

of the subjects falling under the conveyances and obligations therein contemplated to and among the children of their marriage; or, in the event of there being no children, to dispose and convey the same by deed to take effect upon the death of the survivor of the spouses.

"The draft of their antenuptial contract of marriage accordingly, as prepared for execution and submitted to and approved of by the parties, contained a clause in the following terms:—"And the said John Wilson and Christiana Johnston, intended spouses as aforesaid, reserve to themselves jointly full power and liberty at any time during their joint lives, by a writing under both their hands, but not otherwise, to sell or burden with debt the heritable subjects above mentioned hereby conveyed, and also to divide and apportion the fee of the subjects and others hereby conveyed, or falling under the conveyances and obligations herein contained, to and among the children of the said intended marriage, or, in the event of there being no children thereof, to dispose and convey the same by deed, to take effect upon the death of the survivor of the said spouses, in such way and manner as they may think proper."

"The contract of marriage, after being engrossed, was duly executed by the parties upon the 6th day of August 1866: and, on the 23d day of August 1866, it was recorded in the Register of Sasines. They were married shortly after the date of the contract.

"After the deed had been so recorded, the clerk who had engrossed the same was informed by some one of the officials in the Record Office that an error appeared to have been made in engrossing the deed. It was pointed out to him that in the contract as executed the above clause was thus expressed, viz.:—"Reserve to themselves jointly full power and liberty at any time during their joint *leaves*, by a writing under both their hands, but not otherwise, to sell," &c.—the word '*leaves*' having been written in place of the word '*lives*,'—and the deed had been so entered in the Record of Sasines. Upon this being discovered, the clerk to whom it was made known, who was the same person by whom the deed had been engrossed, did, at his own hand, and without instructions from the agent of the spouses who had prepared the contract, erase the letters '*lea*' of the said word '*leaves*,' and, by writing the letters '*li*' upon the erasure, rendered the word '*lives*,'—thus making the deed disconform to the record. No mention of this erasure was made in the testing clause; and no addition could or can be made to it as it had been entered in the record.

"Neither the spouses, nor Mr Somerville, their agent, were aware until the present question arose of the circumstances before-stated as to the error in the deed, and the mode taken to obviate it.

"The said spouses having recently occasion to borrow a sum of £900, entered into an arrangement with Messrs Taylor and Son for a loan of that amount, to be advanced as at the term of Whitsunday 1869, on the security of heritable property, settled and conveyed by the said marriage-contract, and Mr Wilson and his spouse were to grant a bond and disposition in security over certain subjects situated in Oxford Street, Edinburgh, contained in the said antenuptial contract of marriage.

"The lenders have taken exception to the title offered by Mr Wilson and his spouse, on the ground, *first*, that the testing clause does not con-

tain any mention that the said word '*lives*' is partly written on an erasure; and *secondly*, that the deed in this particular is disconform to the record, where the word is '*leaves*,' and not '*lives*.' They contend that in these circumstances the clause above quoted does not effectually reserve to the said spouses power to sell and burden and divide, and that any bond and disposition in security, or conveyance or writing, executed by the said spouses jointly would be invalid and inept.

"In these circumstances, the parties desire the opinion of the Court upon the following question of law:—

"Whether the partial erasure on the said word '*lives*,' not mentioned in the testing clause of the deed—and the discrepancy thereby created between the deed and the record,—render the clause above quoted inoperative and ineffectual?

"Or, Whether the clause is not sufficient without the words '*during their joint lives*,' and is not effectual though these words were held *pro non scriptis*."

"If the Court shall be of opinion that the erasure in the deed in the particular above explained vitiates the clause, and renders it inoperative, they are requested to pronounce a decree to that effect. If they are of opinion that the clause is effectual notwithstanding of the erasure, they are requested to pronounce judgment to that effect.

"And both parties consent that the opinion and judgment to be pronounced by your Lordships shall not be subject to review of the House of Lords."

PATISON for spouses.

HALL for lenders.

The Court held that the word might either be taken as "*leaves*," which would be a mere clerical error not vitiating the deed, or as "*lives*;" but the erasure could not have the effect of annulling it.

Agent for Spouses—J. Somerville, S.S.C.

Agent for Lenders—W. H. Cornillon, S.S.C.

Thursday, May 20.

FIRST DIVISION.

TOSH AND OTHERS v. HOOD AND ANOTHER.

Trust—Revocation—Lapse—Cumulative Bequests. A testator conveyed his whole property, heritable and moveable, to two parties whom he named his executors, for the purpose *inter alia* of paying, at the first term of Martinmas or Whitsunday after his death, certain legacies, including a legacy of £100 to W. H. He subsequently executed another deed, appointing one of the persons named as executors in the previous deed, and another, to be his executors for the administration of his moveable estate, including payment to the same W. H. of a legacy of £300. *Held* (1) that the second deed revoked the first *quoad* the moveable estate, and that the legatees named in the first deed were not entitled to payment out of the *universitas* of the estate, but only out of the heritage; (2) that the legacy of £100 to W. H. did not lapse although he died before the term of payment, he having survived the testator;

and (3) that the executors of W. H. were entitled both to the £100 and to the £300.

On 16th July 1868 David Hood executed a disposition and settlement, conveying his whole estate, heritable and moveable, to Charles Tosh and John Hood, whom he nominated his sole executors, for the purpose (1) of paying his debts and deathbed and funeral expenses; (2) "for payment of the legacies and bequests, at the first term of Martinmas or Whitsunday that shall happen six months after my decease, to the persons after named and designed, *videlicet*, to Charles Tosh, merchant, Kirriemuir, one of my executors, of the sum of £400; to Peter Mitchell, residing in Kirriemuir, son of the late Peter or Patrick Mitchell, baker in Kirriemuir, of the sum of £300; to Mary Mitchell, residing in Kirriemuir, sister of the said Peter Mitchell, my legatee, of the sum of £100 sterling; to Mrs Jane Ann Hood or Hill, spouse of James Hill, farmer, Braideston, the sum of £100 sterling; to William Hood, farmer, Pitcur, near Coupar-Angus, the sum of £100 sterling; and whatever residue there may be over of my said means and estate after payment of the foresaid legacies and expenses, I direct and appoint the same to be paid over to the said John Hood, farmer, Linross, my said executor, whom I hereby appoint to be my residuary legatee: And I hereby revoke all former settlements made and executed by me at any time heretofore: Reserving always my own liferent of the whole estate and effects, heritable and moveable, real and personal, above conveyed, with full power to me at any time in my life, and even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as I may think proper."

"On 22d August 1867 Hood executed this deed: I, David Hood, presently residing in Kirriemuir, being, resolved to settle my affairs, do hereby make, constitute, and appoint John Hood, tenant at Linross, and James Hill, tenant at Braideston, and the survivor of them, to be my executors or executor, with full power to them and the survivor to intromit with the whole moveable and personal estate and executry of every description which shall belong to me at the time of my death, to give up inventories thereof, to confirm the same, and generally to do everything in the premises competent to executors: And I appoint the said John Hood and James Hill, and the survivor of them, after paying all my just and lawful debts and funeral charges, and the expense of confirming and recovering my said estate, to make payment of the following legacies, at the first term of Whitsunday or Martinmas after my death, with interest during the not-payment, viz., to the said James Hill, one of my executors, and his heirs, the sum of £300 sterling; and to William David Proctor Hood, tenant at Pitcur, and his heirs, the like sum of £300 sterling; and whatever residue there may be of my said means and estate after the above payments, I ordain the said John Hood and James Hill, and the survivor of them, to pay over the same to the said John Hood, one of my executors, and his heirs, whom I hereby appoint my residuary legatee or legatees: And this I declare to be my last will and testament."

The testator died in March 1868. At the dates of both the said testamentary writings, as well as at his death, the said David Hood was possessed of heritable property of the value of £600 or thereby, and he was at the said dates possessed of moveable property of the value of £1300 or thereby. The amount of the said heritable property is inadequate

to meet the legacies bequeathed by the deed first above mentioned. The heritable and moveable properties together are more than sufficient for payment of all the legacies bequeathed both by the deed first above mentioned and by the last will and testament second above mentioned. William David Proctor Hood, farmer at Pitcur, one of the legatees under the deed first above mentioned, and therein named William Hood, survived the testator, but died after the term of Whitsunday before the term of Martinmas 1868, the term of payment of the legacies thereby bequeathed. The said John Hood has been confirmed executor to the said William David Proctor Hood, conform to testament-dative by the Commissary of Forfarshire, dated 15th July 1868. The said John Hood is the residuary legatee under both the said testamentary writings, but he makes no claim to any residue of the heritable estate, and he does not dispute that the legacies in the first deed are to be paid out of the heritage. The whole parties having or claiming to have an interest under the said deeds, desired the opinion of the Court on the following questions of law arising on the construction of, and effect to be given to, the said deeds:—“(1) Are the legatees under the deed of 16th July 1866, first above mentioned, entitled to payment of the legacies thereby bequeathed, out of the *universitas* of the said David Hood's estates, or are they only entitled to payment of such portion of the said legacies as can be paid out of the proceeds of the heritable estate? (2) Did the legacy of £100 bequeathed to the said William Hood, otherwise William David Proctor Hood, by the deed first above mentioned, lapse in consequence of his predeceasing the term of payment? (3) If the said legacy of £100 did not lapse, is the executor of the said William Hood entitled to payment of that legacy, and also of the legacy of £300 bequeathed to the said William Hood by the deed second above mentioned; or to which of the said legacies is the said executor entitled?”

CLARK and BALFOUR for John Hood and James Hill.

MILLAR, Q.C., and WATSON, for Tosh and Others. At advising—

LORD PRESIDENT—The question for our determination in the Special Case before us depends on the legal construction and effect of certain deeds of a testamentary nature left by the late David Hood. If, in arriving at the intention of the testator, we were entitled to go beyond the mere legal construction of the clauses of the deed, and resort to conjecture and surmise, perhaps doubts might be suggested whether it was his intention that both deeds should stand as testamentary instruments to any effect; or whether the latter deed was not intended to revoke the former *in toto*; whether the testator, when he made the second, had not perhaps forgotten the existence of the first, or, if he remembered its existence, had not forgotten its precise terms, or did not intend that this second deed, prepared by a different agent, at a different place, and before different witnesses, should take the place of the first. But I am of opinion that we are not entitled to give effect to such conjectures. We must judge of the testator's intention entirely from what these instruments themselves contain.

The first deed is a general conveyance to Charles Tosh and James Hood of the whole of the testator's estate, heritable and moveable. These parties are directed in what way the *universitas* of this estate

is to be distributed. The second deed vests the administration of the moveable estate in the same James Hood, but not in Charles Tosh, another party named James Hill coming in his place. It appears to me that the effect of this is to vest the administration of the heritable estate in Charles Tosh and James Hood, as disponees under the first deed, and the moveable estate in James Hood and James Hill as executors-nominate under the second. As far as administration is concerned, therefore, the two portions of the estate are separated, and therefore there is no doubt that, in so far as administration of the moveable estate is concerned, the second deed is a revocation of the first. But, as regards the heritable estate, the second deed cannot apply to it at all, and therefore the first deed, *quoad* the heritage, stands unrevoked. The second deed contains a clause that the last deed is the testator's last will and settlement. That confirms what I have already said as to it being a revocation of the first deed so far as being a conveyance of moveables. But this contention might be carried farther, and it might be said that not only as a conveyance of the moveable estate, but also as a destination of the moveables and of the legacies appointed, the last deed was meant as a revocation of the first. The contention might be carried that length, but no one before us goes the length of saying that the second deed is a revocation of the legacies contained in the first. It is only said that, so far as regards the moveable estate, the legacies are not to be paid out of it. I think that contention is well founded. The moveable estate is vested in James Hood and James Hill, who are directed to pay two special legacies of £300 each, and they are ordained, after payment of these and of the testator's debts and other expenses, to pay over the residue to James Hood. It appears to me, therefore, that the plain intention of the testator is that the moveable estate is to be burdened with no more than the £600 of special legacies and these expenses, and the residue is to go to James Hood as residuary legatee, and his heirs. The other legacies which are bequeathed by the first deed are left to form a charge on the heritable estate. No doubt that is not sufficient to meet them except to a certain extent. Therefore the legatees under his deed of 1866 are not entitled to payment of their legacies out of the *universitas*, but only to such proportion as may be paid out of the heritable estate.

The second question relates to the legacy of £100 to William Hood. The terms of that legacy are very simple. The trustees are directed to pay to William Hood, farmer, Pitcur, near Coupar-Angus, the amount of £100, stg. Not to his heirs. To him *nominatim* only, and, if he had predeceased the testator, the legacy would have lapsed. But he did not predecease the testator. The testator died in March 1868. William Hood did not die till after the term of Whitsunday ensuing, but he did die before Martinmas ensuing. Now the direction as to payment of these legacies is that they shall be paid "at the first term of Martinmas or Whitsunday that shall happen six months after my decease." The first term six months after the death of the testator was Martinmas, and William had died before that. Therefore the question is, whether, the legatee having predeceased the term of payment, the legacy has lapsed? I see no authority for that. I think if the special legatee survive the testator, though the legacy may not be payable for some time, it vests in the legatee.

Therefore I answer the second question in favour of William's executors.

The third question is—(*reads*). I think he is entitled to both legacies. The one is not meant to be substituted for the other, but both are to receive effect. That is, always assuming, as I do, that the testator intended by these two deeds that the legacies should be paid out of the proceeds of his heritable estate. If that is so, nothing can be more distinct than these two legacies—for the one is payable out of the heritable, and the other out of the personal estate. In the second place, they are destined to different persons, for the one is to William Hood alone, and the other is to William Hood and his heirs. And they are given by different deeds, which, it is assumed, are both intended to receive effect.

LORD DEAS thought there might have been some doubt as to the effect of the two deeds, but did not go into the question, as it was assumed in the case that all the legacies were to be paid, and therefore concurred.

LORD ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that the legatees under the deed of 16th July 1866 are entitled to payment of their legacies out of the heritable estate of the deceased, so far as sufficient for that purpose, but to no extent whatever out of his moveable estate. There was by that deed made a general settlement of Mr Hood's heritage, burdened with certain payments; and a general settlement of his moveable estate burdened with these same payments. The after deed of August 1867, which was a general settlement of moveables, and declared to be Mr Hood's last will and testament, superseded and revoked his former deed so far as moveables were concerned. It did so, not merely so far as it regulated the administration of the estate and the disposal of the residue, but also as regarded the legacies payable out of the moveable estate; for, after bestowing two legacies, it expressly declares the residue to consist of "whatever there may be of my said means and estate after the above payments." I do not see any ground for holding that the prior deed was revoked or altered as regards Mr Hood's heritage. The result, as I think, is, that the first deed remained a settlement of heritage, burdened with the payments specified in it; and the second deed was the deceased's settlement of moveables, burdened exclusively with the legacies which itself specifies.

I am also of opinion that William Hood, having survived the testator, became entitled to his legacy of £100, although he predeceased the term of payment; the case not being taken out of the operation of the general rule to that effect by anything contained in the deed.

And finally I am of opinion that he became entitled to both the legacies of £100 and £300, the one under the settlement of heritage, the other under the settlement of moveables.

Agents for Hood and Hill—J. & J. Gardiner, S.S.C.

Agents for Tosh and Others—Adam & Sang, S.S.C.