

Wednesday, February 28.

SPECIAL CASE FOR JAMES REID AND
OTHERS.

Trust—Testament—Power to alter—Surrogatum.

Where a codicil gave to the truster's widow the option of purchasing part of the trust-property at a fixed price, and thereafter in somewhat ambiguous terms directed this price, if the option were exercised, to be divided in certain proportions alleged to be specified in the deed,—*Held* that under the circumstances it was not intended to give to the widow power to make any alteration upon the distribution of the property by the exercise of this option, but that the price was to be dealt with merely as a *surrogatum* for the property.

Opinion that though such intention could be carried out by such a codicil, its existence was not easily to be presumed.

The late Archibald Reid, the testator, who died on 7th June 1870, without leaving issue, but survived by his wife Mrs Elizabeth Spens Park or Reid, had three brothers and two sisters who survived him, and were the first parties to this case, and one sister Miss Elizabeth Reid, who also survived him, but died a few months afterwards, leaving a trust-settlement; her trustees were the second parties to this case. Mr Reid was also survived by certain nephews and nieces, the children of his three brothers. They were the third parties to this case. Mr Reid's own testamentary trustees were the fourth parties.

Mr Reid left a trust-disposition and settlement, dated 15th October 1865, whereby he left an annuity of £500 a-year to his widow, together with a legacy of £2000. His trust-deed then proceeded—*"In the third place*, I direct and appoint my trustees to make payment of all legacies or bequests which I may leave by any codicil hereto, or writing under my hand, though not formally executed. *In the fourth place*, in regard to the income of the remainder of my means and estate during the lifetime of my wife, I direct and appoint my said trustees to divide the same into nine parts or shares, and to pay the same to my brothers and sisters, the said James Reid, Francis Reid, Andrew Paterson Reid, Barbara Corbet Reid, Elizabeth Reid, and Isabella Reid, residing at Row, near Helensburgh, in the proportions following, viz., two-ninth parts to each sister, and one-ninth part to each brother; and in case of the death of a brother or sister without leaving issue, the share of such deceiver shall be divided among the survivors equally, share and share alike; and after the decease of my wife I appoint my said trustees to pay and divide the whole income of the residue of my estate to and among my whole brothers and sisters, and the survivors of them, equally among them, share and share alike; provided that if any of my brothers or sisters shall die leaving lawful issue, whether in the lifetime or after the decease of my said wife, such issue shall receive, if more than one, equally among them, the parent's share of the income of my estate . . . declaring, as it is hereby expressly provided and declared, that the shares of the income of my said means and estate provided to my brothers and sisters shall be purely alimentary to them, and not alienable or assignable or affectable in any way by their debts or deeds, or attachable by the diligence of their creditors;

and the shares of the said income provided to my sisters shall be, as the same are hereby declared to be, exclusive of the *jus mariti* and right of administration of any husbands they may have, . . . *In the fifth place*, at the first term of Whitsunday or Martinmas which shall happen six months after the decease of the longest liver of the said Mrs Elizabeth Spens Park or Reid, my wife, and my said brothers and sisters, I direct and appoint my said trustees to divide and pay the whole residue and remainder of my said means and estate equally amongst, and to the lawful children, if any, of my said brother Francis Reid, and my said brother Andrew Paterson Reid, then surviving, *per capita*, and the issue of any such children who may have predeceased leaving issue, such issue, if more than one child, taking the share or shares which would have fallen to their parents had they survived, equally among them, and being also entitled to the interest or annual proceeds of their parents' shares till paid, and failing a child or children of my said two brothers, or issue of such child or children, I direct and appoint my said trustees, in like manner, to divide and pay the foresaid residue of my means and estate to the daughter of my said brother James Reid, and failing her, to her children, equally among them, and the issue of any such children or child who may have predeceased leaving issue, such issue, if more than one child, taking the share or shares which would have fallen to their parents had they survived, equally among them, and being also entitled to the interest or annual proceeds of their parents' shares, till paid."

Besides his trust-settlement Mr Reid left the following holograph codicil, in the form of a letter to his trustees:—

"22 Buckingham Terrace, Edinburgh.

"James Reid, Francis Reid, Andrew Paterson Reid, Edward Collins junior, Hugh Moncrieff, and Adam Paterson, Esqrs.

"Dear Sirs,—I hereby give to my wife, Elizabeth Spens Park, the right, at any time within five years after my death, to purchase my house, No. 22 Buckingham Terrace, Edinburgh, on payment to you as trustees the sum of £2700, which sum is to be divided among my sisters and brothers in the proportions mentioned in my will, dated 16th October 1865; or, in her (my wife's) option, she is to have the right to remain in the house as long as she pleases, on payment to you of £108 sterling as yearly rent, which sum is to be divided half-yearly among my sisters and brothers, in the proportions stated in my above-mentioned will.—I am, dear Sirs, yours very truly. (Signed) ARCHD. REID."

Mrs Reid, the truster's widow, who still survives, exercised the right conferred upon her of purchasing the house 22 Buckingham Terrace, Edinburgh, at the price of £2700. The sum was paid to the trustees, and remained in their hands; and as certain questions arose as to the proper mode of dividing it, this Special Case was presented to the Court.

The first and second parties to this case both maintained that, according to the said holograph letter or codicil, the said sum of £2700 fell to be paid at once. The first parties maintained that the division should be in the proportions of one-ninth to each of the truster's three brothers, and two-ninths to each of his two surviving sisters,—the two-ninth shares which would have been payable to the said Elizabeth Reid, had she been now alive, being divisible equally among them; while

the second parties maintained that they were entitled to the said Elizabeth Reid's two-ninth shares.

On the other hand, the third parties maintained that the annual income only of the said sum of £2700 fell to be paid to the first and second parties, in the manner pointed out in the fourth purpose of the trust, with reference to the income of the residue, and that the trustees were bound to preserve the capital until after the death of Mrs Reid and the truster's brothers and sisters, when it would fall, as part of the residue of the trust-estate, to be divided among the parties then entitled to the residue, in terms of the fifth purpose of the trust.

The opinion and judgment of the Court were requested upon the following questions—

"1. Whether the said sum of £2700 falls to be paid over now to the surviving brothers and sisters of the truster, or to them and the trustees of the said Elizabeth Reid; and if so, in what proportions the said sum falls to be divided among the said surviving brothers and sisters and the said trustees, or such of them as may be found entitled to participate therein? or,

"2. Whether the said surviving brothers and sisters, and the survivors and survivor of them, and the issue of such as may die leaving lawful issue, are entitled only to the annual income of said sum as part of the residue of the trust-estate, in terms of the fourth purpose of said trust, the capital falling to be retained by the trustees until the death of the longest liver of the truster's widow and of his said brothers and sisters, and then divided as part of the residue, in terms of the fifth purpose of the said trust?"

SHAND for the first parties.

WATSON for the second parties.

Solicitor-General (A. R. CLARK) and LANCASTER for the third and fourth parties.

At advising—

LORD DEAS—In the decision of these questions I do not think there can be any possible doubt. The testator, by his deed of 16th October 1865, conveys his whole estate to trustees for the purposes specified; and, after giving an annuity of £500 a-year to his widow, he provides for the division of the whole residue among his relations. With regard to the fee, it is quite distinctly specified that there is to be no division of it until after the death of the longest liver of his widow and brothers and sisters; and there is a clause effectually importing that none of it is to vest until the arrival of that event. The only other deed we have consists of a few lines holograph of the testator. The testament itself provides for the division of the annual proceeds of the residue of the estate among his brothers and sisters until the event happened whereon it was to be divided among his nephews and nieces. The shares of his brothers and sisters are declared to be purely alimentary, and exclusive of the *jus mariti* of any husbands his sisters might have. Part of his estate consisted of a house in Buckingham Terrace, Edinburgh. The holograph codicil already mentioned provides that the widow is to be entitled to purchase that house, at her option, for a sum of £2700. The consequence is that, as she has availed herself of that option, there is now in the hands of the trustees, and will be when the time for division comes, a sum of £2700 in money, instead of a piece of household property. But the question is raised, Whether the terms of this codicil, giving this option to the widow, do not at the same time operate a change upon the

settlement, and require the immediate division of this sum of £2700.

This question depends upon the terms of the deed and codicil. And from a consideration of them I am of opinion that the whole object of the testator, in the latter document, was to give the option of purchase to his widow, substituting the price for the house as part of the residue estate, and subjecting it to all the conditions as to vesting and division which are applicable to the residue of the estate. I do not think it necessary to go into the matter in detail. It is so clear on the surface of the deed that it would be mere waste of time. I have not the slightest doubt that we should answer the first question in the negative, and the second question in the affirmative.

LORD ARDMILLAN—I entirely agree with your Lordship. The first peculiarity of the original deed is that, in regard to the income, the directions of the deed commenced to take effect immediately at the death of the testator. While, with regard to the capital, these operations were postponed until a subsequent event. The next peculiarity is that the distribution of the income is to be in certain proportions, which are not to be equal, while the division of the capital is into equal shares. The third peculiarity is that the income is not always to be divided in these proportions, but there is to be a change in this respect at the widow's death. Lastly, the income is made alimentary, and the capital not.

Now, this codicil states £2700 as a price at which the widow may take the house. It is quite true that the codicil might have been so expressed that the widow, in exercising her option, might at the same time have altered the destination of part of the estate. But this is not to be easily presumed; and it is always a much more probable and reasonable supposition that her choice is not to have the effect of altering the destination. I think the latter is the case here most undoubtedly. For the codicil throws us back upon the will; and it is impossible to reconcile a consideration of the two with the idea that any power of alteration was placed in the hands of the widow. In the will the only proportional division mentioned is one of income, whereas the parties of the first and second part require a proportional division of the capital. Again, they demand immediate payment of the capital, whereas the will provides for no payment of capital to them whatever, and for no immediate payment of capital to any party at all. You cannot, with reference to the principal deed, connect in any way the idea of proportional division and immediate payment. Farther, the provision to brothers and sisters is to be alimentary only, which the immediate payment would defeat. Therefore you are thrown back upon the reasonable construction that this codicil is not intended in any way to alter the destination, but merely to give the widow an option to purchase.

LORD KINLOCH concurred.

LORD PRESIDENT absent.

Agents for First and Second Parties—Webster & Will, W.S.

Agents for Third and Fourth Parties—Jardine, Stodart, & Frasers, W.S.