COURT OF SESSION.

Tuesday, December 3.

FIRST DIVISION.

SLOSS AND ANOTHER (GARDEN'S TRUSTEES) *v.* CRUICKSHANK AND OTHERS.

Succession — Mutual Settlement — Destination — Conditional Institution—"Heirs, Executors, and Assignees."

A husband and wife executed a mutual settlement, whereby "for the mutual love and affection" they bore to each other the husband, gave, granted, assigned, and disponed to his wife, in case she survived him, and to her heirs, executors, and assignees whomsoever, his whole estate, and in like manner the wife gave, granted, assigned, and disponed to her husband, in case he should survive her, and to his heirs, executors, and assignees whomsoever, her whole estate. Full power was reserved to each to revoke or alter the settlement during their joint lives. The husband predeceased the wife, and left a will by which he directed his trustees to convey to his wife his whole moveable estate with the exception of certain shares. The wife having succeeded under this will to his moveable estate, thereafter died without having executed any other writing of a testamentary nature than the mutual settlement.

Held, in a Special Case, that the gift by the wife to her husband, and his heirs, executors, and assignees whomsoever, was conditional upon his surviving her, and that as he had predeceased her, her whole estate fell to her heirs *in mobilibus ab intestata*, and was not carried by the mutual settlement to his heirs, executors, and assignees.

Baillie's Executor v. *Baillie*, June 16, 1899, 1 F. 974, 36 S.L.R. 739, *followed*.

Succession — Will — Precatory Trust.

A husband who was survived by his wife left a will by which he nominated trustees, and directed them to convey to his wife all his free moveable estate with the exception of certain particular shares; and he added—"It is my desire that at my wife's death some part of such estate as she may die possessed of should go to the families of my brothers and sisters. In particular, I should like not less than £50 sterling left to the widow of my brother 'A.' or her family, if she predeceased my wife, and I desire that my wife may make a settlement providing for this." The wife having taken, under the will, her husband's moveable estate, died intestate.

Held that the widow of the husband's brother A. was not entitled to get £50 from the wife's estate.

A Special Case was presented for the opinion and judgment of the Court by (1) the Rev. John Smith Sloss and another, the trustees and executors nominated by and acting under the last will and testament of James Garden, retired flockmaster, Aberlour, dated 26th May 1909, *first parties;* (2) William Cruickshank, the executor-dative, *qua* brother and one of the next-of-kin of the late Elizabeth Cruickshank or Garden, widow of the said James Garden, and the whole heirs *in mobilibus ab intestata* of the said Elizabeth Garden, *second parties;* (3) the whole heirs *in mobilibus ab intestato* of the said deceased James Garden as at the date of his death and also at the date of his widow's death, *third parties;* (4) the widow of Alexander Garden, who was a brother of James Garden, *fourth party*.

A mutual settlement was executed by James Garden and Elizabeth Cruickshank or Garden, dated 20th November 1905, in the following terms—"We, James Garden, sheep dealer, Aberlour, and Mrs Elizabeth Cruickshank or Garden, wife of the said James Garden, considering it a duty incumbent on us to settle our affairs so as to prevent disputes after our respective deaths, and for the mutual love and affection which we bear to each other, have agreed to grant these presents in manner after written—that is to say, I, the said James Garden, do hereby give, grant, assign, and dispone to and in favour of the said Elizabeth Cruickshank or Garden, in case she shall survive me, and to her heirs, executors, and assignees whomsoever, all and sundry my heritable and moveable estate of whatever nature or denomination the same may be, which shall belong and be addebted to me at the time of my decease, with the whole writs, vouchers, and securities thereof; and in like manner, I, the said Elizabeth Cruickshank or Garden, give, grant, assign, and dispone to and in favour of the said James Garden, in case he shall survive me, and to his heirs, executors, and assignees whomsoever, all and sundry my heritable and moveable estate, of what kind and denomination soever, which shall belong or be addebted to me at the time of my death, with the whole writs, vouchers, and securities of the same; and for the rendering this deed more effectual, we do hereby nominate and appoint the survivor of us to be the sole executor and universal legatory of such one of us as shall predecease, reserving always to us and each of us our respective liferents of the estates and effects above conveyed; with full power to us and each of us during our joint lives to alter or revoke these presents."

On 26th May 1909 James Garden executed a last will and testament, which appointed the Rev. John Smith Sloss and another his trustees and executors, and conveyed to them his whole estate, heritable and moveable, for the after-mentioned purposes, viz.—"I instruct my said trustees, after payment of all my just and lawful debts, deathbed and funeral expenses, and the expenses incurred in carrying out this will,

to make over to my wife Elizabeth Cruickshank or Garden all my free moveable estate, with the exception of the shares of the North of Scotland and Town and County Bank that may be standing in my name at my death. These shares my trustees shall retain, and disburse the dividends to my wife as they become payable, and at her death the shares shall be transferred to my daughter Jessie Garden or Shaw, Tomdow, Knockando, or to her heirs in the event of her previous demise. . . . I leave and bequeath to my said daughter and instruct my trustees to convey to her or her heirs my heritable properties in Aberlour, subject to the liferent use and enjoyment of my wife. . . . It is my desire that at my wife's death some part of such estate as she may die possessed of should go to the families of my brothers and sisters. In particular, I should like not less than £50 sterling left to the widow of my brother Alexander Garden, New Elgin, or her family, if she predeceases my wife, and I desire that my wife may make a settlement providing for this. I withdraw all former wills and consent to the registration hereof for preservation. . . ."

James Garden died at Aberlour on 27th April 1911, and the first parties accepted office as trustees under his last will and testament, and obtained confirmation as executors to the moveable estate which belonged to him at the time of his death. The total value of the moveable estate amounted to £1240, 10s. 1d., including twenty shares in the North of Scotland and Town and County Bank, Limited, of the value of £236. Out of the free moveable estate the trustees paid the debts, funeral expenses of the deceased, Government duties, and expenses of administering the trust to date, and they transferred to Jessie Garden or Shaw the twenty shares of the North of Scotland and Town and County Bank, Limited. They also conveyed to her the heritable properties in Aberlour, the only heritable estate left by James Garden. The residue, amounting to £825 or thereby, was still at the date of this Special Case in their possession. Mrs Elizabeth Cruickshank or Garden died on 17th August 1911, and William Cruickshank was appointed her executor-dative *qua* one of the next-of-kin. Mrs Garden never executed any other writing of a testamentary nature than the foresaid mutual settlement, and up to the date of her husband's death she was not at any time possessed of separate estate, the whole property of which she died possessed having been acquired by her under her husband's last will and testament.

The *contentions* of parties were—The second parties contended that the residue of the estate of Mrs Cruickshank or Garden being estate *in bonis* of her at the date of her death, and the provisions by her in the mutual settlement having lapsed by the predecease of her husband, fell to her heirs *in mobilibus ab intestata*. The third parties contended that the mutual settlement, *quoad* the provisions made by Mrs Garden therein, was still operative, and that on a sound construction thereof they, as heirs *in mobilibus ab intestato* of James Garden, were entitled to the free residue of the estate of Mrs Garden. The second and third parties further contended that on a sound construction of the last will and testament of James Garden, the fourth party was not entitled to any payment from Mrs Garden's estate. The fourth party contended that on a sound construction of James Garden's last will and testament she was entitled to have paid to her out of Mrs Garden's estate the sum of £50 sterling."

The *questions of law* were—"1. Did the said Mrs Elizabeth Cruickshank or Garden die intestate, with the result that the second party, the said William Cruickshank, as her executor-dative, is now entitled to her whole moveable estate for the purpose of distributing it between himself and the other second parties as her heirs *in mobilibus ab intestata?* or, 2. Did the bequest by the said Mrs Elizabeth Cruickshank or Garden, contained in the said mutual disposition and settlement, remain operative, notwithstanding the predecease of her husband, with the result that the third parties—the heirs *in mobilibus* of the said James Garden—are now entitled to the said moveable estate as conditional institutes in the bequest? or, 3. Does the provision by the said James Garden in his said last will and testament, desiring his widow to leave £50 sterling to the widow of his brother Alexander Garden, constitute that sum a debt upon the estate of Mrs Garden, and entitle the fifth party to payment thereof out of her executry estate?"

Argued for the second parties—(1) The mutual settlement was purely testamentary. Mrs Garden's part of it was rendered inoperative by her husband's predecease. The reason for the gift was affection for the husband, not for his heirs. A conditional institution of the husband's heirs, executors, and assignees was not made nor intended to be made. The case was ruled by *Baillie's Executor* v. *Baillie*, June 21, 1899, 1 F. 974, 36 S.L.R. 739. (2) The fourth party was not entitled to receive £50. There was a mere request to the wife to give. It was not made a condition of the wife taking the moveable estate, and did not constitute a precatory trust—*Barclay's Executor* v. *M'Leod*, January 20, 1880, 7 R. 477, 17 S.L.R. 311; *Hamilton's Trustees* v. *Hamilton*, November 28, 1901, 4 F. 266, 39 S.L.R. 159; M'Laren on Wills, sec. 634.

Argued for the third parties—(1) The wife's part of the mutual settlement remained operative after the husband's death, and carried the money in question to his "heirs, executors, and assignees." There was a valid conditional institution in their favour. *Baillie's Executor* v. *Baillie* (*cit. sup.*) was distinguishable, because here the words "to prevent disputes after our respective deaths" showed clearly that the settlement was meant to regulate the succession not only of the predeceaser

but also of the survivor. Here also there bore to be two wills apart. If the case were not distinguishable from *Baillie's Executor*, then alternatively they argued that *Baillie's Executor* was wrongly decided. It followed *Findlay* v. *Mackenzie*, July 9, 1875, 2 R. 909, 12 S.L.R. 597, which, however, was decided upon the natural obligation of a husband to provide for his wife. But a provision by a wife in favour of her husband was not in implement of a natural obligation. There being no natural obligation, the case fell under the rule of the earlier cases of *Boston* v. *Horsburgh*, 1781, M. 8099; *Halliburton and Others*, June 26, 1884, 11 R. 979, 21 S.L.R. 686; *Cleland* v. *Allan*, January 13, 1891, 18 R. 377, 28 S.L.R. 264. (2) On the second point they adopted the argument for the second parties.

Argued for the fourth party—There was a valid precatory trust in James Garden's will entitling the fourth party to payment of £50. In *Barclay's Executors* the words "anxious desire" were subsequently softened to "hope." In *Hamilton's Trustees* there was a mere expression of a wish, with the addition that the testator did not think his children would "object," thereby implying a right to object. Here "desire" was equivalent to a direction to the wife or a condition of her taking the moveable estate.

At advising—

LORD PRESIDENT—The late Andrew Garden and his wife executed a mutual settlement of the simplest description, by which, upon the narrative that they had a duty incumbent upon them to settle their affairs so as to prevent disputes after their respective deaths and for mutual love and affection, they each made a universal conveyance in favour of the other in case of survivorship—that is to say, the husband conveyed to the wife, and her heirs, executors, and assignees whomsoever, all and sundry his heritable and moveable estate of whatsoever kind, and the wife did the same, *mutatis mutandis*. There was reserved a power to revoke during their lives.

The husband died first, and he left a will by which he nominated trustees, and directed them to convey to his wife all his free moveable estate with the exception of certain particular shares; and then he put in at the end of his will—"It is my desire that at my wife's death some part of such estate as she may die possessed of should go to the families of my brothers and sisters. In particular, I should like not less than £50 sterling left to the widow of my brother Alexander Garden, New Elgin, or her family if she predeceases my wife, and I desire that my wife may make a settlement providing for this"; and then he revokes all former wills.

The trustees made over the husband's moveable estate to her and she entered into possession of it. She then died intestate, and the present Special Case has been brought to settle some doubts that have arisen in the minds of parties as to what is to be done with the moveable estate of which she died possessed.

It is, of course, quite settled that mutual settlements like the one which I have just read are really testamentary and nothing else, and no one has argued to the contrary. Accordingly, after the husband's death the wife took, not in respect of his mutual settlement, but in respect of his will, and she being dead and the estate having been *in bonis* of her, the natural result would be that it goes to her executors. But an argument was presented to us that her old mutual settlement acted, so to speak, as her will, and that by that mutual settlement she had disposed of all estate of which she might become possessed in favour of her husband and his heirs, executors, and assignees whomsoever; and that, secondly, the husband being dead, the husband's heirs and executors came in as conditional institutes.

I do not think I need say more than that in my opinion the question is absolutely disposed of by the case of *Baillie's Executor* v. *Baillie* (1 F. 974), and unless we are prepared to overrule that case—which we cannot do—I do not think we could decide otherwise; and I am bound to say that although there is upon the authorities, and especially upon the older authorities, some difference, it seems to me that the rule in *Baillie's* case is most consonant with common sense. An old couple like this, leaving mutual fortunes to each other, do it entirely out of what the settlement says —"mutual love and affection to each other" —and they really do not think of each other's heirs at all.

The only other point was this—whether there was a right in the widow of the brother Alexander Garden to get £50. I think there is no such right. It is quite possible to constitute a precatory trust which is binding upon an executor, but if estate is left to a person not as an executor but as a beneficiary, then it must be left with a clearly expressed condition in order to bind him.

Accordingly I propose that we should answer the first question in the affirmative, and the second and third questions in the negative.

LORD JOHNSTON—I entirely concur and have nothing to add.

The LORD PRESIDENT intimated that LORD SKERRINGTON also concurred.

LORD KINNEAR and LORD MACKENZIE were in the Extra Division and did not hear the case.

The Court answered the first question of law in the affirmative, and the second and third questions in the negative.

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