

Saturday, February 28.

SECOND DIVISION.

[Junior Lord Ordinary.

MURISON'S TRUSTEE v. MURISON'S TRUSTEES.

*Trust—Administration—Application by the Minority of a Body of Trustees—Supervision by Accountant of Court—Competency—Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), sec. 18.*

It is not competent for a minority of a body of trustees, to exercise the power conferred on trustees by section 18 of the Judicial Factors (Scotland) Act 1889, to apply to the Court of Session for an order on the Accountant to superintend the administration of the trust estate in the matters of investment and distribution.

The Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), section 18, provides—“Section 166 of the Bankruptcy (Scotland) Act 1856 shall be and is hereby repealed, and in lieu thereof be it enacted that where a person deceased has left a settlement appointing trustees or other persons with power to manage his estate, it shall be competent for such trustees or other persons to apply to the Court of Session for an order on the Accountant to superintend their administration of the estate in so far as it relates to the investment of the estate and the distribution thereof among the creditors of the deceased and the beneficiaries under the settlement, and the Court may grant such order accordingly.”

Mrs Mary Josephine Bergmans or Coulson, wife of and residing with Harry Petty Coulson, writer, Glasgow, as a trustee under the trust-disposition and settlement of the deceased James Murison, merchant in Glasgow, and as an individual, with her husband's consent and concurrence, *petitioner*, presented a petition for an order under the Judicial Factors (Scotland) Act 1889 on the Accountant of Court “to superintend the administration of the trust” constituted by the trust-disposition in question “in so far as relates to the investments and distribution thereof.” The petition craved an order for service on the petitioner's co-trustees Mrs Margaret Murison or Bergmans, London, Theodor James Bergmans, otherwise known as Theodor James Erroll, London, and George Murison Bergmans, otherwise known as George Murison Erroll, London. Answers were lodged for Theodor James Erroll and George Murison Erroll, in which they maintained, *inter alia*, that the petition was incompetent.

On 7th February 1920 the Lord Ordinary on the Bills (BLACKBURN) reported the petition to the Second Division, appointed the petitioner to print the papers therein, and granted warrant for enrolling the cause in the Inner House rolls.

*Report* (from which the facts of the case appear).—“The petitioner is one of a body of four trustees, the other three being her mother and two brothers, who manage under

separate trusts the estates of her grandfather James Murison, her uncle Joseph Murison, and her aunt Janet Murison. In three separate petitions relative to these trusts she asks for an order under section 18 of the Judicial Factors (Scotland) Act 1889 ‘on the Accountant of Court to superintend the administration of the trust in so far as relates to the investments and distribution thereof.’ The petition is opposed by the petitioner's two brothers, who by themselves now form a majority of the trustees, the mother having been certified on 14th June 1919 as incapable of managing her own affairs. The competency of the application is challenged on the ground that the section of the Act only applies to an application made by the majority of the trustees as a corporate body, and not to an application by an individual trustee to compel the majority to adopt a course to which they are adverse. In my opinion this contention is well founded, and I think the section contemplates that the petitioner or petitioners must be in control of the trust accounts which they desire to have submitted to the Accountant for examination and audit. There is nothing in the section to suggest that the Court has power to order the accounts to be produced for superintendence by the Accountant. The purpose of the section was said by Lord President Robertson in *Stair's Trustees* (23 R. 1970) to be to enable ‘the trustees acting under any private trust to obtain immunity from their acts in the important articles of investment and distribution, by subjecting their administration to the supervision of the Accountant of Court.’ But in the case of *Turnbull v. Smith* (13 S.L.T. 144) Lord Johnston pronounced an order under the section on the application of one of a body of trustees although it was opposed by his co-trustees. The reason given for doing so was that there was disagreement between the trustees, although there had not been any maladministration of the trust funds. The report does not show that the question of competency was argued, but the answers to the petition contain an objection on that ground. In a more recent petition—*Duncan M'Laren and Another* (1917, unreported)—a similar application was made and granted by Lord Sands. His Lordship in disposing of the petition said that if the question of the competency had been argued he would have reported the case, as he would not have felt justified in following or disregarding the decision in *Turnbull*, but as the objection was not pressed he did not feel it necessary to do so. In addition to the three petitions already referred to I have another before me in which the same question is raised by another party, and I think it is desirable that some authoritative decision should be pronounced on the question. . . .”

Argued for the respondents.—The petition was incompetent. Section 18 of the Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), which repealed section 166 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), only gave power to the trustees of a testator, or a majority thereof, to apply for a supervision order and did not

authorise a single trustee or a minority of trustees to compel the majority to consent to such an order. In none of the cases had the question of competency in such circumstances been definitely decided—*Earl of Stair's Trustees*, 23 R. 1070, 33 S.L.R. 777; *Bonmar (Wales' Trustee), Petitioner*, 1893, 1 S.L.T. 57; *Milroy v. Tawse*, 1905, 12 S.L.T. 777; *Turnbull v. Turnbull's Trustees*, 1905, 13 S.L.T. 145; *Patullo, Petitioner*, 1908, 46 S.L.R. 712. It was clear from the statutes that the section was intended as a benefit to the trustees as a corporate body.

Argued for the petitioners—The terms of section 18 of the Judicial Factors (Scotland) Act 1889 were wide enough to cover this application. In that section the plural "trustees" included the singular—Interpretation Act 1889 (52 and 53 Vict. cap. 63). The case of *Turnbull v. Turnbull's Trustees* was a direct precedent for what petitioner asked, because the Lord Ordinary (Johnston) in that case impliedly decided the question of competency in the sense the petitioner contended for. If the section was not available to the petitioner her only alternative would be a petition for the appointment of a judicial factor or for the removal of her co-trustees, and the facts in the present case did not warrant either of these alternatives.

LORD JUSTICE-CLERK—In this case I think the Lord Ordinary has quite properly reported this question to us. It is a question of procedure, and is undoubtedly of some importance in the administration of Scottish trust estates. There is unfortunately a difference of opinion as to the management of this trust estate between one of the trustees and the other trustees. That probably has given occasion for the present application, but at this stage we are not concerned with the merits of that difference one way or the other, and I express no opinion upon them. The respondents have raised the sharp point of competency, involving the consideration and interpretation of section 18 of the Judicial Factors Act 1889. That Act, as I read it, was intended to carry out this purpose—I quote from the opinion of Lord President Robertson in the case of *Earl of Stair's Trustees* (23 R. 1070)—“It enables the trustees acting under any private trust to obtain immunity for their acts, in the important articles of investment and distribution, by subjecting their administration to the supervision of the Accountant of Court.”

That seems to me exactly to describe what the statute provides for, because section 18 enacts—“That where a person deceased has left a settlement appointing trustees or other persons with power to manage his estate, it shall be competent for such trustees or other persons to apply to the Court of Session for an order on the Accountant to superintend their administration of the estate, in so far as it relates to the investment of the estate and the distribution thereof among the creditors of the deceased and the beneficiaries under the settlement, and the Court may grant such order accordingly. . . .”

I cannot read that section as sanctioning

an application of the Act of 1889 to the effect of providing that because the use of a word in the plural shall be held to include the singular any single trustee or other person who has been appointed an administrator by the deceased is entitled to make this application. I think the title to make the application is in those who are vested with the powers of administration of the estate in question, and like every other act of the trustees it requires, not unanimity on the part of those who propose to perform the act, but certainly the concurrence of a majority in the act, and the section does not allow a single trustee who differs from the rest of the body to make the application, which they not only do not desire but which they vehemently oppose.

That certainly is not carrying out the provision which was to enable trustees to obtain immunity. Lord President Robertson in the *Earl of Stair's* case points out that although there had been few applications under the statute, that may just have been because the trustees or a majority of them thought it was unnecessary to burden the administration of the estate with the superintendence of the Accountant of Court, and preferred to retain their independence in regard to administration even as to investment and distribution. I can find nothing in the section which gives the Court jurisdiction to impose upon trustees when they do not want it the superintendence which is there provided for. Therefore on a consideration of the statute itself I think the present petition is not competent.

It is quite true that in the *Earl of Stair's* case the question of competency was not raised on the precise point with which we are now dealing, for the matters in dispute here involve questions of investment, and therefore the judgment in the *Earl of Stair's* case is not strictly a judgment bearing on the point in this case. But one cannot leave out of account the very detailed and distinct expressions of opinion which Lord President Robertson then gave as to the scope and purpose of the Act. I need hardly say that I entirely agree with those expressions of opinion by his Lordship, which support the view I take of the construction of the statute.

I think it is conceded that there have been orders made in previous cases under this section which if the views I have expressed are sound proceeded upon petitions or applications which were not strictly competent. But in none of these cases was any judgment on the question of competency given by the judge who made the orders. No doubt he proceeded as if the applications were competent, but even if it were otherwise these judgments in my opinion could not be binding on this Court. I think the Lord Ordinary was quite right in the opinion he expressed, and accepting that view we should find that the petition is not competent.

LORD DUNDAS—I am of the same opinion. Section 18 of the Act of 1889 introduced a new and useful change in the administration of Scottish trusts, and one has some-

times wondered why it is not taken advantage of more often than seems to be the case. But the benefits of the change must clearly be exercised within the limits which define the statutory jurisdiction of the Court in the matter.

Now the words of section 18 seem to me plainly to contemplate an application by the trustees in the administration of the trust as a body, or at least a majority of them, who seek to place the administration of their trust under the guidance of the Court, and so to obtain immunity for their actings in the matters of investment and distribution. It does not apply to an application by a minority of trustees, or one single trustee, who disagree with the majority as regards the administration of the trust.

In the *Earl of Stair's* case the trust was already under the Court's guidance under section 18 when the application which is reported arose. That application was made by the trustees, who desired to obtain the advice of the Court as to whether they should or should not exercise a discretionary power conferred upon them, and the Court refused to advise the trustees on that matter. But in dealing with the case the judges, and especially Lord President Robertson, did express dicta as to the proper scope and nature of section 18. Thus the Lord President described it as enabling "the trustees acting under any private trust to obtain immunity for their acts, in the important articles of investment and distribution, by subjecting their administration to the supervision of the Accountant of Court." In another passage he alludes to the "administrators" of a trust coming under the supervision of the Accountant of Court and thereby obtaining protection.

These phrases seem to me to carry out the view I entertain in common with your Lordship that the section contemplates the trustees as a corporate body, or a majority of them, applying to the Court. Lord President Robertson and also Lord McLaren indicated the view that even as regards matters of distribution the section would not warrant the Court in intervening for the determination of contentious rights. That, however, is a matter which does not seem to arise now upon the question of strict competency, although it might have had a bearing upon the merits of the case if it had gone on, which, for the reasons I have expressed, I think it should not.

I therefore hold this petition to be incompetent on the simple ground that it is beyond our jurisdiction, as not being an application of the trustees but of a minority. This view appears to be in accordance with that which Lord Blackburn in the Outer House entertained and would have given effect to but that he thought, quite properly, the better course was to report the matter to your Lordships. I think we should refuse the petition.

LORD GUTHRIE—I agree. The section of the Act founded on repeals a section of the Act of 1856, with the result that whereas under the previous Act it was a question of getting the Accountant of Court to super-

intend the administration of the estate generally, in this case his superintendence is to be restricted to investment and distribution. On the other matter—namely, the language involving action on the part of the whole body of trustees or a majority of them—no change was made.

It seems to me, therefore, that this matter was dealt with by the Legislature on the footing which Mr Watson maintains, and there are expressions in section 18, in addition to anything in the 1856 Act, which go to strengthen his contention—such as the expression "such trustees," and the provision at the end for the accounts being reported on with regard to any question that may arise in the administration of the estate.

LORD SALVESEN was absent.

The Court dismissed the petition.

Counsel for the Petitioners—Macphail, K.C.—Gentles. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Respondents—Hon. Wm. Watson, K.C.—A. M. Mackay. Agents—Murray & Brydon, S.S.C.

Saturday, March 6.

## FIRST DIVISION.

### LOW, PETITIONER.

*Parent and Child—Process—Custody—Divorced Wife Removing Child from Guardian Nominated by Father and Taking Child out of the Jurisdiction—Form of Interlocutor.*

A husband having divorced his wife for adultery and obtained custody of the only child of the marriage, a girl of about four years of age, died leaving a will in which he nominated his mother, whom failing certain others, to be tutors, curators, and guardians of the child. The mother accepted office and acted. The divorced wife having taken forcible possession of the child, and having removed her to England, the mother presented a petition craving an order on the divorced wife to deliver up the child to her to remain in her custody, and with various other craves. On a first enrolment the Court, upon a statement by counsel that in the event of publication of the proceedings there was a material risk of the divorced wife disappearing with the child, and that the petitioner undertook to go to England to receive the child, *dispensed with* intimation on the walls, and *granted* warrant to officers of law to take possession of the child and deliver her to the petitioner, and *recommended* to all magistrates in England or elsewhere to give their aid and concurrence in carrying the warrant into effect.

Mrs Isabella Carfrae or Low, widow, *petitioner*, brought a petition, the *prayer* of which was in the following terms—"May it