

articles in question. But it is not disputed that he could not have done that without having taken delivery of the vessel. On the whole matter, therefore, I am of opinion that on Saturday the 10th of October the defenders gave delivery, and that the pursuers took delivery of the vessel under the contract, and that nothing more was required or necessary to be done to transfer the risk.

The Lord Ordinary, however, while agreeing that this was the intention of the parties, has come to a different conclusion. The grounds on which he does so are these. He says—"The contract provides that the vessel shall be at the risk of the builders until handed over to the purchasers, and the specification provides that the vessel shall be insured by the builders until delivered over to the owners. Now, the delivery or handing over here referred to has nothing to do with the property of the ship, and must therefore, in my opinion, mean giving the possession or control of the ship to the purchasers. But Captain Newell never got possession or control of the ship. She remained in the possession and under the control of the defenders. Their watchman looked after her, their ropes moored her, and it was they who at once recognised the duty of providing for her safety when the storm arose. I am therefore of opinion," he says, "that the vessel was never delivered or handed over to the pursuers within the meaning of the agreement, and that therefore she remained at the risk of the defenders."

I agree with the Lord Ordinary that handing over or delivering the ship means giving the control to the purchasers, but I differ from his Lordship in thinking that the effect of what took place on Saturday morning was not to give the control of the ship to the purchasers.

I think it is doubtful on the evidence whether Captain Newell had not taken actual possession of the vessel, but however that may be, Captain Newell might, after the meeting on Saturday, have taken immediate possession of her if and when he pleased. He might have shifted her at any time and to any place, or exercised any other act of ownership without reference to the defenders. That Captain Newell might not have thought it necessary to make any change of the existing arrangements with reference to the position or security of the vessel, does not alter the fact that with him lay the power of doing so. The control of the vessel being, as I think, with the pursuers, so also was the risk.

On these grounds I think that the Lord Ordinary's interlocutor should be altered.

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

The Court altered the Lord Ordinary's interlocutor, assoilzied the defenders from the conclusions of the action, and found the pursuers liable in expenses.

Counsel for the Pursuers and Respondents

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—Jameson—Aitken. Agents—Forrester & Davidson, W.S.

Counsel for the Defenders and Reclaimers—Sol.-Gen. Asher, Q.C.—Dickson. Agents—J. & J. Ross, W.S.

Wednesday, December 7.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### TURNBULL v. OLIPHANT.

*Succession—Settlement—Construction—Vesting—Title to Sue.*

A testator by a general disposition and deed of settlement left his whole estate, heritable and moveable, to his wife, whom he appointed his executrix, with full power to her to sell and dispose or burden the heritable estate, and generally to "act and perform in respect to the whole premises hereby conveyed as fully and freely as I could myself before granting hereof, my express wish and intention being that my said wife, in the event of her survival, shall possess and occupy and enjoy my said estate and effects all the days of her life, but expressly prohibiting any gratuitous alienation of any part or portion of my estate, heritable or moveable, either during her lifetime or to take effect after her decease." On her death "any residue" of his estate was to be divided in certain proportions between his two brothers and the children of a deceased brother.

His wife survived him. After her death, upon the petition of the residuary legatees, a judicial factor was appointed upon the testator's estate. The judicial factor sued a niece of the testator's widow for the sums contained in two deposit-receipts given to the defender by the widow.

*Held* that under the testator's settlement his widow took the fee of his whole estate, and that as the pursuer had failed to prove that the sums sued for were the property of the testator, he had no title to sue.

Robert Mickel, Linlithgow, died on 13th April 1880, leaving a general disposition and settlement dated 8th February 1875, whereby he granted and disposed, "under the burdens, provisions, and reservations after mentioned, in favour of Mrs Isabella Oliphant or Mickel, my wife, in case she shall survive me," his whole estate, heritable and moveable, and he appointed her his sole executrix. The deed, after describing the heritable subjects, proceeded—"All these, as well as my personal estate, I give and bequeath to my said wife Mrs Isabella Oliphant or Mickel, with full power to her to sell and dispose of all or any part of the said heritable subjects,

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or burden the same with debt, and generally to do, act, and perform in respect to the whole premises hereby conveyed as fully and freely as I could myself before granting hereof, my express wish and intention being that my said wife, in the event of her survivance, shall possess, occupy, and enjoy my said estates and effects all the days of her life, but expressly prohibiting any gratuitous alienation of any part or portion of my estate, heritable or moveable, either during her lifetime, or to take effect after her decease; and on the decease of the said Mrs Isabella Oliphant or Mickel, in the event of her surviving me as aforesaid, I direct and I hereby leave and bequeath any residue of my said estates, heritable and moveable, which may remain, to be divided into three parts or shares *pro indiviso*, to pay or convey the same, one *pro indiviso* part or share to Andrew Mickel, my eldest brother, residing in Linlithgow, the second *pro indiviso* third part or share equally between and among Robert Mickel, John Mickel, Helen Mickel, Stephen Mickel, and Sarah Mickel, my nephews and nieces, and children of deceased brother Stephen Mickel, and the remaining third part or share *pro indiviso* to James Mickel, bottler, Linlithgow, my youngest brother."

There was no issue of the marriage, and Mrs Mickel survived her husband, and died upon 11th June 1891.

Upon the petition of the heirs of provision and the residuary legatees of the late Robert Mickel, Alexander Turnbull, accountant, Linlithgow, was appointed judicial factor upon his estate by decree dated 29th September 1891.

Upon 24th November 1891 Turnbull raised an action against Christina Oliphant, residing in Linlithgow, as executrix-dative of Mrs Mickel, as executrix and also as an individual, for payment of £270, with interest from the date of Mrs Mickel's death. This sum was alleged to be contained in two deposit-receipts—one for £110, and the other for £160—which the pursuer averred were part of Mr Mickel's estate, and were properly not included in the inventory of the personal estate of Mrs Mickel, upon which Christina Oliphant had obtained confirmation. The defence to the action was that these deposit-receipts were handed to Christina Oliphant by her aunt Mrs Mickel sometime before her death, together with a sum in cash in part payment of services rendered to her.

The pursuer pleaded—“(1) The sums contained in said deposit-receipts being part of the estate of the late Robert Mickel, and the defender Miss Christina Oliphant having illegally taken possession of and cashed said deposit-receipts, decree for payment by her to the pursuer of the contents thereof, amounting to £270, 13s. sterling, with the interest of the same, should be granted as concluded for.”

The defender pleaded—“(2) The transfer of the said deposit-receipts to this defender not being gratuitous, she is entitled to absolvitor *quoad* the first conclusion of the summons. (3) The deposit-receipts in

question having been applied by the deceased Mrs Mickel in payment of or recompense for services rendered by this defender to her, this defender is not bound to account for or pay over the sums in said deposit-receipts to the pursuer.”

Upon 19th March 1892 the Lord Ordinary (KYLLACHY), after a proof relevant only to the averment of the defender that she had received the deposit-receipts from her aunt, assoilzied the defender Christina Oliphant from the conclusions of the summons so far as directed against her individually, holding that she had proved her averment of the manner in which she had become possessed of the deposit-receipts.

The pursuer reclaimed.

In the course of the discussion the Court suggested that the point might be argued whether the deposit-receipts were a part of the late Robert Mickel's estate.

The case was ordered to be reheard.

The defender argued—Under Mickel's will his widow took the fee of the whole estate. She had made up her title to the moveable estate, with which this case was alone concerned, by confirmation, and took the whole estate as her own. Full powers of property were given to the widow; she was to use it with the same powers and enjoyment as her husband had previously done. This was not a case of limited ownership which could be probably managed only by a trust; and the prohibition against gratuitous alienation was repugnant to the gift, and should not be given effect to—*Allan's Trustees v. Allan*, December 12, 1872, 11 Macph. 216. The provisions in the deed did not restrict her to a liferent; she had full power over the estate, and could dispose of it during her lifetime as she desired. She could spend it all upon her own maintenance, or she might have expended it upon buying an annuity for herself, and thereby defeated the purpose for which it was said she held as a trustee, viz., payment after her death to her deceased husband's residuary legatees. She was not therefore a trustee whose sole duty it was to administer the fund for behoof of the beneficiaries. As the whole property vested in the widow, the judicial factor had no estate he could take up, and therefore he had no title to sue the defender Oliphant for repayment of the sums.

The pursuer argued—The testator had no intention of giving the fee of his whole estate to his wife. He gave her the full use of the estate not only of the interest but also of the capital for her liferent use, but it was for her lifetime only that she was to have the full enjoyment. She was not entitled to dispose of it after her death, nor by gratuitous alienation during her life. That made it a limited trust in her which was well known and recognised in the law. That it was given in trust was shown by the first clause in the deed, stating that the estate was granted to the testator's widow under the restrictions thereafter mentioned. Among these restrictions was that of gratuitous alienation. Again, whatever

was not consumed was not to go to the widow's heirs nor by her disposition, but to her husband's residuary legatees, viz., his brothers, as directed by his settlement. In these circumstances the unconsumed portion of the estate returned to the husband's estate, and must be administered by his judicial factor—*Mein v. Taylor*, June 8, 1827, 5 S. 727, 1st ed. 779; *Ramsay v. Beveridge*, March 3, 1854, 16 D. 764; *Sprot v. Pennycook*, June 12, 1855, 17 D. 840; *Boustead v. Gardner*, November 4, 1874, 7 R. 139; *Reddie's Trustees v. Lindsay*, March 7, 1890, 17 R. 559.

At advising—

LORD YOUNG—This case was first heard last session, and the question which has been argued in the rehearing now is founded upon the first plea-in-law for the pursuer. He sues Miss Christina Oliphant for the amount contained in two deposit-receipts which she got possession of and cashed, as averred upon record, and the plea-in-law is in these terms—[*His Lordship read the plea.*]

Upon record it was averred by Christina Oliphant, and the averment was followed by the necessary pleas-in-law, that she got these deposit-receipts from her aunt, the widow of Robert Mickel, shortly before her death, as a recognition of the services she had rendered to her, and a recompense for the sacrifices she had to make in rendering these services, and that she was therefore entitled to keep them and the cash she got for them.

It does not seem to have occurred to either party in the case to have raised the question whether these deposit-receipts formed any part whatever of the deceased Robert Mickel's estate, nor does it seem to have occurred to the Lord Ordinary. The Lord Ordinary allowed a proof, and a proof was taken relevant only to the averment of Christina Oliphant that she got these deposit-receipts from her aunt.

Upon the evidence, as it appeared at the proof, it was maintained by the pursuer that the defender had failed to prove that she got the deposit-receipts from her aunt as she said she did; and that indeed, from anything proved to the contrary, she might have got them in an irregular manner; and that at all events she did not prove that she got them for an onerous cause for services rendered, and that as Mrs Mickel was forbidden to dispose of the estate by gratuitous alienation she was not entitled to keep the proceeds. The defender said, on the other hand, that she had proved her case, and showed that the deposit-receipts had been handed over to her as she averred. After the proof the Lord Ordinary pronounced judgment upon the case in favour of the defender, that is to say, he held that she had proved that the way in which she said she had got the deposit-receipts was true, and that she had got them from her aunt for services rendered.

When the case was argued before us upon the evidence given at the proof it was suggested from the bench that it might be

a matter for the consideration of the parties whether it might not be argued that these deposit-receipts ought not to be regarded as a portion of Mr Mickel's estate at all.

A rehearing was ordered for argument to us whether, having regard to the terms of the will, it must not be held that by his will the deceased had disposed of all his estate in favour of his wife, so that none of the heritage he once possessed remained in his *hereditas jacens*, and no moveables *in bonis*.

I am not going to refer to the terms of the will; they have been read to us several times. My opinion upon the terms of that deed is that thereby Mrs Mickel was made *fiar* upon a property title of the whole estate of her late husband.

It was said that she had made up a title to part of the heritage; it consisted, I think, of houses. My opinion is that she could have made up a title to the whole of it; and she made up her title to the moveables by confirming herself as executor. She made up her title as executor to everything which had belonged to her late husband except a deposit-receipt of small amount which lay in the bank in the names of himself and his wife, and which she, acting under advice, uplifted as her own property.

But the will does not merely make the wife the proprietor of the whole estate formerly belonging to the husband; it goes on to say that he wishes her to have the full benefit and enjoyment of the estate, but that she is not to alienate it gratuitously. The question in this case whether she has thus gratuitously alienated any part of the estate is one which I think we are not able to determine, because we have not before us all the parties who are interested in the question.

All that we can determine now is that these deposit-receipts, the subject of the action now before us, are no part of the estate of the late Robert Mickel. Therefore I think we should repel the pursuers' first plea-in-law, find that the deposit-receipts do not form part of the late Robert Mickel's estate, and assoilzie the defenders from the conclusions of the summons.

LORD RUTHERFURD CLARK—I am of the same opinion. It is certainly not easy to reconcile all the phrases of this deed, but I am satisfied that the widow took the fee.

LORD TRAYNER—I agree with Lord Young. I think that the pursuer has failed to prove what is the foundation of his case, that the deposit-receipts were the property of the late Robert Mickel.

LORD JUSTICE-CLERK—I also concur.

The Court recalled the Lord Ordinary's interlocutor.

Counsel for Appellants—Strachan—C. S. Dickson—A. S. D. Thomson. Agents—John Veitch, Solicitor.

Counsel for Respondents—H. Johnston—Clyde. Agent—Lewis I. Cadell, W.S.