proof was not in conformity with the Act of Sederunt of 10th March 1849 which was passed to regulate proof in the courts of royal burghs, and which by sec. 2, sub-sec. 1, provides, *inter alia*, as above quoted, "that the interlocutor allowing proof shall appoint the place where it is to be taken" . . . This provision was not complied with.

Authority — *Wright* v. *Wightman*, 3d Oct. 1875, 3 R. 68.

Counsel for the respondent was not called on.

LORD PRESIDENT—There are two points which have been submitted to us under this appeal, both of which have reference to the competency of the proceedings in the Burgh Court. The first of them is whether in a case of this kind that Court has jurisdiction. This is a petition for ejection—a process which is competent in any inferior Court, and therefore perfectly so in Burgh Courts, and that being so, I am quite clear upon the matter of jurisdiction.

The other point which was argued to us related to whether the magistrates had not failed to comply with certain provisions contained in the Act of Sederunt of 10th March 1849 to which we were referred. Now, it is quite possible that they may not have strictly complied with all the provisions contained in this Act, but the question comes to be whether this failure is to result in a quashing of the whole procedure which has followed thereon. I am clearly of opinion it is not. No objection was taken at the time to what was done, and a judgment was obtained on the merits. Had the Act of Sederunt provided the penalty of nullity to follow upon the non-compliance with its provisions, that would have been a very different matter, or had there even been a penal provision effect would have required to have been given to it, but there is neither the one nor the other. I am therefore for refusing this appeal.

LORDS DEAS, MURE, and SHAND concurred.

The Court refused the appeal.

Counsel for Appellant—Rhind. Agent—James M'Caul, S.S.C.

Counsel for Respondent—J. Burnet. Agents—Campbell & Smith, S.S.C.

Wednesday, January 10.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HISLOP & OTHERS *v.* THE KELVINSIDE ESTATE COMPANY TRUSTEES.

Property — Neighbourhood — Nuisance — Burning "Blaes" — Smoke — Offensive Smell — Coming to Nuisance — Superior and Vassal — Interdict.

The proprietors of an estate, situated on the confines of a large city, commenced to feu out the land in building lots for dwelling houses of a superior class. The coal and ironstone in the lands had previously been worked out, but there remained on the surface of the ground after the workings were abandoned several large heaps of "blaes." After a considerable part of the lands had been feued and many houses in streets and detached villas had been erected by the feuars, the proprietor set fire to one of the heaps of blaes in the immediate vicinity of the houses, and proposed to set fire to others. In a petition for interdict at the instance of the feuars and certain proprietors of houses in the neighbourhood, *held*, after a proof, which established that the fumes emitted by the heaps in the course of combustion, though not directly injurious to health, were in certain directions of the wind productive of material discomfort to the dwellers in the houses, that the petitioners were entitled at common law to have an interdict against the ignition of any other heaps of blaes in the vicinity of their houses, as a nuisance, and the plea that in the circumstances they were barred from complaining because they had come to the nuisance *repelled*.

The Kelvinside Estate Company were proprietors of a large area of land lying to the west and north-west of the city of Glasgow. For many years previously to 1881 the Kelvinside estate had been treated principally as a mineral property for the working of coal and ironstone. About the end of that year the mineral workings were finally abandoned. Some years previously the trustees of the company had commenced to feu out the lands in lots for the erection of self-contained houses and villas of a superior class; and streets had been laid out and houses erected to the extent of forming a new residential suburb of considerable size. But the greater part of the lands still remained unfeued. In consequence of the mining operations the surface of the ground became encumbered with large heaps or bings of mineral refuse, consisting of a kind of clayey shale called technically "blaes." These bings or heaps were of various dimensions. The largest of all contained 102,500 tons of blaes, and the smallest 5100. The combined amount was 263,800 tons, occupying upwards of 9 acres of land. The largest heap was of a maximum height from the ground of 55 feet. The material composing them was for the most part combustible. On 14th December 1881 the smallest heap—that of 5100, situated on the farm of John Semple, an agricultural tenant of the trustees, and known as No. 6 pit—was set fire to, with consent of the trustees, by their mineral tenants, who were under an obligation to remove them at the expiry of their lease.

The present action was raised in the Sheriff Court of Lanarkshire at Glasgow by certain proprietors of houses built on ground feued from the Kelvinside estate, along with some other proprietors in the same neighbourhood who were not feuars of the Kelvinside trustees, to interdict the trustees from continuing to burn or calcine the blaes heap to which they had already set fire, and from again setting fire to it or to any other heap in the lands of Kelvinside.

The pursuers pleaded—"(1) The burning and calcining of the said heap being a nuisance, and injurious to the health and comfort of the pursuers and inhabitants of the neighbourhood, the pursuers are entitled to decree and interdict as craved. (2) The procedure of the defenders being in violation of the rights of the pursuers, both at common law and under their titles,

decree ought to be granted as craved. (3) The defenders having refused to remove said nuisance or to adopt any means to remedy or abate the same, the pursuers are entitled to decree, both interim and final, as craved."

The defenders pleaded—"(2) The burning of the blaes heap being a perfectly legitimate exercise of the defenders' rights of property, and not being in any way a nuisance, the defenders are entitled to absolvitor, with expenses. (3) The fire complained of having attained such strength that it cannot now be extinguished except at enormous expense, it must be regarded as a completed act against which interdict cannot be competently granted. *Separatim*, no sufficient cause having been shown for granting interim interdict, interim interdict should be refused."

It appeared from the evidence that the material composing these heaps, was entirely useless in its natural state, and could not be removed without great expense. The only way in which it could be utilised was to set fire to it, when what remained after the combustible matter was burned off had a certain commercial value as a road-making material. If left as they were and levelled or spread over the ground, the heaps of blaes would be liable to accidental ignition at any time, to the serious danger of the property built over it. The heaps of blaes were situated to the north-west of the pursuers' houses. The heap which was burning at the date of the action was the nearest one to the houses. It was within 185 yards of one of them, 270 yards from another, and 160 yards of the Great Western Road. Another bing of 36,700 tons was 200 yards from the second of these houses, but none of the others were nearer than 300 yards, and the largest 500 yards from any of the houses.

Much scientific evidence of engineers, chemists, and physicians was led on both sides. It appeared from this evidence that though on analysis of specimens it was impossible to predicate from one specimen the precise proportional constituents of another, taken either from the same heap or a different one, the material of all the bings contained the same component parts, and that among these were gas, tar, and crude paraffin, which in the process of combustion would give off a considerable amount of fumes and a very distinct smell. The vapour given off was increased in volume by wet weather. The fumes were heavy, and did not rise like ordinary smoke and became dissipated in the air, but crept along the ground. Mr Clark, one of the City Analysts, and Dr Andrew Fergus, witnesses for the pursuer, deponed to having traced the fumes over a ridge of ground, in a dip of the road, at a distance of 650 yards from the bing, while according to the defender's evidence the fumes were not traceable beyond 50 or 60 yards. The result of the whole evidence was to the effect, that the fumes were such as were disagreeable, and would cause discomfort to the inhabitants of the houses, some of the pursuers' scientific witnesses going the length of saying that if the largest bing were burning the houses would be rendered "uninhabitable," and the roads "unpassable" in certain directions of the wind. The fumes would prove more or less a nuisance according to the amount of blaes on fire at once, the proximity of the burning masses to the houses, and the direction and strength of the wind. Dr Grant, Professor of Astronomy, deponed from notes of several years' observations, that the least prevalent winds were (with the exception of the south-east) the north and north-west, and that the prevailing wind throughout the year was the south-west. The medical evidence on the point of injuriousness to health did not go beyond the opinion, in the part of the pursuers' witnesses, that the fumes might be dangerous to persons in a delicate state of health.

It appears that once the larger masses were set on fire there was no way either of extinguishing them or regulating the consumption. Were they to be consumed in detail, the time of consumption might extend to ten years, and could not be less than five.

The Sheriff-Substitute (SPENS) found, *inter alia*, "that the defenders, or persons with their authority, set fire to the heap of blaes at No. 6 Pit on or about 14th December last, said heap consisting of about 5,100 tons: Finds that at the last diet of debate said heap was admittedly still burning: Finds, for the reasons in note subjoined, that it is unnecessary to make any order with reference to said heap of blaes. *Quoad ultra*: Finds it is avowedly the intention of the defenders to set fire to the other heaps of blaes above specified unless interpelled by legal authority: Finds that petitioners are entitled to interdict as craved against the defenders setting fire to all or any of said heaps of blaes, in respect that a nuisance would be caused thereby: Therefore, so far as not given effect to by the preceding findings, repels the defences, and grants interdict against the defenders burning or calcining said heaps of blaes. . . .

"*Note.*—This case has been conducted and debated on both sides as one of great importance. On the one hand, it appears that the pursuers consider that if fire were allowed to be set successively to the heaps of blaes marked on the plan, as at the worked-out pits 8, 7, 5, and 4 respectively, a nuisance would result, and would exist for a period of not less than ten years; while, if the whole of these heaps of blaes were set fire to at once, the nuisance that would emerge would be so bad (although it might last only for a couple of years) as to render every house in the neighbourhood utterly uninhabitable. On the other hand, the defenders say that there is no intention whatever to set fire to the said heaps of blaes at one and the same time; while it is frankly admitted that it is the intention to set them on fire successively unless they are interdicted from so doing: that these heaps of blaes are the residue of the mining operations which have gone on in the district, and that, in the interests of all parties, at the cost of some trifling inconvenience not amounting to a nuisance, it is advisable they should be disposed of, and practically the only way in which they can be disposed of is by burning. It was stated in evidence by one of the witnesses for the defenders, and remains uncontradicted, that the expense of removing these heaps could not be less than 2s. 6d. per ton; and as the four heaps in question amount altogether to close upon 260,000 tons, the expense of removal would come to over £30,000; and this, the defenders say, makes it impracticable for them to remove them. Defenders further say, in their present unburned state the blaes heaps are unmerchantable and unuseable; and except that they might perhaps be used in connection with brick-burn-

ing (which would be equally bad, if not worse, for the petitioners), the evidence is to the effect stated; whereas, whenever these heaps of blaes are burned, the residue becomes available to be spread on footways and for other purposes; and not only that, but a price is obtainable for it.

"A large amount of conflicting evidence has been led on either side respectively with reference to the fumes of the burning heap at No. 6 pit, and to the effect of setting fire to the heaps in question other than the burning heap.

"It is not my intention to make a minute analysis of the evidence led on either side. On the one hand petitioners adduced, of what may be called scientific witnesses, Mr Rankine, Civil Engineer, and Drs Clark, Tatlock, Beath, Fergus, and Christie, to prove that a nuisance, and one dangerous to health, would result by the firing of the heaps of blaes in question. On the other hand, defenders adduced Mr Robertson, C.E., Professors Ferguson, Leishman, Mills, and M'Kendrick, and Drs Hay and Craig, to give evidence to a contrary effect, as well as Professor Grant, to speak, however, solely to the prevailing direction of the wind in the locality. Much of the evidence of these witnesses is purely speculative; and, of course, I lay greater stress upon facts positively deponed to than on any amount of speculative evidence. Thus, for instance, when Dr Clark (who is corroborated by Dr Fergus on this point) speaks to tracing the fumes of the burning bing at No. 6 pit a distance of 650 yards, unless I were to believe that he is giving false evidence—which is out of the question—I necessarily arrive at the conclusion that Mr Robertson is certainly wrong when he says that the fumes of the large bing at No. 8 (being twenty times the size of the one at No. 6), if set fire to would not be perceptible at a distance of 400 yards.

"I have in this case to deal with five different heaps. One of these heaps is the heap at No. 6 pit as shown in the plan. It was admittedly fired by defenders on 14th December. With regard to it, petitioners crave that the defenders be interdicted from continuing to burn it, and they further crave that the defenders be ordained instantly to extinguish it, and on its being extinguished they crave interdict against its being again set fire to. These cravings proceed alternatively upon an allegation that in setting fire to this heap defenders have violated an express or implied agreement with the petitioner Hislop, who is one of their feuars, and otherwise on the ground that it is at common law a nuisance. This heap consists only of 5100 tons. I use the word "only" because comparatively with the other heaps it is a mere trifle in respect of size and quantity of material. There seems to be no doubt whatever on the evidence that Mr Fleming avowedly set fire to this heap as a test of what the effect of setting fire to the other heaps would be. I have found in the preceding interlocutor that it is unnecessary to make any order with regard to this heap. I made the finding for the following reasons:—(1) I incline to think on the evidence that it would be a matter of very great difficulty, if not of impossibility, to extinguish this heap at the present time. In the second place, it does not appear to admit of dispute that the heap which has now been burning for about four months is very nearly burned out, and as it is very certain, from the statements at the bar, that whatever judgment I gave would be appealed, it seems clear on the evidence that before this case is finally disposed of the heap in question will be wholly burned out. Therefore it appears to me that it is not necessary in this case that I should determine what in these circumstances is merely a speculative question, viz.—Whether defenders were or were not entitled to set fire to this heap of blaes? The question, whether under the contract between the proprietors of Kelvinside and Mr Hislop, apart from the common law question of nuisance, the defenders were barred by express or implied agreement from setting fire to a heap of blaes within 200 yards of Mr Hislop's feu, is a difficult one; and as regards the question of nuisance at common law, I merely propose to use in the present case the evidence as to this matter as bearing upon the only important question, viz.—Whether the setting fire to the other heaps would constitute nuisances at common law? There is no claim of damages in the present action, and there is nothing whatever in the present case to prevent the petitioners, or any of them, instructing damages in another action if they have a valid claim against the defenders.

"In connection with the word nuisance, it may be well at once to clear away any possible misconception which might arise from portions of the evidence which have to do with the terms of the Public Health Act of 1867. A nuisance in the sense of the 16th section of the Public Health Act must be something which is 'injurious to health.' A good deal of evidence was led on the part of the petitioners to prove that the smoke and emanations arising from burning heaps of blaes of the kind in question would be injurious to health; and on the other hand a considerable amount of rebutting evidence on this point was adduced by defenders. All the medical men examined were specially questioned as to this matter, with the result of bringing out a not uncommon divergence of medical opinion. I intend to say no more on this point here, except that on the evidence I think petitioners have failed to establish that the burning of the heaps in succession would be injurious to health. Therefore, if it were to be held that petitioners were not entitled to their interdict unless their allegation on this head were proved, I would have had no hesitation whatever in deciding against them. But the question of whether a certain thing does does not constitute a nuisance at common law, does not depend necessarily by any means on its being something which is injurious to health. Of course anything may be made illegal or a nuisance as by paction between two parties; but when there is no paction the question is entirely one of circumstances; that which is a nuisance in one particular locality would not be a nuisance in another, and a person who came and sat down in a locality where some work was going on which he would have been entitled to interdict had it been set up after his arrival, would be held to have no good title to insist on its removal when he himself had come to the alleged nuisance. Then, again, that which might be held to amount to nuisance in what is known as a residential locality, might be held in a manufacturing locality to be no nuisance. Generally speaking, however, a nuisance may be defined to be anything noxious or offensive or

dangerous to life or health, or rendering the neighbourhood uncomfortable. This general proposition appears to me to be so well fixed as to render it unnecessary to quote authority with reference to it. . . . . .

"In conclusion, it seems to me tolerably clear that if the defenders were allowed successively to fire the heaps of blaes I have been dealing with, it could not safely be predicted that the fires would be extinguished within a period of ten years. I cannot doubt that the result of this would be to some extent to diminish the present value of houses in the vicinity. As the feus in Montgomerie Crescent were given off by defenders as feus for residential purposes, I am of opinion that defenders cannot be allowed to proceed with the operation contemplated, which would, I think, have the effect of diminishing not only their residential value but also their actual present pecuniary value. But the defenders say their bings are interfering with the feuing operations contemplated in the neighbourhood, they must be got quit of somehow, and the only practicable method of disposal is to burn them. It seems to me that if the preceding observations as to the firing of these bings constituting a nuisance to the feuars on the Kelvinside estate are well founded, this is no valid argument. The answer simply is—'It is no matter to us how you dispose of these heaps, or whether you dispose of them at all; but you are not entitled to cause a nuisance to us because you propose to feu more ground.'"

The defenders appealed to the Sheriff, who recalled the Sheriff-Substitute's interlocutor, found that no case had as yet been made out for the intervention of the Court, and therefore refused the interdict and dismissed the petition for reasons thus summarised in his note:—

"1. The operations sought to be interdicted are those usual in the circumstances, and must therefore be held to have been in contemplation of all concerned from the beginning.

"2. If these operations were to be interdicted the heaps in question would remain to encumber the ground, to disfigure the locality, and to become a probable source of danger in the future.

"3. In so far as at present appears on the proof, these operations, if properly conducted, will not be attended with any injury to health, or with any serious inconvenience or discomfort—certainly not with more than the pursuers are bound to submit to for the common benefit, including their own.

"4. It is highly improbable that the defenders will conduct their operations in such a manner as to be injurious to the pursuers or others in the locality, because to do so would be to defeat their own interests. None can have a greater interest in maintaining the salubrity and amenity of the district than the defenders.

"5. No case has as yet been made out for the interference of the Court; but if in the course of the contemplated operations the defenders are found to be exceeding their powers, and causing injury to the neighbourhood, the remedies of interdict or damages, or both combined, will always be available."

The pursuers appealed to the Court of Session, and argued—The burning of these heaps was a nuisance, and this could not be met by the plea that the pursuers came to the nuisance, for they did so at the invitation of the defenders, and when they took their feus they had no notice that the bings were to be set on fire. When they came to them they were innocuous, and had been rendered noxious by ignition since. The pursuers could not be held to have looked forward to their removal by burning, which was a mode of cheaply making the blaes into a marketable commodity for the defenders' profit. Besides, the old *dictum* about coming to the nuisance barring the right to complain was now exploded, and it was not now enough for the creator of the nuisance to show merely that the complainer came to him after he had begun to commit it; he must show a prescriptive title to do so — Rankine on Land Ownership, p. 305–7; Ker on Injunctions, p. 208; *Bliss* v. *Hall*, 4 Bingham (New Cases) 183; *Tipping* v. *St Helens Smelting Company*, L.R., 1 Chan. 66, 11 Clark (H. of L.) 642; *Crump* v. *Lambert*, L.R., 3 Eq. 409; *Carey* v. *Leadbitter*, 13 C.B. (N.S.) 470. Nuisance was always a question of circumstances. It is not necessary to show that it is directly injurious to health; it is enough to them to show substantial discomfort. They could be removed without burning, and it was no answer to say that burning was the cheapest way, and that any other would cause great expense. The question of expense was the defenders' business.

The defender replied—There was no nuisance here, only a little personal discomfort, and that only on the few occasions when the wind was in a certain quarter. The pursuers had failed to show that the fumes were injurious to health, and till they could show actual injury to health or property they were not entitled to interfere with a lawful and profitable operation of trade. But even assuming there was a nuisance, the pursuers having come to it were precluded from complaining. Though this doctrine has lately suffered some modification in England it has never been overruled in Scotland, and is applicable to the circumstances of this case, for when the defenders took their feus they must have anticipated the removal of the blae by burning, since that was the mode everywhere adopted—*Tipping, supra cit.;* Rankine on Land Ownership, p. 315; *Dewar* v. *Fraser*, M. 12,803; Bell's Prin. 974–8.

At advising—

Lord Justice-Clerk—In this case the Judges in the Court below have differed in their judgments. The Sheriff-Substitute has decided in favour of the pursuers, and has granted interdict, and the Sheriff has recalled this judgment and refused interdict. What I now propose to your Lordships is to revert to the judgment of the Sheriff-Substitute. As I concur in the reasons of his judgment, I shall shortly state the grounds on which I rest this opinion, though indeed the Sheriff-Substitute has already stated them with great fulness. These proceedings have been taken at the instance of certain proprietors who were feuars of the Kelvinside Estate Company, now represented by the trustees, who have been made respondents in this complaint. There are also among the pursuers certain neighbouring proprietors who are not feuars of the defenders' land, but who are substantially in the same position, and their complaint is that the trustees of the Kelvinside estate, which was formerly, and is still said to be to a great extent, a mineral pro-

perty, have set on fire a heap of blaes or refuse from the deserted ironstone workings in close proximity to the residences of the complainers, and are threatening to set on fire certain other heaps. It appears that prior to the year 1881 there had been a good deal of mineral working on this estate, and in that year a great amount of the mineral working ceased, and ten heaps of what is called blaes, by which I understand refuse or superfluous rubbish, were left lying on the ground where they had collected in the course of working, in the immediate vicinity of the complainers' property. This district consists partly of detached villas, and partly of a row of houses called Montgomerie Terrace. In short, the city of Glasgow has fairly reached that quarter. The blaes heaps consist substantially of inflammable matter, and of course solid components. The mode in which it is proposed to get rid of these heaps is that usually adopted, destructive distillation—that is, to set them on fire, and allow them to burn until they extinguish themselves, and that has the effect of driving off the inflammable material, leaving a certain amount of dross. This is said to be the usual procedure, and the one adopted in other places. Now, these heaps are exceedingly extensive, amounting in all to 260,000 tons. If once these heaps are set on fire, it is clear from the evidence that nothing will extinguish them, and that it will take a very long period before they will burn out. One of the heaps alone contains no less than 100,000 tons. In order to test this matter, Mr Fleming, one of the defenders, set fire to the smallest of the heaps, with the result that it has burned for four or five months, and therefore it may be taken for granted that if all, and particularly the largest—the 100,000 ton heap—were kindled it would continue to burn for a much longer period. The injury, it may therefore be said, would be certainly a continuous one. On the other hand, it is contended that no injury will be created at all by the burning of these heaps. I have come to be of the opinion of the Sheriff-Substitute that this process of distillation or burning the blaes is not injurious to health, but it is impossible to read the evidence without seeing that it would be productive in certain directions of the wind of a considerable amount of discomfort and annoyance. Now, I think that is quite enough to entitle the pursuers to the remedy asked, unless there is some good answer otherwise on the part of the defenders. It is said that this is a mineral district, and that persons who feu ground and build houses in that district must lay their account with the discomfort of a mineral district—in short, that the complainers came and sought out the nuisance instead of its being inflicted upon them. I am not in the least disposed to sustain that plea. Indeed, I think it is entirely inapplicable to the circumstances of this case. and as a general proposition cannot be predicated of an urban suburb like this. Looking to the condition of a great city like Glasgow, it cannot be said that the extending of the city in consequence of the increase in the population is a seeking out of a nuisance. The first answer to the statement of the respondents is that when the complainers came to the district the blaes heaps were not burning. It is the nuisance resulting from the burning, and not the heaps themselves, of which the feuars complain. It is further clear that the burning of these heaps is no part of the workings in the district, because there is no working going on; it is only a question of how the accumulations of rubbish created by prior workings are to be disposed of. It is unnecessary to consider the doctrine that a man may use his property as he pleases so long as he does not hurt his neighbour. The feuars naturally say—"You shan't dispose of it to our annoyance;" and it is vain for the superior to say to his vassal to whom he has feued his ground, "You cannot complain of my creating discomfort or annoyance, because you knew I would set the heaps on fire." That is a plea which cannot be sustained, and in my opinion the Court must deal with this as a simple ordinary case of a certain operation being carried on on the confines of a large city to the injury of a residential quarter, and taking that view I have no hesitation in coming to the conclusion that these operations should be put an end to. But the real truth is that the trustees of the Kelvinside estate see that they could feu the remainder of their ground to better advantage if they could dispose of these heaps, because of course there would always be the question, What was to become of them? But that does not entitle them to make their feuars victims of the process, and to improve their estate at the cost of the vassals who at their invitation have taken feus and built houses there. They are composed to a certain extent of inflammable material, and there is always the danger of it taking fire and causing injury, and consequently so long as they remain they depreciate the value of the ground. That is not in my opinion a reasonable proceeding. It is also to be observed that while the usual way of dealing with these heaps is to destroy them by combustion, it is not an impossible thing to remove them. It is only a matter of expense. On the whole matter I have come to the conclusion that the feuars are not bound to submit to have these blazing masses around their houses, sending out fumes which may be noxious or not, but which cannot fail to be unpleasant, for an unlimited period of time. I am therefore in favour of the judgment of the Sheriff-Substitute, and am for recalling the Sheriff's interlocutor and granting interdict of new.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Find that in the circumstances it is unnecessary to pronounce any order in regard to the blaes heap or bing of blaes on Semple's farm (Addie's pit, No. 6): *Quoad ultra* find that the ignition of any other heap or bing of blaes on said farm, or in the vicinity of the pursuers' lands, would cause material discomfort and annoyance to the pursuers: Therefore sustain the appeal: Recal the interlocutor of the Sheriff of 13th July last: Affirm the interlocutor of the Sheriff-Substitute of 17th April last: Of new interdict the defenders from burning or calcining the said heaps or bings of blaes other than the heap or bing No. 6 pit," &c.

Counsel for Pursuers (Appellants)—Trayner—Ure. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders (Respondents)—Robertson—Jameson. Agents—H. B. & F. J. Dewar, W.S.

Friday, January 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

GAVINE *v.* LEE.

Sale—Sale of Heritage—Missive—Writ—Holograph.

Where a holograph signature and statement by a party sought to be bound is appended to words not holograph, and the signature and statement are written under the part which is not holograph, the party adopts that which goes before, and the document is equivalent to a holograph document.

Terms of an agreement constituted by missives, and stipulating that the granter of a feu should procure for the feuar a loan on certain conditions, under which *held* that the feuar was not entitled to have the feu-contract and the bond for the loan executed simultaneously; and in respect the granter had offered to implement the contract, action *dismissed* as unnecessary.

This was an action at the instance of John Gavine, designed as a builder and contractor in Edinburgh, against J. B. W. Lee, S.S.C., to enforce implement of a contract alleged to have been constituted by certain missives by which the defender agreed to feu out to the pursuer certain vacant building stances in Albert Street, Edinburgh, and also to procure for him certain loans on the security of the subjects built.

The missive offer was in the following terms, the signature and the words following being holograph of Gavine:—

"*Edinburgh, 27th July* 1881.

"J. B. W. Lee, Esq., S.S.C.,

"10 George Street.

"Sir,—I hereby offer to feu from you the two vacant stances belonging to you at the north-west end of Albert Street, adjoining Messrs Drysdale & Gilmour's feu, each having a frontage of 55 feet or thereby, at the rate of 16s. per foot of frontage, with duplicand every twenty-first year, as in your title, on the following conditions, viz.—

"(1) That you grant or procure for me a loan or loans equal to three-fourths of the value of the subjects built, at the rate of 4½ or 5 per cent., payable by instalments, according to schedule annexed, on the certificate of Messrs M'Gibbon & Ross, architects, the buildings being always in value one-fourth more than the payment so made:

"(2) That I be allowed one year from Martinmas next, free of feu-duty, to build, the feu-duty beginning to run at Martinmas 1882:

"(3) That I take the ground subject to all conditions, provisions, &c., in your title from Heriot's Hospital, except as regards feu-duty and duplicand above stipulated, so far as applicable to the ground:

"(4) That I have entry to the subjects at date of acceptance of this offer: And

"(5) That a valid feu-contract of the ground be entered into between us, subject to the conditions, &c., above referred to.

"This offer to be binding for two days only.—I am, Sir, your obedient servant.

"JOHN GAVINE,

"Builder, 42 Rosemount.

"*Adopted as holograph.*"

Annexed was a schedule stating the periods when instalments were to be payable, according to the advancement of the work. To this schedule there was this docquet:—

"I hereby adopt the above as holograph.

"JOHN GAVINE,

"*27th July* 1881."

The original offer was lost, but it was proved by the pursuer and his agent, Mr Barton, S.S.C., that it had been written by a clerk of the latter, and that thereafter the pursuer had appended to the letter his signature, "John Gavine, builder, 42 Rosemount," with the docquet in his own writing, "Adopted as holograph."

The letter with the schedule, in this shape, was sent to the defender, who by holograph letters dated 28th and 30th July 1881 accepted the offer. It was not proved when the docquet was appended to the schedule. The original offer having been lost in the hands of the defender, a copy was admitted.

The defender pleaded—"(1) The documents founded on by the pursuer not being holograph or tested, are insufficient in law to make a binding agreement. (2) The defender having been always willing and ready to enter into a feu-contract with the pursuer in terms of said documents, as if they were legally binding, the present action is unnecessary, and should be dismissed."

The nature of the dispute as to the terms of the contract is explained in the opinion of the Lord President.

Gavine having become bankrupt, Theodore Macdonald, commission agent, Leith Walk, Edinburgh, trustee on his sequestrated estate, was sisted as pursuer.

The Lord Ordinary (FRASER), after a proof, pronounced this interlocutor:—"The Lord Ordinary having considered the proof, productions, and whole process, Finds that John Gavine, by missive letter, not tested or holograph, offered to take a feu from the defender of two vacant stances belonging to the latter in Albert Street, Edinburgh, and that the defender, by missive letter holograph of him, accepted said offer: Finds in law that said missives do not constitute a binding agreement, in respect that the offer by Gavine was not holograph or tested: Finds it not proven that there was such *rei interventus* as to obviate said objection; therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, subject to modification, from Theodore Macdonald, trustee on the sequestrated estates of John Gavine, who was sisted as pursuer in room of Gavine," &c.

"*Opinion.*—The plea which has now been sustained gives effect to one of the most firmly settled rules in regard to heritable rights in our law. An agreement for the sale or feuing out of heritage must be on both sides holograph or tested. This rule has been uniformly enforced, and therefore it is not necessary to do more than to refer to the recent decisions upon the subject—*Goldston* v. *Young*, 8th Dec. 1868, 7 Macph. 188; *Scottish Lands and Building Co.* (*Limited*) v. *Shaw*, 13th