

Thursday, January 12.

FIRST DIVISION.

DAVIDSON AND OTHERS (TENNANT'S TRUSTEES), PETITIONERS.

Trust—Charity—Administration—Nobile Officium.

A testator in 1739 left three sums of money, the interest of which was to be expended in the following ways, viz.—(1) In maintaining children attending a particular charity school; (2) in pensions to widows of ministers, &c.; (3) in loans to tradesmen. In 1893, upon the representations of the trustees of these moneys that the charity school had ceased to exist, and that the third purpose of the trust had been found unworkable, the Court sanctioned a scheme of administration under which the income of the third sum was to be expended along with that of the second in pensions to duly qualified widows, and that of the first sum in allowances to children of such pensioners, being under fourteen years of age.

Mr Robert Tennant, merchant in Glasgow, by trust-disposition and settlement, dated 22d August 1739, left the following sums for certain charitable purposes, viz.—(1) 5000 merks Scots (£277, 15s. 6d. sterling) for the maintenance of poor children in the charity school erected by his brother; (2) 4000 pounds Scots (£333, 6s. 8d. sterling) the annual rent of which was to go to “three widows of good report, deportment, and conversation, and who are the relicts of such as have been ministers, merchants, or tradesmen within the city; (3) 1000 merks Scots (£555, 11s. 1d. sterling) to be lent out for periods of five years without interest, upon sufficient caution, to fifteen merchants and five tradesmen of the city, being 500 merks to each of the said twenty persons.”

In consequence of the passing of the Education (Scotland) Act 1872 the charity schools became unnecessary, and the school receiving aid under the first head of the trust was discontinued in 1875. Pensions continue to be regularly paid under the second branch to deserving widows, whose number was in 1835 increased to five, upon the receipt of a legacy from Captain Tennant of Ayr. It was found difficult to lend out money under the 3rd head of the trust, and no loan was made after 1803.

In 1892 the whole funds amounted to £2839, 9s. 3d., made up as follows:—

1. Sums in the hands of the Magistrates and Town Council of Glasgow—	
(1) Charity School Account,	
5000 merks	£ 277 15 6 ³ / ₄
(2) Widows' account, 6000	
merks	333 6 8
(3) Loan account, 10,000	
merks	555 11 1 ³ / ₄
(4) Excrescence account	166 5 0
2. £1560 consols cost	1494 3 8
3. Cash in hands of treasurer	12 7 3
	£2839 9 3

The “Excrescence account” was an account into which surplus income used to be credited. It was closed many years ago at its present figure. The estimated income from these sums was £94, 15s. 1d.

Mr Tennant's trustees then presented a petition to the First Division of the Court of Session in which they narrated the facts given above, and stated that “as the mortified fund, over and above what is required to provide the present provisions to widows, cannot be applied exactly as the testator intended, it is suggested by the trustees that it would be proper to apply it for behoof of the third object selected by him—the relief of widows.” Accordingly they prayed the Court “to settle a scheme for the future administration of the said trust, so as to enable the trustees, your petitioners—(1) To employ the whole income of the trust, after defraying expenses, in pensions or payments to or for behoof of widows of good report, deportment, and conversation, the relicts of such as have been ministers, merchants, professional men of any description, or tradesmen within the city of Glasgow; (2) the pensions or payments to be of such amounts as the trustees in their discretion may from time to time fix, but in general not to be under £5 or over £20 in a year; (3) the pensions to be held at the pleasure of the trustees, and payable at such times and in such manner as they may fix, all in the manner above suggested; or to settle such other scheme as your Lordships shall please.”

The Court remitted to Mr B. P. Lee, advocate, “to inquire into the facts set forth in the petition, to consider the scheme proposed by the petitioners, and to report.”

Mr Lee reported as follows:—“I have had the assistance of Mr C. D. Donald, one of the trustees and also agent to the trust, who has given me very full information as to the working of this and similar charities.”

“The facts set forth in the petition are correctly stated. Circumstances have, I think, so altered in the last hundred years that Mr Tennant's beneficence can no longer be applied in the strict terms of his will. Besides this, one part of Mr Tennant's scheme—that providing for loans to merchants and tradesmen in Glasgow—never seems to have been popular, and from that and other causes it has now been for the last ninety year, so far as is known, absolutely inoperative. I think that with greater energy on the part of former trustees some use might have been made by the citizens of Glasgow of a charity which, as it is, has been allowed to sink into oblivion. At the same time it seems beyond doubt that it would be impossible now to revive such an interest in this branch of the charity as to make it of any practical use to those whom it was meant to benefit. The loans are for so small amount (£41, 13s. 4d.) as to be of little use in the present altered circumstances of trade, and there are now such extended banking facilities within the reach of every-

one as to render such a charity unnecessary. The demand for these loans has also been curtailed by the difficulty of providing the necessary caution.

"I have inquired into the existence of any similar charitable scheme to assist tradesmen or others by loans, and the only instance of such a scheme that I have been able to discover is that known as 'Baxter's Mortification' in Glasgow. In 1776 Daniel Baxter left funds to be applied, *inter alia*, for loans, in sums of £50 each, to six merchant burgesses, and of £33, 6s. 8d. each to six craftsmen burgesses, without interest, but on undoubted personal security. The trustees of the charity recognised many years ago the impracticability of such a scheme, and by the Hutcheson Hospital Act 1872 (35 Vict. chap. xx.) they were empowered to apply not less than one-half, and not exceeding two-thirds of the 'Baxter Mortification' in payment of pensions to persons needful, and deserving of aid, who shall have carried on business in Glasgow, and their widows and daughters.

"On the whole matter I consider that the trustees accurately describe this branch of the charity as obsolete, and that in these circumstances the trustees are justified in asking your Lordships' authority to devote this part of the funds in the manner proposed. Any new scheme should, I think, provide that no diminution be made in the original number of the pensions.

"I have had much greater difficulty with regard to that part of Mr Tennant's scheme which provided for the maintenance of certain poor children, and which, under altered circumstances, the petitioners also allege to be out of their power now to administer without some modification. . . .

"The petitioners suggest that this fund as increased by accumulations should also be added to the pension fund.

"Similar bequests do not seem to be of frequent occurrence, but in several Glasgow educational endowments certain funds were set apart for the clothing and maintenance of necessitous children, and in the new schemes of the Educational Commissioners authority seems in all such cases to have been reserved to the governors to expend a certain annual sum in this way.—[See the schemes relating to the Glasgow Buchanan's Institution, the Logan and Johnston School of Domestic Economy, Hutcheson's Educational Trust, &c., &c.] According to Mr Donald and the Reverend Frederick Lockhart, D.D., a gentleman whose interest in Glasgow charities, and responsible connection with the management of very many of them, gives great value to his views, it has never been the practice of any of these institutions, except in very special and exceptional cases, to apply any part of the permitted sum in clothing and maintaining children attending the schools, owing to the extreme difficulty of making a judicious and proper selection. Practically, it may be said no such applications have been made.

"I do not doubt your Lordships' power in these circumstances to sanction a scheme

for the application of this part of the fund in a manner more in accordance with modern wants and usage. In 1876 the Court sanctioned a scheme by which 300 merks, left to clothe children attending a charity school in a uniform of plain grey clothes, was in future to be applied to the payment of school fees, the purchase of school books, and 'in such other way as the trustees shall think best—by which it was explained that the trustees intended, when the surplus is sufficient, to apply it to the purchase of some necessary articles of clothing, such as boots, &c.—(Judgment of Lord President Inglis in *Bishop Burnet's Trustees*, 4 R. 132). Lord Mure in this case grounded his willingness to sanction the change solely on the fact that the fund was still to be applied to 'the precise same class of beneficiaries as those contemplated by the founder.' I think that this case only follows the invariable practice of the Courts when authorising any new application of a charitable fund, to guard very strictly the interests of those who were preferred by the founder. I do not think that the scheme proposed by the trustees as regards this branch of the charity sufficiently recognises this principle.

"In dealing with a charity of such small dimensions as this, it is doubtless convenient, so far as is possible with a due regard to the intentions of the testator, to minimise the labours of those who have to administer it. I think that this object would be secured were the Court to authorise a scheme by which the sum of 5000 merks, set apart for the maintenance of children in attendance at a school which has now ceased to exist, with accumulation of income, were to be applied in future for the benefit of children of a corresponding age. The pensions now paid by the trustees to widows are of very small amount, and the children's grants might be paid in augmentation of these to such female pensioners as have children to support. Such a scheme would restrict the benefits of the charity to children of the class in which Mr Tennant's whole original scheme shows that he felt the deepest interest."

The petitioners expressed their willingness to adopt the amended scheme proposed by Mr Lee, and asked the Court to approve thereof. They submitted that in the recent case of the *Kirk-Session of Prestonpans v. School Board of Prestonpans*, November 28, 1891, 19 R. 193, the Court had approved a scheme which was a much greater departure from the original one than that now in question.

The Court remitted to Mr Lee to prepare a scheme in terms of his report.

The following scheme was thereafter submitted to the Court:—

"I. The whole interests and annual profits derived from the said funds and estate, after defraying the expenses of the trust, shall be expended by the trustees as nearly as may be in manner set forth in the following state:—

Annual income, subject to expenses of trust, say	£94 15 1
Divisible as follows:—	
1. For pensions to widows, the income of 6000 merks, 10,000 merks, and £1560 consols, say	£78 9 1½
2. For grants towards the maintenance of children, the income of 5000 merks and of £166, 5s., say	16 5 11½
	£94 15 1

“II. The trustees shall, from time to time, choose and elect as pensioners such number of widows, being not less than five, as the revenue of the trust at the time will permit. The widows shall be persons of good report, deportment, and conversation, the relicts of such as have been ministers, merchants, or tradesmen within the city of Glasgow, and they shall continue to hold the pensions for such period or periods as to the trustees may seem proper. The pensions shall be of such amounts as the trustees in their discretion may from time to time fix, but in no case shall any pension exceed the sum of £20 in a year.

“III. From the fund set apart for the maintenance of children the trustees shall make grants from time to time, as the income of the fund will permit, to assist in the maintenance of children under the age of fourteen years, the sons or daughters of widows who are pensioners of the trust, or who in the opinion of the trustees are duly qualified as such. The trustees shall, from time to time, in their discretion fix the amount of these grants, and may either continue them annually to the same persons or not as they may think proper.”

The Court approved of the scheme.

Counsel for Petitioners—N. J. Kennedy.
Agents—C. & A. S. Douglas, W.S.

Thursday, January 19.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

STEWART v. NORTH.

(On question of Jurisdiction, *see ante*, vol. xxvi. 650; 16 R. 927, and 17 R., H. of L., 60.)

Partnership—Joint-Adventure—Count and Reckoning—Mora—Right of Co-Adventurer to Accounting where Managing Partner Changes the Method of Carrying Out the Joint-Adventure, and Acquires New Rights by Some Use of the Joint-Property—Claim for Profits Barred by Mora.

A joint-adventure was entered into in 1877 for acquiring and working a concession to supply a seaport in Peru with water by laying pipes. In 1878 one of the joint-adventurers, who had the local management, instead of going

on with the original scheme, negotiated for himself a lease of the business and property of an existing water company which brought water in steamers to that, amongst other, towns. His control over the concession helped him in obtaining this contract. He carried on the water company's business under the location until the bombardment and destruction of the town in 1879. In 1881 he purchased the water company's plant and business, and carried on operations till 1887, when he sold the business to a new company.

In 1887 the assignee of another joint-adventurer, who had contributed certain sums to the capital of the joint-adventure as originally projected, but had not claimed or offered to share in these later enterprises, brought an action of count and reckoning against the managing partner for a share of the profits made under the contracts of location, purchase, and re-sale of the water company's business.

Held (1) that he was entitled to an account of all intromissions with the funds and estate of the joint-adventure in respect of his author's contributions to its capital; (2)—*rev.* the Lord Ordinary's ground of judgment—that the joint-adventure had not lapsed prior to the date of the location contract; (3) that as the location contract covered the ground of the joint-adventure, and was obtained by means of the concession, which was joint-property, the pursuer would have been entitled to an account of any profits made in virtue of the rights acquired under that contract if his claim had been asserted in reasonable time; (4) that his claim was barred by his delay for nine years to take active steps to enforce it.

On 10th July 1876 John Thomas North obtained from the Municipal Council of Pisagua, Peru, by deed of agreement, a concession of the exclusive right to supply the port of Pisagua with drinkable water by pipe-conduit from the interior. The deed provided that the works were to be completed in three years, and that the concession should endure for thirty years.

By minute of agreement dated 13th October, 1877 North and William Speedie, engineer, Mollendo, Peru, entered into a joint-adventure for the execution of the necessary works in terms of the concession. By the first article, Speedie undertook to pay North £5000 at the ensuing term of Martinmas, in return for which obligation North assigned the concession to himself and his partner. By the second article it was provided that the capital stock of the joint concern was to be £50,000 in equal shares, and that “such portion of said sum as may be required to meet payments in Great Britain in connection with said works, but not exceeding £20,000,” should be raised upon securities belonging to Speedie, to be placed in the hands of Mr John Welsh, S.S.C., Edinburgh. The fifth article provided that