

argument with less of the feeling that I was following and understanding it. It seems perfectly clear to me that there was no abandonment. After the sequestration began these heritable creditors—the Misses Campbell—lodged a claim in the sequestration, in which it was brought out, on figures which have not been disputed, that the unsecured balance due to them amounted to £108, 4s. 4d. A negotiation between the trustee and commissioners on the one side, and these heritable creditors on the other, accordingly began, by which the heritable creditors agreed to withdraw their ranking on condition that the trustee and commissioners should transfer to them the absolute right to the property which they had previously held in security. This was simply a transaction of sale of the property, and utterly excludes the notion of abandonment. If, then, there has been no abandonment, and no retrocession, there can be no title in the bankrupt to ask that the subjects should be held to belong to him.

Another argument was presented to us, founded on the circumstance that this property, though sold, was sold by private bargain, and not, as the statute provides, with “concurrence of a majority in number and value of the creditors, and of the heritable creditors, if any, and of the Accountant.” If the creditors had raised this objection, it might have been a formidable one, but has the bankrupt any title to plead it? He was discharged without composition, and after payment of a dividend of only 1s. 6d. in the £. I think he has no title to raise a question of this kind. If the estate had paid a considerable composition, he might possibly have been allowed to object to a private sale, on the ground that a larger price might otherwise have been received, and there might so have been a reversion in his favour. But that notion is, I think, excluded by the circumstances of the case.

There is another ground on which, though it is not necessary for the decision of the case, I think the bankrupt is not entitled to succeed. He was personally quite aware in 1859 that the trustee and commissioners and these heritable creditors had made this transaction. He was not only aware of this, but he made two offers by letter to buy the subject himself from the creditors. Those offers were not agreed to; and the bankrupt stood by and let them lay out money on improvements, and go on acting on the faith of the contract. They possessed the subject, and acted on the faith of the arrangement for twenty years, and it is now proposed to overturn it. I cannot give effect to such a contention; and if it were necessary for the decision of the case I think this ground alone would be sufficient to justify us in holding that the bankrupt is not entitled to succeed.

The Lord President stated that LORD DEAS, though absent, concurred in the judgment of the Court.

LORD MURE having been absent when the case was heard, took no part in the judgment.

The Court adhered.

Counsel for Reclaimer—Solicitor-General (Balfour, Q. C.)—Lang. Agent—Thomas Carmichael, S. S. C.

Counsel for Respondent—Robertson—D. Robertson. Agents—M'Neill & Sime, W. S.

Saturday, February 5.

FIRST DIVISION.

[Lord Lee, Ordinary.]

BIRKMYRE AND OTHERS, PETITIONERS.

Trust—Long Lease—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 3.

Held (rev. Lord Lee) that a lease for 999 years, which was expedient in itself, was not inconsistent with the intention of a trust which directed that the subjects should be held by the trustees until the expiry of certain liferents and thereafter sold and the proceeds divided among the children of the liferenters then in life.

The leading petitioners in this case were the trustees of the late William Birkmyre, merchant, Port-Glasgow. The petitioners desired the authority of the Court to enter into a long lease with the Corporation of Port-Glasgow, by which certain subjects belonging to the trust were to be held by the Corporation for a period of 999 years for the purposes of the Corporation gas-works; the lease to be registered in terms of the Registration of Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26). The petition was presented under section 3 of the Trusts (Scotland) Act of 1867 (30 and 31 Vict. cap. 97), by which the Court are empowered to grant authority to the trustees to grant long leases “on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof.”

The trust-deed directed that after the death of the truster's widow, who was to have a liferent of the subjects in question, the trustees were to enter upon the possession of the lands disposed, to realise the profits, and to divide and pay over the proceeds half-yearly among the truster's children as an alimentary fund. Upon the death of the last survivor of the children the trustees were directed “to sell and dispose of the whole lands and others above conveyed, and on realising the proceeds thereof, to divide the same, after deducting any expenses which may have been incurred in the management of the said trust, and in the sale of the said lands and others, equally among the lawful children then in life of” the truster's children. There was no power to grant long leases contained in the deed, nor any power of sale other than the above. The truster's widow was still alive, and she, along with all the other parties beneficially interested in the subjects so far as in existence, concurred in the petition; some of the grandchildren, however, were pupils or minors.

It appeared that the Corporation had already feued part of the adjacent ground for their gas-works; that they also possessed a part of the proposed subjects of the long lease under a lease for twenty-one years from 21st September 1863; and that they were prepared to give a rent of £110, with a duplicand every nineteenth year, instead of £78, 8s., which was the present rental of the entire subjects, including those already possessed by the Corporation.

The Lord Ordinary (LEE) found “that the proposed lease is inconsistent with the intention of the trusts referred to in the petition, and expressed in the trust-disposition and settlement;”

and consequently refused the petition, adding this note— "It is always a delicate matter to authorise the anticipation of a period appointed for the sale of subjects in the neighbourhood of a place like Port-Glasgow; and the truster may have had very good reasons for providing, as he did, that the subjects should be retained during the lifetime of his children (subject to a power of granting leases for nineteen years), and should be sold on the death of the last survivor of them. The question is, Whether the granting at present of the proposed lease for 999 years would be consistent with the intention of the trust-deed, as regards the management and disposal of the property. And the Lord Ordinary feels bound to answer that question in the negative. The case seems to him to belong to the same class as that of *Anderson*, May 13, 1876, 3 R. 639."

The petitioners reclaimed, and argued—The expediency of the proposed lease was clear, and the Lord Ordinary did not doubt it. His sole ground was that the lease was inconsistent with the purposes of the trust. But long leases were not prohibited, either expressly or by implication. It was not possible to extract a prohibition of a lease like that proposed, from the direction to sell at the expiry of the liferenters. It was not a case in which the truster desired the subjects to be retained *in forma specifica*.

Authorities—*Hay's Trustees*, June 13, 1873, 11 M. 694; *Anderson*, May 13, 1876, 3 R. 639; *Weir's Trustees*, June 13, 1877, 4 R. 876; *Downie*, June 10, 1879, 6 R. 1013.

At advising—

Lord President—In this case there cannot be much doubt as to the expediency of the proposal made by the petitioners. The subjects at present yield £30 less than they would yield if this long lease were granted. There is therefore an important immediate increase in the value of the estate if the power which is asked for is granted, and there is no reason to suppose that the subjects are of such a nature, or so situated, that they are likely to become much more valuable in future. The present advantage does not seem to be subject to any possible future disadvantage. The only question therefore is, whether the proposal is inconsistent with the intention of the truster—that is, with his main design and object in this trust-settlement. Now, there is fortunately no difficulty in understanding what the main designs and objects of the truster were. His widow is to have the liferent of his estate, and after her death the income is to be divided among his children, and that until the last survivor of the children dies. The income, and that only, is to be given to the children and the last survivor of them. Then after the death of the last survivor the property is to be sold and the proceeds divided among the truster's grandchildren. Now, it does not appear to me that the granting of this long lease will interfere in any way with the intention of the truster. It enhances the value of the subjects, and does not restrict the rights of the liferenters or the fiars. Everything will go on in the execution of the trust just as if the lease had never been granted, with the benefit of the additional income I have mentioned. It is said that what is asked is a sale, and that the only sale which the deed authorises is a sale after the death of the longest liver of the children,

for the purpose of dividing the proceeds among the grandchildren; and that this implies a prohibition against selling in any other circumstances. But it is important to observe that there is not, as there was in some former cases, a direct prohibition against selling the estate; on the contrary, the estate is only to continue in *forma specifica* until a certain event shall occur, and is then to be sold. The intention is not to preserve the estate entire, but simply to keep it as an income-yielding subject in order to sell it at the death of the liferenters. Then it must further be observed that to give a power of sale on the death of the liferenters can hardly imply an intention on the part of the truster to prohibit such a sale as this. This is not such a sale as the truster could grant. Their duty is to sell the estate in such a way as to get money in order to divide it among the grandchildren. They could never grant a long lease like that which we are here asked to authorise. A long lease is an essentially different kind of power from that conferred by the trust-deed. It is therefore not what the truster calls a power of sale. On the whole matter, I think we should be aiding rather than frustrating the intention of the testator by granting this petition.

The Court recalled the interlocutor of the Lord Ordinary and granted the prayer of the petition.

Counsel for Petitioner—Trayner—Guthrie.
Agents—Duncan & Black, W.S.

Wednesday, February 16.

FIRST DIVISION.

SOCIETY OF SOLICITORS OF ELGINSHIRE, PETITIONERS.

Process—Law Agents Act 1873 (36 and 37 Vict. cap. 63)—Petition to Strike Name off Rolls.

On the petition of the Society of Solicitors of the county of E., the Court ordered the name of an enrolled law agent, who had been convicted of forgery and imprisoned, to be struck off the register of enrolled law agents, and off the roll of law agents practising in the Sheriff Court of said county.

James Shepherd, an enrolled law agent, practising in the Sheriff Court of Elginshire, was convicted of forgery on 8th September 1880, and sentenced to twelve months' imprisonment. The document which he had fabricated was a petition to the Sheriff Court of Elginshire for discharge of a sequestrated bankrupt, who was his client, to which he adhibited a forged signature of the Sheriff-Clerk-Depute.

The Society of Solicitors of Elginshire presented a petition to the Court craving their Lordships to "decern and ordain the Registrar of Law Agents to strike the name of the said James Shepherd out of the register of enrolled law agents, and also to decern and ordain the Sheriff-Clerk of the Sheriff Court of Elginshire to strike the name of the said James Shepherd off the roll of law agents practising in the said Sheriff Court."

In the petition it was stated that the petitioners are a society of procurators in the county of