and if he receives it without the record being appended to it, then those from whom he receives it are practically certiorated that he is satisfied with what they have done. Therefore it is not merely a question of fault on the part of the agent. Now the fault, venial it may be and probably explainable, is still a fault, and ought not to be allowed to pass without some censure, and I agree with Lord Dundas and Lord Salvesen that a fine would be a very proper way of securing proper procedure in this matter. I cannot help thinking that if we were to frame an Act of Sederunt we might well dispense with the rule which provides for this appending of records to reclaiming notes.

When we go back through the authorities, which is probably the best course the Court should follow, to see what the Court should do in any case regarding procedure, and come to an authority which is exactly apposite to the case in hand, we certainly ought not lightly to give an opposite decision. We should do so if we were to decide in this case that the fault committed could not be condoned and the case allowed to proceed, as we should be going contrary to the distinct decision in *M'Lachlan*, 6 F. 338. While I think we should follow that decision, I cannot say that I agree with Lord M'Laren when he says—"It is too severe a penalty to throw out the reclaimer's case because some one has omitted to lodge a copy of the record with the Clerk of Court." I do not think that is a good ground for dispensing with the requirement of the Act of Sederunt. The question is whether the fault is such that the Court can see ground for not enforcing the penalty stated in the Act of Sederunt, and they held in that case that it was such a fault. I see no ground for taking a course here which would imply the setting aside of that decision.

The Court repelled the objection.

Counsel for the Reclaimer — M'Lennan, K.C.—Maclaren. Agent—John Robertson, Solicitor.

Counsel for the Respondent—Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

Saturday, May 22.

FIRST DIVISION.

(SINGLE BILLS.)

DUNBAR'S TRUSTEES, PETITIONERS.

Trust — Administration — Nobile Officium of Court—Power of Trustees to Take into Own Hands and Manage Farm on Trust Estate.

The trustees under a testamentary settlement presented a petition to the *nobile officium* of the Court for authority to take one of the farms on the trust estate into their own hands and manage it, and further, to borrow a sum of money to enable them to do so. They explained that it was impossible to get the farm let, and that the settlement conferred no such power on them as was craved. *Circumstances* in which the Court *dismissed* the petition as unnecessary, since the exercise of the power proposed was merely an ordinary act of administration.

Dame Isabella Mary Dunbar, widow of the late Sir Archibald Hamilton Dunbar, of Northfield, baronet, and others, the testamentary trustees of the said Archibald Hamilton Dunbar, *petitioners*, presented a petition to the First Division of the Court of Session, in virtue of its *nobile officium* and under the Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), for power to take into their own hands one of the farms on the trust estate of the said Sir Archibald Hamilton Dunbar, and to stock, cultivate, and manage the same for behoof of the said trust estate under their charge, until a suitable tenant be secured therefor, and further for power to borrow a sum not exceeding £1500 to enable them to execute the powers above craved.

The petition, *inter alia*, set forth "that the said Sir Archibald Hamilton Dunbar . . . conveyed . . . to and in favour of the petitioners . . . all and whole his lands and estate of Duffus or Thunderton, in the county of Elgin. . . . The petitioners, upon the death of the testator, duly accepted office, and entered upon and have continued the administration of said estate in terms of the settlement. Upon the said estate of Duffus there are a number of arable farms let to tenants upon leases of various durations, and the petitioners in the course of their administration have dealt with the said farms through their factors, and arranged for renewals of tenancies, and acted in regard thereto in the ordinary way in which such management of estates of the kind is conducted, and in accordance with the provisions of the settlement. One of the farms, viz., the farm of Crosshill, was let under lease to Mr John Masson for the space of nineteen years and crops from and after the term of Whitsunday 1905, with a break, however, in the option of either the proprietor or the tenant at Whitsunday 1915, at a rent of £138 per annum. The tenant gave the necessary notice to entitle him to receive the benefit of the break, and he leaves the farm at Whitsunday 1915, as to the houses, &c., and the land under crop at the separation of the crop from the ground. The petitioners have taken the usual steps through their factors, personally, and by advertisement, to relet the farm, but without success. . . . Only one offer was, however, received by the factors, viz., an offer dated 25th March, in terms of which there was offered for the farm a rent of £34, 16s. per annum on a lease for a period to be arranged. The offerer stated that he could not see his way to make a better offer, as the houses were not in good condition and the land seemed to be very expensive to work. The reasons stated, though to a certain extent correct, did not justify the offer of such a reduced rent. The buildings on the farm are in point of fact in fair tenantable order, though they may require a

general overhaul when a new tenant is obtained. The dwelling-house is in good condition, but part of the steading is roofed with tiles which are out of date and which might require renewal. The land is a stiff clay somewhat expensive to work and difficult to labour, but it has been well farmed and is in good condition. The farm extends in area to about 116 acres, and the present rent is £138. The petitioners did not consider that the offer above quoted could in the interests of the trust estate be accepted, as, even assuming that the offerer had been otherwise suitable and financially capable of stocking the farm, they were of opinion that the rent offered was quite inadequate, looking to the extent, nature, and condition of the farm and the existing rent. The position therefore is that the petitioners have no tenant for the farm for the forthcoming term, and it will therefore be thrown on their hands, and they will require to make provision for managing it. The petitioners believe that the difficulty in obtaining a tenant results to a large extent from the general condition of affairs in the country owing to the war, under which, owing, *inter alia*, to the enhanced cost of stock, the expense of the ingoing is largely increased, and there is great difficulty in getting the necessary labour on reasonable terms. . . . Under the said trust-disposition and settlement the petitioners have no power to take into their own possession and to stock and carry on any farms on said estate. It would be in the interests of the trust that the petitioners should obtain such power, in the circumstances narrated, in which the petitioners have no alternative but to undertake themselves the management of said farm and to implement the obligations upon them as proprietors in trust as aforesaid, contained in the lease to the said John Masson, by taking at valuation the grass and grain crops and others foresaid. It is accordingly necessary for them to apply to your Lordships for power to enter into possession of said farm of Crosshill themselves, and to stock, cultivate, and manage it for behoof of the trust estate, and for that purpose to appoint managers, engage servants, purchase horses, stock, and implements, and do every other thing requisite and necessary for the proper management of said farm, and to continue to hold and manage said farm for such space of time as may be required to enable them to secure a suitable tenant. Further, in order to meet the obligations incumbent on them under the said lease, and to enable the petitioners properly to stock and carry on the farm and manage the same, it will be necessary for them to borrow money either on the security of the heritable estates of the trust or part thereof, or by obtaining an overdraft from the bank or otherwise. They have no capital funds which could be used for this purpose, and they are under the necessity of applying to your Lordships for power to borrow a sum not exceeding £1500 to be applied in carrying out the same. The powers craved are not only beneficial for the administration of the trust, but are in the circumstances necessary for its proper administration."

Argued for the petitioners—The Court might in virtue of its *nobile officium* grant the powers craved. It would be unreasonable to refuse them, since the testator could not have foreseen and provided against the contingency of the farm not being let. Alternatively, the powers were in the ordinary course of administration, and the petition might therefore be dismissed as unnecessary—*Berwick and Others, Petitioners*, November 13, 1874, 2 R. 90, 12 S.L.R. 58; *Noble's Trustees, Petitioners*, 1912 S.C. 1230, 49 S.L.R. 888.

At advising—

LORD PRESIDENT—Upon the statements made in this petition it appears that the trustees have really no other course open to them than to take this farm into their own hands, and accordingly, if they do so, it will be an ordinary act of trust administration. That being so, Mr Millar frankly concedes that they must act on their own responsibility, and that it will be quite unnecessary for them to obtain the power craved in the prayer—power to borrow for the purpose of stocking the farm.

LORD JOHNSTON—I concur. Counsel for the petitioners spoke as if the taking of the farm by the trustees into their own hands was of the nature of a commercial operation. I do not regard it as of that nature at all. It is an act of administration of the estate forced upon the trustees by the circumstances which they disclose. At the present time, for a farm which has been rented at £130 odd they can only get an offer—and not a very satisfactory offer—of something like £36. To accept such an offer in the midst of a great national emergency would not appear to be a very discreet act of management, and the trustees not unnaturally propose to take the farm into their own hands. Now taking it into their own hands to carry it on is not in the circumstances undertaking a commercial operation; it is simply administering the estate and conserving the condition of one of the subjects which it comprises, and which happens to be a farm. It is of course understood that the trustees only propose to take the farm into their own hands to keep it going in the meantime, be it longer or be it shorter, in order that they may let it again at a rent which they would be justified in the interests of the estate in accepting.

LORD MACKENZIE—I am of the same opinion. I think that what was said in the case of *Noble's Trustees*, 1912 S.C. 1230, applies to the present.

LORD SKERRINGTON—I concur.

The Court dismissed the petition as being unnecessary.

Counsel for the Petitioners—J. H. Millar. Agents—John C. Brodie & Sons, W.S.