

bankrupt's counsel, that the clause regulating the consents of creditors is a direction or directory provision merely. It is distinctly imperative, both from the words used in the clause itself, and from the objects which, it is apparent throughout the whole, were in the view of the Legislature. It is the policy of this statutory enactment, and it is a sound one, that the bankrupt shall not be allowed to deal or transact with his creditors with a view to his discharge, until the trustee's report has been laid before them. This is set out distinctly and imperatively in the clause referred to. And the reason for requiring that the creditors' consents shall bear distinct reference to the report is to make sure that the report shall have been previously made, in accordance with the policy and intention of the Legislature in framing this statute. I think we must therefore alter; and remit to the Sheriff to refuse the petition,

The other Judges concurred.

Agent for the Appellant—William Black, S.S.C.  
Agents for the Bankrupt—Menzies & Cameron,  
S.S.C.

Saturday, March 16.

## SECOND DIVISION.

### SPECIAL CASE—DR CONNELL'S TRUSTEES.

*Testament—Disposition—31 and 32 Vict. c. 101, § 20.*

A will executed according to the law of England (the place of execution), disposing heritable estate in Scotland, sustained as sufficient to convey heritage.

This Special Case was presented by the trustees and the heirs-at-law of the late Dr Abraham James Nisbet Connel, who died at London on the 9th of March 1871. At the time of his death he was possessed of considerable personal estate, and some freehold and leasehold property in England, and he also died possessed of a large number of shares in the British Linen Company's Bank, and some heritable property in Edinburgh. Dr Connel, by his will, dated 6th February 1871, after appointing trustees and executors, provided as follows:—"As to all my real estate and my personal estate (except such plate as is hereinafter specifically bequeathed) whatsoever and wheresoever, over which I now have, or at the time of my decease may have, any power of gift, devise, bequest, disponent, conveyance, disposition, and appointment (but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively), all which said real and personal estate is hereinafter referred to as my said trust-estate, I give, devise, bequeath, dispose, disponent, appoint, and convey the same unto my said trustees, their heirs, executors, and administrators respectively, upon trust that they, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall, in such manner and under such stipulations, and upon such terms and conditions in all respects, as they or he shall in their or his discretion think fit, sell, collect, or otherwise convert into money, according to the nature of the premises, all such parts of the same premises as shall not consist of money, and shall buy in or rescind or vary any contract for sale, and resell, without being answerable for loss; and may, for the purposes aforesaid, or any of them, execute and do all such assurances

and things as they or he shall think fit: And I declare that my said trustees shall, out of the monies to be produced by such sale, collection, and conversion, after payment of my just debts, funeral and testamentary expenses, pay the legacies or sums of sterling money," &c.

Dr Connel was of Scotch origin, and for many years was a medical officer in the Rifle Brigade, and afterwards served in the 2d Regiment of Horse Guards.

The will was executed according to the law of England, and was valid to include and pass all the real and personal estate of the deceased situated in England.

The second parties to the case were the persons who would be entitled to succeed to Dr Connel's heritable estate in Scotland in the event of its being held that it was not validly conveyed to his trustees by the will in question.

The question on which the opinion and judgment of the Court was requested was—

"Whether the will of the testator operates, under the Act 31 and 32 Vict. c. 101, § 20, a conveyance to the trustees therein named of his heritable estate in Scotland?"

Solicitor-General (CLARK) and BROWN for the Trustees.

FRASER and R. V. CAMPBELL for the Heirs.

At advising—

LORD JUSTICE-CLERK—This Special Case raises a point of general application and of some importance. The question rests on this state of facts. Dr Connel died, having executed in England, according to the forms of the law of England, a will, which contains the following clause:—"As to all my real estate and my personal estate (except such plate as is hereinafter specifically bequeathed) whatsoever and wheresoever, over which I now have, or at the time of my decease may have, any power of gift, devise, bequest, disponent, conveyance, disposition, and appointment (but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively) all which said real and personal estate is hereinafter referred to as my said trust-estate, I give, devise, bequeath, dispose, disponent, appoint, and convey the same unto my said trustees, their heirs, executors," &c. It is certain, as regards the heritable estate thereby attempted to be conveyed, the will would not have been effectual prior to 1868. By the law of Scotland, however, a will executed according to the law of the place of execution would be effectual as regards moveables. This principle was given effect to in the case of *Purvis*, in which it was unanimously held that it had always been the law of Scotland that a will executed according to the law of the place of execution was effectual as to moveables. Thereafter the Act 24 and 25 Vict. was passed, extending this principle of law to the three parts of the kingdom. By that enactment a will executed according to the law of England will enable an executor to obtain confirmation in Scotland, and a will executed according to the law of Scotland will enable the testator to obtain letters of administration in England. But that statute made no change in the law as to the conveyance of heritage. The Act 31 and 32 Vict. § 20, deals with this matter. The primary object of the enactment was to alter the law of Scotland, which required words of *de presenti* conveyance in a disposition of heritage. The other object of the statute was to do away with the necessity for dis-

positive words. The clause then goes on to propound how the conveyance shall be completed subject to these alterations.

We must attend to the precise words of the clause—(1st) "From and after the commencement of this Act, it shall be competent to any owner of lands to settle the succession to the same, in the event of his death, not only by conveyances *de presenti* according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings;" and (2dly), "No testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands, which shall have been granted by any person alive at the commencement of this Act, or shall have been granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of lands to which such deed or writing applies, on the ground that the grantor has not used, with reference to such lands, the word *dispone*, or other word or words importing a conveyance *de presenti*." The 3d part commences in this way—"And where any such deed or writing" (that is, any deed or writing purporting to convey heritage) "shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands."

Now, the question which arises is, Whether this clause applies to the case at all? It was ingeniously argued that it could not apply, as the deed in question expressly conveys the lands. I do not think that we would be giving effect to the plain meaning of the statute if we were to hold that, because the word "*dispone*" is used, a greater amount of authentication is required than if that word had not been used. The real object of the statute was to deal with the phraseology of the conveyance, and not with the authentication. We have to inquire whether the deed in question is a testamentary writing, authenticated according to the law of Scotland. By the Act 24 and 25 Vict. a testament is valid if executed either according to the law of Scotland, or according to the law of the place of execution. The law of Scotland does permit a testamentary writing to be executed according to the forms of the place of execution. My opinion therefore is, that this will, executed according to the law of England, is sufficient to convey heritable as well as moveable property in Scotland.

The other Judges concurred.

Agents for the Trustees—Richardson & Johnston, W.S.

Agent for the Heirs—James Young, S.S.C.

## HIGH COURT OF JUSTICIARY.

Saturday, March 16.

(Before Lord Justice-Clerk, Lord Cowan and Lord Neaves).

THOMAS KERSHAW *v.* JAMES MITCHELL  
& CO.

*Jurisdiction—Master and Servant—Complaint under Master and Servant Act 1867—Contract, Evidence of—30 and 31 Vict. c. 141, §§ 2 and 3.*

*Held* that the Court of Justiciary still had jurisdiction in suspensions of sentences pronounced under the Master and Servant Act of 1867, though that Act had removed much of the criminal character from the proceedings as formerly instituted.

*Held*, farther, that the Act of 1867 was applicable to all contracts which at common law could be proved by parole, and that the third section did not contradict the second as to the manner in which contracts falling under the Act could be constituted, but was only intended to define those contracts, by a reference to the competent contracting parties, as described in the Acts scheduled.

This was a suspension brought by Thomas Kershaw, Power Loom Tuner, at Innerleithen, of a sentence pronounced against him by the Sheriff-Substitute of Peebles (HUNTER) in a petition and complaint under the Master and Servant Act 1867, at the instance of James Mitchell & Co., Manufacturers, Galashiels.

The petition and complaint of Mitchell & Co. was in the following terms—"That the said Thomas Kershaw (hereinafter called the said employed), being the artificer of the said James Mitchell & Co. (hereinafter called the said employers), in their trade or business of Manufacturers, under a certain contract of service to enter the employment of the said employers as a power-loom tuner on the 18th day of December 1871, did, on the said date, at Galashiels, in the county of Selkirk, unlawfully neglect or refuse, and has ever since neglected or refused, to enter into or commence his service according to the said contract. And the said complainants, the employers, further say that the amount of compensation which they claim for the said breach and non-performance of the said contract is £8. And they pray that the said employed may be summoned and adjudicated upon under § 4 of "The Master and Servant Act 1867."

"May it therefore please your Lordship to grant warrant to cite the said Thomas Kershaw, respondent, to appear before you to answer to this complaint, and thereafter to proceed in the matter in terms of the said Act."

After hearing evidence, the Sheriff-Substitute convicted Kershaw of the offence charged against him, and ordained him to pay to the respondents the sum of £4 of compensation for the breach and non-performance of the contract referred to in the petition, with certification of imprisonment for thirty days in default of payment or recovery by pouding and sale.

The said Thomas Kershaw thereupon brought the present bill of suspension in the High Court of Justiciary. He therein set forth that the said conviction was contrary to law. By the third section of the Act passed in the fourth year of the