

Replied for the defender, *1mo*, The tack is granted for an adequate rent, as it is equal to what Reid paid for the other half of the lands, or very little short of it. *2do*, Experience hath proved the inconveniency, both to master and tenant, of limiting tacks to a short period of time; and the utmost length the objection to this tack's endurance could go, would be to restrict it to such a shorter period as might be thought proper. *3tio*, There is properly no mansion-house on either half of the lands, but only an onstead for each farm; and the pursuer may, if he pleases, have his choice of the two. *4to*, The two halves of the lands have been always possessed as separate farms: so the inconveniency is not greater than formerly; and could not be remedied by this reduction, as both lie run-rig with other grounds. And, *5to*, The substitution of Thomas, the granter's other son, cannot affect this tack, more than if it had been granted in such terms to perfect strangers. Nor does the decision, *Chrystisons contra Kerr*, which is a single one, apply to this case; as there the tack was given on deathbed of the whole of the granter's estate for three nineteen years, which was considered as a species of alienation.

'THE LORDS reduced the tack; and decerned.'

Act. *Miller*.

Alt. *Jo. Dalrymple, Lockhart.* Clerk, *Pringle*.

Fol. Dic. v. 3. p. 171. Fac. Col. No 187. p. 334.

1797. December 5.

MARGARET and AMELIA MURRAY, *against* The TRUSTEES of MARGARET BORTHWICK.

JOHN SCHAW died on the 1st September 1770, leaving a widow, Margaret Borthwick, and two daughters, Janet, married to William Murray, and Margaret, the wife of Dr James Feild.

In 1769, John Schaw had executed a trust-settlement, by which he left his wife L. 2000, and the liferent of the greatest part of the remainder of his property. He also left L. 1500 to his grand-children by each of his daughters, payable at his wife's death.

These legacies were qualified by the following clause: 'Reserving always full power to the said Margaret Borthwick, my spouse, at any time of her life, after my decease, by a writing under her hand, to revoke and alter the provisions hereby conceived in favour of my said grandchildren, or otherwise to divide and proportion the same amongst them, in the same manner, and as freely in all respects as I could have done myself, if in life.'

The deed further provided, that 'upon the decease of the said Margaret Borthwick, my spouse, I do hereby appoint the whole free residue of my estate, real and personal, which shall then remain, after payment and satisfaction of my debts, funeral-charges and expenses, and after deduction of the aforesaid L. 2000 Sterling provided to my said spouse, in case she shall have disposed thereof by a writing under her hand; as also after payment of any

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Bonds secluding executors fall under the law of deathbed.

No 56. ' legacies or donations, which I may hereafter think fit to bequeath to any of
 ' my friends or relations ; and the aforesaid provisions to my daughters or
 ' grandchildren, before named, to be divided into two equal shares ; the one
 ' just and equal half thereof, I do hereby assign and dispoⁿe, to and in favour
 ' of the said Janet Schaw, my eldest daughter ; and the other just and equal
 ' half thereof, to and in favour of the said Margaret Schaw, my other daugh-
 ' ter, and their respective heirs and assignees ; and which division between my
 ' said daughters shall be made at the term of Whitsunday or Martinmas next
 ' and immediately following the decease of my said spouse, by two neutral
 ' persons, one to be chosen by each of my said daughters, or their heirs.'

John Schaw, on the 27th August 1770, when on deathbed, executed a sub-
 sequent deed, by which, after referring to his former settlement, he declares,
 That ' in place of an equal division betwixt my said two daughters of the resi-
 ' due of my means and estate, as is appointed by my said disposition and set-
 ' tlement, it now is my will and intention that the said Margaret Borthwick,
 ' my spouse, if she survive me, shall have the sole power of dividing the said
 ' residue betwixt my said two daughters, or amongst them and their children,
 ' as she shall think proper ; therefore, and in virtue of the said reserved power,
 ' I do hereby, but in so far only as regards the division of the said residue, re-
 ' voke and alter the said disposition and settlement ; and do hereby declare,
 ' that it shall be in the power of the said Margaret Borthwick, my spouse, in
 ' the event of her surviving me, to divide the residue of the said means and e-
 ' state, which shall remain at her decease, after payment and satisfaction of my
 ' debts and funeral charges, and of the other debts and burdens mentioned in
 ' the said disposition and settlement, betwixt my said two daughters, or a-
 ' mongst them and their children, by such shares and proportions as she shall
 ' think proper, and payable to them at such times or terms as she shall think
 ' fit.'

At Mr Schaw's death, almost all his fortune was lent out, on bonds seclud-
 ing executors.

Mrs Schaw survived her husband twenty-four years, in the course of which
 she received payment of the greater part of the bonds, and again lent the mo-
 ney, along with sums belonging to herself, and took bonds for the whole, pay-
 able to herself, *proprio jure*.

In 1791, Mrs Schaw executed a trust-settlement, by which she left the
 whole of her own fortune to her daughter Margaret, and her family ; and, in
 virtue of her power of distribution by the deed made by her husband in 1770,
 she likewise ordered the residue of Mr Schaw's fortune, after paying his debts
 and legacies, amounting to L. 3746 : 14 : 6½, to be divided in the following
 proportions, namely, L. 2946 : 14 : 6½, to her daughter Margaret, and her fam-
 ily, and the remaining L. 800 to her grandchildren, and great grandchildren
 by Janet, who had died before the date of the settlement. She further or-

dered the special legacies of L. 1500, left by her husband to the families of each of the daughters, to be paid precisely in terms of his settlement.

Considerable losses having been sustained on the bonds which Mrs Schaw had taken in her own name, it was by her settlement declared, that ' although in justice I might state and get allowance of the losses which have already fallen upon my husband's funds ; yet it is my resolution, that the same shall be sustained proportionally by his funds and my own, and therefore, I do hereby direct my trustees before named, and survivors or survivor of them accepting, that after my death, upon casting up the whole losses which have been sustained, a proportional deduction shall be made from the estates both of my husband and myself, so that the losses may fall equal upon both ; and I direct that the different sums payable to my grand-children, or great-grand-children, shall suffer a proportional abatement.'

Margaret and Amelia Murrays, children of Janet Schaw, conceived that they had right to a greater share of their grandfather's succession, than was given them by his widow's settlement, on two grounds: 1st, Because, as John Schaw's funds consisted chiefly of bonds heritable *destinatione*, he could not by his death-bed deed in 1770, give his widow the power of dividing the residue of his estate, to the prejudice of his heirs at law ; 2dly, Because his widow had no right to burden her husband's funds, with losses arising on bonds payable to herself, *proprio jure*. They accordingly brought a reduction of Mr Schaw's death-bed settlement, and of Mrs Schaw's trust deed, to the effect of setting them aside in these particulars.

In defence, Mrs Schaw's trustees

Pleaded, 1st, It is doubtful if the law of death-bed applies to bonds including executors, which are heritable merely *destinatione*, and have no connection with land or real property.

At all events, Mrs Schaw, by her husband's first settlement, made in *liege poustie*, had the faculty of distributing or revoking the special legacy of L. 1500, left to the pursuers, and she certainly would have exerted it, had she known her want of power to distribute the residue of his fortune in virtue of his last deed. By her present settlement, the pursuers get L. 2300, but she might have cut them off from every thing, but the half of the free residue of her husband's funds, which amounts only to L. 1873 : 7 : 3. Her settlement must therefore be held in law to have the same effect, as if she had declared in general terms, that the pursuers should not draw more than L. 2300 from their grandfather's succession, which was unquestionably within her power.

2dly, Mrs Schaw, by her husband's settlement, had express powers to receive payment of her husband's bonds, ' and of new, to lend out and re-employ the same.' And as the debtors, at the time she made the loans, were habite and repute responsible, she was clearly entitled to deduction of the loss which afterwards arose from their insolvency.

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Answered, 1st, Bonds secluding executors fall clearly under the law of death-bed; Erskine, b. 3. tit. 8. § 20.; Bankton, b. 3. tit. 4. § 34.; 12th January 1725, M'Kay against Robertson, No 47. p. 3224.

There is no evidence that Mrs Schaw, had she known her disability to dispose of the residue of her husband's funds, would have deprived the pursuers of their special legacy; and were courts of law to give effect to conjectures with regard to what parties might have done, had they properly conceived their situation, it would lead to much injustice and endless litigation.

2dly, A person lending trust funds, should take the bonds payable to him in his character of trustee. Where bonds are payable to himself *proprio nomine*, the presumption of law is, that the money belongs to himself, and no loss which arises on them can affect the trust estate.

'THE LORDS, (30th November 1796,) found, That the deceased Mr Schaw, when upon death-bed, had no power to execute the deed, 27th August 1770, and therein to revoke the equal division of the residue of his means and estate, appointed by his prior deed, of date 3d January 1769, and confer the power of division on Mrs Schaw; and therefore, in so far sustained the reasons of reduction of the said death-bed deed, and also of the deed executed by Mrs Schaw, of date 28th June 1791, in so far as it exercises that power; but repelled the reasons of reduction of Mrs Schaw's deed, in so far as it provides that the losses should be sustained proportionally by her husband's funds and her own; and before answer, as to the question how far Mrs Schaw, in virtue of the powers committed to her by her husband's deed, 3d January 1769, could have made a distribution among her grandchildren, which would in effect have been the same with what she has actually made by the deed under reduction, appointed memorials to be given in upon that point.'

Both parties reclaimed, and memorials were also given in, in terms of the interlocutor.

And, on again advising the cause, the COURT 'repelled the defence pleaded by the defenders, that the deceased Mrs Schaw, in virtue of the powers committed to her by her husband's deed, dated 3d January 1769, could have made a distribution amongst her grandchildren, which would, in effect, have been the same with what she actually made by her deed under reduction; refused the desire of the petition for the defenders; and agreeably to the prayer of the petition for the pursuers, sustained the reasons of reduction of Mrs Schaw's deed, in so far as it provided that the losses should be sustained proportionally by her husband's funds and her own; and, with this variation, the LORDS, of new, found and declared agreeably to their former interlocutor.' See QUOD POTUIT NON FECIT—TRUST.

Lord Ordinary, *Craig.*

Act. Solicitor-General *Blair, Cullen, Tait.*

Alt. Mat. *Ross, Hope, Montgomery.*

Clerk, *Sinclair.*

R. D.

Fac. Col. No 47. p. 108.