

Tuesday, November 12.

SECOND DIVISION.

[Dean of Guild, Paisley.]

THE PAISLEY PROVIDENT  
CO-OPERATIVE SOCIETY (LIMITED)  
v. BUCHANAN AND OTHERS.

Burgh—Dean of Guild—Jurisdiction—  
Lining—Contract.

A petitioner obtained from the Dean of Guild a lining to buildings in erecting which he proposed to take advantage of a mean gable belonging to himself and a neighbouring respondent, and he settled by agreement with the latter certain disputes which had arisen. Further questions having emerged between the parties he applied for a new lining, and proposed to erect the buildings entirely within his own grounds.

The Dean of Guild refused the petition. On appeal the Court held that even if the petitioner was under obligation to erect the buildings in a certain manner the respondent had mistaken his remedy in objecting to the petition for lining, and remitted the case to the Dean of Guild to consider the question of lining on the plans before him.

In August 1889 the Paisley Provident Co-operative Society (Limited), incorporated under the Industrial and Provident Society Act 1876, presented a petition to the Dean of Guild Court at Paisley for a lining to their property at 48 Broomlands Street, Paisley, and for warrant to erect buildings conform to the plan produced.

The company called as respondents the contemninous proprietors, one of whom, Mr Crawford Buchanan, lodged objections. It appeared that the present application was identical with one presented in June 1889, except that whereas then the petitioners proposed to take advantage of the mean gable which stood half on their ground and half on the respondents', they now proposed to build entirely within their own ground.

The dispute which arose with the respondent in regard to the first proposal was settled by agreement, whereby the respondent enjoyed certain advantages. The petitioners obtained a decree for the proposed operations.

The petitioners explained that their present application had been rendered necessary by the respondent, who had demanded unreasonable conditions additional to those which had been included in the contract. In order to avoid litigation they preferred to confine their operations to their own ground.

The respondent pleaded—"The present application being, in respect of the former decision of the Court, *in rem judicatam*, should be dismissed."

The Dean of Guild sustained this plea.

"Note.—The present application to the Court contains no reference to the former one by the same petitioners relating to

the same property. If the present were granted, the petitioners would hold two separate linings for erections on the same piece of ground. They would thus be in the position of having an option which of these they would act upon and carry out. This the Court cannot see their way to allow. The plea of *res judicata* urged by the respondent Buchanan does not precisely meet the position of matters, although it may be fairly said to cover it. Assuming that the petitioners have good reason for seeking to be allowed to depart to some extent from the plans previously sanctioned by the Court, they must take some means for having the former lining recalled or abandoned, or, it may be, supplemented." . . .

The petitioners appealed, and argued—There was no question of *res judicata*. They found that the agreement could not be carried out with the respondent, and chose to build entirely within their own ground, on fresh plans which did not interfere with the property of neighbours. The Dean of Guild had no jurisdiction to consider the effect of the former agreement between the parties.

The respondents argued—It was not the practice of the Dean of Guild to grant two linings for two different plans of building upon the same ground. If that was done it would be possible for a person to erect a building, part of which might be according to one plan and part according to the other. The whole building might be most objectionable, but the Court would not be able to interfere, as each part had been erected under a decree of the Dean of Guild Court. Here the petitioner had agreed with the respondent Buchanan to erect a building in a certain way, and plans were prepared under that arrangement, but when it was attempted to be enforced the petitioners refused, and sought to have other plans approved of. It might not be *res judicata* in the strict sense of the words, but what was meant was that the Court declined to give two linings for different buildings upon the same subject.

At advising—

LORD JUSTICE-CLERK—This case must go back to the Dean of Guild Court. The duty of the Dean of Guild is to look to questions of lining on the plans before him, and not to disputes between parties who are at issue in regard to an agreement made between themselves. If there was an agreement between the appellant and the respondents here, I do not think that the Dean of Guild is entitled to look at that.

LORD YOUNG—I am of the same opinion. Apparently this society was not under any contract with the respondent by which they could be forced to carry out their building in a certain way, and according to certain plans. If that is so, then they are entitled to carry them out in any way they choose consistent with the comfort of their neighbours. It may be that the respondent could have an action against the appellants here for their failure to carry out the agreement between

them, but that is a different thing.

The duty of the Dean of Guild is to consider every case upon its merits without any prejudice as regards plans that had been formerly laid before the Court.

LORD RUTHERFURD CLARK—I agree. If the respondent can show that the petitioners are under an obligation to him to build his house in a certain way, then he may take proceedings to stop the building of the house, but I do not think that an objection to the lining in the Dean of Guild Court is the proper way to show his opposition.

LORD LEE—I agree. I would only wish to add that in my opinion nothing has occurred in his Court to prevent the Dean of Guild going on with the application for a lining which the petitioner here has made to him.

The Court pronounced this interlocutor—

“Sustain the appeal: Remit the case to the Dean of Guild Court at Paisley, to grant a lining to the petitioners’ property at No. 48 Broomlands Street, Paisley, conform to the plans produced,” &c.

Counsel for Appellants—J. C. Thomson—Ure. Agents—Sturrock & Graham, W.S.

Counsel for Respondents—Guthrie. Agents—Carmont, Wedderburn, & Watson, W.S.

Friday, November 15.

## SECOND DIVISION.

### M’WHIRTER AND OTHERS v. LATTA.

*Trust—Breach of Trust—Misconception of Duty amounting to Failure on Trustee’s Part to Administer Trust—Removal of Trustee.*

In a petition at the instance of all the beneficiaries of a trust for removal of a testamentary trustee and appointment of a judicial factor, it was proved that the trustee had without excuse constantly interfered with the liferentrix in the exercise of her most ordinary rights. He had prevented her making ordinary repairs at her own expense on the trust subjects occupied by her, and had threatened to sell the business which she carried on. He refused her reasonable application for the use of part of the trust subjects as a store in connection with her business, and claimed a right to administer the trust without consulting the liferentrix or considering her wishes.

Held that the trustee’s misconception of duty was so gross as to amount to a failure to administer the trust, and the prayer of the petition granted.

Alexander M’Whirter died on 17th October 1885, leaving a trust-disposition and settlement dated 19th December 1884, whereby he disposed to John Latta, printer in Maybole, and to any persons to be as-

sumed by him, as trustees for the purposes therein specified, his whole estate heritable and moveable. The purposes of the trust were generally—(1) Payment of debts; (2) the trustees were directed to allow the petitioner Mrs M’Whirter the truster’s wife, the liferent use and enjoyment of his whole estate as an alimentary provision; (3) and (4) on her death the trustees were directed to realise the estate, and divide it in certain proportions amongst his children and grandchildren, the other petitioners.

This was a petition at the instance of the testator’s widow, children, and grandchildren, for sequestration of the trust-estate, and for the removal of Latta from the office of trustee, and the appointment of a judicial factor. The petitioners averred that Latta obtained this position by inducing the testator, who shortly before his death was weak and facile in mind, to delete from the deed the names of other two trustees.

The petitioners averred that “as tenant of premises belonging to the trust the interests of Latta are or may be adverse to his duty as trustee. He acted for a long time as factor for the trust-estate, and as trustee he has the power of determining what repairs shall be ordered to the trust property, and at what rents the other houses belonging to the trust shall be let. Under the settlement he is entitled to charge for his services as factor. Immediately on his obtaining the management of the estate the said John Latta acted in a very arbitrary manner. The revenue of the trust was to a large extent frittered away in useless repairs of the trust property, regarding which he never consulted the petitioner Mrs M’Whirter, against whose liferent the expense was charged. He displayed a strong dislike of the beneficiaries, and in various ways sought to harass and annoy them. In consequence of his conduct the petitioners requested him to assume other trustees to act along with him in the trust, and on his refusing to do so they were obliged, on 24th February 1887, to present a petition to the Second Division of the Court of Session for the nomination of additional trustees, or alternatively for his removal and the appointment of new trustees.”

On the suggestion of the Court, Latta assumed two new trustees, and the first petition was in consequence dismissed.

The petitioners further averred—“After the assumption of the new trustees Mr Latta still continued to act in an arbitrary manner, and to interfere at his own hand in the management of the property. The petitioners having thus again cause to complain of his actings, instructed their agent to apply to the trustees to appoint a factor, and they offered, for the sake of having the trust on a satisfactory footing, and to relieve the trustees from their difficulty about expenses as after mentioned, to pay the expenses the said John Latta had been put to in the former petition if he would retire from the trust. At the same time Mr Scoular, one of the assumed trustees nominated by the petitioners, also offered to re-