

follows:—"And on the marriage of our daughters respectively, to settle and secure on each daughter, for her sole and exclusive use during her marriage, an equal share of our several estates, so that the same shall be held by trustees for her behoof, exclusive always of the *jus mariti* and right of administration, or other right whatever of her husband, with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, the same shall be paid, assigned, or conveyed to her heirs and executors." There is a further provision in regard to the shares belonging to the unmarried daughter—"And in regard to the disposal of the fee of the shares of any of our said daughters who may not marry, we direct the said trustees to pay, assign, or dispense the same according to the directions which each such daughter may leave by any testamentary deed." The question is, whether these conditions are or are not *ultra vires* of the husband and wife?

It appears to me that if the question had not been concluded by decision it would have been open to argument. But I am of opinion that it is impossible to distinguish the case of *Lennox's Trustees* from the present. The matter arose there for decision in exactly similar circumstances. The conditions and limitations of the power were expressed in precisely the same way. I therefore think the case of *Lennox's Trustees* is conclusive, and accordingly that the appointment is a good one.

The clause on which the second question arises is—"And we further direct the said trustees on making payment of a share of our said estates to a son, or on settling a share for behoof of a daughter, to take the said son or the trustees for behoof of such daughter bound to repay the same, but without the addition of interest, and so that the same may form an addition to the funds available for division among our other children, in the event of such son or daughter succeeding to the said estate of Lochryan." I do not very well see how that could ever become an operative condition. It appears to me to be quite ineffectual and *ultra vires*. But assuming that it is not so, I think the law is clear; it is laid down as follows in Sugden upon Powers, p. 526, "Where conditions are annexed to the gift, not authorised by the power, the gift is good, and the condition only is void, so that the appointee takes the fund absolutely. Holding the condition to be void, I think it has no effect upon the appointment in other respects.

LORD M'LAREN—The most important of the questions we are asked to answer in this case relates to the exercise by the spouses of the powers reserved to them in the clause of the antenuptial marriage-contract dealing with their children's provisions. They reserve to themselves a qualified power of distribution. The children's provisions are to be paid to them by the trustees upon the death of the survivor of the spouses, "in such shares or proportions,

and subject to such conditions, provisions, and limitations" as the spouses or the survivor of them should appoint. There is a decision of the Second Division of the Court, which is directly in point. The powers in that case—*Lennox's Trustees v. Lennox*—and in the deed before us, are expressed in identical terms, and the powers were executed in substantially the same way. The Court there held that the power was well exercised, and I agree with Lord Adam that a power to apportion among the children of the marriage, and to impose conditions and limitations, entitles the spouses, as is the case here, to direct that the fund be held by trustees for the daughters, the income to be paid to them for life, and they to have a testamentary power of disposal. Whether the exercise of such a power can be extended further so as to provide for the event of the daughters not availing themselves of the power of disposal, I give no opinion. I see great difficulty in the way of extending the significance of the reserved power, because, wherever a new course of succession is introduced, persons are taken in who are not proper objects of the power. Here the framers of the settlement have avoided that difficulty, and while they have provided that the daughters shall not have power to dispose of their shares by way of anticipation, they have at the same time given them the power of disposing of the fee by testamentary deed. So far, I think the power of appointment has been validly exercised. On the other points of the case I concur in the judgment proposed.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court answered the first question in the affirmative, the second in the negative, and the third in the affirmative, and decreed accordingly.

Counsel for First, Third, and Fourth Parties—D. F. Balfour, Q.C.—Guthrie. Agents—John C. Brodie & Sons, W.S.

Counsel for Second Parties—C. S. Dickson—Fleming. Agents—Wallace & Begg, W.S.

Friday, June 12.

## FIRST DIVISION.

RANNIE v. OGG.

*Proving of the Tenor—Entire Absence of Adminicles—Parole.*

In an action of proving of the tenor, where the alleged *casus amissionis* was that the granter had himself destroyed the deed, the pursuer produced no adminicles and sought to set up an absolute disposition, of which he was unable to give the terms of the testing clause or the names of the witnesses by parole evidence only. The only important evidence was the admission of the granter that he had destroyed a

deed, but one which was *mortis causa* and undelivered, and the evidence of a law-agent who averred that fifteen years before he had seen and examined the deed, and that he was of opinion that it was absolute in its terms although he was unable to supply any of its contents. *Held* that the tenor had not been proved.

*Question reserved*, whether in certain circumstances the tenor of a deed might not be proved by parole evidence alone.

About the year 1844 George Ogg, feuar, Turriff, Aberdeenshire, married Jean Abercromby Rannie, daughter of John Rannie, baker in Turriff. She died in 1851, and in October 1852 he went through a form of marriage with her sister Alexina, who lived with him as his wife until her death, intestate, upon 19th June 1875.

In March 1889 William Ross Rannie, wholesale confectioner, Penn Yan, New York, was duly served heir to the said Alexina Rannie as being the eldest son of her deceased brother William Rannie, and in February 1890 brought an action of proving the tenor against the said George Ogg to have it found and declared that "the defender, the said George Ogg, executed a disposition in favour of the now deceased Alexina Rannie, daughter of John Rannie, sometime baker in Turriff aforesaid, of date the 1854, and that the said disposition was of the following tenor, *videlicet*:—"I, George Ogg, feuar, residing in Turriff, Aberdeenshire, for the love, favour, and affection which I have and bear to Alexina Rannie, daughter of John Rannie, baker in Turriff aforesaid, have disposed, as I hereby alienate and dispone, from me, my heirs and successors, to and in favour of the said Alexina Rannie, her heirs and assignees whomsoever, heritably and irredeemably, All and Whole that piece of ground lying within the town of Turriff and county of Aberdeen, and on the west side of the new square of the said town of Turriff, bounded as follows, *videlicet*:—" [here follow the boundaries]—"and I oblige myself to infest the said Alexina Rannie and her foresaids, to be holden *a me vel de me*, and I resign the said lands and others for new infestment, and I assign the writs, and have delivered the same, according to inventory, and I assign the rents, and I bind myself to free and relieve the said Alexina Rannie and her aforesaids of all feu-duties, casualties, and public burdens, and I grant warrandice, and I consent to registration hereof for preservation; moreover, I desire any notary to whom these presents may be presented to give to the said Alexina Rannie or her foresaids sasine of the lands and others above disposed.—In witness whereof," &c.

The pursuer averred that "In or about the year 1854 the defender, who was then heritable proprietor of the subjects described in the summons, conveyed the said subjects to the said Alexina Rannie. The disposition or other deed of conveyance granted by the defender in favour of the said Alexina Rannie was delivered by him to her."

Further, that the defender was examined upon commission as a haver in an action at the instance of the pursuer against him for delivery of the said disposition or other deed of conveyance, and deponed that the deed was in his possession about fifteen years ago, that he then destroyed it by burning it, and that he had no copy or draft of it. That the pursuer had been unable to ascertain by whom the said disposition was prepared, or to discover any copy or draft thereof, and that he believed no copy or draft thereof was now extant, and consequently that it was necessary in order that his right of property in the said subjects might be established that the tenor of the said disposition or other deed of conveyance should be proved.

The defender explained that the deed referred to in said deposition as having been destroyed was an unstamped and undelivered deed of settlement by him, containing provisions in favour of the said Alexina Rannie, and that there was no draft or copy of the kind alleged in existence, and that no such principal, copy, or draft did at any time exist.

The defender pleaded, *inter alia*—" (2) No written adminicles being libelled on for proving the tenor of the alleged disposition, the action should be dismissed. (3) The disposition libelled never having been in existence, the defender should be assolizied."

The Lords of the First Division, to whom the Lord Ordinary (KINNEAR) made avizandum of the cause, closed the record, and thereafter pronounced the following interlocutor:—"Before answer as to the sufficiency of the adminicles and of the *casus amissionis*, allow the pursuer to prove the tenor of the writ libelled on and the *casus amissionis* thereof, and allow the defender a conjunct probation thereant, and for that purpose grant commission." . . .

The best and almost only material evidence for the pursuer was that of Alexander George (52), who deponed—"I am a solicitor at Macduff, and provost of that burgh. I remember having a call from the pursuer along with M'Lennan, a friend of his, on 10th December 1888. . . . Shortly, their object was to take steps for the recovery of the property which is the subject of this action. I had no recollection of the transaction in which I had been engaged in 1875 beyond the fact that there had been one, and I arranged that they should call for me next day. They did so. They both called. Before they called I had looked up my ledger, and some of the facts and circumstances were brought to my mind in consequence, and they gave me their story of what had taken place in 1875. . . . Going back to 1875, I remember having a call during that year from Alexander Rannie, the pursuer's uncle, with reference to this same property. I have looked up an account which stands in my business books, and which was rendered to Mr Ogg in connection with what was done then, and have by that means refreshed my memory of what took place. Alexander Rannie called first on 2nd July 1875. He

brought those titles I have now produced along with the disposition by Mr Ogg conveying the property covered by these titles to Alexina Rannie. His sister Alexina Rannie had died shortly before that, and he wished to know who would succeed to this property in respect of his sister's death. I said that on the statement he made to me my opinion was in favour of the heir-at-law—Alexina Rannie's heir-at-law. Alexina Rannie had left children, and Alexander Rannie wished the property to go to her children, and my duty was to prepare a deed in favour of the children in respect of this disposition in favour of Alexina Rannie; and in consequence the titles were left with me that I might consider the matter. . . . My advice was, that in my opinion Alexina Rannie's heir-at-law had right to the property, but that if Mr Ogg was to take the risk of that, I thought he should just put a warrant of registration upon his disposition [*i.e.*, a disposition by Mr and Mrs Rannie in his favour dated 6th December 1849], in his own favour, and record it, and be infeft. (Q) And what was to happen to Alexina Rannie's deed?—(A) It would just be laid aside. (Q) Was that advice taken by Mr Rannie and Mr Ogg?—(A) Yes. I received instructions to put on the deed a warrant of registration, which I did, and which you will find on the disposition in favour of Mr Ogg. He did more than that at this time. He then instructed me to prepare a settlement. I did so. He signed it on 28th July 1875. I have the draft here. The testing-clause is not in. Referring to business account, I find I wrote him on 28th July to come and sign the settlement. I do not find a meeting signing it, but I know it was signed. I am aware that it was executed about that time and that it was delivered to them. Generally that settlement is in favour of Ogg's children by Alexina Rannie. I cannot tell who was Alexina Rannie's heir-at-law at that time." *Cross.*—(Q) Tell me as precisely as you can the nature and terms of the deed by the defender in favour of Alexina Rannie?—(A) I could not tell the terms of the deed. All I know is this, that I have a distinct recollection that I advised that in my opinion the heir-at-law had a claim. Consequently I can only say I was satisfied it was a valid deed, otherwise I could not have given the advice that the heir-at-law had a claim to the property. (Q) Can you give us the date of the deed?—(A) I have no recollection of the date of the deed. (Q) In the second place can you inform us who the witnesses were?—(A) Not at all. (Q) In the third place can you tell us who the solicitor was who drew the deed?—(A) No. (Q) Do you recollect whether there was one name in the testing-clause?—(A) I do not recollect anything of the deed beyond the fact that I can tell that I was satisfied at the time that the deed was valid, and effectually conveyed the property to Alexina Rannie. (Q) Do you recollect if it was a Scotch-drawn deed?—(A) I would not like to say, but I have a hazy notion who drew the deed; but I

could not say it with any certainty, for that might come from seeing the name of the drawer of this other deed, the conveyance by the Rannies to Ogg—James Horn. I cannot say when James Horn died. He was not alive when I started in Macduff. He had been a writer in Macduff. I don't think anybody in particular succeeded to his business. (Q) Why do you say that it was a valid deed?—(A) I just say that it was a valid deed, and hence my advice—my opinion—that the heir-at-law was entitled to the property, and not George Ogg. . . . (Q) Can you tell me why you were so satisfied?—(A) Just upon the information submitted to me by looking at the deed, and upon information submitted to me by Alexander Rannie. (Q) Will you tell me what information was submitted to you by Alexander Rannie?—(A) That this deed was given by Ogg to this Alexander Rannie's sister, who lived with him as his wife, as a consideration for her—as a provision for her; and more than that, was given to her as a provision for her, and that the deed was handed over to her and was in her possession, and it was on that information that I gave my opinion. (Q) Was the deed stamped?—(A) I will just answer that question as I did all the others—it must have been stamped, otherwise I would not have had the opinion that I had."

The defender deponed—" (Q) Was a deed in favour of Alexina made out by a lawyer?—(A) I could not say. It was John Rannie that got it done. I suppose it had, but I do not know. I do not know whether he got it done in Scotland or in London. He brought me the deed written out. It was ready with a stamp on it. I could not describe it in words altogether; but it was made out for her and her heirs and successors, and I would not sign it. I wanted it to be just for her use after my death. I refused to sign it, because I thought it was made out in a way that she could take it if she liked, and turn me out of the place altogether. I explained to John Rannie that I would not sign it because of its terms. It was arranged that another deed should be got. . . . (Q) What instructions did you give about the form the second deed was to take?—(A) Simply that it was to be a provision for her at my death. (Q) What did you mean exactly by 'at your death'? Do you mean a provision after your death?—(A) For her after my death. (Q) Do you mean in the event of her surviving you?—(A) Yes. John Rannie brought the second deed to me to sign. I was satisfied with its terms and I signed it. (Q) Was it a deed by a lawyer?—(A) I think it was—the same as the first. I cannot recollect the terms of it. It was with the view I have mentioned that I got it made and signed it—for her behoof after my death. (Q) Did you understand it carried out the object that you had in view—to provide for Alexina in the event of her surviving you?—(A) Yes. . . . (Q) Was there any discussion between you and Alexander and Mr George as to whether the deed in favour of Alexina was a good deed, and carried the property away from you to Alexina's heirs?—(A) It was never

mentioned. During my presence with Mr George the only thing was to give him instructions to make out a will in that form, and that was the only conversation we had on the subject. That will was made out. (Q) Did you receive back the deeds from Mr George at the date of signing the will, or when did you receive them?—(A) There were some I brought home with me, and one I never got back. That was the title by the Rannies in favour of me. That deed had not been registered, and he registered it in favour of me, and he happens to have kept it till now. I got the older deeds home again. The deed in favour of Alexina was not among them; it was destroyed before I went to Mr George to get the will made out. (Q) Are you quite sure about that?—(A) Yes. (Q) Are you quite sure it was not destroyed after you got the deeds back again from Mr George?—(A) Yes. (Q) You say you are quite sure of that?—(A) I am sure it was before. I did not take it to Mr George, and it must have been destroyed before going there. (Q) Was it you who destroyed it?—(A) It was by my orders. I considered it was of no value after she was dead. (Q) Can you tell me who it was that actually destroyed it?—(A) It was my little boy—a son of Alexina. It was the one that is dead. He was the younger, the other one was at Aberdeen at the time. (Q) Did you burn it, or tear it up?—(A) It was torn up. (Q) What became of the pieces?—(A) They were burned, of course. I considered it was of no value after she was gone. (Q) Did you see the pieces burned?—(A) I am sure I do not recollect now; but it was destroyed. (Q) Did you see it torn up?—(A) Yes."

It was argued for the pursuer—The defender had admitted that a deed in favour of Alexina at one time existed and had been destroyed by him, although he refused to admit that it was an absolute disposition in her favour. As she lived with him as his wife, the deed although delivered would necessarily remain in the house, which rendered proof of such delivery well nigh impossible. Everything must be presumed against a granter who made such an admission. Here also there was the distinct evidence of a solicitor conversant with such deeds, who had seen and examined the one in question for the purpose of giving a legal opinion upon it, to the effect that it was absolute in its terms. As to adminicles, see *Stair*, iv. 32, 9; *Ersk. Inst.* iv. 1, 55. They might be dispensed with where their existence was not to be expected—*Ogilvy v. Napier*, 1612, M. 15,786; *Lithgow v. Murray*, 1680, M. 15,799; *Earl of March*, 1743, M. 15,820; *A v. B*, 1749, M. 15,823; *Winton & Company v. Thomson & Company*, June 10, 1862, 24 D. 1094; or where the obligant under the deed had destroyed them—*Ritchie v. Ritchie*, June 10, 1871, 9 Macph. 820. This case came under both categories. As to the *casus amissionis* see *Winchester v. Smith*, March 20, 1863, 1 Macph. 685. [By the Court—What use could you make of the document in the summons, which is without testing clause, subscription, or witnesses, even if its tenor

were held proved?] A declarator in an action of adjudication and implement might be brought, but that would be a matter for future consideration—see *Falconer v. Stephen*, 1848-49, 11 D. 220 and 1338. There too an admission of destruction although qualified was considered apart from its qualification.

Counsel for the defender was not called upon.

At advising—

LORD PRESIDENT—The defender in this case must in my opinion get decree of absolvitor. No adminicle whatever has been produced, and the *casus amissionis* is said to be that the deed whose tenor is sought to be proved was destroyed by the maker of it while it was in his possession, and consequently while it must be presumed to have been an undelivered deed. In these circumstances it is an attempt for the first time to set up a written document by parole evidence alone. The deed being in the possession of the supposed granter it must be presumed that it was in his power to deal with it as he chose. It is not averred that he was under any obligation to grant such a deed as this is represented to have been, and therefore not entitled to destroy it. The tenor is not susceptible of proof here except by parole, and that is an entire novelty in my experience. The evidence led here is quite insufficient for the object desired. But the difficulty of the pursuer's case does not end there. He sets forth as the deed to be set up a deed which ends with the words "in witness whereof," and proceeds no further. There is no evidence that the deed ever had a testing clause, or was ever subscribed by the granter, no witnesses' names are given, and yet it is not suggested that it was a holograph deed.

I see no escape from the conclusion that the pursuer has completely failed to set forth anything like sufficient grounds in support of his case, and that therefore the defender is entitled to absolvitor.

LORD ADAM—I am of the same opinion. As your Lordship has said, the proposal here is to set up an alleged disposition by parole evidence alone, there being no written evidence whatever. That is a very uncommon case, but I desire to guard myself from saying that in no conceivable case would it be possible to set up a writing by parole only. I can figure to myself cases in which the words of the deed lost might be clearly and distinctly recovered by parole. I reserve my judgment upon such a case, but I have no difficulty in this particular case. There is no evidence of the tenor of the deed sought to be set up. We have only the evidence of a solicitor who says he saw the deed, and that in his opinion it was a binding absolute disposition. He does not profess to know the terms of the deed, to be able to state the words or even to give its tenor. He cannot give any one word in it. In such a case we have an absolute failure to set up the deed.

Further, even if we were to pronounce decree in the terms of the summons, which sets out the terms of the document, we should in my opinion be setting up a worthless deed having no testing clause, no subscription either of the granter or of witnesses, and which could be of no avail to the pursuer.

LORD M'LAREN—No doubt this case contains an element of novelty in so far as there is no written evidence to supplement the parole—evidence as regards the tenor of the deed which is sought to be set up—but I should be sorry to think that the law was such that in no circumstances could a deed which had been fraudulently destroyed be set up by parole evidence alone, supposing its tenor could in fact be ascertained by such evidence. A deed might be a mere copy of a statutory form with the names of the parties and the description of the subjects disposed inserted. In such a case every word might be supplied from the memory of the draughtsman having before him the style book and the deed from which the description of the subjects were taken. But as to the second point—and here is the real difficulty—there is no evidence that the deed alleged to have been destroyed was an absolute and irrevocable disposition by the granter in favour of the lady whom he regarded as his wife. We have not got the evidence of the solicitor who prepared the deed, or of the instrumental witnesses. It is indeed remarkable that it should have been found impossible to trace the draft of the deed, because solicitors are known generally to preserve their drafts. But that being so we have only the evidence of a solicitor who many years after the deed had been prepared says he saw it, and who states that he has the impression derived from entries in his note-book that the deed was or must have been an absolute deed. Such evidence is altogether insufficient to establish the tenor of the deed in dispute as an absolute deed. I think therefore the pursuer has failed to establish his case. That is his misfortune. It may be a hardship to the pursuer that a deed has been destroyed which was once in existence, and in which he thinks he has an interest and which cannot now be set up. But that is only the unavoidable result of the inability of the pursuer to adduce more satisfactory proof of the tenor of the deed.

LORD KINNEAR—I think that even if the pursuer had made out his case in substance so that we could have given decree in terms of the summons it would have been a futile decree, because he proposes to replace a deed incomplete as submitted to us, which has been destroyed, by a new document in the same terms and to the same effect. If he had got the decree he desired he would have been furnished with a document of which he could make no use whatever—a document undated, untested, unsubscribed. The document asked for is so drawn just because the pursuer could not supply a

testing clause. If he had proved in substance that the granter had got possession of the deed fraudulently, and had fraudulently destroyed it to defeat the just rights of his wife, I have no doubt the pursuer would have had a good action, but it would not have been an action of proving of the tenor. Such an action is futile unless the pursuer can supply enough to make the deed set up a good feudal instrument. There would have been nothing if there had been fraud to prevent him getting the defender ordained to grant a new deed or adjudging in implement of the granter's obligation, but he has failed to prove the substance of his case. His case is that he has failed to get the benefit of a disposition never intended for him. He says that the defender executed a conveyance settling certain property absolutely upon his wife. Now, it is not to be supposed that the defender intended not only to put the property away from himself to her, but from himself and her children to her heirs even in his own lifetime. It would need exceedingly clear and precise evidence to establish that, whereas we have no evidence whatever but the opinion of a solicitor, who says he thought the deed submitted to him for his opinion was an absolute deed. That is not evidence to which we can give any effect. The only evidence of his which we could have given effect to would have been evidence from his remembrance as to the contents of the deed. If he had been able to say "I studied the deed, it contained a destination to the wife and her heirs, it contained no clause reserving the granter's liferent, it contained words dispensing with the necessity of delivery," and so on, his evidence might have been worth something, but he is not asked a single question which could bring out the contents of the deed plainly, because it was known that it was impossible for him to give any such answers in support of the pursuer's case. I think the pursuer has failed in fact to prove the substance of his case.

LORD PRESIDENT—I wish to add that I think the element of fraud is not in this case at all. If there had been a relevant averment of fraud on the part of the maker of the deed in destroying the pursuer's absolute right to the deed, there would certainly have been a remedy, but the remedy would not have been such as that of the action before us. As to what that remedy would have been I reserve my opinion.

The Court assolizied the defender.

Counsel for the Pursuer—M'Kechnie—Burnet. Agents—Waugh & M'Lachlan, W.S.

Counsel for the Defender—H. Johnston—M'Clure. Agent—Alex. Morison, S.S.C.