*Tuesday, July* 14.

## SECOND DIVISION.

### LANG'S TRUSTEES *v.* LANG.

*Succession—Mutual Settlement—Survivorship—Power of Revocation—Effect of General Settlement on Previous Special Destination.*

Two sisters executed a mutual trust-disposition and settlement by which they conveyed their whole estate (which was held by them in common on a *pro indiviso* title) to trustees for certain purposes, and, *inter alia*, for a liferent of the estate of the predeceaser to the survivor, and then for payment of certain legacies and disposal of the residue. The settlement contained a clause to the effect that the testatrices reserved the liferent of their respective estates, with power to either of them at any time during their respective lives to alter or revoke the settlement, each without consent or concurrence of the other. One of the sisters predeceased without having exercised the reserved power of revocation. At the date of her death the joint-estate amounted to £8000. Of this, £5000 was invested on heritable security, the destination in the bond being to the testatrices, "or the survivor of them, or to the executors or assignees whomsoever of the survivor." The legacies amounted to £6000. *Held* that the mutual settlement was revocable by the surviving testatrix only to the extent of her own share of the joint property; that the destination in the bond and disposition in security was not evacuated by the terms of the settlement, and that the sum contained in it therefore belonged to the survivor; and that the contingency that the exercise of that power might not leave sufficient to meet the legacies bequeathed by the settlement did not in the circumstances afford evidence that the general settlement was intended to affect the special destination.

Miss Janet Lang and her sister Miss Jane Crawford Lang, who resided together at Warren Park, Largs, in the county of Ayr, executed a mutual trust-disposition and settlement, of date 22d August 1878, by which they conveyed to Major Alexander Haldane Eckford and Alexander Young, as trustees for the purposes therein mentioned, their whole means and estate, heritable and moveable, real and personal, owing and belonging to them respectively at their respective deaths, or of which they or either of them might have the power of disposal.

The purposes of the settlement were that the trustees should "apply our respective estates and the produce thereof in manner following"—In the first place, payment of debts; "in the second place, we direct our trustees to convey and deliver the whole plate and books, household furniture and plenishing, bed and table linen, china, and whole other household effects, which may belong to the first deceaser of us, to the survivor, as the absolute property of such survivor; in the third place, in payment to the survivor of us of the whole annual rents, interest, and produce of the residue and remainder of the means and estate of the first deceaser of us during all the days of the life of said survivor; in the fourth place, upon the death of the survivor of us our trustees shall hold, apply, pay, and convey the whole of our respective estates, heritable and moveable, as follows," viz.—in payment of six legacies of £1000 each—£6000 in all—to certain charities; and in the fifth place, to divide the residue at their discretion among such charities as they might deem proper.

The deed contained also the following clause—"And we reserve our own liferents of our respective estates, with full power and liberty to us, or either of us, at any time during our respective lives, to alter, innovate, or revoke these presents, in whole or in part, as we may respectively think proper, which power each of us reserves entire, and may avail ourselves of without the consent or concurrence of the other."

The Misses Lang always lived in family together, and held their estate in common, each being owner of a *pro indiviso* half share of the joint-estate.

Miss Janet Lang died on 26th August 1884 without having exercised the power of revocation reserved in the mutual settlement.

At the date of her death the joint-estate amounted in value to about £8000. Of this total the sum of £5000 was contained in a bond and disposition in security dated 13th May 1878, by Arthur Colville, builder, Edinburgh, which was taken to "the said Misses Jane Crawford Lang and Janet Lang, or the survivor of them, or to the executors or assignees whomsoever of the survivor."

After the death of Miss Janet Lang questions as to the rights of the survivor Miss Jane Crawford Lang arose between her and the trustees. The trustees maintained that on the death of Miss Janet Lang the whole joint-estates, including the bond and disposition in security, fell under the trust for administration by them, and that Miss Jane Crawford Lang could not revoke to any extent the mutual trust-disposition and settlement. Miss Jane Crawford Lang, the survivor, on the other hand, maintained that she had the power to revoke the whole of the mutual deed (in terms of the reservation contained therein), not only as regarded her own estate, but also as regarded the estate of the deceased Miss Janet Lang; or, at all events, that she had power to revoke the deed so far as regarded her own share of the property, and could at the same time accept the liferent of the estate of Miss Janet Lang; and further, she maintained that the whole sum contained in the bond and disposition in security fell to her as the survivor.

In these circumstances the present Special Case was adjusted between the trustees of the first part and Miss Jane Crawford Lang of the second part. The following questions were submitted for the opinion and judgment of the Court:—"(1) Is the said mutual trust-disposition and settlement revocable by the second party? Or (2) Is the deed revocable by the second party only to the extent of her own share of the joint-property? (3) In the event of the second question being answered in the affirmative, is the second party entitled to the survivor's provisions under the said mutual deed? (4) Is the destination in the said bond and disposition in security evacu-

ated by the said mutual trust-disposition and settlement?"

Argued for the parties of the first part—They did not maintain that the party of the second part had not the power to revoke as regarded her own share of the joint-estate, but it was equally clear that she had no power of revocation, or any power of disposal whatever, over the testamentary estate beyond the amount of her own share, and that the share of the predeceaser was now vested in the trustees—*Craich's Trustees* v. *Mackie*, June 24, 1870, 8 Macph. 891; *Mitchell's Trustees*, June 5, 1877, 4 R. 800. Though the general rule was that a subsequent general disposition did not evacuate a previous special destination, there was enough here to take it out of the rule by showing a contrary intention on the part of the testator, for were it held to fall under the survivor's powers of revocation there might not be enough left to meet the legacies.

Argued for the party of the second part—Her power of disposal as the survivor extended to the whole property, and she had therefore power to revoke the will, not only as to her own share, but as to the whole. A mutual deed might be onerous between the parties, but at the same time gratuitous as to the beneficiaries, and therefore revocable. There was nothing in the special circumstances here to take the case out of the settled rule that a subsequent general conveyance by a testator would not affect a previous special destination made by him unless there were something in the special circumstances of the case to show clearly that such was the testator's intention. There was no such evidence here, and the money in the bond must therefore stand on the destination in the bond unaffected by the mutual settlement, and the whole of it belonged to the second party as the survivor—*Traquair* v. *Martin*, November 1, 1872; *Lang* v. *Brown*, May 24, 1867, 5 Macph. 789; *Renton's Trustees* v. *Alison*, July 20, 1876, 3 R. 1142; *Walker's Executors* v. *Walker*, July 19, 1878, 5 R. 965.

At advising—

Lord Young—This case concerns a mutual trust-disposition and settlement executed in 1878 by two sisters Janet Lang and Jane Crawford Lang, whereby they conveyed to testamentary trustees and executors all and sundry their whole heritable and personal estate owing and belonging to them respectively at their respective deaths, or of which they or either of them may have the power of disposal, the import and scope of the settlement otherwise being that the survivor was to have the liferent of the estate of the predeceaser, and the absolute property of the furniture and plate belonging to the predeceaser, and that after the death of the survivor certain legacies were to be paid. Jane was, or rather is, the survivor, Janet having died in 1884, and the question immediately before us arises under a clause dealing with the subject of revocation, which is in these terms—"And we reserve our own liferents of our respective estates, with full power and liberty to us, or either of us, at any time during our respective lives, to alter, innovate, or revoke these presents, in whole or in part, as we may respectively think proper, which power each of us reserves entire, and may avail ourselves of without the consent or concurrence of the other." Under this clause the trustees maintained that on the death of Janet the whole joint estate, including the bond and disposition in security of which we have heard so much in the course of the discussion, and which bond was the joint or common property of the sisters, and was taken to them or the survivor, or to the executors or assignees of the survivor, fell under the trust for administration by them, and that Jane cannot revoke the mutual trust-disposition and settlement to any extent. The surviving testatrix, Jane, on the other hand maintained that she has power to revoke the whole of the mutual deed not only as regards her own estate but also as regards the estate of her predeceasing sister Janet, but at all events that she has power to revoke so far as regards her own share of the common property. She also maintains that the whole sum in the bond falls to her as survivor. Counsel for the trustees very properly abandoned the position that the whole estate of both sisters fell under the trust, and was vested in them on the death of the predeceasing sister. That is on the face of it a quite extravagant contention, because at the death of the predeceaser the survivor had conveyed nothing. She had indeed executed a conveyance but it had not taken effect. But I need not pursue this part of the case, for as I said it was very properly conceded by the counsel for the trustees that only the estate of the predeceaser vested in them on the predeceaser's death. But it was maintained that the bond for £5000 was, to the extent of a half, the estate of the predeceaser Janet, and therefore to that extent was vested in the trustees, the remaining half being vested in the survivor as her estate, and subject to her power of revocation, if she had the power of revocation, to the extent of her own estate.

I am very clearly of opinion that the survivor has a power to revoke with respect to her own estate, but no power to revoke with respect to the estate of the predeceaser. On the predeceaser's death the whole of her estate passed under the settlement to the trustees. She might have revoked to any extent while she lived, but having died without making any revocation, her estate as belonging to her at the time of her death passed to the trustees and fell under the will.

On the question whether this included any part of the bond for £5000, I am of opinion that it included no part of it. The money in the bond belonged to the two sisters, but they put it out upon an investment which made them joint-proprietors with an express right of survivorship. It was no doubt in the power of both together, and I do not doubt that it was in the power of either to terminate this investment and to divide the money between them, and so to put an end to the joint right and the right of survivorship. But this was not done unless this mutual will can be construed so as to bring it about. The decision of the question therefore depends upon whether the execution of this will terminated the condition on which the right to the £5000 stood—the investment standing exactly as it does.

I am of opinion that the settlement does not have nor was intended to have that effect. So far as I am able to judge, the rights of the parties under the mutual settlement are in no respect different from what they would have been had each of the sisters executed an independent settlement in the

very terms of this one—that is to say, each conveying to her executors and testamentary trustees all the property of which she should die possessed, they paying the income to her surviving sister during her life, and on her death paying certain legacies and disposing of the residue as here. If each sister had executed a will in these terms I think their rights would have been in all respects the same as under this mutual settlement, which is in effect doing it by one deed instead of two. It was necessarily unknown which of the two sisters would be the survivor, and so would take the £5000 if not paid up while they both lived. I do not think there is anything in the mutual settlement to show a desire or disposition on the part of the sisters to terminate this state of things, namely, that the bond should belong to the survivor, it being unknown which that would be. There was no reason for terminating this state of things, at least none is disclosed in the settlement. Whichever was the survivor, the sum in the bond fell under that part of the mutual settlement which is her will. No doubt by the one or the other the sum in the bond was conveyed to these testamentary trustees; the only question is, by which of them, or was it by the survivor, she having the power of revocation? If Jane, the survivor, is the one of the two sisters by whom this bond is conveyed to the trustees—which in my opinion she is—then it is within her power to revoke her own conveyance to them. Had it been otherwise—if the mutual will had been held to operate a change of matters, a determination of the right of survivorship, and an appropriation of half of the sum of £5000 to each of the two sisters, then each would have been a testatrix with respect to that half. Janet, who predeceased, might have revoked with respect to her half during her lifetime. If she died without having done so, then it would be irrevocable with respect to that half, and revocable only by the survivor with respect to the other half. But in my opinion nothing has been done to change the rights of the parties as they stood on the investment, and therefore the £5000 on the death of Janet belonged to Jane, and if she died without revoking or altering the will, it will by her part of that conveyance pass to her executors or trustees; but I am of opinion that she had the power to revoke, and that will answer the last question put here, as my previous observations have answered the preceding questions.

I have only to notice the argument that the fact of legacies having been left to the extent of £6000 indicated an intention that the sum in the bond should fall under the will, because if it did not there would be only £3000 to meet the £6000 of legacies. But I take it to be quite certain that the testatrices intended the £5000 to fall under the will. Now, the will was revocable by both together or by one or other, so that each sister conveyed her half to the executors of her will, and each could revoke as to the half, and both together as to the whole, either of which events would leave an insufficiency for the legacies. In the same way it is only if revoked by the survivor's taking the whole that there might be a deficiency to meet the legacies, but revocation by both or by either would interfere with the scope of the deed, which proceeds on the footing that there is to be no revocation although there is a power of revocation reserved. The language is not quite accurate, but that I think is its import and legal meaning. "We reserve our own liferents of our respective estates" is plain enough. It does not operate as a conveyance at all while both sisters are in life, because nothing is conveyed but what shall belong to each at her respective death; while both are alive there is no operative conveyance at all, and when one dies then what is ascertained to belong to her passes to her executors, and the will must have effect with respect to it if she has not revoked it. When the other dies, what shall be ascertained as belonging to her at her death will in like manner pass to her executors unless she shall have revoked or altered the will. But her power to alter or revoke is, I think, quite clear to the extent of whatever she may have.

I therefore propose that we should answer the questions according to the opinion I have indicated—that is to say, that the deed is revocable by the second party only to the extent of her own share of the joint property, and that the destination in the bond and disposition in security is not evacuated by the mutual settlement, and that the sum in this bond is within the survivor's power of alteration and revocation.

Lord Rutherfurd Clark—I concur. There is only one question in the case of some nicety, and that is the effect of the mutual settlement upon the destination in the bond for £5000.

*Prima facie* a general settlement by a testator will not evacuate any special destination which the testator has previously made. But of course the later deed will be sufficient to do so, if it be shown in any other way by competent evidence that such was the intention of the testator. I should be inclined to think that if the money thus specially destined were shown to be necessary for the execution of the purposes of the general settlement, that might be sufficient to show that the testator meant the special funds to be carried by the general settlement. But I do not think we have got that evidence in this case in consequence of the combination of the two settlements by the two ladies. We see of course that the whole money was required for the purpose of the settlement, but then it was the settlement of two sisters, really to take effect on the death of the longest liver of the two. I do not therefore think that we have any evidence furnished by the terms of the settlement sufficient to prevent the application of the ordinary rule, that a general settlement does not evacuate a special destination previously made by a testator.

The Lord Justice-Clerk concurred.

Lord Craighill was absent.

The Court found that the second party was entitled to revoke the settlement only to the extent of her own share of the joint-property, that the destination in the bond was not evacuated by the mutual settlement, and that the sum therein contained fell within the second party's power of revocation.

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