

Thursday, July 3.

FIRST DIVISION.

SPECIAL CASE—CRAIG AND OTHERS.

Succession—Alimentary Provision—Trust—Discretion of Trustees—Expense of Committal to Asylum and Maintenance therein—25 and 26 Vict. cap. 54, sec. 15.

By his trust-disposition and settlement a testator directed his trustees to divide his whole estate equally amongst his children. By a codicil he authorised his trustees, "should they consider it for the advantage and benefit of my family, to pay the share of the income of my means and estate falling to each child in such manner as they shall consider right, and either weekly, monthly, quarterly, half-yearly, or yearly, as they may think proper;" and also "to retain the shares of the principal or capital of my said means and estate from either or all of my said children." The trustees resolved to exercise this discretion, and to retain the share of the estate falling to one of the truster's sons. This son was subsequently committed by the Sheriff to an asylum as a dangerous lunatic, under 25 and 26 Vict. cap. 54, sec. 15, upon an application by the procurator-fiscal, and decree was pronounced in terms of the statute for £25, 15s., being the expenses of the application, and £10, 13s. 6d., being the sum expended on the maintenance of the lunatic. The inspector of poor of the parish where the lunatic had his settlement having made payment of these sums, obtained decree against the lunatic for them, and used arrestments in the hands of the testamentary trustees. On a Special Case being stated for the opinion of the Court, setting forth these facts, it was held that as the fund in the hands of the trustees was alimentary the arrestments were bad, except to the extent of £10, 13s. 6d., because the expenses of the committal were not an alimentary debt.

This was a Special Case presented by James Craig, Inspector of Poor of St Cuthbert's Parish, Edinburgh, party of the first part; James Maxwell Ferguson, Millend, Stocket, by Aberdeen, party of the second part; and Robert Gordon and others, trustees and executors acting under the trust-disposition and settlement executed by James Ferguson, pawnbroker, Edinburgh, dated 13th December 1849, and with codicils thereto dated 31st December 1849, 15th August 1850, 28th March 1851, and 25th October 1852, recorded in the Books of Council and Session 8th April 1854, parties of the third part.

By his said *mortis causa* trust-disposition and settlement James Ferguson conveyed to his trustees his whole means and estate, heritable and moveable, for the purposes therein set forth, and, *inter alia*—"Quarto, so soon as my youngest child attains majority, I appoint my trustees to make up a state of the trust-estate, and to divide and convey over the same equally among my said children," under burden of certain legacies therein specified.

By one of the codicils to this settlement, dated 31st December 1849, it was provided and declared as follows:—"I do further authorise and empower my said trustees, should they consider it for the advantage and benefit of my family, to pay the share of the income of my means and estate falling to each child in such manner as they shall consider right, and either weekly, quarterly, half-yearly, or yearly, as they may think proper; and also on the arrival of my youngest child at majority, when in terms of my said trust-disposition and settlement my trustees fall to denude themselves of said trust, it shall be in the power of my said trustees to retain the shares of the principal or capital of my said means and estate from either or all of my said children, and that during such period as they shall think right, and even during the period of their natural lives—the income of my said means and estate being always paid to my children in manner directed in my said trust-disposition and settlement—but with powers as to the manner and period of payment given above; and I further declare that it shall not be in the power of all or either of my children to sell or dispose of the whole or any part of their rights or interest in my said means and estate, to borrow money thereon, or assign the same in security of such loans, such dispositions, assignations or conveyances being hereby declared to be null and void; neither shall my said means and estate, whether income or principal, be arrestable, or attachable for any debt my said children may contract, and my said trustees are hereby authorised and empowered to pay or convey my said means and estate to my said children notwithstanding of such dispositions, assignations or conveyances, arrestments, or other attachment."

James Ferguson died on 1st April 1854, leaving a widow and seven children, all of whom were alive at the date of this Case. His estate amounted to £25,000 or thereby, out of which there was payable to his widow an annuity of £130. James Maxwell Ferguson, party of the second part, was a son of James Ferguson. The truster's youngest child attained majority on 7th January 1873, and the Case stated that at that date the third parties considered it necessary to exercise the discretion conferred on them by the trust-deed, and to retain the shares of the trust-estate falling to certain of the truster's children. In particular, the mental condition and conduct of the said James Maxwell Ferguson then appeared to the third parties to make it necessary for his benefit that the discretionary power should in his case be exercised. A number of years before the date of this Case, when engaged in the business of a commission agent, his affairs became embarrassed, and he was sequestered. He was discharged on a composition which was derived from his share in his father's estate. Since then he had had no occupation, and his sole means of subsistence was derived from the trust. He was married in 1874, and his wife was also dependent on the same source, she having no means of her own. The income effeiring to James Maxwell Ferguson's share had never been sufficient to support him, and it had been necessary to encroach upon the capital year after year. His share of the annual income amounted on the date of this Case only to about £20 a-year, and his share of the capital at 17th November 1883, when

the arrestments after mentioned were used, amounted to the sum of about £900 sterling. His share was burdened with one-seventh share of the widows' annuity and of the trustees' allowance, as well as the expenses of management, amounting in all to upwards of £170 per annum, which accounted for his income only amounting to about £20.

On 24th October 1874 James Maxwell Ferguson, the second party, and his wife, Eleanor Wyman, entered into an antenuptial marriage-contract, which was intimated to the parties of the third part in January 1875. By that deed James Maxwell Ferguson assigned to the trustees therein named his whole share of the capital of his father's trust-estate to which he was entitled under the said trust-disposition and settlement, for the following purposes, viz., *inter alia*, for payment of the free annual income to himself and his wife, for their alimentary use during their joint lives, and to the survivor during his or her life. "*Tertio*, Upon the death of the survivor of the said spouses the said trustees or trustee shall pay and make over the said principal or capital sum which may be recovered by them as aforesaid to the children that may be procreated of the said intended marriage equally among them, share and share alike. . . . And in the event of there being no child or children of the said intended marriage or issues of the bodies of such child or children surviving at the death of the survivor of the said intended spouses, or that such survivor shall die before majority, the said trustees or trustee acting for the time shall pay over, assign, and convey the said trust funds to the assignees, executors, or next-of-kin of the said James Maxwell Ferguson."

There were no children of this marriage at the date of this Case.

The trustees named in the antenuptial contract did not accept office.

On the 23d October 1883 the party of the first part obtained in the Court of Session a decree in absence against James Maxwell Ferguson, the party of the second part, for £36, 8s. 6d., with interest from 29th July 1882 until payment, together with £7, 14s. 3d., being the taxed amount of the expenses of process, and 12s. 6d. as the dues of extract. The party of the second part became indebted to the party of the first part in the principal sum in the said decree, under the following circumstances:—On or about 4th May 1882 the party of the second part was apprehended in the parish of St Nicholas and county of Aberdeen in virtue of a warrant of the Sheriff of the county of Aberdeen, obtained on the application of the Procurator-Fiscal of Court for the public interest, for inquiry into the mental condition of the party of the second part. The said application was, in terms of the statute 25 and 26 Vict. cap. 54, sec. 15, quoted in the opinion of the Lord President, *infra*. On 15th May 1882 the Sheriff, after inquiry, found the party of the second part to be insane, and in a condition threatening danger to the lieges, and granted warrant for his committal to the Royal Lunatic Asylum of Aberdeen until he was cured, or until caution was found for his safe custody. The party of the second part remained in said asylum until 28th September 1882. In terms of the said statute the Sheriff granted decree against James Wallace, inspector of poor of the parish of St Nicholas, as representing the parochial board

of the said parish, for the Procurator-Fiscal's taxed expenses in said application, and also for the expense of maintenance in the said asylum of the party of the second part. The taxed expenses amounted to £25, 15s., and the account for maintenance to £10, 13s. 6d. These two sums made up the principal sum in the said decree. The party of the second part had no settlement in the parish of St Nicholas. His settlement was in the parish of St Cuthbert's Combination, Edinburgh, and accordingly the inspector of the parish of St Nicholas claimed relief from the party of the first part as representing the parochial board of the said combination. The party of the first part admitted the claim, and paid the sum demanded. On the 17th November 1883 the party of the first part, in virtue of a warrant to arrest contained in the said decree, caused arrestments to be used in the hands of Ferguson's Trustees, the third parties. These arrestments bore to be for the sum of £50 sterling, more or less, due and addebted by the parties of the second part to the said James Maxwell Ferguson.

At the date of these arrestments the third parties held the sum of about £900 above mentioned, and apart from this sum, they held no funds in which the second party had any interest. Except the provision made for him by his father, the second party had no means. The third parties were willing to pay the first party the said sum of £10, 13s. 6d.

In these circumstances the opinion of the Court was asked on the following question:—“Whether, in respect of the said arrestments, the parties of the third part are bound to pay to the party of the first part the sums contained in the said decree?”

Argued for the first party—The whole of this debt was alimentary, as the expenses had been incurred for the benefit of the second party himself. The trustees were therefore bound to make payment out of the fund in their hands. Even if the debt was not alimentary the trustees were bound to pay it—*Gibb v. Pitcairn*, June 8, 1839, 1 D. 889.

Argued for the second and third parties—From the terms of the deed it was clear that this fund was alimentary, and as it had been arrested for a non-alimentary debt, the arrestments were bad—*Irvine v. Cannon's Trustees*, March 8, 1883, 10 R. 731.

At advising—

LORD PRESIDENT—The third parties here are the testamentary trustees acting under the trust-disposition and settlement of the late James Ferguson, who was the father of the second party. By this settlement Mr Ferguson substantially directed his trustees to divide his estate equally among his children, under burden of particular legacies which are specified; and if that settlement had remained unqualified, and the second party had been entitled to his share of the estate equally with the other children, without any conditions, then undoubtedly the arrestments here in question would have been effectual. But a codicil to this settlement which Mr Ferguson executed, introduced another element. It would appear that even at that date, 1849, the second party had shown some eccentricity, if not insanity, and therefore his father authorised and

empowered his trustees, "should they consider it for the advantage and benefit of my family, to pay the share of the income of my means and estate falling to each child in such manner as they shall consider right, and either weekly, monthly, quarterly, half-yearly, or yearly, as they may think proper, and also on the arrival of my youngest child at majority, when in terms of my said trust-disposition and settlement my trustees fall to denude themselves of said trust, it shall be in the power of my said trustees to retain the shares of the principal or capital of my said means and estate from either of my said children, and that during such period as they shall think right; and even during the period of their natural lives, the income of my said means and estate being always paid to my children in manner directed in my said trust-disposition and settlement, but with the power as to the manner and period of payment given above; and I further declare that it shall not be in the power of all or either of my children to sell or dispose of the whole or any part of their rights or interests in my said means and estate, to borrow money thereon, or assign the same in security of such loans, such dispositions, assignations, or conveyances being hereby declared to be null and void; neither shall my said means and estate, whether income or principal, be arrestable or attachable for any debt my said children may contract, and my said trustees are hereby authorised and empowered to pay or convey my said means or estate to my said children notwithstanding of such dispositions, assignations, or conveyances, arrestments, or other attachment."

Now, this codicil gives a large discretion to the trustees, and the right and interest of the second party in the estate depends entirely, or almost entirely, upon the manner in which the trustees exercise this discretion. It is stated in the 4th article of this Case that the truster's youngest child attained majority on 7th January 1873. The trustees, who are the third parties to the Case, then go on to say—"The third parties then considered it necessary to exercise the discretion conferred on them by the trust-deed, and to retain the shares of the trust estate falling to certain of the truster's children. In particular, the mental condition and conduct of the said James Maxwell Ferguson appeared to the third parties to make it necessary for his benefit that the discretionary power should in his case be exercised." Then their reasons are assigned for doing this, and they further state—"The income effecting to James Maxwell Ferguson's share has never been sufficient to support him, and it has been necessary to encroach upon the capital year after year. His share of the annual income amounts now only to about £20 a-year, and his share of the capital at 17th November 1883, when the arrestments after mentioned were used, amounted to the sum of about £900 sterling." Then they explain that the reason why this sum of £900 produces so little as £20 is because of certain expenses which have to be paid out of the income.

The result of this exercise of the discretion is that the capital is not at the disposal of the second party, and he never can affect it in any way; and the income is only payable in such manner and at such terms as the trustees shall think fit. In short, it is very plain that the income is to be applied entirely for the mainten-

ance of the son, and the trustees have the money in their hands to ensure its being so applied. Therefore I think that this is clearly and purely an alimentary fund. I think the trustees would have been quite well advised in encroaching upon the capital in order to provide a sufficient amount for the son's maintenance, and that in my opinion marks more clearly that this fund is alimentary.

Now, what is the nature of the debt which is here alleged to be due? Is it alimentary—for it is not, that is an end of the case, since otherwise it could not be made the basis of these arrestments.

The portion of the debt which is for maintenance in the asylum, amounting to £10, 13s. 6d., is admitted to be of an alimentary character, and I think very properly, for I do not see how that could be disputed. But the rest consists of the expenses of the apprehension of the second party under the provisions of 25 and 26 Vict. cap. 54, sec. 15; of conducting the inquiry before the Sheriff as to his condition of mind, and the probability of his being dangerous and offensive to public decency; the greater part therefore of the debt for which decree has been obtained consists of these expenses, and the question now is whether that part of the debt is of an alimentary nature.

But it has been argued very ingeniously that if the sum expended for his maintenance in the asylum is alimentary, then the sum expended in order to place the lunatic there must be alimentary also, since it was for his own benefit. That depends entirely upon the construction of the 15th section. If its provisions are directly for the benefit of the lunatic himself, then there would be a good deal of force in the argument, though I do not say that even then it would have been very easy to represent this as an alimentary debt. But I think that the terms of section 15 show conclusively that the sole end in view was the maintenance of public safety and decency, for the section provides— . . . "When any lunatic shall have been apprehended, charged with assault or other offence inferring danger to the lieges, or when any lunatic shall be found in a state threatening danger to the lieges, or in a state offensive to public decency, it shall be lawful for the Sheriff of the county in which such lunatic may have been apprehended or found, upon application by the procurator-fiscal or inspector of the poor, or other person, accompanied by a certificate from a medical person, bearing that the lunatic is in a state threatening such danger, or in a state offensive or threatening to be offensive to public decency, forthwith to commit such lunatic to some place of safe custody" . . . Now certainly it would not be a good ground for committal that it was for the benefit of the lunatic himself that he should be taken into custody; it would be a bad committal, for under this section it is only danger to the public, or an offence to public decency, or assault, which will justify a committal. The provisions are conceived entirely in the interest of the public, and the same idea runs through the section. It goes on to provide that the Sheriff "shall pronounce a judgment finding the amount of the expenses connected with the said application, inquiry, and procedure, as the same shall be taxed, and shall grant decree for such expenses

against the parish within which the lunatic shall have been apprehended or found at large, in favour of the procurator-fiscal or other person (except the inspector of poor) at whose instance such application shall have been made and such inquiry and procedure conducted, and shall also grant decree against such parish and in favour of the procurator-fiscal or other such person (except the inspector of poor), or in favour of the superintendent or keeper of the asylum to which the lunatic shall have been committed, for such sum as may be necessary for the maintenance of such lunatic" . . . and this decree is to be final and not subject to review, "but the parish so decerned against and paying such expenses and cost of maintenance shall have relief and recourse therefor against the lunatic and his estate, and any of his relatives legally liable for his maintenance, and also against the parish of settlement of such lunatic, in the event of the parish in which the lunatic was apprehended or found at large not being the parish of settlement." . . .

That is the case here, and it appears to me that the expenses of the apprehension fall primarily on what may be called the public, that is to say, the inspector of poor, with recourse, if he can find it, against the lunatic's relatives, or the parish in which he has a settlement; but if no recourse can be had, then the liability rests where the statute left it, on the parish where the apprehension was made, and it is just the public paying through the parish for immunity from danger. Again, if the parish where the apprehension is made finds the parish of settlement, then that parish pays; but if the parish of settlement finds estate belonging to the lunatic, or any person who is bound to maintain him, then it has recourse; if not, then it bears the expense; but in that case, too, it is just the public paying through its representative in a particular parish. I come, therefore, to the conclusion that this is a purely civil debt, and not of an alimentary character, and that therefore it cannot be enforced against the fund in the hands of the trustees. If the estate had been in the hands of the lunatic himself, then it might have been enforced against him, and he might even have been imprisoned for it, before imprisonment for debts of this kind was abolished. But that does not alter the character of the debt, which was incurred in consequence of the lunatic becoming dangerous to the public. The very words of the statute make it plain that this is not of an alimentary character, and therefore, except to the extent of £10, 13s. 6d., I think the arrestments are bad.

LORD SHAND—I think this is a very clear case. There can be no doubt that under the statute St Cuthbert's Parochial Board are creditors of the lunatic to the extent of £36, 8s. 6d., being the sum they disbursed in the way stated. And, accordingly, if Mr Ferguson had had any money belonging absolutely to himself, either in his own possession or in the hands of other parties, it would have been available to satisfy this claim. The inspector of poor, therefore, is entitled to recover this sum of £36, 8s. 6d. if he can, but when he attempts to make good his claim by laying on these arrestments, he is met by the answer that the money was left to Mr Ferguson

by his father's settlement with a protecting clause, and that it cannot be made available to his creditors.

There can be no doubt that Mr Ferguson's father recognised his son's peculiar mental tendency, and therefore directed his trustees, if they thought fit in the exercise of their discretion, to retain the capital settled upon him, and to pay over the income only; and it is also clear from the statements of parties that the trustees have exercised this discretion, and have resolved not to pay the capital. Mr Ferguson then could not force the trustees to pay him this money, and neither can his creditors.

It was attempted to represent the amount of the expenses as being an alimentary debt, but I do not see any possible reason why they can be so considered. It is quite evident that the provisions of the statute are not primarily for the benefit of the lunatic, but of the lieges, and in no way can these expenses be regarded as alimentary.

I have only further to add, that as it has been represented to us that Mr Ferguson could not assign this fund, I have no doubt of the validity of the assignation contained in his marriage-contract, so far as the provisions to his children are concerned. I do not think that the clause in his father's settlement, "that it shall not be in the power of all or either of my children to sell or dispose of the whole or any part of their rights or interests in my said means and estate, to borrow money thereon, or assign the same in security of such loans, such dispositions, assignations, or conveyances being hereby declared to be null and void"—applies to the testamentary provision by this gentleman in favour of his children of what remains of the capital.

LORD ADAM concurred.

LORD DEAS was absent.

LORD MURE was absent on Circuit

The Court pronounced this interlocutor:—

"Find and declare that the parties of the third part are not bound, in respect of the arrestments used by the party of the first part, to pay the sums contained in the decree mentioned in the case, except to the extent of £10, 13s. 6d., and decern: Find the party of the first part liable to the other parties in expenses.

Counsel for First Party — Moncreiff — M'Kechnie. Agents—James M'Caul, S.S.C.

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