

Tuesday, June 22.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

INLAND REVENUE v. PATERSON'S
EXECUTORS.

Succession—Revenue—Testament—General Settlement and Special Destinations—Investments with Special Destinations Taken by Testator Himself, and that subsequent to His General Settlement, Falling under the General Settlement.

A husband and wife executed in 1855 a mutual settlement by which each disposed the whole property which he or she might be entitled to at death in favour of the other in life and the children of the marriage in fee, with powers of division. In 1877 they executed a mutual codicil whereby, in supplement of the general conveyance in the mutual settlement, the husband disposed certain heritable subjects, which he had since acquired, to his wife and children in the same terms as in the mutual settlement, and with the same powers of division. The codicil also gave power to the survivor to make advances to the children and "upon such advances interest at the rate of four per centum per annum shall be calculated from the date or dates of advance to the final division of the free capital or stock of our said means and estates under these settlements." The husband died in 1881 survived by the wife. Certain investments of a moveable character, made by the husband subsequent to the mutual settlement, were taken in name of himself and his wife and the survivor, some of them being before and some after the date of the codicil, and there was one in name of himself and his wife jointly, its date being subsequent to the codicil.

Held that the codicil showed that the intention of the husband was that his investments should be dealt with under the mutual settlement, and that accordingly the right taken by the surviving wife was a life interest.

The Lord Advocate, on behalf of the Commissioners of Inland Revenue, raised an action against William Alexander Paterson and others, the executors of Mrs Elizabeth Finlay or Paterson, Croft House, Craigie, Perth, widow of William Paterson, acting under a deed of apportionment and settlement dated 18th December 1893, and relative codicils dated 26th September 1905 and 17th October 1906.

The pursuer sought payment of estate duty upon (1) certain investments taken by the said William Paterson in name of himself and of his wife and the survivor, and (2) half of an investment taken by him in name of himself and his wife jointly.

The defenders pleaded, *inter alia*—“(2) The investments made by Mr Paterson in joint names of himself and Mrs Paterson and the survivor having been made, not as

testamentary dispositions of his estate, but merely with a view to administration by Mrs Paterson as his executrix and life-rentrix of his estate, did not pass to Mrs Paterson on his death. (3) The investment made by Mr Paterson in joint names of himself and Mrs Paterson having been made not as a donation but merely with a view to administration by Mrs Paterson as executrix and life-rentrix foresaid, no right to the fee thereof vested in her.”

The facts of the case appear from the opinion of the Lord Ordinary (JOHNSTON), who on 29th March 1909 assolizied the defenders from the conclusions of the summons.

Opinion.—“The late William Paterson, who was a civil engineer in railway employment residing in Perth, on 24th April 1855, along with his wife Mrs Elizabeth Finlay or Paterson, executed a mutual settlement, whereby he gave to his wife, in case she should survive him, for her life interest use alienarily, and to Elizabeth Marshall Paterson, their firstborn child, and to any other child or children that might thereafter be born of their marriage, but under the provisions and declarations thereafter mentioned, in fee, all his means and estate then belonging or which might belong to him at the date of his death. Mrs Paterson bequeathed her means and estate to her husband and children in similar terms. They each severally nominated and appointed the survivor sole executor of the predeceaser, and they declared that it should be ‘in the power of the survivor of us, by a writing under his or her hand, to divide and apportion our said means and estate above conveyed among our said children in such manner or shares as the survivor may think proper,’ failing which, the division was to be among the children equally, share and share alike. The deed concluded with a power to the survivor, if necessary, ‘to use and apply the capital of said estates and effects for and towards our own maintenance, and for and towards the maintenance of our said children; reserving always to us and each of us our respective life interests of the estates and effects above conveyed, with full power to us at any time during our joint lives to alter, innovate, or revoke these presents in whole or in part as we may see proper, but declaring always that the same, in so far as it shall not be altered, innovated, or revoked as aforesaid, shall be effectual,’ &c.; and they dispensed with delivery.

“Mr Paterson died on 5th November 1881, survived by his widow. Betwixt the date of the mutual disposition and his death Mr Paterson took a number of investments in railway stocks and other securities of a moveable character, at first in his own name, but afterwards with special destinations either in name of himself and his wife and the survivor, or in name of himself and his wife jointly. At Mr Paterson's death the inventory of his estate was given up by his widow as his sole executrix, on the footing of including the whole of her husband's securities, whether in his own name or in those of

himself and his wife jointly, or in those of himself and his wife and the survivor, as his estate, and duty was paid accordingly.

"Mrs Paterson survived until 24th August 1907, and on her death an inventory of her estate was given up on the footing that *qua* the funds contained in the inventory of her husband's estate she was executrix merely, and that her executors were accountable for the purposes of estate duty for her own net estate only.

"I do not refer in detail to the inventory, because it is complicated by the fact that while investments of her husband to the value of £9253, 17s. 11d. remained on the original joint title, and had not been disturbed since his death, others, to the value of about £1581, 8s. 7d., either by reinvestment on maturity or otherwise, had become vested in Mrs Paterson's name. Duty was paid on the net amount of Mrs Paterson's estate, viz. £1311, without including the value of the estate which she was treated as holding as executrix of her husband, or in trust for herself in *lifereit* and her children in fee. The Inland Revenue now claim duty upon the whole estate, which, by the terms of the special destinations in the certificates of investment, stood in name of Mrs Paterson as the survivor of the spouses, and upon one-half of that which was invested in the names of the spouses jointly, on the ground that these funds had passed to Mrs Paterson on survival of her husband, and were thereafter, at the time of her death, at her disposition and control, and did not fall under the mutual settlement. This action has been raised to determine the right of the Inland Revenue to recover. On a consideration of the circumstances I think that the executors of the late Mrs Paterson are entitled to be *assoiizied*.

"The case was argued to me on the footing, which I accept as correct, that Mr and Mrs Paterson were possessed of little or nothing at the date of the mutual settlement, which was executed shortly after their marriage but after the birth of their first child; that Mr Paterson's estate was gradually amassed in the course of his married life; and that, so far as Mrs Paterson had any other estate at the date of her death, it was derived from savings during her widowhood.

"Valuable information as to Mr Paterson's investments is given in a joint minute of admissions. I may state its result shortly:—(1) All investments left by Mr Paterson were made subsequent to the date of the mutual settlement. (2) All investments standing in his own name alone, with one small exception, were made prior to 30th March 1864, the exception being £200 Five per cent. Preference B Stock of the Highland Railway, acquired in August 1865. (3) The bulk of his investments were acquired between March 1864 and 3rd August 1877, a date of importance, to be afterwards referred to, and all, with the exception of the said £200 Five per cent. Highland Preference B Stock, were taken in joint names and the survivor. (4) Some further investments were taken

between 1877 and the date of Mr Paterson's death in joint names and the survivor, and one in joint names without mention of survivor.

"The first important circumstance that affects the decision of this case is that on 3rd August 1877 Mr and Mrs Paterson jointly executed a codicil, appended to their mutual settlement, in terms which, though not absolutely inconsistent with the idea that Mr Paterson may have been for thirteen or fourteen years placing the bulk of his fortune in joint names with the object of withdrawing the sums so invested from the operation of the mutual settlement, at the same time create a strong presumption that he considered that document as still ruling his whole succession. He had acquired the heritable subjects in which he resided, and in respect that since the mutual disposition and settlement other three children, making four in all, had been born of the marriage, and that he had acquired these heritable subjects, and wished to provide for the management and disposal thereof by this codicil in supplement of the general conveyance by him contained in the mutual settlement, he disposed the said property to his wife and children in the same terms as in the mutual settlement, 'but always with and under the conditions, provisions, declarations, and power of division and apportionment' specified in the said mutual settlement. But the latter part of the codicil contains joint provisions by himself and his wife of a supplementary character, treating the mutual settlement not only as subsisting, but as a deed regulating their joint provision for their children, for instance, a declaration that the 'above provisions to our children'—by which I can only understand the general provisions of the mutual settlement, and not merely the special destination of the heritage—whether the foresaid power of division and apportionment should be exercised or not—which could only refer to the power conferred by the settlement—should be payable to them after the death of the survivor of their parents, on majority or marriage, with power to the survivor to make advances, to be taken into computation at the 'final division of the free capital or stock of our said means and estate under these settlements.' There was further a clause declaring the provisions in favour of Mrs Paterson and of the children of the marriage in full satisfaction of *ius relictæ* and legitimi.

"When I read the terms of this joint codicil and consider its date with reference to the history of the accumulations of Mr Paterson's means and estate, both before and after, I am led to the irresistible conclusion that Mr Paterson did not intend to take the funds, of which after the year 1864 he began to make special investments, out of the scope of the mutual settlement, but merely to facilitate, as he thought, the administration of his estate after his death. It must be always kept in mind that, except the small investment in heritable property, they were all of a class which he, as a man whose life was spent in the railway service,

would naturally make without reference to his lawyer; and that when he did take an investment in heritable property, where legal assistance was required, he made it perfectly clear that the reason for executing a separate deed was, in part at least, merely convenience in administration. That he was creating difficulty instead of the reverse was naturally not understood or anticipated by him.

"I do not think that I need go further than refer to the two cases of *Webster's Trustees*, 4 R. 101; and *Walker's Executors*, 5 R. 965. There is nothing to indicate that the funds in the present case were in any different position from the bond in *Walker's* case, viz., under Mr Paterson's control at the date of his death, and therefore, notwithstanding the terms of investment, were properly included in his estate by his widow and executrix in settling Government duties at his death. But that does not determine whether they were to pass, each under its own special destination, to his widow, or fell under the mutual settlement. In *Webster's* case the Lord Justice-Clerk Moncreiff says—'There are two legal presumptions which may arise in such cases, first, that a special conveyance derogates from a general conveyance; and second, that a later deed derogates from a prior deed. In most of the cases on this subject, such as those of *Glendonwyn* and *Thoms*, the general conveyance was later than the special conveyance, and accordingly these two presumptions came into conflict. But here the two presumptions concur, for the special conveyance is the later, and therefore, *prima facie*, the later destination must rule.' Though in *Perrett's* case, 1909, 46 S.L.R. 453, the language used by the present Lord President is more general, I do not understand that the rule to which he refers is more than as stated by Lord Moncreiff in *Webster's* case, namely, a presumption or *prima facie* rule, and one therefore which may be redargued. In the present case, did I form my opinion upon the circumstances to which I have already adverted, I should have no hesitation in holding that it has been so redargued. But I am, I think, conclusively confirmed in this view by the action of parties after Mr Paterson's death. If it be assumed that the taking of securities in joint names after 1864 was matter of arrangement between the spouses, or was known to Mrs Paterson to have been adopted by her husband for the sole purpose of conveniently vesting a trust title in her, as he thought, I cannot doubt for a moment that if she had proposed to act after his death inconsistently with such trust her children might have established the trust by her writ or oath, and that the reality of the situation was one which the Inland Revenue must have recognised. The Inland Revenue could not found upon the mere form of title, as against the reality and substance, in order to exact additional duties. Now, for more than five and twenty years after Mr Paterson's death his widow and children acted upon the footing that, notwithstanding the terms of invest-

ment of his funds, Mrs Paterson's title was a trust title merely. The children never claimed their legitim, which, had they not acquiesced in the trust for their behoof, would have been their right; and Mrs Paterson, their mother, executed a deed of apportionment and settlement in 1893, in which she emphatically recognised the whole estate to have been Mr Paterson's, and her only beneficial right to be derived from the mutual settlement. Mrs Paterson being now dead her children may be obliged to have recourse to her writ, but they could wish nothing better than this deed of apportionment. I cannot for a moment listen to the suggestion on behalf of the Inland Revenue, first, that Mrs Paterson did not know her own rights and might have claimed the whole estate under these special terms of investment, and that the case must be judged of, not in reference to what Mrs Paterson did, but to what she might have done; and second, that Mrs Paterson may have executed the deed of 1893 for the special purpose of defeating the Revenue's claim to further duties under the Finance Act, passed, as it was, in the following year.

"I shall therefore assoilzie the defenders with expenses."

The pursuer reclaimed, and argued—(1) The investments in name of William Paterson and Mrs Paterson and the survivor passed to Mrs Paterson in fee on his death, and were not carried by his will. A special destination taken after the date of a trust-disposition and settlement superseded the general destination therein—*Perrett's Trustees v. Perrett*, 1909 S.C. 522, Lord President at 527, 46 S.L.R. 453. The codicil dealt with other matters, and did not carry down the date of the settlement to the date of the codicil. In any case certain of the investments were taken subsequent even to the date of the codicil. As to the investment taken after the date of the codicil in favour of William Paterson and Mrs Paterson jointly, half of it passed on his death to her in fee—*Connell's Trustees v. Connell's Trustees*, July 16, 1886, 13 R. 1175, Lord Adam at 1184, 23 S.L.R. 857. The fact that the settlement was mutual made no difference—*Lang's Trustees v. Lang*, July 14, 1885, 12 R. 1265, 22 S.L.R. 866. The right of Mrs Paterson could not be affected by the construction which she put upon it; if it were a fee it made no difference that she thought it was a lifeferent. There was nothing to take the case out of the ordinary rule. The mutual codicil dealt with subjects quite different. (2) It could not be said Mrs Paterson had renounced her right if she was in error as to what that right was, and in any case that did not affect the Crown's right.

Argued for the defenders and respondents—The provision referred to by the Lord Ordinary as to the charging of interest on advances "until the final division of the free capital or stock of our said means and estate under these settlements" showed that Mr Paterson intended all his investments to be carried under the mutual settlement. The codicil showed the inten-

tion of the testator down to its date, and brought the date of the mutual settlement down to the date of the codicil. The conduct of Mrs Paterson showed what she had understood by the mutual codicil, and at least helped to show what her husband's intention had been. It could not be assumed that the children would be offered about half of their legal rights, and that half burdened with a liferent. Rules as to the effect of special destinations did not apply to a case where a contrary intention of the testator could be gathered from his testamentary writings—*Minto's Trustees v. Minto*, November 9, 1898, 1 F. 62, 36 S.L.R. 50. (2) Mrs Paterson by her actings had in effect made a declaration of trust.

At advising—

LORD PRESIDENT—This is a case in which the Inland Revenue sue the executors of Mrs Elizabeth Finlay or Paterson to pay estate duty upon the value of certain investments. The history of these investments is as follows—The lady's deceased husband and herself executed, as married persons, a mutual settlement by which each disposed the whole property which they might be entitled to at their death in favour of the other in liferent and to the children of the marriage in fee, with various powers as to division and so on which it is not necessary that I should enter into. Mr Paterson died on the 5th of November 1881, survived by the late Mrs Paterson. Between the date of the mutual disposition and settlement, which was dated in 1855, and his death, Mr Paterson took a number of investments in railway stocks and other securities of moveable character, with special destinations in favour of himself and his wife and the survivor, and sometimes in favour of himself and his wife jointly. These investments were made with his own money, and accordingly at Mr Paterson's death in 1881 an inventory was given up by his widow as sole executrix in which the whole of these securities, whether in name of himself and his wife jointly or in name of himself and his wife and survivor, were entered as his estate, and paid duty accordingly. Mrs Paterson then lived and enjoyed the liferent of these various investments, that is to say, treating the matter as having fallen under the mutual disposition and settlement. But now that she is dead the Inland Revenue sue her executors for estate duty, upon the ground that these investments belonged to her and not to her husband. If she only took a liferent, then there is admittedly no estate duty payable, not because something did not pass, because that was so, but because of the exception in the Finance Act, which exempts from estate duty property passing which has already paid certain specified duties, one of which was the probate duty, which had been paid in 1881. The argument for the Crown is based upon various decisions in this Court as to the effect of special destinations. I do not propose to go into the question of the law, because I have nothing to add to what

I said in the very recent case of *Perrett's Trustees v. Perrett* (1909 S.C. 522). I only say that I think this case is another illustration of how very unfortunate it is that the doctrine of heritable destinations and the effect of evacuations of special destinations, as in the case of *Glendonwyn*, (1873) L.R. 2 Sc. App. 317, 11 Macph. (H.L.), 33, and *Thoms*, (1888) 6 Macph. 704, and so on, was ever introduced into a domain of the law to which I think it had little application, but that was done so long ago as *Webster's Trustees* (1876, 4 R. 101) and *Walker's Executors* (1878, 5 R. 965), and cannot now be gone back upon. Although that is so, although I do not disguise that I have had some difficulty in the case, yet on the whole I have come to agree with the Lord Ordinary. The Lord Ordinary refers to the language used in *Perrett's case* by myself, and speaks of it as more general than that used by Lord Justice-Clerk Moncreiff in *Webster's case*. I think the Lord Ordinary's interpretation of my language is quite correct, but, if I may say so, I think my language was so clear as to leave no doubt, because I find that after setting forth the various rules which are the outcome of the series of decisions by which I considered myself bound, I go on to say—"But these rules are only presumptions which can be redargued by circumstances," and I go on to give the particular circumstance which had application in that case but has none in this. Taking it in that way, I find that the rules are redargued, to my mind, by the special circumstance of the phraseology used by the deceased Mr William Paterson, along with his wife, in the codicil of 1877. It is quite true that the codicil deals with subjects quite different; it deals with a heritable property, but it goes on, after dealing with that, to use this phrase—speaking about the power of a survivor to make advances to children—that on such advances "interest at the rate of 4 per cent. shall be calculated from the date or dates of advances, until the final division of the free capital or stock of our said means and estates under these settlements." That seems to me clearly to mean this, that William Paterson in 1877 repeats, after the date of these investments, his belief, and consequently his intention, that his estates are to be dealt with under the mutual trust-disposition and settlement, and not under anything else. Accordingly, upon that ground I think the Lord Ordinary's judgment is right.

I confess I should have had more difficulty in resting my judgment upon the ground of the action of Mrs Paterson, because however much Mrs Paterson might truly think her husband intended so and so, and might, as a good wife and widow, respecting his memory, have been determined that in nothing that she did she should go against him, yet, none the less, if she did so she was really making a gift to her children, if the property was truly hers in fee-simple and not in liferent; but the one circum-

stance is enough for me, and consequently upon the whole matter I agree with the Lord Ordinary's interlocutor.

LORD KINNEAR—I am of the same opinion. I agree with an observation which has been made more than once by Lord M'Laren in cases of this kind, that an extension to moveable rights, and especially to such documents as stock certificates, of the doctrine of special destinations in heritage, and of the restricted methods by which such destinations may be evacuated, is, as his Lordship said, a very artificial creation of modern law, and is perhaps founded upon questionable reasons; but I think with your Lordship that the law is so settled that we are bound by it. But then it is settled only to this effect, that such special destinations must be treated in the same way as special legacies which are held to be outside the general words of bequest by which a testator gives his whole estate, heritable and moveable, to particular persons. If that be so, it is, of course, always a mere question of intention in the particular case whether, when the two documents are compared and construed with reference to the circumstances in which they were taken or executed by the testator, he did or did not intend a special legacy to one person, or that the directions of his general will should receive effect. Upon the reasoning that your Lordship has given, I think in this case we must hold the testator's intention to be to dispose of these investments by the mutual settlement to which he and his wife were parties. Therefore I concur.

LORD GUTHRIE—I concur. I think we must, as your Lordships have said, find the evidence of Mr Paterson's intention under his own hand. At the same time, I cannot resist the conviction that what Mrs Paterson did after her husband's death points very strongly to it being the intention both of herself and her husband that the whole estate should be dealt with under the mutual settlement. But apart from that ground, I agree in thinking that sufficient is found under Mr Paterson's own hand, in the codicil, to show that such was his intention—a codicil to which his wife was a party.

LORD M'LAREN and LORD PEARSON were absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Cullen, K.C.—Umpherston. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders (Respondents)—Chree—Hamilton. Agents—W. & J. Burness, W.S.

Wednesday, July 14.

FIRST DIVISION.

[Lord Salvesen, Ordinary.]

GOODALL v. FORBES AND OTHERS.

Process—Summons—Competency—Reparation—Slander—Issue—Accumulation of Defenders—Action against Different Defenders Concluding for Lump Sum of Damages.

In an action of damages for slander at the instance of a licence-holder against certain defenders, in respect of statements said to have been uttered by one of them, K, on their behalf, the pursuer craved decree for a lump sum against the defenders "conjunctly and severally, or otherwise severally, or according as their several liabilities shall be determined." The defenders pleaded that the action as laid was incompetent, on the ground that it concluded for a lump sum in respect of separate and distinct wrongs.

Held that the action was competent, inasmuch as the joint responsibility of the defenders for K's statements—which the pursuer averred—might be satisfactorily tried on an issue putting to the jury "whether the defenders, or one or other, and which of them, stated or caused to be stated" the statements complained of.

Slander—Issue—Counter Issue—Veritas—Averments—Sufficiency—Allegation that Public-House Frequented by Dissolute Men and Women.

In an action of damages for slander at the instance of a licence-holder, the pursuer obtained an issue whether the defenders stated that he was not conducting his business in a satisfactory manner in respect that dissolute men and loose women were allowed to frequent the premises. The defenders pleaded *veritas*.

Averments held sufficient to entitle the defenders to an issue of veritas.

On 11th April 1907 Alexander Goodall, wine and spirit merchant, Glasgow, brought an action against Andrew Forbes, J.P., Alexander Sinclair, J.P., John Battersby, J.P., J. Paton Maclay, J.P., all of Glasgow, and Robert Kyle, writer, 45 West Nile Street, Glasgow, in which he sought to have the defenders ordained, "conjunctly and severally, or otherwise severally, or according as their several liabilities shall be determined," to make payment of £3000 as damages for slander.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary (SALVESEN):—"This is an action of damages for slander of a somewhat unusual kind. The pursuer is the tenant of premises at 68 M'Alpine Street, Glasgow, in which he carried on business under a public-house licence from May 1903 to May 1907. He paid £1000 for the business, and expended £3000 in improving the shop. While carrying on the business the pursuer was also