opposite agent it has been held are not imperative but directory only, but in point of fact they have been implemented. No doubt the inveterate and proper practice is also to lodge the reclaiming note with the Clerk of the Division to which the cause belongs, but that is not enacted by the Act of Parliament of 1825. Nor do I find any definite statutory provision to that effect in section 4 of the 1838 Act. What that section says is—[*His Lordship read the section*]. "It shall be carried" is vague, not to say cryptic, there being no precise statement as to the person by whom the cause is to be carried, though practice has no doubt recognised it as meaning the party by whom the cause has been removed to the Inner House. The position here therefore is that the reclaimer has removed the cause to the Inner House, but he failed to carry it, in the first instance at any rate, to the Division set forth in the *partibus* and lodged the reclaiming note with the Clerk of the other Division. That was a blunder, but it was in theory at least if not practically susceptible of instant correction, it appears to me, by the Clerk, who should have refused to receive the note, and it would then, no doubt, on the error being pointed out, have been taken at once to the Clerk of the other Division and all would have been well. In the circumstances, as no imperative provision of any statute has been breached—we were not referred to any Act of Sederant—and as Mr Gilchrist admitted that the respondent had not suffered any prejudice by the blunder, I think we should repel the objection to the competency and send the case to the roll.

The view that I have expressed receives support from the case of *Ledingham* (21 D. 844), to which Mr Gilchrist, as bearing on the question, although in a sense not favourable to his own contention, very candidly and properly referred us.

Lord Anderson—In accordance with the procedure set forth in the Court of Session Act 1838, sec. 4, in conjunction with the statutory enactments prescribing the periods within which reclaiming notes must be taken, a reclaimer is bound to do two things—(1) to present a reclaiming note within the reclaiming days to the Inner House, and (2) to "carry" the reclaiming note to the Division named on the *partibus* of the summons. The former step was duly taken by the reclaimer's advisers, and a reclaiming note against the Lord Ordinary's judgment was timeously presented to the Inner House on the second box-day in April. A blunder, however, was made as regards the second step, because instead of lodging the reclaiming note in the office of this Division, to which the case had been marked on the *partibus* of the summons, the reclaiming note was lodged in the office of the First Division. The papers were received without demur by the Clerk of that Division, and they remained in the office of that Division until Wednesday last. In my opinion the plain implication of the 4th section of the Act of 1838 is that the reclaiming note should be "carried" to the office of the appropriate Division within the reclaiming days, and the duty of seeing that this is done is primarily on the reclaimer's agent. But it may be that the Clerk of Court is not without responsibility in the matter, and that he has a duty to examine the process to ascertain whether or not it belongs to his Division. Had the mistake been pointed out at the time of presenting the reclaiming note the reclaimer's agent could have lodged the note timeously in the office of the Second Division. This, however, was not done, and the blunder was not discovered until the case appeared in the Single Bills of the First Division. In view of the fact that an official of Court was perhaps to some extent responsible for what has occurred, I am of opinion that we may repel the objection taken to the competency of the reclaiming note.

The case of *Ledingham* (21 D. 844) is, moreover, an authority to the effect that it is within the competency of the Court to excuse a blunder of this nature, and I agree with your Lordships that in the present case this should be done and the case sent to the roll.

The Court appointed the cause to be put to the roll.

Counsel for the Pursuer (Reclaimer)—Ingram. Agents—Ketchen & Stevens, W.S.

Counsel for the Defender (Respondent)—Gilchrist. Agents—M. J. Brown, Son, & Company, S.S.C.

Saturday, May 19.

FIRST DIVISION.

(Single Bills.)

[Lord Anderson, Ordinary.

NESS *v.* MILLS' TRUSTEES.

(*Reported ante*, January 17, 1923, *supra*, p. 241.)

Process—Repetition of Judgment—Interlocutor Pronounced in Ignorance of Pursuer's Death—Sist of Pursuer's Executrix.

In an action of declarator and payment against testamentary trustees an interlocutor assoilzieing the defender was pronounced in ignorance of the pursuer's death. On the application of the pursuer's executrix the Court *sisted* her as pursuer in room of the deceased and of new *assoilzied* the defenders.

The circumstances in which the action was raised are narrated in the previous report *ut supra*.

On the 17th January 1923 the Court assoilzied the defenders. Thereafter a note was presented to the Lord President by Mrs Stewartina Mary Ness or Scott, which included the following passage:—"Since the said interlocutor [viz., the interlocutor of 17th January assoilzieing the defenders] was pronounced it has come to the knowledge of the pursuer's agents that the said Mrs Mary Stewart or Ness died on 29th November 1922. The minuter is her sole accept-

ing executrix nominated and appointed by her settlement dated 21st June 1922. In these circumstances the minuter desires to be sisted as executrix foresaid in room and place of the said Mrs Mary Stewart or Ness as pursuer in this action. It would also appear to be necessary to rehear the parties, or to have the said interlocutor repeated without a rehearing. The minuter without acquiescing in the terms of the said interlocutor is prepared to concur in the latter course."

Counsel for the minuter cited the case of *Gibson's Trustees* v. *Gibson*, 7 Macph. 1061.

Counsel for the defenders stated that he did not oppose the motion.

The Court sisted the minuter as pursuer in the cause, and of new assoilzied the defenders from the conclusions of the summons.

Counsel for Minuter — Keith. Agents—Simpson & Marwick, W.S.

Counsel for Defenders — J. A. Christie. Agents — Henderson, Munro, & Aikman, W.S.

Saturday, May 19.

FIRST DIVISION.

TRUSTEES FOR UNITED ORIGINAL SECESSION CONGREGATION IN STRANRAER, PETITIONERS.

Trust—Charitable Bequest—Cy près Scheme — Incorporation in Scheme of Power to Sell Heritage—Sale of Heritage Expressly Prohibited by Trust Deed—Nobile Officium — Trusts (Scotland) Act 1921 (11 *and* 12 *Geo. V, cap.* 58), *secs.* 5 *and* 26.

Process — Trust—Petition for Approval of Cy près Scheme, including Power to Sell Heritage—Nobile Officium.

A charitable bequest of the income of certain heritable property having become inoperative the trustees presented an application to the Court for approval of a *cy près* scheme. In their application the petitioners craved the Court to allow the incorporation in the proposed scheme of a general power of sale of the heritable property. Alienation of the heritable property was expressly prohibited by the terms of the trust.

Circumstances in which the Court, in the exercise of its *nobile officium, sanctioned* the proposed scheme, and in view of the old and dilapidated condition of the heritage *allowed* the incorporation of a general power of sale, the incorporation of the power to sell being essential to prevent the new scheme proving abortive and inoperative.

The Trusts (Scotland) Act 1921 (11 and 12 Geo. V, cap. 58) enacts—Section 5—"It shall be competent to the Court, on the petition of the trustees under any trust, to grant authority to the trustees to do any of the acts mentioned in the section of this Act relating to general powers of trustees, notwithstanding that such act is at variance with the terms or purposes of the trust, on being satisfied that such act is in all the circumstances expedient for the execution of the trust. . . ." Section 26—"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, . . . and all such petitions shall as respects procedure, disposal, and review be subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary in virtue of the Court of Session Act 1857 (20 and 21 Vict. cap. 56): Provided that when in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such scheme, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled. . . ."

Peter Tait and others, as trustees for the now dissolved United Original Secession Congregation in Stranraer, *petitioners*, presented a petition to the First Division for approval of a scheme for the application and administration of the trust estate in consequence of the dissolution of the said congregation.

The petition stated, *inter alia*—"That the late Mrs Isabella M'Master or Kevan, who resided in Stranraer, died on 9th July 1862 leaving a trust-disposition and settlement. . . . By her said trust-disposition and settlement the testatrix conveyed to her trustees her whole estate, including, *inter alia*, two heritable properties, for the purposes after mentioned:—In the second place, the trustees were directed to convey the two properties above mentioned to the managers for the time being of the Original Secession congregation in Stranraer and their successors in office under the conditions and for the purposes following:—'*First.*—The said two properties in Stranraer shall for ever be inalienable by the said managers or their successors in office under pain of nullity, and they shall be bound to pay out of the first of the rents an allowance of ten pounds sterling yearly to the present or any future incumbent minister in the Original Secession Church in Sun Street, Stranraer, and that over and above the usual and regular allowance of salary or stipend payable to him from the congregation, to enhance his income in all time thereafter. *Second.* — After paying said ten pounds yearly and defraying feu and other duties with repairs, the balance of rents of said two subjects is to be appropriated in extinguishing the debts on the said Original Secession Church and congregation, or in the option of the managers said balance may be applied in assisting to erect a manse for the minister of said congregation, which when done and in all time thereafter the balance of said rents to be used and applied by the said managers for congregational purposes only.' . . . The estate of the testatrix was not