1797.

DOUGLAS v. MURRAY, &c.

Ordered and adjudged that the interlocutors be affirmed, with £100 costs.

For Appellant, *Wm. Grant, John Dickson, Wm. Tait.*
For Respondent, *Sir J. Scott, Wm. Adam, John Clerk.*

WILLIAM DOUGLAS, Esq., *Appellant;*

JOHN MURRAY, ROBERT HENDERSON, and R. BELL, surviving Trustees of ROBERT DALRYMPLE, ... *Respondents.*

House of Lords, 29th Dec. 1797.

TRUST—FACTOR AND TRUSTEES—POWERS—ACQUIESCENCE FROM LAPSE OF TIME—PENALTIES IN AN ADJUDICATION.—Circumstances in which a factor for trustees on a private trust, who was also a trustee, was to be presumed as having acted with the concurrence of the trustees in abating £499 of penalties, accumulated in an adjudication in a debt due to the trust, and which he had recovered and discharged;—and action being raised against the appellant, on whose estate the debt was constituted, to make good this sum, twenty-five years thereafter, and after the factor had been removed and had become insolvent, dismissed, reversing the judgment of the Court of Session.

In the ranking and sale of the estate of Darnock, belonging to the appellant's father, William Henderson became the purchaser of the estate.

Robert Dalrymple, W. S., was a large creditor on the estate; and was ranked in the decree of sale for the contents of his adjudications, amounting, including interest and penalties, to the sum of £3965. 16s. 9½d.

Robert Dalrymple, before his death, executed a trust disposition in favour of the respondents, John Murray, Robert Henderson, and Alexander Orr, W.S. They accepted, and entered on the management of the trust; and, with the view of facilitating the recovery of the trust funds, they granted a factory in favour of Mr. Orr, one of their number, "with power to him to uplift, ingather, call for, "pursue, discharge, and convey all debts and sums of "money, heritable or moveable, due and owing to the said "deceased Robert Dalrymple, by bonds, bills, decreets, "accounts, or any other manner of way, specially or gene-"rally assigned to us by the said settlement, with all annual "rents due thereon, and expenses incurred thereanent; and to apply his intromissions therewith under our directions,

1797.

DOUGLAS
v.
MURRAY, &c.

" or a quorum of us," &c. " Declaring that the said Alex-" ander Orr shall not be liable for intromissions or negli-" gence of any kind."

The trust deed declared that " the trustees, or such of them as shall accept of the said trust, and act in consequence " thereof, shall not be liable for omissions, nor in solidum, " one for another, but each shall be liable and accountable " for his own actual intromissions only; nor shall they be " liable for any factor or cashier to be appointed or employ-" ed by them, further than that he is habile and repute " sufficient and responsible for the time, being satisfied that " my said trustees shall act therein as if they were acting " for themselves."

In virtue of this factory, Mr. Orr received payment of the debt due to the trust from the Darnock estate, which belonged then to the appellant's father, afterwards to William Alexander, whose interest was purchased by Sir William Pulteney at the judicial sale thereof, with a reversion over to the appellant, but the factor, instead of receiving the full sum due, as contained in the decree of sale and warrant obtained from the Court, £3965. 16s. 9½d., he granted a discharge for £3465. 17s. 1d., being £499. 18s. 8½d. less.

In these circumstances, the respondents, along with other parties interested, raised a summons of reduction of this discharge, calling the appellant and Sir William Pulteney,* and demanding payment of the sum of £499. 18s. 8½d., twenty-five years after the date thereof, and after the removal, the insolvency, and subsequent death of the factor, on the ground that, by his factory, he had no power to abate the sum for which he had obtained the warrant of the Court.

The action being thus brought against the appellant, in defence, he stated, that by the factory and commission, the full powers of the trustees were delegated upon the factor. That the trustees, by the trust deed, had full power " to com-" pound, transact, and agree thereanent;" and although the factory does not in express terms contain these words, yet they must be implied, especially with reference to one who, while acting as factor, was also a trustee at sametime. That there was no step taken by Mr. Orr without the respondents' knowledge; they were aware that this sum of £499. 18s. 8d. consisted of penalties entirely—that such were

* Sir William gave in a minute, stating, that he had no objection to decree going out, under the proviso that he should be no further liable than to the extent of the balance of the price in his hands; and appeared no further in the action.

1797.

DOUGLAS v. MURRAY, &c.

rarely exacted, and when exacted, only to the effect of covering expenses.—That in point of fact a meeting of the trustees was called by Mr. Orr to have the abatement sanctioned by them, as was clearly proved by the following entry in Mr. Orr's book: "To incidents in tavern with Mr. "Dalrymple, Mr. Murray, Mr. Hay, and Darnock's two "agents, settling the debts due by Darnock, 15s. 6d.—27th "June 1771," which meeting took place after the decree and warrant was obtained. It was further stated that the majority of the other creditors had settled their claims by accepting the principal sums and interest, and neat expenses, and abating the penalties.

Feb. 6, 1793. The Lord Ordinary, of this date, pronounced this interlocutor. "In respect that Alexander Orr had no power to "compound or give down any of the debts, at least without "concurrence of a quorum of the trustees, and that it does "not appear that they concurred in or authorized his dis-"charging the debt in question for less than the sum for "which the warrant of the Court, upon the purchaser, had "been granted: therefore reduces the discharge, disposi-"tion and assignation granted by the said Alexander Orr to "William Alexander, the purchaser, in so far as regards "that part of the debt which was given down by the said "Alexander Orr; and finds the defender liable to the pur-"suers in payment of the said sum of £499. 18s. 8d." A representation being presented against this interlocutor, the Lord Ordinary reported the case to the whole Court, who,

Nov. 29, 1793. of this date, reduced "the discharge, disposition and assig-"nation granted by the said Alexander Orr to William "Alexander, the purchaser of the estate of Darnock, in as "far as regards that part of the debt which was given down "by the said Alexander Orr; find the said William Douglas "liable to the pursuers in payment of the sum so given "down, amounting to £499. 18s. 8d., with interest thereof "since the term of Whitsunday 1768." Other three inter-

Jan. 25, 1796. Jan. 28, 1797. Feb. 18, 1797. locutors followed, of these dates, which simply followed out the findings therein.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The trust deed and settlement granted by Robert Dalrymple in favour of the respondents, his trustees, vested them with the full property of the estate, with "power to collect the debts due to him, "and to grant receipts and discharges or conveyances of "the same, and to *compound, transact, and agree there-*

" *anent*," and declared that they should not be liable for omissions, nor in solidum, nor for any factor or cashier to be employed by them, but each for his own actual intromissions, " being satisfied that my trustees will act herein as if " they were acting for themselves." The factory granted by the trustees to one of their own number empowered him to uplift, discharge, and convey all debts and sums of money, heritable and moveable, and declared that he should " not " be liable for omissions or negligence of any kind, but only " for his actual intromissions." It is proved that Mr. Orr did not grant the discharge sought to be reduced, without first consulting the trustees. He did not act on the bare authority of these powers, although ample and sufficient; the authority of the trustees was actually taken for the abatement of the penalties and accumulated interest in question; for after the decree and warrant of the Court was obtained, a meeting took place, as is proved by the entry in Mr. Orr's books charged for attending that meeting, for " settling the debts due by Darnock," and the names of two of the trustees are mentioned as present, along with Mr. Dalrymple's eldest son, as a beneficiary under the trust. The discharge, besides, was signed by Robert Bell, one of the respondents, as a trustee; so that the whole transaction was gone into with the full knowledge, concurrence, and consent of the trustees. Besides, the established practice in the law of Scotland has been, when a creditor, by adjudication upon bonds which bear a penalty in case of non-payment, comes to receive payment of his debt, out of the price of a bankrupt estate, the penalties and interest accumulated upon them, although they may be due by the strict rigour of law, yet are seldom demanded, and never paid, except in so far as covers costs. Mr. Orr was himself a creditor on the estate, and he acted in the same manner in discharging his own claim, and several other creditors acted in the same spirit. If therefore he, as a trustee, or as factor and trustee, had power to " *act herein as if they were acting for them-* " *selves,*" why challenge the transaction, which has not exceeded these powers, and why challenge it when it is so manifest it had their own authority and consent? Besides, the great delay and lapse of time in bringing this challenge ought to be a complete bar to the action, as upon a presumed acquiescence from their taciturnity.

Pleaded for the Respondents.—Mr. Orr had no power to discharge or convey the adjudications on the estate of Darnock, without receiving payment of the sum contained

1797.

DOUGLAS v. MURRAY, &c.

in the act and warrant of Court. To abate claims is an extraordinary power, which a mere factor cannot exercise without it be specially conferred. It was therefore illegal for him to grant a discharge and conveyance for a sum less by £500 than what was due of the debt. The trustees never gave him authority so to transact and discharge, and it was therefore also illegal for Mr. Alexander to accept of such discharge and conveyance, knowing as he must have done, that it flowed *a non habente potestatem;* and this objection strikes with equal force against the appellant, who now comes in his place. Even if the trustees had authorized this discharge, they would have been still liable, because the trust settlement gave them no such powers to part gratuitously with £500 of the trust funds in this manner. Nor is it of any consequence to show, that the sum abated was equal to the penalties on the debt; because the question always is, what was the amount of the debt in the decree and warrant? If penalties formed a part of that amount then they were as legally due, and exigible just as clearly as the principal sum and interest.

After hearing counsel,

Lord Thurlow said:—

"My Lords,

"This is an appeal from the unanimous decree of a pretty full Court, to which therefore I lean with some degree of favour. But I have listened with eager anxiety to the able argument which has been held at the bar, to learn what possible ground could be suggested in support of the judgment. I can find no trace of it but in the short note of the opinion of the Lord Justice Clerk; he put it upon this, that he did not think that the trustees were consulted upon the transaction of the discharge granted by the factor. From this, I take the consolation to myself, that I understand the true point of this cause; namely, whether these trustees were consulted, and concurred, or not? The Lord Justice Clerk does not say whether he would have deemed any specific consent necessary; but seems to think that if the trustees were consulted, and concurred, the judgment of the Court ought to have been on the other side; and that, for want of such concurrence, the judgment was to be against the validity of the discharge.

"I shall recapitulate the circumstances which appear necessary to be considered in this case. In 1759 adjudications were obtained of the estate of Darnock by several persons, and, among others, by one Robert Dalrymple, for the sum of £3965 and a fraction. This was composed of debts, to which Dalrymple appears to have been entitled in various ways. It is surmised for the appellant, that he bought up some of them while agent for Darnock, and that he ob-

tained eases from the creditors. I give my opinion freely upon this, that if he did not buy up these debts expressly with Darnock's consent, *and for his use, Darnock would not be entitled to the benefit of the eases.* But it is not proved that he did so. One Graham, a witness, says it is believed that Dalrymple got abatements, but for a witness to say so, is totally unavailing.

"Others of the debts in Dalrymple's person had been assigned to him by other creditors, that he might act as trustee for them. Your Lordships have heard it argued, that notwithstanding of such assignment, there still remained an independent interest in the creditor; but in my opinion it is not so, the creditor relies on the trustee, and it is impossible to impeach the acts of the latter, except collusion take place between him and the debtor.

"I consider all the debts to have been vested in Dalrymple, as well those belonging to himself, as those which he held in trust. He led the adjudication in his lifetime, and executed a disposition of his estate, real and personal, to trustees, to whom he gave authority to compound, transact, and agree, and do everything relative to the trust in the most ample form; and a perfect trust as to the whole, was reposed in them. They granted a subordinate commission to Orr, one of their number, to uplift, call for, discharge, and convey all debts real and personal. I agree, if this cause rested entirely on the acts of Orr, that he had no authority to compound, and by doing so would not have bound the trustees. The cause is therefore reduced to the single question, whether the trustees be bound or not, by the transactions which have taken place?

"I conceive, that the acquiescence on their part for such a length of time, must be held to carry not a prescription, but a presumption of reason that those persons, with all the opportunities of knowing the circumstances of the case, which, it is evident from this cause, they had, were satisfied with the acts of the factor. There would otherwise be no security whatever in the affairs of men. If no challenge were brought in a reasonable time, but if they forbore to stir in the matter, when it was brought before them again and again, it affords a demonstration that they saw some reason why they should not stir in it at all.

"A circumstance was stated of a meeting held in August 1771, previous to the discharge, at which these abatements were probably settled. It was ingeniously argued on the other hand, that no agreement could at that meeting have been made, nor any agreement whatever that would have been binding relative to this debt, without the concurrence of three trustees. I think, however, it is probable that the abatement of the penalties was under consideration at this meeting.

"I go entirely, in this cause, upon the abatement of the penalties, these are computed so exactly in the present case, that it is obvious the parties to the discharge must have made the abatement with

1797.

DOUGLAS v. MURRAY, &c.

reference to them. The Court of Session have adopted a principle, that when penalties are asked for in a court of distributive justice, they allow them no further than to cover expenses incurred. In this country, the moment that a penalty is mentioned, the court only go to the principal sum really due. The Court of Session have gone rather awkwardly to work on this subject, with regard to adjudications; if they find any flaw in an adjudication, they do not extend it, to cut down *bona fide* creditors, but to cut down penalties, though they should be due upon the express words of a contract. I remember to have had a conversation on this point with the present President of the Court of Session, and I believe there is nothing the Court will not lay hold of, to reduce the process of adjudication *eo usque* as to penalties. This being familiar in the law of Scotland, it will not be denied me, that most frequently penalties are cut down by the Court of Session in adjudications.

" I do not think that the enquiry suggested by Lord Eskgrove, as to what number of the creditors of Darnock accepted of abatements is material. The practice undoubtedly is, that penalties are cut down on slight grounds. And it is most probable that, at the meeting on the 17th August 1771, this was the subject of deliberation. I agree with Mr. Grant, that what appears does not amount to absolute proof of this, but it is a circumstance of strong presumption.

" In 1771, after this meeting, the discharge was granted, and it is also, from the circumstances of the case, to be presumed that the trustees had knowledge of the terms of it. When I speak thus, I mean a presumption *donec in contrarium probabitur*, not a presumption *juris et de jure*. It certainly might be done away by a proof to the contrary.

" Those who employ factors must be presumed to know what is done by those factors; and, in this view, the trustees of Mr. Dalrymple must be held to be aware of what was done by Mr. Orr, except in the case of corruption on the part of the factor; but, in the present case, I lay bribery entirely out of the question, as not charged in the cause. Orr having been held by the trustees to have done amiss, in paying a large sum of money to the son of Robert Dalrymple, was turned off from his office of factor. Young Dalrymple, the grandson of this Robert, then suggested one Innes to be factor in his room; and of the acts of this second agent they must also be presumed to be cognisant.

" The first act of Innes' administration was to call for Mr. Orr's accounts, which were accordingly rendered; and, in one article of these, it was expressly mentioned, that in the adjudication upon the estate of Darnock, the penalties were given down and deducted, with the concurrence of the two Dalrymples. This fact was stated to the factor appointed to call Orr to account; and is it possible to say that the trustees can be held to have been ignorant of this? In

such a view of the case, no person can be in safety to deal with a factor.

"After this, Orr is sued in an action of count and reckoning, in which he is charged with various articles, but this was none of them. Are the trustees to be held so remote from their own business, that they did not know what was then passing? This action depended for several years; and Orr afterwards died insolvent.

"And further, an action was afterwards raised by the trustees against Darnock himself, in which not a word was said of the transaction in question. They would have it presumed that they remained ignorant of it till 1791, when they discovered it by means of another process. I wish this other process had been produced, for I think it is probable that it would also have been against this presumption of the trustees. They were not anxious, it is said, to inquire into the matter, till pinched by claims on the estate of Dalrymple. But will a court of justice allow that they were not cognisant of their own acts? Is it any reason to be urged on their behalf, that they paid no attention to the affairs entrusted to them? And, at the end of such a length of time, shall they be permitted to make use of this transaction? If twenty-five years will not conclude a matter of this nature, 2500 years would not do it.

"I have said this much with regard to the debts which belonged to Dalrymple in his own right;—there were others contained in his adjudication, in which he was only interested as trustee. It was suggested, though but faintly, that Bell, Clarinda Douglas, Swan, and others, have to come in on grounds of their own, that *they* were truly the creditors, and that Dalrymple was only interested as assignee of their debts. What does this amount to, but that Dalrymple had the management of both? They petitioned the Court, saying, that they had a right as the *cestui que* trusters of Dalrymple. They only called Dalrymple's trustees as respondents, who resisted the demand. The Court afterwards admitted them, and allowed them to take their share of the £500 and interest, on the ground it then stood; and found the trustees liable in £54. 2s. of expenses. But this is not appealed from by them.

"Upon the whole, according to my apprehension of this case, not half the circumstances were necessary to confirm the discharge; the mere acquiescence on the part of the trustees for the space of twenty-five years, would have been sufficient: but, with the circumstances as they stand, I am clear that the appellant is entitled to *absolvitor*. I am happy that my opinion is so far on the same ground with that of the Lord Justice Clerk, for whom I entertain much respect. His Lordship decided against the appellant, on the ground that he thought the trustees had not concurred: whereas I think they must be presumed to have concurred."

It was therefore

1798.

ROSS
v.
M'DOWALL,
&c.

Ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed; and that the defenders be assoilzied; and it is further ordered that the pursuers do pay to the defenders the expenses incurred by them in the Court below, according to the course of the Court.

For Appellant, *Sir John Scott, Wm. Tait.*
For Respondents, *W. Grant, Geo. Ferguson.*

NOTE.—Unreported in Court of Session.

GEORGE ROSS, sometime merchant in Dumfries, now of Staffold, . . . *Appellant;*

MARGARET M'DOWALL, Sister-German and Executrix of the deceased WILLIAM M'DOWALL of Gatehill, Accountant in Dumfries, now Spouse of HUGH STEWART of Gatehill; and the said HUGH STEWART for his interest; and JOHN AIKEN, Writer in Dumfries, Husband of the deceased JEAN M'DOWALL, the other sister, and Executrix of the said WILLIAM M'DOWALL, . . *Respondents.*

House of Lords, 5th Jan. 1798.

BILL—LIABILITY FOR PAYMENT.—A bill was drawn by a party for the accommodation of the acceptor, and was indorsed by the drawer to another, and indorsed again to the bank, with whom the acceptor got it discounted, and received the money. It being dishonoured, a third party, with whom the acceptor had business dealings, and who then had funds of his in his hands, came forward and paid it for the acceptor. Circumstances in which it was held, that he had no recourse against the drawer on the bankruptcy of the acceptor, as the moment he paid the bill for *the acceptor* the bill was for ever extinguished.

At the distance of eighteen years, action was raised upon a bill, in the following circumstances:

Feb. 16, 1777.

The bill was drawn by the appellant Ross for £170 upon and accepted by William Kirkpatrick, for the accommodation of the latter. The bill was indorsed by Ross specially to Thomas Stothart or order; and again indorsed by Stothart and Ross to "Robert Riddock, Esq., agent of the Bank