to deposit their goods under a contract which so favoured the defenders they must accept the consequences of having done so.

If the Lord Ordinary's views as to warranty are sound the ensuing difficulties are obvious, and they were clearly indicated by the reclaimers' counsel. If there is the warranty suggested by the Lord Ordinary it follows that there must be a remedy for breach of that warranty, and if the contract gives this warranty and at the same denies a remedy in damages, it may well be held to be self-contradictory and meaningless, thus leaving the parties to their rights at common law. The Lord Ordinary has not met this difficulty by his reference to the possibility of an order for specific performance. The law of Scotland undoubtedly recognises this as a remedy for failure to implement a contract—*Stewart*, (1890) 17 R. (H.L.) 1—but it is only appropriate in certain exceptional cases of which the present does not seem to me to be one. Such a remedy, moreover, is almost invariably accompanied by an alternative crave for damages, it being always discretionary in the Court to declare that the latter is the appropriate remedy—*Moore*, (1881) 9 R. 337, per Lord Shand at p. 351.

The argument of the reclaimer was based on the hypothesis that the Lord Ordinary was right in holding that condition 1 contained the warranty suggested. It was conceded that if this hypothesis was unsound the defence would prevail.

Of the five cases cited by Mr Normand I am satisfied that three have no bearing on the question at issue and afford no aid in the decision of the case. These are *Churm*, [1916] 1 A.C. 612, *Pollock & Company*, 1922 S.C. (H.L.) 192, and *Ambatielos*, [1923] A.C. 175. The other two cases founded on—viz., *Elderslie Steamship Company* ([1905] A.C. 93) and *Nelson Line (Liverpool), Limited* ([1908] A.C. 16)—seem to have a bearing on the point at issue, but their different circumstances make them readily distinguishable from the present case. In the former case there was a general clause of exemption from all damage, which was followed by a second clause which exempted only "if reasonable means have been taken to provide against such defects. . . ." It was held that the second clause qualified the generality of the first clause. In the present case if it be held, as I think it must be, that the initial words of the condition express nothing more than an intention and do not import a warranty, there is no inconsistency between the two clauses of the condition calling for reconciliation or qualification. In the case of *Nelson Line (Liverpool), Limited*, the agreement as to limitation of liability was described by the Lord Chancellor (Loreburn) (at p. 19) as "so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate." The result was that the agreement was jettisoned and the rights and obligations of parties determined by the common law. The reclaimers invited us to tear up the contract under which the hops were deposited and allow the common law to determine the rights and obligations of parties. This is an extreme step which can only be taken if the conventional agreement is meaningless and unintelligible. In my opinion the meaning of the contract is not doubtful, and this being so it must be given effect to.

The result is that I reach the same conclusion as the Lord Ordinary although by a different route. I am therefore of opinion that the reclaiming note should be refused and the interlocutor of the Lord Ordinary affirmed.

LORD HUNTER was absent.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for the Reclaimers (Pursuers)—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Respondents (Defenders)—Wark, K.C.—Macgregor Mitchell. Agents—Kirk Mackie & Elliot, S.S.C.

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*Saturday, January* 26.

## SECOND DIVISION.

## DUKE OF BUCCLEUCH AND QUEENSBERRY AND ANOTHER (TRUSTEES OF ROSYTH ROYAL NAVAL DEPOT CANADIAN FUND), AND THE ADMIRALTY, PETITIONERS.

*Charitable Trust—Nobile Officium—Trust Unworkable for Lack of Effective Machinery—Transfer of Trust Funds—Discharge of Trustees.*

Owing to change of circumstances a charitable trust became unworkable for lack of effective machinery. In a petition by the trustees to authorise the petitioners to transfer the trust funds to another charitable trust, the purposes of which were similar, and on the trust funds being transferred to declare the trust at an end and to grant a discharge to the petitioners, the Court *authorised* the transfer proposed, and with reference to the application for discharge *remitted* the petitioners' accounts and vouchers to the Accountant of Court for examination, audit, and report prior to granting discharge.

(1) The Most Noble John Charles Montagu Douglas Scott, Knight of the Thistle, Duke of Buccleuch and Queensberry, and the Honourable Sir George Halsey Perley, K.C.M.G., formerly High Commissioner in London for the Dominion of Canada, 19 Victoria Street, Westminster, London, now residing in Ottawa, Canada, the surviving trustees acting under the declaration of trust after mentioned; and (2) the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, presented a petition to the Court for authority to transfer certain funds to a trust therein

named and for discharge of their intromissions as trustees.

The petition set forth—"That in or about July 1917 the War Pensions Statutory, &c., Committee of 22 Abingdon Street, London, handed over to the Commander-in-Chief, Coast of Scotland, a sum of £3000 sterling, being a portion of a larger sum collected in the Dominion of Canada for the benefit of the men of the British Navy, and designated 'The British Sailors' Relief Fund, Canada.' Thereafter this sum of £3000 was handed over to the Duke of Buccleuch, Sir George Halsey Perley, High Commissioner in London for the Dominion of Canada, and Sir William Robertson, Lord-Lieutenant of Fife (now deceased), and a constitution of the fund, *i.e.*, of the said sum of £3000, was established. It provides that (1) the fund shall be called 'The Rosyth Royal Naval Depot Canadian Fund'; (2) the object is the rendering of temporary assistance in time of sickness, distress, or difficulty by the gifts of money or other necessaries to persons declared by the constitution to be eligible for assistance from the fund; (3) the following persons are eligible for assistance:—All ratings and ranks of the rank or equivalent rank of chief petty officer, and below that rank who may be in receipt of naval pay and their dependants. That it is further provided by said constitution that the capital of the fund shall be held by the trustees from time to time acting under the declaration of trust after mentioned, and that the income of the fund shall be administered by a council, such council to consist of. . . . That by declaration of trust, dated 23rd February and 7th and 10th March, and registered in your Lordships' Books on 20th March, all in the year 1919, the Duke of Buccleuch, Sir George Halsey Perley, and Sir William Robertson declared that £3000 registered 5 per cent. National War Bonds 1927 (in the purchase of which the said sum of £3000 had been invested), and the securities in which the capital of the trust should thereafter from time to time be invested, were and shall be held by them and the survivor of them as trustees for the purposes set out in said declaration of trust, such purposes being as follows:—(*First*) For payment of such expenses of the trust as might be incurred in any year out of the income of the trust for said year; (*second*) for payment of the balance of the income to the honorary treasurer of the council acting in terms of said constitution. . . . That at the time when said constitution was established and when said declaration of trust was signed Rosyth was a busy centre with a large naval population. . . . That the position of matters at Rosyth has now entirely changed. There is no longer any considerable naval population there. . . . There has not been a council for several years, there is not one now, and there is no prospect of there being one. Accordingly there is now a situation rendering the continued administration under the constitution and declaration of trust before referred to impossible in practice. That in these circumstances your petitioners desire that, if your Lordships approve, the trust estate in the hands of the survivors of the trustees under the said declaration of trust should be transferred to the Royal Naval Benevolent Trust (Grand Fleet and Kindred Funds) incorporated by Royal Charter. . . . It will also be seen from said charter that the objects of the Royal Naval Benevolent Trust (Grand Fleet and Kindred Funds) are— . . . These objects are similar to those specified in the Constitution of the Rosyth Royal Naval Depot Canadian Fund. The Royal Naval Benevolent Trust (Grand Fleet and Kindred Funds) is willing, if your Lordships approve, to accept the transfer of the trust estate and to administer same."

The petition prayed the Court, *inter alia* —"To authorise and empower your petitioners the Duke of Buccleuch and Queensberry and Sir George Halsey Perley, as surviving trustees acting in the trust constituted by said declaration of trust, to transfer the trust estate in their hands (under deduction of the expenses after mentioned) to the Royal Naval Benevolent Trust (Grand Fleet and Kindred Funds), and on same being transferred to declare the trust in the said Duke of Buccleuch and Queensberry and Sir George Halsey Perley at an end; to grant a discharge to the said Duke of Buccleuch and Queensberry and Sir George Halsey Perley, and to the representatives of the said Sir William Robertson, of their whole actings, intromissions, and management as trustees in the trust constituted by the said declaration of trust; and to find the petitioners entitled to the expenses of the present application and incident thereto out of the said trust estate; or to do further or otherwise in the premises as to your Lordships shall seem proper."

On 22nd November 1923 the Court pronounced an interlocutor remitting to J. R. Dickson, Esq., Advocate, to inquire as to the facts and circumstances set forth in the petition, and to report.

The reporter stated, *inter alia*— ". . . The reporter is . . . of the opinion that the constitution of the Rosyth Fund has become unworkable, and that it no longer provides effective machinery for the distribution of the proceeds of the fund; that in the circumstances it is desirable that the money should be transferred to another body more fitted to deal with it; that the Royal Naval Benevolent Trust is the only body which has been suggested as suitable; that its transfer to this body would best ensure its being distributed in accordance with the intention of the donors and the principles under which it has hitherto been distributed. The Royal Naval Benevolent Trust has signified its willingness to take over the Rosyth Fund, and seems to have power under its charter to do so, even under conditions if the Court thought it advisable to attach any. None, however, suggest themselves to the reporter as being necessary or desirable. The petitioners further crave that they be granted a discharge. The reporter has been unable to find any authority in support of the granting of a discharge in a petition of this nature except the unreported case of *Petition, Mitchell*, which was presented to your Lordships of

the Second Division in March 1921. In that petition the trustees of a mechanics' institute asked for authority to transfer the funds of the institute to a branch of the Young Men's Christian Association and for discharge. The reporter in the case, after calling the attention of the Court to the cases of *Dundas* (7 Macph. 670) and *Rosebery* (1892, 29 S.L.R. 865), advised that the exoneration should be refused on the grounds that the granting of exoneration and discharge on an *ex parte* application might embarrass the Court in the event of any item of expenditure being subsequently challenged. The Court, however, remitted the petitioners' accounts to the Accountant of Court, and thereafter on his report granted discharge. In the present case the accounts of the petitioners have not been audited, but it humbly appears to the reporter that it would in the circumstances be a reasonable and convenient course for the Court to follow the procedure adopted in *Petition, Mitchell*, and that there could be no practical objection to the granting of a discharge after an official audit."

At the hearing in the summar roll counsel for the petitioners argued—The petitioners were entitled to the decree prayed for—*Petition, Mitchell* (*unreported, cit. per Reporter*). The case of *Dundas and Others, Petitioners*, (1869) 7 Macph. 670, was distinguishable. In the case of *The Earl of Rosebery and Others, Petitioners*, (1892) 29 S.L.R. 865, the Court granted decree of exoneration and discharge (see *ibid.* at p. 867).

LORD JUSTICE-CLERK (ALNESS)—This is a petition at the instance of the trustees of the Rosyth Royal Naval Depot Canadian Fund and of the Admiralty. The petitioners in the first place seek authority to transfer certain funds which they hold to the Royal Naval Benevolent Trust, and in the second place they ask for discharge of their intromissions as trustees.

As regards the proposed transfer, it is clear upon the report by the reporter to whom we remitted the petition that, owing to the change of circumstances which he narrates, the fund in question has become quite unworkable for lack of effective machinery, and that there is no prospect of cobbling up the machinery to make it workable. It is therefore desirable to transfer the money to somebody who can more effectively deal with it. The Royal Naval Benevolent Trust is a suitable body for that purpose, its operations would seem to be in accord with the intentions of the providers of this fund, and we have been informed that the Trust is both able and willing to undertake the task which it is proposed to lay upon it. In these circumstances I suggest to your Lordships that, as recommended by the reporter, the first part of the prayer of the petition should be granted.

As regards the crave for discharge which is also included in the prayer, it is obviously a delicate and a difficult matter to grant forthwith, upon an *ex parte* application, the discharge which the petitioners seek. The reporter has properly drawn our attention to an unreported case where, under similar circumstances, a remit was made by this Division to the Accountant of Court to report upon the accounts of the petitioners, and on his report a discharge was granted. I see no reason why we should not follow that precedent, and why, so far as the second part of the prayer is concerned, we should not now remit the accounts of the petitioners to the Accountant of Court for report. I suggest to your Lordships that we should do this. Should this report be favourable then we shall grant the second part of the prayer as well as the first. In the meantime the petition must remain in Court.

LORD HUNTER and LORD ANDERSON concurred.

LORD ORMIDALE was absent.

The Court pronounced this interlocutor—

"Approve of the report: Authorise and empower the petitioners, as surviving trustees acting in the trust constituted by the declaration of trust mentioned in the petition, to transfer the trust estate in their hands (under deduction of the expenses found chargeable by this interlocutor) to the Royal Naval Benevolent Trust (Grand Fleet and Kindred Funds): And with reference to the application by the petitioners for discharge, remit their accounts and vouchers to the Accountant of Court to examine and audit the same and to report to this Court," &c.

Counsel for the Petitioners—Crawford. Agent—Norman M. Macpherson, Solicitor in Scotland to the Admiralty.

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*Friday, December 7.*

## FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

## MURRAY v. FIFE COAL COMPANY, LIMITED.

*Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Arising out of and in the Course of the Employment—Breach of Verbal Prohibition Imposed by Employers—Guiding Descending Hutches by Getting in Front of them Contrary to Orders.*

A miner whose duty it was to take hutches down an incline in a mine attempted to do so by placing himself in front of them, in violation of an express verbal prohibition by his employers from guiding the hutches downwards otherwise than from the side, with the result that he was fatally injured. *Held* that the accident arose out of and in the course of his employment.

Mrs Jane M'Lean Braid or Laurence or Wilson or Murray, mother of the late William Laurence, miner, Windygates, and Marion Wallace Laurence, the minor child of the said Mrs Murray, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Kirkcaldy (DUDLEY STUART)