duty, when this is not provided in the trust-disposition or in the previous part of the codicil. Besides, the expression "free sum" is ambiguous, and requires construction. If we had found the words "free sum" in the clause in which the gift is made, it might have been doubted, whether even in that connection they meant free of legacy-duty. If the words "free sum" were there and had been explained in the codicil to mean free of legacy-duty, it would have been different. But the words of gift are entirely free of all ambiguity. It would be against all authority to allow the very ambiguous words of the codicil to mean that the gift of £2000 in the original deed is to be paid free of legacy-duty. I therefore think that there is nothing in this deed to enable us to say that they meant payment free of legacy-duty. The maker of the deed knew what words to use when he wished that to be done; and, further, I think it not incompetent to refer to a deed which is impliedly revoked, and which is holograph, for the purpose of showing that he possessed this knowledge. I am, therefore, for answering the question in the negative.

Lord Mure—I am of the same opinion. In the trust-disposition there are with one exception, no words to indicate freedom from legacy-duty, and accordingly it is upon this codicil that the first parties found. We are asked to read the codicil as part of the trust-disposition; but even so reading it, I think there is not sufficient to show an intention to put the £2000 in any position different from that in which it is put by the trust-disposition. And further, I am led to that conclusion because I see that when the testator intended a payment to be free of legacy-duty he uses that expression. These deeds were executed at the same time, and by the same man of business, and they show that the maker understood how to use the expression "free of legacy-duty," when he desired an annuitant to be relieved of it. On these grounds I do not think "free sum" an expression equivalent in meaning to "free of legacy-duty."

Lord Shand—Had the language of the original deed been identical with the language of the codicil—had it been provided, that is to say, that the testator's trustees should pay over to the bursary trustees the free sum of £2000—I should have thought the question one of nicety, and attended with difficulty. The argument would still have remained, that when the testator wished, he used the full phrase; still it would have been very difficult to give a meaning to "free" other than that of "free of legacy-duty." But the peculiarity of this case, in respect of which it differs from every case cited, is that the expression is not in the clause of gift itself. The provision gives the sum of £2000—it does not say the "free sum"—and the question is whether we are to gather from the language of the codicil the great additional advantage of no less than £200, by virtue of an incidental expression. On a sound construction of the deeds that conclusion cannot be reached. The sole object of the second deed is to provide a scheme of administration. The expression "free sum" is only mentioned incidentally in the provision, that one sum only and not two is to be paid to the bursary trustees. The reasonable construction is that "free" refers to freedom from expense of management of or burdens on the trust, rather than to exemption from so large a burden as legacy-duty. I admit that we must give effect to the intention of the testator, but I do not think it clear that the testator's intention was as contended for by the first parties.

Lord Adam—If the question had arisen on the terms of the trust-deed alone, there could have been no dispute that the gift of £2000 was not free of legacy-duty. Now, it was not the intention of the codicil to enlarge but only to regulate the disposal of that sum. The only object of the clause in the codicil founded on by the first parties is to prevent any possibility of double legacy. There may be many suggestions as to the meaning of "free;" but if the testator had meant that this payment was to be free of legacy-duty he would have inserted a clause to that effect in the proper place.

The Court answered the question in the negative.

Counsel for the First Parties—Low—Lee. Agents—W. & J. Cook, W.S.

Counsel for the Second Parties—H. Johnston—Chisholm. Agents—Gordon, Pringle, Dallas, & Company, W.S., and P. Adair, S.S.C.

Counsel for the Third Parties — Guthrie. Agents—Smith & Mason, W.S.

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*Friday, June* 17.

## SECOND DIVISION.

[Dean of Guild Court, Govanhill.

### ROBERTSON *v.* THOMAS.

*Burgh—Dean of Guild—Jurisdiction—Nuisance—Appeal under* 50 *Geo. III.* (*cap.* 112), *sec.* 36.

A petition for a lining was presented in a Dean of Guild Court, and the burgh surveyor for the public interest lodged objections stating that the alterations proposed were of such a nature that they would be a nuisance, that they would cause annoyance and discomfort to the neighbours, danger to the public health, and danger from fire. The respondent also averred that the alterations were in contravention of the Public Health (Scotland) Act 1867, sec. 16, and the General Police Act 1862, sec. 177. The petitioner pleaded that the Dean of Guild Court had no jurisdiction to entertain these objections. The respondent was allowed a proof of his averments. The petitioner then appealed to the Court of Session under the 36th section of the Act 50 Geo. III. cap. 112, which allows appeals from interlocutory judgments of inferior courts, upon the ground, *inter alia*, of incompetency, including defect of jurisdiction. The Court (*diss.* Lord Rutherfurd Clark) *dismissed* the appeal, holding that as the objections, or some of them, did not upon the face of them include matters which were beyond the

jurisdiction of the Dean of Guild Court, the inquiry should proceed.

Robert Robertson, carriage hirer, Westmoreland Street, Govanhill, presented a petition to the Magistrates of Govanhill as a Dean of Guild Court, and prayed the Court to line the ground described in the condescendence annexed to the petition, and approve of the proposed alterations thereon, conform to plans and sections produced, and to authorise the petitioner to use such portion of Westmoreland Street as might be necessary for the purpose of depositing materials and making the alterations.

Moses Thomas, Burgh Surveyor, Govanhill, lodged objections to the petition. He stated—"(1) The proposed buildings will be the cause of very disagreeable smells, which will be prejudicial to the public health by vitiation of the air. (2) There will be continuous and great noise arising from the large business of stable-keeping proposed to be carried on by the petitioner. (3) The presence of the large number of horses to which the proposed buildings will give accommodation (between thirty and forty) may be the cause of epidemic disease of a serious kind in the neighbourhood. (4) The proposed buildings will greatly vitiate the air by the emission of the large quantity of smoke that must necessarily arise in the preparation of the food for so many horses, and otherwise in connection therewith. (5) The stables will give rise to the presence of large numbers of rats in the neighbouring houses, to the annoyance and danger of the inhabitants. (6) The risk of fire in the neighbourhood will be much increased by the existence of the proposed buildings. (7) This respondent's objections are accentuated by the fact that the proposed buildings will be in the centre of what is almost already, and will soon be entirely, a hollow square (that is, a square built on all four sides), the area of which is little more than an acre in extent, through which there is no provision for a current of pure air or for ready access in case of fire or otherwise, and dwelling round which there is already a population of about 500, which will be increased when the square is entirely built, to 700 or 800. (8) The proposed buildings are in contravention of section 16 of sub-section (*c*) of the Public Health (Scotland) Act 1867, and section 177 of the General Police and Improvement (Scotland) Act 1862."

The petitioner pleaded—"(3) No jurisdiction relative to objections."

The respondent pleaded—"(2) The proposed buildings being of a nature to cause serious annoyance and discomfort to the neighbours, and danger to the public health, the petition should be refused. (3) The proposed buildings being a nuisance both at common law and by statute, should not be sanctioned."

On 16th May the Dean of Guild Court pronounced this interlocutor:—"Having heard parties' procurators, and made avizandum, Repels the preliminary pleas stated for the respondent Moses Thomas against the petitioner's title to sue, and *quoad ultra* allows the respondent Moses Thomas a proof of the averments in his objections, and to the petitioner a conjunct probation.

"*Note.*—In the opinion of one of the magistrates, and also of the assessor, the averments of the respondent Moses Thomas are irrelevan and incompetent, and the pleas stated by him should be repelled. The majority of the magistrates, however, are of opinion that the respondent's averments should be admitted to probation."

The Act 50 Geo. III. cap. 112, sec. 36, provides—"And be it enacted, that bills of advocation from the Sheriffs and other inferior judges in Scotland against interlocutory judgments shall be allowed only upon the following grounds—First, of incompetency including defect of jurisdiction, personal objection to the judge, and privilege of party; secondly, of contingency; thirdly, of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for a partial payment, provided that in the cases specified under the third head leave is given by the inferior judge."

The petitioner appealed to the Court of Session, and argued—This appeal was competent. It was admitted that the appeal was under the Act of 50 Geo. III. cap. 112, but the 36th section of that Act allowed appeals from the interlocutory judgments of inferior courts, where these judgments were beyond the competency of the court pronouncing them. Here it was plain that all the objections urged against the plans for which a lining had been sought, were objections against the use to which the proposed buildings were to be put, and not objections to any structural deficiency. It had, however, been held, and was settled law, that the Dean of Guild Court had no jurisdiction to inquire into any nuisance that might arise from the use proposed to be made of any building, but could only deal with objections to the structure and formation of the building. If any nuisance was caused by the use of the building, the proper remedy was by interdict in the Sheriff Court, and not by objections to the proposed structure in the Dean of Guild Court. As the Dean of Guild Court had no power to deal with the objections that had been raised by the burgh surveyor, it was incompetent for the magistrates to order an inquiry to be made into them. The Dean of Guild Court had power to say that these objections could not be entertained in that Court against a petition properly brought there, but had no power to order an inquiry into objections which plainly dealt with questions relating solely to the use to which the proposed buildings were to be put, and not to their structure. The appeal was therefore competently brought under the Act of 50 Geo. III. c. 112, and the present case was analogous to cases in which questions of heritable right arise in the Dean of Guild Court. The Dean of Guild might competently consider a petition as to a proposed building, but if a question of heritable right arose upon the competing claims of two proprietors, the Dean of Guild could not determine it, although he might hold that there was no real competition of title and proceed with the case. As regarded the objections in the respondent's eighth statement, these were objections under public statutes. In both of the statutes founded on, machinery was provided for carrying them out, and for punishing persons who transgressed their provisions. It must be taken that the public authorities in Govanhill were quite competent to carry out the provisions of the statutes

in the way provided, and did not require to proceed by way of objections in the Dean of Guild Court.—*Forrest* v. *Manson*, June 14, 1887, 24 S.L.R. 578; *Colville* v. *Carrick*, July 19, 1883, 10 R. 1241, 20 S.L.R. 839; *Lang* v. *Bruce*, February 5, 1873, 11 Macph. 377; *Miller* v. *Crawford*, January 15, 1881, 8 R. 385; *Pitman, &c.* v. *Burnet's Trustees*, July 7, 1881, 8 R. 914; *Donaldson* v. *Pattison and Others*, November 14, 1834, 13 S. 27.

The respondent argued—The appeal was incompetent. The only statute under which appeals could be taken from inferior courts other than the Sheriff Court was the Act 50 Geo. III. cap. 112, and that allowed appeals only against interlocutors dealing with the merits of the case, and not against interlocutory judgments. This petition had been competently presented in the Dean of Guild Court, the objections had been competently lodged by the burgh surveyor in the public interest, and the Court had the right to examine into the circumstances which the objections disclosed, in order to say whether the Court should deal with them or not. All the circumstances stated in the objections showed that there was here a state of affairs in which it was only right that the Dean of Guild Court should have jurisdiction. It was alleged that disease and danger might be caused by the proposed alterations, and if that were connected with the structure of the buildings, then the Dean of Guild had power to deal with the matter. But it was impossible to know the facts without inquiry and therefore the inquiry ought to be allowed to go on—*Lamont* v. *Cumming*, June 11, 1075, 2 R. 785; *Buchanan* v. *Bell*, November 15, 1774, M. 13,178; *Proprietors of Carrubbers Close*, February 26, 1762, M. 13,175; *Thomson*, November 21, 1776, M. 13,182; *Vary*, July 2, 1805, Dict. *voce* Pub. Police Appx. p. 4; *Blakeney* v. *Rattray's Trustees*, July 10, 1886, 13 R. 1151; *Glass* v. *Glasgow Master of Works*, March 5, 1887, 14 R. 567; *Arrol* v. *Inches*, January 27, 1887, 24 S.L.R. 287, and 14 R. 394; *Moffat* v. *Denham*, June 26, 1829, 7 S. 781; *Alison* v. *Balmain*, October 25, 1882, 10 R. (J. C.) 12.

At advising—

Lord Justice-Clerk—I confess I have had some difficulty in this case, from the vagueness and scantiness of the statements, but on the whole I think that the appeal should not be sustained, and that the proceedings in the Dean of Guild Court should be allowed to go on as ordered in the interlocutor appealed against.

The petition was presented in the Dean of Guild Court of Govanhill at the instance of Robert Robertson, a carriage-hirer there, and prays the Dean of Guild "to line the ground described in the said condescendence, and approve of the proposed alterations thereon, conform to the plans and sections herewith produced, and to authorise the petitioner to use such portion of Westmoreland Street as may be necessary for the purpose of depositing materials and making the alterations referred to." Now, the Burgh Surveyor of Govanhill makes these statements in objection to the alterations—*first*, that the proposed buildings will be the cause of disagreeable smells, which will be prejudicial to the public health by the vitiation of the air; *second*, that there will be a great noise; *third*, that the presence in the proposed buildings of a large number of horses will be the cause of epidemic disease; *fourth*, that the emission of smoke in the course of preparing food for so many horses will cause vitiation of the air; *fifth*, the presence of rats; and *sixth*, the risk of fire. Then the *seventh* and *eighth* statements substantially embody all the previous objections, and in these the surveyor says—[*His Lordship here read the seventh and eighth statements, quoted above*].

Now, the Dean of Guild before disposing of the objections allowed the respondent a proof of his averments, and the petitioner has appealed to this Court on the ground that the objections taken are beyond the cognisance and jurisdiction of the Dean of Guild Court. To the competency of this appeal it is objected that the judgment in the Inferior Court is merely an interlocutory judgment. In maintaining its competency the petitioner has argued that an allowance of proof of these objections is an excess of the jurisdiction of the Dean of Guild Court. Now, if I were satisfied on the face of these objections that they included matters beyond the jurisdiction of the Dean of Guild Court, I would give effect without difficulty to the appellant's argument. But I do not think that this is the nature of the present case. Apparently the facts are that this stable stands in the centre of a square, and that the premises are to be enlarged. Now, although the Dean of Guild is not a judge in a simple case of nuisance, unconnected with the structure of the building sought to be erected, still the result of the proof may be that he will find that the structure and the nuisance are connected. I am clearly of opinion that there are cases of nuisance arising from the use of buildings which cannot come under the jurisdiction of the Dean of Guild, because they are not connected with the structure of the buildings. But on the other hand it is no answer to say what the appellant says here if the nuisance is connected with the structure of the building, and the use is the use of that building. It may well be that a thing which is innocuous in one place may be a nuisance in another, and that may be the condition of affairs in regard to this stable. I think that that is the outcome of the cases quoted to us, and that there is no case in which the objection was one taken to a building in regard to its particular locality and surroundings in which it has been held there was no case for inquiry. If I were to take some of these objections by themselves I might be inclined to say that they are not within the jurisdiction of the Dean of Guild, but I do not think we ought at this stage to limit the inquiry. I think that the Dean of Guild is entitled to make the proposed inquiry. The result may be to bring out that the matters put forward as objections are outside of his jurisdiction, but I do not think we can say so as yet.

Lord Craighill—I concur in your Lordship's opinion, and in the grounds of it.

The view of the Dean of Guild is that he is not, without inquiry, able to say that all the objections stated are such as to be outside his jurisdiction, although in the end of the day it may turn out that all the objections are beyond his jurisdiction. I am not satisfied that all these objections are outside his jurisdiction, and I

think it would be a strong thing for us at present to say, for example, that the objections founded on the General Police Act and the Public Health Act as to the natural consequences of the proposed erections, and the carrying on of the appellant's business in them are matters entirely beyond the jurisdiction of the Dean of Guild. Unless satisfied of that, I think it would be inexpedient to recal this interlocutor. We do not, by supporting it, assert that the Dean of Guild's jurisdiction will in the end be sustained, but only that a decision upon that would at present be premature.

Lord Rutherfurd Clark—I still feel difficulty here. If I had to give an opinion on the merits of the question between the parties I should have taken more time to consider my judgment. But your Lordships propose that the proof should go on, of course every question of competency and otherwise being reserved. That judgment cannot prejudice these questions, though it may cause delay and expense. As that course is suggested by your Lordships, I am relieved from entering on the important questions as to the jurisdiction of the Dean of Guild. I only add—but without stating reasons—that I am not prepared to concur in the judgment proposed. I do not enter on any reasons, because to do so would be to discuss matters on which in future I may have to give an opinion.

Lord Young was absent.

The Court dismissed the appeal, and affirmed the judgment of the Dean of Guild appealed against.

Counsel for Appellant—Darling—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for Respondent — Dickson — Law. Agents—Macpherson & Mackay, W.S.

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*Friday, June 24.*

## FIRST DIVISION.

[Sheriff-Substitute, Paisley.

## JARDINE *v.* THE STONEFIELD LAUNDRY COMPANY AND ANOTHER.

*Reparation—Tramway—Rule of the Road.*

A person alighted from a tramway-car when it stopped, upon the left side, and in crossing to the pavement, was knocked down by a van which was passing the car on that side. In an action of damages against the owners of the van on the ground that the van had been carelessly driven, and that the driver had infringed the rule of the road, the defenders were *assoilzied*.

*Per* the Lord President—That it is the duty of the driver of a vehicle to pass a tramway-car upon the left side, and that the old rule of the road has been altered in this case.

This was an action in the Sheriff Court of Lanarkshire at the instance of George F. Jardine, tailor, Cathcart Street, Glasgow, against the Stonefield Laundry Company and William Phillips for damages for personal injuries.

The facts of the case were that on 1st September 1886 the pursuer travelled in a tramway-car from Nelson Street to Kinning Park; that at the corner of Kinning Place and Paisley Road the car stopped to let passengers alight; that he stepped off on the left side (the one nearest the pavement, and the only one available, the other side being railed off); that he walked one or two steps from the car towards the pavement, when he was knocked down by a horse driven in a van belonging to the defenders, which was passing the car on the left side.

The pursuer averred that there was negligence on the part of the driver, and also that by passing on the left-hand side he had infringed the rule of the road.

On 17th December 1886 the Sheriff-Substitute (Cowan) found that the pursuer had failed to prove that the injuries he had sustained were occasioned by the fault of the defenders' servant, and that the defenders were therefore entitled to absolvitor.

"*Note.*—In the opinion of the Sheriff-Substitute the evidence establishes that on the day in question the defenders' van was overtaking the tram-car, and was about to pass it, when the latter pulled up to stop. Immediately the vanman pulled up, but being close behind the tram-car his horse passed the end of the car, and the pursuer, who in stepping off the car had not looked behind to see that the way was clear, was knocked down and injured. Fault on the part of the vanman there was none. He was on the proper side of the road, he was within his rights when he sought to pass the tram-car, and he did what he was bound to do—pulled up to stop when the tram-car stopped. What more could he be asked to do? The slightest and most ordinary care on the part of the unfortunate pursuer would have saved him from what happened."

The pursuer appealed to the Court of Session, and argued that there was fault on the part of the driver.

Counsel for the respondents was not called on.

At advising—

Lord Shand—We have had an excellent argument in this case upon behalf of the appellant, but I, for my part, can see no sufficient ground for disturbing the interlocutor of the Sheriff-Substitute, which I think is fully borne out by the evidence in the case, and which makes it clear that the pursuer is not entitled to recover damages.

The pursuer was travelling in a tram-car, and on leaving he had descended and taken two steps in the direction of the pavement when he was struck by the shaft of the defenders' van, which was being driven in the same direction.

The striking features of the case are to be found in two passages of the pursuer's evidence. There he says—"I had made three steps towards the pavement when I was knocked down by the right shaft of a van proceeding in the same direction as the tramway-car. I had no idea of its coming, and first became aware of the van being there by being knocked down;" and again—"I cannot say whether the way was clear behind the car, as I did not look before stepping off. I fell between the van and the tramway." Now, I take it to be perfectly clear that the duty of anyone using a car, and about to step off, is