

tions contained in the Sheriff Court Act, is necessarily open to review here.

The fact that a decree for expenses has been pronounced which can be extracted and enforced by officers of law, marks the character of the proceeding, and if Mr Robertson were right, the appellant in order to obtain a complete remedy would have to bring two processes, both in the Court of Session, so far as I can see—one an action of suspension against the arbiter proceeding with the arbitration, and another an action of reduction of the decree of expenses as *ultra vires*, for as it stands it is extractable and can be put into the hands of a sheriff officer for enforcement.

In these circumstances I entertain no doubt that this is an appealable interlocutor, but if I had any doubts on that subject I certainly should hold that the respondent is personally barred from maintaining that it is not appealable, she having chosen to invoke the jurisdiction of the Sheriff Court as such in an action for the enforcement of a right which she considered that she had under a contract. In short, she has used the ordinary Courts of the country for the enforcement of a contractual right.

The Court repelled the objection and appointed the cause to be put to the roll.

Counsel for the Pursuer and Respondent—T. Graham Robertson. Agents—Webster, Will, & Co., W.S.

Counsel for the Defenders and Appellants—D. P. Fleming. Agents—Robert White & Co., S.S.C.

Friday, May 14.

FIRST DIVISION.

THE TRUSTEES AND MANAGERS OF THE PRIME GILT BOX SOCIETY, PETITIONERS.

Process — Petition — Competency — Nobile Officium — Interdependent Craves for Exercise of Legal and Equitable Jurisdictions—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 16.

Held that a petition which craved power to sell heritage under the Act of 1867 and also to use charitable funds for purposes *cy près* to those for which they were bequeathed was competently brought in the Inner House, in respect that the two craves were so intertwined as to render procedure by separate petitions in the Inner and Outer House unreasonably inconvenient.

The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97) enacts—Section 16—“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. . .”

Alexander Kilgour and others, the trustees and managers of the Prime Gilt Box Society, Kirkcaldy, *petitioners*, brought a petition of which the prayer was “. . . To

grant power and authority to the petitioners, as trustees and managers foresaid, (*first*) to sell and dispose at the price of £1150 by private sale to the directors of the Scottish Coast Mission of All and Whole that tenement of land, high and laigh, back and fore, under and above, outer and inner yards thereof, with the pertinents belonging thereto lying within the burgh of Kirkcaldy, upon the north side of the King's High Street of the same, bounded betwixt the lands sometime of the heirs of umquhile David Wilson afterwards to Michael Beveridge's heirs on the east; the lands sometime of James Mitchelson afterwards of David Clephane on the west; the lands of Smeiton on the north; and the said High Street on the south parts thereof; (*second*) to sell and dispose at the price of £30 by private sale to the Kirk session of Kirkcaldy Parish Church of the pews in Kirkcaldy Parish Church presently belonging to the petitioners: (*third*) to apply to the general purposes of the Prime Gilt Box Society of Kirkcaldy the income of the balance of the Matthew Beveridge Bequest Fund remaining after payment of the sum of £200 to the directors of the Scottish Coast Mission, for the purposes and on the conditions narrated in the petition.”

The petition set forth—[*After narrating the previous history of the society, and that as the result of a litigation a constitution and rules for the society were considered by the Court*]—“Rule I provides—‘The whole funds, property, and effects, heritable and moveable, belonging to the Prime Gilt Box or Prime Gilt Box Society of Kirkcaldy, shall be made over and conveyed to, and remain vested in, the present Provost and bailies of the burgh of Kirkcaldy and their successors in office, as trustees and fiduciaries to and for the use and behoof of the members of the Prime Gilt Box and persons entitled to relief out of the funds thereof, as being the poor of the seafaring population of the burgh of Kirkcaldy.’

“Rule III provides—‘The persons entitled to be considered members of the Society or to claim relief from the trust funds shall be—(1) All persons who previous to the raising of the present action have paid entry-money to the Society, or rates and dues thereto, or who served for three years in ships which contributed during that period to the funds, and the widows and families of these persons wherever they may at present reside. (2) All shipmasters, seamen, ship-carpenters, and ferrymen belonging to the actual port of Kirkcaldy, or who have served for three years in ships belonging to the actual port thereof, and who have acquired or shall hereafter acquire a settlement within the parish of Kirkcaldy by a three years' residence therein, their widows and families.’

“Rule IV provides—‘The sole objects of the institution, after providing for the annuitants as after mentioned, shall be to afford relief to the members when disabled from earning subsistence by sickness, old age, or accident, and the like relief to their widows and children; to which purposes the income of the institution shall be ex-

clusively applied at the discretion of the managers, after deduction of the necessary expenses of management and repairs, and a small reserve to meet extraordinary emergencies.'

"Rule V provides—'The capital stock shall in no case be encroached upon.' . . .

"Under this constitution the affairs of the Prime Gilt Box have continued to be administered ever since, managers being annually elected, under whom the fund is administered by a treasurer or boxmaster appointed by them, whose accounts are approved of and printed annually.

"The title of the petitioners, the Provost and Magistrates of the burgh as trustees, was completed by decree of declarator and adjudication and sasine thereon. . . .

"The stock of the Society consists of (1) heritable property situated at 415-417 High Street, Kirkcaldy; (2) feu-duties over property in Dunnikier Road, Mathew Street, and Meldrum Road, Kirkcaldy; (3) pews in Kirkcaldy Parish Church; (4) £500 6 per cent. Exchequer bonds. The total value of the stock as at 1st October 1919 amounted to £5016, 13s. 1d. After paying burdens and expenses of administration the balance of income is applied in paying pensions of £1 per annum to old sailors and widows and children of old sailors, the number of annuitants for the year ending 1st October 1919 being 150. The income is collected and the relief administered by the treasurer. . . .

"The property at 415-417 High Street, Kirkcaldy, consists of a shop and three dwelling-houses, situated at the east end of the High Street, opposite the harbour, in the least attractive part of the street from a business point of view. The shop has been vacant for six years. It has now been re-let but owing to its unfavourable situation considerable difficulty was experienced in obtaining a tenant. The gross rental of the whole property in the High Street is £52, 10s., and when fully let the net rental does not exceed £38 per annum. The managers have received an offer from the Scottish Coast Mission to purchase the whole of this property at the price of £1150 sterling. As this price when invested would yield a considerably higher return than that obtained from the property the managers unanimously agreed to accept the offer subject to the consent of the Court being obtained. . . .

"An offer has also been received from the kirk-session of Kirkcaldy Parish Church to purchase for the sum of £30 the pews belonging to the Society in that church, the present rental from which amounts to £3, 13s. 2d. per annum.

"The only interest of the petitioners is the benefit of the charity under their charge. And as that appears to them likely to be promoted by the increased income which the proceeds of these sales will yield when invested, they now submit the matter to the Court by whom the trust was constituted, that, if approved, it may be sanctioned by your Lordships. The petitioners have no power of sale, and are unable to accept these offers or to give a good title

to the property. The present application, so far as concerns the power to sell heritage, is therefore made under and in virtue of section 3 of the Trusts (Scotland) Act 1867.

"In addition to the other property of the Society the managers of the Prime Gilt Box also administer the Mathew Beveridge Bequest Fund. The late Mathew Beveridge, writer, Kirkcaldy, who was for many years boxmaster of the said Prime Gilt Box, left a trust-disposition and settlement dated 19th August 1876, with relative codicils dated 25th August, 28th and 30th September, and 23rd and 30th October 1876, all registered in the Books of Council and Session 24th November 1876. . . . The codicil dated 23rd October 1876 contains the following provision:—'. . . ; and I direct my trustees to pay the managers of the Prime Gilt Box, Kirkcaldy, the sum of £500, free of legacy duty, to be expended by said managers in building a hall where the meetings of the Society can be held, or which sum the managers may apply for such other building as they may think necessary for the benefit of the Society.'

"The said sum of £500 was in July 1877 paid over unconditionally to the managers, by whom it was invested with the Police Commissioners of Kirkcaldy until an opportunity should occur either for building a hall or applying the same as directed by the testator.

"On 7th June 1889 the managers of the Box at a special meeting decided to apply the bequest, which then, with interest, amounted to £700, to the Adam Smith Memorial Fund, upon condition that the Prime Gilt Box should obtain the use of one of the proposed halls for holding meetings of the Society and that the Society should be entitled to a preference over all others to the hall. It was not until 1895 that the committee of the Adam Smith Memorial Fund decided to proceed with the erection of the Adam Smith Memorial Hall, and made a demand on the managers of the Box to pay over the amount of said bequest with interest. After obtaining the opinion of counsel to the effect that it was within the power of the managers of the Box to pay over the bequest without judicial authority, the managers of the Box on 19th July 1897 paid over to the Town Council of Kirkcaldy the said Bequest, which at that date amounted to £877, 9s. 3d., in return for which the trustees for the Box obtained a deed of servitude by which they were granted a servitude right and tolerance in preference to all others over a room in the Adam Smith Hall, which room was to be known as 'The Prime Gilt Box Hall.'

"The only use which the managers of the Box made of the Prime Gilt Box Hall was to hold quarterly meetings. As the amount of the capital was out of all proportion to the benefit derived from the use of the room, the managers of the Box resolved to call for repayment of the money. On 16th April 1910 the trustees of the Box obtained repayment of the money, which has since been invested and allowed to accumulate.

“At the date of the last annual balance on 1st October 1919 the Bequest Fund amounted to £1257, 10s. 6d.

“Until recently the managers of the Box have been unable to evolve any satisfactory scheme for the application of the funds of the Bequest. A hall for meetings is not required except on four or five days annually, and the provision of a building would involve unjustifiably large expenses of upkeep. In connection with the offer received by the managers of the Box from the Scottish Coast Mission for the purchase of the Box's property at 415-417 High Street, Kirkcaldy, the directors of the Scottish Coast Mission have applied for a contribution of £200 from the funds of the Bequest. Subject to the authority of the Court being obtained, the managers of the Box have unanimously resolved to make such a contribution, provided that one of the rooms in the building be known as ‘The Prime Gilt Box Room,’ that the managers have the use of it for their meetings, that the annuitants of the Box have the use of one of the rooms, and that in the event of the Scottish Coast Mission selling the property, or discontinuing the use of the building for the proposed purposes, alternative provision to the satisfaction of the managers of the Box be made, failing which the said sum of £200 shall be repaid. The directors of the Scottish Coast Mission have agreed to these conditions.

“The petitioners consider that the proposed arrangement will effect the object desired by the late Mr Mathew Beveridge, and that this application of the bequest fund will be for the best interests of the whole beneficiaries of the trust. The original £500 bequeathed to the Prime Gilt Box, by accumulation of income, has become much larger than is necessary to effect the object desired by the testator, and it is most desirable that the balance of this bequest should be made available for the general objects of the trust. In view of rule iv, already quoted, it is only the income of said balance that could be so applied. The petitioners therefore ask your Lordships, in the exercise of the *nobile officium* of the Court, to authorise the petitioners, after payment of said sum of £200 as aforesaid, to apply the income of the remainder of the Mathew Beveridge Bequest Fund to the general objects of the Prime Gilt Box.”

No answers were lodged.

On 3rd March 1920 the Court remitted to James Smart, S.S.C., to inquire into the facts and circumstances set forth in the petition.

Mr Smart's report set forth—“The petition so far as the powers of sale sought are concerned is presented in virtue of section 3 of the Trusts (Scotland) Act 1867, and so far as the application of the Mathew Beveridge Bequest Fund is concerned to the *nobile officium* of the Court. The reporter humbly desires to call the attention of your Lordships to section 16 of the Act referred to, which provides that all applications to the Court under the authority of the Act shall be brought in the first instance before one of the Lords Ordinary officiating in the Outer House. So far as the Beveridge

Bequest Fund is concerned the reporter is humbly of opinion that the application is competently presented to the *nobile officium* of the Court, and as part of the bargain for the sale of the heritable subjects consists in an arrangement which substantially meets the original object of the Beveridge Bequest, your Lordships may be of opinion that both branches of the application are sufficiently interdependent to allow the application as a whole to be competently presented to your Lordships. Subject to these observations, the reporter is humbly of opinion that the powers of sale craved should be granted. The price offered for the heritable subjects appears to be their full market value, and as the net rental does not exceed £38 it is apparent that, as averred by the petitioners, the price offered when invested will yield a considerably higher return than the property. In the humble opinion of the reporter the pews are not a very eligible or satisfactory class of investment for trustees to hold, and it would simplify the administration of the trust if your Lordships were to approve of the proposed sale so that the price may be invested with the price of the heritable subjects. The reporter is further humbly of opinion that the application for authority to apply the income of the balance of the Beveridge Bequest Fund to the general purposes of the Society should also be granted.”

Argued for the petitioners—In so far as the petition craved power to sell heritage it was appropriated to a Lord Ordinary—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), section 16—but in so far as it craved power to use the Beveridge Bequest it was an appeal to the *nobile officium*, and therefore appropriately brought only in the Inner House. Those two craves were dependent on each other, and could not be effectively dealt with in two petitions—one before a Lord Ordinary and the other in the Inner House. In those circumstances the only convenient course was to bring the petition in the Inner House. *Dow's Tutor, Petitioner*, 1910 S.C. 273, 47 S.L.R. 251; *Smith v. Smith*, 1892, 20 R. 27, per Lord Justice-Clerk (Kingsburgh) at p. 28, 30 S.L.R. 59; *Rintoul, Petitioner*, 1862, 1 Macph. 214; *Speirs v. Speirs' Trustees*, 1877, 5 R. 75, per Lord President (Inglis) at p. 77, 15 S.L.R. 53; and *Webster v. Miller's Trustees*, 1887, 14 R. 501, 24 S.L.R. 368, were referred to.

LORD PRESIDENT (CLYDE)—This is a petition presented by the trustees and managers of an ancient benefit Society—the Prime Gilt Box Society of Kirkcaldy. It is a double-barrelled petition, if I may call it so. It craves in the first instance power to sell certain heritable property of the Society, and in the second instance for judicial sanction for the incorporation into the general funds of the Society of the accumulated balance of a sum which was originally bequeathed to the Society for the specific purpose of enabling it to equip itself with a meeting-place.

It appears at once from that description of the petition that its competency falls under two heads. On the one hand the

power of sale is a matter which arises under the Trust Act 1867; on the other hand the question with regard to the balance of the Beveridge legacy is a matter which involves an appeal to the *nobile officium* of the Court. A petition of the latter character is appropriately presented to the Inner House; a petition of the former character is by the terms of section 16 of the Trusts Act 1867 appropriately presented to one of the Lords Ordinary. The reporter has very properly drawn the attention of the Court to the question of competency which arises from the fact that these two craves have been combined in one and the same petition to the Inner House.

The peculiarity of this case is that two questions, or rather two separate craves, are combined in one petition, because the two matters dealt with cannot well be separated in the circumstances out of which the petition arises. What the trustees wish to do is to carry out a bargain which they have made with the Scottish Coast Mission in reference to their heritable estate. The bargain includes a sale to the mission of part of that estate, and also a contribution by the trustees to the cost of alterations by which the mission will be enabled to provide the Society with accommodation. In short, the contract under which the property is to be sold necessarily involves the use of part of the accumulated balance of the Beveridge legacy. It also results in making the balance of the legacy unavailable for the original purpose of providing a meeting-house, and in making it available if the Court sanctions such an application for the general purposes of the Society.

The question is whether in these circumstances there is anything incompetent in the Inner House of the Court of Session disposing of both the craves submitted to it. I think that there is not. It must be kept in mind that the Act of 1867, by section 3, empowers the Court of Session generally to authorise trustees to sell heritage. It is true that section 16 directs that applications to the Court under the authority of the Act—and that I take to mean solely under the authority of the Act—shall be brought before a Lord Ordinary. But where the circumstances make it impossible, as they do in this case, that the application should be presented with any reasonable convenience in the Outer House as regards one part of the bargain, and in the Inner House as regards another part, it seems to me that is not the case of a petition presented solely under the authority of the Trusts Act in the sense of section 16. On the contrary, the petitioners must appeal, and in this case they do appeal, to other authority than the Act, for the Act alone would not enable the Court to authorise them to do that which they ask power to do. Accordingly in such a case as this I think it is competent as matter of procedure to bring a petition dealing with the whole matter directly before the Inner House, and that it is competent for the Inner House to grant it.

With regard to the merits the reporter reports favourably both on the question of power to sell and on the question of the use

to be made of the balance of the accumulated sum representing the Beveridge Bequest, and the circumstances as disclosed to us are in my opinion such as warrant the granting of the prayer.

I therefore propose that we should grant the prayer of the petition, including authority to pay the expenses of the application out of the price to be received.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Watson, K.C.—Marshall. Agent—Daniel Tudhope, Solicitor.

Tuesday, May 18.

FIRST DIVISION.

[Lord Ormidale, Ordinary.]

LOGAN v. LOGAN.

Husband and Wife—Donation inter virum et uxorem—Aliment—Remittances Sent by Husband and Banked by Wife.

A husband who was working in the East remitted his surplus earnings to his wife, who, with the only child of the marriage, was living in Scotland with her adoptive parents. The child was not of full age and was dependent on her parents. There was no arrangement between the spouses as to the purpose for which the money was sent. It was used by the wife, in so far as she found she required it in the circumstances in which she was living, for the maintenance and upkeep of herself and child; the surplus was placed by her on deposit-receipt in her own name. The wife died leaving everything to the child. The husband brought an action to recover the amount which the wife had put on deposit-receipt, alleging that it belonged to him, or, alternatively, was a donation by him to his wife and revocable. *Held* upon the facts that there was no evidence to instruct a transference of property in the money from the husband to the wife, and consequently that the husband was entitled to recover the extant balance of the remittances.

John Logan, marine engineer, *pursuer*, brought an action against Mary M'Master Logan, his daughter, *defender*, concluding (secondly) for payment of £1500 by the defender to the pursuer, or of such other sum as might be found to have been received by the defender under her mother's will, or, alternatively, for the pursuer's *jus relict* out of his wife's estate, with conclusions for an accounting so as to ascertain the amount of the *jus relict*.

The pursuer *pleaded, inter alia*—"2. The estate bearing to be bequeathed to the defender under the said alleged trust-disposition