

and not to act properly in the administration of the trust. In answer to this statement it is denied that there have been any communications between Messrs Neilson and Mr Bunten, or that any understanding whatever has been arrived at between the parties as to how Mr Bunten will act if he is assumed into the trust, and it is denied that he has any connection with the Mossend Iron Co. Now, the complainer could have met this answer if she had liked, and might have made some more specific averment about the alleged understanding existing between the Messrs Neilson and Mr Bunten. She has not done so, and we are therefore thrown back upon the bare averment by the complainer that Mr Bunten is to give effect to the Messrs Neilsons' views in Mossend matters, and such a statement is in my opinion irrelevant. If we were dealing here with the appointment of a trustee, or of a factor, by the Court, that would be a different matter, and we should then appoint some neutral party, but we are dealing with a case of assumption of new trustees, the power to do which is conferred by statute, and the Court has no right to interfere with this statutory power unless something of the nature of corruption is made out. It is to be hoped that matters will be satisfactorily arranged by Mrs Neilson consenting to act along with Mr Bunten, but if not, I think the trust is very fortunate in securing the services of a gentleman like Mr Bunten, who unless he was actuated by a spirit of friendly interest towards the parties would not accept an office which no stranger would covet.

LORDS MURE and SHAND concurred.

The Court adhered.

Counsel for Complainer—Pearson—Guthrie.
Agents—J. & J. Ross, W.S.

Counsel for Respondents—Low. Agents—
Morton, Neilson, & Smart, W.S.

Thursday, February 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

EADIE AND OTHERS v. MACBEAN.

Partnership—Insanity of Partner—Dissolution of Partnership.

When by the terms of a contract of copartnership the whole partners are bound to take an active management of the business, the permanent insanity or incapacity of one of them operates a dissolution of the partnership, because such partner cannot perform his part of the contract.

Partnership—Duties of Partners—Permanent Incapacity of Partner.

A contract of copartnership provided that all the partners with one exception should give their whole time to the affairs of the business. The remaining partner providing the capital and plant of the business, and it was agreed that he alone should sign bills and cheques, but in the event of his indisposition or his being unable to attend to business from other causes any of the other partners might do so. He was struck with paralysis and

rendered unable for business. *Held* that the other partners were not entitled to have the partnership dissolved and the business wound up, the event which had happened being provided for by the contract, and the partnership not being one to which he was bound to devote his time and attention.

For many years prior to 1880 Mr Hugh MacBean had been in business as an oil and colour manufacturer in Glasgow. In the beginning of 1880 he was sole partner of his firm of MacBean & Co., and proprietor of the works in which it was carried on, as well as of the plant. He was then about 60 years of age. In that year he assumed into partnership Archibald Eadie, John Cassells, and John Shankland, of whom Eadie and Shankland had been in the employment of Hugh MacBean & Co.

The contract was for ten years from 1st January 1880, it being competent to MacBean (the first party) to retire at the end of any year on giving six months' written notice. The name of the firm was to continue to be H. MacBean & Co. Eadie and Shankland were not possessed of much capital. The contract provided (article 2) that the capital should be £20,000, £5000 being contributed by each partner. The firm was to pay a rent to the first party for the heritable property and plant. MacBean's interest in the firm was (article 5) to be four-twelfths, Eadie's three-twelfths, Cassells' three-twelfths, and Shankland's two-twelfths. Each partner was (article 6) to receive from the copartnership a salary of £350 a-year. Eadie, Cassells, and Shankland (2nd, 3rd, and 4th parties) were to "devote their whole time and attention to the copartnership business, and shall not be concerned, directly or indirectly, in any other trade or business whatever or in any speculation or adventure, and none of them shall become surety, cautioner, or guarantee for any person or company." MacBean was connected with another business and was not taken so bound. MacBean (article 7) was alone to be entitled to sign cheques and endorse bills and promissory-notes, but all the partners might subscribe the copartnership name in other cases, but that only for the purposes of the business. "In the event of the indisposition of the first party, or of his being unable to attend to business from other causes, any of the other partners shall, in such a case, be likewise entitled to sign cheques and to endorse bills and promissory-notes for the purposes foresaid. (8) In the event of any of the partners contravening the provisions of article 7th, or in the event of either of the second, third, or fourth parties contravening the provisions of article 6th, the observing partners shall be entitled to extrude the non-observing partner from the copartnership, and to advertise the same in the *Gazette* and otherways to the public: And in the case of such extrusion, the extruded partner shall cease, from and after the date of any such act or contravention, to be a partner in like manner in all respects as if he had become bankrupt on the date of contravention, and shall be paid out or settled with by his copartners in the same manner and to the same effect in all respects as his creditors would have been entitled to be paid out as hereinafter mentioned." A partner who became notour bankrupt was *eo ipso* to cease to be a partner (article 10). Books were to be regularly kept, and to be balanced once a-year.

In March 1882 MacBean, who was then 63, was seized with paralysis. His mind was not rendered unsound, but he was from the state of his nervous system unfit to take charge of or give directions for the care of his affairs. A *curator bonis* (John Wilson, C.A.) was appointed to him. The medical certificate on which Mr Wilson was appointed *curator bonis* was dated 3d October 1882, and was as follows:—"Mr Hugh Macbean has suffered from paralysis since the 27th day of March last, from which he is slowly recovering. He is not of unsound mind, but from the state of his nervous system we have no hesitation in saying that he is unfit to take charge of or give directions for the care of his business affairs."

This was a petition by Eadie, Cassells, and Shankland to have a judicial factor appointed on the partnership estates to wind up the firm. The petitioners set forth the partnership and stated that MacBean had attended to business, and taken an active part in it till his paralytic seizure on 27th March 1882, of which they stated the result to be, that "his nervous system was completely shattered, his power of speech almost lost, and his mental faculties greatly impaired. He thereby became, and still continues, unfit to give any directions for the management of his affairs, or to take any part in the business of the copartnership, and he is now permanently disabled from doing so." They stated that as MacBean's incapacity continued they were desirous of the appointment of a judicial factor to wind up the partnership affairs.

The *curator bonis* lodged answers. He referred to the provisions of the contract of copartnership, quoted *supra*. He stated that MacBean had left the active part of the management to the petitioners from the first; that he was not insane, and that the object of the petition was during MacBean's illness to turn him out of a business which he had built up, and to acquire it for themselves, without any payment for goodwill; that the petition was presented without regard to MacBean's interests. He denied the averments as to MacBean's mental state, and quoted the medical certificate above referred to.

The Lord Ordinary (KINNEAR) dismissed the petition.

Opinion.—The ground on which the petitioners maintain that their copartnership should be dissolved and the business wound up is, that the senior partner, Mr MacBean, is permanently disabled from taking part in the business of the copartnership in consequence of paralysis, by which his nervous system has been shattered, his power of speech almost lost, and his mental faculties greatly impaired.

"There can be no question that the permanent insanity of a partner may be a sufficient ground for dissolving a partnership. But the reason is that in consequence of his insanity the performance of the contract has become impossible; and it follows that the validity of the alleged ground of dissolution must be determined with reference to the stipulations of the particular contract. It is in general an obligation upon every partner implied, if it is not expressed, in the contract, that he shall take part in the business of the copartnership. But under the contract in question the position of Mr MacBean is exceptional; and the reason is very obvious from the

admitted history of the business. It appears that he had carried on the business now conducted by his present firm for upwards of thirty years before he assumed the petitioners as his partners. He contributed, therefore, to the concern not only his share of the capital, but the goodwill of an established business. It is stipulated by the contract that the three junior partners 'shall devote their whole time and attention to the copartnership business, and shall not be concerned, directly or indirectly, in any other trade or business whatever, or in any speculation or adventure.' No similar obligation is undertaken by Mr MacBean, who was therefore entitled to give so much of his time and attention to the business as he might think fit. It appears to me, therefore, that if this were the only stipulation bearing on the question it would be difficult for the petitioners to maintain that his failure to attend to the business involves a breach of any duty that he has undertaken to perform. But it is evident from the 7th article that his inability to attend to the business from indisposition or other causes is contemplated as a contingency, which, if it occurred, should not determine the contract, since it is provided that 'in the event of' his 'indisposition, or of his being unable to attend to business from other causes, any of the other partners' shall sign cheques and endorse bills and promissory-notes. In other words, if he shall be unable to attend the copartnership is not therefore to be dissolved, but the other partners are to perform the duty which he had reserved to himself. It is said, however, that by the 6th article he is to have a salary, which necessarily implies that he is to give the firm the benefit of personal service, for which he is to be paid by salary. I agree that, *prima facie*, the payment of salary implies that work is to be done. But the implication from the use of that word cannot overrule the clearly expressed provisions of the contract. Nor is it at all unintelligible that even without undertaking to give personal attention he should be entitled to a so-called salary as well as his copartners, having regard to the circumstances under which the agreement was made. For his contribution of an existing business may well have been thought a sufficient consideration for his partners' contribution of labour and skill in carrying it on. The reason for paying salary to the junior partners is obvious, for their share of the profits was to be taken for their share of the capital until their whole contribution to capital should be fully paid up. But if a payment in name of salary was made to them, it was necessary, in order to equalise the interests of the partners, that a similar payment should be made to Mr MacBean also. It appears to me that the word salary is used to signify an annual payment to the partners irrespective of the profits in each year, and the clear intention of the contract is that the interests of the partners are to be equal, although their contributions of time and labour are not to be equal. I cannot find, therefore, that there is any stipulation in the contract, expressed or implied, which is necessarily violated by the illness of Mr MacBean, assuming that his illness is permanent. It was no doubt contemplated that he should give some share of his time and attention to the business, although the exact amount of attention he should give was a matter for his

discretion. But his failure to attend from illness, either mental or bodily, is not in my opinion a breach of this obligation which will justify his partners in dissolving the contract with him on the ground of non-performance.

“It is a different question whether Mr MacBean’s incapacity, although it may involve no breach of contract, may not have rendered the attainment of the common object for which the copartnership was formed practically impossible, and may not therefore be a ground for determining the contract. But it is not averred that his illness has occasioned any difficulty in the conduct of the business. On the contrary, the petitioners allege that by their skill and energy they are carrying it on even more advantageously than before. Their sole case, therefore, is that they are not bound to give a share in the benefit of the business to Mr MacBean while he is unable to take an active part in it. I think they are so bound, because that is the contract they have made, and for what I must assume to have been a sufficient consideration. It is apparent, on the face of the contract, that they take the benefit of Mr MacBean’s business on condition that they shall give their whole time and attention to it for his advantage and their own, and I think they have shown no sufficient reason for relieving them of that obligation.”

The petitioner reclaimed, and argued—Mr MacBean, being unable for any business, could not perform his part of the contract, and was incapable of discharging the implied obligation to attend to the business. Insanity though not necessarily disturbing the pecuniary arrangements of a copartnership formed a ground of dissolution. If therefore the lunatic could have got rid of the copartnership, so in equity the partners should be able to dissolve the partnership.—2 Bell’s Com., 5th ed. p. 635; Lindley on Partnership, 4th ed., vol. ii, p. 24; *Jones v. Noy*, L.J., 3 Ch. 14; *Sayer v. Bennet*, 1 Cox’s Eq. Ca. 170; *Rollands v. Evans*, 30 Bev., 2 Lindley, 1017; *Jones*, L.R., 18 Eq. 265; *Gilray’s Curator*, 21st May 1872, 10 Macph. 715. Mr MacBean’s position was that of a permanent disqualification, arising from mental disease, and a proof ought to be allowed of his present condition. There was a strong presumption against a party continuing as a partner and at the same time being precluded from giving any attention to the business of the copartnership.

Replied for respondents—No relevant averments had been made to support the claim for a proof, for, 1st, the averments did not amount to insanity, nor, 2d, did they amount to total disability on Mr MacBean’s part to act in the copartnership business. He was not incapable of being consulted, and therefore the averments were not sufficient to warrant dissolution of partnership.—2 Bell’s Com., 7th ed. 525. The case of insanity was different, since a lunatic partner might wreck the whole concern, but there was no risk of that kind in the present case, and so the Court would not interfere. It had not been shown that Mr MacBean failed to discharge any obligation which he undertook. He was the moneyed partner, and the money was still forthcoming. The question between the parties really turned upon the construction of the contract; the 6th, 7th, and 8th clauses must be read together to get Mr MacBean’s true position, which really came to

this, that he could do as much and as little as he liked in the business. If the partnership in the present case was dissolved, it would be simply because a partner who was not bound to devote himself to the company affairs had become unable for business. Insanity would no doubt dissolve a partnership where there were two partners only, both of whom were bound to contribute skill. Here MacBean was not an active partner.

Authorities.—Cases cited by reclaimers; *Jamieson (Bontine’s Factor)*, 13th July 1870, 8 Macph. 976.

At advising—

LORD PRESIDENT.—The petitioners in this case are those of the four partners of the firm of MacBean & Co., and the object of their petition is to have that partnership dissolved, upon the ground that the remaining fourth partner, Mr MacBean, is permanently disabled from acting as a partner by reason of his nervous system having been shattered, his power of speech being almost lost, and his mental faculties greatly impaired. These are the statements upon which the petition is founded. In any view that may be taken of the case I should be extremely doubtful whether we could grant the prayer of this petition as it stands, because the petition prays for the appointment of a judicial factor. Now, that is not the appropriate remedy in such a case as is presented in this petition. But it is not necessary to consider that very particularly, because I have come, in common I believe with all your Lordships, to the same conclusion as the Lord Ordinary, that this petition must be refused upon its merits. There can be no doubt that under ordinary circumstances where two or more persons are engaged in business together as partners, and all of them are expected, and by the contract of copartnership bound, to take an active management of the business, the permanent insanity or incapacity of one of the partners necessarily operates a dissolution of the partnership. The ground in law upon which that result is reached is a very obvious one, that the insane partner is no longer able to perform his part of the contract, and where one party to a contract becomes disabled from performing his part of the contract, of course the other party to the contract is liberated from his obligation. That is a rule of very general application, and not confined to contracts of partnership by any means. But it is equally clear I think that there may be contracts of partnership in which the duties devolved upon the several partners are so defined that even the permanent insanity of one of the partners would not operate a dissolution of the partnership. Nothing is more common than that two persons should enter into partnership, one of whom is an active man of business, of skill and experience in the particular trade, and the other person has no qualification for being a partner except that he has plenty of money. In those circumstances the contract would probably provide that the one man should supply the capital and the other should do all the work. Now, it is very clear, I think, that in a case of that kind the mere incapacity or insanity of the moneyed man would not dissolve the partnership, because his insanity does not render it at all impossible that he should perform his part of the contract. So long as his estate is good for the money, his part of the contract can be performed by the person in the administration of that estate, by advancing the re-

quisite money for carrying on the business. And so the active partner—the man of business habits, skill, and experience—to whom the whole conduct of the business is entrusted, will have no cause for complaint, because he will have obtained from his partner or his partner's estate everything he stipulated for in the contract. The only question therefore that can arise in a case of this kind is to which of these two categories the present case belongs. Now, that depends entirely upon the terms of the contract; and in some respects it is a peculiar contract. Mr MacBean was the sole partner in this business before this contract was made. He and some of his relatives had established the business, and the business premises, the whole stock-in-trade, and the goodwill of the business belonged to him absolutely. But he resolved to take in the three petitioners as junior partners, he being at that time a man of about sixty years of age, and being also engaged in some other trading concerns. The business was to be carried on very much as it was before, so far as the nature of the trade was concerned, but the capital was in the first place to be supplied by Mr MacBean only, the other three contributing their portion of the capital required by the contract out of the profits to be earned in the first years of the business. The partnership was to endure for ten years after the 1st January 1880, but there was right reserved to Mr MacBean, who is called the first party, to retire from the business at the end of any year upon giving six months' previous notice in writing. The capital was to be £20,000, which was to be contributed and made up in the manner I have already explained, and the business premises were to be let to the firm by Mr MacBean at a rent of £500 a-year. Mr MacBean was to be interested in the business to the extent of 4-12ths. Mr Cassells and Mr Eadie were to be interested to the extent of 3-12ths, and Mr Shankland, the remaining petitioner, to the extent of 2-12ths. These were generally the terms of the contract. But as regards the work to be done by the different partners we find that very distinctly specified, I think in the 6th, 7th, and 8th heads of the contract. The 6th head of the contract begins with this provision:—"The copartnership shall pay each of the partners a salary of £350 a-year." Now, certainly, at first sight that looks very much as if each of the partners were to take an active part in the conduct of the business. The use of the term salary very naturally suggests that idea. But when one comes to examine the thing a little more minutely, it is quite obvious that this is not the meaning of this provision. The three junior partners not being entitled to draw any profit in the meantime, but their profits going to supply the capital which they were bound to contribute to the business, they would have had nothing to live upon at all but for this provision, and therefore it became necessary to give them each a certain allowance until their capital being paid up they should be enabled to live upon the profits of the business. And accordingly they receive £350 each. But it would obviously have been quite unjust to Mr MacBean that while they were receiving this amount each for the purpose of enabling them to live in the meantime, he who had supplied all the capital that was in the first instance put into the business should receive nothing at all, and accordingly he receives also

£350 a-year. It becomes thus apparent that although called a salary, this is really nothing more than what may be called an allowance for maintenance to each of the partners out of the business. The 6th article then proceeds further—"The 2d, 3d, and 4th parties shall devote their whole time and attention to the copartnership business, and shall not be concerned directly or indirectly in any other trade or business whatever, or in any speculation or adventure, and none of them shall become surety, cautioner, or guarantee for any person or company." Now, this is very precisely and carefully worded so as to exclude from its operation the fourth partner, Mr MacBean. It does not apply to him at all, but the other three partners are to devote their whole time to the business, and to engage in no other business whatever. If the matter had stood there, it perhaps might still have been doubtful how far Mr MacBean was not after all bound to contribute his time and attention to the conduct of the business when required. But the complement of this sixth provision is to be found in the seventh, which immediately follows, and it is this—"The first party alone shall be entitled to sign cheques and to endorse bills and promissory-notes, but the other parties shall be entitled to subscribe the partnership name in other cases, but that only for the purposes of the business." Now, the duty assigned to Mr MacBean here is no doubt a very important one. It is intended for his protection to a certain extent, but it is intended also for the benefit of the joint concern, and to secure its stability. Mr MacBean's duty therefore is defined to be the signing of cheques and endorsing bills and promissory-notes connected with the business of the partnership. That is his share of the duty, and when you take that in connection with the provision in the sixth article, I think it is impossible to resist the conclusion that that was to be the only part of the duty of a partner that was to devolve upon him at all. He might obviously under the provisions of the sixth article engage in other business, and we are informed—and it does not seem to be disputed—that he really was engaged in other duties, and he was not restrained from becoming a cautioner for other persons in trade, the other partners being so restrained. Now, that being so, one would say that so long as Mr MacBean performed the duties devolving upon him under article seven, he could not be required by his partners to do anything else. Still if the matter had stopped there, it might have been maintained that when he became incapable—as it was alleged he did—of performing this duty of signing the cheques and endorsing bills and promissory-notes, that would necessarily have the effect of dissolving the partnership. And so probably it would but for what follows in this seventh article, because it seems to me that the remainder of the seventh article provides for the very case which has arisen. It is thus expressed—"In the event of the indisposition of the first party, or of his being unable to attend to business from other causes, any of the other partners shall in such a case become likewise entitled to sign cheques and endorse bills and promissory-notes for the purposes foresaid." Now, is Mr MacBean in the position of being unable to attend to business? That is the very allegation against him by the petitioners. He is unable to attend

to business, and therefore he cannot perform this duty of signing cheques and endorsing bills and promissory-notes. Well the contract provided that if that shall occur—if he shall from any cause be unable to attend to business—the duty which devolves upon him in the first instance under the seventh article is to be performed by any of the other partners. Now, if that be so, Mr MacBean being liberated from the only obligation laid upon him to do anything actively in the business of the partnership, he is in a condition to perform all the other duties which lie upon him, which consist of nothing else than the providing of money. And therefore it seems to me that that reduces the present case very much to the position of a case where to provide the money is the only duty imposed upon one partner, and the active management of the business is left entirely to the other or others. The view which I have taken of the sixth and seventh articles is, I think, confirmed very much by the provision in the eighth article, which provides that in certain events a partner may be put out of the concern, or “extruded” as it is expressed. Now, the event in which that may be done is—“In the event of any of the partners contravening the provisions of article seven”—that is, about signing cheques and endorsing bills—“or in the event of either the second, third, or fourth parties contravening the provisions of article six”—it is not here contemplated that Mr MacBean, the first party, can possibly contravene the provisions of article 6, thereby shewing that the active management of the business was to be in the hands exclusively of the second, third, and fourth parties. For these reasons I entirely concur in the view which the Lord Ordinary has adopted, and think that this petition ought to be dismissed.

LORD MURE—I concur in what your Lordship proposes. It appears to me that we have not here to deal with a question of insanity in the ordinary sense. I am quite ready to take it that this gentleman was, on the 3d October 1882, when the *curator bonis* was appointed, in the position of being, mainly through an attack of paralysis, unfit to take care of his own affairs. If the matter had stood there, and there had been no special provisions in the contract of copartnery, there might have been a nice question raised on the allegations here of the illness having become permanent. But I agree with your Lordship in thinking that upon the 6th, 7th, and 8th articles of this copartnery the position of this gentleman has been met, by the provisions especially of the 7th article. The Lord Ordinary has quoted the words of that article, and nothing can be broader than the terms of it—“In the event of the indisposition of the first party, or of his being unable to attend to business from other causes,” &c., the other parties shall do the only duty which seems to have been imposed upon him by the contract of copartnery, namely signing cheques and endorsing bills. I think your Lordship’s observation is conclusive upon that question, that under the terms of this contract there is no ground for the interference of the Court, because the parties themselves have provided for the very circumstance that has arisen.

LORD SHAND—I am of the same opinion. The first and important term of this contract of co-

partnery is that the partnership shall endure for ten years from the 1st January 1880, so that it has still a period of nearly five years to run, and the proposal of three of the partners is, notwithstanding that specific agreement, that in consequence of their intimation that the partnership has come to an end, it shall be held to be at an end now. In considering the question I accept the statement of the petitioners as to the state of health and mind of Mr MacBean as amounting to this, that there is a complete permanent inability on his part to take any further share in the management of this business. I think, giving the averment its fair construction, that is substantially averred, and I should be disposed to say that if in that state of matters the three petitioners are in law entitled to bring the copartnery to the end—and they had intimated that they did bring it to an end by a notice to the *curator bonis*—I should be disposed to hold that a declarator in such a case would probably not be necessary, and that the Court might reach the result of giving an appointment to a factor to wind up on such an application as this. But it is unnecessary to come to any decision upon that question, for I agree with your Lordships in holding that the petitioners here have no right to give an effectual notice bringing the contract to an end, and would not succeed in an action of declarator brought with that view. It is unnecessary that I should again go over the clauses of the contract which your Lordship has carefully examined. The result of them appears to me to be this, that on the one hand Mr MacBean was certainly entitled to take such share as he thought fit in the management of the business—I mean that he was entitled to advise and to act in the business generally, and that he had the exclusive right to sign cheques and to endorse the bills of the company. But although he had that right, I am further of opinion that in substance he might, if he thought fit, become a sleeping partner in the concern. It is plain that he was under no obligation to refrain from entering into other business. He seems to have contemplated that he should possibly retire during the currency of the contract, for he reserved power to do so; and section 7 shows very plainly that he might still remain a partner although he suffered from serious indisposition—indisposition which went the length of his being unable to attend to business. Whether in the absence of illness or indisposition he could have entirely declined to take part in the business I quite admit to be a question. But in the case that has occurred I think there is no real difficulty. The contract provides, I think substantially, that he shall and may remain a partner although there is inability on his part to attend to the business; and it appears to me that if the parties had been in this different position, that Mr MacBean’s curator and relatives desired to withdraw him from this business now, there would be a good answer on the part of the petitioners that there was no legal right to withdraw, that Mr MacBean’s capital had been given as a capital that was to remain there for ten years, and that, looking to the provisions generally of this contract, which did not impose upon him absolutely the duty of giving services, he was not entitled to withdraw his capital till the end of the ten years. Taking the case as

one in which I think the petitioners have failed to show that they are entitled to have the services of Mr MacBean to the end of the contract, to which right it is no answer that he has become permanently ill, I am of opinion with your Lordships that they have failed to show any right to bring this partnership to an end, and that it must endure till 1st January 1890 under the terms of the contract. Your Lordship has suggested to me, and I feel the force of the suggestion, that with reference to the special provision that Mr MacBean had power to retire upon giving six months' notice, the curator might possibly avail himself of that power, but we have no question of that kind before us.

The Court adhered.

Counsel for Petitioners—J. P. B. Robertson—Pearson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Respondents—Mackintosh—Guthrie. Agents—J. & J. Ross, W.S.

Thursday, February 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

THE COUNTY ROAD TRUSTEES OF LANARK
v. LOCAL AUTHORITY OF BURGH OF
AIRDRIE.

Road—Roads and Bridges (Scotland) Act 1878
(41 and 42 Vict. cap. 51), secs. 32, 37, 44—
Disused Tollhouses.

Held that tollhouses situated within a burgh, and which prior to the Roads and Bridges Act 1878 had belonged to trustees having the management of roads not wholly situated within one county or burgh, were by that Act vested in the local authority of the burgh.

Prior to the passing of the Roads and Bridges Act 1878, two tollhouses situated within the burgh of Airdrie, and known as the Rawyards Tollhouse on the North and South Lanarkshire turnpike road, and the Old Tollhouse on the Bathgate and Airdrie turnpike road, belonged to the respective trusts (North and South Lanarkshire Turnpike Road Trust, and Bathgate and Airdrie Road Trust) having the management of these roads.

The Roads and Bridges (Scotland) Act 1878, (41 and 42 Vict. cap. 51) sec. 32, provides—“From and after the commencement of this Act the whole turnpike roads, statute labour roads, highways and bridges, within each county respectively, shall form one general trust, with such separate district management as shall be prescribed by the trustees as hereinbefore provided; and all the roads, bridges, lands, buildings, with rights, interests, moneys, property, and effects, right of action, claims, and demands, powers, immunities, and privileges whatever, except as hereinafter provided, vested in or belonging to the trustees of any such turnpike roads, statute labour roads, highways, and bridges within the county, shall be by virtue of this Act transferred to and vested in the county road trustees appointed under this Act, who, subject to the qualifications hereinafter expressed,

shall be liable in all the debts, liabilities, claims, and demands in which the trustees of such turnpike roads, statute labour roads, highways, and bridges are or were liable under any general or local Act then in force, except in so far as such debts, liabilities, claims, and demands may under the provisions of this Act be discharged, reduced, or extinguished.”

Section 37 provides:—“Where any trust existing at the commencement of this Act embraces a turnpike road which is not situated wholly within one county or burgh, the following provisions shall have effect; that is to say—(1) Where this Act shall have been adopted, or shall be in force in each of the counties in which such road is situated, (a) the portion of such road within each such county or any burgh therein shall be vested in and managed and maintained by the trustees, board and district committees of the county, or the local authority of the burgh, as the case might be, in which such portion is situated; (b) the whole assets of the trust shall, except as herein otherwise provided, be valued and allocated among the trustees of the counties and local authorities of the burghs respectively in the proportion and in the manner in which the debt affecting such turnpike trust shall be valued and allocated among the trustees of such counties and the local authorities of such burghs respectively under the provisions of this Act; (c) all lands, heritages, works, and buildings belonging to any such trust locally situated within any county or burgh shall be and are hereby transferred to the trustees of such county and local authority of such burgh, as the case may be, within which the same are so situated, and shall be applied and used or may be sold and disposed of under the powers and for the purposes of this Act.”

Section 44 provides:—“The trustees [which expression by sec. 3 means ‘County Road Trustees’] before selling any tollhouse or other building belonging to them, shall first offer the same, together with the site thereof, to the person or persons whose lands immediately adjoin thereto, at a price to be fixed by a valuator to be named by the Sheriff, and the price obtained for such tollhouse or other buildings shall be applied in the first place to the payment of road debts, if any, and the balance, if any, to the general purposes of this Act, provided always that in fixing such price the valuator shall take into consideration the terms and conditions upon which such site was originally acquired.”

The Provost and Magistrates of Airdrie, as local authority of the burgh under the Roads and Bridges Act, having in September 1884 advertised the Rawyards Tollhouse and Old Tollhouse for sale as belonging to them, the County Road Trustees of the County of Lanark raised this action against them as the local authority of the burgh, constituted and acting under the Roads and Bridges (Scotland) Act 1878, to have it declared that these toll-houses belonged to them (pursuers), and that the price of them, if sold, belonged to the pursuers, to be applied to extinguish local debt affecting turnpike and statute labour roads within the counties of Lanark and Renfrew, and the burghs therein. They also sought to have the defenders interdicted from selling, conveying, or otherwise disposing of the said toll-houses or either of them.