Wednesday, November 22.

FIRST DIVISION.

TAYLOR & FERGUSON, LIMITED *v.* GLASS AND OTHERS (GLASS'S TRUSTEES).

Trust — Trustees — Executors — Personal Liability.

G. granted to T. & F. a letter of guarantee for repayment to the extent of £500 of a sum of £2100 which T. & F. advanced to D. G. died and T. & F. intimated to his trustees that they held this guarantee, but they continued their course of dealing with D. and did not proceed to constitute their debt against D. until three years after G.'s death. They then, D. not being able to pay, claimed payment of the £500 from G.'s trustees. G.'s trustees, who, prior to this claim but more than six months after G.'s death, had paid a composition of 15s. in the £1 to G.'s creditors, intimated that they had not sufficient money to pay.

Held that the trustees were not personally liable for the £500.

Per the Lord President—"The executor is not a trustee for creditors. He is *eadem persona cum defuncto*, and as *eadem persona cum defuncto* he is bound to pay and can be made to pay the deceased's debts. He cannot be sued within six months, but after the six months I think he is bound to pay any just debt that is brought to him, and, as it is often expressed, he is bound to pay *primo venienti*. I do not mean that that expression must be pressed too far. . . I do not think the executor would be entitled, so to speak, to get up early on the first day after the six months had expired and run round to those creditors whom he liked best and leave the others in the lurch. But on the other hand I think he is entitled to pay when persons come forward. If they come forward in such numbers that he sees that the estate is insolvent, I think that it would be his duty certainly to give notice to them to that effect and not pay more to one than to another; and, undoubtedly, he is not entitled—because there are cases decided to that effect—he is not entitled to pay a creditor whom he knows to be a deferred creditor and leave the preferred creditor unsatisfied . . . On the other hand, the trustee is not bound to turn himself into a trustee in bankruptcy, and I think therefore that what it comes to is this—that the next step lies with the person who says that the money is due to him."

Taylor & Ferguson, Limited, wholesale wine and spirit merchants, Glasgow, raised an action against John Glass and others, the trustees acting under the trust-disposition and settlement of the deceased John Glass. The pursuers sought to have the defenders decerned and ordained "as such trustees and as individuals, conjunctly and severally, to make payment to the pursuers of the sum of £500 sterling, with interest thereon at the rate of 5 per centum per annum from the 9th day of February 1910 until payment, being the sum guaranteed to be paid by the said deceased John Glass to the pursuers conform to letter of guarantee granted by him in their favour, dated 23rd March 1900."

The pursuers pleaded, *inter alia*—"(1) The defenders being liable to make payment to the pursuers of the sum of £500 under the letter of guarantee libelled, decree should be pronounced as craved. (2) The defenders having failed to make provision for payment of the said sum out of the trust-funds in their charge before paying away the sums condescended on, they are personally liable to the pursuers therefor."

The defenders pleaded, *inter alia*—"(4) The pursuers having continued to deal with the principal debtor after the death of the said John Glass, and having renewed the bill or bills current at the date of his death, and having given time to the principal debtor, the defenders, as his trustees, are freed from liability under said letter of guarantee. (5) In respect that the defenders acted in good faith and in the ordinary course of trust administration in making the payments to the deceased's creditors condescended on, and that the pursuers at that time made no claim against the trust-estate, the defenders are not individually liable for the sum sued for. (6) In any event, the defenders are only individually liable to pay to the pursuers such sum as they would have received had they participated in the distribution of the trust funds among the creditors which has already taken place."

The *facts* of the case appear from the opinion of the Lord Ordinary (SKERRINGTON) (see also that of the Lord President), who on 8th November 1910 pronounced this interlocutor—"Sustains the fifth plea-in-law for the defenders, and repels the second plea-in-law for the pursuers; and assoilzies the defenders from the conclusions of the summons so far as laid against them personally, and decerns against them as trustees of the deceased John Glass in terms of the conclusions of the summons; and having heard counsel on the question of expenses, finds no expenses due to or by either party."

Opinion.—"On 23rd March 1900 the late John Glass gave to the pursuers a letter of guarantee which bore that the pursuers were about to advance to John Donohoe the sum of £2100 on loan, 'to continue so long as you (the pursuers) may think fit, and that it has been arranged that I should guarantee you due repayment thereof to the extent after mentioned.' By the said letter the said John Glass bound himself, and his heirs, executors, and representatives whomsoever, all jointly and severally with the said John Donohoe, to repay the said loan to the pursuers (at any time, on receiving two months' notice of their desire to obtain repayment), but

that only to the extent of £500 sterling, to which sum the said guarantee had been agreed to be limited. The said guarantee further provided that 'although any promissory-note or bill held by you for the said loan is not presented for payment, or is held unenforced, or is renewed, this guarantee shall remain binding upon me, and shall be a continuing guarantee so long as the said sum of two thousand one hundred pounds, or any part thereof, and interest thereon, shall remain unpaid by the said John Donohoe or his representatives.'

"John Glass died on 2nd June 1906, at which date the principal sum due to the pursuers was £1650. Since then £20 has been paid to account, leaving £1630 still due. These figures are not formally admitted on record, but it was not disputed by the defenders' counsel that a much larger sum than £500 is still due by Donohoe to the pursuers.

"The first ground upon which the defenders Mr Glass's testamentary trustees claimed to escape liability was that subsequent to the death of Mr Glass the pursuers had continued to renew the bills for the principal sum due by him. It was argued that the clause above quoted had no reference to the period subsequent to the death of Mr Glass. This construction is, in my opinion, far too narrow, the plain object of the parties being that the guarantee should continue until the loan had been repaid, notwithstanding the fact that bills had been held over or renewed. It was further argued that the trustees' liability was barred *mora* and *personali exceptione*, but I find no relevant averments in support of this contention. It follows, in my opinion, that the pursuers are entitled to decree as concluded for against Mr Glass's trustees.

"The pursuers further claim that they are entitled to decree against the defenders as individuals, in respect that the latter have incurred personal liability for the debt by paying to the creditors other than the pursuers dividends amounting to 15s. per £1. It is doubtful whether the trust estate still in the hands of the defenders will be enough to provide the pursuers with an equalising dividend. I am of opinion that this claim is unfounded. The pursuers' claim under their letter of guarantee was essentially conditional upon the principal debtor failing to pay when called upon; and it was further in terms conditional upon the pursuers giving to the guarantor two months' notice of their desire to obtain repayment. Instead of liquidating their claim against Mr Glass's estate, as they might have done, by demanding payment from the principal debtor and from Mr Glass's representatives, the pursuers contented themselves with informing Mr Glass's trustees by letter, dated 29th June 1906, that they held the said letter of guarantee. They did not demand repayment, as they no doubt preferred to continue the former course of dealing with the principal debtor. In these circumstances Mr Glass's trustees were, I think, entitled to pay the creditors who had liquid debts; and it is not in my opinion material that they were unable to pay in full but only paid a dividend.

"I accordingly assoilzie the defenders from the action so far as laid against them personally."

The pursuers reclaimed, and argued—Where trustees were aware that there were outstanding debts they were not entitled to pay away the trust estate without making provision for the debt—*Lamond's Trustees* v. *Croom*, March 8, 1871, 9 Macph. 662, 8 S.L.R. 412; *Heritable Securities Investment Association, Limited* v. *Miller's Trustees*, December 17, 1892, 20 R. 675, 30 S.L.R. 354. In *Stewart's Trustees* v. *Evans*, June 9, 1871, 9 Macph. 810, 8 S.L.R. 549, the trustees paid away the trust estate in the reasonable belief that all debts had been satisfied.

Argued for the defenders and reclaimers—Executors and testamentary trustees were not trustees for creditors. They were entitled to act in the same way as the deceased might honestly have done—*Globe Insurance Company* v. *M'Kenzie*, 1850, 7 Bell's App. 296, Lord Brougham at 319. They could not pay the estate to beneficiaries if they had reason to believe that the estate was insolvent, but there was no duty on them to provide for contingent debts. Reference was also made to *Laird* v. *Hamilton*, 1911, 1 S.L.T. 27, and Bell's Principles, sec. 1900.

At advising—

LORD PRESIDENT—In this case Messrs Taylor & Ferguson, wine and spirit merchants, sue certain gentlemen, who are executors of the late Mr Glass, in respect of a letter of guarantee which was granted by Mr Glass during his lifetime, in which he guaranteed the account of Mr Donohoe up to the extent of £500. The Lord Ordinary has granted decree against the defenders in their representative capacity, but he has refused to give decree against them personally, and in the reclaiming note before your Lordships the respondents do not complain of the decree which was given against them in their representative capacity, but the pursuers insist that besides that they ought to have decree against the defenders personally.

Now the state of affairs was that Mr Glass died in June 1906. There seem to have been various transactions between Mr Glass and Messrs Taylor & Ferguson, because there was an application by the trustees, through their solicitor, to Messrs Taylor & Ferguson, to know what credit he had standing in their books. In answer to that the trustees and executors were told that there was a letter of guarantee existing which had been granted by Mr Glass for Mr Donohoe to the extent of £500. The trustees then asked Messrs Taylor & Ferguson if they had any proposal in connection with the letter of guarantee and they said they had none, and upon that nothing was done. I ought to explain that the letter of guarantee was for sums in which Mr Donohoe might be indebted

to Messrs Taylor & Ferguson, and no steps were taken by Messrs Taylor & Ferguson at this time to constitute their debt against Mr Donohoe, but their course of dealing with Mr Donohoe was allowed to go on.

Nothing more seems to have been heard of the matter until three years after the death of Glass, when Messrs Taylor & Ferguson proceeded to constitute their debt against Mr Donohoe and then intimated to the trustees that they would require payment of the £500, Donohoe it seems not having been in a position to pay what he was due. The trustees intimated that they had not now sufficient money to pay £500, most of the money in their hands having been paid to Glass's creditors. To that Messrs Taylor & Ferguson replied that they "understand Mr Glass's creditors have received a composition of 15s. in the £1," and that they "think that a sum should have been set aside to meet this guarantee. Under these circumstances we consider that the trustees are responsible." And that is the position that is taken up in this action.

Now, it is perhaps curious that there is not more explicit law upon this subject; but it seems to me the matter is really perfectly well settled. I should like to repeat here—as I can now do with more authority—what I said in a case of *Laird* v. *Hamilton*, 1911, 1 S.L.T. 27, which I decided for Lord Guthrie in the Outer House; and there, speaking of an executor, I said that though he is not a trustee for creditors, "I do not think that the proposition that he is not a trustee in a question with a deceased's creditors is exactly the same as saying that he therefore has no duty whatever to them. The authorities are somewhat vague upon what the precise confines of this duty are, but that there is such a duty may be well gathered, I think, from the way in which Lord M'Laren has expressed the matter in section 2159 of his work."

Now I think that the duty comes to be this—Emphatically he is not a trustee. That was laid down in a considered judgment of the House of Lords in the case of the *Globe Insurance Company* v. *Mackenzie*, 1850, 7 Bell's Appeals 296; and the same proposition was repeated, following, of course, that judgment, in the case of *Mitchell* v. *Mackersy*, 8 F. 198, which reaffirmed the case of *Stewart's Trustees* v. *Stewart's Executrix*, 1896, 23 R. 739, and which finally overruled the case of *Gray's Trustees* v. *Royal Bank*, 23 R. 199.

Accordingly we start with the proposition that the executor is not a trustee for creditors. He is *eadem persona cum defuncto*, and as *eadem persona cum defuncto* he is bound to pay and can be made to pay the deceased's debts. He cannot be sued within six months, but after the six months I think he is bound to pay any just debt that is brought to him, and, as it is often expressed, he is bound to pay *primo venienti*. I do not mean that that expression must be pressed too far. As I said in *Laird's* case, I do not think the executor would be entitled, so to speak, to get up early on the first day after the six months had expired and run round to those creditors whom he liked best and leave the others in the lurch. But, on the other hand, I think he is entitled to pay when creditors come forward. If they come forward in such numbers that he sees that the estate is insolvent, I think it would be his duty certainly to give notice to them to that effect and not pay more to one than to another; and, undoubtedly, he is not entitled—because there are cases decided to that effect—he is not entitled to pay a creditor whom he knows to be a deferred creditor and leave the preferred creditor unsatisfied. Of course there are not many creditors who are in the position of preferred creditors in the sense in which I am using the word, but there are some.

On the other hand, the trustee is not bound to turn himself into a trustee in bankruptcy, and I think, therefore, what it comes to is this—that the next step lies with the person who says that the money is due to him. In other words, in this case I think it was Messrs Taylor & Ferguson's business to make up their minds in 1906 either to constitute their debt against Mr Donohoe and then proceed to make good the liability under the guarantee, or else to go on dealing with Mr Donohoe, but in that way to take the risk that the deceased guarantor's money might be paid away to his lawful creditors. Really, when you say that the executor is *eadem persona cum defuncto*, you seem to solve the problem. Suppose one of those other creditors had come to Mr Glass when alive and had said to him, "Pay me my debt," would it have been any answer on Mr Glass's part to say, "No, I cannot pay you your debt in full because I know there is a guarantee under which in a few years' time I may be called on to pay and I must really keep some money to pay that creditor as well as you?" That answer would have been no answer at all, and therefore it really comes to this, that we should either have to lay down the proposition that no executor was in safety to pay unless he was actually made to pay by legal process, or else, if that is not so—and it is well settled it is not so, —then we must take the position which I am venturing to take here.

Accordingly I think this view, which is really merely expressing at rather greater length the conclusion to which the Lord Ordinary has come, is a just one.

LORD KINNEAR—I concur.

The LORD PRESIDENT intimated that LORD MACKENZIE, who was absent at the advising, also concurred.

LORD JOHNSTON, who had not heard the case, gave no opinion.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Dean of Faculty (Dickson, K.C.)—D. Anderson. Agents—Cairns, M'Intosh, & Morton, W.S.

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