses, the defender let the northmost half of the said upper flat to a number of persons, who started therein what they termed a 'Musical and Dramatic Club,' but what was really a billiard, draught, card-playing, and drinking club, keeping open house for the greater part of the night and morning. Under guise of being a private club, the said persons kept and sold spirituous liquors therein. All this, as well as the proceedings after mentioned, was done with the knowledge and authority of the defender, and continued down to the breaking up of the said club as after mentioned. At the time the defender let the said upper premises for the use of the said club he informed and assured the pursuer that should their existence in the stair prove an annoyance to him, or interfere with the comfort of his visitors, he would have them turned out. Shortly after the said club took possession of the said premises billiard-playing and drinking almost nightly began about eleven o'clock, and were often carried on until three o'clock in the morning. The pursuer complained to the defender (and it was the fact) that the existence of the said club in the stair was causing a nuisance to him, and that his visitors were leaving his hotel in consequence of want of sleep caused by the great noise overhead occasioned by the playing of billiards and other entertainments, which, with the knowledge and authority or license of the defender, were being carried on in his premises occupied by the said club. The defender, in answer to the pursuer's complaints above and after condescended on, acknowledged and accepted liability for the nuisance complained of, but took no steps whatever to have the same removed." He further averred that in consequence of the annoyance caused to his customers by the noisy and disreputable conduct of the club his business greatly fell off, and he had suffered damages to the amount sued for. Notwithstanding this he alleged that the defender had again let the same apartments to the club for a second year from Whitsunday 1881.

The defender admitted that he was proprietor of the premises occupied by the pursuer, but denied that he was proprietor of the premises let to the club. These premises he alleged belonged to his brother Henry M'Farlane. He denied that he had ever sanctioned or was in any way responsible for any improper use of those premises by the club.

The Lord Ordinary (Adam) having allowed both parties a proof of their averments, the pursuer reclaimed, and asked that issues should be adjusted, arguing that an action for causing a nuisance such as the present was specially marked out for trial by jury under the Act 6 Geo. IV. c. 120, sec. 28, and was not removed from that category by the subsequent Acts 13 and 14 Vict. c. 36, sec. 49, and 29 and 30 Vict. c. 112, sec. 4. There was no "special cause" to prevent it from being so tried—*Ross Hume* v. *Young*, January 19, 1875, 2 R. 338; *M'Avoy* v. *Young's Paraffin Oil Company*, November 5, 1881, 19 Scot. Law Rep. 691, 9 R. 100. The tenant injured as the pursuer had been might sue either the person causing the nuisance or the landlord—*Weston* v. *Tailors of Potterrow*, July 10, 1839, 1 D. 1218; *Young* v. *Hamilton*, March 11, 1837, 15 S. 853.

The defender argued—There was here ample "special cause" in the fact that the property of the subjects alleged to be used so as to cause a

nuisance was not admitted to be the defender's. There was also "special cause" in the circumstance that the pursuer was suing not the persons who caused the alleged nuisance themselves, but another whom he alleged to be responsible for what they had done.

LORD PRESIDENT—Is the pursuer willing to take an issue whether the defender, "as proprietor" of these subjects, wrongfully caused the disturbance complained of?

The pursuer declined to take such an issue.

At advising—

LORD PRESIDENT—I am for adhering to the interlocutor of the Lord Ordinary. It is quite true that as a general rule such a case must be sent to a jury, and that special cause for not so sending it is required, but I think that the peculiar way in which this action is libelled is special cause enough, and that the vague nature of the averments in article 3 of the condescendence would cause great difficulty before a jury which would be avoided by a trial before a Judge.

LORD DEAS concurred.

LORD MURE—I am of the same opinion. An issue in this case would certainly be followed by a bill of exceptions.

LORD SHAND—I am of the same opinion. This is a very special case, and on that ground, and particularly with reference to article 3 of the condescendence, I think that there should be a proof and not an issue.

The Lords adhered.

Counsel for Pursuer—Rhind—Baxter. Agents—Begg & Murray, Solicitors.

Counsel for Defender—D.-F. Macdonald, Q.C.—W. Campbell. Agent—P. Morison, S.S.C.

Saturday, May 20.

OUTER HOUSE.

[Junior Lord Ordinary, Lord Kinnear.

COUNTESS OF STAIR, PETITIONER.

Expenses—Railway—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. c.* 191)—*Entail.*

A sum of money was consigned as compensation for part of an entailed estate taken by a railway company for the purposes of their undertaking. The heiress of entail then in possession subsequently executed a disentail. In a petition by her to uplift the consigned money and acquire it in fee-simple, *held* (*per* Lord Kinnear, Ordinary) that she was entitled to the expenses against the railway company of advertising the petition, serving it on the three next heirs who would have been entitled to succeed to the estate but for the disentail, and of appointing and remunerating a tutor *ad litem* to one of these heirs who was a pupil.

In 1871 the Girvan and Portpatrick Junction Railway Company took certain portions of the then entailed estate of Bargany, in Ayrshire, for the purposes of their undertaking, and the purchase money due to the Countess of Stair, who was heiress of entail in possession of the said estate, was fixed by arbitration at £710, 11s. 4d., and was consigned in bank, all in terms of the Lands Clauses Consolidation (Scotland) Act 1845. In 1876 the Countess of Stair, with consent of her husband, presented and duly carried through an application to the Court of Session for authority to disentail the said lands and to acquire them in fee-simple.

Thereafter in 1882 Lady Stair brought a petition for authority to uplift the said consigned sum of £710, 11s. 4d., "to which so far as the entailed estate is interested by force of said disentail she has become absolutely entitled." The petition set forth the names and designations of the three nearest heirs of entail who would have been entitled to succeed to said entailed estate of Bargany if it had not been disentailed as before mentioned. One of these heirs was a pupil.

The petition was laid under the Lands Clauses Act and the various Entail Acts from 1848 downwards. Expenses of the application were craved against the said Girvan and Portpatrick Junction Railway Company, and Mr James Haldane, their judicial factor.

The Lord Ordinary (KINNEAR), after ordering intimation and advertisement of the petition, and service on the said three next heirs, and appointing a tutor *ad litem* to the said minor heir, and also after a remit to and report by a man of business, granted the prayer of the petition, and remitted the account of expenses to the Auditor to tax and report, which was accordingly done.

Thereafter the petitioner lodged a note of objections to the Auditor's report on her account of expenses, in so far as he had disallowed the expenses (1) of advertising the petition, (2) of service on the three next heirs, and (3) of appointing and remunerating the tutor *ad litem* to the said pupil heir.

Counsel for the Railway Company relied on the case of *Torphichen* v. *Caledonian Railway Company*, July 19, 1851, 13 D. 1400.

The Lord Ordinary, after making avizandum, sustained the petitioner's objections to the Auditor's report. His Lordship in giving judgment said—"This is not properly a question of the expense of constitution at all, as in the case of *Torphichen*. The petition is simply one for authority to uplift consigned money on a statement that while the petitioner was heiress of entail in possession, a sum of money was consigned in terms of the Lands Clauses Consolidation Act, to which, in virtue of the subsequent disentail, she has now become absolutely entitled. I think that is not a petition under the Entail Amendment Acts at all, but under the Lands Clauses Act, and I do not see how it would have been possible for me to grant the prayer without ordering intimation to and service on some party interested in the matter. These next heirs of entail were the proper parties for such service, being the proper contradictors of the petitioner in this particular matter. I have no doubt therefore that I should sustain these objections without, however, in any degree interfering with the general rule that the expenses in proper entail applications of this sort would not fall on the railway company."