

Friday, February 22.

SECOND DIVISION.

THOMSON'S TRUSTEES v. THOMSON AND
OTHERS.*Trust—Powers of Trustees under Trust-deed—
Investment of Trust Funds—Shares in a Com-
pany after Voluntary Liquidation and Re-
constitution.*

Trustees were empowered by trust-deed to lend the trust funds upon certain enumerated securities. They were also recommended not to change any of the investments made by the trustee, which they were authorised to continue without incurring personal responsibility. A company, which was not among the enumerated securities, but which paid large dividends, and in which the trustee held several shares, was wound up voluntarily for the purpose of being re-constituted with larger capital and more extensive powers.

Held that, however desirable it might be for the beneficiaries under the trust-deed to become shareholders in the new company, it was not within the powers of the trustees to hold the shares allotted to them in lieu of those held in the old company.

David Jugurtha Thomson, merchant in Edinburgh, died on or about the 16th March 1871, leaving a trust-disposition and settlement dated 3rd December 1868 and recorded 23rd March 1871. By said deed Mr Thomson disposed his whole estate, heritable and moveable, including "shares in trading and other companies," to trustees therein named, with the powers and for the purposes therein expressed.

The deed conferred the usual general powers upon the trustees, and contained a number of special directions with regard to the management and investment of the trust-estate, and specially, with regard to trust investments, the trustees were authorised "to continue or not, as they may think advisable, such investments of my means and estate as I may have made during my lifetime of whatever kind or denomination, and that without incurring any responsibility for so doing, but (though without prejudice to the general discretionary powers hereby conferred) I recommend my trustees not to change any of the said investments, unless circumstances may in their opinion render it expedient for them to do so." The trustees were further empowered to lend the trust funds upon heritable security, or upon security of debentures of incorporated companies, or on the security of the Government funds, or of shares in chartered or incorporated companies in Great Britain, and they were empowered to invest the trust-estate, or any part thereof, in the Government funds in the purchase of heritable property, feu-duties, ground annuals, or other heritages, or of the guaranteed or preference or debenture stock of railway or other incorporated companies in which the liability of each shareholder is limited, or to retain the same in bank in Great Britain. General power was also conferred upon them to alter and renew the securities from time to time as they might consider expedient.

The estate left by the trustor included 37 £100 shares of the North British Rubber Company, Limited, a company registered under the Limited Liability Act 1856 (19 and 20 Vict. c. 47) on 30th March 1857. The trustees continued to hold these shares except three, which they sold. The investment proved a very remunerative one for the trust, the dividends during the last ten years on the ordinary selling price of the stock having averaged about 8 per cent. On or about 28th March 1888, at a general meeting of the company, a scheme for the reconstruction of the company was submitted, and the meeting approved thereof and instructed the directors to carry it out.

Under that scheme it was arranged that the company should go into voluntary liquidation, and that a new company should be formed upon the same basis as the old one, but with enlarged capital and more extensive powers. The old shareholders were, if they wished it, to have their interest in the old company satisfied by shares in the new company, and to have the first offer of the additional shares about to be issued by the new company. The new company was registered under new memorandum and relative articles of association on 9th August 1888, and on 3rd September the liquidator of the old company intimated to Mr Thomson's trustees that he had accepted on their behalf certain shares in the new company, and as an equivalent for the foresaid shares held by them in the old company. By the re-constitution of the company there was no material change of the assets or liabilities of the company as it existed prior to re-constitution, and it was probable that the registration under the later Companies Acts would prove of advantage to the shareholders.

The beneficiaries under the trust-deed were anxious to become shareholders in the new company, but the trustees being doubtful as to their powers to hold the shares allotted to them without incurring personal responsibility in the event of loss occurring to the trust-estate in said shares, a special case was prepared by the trustees of the first part, and the beneficiaries of the second part, submitting the following questions for the opinion and judgment of the Court, viz.—“(1) Are the parties of the first part bound to sell the shares in the new company now offered to them in exchange for those formerly held by them in the old company? Or (2) are they entitled in the circumstances stated to retain the same as a proper investment of the trust funds?”

Argued for the first parties (the trustees)—They were not entitled to invest the trust funds in any other securities but those enumerated above, and this was not one of them. They were, no doubt, entitled to retain the investments made by the trustor, but his investment in this company had come to an end by its liquidation. They were not entitled to hold the shares allotted to them in the company as now re-constituted. It was virtually a new company, although many of the old shareholders were members of it.

Argued for the second parties (the beneficiaries)—The shares of the new company offered to the trustees being of a greater nominal value, as well as of at least an equal actual value, as the shares in the old company originally held by the testator and thereafter by his trustees, formed an

investment for the trust funds authorised by him by his trust-disposition and settlement fore-said, which the trustees might hold without incurring personal responsibility therefor; and further, that looking to the powers generally and specially conferred upon the trustees by the said trust-disposition and settlement, and the testator's recommendation therein expressed not to change any of his investments unless circumstances rendered it expedient, the trustees were not in the circumstances entitled to realise the shares offered to them in the new company, but were bound, or at all events entitled, to accept and hold them as a proper investment of the trust funds. It was the same business, which was to be carried on by the same people, only with more extensive powers. This case was analogous to that of two railway companies being amalgamated.

At advising—

LORD JUSTICE-CLERK—However desirable it might be that these beneficiaries should become members of this company, the Court cannot say that there is any authority in the trust-deed enabling the trustees to make them so.

The testator recommends his trustees not to change any of his investments, but that is a totally different thing from authorising them to become members of a new company, with new capital, and under new conditions. The company in which the shares were held is in liquidation. It has been put an end to, and could not have been put an end to in any other way. Probably the new company will consist largely of the same members as the old one, and no doubt it may be highly successful. In this age of competition large extensions are sometimes of immense advantage to companies, but that does not make this company the less a new one, of which the trustees have no power to become members.

LORD YOUNG and **LORD LEE** concurred.

LORD RUTHERFURD CLARK was absent on Circuit.

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

Counsel for the Trustees—**G. W. Burnet**.
Agents—**Fodd, Simpson, & Marwick, W.S.**

Counsel for the Beneficiaries—**Jameson**.
Agents—**Boyd, Jameson, & Kelly, W.S.**

Saturday, February 23.

FIRST DIVISION.

WALTER AND ANOTHER, PETITIONERS.

Process—*Nobile Officium*—*Certified Copy of Proceedings in Scottish Courts*—*Clerk's Certificate*.

The pursuer in an action of damages for libel depending in the Court of Session, raised an action in Ireland on the same grounds against the same parties who were defenders in the Scottish action. On the petition of the defenders the Court authorised and required the principal Clerk of Session to certify a copy of the proceedings in the Scottish action for production in the Irish Court.

An action of damages for libel at the instance of **Charles Stewart Parnell, M.P.**, against **John Walter** and **George Wright**, was dismissed by the Lord Ordinary (**KINNEAR**) on the ground of want of jurisdiction on 5th February 1889, and a reclaiming-note was thereafter presented by the pursuer to the First Division.

During the dependence of the reclaiming-note an action of damages for the same alleged libels was raised by **Mr Parnell** against the same defenders in the High Court of Justice in Ireland, and an order for service was granted by that Court. **Mr Walter** and **Mr Wright** thereafter applied to have the order for service set aside on the ground of the dependency of the action in the Court of Session.

This was a petition by **Mr Walter** and **Mr Wright** in which they prayed the Court to direct the principal Clerk of the Division to sign an authenticated copy of the proceedings in the action before the Court of Session, which they averred was necessary in order to support their application in the Irish Court.

It appeared that the Clerk had pronounced himself unable to give the certificate required, as he knew of no authority which bound or entitled him to do so.

By the Act 50 Geo. III., cap. 112, sec. 14, it is provided:—"Provided always, and be it enacted, that it shall and may be lawful for any party to require, and the said assistants respectively are hereby required, to furnish to such party authenticated copies of all or any part of the proceedings in any cause, signed by one of the principal Clerks of Session, and which copy the principal Clerks of Session are hereby respectively required to sign, but no fee whatever shall be paid or payable for such copy (save and except the ordinary charge for copying paid at the time in the Court of Session)."

Counsel for the petitioners founded on this section, which he maintained could not be held to have been repealed by the Statute Law Revision No. 2 Act (35 and 36 Vict. cap. 97), sec. 1, schedule, although in terms that was done. The section in question did not fall within the preamble of the Statute Law Revision Act, and the enacting clause of that Act bore that the Act should not "affect any form or course of pleading practice or procedure." Even without any statutory authority the Court must have power to direct some method of certifying such proceedings—**Dickson on Evidence** (2nd ed.) 1255.

At advising—

LORD PRESIDENT—I do not see that we require any statutory authority to do what **Mr Murray** asks. It seems to me a matter of ordinary procedure which the Court in its discretion may adopt where necessary for the ends of justice.

LORD MURE and **LORD ADAM** concurred.

LORD SHAND was absent.

The Court pronounced an interlocutor authorising and requiring the principal Clerk of Session to certify the proceedings as craved.

Counsel for the Petitioners—**Graham Murray**.
Agents—**J. & F. Anderson, W.S.**