succeed only without division and exclude heirs-portioners. I think that Lord Guthrie's interpretation of this clause is correct. The first part of it connotes only that which the general law prescribes, and is intended merely as an introduction to the alteration which the entailer intends to make in the order according to which females are by the general law called to the succession.

In my opinion therefore the appeal fails.

LORD SUMNER—I agree in the motion proposed from the Woolsack, and for the reasons that have already been given.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant—Macmillan, K.C.—C. H. Brown. Agents—Lindsay, Howe, & Company, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondents—Watson—Wilson. Agents—J. & A. F. Adam, W.S., Edinburgh—Druces & Attlee, London.

COURT OF SESSION.

Friday, October 22.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

FREE CHURCH OF SCOTLAND AND OTHERS *v.* MACKNIGHT'S TRUSTEES.

Trust—Charitable Bequest—Administration—Trust for Religious Purposes—Breach of Trust—Personal Liability of Trustees.

A testator directed his trustees to expend the free annual income of his estate for the promotion of the Home Mission in connection with the Free Presbyterian Church of Scotland, declaring that it should be in the power of his trustees to engage Free Church missionaries in the promotion of the mission in such way as they might think proper either through the Church or independently of it. The trustees, independently of the Church, appointed and paid a licensed probationer and ordained preacher of the Free Church of Scotland to conduct a mission in Bathgate

By Allocation Orders, dated 10th November 1909, under the Churches (Scotland) Act 1905 (5 Edw. VII, cap. 12), the funds left by the testator were as from 10th October 1909 allocated to the Free Church of Scotland. The trustees, however, continued to expend the income of the trust estate on the mission in Bathgate until it was decided in the *Free Church of Scotland* v. *Macknight's Trustees*, 1913 S.C. 36, 50 S.L.R. 55, that the discretionary powers of the trustees to administer the trust estate independently of the Church had ceased after the said Allocation Orders, and that the Church was entitled to payment of the income. The trustees thereafter ceased to expend the income as aforesaid, and paid the same to the Church.

In an action of count, reckoning, and payment against the trustees, concluding for decree of accounting against them for their intromissions with the trust estate prior to the decision above referred to, *held* that the trustees were not personally liable to repay the expenditure by them independently of the said Church on the said mission at Bathgate either before or after the date of the said Allocation Orders.

Charitable Bequest—Trust—Revenue—Administration of Trust—Recovery of Estate—Income Tax—Personal Liability of Trustees—Averments of Trustees.

In an action of count, reckoning, and payment by the beneficiaries under a trust for religious purposes against the trustees, the beneficiaries averred that the trustees had for a number of years negligently failed to recover income tax which they were entitled to recover.

Held that, in answer to such an averment, the trustees must make specific explanation to enable the Court to decide the question with or without inquiry, and the trustees *allowed* to amend their record and the beneficiaries to answer their amendments.

The Free Church of Scotland, *pursuers*, brought an action of count, reckoning, and payment against Hugh Martin and others, the sole trustees, original and assumed, acting under the trust-disposition and settlement of the late Alexander Edward Macknight, advocate, Edinburgh, dated 22nd June 1896, and codicils thereto dated respectively 13th July 1896 and 13th May 1898, and all registered in the Books of Council and Session on 13th June 1899, as such trustees and also as individuals, *defenders*, concluding for decree against the defenders to account for their intromissions with the free annual income of the trust estate in their hands.

By *codicil* to his *trust-disposition and settlement*, dated 13th May 1898, the late Mr A. E. Macknight, who died on 8th June 1899, directed his trustees, the defenders, "to expend the free annual income of my estate in manner after mentioned for the promotion of one or other or both of the following missions, the residue of my estate to form a capital fund for the same, viz —(1) The Mission to the Miners of Scotland promoted or being promoted by the Reverend Doctor James Hood Wilson of Edinburgh, and (2) the Home Mission in connection with the Free Presbyterian Church of Scotland . . . : Declaring that it shall be in the power of my trustees to engage Free Church missionaries, or in their discretion other workers, including laymen and lady missionaries or workers being members of the Free Church, in the promotion of the above missions or either of them in such a way as they may think proper either through the Church or independently of it, such missionaries or other workers receiving suitable remuneration, or my

trustees may, should it be deemed by them more expedient, pay over the free annual income of my estate to the respective treasurers of said missions or one or other of them to be applied to the purposes foresaid: Declaring further that should the said Mission to the Miners of Scotland be now or become non-existent the whole of the said income shall be applied to the promotion of the said Home Mission."

In an action of multiplepoinding it was decided on 4th July 1901 that the Home Mission in connection with the Free Presbyterian Church of Scotland was to be interpreted as meaning the Home Mission of the Free Church of Scotland. At the date of that decision questions had arisen as to who were the Free Church of Scotland, and until it was decided on 1st August 1904 by the House of Lords in the case of the *Free Church General Assembly* v. *Lord Overtoun*, 1904, 7 F. (H.L.) 1, 41 S.L.R. 742, that the pursuers herein were the Free Church of Scotland, the defenders did not apply the free annual income of the trust estate in their hands to any of the trust purposes. Thereafter in the beginning of 1905 the defenders began to apply the income independently of the pursuers, by appointing and paying out of it a licensed probationer and ordained preacher and member of the Free Church of Scotland to conduct a mission at Bathgate. The defenders continued to do so until, by Allocation Orders Nos. 1252 and 1253, both dated 10th November 1909, under the Churches (Scotland) Act 1905 (5 Edw. VII, cap. 12), the fund administered by the defenders was as from 30th October 1900 allocated to the pursuers. The defenders, however, continued to devote the income to the Bathgate Mission. The pursuers then brought an action of declarator against the defenders, in which it was decided that the discretionary powers of the defenders herein as trustees to administer the trust estate independently of the pursuers were superseded by the Churches (Scotland) Act and the orders thereunder—*Free Church of Scotland* v. *Macknight's Trustees*, 1913 S.C. 36, 50 S.L.R. 55. The defenders thereafter paid over the income to the pursuers. The pursuers now raised the present action, alleging that the expenditure upon the mission in Bathgate was *ultra vires* of the defenders. This was denied by the defenders.

The pursuers further alleged that the defenders had negligently failed to recover the income tax levied upon them (which they were entitled to recover) until their attention was called by the pursuers to the fact that the tax was recoverable. The defenders admitted that the tax had not been recovered and denied negligence, and stated that payment was made on the demand of the Inland Revenue authorities.

On 26th June 1914 the Lord Ordinary (ORMIDALE) repelled the objections by pursuers to the accounts lodged by the defenders and dismissed the action.

Opinion.—"With regard to the point first argued, viz., Whether on a sound construction of Mr Macknight's settlement the administration of the trustees was within their power up to the date of the allocation order, it appears to me that that question has already been considered and determined in the action *Free Church of Scotland* v. *Macknight's Trustees*, 1913 S.C. 36, 50 S.L.R. 55. The observations made by the Court with reference to the course followed by the trustees down to the date of the allocation order cannot fairly be described as *obiter dicta*. The Court obviously took into consideration the hitherto administration of the trustees. I note particularly that the contention of the Free Church 'that the mission which is held in Bathgate can in no sense be held to be a mission in connection with their Church,' which is just the contention which was advanced before me, was referred to in terms by the Lord President at p. 47 of 1913 S.C., and that the declaratory clause under which the trustees justified and maintained their right to continue their administration of the fund independently of the Free Church is recited by his Lordship at p. 48. Having these before him the conclusion to which his Lordship came was 'that as the trust stood originally there is no question that the action of the trustees would have been well within their powers.' The question, however, raised in the case, his Lordship went on to say, was—Whether the trustees' position 'is really now in accordance with what may be called the law of the case.' Later on, at p. 49, his Lordship again deals with the discretionary power conferred upon the trustees, and says that while not in one sense superseded, it has become inapplicable in the present circumstances, 'for although there could be independent action at the time when Mr Macknight made his trust there cannot be independent action now in the case of money which is allocated by Act of Parliament for a particular thing which must be done by the Church itself.' As he afterwards describes it, it was an administrative right workable in connection with the old trust purposes, but not workable in connection with the new trust purposes, which are the parliamentary purposes and supersede the old.

"Lord Cullen, after describing the power conferred upon the trustees by Mr Macknight 'as an administrative power to expend the money themselves in Home Mission work as an alternative to paying it into the Home Mission Fund,' goes on to say 'the trustees have so far exercised this power.'

"Accordingly it is out of the question for me to put a different construction upon the codicil to that put upon it by the Judges of the First Division, even if I thought there was any ground for my so doing. But if I may respectfully say so, I quite agree with the views expressed in the Inner House. Taking this view, it is not necessary for me to deal with the argument founded on the case of *Andrews* v. *Ewart's Trustees*, 13 R. (H.L.) 69, 23 S.L.R. 822, so far at any rate as the period prior to the date of the allocation order is concerned, but it does seem to me that a case like the present

is not one to be dealt with—to use Lord Watson's words—'as depending upon the ordinary rules which govern the liabilities of trustees to beneficiaries under a private trust,' and that the dictum of Lord Kinloch in *Lamond's Trustees* v. *Croom*, 1871, 9 Macph. 662, 8 S.L.R. 412, is not in point. I should not be prepared to hold the trustees liable to repay out of their own pockets moneys which in good faith and in the honest discharge of their duty as they reasonably understood it they had expended on purposes in no essential particular differing from those on which, prior to the allocation orders, the Free Church would itself have been bound to expend them. It is entirely different from the case of a private beneficiary who challenges the administration of trustees on the ground that they have put into another person's pocket money which according to the express direction of the truster should have gone into his.

"Accordingly, so far as the administration of the trustees down to the date of the allocation order is concerned, I think the objections to their accounts under Branch I fall to be repelled.

"A more difficult question arises in connection with the administration of the fund for the period between November 1909 and August 1911, for by the allocation order the trustees, on a sound construction of it, were notified that their undoubted discretionary right to promote the Bathgate Mission in accordance with the truster's settlement had ceased. By these orders and the Act of Parliament they were certiorated that the trust purposes had been superseded by parliamentary purposes which required to be carried into effect not independently of but through the Free Church. Now if all that had been written large on the face of the order, so that he who ran might read, the trustees in my opinion by continuing their administration under the original settlement must have done so at their own risk, and would have been liable personally for the expenditure of the trust fund on wrong purposes. But the effect of the Act of Parliament and the allocation order was far from being clear. A wrong start to the right understanding of them had been given by the letter of the secretary of the Commissioners dated 16th February 1909, for it gave, as the event has proved, a much too limited effect to the intended allocation, and as I read the correspondence between parties the Free Church as well as the trustees remained, until very shortly before the action to which I have referred, under a misapprehension as to their true meaning and effect. At the same time it appears to me that the letter of 11th November 1910 was a distinct intimation to the trustees that their administration was challenged. The attitude taken by the Free Church as notified in that letter appears to me to have been a fair and reasonable one. They proposed not to go back on the matter of disbursements effected prior to the date of the order, and they further proposed that the trustees' reluctance to act without some direction from the Court should be met by having the question at issue determined by a special case. That course commended itself to Mr Sutherland Mackay, one of the trustees, but he was outvoted in the matter of its adoption by his co-trustees. Now if the trustees—or rather the majority of them—had persisted for an undue length of time after the letter of 11th November 1910 in continuing their administration thus challenged, I would have had great difficulty in relieving them of personal liability for the funds expended by them. But they brought it to an end in August 1911 after a lapse of nine months, and I observe that the payments amounting to about £100 made by them during that period were mainly in connection with the Free Church missionary's salary, and the rent of the hall in which the mission services were I understand conducted.

"In the whole circumstances, keeping in view the novelty of the situation created by the Act of Parliament and the allocation order, and the difficulty in ascertaining their true meaning and effect, I observe that the Court described the question raised in the action as a fair question to try—and the fact that in relation to Mr Macknight's trust no individual private beneficiary has suffered in the very least by the action of the trustees, they should not in my judgment be held personally liable to replace the funds expended by them even during the period or a part of the period subsequent to the date of the allocation order.

"The second question is as to the failure of the trustees to recover the income tax paid by them during the earlier years of their administration. Now as trustees I see no ground for holding the defenders liable. In that capacity they cannot in my opinion be held responsible as for breach of trust because of a failure to know that the tax was not payable on income applied for religious purposes. They appointed law agents as it was their right, and in a trust like Mr Macknight's probably their duty, to do. It is the fact that Mr Martin has been, either as an individual or in partnership with Mr Sutherland Mackay and Mr Wright, the law agent of the trust from its commencement. Now if a law agent receive remuneration for acting as such and as factor, it may be that he is liable in ordinary circumstances for an act of omission like that in question, but then his liability must be ascertained in an action in which he is duly cited as law agent. In the present action, which is one of accounting, the defenders are called only as trustees and not as law agents, and they are not called upon to assign to the pursuers their right to recover from their law agent or law agents the money said to have been lost to the trust estate by the negligence of their law agent or law agents. If not cited to do so, I cannot hold that they are bound as a condition of avoiding personal liability as for breach of trust to offer so to assign. In my judgment the failure to recover the income tax in question is not so flagrant an omission as might at first sight appear. In the Scots case of

Baird's Trustees, 15 R. 682, 25 S.L.R. 533, it was held that there was no right to recover the tax on income applied to religious purposes; and while in 1891, in the case of *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, the decision in *Baird's* case was upset, and the word 'charitable' was held to include religious purposes, obviously the matter was one of difficulty. The law agents and factors' accounts were audited by accountants of eminence and by the Auditor of the Court, and the omission was not brought to their notice. But whether it is a well-founded claim or not against the law agents, it cannot in my judgment be dealt with in an action of accounting against trustees for recovery from them of moneys improperly paid away, but can only be recovered in an action against the law agents and factors as a claim of damages for loss occasioned to the trust estate by the fault of these law agents—*Raes* v. *Meek*, 16 R. (H.L.) 31, 27 S L.R. 8.

[*His Lordship then dealt with a question which is not reported.*]

"I shall accordingly repel the whole objections of the pursuers to the accounts of the trustees."

The pursuers reclaimed. Counsel for the respondents were not called upon to reply with regard to the question of *ultra vires*.

Argued for the reclaimers—(1) On the question of *ultra vires*—The trust funds had never been properly applied at all. There could be no benevolent construction of the actings of the defenders, as they were not trustees for the public generally but for a definite beneficiary—*The Magistrates of Aberdeen* v. *The University of Aberdeen*, 1877, 4 R. (H.L.) 48, 14 S.L.R. 490. If so, they were bound to repay money paid away in error no matter their *bona fides*—*Lamond's Trustees* v. *Croom*, 1871, 9 Macph. 662, 8 S.L.R. 412. Further, in any event, they were fixed with knowledge of the proper objects and purposes of the trust by the judgment in the multiplepoinding referred to, and of the fact that the beneficiaries did not acquiesce in their administration, and it was for them to show *bona fides* (which they had not done) if they were to be entitled to claim a benevolent construction—*Andrews* v. *Ewart's Trustees*, 1886, 13 R. (H.L.) 69, 23 S.L.R. 822. Such *bona fides* meant that their actings must have conformed to the general purposes of the trust, which was not the case here — M'Laren, Wills, ii, 917-947; Lewin, Trusts (12th ed.), 1210-1212; *Attorney-General* v. *Corporation of Exeter*, 1826, 2 Russ. 45; *Attorney-General* v. *Dean of Christ Church*, 1826, 2 Russ. 321; *Attorney-General* v. *Mayor of Newbury*, 1834, 3 My. & K. 647. They had not expended the money on the trust purposes and must repay — *Cochrane* v. *Black*, 1855, 17 D. 321. (2) On the recovery of income tax.—Religious trusts were charitable trusts in the sense of the Income Tax Acts—*Commissioners of Inland Revenue* v. *Pemsel*, [1891] A.C. 531. The defenders had negligently failed to recover an asset of the trust which pursuers were entitled to under the allocation orders. If they administered the trust themselves they must show *diligentiam quam in suis*, which they had not done. *Pemsel's* case was cited in ordinary income tax handbooks—Murray and Carter, Guide to Income Tax, 1911 ed., p. 472—and the pursuers could recover from the present trustees though the fault was of prior trustees—*Sommerville's Trustees* v. *Wemess*, 1854, 17 D 151. There was no averment that a factor or law agent was employed by the defenders, but a factor or law agent if employed by the defenders *spondet peritiam* and ignorance of *Pemsel's* case was negligence on his part which would entitle the trustees to recover from him—*Simpson* v. *Kidstons, Watson, Turnbull, & Company*, 1913, 1 S.L.T., 74; *Frame* v. *Campbell*, 1836, 14 S. 914, *affd.* M'L. & R. 595. There was no question of the application of the income, for it was all ear-marked for charitable purposes. In any event it was for the defenders to plead any defences they had.

Argued for the respondents – On the recovery of income tax — There was no relevant averment of negligence, for the record did not state who was negligent; further, the position of the trust funds was different at different periods, and no recovery might have been possible from 1900 to 1905, for the income was not then applied to charitable purposes but merely applicable—*Pemsel's* case (*cit.*); *The King* v. *Special Commissioners of Income Tax*, [1911] 2 K.B. 434; *Maughan* v. *Free Church of Scotland*, 1893, 20 R. 759, 30 S.L.R. 666. In any event the question of recovery was open to reasonable doubt. *Baird's Trustees* v. *Lord Advocate*, 1888, 15 R. 682, 25 S.L.R. 533, was decided in the contrary sense to *Pemsel's* case. This was not a case where the trustees were liable—*Carruthers* v. *Carruthers*, 1896, 23 R. (H.L.) 55, 33 S.L.R. 809. *Simpson's* case and *Frame's* case were not in point, for there the law agent was employed to do a particular thing.

LORD PRESIDENT—On the main topics in controversy in this case my view coincides with the view taken by the Lord Ordinary. His reasoning appears to me to be sound.

The fund with which we are concerned here was conveyed by the testator to his trustees in order that they might devote it to the promotion of the objects sought to be attained by the Home Mission of the Free Church, for this now appears as the result of the disappearance of the first object designed in the settlement and the decision of Lord Low in a case to which we were referred.

What, then, are the objects sought to be attained by the Home Mission of the Free Church of Scotland? On that topic the record is silent, the correspondence is silent, and counsel offered us no light. We are asked, therefore, to say that the trustees are guilty of malversation of office and misapplication of trust funds whilst we are kept entirely in the dark as to what the true objects to which they were to devote the funds in terms of the settlement really were. I decline.

It is common ground that the trustees in the exercise, as they believed, of their powers under the settlement, established a mission in Bathgate, which was unquestionably a "home mission," and they appointed to carry on the mission a licensed probationer and ordained preacher and member of the Free Church of Scotland. Now by the unaided light of reason I should have supposed that that was a punctilious and faithful performance of the duty thrown upon the trustees. And if I err here I err in excellent company, because I observe that Lord President Dunedin in the prior litigation between these parties expresses himself thus—"As the trust stood originally, there is no question that the action of the trustees would have been well within their powers. I feel quite sure that the action of the trustees is not based upon any antagonism to the Free Church, but is in the exercise, according to the best of their abilities, of the discretion which was conferred upon them by the truster, and the exercise of which, for reasons which commend themselves to their minds and with which I have nothing to do, has led them to take the step that they have taken." That seems to me accurately to express the position taken up by these trustees, and it appears to be in strict accordance with the trust purpose as expressed in the deed before us.

What fault, then, do the pursuers find in the trustees? Turning to their objections I find that the only criticism which they offered upon the first head was that this home mission in Bathgate was not one connected in any way with the Free Church of Scotland or with the Home Mission. The truster never said that the object in view was to be attained by a mission in connection with the Free Church of Scotland, or in connection with the Home Mission scheme. On the contrary, the truster gave his trustees the freest hand in administering the trust and in endeavouring to achieve its purpose; for it appears that he empowered them, if they were so minded, to engage Free Church missionaries or other workers, including laymen or lady missionaries or workers, being members of the Free Church, in the promotion of the mission in such a way as they might think proper, either through the Church or independently of it. And, accordingly, being minded to secure the objects of the trust independently of the Church, the trustees were well entitled to do so.

I hold, therefore, that on the pursuer's own showing here the trustees have faithfully administered the trust, and that accordingly, so far as relates to the period anterior to the date of the allocation order, there is no ground whatever for charging them with misapplication of trust funds and asking them to refund money which they had expended strictly in conformity with the trust deed.

So far as regards the period subsequent to that date, it appears to me to be a mere question of administration. In other words, if the pursuers themselves had been placed in the saddle immediately after the allocation order was pronounced, and if they had been minded to devote this money to the prosecution of the Bathgate Mission, they would not, in my opinion, have been acting contrary to the allocation order; for it must be observed that the allocation order, although it undoubtedly changed the administrators (as was determined by the Court in the prior litigation), left the objects to which the fund was to be devoted in quite general terms, and left the administrators, whoever they might be, free to devote the amount, *inter alia*, to general purposes of administration and management of the Free Church.

Now I should have thought that home missions were part of the general purposes of the Free Church. And I observe, in the report of the argument submitted in the prior litigation, it is set out that it was not suggested that home mission work had ceased to be part of the work of the Free Church, and it might be said to be embraced in each of the purposes described in the fourth head of the First Schedule to the Churches Act. I see nothing in the opinions of the learned Judges who decided the case to indicate a view contrary to that which is suggested in the argument. It seems to me to be in strict accordance with the terms of the allocation order. And therefore if the Free Church themselves had been at once permitted to administer this fund when the allocation order came into force, they might quite well, had they been so minded, have continued to devote the money to the Bathgate Mission.

Therefore, as I said at the outset, this is a mere question of who is to administer, for no trust purpose was violated.

Now the question who is to administer was expressly said by the Court to be quite a fair question to try—a question upon which judicial opinion seems to have differed—and I am wholly unable to hold that these trustees were guilty of any misapplication of trust funds during the period with which I am now dealing because they did not hand them over at the commencement to the Free Church which might, as I have said, have devoted them to exactly the same purpose without in any way differing from the way set out in the allocation order. That disposes of the main topics discussed before us.

There comes next the question relating to income tax. I am not prepared to take the same view as the Lord Ordinary has taken on that question. I do not feel for my part in a position to deal with it in the present state of the record, and I would propose to your Lordships therefore that the defenders should be allowed to amend their record and the pursuers to make such answer as they think proper; and when the record is before us in its final shape we shall then be in a position to consider and to decide the question relative to the income tax, for it may be that inquiry will be necessary before the question can be decided. On the other hand it may be that upon the averments as they finally stand we shall be enabled to express a final opinion. [*His Lordship then dealt with a question which is not reported.*]

LORD MACKENZIE—I am of the same opinion. The only point about which I desire to say anything is in regard to the income tax. Upon that question the pleadings as they at present stand are in my opinion deficient. I think we may take it that the pursuers' case as stated is this—that there are certain assets belonging to the trust which the trustees have not ingathered. That statement as it appears to me imposes a duty upon the defenders to come forward with an explanation as to the way in which the assets in question, *i.e.*, the payments of income tax, were dealt with. Even when the pleadings have been revised in view of the discussion we have had, it may in the end of the day be open to the Court to decide the question upon relevancy. I do not at present go the length of saying that there must be an inquiry. All we decide at present is that the parties should have an opportunity of presenting what, in their opinion, are relevant facts to enable us to form an opinion upon that point.

On the other matters I agree with what your Lordship has said.

LORD SKERRINGTON—The most important question raised in this reclaiming note is whether the defenders are entitled to credit for a sum of £1728 which they expended in maintaining a mission at Bathgate, which was conducted by a missionary who was a licensed probationer and ordained preacher and member of the Free Church of Scotland. The pursuers object to this credit on the ground that the mission in question was not in connection with the Free Church of Scotland. As a mere matter of words, that seems a good and relevant objection, because the codicil says—and I read the codicil as interpreted by the decision of Lord Low in the previous action—that the mission which the testator desired to favour was the Home Mission in connection with the Free Church of Scotland If the codicil had stopped there a great deal could have been said for the view that no Free Church mission fell within the scope of the testator's bounty unless it had received the sanction of the ecclesiastical authorities and was carried on in a place where they considered that a Free Church mission would serve a good and useful purpose. And the objection comes to this, that these trustees chose to carry on a mission in a place where the authorities of the Free Church thought that it was a mere waste of money to carry on a Free Church mission. But then this objection has really been anticipated by the testator, because he goes on to say in so many words that it shall be in the power of the trustees to employ missionaries, and to do so either through the Church or independently of it. In these circumstances the only objection which I can discover in the pleadings turns out to be no good legal objection at all; and accordingly I have no difficulty in agreeing with your Lordships that it must be repelled.

There remains another question, as to which I agree with the Lord Ordinary that it is one of difficulty, namely, whether the position of matters was not seriously affected by the issue of the allocation order of the Church Commissioners. In regard to that all I need say is that after carefully considering the matter I do not see my way to disagree with the opinion expressed by the Lord Ordinary and also concurred in by your Lordships.

As regards all the other points in the case, I agree with what your Lordships have said.

The Court recalled the interlocutor of the Lord Ordinary, repelled the objection to the defender's accounts relating to the Bathgate Mission, and, with reference to the objection relating to income tax, allowed the defenders to amend the record and the pursuers to answer their amendments.

Counsel for Pursuers—Constable, K.C.—Christie, K.C.—M. J. King. Agents—Simpson & Marwick, W.S.

Counsel for Defenders Hugh Martin and Robert Martin — Chree, K.C. — Mitchell. Agents—Hugh Martin & Wright, S.S.C.

Counsel for Defender Sutherland Mackay—Anderson, K.C.—J. B. Young. Agents—Sutherland Mackay & Pattison, W.S.

Saturday, July 17.

OUTER HOUSE.

[Lord Cullen, Ordinary on the Bills.

LEITH MAGISTRATES *v.* JAMES BERTRAM & SON, LIMITED.

Public Health—Nuisance—Local Government—Smoke Prevention—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 16 (9).

The Public Health (Scotland) Act 1897, sec. 16, enacts—"For the purposes of this Act . . . (9) Any fireplace or furnace situated within the limits of any burgh or special scavenging district which does not so far as practicable consume the smoke arising from the combustible matter used therein for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever . . ., shall be deemed to be nuisances liable to be dealt with summarily in manner provided by this Act. . . ."

A public health authority sought interdict against a firm of engineers on the ground that their furnace did not "so far as practicable" consume the smoke, in that it was not supplied with a mechanical stoker. They, however, failed to specify what particular appliance was required, or to prove that such appliance would be successful, looking to the nature of the defenders' work, or that it could be fitted in at any reasonable cost.

Held (*per* Lord Cullen, Ordinary on the Bills) that the existence of a nuis-