Second Division at the instance of Elizabeth Reid and Others v. Reid's Trustees.

Counsel for Elizabeth Reid and others—Keir. Agents—Webster & Will, S.S.C.

Counsel for Walter Reid—Balfour. Agents—J. & J. Gardner, S.S.C.

Counsel for Reid's Trustees—Marshall. Agent—Alexander Stevenson, W.S.

Friday, January 10.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

STEVEN (YOUNG'S FACTOR) *v.* YOUNG & OTHERS.

Disposition—Mutual Disposition—Revocation—Conditional Institution.

A purchased certain heritable subjects, and took the title to himself and his wife, in conjunct fee and liferent, for her liferent use allenarly, and to himself, his heirs and assignees whomsoever in fee. By mutual disposition and settlement A and his wife disponed the subjects to "their daughters in liferent, and their heirs in fee," reserving power to themselves to revoke during their joint lives. After the death of his wife A executed a settlement disponing the said subjects to his said "daughters in liferent, and to their lawful children equally among them." *Held* that the mutual disposition and settlement by A and his wife was revoked by the subsequent settlement by A alone.

The said A, by another disposition and settlement, disponed certain other subjects to his *children* "equally among them and the lawful issue of their bodies, to the survivors equally, their heirs and assignees, exclusive always of the *jus mariti* of the husbands, present or future, of my said daughters." *Held* that this destination was a conditional institution.

This was an action of reduction of certain deeds brought at the instance of William Stiven, accountant in Dundee, factor *loco absentis* to James Young, against the trustees of James Brown and others. The questions which ultimately came before the Court were two, (1) Whether a mutual deed granted by a husband and wife had been revoked by a subsequent deed by the husband alone, and (2) whether the destination in a third deed imported substitution or conditional institution. The circumstances under which these questions arose were as follows.

James Brown senior, merchant in Dundee, purchased certain subjects in Couttie's Wynd, Dundee, and took the title to himself and his wife Isobel Maiden, in conjunct fee and liferent, for her liferent use allenarly. By mutual disposition and settlement, dated the 23d day of August 1821, executed by the said James Brown senior and Isobel Maiden, proceeding on the narrative that it being their duty in their own lifetime to settle their affairs in such a manner as to prevent all disputes after their death, they had resolved to grant said mutual disposition in manner therein under written: Therefore, and for other good and onerous causes, the said James Brown senior and Isobel Maiden gave, granted, assigned, and disponed to and in favour of the said Janet Brown, and Isobel or Isabella Brown, their daughters, equally between them, and the survivor of them, in liferent for their liferent use allenarly, and to their heirs in fee, all and whole the said subjects lying on the east side of Spalding's or Couttie's Wynd, in Dundee, being the subjects second described in the conclusions of the summons. The said mutual disposition and settlement contains a clause in the following terms:—"Reserving always to us during our joint lives our own liferent right and use of the premises, with full power to us at any period during our joint lives to alter, innovate, or revoke these presents in whole or in part, to sell, alienate, and dispone the subjects and effects hereby conveyed in any manner we may think proper; but, in as far as these presents shall not be altered or revoked, the same shall be valid and effectual though found lying in the custody of either of us at the time of the death of the longest liver, or in the custody of any other person at that time, dispensing with the delivery hereof," After his wife's death, in 1825, the said James Brown, by a settlement executed on 29th July 1829, made a new and different disposition of the whole of the properties, heritable and moveable, belonging to him, which had formed the subject of the former settlement of 1821. In particular, he conveyed the said subjects in Couttie's Wynd to his daughters Janet (who had in the interval been married) and Isobel, equally between them, in liferent for their liferent use only, and to their respective lawful children equally among them, whom failing to the heirs and assignees of his said daughters in fee. On the said James Brown's death he was survived by five children, and among them by his daughters Isobel and Janet. The said Janet Brown or Young left five children, of whom James Young, to whom the pursuer had been appointed factor *loco absentis*, was the eldest son. The pursuer maintained that the mutual deed of 23d August 1821 was not revoked by the deed of 29th July 1826, and that under the former, Isobel Brown or Young had right to half the subjects in Couttie's Wynd therein conveyed to her and her sister, and that the said James Young, being the eldest son and heir of line and conquest to his mother, was heir of provision to her under the said mutual disposition, and had right to the said one-half of the subjects.

Then, by disposition and settlement, dated 6th December 1831, the said James Brown senior, on the narrative of the love, favour, and affection which he had and bore to his sons and daughters thereinafter named, gave, granted assigned, and disponed to and in favour of his three sons, and Margaret Brown, Isobel Brown, and Janet Brown or Young, his daughters, equally among them, and the lawful issue of their bodies, and failing any of them by death without lawful issue of their bodies, to the survivors equally, their heirs and assignees, exclusive always of the *jus mariti* of any husbands, then present or future, of his said daughters, all and whole the subjects situated on the south side of the Cowgate of Dundee. Under this deed the pursuer maintained that the said James Young, as heir of provision to his mother, was in right of one-fifth part of the said subjects in the Cowgate of Dundee.

It was *inter alia* pleaded for the defenders that "the pursuer was not entitled to insist in any of the conclusions of the action in so far as regarded one half *pro indiviso* of the subjects in Couttie's Wynd, in respect—(1) That the settlement of 1821,

on which that claim depends, was revoked and superseded by the settlement of 1829. (2) That by said settlement of 1829 the only right conferred on Janet Brown or Young was one of liferent allenarly to a specific portion of said property; and (3) That the fee thereof was by said settlement given to all her children equally among them, James Young, whom the pursuer represents, being only one of her five children." Also that "the pursuer was not entitled to insist in any of the conclusions of the action, in so far as regarded one-fifth share *pro indiviso* of the subjects in Cowgate of Dundee, in respect that, according to the sound construction of the settlement of 1831, on which the claim depended, the right of Janet Brown or Young to said share devolved, on her death, upon the whole of her children, who were five in number, and not upon her eldest son James Young."

The Lord Ordinary pronounced an interlocutor sustaining the above pleas in law of the defenders.

The pursuer reclaimed.

At advising—

LORD PRESIDENT—The first question which we have to decide is, whether the pursuer, under the deed of 1821, is entitled to claim a share thereby conveyed, as his mother's heir. Undoubtedly he is so entitled if that deed is unrevoked, but if it is revoked by the deed of 1829 he is not so entitled, and therefore the only question comes to be whether the deed of 1821 is effectually revoked. There is no doubt this is a mutual deed, though it is not called so in the deed itself. These two, James Brown and Isabel Maiden his wife, dispone the subject to and in favour of their son and daughter in liferent and their heirs in fee. It is obvious that if only one of them is in right of the estate, the fact of the other concurring will not have any effect unless you find in the instrument itself words showing a contract; but in this deed there is nothing of the kind, except the mere conjunction of the names. Looking at the titles the thing is clear, because it stands on an infeftment proceeding on the conveyance of June 25th 1816 "to and in favour of the said James Brown and Isabel Maiden his wife in conjunct fee and liferent, for her iiferent use allenarly, and to the said James Brown his heirs and assignees whomsoever in fee." Under that conveyance there can be no doubt that Mr Brown is absolute fiar of the estate, and Mrs Brown has only the bare liferent. It might be proper that she should concur, but it certainly was not necessary. I am clearly of opinion that the deed was testamentary and revocable, and that it was revoked by the deed of 1829.

The second question which we have to decide, is if the pursuer's claim to one fifth of the second class of subjects, in Cowgate Street is well founded. This claim depends on the construction of the deed of 1831, by the same James Brown, by which he conveys to his six children, equally among them, and the lawful issue of their bodies; and failing any of them by death without lawful issue of their bodies, to the survivors equally, their heirs and assignees, exclusive always of the *jus mariti* of the husbands, present or future, of my said daughters.

There is no positive rule for the construction of such words, so we must consider the testator's intention. The argument of the defenders is, that these words express a substitution of each son and daughter to their parent. I never saw a substitution in such terms. At the first reading what most naturally suggests itself is conditional institution. It was natural that the parties should contemplate the possibility of one or more of his children dying before him, and he seems to have here provided naturally and conveniently for such a contingency In short, the meaning simply is, I convey to my children or to the lawful issue of their bodies if they predecease me; and the words are applicable to the whole persons. An additional argument is derived from the succeeding clause. When a testator makes a substitution without making an entail, no doubt he leaves the person first called absolute *dominus* of the estate, but he does not intend to encourage him to defeat the substitution, but if this is a substitution, that is what he has done in the case of the daughters, for by declaring that they shall, without their husbands' consent, be entitled to sell, burden, or otherwise dispose of their shares of the said subjects, he has enabled them to do what they could not otherwise have done. I think the case is quite clear.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Solicitor General (Clark) and Mackintosh. Agents—Hill, Reid & Drummond, W.S.

Counsel for Defender—Maclaren and Marshall. Agents—Fyfe, Miller & Fyfe, W.S.

Saturday, January 11.

FIRST DIVISION.

[Sheriff-Court of Lanarkshire.

RUSSELL AND MANDATORY *v.* HILL.

Process—Father and Child—Pupil, Recovery of—Petition—Competency.

A petition brought in the Sheriff-court by a father residing abroad, for recovery of his pupil daughter, who he alleged was detained by certain third parties without his consent and against his will, *dismissed*, on appeal.

This was a petition which was presented to the Sheriff of Lanarkshire by James Russell, millworker, in the town of Lawrence, Massachussetts, United States of America, and James Leitch Lang, writer in Glasgow, his mandatory, against Mary Hill and Annie Hill, millworkers in Glasgow, and residing there. The petition set forth that the defenders wrongously and unwarrantably refused to deliver to the pursuer or his representatives a female child called Annie Russell, the lawful daughter of the pursuer, whom the defenders, without the knowledge of the pursuer, and after he went to America, removed from the custody of the pursuer's sister. That the defenders refused to restore the child until payment of certain claims, which they alleged they had against the pursuer. That although the pursuer did not admit these claims, he was quite willing to pay, if proved to be valid claims against him, and that he had instructed his mandatory to that effect. The petitioner therefore prayed his Lordship "to decern and ordain the said defenders, jointly and severally, or severally, to deliver up to the pursuer, or his mandatory, the said female child, called Annie