

contract, may be made either to the Court of Session or to the Sheriff Court of the district in which the spouses are or the survivor of them is domiciled; and in all other cases shall be made to the Court of Session."

A petition was presented in July 1895 to the First Division of the Court of Session, by James Tod, 16 Royal Terrace, Edinburgh, and J. B. M'Intosh, S.S.C., Edinburgh, the sole surviving trustees acting under the trust-disposition and settlement of the late John Marshall, S.S.C., Edinburgh, praying the Court to authorise Mr Tod to resign, or alternatively to remove him from office. The petition set forth that Mr Tod, not being a gratuitous trustee, could not resign without the sanction of the Court, but that, even if such sanction were given, he was incapable from physical and mental disability of attending to any business, and a medical certificate to that effect was produced.

Answers were lodged by one of the beneficiaries under the trust, objecting to the petition being granted until the other trustee had made arrangements for the assumption of suitable persons as new trustees.

Argued for the petitioners—When the petition was lodged it was thought that Mr Tod could have resigned upon receiving authority to do so, but his health now precluded him from executing any deed whatever. Although no reference was made in the petition to the Trusts Act 1891, it was competent for, and indeed incumbent upon, the Court, before whom the present petition had been properly presented, to have respect to the provisions of that Act, and in terms of section 8 to remove Mr Tod.

Argued for the respondent—It was incompetent for the Court to remove Mr Tod under this petition, which made no reference to the Trusts Act 1891, and which was an application to the Court for the exercise of their *nobile officium*. If advantage were to be taken of the Trusts Act 1891, a petition should have been presented to the Junior Lord Ordinary. This appears from section 16 of the Trusts (Scotland) Act 1867, which provides that applications under that Act are to be brought, in the first instance, before the Lord Ordinary. Section 1 of the Act of 1891 provides that that Act and the Act of 1867 are to be construed together, and section 16 of the earlier Act therefore applies to applications under the later Act.

At advising—

LORD PRESIDENT—The Trusts Act of 1891 gives certain powers to and imposes certain duties upon the Court, and then it says in section 2 that "the expression 'the Court' shall mean any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried." Now, we have here an application which *prima facie* looks to be founded on common law, for it appeals to the *nobile officium* of the Court, upon grounds which preclude all idea of the application being disregarded as foreign to

that jurisdiction. Accordingly this Court is competent to deal with, and is vested in, that application. That being so, it seems to me that this Court is affected by the alteration of law set out in the Act of 1891 in this regard, and that it is impossible for us to ignore the prescribed duty which is imposed on the Court by that Act—the duty which is imposed upon any competent court dealing with the question of the removal of a trustee. The Legislature has really relieved the Court of the duty of exercising any discretion in the matter, and has bidden the Court remove the incapacitated trustee. I am therefore prepared to grant the prayer of the petition.

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

The Court granted the prayer of the petition and removed the trustee as craved.

Counsel for the Petitioners—Wilson. Agents—Myrne & Campbell, W.S.

Counsel for the Respondent—Chree. Agents—John Clerk Brodie & Company, W.S.

Wednesday, October 23.

## FIRST DIVISION.

### WATT AND OTHERS, PETITIONERS.

*Trust—Charitable Bequest—Petition for Scheme by Trustees Named but not Vested in Trust—Competency—Title to Sue.*

A testator by trust-disposition and settlement, dated 1879, left a sum of £3500 to be held in trust by the minister and kirk-session of a church for the purpose of applying the free income in maintaining a male missionary of not less than fifty years of age, and a female missionary of not less than forty years of age. In 1895, when the sum fell to be paid, the minister and kirk-session, before accepting the trust, presented a petition to the Court to have the scheme altered to the effect of authorising them to expend £1000 in the erection of a mission-hall, and to use the income of the residue of the bequest in maintaining one male missionary without restriction as to age. The church had no mission-hall, and the income of the capital was, in the petitioners' view, insufficient for the payment of two suitable missionaries. They further stated that their acceptance of the trust would depend upon the petition being granted.

*Held* that the petitioners, not having accepted the trust, had no title to sue, and that the petition was incompetent.

*Opinion* that, apart from the question of competency, no sufficient reasons had been stated for sanctioning such a departure from the scheme laid down by the testator as was proposed.

The late William Hunter, merchant, South Bridge, Edinburgh, who died on 26th July

1879, left a trust-disposition and settlement, which by the fourth codicil thereof, dated 22nd July 1879, made the following provision—"I direct that the sum of Three thousand five hundred pounds shall be paid over to the minister and kirk-session for the time of the Infirmary Street (Edinburgh) congregation of the United Presbyterian Church, and shall be held by them in all time coming in trust for the purpose of paying and applying the free income and annual proceeds thereof in maintaining a male missionary and a female missionary in connection with the said congregation, and with the beneficiaries of the old men's fund mentioned in my said trust-disposition and settlement when constituted: And I declare that the male missionary for the time shall not be less than fifty years of age, that the female one shall not be less than forty years of age, and that both shall be God-fearing persons well qualified for the offices, and who will apply their whole time to their duties and have no other employment; and both missionaries shall be elected and appointed annually by the said minister and kirk-session for the time, who shall have power in their management of the said sum of Three thousand five hundred pounds from time to time to make such regulations and conditions in regard thereto, and in regard to the duties and conduct of the said missionaries, as to the said minister and kirk-session shall seem proper."

This legacy fell to be paid in 1895, and amounted, less legacy-duty, to £3150. The Rev. Pollok Watt, then minister of Infirmary Street U.P. Church, and the members of the kirk-session thereof, before accepting the administration of the trust, presented a petition praying the First Division of the Court of Session to settle a somewhat modified scheme. The petition contained the following statements:—"During the sixteen years that have elapsed since the death of the truster great changes in the mission work of the said congregation have taken place, and the conditions attached to the said bequest by the truster are such as to render it impossible to carry out his intentions in strict obedience in detail to his directions.

"During his life, and while the said William Hunter was connected with the said congregation, the congregation rented mission premises, and regularly employed a missionary; but owing to changes in the district in which their church is situated and other circumstances, the congregation has not for many years been in possession of a mission-hall, and has not employed a missionary. A mission-hall is essential to the successful prosecution of mission work, and there is no present prospect of such being provided by the congregation.

"The income derived from the said sum of £3150 will not be sufficient to support two missionaries, as, having regard to the present return for trust-moneys, it can hardly exceed £100 a-year.

"The limit of age and certain other of the conditions imposed by the truster will also make it extremely difficult for the congre-

gation to obtain the services of suitable missionaries.

"The petitioners have maturely considered the terms of the above bequest, and they have been compelled to come to the conclusion that they could not, in the circumstances above narrated, carry it out according to the letter of the truster's directions. They are advised that the said sum of £3150 falls to be administered by them as under a trust for the due application thereof, and that your Lordships, in virtue of the equitable powers belonging to the Court at common law for the regulation of trusts, have power to settle a scheme for the administration of the said fund within the scope of the bequest.

"The petitioners have accordingly prepared a draft scheme for the administration of the said fund, which they respectfully submit for the approval of your Lordships. The draft scheme modifies the terms of the said bequest in respect that it, *inter alia*, confers powers on the trustees (1) to provide a mission-hall in the first instance; (2) to employ one male missionary only; (3) to regulate the conditions of the tenure of office of the missionaries to be appointed."

In their scheme the petitioners proposed to devote £1000 at once to the erection of a mission hall or to accumulate the income until it amounted to that sum. They also wanted the age limit removed.

Upon 6th July 1895 the Court remitted to Mr Bremner P. Lee, advocate, to consider and report upon the petition. Mr Lee, after referring to the provisions of Mr Hunter's trust-disposition under which an Old Men's Fund may come to be established, reported, *inter alia*—"I think that the terms of the bequest leave it not doubtful that Mr Hunter meant to provide for missionary work quite unconnected with, or at least not necessarily requiring, any missionary premises at all. The missionaries were to be in connection not only with the congregation, but also with the Old Men's Fund, and therefore a great part of their labours was to be among indigent annuitants chosen on consideration of age, 'inability to work for maintenance, delicate health, &c.' This seems consistent with, and even to indicate, an intention to provide for visitation in the home rather than any other form of missionary work. In any event, I think that the testator meant that any premises which might be necessary should be supplied as formerly by other means, and not at the expense of one of the two classes which he meant to benefit. . . . Since the death of Mr Hunter sixteen or seventeen years ago, trust-money yields a much smaller income than it did formerly, and while the sum left might at one time have been sufficient to pay both a male and a female missionary, it would not now yield more than would pay the male missionary alone. . . . This congregation, which is in the Cowgate district, has of late years had to discontinue its missionary work on account of its inability to provide mission premises, without which useful work in the district seems impossible. The church itself cannot be made available, as

the mission work would be carried on amongst the very lowest classes of the population, and the regular congregation would naturally dislike, on sanitary and other grounds, that the church should be used for this purpose. So firmly do the petitioners hold this view that they are convinced that without some modification of the testator's directions, it will be their duty to refuse to accept the legacy at all. In these circumstances it seems that Mr Hunter's object may be best promoted, without any violation of his expressed wishes, by allowing the petitioners while they are unable to usefully spend the income, to accumulate it until they are able to provide the essential premises. At the same time, until the petitioners are in possession of the money, I doubt whether they have any title to petition the Court for a scheme.

Counsel for the petitioners admitted that there was no authority for trustees not yet vested in the administration of a trust presenting a petition such as the present, but argued that there was no reason against their doing so. This was not a merely speculative question. They were anxious to accept and to administer this fund but felt they could not conscientiously do so if they were to carry out the directions of the testator literally. Their only course was to present to the Court for approval the scheme which they thought feasible in the altered circumstances of the case. Although the trust had not been dead twenty years, the condition of the congregation in which he was interested had greatly changed. There were fewer people in the neighbourhood attending the church able to assist in keeping up mission work. A hall had existed in the trustor's lifetime, and was a necessity for such work. The age limit was unreasonable, for missionaries of that age were either incompetent or would require a much higher salary.

At advising—

LORD PRESIDENT—In anything which I have to say adverse to the position taken up by the petitioners, I do not intend to reflect on the motives which actuated them in presenting this application. One can see from what has been said by Mr Johnston that it is really their anxiety and scrupulousness for the success of the mission that have led them to adopt a position which we cannot sustain.

In the first place, I have grave doubt as to the competency or appropriateness of an application to settle a scheme for the administration of a trust framed by persons nominated to be trustees, but who have not accepted the trust, and who, although nominated to the trust, say that as at present advised they are not minded to accept unless the scheme which they propose is sanctioned.

I have not heard any sufficient reason, nor am I aware of any precedent for such a proceeding, in which the Court would interfere upon the application of persons occupying a perfectly irresponsible and tentative position, and without having before it any-

one committed to the execution of the trust. Accordingly, we have no guarantee for further procedure at all, but are asked to give effect to the no doubt honest but somewhat speculative criticisms and proposals of outsiders.

But further, this testator died only in 1879, and all that is said is, that external circumstances have so changed as to render his proposals less appropriate to 1895 than to 1879. These changes are mainly the inability of the congregation now to rent a mission-hall as they formerly did, and a fall in the rate of interest, which has rendered the fund less adequate for the purposes intended by the trustor. Given due consideration to these circumstances, I am driven back to the question, what right have we to alter Mr Hunter's will made so recently as 1879. Is it because its provisions have become impracticable? Now, the present petitioners, viz., the minister and session of this church, are entitled to have their opinions treated with great respect, for in a sense they may be regarded as experts in the mode of conducting mission work. But I am not prepared to accept the statement even from them that with a sum of £3000 they would be unable to get missionaries to carry on the work—at least in a humble way—intended by the testator. It may be that if one had to write the will now, it would be better to provide for only one missionary and supply him with a mission-room or hall for carrying on his work. But that is not our business, nor is it that of the trustees, but of Mr Hunter, who may have had more modest and less ambitious ideas on the subject, and thought that if two middle-aged persons were selected to visit from house to house, a great deal of unostentatious and homely work might be done with this money.

It seems to me that we are not entitled to sanction a scheme of this kind, the central object of which is the acquisition of a mission hall, which would absorb one-third of the whole fund and at once cripple the objects which Mr Hunter had in view. I am not prepared to take that step. I do not think we have heard any adequate reasons for interfering with the terms of this bequest, least of all at the instance of persons who stand aloof from its execution. The sequel will depend on the reasonable and well-considered opinion which the trust-disponees will now come to form as to their own course of action; for I cannot suppose that, because their views of the ideal apparatus of mission work do not coincide with Mr Hunter's directions, they will sacrifice this charity altogether.

LORD ADAM—I agree.

LORD M'LAREN—On the first point I conceive that it would be contrary to the usual practice to proceed to adjust a scheme at this stage, and at the instance of persons who refuse to say whether they will accept or decline the office of trustees, and who are consequently not yet charged with the administration of the trust. The Court has always taken a very liberal view in questions of title to sue with reference to the adminis-

tration of charities, and has sustained all sorts of titles, *e.g.*, that of a corporation, that of a sheriff of a county, and that of persons who represent the class intended to be benefited. But then, in all these cases the persons who brought the application had to put themselves into a definite position in relation to the charity from which they had no intention of receding. But when, as here, dispoonees come forward with a scheme, they must first say whether they propose to accept or not the office imposed upon them, for if they do not accept they have no title to intervene. Otherwise it might lead to this result, that when the Court had, after obtaining such information or advice as was available, approved of a scheme, the petitioners might decline to accept office, and then new administrators might be appointed, who might come and tell us that the scheme which we had sanctioned was not the best. The attitude, which, no doubt with the best motives, the petitioners here have taken, is one which in my opinion disables them from promoting an application of this kind.

I also agree that if we were to consider the merits, there would be the greatest difficulty in sanctioning such a variation from the testator's purposes as would be entailed in the expending one-third of the whole fund in the erection of a mission-hall when nothing was contemplated by the testator but out-door work.

LORD KINNEAR concurred.

The Court refused the petition as incompetent.

Counsel for the Petitioners—H. Johnston—C. D. Murray. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, October 23.

## SECOND DIVISION.

[Lord Low, Ordinary.]

J. & G. PATON *v.* THE CLYDESDALE BANK, LIMITED, AND ANOTHER.

*Fraud—Representations as to Credit—Mercantile Law Amendment Act 1856 (19 and 20 Vict. c. 60), sec. 6.*

In an action of damages against a bank and the bank's agent, the pursuer averred that he had been induced by the false and fraudulent representations of the agent as to the credit of a debtor of the bank, to accept bills drawn by the debtor. He also stated that the proceeds of the bills were applied to reduce the balance due by the debtor to the bank, contrary to the representation by the agent that they would not be so applied. It was contended by the defenders that the alleged representations as to credit, not being in writing, the action was excluded under section 6 of the Mercantile Law Amendment Act 1856.

*Held* that the case did not fall within the section, on the ground that the purpose of the alleged fraudulent representations was not that the debtor might obtain the acceptances for his own benefit, but for that of the bank.

*Fraud—Agent and Principal—Imputed Liability—Scope of Employment.*

*Held* that in the circumstances alleged the agent had made the representations complained of in the course of his service, and, in that sense, within the scope of his employment, and that the bank were liable for his fraud.

Messrs J. & G. Paton, merchants, Dundee, raised an action against the Clydesdale Bank, Limited, and Alexander Scott, agent at the Dundee branch of the bank prior to November 1894, as defenders jointly and severally, for £4083, 8s. 5d. In their condescendence the pursuers averred that in and prior to March 1893, Douglas, Reid, & Company, manufacturers, Dundee, were indebted to the Dundee Branch of the Clydesdale Bank in sums amounting to upwards of £20,000. They also stated that prior to March 1893 they had sustained very serious losses in their business, and that in that month the defender Alexander Scott, the agent of the bank, was well aware of the losses which had been incurred by Douglas, Reid, & Company, and knowing that they were insolvent, or at all events in great financial difficulties, he became apprehensive of the safety of the bank's claim against them, and also as to the effect on his own position if he were obliged to report the real state of matters to the head office of the bank.

The pursuers further averred—(Cond. 4) "Mr Scott, either alone or in conjunction with Charles Reid, one of the partners of the said firm of Douglas, Reid, & Company, conceived the fraudulent design of getting Douglas, Reid, & Company to procure acceptances from the pursuers and other merchants in Dundee, with the view of applying the proceeds of these acceptances in extinction *pro tanto* of the debt due to the Clydesdale Bank. It was a part of this scheme that the pursuers and the other mercantile friends to whom Douglas, Reid, & Company applied for acceptances should receive from Mr Scott satisfactory assurances (*first*) as to the solvency of Douglas, Reid, & Company, and (*second*) that none of the money payable under the acceptances should be applied in extinction of any prior claim or debt of the bank or other creditor of Douglas, Reid, & Company. (Cond. 5) In pursuance of this fraudulent scheme, Charles Reid, in or about the month of March 1893, represented to Mr John Paton, the senior partner of the pursuer's firm, that his firm of Douglas, Reid, & Company required temporary accommodation, and suggested that Mr Paton should see Mr Scott on the subject. Mr Paton accordingly saw Mr Scott, who assured him (*first*) that Douglas, Reid, & Company were in a thoroughly sound condition financially, and only required temporary accommodation; (*second*) that the sum due to the bank