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SPENS *v.* MONYPENNY'S TRUSTEES.*

(*Ante* p. 25.)

OPINION OF LORD DEAS—The late Mrs Monypenny, by her trust-deed and settlement, dated 11th Feb. 1869, conveyed her whole means and estate, heritable and moveable, with certain specified exceptions, to trustees, whom she directed, as soon after her death as convenient, to make up a state exhibiting the amount of residue remaining after certain specific purposes had been provided for, in order that the trustees might, and she thereby directed them, as soon after her death as convenient and as they might think proper, invest that residue in the purchase of lands in the county of Fife, adjacent to the estate of Craigsanquhar, belonging to her brother Nathaniel Spens, the pursuer's father, or to the portions of her own estate of Airdit, which, by a separate deed of the same date with her deed of settlement, she conveyed to her said brother in liferent and to the pursuer and the heirs of her body in fee; and, if a suitable purchase could not be made in such locality, then in some other part of the county of Fife, and failing thereof, in some other part of Scotland; and when the fund was thus exhausted, or within £300 of being so, to execute a disposition thereof in favour of her said brother in liferent for his liferent use only, and his son, the pursuer, and the heirs whomsoever of his body in fee, whom failing to his sister Jessie Hannah Elizabeth and the heirs whomsoever of her body, whom failing to his sister Mary Margaret Roberta and the heirs whomsoever of her body—the eldest heir female always succeeding without division, whom failing to the granter's own heirs and assignees whomsoever.

The testatrix died in May 1873. Her brother predeceased her, having died in November 1869. The trustees have paid all the legacies, and secured all the annuities bequeathed by the deed to the satisfaction of the annuitants. The residue applicable to the purchase of lands has been ascertained by the trustees to amount to about £60,000, of which they have already invested about £40,000 in the purchase of lands in Fife—leaving about £20,000 still uninvested. The pursuer desires to have the application of this sum in his own hands, and for that purpose he has brought the present action, concluding to have the amount at once paid over to him. His object, he says, is to build a house on the estate, which is now quite large enough; but as the Lord Ordinary observes, if he gets the money he will, of course, be entitled to expend it otherwise if he thinks proper.

The question whether the pursuer is entitled to succeed in this action appears to me substantially to depend on whether the beneficial fee of the bequest has vested in him or not. If the beneficial fee has so vested, he is, I apprehend, the only person beneficially interested in the bequest, and, on the principle of the case of *Gordon*, 2d March 1866 (4 Macpherson 501), he is entitled to claim the money which still remains in the hands of the trustees. On the other hand, if the beneficial fee has not vested in him, the principle of *Gordon's* case does not apply, and the interlocutor of the Lord Ordinary is right.

The question of vesting depends, as it always does, upon the terms of the particular deed, construed in connection with the surrounding circumstances. It is at least as clear in this case as it was in *Gordon's* case, that if a disposition were duly executed by the trustees in the terms directed by the testatrix, the pursuer would be unlimited fiar of the lands, and entitled to dispose of them, onerously or gratuitously, at his pleasure.

The subsistence of a trust fee is not inconsistent with the vesting of a beneficial fee, and the consequent right of a beneficiary to assign or deal with that fee as he thinks proper. Accordingly, in *Gordon's* case the trust fee stood in the persons of the undivested trustees, but the beneficial fee was held to have vested in the beneficiary, and to entitle him to payment of the capital fund without going through the formality of in the first instance investing it in the terms directed by the testator.

The question in the present case is whether the testatrix intended that the pursuer should have no power to deal with the capital, whether in a marriage contract or in any other way, till it should be converted into land, and a feudal title to the land established in his person? In other words, whether her object, or one of her objects, in directing the conversion into land was to prevent the beneficial fee from vesting in the meantime in the pursuer?

I am disposed to answer that question in the negative. There is no express declaration by the testatrix that the pursuer was not to be entitled to deal with or dispose of his interest in the capital till some future and indefinite time, of which the trustees should be the sole judges, and by which time they should have invested the whole capital in the purchase of lands, and conveyed them to the pursuer in the terms prescribed. A power to trustees to hasten or postpone the period of vesting at their pleasure is not readily to be reared up by implication. The implication, to say the least of it, would require to be very clear. Here I think it is not so. On the contrary, there are weighty considerations the other way.

The testatrix had no sister or sister's children at the time she executed the deed. The pursuer's father was her only brother, and the pursuer (an only son), was her only nephew, and, failing his father, he was her heir-at-law. The father died in November 1869—that is about nine months after the date of the deed—at the age of 64, while the testatrix survived, without altering her destination of the residue, till May 1873. The pursuer was obviously the person of all others whom the testatrix was desirous to favour. The disposition which she directed to be executed of the lands to be purchased was to be in favour of her brother, "in liferent, for his liferent use only, and to the said Nathaniel James Spens and the heirs whomsoever of his body in fee." Nobody can doubts that under such a disposition the pursuer would have been unlimited fiar notwithstanding

* The manuscript of this opinion, which was read by Lord Deas, and which was the leading opinion, was not received in time for publication with the report of the case.

of the substitutions, which I shall advert to immediately. Her whole silver plate and plated articles she directed to be delivered to her brother, "for his liferent use, and to the said Nathaniel James Spens, for his absolute use, after the death of his father." She bequeathed to the pursuer a legacy of £5000, payable, along with her other legacies, six months after the first term following her death, and she excepted entirely, from the dispositive clause of her trust deed, two subjects, both of which she conveyed, by separate deeds, directly to the pursuer, in terms which undoubtedly made him immediate and unlimited fiar of both of these subjects. The one, which is first mentioned in the trust deed, consisted of the portions (extending to 339 imperial acres) which belonged to her of the lands of Airdit in Fife, and the other consisted of 285 square yards of valuable building ground at Trinity, on the sea coast adjoining this city, with the dwelling-house and other buildings thereon.

The clause reserving the lands of Airdit from the operation of the trust bears "of which a separate disposition and settlement has been executed by me, of equal date herewith, in favour of my said brother Nathaniel Spens in liferent, and the said Nathaniel James Spens his son and the heirs whomsoever of his body in fee, whom failing as therein mentioned." And from the deed itself, which is in process, we see that the destination was to the father "for his liferent use only, and to Nathaniel James Spens, his only surviving son, and the heirs of his body in fee," whom failing, to the pursuer's two sisters before-named, in their order, and the heirs of their bodies, in verbatim the same terms with the destination directed to be inserted in the disposition to be executed by the trustees of the lands to be purchased by them.

The clause in the trust-deed reserving the subjects at Trinity bears "of which a separate disposition and settlement has also been executed by me of equal date herewith, in favour of Wm. Thomas Thornton, Esq., and Miss Anne Halkett Craigie, both residing at Christian Bank, Trinity, in liferent, whom failing, the said Nathaniel Spens in liferent, and the said James Nathaniel Spens and his heirs and assignees in fee." This separate disposition is erroneously described as being of equal date with the trust-deed, which no doubt it had been intended to be, but something apparently had delayed its execution till 6th May 1869—a discrepancy of no materiality here. The narrative in the trust-deed of the dispositive clause of this disposition is quite accurate, as we see from the deed itself.

Nor did the testatrix leave the pursuer's two sisters dependent for their comfortable livelihood on the chance of their succession to the lands to be purchased by the trustees. The testatrix bequeathed to each of them £5000, with the furniture and everything else in her house No. 7 Moray Place, Edinburgh, except the silver plate and plated articles bequeathed to the pursuer; and, moreover, as is likewise set forth in the trust-deed, she conveyed that valuable house itself, by a separate deed, to these ladies "equally between them, and the heirs of their bodies, whom failing, as therein mentioned."

The direct conveyance to the pursuer of the lands of Airdit explains why it was that the testatrix wished the lands which were to be purchased by the trustees to be adjacent or near to Airdit, failing their being got adjacent or near to Craigsanquhar; and it is an important fact in the present case that preference was to be given, over all other localities to the vicinity of Craigsanquhar, the pursuer's paternal estate, and to which he succeeded on his father's death some four years before the death of the testatrix; and it is further important that failing adjacency or vicinity to Craigsanquhar, preference was to be given to the adjacency or vicinity of the estate of Airdit, which the testatrix had made absolutely and unconditionally the pursuer's own.

These very substantial proofs of preference for the pursuer over his sisters are to be coupled with the fact, also important, that six months after the death of the testatrix, the pursuer, failing his father, the liferenter, was to enter, at once, into the continuous enjoyment of the bequest of residue by drawing the whole annual income thereof,—alike that arising from the fund while wholly uninvested in land, and that arising from the land after partial investment, as well as from the uninvested balance.

The Lord Ordinary holds that, notwithstanding all this, there was to be no vesting of the capital of the bequest till all the land was purchased and a disposition thereof executed divesting the trustees. In consistency with this view, his Lordship ought to have held, having reference to the 10th head of the trust-deed, that it was further a necessary preliminary to the vesting that a discharge of the trust should be executed by the pursuer, and feudal titles to the lands completed in his person, for the directions on that subject in the 10th head of the trust-deed are equally explicit with those which relate to the purchase and disposition of the lands.

If it be quite clear that the object, or even one of the objects of the testatrix, in all this, was to favour one or both of the pursuer's sisters in preference to himself, there may be much to be said for the result arrived at by the Lord Ordinary. But I think it far from clear that the testatrix had any such object. If she had, it is remarkable that the pursuer and his father were to be two out of the four trustees who were to be vested with the discretionary power of fixing the period of vesting by the purchase and conveyance of lands which might readily have been got, with that view, in some part of Scotland. If one of the other trustees had died, and the father and son had survived, they would have been a majority and quorum of the trustees, and if both the other trustees had predeceased them they would have been the only trustees. It is also remarkable, upon the same supposition, that, in place of directing accumulation after the death of the liferenter, an express direction was given, which was not given in *Gordon's* case, to pay over the annual proceeds of the bequest to the pursuer, without reference to whether the bequest stood in the form of money or of land.

At the date of the trust-deed the pursuer was a young man of twenty-three years of age. His father, the liferenter, was alive, and might have survived the testatrix for a longer or shorter period of years. Without any desire to give either of the sisters of the pursuer a better chance than was given to him of being able to deal with the fee of the bequest, the testatrix may have thought that a substantial addition to

the pursuer's landed estate would be, to him, the most gratifying form which the bequest could assume, and that, in converting it into that form his own want of experience might be usefully supplied by that of his father and the two other trustees whom she conjoined with him in the trust. It is difficult to suppose, at all events, that her object was to interpose obstacles to the pursuer attaining the position in which he could deal with the capital of the bequest, in order to increase the chance of one or other of his sisters of coming into that position. Colonel Gordon obviously meant to exclude all and every one of his disponees, named and unnamed, from ever being in such a position, for he directed the execution of a strict entail. He contemplated a destination which the law of Scotland did not recognise at all, but which, if it had been legally effectual, would have made none of the disponees unlimited fiar; and that created one of the greatest difficulties in the case,—namely, whether the succession was not left open to the testator's heir-at-law. Here, on the contrary, the testatrix directed a destination which is quite recognised in our practice as effectual, but the effect of which is to place the estate entirely at the disposal of the first disponee. The law in such a case as this presumes that the testatrix knew the legal effect of the words which she used, and meant them to have that effect. The testatrix must therefore be presumed to have known that the effect of postponing the vesting of the fee would not be to create an effectually protected course of succession, but simply to exclude for an indefinite period, at the discretion of the trustees, the pursuer from being unlimited fiar, for the benefit of another who must necessarily come into that position, and for whom, it is perfectly clear, that she had nothing like the same favour. I cannot think that that was her object in directing the conversion of the money into land and the completion of titles in the person of the beneficiary, at the expense of the trust-estate. If that was not the object of her direction, there is nothing else suggested which could possibly suspend the vesting of the beneficial fee. The only suggestion thus made is, at the best, doubtful and inconclusive, while there are many cogent reasons against it. I am therefore of opinion that the beneficial fee has vested in the pursuer; and, if that be so, I am further of opinion that the principle governing the case of *Gordon* is *a fortiori* applicable here. Colonel Gordon meant nobody to be unlimited fiar. But in making or directing a destination like the present, the law holds that the testatrix meant somebody to be unlimited fiar, and if we were to interpose delay and obstacles to increase the chance of another than the pursuer coming into that position, we should just be adopting, in more difficult and hostile circumstances, the principle which weighed with the minority in *Gordon's* case but which was authoritatively overruled by the majority.

If I am right in these views, the interlocutor of the Lord Ordinary must be recalled, and decree pronounced in terms of the libel.

Thursday, November 11.

FIRST DIVISION.

[Lord Young.

GIBSON *v.* ADAMS AND ANOTHER.

Lease — Constitution — Proof — Parole — Writ or Oath.

A averred that by verbal agreement it was arranged that he was to get a lease of a house and garden for five years, and that, "in the meantime and until the lease for five years was formally completed, the said subjects were let to him, and he was to occupy and possess the same for a period of at least one year." He averred that he accordingly entered into possession, and proceeded to improve the garden and prepare the same for crop. *Held* that the proof of the constitution of the alleged contract for five years must be limited to the writ or oath of the lessor, but *quoad ultra* proof *prout de jure* allowed.

This was a suspension of a decree obtained in the Sheriff-court of Aberdeen, in an action of removing brought by Adams and his wife against Gibson. The Sheriff-court summons concluded that the defender Gibson should be decerned to "flit and remove . . . from the dwelling-house of Woodbine Cottage, steading, offices, garden ground and other premises at Ruthrieston, occupied by him as tenant thereof under the pursuers, and that at the 4th day of June next, 1875, at which date the defender's right to occupy said subjects expires." The pursuers had purchased the said subjects from a Mr Duthie in March 1875, and in their condescendence they averred that "previous to the date of said purchase they were informed by Mr Duthie that the subjects were let to the defender from the end of October 1874 until the 4th day of June 1875," and that after the purchase was completed they had given notice to the defender that he would be required to leave at 4th June.

The defender made the following statement:—

"The defender is tenant of said subjects under a verbal lease of five years from the 4th day of December last, at a rent of £40 sterling per annum, which lease was followed by possession, and also by *rei interventus* in the shape of improving and planting the garden (which is about an acre in extent) at a cost of upwards of the sum of £20 sterling, said improvements and planting, etc., having been performed with the consent, knowledge, and approval of the proprietor, the lessor, namely, Robert Duthie, shipowner, Aberdeen."

The defender pleaded *inter alia*—"The said lease is in the circumstances at least effectual for one year from said term of entry."

On 13th May 1875 the Sheriff-Substitute (Combie Thomson) pronounced an interlocutor finding that no relevant defence had been stated, and decerning in terms of the conclusions of the summons; and on appeal, the Sheriff (Guthrie Smith) affirmed this judgment.

The defender then brought this note of suspension, which was passed by the Lord Ordinary.

In the statement of facts annexed to the note of suspension the complainer, after setting forth