

SUMMER SESSION, 1874.

COURT OF SESSION.

Tuesday, May 12.

SECOND DIVISION.

[Lord Gifford, Ordinary.

FRASER *v* HASTINGS.

Settlement—Construction.

Terms of antenuptial contract under which held that the conveyance to trustees was effectual, not only to secure the widow's annuity, but also to secure to the children the provisions and shares of the heritable estate provided to them.

The pursuer in this action of declarator was William Fraser, town-clerk of Inverkeithing, and the purpose of the action was to obtain declarator of his right to two parcels of land in Renfrewshire under a deed of sale. The defenders were the Trustees under an antenuptial contract between William Paterson, writer in Glasgow, and Margaret Hastings, his wife, and Mr and Mrs Paterson and their issue. The contract was dated September 1869, and was registered in October 1869. By the contract—which contained no obligation to infest, no clause of resignation, and no assignation of writs and rents, or powers of sale, or term of entry,—Paterson bound himself to make payment to his widow of an annuity of £100 a-year; and “for the further security and more sure payment of the said free liferent annuity, penalty, and interest as aforesaid, and without hurt or prejudice to the before written personal obligation, but in corroboration thereof, the said William Paterson hereby disposes, assigns, conveys, and makes over” the lands in question (which he had purchased, and which were affected by bonds amounting to £2000) to certain trustees. The contract made certain provisions for the children of the marriage, which were declared to be in place of legitim, and Mrs Paterson, in respect of these provisions, gave over to trustees £1500, of which she was possessed in her own right. The contract provides that “all manner of action and execution shall pass upon this contract for implement of the whole provisions thereof in favour of the said Margaret Hastings, and the children of the marriage, or their issue, as aforesaid, at the instance of all or any of the persons after named as trustees.” The marriage took place on 22d September 1869. Paterson was sequestrated on 31st July 1872, and the lands in question were thereafter put up for sale at public

roup by the trustee on his bankrupt estate. The pursuer became the purchaser, and he contended (1) that the contract created no right available against his title except the right of security for the annuity to the widow; (2), that he was entitled to have it declared that neither the existing, nor any future child of the spouses, had or could have a claim on the lands, in respect they were not conveyed to them by the contract; (3), that, as Paterson was insolvent when the deed was executed and down to the date of his sequestration, the conveyance to the children was in fraud of the creditors, and ineffectual to confer any right on the children which would compete with that of the pursuer.

The pleas in law for the Trustees were—“(1) The pursuer has no title to sue the present action. (2) The action is premature and unnecessary, and should be dismissed in so far as the present defenders are concerned, in respect that they have never disputed, and do not now dispute, the right of the pursuer to possess the lands and draw the rents during the subsistence of the marriage and the lifetime of William Paterson, and it cannot, prior to the dissolution of the marriage, if then, be ascertained whether or how far it shall be the duty of the marriage-contract trustees to claim possession of the property. (3) The defenders are entitled to absolvitor, in respect that according to the sound construction of the contract of marriage the fee of these lands libelled was effectually conveyed to the trustees, not only for the purpose of paying the annuity of £100 to Mrs Paterson, but also for behoof of the children of the marriage, and for payment and conveyance of the fee thereof to the said children. (4) The pursuer is not entitled to have the contract declared ineffectual, as regards the children of the marriage, on the ground of the alleged insolvency of William Paterson at its date,—1. because the contract cannot be set aside without a reduction; 2. because the pursuer has no title to challenge the contract on any of the grounds alleged; 3. because the allegations are irrelevant; 4. because they are untrue in point of fact; and 5. because the provisions to the children are onerous, rational, and reasonable, and not excessive (5) The pursuer is not entitled to decree, in terms of the alternative declaratory conclusions of the summons, to the effect of excluding the defenders from removing or ejecting him from the lands, or interfering with him in his possession thereof after the death of William Paterson; and the defenders should be assolizied from the whole of said conclusions, in respect that they never disputed, and

do not now dispute, the pursuer's right to possess the subjects during Mr Paterson's lifetime. (6) The defenders should be assoiized from the whole other conclusions of the summons, with expenses, in respect that the pursuer is not the proprietor of the estate, and is not entitled to possess or administer the same for any period beyond the death of William Paterson."

The Lord Ordinary, after hearing proof, pronounced the following interlocutor:—

"*Edinburgh, 29th January 1874.*—The Lord Ordinary having heard parties' procurators, and having considered the closed record, antenuptial contract of marriage between the defenders, William Paterson and Margaret Hastings or Paterson, and other deeds founded on, and whole process, Finds that, according to the true construction and effect of the said marriage-contract, the defenders, the trustees under the said marriage-contract, hold the heritable property thereby conveyed not only in security of the annuity provided by the said contract to the said Mrs Margaret Hastings or Paterson, but also for behoof of the child or children of the said William Paterson and Margaret Hastings or Paterson in fee, and for division among the said children, if more than one, in terms of the provisions of the said marriage-contract, but subject always to the conditions as to payment to and vesting in the said child or children, contained in the said marriage-contract; and to this extent and effect assoiizes the defenders from the whole conclusions of the libel, and decerns: Finds that the pursuer, in virtue of the conveyance in his favour libelled, is now in lawful possession of the lands and estate conveyed by the said antenuptial contract of marriage, and described in the conclusions of the summons: Finds that he is entitled to continue in possession during the lifetime of the said William Paterson, and thereafter during the widowhood of the said Margaret Hastings or Paterson, if she survive her said husband; but in this last case, subject always to the annuity provided to the said Margaret Hastings or Paterson under said contract; and finds that the pursuer is entitled, while in possession, to administer the said estate in the same way as the said William Paterson himself might have done; but finds that if, after the termination of the lifeferent annuity of the said Margaret Hastings or Paterson, there be a child or children of the marriage then surviving, the marriage-contract trustees will then be entitled to enter into possession for the purposes of the said marriage-contract; and reserving always to the said trustees their right to make the security effectual for the said annuity, as accords: And to the effect of the findings above written, and not otherwise, finds and declares in favour of the pursuer: Finds the defenders, the marriage-contract trustees, and Mrs Paterson, entitled to expenses; and remits the account thereof to the Auditor of Court to tax the same, and to report; but finds no expenses due to the defender William Paterson, and decerns. One word delete.

"*Note.*—The whole questions raised in the present case turn upon the legal construction and the legal effect of the antenuptial contract of marriage between Mr and Mrs Paterson. The marriage-contract trustees were duly infet in the subjects conveyed by registration long previous to Mr Paterson's sequestration. Their right, whatever it was, was made real against Mr Paterson and his creditors; and the pursuer, as a purchaser from the trustee

on the sequestrated estate, is in the same position, and has no higher right, than Mr Paterson himself.

"A very ingenious argument was submitted for the pursuer, to the effect that the conveyance of Mr Paterson's heritable property in the marriage-contract was a conveyance granted for the sole and single purpose of securing the contingent annuity provided to Mrs Paterson, the wife, and that it had no other legal effect. In particular, it was urged that the conveyance was not to any effect whatever a conveyance for behoof of the children of the marriage, and it was maintained that the children of the marriage, though they should survive both the spouses and attain majority, had no *jus crediti* under the contract, and no claim to any portion of Mr Paterson's heritable estate conveyed to the trustees.

"The Lord Ordinary, while admiring the ingenuity, and, it may be, the boldness of the pursuer's plea, is entirely unable to give effect thereto. He thinks it quite clear upon the face of the marriage-contract that the conveyance to the trustees is granted and is effectual not only to secure the widow's annuity, but to secure to the children the provisions and shares of that heritable estate specially provided to them.

"The Lord Ordinary quite agrees with the pursuer that the antenuptial marriage-contract in question is a very ill-drawn deed. It is defective in logical unity and connection. It mixes provisions which are quite distinct and unconnected, and it does not contain clauses which would have been expected in such a deed. Two separate and different styles seem to have been used, and they have been blended without due consideration of their purpose and effect.

"The Lord Ordinary by no means sure, however, that this observation is one in the pursuer's favour. He rather thinks it militates against the pursuer. For the pursuer stands in place and right of William Paterson, and as William Paterson seems to have been the framer as well as the granter of the deed, which is in the highest degree an onerous one, the interpretation thereof *in dubio* would be *contra proferentem*, that is, against the said William Paterson and those coming in his right.

"But, apart altogether from this, the confusion in the deed will not invalidate it if its meaning can be truly gathered, and the Lord Ordinary thinks that, so far as the present dispute is concerned, there is really not much difficulty in getting at the true meaning of the deed.

"After a personal obligation by the husband to pay a free lifeferent annuity to his widow, the husband proceeds to convey to trustees two specific heritable subjects belonging to him. Admittedly this conveyance is effectual,—it vests the subjects in the marriage-contract trustees, and their heritable title is complete. The only question is, For what purposes, and to what effect, are these subjects vested in the trustees?

"Now, it is true the dispositive clause begins with the expression: 'And for the further security and more sure payment of the said free lifeferent annuity,' and so on; and if this had been the only purpose declared it would no doubt have limited the conveyance to a security for the annuity. But then, after the dispositive words, and before describing the subjects, the clause proceeds to declare that the conveyance is made '*for the purposes after mentioned*;' and then, after describing the subjects, but still in the dispositive clause, the deed proceeds, 'in trust

always for the special ends, uses, and purposes after written, '*videlicet*,—First,' to secure the widow's annuity; then 'Second, for behoof of the child or children of the said William Paterson and Margaret Hastings by the said intended marriage, in fee, and that in such shares and proportions among them (if more than one), and under and subject to such conditions, limitations, and restrictions as the said William Paterson may appoint by his settlement, or by any other deed or writing under his hand, and failing such appointment, then equally among the said children (if more than one), share and share alike.' Certain conditions are then specified, and a period of payment and vesting fixed.

"Now, the Lord Ordinary finds himself utterly unable to refuse to give effect to this second purpose of the trust, so explicitly and clearly declared. This second purpose is just as much a purpose of the trust as the first purpose, and it deals with the fee of the estate just as the first purpose dealt with the lifeferent annuity therefrom. There cannot be a doubt as to the intention of the granters of the deed; and, intention being clear, there is no rule of law which denies effect to the intention expressed in the second purpose while giving effect to the intention expressed in the first.

"No doubt the inductive words or sub-narrative which introduces the dispositive clause relate only to the widow's annuity, but a narrative or sub-narrative must always yield to the actual and effective words declared in the dispositive clause. The preamble, whether of a statute or of a deed, will not control the enacting or operative words. It is a well-known canon of construction that when separate clauses in a deed are inconsistent or different, the dispositive clause is the ruling and governing clause, and controls the others. Erskine's Inst., ii., 3, 23; Montgomery Bell's Lectures, i., p. 550, and cases there quoted. But really in the present case there is no conflict. The conveyance is granted for the widow's security, but also for certain other purposes which are entirely consistent therewith, and are put by the express words of the dispositive clause on precisely the same footing as the security.

"Nor does any real difficulty arise from the other clauses of the deed, however awkwardly some of these clauses may be introduced. On the contrary, the other clauses of the deed strongly confirm the view now taken, and would be utterly absurd on the pursuer's view. To take but one example out of several,—it is declared that the provisions in favour of the children of the marriage shall be in full satisfaction to them of bairns' part of gear, legitim, and executry; but if the second purpose of the trust is not a provision in favour of the children, then there is no provision to them at all, and the exclusion of their legitim would not only be ineffectual, but would be absurd.

"No rule of law was referred to which would deny effect to the deed if this was its real meaning; and viewing the question as really a *questio voluntatis*, the Lord Ordinary repels, without much hesitation, the pursuer's pleas, so far as they are directed against the children of the marriage.

"Several subordinate questions were raised under the alternative conclusions of the summons as to what the pursuer's rights would be in the various possible contingencies which may arise by the death of one or other of the spouses, the survivance, the minority, and the possible uncertainty of vesting in the children.

"The Lord Ordinary has great doubts whether he can competently and hypothetically dispose of these questions, which may never arise. At the same time, and as the pursuer was urgent, the Lord Ordinary has attempted to define the pursuer's rights as far as can safely be done at present. *Quoad ultra*, he thinks the questions must stand over till they arise. For example, he has not fixed, and he cannot fix hypothetically, what leases, none of which are granted by the pursuer, would be effectual against the children. It is not without difficulty that the Lord Ordinary has given the pursuer the findings embraced in the preceding interlocutor. There was little, or, rather, no discussion about these findings; and they do not affect the question of expenses, to which the defenders are entitled.

"There were, however, double defences lodged. This, in the Lord Ordinary's view, was unnecessary; and as no separate argument was submitted for William Paterson, he has not found the pursuer liable in expenses to him."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—It is contended that this disposition was intended to convey the heritage solely in security of the widow's annuity; but I think it is impossible to read the deed with that limitation. It is quite true the clause introductory to the dispositive clause begins with the words "and for the further security and more sure payment of the said free lifeferent annuity," but that is quite consistent with the disposition being for many other purposes, and it manifestly was intended for other purposes; and in the dispositive clause the words are "for purposes after mentioned." The only other contention, I rather think, is not raised in the action. It was contended that the right of the children is a mere *spes successionis*, not a vested interest divesting the granter both of the fee and the beneficial interest in the subject. I think it is not a case of succession.

LORD BENHOLME—Two considerations have weighed with me:—1. A real right is undoubtedly constituted by this deed in favour of the trustees. 2. It has for its object to protect some interests in an antenuptial contract of marriage—a contract highly favoured by the law. There are ambiguities in the Lord Ordinary's interlocutor, especially as to Fraser's right of administration, but these have not been objected to by either party.

LORD NEAVES—I concur. Two classes of questions have been raised—(1) as to the intention of the granter; (2) as to the effectual execution of the intention. On the first, I have no doubt the securing of the annuity to the widow was the leading purpose, but that only, *inter alia*, including benefits to children, the counterpart of the renunciation by them of their right to legitim. The bad conveyancing does not defeat the intention of the granter. Substantially, the deed does what was intended. The trustees have a feudal title to the estate, for the purpose, on certain conditions, of creating claims in the children, which in certain events were to be infeasible. A mutual and substantial right is created in favour of the children. As to pursuer's right to administer, I think he has such a right to make the estate as valuable as possible consistent with the rights of parties.

LORD ORMDALE concurred.

The Court adhered.

Counsel for Pursuer—Balfour. Agents—J. & A. Peddie, W.S.

Counsel for the Trustees and Mrs Paterson—Marshall. Agents—Murray, Beith, & Murray, W.S.

Counsel for Paterson—J. P. B. Robertson. Agent—W. B. Glen, S.S.C.

Tuesday, May 12.

SECOND DIVISION.

[Sheriff of Ayr.

HEPBURN v. TAIT.

Action—Mandate—Dominus Litis.

Where a pauper sued an action of filiation and aliment of her pauper child, and attended a diet of proof in the cause before the Sheriff, but produced no mandate authorising the action until it came on for discussion in the Court of Session—*Held* (1) that the action was authorised by the pursuer, and that the action could not be delayed in order to sist the Parochial Board as the true *dominus litis*.

This was an appeal from a judgment of the Sheriff of Ayr. The summons in the suit, at the instance of Sarah Hepburn, Ballantrae, against Alexander Tait, Lagganholm, Ballantrae, concluded for payment of £2 in name of inlying expenses of an illegitimate child, "of which the pursuer was delivered at Ballantrae on or about the 12th day of November 1870, and of which child the defender is the father—item, of the sum of £6, 10s. sterling yearly, in name of his proportion of aliment for the support and upbringing of said child, and that quarterly, and per advance, in equal portions of £1, 12s. 6d. sterling each, commencing payment of the first quarter's aliment for the quarter ensuing as on the said 12th day of November 1870, and continuing the same payment quarterly from said period aye and until the said child shall attain the age of twelve years complete, with interest at the rate of five per centum per annum on said inlying expenses from the said 12th November 1870, and on each quarter's aliment from the time the same falls due till paid." The action was raised in 1871, and the pursuer and her child were paupers, and had received aliment from the parish of Ballantrae from their birth.

The plea for the pursuer was—"Being the father of the pursuer's child, the defender is bound to pay inlying expenses and aliment for it at a rate suitable to his circumstances, and as particularly concluded for in this action."

The pleas in law for the defender were—" (1) The Parochial Board of Ballantrae, being in reality the pursuers in the present action, are bound to sist themselves as such; and failing their doing so, the present action will fall to be dismissed. (2) The pursuer having neither instructed nor sanctioned the raising or carrying on of the present action, the same will fall to be dismissed. (3) The pursuer being insane, the present action will fall to be dismissed. (4)—*On the Merits*—The defender not being the father of the pursuer's child, is entitled to be assoilzied, with expenses."

No mandate was produced by the pursuer in the

Inferior Court, but at the discussion in the Court of Session a mandate was produced, dated January 1874, authorising the action.

The Sheriff-Substitute (ROBISON) pronounced the following interlocutor:—

"Ayr, 1st July 1873.—The Sheriff-Substitute having heard parties' procurators and made avizandum, Finds that the pursuer's alleged insanity has not even been attempted to be proved; finds it not proved that the Parochial Board of Ballantrae alleged to be the real pursuers, authorised and are conducting this action; repels the whole preliminary defences; finds the defender liable in the expenses incurred in this contention, and allows an account thereof to be lodged for the Auditor to tax and report.

"On the merits, Allows the parties a proof of their respective averments, and to the pursuer a conjunct probation; appoints the cause to be enrolled to have a diet assigned for the proof.

"*Note*.—The pursuer's alleged insanity, and the Board's alleged control of the action, were thought to be cognate matters for inquiry, and a proof of them was allowed concurrently. No attempt was even made to prove the first; so far from it, the pursuer was offered as a sane witness by the defender. No proof has been led that the action has not the pursuer's sanction. No member of the Board but one has been adduced in proof of the second point, and his evidence is next to negative, as he says, 'I have no idea that the Parochial Board is carrying on this case;' and although this witness speaks to having heard a certain member of the Board express his willingness to contribute £50 towards the expense of this action, that party has not been examined. Only three references are made to the case in the Board's minute book, and these show that three ways of proceeding crossed the minds of the members at different times—(1) To insist in an action (at the Board's instance) against the defender, 18th May 1871; (2) to have the action brought in the pursuer's name, 29th June 1871; (3) to have nothing to do with an action the one way or the other, 13th July 1871. This is the last reference to the case which the minute book contains (excepting intimation of certain interlocutors made by the Inspector in obedience to the order of Court on the 22d May last), and the resolution which was adopted at a special meeting of the Board is in these terms:—"The meeting having considered the circumstances respecting the claim of Sarah Hepburn on Alexander Tait, and of Martha Linton on Hugh Clarke, for paternity of their children, resolve that the Board do not prosecute the claim of either of said parties, but leave Hepburn and Linton to prosecute their claims themselves, and direct the Inspector to let them know this." In reference to this resolution the Inspector states in evidence that he 'saw pursuer, and told her the Board had withdrawn from the action about to be raised. I cannot speak to the conversation we had beyond remembering that pursuer expressed desire to have the action proceeded with in some way or other.' He adds, 'Although I have no special recollection, still it is my belief that I had pursuer's authority for instructing Mr Rowan to raise the action.' It appears that a correspondence has been maintained between the Inspector and the pursuer's agent in reference to the case, in which the former instructs the latter on the facts of the case, and the latter keeps the former advised of the pro-