

LORD KINNEAR concurred.

The Court sustained the appeal and assoilzied the defender.

Counsel for Pursuer and Respondent—Rhind—Baxter. Agent—William Officer, S.S.C.

Counsel for Defender and Appellant—Jameson—Dundas. Agents—Henry & Scott, W.S.

Tuesday, June 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

ROBERTSON v. ROBERTSON'S TRUSTEES.

Trust-Disposition and Assignment—Divestiture of Trustee—Contingent Right of Beneficiary—Subsequent Revocation.

A trustor by trust-disposition and assignment conveyed certain subjects, including certain policies of insurance, to trustees for the purpose, *inter alia*, of paying a sum of £500 to his nephew out of the proceeds of the policies to be received after his death. It was declared that the beneficiary should have no vested interest until payment. The trustor bound himself to keep up the policies. He completely divested himself of the estate conveyed, and reserved no power to revoke. Subsequently, on the narrative that the obligation in favour of his nephew was quite gratuitous, that his nephew's circumstances had improved while his own estate had become materially reduced, and that to give effect to the provision of the trust in question would unfairly prejudice his wife and children, who would now necessarily be seriously affected by the change in his circumstances, he revoked the said gift. The trustor having died, and his trustees having received payment of the proceeds of the policies, it was held that the nephew was entitled to receive payment of £500, the trustor having had no right to revoke the provision in his favour.

The late John Robertson, Elmwood Villa, Pollokshields, Glasgow, by trust-disposition and assignment, dated 21st November 1881, and recorded in the Books of Council and Session the 4th day of February 1890, on the narrative that he was, at the date of granting said deed, in solvent circumstances, and that he regarded himself as morally and legally liable to the persons thereafter named for the sums therein-after mentioned, and that he was desirous of making a suitable provision for his wife and children, with consent of his wife, the said Mrs Jane Ross or Robertson, disposed and made over to her, and James Robertson and David Robertson, his two sons, and William Mathie, No. 15 South Park Terrace, Hillhead, Glasgow, and to their legal suc-

cessors, as trustees for the ends, uses, and purposes therein mentioned, and to their assignees and disponees, certain heritable subjects, stocks, and insurance policies, and bound himself to make payment to the trustees of the future contributions required to keep the said insurance policies in force, and delivered up the policies to them to be used as their own proper writs and evidents. By the trust-disposition and assignment the trustor declared that his trustees should hold and apply the trust-estate thereby created, and the annual interest or produce thereof . . . "(Third) in payment to my nephew James Henderson Robertson, Paterson Street, Glasgow, of the sum of £500 sterling, . . . which payment . . . I direct my trustees to make so soon as they receive payment of the proceeds of the insurance policies." These policies were all payable after the trustor's death. The trustor further declared "that none of the provisions hereinbefore made in favour of any person shall become vested interests in such persons until the terms of payment thereof." The trust-deed contained no power of revocation, but the trust-disposition and assignment was delivered to the trustees, who all accepted office, conform to minute dated 23rd November 1881, and the deed was then intimated by the trustees to the insurance companies, and the trustees also completed titles in their favour to the heritable properties conveyed to them by the trust-disposition and assignment.

On 7th September 1887 John Robertson, with consent and concurrence of Jane Ross or Robertson, his wife, executed a deed of revocation with the following narrative:—"Considering that since the granting of the trust-disposition and assignment the value of my estates, heritable and moveable, has been so materially reduced as to render the provisions therein contained in favour of certain friends and relatives, out of proportion to the residue which would remain as a provision for my wife and children, and considering further that the circumstances of some of the friends and relatives have since the granting thereof improved to such an extent as to relieve me of the feeling of obligation to make provision for their support to the extent therein provided, and that in the case of my nephew James Henderson Robertson the considerations which led to my making a provision in his favour have ceased to exist; and considering further that the provisions therein in favour of the said James Henderson Robertson and the beneficiaries after mentioned were purely gratuitous on my part, and were made solely because of favour and affection for them, and that the same have not become vested interests in them." By the said deed of revocation John Robertson, *inter alia*, revoked, rescinded, and recalled the direction to his trustees to pay to his nephew James Henderson Robertson the sum of £500 sterling, and declared that he should not be entitled to participate in any part of his means and estate falling under the said trust-disposition and assignment or outwith the same. The deed of revocation

also contained this clause—"And I hereby further provide and declare that these presents shall be read and construed as a portion of the said trust-disposition and assignation, and which trust-disposition and assignation, so far as inconsistent herewith, shall be, and the same is hereby revoked, rescinded, and recalled." The said trust-disposition and assignation, along with the deed of revocation, were all recorded in the Books of Council and Session on 4th February 1890.

The trustee died on 22nd June 1891, and his trustees thereafter received payment from the insurance companies of the amounts contained in the policies.

In October 1891 James Henderson Robertson brought an action against the surviving and acting trustees of the late John Robertson for payment of £500, in which he pleaded—"(1) In respect of the terms of the trust-disposition and assignation libelled on, and the payment to the defenders of the proceeds of the policies of insurance, the pursuer is entitled to decree as concluded for. (2) The trust-disposition and assignation founded on by the pursuer was irrevocable in respect of the terms thereof, and that the same was delivered."

The defenders pleaded—" (2) The provision in favour of the pursuer condescended on being revocable by the trustor during his lifetime, and the trustor having validly revoked the same during his lifetime the defenders ought to be assoilzied. (3) The trust-estate being insufficient to satisfy the purposes of the trust, the provision in favour of the pursuer, if held to be irrevocable and unrevoked, is subject to abatement along with the other provisions of the settlement, *pro rata*, and that after payment of the expenses of administration."

Upon 6th January 1892 the Lord Ordinary (KYLACHY) pronounced the following interlocutor:—"Sustains the second plea-in-law stated for the pursuer, and repels the second plea-in-law stated for the defenders; and with reference to the defenders' third plea-in-law, appoints the case to be put to the roll for further procedure: . . . Grants leave to reclaim."

"*Opinion.*—The question in this case is, whether a certain trust assignation of certain policies of assurance and heritable subjects executed by the late John Robertson was revocable, so as to have been effectually revoked by a subsequent deed of revocation which he executed.

"I have considered the argument which I heard on this question, and have referred to the authorities cited, and also to the more recent case of *Mackie's Trustees*, 10 R. 746 and 11 R. (H. of L.) 10, in which some of these authorities were considered. In result I have come to the conclusion that no sufficient grounds exist for holding the deed revocable. It is not, it will be observed, a conveyance of the trustor's whole estate or of the whole estate belonging to him at the time of his death. On the contrary, it is a conveyance of specific subjects, including no doubt policies of assurance payable at death, but including also various heritable properties, and with respect even

to the policies, conferring upon the trustees certain rights prestatable against the trustor during his life. It cannot, therefore, I think, be held to be a testamentary deed; and that being so, I am unable to hold that it was revocable merely because of the declaration that there should be no vesting in any of the beneficiaries until payment. Such a declaration may be important for purposes of construction when the question is whether a deed is or is not testamentary. Even on that question, however, it is not conclusive, and where a deed not testamentary, but plainly intended to operate *inter vivos*, is executed and delivered to trustees, it cannot, I think, make such a deed revocable that the interests of the beneficiaries (for whom the trustees hold) are in whole or in part contingent upon survival of some certain period, or upon some other circumstance or event.

"On the whole, I am of opinion that I must sustain the second plea-in-law for the pursuer, and repel the second plea-in-law for the defenders; and with reference to the defenders' third plea-in-law, appoints the case to be put to the roll for further procedure, finds the pursuer entitled to expenses, and grants leave to reclaim."

The defenders reclaimed, and argued—This deed was testamentary and revocable. At least it was revocable to the extent that the trustor could readjust the provisions. The provision in favour of the pursuer was a unilateral and gratuitous obligation. The cases relied upon by the pursuer were all cases of onerous consideration. Payment could not take place until after the trustor's death, and until payment he had by the trust-deed no vested interest. There was here no *jus quæsitum tertio*. Was such a provision to be held irrevocable with the result that the wife and children were insufficiently provided for? [*By the Court*—Would the trustees have had to make the trust funds forthcoming for creditors in the event of the trustor's bankruptcy during his lifetime?—*Dunlop v. Johnston*, April 2, 1867, 5 Macph. (H. of L.) 22; *Dickson v. Somerville's Trustees*, May 16, 1867, 5 Macph. (H. of L.) 69; *Mackenzie*, July 10, 1878, 5 R. 1027; *Wightman v. Costine*, March 20, 1879, 6 R. (H. of L.) 13; *Jarvie*, January 28, 1887, 14 R. 411.

Argued for respondent—This deed was irrevocable because there was complete divestiture, which was the element wanting in *Jarvie (supra)*. This was not the case of disposal of the *universitas* of the trustor's estate. The respondent had an irrevocable contingent right which the law recognised, although he had not a vested interest—*Turnbull v. Tawse*, April 15, 1825, 2 W. & S. 80; *Smitton v. Tod*, December 12, 1839, 2 D. 225; *Tennent*, July 2, 1869, 7 Macph. 936; *Spalding*, December 18, 1874, 2 R. 237, see L. P. Inglis' review of previous authorities, although in special circumstances of that case he was in a minority; *Mackie v. Gloag's Trustees*, March 6, 1884, 11 R. (H. of L.) 10.

At advising—

LORD ADAM—This is an action brought

by the pursuer James Henderson Robertson against the trustees of the late John Robertson for payment of a sum of £500.

The claim is founded on a trust-disposition and assignation executed by him on 23rd November 1881, by which, *inter alia*, he directed his trustees to pay to his nephew, the pursuer, the sum of £500. On 7th September 1887 Mr Robertson executed a partial revocation of the trust-disposition and assignation, and *inter alia*, of the provision therein contained of £500 to his nephew. The question in this case is whether that is a valid revocation. Mr Robertson died on 22nd June 1891.

The trust-disposition and assignation proceeds on the narrative that the granter was then in solvent circumstances, and that he regarded himself as morally and legally liable to the persons therein named for the sums therein mentioned, and that he was desirous of making a suitable provision for his wife and children. He therefore, with consent of his wife, assigns and disposes to trustees, for the purposes thereafter written, the dwelling-house and grounds called Elmwood Villa, three heritable bonds secured over property in Glasgow, £1000 A debenture stock of the Somerset and Devon Railway Company, and four policies of insurance on his life for £200, £300, £500, and £500 respectively. He further bound himself to make timely payment to his trustees of the future yearly contributions required to keep the foresaid policies of insurance in force, and he declared that he had therewith delivered up to the trustees the policies of insurance to be used by them as their own proper writs and evidents. He then directed his trustees to hold and apply the trust-estate, and the annual interest or produce thereof, first, in payment of the expenses of the trust; second, in payment to his daughter Georgina Robertson of £500; third, in payment to his nephew, the pursuer, of £500; and fourth, in payment to Henrietta Ross of £500—which payments to Georgina Robertson, the pursuer, and Henrietta Ross he directed his trustees to make so soon as they received payment of the proceeds of the insurance policies.

The fifth purpose of the trust need not be particularly mentioned, but by the sixth he directed his trustees to pay to Mrs Ross an annuity during her widowhood at the rate of £45 per annum, beginning the first term's payment at Whitsunday then next.

By the seventh purpose he directed his trustees, on Mrs Ross' death, to divide among her children on their respectively attaining twenty-one years of age, a sum of £1000, with power to advance the interest for their maintenance and support.

By the eighth purpose he directed his trustees to grant the use of Elmwood Villa to his wife during her life, so long as it should remain unsold.

By the ninth purpose he directed his trustees, after satisfying the other purposes of the trust, to apply the free annual proceeds of the trust-estate for the maintenance of his wife and children, but

exclusive of his *jus mariti* and right of administration.

And lastly, he directed his trustees on the death of his wife to divide the residue of his estate among his lawful children, payable to sons on majority and to daughters on majority or marriage, whom failing to their issue.

The truster further declared that none of the provisions made in favour of any person should become vested interests in such persons until the terms of payment thereof.

The deed contains no power of revocation. The only reservation in the truster's favour is that the trustees should exercise the general power thereby given to them of paying the interest of the sums prospectively falling to the children, or of making advances therefrom, only with his consent during his lifetime. So far as I see he reserves no other power.

The trust-disposition and assignation was duly delivered to the trustees, who accepted office. They were infet in the heritable subjects thereby conveyed to them, and the assignation of the policies of insurance therein contained in their favour was duly intimated to the insurance companies in the months of November and December 1881.

By deed of revocation dated 7th September 1887 the truster, on the narrative of the foresaid trust-disposition and assignation, and, *inter alia*, that the provisions therein in favour of the pursuer and certain other beneficiaries were purely gratuitous on his part, and were made solely because of favour and affection for them, and that the same had not become vested interests in them, revoked the direction to his trustees to pay to his nephew the pursuer the sum of £500, and declared that he should not be entitled to participate in any part of his means and estate falling under the trust-disposition and assignation. He also revoked the annuity to Mrs Ross and certain other provisions.

The question in this case is, as I have said, whether this is a valid revocation.

From the narrative I have given, perhaps in too much detail, of the contents of the trust-disposition and assignation it will be apparent that it is not of the nature of a revocable or testamentary deed. It conveys only certain specific heritable and moveable subjects, and has no reference to the truster's property as at his death. It reserves no power of revocation, and as far as the pursuer is concerned it proceeds, on the narrative that the truster was legally and morally liable for the sum provided to him. Most of the provisions come into immediate operation, and none of them are contingent on the truster's death except only the provisions of £500 each to the pursuer, Miss Robertson, and Miss Ross, and that only in this way, that the fund out of which they are to be paid being the proceeds of the policies on his life, only become available to the trustees for payment of the provisions after his death. But the truster bound himself to make payment to the trustees of the funds necessary to keep the policies in force—an

obligation which no doubt could have been enforced against him during his life—and, as it appears to me, altogether adverse to the notion that the truster intended that the provisions in question should be revocable.

To say that these provisions were gratuitous and were made solely out of favour and affection will not of course make them revocable—the deed having been a delivered deed. On a sound construction, therefore, of the trust-disposition and assignation it was not revocable either in whole or in part by the grantor.

I think, accordingly, that this case is ruled by the cases of *Turnbull*, 1 W. & S. 80, and *Smitton*, 2 D. 225, and that the effect of the deed and of the infestments and intimated assignations following thereon in favour of the trustees was absolutely to divest the truster of the trust property, and to invest the trustees therewith, who were bound to hold and administer it for the purposes of the trust. One of the trust purposes was the payment of £500 to the pursuer out of the proceeds of the policies, if he should survive the period of payment. The pursuer has survived that period, the trustees have received the proceeds of the policies, and I think they are bound to fulfil that purpose.

It was maintained, however, that because of the clause in the deed which declares that none of the provisions made in favour of anybody should become vested interests in such persons until the terms of payment thereof, the truster had power to revoke the provision in favour of the pursuer at any time before the date of payment, in respect he had no vested interest therein. It is true that the pursuer had no vested right but he had a contingent right to the provision, which is a right known to and recognised by the law. But if I am right in thinking that the truster was absolutely divested of the estate, and that the trustees were bound to hold and administer it for the trust purposes, then I think they were bound to hold the estate until it should be seen whether the contingency would be justified, and whether the pursuers would become absolutely entitled thereto. Had the pursuer predeceased the term of payment the result would have been, not that the truster would have right to the £500, but that the £500 would have fallen into residue and have been administered under the ninth and last purposes of the trust. I do not see that the truster had power to revoke or deal with it to any effect.

I accordingly think that the Lord Ordinary's interlocutor is right and should be adhered to.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for Pursuer and Respondent—Burnet. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders and Reclaimers—Shaw—Guy. Agents—Ronald & Ritchie, S.S.C.

Tuesday, June 7.

FIRST DIVISION.

CHAPMAN v. SULPHITE PULP COMPANY.

Company—Shareholder—Application for Shares—Acceptance—Withdrawal—Notice of Allotment.

Where a person applies for shares in a company, and shares are allotted to him, it is not necessary in order to constitute him a member of the company, that a formal notice of allotment should be sent to him, provided he is made aware that the company have accepted his application.

C having applied for shares in a company, withdrew his application some months later, in respect that he had received no intimation of allotment.

In a petition by C to have his name removed from the register of members it appeared that before he withdrew his application he had received a circular calling a meeting of shareholders, and that his wife having called at his request upon the secretary of the company in reference to the shares, had been informed that her husband's application had been accepted, and that his name was upon the register. The Court, without deciding the question whether or not a notice of allotment in the usual form had been sent to the petitioner, *refused* the petition, *holding* that the petitioner had been adequately informed that his application had been accepted.

On 26th November 1890 Samuel Chapman applied for twelve shares in the Sulphite Pulp Company, Limited, and deposited with the Royal Bank of Scotland the amount payable on application, in conformity with the conditions contained in the company's prospectus. On 12th January 1891 he made a further application for twelve additional shares, and again made the necessary deposit.

On 7th August 1891 Chapman's agents wrote to the secretary of the company saying "As Mr Chapman has received no intimation that these shares or any portion of them, have been allotted to him, nor indeed any other communication concerning them, he instructs us to write you withdrawing unconditionally his application for the shares referred to. Be good enough therefore to hand us your cheque for £120, in repayment of the sums paid by Mr Chapman as deposits."

The company having failed to comply with this request, Chapman presented a petition to the Court for rectification of the register by deletion of his name, and for repayment of the sums paid by him upon application.

Answers were lodged for the company in which it was averred "that the company duly sent to the petitioner allotment letters