

The Court therefore answered in favour of the third parties to the case.

Counsel for First and Second Parties—Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Third Parties—Graham Murray. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Fourth Party—Guthrie. Agent—Alexander Fleming, S.S.C.

Saturday, December 7.

SECOND DIVISION.

[Lord Adam, Ordinary.

PAXTON'S EXECUTORS v. PAXTON.

*Trust—Legacy made Burden on Heritage with Power to Legatee to Sell, but no Direct Conveyance—Right to sue Heir-at-law for Payment where Legatee Dead without Payment.*

A husband left his whole means and estate to his wife in *lifereit*, and to his heirs and executors and assignees whomsoever in fee. Subsequently by *codicil* he bequeathed a specific legacy to his wife, declaring the same until paid a real burden on the heritable estate, and conferring on her power to sell the heritable property if necessary to meet this. There was no direct disposition of the heritage to the wife. The wife did not receive payment of the legacy during her *lifereit*, and never exercised the power of sale, but died leaving a general disposition of all her estate in favour of executors. *Held*, in a question between them and her husband's heir-at-law, whose title had been made up independently of the deed of settlement, that the former were entitled to obtain payment from the latter of the amount of the specific legacy, less any sums received by the widow from the moveable estate of her husband.

*Prescription—Holograph Writings and Mem. in Note-books—Proof of Resting-owing.*

Seventeen years after a party's death a claim was made against his representative, founded on a prescribed promissory-note, endorsed by the debtor, and having markings of payments of interest appended holograph of him, and also on certain memoranda relating to the interest which had been entered by the deceased in pass-books. No interest had been paid for seventeen years. *Held* (rev. the Lord Ordinary (Adam), *duo*. Lord Gifford) that in the circumstances there was not sufficient evidence of resting-owing.

*Observed* (per Lord Gifford) that the promissory-note was an *adminicle* of proof, not of the debt, but of its having at one time existed.

Andrew Paxton died on 4th August 1861 leaving a disposition and settlement conveying his whole estate, heritable and moveable, to his widow Mrs Margaret Storey or Paxton in *lifereit*, and his own heirs, executors, and assignees whomsoever in fee. By *codicil*, dated 23d June 1857, appended thereto, he also bequeathed to his widow a legacy of £600, and declared the same to be payable to her twelve months after his death,

and that it should form a real burden on his heritable estate until paid. He also gave his widow power to sell such portion of the heritable estate as should be sufficient to discharge the legacy and pay expenses. The widow was confirmed executrix, and after payment of debts the estate amounted to no more than £90, 14s. 4d. She died on 24th February 1877 leaving a disposition and settlement nominating her brothers, the pursuers in this action—Ralph, Richard, and John Storey,—her executors, and conveying to them her whole means and estate, heritable and moveable. Mrs Paxton never exercised her power to realise the heritable estate in payment of the £600 legacy, and the pursuers asserted it was still a burden on the estate, and claimed it from Adam Paxton, the defender, who had made up his title to the heritage as heir-at-law independently of the disposition and settlement. The defender answered that Mrs Paxton had obtained payment otherwise. This question formed the first point of the case.

The pursuers further averred, *inter alia*—“By promissory-note, dated 4th June 1845, the deceased Andrew Paxton bound himself to pay to Ralph Storey six months after date the sum of £223 sterling for value received, and by holograph acknowledgment, of date 1859, Paxton acknowledged to be owing Storey £223 sterling. The interest was duly paid by Paxton up to the term preceding his death, and thereafter by his widow. By another holograph writing, dated 22d July 1846, Paxton acknowledged to have received from Storey £10. The holograph acknowledgment contained in the pass-book embraces this sum. The pursuers as executors of the deceased Ralph Storey senior are now in right of these two sums, amounting together to £233, and interest is due thereon from 1861.” There was also a claim for £30 founded on similar entries.

The defenders objected to these claims, impugning the genuineness of the holograph writings, and further objecting to them as prescribed.

The pursuers further stated that they were ready to give the defender credit for £90 14s. 4d. (the balance Mrs Paxton had in her hands as executrix), and for one-fifth of Ralph Storey senior's moveable estate, which had vested in Andrew Paxton in right of his wife.

The pursuers pleaded, *inter alia*,—“1. The foresaid legacy having vested in the said Mrs Margaret Storey or Paxton, and the same having been carried by the disposition and settlement executed by her in favour of the pursuers, they, as executors foresaid, are entitled to decree therefor, with interest from the date of her death as concluded for. 2. In any view, the said legacy having been declared a real burden on the heritable estate of the said deceased Andrew Paxton, the defender is not entitled to take up the succession without discharging it by making payment of the sum so constituted. 3. The foresaid sums of £223 and £10 and £30 being due and resting-owing, the pursuers as executors of the said Ralph Storey senior are entitled to decree therefor with interest.”

The defender pleaded, *inter alia*,—“1. The claim for the alleged legacy is unfounded, in respect (1) that the writings libelled are insufficient to constitute a real burden upon the property, or any obligation enforceable against an heir-at-law

(2) that the widow herself was the executrix, and bound to pay legacies out of the executry funds; (3) that her failure to sell the heritable estate in order to pay the said legacy implies that it had been otherwise paid; or that by her conduct she waived or abandoned her right to said legacy; and (4) that the pursuers have no title to recover it even if due. 2. The promissory-note founded on is invalid as a document of debt, in respect (1) that it is prescribed; (2) that it is vitiated *in essentialibus*; (3) that no value was ever given for it; and (4) that the pursuers have no lawful title to it. 3. The alleged holograph writings being more than twenty years old are prescribed."

The Lord Ordinary (ADAM) pronounced an interlocutor giving decree against the defender in terms of the conclusions of the summons. He added this note:—

"*Note.*—As regards the legacy of £600 left to Mrs Paxton, it is clear that the moveable estate left by her husband was insufficient to pay it. She did not during her life exercise the power given to her of selling such portion of the heritable estate as would be sufficient for that purpose, and it has consequently never been paid. It is declared that the legacy should until paid form a real burden on the heritable estate left by the testator, and as the defender has succeeded to that estate it appears to the Lord Ordinary that he is liable in payment of the legacy—*Ersk. iii. 8, 51; Bell's Prin. secs. 915-916.* The Lord Ordinary understood that the parties had agreed that the balance in Mrs Paxton's hands of her husband's moveable estate applicable to payment of this legacy should be taken to amount to £125.

"The second sum sued for is a sum of £233 contained in a promissory-note dated 4th June 1845, granted by Andrew Paxton in favour of Mr Ralph Storey. The note is written on a stamp dated 7th November 1845. It must therefore have been antedated. It does not appear to the Lord Ordinary that that circumstance affects the validity of the note. It is maintained that this debt is prescribed. It is proved that the markings of payments of interest on the back are holograph of the debtor Mr Paxton. The last of these is dated 'June 1854,' after the years of prescription of the note, but not within the vicennial prescription of holograph writs. Two pass-books are produced which contain entries proved to be holograph of Mr Paxton. The first of these contains an entry of the receipt of this sum of £223, and of another sum of £10, making £233, and entries of payments of interest thereon annually down to 1858. The amount is then carried forward to the second pass-book, in which there are entries holograph of Mr Paxton of payments of interest down to March 1861, the date of Mr Paxton's death, he having died on 4th August 1861. It will be observed that the last of these entries falls within the period of the vicennial prescription. There can be no doubt that these entries refer to the debt sued for. It appears to the Lord Ordinary that the holograph writ produced not being itself prescribed is sufficient to elide the prescription of the promissory-note, and that it is sufficiently proved that the sum of £223 was due and resting-owing at the date of Mr Paxton's death, and that it is still unpaid—*Ferguson v. Bethune, March 7, 1811, F.C.; Mackindoe v. Frame, November 18, 1824, 3 S. 295.*

"The pursuers also produce a document dated

22d June 1846, bearing to be signed by Andrew Paxton, by which he acknowledges to have received from Mr Ralph Storey the sum of £10. This is the sum referred to above as being entered along with the sum of £223 in the pass-books. On the same grounds, the Lord Ordinary thinks that this sum is due by the defender. There falls to be deducted from the sums due to the pursuers as executors of their father the share of their father's estate which was due to Paxton as in right of his wife, but which never was paid. The Lord Ordinary understood that the parties had agreed to hold this to amount to the sum of £52, 8s. 6d.

"The pursuer Ralph Storey produced a document dated 21st February 1849, bearing to be signed by Andrew Paxton, by which he acknowledges to have received from him the sum of £49. This document is also proved to be holograph of Mr Paxton. It has markings in his handwriting of payments of interest down to 1854, and of sums of £2 and £10 having been paid in 1850 and April 1854 respectively, leaving a balance of £37 due as at that date. Corresponding entries are to be found in the first pass-book, in which the payment of interest is continued down to 1858. The balance of £37 is then carried into the second pass-book. A sum of £7 is credited as paid in June 1860, and the entries of payments of interest are continued till June 1861, Paxton having died before the next termly payment. This entry is within the period of the vicennial prescription. It appears therefore to the Lord Ordinary that it is sufficiently proved that this debt was due and resting-owing by Mr Paxton, and is now due and resting-owing by the defender.

"The pursuers have been allowed expenses, but only under modification, because it appears to the Lord Ordinary that a great deal of expense has been occasioned by their delay in taking proceedings to recover payment of the debts in question."

The defender reclaimed.

Authorities cited—*Wink v. Speirs, March 23, 1868, 6 Macph. 657; Waddell v. Waddell, December 20, 1790, H. of L. 3 Pat. App. 188; Ferguson v. Bethune, March 7, 1811, F.C.; Mackindoe v. Frame, November 18, 1824, 3 S. 295; 1 Bell's Comms. (M'Laren's ed.) 420.*

At advising—

LORD ORMDALE—The pursuers conclude in this case against the defender as heir-at-law of the deceased Andrew Paxton, and as having taken up his heritable estate, for payment of a legacy of £600 bequeathed by Paxton in favour of his widow, in whose place and right the pursuers now are, and also for payment of three separate sums of £223, £10, and £30, being alleged debts of Paxton.

I. *The Legacy of £600.*—I did not understand the defender to maintain that payment of the legacy has ever been made, or that it has been otherwise satisfied except to the extent of £125 as mentioned by the Lord Ordinary in the note to his interlocutor. But the defender argued as his only defence that, as he has made up his title to Paxton's heritable estate, not under his deed of settlement, but independently of it altogether, as his heir-at-law, he is not under any obligation to pay the legacy, seeing that it never was consti-

tuted a real burden on the heritable estate. Now, although it is true that the legacy has not been constituted a burden on the heritable estate so as to be effectual against creditors or singular successors, it has, I think, been created an obligation on the defender as having succeeded to and taken up the heritable estate, which he must fulfil. Paxton's settlement was in effect and intention a conveyance of the *universitas* of his means and estate, and although there is no direct disposition of the heritable estate to his widow, she was to have the power of selling and granting dispositions of it to purchasers in order to pay the £600 legacy. To that extent and effect therefore the heritable estate was virtually destined to the widow, and this being so, the defender as coming in the place of Paxton could not evade payment of the legacy by merely making up the title to Paxton's heritable estate independently of his deed of settlement. I think that by gratuitously taking up the heritable estate he has rendered himself liable in payment of the legacy. And in addition to the authorities on the point cited by the Lord Ordinary, there is the case of *Wyllie v. Ross and Others*, Nov. 12, 1825, 4 S. 172.

II. *The Promissory-Note for £223.*—The next question is whether the promissory-note for £223 has been saved from prescription. It is true that one of the markings of interest is after the first course of sexennial prescription had run, but then the second course, commencing six years thereafter, must, in terms of *Ferguson v. Bethune*, 7 March 1811, F.C., referred to by Mr Bell (1 Bell's Coms., M'Laren's Edition, 420), be held to have taken effect. The pursuers' action, therefore, cannot be maintained on the promissory-note. But then they rely on the holograph entries in the pass-books of the debtor Paxton. I am not satisfied, however, that this is sufficient for them. (1) Neither their action nor the Lord Ordinary's judgment is laid upon the holograph entries, but solely upon the promissory-note; (2) and at any rate, supposing that they could get over this objection by amending their record, I think that in the circumstances their claim could not now be given effect to after the lapse of so many years and the deaths of various parties who might have been expected to throw light on the subject, merely in respect of the entries in the pass-books. These pass-books are different altogether from regular books, and there is no proper evidence of the object or purpose for which the entries in them were made. There is further, I think, great room in the circumstances for the presumption that this debt had been satisfied, and is no longer a subsisting debt. In this state of matters the case of *Waddell v. Waddell* (3 Paton's Appeals, 188) and *Wink v. Speirs* (6 Macph. 657) must, I think, be held as conclusive against the contention of the pursuers. It was further urged, however, by the pursuers that there was here the promissory-note in addition to the holograph entries, and that this was sufficient to bring the present case from under the principles of decision in the cases referred to. I cannot think so. The promissory-note must be held as extinguished, and to allow it now to establish a debt not otherwise proved would, as it appears to me, be quite inadmissible. No doubt Mr Bell (1 Com. 119) says "that although a bill after being prescribed may be produced in the way of admittance as documentary evidence," he adds, "the proof on which alone judgment can

proceed is the writ or oath of the debtor," by which I understand the learned author to mean that there must be proof sufficient to prove the resting-owing of the sum in the bill, independently of the bill itself, although the bill may be produced and read along with the other writs in order to show that such a writ had existed. But the promissory-note in question being extinguished by prescription is no proof at all of a debt being resting-owing, and it has been shown that holograph entries do not in the circumstances amount to such proof. I cannot, therefore, hold the alleged £223 debt to be established. And besides, the proof in the present case is so unsatisfactory, to say the least of it, in regard to the party or parties who got possession of the promissory-note shortly after Paxton's death, and from whom it was ultimately obtained with a view to the present action, that I am confirmed in my opinion that the pursuers have failed to establish their claim for the £223—the more especially considering that the *onus probandi* lies entirely upon them, as was very distinctly explained by Lord Fullerton at p. 600 of the report of the case of *Darnley v. Kirkwood*, 7 D.

III. *The £30 and £10 Debts.*—As the observations I have now made in reference to the £223 claim are in all material respects applicable also to the alleged £30 and £10 debts, nothing more need be said as to them, except that as they can derive no aid from the promissory-note they are even less supported than the £223 claim.

The result is, that in my opinion the Lord Ordinary's interlocutor reclaimed against ought to be adhered to *quoad* the £600 legacy, but in regard to the pursuers' other claims recalled, and the defender assolizied.

LORD GIFFORD—In this case there arise two questions, the one entirely distinct from the other. The first question has reference to the legacy of £600 left by Andrew Paxton to his widow. The point on which it turns is, whether the pursuers as the representatives of Mrs Paxton are entitled to recover that sum from the defender, who is the heir-at-law of Andrew Paxton, under certain admitted deductions. The claim falls to be decided under the law as it stood prior to the Conveyancing Act of 1874, which by the 27th section provided that no objection to the validity of any deed or writing as a conveyance of heritage should be founded on the absence of the word "dispone." We have to inquire whether the trustor gave to his widow any right to the £600 so as to entitle her representatives to have the sum made good out of his heritable estate. I think that his will is sufficiently explicit to enable me to say that he did so. Had such a question arisen under the recent statute there could have been no room for doubt, but the point is, whether he actually, as under the former law, effected his purpose, for of his intention I do not think there can be question.

Now, I am inclined to read the will and the codicil together as one deed. There is a conveyance of his whole estate in *liferent*, and then there is the specific legacy in the codicil, with the declaration that until paid it shall form a real burden upon the heritage. Looking at this in its strictest feudal meaning, it is a disposition in *liferent*, with a power of sale, in order to make up the amount of the legacy should the moveable

estate prove insufficient. I know of no case where the exercise of such a power has been found imperative in order to its efficacy.

It has occurred frequently that a man has taken a disposition of heritable estate to himself and his wife in liferent, and to his children in fee, but with a reserved power of sale to himself, and the exercise of that power has always been allowed. Really this is a very similar case. Mrs Paxton was the disponee not only of the liferent, but of the £600, with a power of sale, in order to make that sum good. With her liferent the fiar could not interfere. How, then, could he interfere with this power to make good the £600? The power of sale was for her own behoof, and I think that it was effectual, and I entirely agree on this matter with the Lord Ordinary.

Upon the second point we have to consider whether certain debts have been made good as debts due by the late Andrew Paxton, and therefore due by the defender as his heir. Here I confess to feeling some difficulty. The promissory-note is long ago prescribed, and the mode of proof in these circumstances proposed is, in default of oath, certain holograph memoranda kept not in regular account-books but in pass-books. Had nothing been founded on but these entries or memoranda, I should have felt bound by the cases of *Waddell v. Waddell* in the House of Lords and *Wink v. Speirs* here. But in the present instance we have the promissory-note itself, which may be looked upon as an adminicle of proof perhaps, especially when the other coincidences are so very precise, not of the debt but of its having once existed. I had at one time thought this might be sufficient for the pursuers, but on fuller consideration I have come to the conclusion that it will not do to rely upon these memoranda, especially when we see further that a very long time has been permitted to elapse, of which we have no satisfactory explanation. The result is, that all the memoranda, dating back beyond the vicennial period of prescription, are not available. I think, on the whole, that the only safe course will be to hold that the pursuers have not proved resting-owing, and I acquiesce in the decision proposed on the first part of the case strongly, and on the second with doubt and difficulty but without dissent.

LORD JUSTICE-CLERK—I concur on both points.

In regard to the first, the codicil must of course be read as part of the settlement; and, so read, no difficulty arises on the absence from the codicil of the word "dispone." That technical formality is fully complied with; but the real question raised—and it is not without difficulty—is, whether a disposition to A in liferent, and the heirs whatsoever of the grantor in fee, is a sufficient disposal of the fee so as to validate a power of sale conferred for a specific purpose on the liferenter? I think it is. It is immaterial in what way the heir of the grantor may complete his title. He can only do so under burden of this power, which by virtue of the dispositive words affects the fee. I am further inclined to think that, for the purposes, and to the extent, of the power of sale thus confined, the liferenter had the power of a fiar, and that the dispositive words in her favour gave her, as far as technical conveyancing is concerned, all the power necessary to make her right effectual.

As regards the other question, the claim on the

debt said to have been constituted by the bill libelled, and kept alive by the informal pencil jottings, it is narrow, and requires attentive consideration.

The bill is prescribed. The markings on the back of it of payments of interest might have kept it alive for a second prescriptive term; but that also has long ago expired. But it is said that the pencil entries in the book of old Paxton, the debtor, prove the constitution of the debt, that the bill may be looked at to explain these entries, and that if the constitution be proved, the debtor must aver and prove payment.

While I am not disposed to rule absolutely that these entries are of a nature which might not form adminicles of evidence, that will at all events depend on the circumstances under which they are tendered. Now here, first, they are produced for the first time after an interval of sixteen years from the date of the last of them, and long after the death of the maker of them. We have no means of knowing for what object they were made, or what they were meant to import. During all that interval no claim has been made for either principal or interest of the debt which they are supposed to constitute. Further, the last entry, of interest paid to March 1861, a month after the creditor's death, being in the middle of a term, would seem to import some settlement of the debt itself, which shows how important the explanations of the maker of these entries would have been. And, lastly, this derives very great weight from the fact, wholly unexplained, that the bill itself, indorsed by the creditor's representatives, was delivered to the agent of the creditor, and was found among and recovered from his papers. We are, moreover, left entirely in the dark as to the time and place relative to the finding of these pass-books themselves.

In these circumstances, I think these entries are wholly insufficient to establish the constitution of this debt; and in so finding we only follow the precedents of the cases of *Waddell* and *Wink* which have been referred to.

The Court therefore adhered to the Lord Ordinary's interlocutor, in so far as it decerned in the pursuer's favour for £600, and *quoad ultra* recalled it and assoilzied the defender.

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Counsel for Defender (Reclaimer)—Kinnear—J. C. Smith. Agent—Adam Shiell, S.S.C.