

what the Solicitor-General said, that the petitioner's statement that a board of directors has been constituted is not a statement of fact within his knowledge, but an inference from other facts which are not before us. We were asked to allow a proof that a board had been duly constituted, but the statements on that subject are too vague to be remitted to probation.

I agree with your Lordship in thinking that the 4th section of the Act of 1867 does not authorise such an appointment as is here sought, and also that there is here no case for the exercise of the *nobile officium* vested in the Court.

LORD MONCREIFF — I am of the same opinion. I am inclined to concur with Lord Trayner in the first place that we must hold that Mr Chiene is still in the saddle. His appointment was until a board of directors should be duly constituted, and I do not think that the averments made by the petitioner are relevant, or are such as should be remitted to probation, to establish that any board of directors ever was duly constituted. But if we could get past that difficulty, I agree with your Lordships in regard to the rest of the case. In the first place, I am quite convinced that section 4 of the Act of 1867 has no application to this case. This is a company which has no undertaking; no land has been taken for it, and no stock has been purchased for its use. And then, with regard to the *nobile officium* of the Court, I think this is not a case in which we should exercise the *nobile officium* of the Court by appointing a judicial factor. The creditor must just attach any funds which he may be able to lay his hands upon in the usual way.

LORD YOUNG was absent.

The Court dismissed the petition.

Counsel for the Petitioner — Solicitor-General Dickson, Q.C.—MacIennan. Agent — A. & G. V. Mann, S.S.C.

Counsel for respondent Best — Clyde. Agents—Macpherson & Mackay, S.S.C.

Counsel for George Todd Chiene—W. C. Smith. Agents—Mackenzie & Kermack, W.S.

Wednesday, June 27.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BARRAS v. SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY.

Husband and Wife—Parent and Child—Postnuptial Provision—Revocation with Consent of Wife and Children and Trustees.

A husband and wife were married in 1867, and several children were born of the marriage. In 1881 the husband, on the narrative that he had made no

specific provision for his wife and children by antenuptial contract of marriage or otherwise, assigned to three trustees, including his wife, certain policies of insurance in trust for behoof of the wife and the children of the marriage, all as the wife might see proper or might direct or appoint by writing under her hand, it being declared that the wife should be a trustee *sine qua non*, and that the other trustees should be guided by her as to how and in what manner and in what sums the funds at the disposal of the trustees should be apportioned for the foresaid purposes. The provisions in favour of the wife and children were declared to be for their own separate alimentary use alienarily. The assignation was intimated to the Insurance Company and delivered to the trustees.

In 1900, after all the children had attained majority, *held* (aff. judgment of Lord Kyllachy) that, the provision being reasonable in amount, the husband was not entitled to revoke the assignation even with the consent of the wife, children, and trustees.

Low v. Low's Trustees, November 20, 1877, 5 R. 185, and *Peddie v. Peddie's Trustees*, February 6, 1891, 18 R. 491, followed.

Dr James Barras was married to Miss Rachel Anderson Hyde or Barras on 9th April 1867. The following children were born of the marriage, viz.—(1) William George Barras, M.D., born 30th March 1868; (2) Margaret Mary Barras, born 18th January 1873; (3) Florence Helena Barras, born 5th September 1875; (4) Alice Smith Barras, born 21st February 1877; and (5) Ada Beatrice Barras, born 7th August 1882, who died 8th February 1898.

By a deed of provision and assignation dated 8th April 1881, Dr James Barras, on the narrative that he had not by antenuptial contract of marriage or otherwise made any specific provision for his wife Mrs Rachel Anderson Hyde or Barras, or for the children born or to be born of their marriage, and that he had from time to time taken out policies of insurance on his own life with a view to make suitable provision for them, and on the further narrative that to give effect to his said intention it was necessary that he should execute the said deed of provision and assignation in manner therein underwritten, assigned to and in favour of his wife, the Rev. J. T. Graham, and Thomas Hart, writer, Glasgow, and the survivors or survivor of them, the certificates or policies of assurance granted by the Scottish Widows' Fund and Life Assurance Society on his own life, viz.—(First) a policy for £500, dated 20th December 1865; (Second) a policy for £500, dated 27th August 1873; and (Third) a policy for £1000, dated 23rd December 1880, together with the whole sums and profits already due and to become due thereon respectively, "in trust for behoof of my said spouse for her own separate use and maintenance, and the maintenance, up-bringing, and advancement in life of the

children procreated or to be procreated of the marriage between us, all as she may see proper or may direct or appoint by any writing under her hand, it being hereby declared that in the trust hereby created my said spouse shall be a trustee *sine qua non*, and my said other trustees shall be guided by her as to how and in what manner and in what sums the funds at the disposal of my said trustees shall be apportioned for the foresaid purposes alienarily: And in the event of the death of my said spouse without leaving any written directions as aforesaid, then my said trustees shall hold whatever sum may remain in their hands for behoof of our children procreated or to be procreated of our said marriage as aforesaid, equally between them, share and share alike: Declaring that the provisions hereby conceived in favour of my said wife and children shall be for their own separate alimentary use alienarily, and not affectable by or attachable for their own debts or deeds or the diligence of their creditors, and also exclusive of the *jus mariti* and right of administration of any husband my wife or daughters may marry: And with the view to render these presents more effectual I hereby bind and oblige myself, my heirs, executors, and successors, regularly to continue to pay the premiums on said certificates or policies of assurance as the same fall due, and to exhibit discharges therefor to my said trustees, surrogating and substituting my said trustees in my full right and place of the premises, with power to them to ask, crave, and uplift the respective sums of money, principal, interest, and profits or bonuses hereby assigned, and upon payment to grant discharges thereof either in whole or in part, and generally to do everything concerning the premises that I could have done myself before granting hereof, which assignation I bind myself, my heirs, executors, and successors whomsoever, jointly and severally to warrant to the said trustees from all facts and deeds done or to be done by me in prejudice hereof; and I appoint the said Thomas Hart to be law-agent in the said trust, and have delivered up to him the said three certificates or policies for behoof of the said trustees, and to be used by them in trust as aforesaid as their own proper writs and evidents in all time coming."

The deed of provision and assignation was intimated by Thomas Hart to the Scottish Widows' Fund and Life Assurance Society on 18th April 1881. The premiums were thereafter regularly paid by Dr James Barras.

On 9th December 1899 James Barras, with consent and concurrence of his wife and surviving children, and of the trustees named in the deed of provision and assignation, brought an action against the Scottish Widows' Fund and Life Assurance Society concluding for declarator that the deed of provision and assignation was revocable by the pursuer either at his own hand, or with the consent of his wife and children and of the said trustees, and that he was entitled to revoke it; and further,

that it should be declared that the policies of assurance were the sole and absolute property of the pursuer, and were free from and unaffected by the provisions of the above deed.

The pursuer averred—"The purposes which Dr Barras had in view in granting the said deed of provision and assignation have been otherwise accomplished, Mrs Barras having been otherwise suitably provided for, and the children of the marriage having been properly educated and brought up to full age. The pursuer's natural obligations to his wife and children have thus been otherwise discharged. The pursuer therefore maintains that the deed was a donation *stante matrimonio*, and that he is entitled to revoke it at his own hand. In any view Dr Barras maintains that he is entitled to revoke the said deed of provision and assignation, with consent of Mrs Barras and the children of the marriage, and also the persons named as trustees in the said deed, all of whom are willing to concur with Dr Barras in executing a deed of revocation. The defenders, however, have refused to recognise the right of the pursuer to revoke said deed of provision and assignation, either at his own hand or with the consents above mentioned, and the present action has been rendered necessary to vindicate said right of revocation."

The defenders explained "that recently Dr Barras asked the defenders if they would recognise as effectual a revocation by him of the said deed of provision and assignation in trust, either at his own hand or with the consent of Mrs Barras and the children of the marriage and the trustees. The defenders were advised, and informed Dr Barras that as the deed had been duly delivered, intimated, and acted on by the trustees therein named, and made alimentary provisions of a reasonable amount for the granter's wife and children, and as the marriage is not yet dissolved and the ultimate beneficiaries cannot yet be ascertained, they could not recognise as effectual a revocation by him, either at his own hand or with the consents mentioned, and they are not now prepared to do so without the sanction of the Court. Such sanction cannot be obtained otherwise than by the defenders lodging defences, as the trustees, who are the proper contraditors, having the substantial interest, are acting in concert with Dr Barras, and appear as pursuers."

They pleaded—(1) "The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons."

On 20th March 1900 the Lord Ordinary (KYLACHY) sustained the first plea-in-law for the defenders and dismissed the action.

Note.—"I have, I confess with some reluctance, come to the conclusion that I cannot give the pursuer decree in terms of the conclusions of the summons.

"It has to be noted that the question here raised is not, as in the case of *Schumann*, 13 R. 678, whether the trustees who hold the assigned policies can legally surrender them, or can legally borrow money upon them for the purposes of the trust. I

do not, as at present advised, at all doubt that they might do so, and that the defenders, the Insurance Company, would be in safety to accept a surrender, or even to make advances as against the policies in terms of their rules. Such transactions would—as explained in the case of *Schumann*—not necessarily be inconsistent with the trust, and indeed might be quite necessary for its protection. Nor, apart from notice of any intended breach of trust, would the Insurance Company be bound to assume that anything of that kind was intended. I am disposed to assent to the argument that all this may be made to follow from the case of *Schumann*.

“But the object of the present action is to put an end to the trust altogether, the declarator sought being that the husband and grantor is entitled to revoke it, or at least to do so with the assent of the trustees, and his wife and children, who are the existing beneficiaries. This, it is obvious, is quite a different matter, and one which cannot be considered apart from the cases of *Low v. Low's Trustees*, November 20, 1877, 5 R. 185, and *Peddie v. Peddie's Trustees*, February 6, 1891, 18 R. 491. In both of those cases opinions were expressed and received effect adverse to the competency of revocation in such circumstances as exist here—opinions going in effect to this, that the doctrine of the cases of *Torry Anderson* and *Menzies and Murray* applies equally to postnuptial and antenuptial provisions. If, therefore, the trust-deed here is to be held as delivered—and I understand the pursuer does not now dispute that that is so—I am unable to hold that the pursuer's wife was entitled *stante matrimonio* to discharge the provisions in her favour. The pursuer does not propose to amend his summons, nor does he make any motion for proof. I have therefore no alternative but to sustain the first plea-in-law for the defenders and dismiss the action.”

The pursuer appealed, and argued—The deed of provision did not constitute a liferent in favour of the wife and a fee in favour of the children; it was a deed the immediate effect of which was to place the fee wholly in the power of the wife. In short, under the deed the wife was entitled to the fee of the estate—*Allan's Trustees v. Allan*, December 12, 1872, 11 Macph. 216; *Gibson's Trustees v. Ross*, July 12, 1877, 4 R. 1038. In these circumstances the pursuers, with the consents mentioned in the summons, were entitled to revoke the deed. The cases of *Low* and *Peddie* founded on by the Lord Ordinary were cases in which a liferent provision in favour of the wife was constituted or might emerge.

Argued for defenders—The cases of *Low* and *Peddie* conclusively settled that where a husband makes a reasonable provision for his wife during her life by conveyance to trustees, he is not thereafter entitled to revoke it although he has her consent or any other consents. There was no distinction between a provision by liferent and a provision by fee; if it were reasonable it was not revocable, even if it consisted of a

fee—*Galloway v. Craigs*, July 17, 1861, 4 Macq. 267.

LORD JUSTICE-CLERK—My opinion in this case is that the judgment of the Lord Ordinary is right, and I have nothing to add to what he says in his note.

LORD TRAYNER and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer—Guthrie, Q.C.—W. Watson. Agent—Thomas Hart, L.A.

Counsel for Defenders—Fleming—Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, June 28.

SECOND DIVISION.

ROBERTSON'S TRUSTEES v. MACGREGOR.

Succession—Mutual Settlement—Husband and Wife—Provisions for Children in Mutual Settlement—Contractual or merely Testamentary—Mutual Benefits Conferred by Spouses—Revocation—Revocability of Provisions to Children.

By mutual trust-disposition and settlement dated in 1883, a husband and wife, who had not executed any marriage-contract, in order to settle the succession to their means and estate, disposed and assigned to trustees the whole means and estate that should belong to them at the date of their respective deaths. The purposes of the trust were, on the death of the first deceiver of the spouses, to give the survivor the liferent of the predeceaser's estate, and on the death of the survivor to divide the whole estates of the two spouses equally among their children. The deed contained the following clause:—“And we reserve power also jointly, but not otherwise, to alter, innovate, or revoke these presents in whole or in part, it being hereby declared that should these presents stand unrevoked at the death of the first deceiver of us, then it shall not be competent to the survivor of us to alter or recal them in any way.”

The wife died in 1884. She was survived by the husband and six children. She left property worth over £10,000. After receiving the liferent of his wife's estate for fifteen years the husband died in 1899, leaving a trust-disposition and settlement dated 10th October 1898, by which he revoked the mutual settlement so far as it dealt with his own estate, and left his whole means and estate to trustees to be divided among the children in certain proportions. The husband left property worth over £20,000.