

1784. August 4.

Mrs JACINTHA DALRYMPLE *against* JOHN MURRAY and Others.

No 67.

Trustees liable for factors, by the conception of the trust, removed a factor for mismanagement. Their second factor also acted improperly. A legatee, who had been dilatory in demanding payment, and to whom no fund now remained, was found not entitled to payment from the trustees, on the footing of their liability for their factors.

MR ROBERT DALRYMPLE, by a deed of trust, conferred on Mr Murray and others of his friends, the whole management and administration of his estate after his death. The declared purposes of this trust were, that the trustees should first of all discharge his debts, which were very inconsiderable, and pay his legacies, one of which was devised to Mrs Jacintha Dalrymple, his granddaughter, and then make over the residue of his effects to Hugh Dalrymple, his grandson.

The trust-deed contained the following clause : ‘ Declaring, That the trustees shall not be liable for omissions, nor *in solidum* one for another, but each shall be liable and accountable for his own actual intromissions only ; nor shall they be liable for any factor or cashier to be appointed or employed by them, further than that he is habit and repute sufficient and responsible for the time ; being satisfied that my said trustees will act herein as if they were acting for themselves.’

The factor whom the trustees first appointed was one of their own number ; a man in good credit at the time, but who afterwards became insolvent. Instead of complying with the direction of the trust-deed, by discharging the debts and legacies in the first place, he began with paying large sums to the residuary legatee. The trustees dispossessed him of the office, and named in his room a person not of their number. But he, too, made ample payments to the residuary legatee, insomuch that there remained not sufficient funds for the satisfaction of the other legatees and the creditors.

Mrs Jacintha Dalrymple, therefore, instituted an action against the whole trustees, as being personally liable to her in payment of her legacy ; when, in defence, it was

*Pleaded ;* The mismanagement of the factors arose not from any fault in the trustees. They nominated to that office persons, who, at the time, were possessed of credit and character ; nor were they bound, either by the nature of their duty, or by the terms of the trust-deed, to watch every step in the conduct of their factors with a jealous eye. If any blameable negligence has occurred, it is on the side of the legatee, who was not restrained by a trust-settlement of this kind, as she might have been by a deed framed for behoof of creditors, from obtaining payment as soon as it became due.

*Answered ;* The acceptance of this trust implied an obligation on the trustees to act in such a manner, with respect to the affairs of their deceased friend, as they would do in their own concerns. But to these, it is not to be presumed that they would have shewn such a degree of inattention.

THE LORD ORDINARY ‘ assoilzied the trustees ;’ and

' THE LORDS having advised the petition for Mrs Jacintha Dalrymple, reclaiming against the above judgment, with answers for the trustees, and having heard parties procurators thereon, and upon the whole cause, found no sufficient ground, from the terms of the trust-right, or from the manner in which the trust has been executed, to subject the trustees personally to the payment of the sums pursued for.'

No 67.

The COURT adhered to this interlocutor, on advising a reclaiming petition and answers.

Lord Ordinary, *Braxfield.* Act. *Maclaurin, H. Erskine.* Alt. Lord Advocate, *G. Ferguson.*  
Clerk, *Home.*

*Fol. Dic. v. 3. p. 183. Fac. Col. No 174. p. 272.*

1787. February 4. WILLIAM MASON against WILLIAM THOM.

WILLIAM THOM, Advocate in Aberdeen, was intrusted with a bill of exchange which had been accepted in favour of William Mason, 'for the purpose of doing such diligence as to put the drawer on an equal footing with the other creditors.'

The debtor in the bill had a landed estate, which was covered with heritable securities for debts amounting to L. 8000 Sterling. It was farther affected with two existing liferents, amounting to L. 150, and an eventual one of L. 50. It was sold by a trustee appointed by the debtor, but not before it had been adjudged by a considerable number of the personal creditors; among whom L. 3000, the residue of the price, after discharging incumbrances, being nearly a fourth part of what was due to them, was immediately divided. This was chiefly owing to the liferents having unexpectedly terminated between the execution of the trust-deed and the payment of the price of the lands.

William Thom used inhibition on the ground of debt that had been intrusted to him; but, as he neglected to adjudge, no part of the money could be recovered. An action of *damages* having been afterwards brought against him by William Mason, he

*Pleaded* in defence; If a person, in the situation of the defender, has had the line of his conduct marked out to him by his employer, he cannot, it is true, deviate from it, without subjecting himself to the loss thence arising. But otherwise, as a discretionary power is in general understood to be given, nothing but inexcusable *negligence* on his part ought to have that effect. And as the defender's proceedings, in the present case, were dictated by the laudable purpose of avoiding an expense which he thought would be fruitless, and which his employer's circumstances could very ill afford, such a determination here would be extremely unjust, as well as inexpedient.

No 68.

An agent, who had neglected to adjudge, which, if he had, it would have had the effect to secure part of his client's money, was found liable for the sum which an adjudication would have rendered effectual.