"for his own behoof" the sale of exciseable liquors without having obtained a certificate in that behalf. If that is the fact (and I must take it to be so), then the conviction complained of is a good conviction and cannot be disturbed. But I think, on the facts set forth in the case, and the documents produced as part of the proof, that the conclusion might fairly enough be reached that the appellant at the time of the alleged offence was not carrying on business for his own behoof. He was carrying on a business which he had bought conditionally on his being able to obtain a transfer in his favour of the certificate which had been granted to the seller of the business. Until that condition was purified there was no completed sale; the business was not yet the business of the appellant, and might never become his. The business was still that of the man who had proposed to sell it, and I should have thought, *prima facie*, that the business in these circumstances was being carried on for behoof of the owner. I want to guard myself from being supposed to hold that in such circumstances the intending buyer is necessarily committing a violation of the Public-Houses Acts, because he keeps the house open and continues the business until the transfer of the certificate which he has applied for can be got, assuming (as is the case admittedly here) that the person so carrying on the business shows proper diligence in endeavouring to obtain the certificate, and is acting throughout in *bona fide*.

The Court answered the question in the affirmative.

Counsel for the Appellant—A. J. Young. Agent—John Veitch, Solicitor.

Counsel for the Respondent—Lees—Ure. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Friday, February 3.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

PATERSON AND OTHERS *v.* PATERSON AND ANOTHER.

Succession—Contract to Execute Settlement—Onerous Deed—Revocation.

A widow entered into an agreement with her eldest son to execute a settlement of her whole estate in his favour, which she bound herself not to alter or revoke to any extent, on the narrative that he had advanced considerable sums to be expended on heritable property belonging to her, and in consideration of his undertaking to discharge or take an assignation to a bond over the property, and to pay her the rents during her lifetime without deduction of taxes.

On the same date she executed a settlement in implement of the agreement, which bore to be irrevocable. But subsequently she executed another settlement revoking all previous settlements, and directing her estate to be divided among all her children.

The eldest son raised an action of reduction of the posterior settlement, on the ground that it was barred by the prior agreement and will. It was admitted that he had implemented the agreement on his part.

Held that the prior agreement and will were irrevocable, the agreement being on the face of it onerous and having been implemented by the pursuer.

At Dundee on 12th October 1889 the deceased Mrs Margaret Linton or Paterson and her eldest son John Paterson executed a mutual agreement, which proceeded on the narrative that he had advanced to his father and mother in connection with house property in the High Street of Linlithgow upwards of £800, which was more than the value of the property, and that he had agreed to make other advances as therein provided.

By the first article his mother, then a widow, undertook forthwith to execute a trust-settlement which she should not be entitled to revoke or alter, whereby the said property and any other estate she might possess should be made over to him. By the second article it was provided that he should have the management of said heritable property as from the date of the agreement. By the third article it was provided that he should pay an existing bond for £150 on said property, by either taking an assignation thereof to himself or a discharge of the bond, and also pay "all taxes and assessments leviable on account of the said property, and fire insurance premiums applicable thereto," and that he should pay to his mother the full rents without any deduction whatever during her lifetime.

On the same day Mrs Paterson executed a trust-disposition and settlement, by which she conveyed to her daughter Elizabeth, wife of the Rev. William Blumenreich, minister of the German Church, Dundee, and to the said William Blumenreich, her whole estate, heritable and moveable, in trust (1) for payment of debts, and (2) as soon after her death as convenient, that they might assign the same to her eldest son, the said John Paterson. By said settlement she revoked all former settlements, and also renounced and gave up her right to revoke the said settlement in whole or in part.

On 26th June 1891 Mrs Paterson executed another trust-disposition and settlement, by which she disponed her whole estate, heritable and moveable, to her son James Lovell Paterson, as trustee, and directed that the various subjects of which her property consisted should be conveyed in the manner specified, involving a division of her estate among the members of her family, viz., her sons John, James, Andrew,

and her daughter Mrs Blumenreich, and she revoked all settlements of a testamentary nature made by her at any time theretofore.

Mrs Paterson died on 27th July 1891.

Thereafter John Paterson, and the other trustees nominated under the settlement dated 12th October 1889, raised an action against James Lovell Paterson, sole trustee under the settlement dated 26th June 1891, and Andrew Young Paterson, concluding for reduction of the deed of 26th June 1891, on the ground that it was barred by the prior agreement and will.

The pursuers averred that Mrs Paterson executed the prior settlement of 12th October 1889 in implement of the agreement entered into between her and her son on the same date; that it was an onerous and reasonable arrangement; and that she and her son had acted on it.

They pleaded—"(1) The alleged will of 26th June being in contravention of the agreement with the pursuer and prior irrevocable will made in implement of said agreement, is invalid, and should be reduced as craved."

The defenders denied these averments, and pleaded—"(4) The alleged agreement founded on by pursuers being gratuitous and invalid and not binding on Mrs Paterson, and not having been acted on, and the alleged prior will being revocable, the same form no bar to the execution of the will of 26th June 1891."

On 1st June 1892 the parties lodged a joint-minute of admissions, in which they renounced further probation as regarded their averments relative to the pleas above stated, and concurred in admitting—"(1) That the sums advanced by pursuer were expended in connection with the heritable property, and the said property was left by the husband John Paterson to his wife Mrs Margaret Linton or Paterson under his settlement, and her title thereto was completed in the year 1873. (2) That the rents from tenants amounted to about £15, 10s., and that Mrs Paterson had no other estate or income except what she received from her family. One dwelling-house, part of the heritable property, of the yearly value of about £7, was occupied by Mrs Paterson and her sons, the defenders, who lived together in family. The said defenders occupied, without paying rent, a workshop, also part of the said property, of the annual rent of £8."

On 5th July 1892 the Lord Ordinary (KINCAIRNEY) found that the deed under reduction was granted in contravention of the agreement between Mrs Paterson and her son John, and of the settlement executed by her, both dated 12th October 1889, and sustained the first plea-in-law for the pursuers.

"*Opinion.*—This action of reduction of the settlement of Mrs Margaret Linton or Paterson, dated 26th June 1891, is rested on two separate grounds—(1) That the settlement was barred by a prior agreement and will; and (2) that it was not the deed of the testatrix, was executed under essential error, and obtained by fraud.

"These last grounds of reduction could only be established by a jury trial, but a jury trial will be unnecessary if the first ground of reduction, which is embodied in the pursuers' first plea-in-law, be well founded.

"The defenders aver that the agreement founded on and the prior will were executed under a misunderstanding on Mrs Paterson's part, and they plead (4) That the agreement 'being gratuitous and invalid, and not binding on Mrs Paterson, and not having been acted on, and the alleged prior will being revocable, the same form no bar to the execution of the will of 26th June 1891.'

"Parties have lodged a joint minute, by which they agree upon certain facts to be immediately noticed, and renounce further probation in regard to the pursuers' first plea and the defenders' fourth plea, that is to say, in regard to the agreement and prior will.

"The question now to be solved therefore is, whether the agreement and prior will formed a bar to the execution of the will under reduction.

[*After summarising the provisions of these deeds*]—"The admissions made by joint minute amount to this—(1) That the sums advanced by the pursuer were expended in connection with the heritable properties left to Mrs Paterson by her husband; and (2) that the heritable property consisted of subjects in Linlithgow, worth in all about £30, 10s. per annum, which formed Mrs Paterson's whole estate.

"Further probation having been renounced, I must assume that the agreement and relative trust-disposition, executed on 12th October 1889, was duly executed by Mrs Paterson, and express her deliberate intention. That being so, I have formed the opinion that they were irrevocable deeds; that the settlement of 1891 is in contravention of them, and is reducible on that ground, and that therefore it is unnecessary to remit the case to a jury on the other grounds on which the deed is challenged.

"I do not hold the prior settlement irrevocable on the ground that it is declared to be so in the deed itself. I agree that it is settled that such a declaration in a testamentary deed is itself revocable along with the rest of the deed—*Dougal* v. *Dougal*, 1789, M. 15,949; and further, that a *mortis causa* deed will not be protected or rendered irrevocable by delivery—*Somerville* v. *Somerville*, May 18, 1819, F.C; *Millar* v. *Dickson*, July 11, 1825, 4 S. D. 822; M'Laren on Wills, i. 249. Further, I think it may be held at least doubtful whether a bare obligation in a separate deed not to revoke a testament or legacy if undelivered would not be equally revocable with the testament or legacy, as suggested by Lord Ivory in his note. But revocation of the will appears to me in this case to be barred by the agreement which I must hold to be irrevocable. It was argued, indeed, that the agreement was a mere pretence, not a true agreement at all, but at most a unilateral obligation. I must hold that the

deed is what it purports to be, a bilateral agreement; and as such a delivered deed, or, as binding without delivery, equivalent to a delivered deed. I see no reason why it should not be held to be, as it purports to be, irrevocable.

"The authority of Stair, iii. 8, 28/33, on this point is explicit. In the latter passage he says that legacies may be taken away by a derogatory deed, 'unless the defunct be obliged by contract *inter vivos* not to alter the same, in which case contract and paction doth so far overrule the power of testing, that posterior deeds, whether expressly or impliedly altering, would be ineffectual.'

"And Erskine states the law in similar terms—iii. 9, 6. It is true that Lord Ivory, in his note already referred to, questions whether the law so stated be warranted by the case of *Houston*, quoted by Stair, and that may certainly be open to doubt. But I doubt whether either Stair or Erskine meant to rest their statement of the law on that case, which is mentioned by Stair rather as an illustration than as an authority, and is not quoted by Erskine at all. I take it that the doctrine may be rested on the authority of Stair and Erskine independently of that case.

"In *Curdy* v. *Boyd*, 1775, M. 15,946, a disposition *de præsenti* of the whole estate which might belong to the granter at his death was held irrevocable and a bar to a subsequent settlement.

"In *Duguid* v. *Cadell's Trustees*, June 29, 1831, 9 S. D. 844, a letter binding the granter's heirs to pay an annuity to a beneficiary after her death, and declared to be irrevocable, was held to be so, having been delivered.

"In *Murison* v. *Dick*, February 10, 1854, 16 D. 529, Lord Rutherfurd, as Ordinary observed, 'That a party may grant an irrevocable deed, and put it beyond his power by delivery, and vest effectually the property so conveyed against his own subsequent act and deeds, for the benefit of existing parties in whom by that deed he creates an interest, there can be no doubt.'

"I understand Lord M'Laren to lay down the law to the same effect at vol. i. p. 250 of his work On Wills, and he quotes *Turnbull* v. *Tawse*, April 15, 1825, 1 W. and S. 80.

"These authorities appear to establish that an *inter vivos* agreement to make a testament or grant a legacy will bar revocation of a will or legacy made in implement of it.

"It was contended that the agreement between Mrs Paterson and the pursuer was not obligatory on Mrs Paterson because it was gratuitous. It was said that the obligations on the pursuer were merely nominal. I do not think that these obligations are wholly nominal, although they are certainly not burdensome. The obligation to pay the rents without deduction of taxes amounts to something, if not to much. Further, the deed is not gratuitous in the sense of being without any good reason, and granted for mere favour and affection; for the statement that the pursuer had spent on the heritable subjects more than they were worth is certainly some reason for agreeing to leave the property to him.

"But according to our law it is of no importance in this question whether a deed is binding or is revocable—to consider whether the deed is gratuitous or onerous. The one is just as irrevocable as the other if meant to be so, and containing nothing to the contrary. In *Duguid* v. *Cadell's Trustees* the letter founded on was gratuitous, and yet was held irrevocable.

"I do not know why the object of the parties was not carried out by a disposition to Mrs Paterson in liferent and to the pursuer in fee. If the transaction had taken that form there would have been no question, and the execution of the agreement and will in this case appears to be only a clumsy and roundabout method of attaining the same object.

"I am of opinion, therefore, that the pursuers are entitled to prevail on the first ground pleaded."

The defenders reclaimed, and argued—The agreement, though in form an onerous contract, was purely gratuitous. When the free power of testing was abridged by paction, the Court looked closely to see that the deed was really onerous—*Coutts* v. *Campbell*, 1 Macph. 647. There was no mutuality here; the whole obligations undertaken by the son under the agreement were less than he would have had to pay as aliment to his mother. She would have been entitled to aliment, as she admittedly had no other income except what she received from her family. That being so, the right to test survived. Where the right to test has been held to be excluded, it was always on the footing that there had been a mutual contract.

Counsel for the pursuers were not called on.

At advising—

LORD PRESIDENT—I think the Lord Ordinary is right. I take it that the agreement is not open to challenge. It is plainly on the face of it an onerous contract. Two considerations are admitted on the face of it. First, this lady admits that her son advanced to her and her husband a sum of something over £800, and she goes on to deliver to him an obligation to give him her whole estate after her death. Second, it appears from the third article that she is debtor to a third party for a sum of £150, and she says to her son—"Either discharge this debt or take an assignation to the bond, and pay the rents to me without deduction of taxes, and I will leave you all my estate after my death." It is admitted that the son did what she desired in one of the two forms. I think he could only have let that investment lie, and was bound to let it lie, and not seek to distress her. An agreement purporting to be onerous having thus been dealt with as binding, and having in fact been implemented on the one part, it seems to me that the pursuer is in the position of having given value, and is therefore entitled to insist that he shall obtain

implement of the consideration in his favour. I think this agreement is onerous as it stands, and is not the less to be implemented because implement is asked after the death of the other party.

LORD ADAM—The case is so clear that I have nothing to add to what your Lordship has said.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Respondents — Kennedy — J. Reid. Agents — Macpherson & Mackay, W.S.

Counsel for the Defenders and Reclaimers —Lorimer — Orr. Agent—George Inglis, S.S.C.

Tuesday, May 23.

FIRST DIVISION.

[Lord Low, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* MAGISTRATES OF EDINBURGH.

Conveyance—Qualified Disposition—Repetition of Qualifying Words in Warrandice Clause.

A common law conveyance of lands was granted "with and under the provisions of the said Act." . . . . These qualifying words were inserted in the dispositive clause and the disponer proposed to repeat them in the warrandice clause. To this the disponee objected, although unable to shew that he would suffer prejudice. The Lord Ordinary *held* that the disponer was entitled to qualify the warrandice clause as proposed, and the Court refused to disturb his judgment.

The North British Railway Company obtained a special Act of Parliament in 1891 which enabled them to obtain from the Corporation of Edinburgh certain ground in Princes Street Gardens, Edinburgh.

By section 35, sub-section 22, of said Act it was provided that "nothing contained in this Act shall prejudice or affect the rights of servitude or other rights of the Corporation, or of the vassals of the Corporation, in virtue of their title-deeds."

An arbitration was entered into between the parties, with the result that the Corporation were found entitled to receive £26,500 from the railway company as the value of the land to be conveyed. The parties endeavoured to arrange the terms of the disposition of the land to be granted, but were unable to agree. The Corporation desired to insert in the dispositive clause the words—"But declaring always that these presents are granted with and under the provisions of the said North British Railway (Waverley Station, &c.) Act 1891, in so far as applicable to the subjects and others hereinbefore disponed," and to add after the words "we grant warrandice" the following—"but subject always to the provisions of the said North British Railway (Waverley Station, &c.) Act 1891 and Acts incorporated therewith." The railway company refused to accept a disposition with these qualifications, but finally they acquiesced in the qualifying words being inserted in the dispositive clause but not in the repetition of them in the warrandice clause. They expressed their willingness however to accept a conveyance without any clause of warrandice.

The Corporation charged the railway company on letters of horning to make payment of the said sum of £26,500 and the railway company brought a note of suspension of said charge on the ground they were not obliged to pay until they received a conveyance to the lands.

Upon 19th April 1893 the Lord Ordinary (LORD LOW) pronounced the following interlocutor:—Finds . . . that the respondents are entitled to qualify both the dispositive clause and the warrandice clause of the conveyance by a reference to the said Act . . . and in respect of the offer made by the respondents to grant to the complainers a conveyance in terms of the draft No. 37 of process, Finds the letters and charge orderly proceeded: Sustains the same: Repels the reasons of suspension: . . . Refuses the prayer of the note: . . . Grants leave to reclaim.

"*Note.*—As I intimated when this case was argued before me, I am of opinion that the respondents are entitled to qualify the conveyance which they grant to the complainers by a reference to the Act of Parliament. The complainers are not entitled to acquire the lands except subject to the conditions and restrictions imposed by the Act, and I do not think that the respondents can be asked to grant a disposition which *ex facie* might convey to the complainers, and bind the respondents to warrant to them larger and more unrestricted rights in regard to the lands than they are authorised to convey by the Act. In such circumstances it seems to me that a conveyance containing a reference to the Act, both in the dispositive and in the warrandice clause, is the proper form.

"The complainers consented at the debate to a reference to the Act of Parliament in the dispositive clause, but they objected to any such reference in the warrandice clause, and they have now lodged in process a minute (No. 39) in which (for the first time) they offer to accept a conveyance without a clause of warrandice at all.

"I confess that I am unable altogether to appreciate the complainer's objection to a reference to the Act in the warrandice clause. I do not see how they can be prejudiced by such a reference, because, while the dispositive clause, qualified by a reference to the Act, conveys to the complainers all that they are authorised to acquire, a warrandice clause, also qualified by a reference to the Act, lays upon the respondents the obligation to warrant to the complainers all that is conveyed by the