

Saturday, December 9.

SECOND DIVISION.

[Sheriff of Fife.

CRUICKSHANK v. THOMAS.

Trust-Deed—Inter vivos Trust—Trustee—Personal Liability—Jus quæsitum tertio—Whether Trust-Deed one for Creditors or Granted for Private Purpose—Actings of Trustee after Deed Granted.

By trust-disposition A conveyed to B as trustee her interest in the estate of her father and mother. The trust-disposition provided, *inter alia*, that the trustee should pay all debts due by B by A at the date of the deed. B obtained possession of the estate conveyed to him by the deed, realised the estate, and advertised that A having granted a trust-disposition in favour of the subscriber, all parties having claims against A were requested to lodge the same with him within fourteen days. In response to the advertisement C lodged a claim for the amount of an account due by A. A at first disputed the account, then signed a doequet certifying it as correct, and authorising B to pay it, and thereafter again changed her mind and interpellated B from paying it. B refused to pay the account although he had sufficient trust funds to do so, and handed back the balance of the trust funds to A.

C having raised an action against A and B, jointly and severally, for the amount of the account, *held* that B was liable as well as A for the amount sued for, because B by his actings had adopted the trust as one for creditors, and was not therefore entitled to part with the balance of the trust funds in his hands to A without making provision for the payment of C's account.

Opinion (by the Lord Justice-Clerk) that if B had doubts about C's claim on the trust-estate his proper course was to raise an action of multiplepounding in order to decide as to its soundness.

By trust-disposition dated 19th January 1892 Mrs Catherine Muir or Thomas and her husband William Robert Thomas conveyed to Thomas Jackson and his assignees all and whole the fourth part or share of the property, heritable and moveable, real and personal, conveyed by the disposition and settlement of the deceased William Muir, the father of Mrs Thomas, to whom the deceased Mrs Isabella Muir or Brown, the mother of Mrs Thomas, had been confirmed as executrix—"Declaring that these presents are granted in trust for the ends, uses, and purposes, and under the conditions following, viz. (First) That the said Thomas Jackson, as trustee fore-said, shall with all convenient speed realise the estate hereby conveyed and convert the same into cash; . . . (Second) That Thomas Jackson, said trustee, shall pay all

debts due by us at the date of these presents, and the expenses of this trust-deed, and the expenses of the trust hereby created, including a reasonable gratification for his trouble, and in particular that he shall pay the following debts due by us, viz., the sum of £34, 10s. 8d sterling due to George Gillespie, draper, Kirkcaldy, £2, 3s. 10d sterling due to Mrs Jane Dick, boot and shoe merchant there, and the sum of £23, 7s. 9d., being the sum due by us to him for advances and for a business account incurred to him before the granting of these presents, it being hereby provided that the said Thomas Jackson shall be entitled to conduct the said trust as law-agent on the footing that he shall be paid the usual charges as such for his trouble, or that he shall be entitled to employ any law-agent he may appoint; (Third) the said trustee, after satisfying the whole foregoing trusts and purposes, shall pay or convey to me, the said Catherine Muir or Thomas, the balance or residue of the said trust-estate."

Under this trust-disposition Mr Jackson obtained possession of and realised the estate therein conveyed to him. The estate realised about £471.

On 20th February Mr Jackson advertised in the *Fifeshire Advertiser* as follows:—"Mrs Catherine Muir or Thomas, wife of William Robert Thomas, residing in Kirkcaldy, having, with the consent of her said husband, granted a trust-disposition in favour of the subscriber, all parties who have claims against Mrs Thomas are therefore requested to lodge the same with him, along with the vouchers thereof, within fourteen days from this date.

"THOMAS JACKSON, Solicitor, Kirkcaldy.
"Kirkcaldy, 15th February 1892."

A few days after the advertisement appeared, and in response thereto, Miss Margaret Jack Cruickshank lodged a claim against Mrs Thomas for £30, 12s. 7½d., being the amount of an account incurred by Mrs Thomas to Miss Cruickshank's father between 10th January 1887 and 20th September 1890 for board and lodging, and sums advanced, which debt had been assigned to Miss Cruickshank by her father.

Mr and Mrs Thomas at first disputed this account, but on 13th December 1892 they signed the following docket appended to the account:—"I, Kate Muir or Thomas, authorise you, Thomas Jackson, Esq., to pay the sum as claimed. This correct from me.

"13th December 1892.

"KATE MUIR OR THOMAS.
"WILLIAM R. THOMAS."

On 19th December 1892 Mr and Mrs Thomas verbally asked Mr Jackson not to pay Miss Cruickshank's account, and on same date Mr Jackson received the following letter from Mr Thomas:—"After considering about Mr Cruickshank's account, we find that we made an error by signing it, as it is not just, so please do not pay it."

The trust funds realised by Mr Jackson were sufficient for payment in full of all the truster's debts, including Miss Cruickshank's account, but Mr Jackson, on being

interpellated by Mr and Mrs Thomas from paying the account, refused to pay it, and paid over the balance of the trust funds to Mr and Mrs Thomas.

Thereafter Miss Cruikshank raised an action in the Sheriff Court at Kirkcaldy against Mr and Mrs Thomas and against Mr Jackson as trustee under the trust-disposition of Mr and Mrs Thomas praying the Court to grant decree against the defenders ordaining them, jointly and severally, to pay the pursuer the sum of £39, 6s. 10d.

All the defenders lodged defences. *Inter alia* it was stated that the signature to the docquet was "got from the Thomas's when in drink."

On 5th July 1893 the Sheriff-Substitute (GILLESPIE) pronounced the following interlocutor:—[After stating the facts above]—"Finds that the defenders Thomas having granted the said docquet, no relevant and sufficient grounds have been stated which would entitle them to challenge the accuracy of or repudiate the said account; that the defender Thomas Jackson was not entitled to part with the balance of funds in his hands without making provision for payment of said account: Finds, for the reasons stated in the subjoined note, that each of the defenders have made themselves liable for the said account: Repels the defences: Decerns against the defenders in terms of the prayer of the petition, but superseding execution against the defender Catherine Muir or Thomas *stante matrimonio*, except as regards her separate estate, and reserving the claim of relief of the defender Thomas Jackson against the other defenders.

"*Note*.—The main subject of debate was whether relevant grounds have been stated to enable Mr and Mrs Thomas to get behind the docquetted account. . . .

"(2) That the docquet 'was got from the Thomas's when in drink.'

"Drunkness is not a plea which the Court should view with favour, and this averment, which was only put on record at the adjustment of the record, is meagre and insufficient—See Lord Neaves in *Pollok v. Burns*, March 3, 1875, 2 R. 497, 504.

"It is not alleged that either of the spouses was so drunk as not to know what he or she was doing. Nor is it alleged that they stated the objection of drunkenness as soon as the fact of their having signed it was brought under their notice. An opportunity was given to the defender's agent to consider whether he should tender a minute of amendment, but this was declined. . . .

"Coming now to the question of Mr Jackson's liability, there is perhaps no very direct authority as to the liability of a trustee under an *inter vivos* trust, but the general proposition was hardly disputed that a trustee who parted with the trust funds without providing for a claim of which he had notice incurred personal liability if the claim proved a good one. It is not necessary that vouchers should have been submitted to the trustee. It was his duty to call for them if he thought them necessary. But it may be added that in the case of an open account like this, vouchers would not

be required even in a sequestration. The trustee was not of course bound to run any risk, and being interpellated by the trustees from paying this claim, his proper course was to raise an action of multiplepoinding and exoneration—Bell's Com. ii. 504." . . .

The defenders appealed to the Sheriff (MACKAY), who on 8th August pronounced the following interlocutor:—"Recals the finding in the interlocutor of the Sheriff-Substitute of 5th July 1893 that the defender Thomas Jackson was not entitled to part with the balance of funds in his hands without making provision for payment of said account, and also in so far as it finds the said Thomas Jackson liable for such payment; and in lieu thereof, Finds that no relevant grounds are stated for holding the said Thomas Jackson personally liable for the said account, and assoilzies the said Thomas Jackson from the conclusions of the action: . . . *Quoad ultra* adheres to the said interlocutor of the Sheriff-Substitute."

Against this interlocutor the pursuer appealed, and argued—The judgment of the Sheriff should be recalled, and that of the Sheriff-Substitute reverted to. This was a trust for creditors, and nothing else. No other persons except creditors were favoured by the deed, and it made no difference that in the deed there was a clause stating that the balance of the trust funds, after payment of creditors, were to be paid over to the granter. The trust being one for creditors the trustee was bound to hold the estate for the creditors, and was accountable to them if he handed over a balance to the trustee before all the debts were paid—Bell's Com. (7th ed.), p. 383; *Globe Insurance Company v. Scott's Trustees*, February 16, 1849, 11 D. 618, August 5, 1850, 7 Bell's App. 296; *Nicolson v. Johnstone*, December 6, 1872, 11 Macph. 179. In the present case, even if the deed did not at first create a trust for creditors, the trustee by his actings had made himself personally liable for the debt.

Argued for defenders—The deed was not a trust-deed for creditors; it did not confer a *jus crediti* upon the creditors at all. The deed was granted in order to benefit the granter by the trustee realising and handing over to her her share of her father's estate. There was nothing in the deed to suggest insolvency on the part of the granter. It was not a general conveyance. In short, it was granted for a private purpose, and was not a trust for creditors at all. The trustee having been told by Mr and Mrs Thomas that the pursuer's account was not due, he was not bound to pay it, and was not now personally liable for it—*Pagan v. Eaton*, January 17, 1823, 2 S. 125; *Lucas' Trustees v. Beresford's Trustees*, June 29, 1892, 19 R. 943.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case sues Mr and Mrs Thomas as being originally the debtors for the debt due to her, and also Thomas Jackson, as trustee under the trust-disposition of Mr and Mrs Thomas. That trust-deed made over to Mr

Jackson, in trust for the purposes therein mentioned, all and whole the fourth part and share of the property, heritable and moveable, real and personal, conveyed by the disposition and settlement of William Muir, the father of Mrs Thomas, and the second purpose of the trust was that Mr Jackson should pay all debts due by Mr and Mrs Jackson at the date of these presents.

I think the grounds on which this case must be dealt with are found in what followed after the trust-deed was granted. Mr Jackson having received that disposition, and holding the sums contained therein as a trustee for payment of the debts of the granters, advertised in the *Pifeshire Advertiser* for claims in the general statement, that Mrs Thomas having, with consent of her husband, granted a trust-disposition in favour of the subscriber—"All parties who have claims against Mrs Thomas are therefore requested to lodge the same with him along with the vouchers thereof within fourteen days from this date." Mr Jackson therefore took up the position of one to whom a debtor had made a disposition of estate, and who was to settle claims by creditors therefrom. Thereafter certain proceedings took place in regard to Mrs Cruickshank's account. Mr and Mrs Thomas at first disputed it, but ultimately signed a docquet certifying it as correct. No doubt they now say that when they signed the docquet they were intoxicated, but I agree with the Sheriff-Substitute that the averment on this point on record is insufficient, and that we must hold the docquet to have been duly signed by Mr and Mrs Thomas. What happened thereafter? Mr Thomas, on behalf of himself and his wife, writes to Mr Jackson—"After considering about Mr Cruickshank's we find we made an error by signing it, as it is not just, so please do not pay it." Therefore Mr Jackson's position was this, that he advertised for claims, that he got a claim certified by the debtors as correct, and that he was thereafter interpellated from paying it by the statement that it was not correct. What he did was to hand the balance of the trust funds to Mrs Thomas and her husband, and he thus left the creditor to recover her money in the best way she could. In these circumstances I think the Sheriff-Substitute was right in holding that as a trustee for creditors Mr Jackson was not entitled to hand back the money to Mrs Thomas without satisfying himself that all claims of creditors had been satisfied. If he had doubts about the claim, his proper course, as stated by the Sheriff-Substitute, was to raise an action of multiplepointing.

I am of opinion we should recal the interlocutor of the Sheriff, and pronounce judgment in terms of the interlocutor of the Sheriff-Substitute.

LORD RUTHERFURD CLARK—I am of opinion that the deed created a trust for creditors, and that the trustee acted as if it did so. I therefore concur in the judgment of the Sheriff-Substitute.

LORD TRAYNER—I concur in the result which your Lordships have reached.

I do not regard the trust-deed with which we are here concerned as a trust-deed for creditors in the ordinary sense. It was, I think, primarily a trust for behoof of the granters, although it contains a clause authorising the trustee to pay "all debts due" by the trusters at the date of the deed. But then the defender Jackson, by the advertisement which he published calling on all parties having claims against the trusters to lodge the same with him within a limited period, may reasonably enough be held to have thereby represented that the trust in his person was for behoof of those whose claims he desired to be sent to him, and further, that he had funds for the purpose of meeting those claims. The claim now sued for was duly lodged with Jackson, and after that was done, I doubt his right to part with the estate in his hands until that claim had been settled, or at all events to part with the estate without due notice to the claimants that he intended to do so. The pursuer lodged with Jackson an account of her claim, docketed by the trusters as correct, and authorising him to pay it. The defenders Thomas now say that the docquet was obtained from them when they were "in drink." I think such a defence cannot be listened to here. The docquet must stand until it is regularly set aside, and standing that docketed account, I think Jackson cannot excuse himself for parting with the trust funds before paying the debt which was not only admitted, but payment of which out of the trust funds was authorised. I prefer to affirm Jackson's liability for the sum sued for rather on the ground of his own actings in the circumstances which I have stated, than upon the view that the trust-deed was in itself one for behoof of creditors in the ordinary sense.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Sheriff, found in terms of the findings of the Sheriff-Substitute, and decerned against the defenders in terms of the prayer of the petition.

Counsel for the Pursuer—Sym. Agent—W. J. Lewis, S.S.C.

Counsel for the Defenders—Clyde. Agent—James Skinner, S.S.C.