

Tuesday, November 14.

## FIRST DIVISION.

### MACDONALD v. STEWART'S TRUSTEES.

*Trustee—Sale—Interdict.* Circumstances in which a trustee was held not entitled to sell the trust-estate except for certain specific purposes.

*Trustee—Arrestment.* It is incompetent for a trustee to use arrestments against his trustee during the subsistence of the trust, where malversation or some other special ground is not averred.

By disposition, dated 14th July 1863, Mrs Macdonald, with consent of her husband, disposed certain premises in Dundee to the late James Stewart and his heirs, in trust for certain purposes therein stated. The disposition proceeded on the narrative that the subjects were held in security by Peter Geekie for the sum of £1350, under an absolute disposition with back bond, and that Peter Geekie had agreed to advance the additional sum of £550 on the security of the subjects, and on the further narrative that James Stewart had become a cautioner for the last-mentioned sum of £550, as also for £150 of the sum of £1350. The subjects were also burdened with a first security of £600, though this was not mentioned in the deed.

The purposes of the trust were stated as follows:—“(1) That the said James Stewart and his foresaids shall duly and regularly pay the interest due and to become due on the foresaid debts to the said Peter Geekie, together with all premiums of fire insurance, and all costs of loans and penalties incurred or to be incurred in reference to the premises. (2) That the said James Stewart and his foresaids shall duly pay the costs of and attending these presents, and the public and parochial burdens applicable to the said lands and others, and the costs of all proper repairs. (3) That the said James Stewart and his foresaids shall pay and liquidate from time to time, or any time they consider proper, the said debts, principal, interest, and penalties, to the said Peter Geekie, and that either from the proceeds of sales of the lands and others, or of parts thereof, or from accumulations of rents or otherwise. (4) That the said James Stewart and his foresaids shall pay and defray the costs of and attending his management, and of all sales and loans to be made or carried through, and generally all other costs, disbursements, and expenses incurred or to be incurred by the said James Stewart or his foresaids in or connected with or arising out of these presents, or the management of the said lands and others, in any way.”

It was declared that James Stewart should be entitled to charge a commission on his management as if he were factor for the properties; and the fifth purpose of the trust is expressed in the deed in these terms, viz.,—“That the said James Stewart and his foresaids shall account to us for all residue in the premises, or denude on the foresaid several purposes being satisfied, with power to the said James Stewart and his foresaids to enter into possession of the lands and others above disposed, and to sue for, uplift, recover, receive, and discharge the rents, interests, and profits of the lands; with power also to grant leases of any parts or portions of the subjects, and that either by public roup or private bargain, for any period

not exceeding nineteen years, and to output and input tenants, occupiers, and possessors at pleasure, with power also to enter into submissions and arbitrations, to compound and transact, to make compromises, to borrow money, and grant all necessary deeds and securities therefor, to alter or change securities, and to do all other things in and concerning the premises necessary or expedient, or appearing to the said James Stewart or his foresaids at the time to be so.”

Mr James Stewart entered upon the management of the subjects, and continued in the management till his death on 19th April 1871. The trust then devolved on his eldest son James Arnott Stewart, who on the 20th July 1871 was decerned heir in special in the subjects, but in trust only.

Mr J. A. Stewart proceeded to advertise the subjects to be sold by public roup on the 22d September 1871, at the upset price of £3500.

On the 21st September 1871 Mrs Macdonald and her husband presented a note of suspension and interdict against the sale, on the ground that the conveyance in trust to Mr Stewart contained no power of sale. They alleged, moreover, that the upset price was greatly below the true value of the property, of which the rental was above £300 a-year, and that Mr Stewart had never rendered any account of his intrusions.

Answers were lodged for Mr Stewart's testamentary trustees, and for Mr James A. Stewart, in which it was averred that there was a balance due out of the trust-estate to the trustee of above £900; and that the person to whom Geekie had assigned his security was threatening to bring the property to a sale.

The Lord Ordinary on the Bills (BENHOLME), in respect that the note was offered without caution, refused the note.

The complainers reclaimed.

SCOTT and J. P. B. ROBERTSON for them.

SHAND and BALFOUR for the respondent.

Authorities—*Innes*, Dec. 18, 1828, 7 S. 206; *Erskine's Trs.*, May 13, 1829, 7 S. 694; *Campbell's Trs.*, Dec. 4, 1838, 1 D. 153; *Henderson*, June 22, 1841, 3 D. 1049; *Graham*, Dec. 21, 1850, 13 D. 420, 427; *Bell's Prin.* 1998.

At advising (October 31)—

LORD PRESIDENT—This is rather a peculiar trust. Certain property belonging to Mrs Macdonald was burdened with a first security of £600, and a second security of £1350 in favour of Mr Peter Geekie, secured by an absolute disposition and back-bond. Mr Geekie further agreed to advance £550 on the subjects; and the trustee became cautioner for that sum, and also for £150 of the £1350. The trust is granted to Mr Stewart with a variety of power, but without a power of sale in that part of the deed where the other powers are given. I do not say that the deed does not contain a power of sale, but it is a power of sale for a limited and specific purpose. No notice is taken of the prior security. The first purpose of the trust (*reads*) represents a payment out of income. The second purpose can only be discharged properly out of the income of the estate. Then comes the third purpose. It must be remembered that the direction to pay is confined to the debt due to Geekie. There is no authority to pay the principal of any other debt. The power of sale is limited to paying off Geekie's loan. The fourth purpose is a verbose direction to pay the expenses of management out of the income of the estate. It is to be observed that no security is created in favour of anyone but Geekie, and,

incidentally, a security in relief of the cautionary obligation incurred by the trustee. There is no security of any debt due to Mr Stewart, except as to the expense of the trust management. If money is owing to Stewart other than for charges properly chargeable against the income of the trust-estate, he is merely a personal creditor. The purpose of this sale, according to the trustee, is to pay off Geekie's debt, and apply the balance to his own debt. That may be an expedient course, but the question is one of power. It is not shown that the estate is insolvent, or that Geekie's assignee is pressing so hard that it is impossible to resist a sale; and if he was, it only comes to this, that he might bring the estate to sale himself. The true object of the sale is to realise the funds, and pay off the debt due to Stewart. The trustee has no power to sell for such a purpose. I think this note should be passed without caution.

**LORD DEAS**—I think there is a power of sale on the words of the deed, but the question is, for what? Only for the debt due to the heritable creditor, and the expenses connected with the management. The rents of the property are greatly more than enough to pay the interest on the heritable debts, and there is no probability that any balance has arisen due to the trustee, in respect that the rents were not sufficient to pay all expenses. Moreover, the trustee could only sell with concurrence of heritable creditors. They may be desiring payment or not; we cannot tell. The sale which the trustee intended was a sale without the concurrence of creditors, whose concurrence was necessary to give a good title. No one was likely to give a full price.

**LORD ARDMILLAN** and **LORD KINLOCH** concurred, Lord Kinloch giving no opinion as to the extent of the power of sale.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to the Lord Ordinary on the Bills to pass the note.

On the 22d September 1871 a summons of declarator, count, reckoning, and payment was raised by Mrs Macdonald and her husband against Stewart's Trustees, concluding for payment of £1000, or such other sum as shall be found due, upon Mr Stewart's intromissions. In virtue of the warrant of arrestments contained in the summons, Mrs Macdonald and her husband arrested certain rents in the hands of the factor.

Stewart's Trustees and Mr J. A. Stewart presented a petition for recall of arrestments.

**SCOTT**, for Mrs Macdonald, argued that the circumstances disclosed in the late proceedings were sufficient to justify the arrestments; at all events they should not be loosed except upon caution.

At advising—

**LORD PRESIDENT**—The arrestments must be recalled. A trustee is not entitled to use arrestments against the trustee, who, under an arrangement with him, is vested with the trust administration, unless malversation or some other ground is alleged to justify so extraordinary a proceeding.

The other Judges concurred.

Arrestments recalled.

Agent for Mrs Macdonald and Husband—D. F. Bridgeford, S.S.C.

Agent for Stewart's Trustees—Laurence M. Macara, W.S.

Tuesday, November 14.

## SECOND DIVISION.

### IRONSIDE v. WILSON.

*Bankrupt—Bill—Illegal Preference—Discharge.* The creditors of an insolvent agreed to a composition, which he was to pay by bills, falling due at certain intervals, and thereafter he was to obtain his discharge. The insolvent after the composition arrangement was completed, but before his discharge, granted a bill in favour of one of his creditors, towards further payment of his debt. *Held* that the bill did not constitute an illegal preference, and was not null under the Bankrupt Statute.

Wilson in this action sued Ironside for the sum contained in a bill granted by the latter in favour of the former, before the Sheriff of Aberdeen. The facts, as ascertained by proof, sufficiently appear from the interlocutor of the Sheriff-Substitute (**COMRIE THOMSON**), as follows:—"Finds, as matter of fact that the defender on 14th October 1867 executed a trust-disposition for behoof of his creditors, and subsequently offered a composition of 10s. per pound, payable by three instalments, of which the last fell due on 1st January 1869; that said offer was accepted, *inter alios*, by the pursuer; that at or about the time when the pursuer agreed to accept the said composition the defender said to him 'that he might get something from him in the future;' that at or about the 12th December 1867 the pursuer reminded the defender of the said promise, and received from him the bill libelled; that the same was granted by the defender when an undischarged insolvent, to the pursuer, one of his creditors, without the knowledge of the rest of his creditors: Finds, as matter of law, that the said bill constituted an illegal preference in favour of the pursuer over the other creditors of the defender; that the pursuer was not entitled to accept of the preference so constituted, and cannot now enforce the same; assolvizies the defender from the conclusions of the libel, and decerns.

"*Note.*—The Sheriff-Substitute feels this case to be one of considerable difficulty. It has not been clearly established that the bill libelled was granted to the pursuer with the view of inducing him to accept, still less as a condition of his accepting, the composition offered by the defender. That being so, it seems inequitable that the defender should now turn round and refuse payment on the ground that, although the bill was not intended to create a preference, it did in point of fact operate as such. On the other hand, the defender was not a free man, and the transaction with his creditors was not completed until he had got his discharge. So long as he was undischarged, the bill did, on its face, whatever may have been the intention of parties, operate as an illegal preference; and it is contrary to the policy of the law to sanction anything which disturbs the perfect equality among creditors, which is an essential element of a settlement by composition. The doubts which the Sheriff-Substitute was disposed to entertain are considerably modified by the opinions of the majority of the Judges in the case of the *Bank of Scotland v. Fauds*, July 8, 1870, 42 Scot. Jurist. 557. Looking to the import of the judgment in that case, the Sheriff-Substitute finds himself unable to decide the present case otherwise than he has done.