SUMMER SESSION 1876.

COURT OF SESSION.

Friday, May 12.

SECOND DIVISION.

ROBSON, PETITIONER.

Poor's-Roll—Probabilis causa litigandi.

The Court will not entertain any application to review the decision of the reporters on *probabilis causa litigandi*, unless where there has been gross miscarriage of justice or failure of duty on the part of the reporters.

This was an application by Jane Robson in a petition presented by her for admission to the poor's-roll. The case had been twice before the reporters on *probabilis causa litigandi*, having been remitted to them a second time by the Court on a statement made for the petitioner that certain new facts had come to the petitioner's knowledge. The reporters on both occasions found that there was no *probabilis causa litigandi.*

The petitioner now appeared and presented a note making a statement to the Court, and craving admission to the poor's-roll.

At advising—

LORD JUSTICE-CLERK—My Lords, this is a question as to the admission of the petitioner to the poor's-roll. Now, the meaning of that is, that the party who gets the benefit of the poor's-roll is to be allowed to litigate on a footing different from that of ordinary litigants, in respect that the services of counsel and agents are obtained gratuitously. I am not aware that such an application has ever been granted without a remit to the reporters on *probabilis causa litigandi*, and a report by them in favour of granting the application. This case went to the reporters in due course by remit from your Lordships, but the reporters refused the application. On a statement made to us it was again remitted, with a like result. Now, the course I understand your Lordships are now about to take will not prevent any future action by the petitioner—the Court simply refuses to entertain the present application, and to question or inquire into the decision of the reporters.

LORD NEAVES—I abstain from any opinion on the merits; but we have here the decision of the reporters on *probabilis causa*—gentlemen who are anxious to do their duty—and they report that they are not satisfied that any probable cause has been made out. The condition of admission to the poor's-roll is the obtaining of a favourable report from the reporters, and if that condition is not satisfied then that mode of coming into Court is closed to the applicant. It is so here, and we have no jurisdiction to review the reporters' decision unless there were allegations of gross miscarriage of justice or neglect, which there are not.

LORD ORMIDALE—I am of the same opinion. I consider it a considerable hardship to a litigant to have opposed to him a person who has the benefit of the poor's-roll, and can set all the machinery of the Court at work against him without expense. Now, I heard the statement read to the Court by the petitioner, and I listened to it with the utmost attention, but I heard nothing which would induce me to give further investigation.

LORD GIFFORD—I concur. Only in case of a gross miscarriage of justice or failure of duty could the Court interfere with the decision of the reporters on *probabilis causa.* There is nothing of that kind here. I am for adhering entirely to the reporters' decision. The condition on which admission to the poor's-roll can be granted has not been complied with.

The Court refused the application.

For Petitioner—Party.

Saturday, May 13.

FIRST DIVISION.

[Lord Craighill, Ordinary.

ANDERSON AND OTHERS (OLIVER'S TRUSTEES), PETITIONERS.

Trust—Authority to Feu—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97. *sec.* 3).

The Trusts Act 1867, sec. 3, empowers the Court of Session to authorise trustees to grant feus of the trust-estate "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." A truster di

rected his trustees to "let annually, or on lease for a period not exceeding seven years, to the best advantage," a certain subject, declaring that it "shall never be sold nor disposed of." In a petition by the trustees asking for authority to grant feus of that subject—*held* that the granting of such a power was inconsistent with the intention of the truster, and therefore was not authorised by the Act.

James Douglas Oliver, rector of Selkirk Grammar School, who died in 1825, left a trust-deed and settlement executed in 1824, by which he disponed to trustees therein named his whole heritable and moveable estate, and in particular, *inter alia*, "All and whole the park or enclosure of land acquired by him from Walter Clerk, sometime carrier in Selkirk, thereafter tenant in Craigsfordmains, lying within the liberty and territory of the said burgh of Selkirk, and in that part thereof called Tait's Hole, and a small piece of land, 10 feet wide, extending from the King's highway to the foresaid park or enclosure, &c." The trustees were directed, "if there should be any residue of the estate, to allow it to remain in bank, or otherwise invest it on security to their satisfaction, and add the interest of it annually to the rents of Taits Hole; and to let annually, or on lease for a period not exceeding seven years, to the best advantage, the park called Tait's Hole, for the interest of the Grammar School of Selkirk in all time after the truster's death." It was declared that the said park should "never be sold nor disposed of," nor ever let to the truster's successor in office, and that no burdens should be left or contracted upon it after his death.

It was further ordained that the rents of Tait's Hole and the interest of any residue should be applied for behoof of the Grammar School of Selkirk in the manner therein at length set forth, and in particular, "in educating a few docile children whose parents reside within the liberties and territories of the said burgh of Selkirk, and bear a good character, and who at the same time that they need such assistance for the education of their children (of which my said trustees are to be the sole judges) do not receive aid as paupers from the poor's funds of the burgh or parish of Selkirk, or any other parish or place."

It was further stated in the petition that the park referred to under the name of Tait's Hole extended to rather more than an acre and a-half imperial measure, and was let from year to year at a rent of £5. The income from the rest of the trust-funds, which were invested as authorised under the trust-deed, amounted to about £24, and after defraying the expenses of management the balance of revenue was sufficient to educate about twenty children of the class referred to in the deed. The park was let at a full rent, but owing to the prosperity of the town of Selkirk, near which it lay, it had now become much more valuable for building purposes, and the trustees had recently received an offer to feu a portion thereof, extending to a-fourth of an acre, at the rate of £12 per acre. The trust-deed, however, contained no power to feu. The trustees had reason to believe that if they were empowered to grant feus they would soon be able to dispose of the whole ground at rates amounting at least to £12 an acre, thus adding £13 per annum to the income, to the material advantage of the trust, the usefulness of which would be much increased by this permanent addition, as it would put it in the power of the trustees to afford education to ten or twelve children above the present number.

The petition proceeded upon the Trusts (Scotland) Act 1867, sec. 3, which enacted that "it shall be competent to the Court of Session, on the petiton 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; —(*inter alia*) "2. To grant feus or long leases of the heritable estate, or any part of it." It prayed the Court for authority to grant feus of these subjects, "such feus being beneficial and expedient in the execution of the trust, and not inconsistent with the intention thereof."

The Lord Ordinary pronounced the following interlocutor:—

"The Lord Ordinary having heard the counsel for the petitioners upon the petition and productions, and having considered the argument and whole process—Finds that the feuing of the heritable subjects called Tait's Hole, referred to in the petition, would be inconsistent with the intention of the trust represented by the petitioners as trustees: Therefore refuses the prayer of the petition, and decerns.

"*Note*—Power to feu is not conferred by the trust-deed creating the trust, of which the petitioners are trustees; but by the Trusts (Scotland) Act 1867, section 3, it is made competent to the Court to grant such power 'on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof.'

"The truster in this case ordained that his trustees should let annually or on lease, for a period not exceeding seven years, to the best advantage, his said park called Tait's Hole, for the interest of the Grammar School of Selkirk in all time after his death, declaring that the said park should never be sold nor disposed of, nor ever let to his successor in office, and that no burden should be left upon it or contracted upon it after his death.

"There is, it may be, a sense in which the feuing of ground may be said to be compatible with the condition that the ground shall never be sold or disposed of, and were this the only obligation imposed on the petitioners in their administration of the property the Lord Ordinary might have hesitated before coming to the conclusion at which he has arrived. But there is another direction by which the course of the administration of this heritable subject has been prescribed. Tait's Hole is to be let annually or on lease for a period not exceeding seven years in all time after the truster's death. The fulfilment of this purpose is obviously incompatible with the feuing of the ground—that is to say, using the words of the Act of Parliament referred to, inconsistent with the intention of the trust. The prayer of the petition for authority to feu has therefore been refused."

The petitioners reclaimed, and argued—The provisions of the Act would be complied with if the prayer were granted. (1) The expediency was undoubted. (2) The purpose of the Act

was to give the Court power to grant authority to trustees to do things not in the contemplation of the truster. The truster here had in view the objects of the trust, not the means by which these were to be carried out. He only directed what seemed to him most advantageous at the time. In any case, all he intended was that the property should not pass out of the truster's hands, and if feuing was allowed that would not take place. There was no fixed purpose of the trust against feuing.

Authorities—*Merchant Company* v. *Governors of Heriot's Hospital*, M. 5750; *Arkley and Others* (*Hay's Trustees*) v. *Miln*, June 13, 1873, 11 Macph. 694.

At advising—

Lord President—We are empowered under the Trusts Act 1867 to grant the authority which is here asked, provided we are satisfied that the same is expedient for the execution of the trust, and also "not inconsistent with the intention thereof," that is, with the intention of the truster. The power here required is a power to feu, and it is admitted that the trust-deed contains prohibition to sell, but it is contended that there is no prohibition against feuing. It is needless to enlarge upon the distinctions between these powers, for the question is, what was the intention of the truster in the provision he made with reference to the prohibition to sell. He directs his trustees to allow the residue of his estate "to remain in bank, or otherwise invest it on security to their satisfaction, and add the interest of it annually to the rents of Tait's Hole," the property here in question. That fund is to be applied to the carrying out of the main object of the settlement, and with regard to Tait's Hole there is a special provision as follows [*reads as above*].

Now, what does the testator mean when he says that Tait's Hole is "never to be sold or disposed of." It appears to me that these words can have no meaning unless they are to cover such an alienation as is proposed in this petition. The trustees are further forbidden to let on long lease, or even on lease for the ordinary term of possession, for it is provided that no lease is to exceed seven years in duration; and it would be strange if in these circumstances we were to hold that there was no inconsistency in granting the power to feu, although in the same sentence there are contained the prohibitions to which I have alluded. There is no room for doubt in this clause, and we must take it that the prohibition against a disposal of this property either by sale or for an annual payment, except for a limited number of years, includes a prohibition to feu. There is only one answer to the question whether the power asked is inconsistent with the testator's intention, and the testator has left no room for hesitation as to what his meaning is. While the granting of this power might have been expedient, it is impossible to hold that it is in conformity with the truster's intention.

In the other case which has been alluded to —*Arkley and Others* (*Hay's Trustees*) v. *Miln*, June 13, 1873, 11 Macph. 694—the truster had created a trust, directing his trustees to hold certain estates in any event for twenty-one years. His debts were to be paid, and an annuity had also to be provided for out of the annual proceeds of the estate. The project of the truster turned out impossible, and the trustees after a few years found the estate not only bankrupt, but irretrievably so, the burdens largely exceeding the rental, and that was a condition which would be aggravated every year. There was a prohibition in the trust-deed against selling any part of the landed estate, because the ultimate purpose under the deed was that that should be entailed. In these circumstances an application was made for power to sell a part of the estate, the effect of which would be to enable the debt to be paid off, and to leave a balance of the property to be entailed. It was represented that the intention of the testator was impracticable, and that if the power were refused the estate would be torn to pieces by the diligences of creditors, and that the only alternative was to carry out the intention of the testator so far, and settle an entailed estate not of the same amount as had been contemplated by him, but of some amount, upon the series of heirs. That was a telling argument, but the Court found themselves compelled to refuse the application, because the prohibition was so expressed that they could not say that the condition of the statute was purified, which requires that the granting of such a power must not be inconsistent with the intention of the testator.

The present is a stronger case, and the petition must accordingly be refused.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

The Court adhered.

Counsel for Petitioners—Dean of Faculty (Watson)—Jameson. Agents—Scott-Moncrieff, & Wood, W.S.

Tuesday, May 16.

FIRST DIVISION.

[Sheriff of Midlothian.

GREIG AND SIMPSON *v.* CRAIG.

Poor—Settlement—Desertion—Statute 8 *and* 9 *Vict. cap.* 83, *sec.* 76—*Husband and Wife.*

A man who had a residential settlement deserted his wife and children, and was absent for more than five years.—*Held* that his desertion being equivalent to his death, his residential settlement inured to his wife and children till he should return, or till they should acquire a new settlement for themselves, and was not lost by his absence, in spite of the 76th section of Stat. 8 and 9 Vict. c. 83, there being no presumption that he was still alive.

John Scott was born in the parish of South Leith. In 1854 he was married, and in 1868 he deserted his wife, having previously acquired a residential settlement in the parish of St Cuthbert's. In respect of this settlement his wife and children, who had become paupers, were relieved by St Cuthbert's parish down to June 1872. In June 1873 they left that parish and came to reside in the City parish of Edinburgh, and in that month they obtained relief from the City parish.