

Wednesday, July 20.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

GUNN AND OTHERS (SUTHERLAND'S
TRUSTEES), PETITIONERS.

*Trust—Special Powers—Sale of Heritable
Trust-Estate.*

A trustor directed his trustees to sell his whole heritable estate, excepting his heritable estate in L. and T. Held that that did not prevent the trustees being authorised to sell the heritable estate in L. and T. when that had become necessary in the interest of the beneficiaries, and for the preservation of the trust-estate against the diligence of creditors. The case of *Whyte*, January 10, 1891, 18 R. 376, distinguished.

Robert Sutherland, farmer in Clatequoy, in the parish of Thurso and county of Caithness, died in 1880. By trust-disposition and settlement dated 18th July 1877 he disposed of his whole estate, heritable and moveable, to trustees for, *inter alia*, payment to his wife of the whole interests, rents, and profits of his estate, heritable and moveable, for the maintenance of herself and children; payment of a legacy of £200 to the trustor's daughter on her attaining twenty-one years of age, or on her marriage, whichever event should happen first; and for the division of the residue of the estate, heritable and moveable, equally between his two sons Donald William Munro Sutherland and Robert Charles Sutherland on their severally attaining the age of twenty-one, but under condition of their supporting their mother.

He directed his trustees, "as soon after my death as they conveniently can, to sell, realise, and convert into money my whole estate, heritable and moveable, excepting my household furniture and plenishing, and also excepting my heritable property in Latheronwheel and Thurso, and to invest the same to the best advantage on such securities as they may think proper;" and he further authorised his trustees, "if they think proper, to advance and pay before the arrival of the term of payment, to and for behoof of my said sons, or either of them, any part not exceeding one-half of the fee or capital of the provision made in his favour for establishing him in business."

The trustor was survived by his wife Mrs Ann Munro or Sutherland, and the following children—Donald William Munro Sutherland, Ann Christian Sutherland, and Robert Charles Sutherland, aged respectively twenty-one, nineteen, and sixteen.

At the trustor's death the whole property belonging to the estate consisted of—(1) heritable property in the village of Latheronwheel, Caithness; (2) heritable property in the town of Thurso, Caithness; (3) the lease and stocking of two farms.

The trustees, being compelled by the landlord to carry on the two farms, incurred serious losses, and in order to pay off the debts so incurred found it necessary in August 1880 to raise money by bond and disposition in security over the two heritable properties.

The creditor in the bond called up the loan at Martinmas 1891, and the trustees being embarrassed by the two farms, and being unable to renew the loan, with the concurrence of the beneficiaries, presented a petition to the Court for power to sell the whole heritable estate in Latheronwheel and Thurso (although they proposed to begin with the sale of the property in Latheronwheel) as being absolutely necessary, with the view of preventing the bondholder selling the whole heritable estate under the bond and disposition in security—thus bringing ruin upon the beneficiaries under the trust—and also of enabling a division of the estate to be made according to the wishes of the trustor.

The Lord Ordinary (STORMONTH DARLING) reported the petition to the First Division.

Argued for the petitioners—That the main purpose of the trust—the support of the widow and children—could not be fulfilled unless power was granted to sell; that the powers asked were consistent with the trustor's intention—*Weir's Trustees*, June 13, 1877, 4 R. 876; *Downie*, June 10, 1879, 6 R. 1013; and that the case of *Whyte's Factor v. Whyte*, January 10, 1891, 18 R. 376, was distinguishable from the present.

At advising—

LORD PRESIDENT—I think the prayer of this petition should be granted. The Lord Ordinary has very naturally drawn attention to the recent case of *Whyte*, with which your Lordships are better acquainted than I am, as I was not then in the Division, but, as it strikes me, there is a clear and sufficient distinction between that case and the present. In *Whyte's* case the trustor conferred upon his trustees power to sell his whole estate, heritable and moveable, "with the exception of the lands of Meethill and Burnhaven." From that it was plain that the trustor desired that his trustees should not have power to sell Meethill and Burnhaven.

Here the trustor does not give power to sell the property in question. What he does is to direct his trustees to sell his other heritable estate. That does not convey to my mind the same implication as in *Whyte's* case—that the trustees are to have no power to sell this property, even if that should be found necessary for the explication of the trust-estate.

I think, accordingly, there is warrant for us dealing with this petition differently from that followed in the case of *Whyte*.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I think Mr Davidson was right in presenting this case as he did, and in arguing that it was necessary that the trustees should have the power

asked if the trustor's wishes were not to be entirely defeated by the estate being carried away by creditors. I am of opinion we should prevent that disaster by granting the prayer of this petition.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Davidson.
Agents—Auld & Stewart, S.S.C.

Tuesday, February 3, 1891.

FIRST DIVISION.

THE HERITABLE SECURITIES
INVESTMENT ASSOCIATION,
LIMITED *v.* WINGATES.

Bankruptcy—Trust-Deed—Accession—Circumstances Held Insufficient to Amount to Accession, so as to Bar a Creditor from Insisting on his Full Rights.

A mercantile firm granted heritable security for payment of a sum of money. It became bankrupt and granted a trust-deed for behoof of creditors, of which the heritable creditors were aware. Being satisfied with the security which they held they did not claim or receive a dividend. *Held* that they had not acceded to the trust to the effect of discharging the partners of the firm from liability for the debt.

Bankruptcy—Novation—Delegation—Discharge.

A mercantile firm and the partners thereof granted heritable security for a debt, and thereafter became bankrupt. A new firm was formed under the old name, which undertook to perform the whole obligations contained in the agreement between the old firm and the heritable creditors for repayment of the debt. The heritable creditors undertook to accept the new firm as tenants under a lease of the security-subjects which they had granted to the old firm. One of the partners of the new firm bound himself for the debt, but without hurt or prejudice to the old security, and in corroboration thereof. The new firm became bankrupt, and on an affidavit and claim lodged in its sequestration the heritable creditors stated that they held no other obligants bound for their claim except the firm, the partners thereof, and the partners of the old firm. Two of the partners of the old firm were not members of the new. *Held* that these facts were insufficient to infer delegation or novation, or to release the two partners of the old firm from their obligation for the debt.

By a personal bond for £55,000, dated 14th December 1875, the firm of Thomas Wingate & Company, engineers, shipbuilders, and founders at Whiteinch, near Glasgow, and the individual partners of said firm, bound themselves as a company, and also as indi-

viduals, conjunctly and severally, to repay to the Heritable Securities Investment Association, Limited, the sum of £55,000, with interest and penalties as set forth in the bond.

The sum borrowed was to be repaid in ten years, and it was provided—"Nothing herein contained shall be held to affect the right and power of the said Heritable Securities Investment Association, Limited (hereby conferred on and declared to belong to them) in the event of one full half-yearly instalment and interest remaining at any time unpaid, to take all proceedings against us or our successors competent by the law of Scotland by diligence or otherwise for enforcing payment of whatever sum, whether the whole or a balance, may at the time be due of said principal sum of £55,000 and interest then due and thereafter to become due thereon: And it is further hereby declared that the amount, whether the whole or a balance, then due and payable as aforesaid, shall for the purpose of such proceedings be competently ascertained by a certificate under the hand of the manager for the time being of said association, and we, the said Thomas Wingate & Company as a company, and we, the said Andrew Wingate, Wilson Wingate, and Paterson Wingate as partners thereof, and as individuals, accordingly bind and oblige ourselves as a company and as individuals, all conjunctly and severally and our respective foresaids to make payment to the said Heritable Securities Investment Association, Limited, or their foresaids, of whatever sum may appear by said certificate to be so due and payable, with the interest thereafter to become due thereon, and one-fifth part more of penalty in case of failure in payment thereof."

By disposition of the same date the borrowers conveyed to the pursuers certain subjects in Govan belonging to them *ex facie* absolutely, but really in security of the debt. The footing on which the conveyance was made was set forth in an agreement dated 14th and 16th September 1875, which contained, *inter alia*, the following provisions—"Third, while the foresaid subjects continue to be held by the said Heritable Securities Investment Association, Limited, the said association shall not be bound to expend money to any greater extent than they choose on any account, or for any purpose whatever in connection with the said subjects, and shall not be responsible for omissions or neglect in keeping the buildings insured against loss by fire (the manager of said association being, however, hereby empowered to insure the said subjects in his own name or that of the association for such sum as the manager shall think proper), or for omissions or neglect in any other way concerning the premises. Fourth, the said second parties shall be bound to implement, fulfil, and observe, and entirely to free, relieve, and skaitless keep the said association of and from the whole obligations, prestations, and conditions specified and contained in the title-deeds of said subjects, and of and from payment of all feu-duties, casualties, ground