

here, and the averments contained in the amendment did not materially alter the case. The property dealt with by the petitioner did not consist of heirlooms, it had all been assigned to her by the will, and it was not extraordinary that she should take it up to London six months after the testator's death. The heir of entail did not appear to oppose confirmation; the only opposition was by one who, even if she succeeded in her action of reduction, would only have a right to the property of the same nature as that which the petitioner now had, viz., a right under a will. Accordingly, no reason had been given for so strong a step as the appointment of a judicial factor.

Argued for respondents—Where there was a *prima facie* case averred of danger to the estate the Court would appoint a judicial factor to protect it. This was laid down by Lord Shand in *Hamilton v. Hardie*, 16 R. p. 198. Such a case had been averred here, and no sufficiently specific denial had been made by the petitioner. Moreover, the respondents had averred a *prima facie* case for reduction of the will, and accordingly the application should be assisted and a judicial factor appointed pending the settlement of the action of reduction.

At advising—

LORD PRESIDENT—I am not sure that had the record stood as it did in the Sheriff Court I should have agreed with the conclusion come to by the Sheriff. But the amendment of the record presents a case different in quality from that which the Sheriff had to consider, and it appears to me to be a case which requires careful attention. The case now made is a case of the estate not being in safety, and that was an aspect of the case not presented to the Sheriff, because the record then contained no impeachment of the conduct and intentions of the executrix-nominate in that regard. But, as I have said, the new statements do touch that delicate question, and they constitute a direct appeal for our immediate action. We must necessarily determine this with a *prima facie* regard to the admitted facts and the reasonable inferences to be drawn from the state of the pleadings. And I cannot say that I think we have adequate assurance for the safety of this estate. Without entering into the various considerations which lead me to that conclusion, I think we should appoint a judicial factor on the estate. It will do no harm, whatever be the event of any pending litigation, and in the meantime it seems to me we could not disregard the pointed statements which have been made, net as they are by answers which are lacking in the precision which I think was called for by what I would call the general aspects of the case. I am therefore for recalling the judgments of the Courts below, and appointing a judicial factor on the estate.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court pronounced the following interlocutor:—

“Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 13th September 1895 and subsequent interlocutors: Appoint A. H. Cooper, W.S., to be judicial factor on the executry estate of the deceased Francis William Garden Campbell, and in respect of said appointment dismiss the petition, reserving right to the petitioner to present such other petition as she may be advised in the event of the action of reduction now pending being dismissed or absolvitor pronounced therein and of the factory being recalled, and decern: Find neither party entitled to expenses.”

Counsel for the Petitioner and Appellant—Balfour, Q.C.—G. Watt. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Objectors and Respondents—Salvesen—Morison. Agent—Peter Morison, S.S.C.

Thursday, November 7.

FIRST DIVISION.

[Lord Low, Ordinary.]

W. R. GRAHAM & COMPANY v.  
RÆBURN & VEREL AND OTHERS.

*Right in Security—Specific Appropriation—Undertaking to Pay out of Profits—Breach of Trust.*

An undertaking by a company to repay a debt by fixed annual instalments payable out of the profits earned by a steam vessel owned by the company, does not operate a specific appropriation of such profits in favour of the creditor, or create a right in security entitling him to a preference upon the profits over the general creditors of the company. Accordingly, there is no breach of trust on the part of the directors or managers of the company, who have entered into the agreement on behalf of the company, in applying the profits to the payment of other debts.

This action was raised at the instance of Messrs W. & R. Graham & Company, merchants, Glasgow, against four sets of defenders, viz., (1) Messrs Raeburn & Verel, shipowners, Glasgow; (2) the Bank of Scotland; (3) James Bain, assistant manager of said bank; and three other members of the committee of the shareholders of the Steamship “Bonnington” Company, Limited, of which committee Mr Bain was also a member; (4) the “Bonnington” Company.

The first conclusion of the summons was for payment by the defenders “jointly and severally, or severally, or in such proportions as shall be ascertained in the

course of the process to follow hereon" of the sum of £3181.

The first defenders were the managers of the steamship "Bonnington," of which the fourth defenders were owners.

The pursuers averred—“(Cond. 1) Under the articles of association of the company as formed in 1883 there were no directors, and this being found to be a defect, special resolutions were passed in July 1885, and the said committee thereafter exercised all the powers of directors of a limited company, and they managed and controlled the financial arrangements of the company, Messrs Raeburn & Verel as managers taking their instructions from said committee in the disposal of the funds or profits passing through their hands. The Bank of Scotland were represented by the said James Bain on the said committee as being already interested in the said company, and particularly as creditors of the same, or of the steamship ‘Bonnington.’ In their character as the leading creditors of the Steamship Company, the said James Bain was their agent and nominee, deputed by them to protect their interests. (Cond. 2) On 17th July 1889 the pursuers offered, at the request of the defenders Messrs Raeburn & Verel, who acted on behalf of the Steamship ‘Bonnington’ Company, and the said committee of said company, to lend to the said company the sum of £15,000 in cash on the following conditions, as expressed in a letter from the pursuers to Raeburn & Verel:—(1) The ‘Bonnington’ s.s. to be mortgaged by the said company to us in security therefor; . . . (5) All profits earned by the steamer to be paid to us towards reducing the said loan till the loan shall have been reduced to £10,000; (6) after the loan shall have been reduced to £10,000, the company shall, if possible, repay to us at least £1500 per annum till the amount on loan shall have been all repaid.’ . . . The said offer was accepted on or about 22nd July 1889 by letter signed by the defenders Raeburn & Verel on behalf of the Steamship ‘Bonnington’ Company, Limited, and, as stated in said letter, on the express authority of the other defenders who formed the committee of the company, subject to the following modifications:—That instead of all the profits being paid to the pursuers till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then, and £1500 thereafter as per the sixth condition above mentioned. The pursuers agreed to this modification, and the transaction was arranged on that footing.”

A mortgage of the steamer, afterwards authorised by a special resolution of the shareholders, was granted to the pursuers' company, and the money was advanced. The "Bonnington" Company made no payment to the pursuers out of the profits of the steamer till January 1891, when they paid £500 to account, which was all they ever gave towards repayment of capital. They continued, however, to pay the interest on the loan until February 1892, after which date it fell into arrear.

In September 1894 the pursuers took possession of the steamer, and in November a resolution was passed by the shareholders to voluntarily wind up the "Bonnington" Company, Mr Raeburn being appointed liquidator.

During the years 1890, 1891, and 1894 the company, by their steamship, earned profits amounting to £3181, which, with the exception of £500 above mentioned, they paid to certain prior unsecured creditors, including the Bank of Scotland.

In regard to the payments above mentioned, the pursuers maintained that "the defenders, in breach of their agreement with the pursuers and in breach of their duty to the pursuers, had paid the earnings or profits of the steamer, which were specifically appropriated to the pursuers, to other parties, and that Messrs Raeburn & Verel and the committee had acted in breach of their duty to them in paying other creditors out of the profits." They maintained accordingly that these defenders were personally liable for the amount so paid away as for a breach of trust. They maintained further that the defender Mr Bain, assistant manager of the bank, who was a member of the committee, had obtained payment of the bank's debt acting in their interest, and in breach of his duty to the pursuers. They averred that two payments of £780 and £1000 had been thus wrongfully made to the bank, and maintained that the bank were bound to repay the amounts thus received.

The defenders pleaded that the pursuers' averments were irrelevant, and on 14th June 1895 the Lord Ordinary (Low) sustained this plea for all the defenders so far as regards the first conclusion of the summons, and *quoad* that conclusion dismissed the action.

*Note.*—[After narrating the agreement under which the loan was granted and the grounds of action]—"The contract, according to pursuers' construction, was that the company should pay the profits to them to the amount of £2000 a-year until the mortgage was reduced to £10,000. I think that it is at all events doubtful whether that is the true construction of the contract. The letters by which the contract was made are not in process, and I am dealing only with the pursuers' averments. But upon their own statement I am inclined to think that the fifth condition in Raeburn & Verel's letter was altogether departed from, and that the modification proposed by the company and agreed to was, that instead of the profits being paid to the pursuers, the company should pay to them £2000 a-year until the debt was reduced to £10,000, and £1500 a-year thereafter. But assuming that the contract was that the profits should be paid to the pursuers to the extent of £2000 a-year until the debt was reduced to £10,000, I am of opinion that the pursuers have not stated a relevant case.

"The pursuers' argument, as I understand it, is that the contract (as construed by them) involved a 'special appropriation' of the profits as they were earned in each

year to the amount of £2000 to payment of their debt; that the shareholders, in approving of the action of the committee, authorised and directed the committee and Raeburn & Verel to hold the profits for and pay them to the pursuers to the extent of £2000; that the pursuers thereby acquired a *jus quæsitum* entitling them to demand that Raeburn & Verel and the committee should account to them for all the profits earned; and it is no defence to the claim that the money was paid to other creditors of the company.

“Now, if an agent receives money from his principal to pay a particular debt of the latter, and applies it to a different purpose, it may well be that the creditor would have a direct action against the agent, especially if the principal had become bankrupt—*Stewart v. Bisset*, M. App. Compensation, No. 2.

“But I do not think that a case of that description is averred here. It was not part of the contract that the profits should be set aside or ear-marked for the pursuers in any way, and as matter of fact that was not done. There was only, at most, an obligation on the part of the company to pay the pursuers £2000 a-year out of the profits. It therefore seems to me to be impossible to hold that the profits as they accrued became the property of the pursuers. But if they were not the property of the pursuers—if the pursuers had not the *jus in re*—I think that their case fails. Take, for example, the case against the bank. The bank have done no more than obtain payment from their debtor of a debt which was due to them. I therefore do not understand how the bank can be asked to repay the money to the pursuers, unless it belonged to them before it was paid to the bank. Again, upon what ground is the claim against Raeburn and Verel and the committee rested? It cannot be rested upon contract, because there was no contract between the pursuers and these parties. Nor is it a claim of damages. There is no statement of a claim of damages in the record. The claim is obviously rested entirely upon what the pursuers call ‘special appropriation’ of the profits. That is a familiar expression in connection with payments of money, but I am not sure what it means in a case of this sort. If it merely means that the company were under obligation to pay the pursuers £2000 out of the profits, that will not entitle the pursuers to sue parties with whom they did not contract. If it means that the money was set apart and held as a specific sum for the pursuers, then upon their own showing no such thing was ever done.

“It seems to me that notwithstanding the contract with the pursuers, the profits remain the property of the company, the pursuers being only the creditors in the personal obligation of the company. I think, therefore, that a creditor of the company could have used arrestments, for example, of freight in the hands of Raeburn & Verel, and if the profits had been still extant, I think that the other personal creditors of the company in the liquidation

would have been entitled to participate in them. But if that is so, the claim of the pursuers for £3181 necessarily fails, because that claim is entirely based upon the supposition that that sum belonged to the pursuers and did not belong to the company.

“I am therefore of opinion that the action must be dismissed as regards all the defenders so far as the first conclusion is concerned.” . . .

The pursuers reclaimed.

Argued for pursuers—The meaning of the agreement was, that the profits were specifically appropriated for the purpose of repaying their loan, and the application of the profits to the payment of other unsecured debts was in breach of this contract. (1) The defenders Messrs Raeburn & Verel, from the circumstances under which the loan was negotiated, were put in a fiduciary relation to the pursuers. They may have merely acted as agents for the company in gathering in the profits, but when they had collected them they held them in trust for the pursuers, and were accordingly personally liable for breach of trust in having applied them to other purposes—*Gas Light Improvement Company v. Tenell*, May 31, 1870, L.R., 10 Eq. 168; *Wilmott v. London Celluloid Company*, November 26, 1886, 34 Ch. Div. 147. (2) Mr Bain as one of the committee was aware of the specific appropriation of the profits, but acting in the interest of the bank he paid their debt, thus breaking the agreement which as one of the committee he had made with the pursuers. The bank was accordingly bound to restore the amount—*Taylor v. Forbes & Company*, December 14, 1830, 4 W. and S. 449.

Argued for defenders Messrs Raeburn & Verel—(1) The breach of trust averred by the pursuers depended on there being a specific appropriation of the profits of such a quality as to confer upon them a *jus in re*. Here there was not even an obligation on the part of the company to specifically appropriate the profits, but merely a personal obligation to pay the debt out of profits. Even if the agreement had constituted an obligation to appropriate specifically, the profits never had been appropriated so effectually as to bar other creditors. They had not been set aside or “earmarked” in the way contended by the pursuers, whose case therefore must fail—See *Baird v. Murray's Creditors*, January 4, 1744, M. 7737, for the test of specific appropriation. (2) In any case these defenders were not personally liable for breach of duty to the pursuers. They had been dealing with the pursuers under the instructions of the committee, and the parties had been treating at arm's length, so they could not be said to stand in any fiduciary relation to the pursuers. (3) The action was irrelevantly laid, conclusions being asked against all the defenders indiscriminately.

Argued for defenders the Bank of Scotland—The payment to the bank was the act of the company, and the fact that their assistant manager was a member of the company's committee in no way disentitled

them from receiving payment of a debt due to them. The pursuers to gain their case would have to show that the money was trust-money, and that there had been a breach of trust in paying it to the bank, and they were unable to show that.

At advising—

LORD M'LAREN—Under this reclaiming-note we are only concerned with the first conclusion of the action, which is for payment of the sum of £3181, 3s. 7d. with interest. The Lord Ordinary has dismissed the action *quoad* that conclusion, being of opinion that the facts as stated do not disclose a relevant ground of liability against any of the defenders.

The pursuers in the year 1889 agreed to lend the sum of £15,000 to the Steamship "Bonnington" Company on mortgage. In their letter agreeing to advance this sum the pursuers made certain conditions, and amongst others it was proposed (5) that all profits earned by the steamer should be paid to the pursuers towards reducing the loan until the loan should be reduced to £10,000; and (6) thereafter that the company should repay the loan by annual instalments of £1500 until the amount on loan should be all repaid. The condensation then proceeds (art. 2)—"The said offer was accepted on or about 22nd July 1889 by letter signed by the defenders Raeburn & Verel on behalf of the Steamship "Bonnington" Company, Limited, and as stated in said letter, on the express authority of the other defenders, who formed the committee of the company, subject to the following modifications:—That instead of all the profits being paid to the pursuers till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then, and £1500 thereafter as per the 6th condition above mentioned." It is added—"The pursuers agreed to this modification, and the transaction was arranged on that footing."

The Steamship Company did not perform their obligation to pay £2000 a-year in reduction of the debt. The only payment made in repayment of principal was a sum of £500 paid in 1891. The company is now in liquidation. It is averred that during the years 1890, 1891, and 1894 the Steamship Company earned profits amounting to £3181, and that such profits were paid to certain prior but unsecured creditors, including a sum of £1783 paid to the Bank of Scotland.

The action is directed against (1) the Bank of Scotland; (2) James Bain, assistant manager of that bank, and three other gentlemen who were a committee of the shareholders of the company; and (3) the company; and it concludes for payment of the sum of £3181, being the profits alleged to have been earned.

As regards the defendant company, it is not disputed that its estate is responsible, not only for the sum claimed, but for the entire mortgage debt of £15,000 less £500 paid to account, but I agree with the Lord Ordinary that a petitory

action is not the proper way of establishing the liability of the company. The right of the pursuers is to enforce their mortgage by bringing the ship to a sale, and if necessary to make a claim in the liquidation for the deficit, if any. But as the theory of the pursuers' case is that they have a preferential claim to the profits earned by the ship subsequent to the agreement, it may be proper to consider this claim more narrowly. If the pursuers have a preference, it must be of the nature of a voluntary security, because they do not say that they have a preference by the use of diligence. Now, it is conceded that they are creditors under the obligation of the defendant company to pay instalments of the debt out of freight. But it is perfectly clear that a mere pecuniary obligation is not a security, and that it does not become one by reason of a fund being designated out of which payments shall be made. The question is not whether the company acted honestly in paying away their profits to other creditors, but whether the pursuers have a preferable claim in competition with other creditors who have not been paid. I think that according to elementary principles in the law of debtor and creditor, an obligation to pay out of profits is in legal effect no more than an obligation to pay, and that it only entitles the creditor to a dividend in the liquidation.

The claim against the Bank of Scotland is founded on the fact that the Bank's assistant manager was a member of the committee of the steamship company at the time when payments were made to the bank out of profits. In my opinion the Bank of Scotland was entitled to take payment from its debtor out of any unsecured fund in the debtor's hands, and the bank would not be the less entitled to accept such payments if its officers knew that their debtor had promised to another creditor to make the fund available to him. It is not a case of trust, because the freights were the property of the steamship company. Then the fact that Mr Bain was a member of the committee of management is, in my judgment, altogether irrelevant, because the payment to the Bank of Scotland was the act of the company, and in general the validity of a corporate act cannot depend on the relation which its members may sustain towards any other contracting party. Such relation could only be material if the act complained of amounted to a fraud, or a breach of trust.

There remains for consideration the claim against the individuals who constituted the committee of management of the defendant company. As I read the record, this claim is not founded on contract, but on breach of duty on the part of these gentlemen. It is plain enough that the contract founded on was with the limited company, and the members of the committee were only responsible as shareholders for its fulfilment, that is, to the extent of their subscriptions to the company's capital. But apart from contract the individual defenders owed no duty to the

pursuers; it is not said that they came under any guarantee on behalf of the company, or that they gave their personal assurance that the company would fulfil its obligations. I assume that they were the instruments or agents of the company in the commission of a breach of contract, but I fail to see how a matter which is no more than a breach of contract in a question with the principal can change its nature and become a breach of duty in a question with the company's agents.

It is unnecessary that I should elaborate this view, because I concur entirely in the reasoning of the Lord Ordinary on the question of individual responsibility, and in his Lordship's observations on the fallacy involved in the use of the expression "special appropriation" as applied to an obligation to make payments out of profits. I am of opinion that the reclaiming-note should be refused.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Lees—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders Raeburn & Verel and Others—H. Johnston—Graham-Stewart. Agents—Davidson & Syme, W.S.

Counsel for Defenders the Bank of Scotland—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Friday, November 1.

## SECOND DIVISION.

### SCOTT'S TRUSTEES v. SCOTT AND OTHERS.

*Trust—Testamentary Provisions—Severing of Interests of Beneficiaries—Residue not Immediately Payable.*

The trustees under a testamentary trust were directed to "retain and invest" certain sums for particular beneficiaries in life and other beneficiaries in fee, the fee not to be payable to the latter until they reached majority, or, in the case of females, until marriage, whichever event should happen first. Other legacies were to be paid immediately.

Parts of the residue were also to be retained and invested for behoof of life-renters and fiars, and the period when the residue could finally be distributed was necessarily remote.

Held that the trustees were not entitled to create separate trusts by appropriating investments to meet particular legacies not immediately payable, and that a loss upon an investment so appropriated fell to be made good out of the residue of the trust estate.

*Robinson v. Fraser's Trustee*, August 3, 1881, 8 R. (H.L.) 127, distinguished.

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### *Trust—Liability of Trustees—Deposit-Receipt—Period of Payment—Guarantee of Indemnity.*

The trustees under a testamentary trust were empowered to retain the securities upon which the trust-estate was invested at the time of the truster's death. They accordingly retained certain deposit-receipts in a foreign bank under a guarantee by two of their number indemnifying the trustees against loss which they or the trust-estate might incur by continuing to hold the deposit-receipts. The bank suspended payment before the period when the deposit-receipts became payable.

Held that neither the trustees nor their guarantors were liable to make good the loss to the residuary estate, it not appearing that the deposit-receipts could have been realised before maturity.

Question whether the terms of the guarantee would have covered a loss to the trust-estate for which the trustees were not personally liable.

Major-General James Corse Scott died on 6th March 1890, leaving a trust-disposition and settlement dated 20th March 1889, by which he conveyed to the trustees therein named his whole estate, heritable and moveable, for, *inter alia*, the following purposes:—"Fourth, That my trustees shall pay to my nephew Captain Alexander James Corse Scott, on the retired half-pay list of the Bengal Staff Corps, in the case of his surviving me, the sum of £5000 sterling, and shall retain and invest in their own names the sum of £5000 sterling in trust, for the life-rent use alienarily of the said Captain Alexander James Corse Scott, and for the lawful issue of the body of my nephew John Scott of Sinton, in fee equally, share and share alike: Fifth, that my trustees shall pay to my nephew Major Edward Corse Scott, of Her Majesty's Sixth Royal Warwickshire Regiment, in the case of his surviving me, the sum of £5000 sterling, and shall retain and invest in their own names the sum of £5000 sterling in trust, for the life-rent use alienarily of the said Major Edward Henry Corse Scott, and for the lawful issue of the body of my nephew, the said John Scott of Sinton in fee, equally, share and share alike: . . . Seventh, That my trustees shall retain and invest in their own names the sum of £10,000 sterling for the younger children of my nephew, the said John Scott of Sinton—that is, the whole lawful children of the said John Scott other than the child or heir who shall succeed, or be entitled to succeed, to the said estate of Sinton, and apply the income thereof for their behoof and maintenance, and convey and make over the capital of said sum of £10,000 to said younger children equally, share and share alike, on said children, if males, attaining the age of twenty-one years complete, and, if females, on their attaining said age or being married, whichever event shall first happen."

By the last purpose the truster directed that the residue and remainder of his estate should be divided into sixty-two

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