

tained complete control over the execution of the operations therein contracted for, and were not thereby in any degree relieved from the obligation incumbent on them to remove the obstruction in question, or to put it in a state free from danger to the lieges: Therefore of new repel the defences, and decern against the defenders for the sum of £50 in name of damages, with interest thereon at the rate of 5 per cent. from the 2d July 1875 until payment, in terms of the conclusions of the summons: Find the pursuer entitled to expenses; and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Guthrie Smith—Reid.
Agent—D. H. Wilson, S.S.C.

Counsel for Defender—Dean of Faculty (Watson)—Trayner—Keir. Agents—Horne, Horne, & Lyell, W.S.

Saturday, March 4.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MILLER v. DOWNIE.

Trust—Debtor and Creditor—Agent and Principal.

A granted a trust-deed conveying all his estate to B for behoof of his creditors, and afterwards arranged for payment of a composition in four instalments. B undertook the management of A's business until the first instalment was paid, when A resumed the management himself, and ordered goods from C. Having failed to pay the third instalment, B took possession of A's premises, and sold the stock, including certain of the goods supplied by C.—*Held*, in an action for the price of the goods, raised by C against B (upon the ground that A had all along acted merely as the agent for his creditors), that in the circumstances B was not liable either as an individual or trustee.

William Miller, residing in Glasgow, brought an action in March 1874 in the Sheriff Court of Lanarkshire, against Robert Downie, accountant, trustee for the creditors of David Brown, baker in Glasgow, under a trust-disposition in his favour. The summons concluded for payment of the sum of £61, 14s. 6d., being the price of goods which the pursuer alleged "were sold and delivered to the defender on the order and instructions of the said David Brown, who had, after the execution of the foressaid trust-disposition, been employed and authorised by the defender to continue and carry on his business in his own name as formerly, for behoof of the defender as trustee, and had in that capacity in his own name ordered and received the said goods, which goods, and the proceeds thereof, were handed over to and taken possession of by the defender, and used and appropriated by him, and which actings and dealings of the said David Brown were adopted and homologated by the defender as his own." The pursuer had already taken decree against Brown for the debt now sued for.

According to the statement of the defender, Brown granted a trust-deed for behoof of creditors in his favour on 13th November 1872. Afterwards an arrangement was come to between Brown and his creditors, by which they agreed to accept a composition of ten shillings per pound, to be paid in four instalments. It was resolved, however, that the defender, as trustee, should intromit with the estate and superintend the business until the first instalment was paid. This was done by Brown in December 1872, and he afterwards, as the defender alleged, carried on the business in his own name and for his own behoof, as formerly, until April 1873, when, in consequence of his inability to pay the third instalment, the defender again resumed possession of the estate and disposed of the stock. The goods sued for in March 1873 (certain sacks of flour) were sold to Brown at the time when, according to the defender, he had the sole conduct of his business, and alone received benefit from them.

The defender's fourth plea in law was:—"The goods, the price of which is sued for, not having been sold or delivered to the defender as trustee for Brown's creditors or as an individual, the defender is not liable for the price of the same."

A proof was led, and Brown, called as a witness for the pursuer, stated—"Between the date of the trust-deed and the date when Mr Downie took possession of the shop, he was superintending the business entirely. He and his clerk called at the shop almost every second day, and then they came every day for a while after that and lifted the drawings. Mr Downie paid me my wages on the Saturdays—at least his clerk did—and the wages of my men too. The goods contained in the account appended to the summons were ordered by me by Mr Downie's liberty. I got no written permission from Mr Downie to order these goods. He did not give me any definite order to buy the particular quantities of flour mentioned in the account, but he gave me liberty to order flour to suit myself."

The Sheriff-Substitute (ERSKINE MURRAY), upon 22d February 1875, issued the following interlocutor:—

"Having heard parties' procurators, and considered the proof led and whole process, Finds (1) that David Brown, baker, Cathcart Road, Glasgow, having got into difficulties, granted on 13th November 1872 the trust-deed No. 7/1 of process, conveying all his estate to defender Robert Downie, accountant, Glasgow, for behoof of his creditors at the date thereof, and according thereto, with full powers: Finds (2) that several meetings of creditors took place, at the third of which, on 23d November 1872, as appears by the minute thereof, 7/2, Brown agreed to pay a composition by four instalments, the first at 3s. 6d. per £ on 13th December 1872, and a second of 1s. 6d. on 13th February 1873, a third of 2s. 6d. on 12th April, and a fourth of 2s. 6d. on 13th June thereafter, which the meeting agreed to; and 'it was resolved that Mr Downie intromit with the estate funds until the first instalment of 3s. 6d. was paid.' Finds (3) that accordingly, till the first instalment was paid Brown regularly accounted to defender daily for the drawings of the shop: Finds (4) that the second instalment was also paid, but Brown failed to pay the third: Finds (5) that

between the time of the first and third instalments Brown himself managed the shop, kept the proceeds thereof, ordered flour, &c., paid (in full) for various quantities of flour got by him for the purposes of the shop from pursuer William Miller and others, and also ordered and received from the pursuer the goods mentioned in the account, which were not paid for: Finds (6) that at the time of his failing to pay the third instalment defender took possession of the balance of cash in Brown's hands and the stock in the shop, including some bags of pursuer's flour, turned Brown out, and proceeded to collect the accounts and realise the estate, which action was approved of by the creditors at a meeting on the 18th April 1873, conform to minute 7/4: Finds (7) that pursuer raised an action against Brown and got decree for the amount of his account, but got nothing thereby; and Brown, after being in prison some time under a decree at the instance of another party, obtained decree of *cessio*, and the pursuer has now raised this action against the trustee: Finds, on the whole case, and in law, that in the circumstances defender has made himself liable *qua* trustee for the creditors for the amount of pursuer's account: Therefore decerns against defender as libelled; allows an account thereof to be given in; and remits the same when lodged to the Auditor of Court to tax and report."

The defender appealed to the Sheriff (Dickson) who, on 18th June 1875, adhered to the interlocutor appealed against, but found that the decerniture could only be against the defender *qua* trustee. The following is the Sheriff's note:—

"There is no doubt that the defender incurred liability as trustee for the debt in question. The pursuer contended that he is also liable therefor personally.

"Upon that question, if properly raised in this case, the Sheriff might have had considerable doubt. He reserves his opinion upon it, thinking that it is not so raised.

"The summons is not against the defender expressly as trustee, but it designs him 'trustee for the creditors,' &c., and it does not say whether the decree is sought against him in that capacity or personally.

"The condescendence is also ambiguous, and there is no plea in law that the defender has incurred personal responsibility for the price of the goods, and all the pursuer's averments are consistent with liability only as trustee rather than personally.

"But it is thought that all these questions are excluded by the finding in the interlocutor appealed against—'that in these circumstances defender has made himself liable *qua* trustee for the creditors for the amount of pursuer's claim,' and by the decerniture following after that as simply 'against the defender.' As the pursuer has not appealed the interlocutor, so as to bring that finding under review, it must be held as final against him, and the decree must be in accordance with it."

Against this judgment the pursuer appealed.

Argued for him—If one person puts forward another to trade on his behalf, a creditor may proceed against either. Here the facts disclosed prove that after granting his trust-deed Brown

carried on the business for his creditors. He acted entirely under the directions of the defender. The conduct of the defender in April 1873, when he took possession of the premises and sold the stock, illustrates his real connection with the business.

Argued for the defender—Brown was neither the agent of the defender nor his partner. The only relationship which existed between them was that of debtor and creditor. The defender was at the most a mere creditor in possession, putting into execution the trust-deed. Creditors in whose favour such a deed has been granted do not incur liability for the subsequent debts of the grantor.

Authorities cited—*Eaglesham & Co. v. Grant*, July 15, 1875, 2 Ret. 960; *Cox v. Hickman*, Aug. 1860, 8 Clark H. of L. Cases, 268; *Mollow Mencha Co. v. Court of Wards*, July 1872, 4 P. C. Ap. 419.

At advising—

LORD JUSTICE-CLERK—This claim does not rest on direct contract between pursuer and defender. It is conceded, and indeed clearly proved, that Miller knew no one in the transaction, and trusted to no one, but Brown. He now, however, says that he has discovered since that Brown was really the agent of Downie—the trustee under a private trust-conveyance for creditors—and claims against him as an undisclosed principal. He was not an undisclosed principal, for if Brown's evidence is to be trusted the pursuer was perfectly aware of Downie's title under the trust-deed; and therefore he did not regard Downie as principal at the time of this contract; and this of itself would go far in the solution of this case. But the ground of action is that the trustee was, in point of fact, the principal in this transaction, disclosed or undisclosed, and that the ostensible purchaser had no personal interest in the transaction, but was only an agent for the trustee. I am very clear in the general case that a trust-deed for security and payment of debt does not of itself divest the grantor, or render the trustee and acceding creditors liable for the subsequent contracts made by the grantor, unless they have by the nature of their proceedings acted as principals in the contracts themselves, or in the subjects to which these contracts relate. Their primary position is that of creditors only; and as long as they act in consistency with that character they will not be liable in any other. Even a creditor in legal possession under a specific security, while he will be liable for subsequent contractions, if these proceed on his mandate, express or implied, will not be liable simply in respect of his possession in security. But this case raises no such question. When these goods were ordered the trust-deed remained as a mere security for the payment of certain specific instalments of the composition; the debtor remained in undisturbed possession by the express consent of the creditors. He alone made the purchase for his own behoof, and the creditors could not have interfered either with the making or the fulfilment of the contract. It is a very clear case. The subsequent taking possession by the trustee, when the debtor failed to pay the third instalment, cannot possibly affect this question, whatever other rights might emerge out of it; but I am not pre-

pared to say that the trustee had not a right to take the step which he did, and that solely in the character of a creditor holding a specific security, and without implying any other relation existing previously between him and the debtor.

LORD ORMDALE—I have come to the same conclusion. The case now presented was in a somewhat complicated form, but has been brought fully under consideration, and I am now satisfied that the judgment of the Sheriff cannot stand. It is clear that the only ground of action can be that the trustee in consequence of his actings has rendered himself liable to the pursuer. It is quite clear, also, that Millar did not rely upon the trustee, the present defender, when he sold the flour, but that he looked to Brown for payment. Accordingly, he did not render his account to the trustee, but to Brown, against whom he gained decree for the amount. And then he says that it occurred to him (or perhaps it was suggested) that the trustee was liable.

If he were able to make out that Brown had been allowed to remain in possession of his shop merely as the agent of the creditors, there could be no doubt of their liability to the pursuer, whether he knew the real position of Brown at the time of the sale, or had ascertained it afterwards. But I am satisfied that he has not established that, but, on the contrary, that at the time the contract was entered into Brown was in no sense the agent of the creditor, but acting for himself alone. That is clear from the evidence before us, and in particular from the statement of Brown himself. It is a mere question of evidence whether he was or was not the agent for the creditors. It is said, and this perhaps raises the only difficulty in the case, that the taking possession of the estate by the trustee in April shows that all along Brown had merely acted for the creditors. I have doubts of the right to take possession in that way. It was a sort of vicious intrussion. It was argued that it was a mere postponement of the taking of possession under the trust-deed. This is not a sufficient answer. There were other creditors whose interests were not protected. Is the pursuer, for example, to lose the value of his flour? But whatever claim he may have, it is certainly not raised in this action, and I reserve my opinion as to what claim he or other creditors may have against the defender in consequence of his proceeding in taking possession.

LORD GIFFORD—I have come to be of the same opinion, and latterly have had no difficulty. The first point here is that we have no direct contract of any kind between the pursuer and the defender. They never came into contact. Mr Downie never heard of the pursuer; direct contract is therefore in this case out of the question. But then it is said that the pursuer entered into a contract with one who was the representative of the defender. It is not said that Brown and Downie were partners, but that the business really was Downie's, in his capacity as trustee for the creditors of Brown. Now, that is a question of fact, and I do not think that there is evidence of such a state of matters having existed. Brown, the bankrupt, made a special stipulation

that he might settle by a composition contract, which was carried into effect. He made an offer of the instalment towards payment of his debts, which was accepted, and he was allowed to carry on his business. This is the usual practice, for in order to pay the instalment the debtor must have his estate. Now, if he had paid all the instalments as they fell due it is clear that the creditors could never have been liable for his debts. But it is said that under this special agreement the creditors were to hold the whole estate and carry it on for themselves during the currency of this composition-contract. No doubt, until the first instalment was paid the trustee did take some superintendence of the business, and had the proceeds paid over to him; but he never interfered with the business, and even his superintendence—for it was never more—came to an end in December 1872, after payment of the instalment then due. The bankrupt then continued his own business, no one meddling with him, and it was at this time that the contract was entered into with the pursuer. He had made other furnishings, for which he had received payment from Brown. The flour sold by the pursuer was for Brown's behoof; the business was his; everything in the shop was his. Therefore, in my opinion, the only ground upon which the pursuer can rely in this action fails him. The only difficulty in the case arises from the fact that in April the defender Downie did take possession of Brown's shop. I do not stop to inquire whether he had a right to do so or not. That is a difficult question. But it does not arise here. Brown was the only person entitled to object, and if he did not, what right had the pursuer, a mere personal creditor, to do so?

I do not think, therefore, that this mere act of taking possession, which has been relied upon as throwing light upon the state of matters all along, really affects the present question.

LORD NEAVES was absent.

The following interlocutor was pronounced:—

“The Lords having heard counsel on the appeal, Sustain the said appeal, and recal the interlocutors appealed from: Find that the flour in question was sold and delivered by the pursuer to David Brown, and between the 15th and 27th of March 1873: Find that at the date of the said sale David Brown was carrying on business on his own account, and was in possession of the business and premises referred to in the record: Find that at the date above mentioned the said David Brown had granted a trust-deed for security and payment of his debts, and had made arrangements with his creditors by way of composition, two instalments of which had then been paid: Therefore sustain the 4th plea in law for the defender, and assoilzie him from the conclusions of the summons, and decern: Find the defender entitled to expenses in both Courts, and remit to the Auditor to tax the same and to report.”

Counsel for Pursuer — Asher — M'Kechnie.
Agents—Dove & Lockhart, S.S.C.

Counsel for Defender — Balfour — Moncrieff.
Agents—Wright & Johnstone, L.A.