

LORD GORDON—After the very full expression which has been given of the grounds on which your Lordships have proceeded, it would be quite out of the question for me to detain the House by saying more than that I concur in the judgment of your Lordships.

Their Lordships affirmed the interlocutor of the Court of Session, and dismissed the appeal with costs.

Counsel for Appellants—Napier Higgins, Q.C.—M'Laren—Grosvenor Woods. Agent—William Robertson, Solicitor.

Counsel for Respondents—Kay, Q.C.—Benjamin, Q.C.—Davey, Q.C.—Kinnear. Agents—Martin & Leslie, Solicitors.

Thursday, March 20.

(Before Lord Chancellor (Cairns), Lord Hatherley, and Lord Selborne.)

COSTINE'S TRUSTEES v. COSTINE.

(In Court of Session March 19, 1878, ante, vol. xv. p. 446, 5 R.)

Succession—Parent and Child—Power to Revoke—*Jus quaesitum tertio*.

A father and son entered into a deed of agreement by which the father agreed to pay his son £7000 as the price of his consent to the disentail of an estate. £4000 was to be paid absolutely, the remaining £3000 was to be paid to trustees, "to be held by them in trust for the use and behoof of the son, but under the declaration that it should be lawful for the father to limit the power and control of the son over the said sum to such extent and in such way as he should think proper, and in particular to direct the trustees to hold the sum for behoof of the son in life only, and for the issue of his body in fee, whom failing to his nearest heirs and assignees." The father thereafter executed a deed of declaration of trust, which was also signed by the son, who therein expressly declared his concurrence and acquiescence, providing *inter alia* that in the event of the son dying without issue the trustees should hold the £3000 for the father's sister and her heirs. The trustees paid the income to the son. After his father's death the son married, and at his death he was survived by his wife, to whom shortly before, in a deed of revocation of the declaration of trust, he had bequeathed the £3000. *Held* (affirming judgment of the Second Division of the Court of Session) that the deed of revocation was effectual, the destination in the deed of trust being truly a testamentary destination by the son, and no *jus quaesitum* therefore having arisen to the beneficiaries under it.

This was an appeal by Mrs Isabella Costine or Wightman and four of her children against a judgment of the Second Division of the Court of Session, who (*diss* Lord Ormidale) had reversed a decision of the Lord Ordinary (Curriehill).

The circumstances of the case will be found fully detailed in the Court of Session report and in the judgments of the House of Lords *infra*.

At delivering judgment—

LORD CHANCELLOR—My Lords, an elaborate and lengthened argument has been presented to your Lordships in this case ranging over a number of legal questions as to which in the abstract there cannot, I think, be much doubt. But the first inquiry to be made, as it seems to me, is what exactly are the facts of the present case, and what was the position of the parties concerned. If your Lordships arrive, as I have no doubt you will, at a correct appreciation of those facts and of that position, you will not, I think, find much difficulty in determining what is the law to be applied to them.

Now, your Lordships have here the case of an owner of a Scotch entailed estate in possession. He was desirous of barring the entail, and for the purpose of effecting that object he had to obtain certain consents, and notably the consent of his only son. The obtaining of that consent became, as it was perfectly right it should become, a matter of bargain between him and his only son, and a bargain was ultimately struck for that purpose. The terms of that bargain are expressed in writing, and there can be no doubt or controversy as to this, that the terms must be extracted from the writing, and the writing appears to me reasonably plain as regards the construction of it. I will ask your Lordships' attention, therefore, in the first place, to what was the agreement which was arrived at between the father John Costine the elder and his son John Costine the younger; and, I will say, my Lords, at the outset, that so far as I can understand these papers, that agreement is the only agreement that ever was arrived at between the parties. I find no trace of either father or son intending afterwards to alter the agreement. I find them nowhere coming together and entering into a new arrangement between them. Any new arrangement, if come to between them, would have been wholly without consideration. The consideration for this agreement was the disentailing of the estate; when that was accomplished any further agreement could only have been a gratuitous one. In point of fact, as it seems to me, no further agreement—no substituted agreement—was ever formed between the parties.

Now, what was the agreement between the father and the son as expressed in the writing to which I have referred? The father was to pay for obtaining the consent of the son to the disentailing of the estate a sum of £7000, but that payment was to be made in two different sums—£4000 was to be paid or secured to the son absolutely and without any kind of qualification, the residue of the sum of £3000 was to be secured and the security was to be in the names of trustees. A bond was to be given to the trustees for the sum, and the enjoyment by the son of that sum was to be qualified in the way I am now going to describe.

In the contract between the father and the son which is the agreement of the 20th of October 1870, it was provided as to this £3000 that it was to be held by the trustees in trust for the use and behoof of the said John Costine junior. I will ask your Lordships to observe that the trusts

which are mentioned of this £3000 are divided into three sentences, the first of which I have now read. It was to be, says the agreement, "in trust for the use and behoof of John Costine junior," and if it had stopped there, that simply would have been a declaration of unqualified proprietorship on the part of John Costine junior of this sum of £3000. But what follows qualifies this absolute proprietorship. The second clause is this—"It shall be lawful for the said John Costine senior to limit the power and control of the said John Costine junior over the said sum to such extent and in such way and manner as he shall think proper." Now, my Lords, if we stopped here at this second stage of the declaration of trust, your Lordships would have that which in its terms would be a complete repugnancy between these two sentences. You would have in the first sentence a declaration of absolute proprietorship in the son; you would have in the second a right in the father to take away and destroy that proprietorship. That could not have been the intention of the parties, and unless you were absolutely driven to that result, you would not so construe the instrument.

But the third clause of the trust entirely clears up what was doubtful or what was strange in the expression of the second—for in that John Costine senior directed his trustees to "hold the said sum of £3000 for behoof of the said John Costine junior in liferent only, and for the issue of his body in fee, and" (passing over the next part) "it shall also be in the power of the said John Costine senior to limit the interest of the said John Costine junior in the said sum of £3000 to that of a liferent alimentary provision which he shall have no power to assign, and which shall not be liable to be attached by the diligence of his creditors." Your Lordships therefore have there an explanation of what was meant by giving to the father the faculty to limit the power and control of the son over the sum to such extent as he thought fit. It was a power which enabled him—continuing the proprietorship of the money for the benefit of the son—to limit and control the form of enjoyment by the son of that sum, so that the son might secure the life interest himself, which he could not alienate, and so that the *corpus* of the property might be preserved for the benefit of his children.

But then there continues, although it is interjected between the two sentences which I have read, the ultimate destination of the fund when this moulding of the enjoyment for the benefit of the son and his children was accomplished. The ultimate destination is this:—"Whom failing (that is, failing children) to his nearest heirs or assignees," the ordinary words for representing the continuance in the son of the absolute right of property by destination to his heirs or assignees. Your Lordships therefore have that which is an intelligent and consistent trust of the fund. It is to be the property of the son, but the father is to have the right of impressing upon it a trust, giving the son a life interest and securing the *corpus* for his children, but these objects being accomplished, the fund remains the fund of the son, as it was originally intended to be. I asked the learned counsel for the appellants (Mr Benjamin), if the question were to be decided upon this deed, would he dispute that the destination which I have read was simply that which would express the

absolute property of the son, and he very properly said in reply that he could not deny that it would be so.

Now, my Lords, I pause there for the purpose of pointing out to your Lordships that the mere reading of this trust disposes of an argument of Mr Benjamin's which was very ably pressed upon your Lordships, namely, that you have here something analogous to what might be termed a joint power in a father and son to declare a trust of this money, or a power to the son with the consent of the father to dispose of the property. No doubt, as Mr Benjamin said, if that were the proper construction of this instrument, and if after such a trust the joint power had once been exercised by the father and the son, or if the power had been exercised by the son with the consent of the father, that being the nature of the power, such an exercise of the power could not be revoked after the death of the father. But, my Lords, there is nothing here in the slightest degree analogous to a joint power, or to a power to the son to be exercised with the consent of the father, or a power to the father to be exercised with the consent of the son. Whatever right the father has is an absolute right in him alone; whatever he can do he can do without any concurrence of the son whatever, it is a right exclusively given to the father, so far as it is given at all, and whatever right the son has is the right of the son entirely independent of the father. There is no junction—no connection—between the two. There is nothing which the father and son are obliged to concur in doing. Whatever either of them can do, he can do separately and independently of the other. The father can mould the mode and the form of enjoyment of the property by the son to the extent which I have mentioned, and he can do that without any concurrence on the part of the son. So far as the father does not do that the property remains the absolute property of the son without any right in the father to control that absolute property.

Now, my Lords, that being the bargain between the parties—that being the trust which originally was declared of this sum of £3000 placed in the hands of these trustees—how is it that any question or confusion has arisen upon the subject? If it stood here, and nothing more had occurred, there could hardly have been any argument raised upon the question. The property would have been open to any fresh destination which the son might choose to give it, provided only that he did not interfere with what the father might do for the benefit of his issue and for the securing of the liferent to himself. Now what took place afterwards was this—the estate was disentailed, and disentailed on the footing of this contract. The proper conveyancing deed to carry into effect what remained to be done had to be executed, and accordingly a bond and disposition in security by the father John Costine the elder was granted over the estate of Glensone in favour of the trustees for £3000, and "for the ends, uses, and purposes expressed in a deed of declaration of trusts executed by me of even date herewith, and to which reference is hereby made." And then the son John Costine junior declares his "concurrence and acquiescence in the above written bond and disposition in security, and in the said deed of declara-

tion of trusts." Therefore we are referred to and we have to go to the declaration of trust.

Now, the declaration of trust professes to be "a declaration of trust by John Costine of Glensone with the concurrence of John Costine junior, in favour of trustees." It recites the contract with regard to disentailing the estate; it recites the bond and disposition in security in favour of the trustees for the £3000. It declares that the trustees are to hold the £3000 in the first place, to invest it in the way spoken of, and to pay the liferent to John Costine the younger as an alimentary provision, and secondly, on the death of the son, the trustees are to hold the principal sum in trust for the issue of the son. And then the third is this—"In the event of my said son dying without leaving lawful issue, or upon the failure of such issue, the said trustees shall hold the said sum of £3000, or the balance thereof if any part shall have been paid to or on account of the issue of my said son, in trust for behoof of my sister Isabella Costine or Wightman, spouse of Robert Wightman, presently in London, in liferent for her liferent use allenarly, free from the *jus mariti* of her husband," and then for her issue, and the shares of the females are not to be subject to the *jus mariti* of their husbands.

Now, my Lords, stopping there, I have to observe that if this had been the deed of the father alone, executed without any concurrence on the part of the son, over and above the limitation of the liferent, or the limitation to the issue of the son, according to my construction of the contract between the father and the son it would have been entirely beyond the power of the father to have made any ultimate destination of the £3000; he would have been disposing of property which was as completely foreign to his jurisdiction as any property could be. Therefore from any power of the father it appears to me this destination could receive no assistance whatever; and there I think that the learned Judges in the Court below seem all to have agreed.

But there follows a declaration by the son to this effect at the end—"And I, the said John Costine junior, hereby declare my acquiescence and concurrence in all the provisions herein contained; and we consent to registration hereof for preservation." Now, the only question which appears to me to raise any ground for argument is, What is the effect of the concurrence of John Costine, the son, in a deed of the character of that which I have read? My Lords, it does not appear, I may say in passing, whether the aunt of the son, Mrs Costine or Wightman, at this time was or would have been his nearest heir or not. I do not assume that either one way or the other. He himself, we are told, was a young man, unmarried, about the age of twenty-five. He declares his concurrence in what his father had done. There is no appearance whatever of any agreement, any family arrangement, any new contract between him and his father, and that observation seems to me to put an end to one part of the argument that there was here *jus quesitum* of third parties. That of course could only arise if there was some agreement between the father and son for the benefit of third parties, and I find no trace of anything of that sort. It was a question of how the father should execute a power or faculty given to him. If he executed it in a proper way, he required no consent or

concurrence of anybody else. If he executed it in a way that was not within his power, we must find some trace of a fresh agreement if that is to be set up as a fresh settlement between the father and the son.

Now, it seems to me that what the son, looking at this deed, had before his mind was this—he had by virtue of the original contract between himself and his father a complete power of disposing of this £3000 subject to the life-interest in himself and to the interest to be secured for his children. He was an unmarried man, and at his age it might appear to him that that was a right which might never become one of much practical importance, but as it stood upon the original contract the destination would have been to his heirs and assignees generally. It appears to me that in this deed he does nothing more than allow, for the time and provisionally, the nomination of assignees under his original right of property. That is an intelligible arrangement to be made. He knew the members of his family at the time, and he would naturally be perfectly prepared to permit the insertion of their names in place of the general destination which stood in the original contract. But I can find no trace here of his intention to do anything more than to allow the insertion of the particular names of members of his family in place of the general destination in the original contract. That is only stating in other words that this was a revocable nomination of assignees—that it was, as one of the learned Judges calls it, testamentary in its nature, which is only another term for saying that it is revocable in its nature. I can find no trace of anything whatever done or said on the part of the son which was intended to give this a different character or to elevate it to the position of an agreement made between him and his father for the benefit of those particular persons whose names were thus inserted in the declaration of trust.

My Lords, therefore without making any comment upon these cases which have established general propositions of law which seem to be beyond a doubt, I ask your lordships to dispose of this case upon the explanation which seems to me to be the sound and proper one of these documents which I have endeavoured to give. That is the explanation which found favour with the majority of the Court of Session, and it seems to me entirely sufficient to uphold the judgment at which they have arrived. I will therefore move your lordships that the appeal should be dismissed; and as there is no agreement between the parties as to costs, it must be dismissed with costs in the usual way.

LORD HATHERLEY—My Lords, I am of the same opinion as that which has just been expressed by my noble and learned friend on the woolsack. I proceed entirely upon this ground, that the instrument, which must regulate the rights, of the parties in this litigation, and which must be considered the foundation of all right that is taken by either the son on the one hand or the father on the other to these estates is the first instrument dated the 20th of October 1870, which is an agreement stating upon what terms the son had come in and consented to the destruction of the estate-tail of which the father was in possession. We can only construe that agreement as it stands

in the instrument before us, and that construction is by no means difficult when all the terms of the instrument are considered.

My noble and learned friend on the woolsack has gone through that agreement with a view to showing the position of the parties, and I shall not therefore cite the passages again. I will simply state that the son's consent was given upon a bond of £4000 unfettered by conditions, and upon a bond of £3000 which was fettered by the conditions contained in the deed. What were those conditions? In the first place, the sum of £3000 is to be held "in trust for the use and behoof of the said John Costine junior," that is the son; that would have given him the absolute interest in it but for the control vested by the subsequent words in the father—"It shall be lawful for the said John Costine senior to limit the power and control of the said John Costine junior over the said sum to such extent and in such way and manner as he shall think proper." Therefore the whole sum of £3000 placed in the hands of the trustees stood in this position, that the father had power to control it in this manner—that is to say, he could direct them to hold the £3000 for the behoof of his son "in liferent only and for the issue of his body in fee, whom failing to his nearest heirs or assignees." But there is not a single word in that agreement giving the father the power of destination over the sum on his own authority. He could guard the son's interests—he could watch over those interests—he could take care in the first place, by reducing it to a life interest, that the son should not dispose (as he the father might think unadvisedly) of the capital. And besides having the power of saying that he should only have a life-interest, he might further limit the interest to "a liferent alimentary provision." That is a further restriction which the father might put upon the son's life-interest. But, my Lords, I look in vain in the instrument for anything whatever which approaches to a power or authority being vested in the father himself to deal with the sum which he had parted with, and which he had handed over to the trustees, that sum being partly the consideration which the son had been paid for barring the entail, and which was the son's to all intents and purposes, for although the father might give directions as to the mode in which it should be enjoyed by the son, and might preserve it for his issue, he had no controlling power over the fund itself.

Mr Benjamin felt the difficulty undoubtedly that arose upon the wording of the deed in the way of his argument of the father having the power to do anything like what he has here done, and he adopted, I think I may say, the reasoning of Lord Curriehill, which puts the case as strongly as can be put for the appellants. He contended that an interpretation was put upon this agreement by a deed which was subsequently executed, and which asserted, as has been said on the part of the father, apparently by the exercise of the nomination of the aunt, a right to control the destination of the fund. Lord Curriehill puts the result of that with reference to the subsequent deed, on which I shall say a word presently. Thus he says—"These are questions which it might have been difficult to answer had the deed of declaration of trusts and the other deeds referred to in the interlocutor not been granted. But I think that by those deeds, and particularly by the

deed of declaration of trusts to which John Costine junior was a party, and gave his full and deliberate consent, he and his father have virtually interpreted the second head of the minute of agreement as conferring upon or as reserving to the father full power, failing issue of his son, to deal with the fee of the £3000 as he should deem right." Therefore, says Mr Benjamin, it is in effect a power given to the father to deal with the fund, and that power he has exercised, and the son has not only not opposed his exercising that power, but has concurred in his so doing. If it was of any important use in this controversy, nothing short of this must be contended, that that enabled the father in effect to revoke the gift of £3000 in favour of the son, and to revoke it from his issue, and to say that not only the liferent, but the capital itself, should be at his disposal. Now, my Lords, if there had been any great difficulty in the construction of that first part of the clause I have read as to the £3000—if there had been any question, looking to the framing of the deed itself, as to whether there was or was not in the deed a power conferred upon the father—I think it would at least not be increased by those deeds which were subsequently executed by the son, and which are viewed by Lord Curriehill as giving a meaning to the agreement which certainly on the face of them the words do not indicate. Regard being then had to the position of the parties, they do not occasion in my mind any doubt or difficulty. Lord Curriehill looks upon them as a concurrence by the son, and as giving to the father that which he had not according to the interpretation of the words themselves in the original agreement which was entered into between the parties. I do not find any trace of such an intention. I do not find that the father and the son recited the agreement as being of a doubtful or ambiguous character, or recited that questions had arisen between the two, and therefore an arrangement had been come to between them that the interpretation should be such that on the face of it the words did not appear to bear. I find nothing of that sort. It only comes to this—there is a declaration of trust, which proceeds in consequence of the agreement; the father recites the declaration of trust, and he says—"Considering that by minute of agreement dated the 17th and 20th days of October 1870, entered into between me on the one part, and the said John Costine junior on the other part, I bound myself, in consideration of the said John Costine junior having consented to the said estate being disentailed, *inter alia* to pay to certain trustees for his behoof, at the first term of Whitsunday or Martinmas that should happen after the said disentanglement had been completed, the sum of £3000 sterling." There is nothing there to say there had been any difficulty or any ambiguity which occasioned the necessity for this deed of declaration of trust. The deed is executed evidently for the purpose of carrying out that agreement which had been come to between the parties in 1870.

I do not know why it was, or whether there was any special intention in the matter, but it does leave out the limitation after the failure of issue which is contained in the original agreement—"whom failing to him and his nearest heirs or assignees." These words are certainly omitted in the recital in the deed of declaration of trust, but

I do not think that anything turns upon that. It is rather singular that these words should have been omitted in the recital of the limitation, but, be the reason what it may, I find nothing whatever that indicates that either the father or the son thought in the slightest degree of varying the agreement or of doing otherwise than carrying it into full effect.

And if the agreement was to be carried into full effect, then I think the case is clearly brought to what the Lord Justice-Clerk and Lord Gifford consider the true construction to be placed upon it, namely, that the £3000 was the son's fund, given to him as part of the consideration for his agreeing with his father to bar the entail. It remains the fund of the son, subject only to such power and control as the father might have over it in the way of arresting alienations of a certain character, as to which nothing need be said, because nothing of the kind took place; but the agreement did not give the father the power to dispose of the fund, nor does it appear to me that the son's concurrence in the subsequent deed is given with the purpose of enlarging the authority of the father, or of parting with the control over the fund to the father and enabling him to hand it over to the aunt. The effect of it appears to me to be simply this—The son had this control over the property guarded in the way I have indicated, and that son said (this is the legal effect of it in my mind) that out of his moneys he was willing at that time that the capital at his death should pass over to the person indicated in the deed. But then, as regards that, it was entirely a voluntary disposition; there was no bargain between the father and the son that that should be the case. They having previously agreed to bar the entail, there was no new bargain entered into at that time of this kind—"You shall also agree with me to give a certain sum of money in this way." If it had been so, the cases which have been cited might have had some application, but that was not the case. I do not see that they intended to agree to anything of the kind in 1871. I think that the deed of declaration of trust left the parties in exactly the position in which the original agreement left them, and that left the property in trust for the use and behoof of the son which he was at that time minded to dispose in a certain way, but the deed being entirely without onerous consideration, it left him full power to dispose of the property by a testamentary act afterwards, and that power he exercised by testamentary disposition.

Under these circumstances, my Lords, I agree with my noble and learned friend on the woolsack that the appeal must be dismissed.

LORD SELBORNE—My Lords, the recital of the agreement between the father and the son in this deed of trust is imperfect and might not impossibly be misleading. If the agreement had been in these terms, and these only, it would (according to the opinion of the Lord Ordinary and Lord Ormidale) have justified the father in dictating at his own mere will and pleasure the succession to this sum of £3000 after the son's death. But that sum really belonged to the son absolutely and would necessarily be part of his *post mortem* succession (failing his issue) after his death, and the father's power of control really extended no further than to the restriction of the manner in

which the son's life-interest was to be enjoyed, and to securing the succession of his issue if issue he should have.

When the deed of trust was executed there was no new bargain and no new consideration. The son could not possibly be bound by any erroneous interpretation which that deed might have put upon the original contract so as substantially to vary its operation and effect (if it ought to be so understood), either on the principle of estoppel or on any other; unless there were some new bargain or new consideration, which there was not, that deed in all its material provisions was the deed of the father speaking in the first person singular, and purported to operate by virtue of the father's power of control. There were no dispositive or conveying words on the part of the son; he merely acceded to the deed and declared his acquiescence and concurrence. This could at the utmost amount to no more than the expression of his will at that time—that his *post mortem* succession as to this fund should go in the order and course declared by that deed. Such a mere expression of his will was at the most testamentary and revocable, and it was duly revoked.

I agree therefore with the view of this case taken by the Lord Justice-Clerk and Lord Gifford, and with the reasons for their decision, which are clearly and ably explained in Lord Gifford's judgment.

Their Lordships dismissed the appeal with costs.

Counsel for Appellants—Benjamin, Q.C.—M'Clymont. Agent—A. Beveridge, Solicitor.

Counsel for Respondent—Lord Advocate (Watson)—E. E. Kay, Q.C. Agents—Simson, Wakeford, & Simson.

Tuesday, May 20.

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord Penzance, Lord O'Hagan, Lord Selborne, and Lord Blackburn.)

CITY OF GLASGOW BANK LIQUIDATION
—(BELL'S CASE)—BELL AND OTHERS
(LANG'S TRUSTEES) v. THE LIQUIDATORS.

(In the Court of Session January 22, 1879, *ante*, p. 249.)

Public Company—Transfer of Shares—Entry on the Transfer Register where New Trustees Assumed—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 25.

Trustees whose names were entered on the register of a joint-stock bank, registered but not formed under the Companies Act 1862, executed a deed of assumption of new trustees, which they intimated to the bank. The bank official made an entry of the terms of the deed in the stock ledger, following the previous entry, and giving the names and designations of the new trustees.

Held (affirming decision of the Court of