

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First and Second Parties—Pearson—Law. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Third Party—Gloag—Kennedy. Agent—Robert Finlay, S.S.C.

Tuesday, July 19.

SECOND DIVISION.

[Lord Lee, Ordinary.]

THOMSON AND OTHERS v. ANDERSON AND OTHERS.

SYNOD OF UNITED ORIGINAL SECESSION CHURCH AND OTHERS v. ANDERSON AND OTHERS.

Trust—Church—Failure of Purposes—Title to Sue.

The title to certain heritable subjects in South Clerk Street, Edinburgh, was taken to trustees "for the congregation of United Original Seceders presently worshipping in Adam Square (Edinburgh), under the pastoral charge of the Rev. Archibald Brown." In consequence of the ill-health of the minister the church was closed in 1878, and the congregation, which had greatly dwindled in numbers, ceased to meet. Subsequently the trustees let the subjects and applied the rents in paying off debt affecting them. An action was raised against the trustees by four surviving members of the South Clerk Street congregation, who after 1878 had become members of a congregation of limited Original Seceders meeting in Victoria Terrace, Edinburgh (which congregation had been formed by a secession from the original Adam Square congregation in 1857), with these declaratory conclusions—that the subjects in question were held in trust for behoof of the pursuers and other remanent members of the South Clerk Street congregation; that the defenders should convey the subjects, and pay the rents, to the kirk-session of the church in Victoria Terrace, or to the Synod of the Original Secession denomination; and for an accounting. *Held* that the pursuers had no title to sue, and action *dismissed*.

Trust—Nobile officium—Cy-près.

In a petition presented by the United Original Secession Church to have the trustees above mentioned ordained to convey to the petitioners the heritable subjects vested in them, to be administered in the support of certain schemes in connection with that church, answers were lodged for the trustees and other members of the congregation, in which they stated that they were desirous that the property should be held upon the existing trust, in order that when the debt was paid off a minister might be obtained who would resume public worship in accordance with the principles of the United Original Seceders. *Held* that there had been no failure of the trust purposes, and petition *dismissed*.

On 22d October 1886 an action was raised by Robert Thomson, baker, 123 Rose Street, Edinburgh, and James Sinton, 15 Buccleuch Street, and their wives, as the surviving members of the congregation of the United Original Seceders, sometime worshipping in South Clerk Street, Edinburgh, under the pastoral care of the Rev. Archibald Brown, against Henry Anderson, residing at 12 Clifton Terrace, Edinburgh, and Charles Lyon, residing at 36 Reid Terrace there, as the sole surviving trustees and managers for the said congregation of the United Original Seceders under a disposition in favour of them and two other trustees, since dead, dated 15th and recorded in the Register of Sasines 20th September 1871, to have it declared (1) that the defenders held certain property, consisting of a hall (used as a church) and a dwelling-house in South Clerk Street, Edinburgh, in trust for the pursuers and other remanent members of the said congregation; (2) that the defenders should produce an account of their intronmissions as trustees and managers of the said subjects; and (3) that they should convey the said subjects and make payment of the rents and revenues to the minister and elders forming the kirk-session of the church of United Original Seceders in Victoria Terrace, Edinburgh, under the pastoral charge of the Rev. John Sturrock, "in trust for behoof of the congregation of said church of United Original Seceders in Victoria Terrace, Edinburgh, or to the Synod of the United Original Secession denomination, or to such other persons or for such other purposes as our said Lords may consider most in accordance with the purposes of the said trust-disposition."

The congregation, of which the pursuers and defenders were all members, worshipped originally in a church situated in Adam Square, Edinburgh, which had been purchased in 1844. The title to this church had been taken to certain persons as trustees, and to the survivors and their successors, assignees, and disponees, "but that always in trust for the use and behoof of the said congregation or of those members thereof who continue to adhere to and maintain the principles presently exhibited in the Testimony emitted by the United Associate Synod of Original Seceders for the Covenanted Reformation attained to by the Reformed Church of Scotland between 1638 and 1650, and against the several steps of defection therefrom in former and present times."

About the year 1857, in consequence of certain charges made by Mr Brown in the course of discussion in the Synod, Mr Brown was libelled, and suspended from his charge. As the result of these dissensions about half the members of the congregation (being that part of it which agreed with the governing body or Synod which had suspended Mr Brown) left, and formed the congregation which met in Victoria Terrace. About half of the congregation, however, sympathised with and adhered to Mr Brown, and kept possession of the Adam Square church.

On 4th October 1870 the property in Adam Square was purchased by the City Improvement Trustees at the price of £2500. Thereafter a hall and dwelling-house were purchased for the use of Mr Brown's congregation in South Clerk Street. The title to the hall and dwelling-house was dated 15th September 1871, and was taken to and in favour of "Charles Lyon, Thomas

Dickson, Henry Anderson, and Charles Frater Lyon, and the survivors and survivor of them, and to such other person or persons as may be named by the male members of the congregation at a general meeting called for that purpose by intimation from the precentor's desk on the Sabbath before such meeting, as trustees and managers for the congregation of the United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Rev. Archibald Brown, any three of said trustees, while more than three survive, and the majority while three only survive, being a quorum, and any four being a quorum of a meeting of the male members of the congregation, and under the condition that any trustee or member of the congregation leaving it and worshipping elsewhere not in harmony with the principles contained in the Testimony (United Original Secession) shall thereby be disqualified from acting as a trustee under this present conveyance, and from voting at meetings, or of having any say in the affairs of the congregation, and to the assignees and disponees whomsoever of the said trustees, heritably and irredemably."

After March 1875 Mr Brown's health declined so much that he was unable to continue to preach, but prayer meetings were carried on in the church, and sermons read to the congregation till July 1878, when the church was closed.

The congregation met on 28th July 1878, when the following minute was adopted:—"That the trustees in whose persons the property belonging to the congregation is vested be empowered to sell the church with fixtures and fittings therein, and that by public roup, at such time as is considered by them or their advisers most expedient, at the upset price of eight hundred pounds (£800), and further, that they be empowered to sell the house presently occupied by their pastor, the Rev. Archibald Brown, at such time and on such conditions as they may deem most expedient, at the upset price of six hundred pounds (£600). Further, in the event of either of the said properties not being sold at such exposure by public roup, with power to the said trustees to re-expose the same at such reduced upset price as they may consider necessary, with power also to invest the proceeds or any part thereof in such way and for such terms and for such period as they may deem proper." The property, however, was not sold. In October 1878 the four pursuers became members of the Victoria Terrace congregation of United Original Seceders.

Mr Brown died in 1879.

The pursuers averred that the congregation had been finally dissolved by the resolution of 1878. This the defenders denied. They stated that the motive in proposing to sell the subjects was to provide for sustenance for Mr Brown, and that his death made it unnecessary to proceed with the proposed sale; further, that they proposed when the debt was paid off to endeavour to get another minister in Mr Brown's place; further, that the pursuers and the rest of the Victoria Terrace congregation which they had joined held principles not in harmony with the 'Testimony' of the Original Secession.

The defenders pleaded that the pursuers had no title to sue.

On 7th January 1887 the Lord Ordinary (LEE) found that the pursuers had set forth no sufficient

title to sue the present action, and therefore dismissed the action.

"*Opinion.*—The pursuers are four persons who at one time (prior to October 1878) belonged to the congregation of United Original Seceders, formerly worshipping in Adam Square under the pastoral charge of the Rev. Archibald Brown. In 1871, when the Adam Square church was taken by the Improvement Trustees, that congregation acquired the subjects in Clerk Street described in the summons, the title being taken to 'Charles Lyon, Thomas Dickson, Henry Anderson, and Charles Frater Lyon, and the survivors or survivor of them, and to such other person or persons as may be named by the male members of the congregation at a general meeting to be called for that purpose by intimation from the precentor's desk on the Sabbath before such meeting, as trustees and managers for the congregation of the United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Rev. Archibald Brown, any three of said trustees, while more than three survive, and the majority while only three survive, being a quorum, and any four being a quorum of a meeting of male members of the congregation, and under the condition that any trustee or member of the congregation leaving it and worshipping elsewhere, not in harmony with the principles contained in the Testimony' (United Original Secession) 'shall thereby be disqualified from acting as a trustee under this present conveyance, and from voting at meetings, or of having any say in the affairs of the congregation, and to the assignees and disponees whomsoever of the said trustees, heritably and irredemably.'

"In July 1878 the church was closed in consequence of the illness of Mr Brown (who died in 1879), and the congregation, at a meeting of the male members, empowered the trustees to expose the church and house for sale, and to invest the proceeds 'in such way and for such terms and for such period as they may deem proper.' The subjects, however, did not find a purchaser. They are still in the hands of the surviving trustees, Mr Henry Anderson and Mr Charles Frater Lyon, who are the defenders in this action.

"The pursuers ask for decree of declarator that the subjects 'are held by the said defenders in trust for behoof of the pursuers and other remanent members of the said congregation of United Original Seceders;' further, for an account of the defenders' intrusions, and also that the defenders should be decreed to convey the subjects, and to make payment of the rents, revenues, and others 'to the minister and elders forming the kirk-session of the church of the United Original Seceders in Victoria Terrace, Edinburgh, under the pastoral charge of the Rev. John Sturrock, in trust for behoof of the congregation of said church (viz., the Victoria Terrace Church), 'or to the Synod of the United Original Secession denomination, or to such other persons or for such other purposes as our said Lords may consider most in accordance with the purposes of the said trust-disposition.'

"The first question raised by the defences is, whether the pursuers have set forth any sufficient title to sue the present action? Have they upon the averments made on record any right or

interest under the titles to the property by virtue of which they can insist in the conclusions or any of them?

“It is substantially settled by the case of *Couper v. Burn*, 22 D. 129, where the terms of the title were very similar, that the trust created by such a title as here occurs is a trust for the congregation therein described, and not for the ecclesiastical body with which that congregation was in connection, nor for any different congregation in connection with that body. I did not understand this to be disputed, and the leading conclusion of the summons seems to assume that the title was of this character, and vested the beneficial interest in the members of a certain congregation.

“In this view of the title, if the action had arisen out of a split in the congregation, it might have been necessary in order to dispose of competing claims to the property to ascertain which party adhered to the principles upon which the congregation was formed.

“But the peculiarity of this case is that it has not originated in any alleged deviation on the part of the defenders from the principles of the Secession Testimony, or in any threatened misappropriation of the subjects to the use of a different body from that which is described in the title as the congregation of United Original Seceders worshipping in Adam Square. The defenders do not dispute that they hold the subjects in trust for that congregation. The sole ground of action is that the congregation has been dissolved. It would not seem to follow, even if the fact were so, that the property is to be taken out of the hands of the trustees. But at all events it is incumbent on those who make such a demand to show that they possess a title and interest to vindicate the claims which they bring forward.

“With regard to the conclusions as directed to a conveyance of the property to the kirk-session of the Victoria Terrace congregation, or otherwise to the United Original Secession denomination, it appears to me that the pursuers' title is manifestly insufficient. Neither of these bodies is a party to the action, and the pursuers have not alleged any title to represent either the one or the other.

“Then, how stands the pursuers' title to vindicate the property for the congregation formerly worshipping in Adam Square under the pastoral charge of Mr Brown?

“They do not profess now to belong to that congregation, for they admit that in October 1878 they became members of the Victoria Terrace congregation. That is not merely a different congregation, having a distinct organisation and separate existence, but it was so at the time when the Clerk Street subjects were bought and the title taken as above set forth. Indeed that congregation was formed in 1857 by a portion of Mr Brown's congregation which separated itself from him upon grounds of difference which are not said to have afforded any pretence for depriving Mr Brown and his adherents of the right to the old church in Adam Square. It seems unnecessary, for the purpose of considering the pursuers' title to represent the congregation referred to in the title, to inquire minutely into the nature and origin of these differences. They were sufficient, in the view of the Victoria Terrace congregation which the pursuers have joined, to justify a

secession from Mr Brown and his congregation. The pursuers' statement is (in Cond. 2)—“As a result of these dissensions about half of the members of the Adam Square congregation seceded from it and formed the congregation of United Original Seceders now meeting in Victoria Terrace, Edinburgh. Mr Brown's adherents remained with him, and kept possession of the church in Adam Square.” It is admitted, in answer to the defenders' statement of facts (Art. 2), that in 1867 the titles of the Adam Square subjects were delivered up to the Adam Square congregation, and that a sum of £50 was then paid by them to the Victoria Terrace congregation, apparently for a renunciation of all claims to the church. It was after this that the Adam Square church was taken by the Improvement Trustees, and that the subjects in Clerk Street were acquired.

“I am of opinion that the circumstances set forth and admitted by the pursuers preclude them from claiming any connection with the congregation referred to in the title by which these subjects are held, and that they have no title to maintain any of the conclusions of the present action.

“Another question, however, has been raised, upon which I should wish to guard myself from being supposed to give any opinion. The pursuers allege that in 1878 the Clerk Street church was finally closed, and that Mr Brown's congregation was then dissolved. That may have been the result of the proceedings which then took place, though the defenders deny it, and plead that they are bound to hold the subjects, or the price obtained for them, in the hope of getting a minister for the congregation in room of Mr Brown, and of thus being able to carry out the trust according to its terms. But whether this be so or not is a question which in my opinion need not be decided in the present action. If an application should be made to the *nobile officium* of the Court upon the ground that the trust has failed, that matter will be duly considered. But in the meantime the property is in the hands of the survivors of the original trustees, who are not said to be making away with it, or to be otherwise than responsible persons. The allegations as to their having become disqualified by attendance at other churches, such as the Original Seceders Church in Lauriston Street or the Free Church, appear to me insufficient to warrant the intervention of the pursuers, at least in this form of action. The congregation is admittedly in a state of suspended animation, and the church is admittedly closed in the meantime. So long as this is the case by an act to which the pursuers themselves were parties the disqualifying clause cannot be fairly applied to the trustees merely in respect of their attendance at another church, and the pursuers can take no benefit from the fact of such attendance. The utmost that the pursuers can claim in any view is a right to see that the property is not misapplied, and I give no opinion against their title to make an application to the Court in the exercise of its *nobile officium*.”

The pursuers reclaimed, and before the reclaiming note was discussed the Synod of the United Original Secession Church, with the consent and concurrence of Mr Thomson and Mr Sinton and their wives, the pursuers in the action of declarator presented a petition craving the Court in the

exercise of its *nobile officium*, in respect it had become impossible to carry out the trust in the manner originally proposed, to direct the trustees, defenders in the other action, to account for their intrusions and convey the subjects to the petitioners to be administered and applied in support of the Home Mission Fund, the Mutual Assistance Fund, and the Synod's Business and Hall Fund of the United Original Secession Church, or one or more of them; or otherwise to ordain the trustees to pay and convey the funds and heritage in question for such objects as the Court should think most in accordance with the purposes of the trust.

The respondents (defenders in the action) lodged answers, in which they were joined by certain other members of Mr Brown's congregation. They took up the same position as in the action. They stated—"The respondents are all desirous that the said property should continue to be held by Mr Anderson and Mr Lyon upon the existing trust in order that when certain debt of the congregation, which is secured upon the property, is paid off a minister may be obtained who will resume public worship in the church in accordance with the Testimony of the United Original Seceders.

The reclaiming-note and petition were heard together, and in the course of the argument the accounts of the trustees were produced. They showed that the rents were being employed in paying off the debt, and that this would be accomplished in about four years. The pursuers (petitioners) did not make any criticism upon them.

Argued for the pursuers and petitioners—The pursuers had a title to sue. The congregation under Mr Brown had never ceased to belong to the Original United Secession Church. When therefore Mr Brown died, and the congregation dispersed, it was right that the Synod should have possession of the property of the congregation—*Craigie v. Marshall*, January 25, 1850, 12 D. 523; *Couper v. Brown*, December 2, 1859, 22 D. 120. The Court had power to vary the application of the funds when they found that a better application could be made of them—*Clephane, &c. v. The Magistrates of Edinburgh*, February 26, 1869, 7 Macph. (H. of L.) 7. The property of dissenting chapels could be treated in the same way as the funds of charities. If the purposes of the trust had failed, as was the case here, there being no minister and no congregation, and the church being let to another denomination, then the funds should be applied *cy-près*, as was asked in the prayer of the petition. Such applications of funds had been previously allowed—*Attorney-General v. Bunce*, April 22, 1868, 6 L.R., Eq. Cas. 563; *Grant v. McQueen*, May 23, 1877, 4 R. 734; *McCulloch and Others v. Kirk-Session of Dalry*, July 20, 1876, 3 R. 1182; Jarman on Wills, 266.

The defenders (respondents in petition) argued—The Court had no power to order the trustees to sell the property and hand over the proceeds to the Synod, as the Court could do that only in the case of the funds of charities, and here the most important element of charity was absent, viz., there was no pious donor. This property had been bought by subscription among certain persons as private pro-

perty, and could not be interfered with—*Craigie v. Marshall*, *supra cit.*, and *Couper v. Burn*, *supra cit.*; *Mitchell v. Burness*, June 19, 1878, 5 R. 954; *Bain v. Black*, February 22, 1849, 6 Bell's App. 317. It was a matter of contract, not of charitable trust. Assuming that this property was on the same footing as the funds of a charity, and that the Court had power to deal with it, then the Court should not make such order as was asked for in the prayer of the petition. (1) Because it was only to certain kinds of charities that the doctrine of *cy-près* applied—that was to say, only to charities where the benefit of some general purpose was sought, and not as here to where the funds were restricted to the benefit of some particular object—*Clark v. Taylor*, July 7, 1853, 1 Drewry's Rep. 642; Boyle's Law of Charities, pp. 149, *et seq.*; *Attorney-General v. Bishop of Oxford*, 1 B.C.C. 444, note. The doctrine of *cy-près* could only be applied where the purposes of the trust had failed, but here the purposes had not failed, as the trustees were paying off the debt, and when that was done they hoped to get a minister and gather together another congregation—*Shepherd v. Hutton's Trustees*, February 24, 1855, 17 D. 516; *McDougall*, June 29, 1878, 5 R. 1014; *Managers of King James VI. Hospital of Perth*, May 20, 1795, Bell's Folio Cas. 173; *Attorney-General v. Oglander*, Michaelmas Term, 1790, 3 Brown's Chan. Rep. 166.

At advising—

LORD JUSTICE-CLERK—In this case I have come to be of opinion that the pursuers in the action, who are also petitioners in the petition, have not shown us sufficient ground for our interference. There are two proceedings before us, the one of which is by certain persons as surviving members of a congregation of United Original Seceders, and the second is a petition presented by the Synod of the United Original Secession Church. The case is simply this. It seems that in 1857 the Rev. Mr Archibald Brown was the minister of a congregation in connection with that body which met in a church in Adam Square. He had certain differences with the governing body of the denomination, and the result was that after a long discussion the Synod removed Mr Brown from his position as a minister in connection with the church—they suspended him. A number of the members of the Adam Square Church at that time joined another congregation which met in a church in Victoria Terrace. But a large portion of his former congregation adhered to Mr Brown, and continued to occupy the church in Adam Square in the enjoyment of his ministry until 1870. Then the ground on which the church was built was purchased from the congregation by the City Improvement Trustees, and the price was paid to the persons in possession, being the trustees for the congregation. After that the congregation purchased a property in South Clerk Street under the title which is set forth in the case. They took the heritable title of the property in the names of certain persons as trustees for the congregation, and it is not disputed that the title was taken for the congregation. It is a good enough title, and such as has often been upheld. Mr Brown became ill in 1878, and died in 1879. For a couple of years before Mr

Brown's death, although meetings were held, there was no regular service in the South Clerk Street church. After Mr Brown's death the trustees let the church and the house adjoining for what rent they could get, and that has been the position of affairs down to the present time. The defenders and respondents are some of the original trustees of the property, and since the congregation was dissolved in 1878 there have been still some thirteen or fourteen members adhering. How many have gone over to the other section we do not know. The church was burdened with some debt, and it is stated in defence that what the defenders have been trying to do is to pay off what remains of that debt, and that then they hope to get another congregation for this church. There are thus two parties who are applicants for the exercise of the powers which we undoubtedly have—on the one hand, the members of the congregation who on Mr Brown's death joined the Victoria Terrace Church, and on the other hand the Synod of the Original United Secession Church come forward saying that as the original purposes of the trust have now failed they have a sufficient interest and title to have the property handed over to them for the purpose of having it sold, and to invest the money in such manner as will be most nearly akin to the original purposes of the trust. No doubt we have the power to do this, but in my opinion as matters stand I think that the trust has not failed—that neither the machinery nor the purpose of the trust have failed. I think the parties had a right to call for the production of the accounts, but these have now been shown, and the pursuers admit that they are correct, and show that the trustees are paying off the debt. The title is in these trustees, and I think it is premature—I say nothing further—to ask us to set up a new trust. As to whether the Synod or the members who have gone to the Victoria Terrace Church may have the right to ask us to interfere at some future time and under other circumstances I say nothing. My general view is that there has not been such a failure of the trust as would lead us to interfere just now.

LORD YOUNG—I am of the same opinion. The action that was first brought was an action of declarator and for an accounting, and it also contained a conclusion that the defenders should hand over the heritable subjects to the minister and elders forming the kirk-session of the Church of United Original Seceders in Victoria Terrace, Edinburgh, under the pastoral charge of the Rev. John Sturrock, in trust for behoof of that congregation. In that action the trustees under the original trust-deed under our direction exhibited their accounts, and the pursuers were quite satisfied that the trustees had done and were doing their best for the property. The property was subject to a small debt which the trustees were paying off by degrees, and their dealings in regard to that debt constituted the greater part of that very small accounting. So far, then, as the conclusion for accounting goes, that has been satisfied. With regard to the conclusion that the church and house adjoining, which are the subject of this litigation, are held in trust, that was quite unnecessary, as the trustees admit that they hold

it only in trust. Is there, then, any ground for our interfering? In my opinion there is none. The church and house were acquired by the congregation worshipping under the pastoral care of the Rev. Mr Archibald Brown. He was not able to keep them together, and when he died the remnant of the congregation disappeared. The church was no longer used for the purpose for which it had been acquired, but then it was trust-property and there was a debt upon it, and the question arose what was to be done with it. The duty of the trustees was to make as much profit out of it as possible so as to meet the obligations upon it. Neither the church nor the house could be used for its original purpose, but they had to be used in some way, and the trustees very properly let both the church and the house. No doubt they did it in the exercise of their duty and their proper discretion as trustees. But that is not a case for our interference. A time may come when we might find it necessary to inquire if it was proper to sell the property, but there is no need to anticipate that time. Had there appeared to be any misapplication or misappropriation of the funds, then a very slight interest or title would justify anyone in applying to this Court so as to make the wrong-doer do right. But here there is no case of the trustees misapplying or misappropriating the funds.

LORD CRAIGHILL and **LORD RUTHERFURD CLARK** concurred.

The Court adhered to the Lord Ordinary's interlocutor in the action of declarator and dismissed the petition.

Counsel for Reclaimers and Petitioners — D. F. Mackintosh—Walton. Agent—Thomas White, S.S.C.

Counsel for Respondents — Glog — Low. Agents—Ronald & Ritchie, S.S.C.

Thursday, July 7.

OUTER HOUSE.

[Lord M'Laren.

BARRON v. DEWAR AND OTHERS
 (BARRON'S TRUSTEES).

Succession—Fee and Liferent—Liferent Alimentary—Unqualified Right to Fee.

By trust-disposition and settlement a testator directed his trustees to hold the residue of his estate for behoof of his daughter, "in liferent for her liferent alimentary use allenarly," and declared that the liferent should be purely alimentary and not affectable by debts, or subject to the *jus mariti* of any husband she might marry. In the event of her being married and leaving lawful issue he directed the residue to be made over to such issue after their mother's death, and in the event of her death without lawful issue the residue was to be made over to the truster's heirs, executors, and assignees whomsoever. The daughter being 58 and unmarried, and being also his heir-at-law