

Counsel for Pursuer (Respondent)—Trayner—Harper. Agent—R. P. Stevenson, S.S.C.

Counsel for Defenders (Appellants)—Gloag—Gillespie. Agents—Mackenzie & Kernack, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

GALLETLY OR HYNDMAN v. ROSS AND
ANOTHER.

Trust—Construction—Annuity.

A testator by his will and settlement nominated and appointed certain persons “to be my trustees; to them I give full power to see my will and arrangements fulfilled for the benefit of my heir after named and designed—First, then, dwelling-house and grounds, everything moveable and heritable to remain in the hands of the heirs of T. R., my father, in perpetuity; following up this to be my desire and will, I fix on J. M. R. . . . to be my heir of Dalling House and grounds as it now stands, heritable and moveable, subject” to certain reservations, and under burden of certain annuities. J. M. R. having made up titles, granted a bond and disposition over Dalling House. In an action of poinding the ground and of mails and duties, at the instance of the bondholder—*held* that whether J. M. R. or the trustees were the proper disponees of Dalling House under the foregoing will and settlement, it, at all events, imported a trust in favour of the annuitants which the bondholder was not entitled to defeat.

Opinion (per Lord Curriehill, Ordinary) that the trustees were the proper disponees of the subjects in question, and that the bond was null as having been granted a *non habente potestatem*.

This was an action of poinding of the ground and of mails and duties at the instance “of Mrs A. M. Galletly or Hyndman against J. M. Ross, alleged proprietor, and J. B. Wingate, tenant and occupant, of certain subjects called Dalling House, Dunoon. The title founded on by the pursuer in support of her action was a bond and disposition in security, dated 16th, and recorded in the Register of Sasines 21st September 1872, granted by J. M. Ross in her favour over the subjects in question. This bond and disposition in security was granted by J. M. Ross on the footing that he was heritable proprietor in virtue of certain holograph and probative testamentary writings by his uncle the deceased William Ross, the former proprietor, and of a notarial instrument expedited by him as general donee under the same; but his title to the property was disputed by the persons who were named by William Ross as his trustees and executors under the testamentary writings, and by the sisters of William Ross, to whom he thereby bequeathed certain annuities. After the present action was raised, an application was made to the Court for the appointment of a judicial factor on the estate of William Ross, and

T. S. Lindsay was appointed to the office, and was thereafter sisted, at his own request, as a defender.

The testamentary writings in question consisted of—(1) a holograph will said to have been written and signed by the testator on 14th June 1869, and a codicil on the same piece of paper, also holograph, but bearing to be dated Dalling House Cottage, 18th June 1869; and (2) a probative will and settlement dated 14th June 1869. The holograph will and codicil contained, *inter alia*, the following:—“I, William Ross, proprietor of Dalling House and grounds, as described by the feu-charter, feeling my health giving way every day, desirous that my affairs should be settled, do hereby nominate and appoint James Nelson, wine and spirit merchant, Glasgow, and William Ross, my nephew, residing at 184 Nelson Street, Tradeston, Glasgow, to be my trustees. To them I give full power to see my will and arrangements fulfilled. First, then, Dalling House and grounds, everything moveable and heritable to remain in the hands of the heirs of Thomas Ross, my father; following up to this my desire and will, I fix on John Macdonald Ross, now in the City Bank, Glasgow, son of Angus Ross, third son of the said Thomas Ross, my father, to be my heir of Dalling House and grounds as it now stands, heritable and moveable, subject to the following reservations—(first) That he cannot sell or borrow any money on it; (second) That the whole proceeds that can be taken out of it by letting the house and cottage after feu-duties and taxes is paid [*shall be paid to my two sisters Margaret and Jessie in the proportion of two-thirds to the former and one-third to the latter during their lives. That sister Margaret take a care of the inventory, and see that the house is cleaned thoroughly every year and the garden kept in good order for the benefit of my heirs*].” The words italicised and within brackets were deleted by the testator, and in substitution thereof he appended the codicil of 18th June 1869:—“I have this day changed my as to the sums to be given to Jessie Ross, my sister, and my sister Margaret. I leave Margaret £40, sister Jess £20, per annum of the income to be derived from Dalling House, and to Jessie Ross, my niece, I leave £20, to be given to her of it for the whole period her life.” The holograph will further dealt with a bond for £1100, as to part of the proceeds of which several directions were given, “the balance to remain in the hands of my trustees to meet any expenses that may incur by the house not letting.” Various legacies were given, and then the following clause as to silver plate occurred:—“My silver plate to be locked up by my trustees till my heir comes into possession of the place; then to be handed to him that he may live like a gentleman. My heir to see that I am buried without fuss, and that the monument is newly painted, my wife’s name entered in the usual way, then mine; that the grave be preserved afterwards for thirty years untouched. My heir failing to fulfil these my instructions, loses claim on which he holds the estate, and goes to William Ross, my nephew, and his heirs.”

The probative will and settlement was in the following terms:—“I, William Ross, proprietor of Dalling House and grounds, as described by the feu-charter, feeling my health giving way

every day, and being desirous that my affairs should be settled, do hereby nominate and appoint James Nelson, wine and spirit merchant, Glasgow, William Ross, wine and spirit merchant there, my nephew, and James Macfarlane, watchmaker and jeweller, Glasgow, to be my trustees; to them I give full power to see my will and arrangements fulfilled for the benefit of my heir after named and designed. First, then, dwelling-house and grounds, everything moveable and heritable, to remain in the hands of the heirs of Thomas Ross, my father, in perpetuity: following up this to be my desire and will, I fix on John Macdonald Ross, now in the City of Glasgow Bank, Glasgow, son of Angus Ross, third son of the said Thomas Ross, my father, to be my heir of Dalling House and grounds as it now stands, heritable and moveable, subject to the following reservations—(First) That he cannot sell it nor borrow any money upon it; (Second) That the whole proceeds that can be taken out of it by letting the house and cottage, after feu-duties and taxes are paid, shall go to pay the following annuities, viz., providing always that the said annuities shall not be payable for any year that the said Dalling House cannot be let to a tenant, (1st) Forty pounds to my sister Margaret; (2d) Twenty pounds to my sister Jessie; and (3d) Twenty pounds to my niece Jessie Ross, second daughter of my brother Angus; and that the balance arising from the letting of said house, and other smaller interests derivable by me, shall go to make up the following legacies, viz., Two hundred pounds to the said William Ross, my nephew, and One hundred and fifty pounds to my faithful servant Catherine M'Rae; further, that the said John Macdonald Ross shall have power and see that the said Dalling House shall be kept in proper order, to enable him to let the house and draw the rents; further, that he shall also have power to carry out my funeral arrangements: Declaring hereby that this settlement shall be effectual although found in my repositories at my death; and I consent to the registration hereof for preservation and execution.—In witness whereof," &c.

The defender J. M. Ross expedes in his own favour a notarial instrument of the dwelling-house and grounds, and recorded it in the Register of Sasines on 24th November 1869. This instrument proceeded upon the infeftment of William Ross, and the mid-couple was thus described in it—"As also there was presented to me, as disposing of the foresaid several subjects, a general settlement or last will and testament granted by the said William Ross, and bearing to be dated at Kirn, Dunoon, the 14th day of June 1869, by which general settlement or last will and testament the said William Ross, *inter alia*, fixed upon the said John Macdonald Ross, therein designed, now in the City of Glasgow Bank, Glasgow, son of Angus Ross, third son of Thomas Ross, his (the testator's) father, to be his heir of Dalling House and grounds 'as it' then stood, heritable and moveable, being (the said house and grounds, as indicated by the relative titles) the several subjects hereinbefore described or referred to, but subject always to and under burden of the feu-duties and others, and performance of the other prestations before referred to, and also under the

reservations of the annuities and legacies specified in said general settlement or last will and testament, and hereinafter mentioned (providing always, as it was thereby provided, that the said annuities should not be payable for any year that the said Dalling House could not be let to a tenant, viz. (First) Forty pounds to his (the testator's) sister Margaret; (Second) Twenty pounds to his sister Jessie; and (Third) Twenty pounds to his niece Jessie Ross, second daughter of his brother Angus; and that the balance arising from the letting of said house, and other smaller interests derivable by him, should go to make up the following legacies, viz., Two hundred pounds to William Ross, his nephew, and One hundred and fifty pounds to his faithful servant Catherine M'Rae, all as particularly therein expressed."

The defender J. M. Ross pleaded—" (1) The facts set forth by the pursuer are not relevant or sufficient to entitle her to decree as concluded for. (2) All parties interested are not called, and the action should be sisted until the testamentary trustees and the annuitants are made parties to it."

The defender Lindsay pleaded—" (1) The testamentary writings libelled of the deceased William Ross contain an effectual nomination of the trustees therein named as his executors, and they are also effectual as or equivalent to a disposition of Dalling House and grounds to the trustees under section 20 of the Titles to Land Consolidation (Scotland) Act 1868. (2) The annuities libelled are preferable to the pursuer's bond, in respect (1st) that the pursuer can have no higher right in a question with the said trustees or the judicial factor than John Macdonald Ross had; (2d) that the writs on which the pursuer founds proceed upon the testamentary writings libelled, and are under burden of the annuities thereby constituted or reserved; and (3d) that the said annuities are effectually created real burdens upon the subjects."

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—"Assolzie the whole defenders from the conclusions of the action, and decerns: Finds the defender Thomas Steven Lindsay, as judicial factor on the estate of the late William Ross, entitled to the fund consigned under the interlocutor of 5th January last."

His Lordship added a note, which besides narrating the circumstances and testamentary writings as above, and considering other points in the case not now necessary to be referred to, contained the following observations:—"Now, it appears to me that the sound construction of these various documents (which must all be read together as forming the final settlement of the deceased) is, that at all events during the lifetime of the annuitants, and possibly for thirty years after the death of the testator, the intention was that Dalling House and grounds should be held by the trustees in order that they might secure the regular payment of the annuities and legacies, and might carry out the trustor's wishes as to the preservation of his monument and non-interference with his burying-ground. It is true that the probative settlement indicates the intention that John Macdonald Ross should have something to say in the management of the property, both in see-

ing that it was kept in proper order, and in letting it and in drawing the rents; but I think he was only to have that power subject to the control of the trustees, and that if the annuities were not regularly paid, or if the house was not regularly let when tenants could have been obtained for it, the trustees were to have the power of managing it for themselves. In short, the management given to John Macdonald Ross by the probative will was substantially not more than was given to the testator's sister Margaret by the original holograph will, afterwards deleted, directing her 'to see that the house is cleaned thoroughly every year and the garden kept in good order for the benefit of my heirs.' . . . I am therefore of opinion that as the pursuer's bond and disposition in security was granted a *non habente potestatem*, she has no real right in the subjects as creditor or otherwise, and that she has no title to sue the present action."

The pursuer reclaimed.

At advising—

LORD PRESIDENT—This is an action of mails and duties, and also of poinding of the ground, and the subjects against which this combination of procedure is directed are certain heritable subjects belonging to the deceased William Ross. The questions raised by this action and reclaiming note depend on the meaning and effect of William Ross' settlement, which is contained in three writings—first of all, a holograph will dated 14th June 1869; secondly, a probative writ dated also on the 14th June; and thirdly, a codicil to the holograph will, also holograph, dated 18th June 1869. Now, in the two principal instruments—the holograph will and the probative instrument—the testator expresses his intention regarding his heritable property in almost identical terms. Taking the probative instrument—in it he nominates "James Nelson, wine and spirit merchant, Glasgow, William Ross, wine and spirit merchant there, my nephew, and James Macfarlane, watchmaker and jeweller, Glasgow, to be my trustees: To them I give full power to see my will and arrangements fulfilled for the benefit of my heir after named and designed. First, then, dwelling-house and grounds, everything moveable and heritable to remain in the hands of the heirs of Thomas Ross, my father, in perpetuity; following up this to be my desire and will, I fix on John Macdonald Ross, now in the City of Glasgow Bank, Glasgow, son of Angus Ross, third son of the said Thomas Ross, my father, to be my heir of Dalling House and grounds, as it now stands, heritable and moveable, subject to the following reservations." And then he proceeds—"(*First*) That he cannot sell it nor borrow any money upon it; (*Second*) That the whole proceeds that can be taken out of it by letting the house and cottage, after feu-duties and taxes are paid, shall go to pay the following annuities, viz., providing always that the said annuities shall not be payable for any year that the said Dalling House cannot be let to a tenant." And then the following annuities are provided—"(*1st*) Forty pounds to my sister Margaret; (*2d*) Twenty pounds to my sister Jessie; and (*3d*) Twenty pounds to my niece Jessie Ross, second daughter of my brother

Angus," which last legacy, we are informed, has now lapsed by the death of the annuitant.

Now, it is contended, on the one hand, that under section 20 of the Conveyancing Act of 1868 this instrument amounts to a conveyance of Dalling House and grounds in favour of the defender John Macdonald Ross; on the other hand, it is said that under the same section of the statute the instrument effects a conveyance of the property to the persons therein named as trustees. It appears to me that the construction of the will is attended with very great difficulty. There seem to be three possible constructions. It may operate as a conveyance in favour of John Macdonald Ross alone, or it may operate as a conveyance in favour of the trustees alone, or lastly, it may operate as a conveyance both to John Macdonald Ross and to the trustees. But whichever view is adopted, I think it is pretty clear that it is a conveyance in trust. Even if it be in favour of John Macdonald Ross alone, it is a conveyance in trust. No doubt in that case the trust in the first place is for the benefit of the annuitants, and after the annuities have terminated, for John Macdonald Ross' own personal benefit. But in every view it is a conveyance in trust in favour of the annuitants. Now, if that be so, I think it is sufficient for the disposal of this case, without determining who is the proper donee of these subjects. Whoever it may be, he can hold only under reservation of the trust in favour of the annuitants. But the effect of this action, if decree is granted in terms of the conclusions of the summons, will be completely to sweep away this trust for the benefit of the annuitants. For its effect will be to carry off the rents, and also the furniture of the house, without which the house cannot be let. Therefore the bondholder must be held to be subject to this trust burden in favour of the annuitants; and consequently I am of opinion, not that the defenders should be assoltized from the conclusions of the action, for that determines more than is necessary for the disposal of this case, but I think the action should be dismissed. It is impossible to allow the bondholder to complete this diligence to the effect of defeating the rights of the annuitants.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court recalled the interlocutor of the Lord Ordinary in so far as it assoltized the defenders, and in place thereof dismissed the action, *quoad ultra* adhering to the interlocutor.

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