from their windows. When it is asked why the liability which once attached to the area should be withdrawn when buildings are erected upon it, the answer is simply because the statute says so. It provides that the moment a building is erected on the area its liability for assessment depends upon whether its windows front on Queen Street or whether they do not.

I may observe that it is stated in the case that the buildings in question were erected in 1867, and it was not for more than thirty years, in 1899, that anyone ever thought they were liable for assessment. That is not conclusive against the claim which is now made, but it seems to me not immaterial as bearing upon the question of fact, whether the new buildings are a part of the original house, because the only way in which they could have escaped assessment before was that it was seen by everybody, and by the Commissioners themselves that they were separate buildings. It is true that they are connected with the original house by a gangway, but that gangway, which could be taken down at any moment, does not prevent them from being separate buildings. I therefore agree with your Lordships that the second question in the case should be answered in the affirmative.

The Court answered the second question in the case in the affirmative.

Counsel for the First Parties—Rankine, K.C. — Younger. Agents — Forman & Bennet Clark, W.S.

Counsel for the Second Parties—Solicitor-General (Dickson, K.C.)—W. L. Mackenzie. Agents—Fletcher & Baillie, W.S.

Wednesday, January 28.

FIRST DIVISION.

[Lord Low, Ordinary.

HARVIE *v.* ROBERTSON.

Prescription — Long Prescription — Nuisance—Lime-Burning—Non valens agere —Pursuer during Period of Prescription not Actually Inconvenienced by Nuisance—Pursuer Himself Committing Nuisance.

In an action of declarator and interdict alleging a nuisance by burning lime, the defender having pleaded prescription, the pursuer replied that up to a date a few years before the date of the action, when the pursuer's grounds were built with dwelling-houses, he and his authors had used their ground for an oil-work, and in consequence suffered no immediate damage or inconvenience from the lime-burning carried on on the defender's ground, and therefore would not have been entitled to object thereto. *Held* that this was not a relevant reply to the plea of prescription, in respect that a proprietor is always entitled to object to any illegal use by a neighbour of his lands which is calculated to reduce the value of such proprietor's lands either immediately or in the future.

Held also (*per* Lord Low, Ordinary, and *acquiesced in*) that it was not a relevant reply to a plea of prescription in a case of nuisance to aver that the pursuer had during the period of prescription been himself committing a nuisance on his own lands, in respect that the fact of his doing so would not have disentitled him from bringing an action.

Observations on the plea of *non valens agere.*

This was an action of declarator and interdict at the instance of William Harvie, proprietor of a plot of ground in Anderson Street, off Gallowgate, Glasgow, against Archibald Robertson, lime merchant, Glasgow, the proprietor of an adjoining plot of ground lying immediately to the north of the pursuer's property.

The pursuer concluded (1) for declarator that the business or operation of lime-burning intended to be carried on by the defender upon his plot of ground would constitute and be a nuisance to the pursuer as owner of the tenement of dwelling-houses erected on the pursuer's plot, and to the tenants and occupants of the same; and (2) for interdict against the defender from carrying on the business of lime-burning on his property.

The defender pleaded, *inter alia*—"(3) *Separatim*, the defender having a prescriptive right to carry on the business of lime-burning on the ground in question is entitled to be assoilzied."

Proof was allowed and led.

The defender's property had been used for lime-burning for a period materially exceeding forty years, and there was no evidence that the kilns caused any more discomfort or inconvenience now than they did at any time during the last forty years.

In 1897 a tenement of dwelling-houses had been erected on the pursuer's plot. Prior to the erection of the pursuer's tenement his plot had been used for an oil-work.

In answer to the plea of prescription put forward by the defender the pursuer maintained in the Outer House that he could not have prevented lime-burning being carried on during the prescriptive period, because during that period he and his authors were using their plot for an oil-work, which must have been as great a nuisance to the neighbourhood as the lime-kilns. In the Inner house this contention was abandoned, but the pursuer maintained that as long as his plot was being used for an oil-work he and his authors could not have objected to their neighbour burning lime, inasmuch as the offensive fumes did no harm to the pursuer's plot so long as it was merely used for an oil-work, and that prescription could not run against him so long as he was sustaining no immediate injury.

On 20th February the Lord Ordinary (Low) pronounced the following interlocutor:—

"Sustains the third plea-in-law for the defender, and assoilzies him from the conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.

Opinion.—"The pursuer is proprietor of a tenement of workmen's houses in Anderson Street, Glasgow, and the defender is proprietor of the adjoining property, upon which he carries on the business of lime burner. The pursuer avers that sulphurous vapours and poisonous gases are given off from the lime-kilns, which render the houses belonging to him uncomfortable to live in, and, at all events, those nearest to the kilns unhealthy. The pursuer accordingly seeks to have it declared that the defender's business is a nuisance and to have him interdicted from carrying it on.

"The defender's property has been used for the purpose of lime-burning from time immemorial, and there is no evidence that the kilns cause more discomfort or inconvenience now than they did at any former period. On the contrary, I think that the evidence shows that the kilns have been less of a nuisance since they came into the defender's hands than they were formerly, because he has entirely renewed the kilns, and the fuel used for burning the lime is coke, which admittedly gives off much less smoke and vapour than coal, which was formerly used.

"In these circumstances the defender pleads that he is protected by prescription. The pursuer, upon the other hand, contends that his right to object has not been cut off by prescription, because prior to 1897, when he acquired his property and erected dwelling-houses upon it, it had been used as an oil-work, which must have been as great a nuisance to the neighbourhood as the lime-kilns. His argument was that it is the negative prescription which applies to such a case, and that so long as the oil-work was carried on his author was *non valens agere*, because an oil-work being a nuisance he could not complain that his neighbour was also committing a nuisance. I am of opinion that the argument is untenable. To found the plea of *non valens agere* there must be a legal impediment which prevents action being taken, and inability arising from the course which the party chooses to adopt is not sufficient. Therefore assuming that the oil-work was a nuisance (which, however, is not proved), I am of opinion that that would not in law have barred the proprietor from taking action to have a nuisance caused by the lime-kilns abated, although if he had taken that step he might have been met by a counter action directed against the oil-work.

"I am therefore of opinion that there is no good answer to the defender's plea that the business of lime-burning has been carried on upon his property for more than forty years without interruption, and that there has been no increase in the inconvenience or discomfort caused by the work.

"I shall therefore sustain the third plea-in-law for the defender, and assoilzie him from the conclusions of the summons."

The pursuer reclaimed.

The arguments sufficiently appear from the opinions of the Judges.

The following authorities were referred to:—*For the pursuer and reclaimer* — *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852, at p. 855; *Fleming* v. *Hislop*, 1886, 10 R. 426, 20 S.L.R. 298, 13 R. (H.L.) 43, at p. 48, 23 S.L.R. 491; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1865), L.R., 1 Eq. 161, (1866), L.R., 1 Ch. App. 349; *Crump* v. *Lambert* (1867), L.R., 3 Eq. 409. *For the defender and respondent* — *Graham* v. *Watt*, July 15, 1843, 5 D. 1368; *Robertson* v. *Stewart*, December 6, 1872, 11 Macph. 189, 10 S.L.R. 99; *Fraser's Trustees* v. *Cran*, June 1, 1877, 4 R. 794; Clark & Lindsell on Torts, p. 347; *Glasgow Waterworks* v. *Aird*, December 20, 1814, F.C.; *Inglis* v. *Shotts Iron Co.*, July 20, 1881, 8 R. 1006, 18 S.L.R. 653, July 26, 1881, 9 R. (H.L.) 78, 19 S.L.R. 902.

At advising—

LORD PRESIDENT—The pursuer seeks by this action to have it found and declared that the business of lime-burning carried on by the defender at or near Anderson Street, Glasgow, constitutes a nuisance to the pursuer as the owner of a neighbouring tenement of dwelling-houses there. Two questions are raised—(1) whether, apart from prescription, the burning of lime as practised at the place in question would be an actionable wrong; and (2) whether, assuming that it would, the defender has by prescription acquired a right to continue it, or as the question may be otherwise put, whether the pursuer's right to complain of it has been cut off by a prescription.

In the view which I take of the case it is not necessary to form an opinion upon the first of these questions, although I may say that my impression is that the pursuer has failed to prove that the burning of lime, as now carried on by the defender at the place in question, is in law to the nuisance of the pursuer.

The pursuer and the defender are the proprietors of adjoining plots of ground at the place in question, which is an industrial part of Glasgow. The pursuer's tenement of dwelling-houses was built upon this plot about five or six years ago, and the defender's plot is occupied by limekilns, which have existed and been used for the burning of lime for upwards of forty years.

[*His Lordship then dealt with the question whether a nuisance had been proved.*]

It is not, however, in my judgment essential for the purposes of the present case to form an opinion on the question whether apart from prescription the burning of lime at the defender's kilns would constitute a nuisance to the pursuer, as I concur with the Lord Ordinary in thinking that assuming that there has all along been a nuisance the third plea-in-law for the defender should be sustained, viz.—"*Separatim*, the defender having a prescriptive right to carry on the business of lime-burning on the ground in question, is entitled to be assoilzied." It is established by the evidence that for a period materially exceeding forty years prior to the raising of this action, the burning of lime had been carried on at the

place where it is now carried on by the defenders, and it does not appear that it was ever challenged or objected to. Further, it is not proved that if the burning of lime at the place in question caused a nuisance, there has been any increase in the nuisance within the last forty years. In this state of the evidence the right of the defender to burn lime at the place in question is, in my judgment, established, and any right which the pursuer might otherwise have had to object to it is cut off.

The pursuer, however, maintained that the operation of prescription is excluded by the fact that when he acquired his property and erected the tenement of dwelling-houses upon it, it had been used as the site of an oil work, which must, he says, have been as great a nuisance to the neighbourhood as the lime-kilns are, and he contended that so long as the oil work was carried on his author was *non valens agere*, seeing that, as he was causing a nuisance by the oil work, he could not complain of the defender's author causing a nuisance by burning lime. I may remark in passing that the existence of the oil work affords evidence that the locality has long been dedicated to industrial or manufacturing purposes of a character which would tend to render it unpleasant for residential purposes. I agree, however, with the Lord Ordinary in thinking that what the pursuer or his author did or abstained from doing voluntarily cannot found the plea of *non valens agere*, as that plea requires that there should be some legal impediment to taking action. *Non valens agere* means not a physical but a legal incapacity to sue, and it is not, in my judgment, proved that any such legal incapacity existed in this case.

We had an interesting argument as to whether the positive prescription or the negative prescription applies in a case like the present, *i.e.*, whether the right to continue something which was *in initio* a legal wrong may be acquired by the positive prescription, or whether the prescription which prevents it from being successfully objected to is the negative prescription operating by cutting off the right of challenge. I am disposed to think that the latter is the true view, although it is unnecessary to express a definite opinion on the subject in the present case.

The pursuer's counsel contended that although it is essential to a right to stop the pollution of water that it should be objected to before the pollution has been continued for forty years, the same rule does not apply to the pollution of air, which they maintained can be objected to even if it has been practised for more than forty years. It was said that the parties have a common interest in water which they have not in air. I do not, however, see any principle, nor am I aware of any authority in the law of Scotland, which would sustain this contention.

For these reasons I am of opinion that the Lord Ordinary's judgment should be adhered to.

Lord Adam—I was somewhat surprised to learn from this case that the business of lime-burning was still carried on in the centre of a populous part of Glasgow, but so it is. It is not disputed in this case that from time immemorial the defender has carried on the business of lime-burning at the same place at which it is now carried on; and, as the Lord Ordinary says, there is no proof that the nuisance, if there is one, which proceeds from these kilns is any greater now than during the last forty years. That being so, the first question, as your Lordship has said, is whether this lime-burning constitutes a nuisance. [*His Lordship then dealt with the question whether a nuisance had been proved.*] If it were necessary to decide that point I should have some difficulty in agreeing with the Lord Ordinary that a nuisance did not proceed from these fumes, but, as your Lordship has said, it is not necessary for our decision to come definitely to a conclusion on that point, because the question of law (assuming that the fumes, noxious or otherwise, issuing from this kiln constitute a nuisance) is, whether or not the defender has by prescription acquired a right to continue his lime-burning—to carry on his works at this particular place even although it should prove a nuisance to the neighbourhood. That is the question, and I agree with your Lordship that he has acquired that right. That he has been carrying on these works and creating the same nuisance—if it is a nuisance—from time immemorial is not disputed, and there is no evidence that the noxious fumes emitted are different or worse now than they were before. The pursuer says that until three or four years ago he was *non valens agere;* he or his predecessors were not in a position to object to these fumes being discharged over his land; and he says—and no doubt if he made it out it would be a good answer—that prescription should not run against him because he could not complain. He says he suffered no damage at that time because his ground was then occupied as an oil work, and being so occupied the noxious fumes did him no damage. Now, I do not understand that he says he could not object because he also was committing a nuisance. If I understand him rightly, he says that his ground was occupied by himself at the time, and that when the fumes passed over him they occasioned him no damage. Now I doubt whether the pursuer has any good reason for saying that. He says that his ground was occupied by oil works, but he does not state the nature of these works, their duration, or whether they emitted any smells or not. We do not know how long these oil works were there, or when they were put there. The pursuer says that he had no title to complain unless he had suffered actual damage, and he says that he only suffered actual damage three or four years ago, when he chose to alter the mode in which he occupied his ground. He then removed the oil works and built a tenement of houses. It was only, he says, when the tenement was built and began to be occupied by the tenants that the injurious effects of these noxious gases were felt.

Now, I do not think the pursuer's plea on that point is well founded. I do not think the question at all depends upon how the pursuer chose to occupy his property from time to time. I think the real question is whether the *prædium* possessed by the pursuer would be injured and was injured by noxious fumes constituting a nuisance being discharged over his ground. It humbly appears to me that anyone who has a stream of noxious gas discharged over his ground has right to complain of it at any time when it is done, because such a nuisance if committed would depreciate the actual value of his property. I think that the proprietor of any ground over which a nuisance of this sort is created has a perfect right, and therefore a perfect title, to complain at once of such a nuisance being created.

I think that the pursuer, as proprietor of the tenement in question, or his predecessors, as soon as that nuisance was created, had a good title to object, and as they did not object it is too late now.

On these grounds I think the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR—I have come to the same conclusion with both your Lordships. I am disposed, however, to think that there is sufficient evidence to show that the defender's lime-burning causes such material discomfort and annoyance to the pursuer's houses and property that if there were no other question involved it ought to be restrained. I am disposed to come to that conclusion on the evidence, although I am very sensible of the weight of the evidence to the contrary. [*His Lordship then dealt with the question whether a nuisance had been proved.*] But then I think with your Lordships that it is not necessary to decide that absolutely, because assuming it to be so for the purposes of this judgment, I agree that it is proved that the defender has carried on his business of lime-burning in the same way as he is carrying it on now, and with the same consequences, for a period considerably exceeding the period of prescription, and therefore I hold with your Lordships that he has established a prescriptive right to use his own property in the way he is using it now, although it may be to the detriment of his neighbours, who have submitted to it for so long a period. When the case was before the Lord Ordinary the pursuer seems to have maintained, in answer to the plea of prescription, that prescription could not run against him or his predecessors, because the pursuer or his predecessors were carrying on an oil work on their own ground, which would itself be a nuisance, and that therefore so long as they were themselves committing a nuisance against their neighbours they were *non valentes agere* and prescription could not run against them. I agree with the Lord Ordinary and with your Lordship in the chair that that is not a good answer. It has been decided in the case of the *Duke of Buccleuch* v. *Cowan and Others* that the fact that one man is using his property in a way that is so detrimental to his neighbour as to make it a nuisance does not excuse another landowner for adding a further nuisance to that originally created, and I cannot see how the fact of the complainer doing something which his neighbour may have cause to complain of should prevent his establishing his right to have pure air over his property. One can quite understand that the fact that a man is using his own property in such a way as to create a nuisance may furnish him with a very good reason for not interfering with the nuisance created by his neighbour of a similar kind, because he might have reason to fear that if he stopped his neighbour's work, his neighbour in retaliation might stop his. But that is not an incapacity to act which will prevent prescription running against him, but, on the contrary, it is a deliberate submission for sufficient reasons to something which might otherwise have been interdicted as a nuisance, and that is exactly the conduct which furnishes the basis for acquiring a prescriptive right. I therefore should not have attached any weight to the argument founded upon the mere existence of the pursuer's oil works as a nuisance to his neighbour. But it is unnecessary to consider the question. Mr Johnston frankly abandoned that argument, and told us that he could not and did not now maintain it, and he put his defence upon a totally different ground which has been pointed out by Lord Adam. He said that apart altogether from any question whether what he was doing on his property was a nuisance to his neighbour or not, he was occupying his property in such a way that the offensive and injurious fumes from the defender's property did not hurt him, because if his ground was not occupied by dwelling-houses as it is now there was no one to suffer from the injurious fumes from the defender's works, and therefore he said that prescription could not run against him so long as he was not hurt, and he based that argument on the English case of *Sturges* v. *Bridgman*. So far as I understand that decision, the principle upon which it rests appears to me to be a perfectly sound principle in the law of Scotland as well as in the law of England, because the principle is simply this—that there can be no acquisition of a right by prescriptive user to occupy property in such a way as to injure a neighbour, unless during the period of user the neighbour has a right of action to prevent such injury. That seems to me to be perfectly clear. The right of action must begin when the nuisance begins, and the prescriptive user cannot begin at an earlier period. So long as what is done hurts nobody there is no nuisance, and there is no right of action to put a stop to operations which are *ex hypothesi* harmless. Whether the application which was made of that principle in the particular case is exactly the same as would be made in this Court I do not think it necessary to consider, because I think the pursuer's use of it in this case absolutely fails upon the facts. It is not shown that the pursuers and their

predecessors had no interest to stop the nuisance forty years ago if they can stop it now.

I agree entirely in what was said by Lord Adam that the question whether a proprietor complaining of such injury has a title and interest to interfere does not depend exclusively upon present injuries to his land. He is entitled to take into account not only the actual inconvenience and discomfort caused to people living on the ground by noxious fumes, but also the injury to the value of the property and the prospect of using it for advantageous purposes, other than those to which it is actually applied at the moment. It is enough that the enjoyment of property is interfered with by conduct which, if persisted in, will tend to create an adverse right. But then I think in this case the pursuer has not only failed to show that he had an insufficient title and interest in the sense already described to restrain the defender's use of his property, but he has entirely failed to show that his land was so occupied during the time of prescription as to make the defender's use of his property of no practical injury to the persons occupying it. All that he proves is that at one time before he erected the dwelling-houses which are now said to suffer injury, the ground was occupied as an oil work. How long it was occupied as an oil work we do not know. What was the occupation before the oil work was established we do not know. There is nothing on the evidence to show what the specific nature of the occupation during the existence of the oil work was, and therefore it is quite impossible to hold it proved that there was nobody on the pursuer's property who could suffer from the poisonous fumes being discharged over the ground. I think upon the facts the pursuer has entirely failed to make out his case. I think it is natural enough to infer from the whole history of the property that the owners might not think it worth while to try to prevent their neighbours from using their land for manufacturing purposes or for any purpose which in another district might create a nuisance, or that they might be unwilling to run the risk of retaliatory proceedings being brought against themselves. But if that were so, that does not show that there was no right of action in the pursuer's predecessors. It only shows that, for what were considered sufficient reasons, they thought it well to submit during a period of over forty years to the use of the defender's land which they are now complaining of. But if that be so, the pursuer has lost his right to complain by deliberately submitting to the thing complained of for the prescriptive period. On that ground I concur in the judgment that your Lordship proposes.

The Court adhered.

Counsel for the Pursuer and Reclaimer—H. Johnston, K.C.—A. O. Deas. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defender and Respondent—Salvesen, K.C.—Munro. Agent—John N. Rae, S.S.C.

Thursday, February 26.

BILL CHAMBER.

[Lord Pearson, Ordinary.

BRABY, PETITIONER.

Bankruptcy—Sequestration—Specification of Debt upon which Award Proceeds—Entail—Entail (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 53), *sec.* 18.

The Entail (Scotland) Act 1882 enacts—"If the estates of such heir of entail in possession of an entailed estate shall be sequestrated for debt incurred after the passing of this Act, the trustee on his sequestrated estates shall be entitled to apply to the Court for authority to disentail the estate." . . .

A petition was presented for sequestration of the estates of an heir of entail in possession of an entailed estate, proceeding upon debts incurred partly prior and partly subsequent to 18th August 1882, the date of the Entail (Scotland) Act 1882. The heir of entail prior to the presentation of the petition had offered to pay the portion incurred subsequent to that date, and in his answers repeated that offer, and by minute of amendment further offered to consign the amount of it. He asked that the award of sequestration should contain a special declaration of the particular debt upon which it proceeded. The Lord Ordinary on the Bills *granted* sequestration in common form upon the petition as presented.

This was a petition at the instance of Alfred Braby for the sequestration of the estates of George North Dalrymple.

In 1900 Dalrymple had succeeded to certain entailed estates, and was now heir of entail in possession.

The debts alleged to be due by Dalrymple to the petitioner were stated at £10,037, all of which, with the exception of £104 incurred subsequent to 18th August 1882, consisted of the principal sum and interest due under a bond granted by Dalrymple in favour of one Alfred Forder for £2500, with interest at 12½ per cent., and dated 22nd March 1879.

The respondent, before the presentation of the petition, had tendered payment of the £104. This the defender had refused. This tender was repeated in the answers lodged by Dalrymple, and also by minute dated 16th March 1903. He subsequently offered to amend the minute by tendering consignation of the sum.

The respondent craved that in making the award of sequestration the Lord Ordinary should specify the particular debt on which sequestration was awarded.

LORD PEARSON—The bankrupt does not oppose the award of sequestration, but he asks that a special declaration should be inserted in the award specifying the particular debt on which sequestration was awarded. His interest to have this done is that he happens to be heir of entail in pos-