Thursday, October 15.

DUNLOP *v.* SMITH AND OTHERS.

Property — Ground-Annual — Condition — Dean of Guild. A petition in the Dean of Guild Court for warrant to erect certain buildings, *dismissed,* in respect that the buildings proposed to be erected were contrary to the provisions in the contract of ground-annual comprehending the land forming the site of the proposed buildings.

Thomas Dunlop, provision merchant in Glasgow, presented a petition in the Dean of Guild Court in Glasgow, setting forth that he was about to proceed with the erection of certain buildings on ground belonging to him at the corner of New City Road and St George's Road, and craving authority in the usual way.

The petition was opposed by the proprietors of an adjoining feu, on the ground that the buildings proposed to be erected were contrary to the restrictions imposed on the ground.

After various procedure, M'Hardy's Trustees, feudal proprietors of the ground, having sisted themselves as parties to the petition, the Dean of Guild, on 31st January 1868, pronounced an interlocutor finding that "by the contract of ground-annual between James M'Hardy and Thomas Kennedy in 1838, No. 7-1 of process, Mr M'Hardy disponed to Thomas Kennedy that plot or area of ground, containing 3813, 31-36 square yards, bounded on the south-east-by-east by the central line of St George's Road, on the south-west-by-south by the central line of Woodside Street, and on the east-north-east by the central line of the New City Road, all as more particularly specified in the said contract of ground-annual, and conform to a plan subscribed by the contracting parties as relative thereto: Find it admitted that the said James M'Hardy was, at the date of granting said contract of ground-annual, the proprietor of the four pieces of ground specifically therein described, of which the plot or area disponed to Thomas Kennedy in the said contract is said to be a part, and that said four pieces of ground are all parts of the lands of Southpark: Find, that by said contract of ground-annual it is 'provided and declared that the houses to be erected upon that compartment of the lands of Southpark, of which the plot hereby disponed is part, fronting Woodside Street and New City Road respectively, shall be erected and formed in strict conformity to the ground-plan of the said lands of Southpark, and to the elevation plans of the said compartment thereof,' specifically referred to in the said contract; and it is provided, 'that the corner tenements towards St George's Road shall be each ornamented with a projected portico,' and that 'the fronts towards St George's Road shall be thirty feet long,' and the fronts of all the other tenements shall be of the dimensions and architectural design specified and contained in the said contract; and it is further declared, 'that the said Thomas Kennedy and his foresaids, and the said Robert Knox and his heirs and successors, and the said first contracting party hereto (James M'Hardy), and their successors in the remaining portions of the said compartment, shall be bound to adhere to the said ground and elevation plans, and to the said provisions, restrictions, and others, and the same are hereby created real liens, burdens, and servitudes on all and each of the said pieces of ground belonging to the said Thomas Kennedy and Robert Knox, and the remaining parts of the said compartment of the said lands vested in the said James M'Hardy;' the said contract also conferring a right of action upon the said Thomas Kennedy and each of the other proprietors against each other 'to enforce implement and observance of the said plans, and of the conditions, provisions, and others' contained in the said contract: Find that the said provisions and restrictions still subsist and affect the lands on which, by said contract of ground-annual, they are made real liens and burdens: And it being admitted that the defenders are the proprietors of a portion of the foresaid 3813, 31-36 square yards of ground, that they are therefore entitled to sue for implement and observance of the foresaid provisions contained in the said contract of ground-annual: Find that the parties have failed to produce either the ground-plan of the lands of Southpark, or elevation plans referred to in the said contract of ground-annual, or authenticated copies thereof, but that the elevation of the buildings to be erected on the compartment of the lands of Southpark, referred to in the contract of ground-annual, is sufficiently and distinctly instructed by the description or specification thereof given in the contract itself: Find, that whether the expression, 'compartment of the lands of Southpark,' was meant to include the whole, or less or more than the four pieces of ground, of which the plot disponed to Kennedy is described as part—there is evidence in the contract to show that it included the plot of ground for which the lining is now sought, as the deed expressly comprehends tenements 'fronting New City Road,' which means fronting it either on the north or south, and provides for the erection of more than one corner tenement fronting St George's Road, and stipulates for the erection of only one by Kennedy: Find also that the plot of ground for which lining is now sought is a corner steading fronting St George's Road and New City Road, and therefore that the buildings proposed to be erected thereon are subject to the provisions and restrictions affecting such corner tenements contained in the contract of ground-annual: Find that the buildings proposed to be erected by the pursuer, conform to the plans produced by him, and founded on in his original petition for lining, are not in accordance with these provisions: Therefore recal the interlocutor of the 13th September last; and refuse the lining in the terms sought; and dismiss the petition at the pursuer's instance; but reserve to the pursuer to present another petition for lining, at his instance, of all competent erections, and decern:"

The petitioner advocated.

The Lord Ordinary (JERVISWOODE) refused the note of advocation.

The petitioner reclaimed.

CLARK and SHAND for reclaimer.

YOUNG and WATSON for respondents.

The Court adhered.

Agents for Reclaimer—J. & R. D. Ross, W.S.

Agent for Respondents—James Webster, S.S.C.

Saturday, October 17.

MANN *v.* TURNER.

Bankrupt—Bankruptcy Act 1856, *section* 103—*Discharge—Hamilton's Estate Act* 1866—*Husband and Wife—Succession reverting to Bankrupt—Reduction—Agreement—Compromise.* A bank-

rupt was sequestrated in 1858. In 1860 an aunt of his wife died, leaving a will excluding her heirs. The heirs brought a reduction of the will, and obtained decree of reduction, but the decree was suspended. No judgment was ever pronounced in the suspension, all parties interested having made an agreement, sanctioned by a special Act of Parliament, regulating the succession in a particular way, the bankrupt's wife obtaining a certain share. This Act was passed in 1866, but meantime, in 1863, the bankrupt was discharged. In a petition by the trustee, under the 103d section, to have that share in the aunt's estate transferred to him, *held* that no right vested in the bankrupt or in his wife till the passing of the Act, and petition *refused.*

In 1858 the estates of David Turner were sequestrated, and John Mann, accountant in Glasgow, was appointed trustee on the estate. In 1860, while the sequestration still subsisted, Agnes Hamilton, an aunt of the bankrupt's wife, died, leaving considerable property, heritable and moveable. In May following, Mr White was appointed judicial factor on her estates. Agnes Hamilton left a trust-disposition and settlement conveying her whole property to the Managers of the Barony of Gorbals, directing payment of certain debts and annuities, and mortifying the whole residue of her estate to the Managers for the payment of small annuities to decayed natives and residenters for forty years in the barony, under certain conditions.

In January 1861 the heirs-portioners and next of kin of Agnes Hamilton raised in the Court of Session a reduction of her settlement. After various procedure, decree of reduction was pronounced in March 1862. Shortly thereafter, a note of suspension of this decree was presented by certain parties, who claimed to be possible beneficiaries under the settlement, as belonging to the class for whose benefit the estate was mortified. This suspension was opposed by Agnes Hamilton's heirs-portioners and next of kin. A multiplepoinding for distribution of the residue of Agnes Hamilton's estate was also instituted by the raisers of the suspension. No judgment was pronounced in these actions, but an agreement was entered into between the parties to the effect that a sum of £7500 should be set aside out of the estate of Agnes Hamilton to meet the payment of the small annuities contemplated by the settlement, and that the remainder should be paid to Agnes Hamilton's heirs, under authority of an Act of Parliament, to be obtained by the parties. An Act of Parliament was accordingly obtained in 1866, giving effect to this agreement. In the meantime, in 1863, the bankrupt obtained his discharge.

The trustee on his sequestrated estate now petitioned the Court to declare all right and interest which belongs to the said David Turner, in and to his wife's, the said Margaret Eadie Kerr or Turner's share of the heritable estate of the said deceased Agnes Hamilton, and the rents and annual proceeds thereof, to be vested in the petitioner as trustee aforesaid, as at the date of the acquisition thereof, to the same effect as is enacted in the Bankruptcy (Scotland) Act 1856, in regard to the estates belonging to the bankrupt at the date of the sequestration.

The petition was opposed by the bankrupt and his wife, who contended that no right to any share of Agnes Hamilton's estate had vested in the bankrupt before 1866, the date of the passing of the Act.

The Lord Ordinary (MURE) found that the petitioner was entitled to have the share of estate in question vested in him, to an extent sufficient to meet the claims of creditors, subject to any claim competent to the wife of the bankrupt to have a reasonable provision made out of the estate for her maintenance—holding that the decree of reduction in 1862 must be taken as fixing the nature of the right acquired by Mrs Turner as one of the heirs-portioners of Agnes Hamilton, and that right was declared to be one of succession to a party who had died intestate prior to the date of the bankrupt's discharge.

The respondent reclaimed.

SOLICITOR-GENERAL (MILLAR), and FRASER for reclaimers.

MONCREIFF, D.-F., and PATTISON for respondent.

At advising—

LORD PRESIDENT—The petition in this case is presented under the 103d section of the Bankruptcy Act 1856, and it falls on the trustee to make out that the estate which he desires to have made over to him for division among the creditors is estate which, after the date of the sequestration, and before the date of the discharge, has been acquired by the bankrupt, or has descended or reverted or come to him. Now the estate in question reverted to the bankrupt through his wife, but, of course, if his *jus mariti* is not excluded, it would carry the estate to him in the same way as if coming to himself. All that is perfectly plain. But the question is, whether this event—I mean the coming of this estate to the wife, and through her to the husband, occurred before or after the date of the bankrupt's discharge?

Now the first fact in this case is certainly this, that the estate or share of estate which has been acquired by Mrs Turner did not come into her possession until at least 1866. It had been previously in the hands of a judicial factor. The next question is, under what authority did he pay over that estate to Mrs Turner? Can there be any doubt of the answer? It was under authority of an Act of Parliament. It follows pretty clearly that Mrs Turner's title to that estate is the Act of Parliament and nothing else. And the more one examines the proceedings antecedent to this Act of Parliament, and the reasons for it being passed, the more clear it is that her title is this Act of Parliament and nothing else. There was an agreement on which the Act was founded, but it must be observed that that was worth nothing without the Act, for not only had they no power to make that arrangement without the Act, but the agreement itself in its eighth head stipulates that "failing such Act being obtained, it is hereby agreed and declared that this agreement shall fall and expire, and the whole rights and pleas of both parties shall revive in the same way as if these presents had not been entered into, and neither party shall be entitled to found on this agreement, or on any statements therein, or what may follow thereon, in any way or to any effect whatever." Now the agreement itself was really a compromise of a depending litigation. It is vain to say that there was any final judgment. If there had been there would have been no room for compromise. But it was just because the whole matter was open in the suspension and in the multiplepoinding raised for the distribution of Agnes Hamilton's estate, that the parties were in a position to make this compromise. The settlement of Agnes Hamilton had been challenged on two grounds—(1) failure of the trustees

appointed to execute the purposes of the will; and (2) uncertainty as to the objects of the testator's bounty. All I shall say at present as to these grounds of reduction is, that *prima facie* they appear to me to be insufficient, and that in all probability the reduction would not have been brought to a successful issue. But be that as it may, certainly the reduction was never finally determined. In these circumstances, it appears to me that no party had any existing title to Agnes Hamilton's estate when this agreement was entered into, and no one could obtain anything under it until it was fortified by Act of Parliament. All who take her estate take it under this Act of Parliament, and have no other title. Therefore the date at which this estate came to Mrs Turner, and vested in her husband, is 1866, and that being after the date of the bankrupt's discharge, this petition falls to be refused.

LORD DEAS—The way in which this property stood originally was, that Mrs Turner was excluded by a formal probative deed. That deed was challenged in a reduction, and decree was pronounced, but that decree was brought under review, and when matters were in that position, before any final decree of reduction, this agreement was made. But it could have no effect without an Act of Parliament. An Act was obtained confirming the agreement. Apart from that it has never been decided that that formal deed should be set aside, and in so far as it is set aside it is by Act of Parliament, and, of course, only from the year 1866. Now, what the trustee says is, that before the bankrupt's discharge this right had come to the bankrupt's wife. That discharge was in 1863. Can we hold that this right had come to her before that? We may hold speculative views as to the greater or less probability of having that deed set aside. But it never was set aside, it was superseded by an agreement. I am clearly of opinion that the date whenthis property must be held to have come to MrsTurner was the date of the Act of Parliament.

LORD ARDMILLAN—I have no doubt in this case. These heirs of Agnes Hamilton had no right to her estate, standing the deed. They had a right to sue a reduction of the deed; but a right to sue a reduction of a settlement is no right to the property conveyed by the settlement, until they succeed in the reduction. A decree of reduction was obtained; but it appears to me to have been to some extent a decree in absence, and it was re-opened, and the whole matters were in suspense. I think the true position of the case is, that the proceedings in the reduction stood suspended, and it was agreed that on the passing of the Act there should be a certain distribution of the estate. I have no doubt that the date when the property came to Mrs Turner was the date of the Act of Parliament.

Interlocutor recalled, and petition dismissed.

Agent for Trustee—R. Pasley Stevenson, S.S.C.

Agent for Respondents—J. F. Wilkie, S.S.C.

Wednesday, October 21.

GRÆME *v.* GRÆME'S TRUSTEES.

Probative Deed—Mutual Settlement—Subscription—Testamentary Witness—Notary-Public—1579, c. 80. *Held* that a mutual settlement subscribed by two notaries and four witnesses was validly executed.

Robert Græme, heir-at-law of the deceased James Græme and Catherine Græme, sought in this action to reduce a mutual disposition and deed of settlement executed by these parties, and subscribed for them by notaries public, the attestation running thus:—"We, James Hamilton and William M'Lean, notaries-public and co-notaries in the premises, at the special request of the before-named and designed James Græme, who declares he cannot write from being unable to see, in consequence of inflammation of the eyes; and also at the special request of the before-named and designed Catherine Græme, who declares that she cannot write by reason of paralysis in her hands; and the said parties respectively having touched each of our pens, in token of their warrant and authority to us to subscribe for them respectively, in presence of the subscribing witnesses, do subscribe these presents for each of them before and in presence of the subscribing witnesses, these presents having been duly read over to the said parties in presence of us and the subscribing witnesses. (Signed) *Fides*, Jas. Hamilton, notary-public. *Veritas Vincit*, William M'Lean, notary-public. Arch. Macdonald, witness; David Gardiner, witness; Hugh Jackson, witness; R. Sinclair, witness." The ground of reduction now insisted in was that the deed was not legally executed, the same notaries-public having subscribed for each of the parties to the deed.

The Lord Ordinary (ORMIDALE) repelled the plea, adding this note:—

"The only point raised before the Lord Ordinary under the pursuer's first two pleas in law now repelled, is that referred to in the second plea, viz., that the same notaries-public subscribed for each of the two parties to the deed in question, which it was maintained for the pursuer was a fatal irregularity, as appears to have been found in the old case of *Craig* v. *Richardson*, 27th June 1610, Mor. 16,829. But in that case the deed was a contract, and although no detailed explanation either of the facts of the case or of the opinions of the judges is given, it may, the Lord Ordinary thinks, be assumed that the two parties to the contract had adverse or antagonistic interests. The deed in the present case can scarcely be held to have any such characteristic, or to be of the nature of the contract at all. Although it bears to be a mutual settlement by two persons, a brother and a sister, it partakes as little as possible of the nature of a pactional engagement. It is substantially little more than a *mortis causa* settlement by two persons respectively, written in one in place of two separate instruments. It could hardly be doubted that the same two notaries might have acted for both the parties in the execution of their respective settlements if engrossed as separate deeds or writings, and accordingly the Lord Ordinary, keeping in view the peculiar nature of the settlement in question, has been unable to see sufficient ground, either on authority or principle, for holding that it was irregularly executed. There is nothing in the words of the statute, relating to the intervention of notaries in the case of persons unable to write, which can be held to require that for every party to a deed there must be different notaries; and there is nothing here in the nature of the deed itself, or in the position of the notaries, who are public functionaries, that can reasonably be held to render that indispensable. The two parties to the deed in question had not opposing or antagonistic interests as in a proper contract, and it is not said that the notaries had any interest whatever in the matter, either as beneficiaries under the deed or from relationship to the parties