

heritable estate into moveable if the ward can only be maintained by means of selling or burdening of an heritable estate. But in the present case I see no reason which would justify any interference with the distribution of the estate in which the heirs and executors of the ward are interested. In the first case we have an estate containing a large amount of valuable timber which it has not been the practice of the administrators of the estate to cut. Now, considering that the ward is at an advanced age, in the first place it is not necessary for her benefit that the wood should be cut, because her income is more than sufficient to maintain her. Next, I think it is impossible to maintain that it is for the benefit of the estate as a whole that this timber should be cut, because there is no suggestion that within any time to which the ward may look forward, the value of the estate would be sensibly diminished by leaving it uncut, and the proposal is that on an occasion unconnected either with the interests of the ward or the estate as a whole, a valuable portion of the entailed estate shall be converted into money by cutting down the timber for the benefit of the executors. I agree with your Lordship that such a proceeding is altogether inadmissible in view of any sound principle of administration.

II. *As to Charging Improvement Expenditure*—Then with regard to the proposal to add to the improvement debt, I think that in most cases it would probably be regarded as sound administration that improvement debt should be charged upon the estate, because it is the habit of heirs of entail when improvements of the kind contemplated by the Entail Statutes are necessary to take advantage of the powers to charge, but it may very well be that in administering the estate of an insane person, who does not require the whole of the income of the estate for his or her maintenance, there may be surplus rents which may reasonably be applied towards payment of part of the improvement debt, and that it may be for the benefit of the ward that they be so applied, so that in the event of the ward's convalescence the estate may not be burdened more than is necessary. We do not know what were the facts which came before the Lord Ordinary when a portion only of this improvement debt was charged on the estate, but we must assume that the considerations were carefully weighed, and that so much only as it was thought necessary in the interest of the estate was charged upon it. On this subject also I am clearly of opinion with your Lordships that it would not be in accordance with proper administration *ex intervallo* to alter what has been already decided for the purpose of enlarging the estate which would eventually go to the executors of this lady.

LORD KINNEAR concurred.

I. The Court adhered to the interlocutor of the Lord Ordinary in so far as it authorised the curator to thin the wood in the

policies; *quoad ultra* recalled it and refused the prayer of the note.

II. The Court recalled the interlocutor of the Lord Ordinary and refused the prayer of the petition.

Counsel for the Petitioner—Ure, Q.C.—A. O. M. Mackenzie. Agents—Mackay & Young, W.S.

Counsel for the Respondent—W. Campbell, Q.C.—J. H. Millar. Agents—W. & J. Cook, W.S.

Counsel for the Minuter Mrs Chancellor—Macphail. Agents—Melville & Lindesay, W.S.

Friday, July 7.

FIRST DIVISION.

[Edinburgh Dean of Guild Court.]

DIRECTORS OF ASSEMBLY ROOMS, EDINBURGH v. SOMERVILLE.

Dean of Guild—Procedure—Failure to Hear Parties—Appeal—Competency—Edinburgh and Municipal Police Act 1879 (42 and 43 Vict. cap. cxxxii), sec. 161.

Section 161 of the Edinburgh Municipal and Police Act 1879 provides that "The Dean of Guild Court may, on the application of the burgh engineer, cause every existing building used or to be used as a place of amusement or entertainment . . . to be inspected, and may, after hearing the persons interested, direct such means to be taken for the proper ventilation, or for the providing of proper means of access and exit to such buildings, and for protection from fire and other damages to the public as to the Court shall seem fit."

In a proceeding under this section dealing with the sufficiency in case of fire or panic of the exits from the Music Hall, the respondents (the directors of the hall) at an initial stage applied to the Dean of Guild Court to see the report on which the public authorities had taken action. This was refused. They subsequently moved that the public authorities should state in a condescendence their objections to the existing exits. This was also refused. Thereafter the Court pronounced an order finding that the existing exits were insufficient, and calling upon the respondents to lodge a minute setting forth the remedies they suggested. This minute having been lodged, the Junior Legal Assessor, in the absence of the Court, having refused to hear counsel for the respondents, issued an interlocutor finding the proposals of the respondents insufficient, and a further interlocutor was afterwards pronounced dealing with additional proposals by the respondents.

On an appeal, held that the powers conferred by section 161 were supplementary to but not exclusive of the ordinary jurisdiction of the Dean of Guild Court, and that consequently an appeal was competent although not expressly provided by the statute.

Interlocutors appealed against recalled, on the ground (1) that the matter being one involving large interests it was the duty of the Court to hear parties before pronouncing a judgment finding the accesses and exits insufficient, or in any case before rejecting the counter proposals of the respondents, and (2) that the interlocutor issued in the absence of the Court could not be regarded as an interlocutor of that Court.

Observations as to the proper exercise of its discretion by the Dean of Guild Court as regards hearing parties.

On 15th March 1898 a petition was presented to the Dean of Guild Court by Mr George Somerville, Procurator-Fiscal of that Court, against the Directors of the Assembly Rooms, Edinburgh.

The petition proceeded on the narrative "That it has been reported by the Burgh Engineer to the petitioner that the arrangements in said hall for ventilation and means of access and exit are not in a satisfactory condition, and it is accordingly desirable in the interest of public safety that the building should be inspected by the Court and such means directed to be taken as they may consider necessary for proper ventilation, for providing of proper means of access and exit, and also for protection from fire and other dangers to the public as to the Court shall seem fit, in terms of the Edinburgh Municipal and Police Act 1879, section 161, as amended by the Edinburgh Municipal and Police Amendment Act 1891, section 80, sub-section (8)."

The petitioner craved the Court to serve the petition on the respondents and "to cite them to appear in Court to be heard *viva voce* thereon; thereafter to appoint a visit to the said building for the purpose of inspecting the same, and thereafter to pronounce such orders as may be deemed necessary, with a view to provide for proper ventilation of same, and proper means of access and exit, and protection from fire and other dangers to the public; as also to find the said respondents liable in the expenses of process, and to do further or otherwise as to your Lordship and Honours shall seem proper."

On the 17th March 1898 the Dean of Guild Court pronounced the following interlocutor:—"Before further answer appoints a visit to the premises for the purpose of inspecting the same, upon Thursday, 24th March current, at half-past two o'clock afternoon, reserving to both parties all their pleas."

On 20th May the Dean of Guild Court pronounced this further interlocutor:—"Having resumed consideration of this petition, and having heard counsel for the respondents, who moved that the Procurator-Fiscal be appointed to lodge a conde-

scendence stating the defects of which he complains and the means of remedy suggested, and that the respondents be appointed to answer the same, Finds it unnecessary to pronounce an order in terms of said motion; and having visited the premises in presence of the parties, finds that the existing stairs and passages do not provide proper means of access to and exit from the said Music Hall, George Street, Edinburgh, and are not sufficient for the protection of the public in the event of fire or panic, and in the meantime appoints the respondents, within twenty-eight days, to lodge a minute setting forth any objections they may have to state to an order being pronounced on them directing them to provide proper means of access to and exit from the premises, and stating the nature of the operations which they are prepared to carry out, if any, for the purpose of making the means of access and exit in question sufficient for the protection of the public."

Objections to this interlocutor were lodged by the respondents on June 16th, in which they objected to the competency of the petition and to the procedure that had taken place. In particular they averred—"The Court then pronounced the interlocutor of 17th March 1898. Thereafter, and in order to acquaint themselves with the nature of the defects complained of, the respondents applied for permission to borrow up the Burgh Engineer's report referred to in the petition, but this was refused. The inspection appointed to take place upon 24th March was made by the Lord Dean of Guild and other members of his Court, and there were also present certain representatives of the respondents. The members of the Court were afforded every opportunity of examining the premises, but no indication was given to the respondents of the nature of the alleged defects or the means suggested for their remedy. No further communication was made to the respondents until 18th May 1898, when intimation was given to the respondents by the petitioner that the case had been enrolled for the following Friday, 20th May, 'for an interlocutor or further procedure.' At the calling of the case upon that day counsel for the respondents repeated his motion for a condescendence and answers if the petition was to be proceeded with further, but this motion was refused. Without giving the respondents any opportunity of being heard upon the competency of the proceedings, or the averments made in the petition, the Court pronounced the interlocutor of 20th May 1898. This had been prepared before the meeting of the Court, and was, along with a note appended to it, then and there read."

The respondents denied that there was any necessity for making any changes in their premises, but offered to execute a scheme of improvement which had been suggested by their architect.

On 7th July 1898 the following interlocutor was pronounced:—"Having considered the objections lodged by the respondents, with the relative plan, and heard counsel

for the respondents, Finds that the alterations proposed by the respondents and shown on said plan will not be sufficient to provide proper means of access to and exit from the said Music Hall or for protection from fire, and continues the cause for a week to enable the respondents, if so advised, to confer with the burgh engineer with a view to the adjustment of satisfactory proposals."

With reference to this interlocutor the following minute was lodged by the respondents on July 11th:—"Cook for the minutes stated, with reference to the interlocutor bearing to have been pronounced upon 7th July 1898, that the case was enrolled for that day (being an ordinary Court day) by the respondents for further procedure:—When the case was called neither the Lord Dean of Guild nor any of his Court were present. The bench was occupied by the Junior Legal Assessor for the city. No appearance was made for the petitioner. The Junior Legal Assessor stated that the Court was to pronounce an interlocutor in the terms of that above referred to. The draft interlocutor had been previously prepared, and it was then read by the Junior Legal Assessor. Counsel for the respondents protested against this proceeding, and stated that the motion which he was instructed to make was that in respect of the offer contained in the objections for the respondents the petition should be dismissed. The Junior Legal Assessor stated that the motion would be refused, and he also refused to record that any such motion had been made. Counsel for the respondents was not heard upon the objections. The Dean of Guild Court heard nobody in connection with the case upon the day in question. The proceedings bearing to be recorded in the said interlocutor never took place, and it was incompetent and illegal for the Lord Dean of Guild to pronounce any such interlocutor."

Certain interviews took place between the respondents' architect, the burgh engineer, and the Junior Assessor. Thereafter, by interlocutor of 21st July, the respondents were allowed to see the report by the Burgh Engineer and to lodge a note of objections thereto.

On 26th July a minute was lodged by the respondents, in which, while maintaining their whole objections to the competency of the proceedings, they offered to execute certain operations.

On 28th July the Dean of Guild Court pronounced the following interlocutor:—"Having resumed consideration of this petition, with the report by the burgh engineer and the minute for the respondents, and heard counsel for the respondents, Ordains the said respondents, the Directors of the Assembly Rooms, Edinburgh, to carry out the following operations on the Music Hall, George Street, viz.—(1) To make and construct emergency egresses as shown on the plan lodged by the respondents, widening the proposed staircase to four feet in place of three feet; (2) to slap out a door on each side of the gallery into the adjacent cloak-rooms; (3) to take off

or remove five sitting spaces next the doors of the orchestra side rooms; (4) subject to obtaining the consent of the tenants, or failing such consent at the expiry of the present lease, to instal electrical light into the premises occupied by Messrs J. & J. Richardson & Company; and (5) at the expiry of the present lease of the front shop, to widen the outlet to George Street by the addition of at least one door: Appoints the work to be done at the sight and to the satisfaction of the Burgh Engineer, and in so far as regards the operations under the heads 1, 2, and 3 hereof to be completed by 1st April 1899, and decerns, and continues the cause."

The respondents appealed to the First Division, and argued—(1) The appeal was competent. It was not expressly excluded, and the powers given to the Dean of Guild Court under section 161 of the 1879 Act, being powers similar to those which they already possessed, and the exercise of them not being expressly protected against review, might be reviewed in the same way as their former powers. This was not an appeal upon a technical point but against grave irregularities, which the Court had inherent power to redress. The history of the proceedings showed that there had been oppressive and illegal procedure which had produced a grave miscarriage of justice.

Argued for respondents—(1) The appeal was incompetent. The section under which these powers were exercised by them contained no provision for appeal. They had not exceeded their jurisdiction, and therefore there could be no review on what was merely a question of procedure. (2) The procedure had been in accordance with the provisions of the section. It provided for (1) an application by the procurator-fiscal, (2) inspection, (3) the hearing of parties, and (4) the pronouncing of an order. Everything else was left to the discretion of the Dean of Guild. All these four steps had been scrupulously taken. It was quite clear from the section that the Court were only bound to hear the parties at the stage at which they had been prepared to do so.

LORD PRESIDENT.—The first question is whether this is a competent appeal. Now, the Dean of Guild Court was, on the question we have to consider, exercising a power which was conferred upon it in 1879 by the 161st section of the Edinburgh Municipal Act of that year. It seems to me to be perfectly plain that the power there conferred upon it is merely a new and additional power of the same class and character as that in use to be exercised by the Dean of Guild Court, and that accordingly in the exercise of this power the Dean of Guild Court act in the same way and subject to the same appeals as they do in all other cognate matters which belong to its previous jurisdiction; and accordingly I think this appeal is very clearly competent. I may add that I think, after what has been disclosed in this case, it would be greatly to be regretted if there were not an appeal.

The jurisdiction here given is in the interests of public safety, and I should be the

last to lay down anything which would require a rigid procedure in matters which might be of urgency. But on the other hand this statute itself indicates that this is to be done with due regard to those interests which are affected by the exercise of this power for the public safety; and in particular, with almost superfluous emphasis, the section requires that parties shall be heard. Now, in judging what amount of procedure shall take place or how often the parties shall be heard, the Dean of Guild Court must exercise, if I may venture to say so, the great saving virtue of common sense; and the question, what are the matters on which there shall be a hearing must be judged with due regard to proportion, the magnitude of the interests involved in the first place, and also the nature of the proposal and counter-proposal on which the hearing is asked. To take the present case, it appears from what we have before us that this would be a very expensive operation involving large structural changes, and involving also the dedication to purposes of access of part of the premises at present yielding a revenue in the way of rent, so that this is a matter where large interests are involved, and where care must be taken that right is done. Now, when I turn to the procedure I cannot recognise the qualities which I have described in the Dean of Guild Court. In the first place I think it was a natural thing that, as this was a matter not of litigation but of the action of a public authority for public safety, the persons whose property was to be affected should see the report on which the public authorities had taken action. That however was refused. Then when the case came before the Dean of Guild Court, and the view was had, the counsel for the respondents—for they had sent counsel to represent them—moved that the Procurator-Fiscal be appointed to lodge a condescendence stating the defects of which he complained and the means of remedy suggested. Now, I by no means say it is the bounden duty of the Dean of Guild Court in every case where a condescendence is asked to grant that order. There again I say common sense must be applied to consider (first) is there any violent hurry, and (second) are these matters of such detail and such costly expenditure that it is proper there be specification to the Court of the faults and the proposed remedies. But the Dean of Guild Court in the exercise of its discretion refused that also. Not only so, but they at once proceeded to find that the existing stairs and passages do not provide proper means of access to and exit from the said Music Hall, George Street, Edinburgh, and are not sufficient for the protection of the public in the event of fire or panic. Again, I am not prepared to say dogmatically that that was too rash procedure, although, taken in connection with the preceding procedure and the subsequent procedure, I do not attach so high value to the discretion exercised as I should otherwise have been glad to do. But that step having been taken, the next question was what shall be

done; and what was done by the Court was that they asked the respondents to lodge a minute setting forth any objections they might have to state to an order being pronounced directing them to provide proper means of access to and exit from the premises, and stating the nature of the operations which they were prepared to carry out; and in answer to that the respondents lodged a minute in which they complained certainly of their being forced to do work which they thought to be unnecessary, but they say with great deliberation, having taken the advice of a very eminent architect, what are their proposals. Now, this may be treated as interlocutory procedure, and in a sense it is, because it does not reach by one step a final judgment; but I agree with Mr Balfour that the question is not whether it is an interlocutory step in order to determine whether there shall be a hearing, but is the matter of such importance in the case as to demand a hearing, and I should say most certainly it is. But what is done by the Court is this—this minute is lodged, and on 7th July the counsel for the respondents attends and finds no Court, but the Junior Assessor for the Dean of Guild produces an interlocutor and issues it, and the interlocutor is this:—“Having considered,”—the nominative I should say is “the Court,”—“Having considered the objections lodged by the respondents, No. 2, with the relative plan, No. 4 of process, and heard counsel for the respondents, find that the alterations proposed by the respondents, and shown on said plan, will not be sufficient to provide proper means of access to and exit from the said Music Hall, or for protection from fire.” Now, it is not the fact that they heard counsel on that question at all. If by the Court is meant the Dean of Guild and his coadjutors nobody heard counsel on that subject at all; and this decision was produced by the Junior Assessor cut and dry. Now, in the first place the Junior Assessor does not constitute the Court, and that decision is not a decision which can be attended to. This is a decision not on a point of law, but really on the merits of the counter-proposal made in answer to the challenge of the Court in asking what are you going to do. The question thus raised was therefore exactly of the kind committed to the Dean of Guild; and the only question of law, so far as I can see, was this pretty elementary one, whether parties should be heard, and that was decided in the negative. Now the result of this to the respondents is that, having their counter-proposals thus disposed of, they, to meet the wishes of the Court, propose something which they say is far in excess of what is required, and the next interlocutor deals with this second and alternative counter-proposal. Now we are told that in regard to this lower alternative the appellants were heard, and this is supposed to justify the higher alternative having been disposed of without a hearing.

I have gone over this merely in order to satisfy your Lordships and the parties that there is no mistake about this pro-

cedure having actually taken place in Edinburgh. I own that I have heard it with great surprise, but it seems to me that this procedure will not do. It is defective in the most elementary attributes which should belong to judicial proceedings even of the roughest and most summary kind. The parties are not heard, and an assessor takes on himself the function of an absent court, not on a matter of form but on this vital one whether the parties are to be heard or not. I regret that these proceedings should have taken place, but I do not dwell on them as the case seems to me so absolutely clear, and I do not want to cause any doubt on this fundamental doctrine, that parties must be heard on matters of this kind, and must be heard by the Court,—where it is a matter for the due exercise of the jurisdiction of the Court in determining whether changes proposed are sufficient or not. I therefore move that we recal the whole interlocutors after the 17th March, and send the case back to the Dean of Guild Court.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court sustained the appeal, recalled the interlocutors appealed against as from 17th March onwards, remitted the case to the Dean of Guild Court, and found the appellants entitled to their expenses.

Counsel for Appellants—J. B. Balfour, Q.C.—Cook. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondent—Cooper. Agent—Thomas Hunter, W.S.

Tuesday, July 11.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

THOMSON v. THOMSON & COMPANY.

(*Ante*, vol. xxxiv. p. 238, 24 R. 269.)

Contract—Sale or Lease—Assignment of Business in Consideration of Annuity—Loss by Fire.

By written agreement A assigned to B the business of engineer carried on by him in certain premises "and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to him." In respect of this assignation B on his part undertook, *inter alia*, to pay to A an annuity of £250 for life, which was declared to be "free of all burdens and deductions whatsoever." A at the date of the agreement was tenant of the premises, which he subsequently acquired as proprietor. B entered into possession of the premises

where he continued to carry on the business, and duly fulfilled his obligations under the contract. A fire having occurred on the premises, in consequence of which the business was suspended for more than two months, B claimed that he was entitled to make a deduction from the annuity representing the rent during the period when he was deprived of the use of the premises, the loss of which fell upon A as the lessor of the premises.

Held that the agreement was not a lease, or subject to the ordinary incidents of a lease, and that by its terms the annuity was payable without deduction.

Thomson v. Thomson & Co. (Dec. 18th 1896, *supra*, vol. xxxiv. p. 238, 24 R. 269) *explained*.

On 22nd January 1894 Mr William Thomson, engineer, Glasgow, entered into an agreement with his two sons by his first marriage, William Thomson jun. and John Thomson, and his son-in-law Charles Davidson, in the following terms:—"Whereas the first party has for a number of years carried on the business of an engineer at 57 Smith Street, Kinning Park, Glasgow; and whereas the first party has resolved to hand over said business, and whole stock, funds, assets, rents, and goodwill thereof, and machinery and appliances used in connection therewith, to the second party, on the terms and conditions after specified: Therefore the parties have agreed, and do hereby agree as follows, *videlicet*:—*Clause First*.—The first party hereby assigns and transfers, as at the date hereof, to the second party, equally among them, the said Charles Davidson, as representing and for behoof of his said wife Marion Stark Thomson or Davidson, the business of engineer presently carried on by the first party at 57 Smith Street aforesaid, whether in his own name or under the style or firm of William Thomson & Company, and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to the first party. *Clause Second*.— . . . The first party shall, however, remain as consulting engineer in connection with the business, at such salary as may be agreed upon from time to time; and the second party shall be bound to take the advice of the first party on all points connected with the practical management and development of said business, as well as the ordering of all material and plant necessary for the carrying on of said business, and the engaging and dismissing of employees; but the first party shall not be responsible in any way for the advice so given, and he shall only give such time and attention to such points as he may think proper. *Clause Third*.—The second party bind and oblige themselves to pay the whole debts and obligations of the first party in connection with said business at the date hereof as the same mature, and to free and relieve and harmless and scatheless keep therefrom the said first party in all time coming. *Clause*