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Friday, July 18.

FIRST DIVISION.

SPECIAL CASE—DUNLOP AND OTHERS.

Succession—Mutual Deed—Vesting—Delivery.

Two brothers, A and B, executed a mutual trust-disposition in favour *inter alios* of the children of B, who was married, "declaring that in the event of there being any more children procreated" of B's then present or any future marriage, "and in the event of me the said" A "becoming married and leaving issue," each family was to have one-half of the subjects *pro indiviso* in fee, "but in the event of there being no such issue of us the said" B and A the declaration should be null, and B's children should take all. There was no delivery of the deed until the trustees took infeftment on it twelve years after its execution. A died unmarried, and B had another child by a second marriage. *Held* that the deed was not such a mutual contract as to render delivery unnecessary, that no vesting took place until the infeftment of the trustees, that on a fair construction of the deed the child of B by his second marriage, was entitled to a share of one-half of the fee of the estate, while the remainder of that half and the whole of the other half fell to be divided equally among the children of B by his first marriage.

In 1850 Alexander M'Crae and his brother Andrew M'Crae executed a disposition by which they conveyed to certain trustees named certain heritable subjects in Glasgow of which they were the *pro indiviso* proprietors. The disposition bore that for certain good and onerous causes and considerations the granters conveyed the subjects to the trustees "in trust for Mrs Janet More or M'Crae, wife of me the said Alexander M'Crae, in liferent for her liferent alimentary use, and in the event of me the said Alexander M'Crae surviving the said Mrs Janet More or M'Crae, for me the said Alexander M'Crae in liferent, for my liferent use allenarly, the whole of the subjects herein disponed; and in the event of my, the said Andrew M'Crae, surviving the said Mrs Janet More or M'Crae, and the said Alexander M'Crae, for me the said Andrew M'Crae in liferent, for my liferent use allenarly, one-half of the subjects hereby disponed, and for George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae, all children of the said Alexander M'Crae in fee: But declaring, that in the event of there being any more children procreated of the marriage between me the said Alexander M'Crae and Janet More or M'Crae, or of any future marriage to be contracted by me the said Alexander M'Crae, and in the event of me the said Andrew M'Crae becoming married and leaving lawful issue, then and in that case the said trustees shall make over and convey to the said George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae, and any other children to be procreated of the body of the said Alexander M'Crae, as aforesaid, the one-half *pro indiviso* of the subjects after disponed, equally among them in fee, and dispone equally among the child or children of the said Andrew M'Crae, in the event of his leaving any as aforesaid, the other half in fee; but in the event of there being no such issue of us the said Alexander M'Crae and Andrew M'Crae, this declaration at our deaths, *eo ipso*, becomes void and null, and the said trustees shall make over to the said George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae the absolute fee of the whole subjects and others after disponed, under burden of the liferent of the said Janet More or M'Crae if she may be then living, in the first place, All and Whole," &c.

Mrs Janet More or M'Crae died on 13th March 1858 predeceasing her husband Alexander M'Crae. Alexander M'Crae subsequently entered into a second marriage, by which he had one son Edward, and died intestate on 9th March 1883, survived by three of the six children named in the deed, and by his second wife and by the son Edward. The children who predeceased him all died unmarried and intestate before December 1862.

Andrew M'Crae never married, and died intestate on 21st May 1863.

The subjects conveyed by the trust-disposition were sold, and it was the proceeds which fell to be divided, but the parties interested were agreed that the sale did not operate conversion from heritable to moveable *quoad* succession.

The trust-disposition was never delivered, but the trustees took infeftment on it on 22d December 1862.

Questions having arisen as to the effect of the trust-disposition in the circumstances which had occurred, this Special Case was stated for the opinion and judgment of the Court. The parties to it were—(1) Hugh Dunlop, the sole surviving trustee; (2) Alexander Small M'Crae, the eldest surviving son of Alexander M'Crae's first family; (3) John M'Crae and Jessie M'Crae, the remaining two surviving children of the first family; (4) Edward M'Crae, the child of Alexander M'Crae's second wife.

The questions of law for the opinion of the Court were as follows:—(1) Is the fourth party [Edward M'Crae] entitled to participate in the division of the proceeds of sale of said subjects? (2) Is the second party entitled to four-sixths, or (in the event of the first question being answered in the affirmative) to four-sevenths of said proceeds? or (3) Are said proceeds to be divided equally, or if not equally, in what proportions, among the children found to be entitled to participate therein?

Argued for the second party—Only the first family was entitled to participate, the condition under which alone the fourth party could come in, being the double event of Alexander having more children, and Andrew marrying and having children. If the fourth party took at all, it could be only a share in the fee of one-half of the estate, there being no words of gift which could possibly give him any more. He, in addition to his own share, was entitled to the shares of his predeceas-

ing brothers and sister, although they had died before infeftment was taken on the deed, inasmuch as being a mutual contract it did not require delivery, but the interests under it vested upon its execution.

Authorities—*Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H. of L.) 151; *Miller* v. *Finlay's Trs.*, Feb. 25, 1875, 2 R. (H. of L.) 1; *Snell's Trs.* v. *Morrison*, Nov. 4, 1875, 4 R. 709 (Outer House); *Taylor, &c.* v. *Gilbert's Trs.*, July 12, 1878, 5 R. (H. of L.) 217; *Duncan's Trs.* v. *Thomas*, March 16, 1882, 9 R. 731; *Haldane's Trs.* v. *Murphy, &c.*, Dec. 15, 1881, 9 R. 269; *Fraser* v. *Fraser's Tr.*, Nov. 27, 1883, 11 R. 196; Erskine's Inst., iii. 2, 44; Stair, i. 7, 14; Bell's Prin., secs. 24, 84; Dickson on Evid. 939; Bell's Lect., i. 110.

The third parties adopted the argument of the second party as against the fourth party, but argued that they were entitled to take equally with him on the ground that vesting did not take place till infeftment was taken on the deed, by which time the three predeceasing children were all dead.

Authority—*Bell* v. *Cheape*, May 21, 1845, 7 D. 614.

The fourth party adopted the argument of the third parties as against the second party. He argued that the deed should be read as a whole and construed in a liberal spirit, and that the disponers' evident intention was to put the children of Alexander M'Crae, whether by his first or second marriage, on the same footing. These events were not indissolubly joined so as to make one double event, but were alternative, the condition of the fourth party's taking being purified if either of them happened. Express words of gift were not indispensable.

Authorities—*Mags. of Edinburgh* v. *Professors of University*, June 20, 1851, 13 D. 1205 (Lord Fullarton's opinion); *Mearns* v. *Mearns*, 1775, M. 13,050; *Douglas* v. *Douglas*, Dec. 21, 1843, 6 D. 318.

At advising—

Lord President—The questions for settlement in this Special Case are two, arising out of a trust-disposition made by two brothers, Alexander M'Crae and Andrew M'Crae, in 1850. The one is, whether the fourth party is entitled to share at all in the estate disponed? and the other is, whether the second party, who is undoubtedly entitled to share, is limited to one share, or to four-sixths or four-sevenths of the estate as heir of his deceased brothers and sisters?

As regards the first question, it depends entirely upon the reading of a part of the deed, and undoubtedly a puzzle has been laid before the Court which it is impossible to solve with absolute certainty owing to the deed being very inartistically and carelessly framed, and while it is the duty of the Court to determine the true meaning of the questions thus brought before it, this cannot always be done with the same confidence and certainty. I have seen in my experience—and this is an example of it—that it is impossible to say with certainty or even any very high degree of probability what is the true meaning of a deed on account of the fault of the granter or testator in expressing his wishes.

One part of this deed is clear enough. These two brothers being *pro indiviso* proprietors of certain subjects, disponed them to certain persons as trustees for the wife of one of them (Alexander) in liferent, "and in the event of me the said Alexander M'Crae surviving the said Mrs Janet More or M'Crae, for me the said Alexander M'Crae in liferent, for my liferent use allenarly, the whole of the subjects herein disponed; and in the event of my, the said Andrew M'Crae, surviving the said Mrs Janet More or M'Crae and the said Alexander M'Crae, for me the said Andrew M'Crae in liferent, for my liferent use allenarly, one-half of the subjects hereby disponed, and for George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae, all children of the said Alexander M'Crae, in fee." That I apprehend means the entire estate was to be held for these children in fee. There are three liferents, one for Mrs M'Crae, another for Alexander M'Crae—these extend over the whole subjects—and a third for Andrew M'Crae, but limited to one-half the estatet, he entire fee of which was to go to the six children of Alexander by his first marriage. Andrew was childless and unmarried. If nothing had happened to alter the position of the family, the meaning of the granter would have been quite clear, but Alexander subsequently married again and had another child. The case of this other child would have been very easily disposed of by the ordinary principles of law if nothing further had been said in the deed, but these persons or their legal advisers tried to provide for all cases that might occur, and that brings me to the second part of this deed, which I am about to try to construe. It is in the form of a declaration—"But declaring that, in the event of there being any more children procreated of the marriage between me the said Alexander M'Crae and Janet More or M'Crae, or of any future marriage to be contracted by me the said Alexander M'Crae, and in the event of me the said Andrew M'Crae becoming married and leaving lawful issue, then and in that case the said trustees shall make over and convey to the said George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae, and any other children to be procreated of the body of the said Alexander M'Crae as aforesaid, the one-half *pro indiviso* of the subjects after disponed, equally among them in fee, and dispone equally among the child or children of the said Andrew M'Crae, in the event of his leaving any as aforesaid, the other half in fee; but in the event of there being no such issue of us the said Alexander M'Crae and Andrew M'Crae, this declaration at our deaths *eo ipso* becomes void and null, and the said trustees shall make over to the said George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae, the absolute fee of the whole subjects and others after disponed under burden of the liferent of the said Janet More or M'Crae, if she may be then living—In the first place, All and Whole," and so on.

Now, the event in which this clause was to take effect is, literally read, the double event of Alexander M'Crae having more children, and Andrew M'Crae marrying and having children. Therefore, read literally, the deed means that this clause is to have effect only if both these things happened. Both these things have not happened, so that if we were to read the deed literally we

should say the child of Alexander's second marriage is absolutely excluded; but various expressions in this clause, and the scope of the deed itself, show that this cannot have been the meaning of the parties.

These were two brothers, proprietors *pro indiviso* of certain subjects, who evidently meant that if both of them had a family, each of their families was to take one-half of the subjects *pro indiviso* in fee, but they cannot have meant that because one of them never had children, one of the children of the other should have no interest in his father's half of the estate.

Therefore I come to the conclusion, not without difficulty, that it was their intention that if Alexander had an additional child, although Andrew had no children, that child should have an interest in the half of the estate belonging to his father.

The other question is much more easily answered. The claim of the second party depends upon whether he can take as heir-at-law of his brothers and sisters, they having predeceased both their father and Andrew, and unless their shares of the estate vested in them before their deaths, of course this second party can take nothing as their heir. We have it stated that the trustees took infeftment on the 22d December 1862, and that there is no evidence to show that the disposition was delivered at an earlier date. Now, it is clear that there could be no interest under the deed till it was delivered, but it was said in argument that the deed must be held as delivered at the date of execution, because being a mutual contract it must be held as in fact delivered. But that rule in my opinion does not apply to a case like this. It may be that neither of the parties could revoke the deed without the leave of the other, but it by no means follows that both of them together could not have revoked it at any time. Therefore nothing could vest in the children, or in the trustees for them, till the deed was *de facto* delivered.

I am accordingly against the claim of the second party, and hold that he is entitled only to one-fourth of Alexander's share of the estate, and to one-third of Andrew's share. The effect of this opinion will therefore be, as regards the half belonging to Alexander, that it will be divided equally among the children, including the fourth party, and as regards Andrew's half, that it will be divided equally among the rest of the children of Alexander other than the fourth party.

Lord Mure—I agree with your Lordship in thinking this deed difficult of construction according to the ordinary rules, and I have come to the same conclusion as to the rights of the fourth party, which is the most difficult question before us. I think it was the intention of the parties that if there were more children of Alexander, whether by the same or a subsequent marriage, they should share with the other children in one-half of the fee. There is a clear and distinct provision to the child of the second marriage of a *pro indiviso* share of one-half, but then the awkward words come in, "and in the event of me the said Andrew M'Crae becoming married," &c. If "or" had been used instead of "and" all difficulty would have been removed, but it is so clear that the child of the second marriage was meant to participate, that I concur with your Lordship in holding that he is entitled to a share of the first half of the fee of the estate, but there are no words used sufficient to bring him in for a share in the second half. As to the rights of the second party and the question of vesting, I agree with your Lordship.

Lord Shand—This deed is as much of the nature of a puzzle as anything else, but although it is difficult to get at the true meaning, I agree with your Lordship as to how it is to be construed.

Lord Deas was absent.

The Court pronounced this interlocutor :—

"Find and declare that the fourth party is entitled to participate in the division of the proceeds of sale of the subjects referred to, to the extent of one-fourth of one-half thereof: Find and declare further that the second and third parties are entitled to have the remainder of said proceeds divided among them equally," &c.

Counsel for First and Second Parties—Mackintosh—Ure. Agents—Ronald & Ritchie, S.S.C.

Counsel for Third Parties — Gloag — Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for Fourth Party — Trayner — Shaw. Agent—John Gill, S.S.C.

Friday, July 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY *v.* MAGISTRATES OF GLASGOW.

(See *ante*, p. 527, 20th March 1884.)

Railway—Railway beneath Streets of City—Limitation of Statutory Powers—Glasgow City and District Railway Act 1882 (45 *and* 46 *Vict. c. ccxvi.*), *secs.* 34, 37, 39.

The Glasgow City and District Railway Company were empowered by their Special Act, for the purpose of making their railway under the streets of the city, to appropriate and use the subsoil of streets, and during the construction of the railway to stop up the streets for traffic. Their works were carried on, where the streets were level, by opening up the whole width of the street and forming the railway in tunnel, and then relaying the street, but it was necessary where there were steep gradients to form shafts for the purpose of driving the tunnel, and these occupied part of the street, leaving a space for traffic, and were surrounded with a barricade. The Act provided that where the works were being performed on the surface of the ground, not more than 150 yards of the street should be occupied, and (section 39) that "in con-