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Wednesday, March 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

WHYTE v. ROBERTSON.

(*Ante*, vol. xxvi. pp. 67 and 91, and  
16 R. pp. 95 and 100.)

*Succession—Vesting—Marriage-Contract—  
Power of Apportionment—Fee and Life-  
rent—Sequestration—Discharge.*

A lady by her antenuptial contract of marriage conveyed certain bank shares to herself in liferent, and failing her to her husband in liferent and to the children of the marriage equally in fee, but with power to her husband, and failing him to herself, to apportion the provisions thereby made for children, and failing such apportionment the provisions to divide equally, the issue of a child dying before receiving its provisions, having right to the parent's share.

The husband died in 1869, survived by his wife, one son, and three daughters.

By deed of transfer in 1870 the wife transferred the said shares to herself in liferent, and to her four children *nominatim* equally in fee. The children accepted the transfer, the acceptance bearing that it was not to affect the rights and interests of the children *inter se* under the marriage settlement.

In 1882 the son's estates were sequestrated. In 1884 he got his discharge. In January 1887 his mother died. In November 1887 the trustee in bankruptcy was discharged. In 1888 the sequestration was revived and the trustee in bankruptcy reappointed.

The son brought an action against the trustee to have it found and declared that his share of the bank shares belonged to him, and had not passed under the sequestration. He maintained that until his mother's death he had only a *spes successionis*, which could have been defeated by her, and that the shares had only vested in him upon her death, three years after he had got his discharge.

*Held* that the shares had vested in him upon his acceptance of the transfer of 1870, and consequently fell under the sequestration.

The estates of George Whyte & Company, distillers, Invernettie, Peterhead, and of George Whyte, sole partner thereof, were sequestrated on 7th June 1882, and James

Alexander Robertson, C.A., Edinburgh, was appointed trustee. On 18th March 1884 the bankrupt was discharged without composition, and on 4th November 1887 the trustee was discharged by the Sheriff.

J. A. Robertson was, after a petition to the First Division to revive the sequestration, reappointed trustee on said sequestrated estates upon 8th December 1888. Whyte brought an action against the trustee to have it found and declared that he had an undoubted right in and to a fourth part of certain shares in the Commercial Bank of Scotland, which he averred had vested in him upon his mother's death on 18th January 1887, and therefore since the date of his discharge, and which he had since assigned.

The history of these shares was as follows:—They belonged originally to the pursuer's mother, who by her antenuptial contract of marriage with George Whyte senior conveyed them "to herself in liferent but exclusive of the *jus mariti*, and failing her by death to the said George Whyte in liferent, and in either case to the children of the marriage equally among them if more than one, in fee, subject to the powers of division and other conditions hereinafter mentioned." And it was further declared "that in case there be more than one child of this marriage, the said George Whyte shall have the power, and failing his dying without exercising it, the said Isabella Mess shall have the power, while she remains his widow, at any time of his or her life, or on deathbed, to divide the provisions hereby made for children in such manner as he and, failing him, she may direct by any writing under his or her hand, and failing any such division the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share." Her husband died in April 1869 without leaving a valid deed of apportionment, survived by herself, one son (the pursuer), and three daughters.

By transfer dated 10th and 11th May 1870, and duly registered in the books of the said Commercial Bank, she made over said shares to and in favour of herself, the said Isabella Mess or Whyte, in liferent for her liferent use allenerly, and to the children of the marriage between her and the said George Whyte, namely—George Whyte (the pursuer), Mary Logan Whyte, Phillis Whyte, and Fanny Whyte equally in fee, and to their assignees and successors whomsoever, declaring "that the acceptance thereof was not to affect the rights and interests of the children of the said deceased George Whyte, *inter se*, under the said marriage settlement." The pursuer and his sisters accepted of said assignation.

The pursuer pleaded—"(1) The pursuer being registered owner of one-fourth part of the said thirteen shares of the stock of the said bank, and his right to and interest in the same having vested subsequent to his discharge from sequestration in March 1884, he is entitled to decree in terms of the declaratory conclusion of the summons."

The defender pleaded—“(4) The said shares having formed part of the pursuer's estate at the date of his sequestration, and having been carried to the defender as trustee thereon, and the sequestration of the pursuer's estates having been revived and the defender reappointed trustee thereon, he is entitled, as such trustee, to the said shares. (6) The Court having expressly held, in reviving the sequestration, that the shares in question formed part of the pursuer's sequestrated estate, the question raised in the present action, *quoad* the said shares, is *res judicata*, and the present action ought to be dismissed with expenses.”

The Lord Ordinary (KINNEAR) sustained the fourth plea-in-law for the defender, and assoilzied him from the conclusions of the summons.

“*Opinion.*—The only question is whether the pursuer's right to certain shares in the Commercial Bank vested in him after his discharge, or whether the shares formed part of his sequestrated estate.

“I think this question is decided in substance, if not in form, by the opinion delivered in the First Division when the sequestration was revived.

“The pursuer argues that the attention of the Court was not called to the terms or legal effect of a stipulation in the transfer by the late Mrs Whyte, that the acceptance by the children was not to affect their interests *inter se*. But the Lord President quotes the stipulation in question, and expresses an opinion as to its effect. I hold it to be decided therefore—first, that when Mrs Whyte transferred the shares to herself in *liferent* and her children in fee ‘a complete change in the right of property in the shares was brought about, and the fee belonged to the children as soon as they accepted the transfer; and secondly, that the stipulation in question does not prevent vesting in each of the children to whom the fee is given *nominatim*.”

“It follows that the assignation which the pursuer is said to have granted is ineffectual, unless it can be supported on the ground that the assignee acquired the shares in good faith and for value, in reliance on the ostensible title of the pursuer. That may be a question between the trustee in the sequestration and the assignee. But the assignee is neither called as a party nor even named in this action. His right, if he has any right, will not be prejudiced by the absolvitor, and the possibility that he may be able to hold the shares as against the trustee will not entitle the pursuer to the decree he seeks.”

The pursuer reclaimed, and argued—His right to the shares did not vest upon the execution of the transfer of 1870, but only upon his mother's death in 1887. His mother was not the *fiar*, and had no right to execute that transfer, as it might have defeated the rights of the issue of the children who might have predeceased her, although these rights were secured by the marriage-contract. But the transfer distinctly saved the rights of the children, *inter se*, under the marriage-contract. By

that marriage-contract his mother had a power of apportionment among the children of the marriage after her husband's death, which she could have exercised at any time during her life, and by the exercise of which she could have defeated his (the pursuer's) right to said shares, although not his children's rights if he had predeceased her. As long as she lived he had only a *spes successionis*, which did not pass to his trustee in bankruptcy. If he had predeceased his mother his children would have come in to the exclusion of his creditors. No one would have taken a title from him to these shares during his mother's life. Had the trustee attempted to claim these shares his mother would at once have exercised the power reserved to her. No such claim was made until the revival of the sequestration. As he had got his discharge before her death it was unnecessary for his mother to exercise the power, and his right to these shares did not now pass to the restored trustee.

Argued for the respondent—As the Lord Ordinary had said in his note, this case was decided in substance, if not in form, by the case of *The Northern Heritable Securities Company, Limited v. Whyte*, November 21, 1888, 16 R. 100 (Lord President's opinion, p. 102); see also *Whyte v. Murray*, November 16, 1888, 16 R. 95 (Lord President's opinion, p. 98).

At advising—

LORD RUTHERFURD CLARK—The defender conducted his case personally, and he stated to us a very ingenious argument. But he has not convinced me that the interlocutor of the Lord Ordinary is wrong. On the contrary, I think that it is unassailable.

The Commercial Bank stock which is now in question belonged to the late Mrs Whyte before her marriage. By her marriage-contract she assigned it “to herself in *liferent*, but exclusive of the *ius mariti*, and failing her by death to the said George Whyte in *liferent*, and in either case to the children of the marriage equally among them if more than one in fee, subject to a certain power of division.” The power of division was conferred on George Whyte, and if he did not exercise it, on his wife, with a declaration that failing the exercise of the power the children were to take equally, “the issue of a child dying before receiving its provisions having right to its parent's share.”

The stock being thus assigned by the owner to herself in *liferent* and her children *nascituri* in fee, there can be no doubt that the fee remained in her, with a right of succession in favour of her children.

In May 1870 Mrs Whyte transferred the stock to herself in *liferent* and to the children of the marriage, *nominatim*, equally, in fee. The pursuer was a child of the marriage, and he took an equal share of the fee along with his sisters. The deed of transference declares that the acceptance of it by the children “was not to affect the rights and interests of the children *inter se*

under the marriage-contract." But not the less did the pursuer take a fee. It might have been subject to diminution or even extinction if Mrs Whyte was still entitled to exercise the power of division contained in the marriage-contract. But as she did not attempt to exercise any such power, an equal share in the fee was immediately vested, and remained all along vested in the pursuer.

It is said that Mrs Whyte had no power to execute this transference, in respect that the children of the marriage had no vested interest under the marriage-contract, by reason of the right which was conferred on the issue of a child who died before receiving its provisions. I do not think it necessary to enter into any question of vesting. It might be that the transference was *ultra vires* of Mrs Whyte, but only in the sense that she might thereby be defeating some ulterior right of succession. As far it was within her power, and it effectually transferred the fee to her assignees. The pursuer has no title to except to the transference, and as he survived his mother, any right which his children might have had is necessarily extinguished.

Further, in my opinion, the children were entitled to transact with their mother so as to obtain an immediate right of fee in the stock, and to the exclusion of their issue. But it is not necessary to enter into this question. For the other considerations which I have set out are sufficient for the disposal of the case.

A fee in the Commercial Bank stock was vested in the pursuer in May 1870. His estates were sequestrated in 1882, and he was not discharged till November 1884. It follows that that fee fell within the sequestration, and hence the interlocutor of the Lord Ordinary must be adhered to. Indeed, we are only repeating the decision of the First Division in a former case—*Whyte*, 16 R. pp. 95 and 100.

LORD LEE—The argument of the reclamer, which somewhat impressed me at the time, was to this effect—and it was not stated before the First Division in the previous case—that his mother during her lifetime had no power to deal with the fee of this estate, because it was destined to children, and failing children to the issue of children. It seemed to me that unless there was some law to the effect that under the marriage-contract Mrs Whyte had power to put forward the fee to her children with the result of defeating the interests of grandchildren the reclamer must succeed. I had that difficulty, for there was no vesting under the marriage-contract by itself.

But on examination of the case of *Routledge*—where the difficulties were very fully explained by Lord Succoth—I have come to be of the same opinion as the Lord Ordinary. I am satisfied that that case settled the point. It was repeatedly considered, and finally decided in the House of Lords affirming the view of the majority of the Court—*Routledge v. Carruthers*, May 19, 1812, F.C., and *Majendie v. Carruthers*,

December 16, 1819, F.C.—*aff.* 6 Pat. App. 597. The case of *Pretty v. Neubigging*, March 2, 1854, 16 D. 667, and various other decisions which followed upon it, leave no room for questioning the authority of that case now, although if the point were open I confess to having doubts whether the opinion of Lord Succoth was satisfactorily combated.

LORD JUSTICE-CLERK—I entirely concur with Lord Rutherford Clark.

LORD YOUNG—was absent at the hearing.

The Court adhered.

Counsel for the Pursuer and Reclamer—Party. Agent—Andrew Urquhart, S.S.C.

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Wednesday, March 19.

## SECOND DIVISION.

[Lord Trayner, Ordinary.

HOOD v. STEWART.

*Bill—Accommodation Bill—Transference for Value without Endorsation—Title to Sue—Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 31.*

By the Bills of Exchange Act 1882, sec. 31, it is provided (§ 4), "Where the holder of a bill payable to his order transfers it for value, without endorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferor."

In an action for the amount of a bill of exchange by the transferee for value against the acceptor, the defender pleaded that as the bill was an accommodation bill the pursuer had no higher right against him than the drawers of the bill who had given no value for it. The bill though held by the pursuer for value had not been endorsed on transference by the drawers, who had since become bankrupt.

*Held* (1) that under the 31st section of the Bills of Exchange Act 1882, the pursuer had a title to sue although the bill was not endorsed, and (2) that although the bill was an accommodation bill it was a good obligation binding on the defender as he had accepted it in order that the drawer might raise money upon it.

In 1887 John Hood, 57 Albert Drive, Pollockshields, in security of an alleged loan of £250, received from M'Guffie, Sillars, & Company, bonded storekeepers, Glasgow, a bill for £210 drawn by them and accepted by John Stewart, spirit merchant, Edinburgh. This bill was not met at maturity, and a bill for £220, dated 28th September 1887,