

Thursday, November 6.

FIRST DIVISION.

[Bill Chamber.

BAIN v. THE COUNTESS-DOWAGER OF
SEAFIELD.

*Church — Churchyard — Mausoleum — Burial
Grounds (Scotland) Act 1855 (18 and 19 Vict.
cap. 68), sec. 11.*

Held that the erection of a mausoleum upon private property is not an appropriation of ground for a burial-ground, or an addition to a burial-ground, within the meaning of sec. 11 of the Act 18 and 19 Vict. cap. 68.

Glebe—Churchyard, Conveyance of—Dispositive Clause—Personal Bar.

A presbytery, with consent of the parish minister, excambed the site of the church, the churchyard, and a portion of the glebe to the proprietor of the contiguous lands, on the narrative that they were to be conveyed with a view to their being planted and improved. No condition was inserted in the dispositive clause. The minister thereafter sought interdict against proposed operations on the portion of the glebe excambed. The Court refused the interdict craved, on the grounds that the conveyance was absolute in its terms, and that whether the conveyance by the presbytery was effectual or not, the minister was barred, in respect of his concurrence in the disposition, from objecting, in the process of interdict, to the validity of the conveyance of the portion of the glebe.

Observed, that so far as regarded the churchyard and site of the church the conveyance was quite ineffectual.

By deed of excambion, dated 3d, 5th, and 6th May 1882, entered into between the Earl of Seafield and the Presbytery of Abernethy, with consent and concurrence of the Rev. James Bain, minister of the parish of Duthil in the presbytery of Abernethy and county of Inverness, on the narrative "that the said Earl of Seafield sometime ago signified to the Reverend James Bain his desire to acquire part of the lands forming the glebe of Duthil, lying to the east and north of the churchyard, and extending to about one acre and one-half of an acre, with a view to plant and improve the said ground, which is in the immediate vicinity of the burying-ground of the family of Grant, and the said Reverend James Bain had expressed his readiness, subject to the sanction of the presbytery of the bounds, and on receiving an equivalent therefor, to concede for the object in view the said parcels of ground, and also that the said Earl should at the same time acquire right to the ground occupied by the church and churchyard of the said parish, to the exclusion of the right of the said Reverend James Bain and his successors in the said cure, to graze with cattle or sheep the said churchyard," the said presbytery, with consent of the said Reverend James Bain, disposed to the Earl of Seafield "All and Whole the following pieces of ground forming parts of the present glebe lands of Duthil, and consisting of

three small parcels, the first forming the triangle between the Grantown and Carr Bridge Road, the road from Duthil Mill to Grantown, and the churchyard, and extending to two roods and two poles or thereby; the second forming a triangle, and lying between the said Grantown and Carr Bridge Road, the north wall of the churchyard, and a straight line between the said road and the churchyard, the said straight line being a continuation of the boundary of the churchyard on the west, and extending to about thirty-two poles; and the third bounded on the west by a continuation of the said straight line last mentioned, extending to the plantation fence, on the south by the said Grantown and Carr Bridge Road, and on the north and east by lands belonging to the said Earl of Seafield, and extending to three roods and thirty-nine poles or thereby; as also the ground forming the churchyard of Duthil, and the site of the parish church thereof, extending to three roods and one pole or thereby; and the land occupied by the Grantown and Carr Bridge Road so far as it traverses the said glebe of Duthil, extending to two roods ten poles or thereby, making in all three acres and four poles imperial measure or thereby, all as delineated and coloured red on the foresaid plan hereto annexed, and signed as relative hereto; together with all right, title, and interest which the said presbytery of Abernethy or the said Reverend James Bain or his successors in the said cure had, have, or any wise might claim or pretend thereto in all time coming, and specially including the right of the minister of the said parish to graze with cattle or sheep the said churchyard, which right is hereby for ever renounced and discharged, the said Earl of Seafield and his forefathers being by acceptance hereof bound to cut the grass in the said churchyard, and to keep it in the order in which it has hitherto been kept by the minister." In return for this disposition the Earl of Seafield disposed to the presbytery a piece of ground extending to three acres and four poles imperial measure or thereby.

This was a note of suspension and interdict at the instance of the Rev. James Bain against the Countess-Dowager of Seafield, who succeeded her son in the estates of Seafield, to have the respondent interdicted from—(2) Erecting or constructing a mausoleum, family vault for burial of the dead, or any such building or erection, in or upon any part of said ground; (3) using or devoting any part or portion of the said ground for extending the area of the churchyard of the parish of Duthil; and (4) devoting the said ground, or any part or portion thereof, to any other use or purpose than that set forth in the said contract of excambion—viz., planting and so improving the same.

The complainant averred that he "only consented to the said excambion on the express condition that the portions of the ground conveyed to the Earl of Seafield should be used solely for planting and for the purpose of improving the amenity of the manse and the privacy of the churchyard;" but that since the respondent succeeded to the Seafield estates she had, "in breach of the arrangement condescended on, resolved to use the ground for building purposes, and was now cutting down trees of old standing and uprooting plants of a few years' standing in the triangle between Grantown Road and the

road leading to the manse called the 'Old Mill Road,' and bounded on the west by the churchyard wall, with a view to extend the area of the churchyard and build a mausoleum thereon."

The complainer founded on the Statute 18 and 19 Victoria, chapter 68, entitled "An Act to amend the Laws concerning the Burial of the Dead in Scotland," section 11 of which enacts that "any burial-ground may be provided under this Act either within or without the limits of the parish for which the same is provided, but no ground not already used as or appropriated for a cemetery shall be appropriated as a burial-ground or as an addition to a burial-ground under this Act, nearer than one hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house." He averred that the ground which the respondent proposed to devote to the extension of the area of the churchyard was within sixty yards of his manse, which was his dwelling-house, and that he had not consented to the extension; further, that the mausoleum which it was intended to build was within sixty yards of the manse; that he and his family had suffered in health from the proximity of the graveyard, and specially of the then existing mausoleum of the family of Grant, which was situated within forty yards of the manse.

The respondent pleaded—“(1) The note ought to be refused, in respect that, on a sound construction of the contract of excambion, the ground on which the respondent proposes to erect the mausoleum is her own absolute property; and, *separatim*, that the said erection is in no way inconsistent with the purpose for which the said ground was acquired. (2) The Burials Ground (Scotland) Act 1855 has no application to the present question, inasmuch as the respondent's operations do not involve the appropriation of ground for a burial-ground, or addition to a burial-ground, under the Act; and, *separatim*, the ground in question is farther from the complainer's manse than the churchyard of Duthil.”

On 4th August 1884 the Lord Ordinary on the Bills (LORD LEE) refused the note.

The complainer reclaimed, and argued—The deed of excambion was inept, because the conveyance by the presbytery, with concurrence of the minister, was *a non domino*. On the narrative of the deed the improvement of the land was made a condition of the conveyance; the proposed erection of a mausoleum was a violation of that condition; and was also in contravention of section 11 of the Act 18 and 19 Vict. cap. 68, above quoted.

The respondent answered—(1) The conveyance was absolute in its terms. Moreover, the proposed erection was quite in consistence with the narrative of the deed. (2) The complainer was barred from maintaining his demand for interdict because the respondent had every title he could give her. The Burials Act of 1855 had no application, because the proposed operations did not involve the appropriation of ground for a burial-ground, or an addition to a burial-ground.

At advising—

LORD PRESIDENT—The deed on which both parties here found is certainly a very extraordinary piece of conveyancing, but I do not desire to say

more than this, that so far as regards the conveyance of the churchyard and the site of the church the deed is quite ineffectual. That part of the deed never could have any effect. How far it is otherwise open to objection I do not propose to determine. The deed is open to any challenge brought in an action of reduction, and even the minister may have a good title to insist in such an action. But that can only be done in a proper process. In the present proceeding the minister must be held bound by the deed which he has executed, so far as it is not against public law. By that deed he put into Lord Seafield's hands a portion of his glebe, including that particular portion of the glebe on which he now complains that Lady Seafield proposes to erect a mausoleum. The mausoleum is not to be erected in the churchyard, but on a portion of the glebe which was conveyed, and I can find nothing in the terms of the deed to justify our granting interdict against this proceeding. This portion of the glebe was conveyed in absolute property, and there was no restriction as to the use which was to be made of it. It is certainly said that the deed recites that the lands were to be conveyed with a view to their being planted and improved by Lord Seafield. That may have been the intention of Lord Seafield, and may also have been the expectation of the minister. But in the conveyance itself there is no such qualification, and therefore the recital cannot avail. Even if it could, I very much doubt whether it would form a good objection to what is now proposed to be done. The erection of a mausoleum upon what is said to have been a piece of waste ground appears to be of the nature of an improvement, but I do not think it is necessary to enter upon that as I think the words of conveyance exclude such an inquiry.

As regards the argument founded on the statute of 1855, I think that the respondent's second plea-in-law makes a good answer to that, and it is this—“2. The Burials Ground (Scotland) Act 1855 has no application to the present question, inasmuch as the respondent's operations do not involve the appropriation of ground for a burial-ground, or addition to a burial-ground, under the Act.” I think that is a good plea. I am therefore for adhering.

LORD MURE concurred.

LORD SHAND—If the operation here complained of was the erection of a mausoleum on the ground of the old churchyard, in virtue of a right of property acquired by Lord Seafield, I should have no difficulty in holding that the complainer was entitled to interdict, for it is quite clear that the grantors of this deed could not convey any right of property to the church and churchyard, and it would not have made the conveyance any better if the heritors had concurred, for there was no proposal to substitute another church and churchyard.

But the question is quite a different one when the ground on which the erection is to be made was part of the glebe, and never was part of the churchyard. I do not say that the title to that is good; I think it may be represented to be a bad title; but it must be taken as good in a question with the minister. He was a party to the deed, and obtained advantage from it, for he held the

ground given in exchange since the date of the deed. I think he cannot challenge the transaction as it now stands. Moreover, if the words of the narrative were contained in the dispositive clause, and if there was a declaration that the conveyance was granted merely for the purpose of planting and improving, even then I am not satisfied that the complainer would be entitled to succeed.

There might then have been an inquiry as to the use of the ground now, as compared with the use formerly, in order to find out whether it has been improved within the meaning of the deed. But it is not necessary to give an opinion on that point, for whatever there may be in the narrative of the deed, the dispositive clause is absolute in its terms, and there is no restriction as to the use to be made of it.

On that ground alone I am clearly of opinion that we must refuse this note.

LORD DEAS was absent.

The Court adhered.

Counsel for Complainer—Lang—M'Kechnie.
Agent—H. W. Cornillon, S.S.C.

Counsel for Respondent—Mackintosh—Darling.
Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, November 6.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

SCOTTISH PROPERTY INVESTMENT COMPANY
BUILDING SOCIETY AND LIQUIDATORS
v. BOYD.

Friendly Society—Building Society—Liquidation—Effect of Winding-up Order on Position of Members—Power of Liquidators to Call on Advanced Shareholder for Immediate Payment of Advance—Building Societies Act 1874 (37 and 38 Vict. c. 42), sec. 14.

Held that "an advanced shareholder" of a building society who had an advance from the society, repayable by fortnightly instalments during a period of fourteen years, but who did not participate in the profits of the society, was really a debtor of the society, whose contract was to pay his debt by instalments, and could not be called upon by the liquidators, by reason of a winding-up order having been pronounced, to pay up the present value of his future instalments at once.

Observations per Lord Justice-Clerk, Lord Craighill, and Lord Kinnear on Brownlie and Others v. Russel, March 9, 1883, 10 R. (H.L.) 17; ante, vol. xx. p. 481.

The Scottish Property Investment Company Building Society was a society incorporated under the Building Societies Act 1874, in terms of rules duly certified as in conformity with the Act. These rules provided, *inter alia*:—"2. *Objects*—The objects of the company shall be by the subscriptions or payments of its members to form a fund in shares of £25 each, half-shares of £12 10s. each, and quarter-shares of £6, 5s. each, out of which fund members who are desirous of

erecting or acquiring dwelling-houses or other heritable property may receive advances to enable them to do so; and further, to afford a safe and profitable investment for sums of money.

"3. *Shareholders*—All persons having entered for, or who shall enter for and subscribe to, shares in the company, in terms of these rules, shall be shareholders thereof.

"7. *Advances of Money to Shareholders*—Advances shall be made for periods of either four, six, eight, ten, twelve, or fourteen years, as individual shareholders may prefer, and shall be repayable in advance by fortnightly instalments within the office of the company on each alternate Tuesday, according to the rates specified in the following table:—[Here followed a scale of repayment of a loan of £100].

"Applications for an advance shall be in the form No. 2 or No. 3 appended to these rules, accompanied by such specification of the security offered and other information as the directors may require, and these applications shall be recorded by the manager according to the dates at which they are received by him in a register to be kept for that purpose; and they shall be preferred and disposed of by the directors in the order in which they are recorded. No application for an advance shall be received unless the shareholder applying shall have paid the amount of one month's subscriptions on the shares on which the advance is required."

"13. *Power to Sell or Redeem Property*—Any shareholder may redeem the property on which he has obtained an advance at any time, on his giving two months' notice in writing to the manager, and on payment of all arrears, interest, and any fines that may have been incurred by him prior to these alterations on the rules coming into effect, and disbursements, and of the then present value of his future payments, calculated at 5 per cent, and also a fee of one shilling per share; and no member shall be entitled to redeem his securities upon any other terms than the above, any rule of law notwithstanding.

"14. *Funds of the Company*—The funds of the company shall comprise the subscriptions of the shareholders, interest, and all fines and other payments herein provided to be paid to the company.

"The profits shall be placed to the credit of the holders of unadvanced shares to an extent not exceeding 5 per cent. per annum on the amount standing at their credit in the books of the company.

"The surplus of such profits, if any, shall be carried to a separate account, and shall form a fund to be called the 'Contingent Fund,' from which shall be defrayed all losses and expenses which the company may sustain or incur. . . .

"18. *Investment of Funds not Advanced to Shareholders*.—It shall be lawful for the directors to lay out and dispose of any sum of money, which may not be immediately required by borrowing shareholders, on heritable security or on such other legal securities as they may think fit, in terms of the provisions of the 13th section of the Act 10 George IV. c. 56, and the trustees shall alter and vary such securities as often as they are required by the directors."

On 5th June 1875 Mr Boyd, the defender, applied to the directors of the society by letter, in the form prescribed by rule 7 above recited,