SUMMER SESSION, 1922.

COURT OF SESSION.

Friday, May 12.

SECOND DIVISION.

SNODGRASS, PETITIONER.

Process—Nobile Officium—Trust—Administration—Presumption against Childbearing—Application to Nobile Officium of the Court to Obtain Payment of Legacy.

A testator disponed his whole means and estate to his son subject to the condition that the latter paid to A (the testator's daughter), whom failing to her children equally among them if more than one, a legacy of £13,500. He further provided that the legacy was to be a real burden upon his heritable estate, and that it should be paid over to trustees for behoof of A in liferent and her children in fee, and failing children for such persons as she might appoint. A having no children appointed the legacy to herself, and being at the date of the deed of appointment fifty-nine years of age and unmarried presented a petition craving the Court in virtue of its *nobile officium* to authorise the trustees to pay over the legacy to her. *Held* that an application to obtain payment of a legacy held by trustees by way of an application to the *nobile officium* of the Court was incompetent, and petition *refused*.

On 1st March 1922 Miss Mary Anderson Snodgrass, Dowanhill, Glasgow, presented a petition to the Second Division in which she craved the Court in virtue of its *nobile officium* to grant authority to Dr David Murray, writer, Glasgow, and herself, the sole remaining trustees under the trust-disposition and settlement and codicils of the late John Snodgrass, grain miller, Glasgow, to make payment to her (the petitioner) of a legacy amounting to £13,500.

The petition stated—"1. John Snodgrass, grain miller, Glasgow (hereinafter called the testator'), died on or about 5th February 1896 leaving a trust-disposition and settlement dated 12th August 1880, and with four codicils thereto, dated respectively 6th June 1882, 11th November 1884, 4th June 1888, and 31st March 1892, registered in the Books of Council and Session 13th June 1896. 2. By said trust-disposition and settlement the testator assigned and disponed to and in favour of his son James Fullarton Snodgrass, grain miller, Glasgow, and his heirs and assignees whomsoever, all and sundry his whole means and estate. . . . 3. One of the provisions in the said trust-disposition and settlement, subject to which the testator assigned and disponed his means and estate to the said James Fullarton Snodgrass, was payment by the said James Fullarton Snodgrass as soon as was convenient for him but not later than seven years from the date of the testator's death, with interest on so much as might be from time to time unpaid at the rate of 5 per cent. per annum from the date of the testator's death until payment, to the petitioner, whom failing to her children equally among them if more than one, of a legacy of £13,500. 4. By said trust-disposition and settlement the testator, *inter alia*, provided and declared that the said legacy of £13,500 should form a real lien and burden upon his heritable estate, and that the same should not be paid to the petitioner but to John Snodgrass, a son of the testator, and to the said James Fullarton Snodgrass and David Murray, writer, Glasgow, and the acceptors and acceptor and survivors and survivor of them (a majority so long as there were more than two trustees being a quorum) as trustees, to be held by them in trust for behoof of the petitioner in liferent and of her children in such proportions, on such conditions, and under such restrictions and limitations as she might appoint by any writing whether testamentary or otherwise under her hand, which failing equally among them, and failing children for such person or persons or for such purpose or purposes as the petitioner might appoint by any such writing as aforesaid, which also failing for behoof of the petitioner's nearest heirs whomsoever in fee. 5. By said codicil dated 11th November 1884 the testator, *inter alia*, provided and declared in the event of the petitioner predeceasing him, or in the event of her surviving him but failing to exercise the power of division conferred upon her by

said trust-disposition and settlement, that the said legacy of £13,500 should be payable to such children in the event of sons when they respectively attained the age of twenty-one years, and in the case of daughters when they respectively attained that age or were married, whichever of these events should first happen, and should vest in them respectively as at the term of payment, and that in the event of any of such children dying before the said term of payment without leaving issue the share of such deceaser should fall to and be divided equally among the survivors and survivor of his or her brothers and sisters jointly with the issue of any of them who might have predeceased leaving issue, such issue succeeding equally to the shares to which their parent would have been entitled if in life. . . . 9. The said sum of £13,500 was duly paid over by the said James Fullarton Snodgrass to himself and the said David Murray as trustees foresaid, and they continued to hold it until 24th January 1902, when they assumed the petitioner as a trustee under said trust-disposition and settlement and codicils, conform to deed of assumption and conveyance dated 24th January and registered in the Books of Council and Session 1st February 1902. 10. The said James Fullarton Snodgrass died on or about 26th November 1916. The said David Murray and the petitioner are the sole remaining trustees under said trust-disposition and settlement and codicils, and continue to hold the said legacy of £13,500, represented by investments amounting in value to the sum of £13,368, 11s. 8d. as at 11th November 1921, in terms of said trust-disposition and settlement and codicils. 11. The petitioner has in virtue of the powers conferred on her by said trust-disposition and settlement appointed the said legacy of £13,500 represented as aforesaid to herself absolutely, and directed that the same be paid over to her as the person entitled thereto in virtue of said trust-disposition and settlement and codicils, conform to deed of appointment dated 17th February 1922. 12. The petitioner was born on 30th November 1862. She has never been married and has no children, and being fifty-nine years of age she is now past the age at which it is possible that she should have issue. She has reached an age beyond the utmost limit of authentically known childbearing, ordinary or extraordinary. She maintains that the restriction of her interest in the said legacy of £13,500 to a liferent was applicable only in the event of her having children, and that that event now having become impossible and having validly appointed the legacy to herself, she is now entitled to payment thereof. It is necessary, however, that the trustees should obtain judicial authority before making payment to her, and she submits that in the circumstances your Lordships should in the exercise of your *nobile officium* grant such authority. Such payment would not affect the interest of any living person except herself. 13. The petitioner is willing to find caution to make repetition in the event, which she avers is impossible, of a child being born to her, but in the whole circumstances she submits that the prayer of the petition should be granted without her being required to find caution."

No answers having been lodged by the trustees, counsel for the petitioner was heard in the Single Bills on 12th and 13th May 1922.

Argued for petitioner — It was in the power of the Court in virtue of its *nobile officium* to grant the authority craved. The petitioner was past the age of childbearing. If any inquiry was necessary a proof should be allowed. The following authorities were cited :—*Anderson* v. *Ainslie*, 1890, 17 R. 337, 27 S.L.R. 276 ; *Beattie's Trustees* v. *Meffan*, 1898, 25 R. 765, 35 S.L.R. 580 ; *De la Chaumette's Trustees* v. *De la Chaumette*, 1902, 4 F. 745, 39 S.L.R. 524 ; *Turnbull* v. *Turnbull's Trustee*, 1907, 44 S.L.R. 843 ; *Rackstraw* v. *Douglas*, 1917 S.C. 284, 54 S.L.R. 224 ; *In re Dawson*, (1888) L.R., 39 C.D. 155 ; *In re Hocking*, [1898] 2 Ch. 567.

Lord Justice-Clerk—[*After narrating the material averments in the petition*]—This is not a petition in which the trustees have taken any interest. They have not lodged answers and have not appeared. It is a petition which has to do with the administration of a private trust.

Counsel for the petitioner mainly argued on the merits of the petition that the recent case of *Rackstraw* (1917 S.C. 284) concluded the question as to when a woman must in law be considered past the age of childbearing. But to my mind a more important question so far as this case is concerned is whether this is a proper application to the *nobile officium* of the Court. The matter was considered in some recent cases. In the case of *Berwick* ((1874) 2 R. 90) a petition, which was not brought under the Trust Acts, was presented to the Lord Ordinary (Lord Curriehill). His Lordship reported the case to the First Division, and it was ultimately dismissed as incompetent. The Lord President said — "I think it is important to notice that this is not an application by tutors-nominate but by trustees. . . . Neither is this a case under the Trust Acts. The powers of trustees are defined by the trust deed, and the Court will give no higher power. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed it is not competent for us to give it them. I think, therefore, that the petition should be dismissed as incompetent." Lord Deas, who was the only other Judge to deliver an opinion in the case, 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." Lord Ardmillan and Lord Mure concurred. That was not an appeal to the *nobile officium*, but in two subsequent cases appeal was made to the *nobile officium*. In *Noble's Trustees* (1912 S.C. 1230), where the application was made

by testamentary trustees, Lord Kinnear (at p. 1233) remarked—"It appears to me that the proper course for the Court to take is that which is, I think, authoritatively fixed by the judgment of this Division in the case of *Berwick*," and after quoting the above passages from the opinions of the Lord President and Lord Deas he concluded—"I am therefore of opinion that this petition must be dismissed," and that was done. In the case of *Scott's Hospital Trustees* (1913 S.C. 289) in the following year, where a petition was presented to the Court for authority to vary the terms of investment which a trust settlement provided, the case of *Berwick* was again referred to and the Lord President's opinion again quoted by the Lord Justice-Clerk, who said—"The donor of this estate has so very clearly expressed himself that we cannot do otherwise than follow his direction. . . . I do not think it is in the power of this Court, merely because we think it expedient, to set aside the direction of the truster, against which nothing can be said except that it may not be possible to invest the money in land so as to get the same or a better return than was got from Craibstone." Lord Dundas and Lord Salvesen concurred, and the Court refused the petition. I do not say that these cases are in all respects the same, but they show the lines on which applications may be made to the *nobile officium*. Mr Jamieson told us he knew of no case he could found on, and furthermore, he argued that he should be allowed to have a proof in the matter. I am not aware of any case where proof was allowed in an application to the *nobile officium* of the Court, and to my mind this is not a case which can be competently dealt with under the *nobile officium*. If this lady has a legal right to get payment of the money it seems to me she should vindicate that right by other means than an application to the *nobile officium*. I am of opinion that we should refuse the petition on the ground that it is not properly brought before the Court.

In these circumstances I think it is undesirable that we should express any opinion on the merits of the question which Mr Jamieson argued before us, and I do that for practically the same reasons as I see were given by the Lord Chief-Justice in the case of *Tindall* v. *Wright*, which was reported in the Weekly Notes for 15th April 1922. I am therefore for refusing the petition on the ground that it is not properly brought before us as one we could entertain under the *nobile officium*.

LORD SALVESEN—I have considerable sympathy with the petitioner in this case, because I think that certain observations which were made by the Judges of this Division in the case of *Turnbull* (44 S.L.R. 843) seem to point to a petition to one of the Divisions of the Court as being the proper mode in which the petitioner could obtain the remedy which she seeks. But I am disposed to think that these observations do not go the length of holding that it would have been incompetent for the Lord Ordinary in that case to have decided the matter in controversy in the same way in which it was ultimately decided in *Turnbull's* case, but merely that they thought in view of the previously decided cases that it was not surprising that the Lord Ordinary had shrunk from giving a decision such as that which the Division ultimately pronounced. Had the case come before us in the form in which it did in *Turnbull's* case, assuming there was no distinction as regards the terms of the bequest, I confess I should have followed gladly the decision that the Second Division pronounced, and indeed that decision is binding upon us. But the petitioner here has not adopted the procedure that was followed in *Turnbull's* case, and I agree with your Lordship in the chair that this is not a proper application to the *nobile officium* of the Court. The question of right as between the beneficiary and the trustees must be determined in the Court of Session, beginning in the ordinary course in the Outer House, and cannot be brought by petition before us to invoke the *nobile officium* which is only inherent in the Divisions. It may be that *Turnbull's* case proceeded on the same equitable grounds as have commended themselves to the Courts in England in establishing an exception to a presumption of law that has been declared in both countries where the only parties interested were the children of the person who desired to obtain an estate in fee, but whether the appeal is made to the Court as a court of law or a court of equity it must be made to that section of the Court which in the first instance disposes of such questions. Accordingly in the result at which your Lordship has arrived that this petition must be refused I entirely concur. I may, however, say that if the case had come before us on the merits I should have had no difficulty in following the decision in *Turnbull's* case, assuming it to be applicable to the circumstances of the present case.

LORD HUNTER—I agree. The petitioner in this case desires to get payment of a legacy held by trustees. She seeks to get that payment by way of an application to the Court to exercise the discretion vested in it in virtue of its *nobile officium*. I know of no case where such an application has ever been granted. It is not suggested that there ever has been such an application entertained. In my opinion it would be a very bad practice to innovate on recognised procedure and introduce such a form of application as that before us, because it appears to me that whenever a person had a petitory right but thought it better to appeal to the *nobile officium* he might do so. On these grounds I think it is clear the application is incompetent. The proper form of procedure for a beneficiary who desires payment from trustees is by direct claim against the trustees. If the trustees refuse or have any difficulty in paying they can present their case by way of defence. In fact it is obligatory upon them to put forward any reasonable ground they may have for refusing, and the matter will then be dealt with by the Court in ordinary form. I do not understand that the

Court is precluded from exercising an equitable jurisdiction altogether independent of an application to the *nobile officium*, and that jurisdiction has been exercised favourably towards a pursuer who was in a somewhat similar position to the petitioner. So far as the merits of the present case are concerned, like your Lordship in the chair I desire to express no opinion one way or other. The matter may come up in some subsequent procedure.

LORD ORMIDALE—I agree. I look upon the matter that has been submitted for the consideration of the Court as merely the construction of the trust-disposition and settlement. That is not a matter for the equitable power that rests in the Inner House of the Court of Session. It is simply a question of law, and is just as competent in the Outer House as any other question of law, and therefore I entirely agree with your Lordships that we cannot exercise the *nobile officium* as we are asked to do with the view apparently of giving to this trust-disposition an interpretation more favourable to the petitioner than is warranted in law. So far as is disclosed in the petition the trustees and the beneficiary appear to be at variance. The trustees have not indicated their attitude. The petition discloses no circumstances of distress and nothing making the administration of the trustees difficult—considerations in which it may be possible for the Court in virtue of the *nobile officium* to exercise a jurisdiction which in strict law might not be warranted.

The Court refused the prayer of the petition.

Counsel for the Petitioner — Jamieson. Agents—J. & J. Ross, W.S.

Tuesday, May 16.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

M'CLYMONT'S TRUSTEES, PETITIONERS.

Trust—Trusts (Scotland) Act 1921 (11 *and* 12 *Geo. V, cap.* 58), *sec.* 24—*Petition for Authority to Complete Title—"Entitled to the Possession for his Own Absolute Use."*

The Trusts (Scotland) Act 1921, sec. 24, enacts that "Any person who shall be entitled to the possession for his own absolute use of any heritable property or moveable or personal property the title to which has been taken in the name of any trustee who has died or become incapable of acting without having executed a conveyance of such property . . . may apply by petition to the Court for authority to complete a title to such property in his own name. . . ."

Held that the above enactment did not apply to a body of trustees who, though beneficiaries in fee under the testator's settlement, were not entitled to the possession of the property for their own absolute use.

This petition was presented by William M'Creath and others, trustees under "The M'Clymont Trust," *petitioners*. The circumstances in which it was brought are sufficiently set forth in the opinion of the Lord Ordinary (ASHMORE) *infra*.

Opinion.—"This is a petition by the trustees of 'The M'Clymont Trust' for authority to complete title in terms of section 24 of the Trusts (Scotland) Act 1921 to the trust estate of the late Mrs Ross.

"The circumstances under which the petition is presented are as follows:—The late Mrs Ross, by holograph letters dated in 1879 and 1881, appointed trustees to hold £3000 provided by her, with instructions (*a*) to make payment of the free annual proceeds to five liferenters and the survivors and survivor, and (*b*) to convey the principal sum to the trustees under the trust settlement of her uncle, the late Archibald MacClymont, to be applied for the purposes of the trust created by his settlement.

"The trustees nominated by Mrs Ross having died without assuming new trustees, on application to the Court new trustees were appointed.

"All the trustees have now died without assuming new trustees, and all the liferenters under Mrs Ross's trust are also dead.

"The sum of £3000 provided by Mrs Ross as aforesaid has been partly invested by her trustees in the purchase of heritable properties and in loans on heritable security, and the titles to these properties and securities have been completed in name of Mrs Ross's trustees.

"In the events that have happened the petitioners, as the trustees acting under 'the M'Clymont Trust,' are entitled to a conveyance of Mrs Ross's said trust estate to be applied by them for the purposes of the M'Clymont Trust.

"In these circumstances counsel for the petitioners maintained that section 24 of the Act of 1921 is applicable.

"In my opinion authority to complete title in the summary method of the statutory provision founded on without reconstituting the lapsed trust is inappropriate in the circumstances.

"The person who can take advantage of section 24 must either himself be entitled to the possession for his own absolute use of property which was vested in the trustees, or must have derived right from someone so entitled.

"Now the petitioners are not in either of these positions. In the first place their right to the property is not absolute or unlimited. They are entitled to possession of it only as trustees for the purposes of the trust created by the will of the late Archibald MacClymont.

"In that respect the case is in contrast with the case of *Trotter*, 1895, 3 S.L.T. 57.

"Secondly, the alternative provision of section 24 is inapplicable, and indeed counsel for the petitioners did not found on it. I may explain, however, that in my opinion it represents an extension of the scope of the analogous section, viz., section 14, of the Trusts Act 1867, so as to include the assignee of a beneficiary under a lapsed trust—an