

COURT OF SESSION.

Tuesday, May 28.

FIRST DIVISION.

LOW AND OTHERS (THE GERARD TRUSTEES) v. MAGISTRATES OF MONIFIETH AND OTHERS.

Charitable Bequest—Settlement of Scheme—Application for Direction of Court—Competency—Cottage Hospital—Trust.

Circumstances in which held that it was competent for the trustees of a charitable bequest to apply to the Court for guidance.

A truster directed his trustees to apply certain funds for the establishment of a "cottage hospital for the parish of M." The trustees presented a petition for the direction of the Court in carrying out this object, and proposed a scheme for a cottage hospital in M, for the medical and surgical treatment of persons suffering from injuries and non-infectious diseases. Answers were lodged for certain local authorities objecting to the hospital proposed, and proposing as preferable schemes either (1) a cottage hospital for infectious diseases; or (2) a "home." After a remit to a reporter, the Court found that the scheme proposed by the petitioners was in accordance with the intention of the testator, and consequently within their powers, and approved of the erection and endowment of a cottage hospital for the purposes proposed by them.

James Fairweather Low and others, the trustees of the late Reverend James Gerard Young, presented a petition for approval of a scheme for the administration of a charitable bequest entrusted to them by the truster.

The bequest was in the following terms:—"The purpose to which I desire my funds to be devoted is the establishment of a cottage hospital for the parish of Monifieth—a useful and valuable institution as has been proved in other parishes. In order to take the first steps towards providing the said cottage hospital I hereby appoint the following trustees: Messrs J. F. Low of Balmacewan; Samuel M. Low, Ashlea; A. B. Gilroy of Castle Roy; William Middleton Tocher, minister of Dunbog; William and R. B. Ritchie, accountants and stock-brokers, Union Buildings, Dundee; and the minister of the parish for the time being; requesting them, if willing to accept office, to do everything in their power to carry out the object of the trust funds thus committed to them; while not desirous to dictate to the trustees I have to request that the trust thus created may be known as the 'Gerard Trust.'"

In the petition the trustees set forth a scheme for erecting, furnishing, equipping, and endowing a cottage hospital in and for

the parish of Monifieth, for the medical and surgical treatment of persons suffering from injuries and non-infectious diseases.

Answers were lodged for the Provost, Magistrates, and Town Council of Monifieth, and others, and the Court remitted the petition and answers to Mr E. F. Macpherson, advocate, to report.

On May 14, 1901, Mr Macpherson lodged an interim report, from which the following passages are excerpted:—"The powers given to the trustees are absolute, and it might well be that they would be quite entitled thereunder to carry out such scheme absolutely at their own discretion. The testator by the appointment of trustees has certainly created a machinery for carrying out the trust, leaving the details to the discretion of the gentlemen in whom he showed that he had every confidence. They prefer, however, to ask for the guidance of the Court, and, looking to the practice of the Court, it humbly appears to me that your Lordships will not refuse to give them such guidance. I may refer on that point to the cases of *The Magistrates of Dundee v. Morris* (The Morgan Hospital Case), February 8, 1861, 23 D. 493; *The Presbytery of Deer v. Bruce*, March 22, 1867, 5 Macph. (H.L.) 20; *Caird*, July 3, 1873, 10 S.L.R. 546, and February 25, 1874, 1 R. 529; and *Clephane v. Magistrates of Edinburgh*, February 26, 1869, 7 Macph. (H.L.) 7. The petitioners propose to apply £1850 in erecting, furnishing, and equipping a cottage hospital in and for the parish of Monifieth for the medical and surgical treatment of persons suffering from injuries and non-infectious diseases. The remainder of the fund, which the petitioners estimate will yield an income of £180, they propose to devote to the endowment of the institution. . . . Answers have been lodged by the Provost, Magistrates, and Councillors of the burghs of Monifieth and Broughty Ferry, and the Parish Council of Monifieth. The respondents submit that the establishment of a cottage hospital on the lines proposed by the petitioners 'is not carrying out the purpose for which the testator bequeathed practically the residue of his estate,' and propose two alternative schemes, viz., a cottage hospital primarily devoted to the treatment of cases of infectious diseases; or an institution in the nature of a 'Home,' such as 'Dorward's Home of Refuge' at Montrose. . . . It appears to me that if there were room for doubt as to the intention of the testator, your Lordships would not accept the respondents' first proposal for the very reason advanced by them in Answer 4 in support of it, viz., that 'each district under the Public Health (Scotland) Act 1897, sec. 66, must now provide an infectious diseases hospital,' and, I may add, may be required to do so by the Local Government Board. The result of devoting the present trust fund to such a purpose would virtually amount to nothing more or less than a relief *pro tanto* of the rates. That is a purpose to which, as was pointed out in the cases of *The Kirk Session v. The School Board of Prestonpans*, November 28, 1894,

19 R. 193, and *The Governors of Jonathan Anderson Bequest*, March 12, 1896, 23 R. 592, the Court will not sanction the application of a charitable bequest. The above reasoning, with the exception of this last point, appears to me to apply with equal force to the respondents' alternative proposition. They have furnished me with information as to 'Dorward's Home of Refuge,' from which I find that in that institution between forty and fifty deserving paupers are maintained free, while others are kept who are paid for by the Parish Council, and when there is room in the house accommodation is given to private boarders. No doubt a home for cases of distress such as those described in the respondents' fifth answer is a most laudable and useful institution. It may well be that it would be, as the respondents maintain, of greater use to the community than a cottage hospital pure and simple. That is a point on which no doubt there would be a great deal to be said by both parties. It certainly could not be satisfactorily determined without an elaborate inquiry. But such a home could not by the widest possible construction of the terms be held as falling under the definition of a 'cottage hospital.' Accordingly, for the reasons which I have already given, I do not consider that it is my duty, under your Lordships' instructions to me, to institute such an inquiry, since in my humble opinion the establishment of such an institution would not be in accordance with the testator's instructions. I therefore humbly submit that the scheme suggested by the petitioners, viz., a cottage hospital for surgical and non-infectious cases should be preferred as carrying out more exactly the intentions of the testator."

On parties being heard on Mr Macpherson's report the following authorities were cited:—*Caird and Others, Petitioners*, February 25, 1874, 1 R. 529; *Allen v. Stiell's Trustees*, November 22, 1876, 4 R. 162; *Governors of Jonathan Anderson Trust, Petitioners*, March 12, 1896, 23 R. 592; *Tudor on Charities* (3rd ed.) p. 123.

LORD PRESIDENT—The question submitted for our decision arises under the first codicil to the will of the testator, in the third head of which he says—"The purpose to which I desire my funds to be devoted is the establishment of a cottage hospital for the parish of Monifieth—a useful and valuable institution as has been proved in other parishes." He continues—"In order to take the first step towards providing the said cottage hospital I hereby appoint the following trustees," whom he names, requesting them "to do everything in their power to carry out the object of the trust funds thus committed to them; while not desirous to dictate to the trustees I have to request that the trust thus created may be known as the 'Gerard Trust.'" The testator had plainly full confidence in the trustees, whom he armed with the power and charged with the duty of carrying out the trust. Now, where the trustees are armed with such large powers

we would be very slow to interfere with what they did unless it was plain that it was not within the powers conferred by the testator, or in other words was *ultra vires*. The trustees accepted the trust, they appear to have addressed themselves to the performance of their duties, and in article 9 of their petition they say that they propose to apply a portion of the funds under their charge "in erecting, furnishing, and equipping a cottage hospital in and for the parish of Monifieth for the medical and surgical treatment of persons suffering from injuries and non-infectious diseases to relief of which such institutions are generally confined." The trustees have interpreted their powers in this way, and the first question which arises is, whether what the trustees say they propose is within or beyond their powers. I am of opinion that it is within their powers, and if it is within their powers, it would not be either competent or proper for us to review or control the exercise of powers which they possess, even if we held a different opinion as to the best mode of administering the trust. This would, in my judgment, be a quite sufficient reason for not interfering with what the trustees propose to do. But it may not be improper at the same time to refer to the contentions which have been put forward by the respondents, especially as their answers have been considered by Mr Macpherson, the reporter, along with the other papers. They put forward two rival schemes, the one is a hospital for the treatment of infectious diseases, and the other is a home for cases of distress, whether from injury, disease, bodily infirmity, or other similar causes. If I be right in the view I have just expressed, it is not necessary to decide whether it would or would not be within the powers of the trustees to carry out either of these schemes. It is enough to say that what the trustees have elected to do is within their powers, although something else might also have been within their powers. But at the same time it is not to be left out of view, as the reporter points out, that the first of the rival schemes proposed would be simply a mode of relieving the rates by applying the funds left by the testator towards providing for cases which the law requires to be provided for out of the rates, a thing which is certainly against right administration in the ordinary case, though we are not called on to express an opinion as to whether it would or would not be *ultra vires* of the trustees. The second alternative is to provide a home, which either means a poorhouse or something exceedingly like a poorhouse. If it means a poorhouse, the objection would again arise that the bequest should not be applied to a purpose which the law requires to be provided for by the rates. We do not, however, require to consider these questions if I be right in thinking that what the trustees propose is undoubtedly within their powers. It therefore appears to me that the best course will be to make a finding that what the trustees propose is within their powers, and to send

the case back to Mr Macpherson to complete his report.

LORD ADAM concurred.

LORD M'LAREN—I also am of the same opinion. It will not be supposed that in taking this course we are giving any encouragement to the notion that trustees who are empowered to apply money to charities or purposes of benevolence are to throw the administration of their trust upon the Court. But where a difference of opinion in matters material exists between the trustees and persons who would have a recognised title to appear and contest the administration, such as the chief local authorities of the district in which the charity is to be founded, where such a difference of opinion exists it would seem that trustees are entitled for their exoneration to obtain a judicial interpretation of the trust either under a declarator or under a petition to approve of a scheme. I think the reporter has very judiciously abstained from entering upon details in the meantime, and has brought before the Court the question whether the purpose to which the trustees propose to apply this money is a purpose consistent with the will of the testator, or whether the scheme proposed in the answers is what the testator intended. I have no doubt whatever that in proposing to establish such a cottage hospital as had been found useful in other parishes the testator meant an institution of the character which the trustees now propose to establish, and therefore I agree with your Lordship that after a further report we should give our sanction to the present scheme either as it stands, or, it may be, in an amended form, but substantially on the lines which the trustees have put before us.

LORD KINNEAR—I also concur. I think it was very proper, and it has been very useful, that the public bodies who have put in answers should appear in such a case and lay their views before the Court, but having considered these views, I agree with your Lordship that the scheme proposed by the trustees is entirely in accordance with the will of the testator, and that nothing has been brought before us which would justify us in refusing to give effect to that scheme or enforcing any different scheme upon the trustees. With reference to the competing schemes suggested by the respondents, I do not find it necessary to consider whether these are entirely contrary to the intention of the testator or not, but I have very grave doubt whether the first alternative which they propose is so exactly in conformity with the will as the trustees' proposal is, because it proposes to introduce a restriction upon the purpose to which the cottage hospital if established shall be devoted, for which I can find no authority in the will itself. And I have even a stronger doubt whether the second alternative suggested by the respondents is within the will at all, because whatever question there may be as to the particular kind of cottage hospital which the testator had in view I think there can be no doubt

that it was at least a cottage hospital for the treatment of persons suffering from diseases, and that it was not intended to be either a poorhouse or an almshouse for the reception of poor persons who could partly contribute to their own support. I find nothing in the will to favour that second alternative at all, and I therefore agree that with the finding which your Lordship proposes the petition should be sent back to the reporter with instructions to proceed in the execution of the original remit.

The Court found that the scheme proposed by the petitioners was within their powers, repelled the answers, and remitted the case to the reporter.

Counsel for the Petitioners—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondents—A. S. D. Thomson—W. L. Mackenzie. Agents—Hutton & Jack, Solicitors.

Friday, May 31.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DUNDEE COMBINATION PARISH COUNCIL v. SECRETARY FOR SCOTLAND.

Local Government—Parish—Division of Parish—Erection of Portion of Divided Parish into New Parish—Secretary for Scotland—Alteration of Parish Areas—Order—Ultra Vires—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 51—Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), sec. 46.

Held (aff. judgment of Lord Kincairney, Ordinary) that the Secretary for Scotland is entitled by order to divide a parish and to erect one portion of the parish so divided into a new parish without annexing it to another existing parish.

Local Government—Parish—Combination Parish under Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83), sec. 16—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 105—Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), sec. 54.

Held (aff. judgment of Lord Kincairney, Ordinary) that the expression "parish" in section 51 of the Local Government (Scotland) Act 1889 includes a combination parish constituted under section 16 of the Poor Law (Scotland) Act 1845.

Local Government—Parish—Alteration of Parish Areas—Order—Local Inquiry—Procedure—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 51—Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), sec. 46.