Wednesday, July 1.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

NORTH BRITISH RAILWAY COMPANY *v.* WHYTE.

Railway — Powers under Private Act — Acquisition of Land Outside Limits of Deviation for Erecting Ventilating Shaft —Objection by Neighbouring Proprietors.

A railway company was empowered by private Act of Parliament to construct certain underground railways, and it was provided that the company should be bound to ventilate the same to the satisfaction of the Corporation of Glasgow. In order to fulfil their obligation under that provision, the company, with the approval of the Corporation, purchased a piece of ground outside the limits of deviation, and applied to the Dean of Guild for authority to erect thereon a ventilating shaft.

Held that neighbouring feuars were not entitled to object to the proposed erection on the ground that the company had no authority under their Act to acquire the ground in question, or to erect the shaft thereon.

Superior and Vassal—Special Stipulations in Feus — Restrictions on Buildings— Whether Enforceable by One Vassal against Another—Nuisance.

A railway company having purchased a piece of ground in the centre of a residential district in Glasgow, applied to the Dean of Guild for authority to erect thereon a shaft for the ventilation of an underground railway. The application was opposed by a number of the neighbouring feuars holding of the same superior as the railway company, on the ground that the proposed erection would contravene restrictions contained in the feu-contract under which the railway company held, which were similar to or identical with restrictions contained in their titles. By that contract it was stipulated that the feuar should not carry on certain specified kinds of business on the ground feued, or any other business which might be "nauseous or hurtful" to the neighbouring feuars, and it was declared that this provision should operate as a servitude upon the lands thereby feued. The feu-contract also contained provisions with regard to the height and kind of buildings to be erected, and declared that these provisions were to be inserted in all subsequent dispositions of the lands until complete fulfilment thereof, otherwise the same should be null.

Held (1) that the proposed shaft could not be considered, without trial, as necessarily "nauseous or hurtful," and (2)—following *Hislop* v. *Macritchie's Trustees*, 7 R. 384, and 8 R. (H. of L.) 95—that the objectors were not entitled to enforce the building restrictions contained in the railway company's title, no mutuality of rights and obligations in this respect being established between them and the company by the terms of their feu-contracts, either expressly or by implication.

By the Glasgow City and District Railway Act, 1882, power was given to the Glasgow City and District Railway Company, thereby incorporated, to make two underground railways in Glasgow, within the limits of deviation marked on the deposited plans, and for that purpose to enter upon and use such of the lands delineated on said plans as might be necessary. The company accordingly took possession of the lands and constructed the railways.

By disposition dated in November 1884 the railway company acquired from the trustees of Free St David's Church, Glasgow, a piece of ground extending to 897 square yards in West Regent Street, originally part of the Blythswood estate, and feued out by the Parliamentary trustees on that estate in 1814. This piece of ground was close to one of the company's railways, but outside the limits of deviation marked on the plans. It was situated in a high class residential district.

By the North British Railway Act 1887 the Glasgow City and District Railway Act 1882 was vested in the North British Railway Company, and all the assets, lands, and property of the Glasgow City and District Railway Company were transferred to the North British Railway Company.

In February 1891 the North British Railway Company presented a petition in the Dean of Guild Court, Glasgow, for authority to erect a ventilating shaft for the railway upon the ground acquired by their predecessors from the trustees of St David's Church. The shaft was to be erected behind the church.

The petition was opposed by some of the neighbouring feuars on the Blythswood estate. They denied that the subjects on which the proposed shaft was to be erected had been lawfully acquired by the railway company under any statutory power which they possessed, and averred that the proposed erection was contrary to the stipulations and restrictions contained in the feu-contracts under which both the railway company and they themselves held, that it would be extremely hurtful to their properties, and would be a public nuisance.

The petitioners pleaded—"(2) The proposed erections not being in contravention of the conditions in the petitioners' title, decree of lining should be granted as craved. (3) The restrictions founded on having been departed from, and the respondents having acquiesced in their abandonment, they are not entitled to enforce the same, and decree of lining should be granted as craved. (4) The petitioners having obtained the sanction of Parliament to the erection of the venti-

lating shaft, and said shaft being to be erected at the elevation and in such manner as not to create a nuisance, the respondents' objections should be repelled, and decree of lining granted as craved."

The respondents pleaded—"(2) The proposed erections being a contravention of the conditions in the petitioners' titles, the petition should be refused with expenses. (2A) The proposed erections and works not being authorised by Act of Parliament, special or general, and being in contravention of the conditions of the title of said subjects referred to in the petition, the petition should be refused. (3) The proposed erection being injurious to the respondents, and the petitioners having no right to make the same, the petition should be refused with expenses."

By the 30th section of the Glasgow City and District Railway Act 1882 it was provided—"The quantity of land to be taken by the company by agreement for the extraordinary purposes mentioned in the Railway Clauses Consolidation (Scotland) Act 1845 shall not exceed two acres."

By section 37 it was, *inter alia*, provided, for the protection of the Provost, Magistrates, and Town Council of Glasgow as follows:—"(*e*) The company shall from time to time make all necessary provision for the ventilation of railway No. 1 to the satisfaction of the corporation, and the company shall not make in any road or street or in the footways of any road or street any openings, shafts, or vents for the purpose of ventilating the said railway except with the consent of the corporation for the admission of fresh air, which consent the corporation may at any time recal. . . . At least two months before the company commence any ventilating works in the city of Glasgow, they shall, from time to time, give to the corporation notice thereof in writing, accompanied by plans, sections, working drawings, and specifications, showing the manner in which any ventilating works are proposed to be executed, which plans . . . shall be subject to the approval of the corporation previously to the company commencing any such ventilating works." . . .

The subjects upon which the petitioners proposed to erect the shaft were conveyed to the original feuars by feu-contract dated in 1846. By that feu-contract it was provided that the feuars should be bound immediately, in so far as not already done, to erect and thereafter maintain, upon the ground feued, houses or other buildings of stone and lime and covered with slates yielding a yearly rent at least equal to double the feu-duty; and it was declared that the lands were disponed under the following conditions, namely:—"That the said second party and their foresaids shall make no use of the subjects above described except what is consistent with and agreeable to the system adopted by the said Parliamentary trustees for the uses of the adjoining property so far as the same is rendered obligatory on the feuars thereof by the terms of the titles granted to them, and in so far as the said Parliamentary trustees or their successors in office or the heirs of entail of Blythswood may be answerable that nothing be authorised inconsistent with or derogatory from that system, . . . and specially declaring that it shall not be in the power of the said second party or their foresaids to make use of any part of the said ground for depositing dung or rubbish except such as are produced within the lands above described, or to carry on any business of brewing, distilling, tanning of leather, making of soap or candle, glue, cudbear, vitriol, or to erect glassworks, foundries of brass, iron, or other metals, and steam engines, or to carry on any other business though not above enumerated which may be nauseous or hurtful, or occasion disturbance to the neighbouring feuars and disponees upon the estate of Blythswood, in whose favour it is hereby declared that this provision shall operate as a servitude upon the lands hereby feued."

It was also declared that the lands were disponed, *inter alia*, under the following condition, namely:—"(*Quarto*) Declaring that the houses or other buildings to be erected in the lands hereby feued shall not exceed three square stories, either in front or behind, besides a sunk storey, and the walls thereof shall be no more than fifty-two feet high above the level of the street, and the front walls of the said buildings shall be built of smooth stone ashlar of a white pile, and the office-houses (if any be) behind the same shall be built of stone, and shall not exceed twenty-one feet in height from the level of the ground to the ridge of the roof thereof."

Upon 30th April 1891 the Dean of Guild (URE) issued this interlocutor:—"Having considered the closed record, plan, productions, and whole process, and heard parties' agents thereon, finds that under the Glasgow City and District Railway Act 1882, now vested in the petitioners, under the North British Railway Act 1887, the powers and provisions therein as to the erection of ventilating shafts are confined to lands or property required for the purposes, and under the powers of the said Act, and do not extend to lands and subjects otherwise acquired, and situated beyond the lines and limits of deviation of the said railway: Finds that the subjects referred to in the petition, and upon which it is proposed to erect the ventilating shaft in question, are situated beyond and outside the limits of deviation of the said Act, and were not acquired under the powers of said Act: Finds that although it were held that the petitioners were proprietors of and duly vested in the subjects referred to in the petition (which is very doubtful), they nevertheless have no other or higher powers than those of any other proprietor, and are bound to conform to the conditions, restrictions, and obligations imposed in the original feu-contract of said subjects: Finds that the ventilating shaft proposed to be erected by the petitioners is in contravention of the conditions imposed in said feu-contract, in respect (1) of being greatly in excess of the height of buildings allowed to be erected on the ground so

feued, (2) as proposed to be built of brick instead of stone, and (3) for a purpose that cannot but be nauseous and hurtful to the neighbouring feuars in a district which is almost entirely residential: Therefore refuses the lining craved and dismisses the petition: Finds the petitioners liable in expenses to the objectors, &c.

"*Note.*—If the petitioners had authority under the provisions of the City and District Railway Act 1882, to erect the proposed ventilating shaft on the subjects in question, no application to this Court to sanction their proceedings was required. All that was necessary on the part of the petitioners before commencing operations was to give notice thereof two months beforehand to the Corporation, accompanied by plans, sections, &c., and obtain their approval of the same—section 37 (*e*). It seems, however, to be beyond doubt that the powers given by the said Act to erect ventilating shafts are confined to the lands and others compulsorily acquired under the Act and within the limits of deviation of the said railway. Admittedly the subjects referred to in the petition were not acquired under the powers of said Act, and are situated outside the limits of deviation. The petitioners therefore (supposing their title to be indisputable) have no further rights or powers over the subjects in question than those conferred by the original feu-contract between Miss Mary Campbell and the Reverend Doctor Smyth and others, dated 12th January, and recorded 5th March 1846, and the Court must hold that, not only as respects the height, but also as regards the character, purpose, and construction thereof, the proposed erection in the centre of a first-class residential district is a clear infringement of the conditions and restrictions in said feu-contract.

"The allegations of the petitioners in regard to the violation of the restrictions in said feu-contract in other properties are very vague and unsatisfactory, but even assuming the violations condescended on to have taken place, they are not, in the opinion of the Court, of such a character as to bar the defenders, on the ground of acquiescence, from insisting in their present objections, or to render nugatory the whole conditions in the feu-contract, and specially the clause as to buildings of a nauseous or hurtful description which, in the centre of a district chiefly residential, the proposed erection would undoubtedly be."

The petitioners appealed, and argued—(1) It was admitted that the railway company had not acquired the land upon which they proposed to build this ventilating shaft under the powers in their Act, and that it was not within the limits of deviation allowed by the statute. They had purchased the land as private proprietors, and were entitled to carry out any works upon their own property they wished to, unless they were restrained by the conditions of their contract. Under section 37 (*e*) they were not bound to construct ventilating works upon ground acquired by them under the Act, but they might erect them wherever they found it suitable to do so, if they had the consent of the Corporation, and that had been obtained. (2) *On the right of the neighbouring feuars to object*—The restriction as to the kind of building to be erected on the ground feued was only for the benefit of the superior, and there was no restriction as to the height of the chimneys which the proprietor of the feu might consider desirable—*Banks & Co.* v. *Walker*, June 5, 1874, 1 R 981. The neighbouring feuars have no *jus quæsitum* to entitle them to object to the proposed erection, because as regarded the building restrictions there was no mutuality of right and obligation established between the feuars by the terms of the feu-contracts. Something more than the mere fact that there were similar restrictions in various contracts granted by the same superior was necessary to establish that. Either the contract must contain an express provision that the superior should insert the same restrictions in all other feus granted by him in the same locality, or there must be a reference to a common plan of feuing—*Macritchie's Trustees* v. *Hislop*, December 17, 1879, 7 R. 384, June 23, 1881, 8 R. (H. of L.) 95. It might be said that there was a reference in the feu-charter to the system of the Parliamentary trustees, which was sufficient to show mutuality between the feuars according to that case, but it was not explained what that system was, and admittedly it had been departed from in many cases. The superior did not object, and in the circumstances the respondents had no title to object—*Miller* v. *Carmichael*, July 19, 1888, 15 R. 991. Further, the clause prohibiting the feuar from carrying on any business of a nauseous or hurtful character was made a servitude upon the lands conveyed, whereas the other restrictions were not, and it was therefore a fair inference that the right of one feuar to object to the operations of another was confined to the operations prohibited by that clause. The erection of this chimney would not be "nauseous or hurtful," and therefore did not fall under the prohibition contained in that clause. The only way to decide whether or not it would be a nuisance was to allow the shaft to be put up, and if it proved a nuisance the company could be made to take it down. Rankine on Land Ownership, 398; *Frame* v. *Cameron, &c.*, December 21, 1864, 3 Macph. 290; *Naismith* v. *Cairnduff* June 21, 1876, 3 R. 863; *Buchanan* v. *Marr*, June 7, 1883, 10 R. 936; *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141.

The respondents argued—(1) The operations which the petitioners proposed to carry out in putting up this shaft were *ultra vires*. They had got power from Parliament to make this railway and to take land for the necessary purposes in making it, and they were also taken bound to have the railway ventilated. That was one of the purposes indicated in the Act, and it could only be carried out upon land acquired under their Act. Here, however, they bought ground as private proprietors and then proceeded to carry out upon it railway work. That

was a mere evasion, because, if they had scheduled this ground for the building of a ventilating shaft, the neighbouring proprietors might have opposed the scheme in Parliament with success. Under the Lands Clauses Act 1845, a railway was entitled to take land for extraordinary purposes, but by section 30 of the petitioners' Act that amount was restricted to two acres, and it was not said that this land was taken under that clause. (2) Assuming however that the railway company were entitled to buy this land for railway purposes, still they were not entitled to erect this shaft thereon, because of the restrictions in their feu-contract, which the respondents had a right to enforce, in respect that their feu-contracts contained similar restrictions. If it was necessary to create mutuality that there should be something more than that, as was sought to be shown by the case of *Macritchie*, it was found in the reference to the system of the Parliamentary trustees. If the system had been in some parts departed from, that did not destroy the right of the feuars to insist upon the restrictions in the contract of one of their number being strictly carried out if he were doing something which would injure them. The erection of this chimney was struck at by the clause in the charter concerning nuisance. It was plain that the erection of a large chimney for carrying off the smoke, &c., which accumulated in this tunnel, would be a nuisance in such a residential part of the town as it was proposed to build it in, and the Dean of Guild was entitled to refuse a lining for it on that account—*Magistrates of Edinburgh* v. *Brown*, January 17, 1833, 11 S. 255.

At advising—

LORD JUSTICE-CLERK—The North British Railway, who have a line which runs below a considerable part of the City of Glasgow, are under an obligation, enforceable by the Town Council of Glasgow, to have the underground part ventilated, and in their endeavours to carry out that obligation they have purchased property not very far from Blythswood Square in Glasgow, and they propose to make a ventilating shaft from the top of their tunnel running at right angles to the street, but some distance off the street, and then to erect a brick shaft for the purpose of carrying off the foul vapours from the inside of the tunnel. They propose to do this on ground acquired by a separate purchase. There is no question whatever of the railway company's right in the matter; it is not disputed that they have a right to acquire this ground, and the right to use it, except in so far as they may be restricted by contract, they coming into the position of the original feuar. All questions also between the superior and the feuar are out of the case, because the superior does not object to what the railway company propose to do, and the sole question which is before us is whether neighbouring feuars have a right to prevent the railway company's action. Now, their right to interfere with one of the Blythswood feuars, in doing what he thinks proper to do upon his own ground in the matter of building, must, if it exists, be something of the nature of a servitude of a dominant over a servient tenement. There is no contract whatever between the feuars who are objecting to this being done and the railway company, and therefore a servitude must be found, if it exists, to be imposed on the railway company by the conditions of the feu-contract, to which they have got a right by purchasing the property from the previous proprietor.

Now, it has been I think very clearly and distinctly decided by the House of Lords in the case of *Hislop*, that where a feu-charter from a common superior contains the same conditions as regards the different feuars in a particular street or district, and where all the feuars have an interest in the observance of the conditions which are set forth in these corresponding contracts, notwithstanding that a feuar may have no right whatever to enforce the conditions against the other feuars, unless he has by direct stipulation in the titles, or by implication, a right to do so. The case of *Hislop* was certainly one of the strongest cases that could be conceived in favour of the feuar, if he had any right in law at all. It was a case in Gayfield Square here, where the feuars were taken bound by the superior to build houses of a particular style, of a particular height, and at a particular distance back from the street, and to maintain the ground in front of the houses free from buildings and to maintain a particular style of railing next the street. Now, Mr Hislop proceeded to build up the whole front garden up to the street, and in fact completely to change the whole aspect of the place, and necessarily to place a dead wall next the neighbouring feuar. If ever there was a case in which an implied right existed on the part of one feuar to interfere with a neighbouring feuar, in consequence of there being conditions imposed on all the feuars by the superior to build in a particular way upon their ground, it would have been in that case; but it was held by the House of Lords, and it was the opinion of one of your Lordships in the Court of Session, that the feuar, apart from express stipulation of right by his title, could not do so.

Now, it really comes to be a question here of what is the state of the titles of the feuars of this district, and whether they have by their titles any right, as against neighbouring feuars, to prevent them from doing such a piece of work as is proposed to be done by the North British Railway. In the particular titles which are before us, it is remarkable that there are certain stipulations made by the superior to which he attaches absolutely the condition, that they shall operate as a servitude in favour of other feuars. These have to do with certain businesses, which the feuar is forbidden to carry on upon the ground feued. It is declared "that it shall not be in the power of the said second party or their foresaids to make use of any part of the said ground for depositing dung or rubbish, except such as are produced within the lands

above described, or to carry on any business of brewing, distilling, tanning of leather, making of soap or candle, glue, cudbear, vitriol, or to erect glassworks, foundries of brass, iron, or other metals, and steam engines, or to carry on any other business though not above enumerated which may be nauseous or hurtful, or occasion disturbance to the neighbouring feuars and disponees upon the estate of Blythswood, in whose favour it is hereby declared that this provision shall operate as a servitude upon the lands hereby feued." Therefore it is quite plain that careful consideration was given to those matters in the interest of the feuing of this part of Blythswood estate, and it was thought advisable to give each feuar a servitude right against the remaining feuars; but most certainly, beyond what is there specified, there is nothing at all touching the proposed erection by the North British Railway, unless it be suggested that it was the carrying on of a nauseous or hurtful business. The erection of a shaft to carry off vapours cannot in itself be so held. It is of course a totally different question, and one independent altogether of the titles of these parties, whether, if after this erection is made, it turns out a nauseous business, or hurtful to the neighbouring feuars, it cannot be put down as a nuisance; but I do not think that can possibly be decided except upon the facts as they arise. It would be anticipating what the railway company may do if they are allowed to put up this shaft, and anything they may do they will do at their own risk.

Now, that stipulation being in the titles of the feuars of this district, I find that there are other stipulations made in reference to such matters as the height of houses, the making of sewers, and so on, the usual clauses which are to be found in the titles relating to a residential neighbourhood; but these, I take it, must be held under the case of *Hislop* to be stipulations entirely as between the superior and the individual feuar, and that no *tertius* can come in and attempt to enforce them. If the superior does not choose to enforce them, they cannot be enforced by anybody else. It is quite certain that in this particular district a very large number of these stipulations have been set aside in actual practice upon the estate, and the superior is not only not objecting, but is a consenting party to what is proposed to be done; and therefore I am compelled, following the case of *Hislop*, which I think went very far in this direction, to hold that the decision of the Dean of Guild here is wrong, and that he was not entitled to refuse a lining to the railway company, who propose to erect this shaft upon ground belonging to themselves, and we must recal his judgment, and remit back to him to grant the lining craved.

I would only like to say, that while not a matter of legal stipulation at all, it was publicly stated to us—and it was just what one would expect from a great company, like the North British Railway—that while they are proposing to erect the ventilating shaft of brick, they do not intend in the event of its proving satisfactory, to keep it in a hideous and unsightly condition at that place. I am quite sure that they will face it up properly so as to make it as little as possible an eyesore to the neighbourhood; but we have only to settle the question of what is their legal right, and I am of opinion that their legal right is to have the authority to erect the ventilating shaft which they ask.

LORD YOUNG—I concur. I think it is very important to keep in view that the railway company are not only entitled but are bound to ventilate their underground railway to the satisfaction of the Town Council, and the Town Council thought that the most satisfactory, if not the only satisfactory, way of performing this statutory duty was that the railway company should acquire a piece of ground outwith the limits of deviation and upon that to put the necessary shaft in order to accomplish the ventilation which it was their duty to accomplish somehow or other. They did acquire this property, which happened to be a church, and adjacent to their line, although beyond the limits of deviation. It is their property now, and I am of opinion that no objection can be stated on the part of the objectors to the right of the railway company to become the proprietors of that subject which they are at this moment.

Another objection to what they propose to do with the approbation of the Town Council in the discharge of their statutory duty is, that they have no statutory authority to make any erection upon that ground. If they required statutory authority to do it, that objection would be unanswerable, but I think it clear that they require none. They are, however, not entitled to do anything which any ordinary citizen of Glasgow acquiring this property would not be entitled to do. Now, an ordinary proprietor acquiring this property would be entitled, or he would not, to make this erection, according or not as it was a violation of the feu-contract upon which the ground was acquired, or an unlawful use of it in itself irrespective of that.

Now, to take the last question first, I think it clear enough that no use unlawful in itself is proposed. The idea of a ventilating shaft with a chimney being an unlawful erection in the city of Glasgow is a strange proposition I must say.

Of course the question of nuisance remains. If the use leads to the production of a nuisance then it may be stopped, but I cannot adopt the view of the Dean of Guild that it cannot be but nauseous and hurtful to the neighbourhood. That I suppose means—I do not think it is intelligent if it means anything else—that the discharge by the ventilating chimney will be nauseous and a nuisance. Well, we are assured that it will not, but that if it is it will be stopped. If it turns out to be a nuisance it will be stopped by compulsion if not done voluntarily. The Dean of Guild

cannot mean, I suppose, that the very sight of a chimney is nauseous and hurtful, and that it would depopulate the place immediately it was put up.

But then the question arises, is it against the conditions of the feu? I am of opinion with your Lordship that it is not. We have no concern with the superior, who assents to the erection of the shaft, and therefore we only determine under this head that it is not in violation of any obligations put upon feuars in favour of other feuars upon the Blythswood property. I do not enter into details; I think it is sufficient to state the conclusion, which is in accordance with the opinion which your Lordship has more fully expressed. It would be a sad pity if the ventilation of this underground railway was hindered or delayed merely because the people about Blythswood Square did not like the look of the chimney. If a nuisance results it will be stopped, or the nuisance will have to be abated in some way or other.

Your Lordship has noticed what was stated at the bar by the learned counsel, that this erection might be made ornamental, and as unlike a chimney as the ingenuity and the taste of an architect could devise. I am afraid that it would still maintain its distinctive appearance as a chimney, and I think there had better be no attempt made to disguise it. It may be built of stone, if that is thought more beautiful than brick, but I should think it would not be very long before it assumed a colour in which stone would not be distinguishable from brick; but that is of no moment. I agree with your Lordship that the Dean of Guild is wrong, and that the railway company should get the decree sought.

LORD RUTHERFURD CLARK—I am bound to follow the case of *Hislop*, and on the authority of that case I hold that the respondents are not entitled to enforce the conditions contained in the title of the appellants. I think it right, however, to say that I do not read that case as deciding that such a title can be given only by express words. I do not think, however, that it can be inferred from the deeds which are before us in the present case. The case of *Hislop* was in my judgment a much stronger one than the present for holding that the conditions might be enforced by the feuars, but the decision of the House of Lords negatives the existence of any such right.

LORD TRAYNER—I concur with your Lordships in thinking that the Dean of Guild has gone wrong in pronouncing the judgment brought under appeal, and I cannot help saying that the three reasons upon which the judgment seems to have proceeded are each and all of them in my opinion quite unsound. The last-mentioned, but which evidently bulks most largely and most influentially in the mind of the Dean of Guild, is, that the proposed erection would be a nuisance. I think that there he anticipates what is not an ascertained fact; and more than that, that he is assuming a jurisdiction that does not belong to him, because the question whether this is or may be a nuisance is one which the Dean of Guild is not competent to try.

The second ground of judgment which I would refer to is, that the railway company are not entitled to do this, because the proposed erection is outwith the limits of their deviation, and because it is against the statute. The Dean of Guild has misapprehended the provisions of the statute entirely. They are not proposing to put up this ventilating shaft under the statute, they are proposing to build the shaft upon property acquired by them as individual proprietors, and unless there be something in the title to the subjects which excludes their exercising this right as one of the rights of property, then they must be allowed to exercise it.

That brings me to the third and last of the reasons of the Dean of Guild in giving this judgment, which is that the proposed erection will be foreign to the conditions of feu. Upon that matter I need say no more than that I entirely concur with your Lordships in the views which you have expressed. I think the judgment of the Dean of Guild ought to be recalled, and the case remitted back to him with instructions to grant the lining.

The Court recalled the interlocutor of the Dean of Guild, and remitted to him to grant a lining for the proposed erection.

Counsel for the Appellants—Cheyne—Comrie Thomson—C. S. Dickson. Agents—Millar, Robson, & Co., S.S.C.

Counsel for the Respondents—Jameson—Aitken. Agents—Forrester & Davidson, W.S.

Friday, July 3.

FIRST DIVISION.

[Lord Low, Ordinary.

BURRELL AND OTHERS *v.* MACBRAYNE, *et e contra.*

Ship—Collision—Reparation—Compulsory Pilotage—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 388.

This section provides—"No owner or master of any ship shall be answerable to any person for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

The steamship "Strathspey" under command of a pilot left dock at Glasgow at half-past five on a January night to proceed down the Clyde. There had been an unusually high tide, and a heavy land-flood, and the seaward stream was very rapid. A strong gale was also blowing across the river from north to south. Of the two alternative