

on which that claim depends, was revoked and superseded by the settlement of 1829.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 life interest alienably 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, dispense the subject to and in favour of their son and daughter in life interest 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 indentment 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 life interest, for her life interest use alienably, 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 life interest. 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 substitu-

tion 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, Massachusetts, 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

Russell, lawful daughter of the principal pursuer or otherwise to grant warrant to officers of Court to search for, take possession of, and make delivery to the pursuer of the said child, and to interdict, prohibit, and discharge the defenders as aforesaid, and all others under their instructions, and for whom they are responsible, and that both *ad interim* and perpetually, from removing said child out of Lanarkshire, and from interfering with the said child when recovered, and in the custody of any party or parties with whom the pursuer may place said child, reserving the principal pursuer's claim for loss or damage already sustained, or which he may yet sustain, in consequence of the respondents wrongously and unwarrantably withholding or refusing delivery of the said child, and find the defenders liable in expenses, and decern therefor, and do otherwise in the premises as to your Lordships shall seem proper."

In answer, the defenders admitted that when the pursuer left for America the said child was residing with the pursuer's sister, Mrs Morrison, but they averred that on the day on which the pursuer sailed for America he instructed the defenders, in the presence and hearing of his sister, to get the said pupil child, Annie Russell, from her, and to maintain and bring her up themselves, which they promised and agreed to do. Thereupon it was arranged between the defenders and Mrs Morrison, in the presence and hearing of the pursuer, that the defenders should send for the child on a day fixed in the following week. That about the 11th February 1870 the defenders got the child from Mrs Morrison, and since that date she had resided with and been maintained, clothed, and educated by the defenders. During all this time the pursuer was well aware and approved of the arrangement which had been made, and repeatedly referred to the subject in his letters, and promised the defenders payment for the trouble which they had been at so soon as he should be able to afford it. The defenders had never made any demand upon the pursuer for any contribution towards the maintenance of said child, and until immediately before this action was raised they never heard or knew of any desire on his part to recover possession of his child, and they deny that he has any such desire. The pursuer, through his agent and mandatory Mr Lang, invited the defenders to send in to him a claim for remuneration and reimbursement, which was done on 28th March 1872, and to that claim no answer was sent till after the present action was raised, and no demand was ever made by the pursuer for delivery of the child as a condition of that claim for alimentary expenditure being entertained or considered.

The defenders *inter alia* pleaded that the action was incompetent in the Sheriff Court.

The Sheriff-Substitute pronounced the following interlocutors:—

"Glasgow, 18th October 1872.—Having considered the cause after again hearing the defenders' procurator, the procurator (Mr T. C. Yonug, jun.) who represented the pursuer having stated that the pursuer had no further argument to submit to the Court, for the reasons stated in the Note, refuses the prayer of the petition that the defenders be ordained to deliver up the child in question to the pursuer or his mandatory, or that warrant be granted to officers of Court to take possession of or make delivery of her to the pursuer, and orders

the case to the roll of the 22d inst., to hear parties as to the remainder of the prayer.

"Note.—The petition sets forth that the principal petitioner, now resident in America, is the father of the child Annie Russell, five or six years old, now in the hands of the defenders, her maternal aunts, and retained by them against his consent; and it craves that decree or warrant be granted as narrated in the interlocutor, and that the defenders be interdicted from removing the child out of Lanarkshire, and from interfering with her when removed and in the custody of the party with whom the pursuer may place her. The mandatory is Mr J. L. Lang, writer, Glasgow, who is not alleged to be in any way related to the child, but who holds a mandate, apparently from the pursuer (No. 8/4), in the following terms:—'I hereby authorise you to take any proceedings, as my mandatory and in my name, against Miss Mary Hill and Annie Hill, residing in Douglas Street, Glasgow, or against any other party or parties, for taking my child, Annie Russell, out of their possession, and placing the said child in the custody of my sister, Mrs Elizabeth Russell or Morrison, wife of Robert Morrison, millworker, 122 Henderson Street, Kinning Park, Glasgow.' The mandatory's powers, as thus defined, are special and limited. He has not power to have possession of the child given up to himself, but only to have her placed in the custody of the person named in the mandate, and his power to raise proceedings is limited to that effect. The petition, however, craves decree or warrant for delivery to the principal pursuer, or decree for delivery to the mandatory, and is silent as to delivery to the only person to whom the mandate authorises it to be made. In a case of debt, such disconformity between the proceedings and the mandate which authorised them would be fatal. Much more must it be so in an action relating to the custody, and consequently involving the maintenance, health, and even existence of a child. Apart from the limited terms of the mandate, the craving for delivery to the father, now abroad, could not be granted, for the reasons stated by the Lord President in *Hood v. Hood*, 24th January 1871; 9 Macph., 451. Nor could the mandatory's mere authority to raise proceedings for securing the father's rights entitle him to the custody of the child; for it is the duty of the Court to see to the child's safety in any order that may be pronounced, and one for her delivery to a law-agent with no further connection with her than as her father's mandatory in the proceedings, would not afford reasonable security for her safety. (*Hood v. Hood, supra.*) Further, it does not appear on record whether the only person for delivery to whom proceedings were authorised is now alive, or, if alive, is in this country, or is either able or willing to undertake the custody and maintenance of the child. Unless the Court were satisfied on these points, the craving even for an order for delivery to that person should not be granted. *A fortiori*, one for delivery to the law-agent, under a mere supposition or understanding that he would hand over the child to that person without any inquiry regarding her, or any guarantee that the agent would carry out the father's intentions, would be transferring the duty of securing the child's safety from the Court to one who is under no natural or legal obligation to protect her. Some of these difficulties might, perhaps, have been overcome if the pursuer's agent

and mandatory had explained his own or his client's intentions, but his continued absence when the case was in the roll has left the Court without much necessary information, and with no alternative but to dispose of the main part of the case as in the interlocutor. His absences indicate also that there cannot be very urgent reasons for withdrawing the child from the care of the near relations with whom she has been for a considerable time, and who are willing and anxious to continue in charge of her. Nothing was said at the debates as to the prayer for interdict. The case is ordered to the roll to have that disposed of."

"*Glasgow, 22d October 1872.*—Having heard parties' procurators, in terms of the appointment in the interlocutor of the 18th inst., for the reasons stated in the Note, continues the interim interdict already granted, and declares the same perpetual: Finds the defenders entitled to half their costs; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report; and decerns.

"*Note.*—The Sheriff-Substitute, although with hesitation, thinks that the craving for interdict against removal of the child out of Lanarkshire is one of the proceedings covered by the mandate, since by means of it further proceedings for delivery of the child, in terms of mandate, may be raised effectually either in this Court or in the Court of Session, whereas the removal of the child might render such proceedings abortive.

"There is also considerable difficulty as to the craving for interdict against the defenders interfering with the child when recovered and in the custody of the party to whom the principal pursuer may entrust her. Seeing, however, that the defenders have no natural or legal right to custody of the child, and that subsequent measures taken under the mandate in question may be effectual, it is thought not to be incompetent to deal with that part of the case in anticipation of such proceedings. Only half costs have been allowed to the defenders, on account of their failure on the question of interdict."

The pursuer appealed against these interlocutors to the Sheriff, who pronounced the following interlocutor:—

"*Glasgow, 29th November 1872.*—Having heard parties' procurators on their respective appeals, and reviewed the whole process, finds that the defenders' appeal, in as far as directed against the interlocutor of 18th October last, is incompetent, in respect that said interlocutor disposed in part of the merits of the cause, and was therefore appealable; but no appeal having been lodged within the statutory period, it cannot now be brought under review: Finds, as regards the conclusions for interdict, which are dealt with by the interlocutor of 22d October last, that the conclusion for delivery of the child in question having been dismissed, the conclusion for interdict against the defenders' interference with said child when recovered and in the custody of another party is inept, and falls to be dismissed, and dismisses the same accordingly; finds that the conclusion for interdict against the defenders removing the child out of Lanarkshire is also in the circumstances unnecessary and nimious; but in respect it was stated for the defenders that they would not object to interdict against their taking the child out of Scotland, grants such interdict accordingly, and to the above extent restricts and alters the said interlocutor of 22d Octo-

ber; alters also as regards expenses, and finds the pursuer liable in two-thirds of the defenders' costs; *quoad ultra* adheres, and decerns."

The pursuer appealed to the Court of Session.

For him the following authorities were cited in support of the competency of the petition—Wallace's Principles, 283; *Goadby v. Maccandys*, F.C., July 7, 1815; *Speid v. Webster*, Dec. 18, 1821, 1 S. 221; *Harvey v. Harvey*, June 15, 1860, 22 D. 1198; *Hood v. Hood*, Jan. 24, 1871, 9 Macph. 451.

Counsel for the defender were not called upon.

The Court recalled the interlocutor of the Sheriff, and dismissed the petition.

Counsel for the Pursuer—Watson and Lang. Agents—Muir & Fleming, S.S.C.

Counsel for the Respondents—Fraser. Agents—Drummond & Mackenzie, S.S.C.

Tuesday January 14.

## SECOND DIVISION.

[Lord Ormidale, Ordinary.

HELLON v. HELLON.

*Divorce—Mora.*

Circumstances in which *held* that a party was not barred by *mora* from obtaining divorce, although ten years had elapsed between the knowledge of his wife's adultery and the institution of the action.

The circumstances of this case are fully set forth in the interlocutor of the Lord Ordinary.

"*Edinburgh, 2d November 1872.*—The Lord Ordinary having considered the closed record, proof adduced, and whole process—Finds facts, circumstances, and qualifications proved relevant to infer that the defender committed adultery with Henderson Carrick, mentioned in the record and proof: Finds her guilty of adultery accordingly; therefore divorces and separates the defender, Mary M'Ormon or Hellon, from the pursuer, Stephen Hellon, his society, fellowship, and company in all time coming: Further, finds and declares that the defender has forfeited all the rights and privileges of a lawful wife, and that the said pursuer is entitled to live single or marry any free woman, as if he had never been married to the defender, or as if she was naturally dead; and decerns.

"*Note.*—The circumstances of this case are peculiar. The parties were married in Glasgow in June 1852. The wife, who is the defender, had her residence in Glasgow at the time of the marriage, and she has resided there ever since. The husband, who is the pursuer of this action, appears to have been at the time of his marriage, and ever since, a seafaring man. It also appears that the pursuer, soon after his marriage, went to Australia, leaving his wife in Glasgow. It has not been said, and the proof shows that there would be no ground for saying, that in going to Australia the pursuer intended to abandon his wife. He went there apparently with the laudable desire of bettering his fortunes; and it has been proved that he for some time corresponded with his wife: that on at least one occasion he sent money to her from Australia, and also that he had expressed a desire that she should join him there. In place, however, of doing so, the defender, within three or four years after the pursuer