

The claimant Jessie Farquhar then appealed to the Court of Session, and argued that the Sheriff-Substitute had taken the proper course. The respondent admitted that he could not maintain the Sheriff's judgment, but argued that the reference should be to the oath of the trustees. The party to whose oath the question should be referred was the debtor in the obligation. There was no case in which a reference had been sustained to the oath of a person who was not the debtor or the representatives of the debtor—*Cullen v. Smeal*, July 12, 1853, 15 D. 868, 882; *Young, Potter, & Company v. Playfair*, 1802, M. 12,486. His opponents were the trustees. [LORD PRESIDENT—No. They were. But you have allowed them to be exonerated.] Besides, the oath of Jessie Farquhar would be useless, as she knew nothing about the debt. [LORD SHAND—Quite so. But reference to oath is a privilege, and if the debtor is dead it very often is useless.]

The case was continued to allow the respondent to lodge a minute of reference to the oath of Jessie Farquhar if so advised. A minute of reference to her oath was lodged, and the case was then advised.

At advising—

LORD PRESIDENT—I must say that I think that this is a very clear case. The multipointing was raised by the trustees of the late John Farquhar, as holders of the fund *in medio*, which consisted of the balance of the moveable estate of the deceased; and upon 4th February 1885 the Sheriff-Substitute allowed the minute tendered by the claimants to be received and marked, and as the parties to the minute took no objection to the condescendence of the fund, he held them as confessed, and decerned.

Upon 12th February consignment was made and the two claimants to the fund joined issue. The interlocutor which was pronounced in this Court upon 16th July 1885 was to this effect—“Having heard counsel for the parties on the appeal of the claimant Jessie Farquhar against the interlocutor of the Sheriff-Substitute of 15th June 1885, recal the said interlocutor, except in so far as it disposes of the claim on the unstamped promissory-note; *quoad ultra* sustain the plea founded on the triennial prescription; and remit the cause to the Sheriff to allow the claimant George Farquhar a proof by the oath of party of the constitution and existence of the debt he claims.”

It appears that the name of the party, though in the draft interlocutor, was *per incuriam* omitted in writing it out; and the Sheriff-Substitute seems to have had some doubts whether the reference was to the oath of Jessie Farquhar, and he allowed George Farquhar to lodge a minute of reference to her oath, if so advised, within ten days from the date of his interlocutor; while the Sheriff when the case came before him, sisted process to allow George Farquhar to constitute his debt.

Now, I cannot see what benefit could accrue from this procedure, because the trustees have been discharged on consignment and exonerated.

The case therefore comes back to this—as George Farquhar has not availed himself of the minute of reference, we must recal the Sheriff-Substitute's interlocutor, sisting process, and George Farquhar can of new put in a minute of reference to oath if he is so advised.

LORD SHAND—Even if the trustees had not been exonerated and discharged in this case, it would not in my opinion have made any difference.

Jessie Farquhar is the person solely interested in this estate, and to allow a proof by oath of the trustees would be I think to let in parole evidence.

If there is to be a reference to oath at all, it must be to the oath of Jessie Farquhar alone.

LORD ADAM concurred.

LORD MURE was absent on circuit.

The Court pronounced the following interlocutor:—

Recal the interlocutor of the Sheriff of 9th January last: Adhere to interlocutor of Sheriff-Substitute of 28th October last, except in so far as it allows the respondent to lodge a minute of reference to the appellant's oath, if so advised, within ten days from its date: Sustain the minute of reference to the appellant's oath, and ordain her to depone thereupon, and answer all pertinent interrogatories that shall be put to her thereanent.”

Counsel for Appellant—W. Campbell. Agent—William Considine, S.S.C.

Counsel for Respondent—Low. Agent—Alexander Morison, S.S.C.

Wednesday, February 24.

FIRST DIVISION.

[Lord Fraser, Ordinary.

WALKER AND ANOTHER v. M'KNIGHT AND OTHERS.

Lease—Landlord and Tenant—Clause excluding Assignees—Lease to a Company—Sequestration of Firm—Removing.

A lessee of a mineral field let it to the partners of a firm “as trustees for the said company, and the partners present and future thereof,” excluding assignees and sub-tenants without the landlord's written consent. The estates of the firm were sequestrated, and the property of the subjects was sold by heritable creditors of the landlord, the purchaser from whom refused to accept as tenant any assignees of the firm who were tenants. *Held* (1) that these purchasers were entitled to remove the partners of the bankrupt firm, because the partnership came to an end by the sequestration, and (2) that tenants whose lease had thus been brought to an end had, on the authority of *Hepburn v. Scott*, 14th June 1876, 3 R. 816, no claim for meliorations on the subjects.

John M'Knight was proprietor of a mineral field in Ayrshire named Flann. By minute of lease between himself on the one part, and himself and W. C. M'Knight, “sole partners of John M'Knight & Company,” as trustees for that company and partners present and future thereof on the other part, he let the coal (under a certain exception) and the fireclay and fireclay works, with machinery and plant, for twenty-five years

from 26th February 1874, to the second parties, but excluding assignees and sub-tenants, legal and conventional, without the first party's consent in writing. M'Knight had borrowed money on the security of his lands, and granted bonds and dispositions in security thereof. In virtue of the powers of sale contained in these bonds the property was exposed for sale by auction at Glasgow on 25th March 1885, when John Stevenson junior, writer in Kilmarnock, became the purchaser on behalf of James Walker junior, Mauchline, Ayrshire.

Walker and Stevenson agreed to take up the purchase, one-half to each, and took the disposition from the bondholders who sold the property in their favour to the extent of one-half each *pro indiviso*. They raised the present action for declarator of property of one-half *pro indiviso* of Plann, and that by the sequestration of John M'Knight & Son, and the partners thereof, the lease became null and void, and for decree of removing against the defenders the two M'Knights, and John M'Knight & Son, and the trustee on their estates, and for £1000 as damages for refusal to cede possession.

The pursuers founded on the following provision in the minute of agreement and lease—“That as from and after the 26th February 1874 the first party has let and hereby lets to the second parties, but excluding assignees and sub-tenants, legal and conventional, without the consent in writing of the first party;” that they were now in right of the first party; and that they had not consented, and did not intend to consent, in writing or otherwise, to the assignees or sub-tenants of the second parties acquiring right to the said lease or subjects thereby let.

The estates of John M'Knight & Son, and of John M'Knight and W. C. M'Knight, as partners thereof, and as individuals, were sequestrated on 14th May 1885.

John M'Knight and W. C. M'Knight lodged defences. They averred that the pursuers knew of the existence of the lease at the time when they purchased the subjects. They also alleged that during the currency of the lease they (the defenders) had laid out not less than £6280 in certain specified meliorations, of which meliorations they claimed that they were entitled to the value.

The pursuers pleaded—“(2) The said lease having determined and come to an end, the pursuers are entitled to decree of declarator and removing as concluded for. (3) There never having been a firm of John M'Knight & Company, the bankrupts cannot maintain possession on the footing of a lease in favour of that firm. (4) *Esiste*, that there was such a firm of John M'Knight & Company, it never having had or obtained possession under the said lease, its title to possess is inept against the pursuers as singular successors in the title.”

The defenders pleaded—“(2) The lease in question being a valid and subsisting one, the action is groundless, and decree of absolvitor should be pronounced, with expenses. (3) In any event, the pursuers are not entitled to decree without making payment of the cost or value of permanent buildings and other meliorations erected or made by the lessees on the faith of the lease enduring for twenty-five years.”

On 13th January 1886 the Lord Ordinary (FRASER) pronounced this interlocutor:— . . .

“Finds that there was no company carrying on business in existence at the time of the said minute under the name of John M'Knight & Company, but the said lease was in favour of the defenders John M'Knight and William Crichton M'Knight, who carried on business in partnership under the firm name of John M'Knight & Son, and that the said lease was truly a lease in favour of John M'Knight & Son: Finds that the estates of said firm of John M'Knight & Son were sequestrated on 14th May 1885, and that the partnership thereby came to an end; and that in consequence of the pursuers (who are now proprietors of the subjects of the said lease) refusing to give consent to the assignees of the partnership to acquire right to the lease of the subjects let, the said lease has come to an end, and the pursuers are entitled to decree of declarator and removing as concluded for: As regards the conclusion for damages, appoints the case to be put to the roll in order that it may be stated how far this claim, in regard to which no proof has been led, is to be insisted in, &c.

“*Opinion.*—John M'Knight, the proprietor of the minerals let to the firm of John M'Knight & Son, had granted bonds and dispositions in security over the property, and in virtue of the powers of sale contained in these bonds the property was exposed for sale by auction at Glasgow on the 25th day of March 1885, when the pursuer John Stevenson junior offered the upset price of £11,500, and was preferred to the purchase as the only offerer. He thereupon declared that he made the offer on behalf of the other pursuer James Walker junior, who consequently enacted himself as purchaser, and bound himself to implement the articles of roup. Both the pursuers signed the minute of enactment. The pursuers afterwards agreed to take equal shares, and therefore, at the request of James Walker, the disposition subsequently made out was to the pursuers to the extent of one-half *pro indiviso* each, and their respective heirs and assignees whomsoever.

“The pursuers having thus become proprietors of the subjects, now insist upon the firm of John M'Knight & Son removing, and to have declarator that the lease is at an end on account of the bankruptcy of the partnership. The lease is in favour of John M'Knight & Company, but it was clearly proved that although persons dealing with the firm sometimes wrote letters to them under that name, they never carried on business except under the name of John M'Knight & Son. Now, it is the law that the bankruptcy of a partnership tenant of heritable subjects puts an end to a lease, as was decided in the case of *Campbell v. The Calder Iron Co.*, December 11, 1805, reported by Professor Bell in 1 Com. p. 82, and accepted as law by all subsequent writers who have referred to the point, and this because sequestration dissolves a partnership, and so there being no longer a partnership, there is no tenant. The case of *Campbell* also is useful, as showing that although the lease here was in name of John M'Knight & Company, if it turns out, as it has turned out, that it was a lease for John M'Knight & Son, the misnomer in the lease would be treated as of no moment. In the case of *Campbell* the lease was in favour of David Muschet of the Calder Ironwork, for himself and partners, but the lease was granted to David

Muschet and his heirs, secluding assignees, legal or voluntary, and all sub-tenants.' On the bankruptcy of the company the Court found that the lease had determined, though Muschet himself was not bankrupt, and this on the ground that it was truly granted to the company, and not to Muschet as a private individual.

"The defenders plead in defence that the pursuers in any event 'are not entitled to decree without making payment of the cost or value of permanent buildings and other meliorations erected or made by the lessees on the faith of the lease enduring for twenty-five years.' And in support of this plea they have a statement of facts shewing permanent improvements upon the premises of the value of £6280. It is said that if this sum or any other sum should be recovered for permanent improvements it would go to the creditors of the bankrupts, and this is quite true. But the trustee, who has been called as a defender to this action, has not appeared, and has made no claim. The bankrupts in these circumstances are entitled to go on with the action in order to vindicate property which may ultimately leave a surplus after paying all the claims of creditors. Of course if the pursuers demanded it the defenders could not maintain such pleas without finding caution, but no such caution has been asked for.

"But there is another and a complete answer to this claim of the defenders. It falls directly under the case of *Scott's Executors v. Hepburn*, June 14, 1876, 3 R. 816, where the Court determined that the tenant whose lease was prematurely brought to a close had no claim for compensation for improvements by which the landlord had been *lucratu*s.

"The claim of £1000 for damages in consequence of the retention of possession by the defenders was not insisted in before the Lord Ordinary, and no proof in regard to it was led. But still it has not been expressly given up, and therefore the case has been ordered to the roll, that the pursuers may have an opportunity of stating what they intend to do with regard to this claim."

By a subsequent interlocutor the Lord Ordinary granted decree of declarator and removing against "the comparing defenders John M'Knight and William Crichton M'Knight, in terms of the conclusions of the summons for declarator and removing: Assoilzies said defenders from the conclusion of the summons for damages, and decerns: Finds said defenders liable to the pursuers in expenses," &c.

The defenders reclaimed, and argued that looking to the peculiar language of the lease, it was not cut down by the sequestration of the firm of John M'Knight & Son. While bankruptcy terminated a copartnership, it did not necessarily end a lease in a question between the tenant and the landlord, provided he could fulfil the requirements of the lease. The lessees here were really trustees for future partners, and fairly read this was not a lease excluding assignees. They were not excluded from their claim for meliorations by the case of *Scott v. Hepburn (supra cit.)*

Authorities — 1 Bell's Com. 82 (5th ed.); Bell on Leases, 150; Hunter on Landlord and Tenant, ii. 585; *Gillespie v. Clark*, November 22, 1821, 1 S. 160.

Replied for pursuers—Bankruptcy ended a copartnership. Here not only was the company bankrupt, but each of its partners was in the same condition. The question of meliorations was decided by the case of *Scott*.

Authorities cited above, and Bell's Prin. 377; Lindley on Partnership, 224 and 1111.

At advising—

LORD PRESIDENT—There can be no doubt that the interlocutor of the Lord Ordinary in this case is right. The firm of M'Knight & Son became bankrupt, and was sequestrated in May 1885, and it is this sequestrated copartnership who are the tenants under the lease in question. Now, it is laid down by Professor Bell in his Commentaries that "when a lease is granted to a company with an exclusion of sub-tenants and assignees the bankruptcy of the company puts an end to the lease," and in support of this he cites the case of *Campbell v. The Calder Iron Company*, December 11, 1805.

Now, I put out of view in the first place the case which Mr Bell cites, and I say that the doctrine which he lays down in this passage is irresistibly well founded, because we find that when a company is sequestrated it is *ipso facto* dissolved, and if a company is dissolved it continues to exist only for the purpose of being wound up. The dissolution is in fact the result of the sequestration. How then can such a company be a party to a current lease requiring the outlay of capital and active management for its proper working. The company has no *persona* to be represented in the lease; and accordingly, even if there had been no such case as *Campbell v. The Calder Iron Company*, my judgment on the present case would have been the same, while the case of *Campbell* is just an illustration of what I have been saying.

A good deal was urged in the course of the discussion as to the peculiarities of this lease, but I must say that I think these peculiarities are somewhat imaginary.

There is no doubt a perfectly good exclusion of assignees and sub-tenants in the first clause of this agreement, but it has been urged that as the second parties are described in it as "trustees for the said company, and the partners present and future thereof," the idea of future partners is opposed to the exclusion of assignees. Now, I can see no inconsistency in this, because it is specially provided that any new partners are to be taken in only with the landlord's consent, and being in this manner made partners they would not be taken in against the conditions of the lease.

I do not think however that either of the parties to this agreement realised what the full effect would be of taking new partners into the concern, namely, that it would have the effect of terminating the old company, but even this might have been done if the alteration in the copartnership had been made with the landlord's consent.

As to the question of meliorations, I quite agree with the Lord Ordinary that the case of *Scott*, in 3 R. 816, decides that matter conclusively.

LORD SHAND—I have come to be of the same opinion. As sequestration has produced a dissolution of the copartnership and as assignees are by the terms of this lease expressly excluded,

the lease must necessarily in the present case fall back to the landlord. Some nice questions might perhaps have arisen (looking to the terms of the lease) as to whether the landlord could have objected to an additional partner being assumed on the ground that assignees were excluded. This point however is not raised by the present case. On the question before us as to the sequestration of the copartnership terminating the lease, I agree with your Lordship, and I think that the other point is settled by the case of *Scott*.

LORD ADAM—I am quite clear that this was a lease to the copartnership of M'Knight & Company, and it is equally clear in law that bankruptcy operates a dissolution of the copartnership. As therefore there is no tenant here, and as assignees are excluded, there is clearly no existing lease. Nor can I see upon what grounds there can be any claim for meliorations.

LORD MURE was absent on circuit.

The Court adhered.

Counsel for Pursuers—Dickson. Agent—T. Carmichael, S.S.C.

Counsel for Defender—Rhind—Baxter. Agent—L. M'Intosh, S.S.C.

Wednesday, February 24.

SECOND DIVISION.

[Lord Trayner, Ordinary.]

CRAIG v. PICKEN'S TRUSTEES.

Entail—Money Directed to be Entailed—Succession—Vesting—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), sec. 27.

A truster directed his trustees to carry on after his death till the termination of the leases the farms of which he might be tenant at his death, and to sell the stock, &c., at the respective terminations thereof. He further directed them, "after providing for payment" of an annuity, "and fulfilling the foregoing purposes," to apply the residue of his means to a certain extent in the purchase of heritage in Ayrshire, to be entailed strictly on a certain series of heirs, the first person to be called being his only daughter. At his death he was tenant of farms the leases of which would not expire for about 12 years, and his estate was liable to fulfil the obligations of these leases. A petition was presented by his daughter under sec. 27 of the Rutherford Act, praying that she, as the person who in the circumstances would be entitled if the entail were made to disentail and acquire in fee-simple, might be found entitled to the estate as far as realised, and the value of the stock still on the farms, as money directed to be employed in purchasing lands to be entailed. Petition *refused*, because the entail was not to be made till the expiry of the leases, which had not yet occurred.

Opinion that the petitioner had yet no vested interest under her father's trust-deed.

Opinion that sec. 28 of the Entail Amendment Act 1848, providing that the date of an entail directed to be made shall be held to be the date of the coming into operation of the deed directing it, was intended only to fix the date of an entail for the purpose of ascertaining the powers of the heir in possession to disentail.

John Picken, farmer, Mansfield Mains, New Cumnock, died on 12th March 1884. By his trust-disposition and settlement dated 7th February 1884, he conveyed his whole estate to certain trustees for certain purposes. The *third* purpose of this settlement was—"In the event of my decease during the currency of my present leases of the farms of Lethans and Clocklowie in the parish of New Cumnock, and of Boghead in the parish of Auchencleck, or of any of them, or during the currency of the lease or leases of any other farm or farms whatsoever that I may be in possession of at the time of my decease, I direct and appoint my trustees to carry on, conduct, and manage the whole businesses and concerns of said farms until the respective leases thereof shall expire, and on the terminations thereof, or as soon thereafter as it can be accomplished, to sell and dispose of the whole stock, crop, and farming implements pertaining and belonging respectively thereto." The *fifth* purpose provided that "after providing for payment" of an annuity left to his widow by the *second* purpose, "and fulfilling the foregoing purposes," his trustees were "to apply the residue of my means and effects, to the extent of a sum not exceeding £10,000 sterling, in the purchase as opportunity offers of such lands and other heritages situated in the county of Ayr as my trustees shall consider eligible, and to convey and make over said lands and other heritages by a valid and effectual deed of strict entail to and in favour of my only child Mrs Jane Watt Picken or Craig, wife of John Craig, ship and insurance broker, Greenock, whom failing to the heirs-male of her body, whom failing to my nephew John Picken, divinity student, son of the said James Picken [his brother, who was one of the trustees nominated], whom failing to the heirs-male of his body, whom failing to the heirs-female of his body, whom all failing to my next nearest heirs and assignees whomsoever, the eldest heir-female and the descendants of her body always excluding heir-portioners and succeeding without division throughout the whole course of succession." By the *sixth* purpose his only child Mrs Jane Picken or Craig was appointed residuary legatee in *lifereint*, and by the *seventh* purpose her children were appointed to the fee of the residue of his estate.

At the date of the truster's death (12th March 1884) he was tenant of the farms of Mansfield Mains and Hill, the leases of which expired at Whitsunday 1885, and of the farms of Lethans and Clocklowie, the leases of which were not to expire till Whitsunday 1897. The trustees on entering on their office sold the farm stock, &c., on the farms of Mansfield Mains and Hill for about £3500, and proceeded to manage and carry on in terms of the truster's directions the farms of Lethans and Clocklowie. The value of stock on these farms was considerable, but the precise amount was not admitted in these proceedings.