

not subject to the adjudication of the Court any larger sum or different property than is specified in the summons. The sum originally in the summons was £600 and upwards. This alteration makes the sum sued for £300.

I therefore think that the proposed amendment should be allowed.

LORD JUSTICE-CLERK—I concur in the opinion delivered by Lord Trayner. I certainly would be anxious to give the fullest scope to an Act of Parliament which enabled a pursuer, by altering his pleadings, to get a decision on the real question between the parties. But what is proposed here is to subject to adjudication of the Court a sum which is larger than any of those concluded for in the separate conclusions of the summons. For that reason this amendment, it appears to me, does not fall within the scope of the Act.

Even if it was competent to allow the amendment to be made, I am of opinion that the Act leaves the right to allow or to refuse to allow an amendment to the discretion of the Court, and I think that this is not a case for exercising that discretion by allowing the amendment.

LORD YOUNG and LORD RUTHERFURD CLARK were absent.

The Court refused the note, and in the same interlocutor, of consent refused the reclaiming-note.

Counsel for the Pursuers—Dickson—MacWatt. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defender—Salvesen—T. B. Morison. Agent—P. Morison, S.S.C.

Saturday, December 21.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.]

WALKER v. GALBRAITH.

Succession—Husband and Wife—Destination to Spouses in Conjunct Fee—Special Destination to Heirs—General Disposition.

A subject was assigned to two spouses “in conjunct fee and to the survivor of them in fee, and at the death of the survivor to the heirs of the spouses equally between them.”

They subsequently executed a mutual general disposition by which they disposed to and in favour of the survivor in liferent for his or her liferent use only, and at the death of the survivor to two sons of the wife by a previous marriage, equally between them, their whole estate, heritable and moveable.

The subject acquired by them under the assignation was the only property belonging to the spouses at the time when they executed this disposition.

Held (1) that the assignation conferred upon the husband and wife a joint fee with the benefit of survivorship; (2) that the general mutual disposition evacuated the destination of the subject to their heirs contained in the assignation.

Expenses—Unsuccessful Litigant—Sale of Heritage—Objection to Title.

A purchaser of heritable subjects who had stated a plausible objection to the title offered to him, and defended an action of declarator and implement raised against him by the seller, though unsuccessful in the action, *held* entitled to expenses.

In March 1877, Mr Patrick Burns, trustee on the sequestrated estate of Hugh More, grocer, Kilwinning, granted an assignation of a ninety-nine years' lease of certain subjects near Kilwinning to “David Deans, miller and innkeeper in Stevenston, and Marion Sneddon or Deans, his wife, in conjunct fee, and to the survivor of them in fee, and at the death of the survivor to the heirs of the said David Deans and Marion Sneddon or Deans equally between them.”

In 1882 Mr and Mrs Deans executed a mutual trust-disposition and settlement, and they conveyed “to and in favour of the survivor of us in liferent for his or her liferent use only, and at the death of the survivor to John Paton, miner, Stevenston, and William Paton, residing with us, both sons of me, the said Marion Sneddon or Deans, equally between them, All and Sundry, our whole estate, heritable and moveable, real and personal, wheresoever situated; also all debts, sums of money, and effects now owing and belonging or that shall be owing and belonging to the first deceased.” The survivor was appointed executor of the predeceaser, and then followed—“reserving always to us, while both survive, power to alter, innovate, or revoke these presents in whole or in part as we may see proper.”

Mr David Deans died in December 1890, having been predeceased by his wife.

The only property in which either of the spouses had any interest at the date of the settlement and of their deaths was the long lease referred to above.

After their deaths the beneficiaries John Paton and William Paton completed a title to the lease, which they sold to a third party, who subsequently sold it to Mr Robert Walker, wine merchant, Kilwinning. Mr Walker in 1894 agreed by missives of sale to sell the lease to Mr Archibald Galbraith, innkeeper, Kilwinning. Mr Galbraith deposited the price, but refused to accept an assignation of the subjects on the ground that Mr Walker was not in a position to give him a good title. Mr Walker accordingly raised an action against him craving for declarator that his title to the subjects was good, and for implement of the missives of sale.

The defender maintained (1) that “the special destination contained in the assignation was not evacuated by the general conveyance contained in the mutual disposi-

tion," . . . and that therefore the heirs-at-law of the spouses were entitled to the subjects; and (2) that even assuming him to be wrong in the first proposition "the general conveyance only conveyed to John and William Paton the estate which belonged to the first decesser Mrs Deans, and as she predeceased her husband, who under the special destination was fiar of the subjects during their joint lives and the life of the survivor of them, the Patons could take no right to said subjects under the mutual disposition in respect it carried none."

He pleaded—"(2) The pursuer is not at present in *titulo* to grant to the defender a valid assignation of the tack in question."

On 17th July the Lord Ordinary (Low) sustained this plea and assoilzied the defender.

[After narrating the clauses of the deeds above quoted his Lordship proceeded]—"The first objection taken is that in the event, which happened, of Mrs Deans predeceasing her husband, no interest in the lease was carried to the survivor, because Mrs Deans had no interest in the lease, and David Deans himself had the fee in terms of the assignation. Mr Cook maintained that the mutual disposition and settlement only dealt with the interest of the predeceaser. I am inclined to think that looking at the peculiar way in which the deed is framed and worded, that is the construction which must be put upon it. Whatever may have been intended, it practically comes to this, that each of the spouses in the event of his or her being the predeceaser, conveyed his or her whole estate to the survivor in liferent, and the Patons in fee. If that is the true construction of the deed, then the deed carried nothing, because Mrs Deans predeceased, and in terms of the assignation David Deans was still fiar, or at least, if he was not fiar, he, on the death of his wife, became entitled, not under the mutual deed, but under the assignation, to the subjects in fee, being the survivor.

"Now, if that is sound, then the title offered by the pursuer is not sufficient, because the title offered is on the footing that right to this lease rested in the Patons under the settlement on the death of David Deans, who had not revoked it. The pursuer's title is deduced through the Patons from him. In order to make a good title there must be an assignation executed by the heirs-at-law of David Deans and Mrs Deans.

"There is a further question, and on that also I am inclined to agree with Mr Cook. He maintained that there was a special destination in the assignation, and I am inclined to think that that is so. It is a special destination—half to the heirs of David Deans and half to the heirs of his wife. The general law is that a special destination is not evacuated by a general disposition and settlement executed by the same person who took the deed with the special destination in it. Therefore the special destination in the assignation was not evacuated by the mutual deed of 1882. It is a question of intention, but that is the

general rule. It is said in the present case by the pursuer that the only property which the spouses had was this lease. That, of course, is a material fact and worthy of consideration, but it is not conclusive, and I do not think it is sufficient to overcome the general rule. But undoubtedly there is more difficulty upon this point than upon the former. The result is that I sustain the second plea-in-law for the defender, and assoilzie him."

The pursuer reclaimed, and argued—(1) The expression "conjunct fee" used in the assignation was to be interpreted in the ordinary sense, there being no reason for putting a different interpretation on it because the assignation was made to two spouses. The old doctrine of *dignior persona*, which would have made the husband sole fiar, did not apply here, the words "and to the survivor in fee" negating such application. Accordingly, the effect of the assignation was to give equal rights to the husband and wife, the subject being vested in them jointly with benefit of survivorship. They were therefore dealing in the mutual settlement with a subject of which they were joint owners, without any limitation other than the destination-over in the assignation, which they had the power to evacuate—and by this deed did evacuate. (2) The destination-over to the heirs of the spouses contained in the assignation was not technically a "special" one, but in any case the general disposition would cover the subject, there being no stipulation to the contrary in the destination-over, or indication of preference for a particular heir. The fact that this subject was the only property belonging to the spouses at the time they made their mutual settlement confirmed this view—*Philip v. Philip*, December 4, 1885, 13 R. 329; *Gray v. Gray's Trustees*, May 24, 1878, 5 R. 820. Accordingly the title drawn by the pursuers from the Patons, who succeeded under the mutual disposition, was valid.

Argued for defender—The pursuer could only offer a defective title, which the pursuer was not bound to accept. (1) The effect of the assignation was to make the husband the sole fiar, as the *dignior persona*—*Anderson v. Bruce*, 1680, M. 4232; *Fergusson v. M'George*, 1739, M. 4202; *Ersk.* iii., 8, 36. That theory has never been seriously impugned. Accordingly the mutual disposition did not convey this subject. (2) Even if each spouse had a right to one-half of the subject, the settlement was only intended to convey the share of the predeceaser, and accordingly the title given would only be to one-half of the subject. (3) The general disposition did not evacuate the special destination to the heirs of the spouses, which was a special destination containing a survivorship clause. There was a general rule to that effect which could only be defeated by indications of purpose inconsistent therewith in the general disposition—*Farquharson v. Farquharson*, July 19, 1883, 10 R. 1253; *Thoms v. Thoms*, March 3, 1868, 6 Macph. 704; *Glendonwyn v. Gordon*, May 19, 1873, 11 Macph. (H. of L.) 33; *Walker's*

Trustees v. Walker, June 19, 1878, 5 R. 965. There were no such indications in the present disposition. The statement that the spouses had no other estate to deal with was not admitted and was not conclusive against this view. The fact that the disposition dealt with *acquirenda* indicated that they might have expected to acquire other estate, and therefore might not have intended to deal with the lease in question. The case of *Gray v. Gray's Trustees* was a very special one, there being many circumstances besides the fact of the disposer having no other estate which induced the Court to determine as they did.

At advising—

LORD M'LAREN—I am of opinion that the title offered in this case is sufficient. The foundation of the title is an assignation to the subject (a 99 years' lease) in favour of David Deans and his spouse in conjunct fee, and to the survivors of these in fee. The Lord Ordinary construes this destination as if it were equivalent to a destination to the spouses in conjunct fee and liferent, in which case the ordinary rule of construction is that the wife is liferenter and the husband fiar. But I know of no authority for giving to the words "conjunct fee," in a destination to spouses, a different construction from the construction which would be put on them in a destination to persons not connected by marriage, and no authority was cited to us in support of the Lord Ordinary's opinion on this point. In my opinion the assignation gave equal rights to the husband and wife, the subject being vested in them jointly, with benefit of survivorship.

In this view of the meaning of the assignation the question raised as to the mutual settlement granted by the spouses in 1882 disappears. They were then dealing with a subject of which they were the joint owners, unfettered by any limitations other than a destination-over to their heirs which it was in their power to evacuate by making a new destination. In such circumstances they, by a deed in proper form, limited the right of the survivor to a liferent, and vested the fee subject to that life interest (and subject of course to the usual liferent by reservation during their joint lives) in John and William Paton, the sons of Mrs Deans by a previous marriage. It is not disputed that the title offered flows from the Patons.

The Lord Ordinary notices another objection which he is disposed to sustain, but without, as I understand, expressing an unqualified opinion upon it. The objection is that the mutual settlement is a general conveyance, and that a destination inserted in a conveyance, presumably by desire of the grantee, is not necessarily revoked or evacuated by a subsequent general settlement.

This is substantially the same question as the question of the revocation of a specific bequest by a subsequent general settlement. It is, as the Lord Ordinary has observed, a question of intention, and there are two reasons which in my opinion lead to the conclusion that it was the intention of the spouses to evacuate the destination. The

first is, that it does not appear that the spouses had any other joint estate on which the mutual settlement could take effect. The second is, that the destination of the joint estate contained in the previous deed was a destination to the heirs of the spouses equally between them. This is not a special destination in the sense of the rule referred to. No claim to the estate has been made by the heirs of David Deans, and I think that the pursuer has a good title and is entitled to decree of declarator in terms of his first conclusion.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The defender craved the Court for expenses. He argued that though unsuccessful he had been within his rights in refusing to take the title offered him till its validity had been judicially determined—*Howard & Wyndham v. Richmond's Trustees*, June 20, 1890, 17 R. 990.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming note for the pursuer against the interlocutor of Lord Moncreiff dated 17th July 1895, and heard counsel for the parties, Recal the said interlocutor and decern: Find the defender entitled to expenses both in the Inner and the Outer House," &c.

Counsel for the Pursuer—Dundas—Craigie, Agents—Cowan & Dalmahey, W.S.

Counsel for the Defender—Ure—Cook, Agents—Emslie & Guthrie, S.S.C.

Saturday, December 21.

FIRST DIVISION.

NEVILLE AND OTHERS v. SHEPHERD AND OTHERS.

Succession—Trust-Disposition—Vesting—Implied Conditional Institution of Children to Parents' Share—Accresced and Original Shares—Conditio si sine liberis.

By trust-disposition and settlement a testator conveyed his whole property to trustees, and directed them, *inter alia*, at the first term of Whitsunday or Martinmas after the termination of a certain liferent, to divide, pay, and make over the whole residue of his estate equally among the whole children born or to be born of his daughter's marriage, and to the survivors or last survivor of said children. The deed proceeded:—"Further, in the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions without leaving lawful issue, and all of which provisions it is hereby declared shall vest at the said terms of payment so fixed by me, then, and in that case, but in that case only," he directed his trustees to make over the