

points out in the concluding portion of this opinion, the question that was there being disposed of was only the constitution of the obligation against the executry estate. Here the obligation is a good one against the father, and will subsist notwithstanding any discharge he may obtain in the sequestration, but it is an obligation that must be construed according to its terms. To construe it as conferring a *jus crediti* on the children in a question with creditors would be to hold that although the father retained full control of the £4000 during his life (except in a question with his wife) the moment he becomes bankrupt his children are entitled to step in and say they are secured. This, in my opinion, they cannot do. The interlocutor appealed against should, in my opinion, be recalled, and the deliverance of the trustee sustained so far as regards the sum of £4000. No argument was submitted to us regarding the sum of £212.

LORD JOHNSTON was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, dated 2nd July 1912, and affirmed the deliverance of the trustee, dated 4th March 1912, in so far as it dealt with the claim for £4000.

Counsel for Mackinnon's Marriage-Contract Trustees, Pursuers and Respondents—Sandeman, K.C.—Normand. Agents—J. & J. Ross, W.S.

Counsel for the Trustee on Mackinnon's Sequestrated Estates, Defender and Appellant—Chree, K.C.—T. G. Robertson. Agents—Carmichael & Miller, W.S.

Tuesday, December 3.

SECOND DIVISION.

TRUSTEES OF ALEXANDER SCOTT'S HOSPITAL, PETITIONERS.

Trust—Administration—Powers of Trustees—Charitable Trust—Nobile Officium—Restriction to Investment in Land—Trust Securities other than Land.

Held that the Court had no power to grant the crave of a petition to its *nobile officium* to invest the prices of certain lands held under a charitable trust in trust investments other than land, in view of the fact that the trust-disposition constituting the trust directed the trustees in the event of a sale to invest the price in other lands.

The trustees and managers of Alexander Scott's Hospital, incorporated under Alexander Scott's Hospital Act 1868 (31 Vict. cap. i), *petitioners*, presented a petition to the Court for authority "to sell and dispose at the price of £17,890, by private sale to the Governors of the North of Scotland College of Agriculture, of All and Whole the town and lands of Crabestone, . . . as the same were possessed by the deceased Mr Thomas Sandielands of Crabestone and his tenants, . . . and to

invest in approved trust investments the balance of the said sum of £17,890."

The petition stated, *inter alia*—"1. That the deceased Alexander Scott of Crabestone, in the county of Aberdeen, by his trust-disposition and deed of settlement, dated 8th June 1824, gave, granted, and disposed to and in favour of certain trustees (all of whom are now deceased, and whose successors in office the petitioners are), for the ends, uses, and purposes mentioned in said trust-disposition and deed of settlement, *inter alia*, his said landed estate of Crabestone. The said Alexander Scott in his said trust-disposition directed that the residue of his estate, including Crabestone, should be applied for the purpose of erecting and endowing a hospital at Huntly, in the county of Aberdeen, for the maintenance, aliment, clothing, and lodging of old men and old women in the said town of Huntly—the said hospital or receptacle to be known, styled, and called by the title of 'Alexander Scott's Hospital.'

"2. That by his said trust-disposition and deed of settlement the said Alexander Scott further provided as follows:—'In case it shall appear to my said trustees above named or those to be assumed as aforesaid, after they have maturely and deliberately considered the matter, and had some experience of the yearly returns and probable increase of value from the wood and otherwise of my said estate of Crabestone, that it is not likely to be such a beneficial investment for the purposes of the mortification as some other landed property, it shall in that event be in the power of my trustees . . . to sell and dispose of the said lands and estate of Crabestone by public roup or private bargain . . . at the best and highest price which can be obtained therefor, and thereupon to grant disposition thereof to the purchaser containing all usual and necessary clauses with obligations of absolute warranty against me and my heirs, and declaring that the purchaser or purchasers shall have no concern with the application of the price, or the conditions, declarations, and appointments contained in these presents; and thereafter my said trustees shall be bound and obliged, as soon as conveniently can be done, to invest and lay out the said residue and remainder of my estate in the purchase of other lands situated in the county of Aberdeen if such can be reasonably had, and failing thereof, in any of the adjoining counties, and shall settle and secure the lands so to be purchased by a deed or deeds for the purposes of the mortification for the said hospital allanery.'

"3. That by 'Alexander Scott's Hospital Act 1868,' the trustees and managers of Alexander Scott's Hospital were incorporated, and further powers were conferred upon them. . . .

"5. That the petitioners have found that the management of the said estate of Crabestone has for some years past been a source of difficulty, and has not been a remunerative investment. . . . In the year 1910 the petitioners were able to

adjust a lease of the mansion-house and home farm with the Governors of the North of Scotland College of Agriculture, and in the course of the negotiations it was arranged that if the said governors were in a position to purchase the estate, the petitioners would make application to the Court for authority to sell. Under said lease, which is for a period of twenty-one years from Martinmas 1910, the mansion-house is to be used as a college, and the farm for experimental purposes. The petitioners calculate that even if in addition to the said let of the mansion-house and home farm, all the other farms on the estate remain let for the next twenty years, and the expenditure on the estate should remain normal, the average income per annum will probably amount to about £451.

"6. Recently the petitioners were approached by the said Governors of the North of Scotland College of Agriculture, who find themselves in a position to purchase. After considerable negotiations, the governors of the said college have stated that they are willing to pay a sum of £17,890 for the said estate. The petitioners have given the matter the fullest and most careful consideration, and have also taken advice of skilled land valuers. As the result of their deliberations the petitioners have come to the conclusion that to accept the said offer would be exceedingly expedient in the interest of the objects of the said Alexander Scott's benefaction—the Scott Hospital, Huntly. The petitioners are further advised, and are of opinion, that it would not be expedient (either from the point of view of management of the trust or of a remunerative return) to reinvest the said sum of £17,890 in the purchase of other landed property. They accordingly propose, if the present application is granted, to invest the said sum of £17,890 in trust securities. If that sum (less say £250 for expenses of realising the estate and incidental expenditure connected therewith) were invested at $3\frac{1}{4}$ per cent., it would produce an annual income of £661, 10s."

On 3rd September 1912 the Lord Ordinary on the Bills (ORMIDALE) remitted to Mr Walker Finlay, W.S., to inquire into the circumstances set forth in the petition and to report.

On 16th November 1912 the reporter lodged his report, which, *inter alia*, stated—"The first question that occurs to the reporter is as to the competency of the petition, and he is unable to refer your Lordships to any case in which the exercise of the *nobile officium* has been resorted to in similar circumstances, and while there is no case in which it has been refused that is exactly similar, there are several cases which appear to have a considerable bearing on the point. The most recent case is the case of *Noble's Trustees*, 1912, 10th July, 49 S.L.R. 888, 1912 S.C. 1230. In this case trustees petitioned for power to uplift capital to be expended upon erecting and extending buildings so as to secure a favourable let, and power was also craved

to grant a lease of the buildings for twenty-one years. The Court refused to exercise the *nobile officium*, on the ground, first, that the questions were questions merely of administration, and second that it was incompetent for the Court to grant additional powers to trustees in virtue of their *nobile officium*. In this case Lord Kinnear quoted with approval the opinion of Lord President Inglis in the case of *Berwick*, 2 R. 90, 12 S.L.R. 58, where the Lord President said—"It is important to notice that this is not a case under the Trusts Acts. The powers of the trustees are defined by the trust-deed, and the Court will give no higher powers. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed, it is not competent for us to give it to them. I think, therefore, that the petition should be dismissed."

"It may be maintained that the present case differs from these two cases cited, as in both of these cases the trustees were petitioning the Court on a question of management or administration of the trust estate, and it seems that in both cases there was some doubt as to whether the course proposed to be taken by the trustees did not fall entirely within the scope of their powers. It might be maintained that no authority of the Court was necessary to authorise their proposed actings, whereas in the present case it appears clear that under the powers contained in the trust-settlement the petitioners would not be justified in following out the course they think should be taken in the interest of the trust estate without specially obtaining your Lordships' authority. There is undoubtedly a distinction between the present case and the two cases already cited, but in following the authorities back to the older cases on which the case of *Berwick* proceeded, the reporter finds an example which is nearer the circumstances of the present application.

"In the case of *Kinloch*, 1859, 22 D. 174, trustees appealed to the *nobile officium* for authority to borrow, there being no special powers to do so conferred upon them by the trust-deed. It will be noted that this case was decided before the passing of the Trusts Act 1867, which enables trustees in certain circumstances to obtain power to borrow by application to the Court under that Act. The circumstances of the case were that the trustees held the trust estate under a trust-disposition and settlement of the late proprietor, and the whole estate consisted of certain heritable estate, out of the revenue of which the testator directed certain annuities to be paid, and a holding in bank shares on which calls had been made and to pay which calls there was no other moveable estate available. In these circumstances the trustees petitioned the Court in virtue of their *nobile officium* to grant power to borrow, and they stated that they had unsuccessfully attempted to sell the property (to which they had power under the settlement), and unless they obtained power to borrow adjudication was imminent at the instance of the

liquidator of the bank to which they were liable for calls. In this case Lord Jarvis-woode, the Lord Ordinary, said that the Court could not confer upon trustees a power to borrow or do any other act the power to do which may not at least by implication be drawn from the deed, and refused the petition. The trustees reclaimed, and the question addressed to the Court was—'Whether the Court can exercise its *nobile officium* in the case of trusts to the extent of conferring on trustees powers not given by the trust-deed.' A minute of argument was lodged by the reclaimers and laid before the whole Court, and the Lord President pronounced an opinion on behalf of the Court to the effect that where the trust-deed does not by construction or implication confer certain powers on the trustees it is not competent for the Court in the exercise of its *nobile officium* to confer such powers.

It may be suggested that land is not now as suitable an investment for trustees as it was thought to be at the time the testator made his settlement, but the reporter is not aware if this point has ever been considered by the Court.

"The reporter respectfully directs the attention of your Lordships to the introductory clause of the settlement where it says that the residue 'shall be vested and secured on landed property.' These words might be taken to cover loans on heritable security or the purchase of superiorities, both common forms of trust investment, but such investments can hardly be embraced in the particular clause which follows, instructing, in the event of a sale of Crabestone, the purchase of 'other lands' situated in the county of Aberdeen. The reporter suggests this might still cover the purchase of superiorities, on the authority of *Sharpe*, 11th February 1823, 2 S. 203 (180), where the Court authorised the purchase of certain superiorities with part of funds directed to be laid out in acquiring lands as contiguous to an entailed estate as possible, though in that case it would seem that the superiorities must at least to some extent have been the superiority of the entailed estate, as the Lord Ordinary reported that the purchase would be advantageous to the entailed estate and serve to make up a freehold qualification.

"It does not seem to the reporter that if the petition had been founded on the Trusts Act 1867 the petitioners would have been in any better position, as that Act requires that not only must the granting of the power be expedient, but the power sought must not be inconsistent with the intention of the trust. Under this head the reporter refers to the case of *Hiddleston's Trustees*, (O.H.) 13 S.L.T. 705, where charity trustees petitioned for power to sell certain lands which had been left to them for the purposes of the charity, and the power was refused by Lord Ardwall on the ground that beneficiaries must take a benefit only in the way and under the conditions prescribed by the deceased benefactor. The reporter directs attention to this case, as

it is a case of a charitable trust like the present case, and not as in the other cases referred to a trust for private beneficiaries. It might be argued that wider powers should be given to semi-public or charitable trustees."

The reporter also referred to Alexander Scott's Hospital Order Confirmation Act 1905 (5 Edw. VII, c. lxxv.). Neither of the private Acts affected the power in question.

At the hearing counsel for the petitioners argued that, looking to the fact that this was a charitable trust, the Court could competently grant the powers craved. In dealing with cases arising under such trusts the Court had liberally construed its powers under its *nobile officium*. In addition to the cases cited by the reporter reference was made to *Trustees of Calvin's Hospital*, January 29, 1842, 4 D. 556

LORD JUSTICE CLERK—I fear that it is not within our power to do what is asked in this petition, and I think it is very much to be regretted, seeing that what is proposed is a very desirable thing indeed. But the donor of this estate has so very clearly expressed himself that we cannot do otherwise than follow his direction. In his deed he expressed himself to the effect that if, as he authorised, the estate of Crabestone was at any time parted with and converted into money, then as soon as convenient thereafter his trustees should be bound and obliged to invest and lay out the residue and remainder of his estate in the purchase of other lands situated in the county of Aberdeen if such could be obtained without serious difficulty, and failing such, in any of the adjoining counties, to be settled and secured for the purposes of the mortification. Now that is a very distinct and clear direction. I do not think it is in the power of this Court, merely because we think it expedient, to set aside the direction of the truster, against which nothing can be said except that it may not be possible to invest the money again in land so as to get the same or a better return than was got from Crabestone.

Dealing with the petition in that way, I think we must just follow what has been done in previous cases, and as the Lord President says in the case of *Berwick* (2 R. 92)—"The powers of trustees are defined by the trust deed and the Court will give no higher power. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed it is not competent for us to give it them." I do not think here the case is so serious as it might be in certain conceivable circumstances; because, undoubtedly, there is a very easy mode of getting this matter settled, viz, by Provisional Order, though that would cost perhaps a little more money than would be expended in endeavouring to get a decision here.

If we realise that the investment which is proposed would be one which would yield nearly a third more income than at present, it is very plain that the expense of getting a Provisional Order, which in a case like this would almost certainly be

unopposed, would very soon be covered by the additional advantage obtained by investing this money in securities instead of in land.

On the whole matter, while expressing the view that this is a very desirable proposal if we had the power to sanction it, which I fear we have not, I think we must dismiss the petition.

LORD DUNDAS—I agree. I think the words of the trust deed are so clear and specific that we have not the power to authorise the petitioners to invest the balance of the funds which they hope to receive in ordinary trust securities. I am afraid they are tied up to investment in land. I share your Lordship's regret in the matter, because it seems clear from the petition and the report that the sale to the North of Scotland College of Agriculture would be a good and proper transaction for the trustees to carry through; and one would think that what they desire to do with the balance of the price is very sensible, but I am afraid we have no power to sanction it. I am glad, however, to think that the petitioners can probably get what they want by another method.

LORD SALVESEN—I am of the same opinion. The footing upon which this proceeding is brought is that the trustees are under obligation, in terms of the truster's direction, if they sell Crabestone, as they are authorised to do, immediately to invest the proceeds in another landed property in the county of Aberdeen or the adjacent counties, and on the footing that it will be a more beneficial investment than if they should continue to hold Crabestone, they ask us to relieve them of that obligation imposed upon them by the truster.

If this case rested entirely upon the trust-disposition and settlement I think it would be incompetent for us to grant the application in the circumstances averred merely for the purpose of increasing the income of the trust, and not because the trust has in any respect become unworkable. It seems to me to be still more difficult when we find that there have been two Acts of Parliament by which this trust-disposition has been modified in important respects, but has not been affected as regards the point which is now before us. That looks very like an incorporation by Act of Parliament of the trust purposes which are not in terms affected by the Acts. I agree with both your lordships in thinking that what the trustees propose to do under present conditions is eminently sensible; but as they have got two Acts of Parliament in regard to this trust already I do not see why they should not obtain a third, looking to the extreme improbability of there being any opposition.

LORD GUTHRIE—I am of the same opinion. The petition at first sight does not seem to raise the question which is really before us. It is titled a petition for authority to sell heritage, but it turns out that the trustees are not in any difficulty as to the sale of the heritage. The real

question arises under that part of the prayer of the petition in which the trustees ask authority to invest the proceeds of the sale of the heritage in approved trust investments. It seems to me that the question is really one arising on the terms of the trust-deed, as Lord Dundas put it, because as I read the Acts of Parliament, especially the one quoted on page 3 of the petition, I think that, while introducing certain alterations, they say in effect that *quoad ultra* the trust-deed is to remain in full force. I concur in thinking that, whatever the truster's unexpressed intention may have been, the intention of the words of the trust-deed is unusually clear and comes to this, that for all time coming the estate of Crabestone was to remain as it was, or if it were sold the proceeds were to be permanently invested in landed property.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Fleming, K.C.—Lippe. Agents—Mackenzie & Kermack, W.S.

Thursday, December 5.

FIRST DIVISION.

[Lord Ormidale Ordinary.]

BOWIE'S TRUSTEES v. GOUDIE AND OTHERS.

Fraud—Agent and Client—Property—Innocent Third Party—Fraudulent Discharge of Bond by Agent—Delivery of Bond to Purchaser of Subjects—Right of Purchaser to Retain Bond as against the True Owner.

The purchaser of a property who had paid a full price therefor, including the sum contained in a bond with which it was burdened, received along with the disposition a forged discharge of the bond and the bond itself—the seller's agent, who also acted for the bondholders and so had custody of the bond, embezzling the sum contained therein. In an action by the creditors for delivery of the bond the purchaser maintained that she was entitled to retain it on the grounds (1) that it was one of the titles to the property, and (2) that the agent had the creditors' implied authority to discharge it.

Held that the pursuers were entitled to delivery of the bond, they not being in any way to blame for their agent's fraud, and he having no mandate to discharge it.

On 11th April 1911 Walter Bowie, farmer, Paisley, and others, testamentary trustees of the late William Bowie, farmer, Blackbyres, Paisley, *pursuers*, brought an action against (1) William Goudie, New Jersey, U.S.A., and (2) Mrs E. H. Watson, wife of Thomas Watson, Craignair, Bridge of Weir, and the said Thomas Watson as