

ing executrix nominated and appointed by her settlement dated 21st June 1922. In these circumstances the minuter desires to be sisted as executrix foresaid in room and place of the said Mrs Mary Stewart or Ness as pursuer in this action. It would also appear to be necessary to rehear the parties, or to have the said interlocutor repeated without a rehearing. The minuter without acquiescing in the terms of the said interlocutor is prepared to concur in the latter course."

Counsel for the minuter cited the case of *Gibson's Trustees v. Gibson*, 7 Macph. 1081.

Counsel for the defenders stated that he did not oppose the motion.

The Court sisted the minuter as pursuer in the cause, and of new assolzied the defenders from the conclusions of the summons.

Counsel for Minuter—Keith. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—J. A. Christie. Agents—Henderson, Munro, & Aikman, W.S.

Saturday, May 19.

FIRST DIVISION.

TRUSTEES FOR UNITED ORIGINAL SECESSION CONGREGATION IN STRANRAER, PETITIONERS.

Trust—Charitable Bequest—Cy près Scheme—Incorporation in Scheme of Power to Sell Heritage—Sale of Heritage Expressly Prohibited by Trust Deed—Nobile Officium—Trusts (Scotland) Act 1921 (11 and 12 Geo. V, cap. 58), secs. 5 and 26.

Process—Trust—Petition for Approval of Cy près Scheme, including Power to Sell Heritage—Nobile Officium.

A charitable bequest of the income of certain heritable property having become inoperative the trustees presented an application to the Court for approval of a *cy près* scheme. In their application the petitioners craved the Court to allow the incorporation in the proposed scheme of a general power of sale of the heritable property. Alienation of the heritable property was expressly prohibited by the terms of the trust.

Circumstances in which the Court, in the exercise of its *nobile officium*, sanctioned the proposed scheme, and in view of the old and dilapidated condition of the heritage allowed the incorporation of a general power of sale, the incorporation of the power to sell being essential to prevent the new scheme proving abortive and inoperative.

The Trusts (Scotland) Act 1921 (11 and 12 Geo. V, cap. 58) enacts—Section 5—"It shall be competent to the Court, on the petition of the trustees under any trust, to grant authority to the trustees to do any of the acts mentioned in the section of this Act relating to general powers of trustees, not-

withstanding that such act is at variance with the terms or purposes of the trust, on being satisfied that such act is in all the circumstances expedient for the execution of the trust. . . ." Section 26—"Applications to the Court under the authority of this Act shall be by petition addressed to the Court, and shall be brought in the first instance before one of the Lords Ordinary officiating in the Outer House, . . . and all such petitions shall as respects procedure, disposal, and review be subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary in virtue of the Court of Session Act 1857 (20 and 21 Vict. cap. 56): Provided that when in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such scheme, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled. . . ."

Peter Tait and others, as trustees for the now dissolved United Original Secession Congregation in Stranraer, *petitioners*, presented a petition to the First Division for approval of a scheme for the application and administration of the trust estate in consequence of the dissolution of the said congregation.

The petition stated, *inter alia*—"That the late Mrs Isabella M'Master or Kevan, who resided in Stranraer, died on 9th July 1862 leaving a trust-disposition and settlement. . . . By her said trust-disposition and settlement the testatrix conveyed to her trustees her whole estate, including, *inter alia*, two heritable properties, for the purposes after mentioned:—In the second place, the trustees were directed to convey the two properties above mentioned to the managers for the time being of the Original Secession congregation in Stranraer and their successors in office under the conditions and for the purposes following:—'*First*.—The said two properties in Stranraer shall for ever be inalienable by the said managers or their successors in office under pain of nullity, and they shall be bound to pay out of the first of the rents an allowance of ten pounds sterling yearly to the present or any future incumbent minister in the Original Secession Church in Sun Street, Stranraer, and that over and above the usual and regular allowance of salary or stipend payable to him from the congregation, to enhance his income in all time thereafter. *Second*.—After paying said ten pounds yearly and defraying feu and other duties with repairs, the balance of rents of said two subjects is to be appropriated in extinguishing the debts on the said Original Secession Church and congregation, or in the option of the managers said balance may be applied in assisting to erect a manse for the minister of said congregation, which when done and in all time thereafter the balance of said rents to be used and applied by the said managers for congregational purposes only.' . . . The estate of the testatrix was not

finally wound up till 1866, when it was found that before the conveyance of the above-mentioned heritable properties could be granted to the trustees and managers for the Stranraer congregation a payment by them of £259, 15s. 8d. would require to be made to meet the truster's debts and the expense of the trust estate as at that date. This payment was duly made by the trustees for the Stranraer congregation, and on 15th May 1866 a disposition in terms of the said testamentary writings of the said properties Nos. 15 and 16 Agnew Terrace, Stranraer, and 28 Nelson Street and 11 St Marknock Place, Kilmarnock, was granted by the trustees of the said Isabella M'Master or Kevan in favour of the trustees for the Stranraer congregation. The trustees for the congregation in Stranraer continued to hold the said properties conveyed to them down to the dissolution of said congregation on or about 5th December 1920 and applied the income for congregational purposes. For some time prior to its dissolution the congregation had no minister. It owned a manse and church, and both were unburdened by debt. The congregation, which at its dissolution had no debts affecting it, made over the whole of its heritable and moveable property of which it had power to dispose, including the manse and church, to the Synod of the United Original Secession Church with which it was connected, and directed the congregational trustees and managers if such a course were competent to convey and make over the said properties to the said Synod for the benefit of the Synod, and to petition the Court if necessary for power to do so. The Synod is the body representative of the whole congregations of the United Original Secession denomination, and its function is the carrying on of mission work both home and foreign, and the general management of religious and all other matters affecting the denomination as a whole. It is the Supreme Court of the Church and holds the general funds. In consequence of the dissolution of said congregation the trust for the said congregation has failed, and the petitioners are not in a position to apply the income derived from said properties in terms of the disposition under which they hold. They are therefore of opinion that the fulfilment of the intentions of the testatrix with regard to the said properties would be as nearly as possible secured by their conveying the said properties to the Finance Committee of the said Synod, and as such committee trustees for the said Synod."

The proposed scheme was as follows:— "The properties and funds pertaining thereto applicable to the said bequests shall be conveyed and made over by the petitioners to the said Finance Committee, and as such trustees for the said Synod, to be held by them in trust for the purpose of applying the income annually amongst the various schemes of the said Synod or any of them as in the circumstances of each year they may consider expedient, with power to sell the trust estate or any part thereof, and that by public roup or private

bargain, and to hold the proceeds of any sale under such power and to apply the income thereof to the said schemes. [*A list of the schemes was appended.*]"

The Court remitted to Lord Kinross, advocate, from whose report the following passages are taken:— "The immediate objects of the trust designated by the testatrix have failed, and the petitioners propose that the property and funds in their hands should be handed over to the Finance Committee of the Synod of the United Original Secession Church for application of the income to eight different funds administered by said Synod. . . . The reporter is of opinion that in this case the Court would not hold that the trust had failed to the effect of depriving the United Original Secession Church of the property and its funds, but that it would favourably consider any scheme which gave effect to the general charitable intention of the testatrix to benefit the Church to which the Stranraer congregation adhered. The reporter is informed that there is no congregation belonging to the chosen Church in the neighbourhood of Stranraer, the nearest being in Ayr. Having regard to the objects towards which the testatrix directed the devotion of the income, it appears to the reporter that of the funds set forth in the scheme (a) the Home Mission Fund and (d) the Mutual Assistance Fund accord more closely with what Mrs Kevan wanted her money spent upon than do any of the other funds. The annual income is small, and its application between these two funds would appear in the circumstances a more reasonable course than applying it among funds (a)-(h) inclusive. It is true that the scheme gives a power of selection to the Finance Committee of the Synod, but this is an additional reason for confining the gift in so far as possible to objects which, so far as Stranraer was concerned, were directly contemplated by the testatrix. The scheme seeks to confer upon the new trustees 'power to sell the trust estate or any part thereof, and that by public roup or private bargain.' The testatrix declared with reference to both the Stranraer and Kilmarnock properties that they should be inalienable. Accordingly but for the provisions of the Trusts (Scotland) Act 1921, section 5, the petitioners could not themselves have obtained from the Court authority to sell the estate. The Court in the exercise of the *nobile officium* are not in circumstances like those of this case in use to grant a general power of sale. In the event of the scheme being granted without this power it will be open to the Synod to apply for a power of sale in the Outer House should circumstances make such a course desirable. No service of the petition has been made upon any party other than the Lord Advocate. The reporter humbly begs to report that the scheme should be granted subject to the deletion of the power of sale and of clauses (b), (c), (e), (f), (g), (h)."

Counsel for the petitioners cited the following cases:— *Governors of John Watt's Hospital*, 20 R. 729, 30 S.L.R. 664; *Prime*

Gilt Box Society, 1920 S.C. 534, 57 S.L.R. 463.

LORD PRESIDENT—This petition is presented to the *nobile officium* of the Court. The circumstances are that a charitable bequest of the income of certain heritable property in favour of the minister for the time being of an Original Secession congregation in Stranraer, and for payment of congregational debt has proved inoperative and impracticable owing to the dissolution of the congregation. The proposal made is that the benefit of the bequest, instead of being appropriated to the particular congregation to which the testatrix (I suppose) herself belonged, and which no longer exists, should be given to two funds of the Original Secession Church, namely, the Home Mission Fund and the Mutual Assistance Fund. This latter fund is one as counsel explained formed to increase the stipends of ministers of the Original Secession Church. The reporter approves of this, and so far we see no difficulty in giving effect to the proposed scheme. In view of the dissolution of the congregation the objects of the proposed scheme approximate as closely as may be to those which the testatrix originally selected.

But the petitioners ask that the new scheme should have incorporated in it a general power of sale of the heritable property, the latter being regarded for the purposes of the new scheme as an investment of the permanent capital of the charitable fund which the administrators of the new scheme are to have power to vary. The testatrix expressly prohibited alienation of the heritable property under pain of nullity. Now under the Trusts Act 1921 the door is opened wide to trustees to obtain powers of sale, even when sale is prohibited by the terms of the trust. Resort to the *nobile officium* of this Court is therefore unnecessary and inappropriate in such a case; and the reporter very properly points out that it is not the practice of the Court to anticipate, as it were, a possible application for powers of sale by the trustees under a new scheme by an exercise of the *nobile officium* in a *cy près* petition. But the circumstances of this heritable property as disclosed in the petition are highly special in their character. It now constitutes the only permanent asset of the trust, but it is so old and dilapidated that expenditure which the trust has no means to defray is required to keep it lettable. In part at least it is already no longer habitable. Sale, and the investment of the price obtained for the sites with the old buildings still standing on them, offer the only practicable means of using the sole permanent asset remaining to the trust for any charitable purpose. If the power of sale was sought to be incorporated in the scheme merely because it was considered that the income of the trust might be improved by changing the form of its assets, the crave for such incorporation could not be granted. That would be a matter for the administrators of the new scheme to consider, and they could apply for powers under the recent Trust Act 1921 if they saw fit to do so. But in the present

case the position is that, except with a power to vary the form in which the only permanent asset of the trust is directed by the testatrix for ever to remain, the new scheme—or indeed any scheme—limited to the administration of the revenue obtained from it cannot in any reasonable sense be a practical one. In short, a general power to sell and to hold the proceeds and administer the revenue arising from such proceeds must be incorporated in the new scheme unless it is to prove abortive and inoperative.

In these special circumstances I think we should sanction the proposed scheme in favour of the two funds already named and also allow the incorporation in it of the general power of sale.

LORDS SKERRINGTON, CULLEN, and SANDS concurred.

The Court approved of the scheme and allowed the incorporation in it of the power of sale.

Counsel for Petitioners—Macphail, K.C.—Normand. Agents—Traquair, Dickson, & M'Laren, W.S.

Tuesday, May 22.

FIRST DIVISION.

[Exchequer Cause.]

INVESTORS' MORTGAGE SECURITY COMPANY, LIMITED v. INLAND REVENUE.

Revenue—Corporation Profits Tax—Exemption — Profits Consisting of Dividends from (a) Public Utility Companies and (b) Companies Owning Controlling Interests in Public Utility Companies — Finance Act 1920 (10 and 11 Geo. V, cap. 18), sec. 52 (1) and (2) and Proviso (i), and sec. 53 (2) and Proviso (a)—Finance Act 1921 (11 and 12 Geo. V, cap. 32), sec. 58 (1) and (2).

Where the profits of a company which was not itself exempt from corporation profits tax under section 52 (2), proviso (i) of the Finance Act 1920 included dividends received from companies so exempted, viz., "public utility" companies as defined by section 58 (2) of the Finance Act 1921, and companies owning controlling interests in "public utility" companies, held that the dividends so received were not exempted from corporation profits tax under the proviso or under section 58 (1) of the Finance Act 1921.

The Finance Act 1920 (10 and 11 Geo. V, cap. 18) enacts—Section 52—"1. Subject as provided in this Act there shall be charged, levied, and paid on all profits being profits to which this part of this Act applies, and which arise in an accounting period ending after the thirty-first day of December nineteen hundred and nineteen, a duty (in this Act referred to as "corporation profits tax") of an amount equal to five per cent. of those profits: . . . 2. The profits to which this part of this Act applies are, subject as hereinafter