

COURT OF SESSION.

Friday, March 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MARSHALL v. CALLANDER AND
TROSSACHS HYDROPATHIC COM-
PANY AND OTHERS.(Ante, July 18th 1895, 32 S.L.R. 693, and 22
R. 954; October 22nd 1896, 34 S.L.R. 5,
and 24 R. 33.)*Building Contract—Decree for Specific
Implement—Work to be “duly proceeded
with” and “Completed” to Satisfaction
of Man of Skill—Approval of Plans.*

The defenders in an action were ordained by an interlocutor to rebuild the buildings of a hydropathic establishment to the extent necessary to maintain them as of the total value of £15,000, “said rebuilding to be commenced within three months of the date hereof,” the date being by a subsequent interlocutor fixed as 8th May 1896, “to be duly proceeded with to the satisfaction of John Dick Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof.”

Mr Peddie having on 11th January 1897 reported that the plans submitted to him in connection with the rebuilding were in certain respects unsatisfactory, and that the methods of construction proposed were not such as would produce a building of the market value of £15,000, the Lord Ordinary pronounced findings in terms of his report, concluding with a finding that “the defenders have not commenced the erection of the building required by the judgment of the Court within three months” from the said date. It was not disputed that the building commenced by the defenders was to cost £15,000.

Held that the report was premature, it not being part of the reporter’s duty to approve of the plans of the proposed building, and the Lord Ordinary’s interlocutor recalled.

In this action, which was at the instance of Mr William Marshall against the Callander and Trossachs Company and others, the pursuer asked for declarator that the defenders were bound to rebuild certain subjects which had been destroyed by fire.

The Lord Ordinary (KYLACHY), on 1st March 1896 pronounced an interlocutor by which he ordained the defenders to rebuild the buildings, “and that to the extent necessary to maintain said buildings as of the total value of £15,000, said rebuilding to be commenced within three months of the date hereof, to be duly proceeded with to the satisfaction of John Dick Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof; *quoad ultra* continues the cause.”

This interlocutor was affirmed by the First Division, and subsequently on 8th May 1896 by the House of Lords with consent of the defenders.

By a subsequent decision of the First Division it was held (reversing the decision of Lord Kyllachy) that the period of three months within which the work was to be commenced did not begin to run till the date when the interlocutor was affirmed by the House of Lords, viz., 8th May 1896.

Sundry correspondence passed between the parties and Mr Dick Peddie as to whether the new buildings which the defenders were in the course of erecting would be in conformity with their obligations under the interlocutor of 1st March 1895, and on 11th January 1897 Mr Dick Peddie reported on the subject to the Lord Ordinary.

The report contained, *inter alia*, the following statements.—“The plans and other documents in connection with the rebuilding which have been submitted to the reporter are not for rebuilding in the sense of providing a building on the lines of that which was destroyed, but are for a building of entirely different design and character.

“It is possibly open to question whether the terms of the interlocutor would be satisfied were a new building of entirely different design constructed, even assuming it to be well planned, substantially built, and of the required size to be of the market value of £15,000, but the reporter thought it unnecessary to ask for your Lordship’s opinion on the point as the plans submitted fail to meet certain conditions which are alike essential in case of partial restoration of the old building, or the construction of a new one to take its place. The accommodation provided by the plans submitted is deficient, the arrangements are in many respects unsatisfactory, and the methods of construction proposed are not such as are fitted to produce a building which would have a value in the market of £15,000, an essential condition to that end being that the structure shall be of a substantial and durable nature.”

The reporter then proceeded to describe various items in the proposed buildings to which he objected.

Objections were lodged by the defenders to this report.—“(1) The defenders object to Mr Dick Peddie’s report in respect that it proceeds upon the assumption that the building to be erected by the defenders must be of the market value of £15,000. The defenders submit that this assumption proceeds upon a misinterpretation of the interlocutor of 1st March 1896, and of the feu-charter. The defenders maintain that they will fulfil their obligation if they judiciously expend a sum of £15,000 upon the erection of a building suitable for a hydropathic establishment. In point of fact, the building which the defenders propose to erect will, as appears from the estimates, cost upwards of £20,000. The defenders maintain that the suggested test of market value is so vague and uncertain that it cannot have been contemplated

either by the Court or by the parties to the feu-charter, and that it is impossible to apply it practically. There are no means of knowing what sum would be obtained in the market on the sale of a hydropathic establishment. . . . (3) The defenders further object to the report in respect that it proceeds upon an erroneous view of the reporter's position and duties under the interlocutor of 1st March 1896. The defenders are advised that Mr Dick Peddie's duties under that interlocutor are merely ministerial, that he is appointed to see that the defenders lose no time in rebuilding, and that the work is properly executed, but that he is not constituted judge on questions of value, or in regard to the plans and design of the work."

The pursuer lodged answers, in which he maintained that he was "entitled to have the buildings of the hydropathic establishment . . . rebuilt to the extent necessary to maintain the said buildings as of the total market value of £15,000. . . . The pursuer further submits that there is no difficulty in determining the market value." He further maintained that the reporter's duty was not limited as alleged by the defenders.

The Lord Ordinary on 3rd February 1897 pronounced the following interlocutor—"Finds that upon the just construction of the feu-contract, and of the judgment of the Court affirmed by the House of Lords, the defenders are bound to erect in lieu of the building destroyed by fire a building suitable for a hydropathic establishment, which shall be of the value of at least £15,000—that is to say shall be capable of realising that value if put into the market along with the ground feued or so much thereof as may be necessary to its most advantageous disposal: Finds that it is sufficiently established by Mr Peddie's report that the building of which plans have been prepared, and which has been or is about to be commenced in accordance with those plans, is not a building which satisfies or will satisfy the above conditions: Finds, therefore, that the defenders have not commenced the erection of the building required by the judgment of the Court within three months from the date of the judgment of the Court or of the House of Lords: With these findings appoints the cause to be put to the roll for further procedure, and grants leave to reclaim."

Opinion.—"I think the interlocutor which I have read perhaps sufficiently explains itself. But there are one or two points which are touched upon in the objections and answers, as to which I may say a word.

"In the first place, it does not appear to me that Mr Peddie went at all beyond his province in examining the plans of the proposed building, and in reporting upon those plans as he has done. The judgment of the Court directs that the building shall be commenced within a certain time, and 'duly proceeded with' at the sight of him (Mr Peddie), and that being so, I take it that it was not only his right but his duty to ascertain and report whether the

building was being proceeded with in due course—that is to say, in conformity with the judgment of the Court.

"In the next place, although this point was not specially raised at the discussion, I see no reason why in a matter of this kind—a matter of skilled opinion and ultimately of valuation—the Court if satisfied as to the correctness of the reporter's principles, should not accept and proceed upon the reporter's conclusions. The alternative would of course be a proof with a number of skilled witnesses on either side, a procedure which I should deprecate. In point of fact neither party moved for a proof. If they should do so elsewhere, the point will no doubt be considered.

"In the third place, I see no reason why the requirement of the feu-contract, and of the judgment of the Court to the effect that the building to be erected shall be of a certain 'value,' should not be construed in its natural sense. The stipulation is not an unusual one in feuing transactions, and as at present advised I see no particular difficulty in working it out. The suggestion that 'value' means cost—that is to say, outlay judiciously expended—is not to my mind intelligible. I do not understand how money can be judiciously expended if what is produced is worthless or not worth the money expended.

"It is a different suggestion that the primary obligation of the defenders is to rebuild—that is to say, to restore the building which was burned down—and that therefore it should be declared that the building to be erected shall not only be suitable for a hydropathic establishment, but shall also—so far as compatible with the allowed limit of value—be erected on the lines of the old building. But it being once admitted that the value to be restored need not exceed £15,000, I do not at present see that there is any practical object in making a declarator of that kind. It appears to me that the terms, and certainly the substance, of the Court's judgment will be satisfied if a building is erected which, if it had been the original building, would have satisfied the feuars' obligation."

"As to what follows from the views I have thus expressed, I do not at present see how the conclusion can be escaped that the defenders have failed to commence the building required by the judgment of the Court within the time allowed. I have accordingly thought it proper so to find. Whether that being found involves as a logical consequence that I should repeat my interlocutor of 18th July 1896, which was recalled I am informed as premature, I do not think I am called upon to determine. I have not been moved to repeat that interlocutor, and I therefore do not in the meantime do so. If the case goes further that question may also be considered under the leave to reclaim, which both parties are agreed that I should grant."

The defenders reclaimed.

The arguments submitted by the parties sufficiently appear from their objections to the report.

At advising—

LORD PRESIDENT—The only duty incumbent on the Court in the present stage of the case is to see to the carrying out of the interlocutor of 1st March 1895.

Admittedly the defenders have commenced building, and it is not disputed that the building so commenced is to cost £15,000. What is said by Mr Dick Peddie, the architect to whom certain duties are assigned in the interlocutor of 1st March 1895, is, that if the plans be executed the buildings will not be so adapted for the purposes of a hydropathic establishment as to be of the market value of £15,000. To this the defenders reply that there is no such thing as a market for ready-built hydropathic establishments, and that the formula of the reporter is meaningless and misleading. They say that they are under obligation to build a hydropathic establishment of the value of £15,000, that they admittedly are going to spend that sum, that they have no intention of throwing away the money, and that they know their own business. With more direct reference to the question immediately before the Court, they question the right or duty of the reporter to criticise their plans, and on some of his objections they remark that the things objected to were in the original building the plans of which were approved by the superior.

Now, it is to be observed that the interlocutor which we have to construe and follow, because it is final, bids the defenders begin the building within a certain time, without reference to Mr Dick Peddie at all. His duties begin after a commencement has been made—he is to see that the work is proceeded with. But a commencement can only be made with plans and after plans have been decided on. Accordingly, the defenders have got to act on their own responsibility, and what Mr Dick Peddie has got to do is to see that they keep at the work. It will be his duty, once the work is completed, to report as to whether it is what was ordered; and the most obvious prudence will make the defenders very ready to conform to his suggestions made in progress of the work. But I do not think that it is incumbent on him to raise for judicial decision abstract questions of value which it would be very difficult to decide at all, and premature to decide until they necessarily arise.

I think it well to note that the pursuer did not found on the fact that his consent had not been obtained to the new plans, or that they did not involve a reproduction of the original building. There are obvious and good reasons for this course being taken.

I am for recalling the Lord Ordinary's interlocutor. It is clear that the last finding could not stand if the building is to go on at all, for it would only be appropriate if the alternative claim of damages were to be now resorted to. The views which I have stated as to the duties of the reporter and the defenders respectively sufficiently explain my difference with the rest of the

interlocutor, and it does not seem necessary to express by interlocutor our estimate of the duties of Mr Dick Peddie. Recalling the interlocutor we may continue the cause. Either party will be at liberty to come to the Court; neither is invited to do so.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor reclaimed against and continued the cause.

Counsel for the Pursuer—Balfour, Q.C.—J. Wilson. Agents—J. & J. Turnbull, W.S.

Counsel for the Defenders—D.-F. Asher, Q.C.—W. Campbell. Agents—Simpson & Marwick, W.S.

Saturday, March 13.

FIRST DIVISION.

SYDNEY AND ANOTHER (ALLAN'S TRUSTEES), PETITIONERS.

Trust—Nobile Officium—Jurisdiction—English Trust—Authority to Sell Heritage in Scotland forming Part of English Trust Estate.

English trustees under an English marriage-contract containing no power of sale, being desirous of selling certain heritage in Scotland which formed part of the trust estate, obtained an order from the Chancery Division of the High Court of Justice to the effect that the judge being of opinion that the sale was in the interest of the beneficiaries, and that by the law of England such a sale would be competent under the Settled Land Act 1882, empowered the trustees to obtain authority from the Court of Session to sell the said property.

The trustees having thereafter applied to the Court of Session for such authority, the Court granted the petition.

This was an application presented by Henry Sydney and another, James Allan's marriage-contract trustees, and formed the sequel of the proceedings reported *ante*, p. 186.

The trust in question was an English trust, and the trustees were domiciled in England; but certain shops and dwelling-houses forming part of the trust-estate were situated in Scotland, at Penicuik. The marriage-contract conferred no power to sell upon the trustees.

The petitioners narrated the unsuccessful result of their previous application to the Court for authority to sell under section 3 of the Trusts (Scotland) Act 1867, and proceeded:—"In view of the disadvantage to the trust for want of power to sell, and with the object of obtaining the judgment of the English Court on the question of the trustees' powers, the petitioners thereafter made application to the Chancery Division