

ing took place, or did he provide that the selection of his institute should be postponed until the debt had been paid off out of the accumulated rents and out of no other source? Looking at the matter as a question of common sense and the construction one has to give to the language used by the testator, I have not much doubt that I should answer the first of the two questions in the affirmative.

If I require authority, however, for that course, I think it is to be found in the decision of *Home's Trustees*, 1921 S.C. 474, to which we were referred. This case appears to me to be a *fortiori* of that decision. On the other hand, the case of *Scarlett*, 1907 S.C. 811, was a very special case. There it was quite impossible that the trustees could follow the course which they were asked to adopt at the time the request was made without disregarding certain of the provisions of the testator to which your Lordship has made reference.

I agree that the questions should be answered as suggested by your Lordship.

LORD ANDERSON—I am of opinion that question (a) should be answered in the affirmative for these reasons—(First) because the only subsisting trust purpose is payment of debts and legacies. There is no liferenter or annuitant, as there was in the case of *Scarlett*, 1907 S.C. 811, whose rights might be prejudiced by the termination of the trust. In *Scarlett* there were also other trust purposes, fulfilment of which necessitated the continuance of the trust. My second reason is because of the terms of the sixth clause of the trust-disposition and settlement. This clause suggests the source from which the debts and legacies were to be paid. To the mind of the truster the accumulated rental was the most likely source, and the only one he could have in contemplation. But this is not the only possible source, and the language of the trust deed does not make it the sole source. It is not made imperative for the trustees to pay from accumulated rental. They are not even directed to do so. In this last respect this case is a *fortiori* of *Home's Trustees*, 1921 S.C. 474, which otherwise seems a direct authority in favour of the second party. The case of *Scarlett* is in contrast with the present case and with *Home's Trustees*, in respect that in *Scarlett* it was made imperative to pay the debts from accumulations. The argument of the third parties was to the effect that it was not legitimate for the first parties to accept the second party's offer and thereby anticipate the time contemplated by the truster for the execution of the entail. But the time contemplated by the truster for this event was the date when debts and legacies should have been paid. If, then, the trustees can legitimately pay these debts and legacies from the funds offered by the second party—as I think they can—there is no anticipation of the time contemplated by the truster.

LORD ORMDALE did not hear the case.

The Court answered the first question

in the affirmative and the second in the negative.

Counsel for the First and Third Parties—Leadbetter, K.C.—Macdonald. Agents—Russell & Dunlop, W.S.

Counsel for the Second Party—Chree, K.C.—Maconochie. Agents—Fraser, Stodart, & Ballingall, W.S.

Saturday, July 7.

## FIRST DIVISION.

### EDINBURGH SOUTHERN CEMETERY COMPANY, LIMITED, PETITIONERS.

*Company—Alteration of Objects—Cemetery Company—Powers to Carry on Business as Masons, Quarriers, Florists, or Gardeners—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 89), sec. 9 (1).*

The Companies (Consolidation) Act 1908 enacts—Section 9 (1)—“Subject to the provisions of this section a company may by special resolution alter the provisions of its memorandum with respect to the objects of the company so far as may be required to enable it (a) to carry on its business more economically or more efficiently; or . . . (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company. . . .”

A company, the objects of which were to acquire and enclose and lay out ground as a place of interment, to dispose of the ground for the purpose of burial, and to provide chapels and vaults or other buildings requisite and proper for a cemetery, by special resolution altered the form of its constitution by substituting for a contract of copartnership a memorandum and articles of association in which were included, *inter alia*, the following additional objects:—“To carry on business . . . as owners of cemeteries or burial grounds, and crematoriums, stone and marble cutters, masons, quarriers, and sculptors, florists, gardeners, and undertakers.”

On a petition by the company for confirmation of the proposed alterations the Court granted the powers craved, but only in so far as these could be used in connection with and incidental to the main business of the company as owners of cemeteries or burial grounds.

The Edinburgh Southern Cemetery Company, Limited, incorporated under the Companies Acts 1908 to 1917, presented a petition for confirmation of alterations in the form of its constitution and of its objects as effected by a special resolution in terms of the Companies (Consolidation) Act 1908, sections 9 and 264.

The petition stated, *inter alia*—“1. The constitution of the company consists of a contract of copartnership dated on or about 12th February 1845, with various resolutions,

altering and adding to the same, passed at meetings of the partners held prior to the aforesaid date of incorporation. 2. That by article 2 of the said contract of copartnership it is provided 'That the object of this company shall be to enclose and lay out the ground acquired from Sir Thomas Dick Lauder of Grange, Baronet, for behoof of the company, extending to ten acres imperial measure' [and bounded as therein described] 'being part of the estate of Grange near Edinburgh, and also if thought expedient . . . to feu or purchase additional ground, properly situated, likewise in the neighbourhood of the city of Edinburgh; to enclose and lay out the ground already acquired and such as may be hereafter acquired for behoof of the company in a superior and ornamental manner as a place or places for interment; to dispose of said ground for burial places, tombs, or graves to individuals or families at proper and moderate prices; and to provide such chapels and vaults or other buildings, and everything which shall be deemed by the directors requisite and proper for a burial ground or cemetery.' . . . 5. That the constitution of the company as embodied in the said contract of copartnership and the numerous resolutions amending and varying its original provisions is cumbrous and inconvenient besides being out of date and unsatisfactory in many ways. The company therefore desires to substitute therefor a memorandum and articles of association in modern form. 6. That on 19th February and 12th March 1923 accordingly at extraordinary general meetings of the shareholders of the company held at the registered office the following special resolution was unanimously passed and confirmed, namely—'That the memorandum and articles of association submitted to this meeting, of which a printed copy has been docketed and signed by the chairman hereof for the purpose of identification, be and the same are hereby approved, and that in accordance with the provisions of the Companies (Consolidation) Act 1908, and particularly sections 9 and 264 thereof, the form of the constitution of the company be altered by substituting the said memorandum (extending the objects of the company) and articles of association for the contract of copartnership of the company executed in 1845 with the alterations and amendments since made thereon, and that the directors be and hereby are authorised to present the appropriate petition to the Court of Session for confirmation of such alteration in the form of the constitution of the company.' . . . 8. That the objects of the company as declared in the third clause of the said memorandum of association are as follows:—(1) To carry on business in or near the city of Edinburgh as owners of cemeteries or burial grounds and crematoriums, stone and marble cutters, masons, quarriers, and sculptors, florists, gardeners, and undertakers. . . . 9. That the objects of the company as set forth in said third clause of the proposed memorandum of association are calculated to enable the company to carry on its business more economically or

more efficiently, and also to carry on any other allied business which under existing circumstances may conveniently or advantageously be combined with the main business of the company. Otherwise the objects as thus set forth substantially represent the objects contained in its original constitution and (apart from the powers set forth in such third clause being such as are usually found in modern memoranda) are declaratory of what the company is at present doing and is entitled to do, with or without express power, in its constitution. The company puts itself into the same position as other cemetery companies established prior to 1862 which have adopted a similar course."

On 20th April 1923 the Lord Ordinary officiating on the Bills remitted to Sir George M. Paul, C.S., to inquire as to the facts and circumstances set forth in the petition, and as to the regularity of the proceedings, and to report.

On 30th May 1923 Sir George M. Paul reported, *inter alia*, that the facts and circumstances set forth in the petition were sufficiently and accurately stated, that the procedure had been regular, and that the proposed alterations might be confirmed.

When the petition came before the First Division counsel for the petitioners referred to *John Walker & Sons, Limited*, 1914 S.C. 280, 51 S.L.R. 246, and argued that unless the proposed alterations were absolutely beyond the constitution the decision of the shareholders ought to rule. All the businesses specified in the alterations were capable of being carried on along with that of a cemetery company.

LORD PRESIDENT—This is a petition for confirmation of an alteration in the form of the constitution of a cemetery company and of an alteration of its objects. The only matter which gives rise to any question is the extraordinary width and variety of the new and specific powers proposed to be taken. At present the company's powers are to enclose and lay out the ground known as the Grange Cemetery (and any other ground near Edinburgh which the company may acquire) in a superior and ornamental manner as a place of interment; to dispose of the ground for purpose of burial; and to provide such chapels and vaults or other buildings and everything which shall be deemed requisite and proper for a cemetery. The new powers asked are as follows:—"To carry on business in or near the city of Edinburgh as owners of cemeteries or burial grounds and crematoriums, stone and marble cutters, masons, quarriers, and sculptors, florists, gardeners, and undertakers." According to the petition these powers "are calculated to enable the company to carry on its business more economically or more efficiently, and also to carry on any other allied business which under existing circumstances may conveniently or advantageously be combined with the main business of the company."

Section 9 of the Companies Act 1908, under which the extension of powers is asked, authorises the alteration of the

objects of a company so far as may be required to enable it to carry on its business more economically or more efficiently, to attain its main purpose by new or improved means, to enlarge or change the local area of its operations, or to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company. Powers to put up and manage a crematorium, to manufacture and sell stone monuments as memorials of the dead whose remains are buried in the company's cemetery or cemeteries, and to act as undertakers in connection with funerals to those cemeteries, are obviously powers within the scope of this section. But neither in the petition nor in the report is there anything to show that it could be either convenient or advantageous to combine with the business of this Cemetery Company such businesses as those of masons, quarriers, florists, or gardeners. It is no doubt possible that a new company might be started in such circumstances, present or prospective, as to make it expedient to comprehend such a diversity of enterprise among its powers. But we have no evidence at all before us to show that in the existing circumstances of this long-established Cemetery Company any convenience or advantage whatsoever would be obtained by it from starting out on such new and apparently distinct undertakings as that of quarrymasters, or that of masons, or that of gardeners growing flowers for sale in the market, or in business premises conducted as a florist's shop. It is therefore both impossible and unnecessary for us to consider whether powers of such width and diversity might not competently be granted under section 9 of the Companies Act if some change in circumstances had been established presenting a case of convenience or advantage. On the other hand it is, I think, fairly put before us that some commercial dealings of the nature of those which usually fall within the sphere of the businesses referred to are, or at any rate may be, incidental to the carrying on of a cemetery undertaking. And if the powers asked are such as are intended, not as authorising the company to embark on so many separate and independent businesses, but to be used as incidental to the main object of the company, there seems no reason, why if the company asks them it should not get them. I suggest therefore to your Lordships that the powers may be sanctioned, provided always that in the enumeration of particular functions which follows the general function of owners of cemeteries or burial-grounds, these functions are described as powers in connection with and incidental to the business of owners of cemeteries or burial grounds.

LORD SKERRINGTON—I see nothing incompetent in any of the alterations proposed for our consideration. In petitions of this kind, however, there is a tendency to overlook the fact that the question whether the Court ought to exercise the discretionary power conferred upon it by the 4th

sub-section of section 9 of the Companies (Consolidation) Act of 1908 comes to be to a large extent one of evidence. In the present case I agree with your Lordship that no good cause has been established for the grant of powers of so wide and far-reaching a character as are embodied in the special resolution. I think that we should exercise a wise discretion if in sanctioning the powers asked we limit them in the manner which your Lordship has suggested.

LORD SANDS—I agree with your Lordship in the chair.

LORD CULLEN did not hear the petition.

The Court confirmed the alterations subject to the first part of the third clause of the memorandum of association being restricted by adding after the word "crematorium" the words "and in connection therewith and as incidental thereto as."

Counsel for the Petitioners—Wilton, K.C.—Gibb. Agents—D. M. Gibb & Sons, S.S.C.

Wednesday, July 11.

## SECOND DIVISION.

### PATON'S TRUSTEE *v.* FINLAYSON AND OTHERS.

*Sale—Retention—Possession—Growing Potatoes Lifted by Buyer and Pitted on Seller's Land—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 43 (1) (b).*

The Sale of Goods Act 1893 enacts—Section 43 (1)—"The unpaid seller of goods loses his lien or right of retention thereon . . . (b) when the buyer or his agent lawfully obtains possession of the goods."

A potato merchant bought from farmers the growing crop of potatoes on their farms at a specified price per acre, and on maturity lifted the potatoes with his own servants, pitted them on the respective farms, and dressed them. The horse work required in lifting and carting the potatoes to pits and to rail was in terms of the contract supplied by the farmers. The buyer having been sequestered the farmers claimed a right of retention over the potatoes lying in the pits against his trustee in bankruptcy. *Held* that at the date of the sequestration the bankrupt had not obtained possession of the potatoes, and that the farmers had accordingly a right of lien or retention over them for the unpaid price.

*Contract—Mutual Contract—Retention—Performance of Counterpart—Possession—Contract between Merchant and Farmer for Use of Farmer's Land to Produce Crop of Potatoes—Mutuality of Services—Right of Farmer to Retain Potatoes Pitted on his Land against Charges.*

Under a mutual contract a potato merchant agreed with a farmer for the use of so much of his land for the pur-