

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-

sign, which offer if accepted would have left Mr Rennie and Mr Porteous to manage the trust. . . . Mr Latta not having been awarded his expenses in the proceedings connected with the previous petition, which practically resulted in the prayer being granted, the liability for these has been the cause of much discussion amongst the other trustees, who were unanimously of opinion these should not be charged against the trust-estate in the absence of a decision by the Court to that effect. Mr Latta has declined to pay them, and in consequence his Edinburgh agents have been pressing the trustees for payment, and threatening if they refuse to take proceedings for their recovery. In consequence of these threats, and partly also of the annoyances to which they have been subjected in acting along with Mr Latta, and the unsatisfactory and most expensive way in which the trust continued to be managed, and which might entail personal responsibility, the three assumed trustees have now sent in their resignation, and Mr Latta is thus again in the position of being sole trustee. . . . The expense of judicial administration will be cheerfully borne by the liferentrix, as she will thereby secure an efficient and neutral administration of the trust-estate. . . . The liferentrix has repeatedly requested Mr Latta not to order repairs and expenditure on the said property without consulting her, and she has also offered to keep the said property at her own expense in proper repair to the satisfaction of the trustees, but both these proposals have been rejected without any reason being assigned. Moreover, she requires a store in connection with the bakery business which she carries on in premises belonging to the trust-estate, and the income from which forms the chief source of livelihood of herself and family; but her repeated applications on this subject for more than two years have hitherto not been successful. In short, the said John Latta's conduct is causing continual friction between him and those whose interests it is his duty to further, and his only object in retaining the management of said estate seems to be that it confers upon him the power of subjecting the beneficiaries to constant loss and annoyance."

Latta lodged answers, in which he denied the allegations made against him, and stated that he considered it his duty to protect the estate on behalf of his grandchildren against the actings of Mrs M'Whirter and her family, whom he averred to be persons of violent character.

Proof was left before Lord Lee upon 18th March 1889, the result of which sufficiently appears from his Lordship's opinion.

The petitioners argued—It was admitted that the trustee had not embezzled or made away with any of the trust funds during the course of his office, but the conduct of a trustee might not amount to actual malversation or dishonesty, and yet might warrant the Court in ordering his removal. The recent cases on the subject were—*Hope v. Hope*, October 29, 1884, 12 R. 27; *Fleming v. Craig*, May 30, 1863, 1 Macph. 850; *Thomson v. Dalrymple*, January 11, 1865, 3

Macph. 337; *Jackson v. Welch*, December 12, 1865, 4 Macph. 177. All these cases with the exception of *Hope* were in favour of the petitioner's contention. The case of *Hope* was a contest between two trustees, and not between a trustee and beneficiaries as the present was, so did not apply. It might be that the Court would not remove a trustee because he quarrelled with the beneficiaries, but if his conduct was such as to make the trust unworkable they would interfere. Here the trustee's conduct amounted to that; moreover he benefited from the loss of the estate.

The respondent argued—Gross malversation must be proved before the Court would take the extreme step of removing a testamentary trustee from his office; mere quarrelling between the trustees and the beneficiaries was not a sufficient ground for the removal of a trustee.—*Taylor v. Taylor's Trustees*, July 18, 1857, 19 D. 1097; *Gilchrist's Trustees v. Dick*, October 20, 1883, 11 R. 22; *Roughlad v. Hunter*, March 5, 1833, 11 S. 516. The evidence showed that all the trustee had done was in *bona fide*, and for the benefit of the estate; in these circumstances the Court would not order his removal.

At advising, LORD LEE delivered the judgment of the Court:—

This is the second application which has been presented by the beneficiaries under the trust-settlement of the deceased Alexander M'Whirter complaining of the conduct of Mr John Latta as sole trustee, and praying for the interposition of the Court. The first petition led to an arrangement by which three additional trustees were assumed, and the petition was dismissed. It now appears that this arrangement has not been successful. The trustees so assumed have resigned, and the administration of the trust is said to be no better attended to than before.

By the interlocutor of 23rd February a proof was allowed to the parties of their respective averments, and a very full inquiry has taken place.

The question now is, whether the circumstances disclosed are such as render necessary the interference of the Court in order to secure the administration of the trust? There is no doubt, I think, as to the power of the Court to interpose if necessary for that purpose.

It is not immaterial to notice that the whole parties upon whom the expense of judicial management would fall concur in the application for a judicial factor and for the removal of the trustee. The leading petitioner is the truster's widow, as to whom the trustees were directed to allow her the use and enjoyment during her life of the whole trust-estate, heritable and moveable, remaining after payment of the truster's debts, and the expenses of the trust. It is only after that liferent, and upon the death of the truster's wife should she survive, as she did, that the trustees are directed to sell and realise the residue of the heritable and moveable estate for the purpose of division among the family, though powers of sale are conferred so far

as necessary to enable the trustees to carry out the purposes of the settlement. The beneficiaries interested in the ultimate sale and division of the residue are also petitioners.

It is one of the admitted facts of the case that before the petition was presented the petitioners offered to pay all the expenses of the first petition if the respondent would resign the trust so as to allow the appointment of a judicial factor. But the respondent states that he considers it his duty to continue to discharge the trust committed to him by the deceased.

If it were the fact that the respondent has faithfully executed the purposes of the trust, the Court in my opinion could not remove him in order to provide other management more satisfactory to the beneficiaries.

But the allegation of the petitioners is that he has so conducted himself as to show that his only object in retaining the management is to exercise the powers of a sole trustee in a manner hostile to the beneficiaries, and so as practically to defeat the leading purpose of the trust, viz., the widow's enjoyment of her life-tenure.

The petition sets forth a variety of ways in which this is said to have been done. Some of these—I refer particularly to the allegations as to the mode in which he became sole trustee, and obtained an extension for twelve years of a lease which had still six years to run—affect the honesty of the respondent's character as a trustee, and his fitness to execute a trust which might require him to take proceedings against himself. If it were necessary in order to support this petition that a charge of moral turpitude be established, the evidence on this subject would have to be examined in order to see whether the respondent's account of the matter is reconcilable with the facts. The evidence presents a serious difficulty. Even Mr Dougall's account of the matter conflicts with the respondent's. But my opinion is that in the present proceedings it is unnecessary and inexpedient to decide anything upon that subject, and that it ought to be assumed that the respondent in a proper action for challenging the extension of his lease might be able to vindicate himself.

It is necessary, however, to consider the proof as to the other allegations of the petitioners. For although they may not involve any moral delinquency on the part of the respondent, or malversation in office to the effect of making personal profit, it has been held, and is I think settled, that such moral delinquency or malversation is unnecessary, and that a breach of trust even from error in judgment may be sufficient.

The case of *Fleming v. Craig*, 1 Macph. 850, appears to me a sufficient authority on this point. The import of the decision in that case is sufficiently expressed in the following passage of the Lord Justice-Clerk's opinion—"Power of sale is granted, but only in order to secure the life-tenure of a portion of the estate to the petitioners the truster's sisters, and the fee of the estate, under certain conditions and qualifications, to the respondent's sons by a previous marriage,

and there is an ultimate destination. Now, what has been done? A portion of the trust-estate has been sold and realised by the trustees during the lifetime of Mr Craig for the purpose of putting it into the hands of Mr Craig himself. That is a clear and direct breach of trust. In using these words I do not necessarily make any charge of moral delinquency against the trustees. Their error may have been merely an error in judgment, but it is not on that account a bit the less a breach of trust, and such a breach of trust as shows either that the trustees did not understand their duty under the trust-deed, or that if they knew it they disregarded it, and this breach of trust has been committed to serve the private ends of Mr Craig and his sons. All the trustees who committed this breach of trust afterwards resigned except Craig, and the estate was left in his hands as sole trustee. It is abundantly clear that this is a condition of the trust which cannot be allowed to continue."

In the present case the facts appearing from the evidence are these—Although he accepted the trust, and claims to have known the truster and his wife for many years, the respondent from the commencement acted towards the widow and life-tenure as if she was a person so disorderly and unreasonable that it was his duty to do all in his power to protect the estate against her; to restrain her in the exercise of the most ordinary rights of a life-tenure; and when she remonstrated and found fault with him—as she appears to have done on some occasions with considerable vehemence—to call in the police. The evidence of the police shows that although he succeeded upon one occasion in getting her convicted of a breach of the peace, and fined ten shillings, the life-tenure was an industrious, respectable, and peaceable woman, who has carried on for many years the principal bakery business in Maybole. Nobody else complained of her, and the complaints of the respondent were of a trifling nature, and were usually either not taken up or found not proven. Indeed it appears that the police thought it necessary to warn the respondent about the trivial nature of his complaints.

The respondent, however, did not confine himself to police complaints. It is proved by the evidence of the life-tenure and her daughter, and corroborated by the correspondence and by the evidence of the plumber Thomson, that he interfered in a most unnecessary and unjustifiable manner with the life-tenure in making ordinary repairs at her own expense on the subjects she occupied. It is further proved that he threatened to sell the bakery business which she carried on, and took legal advice as to his power to carry out his threat. His explanation of this illustrates in a remarkable manner the shifts to which he is put to account for his conduct.

But another significant piece of evidence of the gross misconception of duty by which the respondent has throughout been influenced is to be found in the way in which he dealt with the life-tenure's application for the use of a part of the property of

which she was to have the liferent as a store in connection with her business. There should have been no difficulty in giving it to her at Whitsunday 1888, for her agent applied by letter on 11th January 1888, and the place was only let from year to year. But it had a window which looked out in the direction of the respondent's premises, and he made difficulties, and succeeded in getting the application postponed so that it has not yet been dealt with. He now says it is too damp for a flour store. In short, he thinks evidently that any excuse is good enough for not allowing the liferentrix what she asks.

But perhaps the most prominent of all among the evidences of the respondent's incapacity to understand his duty, and his unfitness to execute this trust, is the fact that he has insisted, and still claims as his right, that he is to administer this trust for the liferentrix without consulting her or considering her wishes in any degree. He has plainly carried to such a length his extravagant views of his independence of the rights and interests of the liferentrix as to bring the trust to a deadlock. This is nothing short of a wilful failure to administer the trust, and in my opinion amounts to a breach of trust not less intolerable and inexcusable than that which took place in the case of *Fleming v. Craig*.

I am of opinion that the condition of this trust is such as cannot be allowed to continue, and that it is necessary that the respondent should be removed and a judicial factor appointed.

As every opportunity has been given to the respondent to retire from the unreasonable position which he has taken up, and as the print now boxed shows that he still persists in maintaining it, I am also of opinion that the expenses of the present application must fall upon him.

The Court pronounced this interlocutor:—

“Remove the respondent John Latta from the office of trustee under the trust-disposition and settlement of the late Alexander M'Whirter, baker, Maybole, dated 19th December 1884: Appoint David Crawford, accountant, Ayr, to be judicial factor on the trust-estate of the said Alexander M'Whirter with the usual powers, he always finding caution before extract: Find the respondent liable in expenses to the petitioners,” &c.

Counsel for the Petitioners—H. Johnston—Ure. Agents—Sturrock & Graham, W.S.

Counsel for the Respondent—J. A. Reid—Orr. Agents—Philip, Laing, & Company, S.S.C.

Friday, November 15.

FIRST DIVISION.

[Court of Exchequer.]

ADAM v. COMMISSIONERS OF  
INLAND REVENUE.

*Revenue—Income-Tax—Municipal Buildings—Burgh Court—Income-Tax Act 1842 (5 and 6 Vict. cap. 35), Schedule A.*

Held that from an assessment imposed on municipal buildings under Schedule A of the Income-Tax Act 1842, a deduction fell to be made in respect of the Burgh Court Rooms, which were exempt from assessment, as they were occupied for the administration of public justice.

At a meeting of the Commissioners of Income-Tax for the district of the City of Edinburgh, held on 17th April 1889, Robert Adam, City Chamberlain, as Treasurer of Police, appealed against an assessment made on the Lord Provost, Magistrates and Council of the City of Edinburgh, under Schedule A of the Income-Tax Acts for the year 1888-89. The property assessed was the City Chambers, and the nett assessed value was £332, 10s., on which the duty, at 6d. per £, amounted to £8, 6s. 3d.

The premises assessed contained various offices and rooms occupied in the management of municipal business, and included the Burgh Court Room and rooms connected therewith.

The appellants maintained that as regards the assessment on the City Chambers, these were occupied for public purposes, and for the administration of the civil government of the city, and for the administration of justice. They included the Burgh Court and the Dean of Guild Court. They were the seat of the Sheriff Court of the county of the city, with the usual offices incidental thereto. The Chambers could only be used for public purposes, and not for profit. The Government contributed towards the salaries of the officials by payments to the Clerk of Court and to the Procurator-Fiscal.

The appellants contended—(1) The occupation which would infer liability under Schedule A must be a beneficial, and not a mere official occupation; (2) the chambers were occupied for public purposes of such a character that their occupation must be taken to be of the Crown, and the Crown not being named in the Income-Tax Statutes, was not bound thereby.

The Surveyor, Mr Edward Maughan, on the other hand, contended that there was no exemption under Schedule A in favour of buildings used for municipal purposes, but that, on the contrary, section 40 of 5 and 6 Vict. cap. 35, expressly imposed the tax on “all bodies politic, corporate or collegiate, companies, fraternities, fellowships or societies of persons, whether corporate or not corporate,” and in the rules annexed to said Act, as applicable to Schedule A, no allowances were specified to be made in respect of municipal buildings.