

Tuesday, July 14.

SECOND DIVISION.

ADAMSON'S TRUSTEES v. ADAMSON  
AND OTHERS.

*Succession—Will—Revocation—Conditio si sine liberis decesserit.*

By antenuptial contract of marriage a husband bound himself, *inter alia*, to pay to his wife, in the event of her surviving him, a free liferent annuity of £200, which was declared to be alimentary. In security of the obligations undertaken by him he assigned to the trustees named in the deed certain funds which he directed them to hold after his death for the purpose of paying the foresaid provisions to his wife, if she should survive him, and subject to that purpose for behoof of the children of the marriage.

A few months after the marriage he executed a will whereby he left to his wife, in addition to the annuity provided to her in the marriage-contract, a further sum of £200 per annum, and to his mother a free yearly annuity of £100.

At the date of the testator's death there were no children of the marriage, but after his death a child was born.

*Held* that the testator's will was not revoked by the subsequent birth of the child, in respect that it was not a general disposition of his estate, and that it was executed by him in the knowledge that his wife was pregnant.

*Succession—Annuity—Where Income of Estate Insufficient to Meet Annuity.*

A testator left to his wife by will, in addition to an annuity of £200 provided to her by marriage-contract, a further sum of £200 per annum, and to his mother a free yearly annuity of £100.

After his death it appeared doubtful whether the funds in the hands of the testamentary trustees would be sufficient to meet out of income both the annuities left under the will.

In a question between the annuitants and the testator's child, *held* that the annuities might so far as necessary be paid out of capital.

*Succession—Clause in Contract of Copartnership—Payment of Profits to Executors of Deceased Partner for Benefit of Widow and Children—Partial Settlement.*

It was provided in a contract of copartnership that if either of the partners died during the continuance of the partnership, leaving a widow or children surviving him, the surviving partner should, for six months from the date of said partner's decease, pay to his executors, "for the benefit of his widow, child, or children, the share of profits to which the deceased partner would have been entitled had he lived."

One of the partners under this contract died, leaving a partial settlement

whereby he left annuities to his wife and mother, and appointed executors to see these provisions carried out. He was survived by his wife, his mother, and one child, and after his death it appeared doubtful whether the income of his estate would be sufficient to meet the annuities to his wife and mother.

*Held* that the share of profits payable under the contract of copartnership did not form part of the deceased partner's general executory estate, but fell to be divided equally between his wife and child, and that the wife's share thereof did not fall to be attributed *pro tanto* towards payment of the annuity provided to her under the will.

On 19th May 1890 John Adamson, of the British India Steam Navigation Company at Negapatam, India, died. He was survived by his wife and mother. At the time of his death there were no children of the marriage, but a posthumous child was born on 15th August 1890.

Mr Adamson and his wife had been married in Scotland in January 1889. Prior to their marriage they had entered into a contract of marriage whereby Mr Adamson bound himself to pay to his wife, in the event of her surviving him, a free liferent annuity of £200, restrictable to £100 in the event of her marrying again, which annuity was declared to be alimentary, and not assignable or attachable by the diligence of creditors. He also bound himself to pay her certain sums for furniture and mournings. In security of these obligations he conveyed certain estate to the trustees named in the deed, and it was further provided that after his death the funds assigned should be held by the trustees for securing and paying the foresaid annuity and other provisions to his wife if she should survive him. Subject to the above purpose the trustees were directed to hold the capital of said funds for behoof of the child or children of the marriage, it being declared that the shares of sons should be payable and vest at majority. On her part the wife conveyed her whole estate to the trustees for payment of the income thereof after the death of either of the spouses to the survivor. On the death of the spouses the trustees were to hold the estate for behoof of the children. The wife accepted the provisions made in her favour as in full of every claim she could make by law on the death of her husband; and it was declared that the provisions in favour of children were in full satisfaction of their legitime, and everything else they could claim upon the death of either of the spouses, excepting only their goodwill.

Mr Adamson also left a will dated 21st May 1889, in the following terms:—"I, John Adamson, residing at Negapatam, considering that by marriage-contract I have provided for my wife, Mrs Elizabeth Mary Fairweather or Adamson, in case she shall survive me, a free yearly annuity of £200 sterling per annum, and now for certain good causes I desire to make a farther provision for her in the event of her surviving me, I hereby, by these presents,

leave and bequeath to her a farther sum of £200 sterling per annum, and that in addition to above-mentioned provision and all others narrated in our marriage-contract. I desire also, and do by these presents, leave and bequeath to my mother, Mrs Elizabeth Thomson or Adamson, in case she shall survive me, a free liferent use of Clydesdale Cottage, Brechin, presently occupied by her, with the whole furniture therein belonging to me, and in addition thereto, if my estate will permit, a free yearly annuity of £100 sterling so long as she shall live." . . .

At the time of his death Mr Adamson was in partnership with Mr Henry Dundas Beatson Mactaggart under a contract or agreement of copartnership dated 1st January 1887. By the 22nd article of said agreement it was provided as follows:—"If either of the said partners shall die during the continuance of the said partnership leaving a widow, child, or children him surviving, the surviving partner shall, for a period of six months from the date of decease of said partner, pay to the executors or administrators of said deceased partner, for the benefit of the widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived (in addition to the monies to which they will be entitled under article 20—i.e., the deceased partner's share of the partnership effects), such payment to be made as soon after the expiry of the six months from the date of decease of said partner as a proper account can be made up."

After Mr Adamson's death doubts arose as to the proper legal distribution of his estate, and a special case was presented to the Court in order to have these doubts removed.

The parties to the case were (1) The trustees under the contract of marriage; (2) the executors under the will; (3) Mrs Elizabeth Fairweather or Adamson, the deceased's wife; (4) Mrs Adamson, the mother of the deceased; and (5) the tutors of John Adamson, the posthumous child of the deceased.

The following statements were made in the case—"At the date when the will of 21st May 1889 was executed, the third party was pregnant, and was known by her husband to be so. She was delivered prematurely of still-born twin children on 21st August 1889. At the time of Mr Adamson's death there were no children of the marriage, but a posthumous child was born on 15th August 1890. Mr Adamson's domicile at the time of his marriage was in Scotland, and it continued so till his death. Mr Adamson's estate, with the exception of the house called Clydesdale Cottage, mentioned in the will of 21st May 1889, is entirely moveable. The estate conveyed in trust by the marriage-contract, and now held by the trustees, amounts, after deducting the widow's claims for mournings and furniture, to about £5200, and is thus barely sufficient to meet the expenses of management and the annuity therein provided to the third party. The testament-

ary estate is almost wholly situated in India, and has not yet been realised. It is estimated at the present rate of exchange to amount to about £7500, and it is thus doubtful whether it will be sufficient to meet out of income the annuities in favour of the third and fourth parties provided by said will. The value of Clydesdale Cottage is estimated at £650."

The opinion of the Court was requested on, *inter alia*, the following questions—" (1) Is the will of 21st May 1889 revoked by the subsequent birth of the child to Mr Adamson? (2) In the event of the above question being answered in the negative, do the annuities thereby provided in favour of Mr Adamson's widow and mother rank *pari passu*, or is the annuity in favour of his widow preferable; and are either or both of said annuities payable only out of income, or if that prove insufficient, may they or either of them be paid out of capital? (3) Do said profits of copartnership form part of the deceased's general executory estate; or do they fall to be divided between the third and fifth parties, and if so in what proportions? (4) In the event of the first question being answered in the negative, and of its being held that part of said profits fall to be paid to the third party, does said part fall to be attributed *pro tanto* towards payment of the annuity provided for the third party by the will of 21st May 1889?"

Argued for the fifth parties—*On first question*—Where a child was born to a testator who had previously made a testament when he had no children, the *conditio si sine* was held to apply, and the testament was revoked by the subsequent birth of the child—*Colquhoun v. Campbell*, June 5, 1829, 7 S. 709; *Dobie's Trustees v. Pritchard*, October 19, 1887, 15 R. 2; *Munro's Executors v. Munro*, November 8, 1890, 18 R. 122. The only exception to this rule was when these two elements concurred, viz., that the testament was a partial settlement which did not dispose of a substantial portion of the testator's estate, and that the testator survived the birth of the child for a considerable period—*Yule v. Yule*, 1758, M. 6400. In the case of *Dobie's Trustees*, 15 R. 4, considerable doubt was expressed by Lord Rutherford Clark whether this latter element should be taken into consideration at all. If it were held in this case that the annuities to the testator's widow and mother were payable out of capital, and the estate did not realise well, the annuities might carry away the whole estate from the child, consequently it could not be said that the testator had not by his will disposed of a substantial portion of his estate. The fact that there were provisions in the child's favour in the marriage-contract did not exclude the application of the rule, as there were such provisions both in the case of *Dobie's Trustees* and of *Munro's Executors*. It should therefore be held that the will was revoked by the subsequent birth of a child to the testator. *On second question*—The annuities were only payable out of the income of the estate. *On third*

and fourth questions—The sum payable under the contract of copartnership was to be paid to the deceased's executors. It must therefore be treated as intestate succession, and should be paid to the widow and child in the proportions applicable to such succession. The widow's share also should be added to the funds out of which her annuity was payable.

Argued for the third party—*On first question*—When he executed his will the testator knew that his wife was pregnant, and that will was only a partial settlement. These considerations distinguished this case from the cases of *Colquhoun, Dobie's Trustees*, and *Munro's Executors*, founded on by the fifth parties. In all these cases the judgment had proceeded on the footing that the will made by the testator was a general disposition of his whole estate, executed at a time when he had not before his mind the prospect of his having children. The fact that the testator knew of his wife's pregnancy when he made his will was sufficient to exclude the application of the *conditio*, but the case was made stronger by the other fact, that the will was only a partial settlement—*Bell's Lectures on Conveyancing*, ii., 989; *Yule v. Yule*, M. 6400. *On second question*—The annuity to the widow was on the terms of the will to be preferred to the annuity to the testator's mother. In the event of the income of the estate being insufficient to meet that annuity, it was payable out of capital—*Thomson v. Thomson's Trustees*, July 10, 1868, 5 S.L.R. 742. *On third question*—There was no mention in the clause in the contract of copartnership of any principle of division. The money was never directed to be paid to the executors of the deceased for the benefit of his wife and child. It must therefore be equally divided between them. *On fourth question*—The widow's share of the sum payable under the contract of copartnership must be paid to her in addition to the annuities payable to her under the marriage-contract and will, there being nothing either in the will or contract of copartnership to lead to an opposite conclusion.

Argued for the fourth party—*On first question*—(The argument submitted for the third party was adopted.) It was also to be observed in addition to what the third party had stated, that the testator had in his marriage-contract made substantial provision for his child. The rule which the fifth parties founded on depended on the presumed intention of a man to favour his issue. This was shown by the fact that an objection to a settlement on the ground maintained by the fifth parties could only be made by a child—*Watt v. Jervie*, 1760, M. 6401. In the circumstances of this case the objection had no place. *On second question*—It was admitted that the mother's annuity was postponed to the wife's. Both were payable out of capital. *On third and fourth questions*—The sum payable under the contract of copartnership went into the general executry for the benefit of the widow and child, and the widow's share

must be imputed towards payment of her annuities.

At advising—

LORD JUSTICE-CLERK—The first question is, whether, in respect that the testator's wife bore a child after the execution of the will of 21st May 1889, that settlement is thereby revoked? The peculiar circumstance in the case is that Mrs Adamson, who had previously given birth to still-born twin children, was at the date of the testator's death six months advanced in pregnancy, the child in question being born three months after his father's death.

It is first necessary to consider what is the nature of the settlement of 1889. Was it a settlement which disposed of the testator's whole estate, and which in its essence and effect ought to be affected by the subsequent birth of a child to the testator?

The deed contains two provisions, both essentially of the nature of legacies. The testator provides a further annuity to his wife in addition to the annuity already provided to her by the marriage contract, and also expresses the desire that his mother should have the free life interest use of a cottage belonging to him, and if his estate would permit of it, a free yearly annuity of £100. The testator does not dispose or intend to dispose of the *universitas* of his estate, but makes certain provisions of the nature of legacies, namely, an additional annuity to his wife, and a reasonable provision for the support of his mother. It is admitted in the case that at the time he executed this will the testator was aware that there was an immediate likelihood of his having a child, and I imagine that he did not think that he was by the execution of this will depriving his child of its interest in his estate. The mother was the child's natural guardian in the event of his death, and as she had a good income provided to her under the marriage contract and the will, in addition to the sum to be received by her from her husband's partner, which I shall have afterwards to mention, he might fairly conclude that the child's interests would be well taken care of.

I am therefore of opinion that the will was not revoked by the subsequent birth of the child, and that we must answer this question in the negative.

With regard to the next question, I may explain that the annuity to the testator's mother is provided only if the estate permit of it—that is to say, after carrying out the provisions otherwise directed—and that the trustees would not be justified in trenching on the annuity to the testator's widow in order to pay the annuity to his mother.

With regard to the third question, it was provided by the contract of copartnership between the testator and his partner in business, that if either of the partners should die during the continuance of the partnership, leaving a widow or children surviving him, the surviving partner should, for a period of six months from the date of the deceasing partner's death,

"pay to the executors or administrators of said deceased partner, for the benefit of the widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived." The amount of the fund payable under this article is, we are told, about £800, and the question is how it is to be dealt with. Is it to fall into executory, or to be disposed of in a particular manner? It appears to me, that looking to the terms of the clause in the contract of copartnership, it comes into the hands of the deceased partner's executors for the benefit of his widow and child, and falls to be divided into two equal portions, and that one of these portions must be paid to the widow and the other to the child.

The last question is, whether the widow's share of the sum to be paid under the clause of the contract of copartnership is to be impounded by the executors in order to be added to the fund out of which the annuity provided to her by the will is payable, or whether she is entitled to her share of this sum in addition to that annuity? I am of opinion that the latter is the true answer, and that the widow is entitled to have her share of this sum paid over to her, and that it does not fall to be impounded by the executors to form part of the fund out of which her annuity is payable.

LORD YOUNG—I agree in regard to the answer to be given to the first question. I think the will is not revoked either as to the increased annuity thereby given to the testator's wife or as to the provisions to the mother.

With respect to the second question, my view is that the widow is entitled to the annuity of £200, increased to £400 absolutely, and that the whole estate, income and capital, must go to meet that in the first instance.

In regard to the annuity provided to the testator's mother, I see nothing to limit that provision and make it payable only out of the income of the estate. The words "if my estate permit" mean that the annuity to the widow is to be paid first, and that till it is paid the estate can afford nothing; but if after meeting the widow's annuity and the testator's debts, there is enough left to provide an annuity of £100 to the testator's mother, she is entitled to have it, and we are informed that there will be no difficulty about it, the estate being sufficient to meet both annuities.

On the other questions I agree with your Lordship.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER was absent.

The Court answered the first question in the negative: Found, in answer to the second, that the third party's annuity was not liable to be diminished should there not be sufficient funds to meet both the annuities to the third and the fourth parties; also that payment of the annuities was not limited to the income of the estate, but might,

to the extent to which that might be necessary, be paid out of capital: Answered the first alternative of the third question in the negative, and the second alternative in the affirmative, and found that the profits in question fell to be divided equally between the third and fifth parties: Answered the fourth question in the negative.

Counsel for the First, Second, and Fifth Parties—Macfarlane—Graham Stewart. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Third Party—Guthrie—Wilson. Agents—Duncan & Black, W.S.

Counsel for the Fourth Party—Shaw—Salvesen. Agents—Cairns, M'Intosh, & Morton, W.S.

Tuesday, July 14.

## SECOND DIVISION.

[Sheriff of the Lothians  
and Peebles.

### DARLING v. GRAY & SONS.

*Reparation—Title to Sue—Two Actions for Same Injury.*

A workman died during the progress of an action of damages which he had brought against his employers for injuries sustained in their service, and his mother, as his executrix, was sisted as pursuer in the action. The mother afterwards brought an action of damages as an individual against her son's employers for the loss caused to herself by the death of her son. Held that this second action was incompetent.

Alexander Darling, a mason in the employment of Messrs William Gray & Sons, builders, raised an action against his employers in the Court of Session to recover damages in respect of injuries which he had received while in their employment, and, as he alleged, through their carelessness. He died on 6th January 1891, during the progress of the action, after issues had been adjusted, and his mother, as his executrix, lodged a minute sisting herself as the pursuer in the action.

On 30th April 1891 she raised another action in the Sheriff Court at Edinburgh as an individual against the same defenders, in which she sought to recover damages from them as *solatium* to herself and as reparation for the loss which she had sustained by the death of her son.

The defenders pleaded, *inter alia*, that the action was incompetent.

The pursuer having mentioned that she intended to appeal the case to the Court of Session with the view of having it conjoined with the action brought against the defenders by Alexander Darling before his death, the Sheriff-Substitute (HAMILTON) on 6th June 1891 pronounced an interlocutor allowing a proof before answer without disposing of the defenders' pleas in so far as preliminary.