

Saturday, May 24.

OUTER HOUSE.

[Lord Kincairney.

PETTIGREW'S EXECUTORS, PETITIONERS.

Trust—Trust (Scotland) Acts 1861 to 1884—Trustee—Executor—Power to Feu.

A testatrix by her testament bequeathed certain portions of heritable property in liferent and fee. She appointed executors, but her testament contained no conveyance of the properties to them. The executors completed a title under the provisions of sec. 46 of the Conveyancing and Land Transfer Act 1874. During the life of the testatrix the properties had been partly feued, and it was in the interest of the beneficiaries that feuing should be continued. In these circumstances a petition by the executors for authority to feu *granted*.

This was a petition by William Frederick Pettigrew, residing at No. 47 Condrace Road, Fulham, London, and Louisa Sykes Pettigrew, residing at Colebrook Lodge, Upper Norwood, in the county of Surrey, the executors of the deceased Frances Mary Pettigrew of Colebrook Lodge aforesaid, widow of the late William Vesalius Pettigrew, Doctor of Medicine, for authority to feu certain heritable subjects in Glasgow which belonged to the said deceased Mrs Frances Mary Pettigrew, and were bequeathed by her to her children by her last will and testament, in manner set forth in the report by Mr Robert Stewart, S.S.C.

The Lord Ordinary (KINCAIRNEY) on 20th March 1890 remitted "to Mr Robert Stewart, S.S.C., to inquire into the circumstances set forth in the petition, and to report: Further, remitted to Mr Murray, land valuer, Glasgow, to inspect the ground to be feued mentioned in the petition, and to fix the minimum rate or rates of feu-duty the same should be feued at, and recommended Mr Murray to communicate with Mr Stewart before completing his report."

Mr Stewart reported as follows—"In obedience to the remit in the interlocutor, of which a copy is prefixed, your reporter has inquired into the circumstances set forth in the petition and examined the proceedings, and he begs respectfully to report as follows:—The said deceased Mrs Pettigrew died at Colebrook Lodge aforesaid on 27th June 1888 leaving a last will and testament executed in English form dated 20th February 1885, and proved in the High Court of Justice on 20th August 1888, by which she appointed the petitioners, who are her son and eldest daughter, to be her executors.

"By said last will and testament the said Mrs Pettigrew, *inter alia*, on the narrative that she was entitled to certain heritable property in Scotland consisting of ground annuals or feu-duties issuing or payable out of certain property in Glasgow, and also a

house and land called the Green property situated near Glasgow, bequeathed one undivided moiety of the said heritable property, and of all other (if any) heritable property in Scotland to which she should be entitled at the time of her death, to the petitioner William Frederick Pettigrew 'in liferent for his alimentary liferent use only, whom failing to any widow he may leave in liferent for her alimentary liferent use only, and to such his child or children as he shall by deed or will appoint, and in default of appointment to such child or children of his as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain the age of twenty-one years or marry under that age, and in default of any such child or children,' to her daughters, the petitioner, the said Louisa Sykes Pettigrew, Christiana Julia Piercy, and Elizabeth Sophia Pettigrew equally among them in fee, and the other equal undivided moiety of the heritable subjects and property aforesaid she bequeathed to her said daughters Louisa Sykes Pettigrew, Christiana Julia Piercy, and Elizabeth Sophia Pettigrew 'equally amongst them in fee, but declaring that the fee of the shares in the said respective moieties hereinbefore expressed to be given (contingently or immediately) to her said daughter Christiana Julia Piercy, shall not become vested as an absolute interest until her death, but the same shall be enjoyed by her in liferent for her liferent use alienarily, and by her children, if more than one, in equal shares, or by her child, if only one, in fee."

"In the said last will and testament there is no disposition of the said heritable estate to the petitioners as executors, though, as regards the leasehold house in England they are directed to hold the same upon trust for the purposes mentioned in the will, and power is also therein given to invest one-third share of the residue of her estate, heritable and moveable, 'in the names or under the legal control of them, him, or her, or of other the trustees or trustee for the time being of this my will' for the benefit of the said Christiana Julia Piercy and her children.

"No provision is made in the will for a successor to the petitioners in the office of executors. While the will proceeds on the narrative of the testator's desire to settle the succession to her property in Scotland and England in the event of her death, no continuing powers appear to be conferred upon the executors so far as the heritable estate in Scotland is concerned.

"The subjects referred to in the petition are those described in the said last will and testament as 'a house and land called the Green property situate near Glasgow.' The petitioners have made up their title thereto by three notarial instruments in terms of the Titles to Land Consolidation (Scotland) Act 1868, and the Conveyancing (Scotland) Act 1874. It appears to your reporter to be a question whether the will is a general disposition of the heritable subjects referred to in favour of the petitioners within the meaning of the 20th and 21st

sections of the 1868 Act, or whether it may not be held, looking to the peculiar terms in which it is conceived, to contain a destination of the heritable subjects in Scotland independently altogether of the appointment of executors.

"The 46th section of the 1874 Act, however, appears to your reporter to warrant the petitioners in making up a title by notarial instrument in the manner they have done, and to hold and administer the estate for the purposes of the will.

"At the present time the only beneficial fee in the subjects is vested in the petitioners, the said Louisa Sykes Pettigrew and Elizabeth Sophia Pettigrew, who have immediate right to one-third each of the second moiety of the subjects.

"The petitioners in virtue of said notarial instruments hold a fiduciary fee of the remainder as follows—One-half for the petitioner William Frederick Pettigrew for his lifeferent use allenarly, whom failing for his widow for her lifeferent allenarly, and the fee thereof to his child or children who shall attain twenty-one, or being daughters marry, whom all failing to the three daughters of the testator, the petitioner, the said Louisa Sykes Pettigrew, Christiana Julia Piercy, and Elizabeth Sophia Pettigrew, under the declaration, however, that the third share of said half as well as the third share of the remaining half (being one-third of the whole subjects) is not to vest in Christiana Julia Piercy, but be enjoyed by her in lifeferent only, and by her child or children in fee.

"The petitioner the said William Frederick Pettigrew is unmarried. Christiana Julia Piercy has two children who have not attained majority. The curator *ad litem* to these children by minute has consented to the petition being granted on condition that evidence be produced that the proposed fee-duty is sufficient.

"Under the 46th section of the 1874 Act the petitioners Louisa Sykes Pettigrew and Elizabeth Sophia Pettigrew, the daughters who are in immediate right of two-thirds of one-half of the subjects, might have claimed, and may yet claim, to have a title completed thereto in their own persons.

"So far as the third part of the subjects therefore is concerned there is no need for the petitioners to continue an administrative trust over the subjects. The petitioners might also execute a disposition of the remaining two-thirds in terms of the destination contained in the will; one-half of the subjects would now vest in the petitioner William Frederick Pettigrew in lifeferent, and the other sixth in Christiana Julia Piercy in lifeferent, and they would hold the same as fiduciary fiars for the several parties entitled thereto under the provisions of the will as before set forth. In the event, however, of the said William Frederick Pettigrew having children no part of the fee would vest in them until they attain twenty-one, or being daughters marry, and in such a case it might happen that no one would be *in titulo* to deal with this half of the subjects.

"The only persons in life other than the

petitioner who are in any way interested in the subjects are the said Elizabeth Sophia Pettigrew and the said Christiana Julia Piercy and William Temple Piercy, her husband, who is at the present time residing in India, and Lilian Clara Temple Piercy and Violet Amy Piercy, their children.

"These persons are all called as parties to the petition.

"Your reporter finds that the petition has been duly intimated on the walls and in the minute-book in common form, and has been served on the said persons called as parties, that the *inducia* has expired, and that no answers have been lodged, and the whole procedure appears to have been regular and proper.

"In these circumstances the executors crave the authority of the Court to feu out the whole or any part of the subjects as shall seem to them proper, and that at a minimum feu-duty of £30 per acre. Mr Murray, the valuator appointed by your Lordship, has reported that the rate proposed is reasonable and proper, and is in excess of the agricultural value.

"In view of the authority given to the petitioners by the 46th section of the Conveyancing Act 1874 'to hold, administer, and dispose of such lands for the purposes of such *mortis causa* deed,' it may be held to be competent to the Court to grant authority to the petitioners *qua* trustees in the sense of the Trusts Acts to do any of the acts specified in the 3rd section of the Trusts Act 1867 (30 and 31 Vict. c. 97), but the Trusts (Scotland) Amendment Act 1884 does not provide that in construing the said Acts 'trustee' shall include executor.

"So far as your reporter is aware the only similar question which has been before the Court was in the case of *Ainslie, &c. v. Ainslie*, December 8, 1886, 14 R. 209, in which parties appointed 'executors' craved the Court for power to assume a new trustee under the 1st section of the Trusts Act 1861. But in that case the testator directed his 'executors' to make and 'continue payments,' to realise and divide the estate, and to sell heritage, though there was no conveyance of the estate to them, and the question for the Court was whether on a sound construction of the will the executors were entitled to exercise the power of assumption conferred on gratuitous trustees by the Trusts Act 1861. The Court held that looking to their duties they were truly 'gratuitous trustees nominated in a deed' within the meaning of the Act, and it was laid down that the powers conferred upon such persons do not depend on the name given to them in the deed under which they act, but are determined by the duties conferred upon them therein.

"It is clearly to the advantage of all the parties concerned that the petitioners as executors should continue to exercise a trust over the subjects.

"If your Lordship shall, looking to the terms of this report, be of opinion that the petitioners are trustees within the meaning of the Trusts Acts, especially of the Trusts (Scotland) Act 1867, it is competent to the

Court to grant the powers specified therein in favour of the petitioners, and an interlocutor may be pronounced in the following terms:—

“Having considered the petition and proceedings, with the reports by Mr Robert Stewart, S.S.C., and Mr Murray, Finds that the procedure has been regular and proper: Grants warrant to and authorises and empowers the petitioners, or the survivor of them, as executors or executor *qua* trustees or trustee in the sense of the Trusts Acts of the deceased Mrs Frances Mary Pettigrew, or their successors in office, to grant feus of the subjects described in the petition, or of any part thereof, and that at such times and in such portions and at such rate or rates of feu-duty (not being less than £30 sterling per imperial acre) as the petitioners or their foresaids may think proper: Remits to the reporter to adjust the terms of the feu-charters to be granted in terms hereof: Finds the petitioners entitled to payment out of the funds of the estate of the expenses incurred by them in these proceedings: Remits to the Auditor to tax the same and to report, and decerns.”

Mr Murray reported, *inter alia*—“The lands, which are in close proximity to the Shettleston station of the North British Railway, are not of great agricultural value, but from their position, being within one mile of the Glasgow city boundaries, and forming part of the suburbs of Glasgow, are very valuable as feuing subjects. Portions of the lands fronting the Edinburgh and Glasgow public road have already been feued at rates varying from £40 to £60 per acre, and the ground remaining to be feued is valuable for tenements or works, such as ironworks, &c.”—and fixed the minimum rate of feu-duty.

The Lord Ordinary on 24th May 1890 pronounced an interlocutor in the terms suggested in Mr Stewart's report.

Counsel for the Petitioners—Rankine.
Agent—Francis J. Robertson, W.S.

Thursday, June 13.

OUTER HOUSE.

[Lord Kincairney.]

HENDERSON v. CALDWELL.

Contract—Fraud—Contract Importing Fraud on a Third Party.

In an action for £200, the unpaid balance of the price of a business, it was averred by the seller, that while the price set forth in the offer and acceptance was £1200, the real price agreed on was £1400, and that the sum of £1200 had been put into the offer and acceptance in order that the purchaser might obtain the assistance of a third party, who had agreed to assist him on condition that he obtained the business for the price of £1200. *Held* that

the contract averred involved the intention and attempt to defraud, and could not be admitted to probatoin.

This was an action by Alexander Henderson, innkeeper, King's Arms Hotel, Melrose, against Robert Caldwell, wine and spirit merchant, County Restaurant, Loanhead, to have the defender ordained to “accept and thereafter deliver to the pursuer two bills of exchange each for the sum of £102, 10s. sterling, bearing date the 6th day of November 1888, and payable six months after date; or otherwise, to make payment to the pursuer of the sum of £200 sterling, with interest thereon at the rate of 5 per centum per annum from the 6th day of November 1888 till payment.”

The pursuer averred—“(Cond. 1) In October 1888 the pursuer was lessee of and carried on business as a wine and spirit merchant in the County Restaurant, Loanhead. The defender, who was then a sheriff officer in Edinburgh, was desirous of purchasing the goodwill of the said business from the pursuer. The price for which the pursuer was willing to sell the goodwill, furnishings, and fittings of the business was £1400. This price the defender was willing to give, and in point of fact he agreed, by letters dated 24th and 25th September 1888, to give the pursuer a sum of £1450 for the goodwill, &c., of the business. His inability at once to deposit £500 to account of the purchase price, which he agreed to do, was the sole cause of the agreement not being carried out. Ultimately, however, Messrs Aitchison, brewers, Edinburgh, agreed, the pursuer believes, to assist the defender to pay the price of the goodwill, provided it could be bought for the price of £1200. (Cond. 2) The pursuer refused to sell the goodwill of the said business at a less price than £1400, and accordingly the defender, who was willing to pay that price and anxious to secure the business, agreed to pay the sum demanded—£1400. But in order to obtain Messrs Aitchison's aid the defender arranged that the letter from his agent to the pursuer's agents making offer for the goodwill should state as the price only £1200. The defender at the same time agreed that he would grant in favour of the pursuer two bills each for £100, with interest at 5 per cent. from the date of entry to the business till the date of maturity of the bills. It was agreed that the said bills should be taken at a currency of six months. (Cond. 3) The agreement above narrated was concluded on the 29th October 1888. Early on that day the pursuer's agents prepared a letter of obligation to be signed by the defender, binding him to grant the bills above mentioned in favour of the pursuer. The defender refused to sign the said letter until the whole transaction was concluded, and he had obtained entry to the premises, but he agreed that whenever he had obtained entry he would at once sign the bills. In reliance on this assurance the pursuer, later on the same day, authorised his agents to accept the defender's offer of £1200 for the goodwill of the said business, together