rant is craved. He thinks that these elements do not appear in the present case.

"The Dean of Guild ought to add, that after visiting the premises, and after full consideration of the plans, he is opinion that the petitioners' proposed operations are confined to their own property, and are structurally of a satisfactory nature.

"The lane, which gives access to various properties, is a *cul de sac.* It is only twelve feet wide, and thus too narrow to admit of two carts or cabs passing each other in it. The cartage for byres for thirty-two cows will be considerable, and will obstruct ordinary traffic."

On 23rd August the Dean of Guild sisted the cause for one month from that date, and on 25th October he pronounced the following interlocutor:—"The respondents having failed to apply for interdict on the ground of nuisance, on the motion of the petitioners recals the sist: Finds that the proposed operations are confined to the petitioners' own property, and can be executed without danger: Finds that the proposed premises are structurally of a satisfactory nature: Finds that the objections of the respondents on the ground of amenity are irrelevant for the reasons explained in the note to the interlocutor of 9th August last: Therefore repels the pleas-in-law for the the respondents, grants warrant to the petitioner in terms of the prayer of the petition and of the plans therewith produced, which are docquetted as relative hereto: Finds the respondents liable to the petitioner in expenses," &c.

The respondents appealed to the Court of Session, and argued—The proposed building would be a nuisance both at common law and under the Public Health Statute 1867, which by section 16 prohibited any accumulation of manure within fifty yards of any dwelling-house. In the present case it was proposed to make a manure-heap within thirty yards of Mrs Leith's house. The Dean of Guild must look to the nature of the building, and the use to which it was obviously to be put. Under the petitioners' title he was prohibited from erecting any such buildings as he here proposed. There was no case in which it had been expressly decided that the Dean of Guild had no jurisdiction to consider the question of nuisance within burgh.

Counsel for the respondents were not called on.

At advising—

Lord President—I think that in this case we ought to follow the same course as was taken in the case of *Manson.* I am not disposed to lay down any very stringent or definite rule as to how far the Dean of Guild in a question of lining is entitled to entertain such an objection as is here taken on the ground of nuisance. I can understand that in such cases as those to which Mr Innes has referred, when certain kinds of works have been ticketed by law as nuisances, the Dean of Guild may refuse a lining, because the structure is only adapted to the purposes of an unlawful trade. But in regard to the other cases which have been referred to, and are quoted in the note to the Dean's interlocutor, I am not disposed to do anything which would lead to an extension of the jurisdiction of the Dean of Guild. Questions of nuisance are often of very great delicacy, and raise points of law which require the intervention of higher courts than that of the Dean of Guild. Such questions are among the enumerated cases which are sent to trial by jury, showing plainly the intention of the Legislature that they are of such importance that they ought to be brought before the highest tribunal only. I think that is very sound, and for these reasons, while I am not disposed to do or say anything which would appear to extend the jurisdiction of the Dean of Guild, I am not disposed to attempt to define the precise limits of that jurisdiction, because that is often a very difficult matter, and will in almost all cases depend upon circumstances. But apart from the ground of incompetency, I have no doubt that expediency requires that a question of nuisance should be tried elsewhere. I therefore think that we ought to sist this process in order to enable the appellants to bring an interdict against the erection of these buildings.

Lord Mure concurred.

Lord Shand—I quite agree with the course which your Lordship proposes, and to the views which your Lordship has expressed. It does not appear from the reports that questions of this kind have been tried in the Dean of Guild Court for a long time, and it is not desirable that they should be dealt with there. The circumstances here are somewhat different from what they were in *Manson's* case, and the question between the parties is a very proper one for raising under an action of interdict in this or the Sheriff Court.

Lord Adam concurred.

The Court sisted process to allow the appellants to raise an action of interdict against the erection of the buildings objected to, reserving the question of expenses.

Counsel for the Appellant Mrs Leith—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Appellant Dr Bremner—Brodie Innes. Agents—Richardson & Johnston, W.S.

Counsel for the Respondents—Mackay—H. Johnston. Agents—Menzies, Coventry, & Black, W.S.

Thursday, December 20.

SECOND DIVISION.

[Sheriff of Forfar.

CUTHBERT *v.* WHITTON AND OTHERS.

Property—Mutual Wall—Common Author.

The proprietor of two adjoining houses, by his settlement, left one to one daughter and the other to another daughter. The conveyance of each house was in similar terms, and each was described as bounded by the other. The gable wall of one house formed part of the back wall of the other.

In an action of declarator by one of the daughters against the other, *held* that in the absence of any evidence to the contrary in the titles this wall must be presumed to be mutual.

John Galloway, plumber, Arbroath, was pro-

prietor of two adjoining houses there. The end or gable wall of one was part of the back wall of the other. By trust-disposition and settlement and codicil dated 22nd May 1857 he left the former to his daughter Mrs Ann Galloway or Whitton, and the other to his daughter Mrs Catherine Galloway or Cuthbert. The conveyance of each house was in similar terms, and each was described as bounded by the other.

In March 1888 Mrs Cuthbert brought an action in the Sheriff Court at Arbroath against John Galloway Whitton and others in right of Mrs Ann Galloway or Whitton, now deceased, and prayed the Court "to find and declare that the wall dividing the property of the pursuer from the property of the defenders situated in Allan Street, Arbroath, is a mutual gable wall." The petition contained further declaratory conclusions of common property in a back court, and exclusive property in a back stair, which were afterwards given up.

The defenders claimed the exclusive right to the wall, or at all events did not admit that it was the mutual property of them and of the pursuer.

As far as this case was concerned nothing was known about the history of these two houses or their sites prior to the time when John Galloway, proprietor of both, conveyed them to his two daughters respectively. The Sheriff-Substitute (Robertson) allowed a proof, which was confined by the parties entirely to the question whether the wall in dispute complied with the characteristics of a mutual wall, and afterwards by interlocutor of 13th June 1888 the Sheriff-Substitute found that the pursuer had failed to show that the wall and back court in dispute were mutual, or that the stair mentioned in the petition was her exclusive property, and assoilzied the defenders. He added a note explaining that his judgment was based on the facts that the defenders' house was built before the pursuer's, that the wall had not the usual thickness of a mutual wall, and that there was a window in it which benefited only one of the proprietors.

The pursuer appealed to the Sheriff (Comrie Thomson), who dismissed the appeal.

"*Note.*—I am unable to find any of the usual features or marks which are looked for in a mutual gable. It has not been built so as to suit the purposes of the two properties in the same degree, and such equality of rights as is of the essence of a mutual gable is, from the mode in which the wall was erected, impossible."

The pursuer appealed to the Court of Session.

Argued for appellant—The conveyances were in similar terms. There was nothing to lead to the conclusion that the father, the proprietor of both houses, had given a four-wall house to one daughter, and a three-wall house to the other with no right to touch the fourth wall without her sister's consent. Such an extraordinary result could only receive effect if for some reason the natural presumption of the mutuality in the dividing wall was clearly overcome by the titles. The conveyances made no such unreasonable distinction, and the Sheriff-Substitute was wrong to allow a proof at all in this matter.

Argued for respondents—This was an oppressive action. The really important conclusions had been departed from, and now a bare declarator that this was a mutual wall was asked. It was the appellant who was seeking to disturb the harmony which had hitherto existed. The respondents conceded the present state of possession, and admitted the appellant was entitled to have her house duly supported by their wall. They objected to the declarator asked on the ground that the appellant, if successful, would probably thereupon insert vents and otherwise weaken their wall.

At advising—

Lord Justice-Clerk—There is here a fifteen-inch wall between two houses which is and must be part of the sustaining walls of both. The proprietor of both houses left one to one daughter and the other to another daughter, and the questions solemnly decided by the Sheriffs after a proof are, whether each daughter has a right in the wall which actually divides her house from that of her sister at that place, or whether the whole wall belongs to one of the daughters, the other being entitled to a right of support for her house. This wall is not strictly a gable, but nothing turns upon that at all. I should have thought the natural reading of the conveyances in this case would have been that the father gave to each daughter an equal right in the wall so far as it forms the division between the two houses, but the Sheriff-Substitute has gone elaborately into the question of mutual gables, and the Sheriff says—"I am unable to find any of the usual features or marks which are looked for in a mutual gable." I do not think that was the way to deal with the case here at all. The property belonged to one man. We do not know how long it is since these houses were built, but when they were gifted to these young ladies they were the property of one man, who was their father, and at that time no rights of property existed in the one house as against the other. He had an equal right to both. The only reasonable reading of such a gift is to hold that he gave an equal right to both in what was necessary to both. It was suggested that there would be great danger to the house of which this wall is the gable if the wall were to be declared mutual and vents were allowed to be introduced. I think if the gable is mutual, the right to have vents made can be settled at once by the proper Court.

I have therefore come to the conclusion that, without looking at the proof at all, we should decide that this wall is a mutual wall.

Lord Young—This case is to my mind one of the very simplest. A father was proprietor of two adjoining and not detached houses, that is, with a wall between them, of which the house on the one side uses one side, and the house on the other side the other. By deed of settlement he left one house to one daughter and the other house to another daughter. The terms of the conveyance of each house are absolutely indistinguishable, and each is described as bounded by the other. The only question is, to whom does the wall between the houses belong? It is used by each as a mutual wall. Is there any reason for including it in the conveyance of one house and excluding it from that of the other?

None in the world that I can see. But it is said one house was built before the other. What in the world is that to the purpose? It might have been to the purpose if there had been two feudal properties divided by a wall, but there is no suggestion here that there ever were two properties. The proprietor of a stance builds two houses upon it, not necessarily at the same time, and conveys one house to one daughter and the other to another daughter. What reason is there for holding that he included the wall in the conveyance to the one daughter, and excluded it from the conveyance to the other daughter, which was in identical terms? Yet that is what the Sheriffs have held. On what ground I cannot see. I should assume, with nothing to the contrary, that this mutual wall was conveyed as a mutual wall and to be so regarded. The other conclusions in the summons I understand to have been simply abandoned. Mr Ure explained that the whole evidence led related to this wall, and apparently the whole evidence does relate to it. He also said that he had been compelled to give up the other conclusions because there was not a word of evidence about anything except the wall. What use there was for evidence I do not see. It might have been needful with regard to the other conclusions, but no such evidence was led.

I therefore agree with your Lordship in thinking that the pursuer here is entitled to the declarator she asks, that this is a mutual wall, and that the defenders should be assoilzied from the conclusions of the action, and that no expenses should be found due in either Court.

Lord Rutherfurd Clark concurred.

Lord Lee—I am of the same opinion. I think the question of the mutual wall depends upon the conveyance from the common author, and that a proof was unnecessary.

The Court recalled the interlocutors in the Sheriff Court; found and declared the said wall to be mutual; *quoad ultra* assoilzied the defenders from the conclusions of the action; and found no expenses due by either party.

Counsel for the Appellant — Gloag — Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Law. Agents Duncan Smith & M'Laren, S.S.C.

REGISTRATION APPEAL COURT.

Friday, December 21.

(Before Lord Mure, Lord Lee, and Lord Kinnear).

[Sheriff of Selkirk.

PHILIP *v* ROXBURGH.

Election Law— County Franchise— Representation of the People Act 1884 (48 *and* 49 *Vict. c.* 3), *sec.* 3—*Service Qualification—Farm Manager.*

A farm manager had the exclusive use and occupation of a bedroom in the farm-house by virtue of his employment. His mother, who was tenant of the farm, and his sisters, also resided in the farm-house, and he took his meals along with them in another room in the house. *Held* that the dwelling-house was inhabited by the person under whom he served, and that therefore he was not entitled to be placed upon the roll of voters as an inhabitant-occupier of a dwelling-house.

Alexander Roxburgh, farm manager, Thorneylee, Selkirkshire, claimed to have his name entered in the register of voters for the county of Selkirk as tenant of a dwelling-house at Thorneylee, Selkirkshire. Alexander Philip, solicitor, Peebles, as agent and mandatory for William Thomson junior, Clovenfords, Stow, a voter on the roll, objected to the claim on the ground that on a sound construction of the Representation of the People Act 1884, as applied to the facts of the case, the dwelling-house inhabited by the claimant was also inhabited by the person under whom he served, viz., his mother Catherine Douglas or Roxburgh. The Sheriff admitted the claim.

Philip took a case for the opinion of the Court. The facts set forth were as follows—"The said Alexander Roxburgh is farm manager at the farm of Thorneylee, in Selkirkshire, of which his mother Catherine Douglas or Roxburgh is tenant under a lease granted by the Right Honourable Lady Reay in favour of the said Catherine Douglas or Roxburgh and William Roxburgh, now deceased, and the survivor of them. The said Alexander Roxburgh inhabits and has the exclusive use of a bedroom in the farm-house of Thorneylee by virtue of his employment as farm manager aforesaid. The said Catherine Douglas or Roxburgh and her daughters also reside in the said farm-house, and the said Alexander Roxburgh takes his meals along with them in another room of the said farm-house. The said Alexander Roxburgh has occupied the said room as aforesaid for the requisite length of time to entitle him to be put on the roll of voters, if his qualification is otherwise sufficient."

The question of law for the decision of the Court was—"Whether in respect of the foresaid facts the said Alexander Roxburgh is entitled to be entered on the roll in respect of the qualification set forth in the 3rd section of the Act 48 and 49 Vict. 3?"

The Representation of the People Act 1884 (48 and 49 Vict. c. 3), sec. 3, provides—"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed, for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as tenant." Sec. 7, sub-sec. 4, provides—"'The expression 'dwelling-house' in Scotland means any house or part of a house occupied as a separate dwelling."

Argued for the appellant—The occupation of part of a house by virtue of service was not a good qualification for the household franchise if the house of which it formed part was occupied by the master—*Stribling* v. *Halse*, November 2, 1885, L.R., 16 Q.B.D. 246. The case of *Ballingall* v. *Menzies*, November 26, 1886, 14 R. 127,