

of the company is formally reduced, the surrendered shares might be again issued, and they would still be part of the company's nominal capital, and would affect the nominal rate of dividend. It is this reduction of capital which your Lordships are asked to confirm.

"So far as I am aware, the only reported case at all similar to the present that has come before the Scottish Courts is that of *The West End Café Company, Limited* January 16, 1894, 21 R. 381, in which the Court confirmed a reduction of capital where certain shares had been purchased by the company and cancelled. Several petitions of a like nature, however, have come before the English Courts, and in the petition of *The Gatling Gun Limited*, 1st February 1890 (Law Reports, 43 Chan. Div. 628), in circumstances somewhat similar to those of the present case, Justice North sanctioned a reduction of capital following upon the surrender of shares to the company.

"In the present instance, the shares which have been surrendered are fully paid up, and as no further liability attaches to them their cancellation will not affect the rights and liabilities of the shareholders of the company *inter se*. By the 3rd section of the Companies Act 1877 it is declared that the word 'capital,' as used in the Companies Act 1867, shall include paid-up capital, and that the power to reduce capital conferred by that Act shall include a power 'to cancel any lost capital or any capital unrepresented by available assets.' The reduction of capital which the petitioners ask your Lordships to confirm appears to fall under this description, and the loss sustained by the company above referred to, and the subsequent surrender and cancellation of the shares, appear to me to warrant the reduction.

"It is provided by the 4th section of the Companies Act 1877 that where the reduction of capital does not involve 'the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital,' the creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction, and in that case the Court may dispense with the addition of the words 'and reduced' to the name of the company. In the present case the cancelled shares are fully paid up, and no repayment to the shareholders of paid-up capital is involved, and therefore, under the section above referred to, no objection on the part of creditors of the company is competent, and no consent by them is required. By your Lordships' interlocutor of 7th November 1896 the addition of the words 'and reduced' to the name of the company was dispensed with from that date, and until disposal of the petition; and I submit that it is a case for also dispensing with the words 'and reduced' after the disposal of the petition. . . . I have to report that the whole proceedings prior to and since the date of the presentation of the petition have been regular, and that there are

sufficient reasons to warrant the proposed reduction of capital, and that accordingly the prayer of the petition may be granted."

No opposition was made to the petition.

The petitioner, in addition to the cases referred to by the reporter, cited the case of *The British and American Trustee Corporation v. Couper*, 1894, App. Ca. 399.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Lorimer.
Agent—R. Ainslie Brown, S.S.C.

Saturday, January 30.

FIRST DIVISION.

MARSHALL'S TRUSTEES, PETITIONERS.

Trust—Power to Sell—Prohibition by Trustee—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 3.

By a codicil to his trust-disposition a truster directed his trustees as follows:—"As I consider that the value of property in B will improve, I direct and appoint my trustees to hold and retain the property known as K, belonging to me, and not sell or dispose of the same" before the truster's youngest son attained majority. The trust-disposition gave the trustees a general power to sell the trust-estate.

Held (Lord M'Laren dub.) that the Court had no power under section 3 of the Trusts Act 1867 to authorise the sale of the trust-estate dealt with by the codicil before the date fixed by the truster, however expedient such sale might be in the interest of the trust.

Mr John Marshall, coal merchant, Leith, executed a trust-disposition and settlement by which he disposed his whole estate to trustees for the purposes therein mentioned. He requested and authorised them to carry on for the benefit of the family the business of John Marshall & Company at Borrowstounness, with power, however, to wind up the business or sell their shares as they should see fit. The truster further conferred on the trustees power to continue to hold his investments as at his death or reinvest the same, to lease, sell, or dispose of all or any part of the trust-estate, all as therein specified.

By a codicil the truster provided—"Second, As I consider that the value of property in Borrowstounness will improve. I direct and appoint my trustees to hold and retain the property known as Kinglass Brewery, belonging to me, and not to sell or dispose of the same before the youngest of my sons by my present marriage attains twenty-one years of age."

Mr Marshall died on 1st January 1879, survived by nine children, and the trust was managed up to the present time by the

original trustees and one who was assumed in 1891.

Mr Marshall's trustees presented a petition craving the Court for power to sell Kinglass Brewery. At the date when the petition was presented all the truster's children had attained majority with the exception of the youngest, who would attain that age in February 1898.

The petitioners averred that the trust-estate was in a very embarrassed condition, the present estimated value being about £4000, while there were bonds and other debts over it to the amount of £4500.

They averred further—"In order to protect the estate and pay off the debts, it is necessary to realise the heritable property, including the property known as Kinglass Brewery. It is considered there is no chance of its improving in value, and the present would be a good time to sell. Had the said Andrew Pratt Marshall been of age, the petitioners would, under their powers under the trust-deed, have at once disposed of it, but owing to the terms of the codicil referred to, special powers are required to enable them to do so."

There was no opposition to the petition.

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

"*Note.*—My difficulty in granting the prayer of this petition arises from the express terms of the prohibition against selling. In several of the reported cases under section 3 of the Trusts Act a distinction has been drawn between a positive direction not to sell (as in *Hay's Trustees*, June 13, 1873, 11 Macph. 694) and a destination from which it could be inferred that sale was not in the testator's mind (as in *Weir's Trustees*, June 13, 1877, 4 R. 876). Cases of the former class have been held not to fall within the statute, because however great the expediency of selling might be, it was impossible to affirm that the power asked was 'not inconsistent with the intention' of the trust.

"In *Whyte's Factor v. Whyte*, Jan. 10, 1891, 18 R. 376, this view prevailed, because certain heads were excepted from the general power of sale. In *Sutherland's Trustees*, however, July 20, 1892, 29 S.L.R. 903, where there was a somewhat similar exception, the Court granted power of sale, in order to preserve the trust-estate against the diligence of creditors.

"The circumstances of the present case as stated in the petition have a strong resemblance to those in *Sutherland's* case, and much may depend on the precise extent to which the trustees are being pressed by creditors. I have thought it better not, at my own hand, to incur the expense of a remit to a man of business, but I have asked the petitioners to be prepared with exact information on this head.

"It is to be observed that the prohibition here expires in February 1898, so that unless creditors are very urgent, the trustees could accomplish their purpose in little more than a year without any authority from the Court. This circumstance was founded on by counsel as diminishing the

force of the prohibition, but it may be replied that the prohibition while it lasts is couched in as strong terms as could well be used. It is not merely that this particular property is excepted from a general power of sale (as in *Whyte and Sutherland*), but that the trustees are directed 'not to sell or dispose of the same' before the majority of the testator's youngest son."

The chief part of petitioners' argument is sufficiently indicated in the Lord Ordinary's note. He further argued that the codicil was merely for administrative purposes, and did not indicate the main design of the trust, and that accordingly a prohibition contained in it was not so binding as one in the trust-deed itself.

At advising—

LORD PRESIDENT—This testator has in so many word directed and appointed his trustees to "hold and retain" this property, and "not to sell or dispose of the same" before a certain date. I am quite unable to get over this direction, and think on that ground we should refuse the petition.

LORD ADAM—I am of the same opinion. We have statutory authority for granting such a petition, if a sale is not inconsistent with the purposes of the trust. There is in this deed a direct prohibition against a sale before a certain date, and I do not see how it can be said that a sale before that date could be consistent with that direction.

LORD M'LAREN—I understand that this petition is maintained on the ground that the direction contained in the codicil is not one of the main purposes of the trust, but is only an administrative direction. That appears from the preamble to the clause where the truster states that he considers the value of property in Bo'ness will improve, and for that reason he gives the direction to defer selling his property there until his youngest child should be of age. Now, it must be admitted that there may be directions in a trust which in some measure conflict with the notion of a power of sale, and which will not exclude the action of the Court under the Trust Acts. The mere omission of a power of sale may indicate that the truster did not intend that there should be a sale; or there may be cases where it is shown by implication that the truster did not contemplate a sale, yet if the necessity arises, the Court may be legitimately moved to grant the statutory power of sale, which the truster, not foreseeing the circumstances, did not himself grant. The question is one of degree, and unless this administrative direction is to be treated as having that positive character which would exclude the statutory jurisdiction, I should be disposed to think that the power might be granted on the ground that this is a direction intended only to secure as large a price as possible, and is not one of those conditions to which the statute refers as "the purposes of the trust," or as the Lord President

in a previous case has called them "the main purposes" of the trust.

But as your Lordships think that the case is one where an order of sale would be inconsistent with the purposes of the trust, I am content that the petition should be dismissed, because power of sale should only be granted where the question of competency is free from doubt.

LORD KINNEAR—I agree. The statute requires in order to the exercise of the power which it gives the Court to enable trustees to sell where the trust-deed contains no such power, that two conditions shall be satisfied—*first*, that the sale shall be expedient for the execution of the main purposes of the trust; and *second* (and equally imperative with the *first*), that it shall not be inconsistent with the intention of the truster.

Now, a sale may or may not be expedient for the execution of the general purposes of the trust. I assume that it will be so, although there has been no inquiry for the purpose of ascertaining the facts. Mr Smith tells us that it will be, and I therefore take it for granted for the purposes of the argument. But assuming that it will be expedient the further question arises, whether it is consistent with what the truster intended? On this matter I can have no doubt whatever, because he says in so many words that the trustees are not to sell before 1898.

The Court refused the petition.

Counsel for the Petitioners—R. E. M. Smith. Agents—J. & A. Peddie & Ivory, W.S.

Tuesday, February 2.

FIRST DIVISION.

[Lord Kincairney,
Ordinary.]

MACGOWN v. CRAMB.

Process—Interlocutor Allowing Proof—Res noviter veniens—Nobile officium—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 28.

In an action of declarator of right to certain property the defender pleaded no title to sue, and the Lord Ordinary closed the record and allowed a proof.

Under a diligence subsequently obtained by the defender, an antenuptial marriage-contract was recovered whereby the pursuer had conveyed to trustees the whole means and estate belonging to her, or which might thereafter belong to her.

Two months after the date of the allowance of proof the defender obtained leave to amend his record by narrating the terms of the marriage-contract, and upon his motion for a recal of the interlocutor allowing proof the Lord Ordinary reported the case to the Inner House.

The defender having moved the Court to authorise the Lord Ordinary to discharge the order for proof, and to send the case to the Procedure Roll, held that under section 28 of the Court of Session Act 1868, the interlocutor allowing proof was final, not having been reclaimed against within six days.

Mrs Susannah Cramb or MacGown raised an action against Miss Susannah Cramb, to have it declared that by survivorship of her uncle James Cramb she had acquired a personal right, as one of his heirs-portioners, to one-half *pro indiviso* of his heritable estate.

The defence was that James Cramb, who died in 1876, had by holograph settlement conveyed his whole property absolutely to his brother John, who died in 1894 leaving his whole means and estate to the defender; and that the validity of James' settlement had remained unchallenged by the pursuer for nearly twenty years.

The defender pleaded, *inter alia*—No title to sue.

On 3rd November 1896 the Lord Ordinary (KINCAIRNEY) closed the record and allowed the parties a proof of their respective averments, and on 20th November, at the instance of the defender, he granted diligence for the recovery of certain documents.

Among the documents recovered under this diligence was an antenuptial contract of marriage between the pursuer and her husband, executed in 1877, by which the pursuer conveyed to certain trustees, "All and whole, the whole property, means, estate, and effects, heritable and moveable, real and personal, wherever situated, presently belonging or which may hereafter belong to her by inheritance, gift, bequest, conquest, or in any manner of way whatsoever," but in trust always for the pursuer.

The defender on 5th January 1897 moved the Lord Ordinary to open up the record in order that she might add an amendment thereto setting forth the above-mentioned marriage-contract. She also moved the Lord Ordinary to recal the interlocutor allowing a proof, and to send the case to the Procedure Roll to discuss the plea of title, on which she maintained the marriage-contract had an important bearing.

The Lord Ordinary allowed the defender's amendment, of new closed the record, and reported the case to the First Division.

Note.—"At the closing of the record on 3rd November last the Lord Ordinary, on the motion of the parties, allowed to them a proof of their averments. On 5th January current the defender moved for leave to add to the record certain statements of the nature of *res noviter*. It appeared to me that these statements should be considered, and accordingly the record has been amended by the addition of these statements, with the pursuer's answers thereto.

"The defender has contended that the effect of these statements is to destroy the pursuer's title to sue, and that therefore the interlocutor allowing proof should be recalled. As I do not seem to have power to recal that interlocutor, the defender's