where they had initiated proceedings on behalf of the workman for getting compensation assessed, as they are entitled to do in certain exceptional cases by the National Insurance Act. If by way of defence an employer tabled a memorandum of agreement and then made application to have that memorandum recorded, it would be very strange if the approved society which had initiated the whole proceeding was not entitled to show that the memorandum was not a genuine record of an agreement between the employer and the workman.

However, as I said before, no question of that kind arises, because the approved society intervened in the present case for the purpose of stating that the lump sum of £100 which had been agreed upon in redemption of the weekly payments was inadequate. Now a very cursory examination of paragraph 9 shows that this procedure was entirely irregular, because paragraph 9 shows that nobody, not even the workman, is entitled to come forward and object to the recording of the memorandum on the ground that the redemption money was inadequate. No one can do that except the sheriff-clerk, and he must act upon information; and anyone, whether with an interest or without an interest, is entitled to lay information before the sheriff-clerk. On this point I beg respectfully to say that I should have been prepared to answer the second question in the negative, because I think it was utterly irregular for the sheriff-clerk to allow that minute by the approved society to be lodged in process. On the other hand, he was quite entitled when the minute was brought to him to say—"I will read your minute to see whether there is any useful information to be found in it." And I think the only reasonable comment one could make on this minute is that it contained no useful information at all. But I am far from dissenting from the practical course which your Lordship suggests, namely, that this approved society, presumably acting in good faith and having some information, should have an opportunity of laying that information before the sheriff-clerk. But I think that the sheriff-clerk ought to be extremely careful to see that the power of laying information is not abused by approved societies, and that they are not allowed to get a *locus standi* by giving vague general information such as they tendered in this particular case. I should expect that the sheriff-clerk as a reasonable man would say—"You must tell me why the £100 was too little. You must tell me what the true sum in your view ought to have been, and you must further give me the names and addresses of the witnesses whom you are prepared to adduce to prove your case." I merely express these views, but I have no right to say anything which would hamper the sheriff-clerk to whom Parliament has intrusted this discretion, and still less the Sheriff, who will have to exercise his discretion if and when the matter comes before him on information from the clerk.

The statute says nothing to guide or to hamper the Sheriff in regard to what he is to do except that he is to dispose of the matter as he thinks just. Obviously he must act judicially in the matter. He must not hear the informants behind the back either of the workman or of the employer, because both these parties are interested in the validity of the agreement. Whether as a matter of process the Sheriff ought to sist the approved society in order that they might be made liable for the expenses of a litigation which they had practically initiated in their own interest is a question which the Sheriff will have to consider in due time.

I understand that your Lordships propose to give no answers to these three questions, and I do not dissent from that course being taken.

LORD MACKENZIE was not present.

The Court recalled the determination of the Sheriff-Substitute as arbiter and remitted the cause to the Sheriff Court to begin *de novo*.

Counsel for the Appellants—Cooper, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—Mackenzie, K.C.—C. H. Brown. Agents—W. & W. Finlay, W.S.

Wednesday, July 15.

FIRST DIVISION.

ANDERSON'S TRUSTEES *v.* LYON AND OTHERS.

(See *Thomson* v. *Anderson*, July 19, 1887, 14 R. 1026, 24 S.L.R. 731.)

Trust—Charitable and Educational Trust—Church—Fulfilment of Original Purpose—Lapse—Cy près.

Certain heritable property was acquired in 1871, and the disposition taken in the name of trustees "for the congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald Brown." Mr Brown had had fundamental differences with the Synod of the United Original Seceders, which led them to suspend but not depose him. In 1878 the congregational existence ceased. Mr Brown died in 1879. During the non-existence of a congregation the property was let and the rents accumulated. In 1912, on the death of the sole surviving trustee, the property was claimed by the Synod of the United Original Seceders, by several congregations of that body, and by the Lord Advocate as *bona vacantia*. *Held* (*rev.* judgment of Lord Ordinary Cullen) that, failing the establishing of a claim of right by one of the congregations, a scheme for administration of the trust ought to be prepared.

On October 8, 1912, James Anderson, Commercial Street, Kirkcaldy, and others, trustees and executors of the late Henry

Anderson, sometime of 111 George Street, Edinburgh, who died on May 7, 1912, *pursuers and real raisers*, raised an action of multiplepoinding and exoneration against (1) Charles Frater Lyon, an original trustee with the late Mr Anderson in a disposition of property dated 15th and recorded 20th September 1871, "for the congregation of United Original Seceders, presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald Brown;" (2) Miss Janet Anderson, the sole surviving member of that congregation; (3) the Reverend James Patrick and others, as representing the Synod and Body of the United Original Seceders; (4) the Reverend Ebenezer A. Davidson and another, as representing the congregation of the United Original Seceders worshipping at 7 Victoria Terrace, Edinburgh; (5) the Reverend William Scott and another, as representing the congregation of United Original Seceders worshipping at 52 South Clerk Street, Edinburgh; (6) the Reverend Walter Macleod and another, as representing the Lauriston Street congregation of Original Seceders in Edinburgh; and (7) the Lord Advocate, as representing the Crown, *defenders*. The *fund in medio* was the property originally held for the Adam Square congregation, and accumulated rents.

The defenders (3) and (4) called claimed the whole fund, and pleaded—"(1) These claimants being the Synod of the Churches which accept the Testimony of 1842, to which Testimony the said Archibald Brown and his congregation also adhered, are entitled to be ranked in terms of their claim. (2) Alternatively, the trust purposes affecting the fund *in medio* have become impossible of fulfilment, and the trust being a charitable one the fund should be applied on the principle of *cy près*, and these claimants being the object most nearly approximate to that of the original trust these claimants ought to be ranked and preferred in terms of their claim."

The defenders (5) called claimed the whole fund either *simpliciter* or according to a scheme prepared and approved by the Court, or alternatively such part thereof as to the Court might seem proper, and pleaded—"(1) The trust purposes affecting the fund *in medio* having, in the circumstances set forth, become impossible of fulfilment, and the trust being a charitable one, the fund should be applied on the principle of *cy près;* and, the claimants' congregation being the object most nearly approximate to that of the original trust, the claimants ought to be ranked and preferred on the fund *in medio*, in terms of one or other branch of their claim."

The defenders (6) called claimed the whole fund, or such part as to the Court seemed fit, and pleaded—"(1) The purposes of the said charitable trust having failed, the funds thereof fall to be applied on the principle of *cy près*, and the claimants are entitled to be ranked and preferred in terms of their claim. (5) The said trust being a charitable one, the funds thereof cannot fall to the Crown as *ultimus hæres*, and the claim for His Majesty's Advocate should be repelled."

The defender (7) called claimed the whole fund, and pleaded—"(1) The said congregation having ceased to exist, and there being no other person entitled to the said trust estate claiming in this process, the claimant ought to be ranked and preferred in terms of his claim. (2) The averments of the whole other claimants being irrelevant their claims should be repelled."

The terms of the *disposition* in favour of the late Mr Anderson and others were—"To the said 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 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 United Original Seceders, presently worshipping in Adam Square, under the pastoral charge of the Reverend 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 irredeemably. . . ."

The *facts* are given in the opinion of the Lord Ordinary (CULLEN), who on June 24, 1913, sustained the claim of the Lord Advocate.

Opinion.—"The fund *in medio* in this action of multiplepoinding and exoneration consists of (1) a heritable property at 36 South Clerk Street, Edinburgh, used as a church hall, &c., and (2) certain moneys forming accumulations of the rents of it. The heritable property was the subject of a trust as declared in the disposition of 1871 mentioned on record 'for the congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald Brown.' The price paid for it was £1100. It is common ground that it is not now practicable to ascertain the sources from which this money came, though it is a probable enough assumption that it represented donations and subscriptions from members of the said congregation.

"The congregation in question stood in a very peculiar position in relation to the United Original Secession Church. It appears that in or about the year 1857 the Reverend Archibald Brown had certain differences with the Synod of that Church relating to the 'Testimony' or fundamental document setting forth the principles of the Church. These differences were serious, as they resulted in the Synod suspending Mr Brown, although they did not depose him

from his ministerial office. A majority of his congregation supported Mr Brown against the Synod, and after his suspension adhered to him, forming the congregation mentioned in the disposition of 1871. It would appear that the differences between Mr Brown and his said congregation on the one hand, and the Synod on the other hand, were never healed, and the suspension of Mr Brown was never removed. The congregation, till it died out, remained in the position of isolation necessarily arising from these conditions.

"In 1878 the members of the congregation had dwindled to fourteen, and at that period the congregational existence ceased. The Reverend Mr Brown died in February 1879.

"Of the trustees named in the disposition of 1871 only one, Mr Henry Anderson, survived and continued qualified to act after the dissolution of the congregation in 1878. He continued to administer the heritable property, which he let to another congregation of Original Seceders. He received the rents and accumulated the amount thereof in bank. Matters continued on this footing until Mr Anderson died in May 1912. He then stood vested in trust with the heritable property under the disposition of 1871, while the moneys representing the accumulated rents were lodged in bank on deposit receipts taken in his name for behoof of the said former congregation which had worshipped under the Reverend Mr Brown.

"In the present competition the claimants are, on the one hand, the Crown whose claim is for the property and funds as *bona vacantia*, and, on the other hand, the Synod of the United Original Secession Church and two congregations of that church none of whom have any existing legal right to the fund *in medio* but who appear to oppose the claim of the Crown and maintain that the Court should make a *cy près* application of the fund in favour of them respectively or in favour of the Original Secession Church in some way.

"It would seem to be an anomalous result if this trust property, provided as it was for the benefit and support of Mr Brown's congregation in the position of alienation from the United Original Secession Church which it occupied, should now be applied for the benefit of that Church from which it differed on questions deemed so fundamental as to justify the Synod in their judgment in suspending Mr Brown and to bring about a split in his original congregation. Assuming that the trust falls within the class of charitable trusts where the *cy près* principle finds place, it is necessary that there should be in the terms of the trust as constituted some express or implied general dedication of the trust funds to charity in order to justify their application by the Court to a new object when the original object specifically named has failed. Now in the terms of this trust as embodied in the deed of 1871 I confess that I am unable to discern any intention on the part of the makers of it other than that of providing benefit to the particular congregation named. Nor do the peculiar circumstances which characterised the history and status of that congregation point in any way to any wider intention. They emphasise the limitation in the expression of the object contained in the trust deed.

"I was favoured with a citation of numerous cases where the *cy près* principle has been applied. The principle itself is well defined, and the question that arises in any particular case is whether the terms of the trust or bequest under consideration contain the element of general dedication required to give room for the application of the principle. Each case must be considered by itself as it arises, and supposed analogies to previous cases may easily prove misleading. In the present case, as I have said, I do not perceive the element of general dedication in the terms of the trust purpose of 1871. And if one considers how real and vital such differences in belief or opinion as marked Mr Brown's isolated congregation are to the persons who share them, it seems to me manifest that to devote now the funds raised by that congregation for their support to the benefit of those from whom they differed and by whom they were ostracised would be doing signal violence to the intentions of the makers of the trust.

"If I am right in the views which I have expressed, the only purpose for which the trust was constituted has been fulfilled so far as it could be fulfilled, and the trust is spent. In legal right the trust property, being freed of the trust, should revert to the persons who provided it. It is common ground, so far as the compearing claimants are concerned, that it is not now practicable to ascertain these persons. The usual publicity by intimation has been given to the dependence of the process, and no one alleging right to any part of the fund *in medio* as a maker of the trust has compeared to claim. In these circumstances the trust funds, for the purposes of the present process, appear to me to be derelict property. And if that be so I do not see any answer to the claim of the Crown to them as being *bona vacantia*. I shall accordingly sustain the Crown's claim."

The Reverend William Scott and another, as representing the Congregation of United Original Seceders worshipping at 52 South Clerk Street, Edinburgh, reclaimed and argued—The doctrine of *cy près* should be applied. There was no distinction in this matter between charitable trusts, properly so called, and trusts for purposes of public utility such as religious and educational trusts—*Burnet* v. *St Andrews Episcopal Church, Brechin*, June 12, 1888, 15 R. 723, 25 S.L.R. 563; *Grant v. Macqueen*, May 23, 1877, 4 R. 734, 14 S.L.R. 478; *M'Dougall*, June 29, 1878, 5 R. 1014; *Kirk-Session of Prestonpans* v. *School Board of Prestonpans*, November 28, 1891, 19 R. 193, 29 S.L.R. 168; *Old Monkland School Board* v. *Bargeddie Kirk-Session*, November 15, 1893, 21 R. 122; *Stuart's Executors* v. *Colclough and Others*, 1900, 8 S.L.T. 236; *Attorney-General* v. *Bunch*, (1868) L.R. 6 Eq. 563; *Attorney-General* v. *Stewart*, (1872) L.R. 14 Eq. 17; *Rodwell* v. *Attorney-General*, (1886) 2 T.L.R. 712; *Association of Episcopalians in Scotland* v. *Lindsay and Others*, (1910) 2

S.L.T. 404; *Peake and Others* v. *Association of English Episcopalians in Scotland and Others*, July 8, 1884, 22 S.L.R. 3; *Thomson* v. *Anderson*, July 19, 1887, 14 R. 1026, 24 S.L.R. 731; *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531; *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212. The only distinction was between private trusts and trusts to benefit a section of the public—M'Laren, Wills and Succession, 3rd ed., 917. This case was similar to *Trustees of Falkirk Certified Industrial School* v. *Ferguson Bequest Fund*, July 18, 1899, 1 F. 1175, 36 S.L.R. 924; *Bannerman* v. *Bannerman's Trustees*, July 4, 1896, 23 R. 959, 33 S.L.R. 695; *In re Slevin*, [1891] 2 Ch. 236; *Bruty* v. *Mackey*, [1896] 2 Ch. 727; *Glasgow Royal Infirmary*, March 19, 1887, 14 R. 680; *Cairncross* v. *Lorimer*, (1860) 3 Macq. 827; *Clephane* v. *Edinburgh Magistrates*, February 26, 1869, 7 Macph. (H.L.) 7, 6 S.L.R, 471; *Attorney-General* v. *Ironmongers Company*, (1833) 2 M. & K. 576; *Moggridge* v. *Thackwell*, (1802) 7 Vesey 36; *Da Costa* v. *De Pas*, 1754, Amb. 228; *Carnegie Park Orphanage*, March 12, 1892, 19 R. 605, 29 S.L.R. 489; *Grigor Medical Bursary Fund Trustees*, July 15, 1903, 5 F. 1143, 40 S.L.R. 818; Tudor on Charities and Mortmain, 4th ed., 109 and 205; Lewin on Trusts, 12th ed., 1202. The following authorities were also referred to—*Aberdeen Magistrates* v. *Aberdeen University*, May 23, 1877, 4 R. (H.L.) 48, 14 S.L.R. 490; *Mitchel* v. *Burness*, June 16, 1878, 5 R. 954, 15 S.L.R. 640; *Burgess Trustees* v. *Crawford*, 1912 S.C. 387, 49 S.L.R. 294; *Rymer* v. *Stanfield*, [1895] 1 Ch. 19.

Argued for the claimants the Synod of the United Original Secession Church—The Crown had no right to the property, which should be given to these claimants as matter of legal right, or at the least they should be allowed a proof—Tudor on Charities and Mortmain (4th ed.), pp. 97, 107, 109, 362, 393; *Attorney-General* v. *Magdalen College, Oxford*, 1854, 18 Beaven 223; *Sands* v. *Bell & Balfour*, May 22, 1810, F.C.; Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 16. There was a general dedication here, but that was really not necessary—*Burnet* v. *St Andrews Episcopal Church, Brechin* (*cit. sup.*); *Old Monkland School Board* (*cit. sup.*); *Attorney-General* v. *Bunce* (*cit. sup.*); *Clephane* v. *Edinburgh Magistrates* (*cit. sup.*); *Craigie* v. *Marshall*, January 25, 1850, 12 D. 523. Tyssen on Charitable Bequests, pp. 440 *et seq.*, and *in re Templemoyle*, (1869) I.R., 4 Eq. 295, were referred to.

Argued for the claimant the Crown—There was no room here for the doctrine of *cy près*, for the trust was not a charitable trust, which was one for the relief of poverty—*Baird's Trustees* v. *Lord Advocate* (*cit. sup.*); *M'Intyre* v. *Grimond's Trustees*, January 15, 1904, 6 F. 285, 41 S.L.R. 225; *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (*cit. sup.*). There was no charitable intention of any sort, only intention to benefit a congregation. The property was *bona vacantia*—Stair, iii, 3, 47, and iv. 13; Tudor, p. 363; *Cunnach* v. *Edwards*, [1896] 2 Ch. 679; *Smith* v. *Lord Advocate*, March 11, 1899, 1 F. 741, 36 S.L.R. 547.

At advising—

LORD SKERRINGTON—The chief item of the fund *in medio* consists of a hall, used as a church, and of a house in South Clerk Street, Edinburgh, which were bought in 1871 and were vested in trustees for behoof of "the congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Rev. Archibald Brown." The price of the property was £1100, as appears from the disposition by the seller in favour of the trustees, which was dated and recorded in September 1871. It was, I think, implied, though not actually expressed in this disposition, that adherence to the principles contained in a document known as "the Testimony" was a condition of the congregation's right to the property; but the point becomes quite clear when we refer (as we may and must) to the title of the property in Adam Square. The occasion for the purchase of new premises for the congregation and its minister was the acquisition of the church in Adam Square by the Edinburgh Improvement Commissioners in 1870. The price of the new church and manse was provided out of the price received from these Commissioners. The instrument of sasine of the Adam Square property, which was recorded in the Burgh Register of Sasines on 20th September 1844, bears that the subjects were bought conform to contract of ground-annual entered into between the sellers and certain persons designed "as trustees of the congregation of United Original Seceders presently meeting in the Merchants' Hall, Hunter Square, Edinburgh, under the pastoral charge of the Reverend Archibald Brown." The consideration was a sum of £250 "paid by the said congregation of United Original Seceders," and also a ground-annual. The trust purposes were described as follows—"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." It will be seen that the primary beneficiary of the trust in question was a particular congregation of United Original Seceders. Though it was described and identified firstly by its successive meeting places and secondly by the name of its minister, the congregation might remain the same notwithstanding that it changed both its meeting place and its minister. On the other hand, adherence to the Testimony was clearly made a condition of the congregation's right to the property. The alternative trust for behoof of such members of the congregation as continued to adhere to the Testimony was obviously not intended to create any beneficial right of a private kind in the persons of such members, but

merely to secure the orthodoxy of the congregation. The trust, in my opinion, was a permanent and public trust as distinguished from a private trust. By providing Mr Brown's congregation with a hall in which they might assemble for public worship and a manse in which they might house their minister, a benefit was at the same time conferred upon a section of the public who would be entitled in all time coming to join this congregation provided such adherents maintained the principles of the Testimony. A minor part of the fund *in medio* consists of the accumulated rents of the heritable property. The Lord Ordinary has awarded the whole fund *in medio* to the Crown as being derelict property and *bona vacantia.*

From the opinion of the Lord Ordinary, though not from his interlocutor, it appears that he has in substance decided three questions. He has decided in the first place that none of the compearing claimants have any legal right to the fund *in medio* as representing Mr Brown's congregation. This finding records what is apparent on the face of the claims, viz., that neither the United Original Secession Synod nor the Associate Congregation of Original Seceders worshipping at No 52 South Clerk Street, Edinburgh, nor the congregation of the Original Secession Church, Lauriston Street, Edinburgh, can identify themselves with the congregation which was the beneficial owner of the trust property forming the fund *in medio* in the present action. It appeared, however, in the course of the debate before us that there does exist a congregation of United Original Seceders worshipping at 7 Victoria Terrace, Edinburgh, which may possibly be able to show that it is the legitimate successor of the congregation which was the original beneficiary. For some reason the Victoria Terrace congregation made no claim in the present action on its own account, but concurred in the claim at the instance of the Synod. It is in my opinion necessary that the members of this congregation should have an opportunity of considering whether they can establish a legal right to the fund *in medio*, though if they desire to lodge such a claim it will be for the Lord Ordinary (to whom the case will be remitted) to decide upon what terms it should be received at this late stage of the litigation. I do not doubt, however, that as the case was presented to him the Lord Ordinary was well entitled to hold (as he did in the second place) that no one representing the original beneficiary was likely to appear, and that the case must be disposed off on the assumption that no such beneficiary existed. In so deciding the Lord Ordinary probably had in view the litigation with reference to this same congregational property which took place in the year 1887, and which is reported in 14 R. 1026. In that case it was proved that the congregation had ceased to worship together in the year 1878 in consequence of their minister Mr Brown having fallen into bad health, and that it had authorised the trustees to sell the church and house and to invest the proceeds. The property was not sold, but was let to another congregation of Seceders, which happens to be one of the claimants in the present case, but does not claim to be identical with Mr Brown's congregation. In October 1886 four members of the original congregation brought an action in which they averred that the congregation had been finally dissolved, and concluded that its property should be conveyed to the congregation in Victoria Terrace, or to the Synod of the United Original Secession denomination, or otherwise as the Court might consider most in accordance with the purposes of the trust. A petition was also presented to the Inner House at the instance of the Synod. The trustees in their defences and in their answers denied that the congregation had been dissolved, and stated that they still hoped to get a minister for it. The Court held that it had not been proved that the purposes of the trust had failed. During the twenty-seven years which have elapsed since that decision the property has remained under lease, and no steps have been taken to reconstitute the original congregation. But the debt on the property has been paid off and nearly £600 of rents have been accumulated. All the trustees have meanwhile died, and the present action of multiplepoinding and exoneration was brought by the testamentary trustees of the last surviving trustee. Having decided rightly and legitimately, as I think, upon the materials before him that no congregation existed which could claim as of right to be the beneficiary in the trust, the Lord Ordinary went on to decide in the third place that the heritable property and accumulated rents had fallen and belonged to the Crown as *bona vacantia.*

No authority was quoted to us as supporting the view that property held in trust for a particular congregation of dissenters falls to the Crown when the congregation has been dissolved without any prospect of its being reconstituted. On the contrary, in the former litigation the Lord Justice-Clerk (Moncreiff) gave a tolerably clear indication to the contrary. He stated that the Court was asked "to find that the property of the congregation ought to be applied for the benefit of the denomination as the purpose nearest to that of the original trust. In the end we may be obliged to do that, but as matters stand at present I am of opinion that the purpose of the trust has not failed" (14 R. at p. 1033). Lord Young (at p. 1034) expressed himself to much the same effect. I have no doubt that the Lord Ordinary would have gone on to prepare a scheme for the administration of the trust estate in the manner pointed out by section 16 of the Trusts (Scotland) Act 1867 if he had not misunderstood (as I venture to think he did misunderstand) a recent decision of this Division of the Court, which in my view had no application to the case before him. Though he does not cite the case of *Burgess's Trustees* v. *Crawford*, 1912 S.C. 387, it is, I think, clear from the language used in his opinion that he proceeded upon the supposed authority of that decision. He states that "the principle itself [of *cy près*] is well defined, and the question that arises in any

particular case is whether the terms of the trust or bequest under consideration contain the element of general dedication [to charity] required to give room for the application of the principle. Each case must be considered by itself as it arises, and supposed analogies to previous cases may easily prove misleading. In the present case, as I have said, I do not perceive the element of general dedication in the terms of the trust purpose of 1871." In this passage his Lordship has in my view confounded two entirely different matters, viz., a testamentary trust or bequest which has not yet taken effect, and the efficacy of which is disputed by reason of the alleged non-existence of the beneficiary pointed out in the will, and a trust or bequest which has taken effect but which has subsequently failed. I shall assume that if a succession had opened in the year 1912 under which a congregation as described in the titles of 1871 and 1844 was left a legacy the bequest would have lapsed because no such congregation then existed, and because the terms of the will did not disclose any intention to benefit the Seceders' denomination as distinguished from Mr Brown's congregation. In that case the legacy would have fallen to the residuary legatee named in the will or into intestacy. The rule of construction which the Court applied to the will of Mr Burgess affords no argument in favour of the view that property which actually belonged to a particular congregation must go to the Crown in the event of the congregation being afterwards permanently dissolved. In such a case it is irrelevant to inquire whether the congregation acquired its property or the price which it paid for its property by bequest or by donation or by means of subscriptions, unless it can be predicated of any particular money or property that it was given on such terms as created a resulting trust, express or implied, in favour of the testator, donor, or subscriber—*Trustees of Falkirk Certified Industrial School* v. *Ferguson Bequest Fund*, (1899) 1 F. 1175; *Young's Trustees* v. *Deacons of Eight Incorporated Trades of Perth*, (1893) 20 R. 778; *Bannerman* v. *Bannerman*, (1896) 23 R. 959; *Bain* v. *Black*, (1849) 11 D. 1286.

The cases are numerous in Scotland where a trust duly constituted for purposes either eleemosynary or educational or religious either failed completely, or at any rate required to be reconstituted owing to a change of circumstances, and where the Court of Session sanctioned a scheme for the application of its property to a purpose different from, but *ejusdem generis* with, the purpose for which the property was previously held. The classical example is that of the Edinburgh Trinity Hospital, and the classical statement of the law was made by Lord Westbury in that case—*Clephane* v. *Magistrates of Edinburgh*, [1869] 7 Macph. (H.L.) 7, p. 15. I refrain from quoting it. Lord Westbury there carefully distinguished a class of cases peculiar to England where a charity having failed by reason of its illegality it fell to the Crown to declare what form of administration should be adopted. Trinity Hospital was an example of an eleemosynary trust. In the case of the *Falkirk Industrial School* the trustees had power under the constitution to alter the destination of the funds, but the Court nevertheless approved of a scheme, not for permanent administration such as is contemplated in section 16 of the Trusts Act 1867, but for the distribution of the funds. I refer to the case of *Trustees of Carnegie Park Orphanage*, (1892) 19 R. 608, for a general statement by Lord M'Laren as to the principles of *cy près* administration. The case of the Drum Bursaries was an example of a purely educational trust, but the Court of Session, acting under the directions of the House of Lords, exercised the same jurisdiction as in the case of an ordinary charity—*University of Aberdeen* v. *Irvine*, (1869) 7 Macph. 1087. The cases of *Kirk-Session of Prestonpans* v. *School Board of Prestonpans*, (1891) 19 R. 193, and *Old Monkland School Board* v. *Bargeddie Kirk Session*, (1893) 21 R. 122, are examples of trusts which were not eleemosynary but educational and religious. The same was true of the Rothiemurchus Endowment—*Grant* v. *Macqueen*, (1877) 4 R. 734. The Lord President (Inglis) indicated that in the case of such a trust the Court had the same jurisdiction "in framing schemes" as in the case of "a charitable bequest." The failure here was only temporary, and so also was the scheme subsequently approved by the Court—*M'Dougall*, (1878) 5 R. 1014. It does not seem to have occurred to anyone that the interim revenues should be paid to the Crown. Perhaps the nearest case to the present one is that of the Episcopal Chapel at Brechin—a purely congregational and religious trust which had admittedly failed owing to the dissolution of the Licensed Episcopal Congregation in Brechin. The Court gave the property to the Scottish Episcopal Church in Brechin—*Burnett* v. *St Andrews Episcopal Church, Brechin*, (1888) 15 R. 723. The Lord President (Inglis) said—"The short ground of judgment seems to be that the chapel was built in the year 1743 by and for the use of the Episcopalians in Brechin, and that the monies arising from the sale of the chapel in consequence of its disuse and the failure of the trust on which it was held ought to be given to the only parties who now represent the Episcopalians of Brechin." And yet the trust in question was not a "charitable" one within the meaning of his definition of that word in the case of *Baird's Trustees* v. *Lord Advocate*, (1888) 15 R. 682. He there said—"It appears to me that 'charity' and 'charitable' have one sense, and one only, in ordinary familiar and popular use. Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word 'charity" as it occurs in this statute. The Court of Chancery, as we know, has extended the use of the word 'charity' to very different purposes—to purposes of general benevolence and of public utility—but I think it is quite impossible, where we are applying the proper

rule of construction to a taxing Act, to give it any such meaning here." The House of Lords in the case of *Commissioners for Special Purposes of the Income-Tax* v. *Pemsel*, [1891] A.C. 531, disapproved of this definition so far as applying to the Income-Tax Acts, but it humbly appears to me that it is equally unsound as an exposition of the popular meaning of the word "charity." Infirmaries and hospitals for the sick were originally founded primarily as a charity to the poor and destitute—a class of persons who are now entitled to medical relief from the parish council. At the present day the main purpose of such institutions is not to relieve poverty but to provide the most skilful medical and surgical treatment for large sections of the population consisting of persons who though self-supporting and well-to-do in their own rank of life could not pay for such treatment in the event of sickness or accident if they had to rely entirely on their own resources. In exactly the same way philanthropic persons provide bursaries and educational foundations for the benefit of young gentlemen who are not objects of charity in the narrow sense of the word but who could not obtain the advantages of a public school or university education without such assistance. Again, the establishment of a convalescent home for fever patients is in a popular sense a charity and was so regarded by the Court—*Glasgow Royal Infirmary*, (1887) 14 R. 680; *Glasgow Royal Infirmary* v. *Magistrates of Glasgow*, (1888) 15 R. 264—but I cannot regard such an institution as in any sense eleemosynary. I see no difference between helping a self-supporting working man to obtain the services of the greatest surgeon of the day during his illness or to obtain the enjoyment of a country residence during his convalescence and helping a professional man of small means to provide his children with something equally beyond his pecuniary resources, viz., the very best education obtainable at a public school and a university. All these objects are philanthropical and are in no sense eleemosynary. They are charitable inasmuch as the pious donor acted charitably, but the party benefitted is not a recipient of "charity" within the meaning of the Lord Justice-Clerk's definition of that word.

I am not concerned with the question whether the trust with which we have to do in the present case is charitable in the sense that its property should be exempted from income-tax, or is charitable in the sense that testamentary trustees who were authorised to expend money on charitable purposes could lawfully have given pecuniary assistance to Mr Brown's congregation of Seceders if they had found such a congregation in existence and contributing to the spiritual welfare of a section of the citizens of Edinburgh. Whether charitable or not, this congregational trust must, in my opinion, be administered as a trust which was intended to benefit a section of the public in all time coming, and in which the public possesses an interest which did not terminate with the permanent dissolution of the congregation which was the primary beneficiary. In the case of *Pemsel* Lord Watson stated that "Scotch trusts which are *ejusdem generis* with trusts falling within the statute of Elizabeth are charitable in this sense, that they are all governed by the same rules which are applicable to charitable trusts in England." The Trusts Act 1867, section 16, assumes that the jurisdiction of the Court of Session to settle a scheme of administration is not limited to charities. In the last edition of his book on Wills and Succession, ii, p. 917, Lord M'Laren went considerably further in the way of denying the existence in Scotland of any distinction between trusts for charitable purposes and trusts for purposes of public utility. I respectfully adopt the following statement of the law of Scotland which was published in the year 1894 as still substantially accurate—"The term 'charitable trust' is a convenient general name, but it must be kept in view that the law of Scotland (as hitherto understood and administered) recognises no distinction either as to construction or principles of administration between gifts to charitable uses properly so called and gifts to purposes which though not charitable are lawful and useful. The true distinction is between private trusts or bequests, in which only individuals named or designed can claim an interest, and those which are intended for the benefit of a section of the public, and which may be enforced by *popularis actio*. A gift to a community of a public park, library, or place of recreation would not according to the ordinary use of language be described as a charity, while a hospital or an asylum would be so described, but the law which governs the trust intended to promote the healthy exercise of the mind and body is (in the absence of artificial limiting rules) necessarily the same law which applies to the trust for the restoration of mind or body when injured or diseased." Lord M'Laren's statement requires modification where a question arises whether a particular trust has been validly constituted. A gift for charitable purposes may be held to be sufficiently definite and therefore valid, whereas a trust for public, religious, or philanthropic purposes may be held to be indefinite and invalid—*Blair* v. *Duncan*, (1900) 3 F. 274, *aff.* 4 F. (H.L.) 1; *Grimond or Macintyre* v. *Grimond's Trustees*, (1905) 6 F. 285, *rev.* 7 F. (H.L.) 90; *in re Macduff*, [1896] 2 Ch. 451. Assuming, however, that a trust has been validly constituted in which the public have an interest, there seems to be no reason why we should adopt the English rule that only a charitable trust can be administered *cy près*. The law of charities in England bristles with technicalities for which no analogies exist in our law. Thus in some cases the validity of a trust depends on its being non-charitable and so outside the law of mortmain; in other cases its validity depends on its being charitable and so outside the law of perpetuities; in other cases its validity depends on whether the donee is free to spend the money or is directed to hold it in perpetuity. Some of these subtle-

ties are illustrated in the recent case of *in re Drummond*, [1914] 2 Ch. 90. As Lord Watson pointed out in *Pemsel's* case, there has been no occasion in Scotland to draw a hard and fast line between charitable and other public trusts, and I must decline the invitation which was made to us by the counsel for the Crown to introduce such a distinction in the present case.

The following authorities were cited at the debate as bearing on the position of the Lord Advocate in regard to charities, viz., a dictum of the Lord Chancellor (Cairns) in *Magistrates of Aberdeen* v. *University of Aberdeen*, (1877) 4 R. (H.L.) 52, and a dictum of Lord Deas in *Mitchell* v. *Burness*, (1878) 5 R. 959. We were also favoured with a copious citation of English decisions, but I do not think it necessary to allude to more than two of them. The case of *in re Macduff*, already cited, is interesting as showing that however wide may be the legal conception of a charitable purpose in the law of England, there may yet in the opinion of eminent English Judges be philanthropic purposes which are not charitable. Again, the case of *in re Slevin*, [1891] 2 Ch. 236, seems to be very similar to the present one, except that the Attorney-General there appeared for the purpose of supporting, and not, as does the Lord Advocate in the present case, for the purpose of defeating, the charity. In the concluding passage of his opinion, Kay, L.J., made it clear that he did not proceed upon the ground of any supposed "general charitable intention." I understand (though I do not profess to be sure) that his statement that the "property falls to be administered by the Crown, who will apply it according to custom for some analogous purpose of charity," does not imply that such application of the funds was a mere act of grace on the part of the Sovereign who, but for a contrary custom, might have appropriated them as *bona vacantia*.

In order to avoid misapprehension, I may say that I have looked through the long series of cases in which the property of dissenting churches and congregations, and more particularly the property of congregations of the Secession Church, has formed the subject of litigation in our Courts. I have found nothing in the way either of decision or of judicial dicta which goes to support the judgment of the Lord Ordinary. On the other hand, I have found nothing in any of these cases which I can usefully cite in support of the judgment which I advise your Lordships to pronounce, and which is as follows:—Recal the interlocutor of Lord Cullen, dated 24th June 1913, and repel the claim for the Lord Advocate: Remit the cause to the Lord Ordinary in order that he may give to the defenders fourth called, viz., the Reverend Ebenezer A. Davidson, 12 Argyle Place, Edinburgh, minister, and John Youngson, 76 Marchmont Crescent, Edinburgh, clerk of kirk-session of the congregation of United Original Seceders worshipping at 7 Victoria Terrace, Edinburgh, as representing said congregation, an opportunity to tender, if so advised, a condescendence and claim in the present action claiming the fund *in medio* as of right, and in order that he may receive such claim if tendered on such terms as he thinks fit, and may thereafter dispose thereof, all as to the Lord Ordinary shall seem just; with further instructions to him to prepare a scheme for the administration of the fund *in medio* in the event of his deciding that the trust purposes for which the said fund was originally held have failed.

The LORD PRESIDENT and LORD JOHNSTON concurred.

LORD MACKENZIE was not present.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to give to the Victoria Street congregation an opportunity of tendering a claim as of right, with instructions to him to prepare a scheme for the administration of the fund in the event of his deciding that the original trust purpose had failed.

Agents for the Pursuers — Ronald & Ritchie, S.S.C.

Counsel for the Reclaimers — Christie, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Claimants the Synod of the United Secession Church — Macphail, K.C.—Normand. Agents—Traquair, Dickson, & M'Laren, W.S.

Counsel for the Lord Advocate—The Solicitor-General (Morison, K.C.)—Smith Clerk. Agent—James Ross Smith, S.S.C.

Wednesday, July 15.

FIRST DIVISION.

M'ILWAINE *v.* STEWART'S TRUSTEES.

Reparation—Property—Landlord and Tenant—Negligence—Defective Premises—Possession and Control—Access—Outside Wooden Stair and Gangway.

A shop was situated in the upper storey of a two-storey building and was reached by an outside wooden stair and gangway which led to no other premises, but had no gate on it and consequently was open to the public. The tenant had no written lease but occupied from year to year. When he first proposed to take the premises there was no stair and gangway, the access being internal, and these, without any definite stipulation, were erected to make the premises suitable. The landlord had executed repairs on the stair and gangway from time to time as he had also on the shop itself. In an action against the landlord by a customer of the tenant to recover damages for personal injury caused by an accident due to a decayed plank in the gangway, *held* (*dub.* Lord Skerrington) that there was no evidence of a duty on the part of the defenders to-