Tuesday, November 5.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MRS MARY MACADAM OR ANDREW AND MISS MARGARET MACADAM *v.* ALEXANDER M'CUTCHEON (TRUSTEE ON D. MARTIN'S ESTATE).

Bankrupt—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), § 104—*Trust—Specific Appropriation.*

Two cheques were transmitted to an agent in order that their contents might be invested on a specified security. In consequence of some delay in the completion of the borrower's title, the agent paid the cheques into his own bank account, and died a few days after. After his death his estates were sequestrated. *Held* that the contents of the cheques were covered by a special trust, and did not form part of the general bankrupt estate.

This was a petition presented to the Lord Ordinary on the Bills by Mrs Mary Macadam or Andrew and Miss Margaret Macadam, under section 104 of the Bankruptcy Act 1856, praying to have a certain £1000 taken out of the sequestration of the estates of the late David Martin, writer in Newton Stewart.

In April and May 1871 some correspondence took place between the petitioners and Mr Martin, who acted as their agent, in regard to the investment of £1000 belonging to the petitioners. On 26th May Mr Martin intimated that he had found a suitable investment, viz., a security over certain heritable subjects in Kirkcowan. Accordingly, about 8th June the petitioners endorsed and remitted to Mr Martin two cheques in their favour for £510, 5s. 9d., amounting together to £1020, 11s. 6d., in order that he might remit them £20, 11s. 6d., and invest the balance of £1000 in the security mentioned. The £1000 was to be paid to Mr Milroy, the proprietor of the subjects, in exchange for the security. Mr Martin remitted £20, 11s. 6d., and in consequence of some delay which took place in the completion of Mr Milroy's title, he paid the two cheques into his deposit account with the British Linen Company's Bank at Newton Stewart, and received a receipt therefor from the branch agent. The cheques were entered specifically in the cash-book of the bank.

On 21st June Mr Martin died.

On 15th June 1871 there stood to the credit of that account the sum of £186, 11s. 6d., and the only operations thereon afterwards were the paying in on that day of the £1020, 11s. 6d., the proceeds of the two cheques, and the drawing out of a sum of £4 on 17th June 1871. On 21st June 1871, the date when Mr Martin died, there stood at the credit of this account, exclusive of interest, £1203, 3s., which consisted of the £1020, 11s. 6d. remitted by the petitioners, and £182, 11s. 6d. the balance of Mr Martin's own funds, after deducting the draft of £4 above mentioned.

On 21st May 1872, about a year after his death, the estates of Mr Martin were sequestrated, and Mr Alexander M'Cutcheon, writer, Newton Stewart, appointed trustee thereon.

The petition prayed for service both on the trustee and on the bank. The Lord Ordinary appointed the petition to be served on the trustee only. Answers were lodged for him, in which he pleaded that the whole funds standing at the credit of Mr Martin in his account with the bank at his death formed part of the bankrupt estate, to be administered by the trustee for behoof of the creditors.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 22d July* 1872.— . . . . Finds that the petitioners have right to the sum of £1000 specified in the prayer of the petition, with the bank interest which has accrued thereon since 15th June 1871, and that the same must be taken out of the sequestration of the estate of the deceased David Martin: Grants warrant to and ordains the British Linen Company to pay to the petitioners the said sum of £1000, with the whole interest which shall have accrued thereon since 15th June 1871, and decerns: Finds the petitioners entitled to expenses.

"*Note.*—(*After a narrative of the facts*)—The rule of law, as defined by Mr Bell (Com. i. 267), is, that 'where the factor is entrusted with property or money of his principal to buy stock, exchequer bills, &c. and misapplies it, the produce will be the principal's if still clearly distinguishable;' and he refers to the leading case of *Taylor* v *Plumer*, 1815, 3 Maule and Selwyn, 562, in which the authorities are reviewed by Lord Ellenborough, who delivered the judgment of the Court. Mr Bell further states (Com. i. 268), that the general rule may be laid down that in all cases of factory, where the property remitted by the principal or acquired for him by his order, is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor, who has become a bankrupt, have no right to the specific property.' The case of *Sayers*, 22d January 1800, 5 Ves. jr. 168, cited by Mr Bell, is a strong example of the application of this principle.

"In the present case, the sum of £1000 claimed by the petitioners (the £20, 11s. 6d. having been remitted to them by Mr Martin), is clearly identified as their money. It is not mixed and confounded with Mr Martin's money, but is distinguishable in his hands. It remained in his hands as a specific trust, and was never otherwise dealt with either by him or by the petitioners, and it never degenerated into a general debt. Mr Martin evidently paid the money into the bank for safe keeping, after retaining the cheques in his hands for seven days, when he found there was delay, from the state of the title, in completing the transaction, and he had no intention of applying it, and he never converted or applied it, to his own uses and purposes.

"The Lord Ordinary is of opinion that such payment into Mr Martin's bank deposit-account, in which there was then a credit balance, cannot, having regard to the fact that there was thereafter no operations thereon which in any way affected the money, alter the rights of the petitioners, or divest the funds of the trust in their favour, or confer upon the respondent, as the trustee on Mr Martin's sequestrated estate, any greater right than Mr Martin had therein. The Lord Ordinary considers that the respondent can, as trustee for the creditors in the sequestration, only take the right of the bankrupt to this sum *tantum et tale* as it stood in his person—(*Gordon* v. *Cheyne*, 5th February 1824, ii. S. 675)."

M'Cutcheon reclaimed.

In addition to the argument submitted for him

on the general question, it was stated that the British Linen Company had a claim against Mr Martin's estate in respect of bills discounted by them; and it was submitted that, as the bank might advance a claim of retention, the present question could not be tried without making the bank a party to the case.

At advising—

LORD DEAS—This is a question of importance if there could be any doubt about it. But I cannot say that there is. I am quite satisfied that the interlocutor of the Lord Ordinary is right. Mr Martin was employed by the two ladies to procure a security. He did procure a security, or the promise of it,—a specific security mentioned in the letters. After concluding the arrangements with the lenders, these cheques were sent to him on the part of the ladies, on the 7th or 8th June 1871. On 8th June Mr Martin acknowledges receipt of the cheques as follows:—"I am this morning favoured with your letter of yesterday, returning the two cheques, value £1020, 11s. 6d., indorsed by you and your sister. I enclose bank order in your favour for £20, 11s. 6d. The new bonds will be with you in the course of next week. I shall take care that the money is not paid over until the bonds are duly completed. As I mentioned before, they will bear interest at 5 per cent. from 26th of last month." Then it appears that the only reason why the bonds were not transmitted to the lenders was that something was not ready with the borrower's titles. Mr Martin, after keeping the cheques about seven days, very properly paid them into the bank for safe keeping, and they were entered specifically in the cash-books of the bank. The transaction was prevented from being completed by the death of Mr Martin. But for the delays caused, first, by the preparation of the titles, and, second, by Mr Martin's death, the transaction would undoubtedly have been carried out. About a year after, a sequestration of Mr Martin's estates is taken out. The question is, Whether the money is to go into the trustee's hands for behoof of the general creditors? To say that it is would be contrary to all law and equity. Had Mr Martin applied this money to his own purposes, which he had not the slightest intention of doing, it would have been a gross fraud. Apart from fraud, if a person gets money for a specific purpose, the money must be applied to that specific purpose or returned. That doctrine has been often recognised. It was laid down by the Lord President Hope in *Blyth* v. *Maberly's Assignees*, July 10, 1832, 10 S. 796.

As regards any claim the bank may have, there is no call for any reservation. I should be sorry to put in a reservation which might suggest to the bank that it was their duty to try a question not at all to their interest.

LORD ARDMILLAN—The two cheques from the London and Westminster Bank reached Mr Martin covered by a special trust for a well-defined purpose, and they passed into the possession of the British Linen Company's Bank only for temporary custody and security, with a view to the early—the almost immediate—fulfilment of the purpose of the trust, viz., the investment of the petitioners' money. All this appears clearly from the documents, the entries in the books of the bank, and the letters of Mr Martin. I have no doubt that Mr Martin was, up to the date of his death, which occurred within a week, under the responsibility of a special trust for the benefit of the petitioners. It was his duty —and I feel sure it was his intention—to apply that money, according to the trust, to the specific trust for which he held it. Martin was not rendered bankrupt during his life. When he died he was bound to fulfil, and appeared able to fulfil, the trust, as above. £1200 was then at his credit with the bank. Since his death it has been discovered that he was insolvent. In respect of that fact, of the subsequently ascertained insolvency, the trustee on the estate of Mr Martin claims this sum.

I am of opinion, and, I must add, without difficulty or hesitation, that the specific trust under which alone Mr Martin received the money was not discharged or impaired by the deposit for safe temporary custody in the bank, but that the trust adhered to the sum so deposited. To have used the money for his own purposes would have been a breach of trust and a fraud on the part of Mr Martin, and I am of opinion that Martin's trustee cannot claim this money.

The authority of the law of England on this question is most important, and is explained by Mr Lewin (Lewin on Trusts, p. 647), who refers, among other cases, to a case of *Pennell*, which is very instructive.

LORD PRESIDENT—I agree with your Lordships. I think that the doctrine laid down by the Lord President Hope in *Blyth* v. *Maberly's Assignees* directly applies to this case, and the point raised was expressly decided in the case of *Pennell*, cited by Lewin, p. 647.

I agree also that we ought not to insert any reservation of the bank's claim. That is not necessary to the safety of the bank. If the bank have a claim, it must be one of the nature of retention, and that can quite competently be tried in a suspension.

The Court adhered.

Counsel for Petitioners—Watson and Strachan. Agents—Watt & Anderson, W.S.

Counsel for Respondent and Reclaimer—Lord Advocate and Marshall. Agents—Campbell & Smith, W.S.

Tuesday, November 5.

SECOND DIVISION.

[Sheriff of Forfarshire.

NOTE OF APPEAL FOR JOHN COOPER.

Sequestration—Discharge—Bankruptcy Act 1856.

Conviction in Circuit Court against a bankrupt of embezzlement of trust funds, *held* not necessarily to bar his obtaining discharge.

On 5th March 1870 the estates of John Cooper, corn merchant in Dundee, were sequestrated under the Bankruptcy (Scotland) Act 1856, and on 17th March a trustee was appointed on the estate. On November 16th, 1871, the bankrupt presented a petition for discharge to the Sheriff of the county of Forfar (CHEYNE), in which he stated that eighteen months have now expired from the date of the deliverance actually awarding sequestration, and the petitioner is desirous of being finally discharged of all debts contracted by him before the date of the sequestration, and has accordingly procured the concurrence in this petition of a majority in number and value of the creditors who have produced oaths in the sequestration, all conform to the trustee's certificate and consent of the creditors. That the trustee has, in terms of the statute,