partnership through an accredited agent, not to restrain trade but to develope it. Each individual member contributes his or her individual productions, not for the purpose of withholding these productions, the creation of their brains, from the public, but to make them available to the public; and the principal object of the Society is to prevent any member of the public, whether an individual or a corporation, taking their property for nothing. The right that the members have in the musical compositions is one which is secured to them by statute, and the purposes of the Society seem to me to be legitimate. Accordingly I agree that on that point, which is the only one of difficulty, the reclaimers fail.

LORD SKERRINGTON—I concur.

LORD CULLEN did not hear the case.

The Court pronounced this interlocutor—

". . . Vary said interlocutor by inserting after the words '*quoad ultra*' therein the words 'before answer,' and by inserting after the words 'conjunct probation' the words 'and in respect of the disclaimer by the pursuers of any intention to found upon sub-section (3) of section 2 of the Copyright Act 1911, in the averment on record that the defenders derive substantial revenue from the performances condescended on,' exclude said averment from said proof; *quoad ultra* adhere to the said interlocutor. . . ."

Counsel for Pursuers—Moncrieff, K.C.—Scott. Agents—Croft-Gray & Gibb, W.S.

Counsel for Defenders—Macmillan, K.C.—Graham Robertson. Agent—A. Grierson, S.S.C.

Saturday, January 14.

FIRST DIVISION.

MAGUIRE AND OTHERS *v.* CHARLES M'NEIL, LIMITED.

Nuisance—Noise and Vibration—Industrial District—Installation of Heavy Drop Hammers in Vicinity of Church, School, and Dwelling-Houses—Interdict—Proof of Material Increase of Discomfort—Limits of the Doctrine of Locality.

The doctrine of locality does not entitle those engaged in industrial work in a manufacturing district to move their machinery where they please within that district, and to extend without restriction their operations if the result be to deprive other classes of the community, such as clergymen, school teachers, and other brain workers, whose work necessitates their living in the district, of such share of the ordinary comforts of life as the industrial character of the district, infested with noise though it be, has hitherto afforded them.

Owners of property in an industrial district of a city brought an action against a firm of forge masters who had for many years carried on business in the immediate vicinity but who had recently installed in their premises heavy drop hammers, in which they, the complainers, sought interdict against the respondents so working their machinery as to cause structural injury to the complainers' buildings and to be a nuisance to the comfortable enjoyment of their premises, and especially to a church, a presbytery, and a school.

Held that as regards structural injury the complainers had failed to prove that the injuries complained of had shown themselves for the first time after the installation of the hammers, or exhibited such marked or progressive aggravation since their introduction, as to entitle the complainers to interdict, and that as regards the comfortable enjoyment of premises they had not succeeded in establishing such a serious addition to the existing discomforts of the neighbourhood, looking to its character as an industrial district, as amounted to nuisance, and interdict *refused*.

The Most Reverend John Aloysius Maguire, Roman Catholic Archbishop of Glasgow, and others, being the Finance Board of the Archdiocese, Smith Brothers & Company (Glasgow), Limited, engineers, Park Street, Glasgow, and other proprietors in the neighbourhood of Portman Street, Glasgow, *complainers*, brought a note of suspension and interdict against Charles M'Neil, Limited, hydraulic forge masters, Portman Street, Glasgow, *respondents*, in which they sought to have the respondents interdicted from so working their machinery and so carrying on their business as by reason of noise or vibration to cause a nuisance to the complainers.

The above-named complainers averred, *inter alia*—"(Stat. 1) The complainers are proprietors of the respective premises after mentioned, all of which premises are situated in the immediate neighbourhood of premises situated at 124 Portman Street, Kinning Park, Glasgow, occupied by the respondents for the purposes of their business, which consists in the manufacture of forgings and stampings. . . . (Stat. 2) For many years down to Whitsunday 1916 the site of the said premises occupied by the respondents was occupied by a firm of iron founders who used it as a foundry for the making of grates. The premises were then known as the 'Star Foundry.' The work carried out in the said foundry was done quietly and without offence to the neighbouring proprietors and occupants. (Stat. 3) At Whitsunday 1916 the respondents acquired the said premises, which occupy ground extending from Portman Street on the east to Smith Street on the west. They proceeded at once to erect and did erect on the said ground large works in which they installed heavy machinery, including heavy drop hammers. At later dates they installed additional drop hammers of a very heavy description. . . . (Stat. 4) In any event the said drop hammers cause a very great and disturbing noise and also cause such vibra-

tion that the whole of the ground in the immediate neighbourhood, with the buildings thereon, is shaken to a material and sometimes to an alarming extent by each fall of the hammers. Material discomfort and annoyance are thus caused to the neighbouring proprietors and occupants, to whom the working of the said hammers is a serious nuisance. . . . (Stat. 5) The immediate neighbourhood of the respondents' said premises is partly industrial and partly residential. Amongst the industries there carried on there is none causing any such noise or vibration as are caused by the respondents' said operations. The whole of the complainers were proprietors of the respective premises in respect of which they sue and were occupants thereof to the extent after mentioned prior to the commencement of the respondents' said operations. . . . (Stat. 8) The complainers first named are proprietors in trust of a church, school, presbytery, and tenement of dwelling-houses situated in Stanley Street, and of premises situated in Portman Street and occupied by their tenants Messrs Matthew Wylie & Company. Messrs Matthew Wylie & Company's premises are situated on the opposite side of Portman Street from the premises occupied by the respondents and face directly towards the respondents' said premises. The other subjects belong to the complainers first named, are back to back with the several premises fronting the east side of Portman Street, and face across that street towards the west side thereof, from which the respondents' premises enter. The Church is a fine Gothic building seated for about 1300 people. The school is a building of considerable height with accommodation for about 1700 children. It is now occupied and carried on by the Education Authority for the area. The presbytery (which is a fine building) and the tenement fronting Stanley Street form ordinary residential property. So far as these subjects are concerned the effect of the noise and vibration caused by the respondents' said operations is, so far as at present observed, as regards the church (which is used daily) to distract and disturb to a material extent the clergy and the congregation, and to loosen the slates and the mosaic passages; as regards the school, to distract and disturb to a material extent the teachers and scholars (writing being almost impossible during the shocks caused by the blows of the hammers), and to crack and weaken the roof, and crack and injure plaster work; as regards the presbytery and tenement of dwelling-houses, to disturb and annoy the clergy and the occupants to a material extent (so that their furniture and utensils are shaken and disturbed in their places and the comfortable enjoyment of their dwellings is destroyed), and to crack and injure plaster work. As regards the premises occupied by Messrs Wylie & Company the effect is to shake and damage machinery, to cause such vibration of the building that articles fall off shelves, to loosen and damage the pointing of the walls, to disturb and impede the operations of the workpeople, and in particular to render all clerical work very difficult. . . . (Stat. 9) The complainers second named are proprietors of premises entering from Smith Street and situated immediately alongside of the respondents' said premises. At their said premises, which were in their possession and occupation prior to the commencement of the respondents' said operations, they carry on the business of a waterproofing manufactory. Their workpeople employed at the said factory are mainly females. The noise and vibration caused by the said hammers have been and are such that work at the factory has been and is seriously impeded. The whole building is shaken by the blows of the hammers to such an extent that at times the workpeople have been alarmed for their safety and have threatened to leave the employment. Writing is almost impossible during the shocks of the hammer blows, and other work is interrupted. . . ."

The complainers pleaded, *inter alia*—"1. The vibration and noise caused by the respondents' said operations being a nuisance and causing material discomfort, annoyance, and damage to the complainers as proprietors, and to the occupants of the foresaid premises, the complainers are entitled to interdict as craved."

The respondents pleaded, *inter alia* — "3. The conduct of the respondents' works not constituting a nuisance, having regard to the character and history of the district, the prayer of the note should be refused. 5. In any event, interdict should be refused in respect that the respondents' operations do not occasion material annoyance, discomfort, or damage to the complainers, and do not otherwise constitute a nuisance."

The import of the evidence sufficiently appears from the opinion (*infra*) of the Lord Ordinary (BLACKBURN), who, after a proof, refused the prayer of the note.

Opinion.—"The respondents in this action have for many years carried on a business as forge masters at West Scotland Street, Kinning Park. In the year 1916, at the instigation of the Government, who urgently required an increase in the output of certain steel forgings formerly imported from Germany, the respondents acquired additional premises at 24 Portman Street, to the east and in the immediate vicinity of their old works. The old and new works are separated by Smith Street, which runs in a northerly direction at right angles to West Scotland Street and parallel to Portman Street. The immediate predecessors of the respondents at 24 Portman Street had been the Star Foundry Company, and before that a firm of boilermakers. On obtaining possession the respondents erected new buildings and installed therein six heavy drop hammers—one of 15 cwts. on 19th March 1917, one of 3 tons on 21st April 1917, two of 35 cwts. on 5th July 1917, and one of 4 tons and another of 5 tons within a few days of each other in August 1919. The two heaviest hammers had been ordered before the Armistice in view of Government contracts, but their delivery had been delayed.

"Of the four original complainers in this action two abandoned the action before the proof, and there now remain only the Roman

Catholic Archdiocese of Glasgow, who are proprietors of a church, presbytery, school, tenement of houses, and business premises in the neighbourhood of the respondents' new works, and Messrs Smith Brothers & Company, who are proprietors of an engineering shop immediately adjacent to the respondents' new works, where they manufacture heavy tools for shipbuilding.

"The complainers ask interdict against the respondents from so working their machinery—*i.e.*, the hammers—as by reason of noise or vibration to be a nuisance to them. It is alleged that the vibration from the blows of the hammers have caused serious structural damage to the properties of both complainers, and that it interferes with the work carried on by Messrs Smith Brothers & Company in their own premises and by Matthew Wyllie & Company, who are the tenants of the business premises belonging to the other complainers. The noise is chiefly complained of by the Roman Catholic Archdiocese as interfering with the conduct of services in their church and of teaching in their school. So far as Messrs Smith Brothers & Company are concerned, it was admitted in the course of the proof that their own machinery makes sufficient noise to render that of the hammers negligible to them.

"A considerable amount of evidence was led as to the history of Kinning Park. It is perhaps enough to say that it has been developed and is now a very busy industrial district on the south bank of the river Clyde. Although for many years completely surrounded by Glasgow, it remained a separate burgh until 1905, when it was absorbed in the larger burgh. There is a considerable residential population, but this consists almost entirely of members of the industrial classes employed in or about the adjacent works, who for the most part reside in tenement buildings.

"The small scale Ordnance Survey sheet gives a good general idea of the locality, and a reference to the evidence of Mr E. C. Todd supplies a list of the engineering and other works situated in the neighbourhood of the complainers' and respondents' premises. The number of these works, involving as they do the use of heavy machinery, the immediate vicinity of two lines of railways, the quays on the river Clyde, the Glasgow and District Subway, and several lines of tramways, together with the heavy street traffic indispensable to such a neighbourhood, leaves no room for doubt that in the day time at any rate the complainers' premises must be subject to an abnormal amount of noise and vibration altogether apart from anything caused by the respondents' hammers.

"The immediate situation of the parties' premises relative to one another are best shown by another plan which is an enlargement of part of the Ordnance Survey sheet. This shows that the church, school, presbytery, and tenements belonging to the Roman Catholic Archdiocese are at the nearest point a little under 220 feet, and at the furthest nearly 400 feet, from the respondents' hammers. These buildings face eastwards to Stanley Street, and behind them and between them and the respondents' hammers there is a row of business premises facing west on to Portman Street all of which are occupied by works of different sorts. One of the premises facing Portman Street is the property of these complainers occupied by their tenant Matthew Wyllie & Company.

"As already mentioned the premises of the complainers Messrs Smith Brothers & Company abut on those of the respondents, and are immediately to the north of them. They face Portman Street and Park Street, which latter street along with West Scotland Street are two of the main thoroughfares of Kinning Park. The south end of these complainers' premises are within 30 feet of the nearest hammer. The respondents' old and new works are from 160 to 260 feet apart, and the Kinning Park Public School is situated immediately between the two works. The plan also shows the premises of the two complainers who abandoned their action, viz., the Scottish Co-operative Society and John S. Craig & Company, and the position of the Kinning Park Town Hall and Public Library, which face West Scotland Street, and abut on the south end of the respondents' new works, and with regard to which a good deal of evidence was led. All these buildings are closer to the hammers than any of the property of the Roman Catholic Archdiocese except the business premises occupied by Matthew Wyllie & Company.

"It is not disputed that the drop hammers installed by the respondents were the first introduced into this district, and that the use of such hammers is a comparative innovation in Scotland. But heavy steam hammers are in common use and the respondents have for many years had several such in their old works, while the complainers Messrs Smith Brothers & Company have a small one of 5 cwt. in their own works.

"The drop hammer is raised by steam to the height required for the blow to be delivered on the anvil. Six or seven feet is the maximum height to which it can be raised and it falls by gravity. The steam hammer acts under the pressure of steam throughout the whole blow, and this pressure is applied through a piston attached to the hammer head. The introduction by the respondents of the drop hammers was at the instigation of the Government, it having been discovered that the forgings which were required during the war in connection with aeroplanes and other war material were not so satisfactory when forged with the steam hammers in use in this country as had been those formerly imported from Germany where they were forged with drop hammers. According to the witness Mr D. M. Anderson, who was the Government Controller of all forging firms during the war, and who spoke from great experience on this subject, the difference in result is probably due to the fact that the blow from a drop hammer is more elastic than that from a hammer acting under continuous pressure, and that this probably allows the molten metal on which the hammer falls to flow

more freely into the die annexed to the face of the hammer. In both cases the metal to be forged rests on an iron anvil which is supported on concrete foundations. But while in the case of the steam hammer a layer of beams 12 inches thick is interposed between the anvil and the concrete foundation to minimise the vibration to the hammer and the consequent crystalisation of the piston rod, it is claimed by the makers of the drop hammer—Messrs Brett—that the layer of wood is unnecessary in the case of drop hammers, and that a better result is obtained by resting the anvil directly on the concrete bed. Mr Anderson —with other expert witnesses—does not agree with this claim of the makers, and acting on his advice, and following on the first complaints which were made as early as April 1917, the respondents at considerable extra expense inserted 12 inch oak beams between the anvils and the foundations of the 3, 4, and 5 ton hammers. With regard to the respective weights of drop and steam hammers it was stated by the witness Archibald M'Neil that the weight of a steam hammer refers to the weight of the piston without taking into account the weight of the hammer head, while the weight of a drop hammer refers to the weight of the head alone. Thus the largest steam hammer in the respondents' old works, which is described as a 45 cwts. hammer, has in addition to a piston of that weight a head weighing 20 cwts., and in comparing it with a drop hammer it must be remembered that the total weight of the steam hammer is 3 tons 5 cwts. In neither case is the extra weight of the die attached to the hammer, which varies according to the job in hand, taken into account. I was satisfied on the evidence that in the case of both hammers the hot metal on which the blow of the hammer falls acts as a cushion both as regards noise and vibration, that the noise is of the nature of a dull thud and not such as would be occasioned by a hammer falling on cold metal, and that the vibration set up depends more upon the size of the concrete foundations than upon the weight of the hammer, varying according to the pressure exerted per square foot of the concrete base. At the initial stages of the proof the complainers, who were unaware that oak beams had been inserted under the anvils of the heavier hammers, attached great importance to this distinction between the foundations of the drop and steam hammers. They maintained that the omission of the beams must result in a greater vibration being set up in the subjacent soil by the blow of a drop hammer. So far as the heavier hammers are concerned this argument disappears, and I do not think it is established that in the case of the lighter hammers the want of the oak beams makes any substantial difference. Before the end of the proof I had reached the conclusion that it must be difficult to distinguish between the effect of drop hammers and steam hammers either as regards noise or vibration. This opinion was confirmed by the last witness — Professor Hudson Beare — who stated that he did not think he could tell the difference between the sound and the disturbance caused by either of them unless he knew which sort of hammer was being worked. On reading through the evidence I see no reason to alter this opinion, and accordingly I approach the questions raised in this case on the footing that the respondents have not introduced into the district a new form of hammer which produces effects as regards the neighbourhood materially different to the effects produced by hammers previously used by themselves and other engineering firms.

"As I have stated, the 15 cwt. hammer was the first to start work on 19th March 1917, and on 2nd April a meeting of neighbouring proprietors was held and a complaint made to the respondents. The witness Ferguson, a director of Smith Brothers & Company, who themselves have a 5 cwt. steam hammer in their own works, states emphatically that the hammers had been working for some time before the meeting took place, but the evidence as to the date when the hammers started work is supported by entries in the respondents' books. It may be that some experimental blows were made with the hammer in the course of erection, but it would have been difficult to determine at that early stage what were the probable or possible effects the hammers might have on the surrounding property. No further action was, however, taken at that time on its being represented to the complainers that the respondents were engaged on war work, and the effect of the hammers can now be tested from the experience of three years' working.

[*His Lordship then dealt with the evidence as to structural damage and interference with machinery, and came to the conclusion that the complainers had failed to prove any structural damage to their properties or any material interference with their machinery which could be directly ascribed to the respondents' hammers.*]

"There remains what I find much the most difficult part of the case, the evidence as to the effect of the noise and vibration from the hammers on the occupiers of the complainers' different premises, and the consequent interference which they allege that it occasions with the carrying on of their daily work. Counsel for both parties were agreed that the law to be applied is accurately stated by Mr Justice Warrington in *Rushmer* v. *Polsue & Alferi, Limited* (1906, 1 Ch. 234, at p. 236, affd. 1907, A.C. 121), and accordingly I have to decide whether, looking to the circumstances of this locality and to the nature of the trades carried on there and to the noise and disturbance existing prior to the installation of the hammers in the respondents' new works, they have added a serious and not merely a slight additional interference with the physical comfort of such persons of an ordinary standard as may be called on to frequent the complainers' buildings in the discharge of their daily duties.

"Now, so far as the complaints refer to the persons resorting to the works of Messrs Smith Brothers & Company and of Matthew

Wyllie & Company, I should have no difficulty in holding that the additional interference is not serious. They may have noticed the hammers at first as making a noise distinct from those to which they were accustomed, followed by a vibration which they could distinguish, but I do not think it ever amounted in their case to more than a slight personal interference, and except in the case of Mr Wyllie, who complains of difficulty in writing, I think it is proved that personally it has become almost negligible. But the personal interference with those who attend the church and school, and with the dwellers in the presbytery, is a different matter. There are many witnesses from among these who I am satisfied believe quite honestly that the hammers have created a very serious additional interference with their lives. Some of them do not distinguish very clearly between the effect of the noise and of the vibration, while some profess to distinguish between one hammer and another. Thus Father Gallagher describes what he calls the medium hammer as having 'a hissing sound and a loud snorting as of a wild beast,' while the heavy hammer reminds him 'of being on a country road where quarrying operations are going on and blasting takes place'—a figurative method of describing the hammers which is not very helpful. There was a period during the war when the hammers were working continuously day and night, and I have no doubt that the night working might have been successfully resisted as a legal nuisance although for patriotic reasons the complainers made no attempt at the time to put a stop to it. The night working has now ceased, but the remembrance of it remains green in the minds of the residenters of the presbytery.

"Before dealing with the evidence of individuals as to their own personal experiences I propose to refer to the amount of vibration actually set up as tested by expert evidence. There is no dispute as to the geological features of the ground of the whole neighbourhood. It consists of a stratum of sand under which is running sand, and I think it is proved that this foundation is not such a good medium for vibration as rock or other hard substances. Further, the whole surrounding soil being homogeneous one would expect the vibration to spread in equal waves in every direction, the intensity diminishing with the distance from the hammers.

"Unfortunately the complainers examined no expert witnesses who had made experimental tests to measure the amount of the vibration at the different critical points. Their only witness who professed to give expert evidence on vibration was Professor Knott, a distinguished seismologist who has extensive experience of the effect of earthquakes in Japan. He had never visited the *locus* in question in this case, and his very guarded evidence does not afford much help. But he admitted that the vibration set up by the hammers might have been tested roughly by experiment. The complainers prefer to rely on the personal experiences of the expert witnesses called to speak to the structural damage rather than to experiment. Thus Mr Brodie, their first witness, after describing the vibration as 'being so intense and disturbing to the operations within the adjoining buildings (Smith Brothers) that there is not any doubt about it in my mind,' admits in cross-examination that it might have been measured by instruments, but that 'it did not need any instrument to record a vibration like this, it is so perceptible, so apparent, and so violent.' He failed, however, to notice any vibration in the school when he paid a visit there to inspect the structural damage on 7th September 1920 between three and four o'clock in the afternoon. He had taken no steps to ascertain if the hammers were working and assumed they were not doing so. It is, however, proved from the respondents' books that the 15 cwts., both the 35 cwts., and the 4-ton hammer were working all that day. This witness thought that apart from its effect on the worshippers in the church the noise did not provide any reasonable ground of complaint. Mr Brodie's experience in not noticing the hammers when he was unaware that they were working is the exact converse of the experience of Mr Devlin, who also gave expert evidence on structural damage. He speaks to a violent disturbance in the church at a midnight mass on Christmas Eve 1917, which he attributed quite confidently to the hammers, whereas it is again proved from the respondents' books that none of the hammers were working that night. While I do not doubt that Mr Devlin was disturbed on this occasion, his evidence suggests that there are other disturbing influences at work besides the hammers.

"Of the respondents' witnesses Professor Cormack, Professor of Engineering at Glasgow, made no experiments, but describes the noise and vibration to be just what you expect in an industrial district, and not materially worse than that from the surrounding works. Professor Gregory, Professor of Geology in Glasgow, speaks to a series of experiments made by the late Professor John Milne, which show that by dropping weights heavier than any of the hammers in this case on loose sand the vibration could not be traced at a distance of 20 feet. He admitted, however, that the subsoil in this neighbourhood is of a more solid character than the loose sand with which Professor Milne experimented, and states that on the top of the school buildings he heard and felt the hammers, but says he did not hear or feel them inside the school buildings, and that neither the noise or the vibration was as great as that which he experiences in his own lecture room. He also spoke to making notes and carrying on conversation in the respondents' works while the hammers were working. Mr James Barr, surveyor, Glasgow, heard the hammers and felt a slight tremor on the roof of the school, but says that lower down it was practically imperceptible. He also paid a visit along with Professor Hudson Beare, and recorded the blows hit by the hammers at specified moments

while the Professor was measuring the vibration with a vibrograph at some of the places said to be affected. This visit was paid during the dinner-hour, when much of the other machinery in the neighbourhood would be at rest, and the time chosen thus provided a good opportunity for an accurate test of the hammers. The vibrograph, an instrument which measures the vibration set up in a bowl of mercury, is described by Prof. Hudson Beare in his evidence, to which I refer. The first experiment was made in the vestry of the church, as the Professor was unable to obtain access to the church itself. The result here was that the instrument failed to record some of the hammer blows noted by Mr Barr, and such vibration as was recorded was not much greater than that set up by a horse lorry passing in the street, which was also measured. The Professor says that unless he had heard the sound of the hammers—and he was listening for them carefully—he could not have detected any vibration in the vestry. From there he went up to the asphalt roof and playground at the top of the school and again some of the blows passed unrecorded, although in the case of those which were recorded the Professor says the vibration was slightly greater than on the basement. He verified this statement by taking photographs of both results. He visited Mr Wyllie's works where he made no test with the vibrograph, but sat at Mr Wyllie's table and wrote without any inconvenience. The machinery in the shop was not working and the Professor says the vibration from the hammers was quite perceptible, but was less than what he experiences at his own office in the University Engineering Laboratory. Before making these experiments with the vibrograph the Professor had made a more elementary experiment in the respondents' works with a bucket of water placed on the floor, and says that when the 3-ton and 35-cwt. hammer were working simultaneously the ripple on the water was faint and died away immediately. Mr Anderson also speaks to a somewhat similar experiment elsewhere, when he placed a tumbler of water on the anvil of a 5-ton drop hammer and after half an hour's working no water was spilt.

"I think these experiments establish that the vibration itself is not a very serious matter, although it is difficult to reconcile this conclusion with the evidence of witnesses who are not connected with engineering as to the effects they have observed and felt from the action of the hammers. Possibly these witnesses confuse the effects of sound with vibration, and there is, I think, much truth in the statement by Mr Anderson, 'Vibration really is wave transmission, and very often people say there is vibration when really it is sound reacting on the nervous system.' On any other hypothesis it seems impossible to account for the descriptions of the vibration as experienced by some of these witnesses. Thus, Father Gallagher says the whole presbytery shakes, every beam of the floor quivers, and the ornaments on the mantlepiece vibrate and oscillate. The Rev. M. M'Carthy, the senior assistant priest, speaks to the altar in the church and articles of furniture in the presbytery shaking, and of the impossibility of writing at his table when the hammers are going on. Mr Courtney, the headmaster of the school, says that several times he left the door of the room he was in open to secure his escape in case of the building collapsing, the effect being 'that the floor vibrated violently, the walls seemed to shake, the partitions shook visibly, boards of presses were rattled, and pictures on the wall were rattled too.' Although he says that the vibration interfered with the teaching and prevented the children writing, he did not consider it necessary to report the matter to the Educational Authorities, leaving it to the inspectors to observe the effect of the hammers for themselves. He admits that shortly before the proof he had a visit from Mr Arch. M'Neil at the school, and says that their conversation was in no way interrupted as the hammers were not working, but Mr M'Neil states positively that the hammers were working all the time. John Walker, the first assistant master, speaks to the ink spurting out of the ink bottles, and to the children stopping writing when they hear the hammer and waiting for the vibration to pass off. If the hammer goes heavily, 'they stop work and look in an appealing manner to me as much as to say that it is causing them trouble, and not only that, but causing them fear,' and on a special occasion 'the children looked at me with a distinct look of alarm on their faces as if they were waiting to get the cue to leave the classroom.' None of the children were examined, or possibly some other explanation of their desire to leave the classroom and even of the ink spurting out might have been forthcoming. This witness gave one very significant piece of evidence. He admitted, as did most of the complainers' witnesses, that the vibration had diminished to a considerable extent during the last few months, and he explains this by saying, 'Well, since the big hammer has stopped naturally the vibration is somewhat lessened.' Now the anvil of the 5-ton hammer broke in February 1920 owing to a flaw in the metal, and the hammer has been out of action ever since, but to perform its duties the respondents weighted up the 4-ton hammer to the equivalent of a 5-ton, so that the same weight of hammer has been falling recently on a smaller foundation than formerly, and must in consequence have produced as much if not more vibration, probably more. But the witness knowing the one fact and not the other observes a diminution in the amount of vibration, indicating to me that his observations were guided to a marked extent by what he expected to happen rather than by what actually occurred. Miss Mary M'Cabe, who takes a girls' class, also says she was terrified and felt as if the whole building was coming down, and adds that the noise in the church was as bad as in the school. A schoolmaster and mistress (William M'Lachlan and Minnie Henderson) from the Kinning Park Public School, which is much nearer to the hammers than the

Roman Catholic School, complain of some interference to which they appear to have got more or less reconciled, but have had no such alarming experiences as the Roman Catholic teachers and clergy. Robertson, the janitor of the church school, seems to have had little personal dislike to the hammers except when they worked at night, which he says interfered with his sleep. There remain two occasional visitors to the school. Mr Moir, Supervisor of Registration for the Education Authority of Glasgow, visits both Kinning Park Public and Roman Catholic Schools. He does not say that he ever noticed the hammers when at the public school, but mentions one occasion at the Roman Catholic School when he heard the noise, and the vibration prevented him from writing at the desk. He got no complaints from the teachers, but says as an 'untrained man' that the noise would be bound to have a nervous effect on a teacher. The other visitor is Dr West, who once a month pays a visit to the school of over two hours' duration, and examines each child as far as he can. He complains principally of the noise, but also felt the vibration, and says that they seriously interfered with his work. I was anxious to ascertain what was the measure of the interference, but as he says he can examine the same number of children in the same time as formerly it cannot amount to more than some personal discomfort in the carrying out of his work. Neither of these witnesses appear to have observed any of the phenomena spoken to by the priests and teachers. Mr M'Lachlan, however, who had attended two funerals in the church on 8th March 1919 and 15th October 1920, says he heard the noise and felt the vibration, and that it made him feel as if he would like to get out of the building, but that the noise was perceptibly less on the second occasion than on the first. The personal effect of the hammers at Mr Wyllie's works is spoken of by Mr Wyllie himself, who says it interferes with his writing; by Mrs Stewart, a shorthand clerkess, who also complained of interference with writing, and says that the noise got on her nerves so much that 'once or twice' in two years she had to take an afternoon off just to get clear of it; and by John Cochrane, who did business with the firm, and found on his visits to the office that owing to the vibration of his chair he could not sit in comfort. He suffered from a complaint which made him peculiarly sensible to any vibration, and it does not necessarily follow that the vibration which caused him to move was excessive or would have had the same effect on an ordinary person.

"I have dealt with these witnesses in some detail, because I think that it is their experiences alone which supply any evidence of such serious interference as might amount to a nuisance, and I had no doubt when they gave their evidence that they honestly regarded the hammers as having introduced a serious interference into the neighbourhood. At the same time I formed the impression that they were exaggerating the effects produced by the hammers, and by the end of the proof I was satisfied that they must have done so. I was referred in the argument to the judgment of L. C. Selborne in *Gaunt* v. *Fynney*, 9 Ch. App. 8, where in a case dealing with the noise of a machine which was alleged to amount to a nuisance, he had to deal with very similar evidence by witnesses who he did not doubt believed what they said. He treated their evidence as dealing with impressions upon the mind rather than with facts. After quoting from a medical work 'that the thought uppermost in the mind, the predominant idea or expectation, makes a real sensation from without assume a different character,' the learned Judge says — 'Every one must have had some experience of the truth of this statement; a nervous or anxious or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, orginating within himself, sounds which at other times would have been passively heard and not regarded.' Eventually he held that reliance could not be placed on such evidence as establishing the facts spoken to. My conclusion with regard to the evidence in this case with which I am now dealing is precisely the same. In view of the other evidence in the case, and of the complete failure of the complainers to prove any structural damage to their property which can with any degree of certainty be attributed to the hammers, I think it is impossible to accept the impressions formed on the minds of these witnesses as evidence of facts which actually occurred. I am inclined to think that the moment it was realised that drop hammers were to be introduced the complainers and these witnesses became prepossessed with the idea that the hammers were a novel introduction calculated to create much greater disturbance than any machinery previously in use in the neighbourhood, and that this accounts for the strange phenomena observed, and for the confidence with which all structural damage or decay was attributed to the evil influence of the hammers from the first moment. I have no doubt that these preconceived impressions were fostered by the effect of the night-working during the war, but I have come to the clear conclusion that these impressions are exaggerated and that in fact the respondents have not introduced such a serious addition to the existing discomforts of this industrial neighbourhood as amounts to a legal nuisance. I shall accordingly refuse the prayer of the note."

The complainers reclaimed, and argued— The evidence brought this case clearly within the law of nuisance as established by a succession of Scots cases—*Kinloch* v. *Robertson*, 1756 M. 13,163: *Vary* v. *Thomson*, 1805 M., Pub. Pol. Apx. 4; *Charity* v. *Riddell*, 1808, Pub. Pol. Apx. 6; *Dowie* v. *Oliphant*, 11th Dec. 1816 F.C.; *Glasgow Waterworks* v. *Aird*, 20th Dec. 1814 F.C.; Ersk. ii, 1, 2; Bell's Prin., p. 974 *et. seq.* Admitting that the question What was a nuisance? must depend on the circumstances of the locality, it had never been held that a resident was not entitled to protection from any material increase in the already

existing annoyances—*Crump* v. *Lambert*, 1867 L.R., 3 Eq. 409; *St Helens Smelting Company* v. *Tipping*, 11 H.L. Cas. 642; *Sturges* v. *Bridgman*, 11 Ch. D. 852; *Rushmer* v. *Polsue & Alfieri, Limited*, 1907 A.C. 121; *Walter* v. *Selfe*, 4 de G. & Sm. 315; *Davis and Others*, Times, 26th Nov. 1920; *M'Ewen* v. *Steedman & M'Alister*, 1912 S.C. 156. No district could be treated as inhabited exclusively by the working classes. Clergy, doctors, and teachers were there on duty to the community and were entitled to protection. The locality must be kept in a condition compatible with the discharge of the duties of these classes of the community.

Argued for the respondents—The test to be applied was whether this was a nuisance when judged by the people who normally lived and worked in the district—in the present case the working class community—Kerr on Injunctions, p. 203; *St Helens Smelting Company* v. *Tipping*, *cit. sup.*; *Sturges* v. *Bridgman*, *cit. sup.*, Sheriger, L.J., at 865; *Clarke* v. *Clark*, 1865, 1 Ch. App. 16; *Rushmer* v. *Polsue & Alfieri*, *cit. sup.*; *Gaunt* v. *Fynney*, 8 Ch. 8; *Fraser's Trustees* v. *Cran*, 4 R. 794, 15 S.L.R. 179. The case of *Davis* (Times, 26th Nov. 1920) referred to by complainers was to be distinguished in respect that Chelsea was a residential district whereas Kinning Park was industrial. Where the general character of an area was industrial with certain centres of noise and vibration the shifting of those centres within the area could not create a nuisance. In any event the injury must be of a really substantial nature to entitle a complainer to interdict—*Salvin* v. *North Brancepeth Coal Company*, (1874) L.R., 9 Ch. 705; *Wilson* v. *Gibbs and Brattesani*, 1903, 10 S.L.T. 293—and that had not been proved.

At advising—

LORD PRESIDENT—Complaint is made in this case both of structural injury to buildings and of nuisance to the comfortable enjoyment of premises.

As regards structural injury, it is proved that the operation of the respondents' drop-hammers has since their installation in 1917 communicated a sensible amount of shock to the premises of the Finance Board and of Messrs Smith, causing them to shake or vibrate. There is unanimity among the witnesses as to this as regards the asphalted roof of the school building. I think it is proved in the case of the presbytery also, and further in the case of Smith's workshops, especially the upper portions. It is corroboratively proved with regard to Wyllie's premises. This is a good foundation for a case of structural injury, and if the defects alleged had been clearly proved to have shown themselves for the first time after the operation of the hammers commenced, or to have exhibited marked or progressive aggravation since that date, the complainers might have made out their case. After repeated consideration of the evidence and of the complainers' argument with respect to it I have not been able to satisfy myself that there is sufficient ground for upsetting the negative verdict to which the Lord Ordinary came.

As regards interference with the comfortable occupation of the Finance Board's church, presbytery, and school—for the purposes for which these premises are respectively designed and used—it is proved that the thud (in which expression I include both sound and concussion) of the respondents' hammers caused sensible annoyance to the resident clergy and to the teaching staff in their daily lives and work. This is corroborated by the evidence of the teachers in the public school hard by, of the official visitors to both schools, and of Mr Wyllie, and it affords a good foundation for a case of nuisance. The critical question, however, is whether the annoyance is proved to be sufficiently material to amount to nuisance, and so to call for interdict.

It was natural for the respondents to support their case by considerations founded on the industrial character of the part of the old burgh of Kinning Park in which the Finance Board's property is situated. In that neighbourhood there are many engineering and metal workshops besides those recently established by the respondents, and extensive railway works. The streets are liable to heavy commercial traffic. There is much tenement property occupied mainly by industrial wage earners who find employment in the various works referred to. Besides the Finance Board's church, presbytery, and school, there are a public school and a branch public library hard by which contribute to serve the higher needs of the local community. The neighbourhood is thus one of a familiar kind in a great centre of commerce such as the city of Glasgow, and its characteristic industries are of the heavy metal type in which, prior to the introduction of the respondents' drop hammers, steam hammers and other instruments and processes inimical to peace and quiet were in use at a number of the workshops. The respondents argued, first, that the neighbourhood being one which, prior to the installation of the drop hammers close to the complainers' property, was generally infested (if I may use the word) by equally violent sources of noise and concussion, the recent installation close at hand is a kind of incident to which the neighbourhood as a whole is liable in consequence of the general character attaching to it, and that, however seriously the recent installation may have lowered the already depressed standard of comfort which the locality afforded to the complainers, it cannot be regarded as constituting in law a nuisance. They argued, secondly, that the neighbourhood being one in which industrial pursuits overwhelmingly preponderate, the standards by which the materiality of noise and concussion should be weighed are those of the resident industrialists, and that the clergy, schoolmasters, and other brain workers who live and toil among them must (in such a locality) be held to belong to the class of *delicati quorum votis lex non favet*. Both these propositions as put forward by the respondents stretch the doctrine of locality far beyond the limits which the law of Scotland—and I think the law of England also—assign to it.

The doctrine of locality is a concession made by the law to that social necessity which (particularly in towns) drives people into close neighbourhood not only with each other but also with the work by which they earn their living. The law of nuisance is designed to protect the use and enjoyment of property free from all interference and annoyance. But this plan has to be accommodated to the rule—inevitable in the nature of things—which requires considerable sacrifice of individual comfort to be made as the price of the advantages which close neighbourhood to others and to remunerative employment brings with it. The rule operates more or less severely according to the particular character which is impressed on a locality by the operation, conscious or unconscious, of the economic methods or habits of the community. The doctrine is not a part of the law of prescription of nuisances, and bears no true kinship with that of acquiescence or consent. Its character was explained so long ago as 1756 in *Kinloch* v. *Robertson*, M. 13,163, as a "temperament in equity," wrung from the rigour of the law of nuisance by the social necessity out of which close neighbourhood springs. I venture to think that the observations made a hundred years later in the House of Lords' case of *St Helens' Smelting Company* v. *Tipping*, 1865, 11 H.L.C. 642, are to the same effect as those shortly reported in *Kinloch* v. *Robertson*, and do not go beyond them. The importance of locality as a circumstance germane to the materiality of an annoyance complained of as occurring in it is thus obvious. But so also is the futility of appealing to it in support of the proposition that an aggravation of the annoyance caused by the new establishment of one of its sources on a site nearer to the complainer's property than before cannot result in raising the materiality of the annoyance to a pitch which the law will regard as amounting to nuisance. "Locality" in this connection points to the immediate neighbourhood of which the complainer's property is the centre—"*his immediate* locality," to use the words of Lord Chancellor Westbury in the *St Helens'* case. It is not to be understood in a sense so loose and extensive as to establish a parity between sources of nuisance sufficiently remote from the complainer's property as to make their effects comparatively little sensible there, and other sources of nuisance which may be established in such proximity as to destroy the comfortable occupation of it. To give the doctrine of locality so elastic an interpretation would in effect be to legalise the creation of nuisance at the will of any owner of property in the neighbourhood. This view was repudiated in Scotland so long ago as 1808 in the well-known case of *Charity* v. *Riddell*, M. *sub voce* Public Police, App. Part I, No. 6. I think the grounds adopted in that case present a parallel to those on which decisions in England have shown disfavour to the principle of "convenient place" as formerly advocated in that country. I should add, with respect, that Mr Justice Warrington's decision, as endorsed by a majority at least of the Judges in the Court of Appeal, in *Rushmer* v. *Polsue & Alfieri*, [1906] 1 Ch. 234, seems to me to be entirely consistent with the doctrine of locality as just explained. The question was whether the establishment of a printing press next door to the complainer in a locality where printing works (some of which worked by night as well as by day) abounded, made so material an addition to pre-existing noises as to constitute a nuisance. The learned Judge held that by day the addition was not proved to be material, while by night it was. The whole question, whether regard be had to day conditions or to night conditions, was whether the addition to the already existing annoyance was sufficiently material as to amount to a nuisance.

Again, the local clergymen, schoolmasters, and other brain-workers in an industrial community are in my view just as truly members of it as those in whose service they labour. That their professional work must be performed under great disadvantages is plain. For the fact that duty to their professional calling, as much as the necessity of daily bread, compels them, for reasons the nature of which has been already indicated, to accept conditions of close neighbourhood with a dense population and innumerable industrial works, implies that they must be content to forgo much of the comfort in life and work which is attainable by those of their professional brethren who are more favourably situated. But there is no justification whatever in the doctrine of locality, or in any other doctrine, for the proposition that because the neighbouring families of ordinary wage-earners, who make their living by operating the very engines of disturbance which subject the work of the local professional men to special difficulties, or by engaging in similarly noisy and repercussive processes—have resigned themselves to make the best of it, therefore the small but indispensable section of brain-workers in the community must suffer torture without hope of protection, however close to their ears the industrial babel may be brought.

There remains the crucial question whether the sensible inconvenience caused to the occupation of the Finance Board's property as established by the evidence is of sufficient materiality in the circumstances—for materiality is always a question of circumstances (see *per* Lord Halsbury in *Colls* v. *Home and Colonial Stores*, [1904] A.C. 179, at p. 185)—to amount to a nuisance. As I have already pointed out, industrial surroundings put the brain-worker to serious disadvantage. But that is not enough; the annoyance must be destructive of the ordinary comfort of life. On the other hand, the interests of the resident wage-earners may incline them to acquiesce, or even to support, the nuisance rather than to attack it. The absence, therefore, of evidence from their ranks, though significant, ought not to be allowed unduly to prejudice the complainers. I am not impressed with the value of the scien-

tific evidence which the Lord Ordinary discusses in connection with this part of the case. But I do find it impressive, firstly, that no evidence has been found to be available from domestic servants in the presbytery, or from persons who have been callers or visitors there, and who might have been sharers in the experience of the resident clergy; secondly, that the evidence of interference with religious observances in the church is exceedingly meagre; thirdly, that interference by the hammering with the educational work of the complainers' school—or of the public school either for that matter—appears never to have been thought worthy of report or complaint to the Education Authority, while the janitor of the complainers' school does not seem to find the annoyance substantial; and lastly, that the independent tradesmen pursuing their avocations in the near neighbourhood do not think it substantial either. I am moved by the hardship to which the resident clergy and the school teachers are put, and I in no way mistrust the sincerity of their complaints, even though some of them may—as is natural enough—be a little overstated. But while this part of the case has occasioned me much anxiety and some misgiving, I think the evidence is insufficient to establish that such share of the ordinary comfort of life as the industrial character of the locality afforded to the occupants of the Finance Board's property prior to the advent of the respondents' drop hammers is so materially impaired by their operation as to amount to a nuisance. I therefore concur, in result, with the Lord Ordinary. I also concur in the view expressed by him to the effect that night working of the hammers if it had been persisted in might have been successfully resisted by interdict.

LORD MACKENZIE—The decision of this case depends upon the view taken of the facts. The Lord Ordinary, who heard and saw the witnesses, has held that the complainers have failed to prove their case. I am unable to find sufficient grounds for differing from this conclusion.

The part of the case which caused the Lord Ordinary most difficulty was that which relates to the personal interference with those who attend the church and school and those who live in the presbytery. In this as in every case of nuisance the question is one of degree, and therefore difficult to decide. The complainers say on record that the effect of the respondents' operations as regards the church is to distract and disturb to a material extent the clergy and congregation. If this be the case it is impossible to understand why the evidence for the complainers is of so meagre a character. [*His Lordship then dealt with the evidence relating to the question of disturbance, and continued*]—

Kinning Park, in which the complainers' property is situated, is an industrial district. The evidence of such a witness as Mr Eyre Todd shows that in 1883, when St Margaret's Church was built, the industries carried on there, such as boilermaking and ironworks, were of the heavy metal type. The district is practically hemmed in by railway yards and depots. There is a subway adjacent, and heavy motors ply upon the streets. In such a district it is to be expected that there is a substantial amount of discomfort. Though this is so, that does not mean that those engaged in industrial work in the district have a licence to move their machinery where they please within the district and to extend without restriction their operations. I think the Lord Ordinary is well founded in holding that the drop hammer is not essentially different in kind from the steam hammer. The complainers' leading witness Brodie seems to take this view, but he says nothing approach the dimensions of the respondents' new drop hammers were known before in Scotland. Porter also says the noises are just something similar to what they were, but in addition there is a sort of dull thud and vibration when the hammer is supposed to be working. The respondents set up these hammers in a work which is nearer the complainers' property than their old works were. The question of nuisance is essentially one of neighbourhood, and this is recognised both in the older cases in Scotland and the more recent cases in the House of Lords. The question is whether, taking into consideration the character of the locality and the noise and vibration there prevailing, the complainers have been able to prove such real and substantial addition to that noise and vibration as to amount to a nuisance. The onus is upon the complainers. The Lord Ordinary has held they have failed to discharge it. In holding that the Lord Ordinary's conclusion ought not to be disturbed it is not necessary to take the view that a standard should be set up that would exclude from the district a class of brain-workers who may be necessary for the district. But it is necessary to bear in mind that the datum line for nuisance is altered by locality, and that those who are discharging public duties in an industrial district may have to put up with a considerable amount of discomfort which they would not encounter if they lived and worked in a purely residential quarter.

It is contended, however, that the case must be regarded as a whole, and that the proof of structural damage and injury to business has a bearing on the question of personal inconvenience. It is therefore necessary to examine that part of the proof as bearing on the question of personal inconvenience as well as being the foundation of a substantive case. [*His Lordship then examined the evidence on the question of structural damage and injury to business, and concluded*]—

The verdict of the Lord Ordinary upon this, as upon other parts of the case, must in my opinion stand. The interlocutor reclaimed against should be affirmed.

LORD SKERRINGTON—In this action for interdict against an alleged nuisance we have to decide whether the complainers and reclaimers have shown sufficient cause for altering the judgment against them pronounced by the Lord Ordinary upon a

question of pure fact. The Lord Ordinary states in his opinion that counsel for both parties were agreed in regard to the law which ought to be applied, and in the debate before us the reclaimers' counsel did not suggest that any legal error underlay and vitiated the interlocutor against which they reclaimed. The only legal questions which were debated before us were raised by the respondents' counsel, and were so raised for the purpose of suggesting additional reasons for deciding the case in favour of their clients in the event of the Lord Ordinary's grounds of judgment appearing to be insufficient or ill-founded.

There can, I think, be no doubt that the standpoint from which a Court of Appeal ought to review a decision upon a question of fact pronounced by a Lord Ordinary (and I suppose by a Sheriff) who has seen and heard the witnesses is not precisely the same at the present day as it was when the Lord President Inglis in the case of *Kinnell* v. *Peebles* ((1890) 17 R. 416, p. 424) stated that it was the duty of the Appellate Court to review "the judgment of a Lord Ordinary on matters of fact just as if we were judging in the first instance." This opinion still holds good in so far as regards the point which the Lord President had immediately in view, viz., the lower degree of finality which attaches to the judgment of a Lord Ordinary as compared with the verdict of a jury. On the other hand the Lord President did not draw attention to a consideration to which the House of Lords many years afterwards indicated that great weight ought to be attached, viz., that even in cases where the Judge of first instance has not expressly based his decision upon the ground that he believed one set of witnesses and did not believe another, he nevertheless stands in such a position of advantage in comparison with a Court which has not seen and heard the witnesses as ought to deter the latter from disturbing his judgment merely because it would have come to a different decision upon the evidence as printed. Before reversing the decision of the Judge of first instance the Appellate Court must go a step further and must come to a clear and definite conclusion that the judgment under appeal is erroneous, after making all due allowance for the fact that the Judge of first instance had, and that the Judges of the Court of Appeal had not, the advantage of hearing and seeing the witnesses—see *Clark* v. *Edinburgh and District Tramways Company*, 1919 S.C. (H.L.) 35; "*Strathlorne*" *Steamship Company* v. *Baird & Sons*, 1916 S.C. (H.L.) 134, *per* Lord Chancellor Buckmaster at p. 135; "*Baron of Buchlyvie*," reported in note to *Murray* v. *Fraser*, 1916 S.C., p. 631.

The Lord Ordinary has decided, for reasons which he states at length in his full and careful survey of the evidence, that the two complainers who continue to insist upon the action have not succeeded in proving that the working of the respondents' drop hammers caused structural injury to any one of their six properties. Five of these properties belong to the complainers first named in the note of suspension and interdict, who are a body of church trustees representing the Roman Catholic Archdiocese of Glasgow. The sixth belongs to the complainers Smith Brothers, and is occupied by them for the purposes of their business as engineers. It is, I think, unfortunate that the Lord Ordinary has in appearance dealt with the question of structural injury as if it formed a separate and independent chapter of the case instead of weighing the evidence as to the effect of the respondents' hammers upon each of the complainers' six properties and its occupants first separately and then along with the evidence in regard to the effect of the hammers upon the other properties and their respective occupants. At the same time there is no reason to suppose that the Lord Ordinary fell into the mistake of deciding any part of the case piecemeal. His decision on the question of structural injury is in my opinion justified by a consideration of the evidence as a whole. Even if I did not agree with his conclusion I should have had difficulty in dissenting from it because it sufficiently appears from his opinion that as regards this matter he considered the testimony of the complainers' witnesses to be less reliable than that of the witnesses adduced by the respondents. The Lord Ordinary's judgment ought, I think, to be affirmed in so far as it decides that the complainers are not entitled to interdict the working of the respondents' hammers upon the ground that it is likely to cause structural injury to their properties.

The next question is whether the complainers have proved that they or the occupants of any of their properties have through the working of the hammers been subjected to such a degree of interference either with their business or with their comfort as they cannot reasonably in the circumstances be required to endure for the future. This part of the case has caused me great anxiety and for the following reasons. Upon the one hand there are passages in the Lord Ordinary's opinion which suggest, to my mind at least, that he has not sufficiently appreciated the strength of the complainers' case, and that he has brushed aside too readily the testimony of witnesses whom he describes as honest but whom he treats as imaginative and untrustworthy. One reason which he assigns for disregarding their evidence is the impossibility of reconciling it with the results of certain experiments which, as described by the respondents' witnesses who made them, seem to me to throw little or no light upon the true issue. He has also, as I think, overlooked the fact that the intensity of the blows struck by the hammers and the consequent noise and vibration, as also the frequency of the blows, varied greatly from time to time, with the result that the conflict between the complainers' and respondents' witnesses is not so acute as would appear at first sight. Again, he has, as I venture to think, attributed to certain observations of Lord Selborne in a nuisance case a generality and a potency which they were not

intended to possess, and has applied them to circumstances to which, as I think, they were inapplicable. Upon the other hand the Lord Ordinary at the same time, and probably primarily, based his judgment upon the ground that the complainers had not sufficiently proved their case, in view of the fact that their most material witnesses created in his mind at the time when they gave their evidence "the impression that they were exaggerating the effects produced by the hammers." This may have been due in some cases to their demeanour, in others to their story appearing to be too highly coloured, and in others to the fact that the witnesses had testified with equal confidence, but as the Lord Ordinary thought erroneously, to structural injury having been caused by the hammers. Suggestions of exaggeration are invariably made in cases of this kind, and if the Judge considers them to be well founded there is, so far as I know, only one way of overcoming them, viz., by pointing to such a substantial body of corroborative testimony as will compel a favourable decision upon the issue of nuisance or no nuisance. It is here that the difficulty, as it seems to me, of the complainers' case becomes apparent. When the evidence of disturbance is analysed it does not possess either the precision or the body which I should have desiderated where so much depends upon the degree and frequency of the disturbance, and where the standard to be applied is that of a class and not of an individual. It is as easy as it is unfair to be wise after the event, but without intending any criticism I may say that the branch of the case which I am now considering has been somewhat overlaid and obscured by the other. The complainers had two grounds of action — structural injury and disturbance—which were relied upon as mutually corroborative. The former was thought to be the more important, and the greater part of the proof was devoted to it. Unfortunately the evidence of structural injury proved to be insufficient for its primary purpose, and it does not assist the other part of the case.

As illustrating the difficulties which the complainers have to meet, I may refer to what may be called "the Church properties," a group of four buildings in Stanley Street, consisting of a tenement of fourteen separate dwelling-houses, a presbytery, a church, and a school, all belonging to the Church trustees. It is not a favourable circumstance that in their pleadings (statement 8) the complainers bracketed together the tenement and the presbytery as "ordinary residential property," and averred with reference to both equally that the noise and vibration caused by the respondents "disturb and annoy the clergy and the occupants to a material extent so that their furniture and utensils are shaken and disturbed in their places and the comfortable enjoyment of their dwellings is destroyed." Their counsel admitted that this had not been proved as regards the tenement, and there is evidence from witnesses on both sides to the effect that the hammers did not interfere with the work or the comfort of an ordinary workman. The complainers' counsel were therefore forced to draw a distinction between the tenement and the presbytery, and to maintain that noise and vibration which were not a nuisance to a manual labourer might amount to a legal nuisance in the case of a brain-worker even if the district is one which may correctly be described as industrial. I see no objection to this proposition as one of abstract law, and the authorities founded on by the respondents' counsel do not seem to me to exclude it. Obviously, however, such a case is more difficult of proof than when something is done which annoys everyone who comes within its range. Obviously too the difficulty of proof is accentuated if the disturbance is irregular both as regards intensity and frequency. [*His Lordship then dealt with the evidence relative to the question of disturbance, and continued*]—

While I have doubts whether there may not have been a miscarriage of justice, I do not, for the reasons already indicated, see my way to move that the Lord Ordinary's interlocutor should be altered.

The LORD PRESIDENT stated that LORD CULLEN concurred.

The Court refused the reclaiming note.

Counsel for Complainers and Reclaimers — Dean of Faculty (Constable, K.C.) — T. G. Robertson. Agents—Alex. Morison & Company, W.S.

Counsel for Respondents — MacRobert, K.C.—T. M. Cooper. Agents—Macpherson & Mackay, W.S.

Tuesday, February 21.

FIRST DIVISION.

DEVLIN *v.* LOWRIE.

Liferent or Fee—Fiduciary Fee—Destination to Strangers—Construction—Disposition by Beneficiary—Validity.

A proprietor disponed certain heritable property to his two nieces, A and B, in conjunct fee and liferent for their alimentary liferent use allenarly, and the heirs of the survivor, but with the proviso that in the event of A remarrying, her whole rights and interests in the subjects disponed should then cease and determine, and should thereupon vest in her sister B and her heirs. The question having arisen as to whether A and B were entitled to grant a valid disposition of the property, *held* that A, B having died before the case was heard, had only a fiduciary fee for her heirs, and that accordingly she was not entitled to grant the disposition in question.

Observed that during their lives the conjunct fiars held not for their respective heirs but for the heirs of the longest liver, and that this involved no extension of the doctrine of fiduciary fee, as