reasons stated by the reporter, they maintained that the original proposal to strike Dull out altogether was the more equitable one, and should be given effect to by the Court.

LORD PRESIDENT—It would be impossible to maintain that persons having an interest are not entitled to come forward and suggest amendments of the Scheme proposed in a petition, merely because such amendments have not been consented to by the Scotch Education Department. The effect of that would be to preclude us altogether from amending the Schemes contained in such petitions. I think it is sufficiently clear that even in matters above the level of mere details, or rising to the position of what have been called organic details, we are free to give effect to amendments which have not been before the Scotch Education Department. There is nothing in the case of *Heriot's Trust* (25 R. 91) to contradict this view. There the proposals which we said we were unable to consider were not amendments of the proposed scheme, but simply competing or alternative schemes. But in the present case the petition itself was presented to us with the consent of the Scotch Education Department, as the result of a compromise suggested on the advice of the Department when the original proposal was made striking out all reference to Dull as a favoured parish. It seems to me therefore, looking to the history of the case, that the consent of the Department has not been obtained to a petition embodying that original proposal, and the like reasoning precludes us from entertaining an amendment, the result of which would be to entirely shut out the element of compromise. But that proposition is confirmed by the complicated position of Mr Harvey, because the persons whom he represents were themselves represented by Governors who were parties to the compromise, and promoted it as against the more absolute original proposition to exclude Dull altogether.

In the circumstances it appears to me that we cannot entertain the amendment, because it is outwith the proper subject submitted for our consideration.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court approved of a scheme under which the parish of Dull should remain entitled to share in the bursaries for university or technical education, and in the bursaries for higher education, while the school bursaries should be confined to the parishes of Logierait and Weem.

Counsel for the Petitioners—W. L. Mackenzie. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Objectors—J. Harvey. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Wednesday, October 19.

FIRST DIVISION.

[Lord Low, Ordinary.

ALLAN, PETITIONER.

Judicial Factor—Pro indiviso Proprietors—Trust.

A feu-contract was taken in favour of "L and A and the survivor and the heir of the survivor, as trustees and in trust for behoof of themselves and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*."

Power was given to the trustees, and to the survivor and his heir, to sell the property as they or he should think proper.

A having conveyed his beneficial interest in the subjects to a third person by a disposition *ex facie* absolute, a petition was presented by the disponee for the appointment of a judicial factor to manage the property, on the ground that he was dissatisfied with the management of it by L. Both parties expressed their willingness to assent to the sale of the property, and the only question at issue between them was with regard to the collection of the rents for two terms which must elapse before a sale could be effected. With regard to this the respondent had offered to assent to the appointment of a neutral person to collect and lodge in bank the rents in the joint names of the parties.

The Court, in respect of this offer, *refused* the application.

Question reserved whether the parties to the contract had the common law right of *pro indiviso* proprietors to sue an action of division and sale.

By a feu-contract executed in February 1896 Mr David Johnston, writer, Glasgow, disponed to Mr Hugh Livingstone, Glasgow, and Mr William Brown Alexander, Bridge of Weir, a certain plot of ground situated at Langside, Glasgow, together with the buildings thereon, known as 17 Millbrae Crescent.

The disposition bore to be "to and in favour of the said Hugh Livingstone and William Brown Alexander and the survivor of them, and the heir of the survivor, as trustees and in trust for behoof of the said Hugh Livingstone and William Brown Alexander and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*, heritably and irredeemably . . . Declaring that the said Hugh Livingstone and William Brown Alexander and the survivor of them, and the heir of the survivor, as trustees and trustee foresaid, shall have full power, without the consent of any person whatever, to sell and dispose of the said plot or area of ground above disponed, or any part thereof, by public roup or private bargain, with or without advertisement, and at

such price or prices as they or he may think proper, and to borrow money on the security of the said plot or area of ground, or any part thereof, and for these purposes or any of them to grant all necessary or requisite deeds or writings containing a clause of absolute warrandice, and that purchasers and lenders, and all other parties paying or lending money to or otherwise transacting with the said trustees or trustee shall have no concern with or right to inquire into the application of the money so paid or lent, but shall be sufficiently exonerated by the receipt of the said trustees or trustee therefor."

In 1898 William Brown Alexander conveyed in favour of Messrs James and John Allan, provision merchants, Glasgow, "my one-half *pro indiviso*" of the subjects above described, "and my whole right, title, and interest therein."

A petition was presented by Messrs Allan craving the Court to appoint a judicial factor to manage the estate for behoof of all concerned.

The petitioners averred that they were heritable proprietors of one-half *pro indiviso* of the subjects, that Hugh Livingstone had for some time back managed the property and uplifted the rents, and that being dissatisfied with his management they had requested him to concur in the appointment of a neutral person to manage the property, but that he had declined to do so.

In a minute lodged subsequently, the petitioners specified certain instances of alleged mismanagement by the respondent previous to the date of Mr Alexander's disposition to themselves, owing to which they averred the respondent had forfeited the confidence of his co-trustee Mr Alexander, and that the latter, so far as he had any right or interest, declined to confide the management of the property any longer to the respondent, there thus being a deadlock in the management of the trust.

The petitioners accordingly moved to have Mr Alexander sisted as a party, and to amend their petition by praying alternatively for sequestration of the trust-estate.

Answers were lodged by the respondent to the petition as originally presented, and to the minute.

The respondent averred that the subjects were purchased by Mr Alexander and himself, and the existing tenement of houses erected, in pursuance of a joint adventure, and that Mr Alexander was indebted to him in a considerable sum of money on the adjustment of the accounts of the joint adventure under a decree-arbitral, his interest in the estate not exceeding £95; that accordingly the respondent's interest in the trust-estate was much larger than that of Mr Alexander, or of the petitioners as his assignees, and that the assignation had been granted gratuitously immediately after the decree-arbitral, with the object of defeating his claims as a creditor. The respondent stated that he was willing either to concur in a sale under the powers of the trust or to raise an action for division and sale, and maintained that the appointment of a judicial factor was vexatious and unnecessary.

The Lord Ordinary (PEARSON) on 6th July 1898 pronounced an interlocutor, whereby he refused the prayer of the petition, and dismissed the petition.

Opinion. — "This is a petition for the appointment of a judicial factor on house property in Glasgow.

"As originally framed, it bore to be presented by the proprietors of one *pro indiviso* half of the subjects, on the ground that the proprietor of the other half, who had for some time been managing the property, was mismanaging it, and that he refused to concur with them in appointing a neutral manager.

"It appears that the title rests upon a recorded feu-contract dated in February 1896, taken in favour of the respondent and William Alexander and the survivor, and the heir of the survivor, as trustees for behoof of themselves and their respective heirs and assignees, each to the extent of one-half *pro indiviso.*

"It is thereby declared that the trustees shall have full power, without the consent of any person whatever, to sell the subjects by public roup or private bargain at such price as they might think proper, and to borrow money on the security of the subjects, and the purchasers and lenders should have no concern with the application of the money.

On 23rd April 1898 Alexander conveyed his *pro indiviso* half to the petitioners by a disposition *ex facie* absolute, but truly in security. But the formal title remains in the persons of the trustees. It is alleged by the respondent, but not admitted, that the relation of himself and Alexander was truly that of joint-adventurers in a building speculation upon the subjects feued, and that Alexander is indebted to him in a considerable sum of money on the adjustment of the accounts of the joint-adventure under a decree-arbitral.

"The petitioners now move to have Alexander sisted as a party, and also to amend their petition by praying alternatively for sequestration of the trust-estate. This is with a view to raising the alternative case of a trust in the persons of the respondent and Alexander which has come to a deadlock, and from which those beneficially interested should be relieved by the appointment of a judicial factor. A minute has been lodged for the original petitioners and for Alexander, setting forth the averments on which this view is based.

"In my view whatever view is taken of the true relation of the parties the petition fails.

"On the one hand, it is said that the Court should interfere as in a dispute between two *pro indiviso* proprietors who have failed to agree as to the management, and one of whom is accused by the other of mismanagement. The cases relied on by the petitioners on this head were *Mackintosh*, 11 D. 1029, and *Bailey*, 22 D. 1105. I do not think either case is in point. The former was the case of *pro indiviso* life-rent rights, where there was no room for

the ordinary remedy of division and sale. In the latter case the Court proceeded on the special circumstances, one of which was that the applicants had already obtained a decree of division and sale, and that the sale was being obstructed by the respondent. I can discover no reason why the parties here, regarded as proprietors *pro indiviso*, should not betake themselves to their ordinary remedies. The respondent expresses his willingness to facilitate this course.

"Nor do I think that the petitioners' case is improved by introducing the trustee Alexander, and thus creating the appearance of a trust that has come to a deadlock. Assuming that a new petitioner may competently be sisted, I observe—(1) that the trust is a purely formal one; and (2) that the respondent, the other trustee, expresses himself as willing to concur in a sale under the powers of the trust. It is, in my opinion, clear that the cases relied on, such as *Stewart* (19 R. 1009), where the Court have extricated an unworkable trust by the appointment of a factor, have no application here.

"If the respondent is correct in saying that the relation between him and Alexander is truly that of joint-adventurers, that might be a good answer to the original petitioners. But Alexander might be entitled to ask the Court to interfere between him and his copartner by the appointment of a factor on the copartnery estate. This, however, is not within the scope or theory of the petition, either as originally brought or as offered to be amended; and moreover, even if it were, I think that no case is disclosed which should warrant the intervention of the Court on that ground.

"I therefore refuse the petition with expenses."

The petitioners reclaimed.

In the course of the argument in the Inner House counsel for the petitioners stated that they were willing to assent to a sale of the property, but that the present date was not suitable for effecting it.

Counsel for the respondent repeated an offer which they had made in the Outer House to acquiesce in the appointment of a neutral person to collect the rents till the sale should be effected, pay necessary expenses, and place the balance in the bank in the joint names of the parties.

Argued for reclaimers—The Lord Ordinary had stated that the proper remedy was an action of division and sale, but it was not expedient for a sale to be effected just now, and meantime the rents were not being collected—those due at Whitsunday had not been collected—so it was necessary for the Court to interfere in order to protect the property—*Bailey* v. *Scott*, May 24, 1860, 22 D. 1105. In that case the petitioner had obtained a decree in an action of division and sale, and yet was held entitled to the appointment of a judicial factor pending the sale. Accordingly, if this was regarded as a case of *pro indiviso* ownership, the course proposed was quite an ordinary one. If, on the other hand, it were held that a trust had been constituted, then there was was a deadlock between the trustees, and the petitioners were accordingly entitled to ask for the appointment of a judicial factor—*Stewart* v. *Morrison*, July 14, 1892, 19 R. 1009. It was clear from the terms of the titles that the relation between the original parties was not that of joint-adventure as maintained by the respondent—*Dunn* v. *Pratt*, January 25, 1898, 25 R. 461.

Argued for respondent — Either party was willing to bring the question to an end by authorising a sale, and the only duty which a judicial factor would have to discharge was the collection of rents pending the sale, which the respondent's offer provided for. Accordingly, there was no need for a judicial appointment, such as was made in *Bailey* v. *Scott*. In point of fact the original disponees were not in the position of *pro indiviso* proprietors, their relation being that of joint-adventure. Accordingly, the petitioners had no title to interfere with the administration of the trust, their only right being to the share due to Alexander at the close of the adventure.

LORD PRESIDENT--In considering whether the Lord Ordinary was right in refusing this application we must first realise what are the duties which a judicial factor would have to perform should he be appointed; and to understand them it is necessary to remember that the property is house property in Glasgow. The connection between the parties who or whose assignees are now disputing is that they are to hold and sell the property, the time of sale being in the discretion of the two joint proprietors, who for the purposes of administration are given the duties of trustees. Now, it is manifest from the explanations given in the papers and at the bar that the dispute relates merely to the collection of the rents of the property. Mr M'Lennan admitted that the only matter which he could represent as of urgency for the appointment of a judicial factor was the collection of rents. It appears that the Whitsunday rents have not been collected, while the Martinmas rents will be soon due to be collected, probably before a sale could be effected, even with the concurrence of both parties.

In the circumstances I think the Court ought not to appoint a judicial factor, unless satisfied that the parties have exhausted all means of reasonable joint action, and when it appears that the party opposing the appointment is willing to make reasonable provision for the performance of the duties which a judicial factor would have to discharge the Court ought not to interfere.

In the present case Mr Kennedy's clients say that as regards the rents they are perfectly willing to concur in the appointment of a neutral person to collect and place them in the joint names of the parties, and as to the sale, that they are perfectly willing to concur, and that accordingly there need be no difficulty about it either. I think that these offers cut the ground from the feet of the petitioners, and that the Court ought not to appoint a judicial

factor at the expense of the joint property when it is apparent that the opposing party is willing to concur in that being done extrajudicially which will supersede the necessity for the appointment.

I wish to add that, as regards the power of sale, I am not prepared on this discussion to affirm absolutely the proposition that the beneficiaries under the deed have the common law rights of *pro indiviso* proprietors, so that each could sue an action of division and sale. The title is somewhat peculiar, and I go no further than to say that the normal method of procedure would be for the trustees to sell while both survive, or for the survivor to sell after the decease of one of them. Whether the pactional appointment of that mode of settlement supersedes the common law right of parties to sue an action of division and sale is a question with which we are not concerned, because I am moved to refuse the application by finding that an opportunity is afforded of extricating the difficulty without our interference.

Lord Kinnear—I agree. I think the respondent's undertaking to agree to the appointment of a neutral person to collect the rents, and to concur in carrying out a sale of the property, removes all ground for the interference of the Court. The meaning of such an appointment, so far as regards the rents, which are the only part of the property imperilled, is that the proprietors may collect the rents through the medium of a neutral person, and the only question is whether that person shall be appointed by themselves or by the Court. The adoption of the latter course would cause expense, and the judicial factor also could not sell the property unless he obtained the authority of the Court, which would cause more expense, and as it is quite unnecessary, in view of the respondent's undertaking, to make such an appointment I think we should refuse the petition.

Lord Adam concurred.

Lord M'Laren was absent.

The Court adhered.

Counsel for the Petitioners—M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondent—Kennedy—Graham Stewart. Agents — Martin & M'Glashan, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, July 19.

(Before the Lord Justice-General, Lord M'Laren, and Lord Kinnear.)

GUILD *v.* FREEMAN.

Justiciary Cases—Licensing Statutes—Sale—Beer Sold in Unlicensed but Supplied from Licensed Premises—24 and 25 Vict. cap. 91, *sec.* 12.

A brewer who held a certificate and Excise licence for the sale of beer by retail in premises belonging to him at Inverness, and also a licence for the sale of beer wholesale in premises at Elgin, accepted a retail order in his Elgin premises. He transmitted the order to Inverness, where it was executed by sending the beer to the station at Elgin, whence it was delivered by his servant to the purchaser.

Held, on these facts, that the sale took place at Elgin, and that the brewer was therefore guilty of a contravention of 24 and 25 Vict. cap. 91, sec. 12, by selling beer by retail without having a certificate.

James Lyon Guild, beer dealer, Main Street, New Elgin, was charged at the instance of James Michael Freeman, officer of Inland Revenue, with a contravention of section 12 of 24 and 25 Vict. cap. 91, in so far as on April 28, 1898, he sold beer by retail in his premises at Main Street, New Elgin, without having duly obtained a certificate and also an Excise licence.

Section 12 of 24 and 25 Vict. cap. 91, provides, *inter alia*, as follows—"That if any person shall in Scotland sell beer by retail, that is to say, in any quantity less than 4½ gallons, or in less than two dozen reputed quart bottles (whether to be drunk or consumed on the premises or not), without having duly obtained a certificate and also an Excise licence respectively authorising him to sell beer under the provisions of any Act or Acts in that behalf, he shall forfeit (over and above any penalty to which he may be liable under such Act or Acts) the sum of £20 for every such offence."

Guild was tried before the Justice of the Peace Court for Elginshire on 31st May 1898, when the following facts were proved—"Guild occupied premises in Main Street, New Elgin, in which he kept a stock of beer, and carried on the business of a dealer in beer. He held an Excise licence authorising him to sell in said premises beer in quantities of not less than four and one-half gallons or two dozen reputed quart bottles at one time. He also held an Excise licence authorising him to brew beer for sale in Thornbush Brewery, Inverness, and a certificate and an Excise licence authorising him to sell beer by retail in said brewery. He held neither a certificate nor an Excise licence authorising him to sell beer by retail in his said premises at Main Street, New Elgin. On 28th April 1898