

Journal Article

Contentious executries: problems with succession to heritable property.

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Abstract: Considers recent decisions involving contentious executries and succession to heritable property. Comments on the Outer House decision in *Hill v Hill* on the difficulties faced by a defender, as executor, in advancing positive defences against a disputed transfer of heritable property, post death. Explains the position of a defender who wishes to counterclaim.

Cases cited:

[Hill v Hill \[2016\] CSOH 10; 2016 G.W.D. 3-66 \(OH\)](#)

[Matossian v Matossian \[2016\] CSOH 21; 2016 G.W.D. 7-139 \(OH\)](#)

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***S.L.T. 61** *The author considers recent decisions involving contentious executries and succession to heritable property.*

In the last year and a half, there have been a number of cases concerning, generally, death and the transfer of heritable property. In December 2014, the case of [Khosrowpour v Mackay \[2014\] CSOH 175; 2015 G.W.D. 1-8](#) considered a party's right to enforce a promised bequest of heritable property, in the face of a contrary testamentary writing. The July 2015 case of [Macdonald v Cowie \[2015\] CSOH 101; 2015 G.W.D. 24-434](#) determined the effectiveness of a purported *inter vivos* gift of heritable property, following the death of the donor. Most recently, in January 2016, the case of [Hill v Hill \[2016\] CSOH 10; 2016 G.W.D. 3-66](#) concerned the purported evacuation of a survivorship destination by a codicil subscribed just days before the testator's death.

These cases are examples of contentious executries. Each of the cases features discreet factual and legal circumstances. However, for the purposes of this article, they are linked inasmuch as they demonstrate problems encountered with the succession to heritable property, following death.

A common feature of the foregoing cases is that the respective defender(s) were the executor(s) nominate of the deceased. In addition, in each of the cases, the respective defender(s) advanced positive lines of defence against the pursuer — for example: personal bar in a wide sense ([Hill](#)) and in [Khosrowpour](#) the absence of averments to support *rei interventus*; unjustified enrichment ([Hill](#)); and reduction on the grounds of facility and circumvention ([Macdonald](#)). As will become apparent from this article, the distinction between the role of executor as an individual and as representative of the testator can create complications for pursuers and defenders in positively advancing rights in respect of a deceased's estate.

With particular reference to [Hill](#) , this article comments upon certain difficulties faced by a defender — as executor — in advancing positive defences against a disputed transfer of heritable property, post death. The potential difficulties faced by a pursuer — as exemplified in [Khosrowpour](#) — are considered (by the author) in an article in Juridical Review 1/2016 ["*Death and the transfer of heritable property*"].

The issues in *Hill*

In [Hill](#) , the pursuer was the estranged widower of the deceased. Mrs Hill died in 1991. Two years before her death Mr and Mrs Hill had purchased a property, title to which was taken equally between them and to the survivor of them.

Five days prior to her death, Mrs Hill purportedly subscribed a codicil in which she bore to evacuate the survivorship destination (in favour of Mr Hill). Mrs Hill's executors [which included her son (the first defender)] included in the inventory for confirmation, a one half share of the property formerly vest in Mrs Hill. After sundry procedure, the executors registered a formal nomination of title in favour of the first defender (as an individual) in respect of the one half share of the property.

Mr Hill challenged the actions of the executors. He claimed that the deceased had no power to evacuate the survivorship destination.

Pausing there, the potential difficulties with evacuating survivorship destinations have been considered recently, in another 2014 case, [Povey v Povey's Executor Nominate, 2014 S.L.T. 643](#). [Povey](#) concerned a different challenge: whether a disposition by spouses as joint proprietors (containing an evacuation of survivorship destination) which was presented for registration after the death of the testator, created a real right in favour of the disponee [for commentary about this interesting case, see "*Survivorship destinations — the debate continues*", 2014 S.L.T. 37, at paras 175 to 178]. In [Hill](#), the issue was whether the deceased had a right to unilaterally dispoise her interest in the property. The pursuer sought declarator that he had acquired a real right to the whole title of the property, on the death of Mrs Hill. ***S.L.T. 62**

There is a line of authority (and which is considered in [Hill](#)) that where a special destination is contractual in nature, there is no power to revoke it by *mortis causa* deed. In determining such issue it is generally considered that identifying the source of funds is important [Stair Memorial Encyclopaedia, Vol.25, para.756]. In [Hill](#), the narrative of the disposition read: "*In consideration of the sum of £11,812.50 paid to us by George Hill and Agnes Hill*" (emphasis added). Notwithstanding this narration, the pursuer averred that he had provided the purchase price and paid the mortgage payments.

The case came before the Lord Ordinary for discussion on the procedure roll; the pursuer arguing that the defender's averments were irrelevant. The defender advanced a number of separate arguments regarding the conduct of the pursuer. These included defences on the grounds of prescription (both positive and negative) and personal bar as a result of *mora*, taciturnity and acquiescence. The defender also questioned the applicability of [Perretts' Trustees v Perrett, 1909 S.C. 522; \(1909\) 1 S.L.T. 302](#), in the situation where (as in [Hill](#)) the spouses were estranged.

[Perretts' Trustees](#) was a special case to the Inner House which considered whether a testator's revocation of all previous testamentary settlements caught a survivorship destination. The Inner House held that the survivorship destination could not be altered except by joint consent. In [Hill](#), Lord Jones reviewed the authority of [Perretts' Trustees](#) and subsequent cases [particularly as regards the distinguishing fact that in [Perretts' Trustees](#) the purchase price had been paid equally by the spouses] and ultimately relied on them to dismiss the defender's averments.

But that is not an end to [Hill](#). At the conclusion of the debate, the defenders' counsel was allowed time to lodge a motion to formally counterclaim against the pursuer on the basis of unjustified enrichment. The case report narrates few details of the defenders' case beyond the averment that the pursuer was unjustly enriched at the expense of the first defender. And herein lies a potential difficulty: in an action against an executor, in what capacity is the defender counterclaiming?

Counterclaiming

There is a salutary lesson to be drawn from another recent contentious executry case: the late January 2016 case of [Matossian v Matossian \[2016\] CSOH 21](#). In [Matossian](#) the pursuer, as executor nominate of his late mother, sought reduction of two dispositions and a deed of gift on the grounds that they had been impetrated by facility and circumvention and by undue influence on the part of the defenders (his brothers). The defenders counterclaimed for payment of sums which they had spent on two of the properties purportedly disposed to them. The case went to proof before Lord Uist.

As an aside, the report of [Matossian](#) makes for interesting reading and guidance to solicitors in preparing testamentary writings. In relation to the substantive issues, the pursuer was ultimately successful in establishing facility and circumvention and undue influence on the part of the defenders. In addition, the counterclaim was held to be irrelevant, and that for two reasons: first the defenders were considered as *mala fide* possessors; and secondly — and importantly for the purpose of this article — Lord Uist held: "*it cannot be said that [the pursuer] was unjustly enriched in his capacity as executor-nominate of Mrs Matossian, which is the capacity in which he brings this action*" [Ibid, at para.35].

Accordingly, the status of a defender who wishes to counterclaim — particularly in a contentious executry case — must be carefully considered to ensure that it complies the rules of court [Rules of the Court of Session Ch.25; Sheriff Court Rules Ch.19], and specifically, that the rights and liabilities of the parties overlap.

Whereas in [Matossian](#) the counterclaim was dismissed on account of relevancy, in [Macdonald](#) the

defender — as executrix nominate of the deceased — counterclaimed *qua* executrix. She sought reduction of a particular writing (which purported to gift property) on the basis of undue influence, but only in the event that the writing was found to be effective. In the end, the writing was held not to oblige a transfer of property and Lord Tyre found it unnecessary to consider the merits of the counterclaim. ***S.L.T. 63**

What next?

As the foregoing cases demonstrate, contentious executries and the resultant complications in the succession to heritable property, are very much alive. In the meantime, [Khosrowpour](#) has been reclaimed and, at the time of writing, a decision in the reclaiming motion is awaited. That decision may have wider implications yet, regarding the law of personal bar.

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S.L.T. 2016, 13, 61-63