THOMSON . . . . . APPELLANT.
CHRISTIE . . . . . RESPONDENT.

1852.
15*th and* 16*th June.*

A trustee held responsible for the consequences of a breach of trust notwithstanding indemnity clauses unusually extensive.

Diversity of the grounds on which the Court below and the House proceeded.

Where on a sale by auction the purchaser makes default, the omission to re-sell under the usual clause is not necessarily a breach of trust.

General remarks by the Lord Chancellor on the danger to trustees of taking house property as mortgage security, and on the hazard of trusting to the opinions of surveyors.

Where the instrument creating the trust does not specify the securities to be taken, they must be understood in Law to mean such securities as a trustee of funds can properly accept.

Censure by his Lordship on the prolixity of the Appellant's printed Case.

THE object of the suit was to fix with liability the representative of a trustee who had also acted as paid solicitor under the trust.

The Court of Session treated the case as one rather of professional than fiduciary culpability (*a*).

Mr. *Bethell* and Mr. *B. Andrewes*, for the Appellant; Mr. *Rolt* and Mr. *Anderson*, for the Respondent.

The circumstances are sufficiently disclosed by the following observations of

The LORD CHANCELLOR (*b*):

My Lords, Mr. Thomson, a writer to the signet, was one of the trustees of Matthew Haldane, of Kingslaw, a gentleman who died so far back as the year 1789.

In 1819, Mr. Thomson, being then the surviving trustee, and continuing to carry on the trust, instituted certain proceedings for the purpose of having the property distributed under the direction of the Court below. In 1822 he brought in his accounts, and four years

(*a*) Lord Justice General: This case, like all such cases of liability enforced against a law agent, is a painful one. I see no ground for relieving the Defender.

Lord Mackenzie: I must concur. On the purchaser's failure to comply with the articles of roup, the subjects might have been put up for sale again. This case is not harder than many to be found in the records of this Court; such as the case of *MacDonald of St. Martyns*, and the case of *Struthers* v. *Laing*. [Both these were cases of professional, not fiduciary, culpability.]

Lord Fullerton: I am of the same opinion, &c.

See Scotch Jurist of 23rd Nov., 1849.

(*b*) Lord St. Leonards.

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afterwards (in 1826) he advanced 600*l.* which had come to his hands as part of the property in the way which I am about to mention. But, before doing so, I ought to state, that by the original instruments creating his trust, he was bound to lay that money out on securities, which, although not defined or described, must be understood in law to have meant such securities as a trustee of funds could properly accept.

At the same time, my Lords, I am quite ready to admit that the very unusual and extensive indemnity clauses in this case might to some extent cover an improper disposition, which, under ordinary circumstances, would not be allowed (*a*). But this gentleman, without consulting any of the parties interested, and without taking the opinion of the Court, or having any officer appointed to consider whether it was right so to dispose of the fund, advanced 600*l.* to one Ireland on the security of two houses then actually in mortgage for 3000*l.* It is true these houses were represented as at that time worth 4200*l.*; and there is evidence of a very slight nature—that of a surveyor—that at a later period they had become of a still larger value. But, my Lords, such evidence is little deserving of con-

(*a*) The indemnity clause referred to by the Lord Chancellor provided that "The trustees having otherwise full and absolute power to do, in all the premises above mentioned, just as they think best and fittest, being limited only by their own discretion, and the trust and confidence by me reposed in them, and noways liable to any control, challenge, interference, action, demand, or account from, by or to the children of my said niece, or any other person whatever, either in respect of what the trustees do, or what they do not think fit to do, but that they shall be guided and directed by their own judgment and discretion only, and by no other rule: nor be under or subject to any other authority or power whatever, all and every other thing to the contrary, whether in law, usage, or custom, notwithstanding, the same being hereby in the most express manner excluded, debarred, and discharged; such being, and being hereby declared to be, the nature and extent of the trust and confidence I have, and hereby do place, in my said trustees."

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fidence, because there is no man who has decided or acted in courts of justice but is painfully aware, that where surveyors are employed for different parties, and you have evidence on both sides, the statements are certain to clash, the one with the other.

This money was secured by what we should call a second mortgage upon the property, and a gentleman named Alison joined in a bond with seisin as a security for the amount which was so advanced. That this would have been an improper security by the law of England is beyond all question. Whether it was so by the law of Scotland may be open to a little doubt. But the clauses in these instruments are so large, that if they were not held to apply to a security so taken as this is, I think they really would be inoperative. It therefore seems to me that they must be considered to excuse the trustees for taking this security.

When, however, trustees lend money, the question is not simply whether the estate forming the security is sufficient for the purpose. It lies deeper. Is it prudent to advance money where there is a prior mortgage, and more especially where the value of the property is not greatly beyond its amount? I may observe too that house property is never very satisfactory; for it is liable to casualties which do not attach in general to land. Take for example the accident of fire, whereby the most valuable buildings may be reduced to dust and ashes in the course of a few hours. In such a case, unless the trustees are constantly alive to the neccssity of keeping an insurance afloat (and it is very easy to miss the day), there may be nothing left to secure the trust fund.

My Lords, I make these observations rather with a view to deter trustees in Scotland from doing acts which may be spoken of to their detriment, than as bearing very closely upon the case now in hand; for, as I have

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already said, I think, under the peculiar clauses to which I have adverted, this was an application of the money, the consequences of which a Court of Equity would not visit upon the trustee.

My Lords, so matters stood till 1828; and we have then a statement on the face of certain deeds executed by Mr. Thomson himself, that he had found it necessary to offer the property forming the subject of this security for sale. In 1828 he put it up for sale by auction in two lots, under the power which he had by the mortgage, and it was bought at two different prices by two different persons. Now the purchase monies were more than sufficient to pay off the 3000*l.* (the first mortgage), and the 600*l.* (the second mortgage). They left a surplus. And it is to be observed that Mr. Thomson, the trustee, acted also as the writer to the signet or attorney conducting the sale. For the expenses of it his bill was made out, 50*l.* all but a fraction; and he not only charged, but was paid, as writer to the signet for his professional labour in carrying out the transaction.

Now, my Lords, it appears that the buyers at the auction were mere nominal purchasers. It turned out that both of them had bought for Mr. Alison. Now who was Mr. Alison? He was himself the surety for Mr. Ireland in the bond with seisin, which had been given as one of the securities to Mr. Thomson when he had advanced the 600*l.* Now, if there was anything calculated to excite the care and suspicion of a legal person,—a solicitor entrusted with the management under the trust deed—taking upon himself the execution of the business—charging for his labour and pains in carrying it into execution,—it was the circumstance that Mr. Alison, the surety liable to pay the 600*l.*, should not himself have come forward, but should have driven Mr. Thomson to the necessity of selling the

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property in order to raise the money. We should have thought, therefore, that great caution would have been exhibited in accepting Mr. Alison as the purchaser in lieu of two persons who were bound by the articles, and who had no right to relieve themselves. But, my Lords, Mr. Thomson at once accepts Mr. Alison as purchaser.

By the articles of sale it was stipulated that the purchaser should enter into bond with a surety to pay the money, and perform every other duty; and it was also stipulated, that, upon default, the seller might re-sell the property. The learned Judges below seem to have laid great stress upon the circumstance that the property was not immediately re-sold under that condition; and the case has been in some respects argued upon that ground at your Lordships' bar. Now I cannot agree that the omission to re-sell is of itself a sufficient ground to charge the trustee. We always have a condition upon a sale by auction, that if the buyer does not within a given time pay the price, it shall be lawful to re-sell the property; and that whatever is the loss sustained on that re-sale, it shall fall upon the first purchaser. But it is very seldom indeed that this clause is put in force. No trustee would resort to it if he were taking other proper steps to carry out the purchase; and therefore, my Lords, I do not agree to put the case upon that omission, or to consider it a breach of trust upon the part of Mr. Thomson.

But what was the subsequent conduct of this gentleman? He lived for three years after the sale. Mr. Alison, whom he had admitted as the purchaser, had not the money forthcoming. He was, in fact, insolvent. So likewise was Mr. Ireland. What, then, does Mr. Thomson do? He suddenly changes the whole position and character of matters—complicates the trust; and, as far as in his power, destroys the original security.

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Only observe, my Lords, what takes place. Not a shilling of principal is ever paid by Mr. Alison, although a small sum for interest appears to have been received. Mr Thomson, nevertheless, executes regular deeds conveying the whole property in separate lots to Mr. Alison. On the face of these deeds, he states that he had found it necessary to resort to a sale in order to raise the money. He admits that he had not received the money; and yet he conveys the property in the clearest terms to Mr. Alison. It has been urged that the attestation clause in these deeds had not been filled up; but it was not attempted to be argued that that deficiency could not have been easily supplied at any later time, and then perfection would have been given to the deeds; for the witnesses' names were affixed.

What further takes place? Why, my Lords, it appears that the deeds and the bond with seisin, which formed the original security given to Mr. Thomson for the 600*l.*, were all delivered up to Mr. Alison, to whom likewise the possession of the property was transferred.

My Lords, it is not to be tolerated that a trustee shall venture to sell an estate because he cannot get trust-money in, and then the moment the sale is effected shall endanger, complicate, and obstruct his trust by executing a conveyance, delivering it to the purchaser, giving that purchaser possession of the property, and allowing him to retain it throughout the whole remainder of his (the trustee's) life without the purchaser paying a single shilling of the price, and without the trustee aiding by a single effort to recover it.

My Lords, there is no one more reluctant than I am in a judicial character to bear hardly upon a trustee. I never do so without pain; and I should not do it at all if the law did not compel me. But it is impossible that trusts can ever be properly executed, if transactions

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such as that which I have described are suffered to pass uncensured.

Mr. Thomson cannot be protected by the clause which has been cited. No man can be permitted to sell an estate as a trustee, and then leave it optional whether that sale shall or shall not be completed by payment of the purchase-money. He is bound from the very necessity of the transaction (if he does not himself find the money) to pursue the matter until he has brought it to a satisfactory conclusion. The act of Mr. Thomson, therefore, was an intromission (*a*) which bound him to answer for his neglect; and I am clearly of opinion that this was a manifest and gross breach of trust. I must, therefore, move your Lordships that the interlocutors complained of be affirmed with costs.

Agreed to (*b*).

(*a*) "And I hereby declare that the said trustees shall not be liable for neglect of any sort, *but only for actual intromissions.*"

(*b*) The Lord Chancellor commented repeatedly and severely on the prolixity of the Appellant's printed case, which extended to 201 quarto pages, made up mainly of recapitulations.

LAW, HOLMES, ANTON, & TURNBULL.—RICHARDSON, LOCH, & MCLAURIN.