

At advising—

LORD YOUNG—The questions raised in this case are questions of fact. There are two questions raised, whether the fishing lines of the pursuers were destroyed by the defenders, and if they were so destroyed, whether the defenders have proved that the destruction was attributable to no fault of theirs? Both the Sheriffs are of opinion that the pursuers' fishing lines were destroyed by the defenders, but they differ in regard to the other question. The Sheriff-Substitute is of opinion that the defenders did not take due care to avoid the pursuers' lines, and therefore finds them liable in damages. The Sheriff finds no fault proved on the part of the defenders, and reverses the Sheriff-Substitute's decision. For my own part I think it doubtful whether the pursuers' lines were destroyed by the defenders at all. I think it doubtful if it is proved that the defenders' lines were ever set as alleged; the evidence is not quite convincing on that point. It is curious that not a trace of the lines said to have been destroyed were ever recovered. The fishermen who first examined the place where the lines were said to have been set say there was not a trace of the lines. They then went to the trawler, and I think all on board her concur as to the complaint that was then made, and as to what the fisherman said; they first claimed £2 of damages, and then they came down to £1. I am disposed to believe that evidence; I see no reason for discrediting these witnesses. It is remarkable that in an action in which £120 is sought as damages the pursuers should have started with asking such small sums, and that as compensation for their lines turn away. I think that it is enough to render their case doubtful. Then they bring an action for £120 and get £20 in all as damages, I do not think these facts are favourable to them. But although I think it doubtful if the lines were even set, I am content to put my judgment as the Sheriff-Principal has put it, and find that the import of the evidence is that the men on board used all due care, and were not in fault. I think that the judgment of the Sheriff should be affirmed, and the defenders absolved from the conclusions of the summons. I think the proper findings would be, that it is not proved that the pursuers' lines were destroyed, and that it is proved that the defenders used all due care and caution and were not in fault.

LORD CRAIGHILL—I concur in the opinion which Lord Young has just pronounced. In my opinion the interlocutor of the Sheriff-Principal is in accordance with the evidence, and in accordance with the law applicable to this case. I think that the result he has come to is that at which we should arrive. There was no carelessness on the part of the trawler. Her crew did not wish to destroy the lines of the fishermen if they were really set, and I think such an allegation totally unfounded. I think that the proof has not substantiated the charge against the trawler, but the contrary. With reference to the question whether the lines were set, and if set were destroyed by the trawler, I do not express an opinion. The case was presented to us on the assumption that the lines had been set, and had been destroyed by the trawler, and taking the

case on that assumption I concur with Lord Young in his opinion.

LORD RUTHERFURD CLARK—I am rather inclined to take the opposite view. I think it proved that the lines were set in the sight of the trawler, and that the trawler did not use due care to avoid going over the ground where they were laid, and that she destroyed them. That is my impression and my view of the evidence.

LORD JUSTICE-CLERK—I confess I have participated in the doubts expressed by Lord Rutherford Clark. But the finding we are asked by the appellants to make is that the defenders have not proved that the loss sustained did not arise from their fault. I cannot make that finding, though there is a conflict of evidence on the point. I think that the fishermen might have taken the precaution, which they did not take, of informing the trawler that their lines were set there. Then again, they left the lines when they had set them, and went on shore, no doubt they say for a very good reason, on account of the weather, but they did leave their lines, and the signs that they left to show that their lines were set there were not sufficient to prevent the trawler going over that ground.

The Court found that "on 20th May 1885 the pursuers' fishing-lines were damaged as alleged by the trawler 'St Clement,' but that the defenders have proved that the loss did not result from their fault; therefore dismiss the appeal and affirm the judgment of the Sheriff."

Counsel for Pursuers (Appellants)—H. Smith—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defenders (Respondents)—Sol.-Gen. Robertson, Q.C.—Dundas. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 18.

SECOND DIVISION.

ANDERSON AND OTHERS (BUCHANAN'S TRUSTEES) v. MINISTERS OF KILMARNOCK, ETC.

Trust—Administration of Trust—Whether "Minister of Town" includes Minister of quoad sacra Parish therein.

A truster directed her trustees to convey a certain portion of the funds which she left for charitable purposes to the Provost and Town Council of Kilmarnock, the "clergymen of the Established Church of Kilmarnock, and the clergyman of the parish of Riccarton," as trustees. In Kilmarnock there were various Established Churches situated in the old parish and in the burgh which had been erected as *quoad sacra* churches out of the original parish. Held that the ministers being ministers of Established Churches within the town of Kilmarnock were trustees along with the collegiate ministers of the original parish and the minister of Riccarton, but that the minister of a *quoad sacra* church situated some distance out of the town, part of whose parish had been disjoined

from the original parish of Kilmarnock and part from Riccarton and Galston, was not.

The trustor further directed the *distribution* of the fund to be by payment of the funds equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith. Held (1) that the fair meaning of the direction was that the trustees to *distribute* should be the same body as the trustees to *hold*, and therefore that those *quoad sacra* ministers who had been found to be trustees should share in the distribution; (2) that the one-half of the fund was to be administered by the minister of Riccarton alone, and the other half jointly by all the ministers of Kilmarnock who had been found to be trustees.

This was a Special Case stated for the opinion of the Court under the following circumstances—By a trust-disposition and settlement dated 8th July 1861, Misses Margaret, Jane, and Elizabeth Buchanan disposed to certain trustees therein named the whole means and estate which might belong to the longest liver of them at her death, in trust for certain purposes therein stated. The trustors reserved full power to themselves and to the survivor to alter or revoke the said trust-disposition and settlement in whole or in part. Miss Elizabeth was the last survivor of the three sisters, and on 11th May 1871 she executed a codicil to the said settlement, which along with the original deed was recorded in the Books of Council and Session on 8th May 1875. In the original settlement the trustees had been directed to convey the lands and estate of Bellfield—part of the trust-estate—to “the Provost, Magistrates, and Town Council for the time being of Kilmarnock, and their successors in office, the clergymen of the Established Church of Scotland in Kilmarnock for the time being, and their successors in the ministry, and the clergyman of the parish of Riccarton for the time being and his successors in office, all in trust,” for certain purposes. By the codicil Miss Elizabeth Buchanan, *inter alia*, appointed the trustees therein named to hold for the period of ten years, from and after the first term of Whitsunday or Martinmas occurring six months after her death, the lands and estate of Bellfield. At the end of that time the trustees were directed to make over the said lands with any accumulations of rents which might be in their hands, “to and in favour of the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of the parish of Riccarton, all for the time being, and their successors in office,” and to the trustees themselves during their lives, in trust for the purposes mentioned. Of these purposes the material one to the present Special Case was the *sixth*, which was as follows—“For payment of the balance or residue of the said revenue or income equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith.”

Miss Elizabeth Buchanan died on 23d April 1875, and her trustees entered into possession and administration of the said trust-

estate. The ten years during which the trustees were directed to hold the said trust-estate expired at the term of Martinmas 1885, and it became the duty of the trustees to hand over the estate as directed by the said codicil. In the course of doing so a question arose as to the meaning of the expression “the ministers of the Established Churches of Scotland in Kilmarnock.” The Laigh Kirk was the original church of the parish of Kilmarnock, and was a collegiate charge, but several *quoad sacra* parishes had been disjoined and erected from it—the High Kirk of Kilmarnock in 1811; St Marnock’s Church in 1862; St Andrew’s Church in 1868. The churches and parishes of High Kirk and St Andrews were entirely within the burgh and the old parish of Kilmarnock. The church of St Marnock was within the burgh of Kilmarnock, but part of the parish was outside the burgh—the rest being within both parish and burgh. In 1874–75 a church and parish *quoad sacra* were erected called Hurlford Church and parish. This parish was erected out of parts of the original parishes of Kilmarnock, Riccarton, and Galston. The church itself was situated outside the boundaries of the burgh of Kilmarnock, though in that part of the parish of Hurlford which was disjoined from the old parish of Kilmarnock. The trustees doubted whether the minister of the parish of Hurlford could be held to be a trustee as included in the designation, the “ministers of the Established Churches of Scotland in Kilmarnock and the minister of the parish of Riccarton,” and the first question in the Special Case was whether he was such and therefore a trustee of the Buchanan Bequest. The next question was whether the ministers of the *quoad sacra* parishes of High Kirk, St Marnock’s, St Andrew’s, and Hurlford (fifth and sixth parties) came within the designation of ministers of the said respective parishes in the sixth purpose, which directed the payment of the income of the Bequest equally between the parishes of Kilmarnock and Riccarton, to be paid and expended by the ministers of the said respective parishes in “charitable and benevolent purposes connected therewith,” and if these ministers or any of them came within the designation, whether the fund was to be administered by them jointly within the respective parishes or in proportion to the population and area of the parishes, or on some other principle.

The funds of the part of the bequest available under the purpose under discussion were about £350 per annum.

This Case was stated to have a decision on these points.

The *quoad sacra* ministers argued—The phrases used in the deed show that Miss Buchanan intended that all the ministers of the Established Church of Scotland whose parishes formed part of the original parish of Kilmarnock should be trustees for holding the fund; that would include the collegiate ministers of the Laigh Kirk, the ministers of the High Kirk of St Andrews, St Marnock’s, and the minister of the parish of Hurlford. It was impossible to separate the trustees for holding the fund and the trustees for distribution. All the reasons pointed to their being the same body. It was a question of carrying out the testator’s intention. The minister of Hurlford must be included in both capacities as a trustee, as part of his parish

belonged to the original parish of Kilmarnock, which along with the parish of Riccarton was the limit of the district Miss Buchanan intended to benefit.

The other parties argued—It was admitted that all the ministers having churches within the bounds of the burgh of Kilmarnock were trustees for the holding of the fund. This included the ministers of all the *quoad sacra* parishes except Hurlford. As regards the trustees for distribution, according to the words of the deed they were a different body, and only the collegiate ministers of the Laigh Kirk and the minister of Riccarton were included.

At advising—

LORD RUTHERFURD CLARK—We have here before us a Special Case, which has been presented for the purpose of determining certain questions which have arisen as to the construction of a charitable trust established by the will of the late Miss Jane Buchanan.

The questions are two in number, first—who are the trustees to hold; second, who are the trustees to distribute. The fund is to be divided into two portions. One-half of it is to be expended on charitable purposes within the parish of Kilmarnock, the other half in the parish of Riccarton.

The clause which establishes the trust for holding the fund is printed in the Case [and quoted *supra*]. By it the truster directs her trustees to pay the trust funds to the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of Riccarton.

The question which has arisen under this clause is, who are in the sense of the deed the ministers of the Established Churches in Kilmarnock? Putting aside the *quoad sacra* parish of Hurlford, which I shall deal with afterwards, it appears that in the town of Kilmarnock there is the original parish church, which is called the Laigh Kirk, and several *quoad sacra* churches which have been created from time to time. The question is whether the expression “ministers of the Established Churches in Kilmarnock” includes not only the ministers of the Laigh Kirk, but also the ministers of the *quoad sacra* churches, and in my opinion it includes the whole. It is plain that the latter are ministers of Established Churches in Kilmarnock, and it is as plain that according to the very expression of the deed more than one minister in Kilmarnock was to be a trustee. I am very clear therefore that the *quoad sacra* ministers are trustees as well as the minister of Laigh Kirk. It is impossible otherwise to satisfy the words of the trust-deed.

There is no question about the parish of Riccarton. With respect therefore to the constitution of the trust for holding the fund, I am of opinion that the trustees include the ministers I have mentioned.

With respect to the trust for distribution we have a different phrase. The clause is thus expressed—“For payment of the balance or residue of the said revenue or income equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith.”

If we had not anything else but these words

there might be considerable difficulty in extending the trustees beyond, first, the minister of the parish of Kilmarnock—that is to say, the minister of the Laigh Kirk, and secondly, the minister of the parish of Riccarton. But I think it would not be consistent with the purposes of the trust and the intention of the truster to take these words according to their strict meaning. It appears to me that she must be held to have meant that the trustees for holding were also to be the trustees for distributing, and that the trustees for distributing, so far as regarded the parish of Kilmarnock, were not to be confined to the minister of the Laigh Kirk. With respect to Riccarton, the trustee for distributing is of course the minister of Riccarton.

I have yet to deal with the minister of Hurlford.

The position of Hurlford is peculiar. That parish has been formed partly out of Kilmarnock, partly out of Riccarton, and partly out of Galston, but I do not think that the minister can be held to be a minister of an Established Church in Kilmarnock. His church, although in the parish of Kilmarnock, is not in the town of Kilmarnock. I think that the words “Established Churches in Kilmarnock” refer to churches in the town of Kilmarnock, and do not extend to the whole parish.

I propose that the questions should be answered according to the opinion I have just expressed.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD CRAIGHILL was absent.

The Court pronounced this interlocutor—

“The Lords having heard counsel for the parties on the Special Case, are of opinion (1) with reference to the first of the questions therein stated, that the minister of the church and parish of Hurlford *quoad sacra* is not one of the ministers of the Established Churches of Scotland in Kilmarnock in the sense of the trust-disposition and deed of settlement and codicil mentioned in the Special Case, and is not a trustee of the Buchanan Bequest; (2) with reference to the second question, that the ministers of the parishes of the High Kirk *quoad sacra*, Kilmarnock, St Marnock's *quoad sacra*, Kilmarnock, and St Andrews *quoad sacra*, Kilmarnock, are for the time being entitled, along with the collegiate ministers of the Laigh Kirk, Kilmarnock, to receive and expend the one-half of the balance or residue of the income of the Buchanan Bequest falling to the parish of Kilmarnock, and that the minister of the parish of Hurlford *quoad sacra* is not so entitled; (3) with reference to the third question, that the minister of the parish of Hurlford *quoad sacra* is not entitled along with the minister of the parish of Riccarton to receive and expend the one-half of the said balance or residue falling to the parish of Riccarton; (4) with reference to the fourth question, that to the extent of one-half the fund is to be administered for the time being by the ministers of the Laigh Kirk, Kilmarnock, of the High Kirk *quoad sacra*, Kilmarnock, St Marnock *quoad sacra*,

Kilmarnock, and St Andrews *quoad sacra*, Kilmarnock, jointly, and that to the extent of the other half the fund is to be administered by the minister of the parish of Riccarton: Find and declare accordingly: Find the whole parties to the Case entitled to expenses out of the trust funds: Remit," &c.

Counsel for the First, Second, Third, and Fourth Parties—Sol.-Gen. Robertson, Q.C.—H. Johnston. Agents—Gibson & Strathearn, W.S.

Counsel for Fifth and Sixth Parties—D.-F. Mackintosh, Q.C.—Johnston. Agent—George J. Wood, W.S.

Tuesday, January 4, 1887.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

M'CAIG AND OTHERS.

Process—Res judicata—Identity of Interest.

In a multiplepounding brought to distribute a deceased's lady's residuary estate which was burdened with a number of annuities, the heir in possession of her family estates claimed the whole residue under burden of annuities thereon. A counter claim was lodged by a party claiming the fund *in medio* at the death of the last surviving annuitant, if he should then be in possession of the family estates. The Court *sustained* the claim of the heir in possession to payment of the residue, so far as not necessary to be retained by the executor to meet the annuities still remaining charged against it, reserving to him and all others concerned his or their claims on the remaining part of the residue retained by the executor. Seventeen years thereafter one of the annuities fell in by the death of the annuitant. In a second multiplepounding brought for distribution of the capital retained to meet it, the person who happened then to be heir in possession of the family estates, and who was son and heir of the party who was unsuccessful in the former process, claimed it as against the executrix of the successful claimant. *Held* that the former process was *res judicata* against him, in respect he was *de facto* in the position of the unsuccessful claimant in it.

Miss Mary Turner Maitland, only daughter of the Hon. Patrick Maitland of Freugh, died at Portobello on 23d January 1861 leaving certain testamentary writings, which were all, except one, in the form of letters to the deceased Alexander Smith, W.S. By the fifth of these she directed the capital of her estate "to revert to the possessor" [of her family estates]—"first, to my nephew Patrick Maitland of Freugh and his children, failing them my nephew John Maitland, Esq.," &c. The residue was burdened with a number of legacies and annuities, which included one of £50 to her nephew Colonel (afterwards Lieutenant-General) John Maitland. Patrick Maitland of Freugh predeceased her, and was succeeded in Freugh by his eldest son and heir-at-law John Maitland.

On 27th October 1861 Mr Smith, her executor, raised an action of multiplepounding and exoneration in the Court of Session for the purpose of having the executry estate divided. There was, *inter alia*, a competition between the eldest son of Patrick Maitland, John Maitland of Freugh, and the younger children of Patrick Maitland. This competition related both to the amount of the residue and the time of division.

The younger children of Patrick Maitland of Freugh claimed to be entitled to three-fourths of the fund *in medio* as it should exist at the death of the last surviving annuitant if Freugh and Balgreggan should remain unsold, and they made an alternative claim if the estates should not then be unsold.

Colonel John Maitland, afterwards General John Maitland, was one of the annuitants. His annuity was one of £50. He claimed his annuity of £50, and further, failing all the children of his brother, the said Patrick Maitland, "that at the death of the last surviving annuitant other than himself he shall be ranked and preferred to the fund *in medio* as it shall exist at that time if the estates of Freugh and Balgreggan shall then remain unsold."

On 10th February 1863 the Lord Ordinary (ORMIDALE) pronounced this interlocutor, in which he found, *inter alia*, as follows:—"Finds that according to the sound legal contention of the said testamentary writings, the claimant John Maitland, as the heir-at-law of the late Patrick Maitland of Freugh, and as such now in possession as proprietor of the estates of Freugh and Balgreggan, is entitled to the residue remaining of the testatrix Miss Maitland's means and estate after payment of all the specific legacies and annuities left by her. . . . Therefore, and in respect of those findings, sustains the claim (in its first branch) [*i.e.*, for his annuity] for Colonel John Maitland; . . . and also sustains the claim of John Maitland of Freugh . . . for immediate payment of the residue of the testatrix's executry estate so far as not necessary to be retained by the raiser Mr Smith as executor of Miss Maitland to meet the annuities still remaining charged against it, reserving to the said John Maitland and all others whom it may concern, his or their claims on the remaining portion of said residue, which in the meantime is to be retained by the pursuer as Miss Maitland's executor: Repels the claims for all the parties, so far as not now sustained, subject always to said reservation, and decerns." To this interlocutor, on a reclaiming-note, their Lordships of the First Division, of date January 15th 1864, adhered—*Maitland v. Maitland*, January 15, 1864, 2 Macph. 417.

John Maitland of Freugh died intestate on 5th July 1869, and his mother was confirmed as executrix-dative to him. His younger brother William succeeded him in the family estates, and dying on 2d January 1881, left a general settlement in favour of his mother, under which she became liferenter of the estates and executrix to him also. He was succeeded in the fee of the estates by his uncle General John Maitland, who died on 16th March 1881, and was succeeded in the fee of the estates, under certain deeds which need not here be detailed, by his son Elphinstone Vans Agnew Maitland, under burden of Mrs Maitland's liferent.