Thursday, July 15.

SECOND DIVISION.

BELL'S EXECUTOR *v.* BORTHWICK.

Succession — Fee — Power of Disposal — Legacy — Repugnancy.

By his trust-disposition and settlement a testator assigned and disponed to his wife his whole means and estate, heritable and moveable, which should belong to him at the time of his death, and "should I predecease her and she fail to exercise the power of disposal given her by this deed," he directed his executor to realise his whole estate, heritable and moveable, and pay certain legacies. There was no power of disposal expressly given by the deed.

The wife survived her husband for six months and died intestate, not having disposed of her husband's estate, which was still at her death in the possession of his executor.

In a question between the legatees named in the deed and the wife's next-of-kin, *held* (*dub.* Lord Trayner, *diss.* Lord Moncreiff) that on the testator's death the wife became the absolute owner of his estate, and that it was divisible amongst her next-of-kin.

Peter Bell, gardener, North Berwick, died on 2nd November 1895. He left a trust-disposition and settlement, dated 28th Feb. 1873, in the following terms:—"I, Peter Bell, . . . for the love and favour which I have and bear to Elizabeth Borthwick or Bell, my wife, and for other good causes and considerations, do hereby give, grant, assign, and dispone to and in favour of the said Elizabeth Borthwick or Bell my whole means and estate, heritable and moveable, real and personal, wherever situated or addebted, which shall belong or be addebted to me at the time of my death, with the whole vouchers and instructions of the said moveable and personal estate, and particularly, without prejudice, the effects and sums of money which may be contained in any inventory made up and subscribed by me as relative to these presents, and which shall be as sufficient to exclude the necessity of confirmation as if every particular thereof were herein inserted: And in the event of the said Elizabeth Borthwick or Bell predeceasing me, or should I predecease her, and she fail to exercise the power of disposal given her by this deed, then I direct my executor after mentioned to realise the whole of my estate, heritable and moveable, above conveyed (power of sale and disposal either by public roup or private bargain being hereby given to him), and to pay the following legacies to the persons after named, viz." Thereafter followed various legacies of sums of money and the nomination of an executor. He also left three codicils, dated 9th February 1882, 11th March 1887, and 20th November 1894, in which he revoked certain of the legacies in the trust-disposition and added others, these additional legacies to be paid "in the event of my wife, the also therein designed Elizabeth Borthwick or Bell, predeceasing me, or should I predecease her, and she fail to exercise the power of disposal given her by the said deed."

Mrs Elizabeth Borthwick or Bell survived her husband, the testator, and died intestate on 22nd April 1896. She did not execute any deed or exercise any power of disposal of the estate of Peter Bell. At the time of her death, the said estate was still in the possession of Peter Bell's executor-nominate, and had not been wound up nor any part thereof paid to her, and no discharge had been given to the said executor.

Thereafter questions arose as to the succession to Peter Bell's estate. The legatees under Peter Bell's settlement maintained that as Mrs Bell did not dispose in any way of the testator's estate, which still remained in the hands of his executor, they were entitled to their respective legacies out of said estate, or otherwise, that the legacies were burdens upon the succession of Elizabeth Borthwick or Bell, and payable by her executor. The next-of-kin of Elizabeth Borthwick or Bell maintained that by the settlement of Peter Bell the estate thereby conveyed passed to his widow absolutely and without qualification, and being vested in her, now formed part of her estate, which was in intestacy and divisible among her whole next-of-kin, free and disencumbered of the legacies.

For the settlement of the point a special case was presented to the Court by (1) Peter Bell's executor-nominate; (2) Mrs Elizabeth Borthwick or Bell's executor-dative; (3) the legatees; and (4) Mrs Bell's next-of-kin.

The questions at law were — "(1) Are the third parties, being the legatees under the said settlement and codicils of the late Peter Bell, entitled to payment of their respective legacies therein mentioned? (2) If the first question be answered in the affirmative, are said legacies payable out of Peter Bell's or Mrs Bell's estate?"

Argued for the third parties — The intention of the testator was plain, viz., that the legacies should be paid in the event of the widow not exercising her power of disposal. It was always the object of the Court to give effect to the intention of the testator. The testator must be held to have either (1) granted his estate to his wife under burden of these legacies—*Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927; or (2) conferred on his wife a right of fee with a good substitution in favour of the legatees to the extent of their legacies, a substitution which had never been evacuated—*M'Clymont's Executors* v. *Osborne*, February 16, 1895, 22 R. 411; *Buchanan's Trustees* v. *Dalziel's Trustees*, February 28, 1868, 6 Macph. 536. The husband's estate had never been immixed with the wife's own funds; it had been kept apart and separate after the husband's death. The widow had no doubt the power of disposing of her husband's estate, but that made no difference, the faculty of disposal never having been exercised by her—*Pursell* v. *Elder*, June

13, 1865, 3 Macph. (H.L.) 59; *Berwick's Executor*, January 23, 1885, 12 R. 565. They were therefore entitled to their legacies, either out of the estate of the husband or the estate of the wife.

Argued for the fourth parties — On the death of the husband the widow became the absolute fiar of his estate. It was said that the intention of the testator was plain, but if that intention could not be worked out in a way the law recognised, if the testator had provided no machinery by which his intention could be carried out, his intention could not be given effect to. The appointment of legatees after the absolute disposal of the estate to the wife was ineffectual and void from repugnancy — *Douglas' Trustees* v. *Kay's Trustees*, December 2, 1879, 7 R. 295; *Clouston's Trustees* v. *Bulloch*, July 5, 1889, 16 R. 937; *Duthie's Trustees* v. *Forlong*, July 17, 1889, 16 R. 1002; *Simson's Trustees* v. *Brown*, March 11, 1890, 17 R. 581; *Mickel's Judicial Factor* v. *Oliphant*, December 7, 1892, 20 R. 172. It did not matter whether the testator's estate was immixed with the widow's or not. The construction of the deed could not be allowed to depend upon accidental circumstances. It was a general rule of law that what ought to have been done must be held to have been done. Opinion of Lord Deas in *Buchanan's Trustees*, *supra*, 6 Macph. 540.

At advising —

LORD YOUNG—Peter Bell by his will and codicils directed his executor, in a specified event, to realise his whole estate, heritable and moveable, which he had conveyed to his wife, and to pay certain legacies.

The questions submitted to us are, first, whether, in the circumstances stated in the case, these legacies are payable, and, if so, second, whether they are payable out of the estate of the testator or that of his widow.

The circumstances are these:—Mr Bell's will consists of a conditional direction to his executor which follows an absolute gift or disposition to his wife of his whole estate, heritable and moveable. In the first and leading part of the deed the testator does not express his will or intention, leaving it to be executed by an executor or trustee, but as Lord Lyndhurst, I think, quaintly expressed it, it is "his own conveyance"—that is to say, he himself directly makes the gift and conveyance. The condition of the will, or direction to his executor which follows, is the event of his disponee predeceasing him, or failing "to exercise the power of disposal given her by this deed." There is no "power of disposal" given by the deed, and the power meant is no doubt just the power of disposal possessed by every absolute owner.

Bell, the disponer and testator, died in November 1895, and his widow, the disponee, died in April 1896 intestate. It is not stated what the estate of Bell at his death consisted of, but it is stated that at the widow's death his estate, whatever it consisted of, "was still in possession of the executor, the first party hereto, and had not been wound up, nor any part thereof paid to her."

On these facts it seems clear that the event (or one of the events) occurred on which the testator directed his executor to realise and sell the whole estate, heritable and moveable, which he had gifted and conveyed to his wife, and pay certain legacies with the proceeds. She survived him, but died without having disposed of the property, and the only question is, whether or not the direction is valid and operative by the law of Scotland. I am of opinion that it is not.

I think it is clear that on Mr Bell's death the conveyance to Mrs Bell took effect, and that she was thereafter absolute owner of the whole estate, heritable and moveable, which it comprehends. She was certainly not a trustee, and there is no conveyance to another of anything, heritable or moveable, in trust or otherwise.

The expression of will which follows the conveyance consists, as I have pointed out, of a direction to an executor-nominate, and is expressly conditioned on one or other of two events, viz., that the disponee of his whole estate either predeceased him, or, surviving him, eventually died without having disposed of that estate. The second event, that which happened, has alone to be considered. I have already noticed that "the power of disposal" referred to must of necessity be that which accompanies ownership under an absolute conveyance, for there was no other. Now, the estate which the executor is directed to realise and sell is "the whole of my estate, heritable and moveable, above conveyed" (not to his executor or any other in trust, but to his wife beneficially), and that only in the event of the disponee having become the owner of it by the disposition, and continued so for any length of time, but dying at last without having exercised her power of ownership by disposing of it.

It seems clear, therefore, that if the disponee survived the disponer, the executor was not directed or authorised to realise or interfere with the estate or any part of it so long as the disponee lived. The universal disponee required no aid from the executor-nominate to recover the estate, and I am satisfied that it was not contemplated that the executor should be required, or, I think, entitled to interfere in any way while she lived. Mr Bell seems to have thought of saving to his widow even the delay and cost of confirmation by having an inventory made of his estate given to her by the disposition. But whether or not the assistance of the executor-nominate was thought useful, or even necessary, and whether it was taken or not, cannot, I think, affect the quality of the widow's right by the conveyance. From the moment of her husband's death the whole estate he died possessed of was hers and subject to her debts and deeds exactly as it had been his, and subject to his debts and deeds. Nor was her estate a "trust-estate," meaning thereby a beneficial interest in property held in trust, *i.e.*, standing on a trust title, which is the proper meaning of

the term. There was here no trust in anyone—certainly not during the widow's survivance—unless indeed it should be held that the direction to the executor in the event of her death without disposing of the property (necessarily assumed to be hers and so at her disposal) to realise and sell the whole of it whether heritable or moveable, constituted him a trustee from the first. It was stated, I think, that Mr Bell died landless, but had he at his death owned land of any extent or value, it would certainly have been carried by the conveyance to his wife, and if the direction to the executor which I am dealing with was valid and operative, and made him trustee, it would have applied to land as well as money and goods, and whether these were inventoried to avoid confirmation or not.

Assuming that Mr Bell's executor-nominate, duly and properly with the assent, and probably at the request, of the widow, entered upon the possession and administration of his executry estate, the question is, for whom did he hold it and to whom was he bound to account for it. I have in what I have already said expressed my opinion on that question. While the widow lived he could not have refused her demand to account for and pay to her everything he had realised, and she having died either without demanding her own or without having her demand satisfied, it follows, I think very clearly, that the familiar rule of law which puts her executor in her place applies and must have effect. Her executor must realise her estate, pay her debts, her death-bed and funeral expenses, and account to her legal representatives, for the balance, if any, that remains. If we could hold that the third parties as legatees of Mr Bell, have a claim, not on his estate, but on that of his widow, we may of course order her executor, who is a party to the case, to satisfy their claim. But I will not waste time by dwelling on this view, which is presented by the second question.

I have, I hope and think, said enough to show why I must reject the argument for the third parties to the effect that there is here what was represented to be a substitution to the widow in the property, heritable and moveable, conveyed to her, or a simple destination which she might have defeated had she pleased, but which, as she did nothing to alter it, must have effect to the exclusion of her legal heirs.

LORD JUSTICE-CLERK—I admit that my opinion wavered during my consideration of this case, but I ultimately arrived at the same conclusion as your Lordship.

LORD TRAYNER—I have found this case attended with a good deal of difficulty. I am unable to divest myself of the impression that the testator's intention was that the legacies now claimed by the third parties should be paid to them, if his wife during her survivance did not use or otherwise dispose of his estate That he gave his wife, in the event of her survivance, a right to the whole of his estate is clear. But what is not so clear is whether the testator's gift to his wife was not conditional, to this extent at least, that whatever part of the estate she did not dispose of (either by use, gift to others, *mortis causa* settlement, or otherwise) should go according to the directions in his own settlement. In construing a testamentary writing the first consideration is the intention of the testator, if that intention can be ascertained from the writing under construction, and if so ascertained it should receive effect. Following that rule, with the impression I have formed as to what the testator intended, I would not be indisposed to sustain the contention for the third parties. But on the other hand it may be that the intention of the testator, as indicated by his will, or fairly inferable from its terms, has not been given effect to by him in the deed he has executed, in which case the terms of the deed must be followed, and the inference as to intention disregarded. It is certainly maintainable that that is what has happened here. The conveyance to Mrs Bell of the whole estate is absolute, and vested in her by survivance. The legacies are bequeathed only in the event of Mrs Bell not exercising the "right of disposal given to her by [illegible] deed." But there was more than a [illegible] of disposal conferred on her—there [illegible] a right of absolute property—and if [illegible] d been clearly recognised by the te[illegible] t e deed might have been otherwise [illegible] but how that would or might h[illegible] ter the terms of the deed we cannot [illegible] ector Further, it is plain that the t[illegible] tor intended to dispose of his whole estate by the provisions expressed in his deed, for there is no clause disposing of residue, and I cannot suppose that he intended his estate (after payment of the legacies) to be disposed of as intestate succession, which it must be if the legacies do not amount to the sum of the whole estate.

On the whole, I do not dissent from the course which your Lordships propose to follow, although I adopt that course not without considerable hesitation.

LORD MONCREIFF—Substitution in moveables is recognised in the law of Scotland. It is not a favourite and it is not readily presumed, and the substitution, if effectually created, will be evacuated either by any clearly expressed intention of the institute to evacuate it, as by assigning or spending the money, or by its becoming immixed with his own funds, or by his disposing of it by will. But if not evacuated, a substitution must receive effect.

The first question in this case is whether substitution is intended. The deed is, in some respects, a bungled deed, but the testator's intention, expressed no less than four times, I think is clear, though the machinery would, in circumstances which have not occurred (that is, in the event of the funds having been paid over to Mrs Bell), have been inappropriate and unworkable. The widow is to have an absolute right to the whole estate in this sense, that she may dispose of it gratuitously or oner-

ously during her life or by will. She is not a mere liferenter; as Lord Stair says (3, 5, 51) —"The nature and extent of such clauses is not to constitute the first person as a naked liferenter, but that they are understood as if they were thus expressed, 'with power to the first person to alter and dispose at pleasure during his life.'"

But if she does not do so, and the funds are extant at the date of her death, so much of them as is required shall be taken to satisfy the legacies mentioned in Peter Bell's settlement and codicils. The will provides no trust or other machinery to protect the interests of the substitutes, but this does not prevent an effectual substitution. If indeed the funds had once passed into the possession of Mrs Bell, there might have been grounds for maintaining, though this is by no means clear on the authorities, that the substitution was, *ipso facto*, evacuated—*Buchanan's Trustees* v. *Dalziel's Trustees*, 6 Macph. 536, *per* Lord Deas, p. 540. But in the present case the funds were not paid over to Mrs Bell. She survived her husband and therefore right to the money was fully vested in her. But she died within six months of her husband, and therefore before the executor was legally bound to make payment to her. She died intestate without having assigned her right and apparently no creditors are claiming as in her right. The funds are still in the hands of Mr Bell's executor. There is no practical difficulty in the way of giving effect to the truster's intention. I know of no case in which a substitution, being well created, and the funds having been paid over to the institute has not received effect on the institute dying without evacuating the substitution.

On these grounds I am of opinion that the third parties are entitled to payment of their respective legacies out of the moveable (the only) estate in the executor's hands.

The Court answered the first question in the negative, and found it unnecessary to answer the second question.

Counsel for the First, Second, and Fourth Parties — Macfarlane — Graham Stewart. Agent—John Mackay, S.S.C.

Counsel for the Third Party—Guthrie Q.C.—Gunn. Agent—John Dobie, Solicitor

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Thursday, July 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BROWN'S TRUSTEES *v.* HAY.

Process—Summons—Plurality of Pursuers —Amendment.

A's trustees, and B, the law-agent of the trust, raised an action against C, who had formerly been in the employment of B's firm, for delivery of certain documents belonging to the trust, and for damages in respect of C's having illegally used these documents while in his possession (in a manner specifically set forth) to the pursuers' prejudice.

The pursuers averred that C had originally obtained possession of some of the documents while employed by the trustees as auditor of a business carried on by them, and of the others while acting as liquidator in the winding up of B's firm.

After the record was closed, the pursuers, in order to meet objections to the competency of the action, applied for leave to amend the summons by making the conclusion for damages one in favour of the trustees alone, and not of all the pursuers.

Held (*aff.* the judgment of the Lord Ordinary) that the summons was relevant, in so far, at least, as its conclusions were founded on a breach, on the part of the defender, of the contract of employment between him and the trustees; and (2) that the conjunction of the law-agent of the trust, as a pursuer along with the trustees, did not, at least as regards the conclusion for delivery, render the instance invalid; and (3) that in any event the amendment had been properly allowed by the Lord Ordinary.

Opinion by Lord M'Laren, that the Court ought not to interfere with the Lord Ordinary's discretion as to amendment, even if differing from him as to the expediency of allowing the amendment.

The Court of Session Act 1868, sec. 29, enacts—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always that it shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment."

An action was raised by Mrs Brown, widow of the late Mr William Brown of Dunkinty; Mr Ralph Cameron, Writer to the Signet, Elgin; and Mrs Brown's two sons, all as trustees acting and assumed under his trust-disposition; and by Mr Cameron, as an individual, against Mr James Hay, accountant, Elgin. The summons craved the Court to ordain the defenders "to deliver to the pursuers all documents or copies of documents having reference to the business of distillers sometime carried on by the said William Brown, and now by