

between agent and client, and to report; and decern."

Counsel for the Petitioner—Grainger Stewart. Agents—W. & J. L. Officer, W.S.

Counsel for the Respondents—Pitman. Agent—Henry Smith, W.S.

Tuesday, March 10.

FIRST DIVISION.

MACTAVISH'S TRUSTEES v. OGSTON'S EXECUTORS.

Succession—Faculties and Powers—Power of Appointment Exercised by General Will Dated before Power Conferred.

By a trust-disposition dated in 1898 a truster left certain funds to his nephew in liferent, declaring that the capital should belong to the liferenter's issue, in such proportions as he should direct, and failing such issue that it should be disposed of as the liferenter might by will direct. The nephew survived the truster, and died without issue, leaving a will dated in 1894, by which he disposed of "the whole estate and effects of every description, heritable and moveable, real and personal, of which I may die possessed." In a special case, in which there was no statement whether the nephew did or did not know of the power of appointment conferred upon him, held that the power was validly exercised by his will.

The late Lockhart Mactavish died domiciled in Scotland on 15th February 1899 leaving a trust-disposition and settlement dated 31st January 1898, and registered in the Books of Council and Session on 5th April 1899.

The sixth head of Mr Mactavish's trust-disposition and settlement, dealing with the residue of his estate, was in the following terms:—"With regard to the residue and remainder of my means and estate, I direct my trustees to hold the same for behoof of my grand-nephews and grand-nieces after mentioned, *videlicet*, James Schofield, Frederick Schofield, Lockhart Alexander Schofield, Letitia Maria Schofield or Macfarlane, Margaret Florence Schofield, and Mary Schofield, children of my niece the late Letitia Lockhart Hargrave or Schofield; and Francis Hargrave Ogston, Walter Henry Ogston, Mary Letitia Ogston or Grierson, and Flora Mactavish Ogston, children of my niece the late Mary Jane Hargrave or Ogston, for the alimentary liferent use of my said grand-nephews and grand-nieces respectively; and the free income, after deduction of expenses, may be paid to each on his or her own receipt, and shall not be assignable or affectable by the debts or deeds or open to the diligence of the creditors of the several liferenters; and subject to the rights hereby conferred on the said liferenters respectively, and to the declarations hereinafter written, the fee or capital

shall belong to the issue of said grand-nephews and grand-nieces in such shares or proportions as the respective liferenters may appoint, and failing appointment equally *per stirpes*, and the fee or capital shall be payable to such issue only on the death of the respective liferenters, prior to which there shall be no vested interest in the fee or capital; and failing issue of any of the liferenters who may survive me, the capital destined to issue shall be disposed of as the respective liferenters may by will direct, and failing direction shall go to increase the shares of the surviving brothers and sisters german of the deceasing liferenter."

Francis Hargrave Ogston, one of the above-named grand-nephews of the testator, died without issue on 17th April 1901 leaving a will dated 3rd November 1894, and registered in the Books of Council and Session on 11th June 1902, by which he assigned, disposed, and conveyed, and made over to and in favour of his sisters the said Mary Letitia Ogston (now Grierson), Flora Mactavish Ogston, and his brother the said Walter Henry Ogston, and the survivors and survivor of them, 'the whole estate and effects of every description, heritable and moveable, real and personal, of which I may die possessed,' and he appointed the said Mary Letitia Ogston (now Grierson), Flora Mactavish Ogston, and Walter Henry Ogston, and the survivors and survivor, to be the executors or executor of his will.

Questions having arisen as to whether Mr Ogston's will operated as an exercise of the power conferred upon him in the trust-disposition of Mr Mactavish, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees acting under Mr Mactavish's settlement, and (2) the executors acting under Mr Ogston's will.

The case narrated the facts above stated. It contained no statement whether Mr Ogston did or did not know of the power of appointment conferred upon him by Mr Mactavish's settlement.

The questions of law were—"1. Are the second parties entitled under the will of the said Francis Hargrave Ogston to payment of the capital of the share liferented by him under the trust-disposition and settlement of the said Lockhart Mactavish? or 2. Is the will of the said Francis Hargrave Ogston ineffectual to exercise the power of disposal of the capital of said share, and must it accordingly be retained in the hands of the first parties so as to increase the shares liferented by the brother and sisters-german of the said Francis Hargrave Ogston?"

Argued for the first parties—The will was not an effectual exercise of the power. The result of the authorities was that there was no rule that a general bequest of a person's whole estate operated as an exercise of a power of appointment—*Smith v. Milne*, June 6, 1826, 4 S. 679; *Hyslop v. Maxwell's Trustees*, February 11, 1834, 12 S. 413, *per* Lord Corehouse, at p. 416; *Mackenzie v.*

Gillanders, June 19, 1874, 1 R. 1050, 11 S.L.R. 612; *Bertram's Trustees v. Matheson's Trustees*, March 10, 1888, 15 R. 572, 25 S.L.R. 385; *Whyte v. Murray*, November 16, 1888, 16 R. 95, 26 S.L.R. 67; *Bowie's Trustees v. Paterson*, July 16, 1889, 16 R. 983, 26 S.L.R. 676; *Dalgleish's Trustees v. Young*, June 29, 1893, 20 R. 904, 30 S.L.R. 802; *Clark's Trustees v. Clark's Executors*, February 16, 1894, 21 R. 546, 31 S.L.R. 430; *Montgomery's Trustees v. Montgomery*, June 27, 1895, 22 R. 824, 32 S.L.R. 628. It was a question of circumstances, and here the fact that the will supposed to exercise the power was made before the power was granted was an element in favour of the argument that the power was not exercised by it.

Argued for the second parties—Admitting that there was no absolute rule that a will in general terms must be held to be an exercise of a power of appointment, the presumption was that the power was exercised. Thus Lord Brougham, in discussing the difference between English and Scotch law on this point, laid down the rule that “unless it can be shown that it was not his intention to execute the power it shall be held a good execution”—*Cameron v. Mackie*, August 29, 1833, 7 W. & S. 106, at p. 141. The fact that the will was executed before the power was conferred was of no importance—a will spoke as at the testator's death—*Hyslop v. Maxwell's Trustees*, *cit. supra*. A will that was universal in its terms was universal in its application—*Grierson v. Miller*, July 3, 1852, 14 D. 939, *per* Lord J.-C. Hope. The cases of *Dalgleish's Trustees* and *Clark's Trustees* (both cited *supra*) were strong authorities to the same effect.

LORD PRESIDENT—The question in this case relates to the effect of the trust-disposition and settlement of Mr Mactavish and a will executed by his grand-nephew Mr Ogston. The material direction in Mr Mactavish's settlement is to his trustees to hold the residue for his grand-nephews and grand-nieces, of whom Mr Ogston was one. Put shortly, the provisions material to the present question were that each of the grand-nephews and grand-nieces should enjoy the free income for his or her life, and that the capital should belong to the issue of each. The provision for the case of those who might die without leaving issue is, “and failing issue of any of the liferenters who may survive me, the capital destined to issue shall be disposed of as the respective liferenters may by will direct, and failing direction shall go to increase the shares of the surviving brothers and sisters german of the deceasing liferenter.” In other words, where a liferenter has no issue he has the power of disposal of the capital of the share which he has liferented, and the question is whether the will of one of them, Mr Ogston, has effectually disposed of the fee or capital of the share of which he enjoyed the liferent. One peculiarity is the relation in time of Mr Ogston's will to Mr Mactavish's trust-disposition, for the trust-disposition was dated 31st January

1898, and registered in the Books of Council and Session on 5th April 1899, whereas Mr Ogston's will was dated 3rd November 1894, so that the will was executed three or four years before the disposition by which the power of disposal was conferred. We have to consider whether this fact makes any difference. It seems to me, both on principle and authority, that the claim of the second parties should be sustained, because although, as the will was prior in date, Mr Ogston could not have had the power of appointment in his mind when he executed it (unless he was aware of its tenor, which is not stated); nor could he then have intended to exercise the power, still, from the terms of the will it is clear that he meant it to have the largest possible effect, and therefore, as it speaks at his death, it may operate as an exercise of the power. It seems to me to be in the same position as if he had said—“I wish my will to operate upon all the rights which may belong to me, or which I may have a power to dispose of, at my death.” It is presumed that when he executed the will he intended it to be an exercise of all the rights and powers of disposal which he might have at his death, whether he knew of them then or not. Accordingly, upon this short ground, and without going through the authorities which have been cited, I think the first question in the case should be answered in the affirmative.

LORD ADAM—I am of the same opinion. The facts of the case are short and simple. The late Lockhart Mactavish died on 15th February 1899, leaving a trust-disposition and settlement dated 31st January 1898. Mr Francis Hargrave Ogston, one of the beneficiaries under Mr Mactavish's will, died without issue on 17th April 1901, leaving a will dated 3rd November 1894, that is, four years before the date of Mr Mactavish's settlement. Under his settlement Mr Mactavish left to Mr Ogston and his brothers and sisters, who were his grand-nephews and grand-nieces, one-half of the residue of his estate for their alimentary liferent, with a fee to their issue in such shares as the respective liferenters might appoint, and failing such appointment, equally. Failing issue the fee was to go as the liferenters might by will direct, and failing such direction it was provided that the fee should go to increase the share of the surviving brothers and sisters german of the deceasing liferenter. It is under this clause that the present question arises. Mr Ogston died without issue and left a will. If that will is a good appointment of his share of Mr Mactavish's estate, his brothers and sisters will get that share in fee; if it is not a good appointment they will take the same share in liferent with a fee to their children as provided with regard to their own original shares. I think it is unnecessary to go over the cases. I think it is settled that a will must be read as at the date of the testator's death, and that he must be held to have considered any changes which took place prior to his death. Mr Ogston must therefore be pre-

sumed to have known that this power of appointment was given to him. I am of opinion that this case is ruled by the cases of *Hyslop*, *Dalgleish*, and *Clark's Trustees*, and I agree with your Lordship.

LORD M'LAREN—The question is whether the will of Francis Hargrave Ogston, which is in the form of a general settlement, takes effect on a bequest contained in the trust-disposition and settlement of Lockhart Mactavish to Francis Hargrave Ogston in liferent and to the persons nominated by him by will in fee. We start with the doctrine laid down by Lord Brougham in the case of *Cameron v. Mackie* (1833, 7 W. & S. at p. 141), that the presumption is that a general settlement exercises a power of appointment. There was not much authority then for that proposition. But we must take it that Lord Brougham expressed the effect of such authority as there was, and of the traditions of the legal profession, that it was to be presumed that a general settlement effectually exercises a power of appointment unless there is something to show the contrary. Here it is enough that there is nothing to show the contrary. It is not indeed certain that Mr Ogston knew he had this power. But it is not plain that he did not know. The presumption is that he had information about it. He drew the liferent, and would naturally be informed as to what was to become of the fee. At least it cannot be affirmed as matter of fact that he was in ignorance of the power. If he knew of it, then according to the rule expressed by Lord Brougham the presumption is that he exercised it by his general settlement. This is only a presumption, and it is easy to figure cases in which it would be rebutted. Here there are no special facts to create difficulty.

I am not sure that it makes any difference which way the question is decided, as one possible reading of the bequest in Mr Mactavish's settlement is that under it the fee goes to the liferenter's brothers and sisters failing appointment by him; but it is not necessary to consider this.

LORD KINNEAR concurred.

The Court answered the first question in the case in the affirmative.

Counsel for the First Parties—Chree. Agents—Skene, Edwards & Garson, W.S.

Counsel for the Second Parties—Campbell, K.C.—Hon. W. Watson. Agents—Tods, Murray & Jamieson, W.S.

Tuesday, March 10.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow.]

SCHMIDT v. CALEDONIAN RAILWAY COMPANY.

Expenses — Parties Liable — Husband — Action by Wife with Consent and Concurrence of Husband — Husband and Wife.

In an action of damages for personal injury at the instance of a married woman, with consent and concurrence of her husband, who had been present when she sustained the injuries on account of which she sued, the case was tried by a jury, and at the trial the husband gave evidence in support of his wife's averments, and a verdict was returned for the defenders. *Held* that the husband and wife were liable jointly and severally in expenses.

Mrs Jessie Kemp or Schmidt, wife of Robert Schmidt, furrier, 3 Pettigrew Avenue, Shawlands, Glasgow, with consent and concurrence of her husband, raised an action against the Caledonian Railway Company, in which she sought to recover damages for personal injuries sustained by her, which were caused by an accident for which she alleged the defenders were responsible.

The case was tried before the Lord Justice-Clerk and a jury.

Robert Schmidt was present when the accident happened to his wife, and consequently was in a position to judge of her grounds of action. At the trial he gave evidence in support of her averments.

The jury returned a verdict for the defenders.

In moving the Court to apply the verdict and for expenses, the defenders maintained that the pursuer and her husband should be found jointly and severally liable in expenses.

Argued for the pursuer—The mere consent and concurrence of the husband was not sufficient ground for making him liable in expenses—*Whitehead v. Blaik*, July 20, 1893, 20 R. 1045, 30 S.L.R. 916; *Fraser v. Cameron*, March 8, 1892, 19 R. 564, 29 S.L.R. 446; *White v. Steel*, March 10, 1894, 21 R. 649, 31 S.L.R. 542; *Macgown v. Cramb*, February 19, 1898, 25 R. 634, 35 S.L.R. 494; *Chalmers v. Douglas*, February 19, 1790, M. 6083, *revd. Baillie v. Chalmers*, April 6, 1791, 3 Pat. App. 213; *Maxwell v. Young*, March 7, 1901, 3 F. 638, 38 S.L.R. 443; *Picken v. Caledonian Railway Company*, October 26, 1901, 4 F. 39, 39 S.L.R. 31. Apart from giving his consent the pursuer's husband had done nothing to identify himself with her action; at the trial he had taken no more active part than an ordinary witness.

Counsel for the defenders were not called upon to reply.