

Wednesday, November 22.

SECOND DIVISION.

[Sheriff of Dumfries
and Galloway.

HENDERSON v. M'LINTOCK.

*Bankruptcy — Arrestment — Preference — Trust
for Creditors—Conditions in Voluntary Trust
for Discharge of Debtor—Non-Acceding Credi-
tor.*

A person who was insolvent granted a voluntary trust for creditors, trustees under which realised the estate. The deed contained a condition for the discharge of the trust on the realisation and distribution of his estate among his creditors. More than sixty days after the date of the trust a creditor used arrestments in the hands of the trustees, and thereafter the debtor was made bankrupt. In his sequestration the arresting creditor claimed a preference by virtue of the arrestment. *Held* (1) that the trust-deed was not rendered invalid by the provision in it for the debtor's discharge, and (2) that having stood for sixty days it was effectual to exclude the preference by arrestment claimed by the arresting creditor.

On the 28th July 1879 the firm of J. M. Henderson & Co., manufacturers in Dumfries, and John M'Ewan Henderson, sole partner thereof, as such partner and as an individual, granted a trust-deed for behoof of their creditors in favour of John Johnstone, joint-agent at Dumfries of the Clydesdale Banking Company, and Walter Mercer, yarn-spinner, Stow. The trust-deed contained the following clause:—"Declaring always, as it is hereby specially provided and declared, that this trust-disposition is granted on the condition that the creditors who accede hereto, and who draw dividends out of the said estates, shall discharge the said firm of J. M. Henderson & Company, and me as the sole partner thereof, and as an individual, of the whole debts due by us respectively to them, in the same manner and on the like conditions as creditors ranking under a sequestration awarded by the Court of Session or otherwise in virtue of the Bankrupt Statutes, and that acceptance of payment of a dividend by any of said creditors acceding as aforesaid shall import a discharge by them to the said trustees of their intrusions with the funds of the estates hereby conveyed." In virtue of this deed the trustees entered into and realised Mr Henderson's whole estate.

Mrs Phoebe Milligan or Henderson, wife of John M'Ewan Henderson, was a creditor of her husband, but did not accede to the trust-deed, and the trustees having refused to recognise her claim, she on 10th November 1880 raised an action against her husband in the Sheriff Court of the county of Dumfries concluding for a decree against him for the sum of £1550, with interest at the rate of five per cent., and expenses. Appearance was not entered in this action for J. M. Henderson, but Johnstone and Mercer as his trust-assignees entered appearance, and were sisted as defenders, and after a record was made up and proof led decree was pronounced by the Sheriff-Substitute (BOYLE HOPE) decerning against the defender J. M. Henderson in terms of the

prayer of the petition, and finding the other defenders Henderson's trustees liable in expenses. This interlocutor was adhered to by the Sheriff on appeal on 6th August 1881. On the dependence of the action Mrs Henderson used certain arrestments against her husband, including arrestments in the hands of the trustees under the voluntary trust of moneys alleged to be addebted to him. She claimed to have thereby attached considerable funds which were then still in their hands undisposed of by division among the acceding creditors.

On 9th January 1881 J. M. Henderson was made notour bankrupt by means of diligence done by one of his creditors, and his estates were sequestrated on 2d November 1881, Thomson M'Lintock, chartered accountant in Glasgow, being appointed trustee on his sequestrated estate. By assignation dated 6th September 1881 Mrs Henderson assigned to her daughter (the appellant) Miss Jane Henderson, and to Miss Elizabeth M. Henderson, and Miss Anne Alexander Henderson, her other daughters, equally among them, the foresaid decree at her instance against her husband, and all arrestments and other diligence executed by her upon the dependence of her action against him.

In virtue of this assignation, they claimed on their father's sequestration to be ranked preferably, on the ground that a preference had been acquired by the arrestment used by Mrs Henderson, in respect that the debtor was not rendered notour bankrupt within sixty days after the arrestments were used. The trustee rejected the claim to a preference, but ranked it along with the other creditor's claims, on, *inter alia*, the following grounds:—"The arrestments in the hands of the trustees under Henderson's trust-deed were ineffectual, because (1) the trust-funds were not arrestable. The trustees did not represent the debtor, but held for the creditors in their just proportions. The debtor was not rendered notour bankrupt within sixty days of the trust-deed. The funds were reduced into possession of the trustees before the date of the arrestments, and were specially appropriated for payment of an equal dividend to all the truster's creditors. (2) The claimant's author recognised, ratified, and *rebus et factis* acceded to the trust. She was barred by personal exception from taking separate measures by arrestment.

Miss Jane Henderson appealed against this deliverance to the Sheriff-Substitute (BOYLE HOPE) of Dumfries and Galloway. On 21st June 1882 the Sheriff-Substitute sustained a plea for the trustee to the effect that it was *res judicata* by certain previous proceedings that the claimant's author had truly acceded to the voluntary trust for her husband's creditors to the effect of disentitling her to any preference over the other creditors of Henderson. This plea not having been insisted in on appeal, neither it nor the proceedings in the Sheriff Court on which it was founded need be further referred to.

Miss Jane Henderson appealed to the Second Division, and the plea of *res judicata* having been abandoned at the bar it was argued for her—The question came to be one as to the validity of the trust assignation in favour of the voluntary trustees. If this was a good conveyance, then possibly the appellant's claim might fall to be disregarded. But as matter of law the deed was bad, inasmuch

as it contained a clause providing for the discharge of the trustee on the distribution and realisation of the estate among his creditors, which the trustor could not impose on his creditors. That being so, the appellant who (1) was a creditor who had not acceded to the voluntary trust-deed, and who (2) had used arrestments sixty days before the trustor's bankruptcy, was entitled to a preference in virtue of those arrestments.

Authorities—Bell's Comm. ii. 383 (7th ed.); *Sutherland and Others v. The Creditors of Watson*, July 3, 1724, M. 1199; *Grant v. Cunningham*, June 5, 1747, M. 1210; *Athya v. Clydesdale Bank*, January 29, 1881, 18 Scot. Law Rep. 287.

Argued for the respondent—The appellant's claim was justly repelled. In virtue of the trust-assignment the voluntary trustees were vested with her father's whole interest and estate, which they held, not for his behoof, but for that of all his creditors. This deed was perfectly good, and contained no extraordinary clause sufficient to break it down. It was to no one's prejudice, and had been acted on by the trustees at the dates of the appellant's arrestments with a view to the fair division of the trustor's estate among his creditors. Non-acceding creditors like the appellant had it in their power, if they were dissatisfied with the private trust, to resort to sequestration.

Authorities—*Marianski v. Wiseman*, March 10, 1877, 9 Macph. 673; *Nicolson v. Johnstone and Wright*, December 6, 1872, 11 Macph. 179.

At advising—

LORD RUTHERFURD CLARK delivered the opinion of the Court, as follows—On 28th July 1879 the firm of J. M. Henderson & Co., of which J. M. Henderson was the sole partner, granted a trust-deed in favour of their creditors. The trustees realised the estate. The trustor was made notour bankrupt on 9th January 1881, and his estates were sequestered on 2d November 1881.

The appellants used arrestments in the hands of the trustees in November 1880. They did not accede to the trust, and in the sequestration they claim a preference by virtue of their arrestments.

The trustee disallowed the claim to a preference, and an appeal was taken to the Sheriff Court against his deliverance. In this appeal the respondent stated a plea of *res judicata*, which was sustained by the Sheriff-Substitute, and on that ground he refused the appeal. In these circumstances an appeal has been taken to this Court.

When the case came before us the respondent did not insist in his plea of *res judicata*. The question came to be whether the arrestments were effectual. The appellants contended that they were, on the ground that the trust-deed was invalid. They admitted that they were invalid, and could confer no preference if the trust-deed was valid.

The ground on which the appellants impeached the trust-deed is this—They said that it was not a simple trust-deed for creditors, but that it contained a condition for the discharge of the trustor on the realisation and division of his estate among his creditors. Such a condition it was beyond the power of the trustor to impose, and they argued that this condition invalidated the deed. It is certain that the condition is of usual occurrence in a deed of this kind. But it is

equally certain that the trustor was not entitled to impose it on non-acceding creditors.

The question which is thus raised is treated by Professor Bell in his Commentaries (ii. 384) as an open question. He says—"It becomes an open question whether such conditions destroy the whole trust, or whether it may not stand to the effect of a simple conveyance, and a bar to the diligence and preference, while the conditions are held *pro non scriptis*." He adds—"It can only be when the grantor of the trust-deed is willing to dispense with the conditions that the trust-deed can be thus supported as a simple conveyance of the estate." This seems to me to be unsatisfactory, as it makes the validity of diligence to depend on the will of the trustor, and as it does not indicate whether the expression of his will must precede or may follow the use of diligence.

In the case of *Nicolson v. Johnstone and Wright*, December 6, 1872, 11 Macph. 178, Lord Deas considers the question whether any available arrestment can be used in the hands of a trustee who has reduced the funds into possession under a voluntary trust-deed. He says—"That is a subject upon which we have in the books a long series of varying decisions, all of which I have carefully gone over, although I do not think it necessary here to resume them. The result I take to be that a voluntary trust-deed granted by a party insolvent but not bankrupt for behoof of all his creditors equally, and containing no extraordinary clauses, will be irrevocable by the grantor, and good and available to bind non-acceding creditors as well as acceding creditors if the estate be reduced into possession by the trustee, and the debtor is not rendered bankrupt within sixty days. The trustee in such cases does not represent the debtor. He represents the creditors in their just proportions, and all preferences by arrestment are excluded. A stipulation for a discharge, however, on a full surrender being made, although it will not void the deed, is, I think, a final step to be considered only at the close, and in which non-acceding creditors may or may not then hold to be binding on them at pleasure. The management of the trustee may be superseded by sequestration under the Bankrupt Statute although more than sixty days have elapsed without the debtor having in the meantime been made bankrupt, and in that case the management of the trustee in the sequestration will supersede from its date the management of the voluntary trustee."

I do not find that the other Judges concurred in this opinion. But they say nothing to the contrary. Lord Deas does not specify the nature of these extraordinary conditions which will vitiate the whole deed. But it may be inferred from his opinion that they relate to something else than the discharge of the debtor, or, in other words, to something else than the conditions which occur in the trust-deed which we have before us.

The opinion of Lord Deas is in conformity with the decision of the Court in the case of *Wilson v. M'Vicar*, February 18, 1762, M. 1214. There a disposition in trust for creditors, though containing extraordinary powers and conditions, was held to exclude the diligence in the hands of the trustee. Unfortunately we have no report of the opinions of the Judges. But the successful argument proceeded on the principle that the disposi-

tion should be sustained as a conveyance which denuded the truster, and vested the estate in the trustee for behoof of the creditors, leaving it to any creditor who was dissatisfied with the powers or conditions of the trust to extinguish the trust by resorting to sequestration. It is true that there is a note to the case by which it is indicated that the arresting creditor acceded to the trust. But the decision did not proceed on this ground, and the facts set out in the note would not amount to accession.

I cannot find any later case which is contrary to that which I have cited, and though it may go further than the opinion of Lord Deas in sustaining as effectual to exclude arrestment a trust-deed with extraordinary powers, I am disposed to adopt that opinion. It sustains the trust-conveyance to the effect of securing a fair division of the estate to the exclusion of preferences, and a sequestration affords an easy remedy for avoiding any conditions with which non-acceding creditors are dissatisfied.

LORD CRAIGHILL, who was absent at the argument, delivered no opinion.

The Court refused the appeal.

Counsel for Appellant—J. Burnet—Wallace. Agent—Knight Watson, Solicitor.

Counsel for Respondent—Trayner—W. Campbell. Agents—J. & J. Galletly, S.S.C.

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HENDERSON v. M'LINTOCK.

Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap 79), sec. 86—Bankruptcy—Trustee in Bankruptcy—Management of Sequestrated Estate.

Statements in a petition held not relevant to entitle the Court to interfere with the management of a trustee on a sequestrated estate under section 86 of the Bankruptcy (Scotland) Act 1856.

Miss Jane Henderson, the appellant in the case reported above, also presented a petition in the Sheriff Court of Dumfries and Galloway, in which she sought to have M'Lintock, as trustee in the sequestration of her father J. M. Henderson, ordained to produce an account of his intrusions with the funds and estate of the bankrupt up to 2d March 1882, and to have him found bound so to account and rank her claim without deducting or taking credit for two sums of £622, 13s. 3d. and £536, 19s. 5d., as if these sums had been recovered by him as part of the funds of the sequestrated estate. The ground on which the petition was brought was that the respondent had illegally and erroneously allowed the trustees under J. M. Henderson's voluntary trust-deed to deduct these sums in accounting with him. The petitioner averred that the trustees under the voluntary trust-deed had realised the greater part of her father's estate, and that the respondent had illegally allowed them to deduct the

sums in question, which they were not entitled to credit for in accounting with the arresting creditors, in whose right (as explained in the preceding report) she now was. The sum of £622, 13s. 3d., first above mentioned, consisted for the most part of the expenses of both parties to the litigation, in which the right of Mrs Henderson to be ranked as a creditor of her husband was established. The other sum of £536, 19s. 5d. consisted of dividends paid to certain creditors by the trustees under the voluntary trust-deed. She alleged that these creditors held securities which they were bound to value and deduct, and that they had not done so, and that therefore the payments to them had been illegally and improperly made.

The petitioner pleaded, *inter alia*—“(1) The defender was bound to recover the whole funds belonging to J. M. Henderson at the date of the arrestments, and to administer the same in terms of the Bankruptcy Statute. (2) Mrs Henderson, the pursuer's author, not having acceded to the trust-deed, no part of the expense connected therewith is chargeable against her. (3) The trustees were not entitled to charge Mrs Henderson with the expenses incurred in opposing the action raised by her against her husband. (4) Those creditors who held securities should only have been ranked after deduction of the value of such securities. (5) [This plea was stated in a revised paper lodged by her] By section 86 of the Bankruptcy Act of 1856 the defender is amenable to the Lord Ordinary and to the Sheriff, at the instance of any party interested, to account for his intrusions and management.”

The respondent averred that he had, in compliance with the Bankruptcy Act, prepared a report setting forth the state of the bankrupt's affairs, and an estimate of what the estate might produce. In that report he stated that he had taken possession of the books and documents belonging to the estate in the hands of the trustees who had been acting under the private trust-deed, and applied to them for an account of their intrusions. He further stated that the accounts rendered by them had been carefully audited by him, and that the balance had been paid to him by them, a discharge having further been executed in their favour. He also averred that the petitioner had had ample opportunity of objecting to his settlement with the private trustees, and had not availed herself of it.

He pleaded, *inter alia*—“(1) The petition being incompetent at common law, and not founded on the Bankruptcy Act, should be dismissed. (2) Section 86 of the Bankruptcy Act 1856, which alone authorises an application of the nature here made by the pursuer, not being founded on in the petition, it should be dismissed as incompetent, and the pursuer found liable in expenses.”

The 86th section of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), enacts as follows:—“The judicial factor, the trustee, and commissioners shall be amenable to the Lord Ordinary and to the Sheriff, although resident beyond the territory of the Sheriff, at the instance of any party interested, to account for their intrusions and management, by petition served on them; and in case it shall appear that such application ought not to have been made, the party complained of shall be entitled to his full expenses, to be either retained out of the funds or recovered from the party complaining, as the Lord Ordinary or the Sheriff shall direct.”