KILDRUMMY (JERSEY) LTD v. INLAND REVENUE COMMISSIONERS

No. 1.

FIRST DIVISION.

30 August 1990

KILDRUMMY (JERSEY) LIMITED,
Appellants .— *Penrose, Q.C., M.C.N. Scott.*
COMMISSIONERS OF INLAND REVENUE,
Respondents .— *Hamilton, Q.C., J. W. McNeill.*

Heritable property and conveyancing—Constitution of lease by disposition—Warrandice clause in disposition purporting to recognise subsisting lease which was in fact void—Whether lease constituted by terms of disposition—Land Tenure Reform (Scotland) Act 1974 (cap. 38). sec. 17.[1]

Landlord and tenant—Lease—Whether lease constituted verbally where grantor thereof having beneficial interest in subjects of let only under terms of trust deed.

Revenue—Stamp duty—Voluntary disposition—Gratuitous transfer of subjects by disposition—Transfer chargeable to stamp duty as voluntary disposition inter vivos on value of subjects conveyed affected by lease with same grantor and grantee.

1 The Land Tenure Reform (Scotland) Act 1974 enacts inter aliathat: "17.—(1) It shall be competent, and shall be deemed always to have been competent, for the person in right of the lesser of a lease to grant, during the subsistence of that lease, a lease of or including his interest in the whole or part of the land subject to the lease first mentioned and whether longer or shorter than or of the same duration as that lease, and the said grant shall be effectual (or, as the case may be, shall be deemed to have been effectual) for all purposes as a lease of land; and the grantee or person in his right shall be deemed (whether before or after the commencement of this Act) to have entered into the possession of the land leased under the grant at the date of that grant: Provided that, in the case of a lease which is registrable under the Registration of Leases (Scotland) Act 1857, or which (being a lease granted before the commencement of this Act) would have been so registrable if this Act had been in force, the rights of parties shall be determined by reference to that Act, as amended by any other enactment, including this Act. (2) Subject to any agreement to the contrary, as from the date of the grant of a lease in terms of subsection (1) above, the lessee under the lease so granted shall become (or, as the case may be, shall be deemed to have become) the lessor of the lessee in the subsisting lease, on the same terms and conditions as if the subsisting lease had, in respect of the property subject to the lease granted as aforesaid, been assigned to the grantee of the lease so granted, and, on the determination, for any reason, of the lease so granted, any remaining rights and obligations of the person in right of the said grantee, in relation to the said subsisting lease, shall vest (or as the case may be, shall be deemed to have vested) in the person in right of the grantor of the lease granted as aforesaid, on the same terms and conditions as if that lease had not been granted."

A company (J. Ltd.) sought the opinion of the Commissioners of Inland Revenue under sec. 12 of the Stamp Act 1891 as regards the extent to which a disposition granted in its favour was chargeable to stamp duty. The disposition in question was in respect of a gratuitous transfer of certain subjects *inter vivos*, the effect of which was agreed to be that stamp duty was exigible on the value of the property transferred. The point of contention between the parties was in respect of the effect which a lease of the subjects, which had been granted and recorded in the General Register of Sasines prior to the disposition being granted, had had on that value. That lease had been disponed to another company (E. Ltd.) and *ex facie* its terms was a transaction for full value at arm's length. However, it was preceded by a deed of trust by which that company had declared that it would hold the subjects in trust and as nominee for all the grantors. The commissioners assessed duty on the basis that the subjects had been conveyed free of all right of occupation on the part of E. Ltd., as they considered: (1) that the lease had been a nullity; (2) that, if it had been capable of being rendered effectual by a supervening event, then the disposition had not been such an event; and (3) that, if the disposition had rendered the lease effectual, it would follow that for the purpose of stamp duty it both conveyed the subjects to the appellant company and effected a lease thereof in favour of E. Ltd., in which case it

would fall to be charged separately and distinctly to duty in respect of each of these matters in terms of sec. 4 (*a*) of the Stamp Act. The appellant company appealed to the Inner House of the Court of Session by way of stated case and argued that the purpose of the deed of trust had been to separate the title to the lease from the beneficial interest therein, thereby creating a bare trust with E. Ltd. being the nominee for the grantors; and that this had been sufficient for its purpose to be achieved. Additionally, in terms of sec. 17 of the Land Tenure Reform (Scotland) Act 1974, the grant of one interposed lease was deemed to be effectual for all purposes as a lease of land, and the matter was put beyond doubt, having regard to the provisions of the Registration of Leases (Scotland) Act 1857, when the lease was recorded and, in terms of the disposition, the appellant company, having accepted a warrandice clause which excepted all current leases, was barred from disputing the lease. It also argued that the only conceivable objection to the lease's validity, namely the identity of interest between the grantors as tenants on the one hand and as landlords on the other, had been removed by the disposition which had adopted and perfected the lease.

Held (1) that as E. Ltd. had been acting from the outset as the grantors trustee or agent and as their nominee, the grantors were in effect seeking to enter into a contract with themselves for their own benefit; (2) that for that reason there had never been any trust property and the commissioners had, accordingly, been right to regard the lease as a nullity; (3) that no agreement between the grantors and E. Ltd. as their trustee, agent or nominee could alter the fact that the lease which had been contemplated by them was something which could not exist, and that the lease which was a nullity could be neither an interposed lease in terms of sec. 17 of the 1974 Act nor a lease binding on singular successors in terms of the 1857 Act, irrespective of the fact that the purported title had been recorded; (4) that the warrandice clause in the disposition, according to its own terms, was merely an obligation of relief from the date of entry and there was nothing to prevent the appellants from bringing a reduction of the lease on any grounds competent in law in order to remove the burden of this obligation; and (5) that with regard to the commissioners' contention that, had the lease been effectual the two transactions would fall to be charged to duty separately, title to the lease could not vest in E. Ltd. as it had not been a party to the disposition; and appeal*refused*.

KILDRUMMY (JERSEY) LIMITED, a company incorporated under the laws of Jersey, sought the opinion of the Commissioners of Inland Revenue under sec. 12 of the Stamp Act 1891 in respect of its liability to pay stamp duty in respect of a gratuitous

disposition of Kildrummy Estate, Aberdeenshire, granted by James Pearson Smith and Mrs Hylda Stell or Smith in favour of Kildrummy (Jersey) Limited dated 3rd September 1979 and subsequently recorded in the division of the General Register of Sasines for the county of Aberdeen.

The disposition contained *inter alia* the following clause:"And we grant warrandice but excepting therefrom all feu rights, current leases and other rights of possession granted by us or our authors, and excepting in particular without prejudice to the said generality the Lease between us and Kildrummy Estates Limited dated the Twenty-Sixth day of July in Nineteen Hundred and Seventy-Nine, the said disponee and its foresaids being bound [as] by acceptance hereof it binds itself to free and relieve us at and from the said term of entry of all obligations of every kind in favour of the tenants of the subjects hereby disponed."

A lease of the same subjects had been granted by Mr and Mrs Smith, in favour of Kildrummy Estates Ltd., on 26th July 1979 and recorded on 28th August in that year. The lease had itself been preceded by a deed of trust, dated 25th July 1979, by Kildrummy Estates Ltd. in favour of Mr and Mrs Smith, which was in the following terms:—"WE, KILDRUMMY ESTATES LIMITED, a Company incorporated under the Companies Acts and having our Registered office at Twelve Golden Square, Aberdeen, HEREBY DECLARE that we are about to enter into a Lease in our favour by James Pearson Smith and Mrs Hylda Stell or Smith of (One) the Lands and Estate of Kildrummy together with the Salmon and other Fishings in the River Don appertaining thereto and (Two) the dwellinghouse known as Stone-Circle Cottage, Glenkindie all lying in the Parishes of Auchindour, Kildrummy and Towie in the County of Aberdeen: AND WE FURTHER DECLARE that we shall hold said Lease in trust and as nominee for the said James Pearson Smith and Mrs Hylda Stell or Smith."

On 2nd November 1987 the Commissioners of Inland Revenue assessed liability to pay stamp duty on the disposition in the sum of £22,000.

The facts and circumstances are adequately set forth in the opinion of their Lordships in the First Division.

The company thereafter appealed by way of stated case to the Inner House.

The cause called before the First Division, comprising the Lord President (Hope), Lord Sutherland and Lord Clyde, for a hearing thereon.

At advising on 30th August 1990,—

LORD PRESIDENT (Hope).—The dispute which has arisen in this case relates to the amount of the stamp duty

chargeable on a disposition of heritable subjects known as Kildrummy Estate in Aberdeenshire. The disposition, which is dated 3rd September 1979, was granted by Mr and Mrs Smith in favour of Kildrummy (Jersey) Ltd. It was presented for registration in the General Register of Sasines on 1st October 1979. This was a gratuitous transaction and it is agreed that the disposition is chargeable with stamp duty as a voluntary disposition*inter vivos* under sec. 74 (1) of the Finance (1909-10) Act 1910 on the value of property conveyed or transferred. The point at issue is whether the value of the property is affected by a lease of the same heritable subjects dated 26th July 1979 which Mr and Mrs Smith granted in favour of Kildrummy Estates Ltd. and which was recorded in the General Register of Sasines on 28th August 1979.

The lease, which was for a period of 99 years and at a rent of £500 subject to review after 20 years and every fifth year thereafter, has all the appearance of a transaction entered into for full value and at arm's length. But it was preceded by a document called a deed of trust dated 25th July 1979 by Kildrummy Estates Ltd. in favour of Mr and Mrs Smith. In terms of this deed the Estates declared that they were about to enter into a lease of the subjects in their favour by Mr and Mrs Smith and that they would hold the lease in trust and as nominee for them. It was in these circumstances that Kildrummy (Jersey) Ltd. sought an

opinion from the commissioners under sec. 12 of the Stamp Act 1891 as to the stamp duty with which the disposition in their favour was chargeable. Jersey's contention was that the subjects should be valued on the basis that Estates already had a right of occupation of the subjects in terms of the lease or, in any event, that the subjects were conveyed to them subject to such a right of occupation in favour of Estates. But the commissioners were of the opinion that Jersey took the subjects free of any right of occupation on the part of Estates because they considered the lease to be a nullity. They were also of opinion that, if the lease were capable of being rendered effectual by some supervening event, the disposition was not such an event. That was sufficient to dispose of the question raised under reference to sec. 74 (1) of the 1910 Act, but the commissioners went on to say that if, contrary to their opinion, the disposition did render the lease effectual they considered that it would follow that for the purposes of stamp duty it both conveyed the subjects to Jersey and effected a lease of the subjects in favour of Estates. In that case it would fall to be separately and distinctly charged to duty in respect of each of these matters in terms of sec. 4 (*a*) of the 1891 Act, by which a single instrument containing or relating to several distinct matters is to be separately and distinctly charged to duty as if it were a separate instrument in respect of each of them.

The amounts of stamp duty chargeable on the basis of these various arguments are all agreed. It is also agreed that the disposition was one of a series of five deeds. In addition to the deed of trust and the lease already referred to there was a disposition by Mr and Mrs Smith dated 3rd September 1979 to Jersey of a cottage at Glenkindie, Aberdeenshire, and there was an assignation of the lease by Estates with consent of Jersey in favour of Mr and Mrs Smith dated 3rd, 4th and 18th October 1979. Neither of these deeds is of importance to the arguments which we have to consider in this case. The disposition of the cottage is mentioned only for completeness because these subjects also were included in the lease to Estates and were mentioned in the deed of trust. And the only significance of the assignation is that it represents the last stage in the arrangements whereby Mr and Mrs Smith became tenants of the subjects with the consent of Jersey as the landlords.

Much of the argument was taken up with an examination of the disposition and in particular its warrandice clause, and with the characteristics of the lease both as an interposed lease in terms of sec. 17 of the Land Tenure Reform (Scotland) Act 1974 and as a registered lease under the Registration of Leases (Scotland) Act 1857. This approach, which was that emphasised by counsel for the taxpayers, was concerned mainly with the state of affairs when the subjects were conveyed to Jersey by Mr and Mrs Smith. It has the logic of looking to the date at which the value of the property is to be ascertained. But the origin of the whole matter is the deed of trust. As senior counsel for the respondents pointed out, the first question is whether, in the light of that document, the lease had any validity at all when it was executed. The answer to that question sets the scene for what follows, and if, as the commissioners have held, the lease is a nullity then in my opinion the entire basis for its affecting the value of the property conveyed to Jersey disappears.

The deed of trust confined itself to two declarations which it is convenient to quote in full at this stage. [His Lordship quoted the terms of the lease set out *supra* and continued thereafter.] There are no other provisions of any kind. The

deed was completed by the execution of a testing clause in the usual form. There is no record of its having been intimated to Mr and Mrs Smith before the lease was granted, but it is agreed that they were aware of its terms and it is to be noted that the solicitors who acted for all parties throughout these transactions were the same. It can be assumed therefore that the

lease was entered into on the understanding, shared by Estates and by Mr and Mrs Smith, that Estates' interest as tenants under the lease would be held by them from the outset in trust for Mr and Mrs Smith, the landlords, as their nominee. It is plain also that this was the sole purpose of the deed of trust. It had no substance other than to provide the basis upon which these parties were to enter into the lease of the subjects the next day.

The argument for the taxpayers was that the purpose of the deed of trust was to separate the title to the lease on the one hand from the beneficial interest in it on the other. It was accepted that the beneficial interest was to remain at all times with Mr and Mrs Smith. The trust was to be seen as a bare trust, Estates being the nominee for Mr and Mrs Smith, but this was sufficient for its purpose to be achieved. Reference was made to the familiar practice by which a stockbroker is appointed to hold shares for his client as his nominee. Other examples were given of what was said to be a vast range of contracts of this kind. I can say at once that I have no difficulty with this concept, and it seems to me not to matter, at least for present purposes, whether one describes it as a kind of trust or as an example of the contract of agency. On either view the beneficial interest in the property in question is held all along to belong to the client and not to the nominee, whose authority is limited to acquiring and holding the title in his name on his client's behalf. But the situation in this case is that the lease was not yet in existence. So the function of the nominee was not merely to acquire a title to the tenant's interest and then hold it on the Smiths' behalf. It was to create the lease by entering into the contract with them which was necessary to give it its existence, and then to hold it from the moment of its creation as their nominee.

In my opinion this feature of the case creates a difficulty for the taxpayers which is insuperable. I have, as I have said, no difficulty in the concept by which the title to property and beneficial interest are separated, the title being held by a nominee. There is no reason to doubt the efficacy of this arrangement where the property in question has some independent existence of its own. This may be shares in the issued share capital of a company, a common enough example, or rights in incorporeal moveable property of some other kind in which some other third party is involved, such as a contract of purchase or sale where the identity of the vendor or purchaser is not disclosed. Or it may be the title to heritable property, such as the *dominium utile* of land itself, or to moveable property where the asset has some independent existence separate from the parties who transact with it. But I know of no case, and none was cited to us, where it has been held that a nominee may contract with his principal so as to create new rights and obligations involving no third party whatever which are to be held only on his principal's behalf. That seems to me to conflict with the principle that a man cannot contract with himself. In *Church of Scotland Endowment Committee v. Provident Association of London Ltd.* 1914 S.C. 165 Lord Dundas said, at p. 171 that a man cannot by any deed constitute a debt by himself to himself, and he described such a contract as plainly inept and void as

an operative instrument. As Lord Macnaghten put it, in *Henderson v. Astwood* [1894] A.C. 150 at p. 158: "A man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of another." The whole basis of a contractual obligation is the agreement of two or more parties as to the act or thing to be done. This is as true of a lease as it is of any other kind of contract. It is impossible to conceive of a lease by a man in his own favour. The essence of a lease lies in the tenant's right to exclusive possession of the subject let, and the landlord's obligation to put and maintain him in that possession: Rankine on *Leases*(3rd edn.), p. 200. I do not see how a man can contract with his own nominee to the effect that his own nominee is to be entitled to that exclusive possession against himself, this to be held for his own behoof. The truth of the matter is that the separate interests of landlord and tenant are incapable of creation by such an arrangement. We were referred to a number of cases on this branch of the argument, but I do not think that any of them affects the essential point of principle to which I have referred. In *Pickard v. Pickard* 1963 S.C. 604 the pursuer was a successful businessman who had been engaged for many years in buying and selling a large number of let properties. His practice was to arrange for the titles of these properties to be taken in the name of one or other of his family. The action concerned a dispute between him and his son and daughter about the true nature of his transactions with them and the result of litigation was that the children held the properties in trust for their father on the basis of their own written acknowledgment. But there was no question in that case of the creation of leases between the father and the children for his benefit. The subject matter of the trust was the heritable properties themselves and the title to them as owner of the property. On the other hand, in *Grey v. Ellison* (1856) 1 Giff. 438 the point at issue was an instrument by which members of an insurance company agreed with other members of the same company that, in a particular event, the company should pay to the company itself a certain sum of money. The Vice-Chancellor, Sir John Stuart, said of this argument: "It is only necessary to state the terms of such a contract to shew that it is merely an empty formality—an instrument that means nothing. Nobody could sue upon it; no remedy could be obtained in respect of an instrument of this sort by any one member of this company against any other members."

And in *Faulds v. Corbet* (1859) 21 D. 587, which was a case about whitebonneting at a public auction of heritable property, at p. 593 Lord Wood said of the trustees in whom the feudal title was vested but who were in substance selling the subjects for the defender's sole behoof: "That being the case, I hold it to be clear that, in entering into competition with the pursuer, the defender was a mere fictitious offerer. He could not be otherwise. Let him offer what he might, if the property was knocked down to him he never could have anything to pay, for any payment made to the trustees would have

been simply a fiction. It would have been a payment by himself to himself—a taking of the money out of one pocket to put into another."

The taxpayers' response to these cases is that there was no empty formality in this case since the parties to the lease were not the same, and the whole point of *Faulds v. Corbet* is that that was a case of fraud. I see these cases as no more than an illustration of the principle which the taxpayers do not dispute, that a man cannot contract with himself. Their argument is that this is not such a case, but I find it impossible to accept this argument in view of the nature of the

transaction which is at the heart of this case. The position would have been different if Estates had been contracting with the Smiths for its own benefit, but since it was acting from the outset as their trustee or agent and as their nominee the Smiths were in effect seeking to enter into a contract with themselves for their own benefit.

There was also some discussion as to whether any trust ever came into existence. The respondents' argument was that it could have had no existence until the trust fund, that is to say the tenant's interest under the lease, was created. Reference was made to *Kerr's Trs. v. Lord Advocate* 1974 S.C. 115 where Lord Fraser said, with reference to a policy of assurance which was to be held by the settlor for others as sole trustee, that there could be no equivalent to delivery or transfer of the trust fund until the trust fund had come into existence by effecting the policy. And in *Clark Taylor & Co. and Quality Site Development (Edinburgh) Ltd.* 1981 S.C. 111, at p. 118 Lord President Emslie said that in order to complete the successful constitution of a trust recognised as such by our law, where the truster and trustee are the same persons, there must be in existence an asset be it corporeal, incorporeal or even a right relating to something yet to be acquired. So far as the present case is concerned, however, I think that this point is really only secondary. The deed of trust, so called, was executed and acted upon, and it can be regarded as having an existence of its own as a contract between Estates and Mr and Mrs Smith—that is to say as a declaration or promise by one party, known to and acted upon by the other, so that the one was the agent for the other with all the rights and obligations that that involves. But the question whether there ever was any trust property is separate, and it is in effect the same question as to whether it was property which could ever be brought into existence given the proposed relationship between the two parties to the proposed lease. For the reasons already given I consider that it was not, and that the commissioners were right to hold the lease to be a nullity.

Much of the taxpayers' argument, as I said earlier, was directed to what happened afterwards. In deference to the detailed and careful submissions which were made on these points, I turn now to examine them. The first chapter on this branch of the argument relates to the lease. This could not, it was said, be disposed of as being a mere nullity. There was a bilateral onerous contract between Estates and Mr and Mrs Smith, the title to which is vested in Estates. Neither Estates on the one hand nor the Smiths on the other could contradict this in view of their own agreement on this matter, and the effect of the transaction was in a real sense to interpose Estates between Mr and Mrs Smith on the one hand and the occupation tenants, who were now to be subtenants, on the other. Estates were exposed to liabilities which they did not have before. In terms of sec. 17 of the Land Tenure Reform (Scotland) Act 1974 the grant of an interposed lease was deemed to be effectual for all purposes as a lease of land, and the matter was put beyond doubt when the lease was recorded having regard to the provisions of the Registration of Leases (Scotland) Act 1857. The existing subtenants, it was said, were put on notice by the recording of the lease in the public register. Estates' *ex facie* absolute title to the lease was to be regarded in all these circumstances as a divestiture by the Smiths of their title to the lease as tenants in the same way as an *ex facie* absolute disposition in security. Reference was made to Lord Fullerton's comments on this matter in *Robertson v. Duff* (1840) 2 D. 279 at p. 291 and to McLaren, *Wills and Succession*, vol. II, para. 1775.

I am not persuaded that there is any substance in these arguments once the

conclusion is reached that the lease was a nullity. No agreement between Mr and Mrs Smith and Estates as their trustee, agent or nominee could alter the fact that the lease which was contemplated by them was something which could not exist. A lease which is a nullity cannot be an interposed lease in terms of sec. 17 of the 1974 Act, and in order that a lease may take effect against singular successors as a recorded lease under the 1857 Act it must, in terms of sec. 2 of that Act, be "valid and binding as in a question with the granters thereof". It is no part of the purpose of that Act to confer validity on a purported lease which is a nullity or to create an agreement with the granter when none exists. The taxpayers' whole argument on this chapter assumed that the lease was effective at least to the extent of vesting a title to the tenants' interest under it in Estates from its inception. In my opinion, however, the title to the tenants' interest can have no existence of its own independent of the lease itself. The title and the beneficial interest go together, both being creatures of the same contract. Where there is no contract there can be no title to enforce it. Even the appearance of a purported title on the

register is of no effect against singular successors or others who transact with the grantee if the contract itself is a nullity.

The next chapter related to the terms of the disposition with Jersey and in particular to its warrandice clause. The disposition is for the most part in normal form, but the warrandice clause is in the following terms: [his Lordship quoted the terms of the disposition set out*supra* and continued thereafter]. The taxpayers' argument was that this clause had the effect of barring Jersey from disputing the terms of the lease. They could not, having accepted a disposition in these terms, say that it did not exist. This rendered the lease unimpeachable at Jersey's instance and the disposition itself removed the only conceivable objection to it as a valid lease—this being the identity of interest between Mr and Mrs Smith as tenants on the one hand and as landlords on the other. This was achieved without altering Estates' position, as the party who held the title on the Smiths' behalf, in any way so that it continued to be held for their sole interest beneficially by Estates. If, therefore, the lease was to be regarded as invalid because of the identity of interest between Estates and Mr and Mrs Smith, the disposition did all that was needed to adopt and perfect it.

There was a dispute about the effect of the warrandice clause. The taxpayers' argument was that this was designed to remove the objection to the lease as a contract which could not receive effect. The background to this argument lies in the practice in the framing of warrandice clauses. Warrandice in its absolute form—as in the phrase "and we grant warrandice"—amounts to a personal obligation by the granter of the deed that the deed and the rights thereby conveyed will be effectual to the grantee. So if the grantee suffers loss or damage by reason of reduction of the deed or of eviction from the property conveyed, he has a personal remedy against the granter based on the obligation of warrandice. The practice is for current leases and other subsisting rights to be excepted from the warrandice. As Halliday, *Conveyancing Law and Practice*, vol. I, para. 4–38 (6) explains: "[T]he safe course in practice is to except existing leases from warrandice without prejudice to the right of the grantee to make any proper challenge of their validity which would not give the tenant a right of recourse against the granter."

By way of explanation of this practice we were referred to Erskine,*Institute*, II. iii. 31 and *Gibson v. Trotter* (1710) M. 5695 as authority for the point that an

exception from warrandice does not of itself prevent the granter from seeking to strengthen his title by bringing a reduction of the right which has been excepted. But a reduction of that right may turn out to be to the disadvantage of the granter, because he may then find himself to be exposed to a claim of warrandice or some other such claim at the instance of the party whose right has been reduced. In *Wight v. Earl of Hopeton* (1763) M. 10461 the exception was qualified so as to bar the grantee from seeking a reduction on grounds which would infer warrandice against the granter or his successors. The true basis for the decision in that case was the subject of some discussion in *Mann v. Houston* , 1957 S.L.T. 89, Lord Sorn's analysis differing from that of Lord President Clyde on this point. It is sufficient for the present case to say that I prefer the approach of Lord President Clyde, which was that the qualification to the exception was sufficient to bar the singular successor of the grantee from challenging the lease on the ground that it had no ish. The only significance of this point is that in the present case the qualification to the exception is in different words, raising the question as to whether or not such a bar exists in this case. As can be seen from the quotation, the disponee and their successors were taken bound to free and relieve the granter of all obligations of every kind in favour of the tenant of the subjects disponed. This was said by the taxpayers to have the effect of substituting Jersey as the landlords under the lease, on the basis that the words were designed to prevent Jersey from taking any action against the tenants on the ground that the lease was defective. This was disputed by counsel for the respondents who submitted that, on a proper construction of the exception, it did no more than to provide the granter with a right of relief in respect of all obligations under the lease whatever they might be. It did not, they said, have the effect of barring Jersey or their successors from challenging the lease on any grounds which might be available.

On balance I prefer the respondents' approach to this clause. I am inclined to agree with the taxpayers' submission that the words "the tenants" at the end of it refer only to the tenants under the lease with Estates. All other rights of possession, including feu rights and other current leases, are dealt with by the general exception at the beginning of the clause. What follows seems all to be directed to the lease with Estates, and I think that the unusual provision by which Jersey are then taken bound to free and relieve the granter of all obligations of every kind "in favour of the tenants" was intended to obtain from Jersey an undertaking which was special to this particular lease. But all it is, according to its own terms, is an obligation of relief from the date of entry. It does not amount to an undertaking not to challenge the lease, nor is it an acknowledgment that the lease is in fact a valid and subsisting lease. I can find nothing in this language to prevent Jersey, if so minded, from seeking to challenge the lease on the basis that it has no validity at all. In my opinion the clause gives no more than a personal right to the granters to be relieved of their obligations whatever they may be, and there is nothing here to prevent Jersey, although bound to relieve them, from bringing a reduction of the lease on any ground competent in law in order to strengthen their position and remove the burden of these obligations. For this reason I consider that the disposition fails to do what the taxpayers said it was designed to achieve.

The taxpayers submitted that the situation in this case was the same as was envisaged by the second alternative argument referred to in*Church of Scotland*

Endowment Committee v. Provident Association of London Ltd. In my opinion, however, that case is of no assistance to them. The situation was that a heritable proprietor as the first party entered into a contract of ground annual with himself as the second party. The deed was then registered in the General Register of Sasines, but it was apparent from the deed itself that the transaction was ineffectual because the so called seller and the so called purchaser of the ground annuals was the same. That deed, as Lord Dundas said at p. 171 was plainly inept and void as an operable instrument. The point of interest in the case for present purposes is what happened afterwards, when the proprietor disposed for value to the pursuers the lands of which he was the owner in security of the ground annual which he had purported to create. It was held that the later deed had the effect of conferring a right on the pursuers which they could enforce against the proprietor and his heirs for payment of the ground annual. The pursuers' argument was put on the basis of two alternatives. These were, first, that disregarding the first deed altogether the second deed by itself had the effect of creating a valid real burden for payment of the debt in their favour. The second was that the proprietor, by plain implication, adopted and re-enacted the personal obligations ineptly undertaken by him in terms of the first deed to the effect of binding himself for payment of the ground annual to the pursuers. The court held that the pursuers were entitled to succeed upon either of these alternatives, but since the Lord Ordinary had given effect to the second of them his interlocutor was affirmed.

It was to the second alternative that the taxpayers addressed their argument in this case. The starting point was a recognition that if the document was an absolute nullity on the face of it, nothing could be done to bring it into effect. But that was not the situation in this case, it was said, because the lease was *ex facie* a lease to a third party to whom title had passed to an *ex facie* absolute disponee. The lease was in Estates' name on the public register, and the title to it was to be taken as vested in them in a sufficiently real and practical sense so that the transaction could not be dismissed as a nullity. There was, therefore, something which could be adopted and homologated by the Smiths, just as the contract of ground annual was held to have been adopted and homologated by the proprietor in *Church of Scotland Endowment Committee v. Provident Association of London Ltd*. In my opinion, however, this argument must be rejected. I return once again to the point that the lease in this case was a nullity. In my opinion Estates never had a title to it because the lease itself did not exist. It is of no consequence that the objection to it did not appear on the face of the register since it is a prerequisite of a lease taking effect as a registered lease under the 1857 Act that it should be valid and binding in a question with the granter. A lease which lacks that quality cannot be made effectual against singular successors merely by placing it on the register, so I do not think that the lease in this case was capable of adoption or homologation in the sense contended for by the taxpayers. Their approach was that the disposition had the effect of removing what was described as the one clog on the effectiveness of the lease. It was said to remove the identity of interest between Mr and Mrs Smith and their nominee, so that their own act in granting the disposition to Jersey cured the only defect in it with the result that the disposition could be seen as having been granted subject to an effective lease in favour of Estates as the Smiths' nominee. The whole point of this argument is that the lease had some independent existence of

its own so that what the disposition did was not to create a new lease which was never there before, but to acknowledge its existence as a burden on the title which it conveyed. But I do not think that this is what Lord Dundas had in mind in *Church of Scotland Endowment Committee v. Provident Association of London Ltd*. He was not concerned with the essential question about value which arises in this case. The only point which mattered to the pursuers was whether a debt had been constituted which was subject to a real security so that the lands were burdened with the debt in a question with the defenders who were the singular successors of the proprietor. It was sufficient for this purpose to look only to the second deed and to what it did. It is clear from the Lord Ordinary's discussion of the matter at pp. 169-170 that in his view, while the attempt by the second deed to assign the ground annual to the committee was inoperative because the supposed rights under the contract of ground annual did not exist, there was nevertheless a sufficient acknowledgment of indebtedness in the second deed to constitute a debt and to give validity to a conveyance of the heritable subjects in security of it. Lord Dundas also, as I read his opinion, had in view the constitution of a debt by the second deed when he referred to the adoption and homologation of the personal obligation contained in the first. That was not a case, therefore, of the adoption of something which had some existence, although imperfect, before. It was a case of a non-existent contract which constituted nothing at all being referred to and adopted by reference in the second deed by its grantor, with the result that the second deed for the first time created a debt which had no previous existence of any kind.

The whole point of this second chapter was to support the taxpayers' alternative argument that, even if Estates had no right of occupation before the disposition was executed, Jersey's acceptance of a disposition in these terms meant that the property was nevertheless conveyed subject to such a right of occupation. For the reasons which I have just given I am not

persuaded that this is so. Underlying the whole argument is the respondents' point that the lease was truly a nullity. The taxpayers' argument assumes that it was not, but I think that senior counsel for the commissioners was right to point out that at no stage in their argument did the taxpayers' counsel explain what, if less than perfect, it really was. There were assertions as to what the lease was meant to achieve and as to why it should be thought to have achieved it. But the recognition, implied by this branch of the argument, that it was defective in some way brings one back to the point at which I began this opinion. I consider that the lease was, in the words of Lord Dundas, inept and void as an operative instrument. I do not see how it can be regarded as anything other than a nullity. There was an absence of any basis for the recognition of subsisting rights of occupation under it to qualify Jersey's interest in the property conveyed by the disposition.

This brings me to the alternative contention for the commissioners, which is that the disposition falls to be separately and distinctly charged with duty in respect that it both conveyed the subjects to Jersey and effected a lease of the subjects to Estates. It is hard to see how the disposition could have effected a lease to Estates since Estates themselves were not parties to this deed. There is no suggestion that there were any actings of any kind known to or accepted by Estates which could have bound them to this lease in any other way. The whole argument turns on the documents and there is nothing to show that Estates were aware of or consented to the disposition. Counsel for the respondents did not

press this alternative argument, and its only purpose seems to be to show that, if there was substance in the taxpayers' argument about the effect of the disposition, the proper analysis of the order of events was that there was no lease at all in existence until the disposition was granted and then the effect of the disposition was to convey the subjects to Jersey and to create the lease. That approach seems to me to be consistent with what was said in *Church of Scotland Endowment Committee v. Provident Association of London Ltd.* , for the reasons which I have already given. There is, of course, an important distinction between that case and the present one. In *Church of Scotland Endowment Committee* the issue was whether the proprietor had undertaken an obligation to the pursuers to the extent of binding not only himself by his own personal obligation but also his heirs as his singular successors. The only parties to the transaction were the proprietor himself and the pursuers, but the second deed involved the creation of a valid real burden in security of the proprietor's obligation. In the present case the issue is whether there was a lease the title to which, on the taxpayers' argument, was vested not in Jersey or the Smiths but in Estates. The only parties to the disposition were Jersey and Mr and Mrs Smith, and in the absence of Estates there was missing from the disposition the third party whose consent to the lease was essential in order to bring it into existence.

In my opinion the proper view of the matter is that the lease was all along a nullity and that the disposition conveyed the subjects to Jersey free of any right of occupation in Estates. I consider that the commissioners were right to assess duty in this case on that basis. Accordingly, I suggest that we should answer question 1 in the affirmative, on the view that the disposition is chargeable to duty as assessed by the commissioners, and on that view question 2 is superseded.

LORD SUTHERLAND .—In 1979 Mr and Mrs Smith (hereinafter referred to as "the Smiths") were the proprietors in occupation of Kildrummy Estate. After a series of transactions they ended up as tenants of the estate, the proprietors being Kildrummy (Jersey) Ltd. who are the appellants. This however was not achieved by a simple sale and lease back. The chronological order of events was as follows. Kildrummy Estates Ltd. ("Estates") on 25th July 1979 executed a document entitled "Deed of Truyst" which declared that they were about to enter into a lease in their favour by the Smiths of the estate of Kildrummy and declaring "that we shall hold said lease in trust and as nominee for" the Smiths. On 26th July 1979 the Smiths entered into a lease of the estate to Estates. On 3rd September 1979 the Smiths, by disposition, conveyed the estate to the appellants. On 18th October 1979 Estates, with consent of the appellants, assigned their rights under the lease to the Smiths. When the disposition was presented for stamping the stamp duty was assessed at £22,000 on the basis that the value of the estate conveyed in the disposition was not reduced by prior occupancy rights held under the lease by Estates. The appellants contend that the lease was valid and binding and had the effect of reducing the value of the estate conveyed to them. If the appellants are correct, the appropriate stamp duty would be £7,000.

The main argument in the case centred around the validity of the lease. In its terms it is in fairly standard form and is *ex facie* a perfectly valid and normal lease. The problem arises because of the relationship between the Smiths and Estates. To ascertain the nature of this relationship it is necessary to look at the so called deed of trust. At the stage of its execution it is difficult to see how it

could constitute a valid trust, there being no existing property put into the trust and there being no trust purposes expressed. If these defects were cured by subsequent events it may be that a valid trust could come into existence. The appellants

argued that the trust came into operation at least when the lease was entered into and Estates' rights thereunder could become trust property. That argument however leaves open the position of Estates at the time when they entered into the lease. At that stage in terms of the so called deed of trust, Estates can only have been nominees of the Smiths. The lease was accordingly entered into between the Smiths and the Smiths' nominees. It is against this background that the validity of the lease must, in my opinion, be judged. There is no doubt that it is perfectly competent for a person to enter into a contract with his nominee, but such a contract would normally be of an administrative nature to regulate the relationship between the parties and to describe the matters which the nominees are empowered to do by their principal. A contract of lease, however, is in my opinion of an entirely different nature. It involves the creation of mutual rights and obligations which can only be given any meaning if the contract is between two independent parties. Estates had no interest of their own to enter into such a contract, any rights and obligations accruing thereunder being exercisable only as nominees for the Smiths. Under a normal lease the landlords cede occupation of the property to the tenants in return for certain obligations, but if the tenants are in fact mere nominees of the landlords the whole lease becomes a pure fiction. Accordingly, in the special circumstances of this case I am of opinion that the purported lease is not a contract to which the law can give effect and must be treated as a nullity. There is no direct authority on this point, but certain cases to which we were referred indicate the invalidity of a purported contract between a person and himself or a person and his nominee. In *Church of Scotland Endowment Committee v. Provident Association of London Ltd.* 1914 S.C. 165 it was held that a deed by which the proprietor of land purported to create ground annuals in favour of himself was null and void. In *Henderson v. Astwood* [1894] A.C. 150 it was held that a man cannot sell property to himself, either in his own person or in the person of another. A similar conclusion was reached in *Faulds v. Corbet* (1859) 21 D. 587. While these cases may involve different considerations they do support in principle the conclusion which I have reached as to the invalidity of this lease. It was contended by the appellants that the lease could not be void as it had been entered in the register under the Registration of Leases (Scotland) Act 1857 and third parties, such as existing tenants, could be affected by it. I cannot regard this point as being of any importance however, as under sec. 2 of that Act it is a prerequisite that the lease should be "valid and binding as in a question with the granters thereof". It cannot be said that a lease which is truly a nullity acquires any form of validity because it is put on the register where it should not have been in the first place. Because the lease is a nullity in my opinion there can be no question of the value of the estate being in any way reduced by prior occupancy rights as at the date of the disposition and therefore the disposition falls to be stamped at the rate contended for by the respondents.

A subsidiary argument was advanced on behalf of the appellants on the basis that the disposition in terms of the warrandice clause and the assignation of rents clause in some way validated or brought into effect the lease which until then had only been inchoate. What was never made clear during the course of the

argument however was precisely how the appellants regarded the lease if it was not a true and genuine lease. We heard an interesting argument on the effect of various forms of warrandice clause, but in my opinion these arguments are of no assistance in the present case because on no view could a void lease be brought into effect in the warrandice clause of a disposition to which the alleged tenants under the void lease were not a party. It was suggested that in *Church of Scotland Endowment Committee v. Provident Association of London Ltd.* the court accepted that the original deed which was held to be null and void had been adopted and homologated by a second deed which did in fact successfully create ground annuals. In my view, however, on a proper reading of that case it is clear that when the word "adopted" is used it is not used in the sense of adopting a void deed but is simply used in the sense of adopting the terms of the original deed by reference into what was a perfectly valid second deed. For these reasons, in my opinion, there is nothing in the disposition which can in any way adopt the lease which was a nullity.

The respondents contended, as an alternative, that even if the disposition in some way validated the lease, it should still be charged with duty at the rate of £22,000 on the basis that it both conveyed the property to the appellants and at the same time effected a lease of the subjects to Estates. This contention can, in my view, be dealt with shortly. I cannot conceive of any proper arrangement whereby a lease of subjects can be created or effected in a disposition to which the purported tenants are not a party. I therefore do not consider that there is any validity in this alternative contention.

For the reasons I have expressed I agree with your Lordship in the chair as to the way in which the questions in the case should be answered.

LORD CLYDE .—I agree. A lease of land is a contract by which the use or enjoyment of the land is given by one person to another for a period of time in return for a defined consideration. Taken by itself the deed of 26th July 1979 appears to be a valid and effective lease. But it is agreed between the parties that the deeds of 25th and 26th July 1979 are to be taken together. The earlier deed is described as a deed of trust and it was explained in the argument by counsel for the appellants as a "bare trust". But construing its terms, and in particular the reference to the holding of the lease "as nominee", I take the view that it leaves Mr and Mrs Smith with the whole rights and obligations of the purported lease. Taking the deeds together it seems to me that Mr and Mrs Smith did not give Estates the use or enjoyment of the lands in question. While they purported to create Estates as a titular tenant in fact the arrangement gave Estates no rights of use or enjoyment at all. Mr and Mrs Smith retained the whole beneficial rights in the land as well as the title to it. The rights and

obligations which were to be imposed on the tenant under the lease were to be the rights and obligations of Mr and Mrs Smith. But where the same person is both debtor and creditor in the same matter there can be no obligation created. It is in my view ineffective to enter into a contract with continuing mutual rights and obligations with oneself and it is whimsical to grant a lease of one's own property to oneself (*Grey v. Ellison* (1856) 1 Giff. 438). To attempt to grant a lease to a nominee for oneself seems to me to be a similarly barren exercise.

There is nothing novel in the idea of a nominee holding a proprietary title but what was sought to be achieved here was the creation of a lease with the

retention of the whole beneficial interest. In the course of the argument reference was made to the case of an *ex facie* absolute disposition. But in that case the whole property right is given by the disponer so that he is divested and left merely a creditor on the disponee's obligation to reconvey (*Robertson v. Duff* (1840) 2 D. 279, *per* Lord Fullerton at p. 291). In the present case Mr and Mrs Smith were not divested of the right to use and enjoy the subjects and no lease was achieved for the benefit of Estates. The deed which was executed was not a lease and since it is to leases that the provisions of the Registration of Leases (Scotland) Act 1857 apply the statutory alternative to possession is not available to support the proposition that Estates became a tenant. Similarly sec. 17 of the Land Tenure Reform (Scotland) Act 1974 will not assist the appellants because it only applies where a lessor has granted a lease. Mr and Mrs Smith did not grant a lease for the purposes of the section. The critical question in the case is what was the interest conveyed by Mr and Mrs Smith to Jersey in the disposition. The interest conveyed was the whole interest which Mr and Mrs Smith had in and to the lands. Since they had not divested themselves of the right to use and enjoy the lands Jersey took the subjects free of any right of occupation on the part of Estates.

If there was no valid or effective lease created the alternative arguments presented by the appellants do not start to run. As regards the submission that the granting of the disposition achieved a separation of the community of interests, which was the point of objection to the effectiveness of the lease, if the lease was null then the separation can achieve nothing. Counsel for the appellants did not suggest that the disposition in the present case created a lease. Nor was it suggested that the disposition created a *jus quaesitum tertio* in Estates. The argument proceeds on the assumption that the lease in some sense existed but was ineffective because the tenants' interest and the proprietary title were both held by Mr and Mrs Smith. But if the tenants' interest is in Mr and Mrs Smith it is not easy to see precisely in what even inchoate form the lease could exist nor how the transfer of the proprietary title could bring the lease to Estates into effect.

The remaining argument rested essentially on the terms of the warrandice clause. But I find nothing in that clause which involves a recognition by Jersey of the validity of the lease. Even if the last part of the clause relates exclusively to the purported lease to Estates I do not consider that it should be construed so as to bar Jersey from challenging that lease. The language used is distinct from that used in the lease itself, which echoes that used in the case of *Wight v. Earl of Hopeton* (1763) M. 10461. The acceptance of obligations does not seem to me to be an acknowledgment of the existence of a lease whose validity was to be beyond challenge. On the basis however that there was no valid lease at all I agree that the questions in the case should be answered as your Lordship in the chair has proposed.

THE COURT refused the appeal.

Dundas & Wilson, C.S.—T. H. Scott.

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