[Heard, 29th April, 1841. — Judgment, 10th August, 1842.]

MARGARET STEWART for herself, and as representative of Jean Stewart, *Appellants.*

JANE STEWART, executrix, and J. W. B. STEWART, heir of JAMES STEWART, *Respondents.*

Deed. — *Proof.* — Not competent to refer to communings previous to the date of a formal deed, in order to negative the consideration expressed in it.

Ibid. — *Delivery.* — What held to amount to evidence of delivery of a deed.

Ibid. — *Revocation.* — Nature of deed held to be irrevocable.

Sale. — Held that the purchaser of the whole executry of a party, as it should exist at her death, in consideration of an annuity, was entitled to retain arrears of the annuity as part of the seller's executry.

BY the contract of marriage of Stewart, proprietor of the lands of Crossmount, yielding a free rental, after payment of taxes and expense of management, of about L.300 per annum, he secured his widow in an annuity of 300 merks, one-third of his household furniture, and two cows, and 200 merks as an allowance for aliment and mournings.

There were born of the marriage two sons, James and Niel, and three daughters, Margaret, Jean, and Isabella.

In 1795, Stewart executed a bond of provision, securing his widow in an additional annuity of L.13, 6s. 8d., and at the same time he executed another bond, providing L.400 to his son Niel, and L.600 payable among his daughters. This last bond he afterwards cancelled.

In 1804, he executed a bond for payment of L.300 to each of his daughters, but without making any provision for his younger son, Niel, whom he had fitted and sent out to India, but this bond he afterwards cancelled; and shortly before his death, a bond was prepared under his directions, for payment of an additional provision of L.100 to his widow, but he died before having executed it. His death took place in the year 1812, and he was survived by his wife, and all his children; his eldest son James being then in Spain with his regiment.

Mrs Stewart brought her husband, at her marriage, a portion of L.1000, and in 1809, she became entitled, under the will of her father, Menzies of Bolfracks, to one-third of his moveable estate, subject to the liferent of three unmarried sisters.

Condie, who had been the law agent, and confidential adviser of Stewart, in a letter to James Stewart, the eldest son, then at Lisbon, of date 9th September, 1813, after telling him what he knew to have been his father's intentions in regard to a provision for his mother and sisters, and asking to have his own intentions upon the subject, added this postscript, — " P. S. Upon reflec- " tion, it occurred to me that your father said something to me " about the provision which he proposed to make in favour of " your sisters. I have, therefore, looked over his letters, and in " one, dated 18th October, 1811, I find he says, 'I think I " 'should provide for my wife in the meantime some subsistence, " 'in case what may happen. You will, therefore, make a scroll " 'and send me before it is finished, and let her have L.100 " 'sterling over and above what she is provided in by her con- " 'tract of marriage, and her income will amount to L.120, " 'besides her share of the household furniture, and some bestial " '— as to the daughters and Niel, that is to be a second con- " 'sideration with me. If the mother and me do not make any " 'alteration in their chance, each will amount to L.900 sterling, " 'including what they are provided in already by me some time

" 'ago. This is all I have to say in the mean time, as to them,
" 'till I see you again.' In a P. S. subjoined to your father's
" letter he adds, — 'As my circumstances cannot admit of acting
" 'otherwise, what occurs to me is to name a handsome portion
" 'to my daughters, and me bound to advance in the mean time,
" 'and to consider how much of the legacy ought to be reduced
" 'to make up my representatives' loss for advancing what the
" 'estate cannot afford otherwise. The last of the Bolfracks
" 'ladies may have a chance to live as long as my daughters.
" 'See what a loss to my heir, to make up to my daughters what
" 'they may expect at such a distant period.' I think you saw
" the letter itself, when in Perth, going over the papers. In the
" event of your making a suitable provision to your sisters, I
" think your mother ought to execute a conveyance, in your
" favour, to whatever part of the Bolfracks money may come to
" her share upon the death of the survivor of your unmarried
" aunts."

James Stewart answered this letter on the 25th September, 1813, in these terms: — " I am very much obliged to you for all
" that you suggest in your letter of the 10th instant, as they
" enable me to give you my own intentions and opinions fully.
" I perceive, from the unbounded thoughtlessness of my brother,
" that, if any thing was to happen me, he would soon have She-
" hallion transported to India, although it is so very high. It
" is, therefore, my determination to secure by a will, L.100
" a-year to my mother, with the house, offices, parks, &c. &c.
" which she now occupies, or a sum adequate to them, if they
" are wanted by my successor. I wish also to have L.1000
" secured to each of my sisters. Under existing circumstances,
" I intend to continue in the army, and I hope to be able to
" contribute to the produce of Crossmount, instead of drawing
" from it, so that, if I exist, in the course of some years, I shall
" free the estate from debt, and pay each of my sisters her por-

" tion. Until I can do this, I shall pay them an annuity, but I " fear I cannot afford to make it equal to the interest of their " portions. I do not know what sum to mention to be equal to " the house, &c. &c. for my mother. Times may alter — would " it be necessary to mention a sum? — I leave it to yourself."

" I hope you perfectly understand me in regard to my inten- " tion of providing for my mother and sisters, and that it is equal " to what my father intended — if not, make it so. In your " P.S. you say that my mother ought to execute a conveyance, " in my favour, to whatever part of the Bolfracks property may " come to her share, in which case, I shall allow her to do as she " thinks proper — my property is my own — hers is her own, " when it comes. I shall do my duty towards my sisters, let her " do hers towards her children. At the same time, I think you " ought to suggest to her, in your official capacity, the propriety " of her executing a deed, of the proportions in which she wishes " it to be shared, when it does come, to prevent family misunder- " standings, for we cannot naturally expect that she is to outlive " three younger sisters."

Condie communicated this letter to Mrs Stewart by a letter in these terms: — " The other day I had a letter from your son, " Captain James; and as I think it will be extremely gratifying " to you, as well as to all the family, to peruse it, I have taken " the opportunity of sending it up to you for that purpose. I " hope that both you and the ladies will be of opinion that, in " your son's present circumstances, the provisions proposed to " be made by him are liberal and handsome, and, indeed, much " more than he could afford, was it not the prospect of your " executing a conveyance, in his favour, of the Bolfracks money " falling to your share, on the death of the survivor of your " unmarried sisters. If I might, therefore, presume to offer an " advice on the subject, I would beg leave to recommend to you " to execute a conveyance of that money, in favour of Captain

" James Stewart, and failing of him, by death, without lawful " children, that it shall go to your daughters. I hope you will " pardon me for taking the liberty of offering the above recom- " mendation — for, as circumstances stand, I think it is doing " your son no more than material justice to convey to him the " money referred to. Crossmount, honest man! was of the " same opinion, though the provisions which he intended to " make for his family were not so liberal as those proposed by " your son. I shall be glad of your sentiments on the subject, " after you consider the matter, before I write Captain James. " — I am, &c."

Mrs Stewart replied to Condie on the 23d October, 1813, in these terms:—" I was favoured with yours of the 7th October; " and having perused James' letter to you of the 25th September, " by which I observed his liberal intentions towards my daughters " and myself, consequently I shall have no objections to execute " a conveyance, in his favour, of L.3000 of the Bolfracks money; " and, failing of him, by death, without lawful children, that it " should go to my daughters. The remainder of that money, with " the moveables, which, I presume, will be about L.500, I shall " retain to myself, to be afterwards disposed of at my pleasure. " Should my son agree to these, there need be no delay on my " part in making up the necessary papers."

In the end of 1813 James Stewart returned home on leave of absence, and on the 24th of February, 1814, he executed a bond in favour of his mother, narrating her contract of marriage and his father's unexecuted intention to make her an additional provision, and bearing to be for love and affection, whereby he secured her in an annuity of L.100, and gave her the liferent use of the house, garden, and parks of Crossmount, or an additional annuity of L.30 in case he should choose to occupy them himself. At the same time he also executed another bond in favour of his three sisters, which narrated the cancelled bond by

their father in 1804, and his intention to increase the provision given by that bond, and for love and affection bound himself to pay L.1000 to each of them at Martinmas 1824, with interest at four per cent till that date, and five per cent thereafter.

Immediately after the execution of these bonds James Stewart returned to his regiment, and Condie thenceforth paid to his mother and sisters the annuities thereby given to them.

On the 16th September, 1817, Mrs Stewart, in the absence of her son James, who was still abroad, but had been at home shortly before, executed a deed, which recited the will of her father, Menzies of Bolfracks, and her husband's unexecuted intention to increase her allowance, and continued thus: — "Considering that, although it was the intention of my said husband to have made a suitable provision for me, in the event of his predecease, yet he was cut off before the necessary deed for that purpose, though prepared, was executed by him; and farther considering that Captain James Stewart, of the 82d Regiment of Foot, now at Crossmount, my eldest son, did, upon the 24th February 1814, execute, in my favour, a bond of annuity, containing a liberal provision for me during all the days of my lifetime, and has also given up to me the use of the stocking in the parks of Crossmount, now occupied by me, on condition that I should execute the deed underwritten: Therefore, and in implement of that agreement, and for the love, favour, and affection which I have and bear for the said James Stewart, and other onerous causes; and considering that he has also granted a bond of provision in favour of Isabella Stewart, now Menzies, spouse to Captain James Menzies of the Royal Perthshire Militia, and Margaret and Jean Stewart, his sisters, containing liberal settlements upon them, in regard his father, though he intended to increase the provisions in their favour contained in a bond executed by him, the 6th June, 1804, had not done so in his own lifetime, I do

" hereby dispone, assign, convey, and make over, to and in " favour of the said James Stewart, and the child, or equally to " the children, to be lawfully procreated of his body — whom " failing, to his assignees — whom failing, to the said Isabella " Stewart, now Menzies, Margaret Stewart and Jean Stewart, " equally among them, their heirs, and executors, all and sundry " corns, cattle, horses, sheep, implements of husbandry, house- " hold furniture, and all other goods, gear, means and effects — " body clothes excepted, which I hereby legate and bequeath to " the said Isabella Stewart or Menzies, Margaret and Jean " Stewart, equally, and to the survivors of them — that shall per- " tain and belong to me at the time of my death: As also, all " and whole my share of all and sundry the foresaid gold and " silver, coined and uncoined, household furniture, body clothes, " corn, cattle, horses, nolt, sheep, farming utensils, and other " stocking which was upon my said deceased father's farm, and " also all other moveable goods, gear, and effects, that pertained " to him at the time of his death: as also my share of all and " sundry debts and sums of money, heritable and moveable, that " were addebted, resting and owing, to my said father, at the " time of his death, by bonds heritable or moveable, bills, tickets, " accounts, or any other manner of way whatsoever, and to which " I have right on the death of the survivor of my said sisters — " conform to the disposition of moveables and nomination of " executors, in part before narrated, with the grounds of debt " whereby the same were constituted, and all that has followed " or may be competent to follow thereon: And I hereby nomi- " nate and appoint the said James Stewart and his foresaids, " whom failing, as aforesaid, to be my executors and universal " intromitters with the goods, gear, means, and effects, debts, " and sums of money before conveyed, excluding all others from " the said office: providing always, and declaring, that the said " James Stewart and his foresaids, whom failing as aforesaid,

" shall be bound and obliged to satisfy and pay my death-bed " sickness, funeral charges, and expenses, but also whatsoever " just and lawful debts shall be resting and owing by me, and " any legacy or legacies that I may think proper to bequeath, by " a codicil to be subjoined hereto, or by any other deed under " my hand, providing the whole of the said debts and legacies " do not exceed the sum of L.500 Sterling."

This deed was prepared by Condie, who was still the family agent, and also the agent and commissioner of James Stewart, and after it was executed it remained with Condie.

In the year 1820, James Stewart claimed to possess Crossmount, and in consequence Mrs Stewart and her daughters left it to reside elsewhere, and from that time Mrs Stewart was paid the additional annuity which James had stipulated to pay her in that event, until her death, which took place in March, 1827.

On the 24th of September, 1824, Mrs Stewart executed a deed, which stated the cause of granting in these terms: — " Considering that, by disposition and deed of settlement, dated " the 16th day of September, 1817, I, for the causes, and with " and under the burdens and provisions therein specified, " assigned, disponed, conveyed, and made over to, and in favour " of, Captain James Stewart, my eldest lawful son, and to the " child, or equally to the children, to be lawfully procreated of " his body, whom failing, as therein mentioned, all and sundry " corns, cattle," &c. (adopting the words of the deed of 1817.) " And I, by the aforesaid disposition and deed of settlement, " nominated and appointed the said James Stewart, my son, and " his foresaids, whom failing as aforesaid, to be my sole executors, " but burdened always with payment of my deathbed sickness, " funeral charges, and expenses, and also with payment of " whatever just and lawful debts should be resting by me, and " any legacies that I might think proper to bequeath, providing " the whole of such debts and legacies should not exceed the

" sum of L.500 sterling: And considering that, at the time I " executed the aforesaid disposition and deed of settlement, I " resided at Crossmount, from whence I removed some years ago, " after the marriage of my said son, to my present place of " abode, where I now reside in family with Margaret and Jean " Stewart, my two unmarried daughters, which I have since fur- " nished chiefly with my own funds, I am therefore resolved to " revoke and recall, as I hereby revoke and recall, the aforesaid " disposition and deed of settlement executed by me in favour of " the said James Stewart, my son, in the whole heads and " articles thereof, excepting in so far as concerns the sum of " L.3000 sterling, part of the means, and which belonged to the " said deceased Alexander Menzies, Esq. my father: as to which " sum of L.3000 sterling, I hereby declare that the said disposi- " tion and deed of settlement shall remain and subsist in full " effect, and the said sum of L.3000 sterling shall be payable to " the said James Stewart and his foresaids, whom failing, as " aforesaid, in manner after-mentioned." The deed, upon this recital, went on to express, that upon a consideration of the propriety of settling her affairs so as to prevent differences, the granter, for love and affection to her daughters and youngest son, and other onerous causes, conveyed to them equally her whole estate whatsoever, and appointed them to be her sole executors, under a proviso, that her son James should be entitled to draw L.3000 out of her share of the estate of her father, and that her executors should be bound to pay her debts.

On the 8th of May, 1826, Mrs Stewart wrote the following letter: — " My dear daughters, As both you and myself are now " about to remove from their (our) house to the town of Perth, " I think it right and just to declare that I give over to you, " freely and voluntarily, from this day, every article of furniture " belonging to me here, to enable you to furnish our new abode " as you shall think fit: all which will be then your property,

" and you are to keep this letter as a proof of it. I ever remain, " my dear Margaret, and my dear Jean, your affectionate " mother, Jean Stewart." And on the 18th July, 1826, she wrote this other letter: — " My dear daughters, To prevent " the possibility of any dispute or difference arising from the " circumstance of the furniture, &c. in the house which you and " I at present occupy, being your property, and not mine, I " have considered it proper to declare, that I gave and delivered " to you, at the time of our removal from Friarton to this house, " the whole household furniture, books, plate, pictures, and " linens, then belonging to me, to be thenceforth used and dis- " posed of by you as your own absolute property; and that, " although I pay the house-rent, I have no right to the furniture, " and other articles above specified. I ever remain, my dear " Margaret and my dear Jean, your affectionate mother, Jean " Stewart."

During her life Mrs Stewart placed in the hands of third parties various sums of money, and in particular she paid L.200 to her grand-daughter and her husband Millius, and took from them their bill for the amount, which bill she afterwards indorsed to her daughters, Margaret and Jean.

In January, 1828, James Stewart brought an action against his brother and sisters, and the parties in whose hands the moneys had been placed by his mother, concluding to have it declared, " that subsequent to the execution of the bonds of " annuity and provision by him in favour of his mother and " sisters, or, at all events, after the execution of the deed of con- " veyance and assignment on 16th September, 1817, Mrs " Stewart had no power to execute any deed, to effect gratuitously " a conveyance of her moveables, so as to diminish the amount " of the same at the period of her death, or disappoint the con- " veyance in his favour contained in the deed of 16th Sep- " tember, 1817, or his rights thereunder; and that the deed of

" settlement by Mrs Stewart, bearing date 24th September, 1824, " and the transferences of money, were in contravention of the " stipulations come under by her in his favour, by the deed of " 16th September, 1817 ;" and farther concluding, that the deed of 24th September, 1824, the two letters of 8th May, and 18th July, 1826, and the various obligations upon which the transfer of the moneys had been effected, and particularly the bill for L.200, granted by Millius and wife, in the event of its bearing an indorsation in favour of the defenders, should be reduced and declared void. In the course of this action the drafts of the deeds executed by James Stewart in favour of his mother and sisters, and of the deed by his mother in his favour, were produced. The drafts of James's deeds bore the date of 1813 on the back of them, while the deed by Mrs Stewart bore the date of 1814, and this latter draft, in reference to the deed by James, had originally been expressed thus : — " has since the death of " his said father now executed," which (as it stood in the engrossed deed) was altered to " did on the 24th February, " 1814, execute in my favour," &c. " I am resolved to execute " the deed underwritten ; therefore, and for the love, favour," &c. This alteration was in Condie's handwriting.

The pursuer pleaded in support of his action : —

" I. The defenders have no title to defend the deed by their " mother of 1824, while they deny that they represent her, and " without undertaking the office of executors, and the liability " for the whole of their mother's debts in terms of that deed. " The only way in which they can impose on the pursuer an " obligation for these debts and the character of executor, is by " admitting his right under the deed of 1817 — they cannot " approbate and reprobate.

" II. The deed of 1817 being onerous, and bearing to be in " implement of an agreement, and of onerous considerations on " the part of the pursuer, was in itself irrevocable, and

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" Mrs Stewart was not entitled to execute the settlement " of 1824.

" III. The deed of 1817, being in implement of the arrange- " ment concluded in 1814, under which provisions were made " both for Mrs Stewart and for the defenders, and the defenders " having derived the benefit of the onerous provisions made for " them, the deed of 1817 thereby acquired additional onerosity " in favour of the pursuer, and they are not now entitled to " repudiate it, or to found on the settlement of 1824."

The defenders pleaded in answer: —

" I. The execution of the deed of 1817 by Mrs Stewart, " formed no bar to her executing the subsequent deed of 1824. " The former was not an onerous deed, but a gratuitous and " *mortis causa* settlement, intended to take effect at her death, " and subject to be cancelled or revoked at her pleasure. It did " not vest the pursuer with a right to any part of his mother's " funds and effects during her lifetime, nor restrain her from " disposing of her property, either by gift, conveyance, or " will.

" II. Even assuming that it could be held a complete and " irrevocable disposition and assignation, in so far as regarded " her own share of her father's executry, it would be impossible " to extend the same construction to any of the other subjects " or funds belonging to the granter, as the grant is expressly " limited to what shall pertain and belong to her at the time of " her death."

Before any judgment had been given in this action, Margaret and Jane Stewart, as the surviving executors of their mother, under the deed of September, 1824, brought an action against their brother James, founding upon the deeds of September, 1817, and September, 1824, and alleging that, at the death of their mother, there were three years' annuities payable under the deed of 1817, due to her from Whitsunday, 1824, to Whitsun-

day, 1827, amounting to L.390, under deduction of L.210 which had been paid, and concluding for payment of the balance.

This action was conjoined with the previous action at James Stewart's instance, and on advising cases for the parties, in the conjoined actions, the Lord Ordinary, (*Moncreiff*,) on the 20th November, 1832, pronounced the following interlocutor: — "Finds, that the deed of settlement, bearing date the 28th day "of September, 1824, executed by the late Mrs Jean Menzies "or Stewart, mother of the parties, and the two letters bearing "to be written by her of the dates, respectively, of the 8th May, "1826, and 18th July, 1826, in so far as the said deed and "letters are inconsistent with, and express or import a revoca- "tion or alteration of the deed of settlement executed by the "said Mrs Jean Menzies or Stewart, of date the 16th day of "September, 1817, were *ultra vires* of her the maker thereof, "and are liable to reduction at the instance of the pursuer of "this action; reduces the same accordingly, and decerns, with- "out prejudice to the effect of the said deed and writings in "other respects: Finds, that the other writs called for, and "produced, are also liable to reduction, in so far as it can be "shewn that they operate in defraud of the pursuer's right, "under the said deed of 16th September, 1817: But, in respect "that the effect of these last mentioned writs depends essentially "on certain matters of fact, as to which the parties are at "variance, appoints parties' procurators to be farther heard as "to the mode in which such matters of fact may be ascertained: "Finds, that, *quoad ultra*, the count and reckoning between "the parties, under the conclusions of the summons to that "effect, must proceed on the principles above laid down; but, "before farther answer, appoints the cause to be called."

This interlocutor was adhered to by the Court (*First Division*) on the 29th January, 1833.

Thereafter the Lord Ordinary remitted the cause to the Jury

Roll, and on the 17th May, 1834, ordered the following issue to be tried; "It being admitted, that, after the death of the said "Mrs Stewart, the defenders, Misses Stewart, produced the "receipt or obligation No. 24 of Process, granted by one Rodney "Myllius and his wife, for the sum of L.200 sterling, dated "London, 1st April, 1826, blank indorsed by the said Mrs "Stewart: Whether the said receipt or obligation for L.200, "as above described, was indorsed to, or was held by the said "Misses Stewart, or is now held by the said Miss Margaret "Stewart, for herself, and as representative of her said deceased "sister, Jean Stewart, for onerous considerations?"

The appellants reclaimed to the Court against the interlocutor ordering the trial of this issue, and prayed the Court "to recal "the said interlocutor, to alter the issue, in so far as it throws "the *onus probandi* thereof upon the complainer — to find that "the pursuer is bound to prove his averments regarding the "said receipt or obligation by Mr and Mrs Myllius, and to "direct an issue to be prepared in such other terms as may be "thought proper for trying the question accordingly." The Court, on 11th June, 1834, refused the reclaiming note, and approved of the issue.

The Jury found for James Stewart on this issue, and on the 21st January, 1836, the Court pronounced this interlocutor: — "In respect of the verdict found for the pursuer, decern and "ordain Jean Ann Myllius, and Rodney Myllius, defenders, to "make payment to the pursuer of the sum of L.200, claimed "by the said Margaret Stewart, defender, with interest, as con- "cluded for in the summons, and decern; reserving all questions "of expenses *hinc inde*."

On the 10th March, 1838, the Lord Ordinary (*Cunninghame*) pronounced the following interlocutor: — "The Lord Ordinary "having resumed consideration of this process, with the revised "minutes: *First*, with respect to the claim made by Miss

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" Stewart for L.180 sterling, as the alleged arrears of the " annuity which Captain Stewart became bound, by the deed " of settlement of 16th September, 1817, to pay to his mother, " and which is said to have been unpaid to the above extent at " her death, Finds that the said balance, if due, falls under the " executry of Mrs Stewart, and so, upon her death, were claim- " able by Captain Stewart himself, who got right specially to " 'all goods, gear, means, and effects, that should pertain and " belong to her at the time of her death;" and who was, more- " over, by the same deed, named his mother's executor: Finds " that Miss Stewart has failed to condescend on any onerous " right to said arrears sufficient to compete with the said assig- " nation in favour of Captain Stewart by the deed of 1817, " which has been found by the former Lord Ordinary and the " Court not to have been gratuitously revocable by the granter: " Finds, that, in so far as Miss Stewart claims the said arrears " under the settlement subsequently executed by Mrs Stewart " in 1824, her right stands, in substance, reduced by the prior " interlocutors of the Lord Ordinary and the Court, before re- " ferred to — in respect that no onerous cause of that settlement, " in reference to this part of Mrs Stewart's funds, is instructed: " Therefore assoilzies the representatives and successors of Captain " Stewart from this claim, and from the conjoined action brought " at Misses Stewart's instance to constitute the same, and decerns: " *Secondly*, with regard to the conclusions of the action of re- " duction, and count and reckoning, in so far as they have not " been formally disposed of by the former interlocutor of Lord " Moncreiff, of 20th November, 1832 — adhered to by the Court " on 29th January, 1833 — Sustains the reasons of reduction of " the deed of settlement, in so far as it imports a right to any " other subjects belonging to Mrs Stewart at the time of her " death: Finds the pursuer entitled to the sum of L.200 con- " tained in the bill libelled on, granted by Mrs Jane Myllius,

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" and Rodney Myllius, to Mrs Jane Stewart, and to any other " funds belonging to Mrs Stewart at the period of her death, in " the hands of third parties, not onerously alienated or burdened: " Of consent, assoilzies Miss Stewart from the conclusions of the " original summons for delivery of the late Mrs Stewart's furni- " ture, and repels the reasons of reduction of Mrs Stewart's " letters of 8th May, and 18th July, 1826, relative to the said " furniture: Finds that no specification has been insisted on by " the pursuers in reference to the general conclusions in the " summons for count, reckoning, and payment, of a balance of " L.2000, and that the pursuer does not now make any claim under " the same; therefore, assoilzies the defender from that conclusion: " *Thirdly*, with respect to expenses of process, Finds, that, as " the leading action in dependence, being the action of reduc- " tion of the second settlement executed by Mrs Stewart in 1824, " was absolutely necessary, and as the conclusions of the sum- " mons were not only resisted *in toto* by Miss Stewart, but " another action raised by the Misses Stewart for payment of " arrears of annuity, the raising of the action of reduction was " necessary and unavoidable, and that the pursuer is entitled " generally to the expenses of the conjoined actions, down to " 29th January, 1833, when Lord Moncreiff's interlocutor was " confirmed by the Court, but under deduction of any expenses " for proceedings during that period in which she succeeded: " Therefore, and with the view of ascertaining the balance of " expenses claimable by each party anterior to 29th January, " 1833, allows each party to lodge an account of their expenses " so far as they allege they were successful, and remits the " account, when lodged, to the auditor to tax and to report: " Finds neither party entitled to expenses subsequent to 29th " January, 1833, and decerns."

The Court, on 30th November, 1838, adhered to this interlocutor.

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The appeal was against the several interlocutors of the Lord Ordinary and of the Court, which have been detailed.

Lord Advocate, (*Rutherford,*) *and Sir W. Follet, for appellants.* — I. The deed of 1817 is represented by the respondent as having been executed by Mrs Stewart, in consideration of the bonds of provision which he had given to her and her daughters in 1814, and the several deeds are treated as parts of one and the same transaction; but this is wholly unsupported by evidence. The bonds of 1814 contain no reference even to the granting of any correlative deed, and the correspondence of the parties at the time, so far from establishing any demand or bargain by the respondent, of a consideration from his mother, or counterperformance for the granting of these bonds, shews that this was entirely a suggestion of Condie, which, however, the respondent, in the postscript of his letter to that gentleman, of 25th September, 1813, refused to adopt, leaving it entirely to his mother's free will, to do in regard to her property as she might feel inclined. Accordingly, he executed the bonds without regard to what his mother might do, and, by his letter to Condie, of 19th April, 1816, he shews, that even then, two years after the bonds had been executed, he considered his mother as having the free disposal of her own estate. The facts of the case, therefore, shew, that whatever may have been stated *narrative* in the deed of 1817, as to the cause of its being granted, that deed was, in truth, purely gratuitous, and such as the respondent could never have enforced the execution of, had Mrs Stewart been minded not to grant it.

II. The deed of 1817 required delivery to complete and render it binding, *Ersk.* III. 2, 43; it was framed by Condie, the agent of the granter, and remained in his possession after execution, and there is no evidence that the respondent knew of the

intention to make the deed, and still less of its existence after execution. There is not only no evidence of delivery, but there is nothing to raise a presumption of delivery, Irvine, *Mor.* 11576; Brownlee, 10 *S.* and *D.*, 39; Ramsay *v.* Cowan, 11 *S.* and *D.* 967. In the case of Ramsay *v.* Maule, 4 *W.* and *S.* 59, delivery was established chiefly upon the ground of payments having been made under the deed.

III. Farther, the deed was testamentary in form; it gives the granter's estate as it should exist at her death; it contains no warrandice, and makes an ordinary appointment of executors. It was therefore revocable by the granter, notwithstanding there had been delivery, and was revoked by the granter's deed of 1824, Leckie *v.* Sommerville, 18th May, 1819. A testamentary deed, even if it contains a clause renouncing the power of revocation, and dispensing with delivery, is nevertheless revocable; Dougall *v.* Dougall, *Mor.* 15949; Balders *v.* Ireland, 22d December, 1814, 18 *F. C.* 124; Somerville *v.* Sommerville, 18th May, 1819, 19 *F. C.* 730; Miller *v.* Dickson, 4 *S.* and *D.* 822, *Ersk.* III. 3, 84.

IV. The only effect of the deed of 1817 was to give the granter's estate as it should exist after the exercise of her disposal of it in any way, during her life, that she might feel inclined; but there is nothing in the terms of the deed to tie up her hands, and give her a mere life enjoyment. Moreover, the terms used are special in regard to the Bolfracks executry, confining the conveyance to the granter's own share alone; that portion, therefore, which she subsequently derived, under the will of her sister Margaret, was unaffected by the deed, and remained *sub potestate* of Mrs Stewart, and was effectually bequeathed to her other children.

V. If the deed of 1817 is to be held as onerous in respect of the annuity to the respondent's mother and sisters, the arrears of the annuity cannot belong to him under that deed; he cannot be entitled to the thing purchased, and, at the same time, to the price paid for it. Mrs Stewart, in her lifetime, could have sued him for payment of the annuity, and the right that was in her is now in the appellants, as her assignees under the deed 1824.

VI. The Court below laid upon the appellants the *onus* of proving consideration for Myllius's bill for L.200; but as holders of the bill, the presumption of onerosity was in their favour, and this *onus* of rebutting it should have been laid on the respondent.

Mr Attorney General (Campbell,) *and Mr Pemberton for the respondent.* — I. The deed of 1817 was the counterpart of the bonds granted by the respondent to his mother and sisters; it was therefore onerous and irrevocable. The deed of 1824, which was purely gratuitous, was thus in fraud of the deed of 1817, and reducible under the act 1621. *Ersk.* IV. 1. 29. It is not competent to go beyond the express terms in the deed of 1817, to prove its nature, these terms being distinct and unambiguous in themselves.

II. The deed of 1817 was allowed to remain in the hands of Condie, who was the agent of the respondent, and the commissioner for managing his affairs in his absence, and who had prepared the deed under the instructions of the respondent. Delivery to him, therefore, was delivery to the respondent. Ramsay *v.* Maule, 4 *W.* and *S.* 59.

III. To make the deed of 1817 revocable, as being testamentary, it should have contained a reservation of power to revoke, but this is wanting in it.

STEWART *v.* STEWART. — 10th August, 1842.

LORD COTTENHAM. — The first question, my Lords, in this case is, whether the deed of 1817, under which the pursuer claimed, was a gratuitous deed, or for an onerous consideration; and that depends upon this, whether the executing such a deed by Mrs Stewart, the pursuer's mother, constituted part of the arrangement with him, under which he made provision for his mother and sisters by the bond of provision of 1814.

If the deed of 1817 were alone to be looked at, there could be no question raised, because that deed recites, that the provision so made for her by her son in 1814 was made on condition that she should execute the deed underwritten, and in implement of that agreement, and for love and affection; and considering that he had made such provision for her daughter, and other onerous causes, she assigned to him and his children, or failing them to her daughters, all effects which should pertain or belong to her at the time of her death, and all her one-fifth share of her own father's effects, he paying all her debts and legacies to the amount of L.500.

In this deed there was not any power of revocation, and the appellants, the daughters of Mrs Stewart, claiming under a deed of 1824, which professed to revoke the deed of 1817, except as to L.3000, have never sought to reduce or impeach the deed of 1817, but insist that it was in its nature testamentary, and therefore revocable. But I do not find that they have contended, that if this recital in it be correct, Mrs Stewart, the mother, could have released herself or her property from its effects.

The grounds upon which the defendants contended that the deed of 1824 was to prevail over that of 1817 were, first, that the onus of invalidating the deed of 1824 lay upon the respondent. If that were so, the production of the deed of 1817 would be sufficient for that purpose.

Secondly, that the deed of 1817 was never delivered. If there

had been no other proof of the delivery than the deed of 1824, under which the appellants claim, they would have been precluded from raising this point, as that deed recites, that she had by this deed of 1817 assigned and made over the property to her son, and she professes to revoke and recal the aforesaid disposition and deed of settlement executed by her in favour of her son. There is, however, evidence of the deed of 1817 having been a completed instrument, as it was in the hands of Mr Condie, the agent who acted for both the mother and the son.

Thirdly, the appellants insisted, that the deed of 1817 was in its nature revocable, which they attempted to support by reference to authorities; that instruments properly testamentary, or *mortis causâ*, were always revocable, which assumes the whole question; that the deed was voluntary, and not for any onerous consideration. But they contended, that the deed of 1817 could not be considered onerous, because its provisions went beyond what the pursuer alleged to have been the agreement, and the value which he had given. The question is not, whether the mother received full consideration for what she gave by the deed of 1817, but whether it was altogether voluntary. It appears, indeed, from Mr Condie's letters of the 9th of September and 7th of October, 1813, that the original suggestion was, that the mother should secure to her son the share to which she had become entitled of her own father's estate. But that does not prove what was the ultimate agreement. Indeed, Mrs Stewart's letter of the 23d of October, 1813, in which she offers to settle L.3000 of the Bolfracks money, proves that the original suggestion was not altogether adopted.

The deed of 1817 is the only legitimate evidence of what the agreement was; but the earlier documents, particularly these letters, and the deed of 1814, are important, as shewing that the recital of a consideration was not fictitious, for the purpose of giving an appearance of validity to a transaction really gratuitous, but

that the transaction was one of mutual arrangement, founded upon valuable and onerous considerations.

If, then, such be the true construction of the deed of 1817, and the true result of the evidence of the earlier arrangement which led to it, it cannot be a question but that the attempt to evade the performance of the provisions of the deed of 1817, by the deed of 1824, was inefficacious. In principle this case resembles the attempt made to defeat a similar arrangement in Wienholt *v.* Logan, reported in 7th *Bligh*, page 1; and upon this point the law of Scotland appears to be equally capable of preventing parties from escaping from the provisions of such arrangements.

The fourth and fifth objections, namely, that the effect of the deed of 1817 ought to have been confined to the mother's own share of her father's property, require no observation. Such is not the provision of the deed, which, if it stands, must be carried into execution in all its parts.

It appears to me, for these reasons, that the first and second interlocutors appealed from, which establish the deed of 1817 as against the deed of 1824, are right.

The third and fourth interlocutors appealed from, which regard the form of the issue for trying the title to the L.200, were also clearly right. The affirmative was upon the appellants, who, by an alleged act of their mother, claimed this sum as against the respondent, who, under the deed of 1817, was entitled to it, if such alleged act could not be proved.

The fifth interlocutor, so far as it was appealed from, only gives effect to the verdict as to the L.200.

The sixth and seventh interlocutors appealed from, disposed of the appellants' claim to the arrears of their mother's annuity, and to the costs of the various proceedings in this unfortunate litigation between such near relations.

For the reasons given by the Lord Ordinary, I think that the

appellants' claim to the arrears was wholly untenable, and was properly rejected. And with respect to the costs, I think the arrangement made was quite as favourable to the appellants as the circumstances justified.

It appears to me that all the interlocutors appealed from are right, and that the appeal ought to be dismissed with costs.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors, in so far as therein complained of, be, and the same are hereby affirmed. And it is farther ordered, that the appellant do pay, or cause to be paid, to the said respondents, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is farther ordered, that unless the costs certified, as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence, for the recovery of such costs, as shall be lawful and necessary.

DEANS and DUNLOP — MUNDELL and MARTIN, Agents.