

averred that the Grangemouth Coal Company, Limited, owes no money to the common debtor, and that it cannot implement the alternative conclusion to transfer the shares. The company, it is said, can register transfers of shares or decrees of the Court in reference to them, but had no power to transfer shares—*Shaw v. Caledonian Railway Company*, February 20, 1890, 17 R. 467. It was admitted that the shares were arrestable, as was decided in *Sinclair v. Staples*, January 27, 1860, 22 D. 600. But it was maintained that the arrestment could not be worked out by mere conclusions of furthcoming, but that conclusions of declarator were essential—*Alison v. The African Company*, 1707, M. 707. The pursuer replied that, although it might be true that decree in the precise terms of his conclusions might not be granted, still the conclusions of an action of furthcoming might always be worked out by the sale of the subjects effectually arrested, or of so much thereof as would meet the pursuer's demand, and that this course could be followed although there were no express conclusions for a sale. It rather appears to me that this contention is in accordance with practice, and is not, as I understand, inconsistent with anything decided or laid down in *Lucas' Trustees*. I am disposed to think that it would be proceeding too strictly to throw out the action for want of a declaratory conclusion, and that the objection of the arrestees is not necessarily fatal. But before finally disposing of this plea I should desire to hear parties further in reference to the question whether there are any shares belonging to the common debtor, and what these are; and as to the precise proposal which the pursuer is prepared to submit with a view to the payment of his debt by means of the sale of the shares."

Thereafter minutes were lodged for the pursuer and for the Grangemouth Coal Company showing that Mr Russell Aitken was the proprietor of the shares in question.

On 15th July 1897 the Lord Ordinary pronounced the following interlocutor—
"Repels the first plea-in-law for the defenders, the said Grangemouth Coal Company: Finds that the shares in the Grangemouth Coal Company Nos. 441 to 605 inclusive, standing on the register of this said company in the name of the principal debtor Russell Aitken, have been lawfully arrested: Grants warrant and authority to sell the same or so many of said shares as shall be required to satisfy and pay the pursuer's claims against the present debtor under the present action, including the principal sum of £27, 17s., and the sum of £5 with interest as concluded for, and also the expenses of sequestration and the expenses of the sale: Remits to Messrs Thomas Miller & Sons, stockbrokers, Edinburgh, to carry through the said sale after such advertisements as they may think proper, and to report the result of said sale to the Courts. Grants leave to reclaim.

The case was afterwards settled.

Counsel for the Pursuer—A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Defenders—Grainger Stewart. Agents—Drummond & Reid, W.S.

Thursday, October 21.

SECOND DIVISION.

[Sheriff-Substitute at Falkirk.]

IMRIE'S TRUSTEE v. CALDER.

Bankruptcy — Sequestration — Trustee — Adoption of Bankrupt's Lease.

A tenant of a farm, consisting solely of grazing ground, on a verbal lease expiring at Whitsunday, became bankrupt on 22nd March. The trustee in the sequestration advertised the stock and dairy plant for public sale, and on 7th April received an offer on behalf of the bankrupt's wife. This offer he accepted on the following conditions—that the offerer should be allowed to carry on the dairy until 28th May, on payment to the trustee, along with the price of the stock, &c., of £12 of rent of houses and pasturage; that the offerer should relieve the trustee of the proportion of servants' wages from the date of the acceptance; and that the price was to be paid immediately on acceptance. These conditions were accepted by the offerer, and she continued in possession of the farm till the conclusion of the lease.

Held that the trustee by his actings had not adopted the lease.

On 22nd March 1897 John Imrie, dairyman, Grangemouth, became bankrupt, and his estate was sequestrated. At that date he was tenant on a verbal lease from Whitsunday 1896 to Whitsunday 1897 of the farm of Reddoch belonging to James Charles Calder, Distiller, Bo'ness. The farm consisted solely of grazing ground, no part of it being under crop.

On 2nd April William Drummond Marshall, solicitor, Falkirk, was confirmed as trustee on the sequestrated estate. The trustee advertised the stock and dairy plant for public sale.

On 8th April, at a meeting of the creditors, the trustee read the following offer by Mr Henry Walker, draper, Grangemouth:—
"Grange Street,

"Grangemouth, April 7, 1897.

"On behalf of Mrs Imrie, I agree to take the stock of cows, milk van, horses, dairy dishes, &c., including all Mr Imrie's sequestrated estate at Reddoch (the pony not included), but all others at valuation prices, as shewn me by Mr Allan, Solicitor; Mrs Imrie to be allowed to carry on the dairy at Reddoch until 28th May, you relieving her of all liability as to rent, wages, &c., till 28th May first. Cash to be paid on Monday first, the 12th April, or any earlier date, if transfer of stock, &c. is completed.

HENRY WALKER.

“Shop fittings not included, but I may be able to arrange for party to take them over.”

Thereupon “after full consideration of the offer, the meeting unanimously agreed to authorise the trustee to accept Mr Walker's offer, on the following conditions, viz.—That Mrs Imrie should be allowed to carry on the dairy at Reddoch until 28th May, on payment by Mr Walker, along with the price, of a sum of £12 of rent of houses and pasturage. Mr Walker or Mrs Imrie to relieve the trustee of the proportion of servants' wages from and after the date of the trustee's acceptance. The price to be paid immediately on acceptance. In the event of these conditions not being agreed to of this date, the trustee was instructed to decline the offer, and proceed with the public sale as advertised.” To this conditional acceptance Walker agreed in the following terms—“*Grangemouth, 8th April.*—I agree to the conditions mentioned in the foregoing minute.” In respect of this agreement Mrs Imrie, the bankrupt's wife, continued in possession of the farm till the conclusion of the lease.

On 28th July Calder put in a claim for £50 as half-year's rent, due May 15th, of farm and house at Reddoch. He claimed “a preferable ranking for said debt in respect of the trustee having retained the use and possession of the farm till the expiry of the let for the benefit of the estate.”

On 5th August the trustee pronounced the following deliverance on Calder's claim—“The trustee rejects this as a preferable claim, in respect it is a claim for rent of agricultural subjects, and is not entitled to a preferable ranking. He admits the claimant to a ranking as an ordinary creditor.”

Calder appealed to the Sheriff-Substitute at Falkirk (RUSSELL BELL), who on 29th September pronounced the following interlocutor—“Finds in fact (1) that at the date of the sequestration (22nd March 1897) John Imrie, the bankrupt, was tenant on a verbal lease, from Whitsunday 1896 to 1897, of the farm of Reddoch belonging to the appellant; (2) that it is admitted that said farm consisted solely of grazing ground, no part of it being under crop; (3) that on 8th April 1897 the respondent, as trustee in the said sequestered estate, transferred the remainder of the lease of said farm to the bankrupt's wife, as recorded in the minutes of meeting of creditors of that date on page of the sederunt book; (4) that the bankrupt's wife continued in possession of the farm till Whitsunday 1897; Finds in law that the respondent, as trustee foresaid, thereby became liable to the appellant in the rent of the said farm, so far as unpaid up to Whitsunday 1897: Therefore sustains the appeal, and ordains the respondent to rank the appellant as a preferable creditor on the said sequestered estate, in terms of his claim.”

The trustee appealed, and argued—His actings did not constitute an adoption of the lease. The question whether a trustee in bankruptcy had adopted the bankrupt's

lease was one of circumstance. Here the trustee had shown no intention of adopting the lease, and had publicly advertised the stock for sale. The landlord could not have entered into possession till Whitsunday 1897, and no prejudice had resulted to him by reason of the trustee, in the interest of the creditors, having received a sum down from Mrs Imrie for the stock, and having handed over to her the management of the farm for the few remaining weeks of the lease. The case was ruled by *M'Gavin v. Sturrock's Trustee*, February 27, 1891, 18 R. 576. Indeed the actings of the trustee were more extensive in that case than the present, as in *M'Gavin's* case the trustee had sublet some of the pasture, and had received rent for it.

Argued for the respondent—The judgment of the Sheriff-Substitute was right. The trustee had sold to Mrs Imrie an independent right to occupy the farm, and the fact that the unexpired period of the lease was short did not make any difference. There were four courses which might have been followed without the adoption of the lease by the trustee. These were specified at length by Lord Deas in *Dobie v. Marquis of Lothian*, March 2, 1864, 2 Macph. pp. 800, 801. None of these had been followed here; the trustee had adopted the lease by selling its unexpired term for a sum of money. The transaction in substance amounted to a sale and assignation of the lease—*Hamilton v. Sommerville*, February 3, 1855, 17 D. 344. The doctrine of *M'Gavin's* case was that the trustee is entitled to do anything necessary in the way of ingathering and managing the bankrupt's estate, but beyond that is not entitled to possession of any part of the farm. In *M'Gavin* the subletting was done for the benefit of the creditors whom the trustee represented; here what was done was to transfer an independent right to a farm to a person who paid cash down for it.

LORD JUSTICE-CLERK—In a case such as this the decision of the Court must depend very much on the particular circumstances, such as the nature of the subject of the lease, the tenure upon which the bankrupt possessed the subject, and the time of the sequestration. Here the lease was for a year, and a very short time before its termination the tenant became bankrupt. In these circumstances it was the duty of the trustee to make such arrangements as would prevent as far as possible loss to the creditors. Of necessity these arrangements had to be prompt, and were temporary in their character, and it appears to me that what the trustee did was simply to make a proper effort to get over the few remaining weeks of the lease with as little loss as possible to the estate.

As was pointed out during the discussion of the case, if the trustee had got Mrs Imrie to take charge of the farm till the termination of the lease, and render him an account of her transactions, no one would have suggested that the trustee had done what he was not entitled to do without

adopting the lease. But in his opinion the best course to take was to accept a slump sum from Mrs Imrie and to allow her to keep the proceeds of her management. In taking this course I do not think that the trustee can be held to have adopted the lease.

LORD YOUNG—I am of the same opinion.

LORD MONCREIFF—I am of the same opinion. I think that in the peculiar circumstances of this case the trustee cannot be held to have adopted the lease. I think that what he did was simply to wind up the estate in the way most advantageous for the creditors. There were only a few weeks of the lease to run, and in the trustee's opinion he got a better return than he could otherwise have done by obtaining payment of cash down for the stock from Mrs Imrie on condition of permitting her to manage the farm on her own account for the short remainder of the lease.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

“Having heard counsel for the parties in the appeal, Sustain the same: Recal the interlocutor of the Sheriff-Substitute of Stirlingshire dated 29th September 1897: Refuse the claim for James Charles Calder: Sustain the delivrance of the trustee rejecting the said claim, and decern,” &c.

Counsel for the Appellant—M'Lennan—Munro. Agent—Robert D. Ker, W.S.

Counsel for the Respondent—William C. Smith. Agent—Alex. Morison, S.S.C.

Friday, October 22.

SECOND DIVISION.

THOMSON'S TRUSTEES v. THOMSON.

Trust—Administration of Trust—Power of Sale—Construction of Will—Implication.

A testator directed his trustees to pay to his wife during her lifetime “the free rents, interests, and profits arising from my means and estate, heritable and moveable, or from the proceeds thereof,” and after her death to divide his “means and estate, heritable and moveable, or the proceeds thereof,” into three equal parts, and to hold one share for behoof of each of his three children in life and his or her children in fee.

The testator was survived by his wife and three children, and left, *inter alia*, engineering works and other heritable property. There was no direction in the trust-deed to the trustees to carry on the engineering business.

Held that the trustees had power under the trust-deed to sell the heritable property, including the engineering works.

Process—Special Case—Competency.

Observations as to nature of controversy which may be made the subject of a special case.

David Thomson, engineer, Johnstone, died on 26th September 1895 leaving a trust-disposition and settlement, dated 24th September, in which he conveyed his whole estate, heritable and moveable, to trustees for the following purposes—*In the first place*, Payment of his debts, sick-bed and funeral charges, and trust expenses: “*In the second place*, In the event of my wife Mary Anne Hamilton or Thomson surviving me, that my trustees shall pay to her during her lifetime the free rents, interests, and profits arising from my means and estate, heritable and moveable, or from the proceeds thereof: *In the third place*, That my trustees shall, upon the decease of the longer liver of my said wife and me, divide my means and estate, heritable and moveable, or the proceeds thereof, into three equal parts or shares, and shall hold one of said equal parts or shares for behoof of my daughter Ann Crawford Thomson or M'Kenzie in life and for her life and use alienably, and of her children in fee; they shall hold another of said equal parts or shares for behoof of my son David Thomson in life and for his life and use alienably and of his children in fee, and they shall hold the remaining said equal part or share for behoof of my daughter Mary Stevenson Thomson or Stewart, in life and for her life and use alienably and of her children in fee.”

The truster was survived by his wife and three children. At the date of his death his estate included, *inter alia*, the engineering works at Johnstone in which he carried on his business of an engineer, and certain leasehold subjects at Kilchattan Bay, consisting of three houses erected on ground held on a ninety-nine years' lease from Whitsunday 1880 to Whitsunday 1879.

The trustees resolved, if it was competent, to sell the engineering works and the leasehold subjects by public roup or private bargain, or, failing sale of the former, to let them on lease for ten years or less; but questions arose between them and the beneficiaries as to their power to do so.

For the decision of the point a Special Case was presented to the Court by (1) the trustees and (2) the beneficiaries under the trust-deed.

The questions at law were—“(1) Have the parties of the first part power under the trust-disposition and settlement to sell the engineering works and fixed plant and tools therein by public roup or by private bargain? (2) Have they power to let the said engineering works and fixed plant and tools on lease for say ten years or under? (3) Have they power, under the said trust-disposition and settlement, to sell the said leasehold subjects at Kilchattan Bay by public roup or by private bargain?”

Argued for first parties—A sale was competent, as the trust-deed directed them to pay to the widow the free rents, interests, and profits arising from his means and