

Counsel for the Pursuers (Reclaimers)—Sandeman, K.C.—Macmillan, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for the Defenders (Respondents)—The Lord Advocate (Clyde, K.C.)—Constable, K.C.—W. J. Robertson. Agent—A. Grierson, S.S.C.

Tuesday, March 16.

### FIRST DIVISION.

[Lord Blackburn Ordinary.

#### TRAILL AND OTHERS v. TRAILL'S TRUSTEE.

(See *Traill's Trustees v. Free Church of Scotland*, 1915 S.C. 655, 52 S.L.R. 524.)

*Process—Special Case—Contract—Construction—Agreement to Create Separate Fund in a Trust Estate Sought to be Made out of Special Case.*

Valuable pictures forming part of a trust estate were sold by the trustee with the consent of the creditors, who agreed "that the price or prices realised by the pictures, under deduction of all expenses connected with the transaction, should be held by the trustee until the rights of all parties concerned should be definitely ascertained and agreed upon." The estate was mainly heritable and some of the creditors held securities over the heritage while others were unsecured. Questions having arisen as to the interests of parties in the proceed of the pictures, a special case was presented, which contained the following question, "Do the . . . proceeds fall to be distributed among the whole creditors, secured and unsecured, of the truster and of his ancestors or predecessors in title *pari passu*?" To that question an affirmative reply was given. Certain unsecured creditors who were represented in the special case thereafter raised an action of accounting against the trustee and claimed that the special case constituted a contract under which the proceeds of the pictures were to be treated as a fund separate from the general trust estate, exempt from the expenses of the trust administration save in so far as dealt with in the special case, and available for immediate division. *Held* that upon the proper construction of the agreement embodied in the special case the proceeds in question formed part of the general trust estate, and action *dismissed*.

Sinclair Traill, solicitor, Blandford, Dorsetshire, and others, *pursuers*, brought an action against John Little Mounsey, W.S., sole surviving trustee acting under the trust-disposition of the late James Christie Traill of Rattar, *defender*, concluding for decree of accounting for his whole intrusions with the proceeds of the sale of the Raeburn portraits forming part of the

trust estate, and for payment of the proceeds of the sale of the portraits "to the pursuers and the other creditors of James Christie Traill, under deduction only of such charges and expenses as may be found in the course of the proceedings to follow hereon to be proper charges against the said proceeds," and, failing an accounting, for consignment in Court of £12,000, which should be held to be the balance of the proceeds of the pictures. The pictures had, with consent, been sold, and a Special Case to settle the rights of parties in the fund thereby produced had been presented to the Court. The *fourth question of law* in that Special Case (*Traill's Trustees v. Free Church of Scotland*, 1915 S.C. 655, 52 S.L.R. 524) was—"Do the . . . proceeds fall to be distributed among the whole creditors, secured and unsecured, of the truster and of his ancestors or predecessors in title *pari passu*?" To that question an affirmative answer had been returned.

The pursuers *pleaded*—"1. The pursuers as creditors of the truster being entitled, along with other creditors, to have the proceeds of the said two pictures, less lawful charges thereon, divided amongst them, decree of accounting should be granted as concluded for. 2. The defender being entitled to deduct from the said proceeds before division only such charges and expenses as may be found in this process to be proper deductions therefrom, decree should be pronounced in terms of the declaratory conclusions of the summons. 3. In the event of the defender failing to lodge an account as concluded for, an order for consignment should be pronounced in terms of the last conclusion of the summons."

The defender *pleaded, inter alia*—"2. The action is ill-laid and incompetent in respect that (a) it is only competent to sue the defender as trustee under and in virtue of the said trust-deed and under and in terms of its provisions, while the pursuers propose to ignore the said deed and to set up an independent trust; and (b) the present action proposes to select one item of a general estate for which the defender is entitled to a right of general accounting, and to treat that item as a separate fund. . . 5. The defender never having refused to account for the proceeds of the portraits, the declaratory conclusion is unnecessary and should be dismissed. 6. The defender being willing to account for the whole trust estate in a proper process, and at the instance of all parties having interest in the said accounting, the action should be dismissed."

On 24th May 1919 the Lord Ordinary (BLACKBURN) assolized the defender.

*Opinion* (from which the *facts* of the case appear)—"The defender in this action is the sole surviving trustee acting under an *inter vivos* trust-disposition for behoof of creditors, dated 5th January 1887, granted by the late James Christie Traill of Rattar, who died on 6th February 1899. The heritable debts amounted to £179,058, secured over different estates, and there was also a number of unsecured creditors. The pur-

suers in this case are some of the unsecured creditors, and the action raises a question as to their rights in a particular sum of £18,375, being the price obtained by the defender for two Raeburn portraits sold by him in July 1911. The sale was carried out with the consent of the creditors, given at a meeting held on 3rd July, when it was formally agreed 'that the price or prices realised by the pictures, under deduction of all expenses connected with the transaction, should be held by the trustee until the rights of all parties concerned should be definitely ascertained or agreed upon.'

"Thereafter numerous claims were lodged by creditors who maintained that they had preferential rights to the sum in question, and a Special Case was adjusted and presented to the Court, which is reported in 1915 S.C. 655. The first party was the trustee, who submitted no separate claim, but on being called on by the Court supported the claim of the seventh parties in argument. The second parties were certain creditors, who claimed a preference in respect that they were creditors of the truster's ancestors. The third party ultimately withdrew their claim. The claims of the fourth and fifth parties were based upon the fact that they were secured heritable creditors on the estate where the pictures had been situated prior to the sale. The sixth parties were other secured creditors. The seventh parties [amongst whom the whole of the present pursuers were represented] were unsecured creditors, who contended that the whole creditors, secured and unsecured, were entitled to be ranked on the proceeds of the said pictures *pari passu*, the secured creditors being bound to value and deduct their securities in order to rank. It was this contention of the seventh parties which was given effect to by the Court in their answers to the questions in the case. It was agreed in the case that the expenses of all creditors in connection with the questions raised should be paid out of the price of the pictures. Following on the decision in the Special Case the defender, after payment of the expenses, paid a dividend to all the creditors at the rate of 1s. 2d. in the £, which absorbed a sum of £9170, 4s. 3d. He declines meantime to pay any further dividend out of this particular fund, maintaining that it forms part of the general trust estate liable for the expenses and outgoings of the trust, which will be fully accounted for on his making a final distribution among the general creditors and obtaining a discharge of his own and the deceased trustee's intromissions. The pursuers, however, claim that the proceedings in the Special Case constituted a contract between the defender and themselves that the price of the pictures was to be treated as a special fund apart from the general funds of the trust estate, to be immediately divided among the creditors in accordance with the decision of the Court, and they accordingly in the present action ask for a declarator to this effect, and seek to have the defender ordained to account to them for the balance. They do not ask in the summons for pay-

ment, but merely for an accounting and consignation of the balance of the price in Court.

"I do not think that the question raised is altogether free from difficulty, but I am unable to give effect to the pursuers' contention. The contention of the unsuccessful parties to the Special Case was to the effect that the price of the pictures did not form part of the general trust funds, but was to be treated as a special fund over which they had a preferential claim. The seventh parties contested this, and the defender supported their argument. I do not think that one can fairly deduce from this anything of the nature of a contract between him and the seventh parties that in the event of their success the fund was in their case also to be treated as a special fund, and immediately divided up. The question of immediate division was not really raised in the case. Division might have followed had the unsuccessful parties been successful, as then the fund could not have been used for the general purposes of the trust, but it does not seem to me to be a natural sequel to the seventh parties' success. The Special Case does not bear to have been brought in place of an action of multiplepointing, in which the pursuer could have obtained a judicial discharge, although in their opinions the Judges, for convenience, refer to the fund as the fund *in medio*, and I do not think it was necessary for the defender to put in a separate claim to be ranked and preferred as trustee. The case was submitted for the opinion and judgment of the Court, but no request was made by the parties that any operative decree should be embodied in the interlocutor except on the question of expenses. To this extent only judgment was pronounced, otherwise the interlocutor contents itself with answering the questions put. The agreement as to the expenses being paid out of the fund, which gave rise to the Special Case, was a reasonable arrangement to which, in my opinion, no such significance can be attached as the pursuers contend for. I shall accordingly assolvie the defender from the conclusions of the summons."

The pursuers reclaimed, and argued—The defender was not entitled to treat the proceeds of the pictures as part of the general trust estate, as the answers to questions 4 and 5 of the Special Case read in the light of the agreement of 3rd July constituted an agreement that the proceeds should be treated as a separate fund. The Special Case was brought to determine the rights of parties in the proceeds, and in terms of the case the proceeds were to be "distributed" without deduction of the expenses of the trust. "Distributed" meant paid away to the last penny in accordance with the answers to the question, and did not refer to ranking. The words of the contract invoked in a special case were crucial, and the parties were bound by them—*Davidson's Trustees v. Davidson*, 1912 S.C. 693, 49 S.L.R. 546. If the defender had meant to treat the proceeds as part of the general trust estate he

should have claimed accordingly in the Special Case.

Counsel for the defender were not called on.

LORD PRESIDENT—I am well satisfied with the conclusion reached by the Lord Ordinary in this case, and generally with the reasons for which he has arrived at it. Having had our attention drawn to the Special Case which was decided by the Extra Division, I, for my part, am quite unable to discover anything of the nature of a contract by the parties that the proceeds of the sale of these valuable pictures constituted a special fund apart from the general funds of the trust estate to be immediately divided among the creditors in accordance with the decision of the Court. If that be so, it is obvious that this action falls to the ground; and I accordingly think we should adhere to the Lord Ordinary's interlocutor.

LORD MACKENZIE—I am of the same opinion. Certainly there was no trace of any such point in the course of the argument in the Special Case as that to which we have now listened, and I share very much the difficulty of the defender in the present case. In answer 14 he sets out what he understands the contention of the pursuers to be, viz., "that the pursuers maintain that the whole of the proceeds of the portraits formed a separate trust fund and should be distributed forthwith, subject only to the defender taking credit for (1) the amount of the interim dividend aforesaid, and (2) the expenses paid in connection with the special case," and continues—"The defender has been unable to understand the grounds of this position." With that statement I entirely agree, because the contention which is put against the defender here is that on the pursuer's construction of the Special Case he is not entitled to administer the trust in accordance with what otherwise must have been his undoubted right.

It is said that having become a party to the Special Case he thereby gave up certain valuable rights without any consideration at all. I think it is out of the question to say that that was the effect of the judgment in the Special Case. The purpose for which the Special Case was brought is distinctly brought out in paragraph 11 of the Special Case; and then in paragraph 12 it is said that various questions had arisen as to the application of the money which had been got by the sale of these Raeburn portraits, and the trustee submitted to the various creditors certain proposals for their consideration and approval, but certain of the creditors would not accede to them, and it was ultimately agreed that this Special Case should be presented for the determination of the various questions which had arisen. The questions which had arisen were with regard to the respective preferences to which the heritable creditors of (a) Sheriff James Traill, (b) George Traill and his trustees, and (c) the personal and heritable creditors of James Christie Traill, were entitled over the price of the portraits, and as to whether creditors holding securities over the lands of Castle-

hill were entitled to any preference over the other creditors, and as to their preference *inter se*. The only argument was about that.

Accordingly I am of opinion that there was nothing of the nature of a contract between the trustee and the seventh parties to the effect that in the event of the seventh parties being successful the fund was to be treated as a special fund and to be divided among the creditors, and that accordingly the judgment of the Lord Ordinary is correct.

LORD SKERRINGTON—I agree with your Lordships. My only difficulty is as to the form of the interlocutor which ought to be pronounced. The true purpose of this action is not disclosed in the conclusions, and I am disposed to think that it should be dismissed.

There is, however, a real question behind which was fully argued, and upon which we may properly, I think, express an opinion. The pursuers maintain that in some way or another an agreement was entered into between the parties interested in this particular estate, including the trustee in bankruptcy, that a special fund of £16,626, being the free proceeds of the sale of two Raeburn portraits, should be distributed among the persons interested in the estate without deduction of any expenses or charges except those specified in article 23 of the Special Case. That would be an intelligible agreement if the parties really entered into it. But, as I understand, the only evidence of any such agreement which was tendered to the Lord Ordinary was the fourth question of law in the Special Case, that question being—"Do the said proceeds fall to be distributed among the whole creditors, secured and unsecured, of the truster *pari passu*?" The Court answered that question in the affirmative. I think it is ridiculous to suggest that that question should be read as inquiring whether the sum of £16,626, referred to in article 11 of the Special Case, must be distributed among the truster's creditors without any deduction therefrom except the expenses mentioned in article 23 thereof. If that had been the question, the pursuers in the present action would have been right, not because the Extra Division ever applied its mind to the figures, but because the parties had agreed to ask not merely the opinion of the Court but also its judgment in a particular form, and accordingly any party to the Special Case, including the trustee, would have been precluded from maintaining that he was entitled to deduct from the sum of £16,626 any expenses which did not fall within the description found in article 23 of the Special Case. But there is no warrant for any such interpretation of question 4; and accordingly, if the conclusions had been properly framed, I should have said that the defender was entitled to absolver. The leading conclusion, however, is for an account of the trustee's intrusions with the proceeds of the sale of the two Raeburn portraits, and then follows a conclusion for a declarator that he is bound to make pay-

ment of the amount of such proceeds to the pursuers and the other creditors, under deduction only of such charges and expenses as may be found in the course of the proceedings to be proper charges against the said proceeds. In the abstract no one could take any exception to that. It seems a right enough conclusion, but it has no application to the facts of the case, and ought therefore to be dismissed.

The next conclusion, which is for consignation, I should dismiss as being unintelligible.

**LORD CULLEN**—*Prima facie* the proceeds of the pictures formed part of the general trust estate of the truster, and were *in pari casu* with other parts of the general estate over which the security of particular creditors did not extend. The pursuers in this action say that at the time of the Special Case there was a special agreement entered into to the effect that the proceeds in question should not go to the creditors by passing under the trust administration in the ordinary way, but should be set aside and be straightway distributed among the creditors without reference to any charges or burdens which the administration would otherwise lawfully impose upon them. I agree with your Lordships in thinking that there is no evidence of any such agreement having been entered into, and that the answer given in the Special Case—read in light of the opinions of the judges and the contentions of parties—does not involve the result which the pursuers contend for.

**LORD PRESIDENT**—We practically affirm the third, fifth, and sixth pleas-in-law for the defender, which, as Lord Skerrington has pointed out, leads to the dismissal of the action.

The Court dismissed the action.

Counsel for the Pursuers (Reclaimers)—Brown, K.C.—Cooper. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender (Respondent)—Chree, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Saturday, March 20.

### FIRST DIVISION.

[Sheriff Court at Stirling.  
**KELLY'S TRUSTEE v. MONCREIFF'S TRUSTEE.**

*Right in Security—Heritable Security—Process—Diligence—Pounding of the Ground—Partnership—Subjects Attached.*

The two partners of a firm were infeft in heritable subjects as individual partners of the firm and as trustees for the firm. Under the partnership agreement one of them was to reside in the premises without paying rent or taxes. A pouncing of the ground was used by a heritable creditor, and the household furniture, which belonged to the individual

partner in occupation, was included in the inventory. *Held* that those moveables had been validly attached, as the partner in question was in substance owner of the ground though not sole owner.

Bell's Com., 7th ed., vol. ii, p. 57, and Ersk. Inst. iv, i, 13, commented on and explained.

John Craigen, advocate, Aberdeen, sole surviving trustee acting under an indenture prior to marriage of John Davidson Kelly and Annie Barnes, *pursuers*, brought an action of pouncing of the ground in the Sheriff Court at Stirling against Braidwood & Moncreiff, Stanley House School, Bridge of Allan, and Thomas Braidwood and Lord Moncreiff, the partners of the firm of Braidwood & Moncreiff, as trustees for the firm and as individuals, *defenders*. In the course of the proceedings which followed John Stuart Gowans, C.A., who had been appointed trustee on the sequestrated estates of Lord Moncreiff, *minuter*, presented a minute seeking to have certain furniture excluded from the diligence.

The *inventory* of the sheriff officer of the goods secured included the household furniture of Lord Moncreiff, who resided at Stanley House School.

The *disposition* under which the heritable subjects in question were held provided—“I, John Davidson Kelly, . . . heritable proprietor of the subjects and others hereinafter disposed, considering that Thomas Braidwood, Master of Arts, Meadow Park, Bridge of Allan, and the Honourable James Arthur Fitzherbert Moncreiff, residing at Hillview, Saint Andrews Road, Henley-on-Thames, as individuals and as partners of and as trustees for the firm of Braidwood & Moncreiff, Stanley House School, Bridge of Allan, have agreed to free and relieve me of the *cumulo* sum of Five thousand, five hundred pounds contained in the bonds and dispositions in security after set forth, viz. (first) bond and disposition in security for Two thousand, five hundred pounds sterling granted by me in favour of John Craigen of One hundred and ninety-three Union Street, Aberdeen, Scotland, solicitor, and John Stanwell Birkett of four Raymond Buildings, Grays Inn, in the county of London, solicitor, trustees appointed by and acting under an indenture dated the Twenty-seventh day of July Eighteen hundred and ninety-eight, made between me, the said John Davidson Kelly of the first part, Annie Barnes of nine Park Place, Weston-super-Mare, in the county of Somerset, then spinster (now my wife) of the second part, and the said John Craigen and John Stanwell Birkett of the third part, being a settlement made prior to the marriage of me and the said Annie Barnes, dated said bond and disposition in security twelfth, and recorded in the Division of the General Register of Sasines applicable to the county of Stirling eighteenth, both days of April Eighteen hundred and ninety-nine . . . Therefore, in consideration of the obligation of relief and other clauses hereinafter contained with reference to the said respective bonds and dispositions in security, I the said John