ised by two enemy alien concerns part of whose business had been acquired by the appellant's husband. While a great part of the Stated Case is taken up with statements of fact and contentions relative to these alien concerns, and is relevant solely to the amount of the assessment, the question of law as put to us raises no question as to the amount of the assessment or as to the method by which it was arrived at. We are asked "whether the appellant is to be deemed to be the person carrying on the trade or business within the meaning of section 35 (2) (*a*) of the Finance Act 1918, and liable to excess profits duty accordingly." The sole question therefore is as to the appellant's liability. Moreover, section 35 (2) (*a*) of the Act of 1918 applies only to a case "where a trade or business has ceased but is deemed for the purposes of this section to have been carried on for any period." The question of law assumes, as did also the counsel on both sides in the arguments which they addressed to us, that the business carried on by Mr Guest did in fact cease at his death. We are not asked to consider whether upon the facts proved or admitted the Special Commissioners were entitled to draw that inference.

Such being the question of law, it is at first sight difficult to see how the appellant can avoid the liability to excess profits duty which is expressly imposed by section 35 (2) (*a*) of the Act of 1918 upon "the person by whom or by whose authority any trading stock is sold, whether as owner, agent, liquidator," &c. The appellant as her husband's executrix was the owner of the trading stock in question, and it was sold by her orders. Her counsel pointed out, however, that Part III of the Act of 1918 is directed by section 45 (1) to be construed with the principal Act relating to excess profits duty —the Finance (No. 2) Act 1915. He further pointed out that by section 45 (2) of the principal Act, where a trade or business has ceased, the duty may be assessed on the person who owned or carried on the business "immediately before the term at which the trade or business ceased." He therefore argued that the word "owner" must be construed in the same restricted sense in section 35 (2) (*a*) of the 1918 Act. If so, the late Mr Guest and not the appellant was the person who owned or carried on the business immediately before the time at which it ceased. Moreover, the Acts did not contemplate an assessment upon a deceased person. In short, according to the argument of the appellant's counsel, the extended liability for excess profits duty introduced by the Act of 1918 was not intended to apply to a case where a trader died and his legal representative did not carry on the business but simply sold the stock-in-trade for the purpose of realising and dividing the estate. It was not intended that both estate duty and excess profits duty should be paid in such a case. In conformity with this construction of the Act the words "executor or administrator" were intentionally omitted from the enumeration in section 35 (2) (*a*) of the persons liable for excess profits duty upon the sale of a trading stock. For the same reason it was enacted in section 35 (5) that "references to disposal of trading stock do not include disposal by way of testamentary disposition."

While I feel the force of these arguments I do not think that it is possible to give effect to them without resorting to something like judicial legislation. The word "owner" as used in section 35 (2) (*a*) of the 1918 Act obviously refers to the person who is the owner of a trading stock and who gives orders for its sale, and not to the person who was the owner of a business which has ceased to exist. In other words, the seller of the trading stock and not the former owner of the business is "deemed to be the person carrying on the trade or business," and as such is liable to be assessed for, and is bound to pay, excess profits duty on the profits from the sale of the trading stock. Moreover, the enactment in section 35 (5) is primarily intended to place a testamentary disponee in the same position as an executor or administrator who takes a trading stock *ab intestato*. In neither case is there any liability for excess profits duty unless and until the disponee, executor, or administrator sells the stock within the meaning of section 35 (4). I cannot construe section 35 (5) as enfranchising a sale by a testamentary disponee. Why should such a disponee be placed in a better position as regards this matter than an executor or administrator who succeeds to the trading stock *ab intestato*?

For these reasons I am of opinion that the question of law should be answered in the affirmative.

LORD CULLEN did not hear the case.

The Court dismissed the appeal and affirmed the determination of the Commissioners.

Counsel for the Appellant—Hon. W. Watson, K.C.—Graham Robertson. Agents —Macpherson & Mackay, W.S.

Counsel for the Respondents—Leadbetter, K.C.—Henderson. Agent—Stair A. Gillon, Solicitor for Inland Revenue.

COURT OF TEINDS.

Friday, February 25.

HENDERSON AND OTHERS, PETITIONERS.

Church—Parish—Unification of Charges—Petition to Court of Teinds.

The second charge in a parish having become vacant the presbytery and kirk session presented a petition for unification of the charges. There was no evidence to show whether the parish was a united parish or how the two charges came into existence. The petition stated that the conditions which the collegiate charge was designed to meet no longer existed, that the temporalities of the benefice were not now sufficient for the

parish, and that the parishioners were desirous that the two charges should be united so as to form one charge. The heritors consented to the application, and a minute of the Synod was produced agreeing to the proposed change. The Court *granted* the petition.

The Rev. Alexander Colin Henderson, minister of the parish of Holm, the Rev. Alexander William Watt, minister of the parish of Evie, Moderator and Clerk respectively of the presbytery of Kirkwall, on behalf of the presbytery, and the Rev. William Barclay, minister of the first charge of the parish of Kirkwall and St Ola, and others, members of the kirk session of the said parish, presented a petition to the Court of Teinds in which they prayed the Court "to unite the said first and second charges of the said parish of Kirkwall and St Ola into one single charge, and to decern and ordain accordingly, and to decern and ordain the said William Barclay to be the first minister of the said united charge, and that inhabitants of the said parish may subject themselves to the said William Barclay and his successors in office as ministers of the said united charge of Kirkwall and St Ola in all time coming."

The petition recited the Act of Parliament 1690, cap. 30, by which power was granted to the Commissioners of Teinds to erect and build new churches; the Act of Parliament 1707, cap. 9, by which the Lords of Council and Session were empowered to exercise the jurisdiction of the Commissioners of Teinds and, *inter alia*, to erect and build new churches, to disjoin too large parishes, and to annex and dismember churches as they should think fit, the transporting of churches, disjoining of too large parishes, or erecting and building of new churches, being always with the consent of the heritors of three parts of four at least of the valuation of the parish concerned; the Acts 2 and 3 Vict. cap. 36, section 8, and 31 and 32 Vict. cap. 100, constituting the two Divisions of the Inner House of the Court of Session along with the Lord Ordinary in Teind Causes to be the Court of Commissioners for Teinds; and the Act 7 and 8 Vict. cap. 44, which enacted that the consent of the heritors of a major part of the valuation of any parish should be necessary and sufficient in all cases in which the consent of the heritors of three parts of four of the valuation of such parish was required by the Act of Parliament 1707, cap. 9.

The petition further stated—"That it has become highly expedient that the first and second charges of the parish of Kirkwall and St Ola should be united into and form one charge. That at the time the parish was erected there were no other churches in the town and district of Kirkwall, and that the ministers of the first and second charges of the parish of Kirkwall and St Ola were the only two ministers available to meet the spiritual needs of the said town and district; that there are now in the parish of Kirkwall two United Free churches, an Episcopal church, and a Congregational church; that the present population of the parish is about 4595; that the population has for some time been almost stationary; that the membership of the church is about 693; that there are no separate spheres of labour for the said ministers of the said two charges; that both attend to the spiritual interests of the same people, and are responsible for the same work. That of the stipend of the minister of the first charge about £67 is payable from teinds, and £88 from the Exchequer under the Acts 50 Geo. III, c. 84, 5 Geo. IV, c. 72, and 5 Geo. IV, c. 90. That of the stipend of the minister of the second charge about £65 is payable from teinds and £138 from the Exchequer under the foresaid statutes. That the minister of the first charge only has a manse and glebe. That the conditions which the collegiate charge of Kirkwall and St Ola was designed to meet no longer exist, and that the temporalities of the benefice are not now sufficient for such a parish as that of Kirkwall, and bear little relation to the present circumstances. That the second charge is vacant, and the petitioners consider it desirable that the two charges should be united into one, and that the Rev. William Barclay, M.A., should be appointed as minister of the united charge. So far as the petitioners have been able to ascertain, there is no valued rent roll of the parish of Kirkwall and St Ola, but the petitioners have obtained the consents of the real rent heritors to the extent of a major part of the valuation, conform to excerpt from minute of meeting of said heritors held on 31st August 1920 produced herewith. It is believed that the parishioners of the said parish as a body are desirous that the first and second charges should be united so as to form one charge, and that the said William Barclay should be declared to be the minister thereof."

A minute of the Synod of Orkney was produced consenting to the proposed unification.

On 28th January 1921 the Court remitted to the Clerk of Teinds to inquire into the facts set forth in the petition, and to report thereon, and as to any other matter that might be involved through the unification of the charges.

On 11th February the Clerk of Teinds presented his report, which, *inter alia*, stated—"That there is no information in the records of the Teind Court to show whether the parish of Kirkwall and St Ola is a united parish or how it came to have a first and second charge. . . . Under this Act, 1707, ch. 9, the Court have united about 30 churches or parishes. The first case of union of churches was that of *Longformacus and Ellene* or *Ellenford*, brought before the Court by the patron of both parishes, and in this process the heritors and ministers were called as defenders. The consent of the heritors and the procurator was produced in the proceedings. Of this date (13th February 1712) the Court pronounced an interlocutor decerning in the union in the terms craved. The last case prior to this Act (50 Geo. III, Ch. 84), was that of *Lethindy and Kinloch*, brought at the

instance of the heritors. The presbytery gave their consent upon certain conditions and after protracted proceedings an interlocutor decerning in the union was pronounced of this date (26th November 1806) and was adhered to on a reclaiming petition.

"Some of the cases were brought at the instance of the patron and heritors, and presbytery or synod opposed. Others were brought at the instance of patron and certain heritors, and opposed by other heritors, or brought by certain heritors and opposed by patron and other heritors, and in some cases heritors, patron, and presbytery concurred in bringing a process and were opposed by the procurator. Controversial points arose in most of the proceedings in regard to the disposal of the manse, glebe, and kirk of the suppressed or united parish and frequently provision had to be made to provide a new kirk.

"All the proceedings were by way of summons, and in the interlocutor decerning the union a decerniture was always made regarding the stipend. In quite a number of the cases the union was not to take effect until there was a vacancy in one of the parishes affected.

"*Longformacus and Ellom, 13th February* 1712.—The Court decerned in the union and ordained the haill inhabitants to acknowledge the minister of Longformacus as their lawful pastor, but in stead of a decerniture of the stipend in his favour made a reservation of the stipend of Ellom to the then minister thereof during all the days of his lifetime, and ordained those liable in payment thereof to pay the same to him as formerly.

"*Kirknewton and East Calder* 1750.—The Court found the consent of the heritors of three parts of four of the valuation of the parish not necessary in a union of churches.

"*Houston and Killellan, 28th February* 1759.—In this case the interlocutor pronounced decerning union but only to take effect in the case of a vacancy in one of the charges, and until that event should take place that the present ministers should enjoy all the rights belonging to their benefices, but that when a vacancy should occur the surviving or remaining minister should have right to the whole emoluments of both benefices.

"*Swinton and Simprin, 5th August* 1761.—A similar decerniture was made as regards the stipend.

"*Annexation of Abbotrule to Hobkirk and Chesters, 19th February* 1777.—In the interlocutor suppressing Abbotrule and annexing the parish to Hobkirk and Chesters was a decerniture of the particular sums of the stipend payable to Abbotrule and proportioning the same between the ministers of Hobkirk and Chesters.

"*Lochel and Cushney, 28th January* 1795.—In this case the decerniture as to stipend was . . . 'and decern and declare that from and after the commencement of the annexation the stipends of the said parishes of Lochel and Cushney, with the communion element money, shall be paid to the minister of the united parishes according to the proportions the same are paid by those liable therein to the present incumbents, at the terms and in the manner conform to use and wont.'

"Sir John Connell, Treatise on Parishes, p. 213, summarises the practice of the Court in uniting parishes as follows — (1) That the grounds of procedure have been the smallness of the parishes proposed to be united in point of extent and population, the contiguity of their situation and inadequacy of the funds to provide for two ministers. (2) That the proposed union has usually received the approbation of the presbytery or other Church Courts before the sanction of the Teind Court has been craved; but that the consent of the Church Courts has not been deemed to be essential to such a measure, and that the measure might even be carried into effect although opposed by the church. (3) That in the union of parishes the consent of three-fourths of the heritors has not been deemed to be necessary. . . . (5) The whole stipends of the united parishes, as well as the glebe of the suppressed parish, has been usually allotted to the minister unless there was a special arrangement with parties to the contrary. . . .

"The present application differs from any of the unions above referred to in the following particulars—(1) The application is by way of a petition and not by summons; (2) It is for a unification of charges inside a parish, and not for a union of churches or parishes; and (3) Both the charge which the Court is craved to suppress by unification and the one to which it is to be united are on the small stipend fund. . . .

"The disjunction and annexation of parishes *quoad omnia* after this Act (7 and 8 Vict. c. 44) have been very few, and the reporter has not been able to find any case of union of *quoad omnia* parishes. Under the Act the ordinary applications for disjunction and erections *quoad sacra* up to 1851 were by summons of disjunction and erection, but the application for the erection of St Matthews, Glasgow, *quoad sacra* in 1852, was by petition, and the applications have since been in this form.

"Of this date (11th June 1920), in a petition for the union of the *quoad sacra* parishes of St Matthews and Blythswood, Glasgow, the Court granted an interlocutor uniting the two parishes, and decerned otherwise in terms of the prayer of the petition.

"The reporter accordingly thinks that the present application by way of petition instead of by summons is conform to modern practice, and it is certainly less expensive than a summons. . . .

"In the previous applications by way of summons which the reporter has examined there is always a conclusion for a decerniture in regard to the payment of the stipend of the united parish when the union should take place, and, unless modified in the course of the proceedings, the decree granted has just followed the terms of the conclusion. Accordingly the reporter suggests that the petitioners should amend the prayer of their petition by inserting after the word 'coming' in the second last line thereof the following crave — 'and decern and

ordain that from and after the commencement of the unification of the first and second charges into one single charge, the stipend of the said charges with the communion element money shall be paid to the said William Barclay and his successors in office as ministers of the said united charge of Kirkwall and St Ola according to the proportions the same are presently paid by those liable therein to the said first and second charges, at the terms and in the manner conform to use and wont.'"

Counsel for the petitioners was heard.

At advising—

LORD PRESIDENT — In this petition the Court is asked to unite the first and second charges of the parish of Kirkwall and St Ola into one single charge. So far as can be ascertained there is no precedent for an application of this kind, and the question accordingly is whether the unification craved is one which it is competent for the Court to make.

From the report by the Clerk of Teinds we learn that there is no information in the records of the Teind Court to show whether the parish of Kirkwall and St Ola is a united parish, or how it came to have a first and second charge. But the parish is one which is partly burghal and partly landward, St Ola being the name by which the part of the parish outside the royal burgh is commonly known. A double parochial charge attached to the same cure and held by separate incumbents is a not uncommon feature in parishes partly burghal and partly landward, and the question whether the first minister of such a parish was entitled to a manse as part of his benefice was the subject of much litigation, as appears from the cases of *Thomson* v. *Heritors of Dunfermline*, (1750) M. 8504; *M'Lean* v. *Heritors of Dunfermline*, (1805) M. *voce* Manse App. No. 1, *aff.* (1812) 5 Paton 593; *Heritors of Eglin* v. *Troop*, (1769) M. 8508; *Magistrates of Ayr* v. *Auld*, (1825) 4 S. 99; and among many others *Baikie* v. *Logie*, (1827) 5 S. 546, which was concerned with this very parish of Kirkwall and St Ola. The general result was to establish two points—(*a*) that the first minister had right to a manse, (*b*) that there was no similar right on the part of the second minister, of whom Lord Auchinleck said in the *Elgin* case that he was to be considered as being no more than an assistant—1 Hailes 283. The second of these two points was finally decided in *Adamson* v. *Paston*, 14th February 1816, F.C., a case arising with regard to the parish of Cupar. In like manner the right of the first minister in a burghal-landward parish to a glebe was definitely established in *Panmure* v. *Presbytery of Brechin* ((1855) 18 D. 197), while a similar right on the part of the second minister has never been affirmed, though it has perhaps never been expressly negatived. In the present case the minister of the first charge alone has manse and glebe.

An examination of these and other reported cases shows that these collegiate charges, as they are called, have arisen in various ways. Thus in *Brechin*, as appears from *Carnegie* v. *Speid* ((1849) 11 D. 1250), the parish (partly burghal and partly landward) was erected into a collegiate charge by a royal grant ratified by Act of Parliament. But that which was probably the more common case is exemplified in *Adamson* v. *Paston*, already referred to, where (according to the findings in the Lord Ordinary's interlocutor, *loc. cit.*, at p. 80) the minister had from time to time had the assistance of a helper or colleague to whom a sum was voluntarily assigned by the town. Later the synod recommended the presbytery and parish to apply to the Commission "for ane maintenance to ane helper to Cupar." The town made the application accordingly, and petitioned for the provision of stipend to the colleague as second minister from the teinds. A decree of modification and locality followed, thus legally establishing the second charge of the parish of Cupar.

It is not material to determine whether the institution of a second charge in the parish of Kirkwall and St Ola owed its origin to circumstances precisely similar to those which occurred in the parish of Cupar. As I have said, its actual origin is unknown. But it is important to observe that the power of the Commission in the matter of modification of stipends to ministers was the sufficient instrument by which a second charge in a single parish was brought into existence. It is difficult to see why the same power should not be appealed to if and when a change of circumstances renders the duties of a second minister superfluous, especially if Lord Auchinleck's conception of the true character of a second charge as being merely auxiliary is correct.

No doubt, both first and second charges once they are established constitute separate benefices. On the other hand there are not, properly speaking, two cures but one only. As Lord President M'Neill put it in *Panmure* v. *Presbytery of Brechin* (18 D. 197, at p. 200)—"So far as the duties are concerned they may be described as one cure. There is generally a sort of *pro indiviso* management of the duties of the parish, but there are separate benefices"; and Lord Curriehill pointed out the important consequences which flow from that separation of patrimonial rights. Accordingly in unifying two charges in a single parish the Court is asked to do something which is only imperfectly analogous to the unification of two parishes. For a union of two charges in a single parish does not, while a union of two parishes does, involve the suppression of one of two originally independent cures to each of which a benefice was attached. It may be observed in passing that while one minister cannot hold more than one cure with benefice attached (in terms of the Act 1584, cap. 132), there is nothing in law to prevent a plurality of benefices from being attached to one cure and held by the minister to whom that cure is committed. There is a case of *Stewart* v. *Glenlyon* ((1835) 13 S. 787), from which it appears that the minister of Blair-Atholl, with which three other parishes had been united, held at one time no less than four glebes. Some process of law, however, is required even in the case of the union of

two charges in a single parish to effect the unification of the two separate benefices which have become established by law as such. It might well, I think, be held that the larger and more far-reaching powers of this Court in the matter of union of kirks or parishes under the statutes referred to in the petition include the lesser power which we are now asked to use. But apart altogether from these, the considerations which are discussed above (particularly in connection with the *Cupar* case), arising out of the character and origin of these so-called collegiate charges, seem to me to afford ample ground for regarding this power as having been inherent in the Commission, and therefore inherent in this Court as its successor. The prayer of the petition will, in accordance with the suggestion made in the Teind-Clerk's report, require amendment so as to include a decerniture for payment of the stipend with the communion element money to the (henceforth) single minister of the parish and his successors, in like manner as the same are at present payable to the holders of the first and second charges, and attaching the emoluments of both benefices to the said minister and his foresaids. On these amendments being made the petition will be granted.

LORDS MACKENZIE, SKERRINGTON, CULLEN, and BLACKBURN concurred.

The Court granted the prayer of the petition, subject to the prayer being amended as suggested by the Clerk of Teinds.

Counsel for the Petitioners —Hon. W. Watson, K.C.—Wilson. Agents—Menzies & Thomson, W.S.

COURT OF SESSION.

Friday, February 25.

FIRST DIVISION.

LAW'S TRUSTEES *v.* GRAY.

Succession — Will — Legacy — Erroneous Recital—Implied Bequest or Misdescription.

A testatrix had a brother, a nephew (the brother's son), and a grandnephew (the nephew's son), all of the same name. Her brother and nephew having died, she appointed the grandnephew to be one of her trustees and bequeathed to him the sum of £500, which was expressed to be "in addition to and over and above his share of the legacy of £1000 hereinafter bequeathed to the children of his deceased father A equally." This reference was erroneous. The will contained no such legacy to the children of his deceased father, but it did contain, *inter alia*, a bequest of a like sum to the children of his deceased grandfather, viz.—"to the whole children of my deceased brother A, who shall survive me, the sum of £1000 sterling equally among them, share and share alike." *Held* that the erroneous reference to a legacy in favour of the children of the grandnephew's father did not constitute an implied bequest to them, such bequest being inconsistent with the general scheme of the will, and the erroneous reference being reasonably attributable to confusion arising out of the identity of names.

A Special Case was presented to the Court by Archibald Gray and others, the trustees acting under the trust-disposition and settlement, dated 31st August 1918, of the late Mrs Jane Gray or Law, Bowfield Road, West Kilbride, *first parties;* and the said Archibald Gray as an individual, Robert Speir Gray, and James Gray, all grandnephews of the said Mrs Jane Gray or Law, *second parties.*

After narrating that the truster (the said Mrs Jane Gray or Law) died on 26th April 1919, the Case set forth as follows:—"2. By her said trust-disposition and settlement the truster conveyed her whole means and estate to the first parties as trustees foresaid, for the purposes therein set forth. . . . 3. The second purpose is in the following terms, viz.—'In the second place I bequeath to the said Archibald Gray' (hereinafter referred to as 'Archibald Gray *tertius*') 'the sum of £500 sterling, and that in addition to and over and above his share of the legacy of £1000 sterling hereinafter bequeathed to the children of his deceased father Archibald Gray equally.' The said last-mentioned Archibald Gray was a nephew of the truster, and is hereinafter referred to as 'Archibald Gray *secundus.*' 4. By the fourth purpose the truster bequeathed 'to the whole children of my deceased brother Archibald Gray who shall survive me the sum of £1000 sterling equally among them, share and share alike.' The said last-mentioned Archibald Gray is hereinafter referred to as 'Archibald Gray *primus.*' 5. By the eleventh purpose the truster bequeathed 'to Mary Gray or Campbell the sum of £500 sterling, and that in addition to and over and above her share of the legacy of £1000 sterling hereinbefore bequeathed to the children of her deceased father Archibald Gray equally.' The said Archibald Gray is 'Archibald Gray *primus*' mentioned in the preceding article. 6. By the twelfth purpose the truster directed her trustees to pay and divide the whole residue of her means and estate heritable and moveable among such charitable and benevolent institutions in the county of Ayr as her trustees might select. . . . 8. The said Archibald Gray *primus* was a brother of the truster, and died on 13th February 1884. He was survived by four children, viz.—two sons—the said Archibald Gray *secundus*, who died on 17th September 1908, and James Logan Gray, who is now abroad, and two daughters the said Mary Gray or Campbell and Margaret Gray or Ferguson. 9. The said Archibald Gray *secundus* left three sons, viz.—the said Archibald Gray *tertius*, who is one of the trustees; the said Robert Speir Gray, and the said James Gray. Said children of the said Archibald Gray *secundus* are the second parties hereto. 10. The