COURT OF SESSION.

Saturday, January 15, 1921.

SECOND DIVISION.

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

Trust—Administration—Special Powers—Nobile Officium — Casus improvisus — Authority to Trustees to Purchase Heritage and to Borrow on Security thereof Part of the Purchase Price.

A farmer by his trust settlement bequeathed the residue of his estate, including the lease and stock of his farm, to his nephew, payment and conveyance of the estate being postponed until his nephew should attain majority, and expressed the desire that his nephew should carry on his herd of shorthorns. Before the nephew attained majority the landlord intimated to the trustees his intention to sell the farm and gave them an option to purchase it at a certain sum. The trust settlement, however, did not confer on the trustees power to purchase heritage or to borrow on the security thereof. In a petition by the trustees for power (*a*) to purchase the farm at the price stated, and (*b*) to borrow on the security of the farm part of the purchase price, the Court *granted* the powers craved, holding that the exceptional circumstances disclosed a *casus improvisus*, and that the main purpose of the trust could only be carried out if the powers craved were granted.

Process — Petition — Competency — Nobile Officium—Petition Combining Applications for Power to Purchase Heritage and Power to Borrow Presented in Inner House — Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *secs.* 3 *and* 16.

Trustees acting under a trust settlement which did not confer power to purchase heritage or to borrow on the security thereof presented a petition in the Inner House in which they craved the Court to grant both these powers. The application for authority to purchase involved an appeal to the *nobile officium* of the Court, while the application for power to borrow was, by the terms of section 16 of the Trusts Act 1867, appropriately presented to one of the Lords Ordinary. The Court, following *Trustees of the Prime Gilt Box*, May 14, 1920, 57 S.L.R. 463, and without remitting the application for power to borrow to the Outer House, *granted* the powers craved.

The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97) enacts—Section 3—"It shall be competent to the Court of Session on the petition of the trustees under any trust deed to grant authority to the trustees to do any of the following acts on being satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof; . . . 3. To borrow money on the security of the trust estate or any part of it. . . ." 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 officiating in the Outer House. . . ."

Alexander Brodie Davidson and others, the testamentary trustees of Thomas Alexander Anderson, farmer, Nonikiln, Alness, who died on 28th November 1914, presented a petition in which they craved the Court "(*first*) To grant warrant to, authorise, and empower the petitioners to purchase from Charles William Dyson Perrins or his successors, at the price of £5640, with entry at Whitsunday 1921, the farm and lands of Nonikiln as at present possessed by the petitioners lying in the parish of Rosskeen and county of Ross and Cromarty; (*second*) for that purpose to grant warrant to, authorise, and empower the petitioners to borrow money upon the security of the said subjects, or on such part thereof as to the petitioners shall seem expedient and necessary to an amount not exceeding £2000, and to execute all such bonds and dispositions in security or other deeds affecting the said subjects as may be necessary for that purpose; (*third*) alternatively to the prayer under head (second) hereof, to remit to a Lord Ordinary to dispose of the application for power to borrow as aforesaid; and (*fourth*) to find that the expenses of the present application are chargeable against the said trust estate."

No answers were lodged.

The circumstances in which the petition was presented sufficiently appear from the report (*infra*) by Mr W. M. Whitelaw, S.S.C., to whom on 4th December 1920 the Court remitted the application.

In his report Mr Whitelaw, *inter alia*, stated—"Under the fifth purpose of the said trust disposition and settlement the testator appointed his nephew Thomas Alexander Anderson Rae to be his residuary legatee, and expressed the wish and desire that he should succeed the testator in the farm of Nonikiln after the testator's death and carry on the said farm in the same manner as it was carried on by him. The testator further expressed the wish and desire that his said nephew should carry on the herd of shorthorns founded by him 'if at the time my nephew shows a decided interest in and knowledge of shorthorns and my said trustees consider it judicious and advisable for him to do so.' The testator further directed his trustees to convey and make over to his said nephew as his own absolute property the whole residue and remainder of the testator's estate on his said nephew attaining the age of twenty-one years, and in particular the testator directed his trustees to convey and make over to his said nephew the lease of the said farm of Nonikiln or his right of tenancy thereof, with the whole stock, crop, and plenishing thereon and everything on or about the said farm belonging to and used by the testator in connection therewith, with the right to his said nephew to reside in the dwelling-house along with the testator's widow. The testator further provided

that in the event of his widow and his said nephew not residing together amicably the right of his widow to reside in the farm house at Nonikiln, together with her right to the whole household furniture and effects therein (under certain exceptions), should cease and determine, as it was necessary for the proper management of the farm that his said nephew should reside in the house. . . .

"The testator conferred upon his trustees all requisite powers for the carrying out of the trust and of any codicil he might make, and particularly empowered his trustees as soon as possible after his death to displenish his farm of Achindunie and any other farm he might occupy at the time of his death with the exception of Nonikiln, which had to be retained in accordance with the provision before mentioned.

"The testator was survived by his widow and his nephew the said Thomas Alexander Anderson Rae.

"As stated in the petition, payment of the specific pecuniary legacies bequeathed under the testator's trust disposition and settlement and codicil has been made and the testator's widow has received one-half of his moveable estate, including the furniture and effects in Nonikiln farmhouse. A receipt by the testator's widow therefor is produced.

"It is further stated in the petition that by arrangement with the petitioners the testator's widow removed from the farmhouse at Nonikiln at Whitsunday 1916, and that the residue of the testator's estate in the petitioners' hands at 31st May last amounted to £9457, 19s. 3d., as specified in the petition.

"Nonikiln farm as stated in the petition extends to about 250 acres, of which 239 or thereby are arable. For several years prior to Whitsunday 1888 the farm was possessed by Mrs Anne Robertson or Anderson, the testator's mother, and by the testator as joint tenants. By lease dated 7th and 21st September 1891 Sir Kenneth James Matheson of Lochalsh, Bart., the then proprietor of Nonikiln, let the farm to the said Mrs Anne Anderson and the testator jointly and to the survivor of them for nineteen years from Whitsunday 1888 at the yearly rental of £235 under the conditions mentioned in the lease. Since the expiry of this lease until the present time the tenancy of the farm has been continued by tacit relocation.

"The said Mrs Anne Anderson died in or about the month of August 1910, and from that date until his death the testator was sole tenant of the farm.

"Since the testator's death the petitioners have carried on the farm. The yearly rent thereof is still £235. The petitioners have kept up the herd of shorthorns at the farm.

"The petition further states that the present proprietor of the farm of Nonikiln, Mr C. W. Dyson Perrins, has decided to sell, *inter alia*, the said farm in terms of the general conditions of sale by him wherein it is stipulated that entry shall be at Whitsunday 1921, when the price shall be payable.

"Certain letters have passed between the agents for the proprietor and the agents for the petitioners, from which it appears that the petitioners have accepted the option given them of purchasing the farm at the price of £5640, subject to their obtaining from your Lordships authority to enable them to carry through the transaction, it being stipulated that if the authority required is not obtained by the 15th of January 1921 the petitioners must vacate the farm at Whitsunday 1921.

"The testator's nephew the said Thomas Alexander Anderson Rae is as stated in the petition seventeen years of age. He is a student of Agriculture at the University of Edinburgh, and it is stated that it is his desire to occupy the farm and keep up the herd of shorthorns when he attains majority. Apart from the value of his interest in the testator's estate, it is further stated in the petition that he has no means wherewith he could purchase the farm. A letter from him dated 27th November 1920, in which he states that the present application is in accordance with his wishes, has been lodged in process.

"The petitioners are desirous of continuing in occupation of the farm to enable them to make over the tenancy and the herd of shorthorns to the testator's nephew in terms of the testator's trust disposition and settlement. They have, however, been served with a notice to quit at Whitsunday 1921, and it is stated that they can only retain possession of the farm by purchasing same.

"The petitioners further state that if the farm has to be vacated at Whitsunday 1921 the herd of shorthorns which is associated with the name of Nonikiln will require to be sold and that the testator's expressed wishes that his nephew should carry on the farm and the herd of shorthorns will be defeated.

"No power to purchase or to borrow upon the security of heritage was conferred upon the petitioners under the testator's trust disposition and settlement and codicil and the present application is accordingly made.

"It is stated in the petition that £4000 of the trust funds (the right to which has as already mentioned vested in the testator's nephew) could be made available towards the purchase price of the farm at Whitsunday next.

"Mrs Anne Janet Anderson or Rae, now residing at 16 Greenbank Terrace, Edinburgh, and William Rae, one of the petitioners, are curators of the said Thomas Alexander Anderson Rae, appointed under trust disposition and settlement by William Rae (father of the said Thomas Alexander Anderson Rae), a copy of which is lodged in process. The said curators have intimated their approval of this application by letters lodged in process.

"In the present application, which your Lordships will observe is not presented under the Trusts Acts, the petitioners crave your Lordships (*First*) to grant warrant to purchase the farm of Nonikiln at the price of £5640 with entry at Whitsunday 1921; (*Second*) for that purpose to grant warrant

to the petitioners to borrow money upon the security of the said farm or part thereof to an amount not exceeding £2000 and to execute the necessary bonds and dispositions in security and other deeds; (*Third*) Alternatively to the prayer under head second, to remit to a Lord Ordinary to dispose of the application for power to borrow as foresaid; and (*Fourth*) to find the expenses of the application chargeable against the trust estate.

"With regard to the power applied for under head First, namely, to purchase the farm of Nonikiln, the reporter would direct your Lordships' attention to a consideration of the question of whether the present application is necessary. It is suggested by the petitioner that for the preservation of a certain portion of the trust estate, namely, the herd of shorthorns referred to in the petition, and for the effectual carrying out of the testator's intentions as to his nephew carrying on the farm of Nonikiln, the purchase of the subjects is essential. If this is so it may be argued that the petitioners are at their own hand entitled to purchase the farm. In support of this view the reporter refers your Lordships to the decision in the case of *Armstrong* v. *Wilson's Trustees*, 7 F. 353, in which it was held that trustees who had expended trust funds in building and repairing heritable subjects belonging to the trust estate which ultimately realised less than the sum expended upon them had not acted imprudently or negligently and that loss had not been caused by their fault.

"The petitioners, however, think that as the purchase of heritable property is a non-trust investment they may be charged with having acted *ultra vires* if they carry through the purchase of the farm without judicial sanction, and they have accordingly applied to your Lordships to grant the necessary sanction in the exercise of the *nobile officium* of the Court in order that they may, although by a method not contemplated by the truster, give effect to his desire that his nephew may carry on the farm.

"In these circumstances the reporter humbly begs to suggest to your Lordships that the competency of the present application is doubtful. He knows of no authority in which the *nobile officium* of the Court has been exercised in circumstances closely resembling those in the present application.

"The reporter, however, would refer your Lordships to the following cases:—In the case of *Kinloch*, 1859, 22 D. 174, trustees appealed to the Court in exercise of its *nobile officium* to grant them power to borrow money on the security of the trust estate, but it was held that where a trust deed does not empower the trustees to borrow money on the security of the trust estate it is not competent for the Court in the exercise of its *nobile officium* to confer such power upon the trustees.

"In a later case, *Berwick and Others* (*Walker's Trustees*), 1874, 2 R. 90, the petitioners craved authority to accept the renunciation of a lease of a farm of which they were the proprietors, but the application was refused, it being held that the petition was incompetent. The reporter would refer your Lordships particularly to the opinion of the Lord President (Inglis) in which he said—'The powers of trustees are defined by he trust deed and the Court will give not higher power. The trustees are not entitled to come to the Court for advice. If they have no power given them by the deed it is incompetent for us to grant it them. I think therefore that the petition should be dismissed as incompetent.' The other judges concurred, and Lord Deas in his opinion said—'I see no reason whatever to doubt that the petitioners take a judicious view of what is for the interests of the trust estate. But it is for them to exercise their own discretion in that matter. If they do so rightly they will be safe. But it is a pure question of management in which we cannot aid them, and I think we must refuse the petition as incompetent.'

"In the still later case of *Noble and Others* (*Robert Noble's Testmentary Trustees*), 1912 S.C. 1230, the trustees presented a petition relying upon the *nobile officium* of the Court for authority to expend a portion of the capital of the trust estate in rebuilding and repairing a tenement included in the estate, and for power thereafter to lease the tenement for twenty-one years, which in their opinion would be to the advantage of all the beneficiaries in the estate. The Court dismissed the petition, holding (1) that if the trustees did not already possess the desired powers under the terms of the deed it was incompetent for the Court to grant them in exercise of its *nobile officium*, and (2) that if the trustees did possess the powers the exercise thereof was a matter of administration for their own determination with regard to which the Court could give no advice. Lord Kinnear in his opinion said—'I am unable to see that the Court can authorise these things to be done by virtue of its *nobile officium*. The questions are purely questions of administration.' Lord Mackenzie, one of the other judges who concurred in his opinion, said—'The matters that are dealt with in this petition are matters of trust administration, and as such cannot be dealt with by the Court in an appeal to the *nobile officium* of the Court. It is for the trustees to administer in the manner which they think best in the circumstances.'

"The reporter thinks it right, on the other hand, to draw your Lordships' attention to certain cases in which the Court in exercise of its *nobile officium* has granted the powers craved.

"In the case of *Sir William Erskine's Trustees* v. *Wemyss*, 7 S. 594, where the trustees were instructed to entail a portion of the truster's heritable estate and no power of sale in relation thereto was given in the deed, on the rest of the truster's estate being proved insufficient to pay his debts the Court authorised the trustees to sell that part ordered to be entailed in so far as necessary for payment of the debts and provisions. Lord Craigie, however, expressed considerable doubts, and thought that the trustees could only sell by authority of Act of Parliament.

"In the later case of *Henderson and Others* (*Somerville's Trustees*) v. *Somerville*, 3 D. 1049), where the trust deed provided for payment of debts and provisions, and empowered the trustees to sell certain portions of the truster's heritable estate, and to apply the same together with the personal funds in payment of the debts and provisions, the Court held that although no special power of sale as to the remaining heritable property was expressed in the deed there was by a fair construction thereof necessarily an implied power of sale, and consequently the trustees were entitled to sell the said property in the same manner and as freely as if the truster had given them special power to that effect.

"In the case of *Stenhouse and Others* (*Wardlaw's Trustees*), 1902, 10 S.L.T. No. 229, p. 349, the Court authorised the trustees, acting under a trust deed in which no power was given to invest the trust estate in the purchase of heritable property, to purchase the heritable property desired. Although there is no reference in the report of this case that it was presented as an appeal to the *nobile officium* it must have been so presented, as it was not, and in the Reporter's view could not have been, presented under the Trusts Acts. The petition was remitted on 19th July 1902 by the Second Division to the Lord Ordinary on the Bills 'to dispose of the petition.' It appears to the Reporter that the petition was so remitted in order that it might be disposed of in the then ensuing vacation. It was not, however, disposed of by the Lord Ordinary until 2nd November 1902. The Reporter accordingly very respectfully suggests to your Lordships the doubt which he has felt as to whether the Lord Ordinary was right in granting the power asked for. The Lord Ordinary may have taken the view that as the trust estate consisted to a large extent of heritage, and as there was a power given to the trustees to excamb, that that implied a power to acquire heritage by purchase where the purchase was essential to the development of the heritage held by the trustees. If that be the explanation of the position, then the petition appears to the Reporter to have been unnecessary, but if it is not, then in the Reporter's opinion the power was wrongly granted, because (*a*) the Lord Ordinary was not entitled to exercise the *nobile officium* of the Court when the power was granted, and (*b*) the decision is inconsistent with the earlier cases of *Kinloch* and *Berwick* above referred to. This was evidently the view of the Court in the case of *Noble's Trustees*, where this case was commented upon, but the case of *Berwick* was followed. The Reporter begs to refer your Lordships in particular to Lord Kinnear's criticism of *Wardlaw's* case.

"In the case of *Coats' Trustees*, 1914 S.C. 723, where owing to a claim of legitim the trustees experienced difficulty in exercising a power conferred on them by the truster to make over valuable pictures belonging to him to his children, including one of the trustees, at valuation, the Court empowered them to expose these pictures to sale at prices not less than those specified in the valuation, and under the express condition that one of the trustees who was a child of the truster should be entitled to bid at the sale.

"From the decisions in the cases above referred to it appears to the Reporter that an appeal by trustees to the *nobile officium* of the Court for special powers is competent only when under special or unforeseen circumstances the powers craved are required to enable the trustees to carry out the general purposes and intentions of the truster not strictly in accordance with his directions but in the manner best calculated to give effect to his intentions, and that an appeal to the *nobile officium* of the Court is not competent where the powers sought relate to a simple act of management which is either a matter for the trustees' discretion or outwith their powers.

"At the date when the testator made his settlement he was occupying the farm of Nonikiln under a yearly tenancy. The farm might therefore have been let to another tenant or sold to a third party. On the other hand, the testator's relations with the proprietor might have been of such a friendly nature that the testator never contemplated the possibility of his nephew not being able to succeed him in the tenancy of the farm should he wish to do so. It is impossible, therefore, to predicate what instructions or powers the testator would have given to the trustees to meet the situation which has now arisen, viz., the investments of the trust funds in a non-trust investment.

"If your Lordships are of opinion that the application is competent, it appears to the Reporter that it is expedient for the execution of the trust, and not inconsistent with the intentions thereof, if the power craved to purchase the farm of Nonikiln is granted. From the report of Mr Gill, which has been obtained by the petitioners' agents on the suggestion of your Reporter, it will be seen that Mr Gill considers the price at which the farm of Nonikiln has been offered to the petitioners to be fair and reasonable.

"With regard to the power applied for under head second of the prayer of the petition to borrow money upon the security of the said farm of Nonikiln after purchase, and under head third alternatively to remit to a Lord Ordinary to dispose of the application for power to borrow, it appears to your Reporter that this part of the application is not one which falls to be made to your Lordships in the exercise of the *nobile officium* of the Court. Under sections 3 and 16 of the Trusts (Scotland) Act 1867 it appears to your Reporter that an application by trustees for authority to borrow money on the security of the trust estate or any part thereof should be presented to a Lord Ordinary, and that the application should state that it is made under the Trusts Acts, and in particular the Trust Act of 1867, sections 3 and 16.

"Your Lordships may accordingly, in the event of your granting authority to purchase the farm of Nonikiln as craved, think it expedient to remit the petition to a Lord

Ordinary to be disposed of by him under the Trusts Acts. It has been held, however, that where a petition combines an appeal to the *nobile officium* with a prayer under section 3 of the Trusts Act 1867 the Division can competently grant the whole prayer — *Trustees of the Prime Gilt Box*, 1920, 2 S.L.T. 2."

At the hearing of the case in the Summar Roll the petitioners argued—(1) The Court should empower the petitioners to purchase the farm. The will showed that the testator anxiously desired that the stock should be kept together, but a *casus improvisus* had prevented this being done. Accordingly the present case was one which was appropriate for the exercise of the *nobile officium* of the Court—*Wardlaw's Trustees*, 1902, 10 S.L.T. 349; *Coats' Trustees*, 1914 S.C. 723, 51 S.L.R. 642; *Erskine's Trustees* v. *Wemyss*, 1829, 7 S. 594. *Weir's Trustees*, 1877, 4 R. 876, 14 S.L.R. 564, showed how far the Court would go in order to carry out a testator's intentions. *Kinloch*, 1859, 22 D. 174, was distinguishable from the present case where power was sought to carry out a special desire of the testator. In that case, as in *Berwick*, 1874, 2 R. 90, 12 S.L.R. 58, and *Noble's Trustees*, 1912 S.C. 1230, 49 S.L.R. 888, the power sought was a power to perform what was a mere act of administration. *Hall's Trustees* v. *M'Arthur*, 1918 S.C. 646, 55 S.L.R. 609, was also distinguishable, for there the power sought received no support from the will—*see* Lord Johnston's opinion at 1918 S.C. 650, 55 S.L.R. 611, and Lord Skerrington's opinion at 1918 S.C. 653, 55 S.L.R. 613. (2) The Court should empower the petitioners to borrow money upon the security of the farm. Although the granting of power to borrow did not involve the exercise of the *nobile officium* of the Court in as much as power to borrow was conferred by the Trusts (Scotland) Act 1867 (30 and 31 Vict. ch. 97), secs. 3 and 16, under which the application fell to be made to the Lord Ordinary, the power to borrow sought for in this case was merely incidental to the power to purchase, which the Court in virtue of its *nobile officium*, was now asked to grant. In these circumstances the Court could competently grant both the powers craved—*Trustees of the Prime Gilt Box*, 1920, 57 S.L.R. 463.

At advising—

LORD JUSTICE - CLERK — This petition raises a question or questions which are certainly not free from difficulty. The petitioners desire the Court to authorise them as trustees to purchase heritable property, and, that being done, to borrow on the security of it for the purpose of enabling them to carry through the purchase. There are two branches of the prayer, viz.—(1) to authorise the purchase to be made; and (2) to authorise the money to be borrowed so far as necessary to provide the required funds. The reporter quite properly suggests as a difficulty the combination of these two craves in one petition presented in the Inner House. The former is an application to the *nobile officium*; the latter is an application competent before a Lord Ordinary under the Trusts Acts. That might have occasioned considerable difficulty, but this case is so near the case of the *Prime Gilt Box*, 1920, 2 S.L.T. 2, that the difficulty as to procedure may, I think, be held to be removed. I think the views expressed in that case by the Lord President, whose judgment was concurred in by the other members of the First Division, results in this — that where a composite petition of this sort is before one of the Divisions properly, so far as one branch of it is concerned, it is not necessary for the Division, having disposed of the part of the prayer which is competently and properly before it, to remit the balance of the prayer to be disposed of by the Lord Ordinary, not because of any doubts as to the propriety of granting it but simply because that is the Court appropriate for the grant of such a power. I think it would be rather pedantic to hold that it was necessary for the Division to confine itself to granting the prayer only in so far as it was properly before it, *i.e.*, in so far as the *nobile officium* was invoked, and should, merely that a rule of process should be observed, remit the balance to the Lord Ordinary to deal with as appropriate to the jurisdiction which is conferred upon him.

The Lord President in the *Prime Gilt Box* case says this—"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 that is not a case of a petition presented solely under the Trusts Act in any 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 a 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." That judgment seems to me precisely to cover this present case. In a matter of procedure it would certainly be out of the question that a different rule should be adopted in this Division from what has been evidently adopted in the other Division. Apart from questions of procedure there is no substance in the suggested difficulty which was quite properly brought before us by the reporter and explained by Mr Chree. Therefore, so far as the point of procedure is concerned, I think we are clearly bound to follow the course which the First Division adopted in the *Prime Gilt Box* case.

On the merits of the case, while I recognise that there are difficulties in regard to the exercise of our equitable jurisdiction, yet I think that there are circumstances which render this case so exceptional that the duty of exercising the *nobile officium* in the manner which the petitioners ask us to do here is one that we should undertake. It is quite plain from the terms of the trust-deed

that the main purpose of the truster really was to secure that his residuary legatee, viz., his nephew, should, when he attained the age of twenty-one, be left in a position to carry on the farm which had so long been associated with his uncle and with his predecessors. The whole scheme of the deed points to that as being the truster's paramount object. The farm has attained a certain amount of renown as a pedigree cattle stock raising farm. The nephew is now a young man of seventeen, and is preparing himself for the business of an agriculturist which he wishes to practise by conducting this farm. The truster and his mother were joint tenants of the farm under a lease in favour of them and the survivor. The mother having died, the truster continued in possession of the farm under the lease, and after its expiry has continued to stay on by tacit relocation. The truster's family and himself on the one hand, and the landlord and his predecessors on the other, have always been on excellent terms, and they were content to let the matter go on from year to year by tacit relocation. The truster quite plainly contemplated that that condition of things would continue. Unfortunately he had not taken into consideration the possibility, which has now become fact, that there might be a change in the ownership of the farm. The estate has been sold to a new owner, and the new owner in turn desires to sell the estate, and has intimated to the petitioners that failing their purchasing the farm they will have to leave, and the farm will be exposed along with the rest of the estate to public sale, and probably will be sold to some outside party. If that occurred it would be impossible to carry out the beneficial scheme of the trust-deed so far as the residue is concerned, In these circumstances the petitioners have applied for authority to purchase the farm and, the trust funds available not being sufficient to meet the whole purchase price, to borrow on the security of the farm what is necessary to make up the difference. The figures are considerable, although not excessive in the present circumstances. The total price asked for the farm is £5640. The farm extends to 250 acres of which 239 are arable. The rent is £235, which seems small for an arable farm, but it is explained that the small rent is due (firstly) to the friendly relationship existing between the former owner and the tenant, and (secondly), and perhaps incidentally to the former, to the fact that the present high condition of the farm is largely due to the large amounts of money spent by the tenant in improving the farm and raising it to a condition which probably was very different from its condition at the time when the rent was originally fixed. The petitioners have some £4000 available in cash to meet the price, and they ask leave to borrow an additional sum of £2000 in order to provide the £1640 and the necessary expenses in connection with the purchase.

There are difficulties of course with regard to our granting these powers, but unless these powers be granted the main purpose of the trust-deed will be completely frustrated. It seems to me that the facts are so special that again it would be almost pedantic if we were to throw difficulties in the way of enabling the petitioners to carry out what was clearly the main purpose of the truster when he executed this trust-deed. The most helpful case in this matter to which we were referred was the case of *Hall's Trustees* v. *M'Arthur* (1918 S.C. 646), especially what was said by Lord Johnston and Lord Skerrington in reference to the previous case of *Coats*, 1914 S.C. 723. Lord Johnston said (at p. 650)—"In the matter of trusts, which are an important branch of its exercise"—he is speaking of the *nobile officium*—"resort to it has been practically confined to cases where something administrative or executive is wanting in the constituting document to enable the trust-purposes to be effectually carried out, and such cases are now largely met by the modern Trusts Acts. But where any such executive or administrative provisions are wanting in the trust-deed the Court will not interfere, for the Court in Scotland does not undertake, as does the Court of Chancery in England, the administration of trusts. In the present case no such executive or administrative provisions are wanting; on the contrary they exist in exceptionally full and carefully thought out measure." Lord Skerrington, referring to *Coats*' case, said (at p. 653)—"It was, I think, a typical illustration of the *nobile officium* that, when objection was taken to the machinery devised by the testator as not being the best in the circumstances, something better should be substituted. That, I say, is a typical illustration of the exercise of the *nobile officium*, where something has to be done which is right and necessary, and the machinery for doing it is either wanting or defective." In that case both Lord Johnstone and Lord Skerrington referred to the fact that the machinery, or, as Lord Johnston put it, "the administrative and executive provisions," was or were awanting. That is exactly what we have got here. There is no difficulty in understanding what the truster intended and desired to do. The only difficulty is caused by the occurrence of circumstances which he had not taken into account, and which has produced a state of facts the effect of which, unless the Court interfere, or unless, at any rate, the trustees do what they desire to obtain the authority of the Court to do, the whole purposes of the trust, apart from some minor purposes, will be frustrated. In these circumstances I think we may grant the powers that the petitioners ask for, on the ground that it is only by so doing that the main purpose of the trust can be carried out, and that there could really be no doubt that, if the truster had foreseen the position of things which has now come about, he would have made provision for it. I think that, if one may say so, this case will be like that of *Coats*, an exceptional one, which cannot be, and certainly was not intended to be, treated as a precedent. But however that may be, it seems to me that the petitioners have shown a case in which it would

be unfortunate if, through adhering to what may be regarded as the strict letter of the law, we were to prevent them—for no good reason as far as I can see—from carrying out what was clearly and distinctly stated by the truster as the purpose which he most of all desired to have carried out.

Accordingly, while I quite recognise the delicacy of the position, I think, on the whole matter, the circumstances are such that we should be well advised in granting and have power to grant the prayer of this petition.

LORD DUNDAS — I agree. I think this petition is one which the Court would be disposed and indeed anxious to grant if it can properly and competently do so. The whole circumstances stated in the excellent report by Mr Whitelaw seem to point all in one direction. It was plainly the wish and indeed the leading wish of the testator that this nephew of his should have the farm and the special shorthorn stock upon it. The young man is desirous of owning the farm. He is in minority and his curator also desires it. The skilled reporter tells us that the price proposed is a reasonable and proper one.

I think that we may grant the prayer of the petition without trenching in any way upon previous authority. The petition is not one where trustees come to ask the advice of the Court as to the precise extent of their powers in regard to some contemplated act of administration or management. It is one where the trustees desire powers to carry out what was plainly the wish of the testator in the way best calculated to reach that end, though not strictly in accordance with his directions owing to the absence of an express power to buy. I agree with your Lordship that this seems to be a case in which we can properly supply the want of machinery, and I think that the observations of Lord Johnston and Lord Skerrington in *Hall's* case (1918 S.C. 646) point in that direction. If we may grant the power to purchase, I think there is no difficulty in our also granting the ancillary power to facilitate that end by borrowing. Whatever difficulty there might have been seems to have been removed, as regards the procedure in that matter, by the very recent case in the First Division of the *Prime Gilt Box*.

Upon the whole, therefore, I am for granting the prayer.

LORD ORMIDALE—The leading purpose of the truster's settlement here is clear that the farm with the shorthorn stock should be preserved for his nephew. The nephew is still in minority. The truster made anxious provision for due effect being given to his settlement in the circumstances which existed when he himself was alive and which he assumed would continue to endure after his decease. As a matter of fact a *casus improvisus* has happened, to wit, the purchase of the farm by a new proprietor who proposes to sell it. In these circumstances it is obvious that the very clearly expressed object of the truster will be defeated unless the power sought is granted, because the trustees are not provided under the settlement with machinery which will enable them to give effect to the truster's desires. The circumstances appear to me, as your Lordship has stated, exceptional; but I think that the Court is warranted in the excerise of its *nobile officium* in granting the trustees the power that they crave.

On the other point, as to the power to borrow, I think we are warranted in granting that power by the case of the *Prime Gilt Box*.

The Court pronounced this interlocutor:—

"Approve of the report; grant warrant to, authorise, and empower the petitioners to purchase from Charles William Dyson Perrins or his successors at the price of £5640, with entry at Whitsunday 1921, all and whole the farm and lands of Nonikiln mentioned in the petition: Further authorise the petitioners to borrow money to an amount not exceeding the sum of £2000 on the security of the said subjects, and to grant a bond and disposition in security or bonds and dispositions in security over said subjects for a sum or sums not exceeding in all the said amount of £2000 in favour of the lender or lenders: Authorise the expenses of and incident to this application, and of the conveyance and bond and disposition or bonds and dispositions in security and whole consequents thereof, including the discharge or discharges thereof, to be charged against the trust estate of the deceased Thomas Alexander Anderson ; and decern."

Counsel for the Petitioners—Chree, K.C. — Scott. Agents — Aitken, Methuen, & Aikman, W.S.

Tuesday, February 1.

SECOND DIVISION.

[Sheriff Court at Glasgow.

DAVISON *v.* ANDERSON AND ANOTHER.

Process—Appeal—Competency—Interlocutor Recalling Decree in Absence—"Any Action Pending in Any Sheriff Court at the Commencement of this Act"—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 27, *and First Schedule, Rule* 33—*Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28), *sec.* 5.

The Sheriff Courts (Scotland) Act 1907, as amended by the Sheriff Courts (Scotland) Act 1913, enacts — Section 27— "Subject to the provisions of this Act an appeal to the Sheriff shall be competent against all final judgments of the Sheriff-Substitute, and also against interlocutors—(E) *refusing a reponing note.*" [*The words printed in italics were added by the Act of* 1913.] The First Schedule provides, Rule 33— "Any interlocutor or order recalling, or incidental to the recal, of a decree