

I reserve my opinion on the effect of payment by A. T. Williamson into the firm account.

LORDS ORMDALE and GIFFORD concurred.

Counsel for Pursuer—Darling. Agent—Alex. Morison, S.S.C.

Counsel for Defender—Low. Agent—William Black, S.S.C.

Wednesday, June 13.

## FIRST DIVISION.

[Lord Adam, Ordinary.]

### PETITION—WEIR'S TRUSTEES.

(Before Seven Judges.)

*Trust—Powers of Trustees—The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), secs. 3 and 7.*

Where a power of sale is expedient for the execution of a trust, and not inconsistent with the main design and object thereof, the Court will grant such power to trustees, and will authorise them to advance the price to be obtained for the maintenance and education of minor beneficiaries.

Circumstances in which, under secs. 3 and 7 of the Trusts (Scotland) Act of 1867, the Court granted power to trustees to sell heritable property belonging to the trust.

The late Samuel Weir died on 17th October 1876, survived by a daughter, Isabella, aged twenty-six, and three sons, Duncan, Samuel, and Alexander, the eldest of whom, Duncan, was seventeen years old, and the other two in pupillarity. Mr Weir had been a man of considerable means, but, after retiring from business some years before his death, had been living on the capital of his estate, and had met with some loss through a cautionary obligation, so that at the date of his death his only property remaining consisted of (1) a house in South Clerk Street, Edinburgh; (2) two-thirds of a shop in West Adam Street, Edinburgh, the other one-third belonging to his son Duncan, in right of his mother; (3) household furniture, valued at £158, 10s. 6d.; and (4) money in bank, £108, 17s. 8d.

Mr Smith left a trust-disposition by which he conveyed his whole estate and effects to William Smith, writer, Edinburgh, and to his daughter Isabella, as trustees and executors. They were directed to pay his debts; to hold the residue of his estate till his youngest child should attain the age of twenty-one, paying the income of the residue equally to his children, and giving Isabella the use of the house in Clerk Street on condition that the other children should live with her; and when his youngest child should attain twenty-one years of age, to convey the Clerk Street house to Isabella, one-third of the shop in Adam Street to each of his younger sons, and to divide the residue equally among his children.

The money found in bank was almost expended in payment of the truster's debts and in the maintenance of his children up to the date of this petition. The shop in Adam Street was let at a rent of £35 per annum, and this was all the family had for their support. In these circum-

stances the trustees presented this petition, praying the Court to authorise them, under the Trusts (Scotland) Act 1867, secs. 3 and 7, to sell the two-third shares of the shop and advance the price for the maintenance and education of Samuel and Alexander Weir, and to borrow money on the security of the house in Clerk Street, or to sell it, and to pay the sum so borrowed, or the proceeds of such sale, to Isabella Weir.

The Lord Ordinary remitted to Mr J. W. Tawse, W.S., to inquire into the circumstances set forth in the petition, and to report. Mr Tawse reported, *inter alia*, as follows:—" . . . On the whole, the reporter feels the matter remitted to him one of considerable difficulty, as while it was evidently the intention of the truster that his children should occupy the house in Clerk Street, and receive the rents of the shop in Adam Street till the youngest was twenty-one, when the properties were to be conveyed—the house in Clerk Street to the daughter, and one-third of the shop in Adam Street to each of the two younger children—it is impossible in the present state of matters the intentions of the truster can be carried out, because at present the children have no means of subsistence. In these circumstances, therefore, the reporter thinks it will be sufficient if power is given to the trustees to sell the two-thirds of the shop in Adam Street, and should it be necessary to borrow on the Clerk Street house at a future time, application may be made to the Court for that purpose."

The Lord Ordinary thereupon refused the prayer of the petition, adding the following note:—

"*Note.*—This is a petition by the trustees of Samuel Weir to obtain authority to sell two-third shares of a shop which belonged to the truster, and to apply the proceeds in the education and maintenance of his two sons Samuel and Alexander Weir, to whom these shares are respectively directed to be conveyed on the youngest attaining twenty-one years of age. The Lord Ordinary does not doubt that it would be expedient that the subjects should be sold, and the proceeds applied in the education and maintenance of the truster's children. He has some doubt whether a sale of the subjects would not be inconsistent with the intention of the truster; but he has refused the petition, because he thinks that the rights of Duncan Weir would be prejudiced by the proceeds being applied in the maintenance and education of Samuel and Alexander as proposed. Duncan is entitled to a share of the income derived from the subjects, but if the subjects be sold, and the proceeds paid over to his two brothers, he would necessarily be deprived of his share of the income. The same objections apply to the borrowing of money on the security of the house in South Clerk Street. The Lord Ordinary was referred to the cases of *Pattison*, February 19, 1870, 8 Macph. 575, and *Hay's Trustees*, June 13, 1873, 11 Macph. 694."

After the case had been brought before the Inner House by reclaiming note, Duncan Weir's *curator ad litem* lodged a minute, in which he stated—"Duncan Weir is agreeable to the trustees being authorised to sell the two-third shares of the shop, and he would at same time sell his one-third, so as to give a complete title to a purchaser; and as the curator humbly conceives that

the money is absolutely required, that there is no other way of raising it, and that it would be for the benefit of all parties interested to have the property sold, he is ready, and hereby offers, to consent to the Court granting authority to sell as prayed for."

The case was ordered to be heard before seven Judges.

The petitioner argued—The important point to ascertain was, what was the truster's intention? It was (1) that his family should continue to live with their sister; (2) that the estate was in the end to go to the family; and (3) that his family was to be alimented. The claim for aliment was a claim of debt, and therefore it must be presumed that the truster intended to satisfy it. Now, these purposes could not be carried out in the way the truster directed; but the trustees were not to hold at all hazards till the children were of age. If there were any other method of carrying out his intention, they were to adopt it. A direction to convey *in forma specifica* was not inconsistent with the existence of a power of sale to satisfy debt, which this claim for aliment was—*Henderson v. Somerville*, June 22, 1841, 3 D. 1049. In the cases referred to by the Lord Ordinary, where authority had been refused, it was so refused because sale was expressly prohibited. In the case of *Anderson*, May 13, 1876, 3 Rettie 639, Lord Ardmillan stated the rule of law under which this application fell.

At advising—

LORD PRESIDENT—This petition is presented under the Trusts Act of 1867 by the trustees of the late Samuel Weir, who were appointed by a trust-disposition and settlement executed in 1876. The prayer of the petition is to authorise the petitioners to sell an heritable subject belonging to the truster, and to apply the proceeds for the maintenance and education of his minor children,—that is to say, to apply the capital sum for that purpose. Now, confessedly, the trustees have no such power to sell under the trust-deed, nor have they power to apply any part of the estate for the maintenance and education of his children. It is necessary to examine the provisions of the trust-deed to see whether we can grant this authority in consistency with the provisions of the statute.

Mr Weir left four children. At the time of his death his eldest daughter was twenty-six, his eldest son was seventeen, and he had other two boys at school, one of thirteen, the other of eight years of age. The eldest boy, Duncan Weir, was, in right of his mother, entitled to one-third of the subject in West Adam Street, the other two-thirds belonging to the truster. Now, the purposes of the trust are—1st, Payment of his debts and funeral expenses; 2d, to hold the residue of his estate, heritable and moveable, until his youngest surviving child should attain the age of twenty-one years, "and during that time to give the said Isabella Ballantyne Weir the use of his dwelling-house, No. 37 South Clerk Street, Edinburgh, and the furniture therein, on the condition that it was to be the home of his children until his youngest surviving child should attain twenty-one years of age, and also during that period to pay the income of the residue of his estate and effects among his children equally." Then he provides that on his youngest surviving child attaining

the age of twenty-one years, his trustees are to convey to Isabella Ballantyne Weir his dwelling-house 37 South Clerk Street. And the fourth purpose is that his trustees shall convey one of the two-thirds of the shop No. 14 West Adam Street, "belonging to him, to his second son, Samuel Weir, and the remaining one-third to his third son, Alexander Weir." And lastly, "after fulfilment of the above purposes of the trust, he directed his trustees to divide, equally among all his children then surviving, the whole residue of his said means and estate."

The condition of the trust-estate is that the dwelling-house in Clerk Street is the most valuable part of the estate. The shop in West Adam Street is let at a rent of £35 per annum, but as two-thirds of this alone is available for the maintenance of his younger children, they have little more than £5 a-year each. The household furniture has been valued at £158, 10s. 6d., and the money found in the truster's house and in bank amounts to £108. That last sum has been nearly expended in the maintenance of his children since his death, and in the payment of his debts. The petitioners cannot go on to fulfil the purposes of the trust, because they have no funds to maintain the family in the house in Clerk Street with Miss Weir, and therefore they propose to sell the two-thirds of the shop in West Adam Street, and to apply the proceeds, so as to enable the family to go on living together in Clerk Street. The clauses of the Trust Act founded on are the 3d and 7th, and it will certainly be necessary to proceed on both if we are to grant the prayer of the petition. The third clause runs thus—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications, and where it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application:—1, To sell the trust-estate or any part of it; 2, To grant feus or long leases of the heritable estate or any part of it; 3, To borrow money on the security of the trust-estate or any part of it; 4, To exchang any part of the trust-estate which is heritable." Now, I do not think it is at all doubtful that the proposal made here is "expedient for the execution of the trust," for they have demonstrated that without it they will not be able to administer the affairs of the truster for behoof of his family so as to support them in family together, which was the main purpose of the truster's deed. The next inquiry is, whether this authority is "not inconsistent with the intention" of the trust-deed. That is a more difficult question. Now, the Court may certainly authorise some things that may be said to be inconsistent with the intention of the truster—for example, to give a power of sale at all, where it is not given by the trust-deed, may be said to be so, for if the truster had intended that, he would himself have given it. But that cannot be the meaning of the clause, for it gives power to the Court to authorise sales. The true meaning is that the autho-

urity sought shall not be inconsistent with the main design and object of the trust, and it seems to me that it will not be so in this case. What is asked is the indispensable thing for obtaining the object of the trust. In this point this case differs from the case of *Hay's Trustees*, relied on by the Lord Ordinary. The purposes of the trust there were to disencumber the estate of debt, to entail it on a certain series of heirs, and to preserve it entire—to ensure that there was a special prohibition of the sale of any part of it. And, accordingly, we found it impossible to say that the sale of any part was “not inconsistent” with the main purpose of the trust. Here the circumstances of the case are very different indeed. The Lord Ordinary seems to have had an impression that such a proceeding as this would not be consistent with the intention of the trust, but he has based his refusal on the ground that Duncan Weir's interest might be prejudiced by any such proceeding. That difficulty is now removed, because Duncan's curator has made inquiry, and now consents that the entire subject in West Adam Street shall be sold. On the whole matter, I am of opinion that the third section applies to this case, and that we are not exceeding the powers given by the statute in granting this authority. But we must go further, for the trustees ask us to aid them under the 7th section of the statute. It runs thus—“The Court may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the trust, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced.” Now, there are a number of conditions there that require to be particularly attended to. We have power to authorise trustees “to advance part of the capital of a fund destined to minor descendants of the trust.” What they represent as coming under that description here is the capital produced by the sale of an heritable subject. If an heritable subject is converted into money through the operation of a trust coupled with this statute, the proceeds will answer the description of the capital of a trust-fund. It must be destined “to minor descendants of the trust.” Here the fund will certainly be in that position, for the house itself was in this position, that one-third part had vested in each of the two younger children. Then, further, it is necessary that it should “appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them.” That, as I have said, is well made out, and it is clear that such a proceeding is not “expressly prohibited by the trust-deed,” and there are no other parties whose rights can possibly be prejudiced. We have therefore a complete compliance with the conditions required by statute. I feel satisfied that we are applying the statute in such a way as to work out as nearly as possible

the intentions of the trust. That is satisfactory, for the object of the Act is that trusts shall be made to work smoothly, so as to carry out the wishes of a trust. As to the proposal to borrow money on the security of the house in Clerk Street, I shall not say more than this at present, that there are very different considerations applicable to it.

LORD JUSTICE-CLERK—I entirely concur in your Lordship's observations as to the extent to which this petition should be granted. There are obvious reasons why the house in Clerk Street is in a different position from the shop in West Adam Street. The first question is, whether this sale is “expedient for the execution of the trust, and not inconsistent with the intention thereof,” as required by the third section of the statute? The second, whether this proposed sale and application of the proceeds comply with the requirements of the seventh section? As to the expediency, there can be no question at all. The next point is, whether it is consistent with the intention of the trust-deed? Now, there must be a distinction drawn between the mere machinery of a trust and that which the machinery is intended to work out. The object of such an application as the present is to attain by different machinery that which the trust intended should be done. I do not say that there may not be cases where the machinery is really one of the purposes of the trust, and there the Court would have no power to interfere with it; but if the machinery provided by the trust is never to be interfered with, the statute would never have any application at all. Now, the trust has provided that his eldest daughter shall have the use of his house and furniture in Clerk Street on condition that it is to be the home of his children till the youngest shall attain twenty-one years of age. That condition must be fulfilled in the first instance, but if there are no funds for the aliment of his children it cannot be fulfilled, and therefore what we are doing is in furtherance of the purposes of the trust.

The second question is, whether this is in consistency with the seventh clause of the statute? On that I have no difficulty. Where we find a clause of this kind following a clause which gives power to authorise the sale of heritage, I find no difficulty in holding it applicable to a sum of money obtained by such a sale.

LORDS DEAS, ORMDALE, MURE, GIFFORD, and SHAND concurred.

The Court pronounced the following interlocutor:—

“Recal the interlocutor reclaimed against: Grant warrant to and authorise the petitioners, with the consent and concurrence of Duncan Weir, the eldest son of the trust, and of David Roberts, S.S.C., his curator ad litem, to sell the shop No. 14 West Adam Street for the best price that can be obtained therefor, and, after paying over to the said Duncan Weir his one-third share of the proceeds of the said sale, to apply the remaining two-thirds to the maintenance and education of Samuel Weir and Alexander Weir, the two younger sons of the trust; and decern *ad interim*: And authorise the petitioners to

charge the expenses of this application, together with the expenses incurred by the said *curator ad litem*, against the trust-estate, as the said expenses respectively shall be taxed by the Auditor."

Counsel for Petitioner—Stuart. Agents—Dalgleish & Bell, W.S.

## HIGH COURT OF JUSTICIARY.

Thursday, June 14.

WILSON & ANDERSON v. SCOBIE.

Statute—Public Houses Acts Amendment (Scotland) Act 1862—Breach of Certificate.

On a case stated by a police magistrate in a complaint charging an offence against the Public Houses Acts Amendment (Scotland) Act 1862, viz., selling or supplying exciseable liquor to persons in a state of intoxication, it was argued that there was no distinct proof of the publican's knowledge that the customers were actually drunk; also, that as regarded the only person proved by distinct evidence to be drunk, he was treated by others to whom the liquor had been sold or supplied before he entered the premises.—The Court held that, as the magistrate had not found that the publican did not know his customer to be drunk, no question of law arose on the first point; and that the facts of the case were not sufficient to raise the question of an intoxicated person being "treated" in the public-house by a person not intoxicated, to whom the liquor was sold or supplied.

Counsel for Appellants—Brand. Agent—Adam Shiell.

Counsel for Respondent—Moncrieff. Agent—J. Carment, S.S.C.

Friday, June 15.

APPEAL—THE UNITED KINGDOM TEMPERANCE AND PROVIDENT INSTITUTION AND OTHERS v. PAROCHIAL BOARD OF CADDER, &C.

Statute—Public Health (Scotland) Act 1867, secs. 17, 18, 19, 22, and 24, Procedure under.

In petitions by a Local Authority under the Public Health (Scotland) Act (which were afterwards conjoined) for remedy of a nuisance arising from an open drain, several parties were brought into Court either as owners of lands or as contributors to the nuisance. The Sheriff, being unable to ascertain the true author, ordered the Local Authority to execute the necessary works, and then decerned against the parties jointly and severally for expenses. *Held*, that in the circumstances the proper procedure under

the statute was for the Local Authority, after constructing the works, to assess the owners of all premises which contributed to the offence.

This was a case stated by Sheriff-Substitute (GUTHRIE) of Lanarkshire for the respondents in two conjoined petitions under "The Public Health (Scotland) Act 1867" and "The Public Health (Scotland) Amendment Act 1871." The petitions were as follows:—*First*, a petition at the instance of the Parochial Board of the parish of Cadder, being the Local Authority under the said Public Health Acts, and Thomas M'Lelland, sanitary inspector for said parish, against John Lang, residing at No. 9 Crown Gardens, Downhill, presented on 12th July 1873, and complaining that upon the 7th July 1873, and for many weeks before, there existed and still existed upon the property of the said John Lang a nuisance consisting of an open drain, gutter, or ditch on the east side of the parish road leading from Lenzie Junction to the village of Auchinloch, so foul as to be injurious to health; that said nuisance was in the parish of Cadder, and that the said John Lang was the proprietor of the ground on which the same was situated, and the author of the nuisance, within the meaning of "The Public Health (Scotland) Act 1867," and, in particular, sections 3 and 16 thereof, and (after founding on the provisions of said Act, and particularly sections 16, 18, 19, 20, and 105) craving the Sheriff to decern and ordain the said John Lang to remove the said nuisance, and that in such manner and within such time as to the Sheriff should seem proper, and in case of non-compliance to find him liable in the penalty of ten shillings per day during his failure to comply; to interdict the said John Lang from causing a recurrence or repetition of the said nuisance; to find him liable in expenses, and, if necessary, to grant warrant for imprisonment. *Second*, A petition at the same instance against (1) The United Kingdom Temperance and General Provident Institution, Hope Street, Glasgow, and James Robertson, their manager in Glasgow; and (2) Murdoch & Rodger, writers, Glasgow, jointly and severally, or severally. This second petition, which was presented on 25th October 1873, repeated the averment contained in the first petition as to a nuisance existing on the property of Mr Lang, and proceeded to narrate that it appeared from a report obtained from Hugh Kirkwood, Esq., Killermont (to whom a remit had been made in the first petition), that the nuisance on Mr Lang's ground complained of was caused in whole or in part by the respondents in the second petition, from whose houses the sewage was allowed to pass to the land of the said John Lang, and that they therefore were the authors of the nuisance in the meaning of the Act. That the Sheriff-Substitute (Galbraith) had in the first action found that it was necessary to a just judgment that the said Institution and Murdoch & Rodger should be called by warrant of the Court, on petition under the statute, and had directed the petitioners to make application to that effect. The second petition therefore craved the Sheriff to decern and ordain the said respondents jointly and severally, or severally, alone or in conjunction with the said John Lang, to remove the said nuisance, and that in such manner and within such time as to the Sheriff should seem proper,