

Wednesday, June 19.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

SUTHERLAND v. W. M. LOW & COMPANY, LIMITED.

Cautionary Obligation—Reduction as against Creditor—Conduct of Creditor—Facility and Circumvention—Deed Obtained by Misrepresentations made by Debtor on the Instructions of the Creditor.

In an action of reduction brought by the granter of a cautionary obligation on the ground of facility and misrepresentation, it was proved that A, the pursuer's brother-in-law, who was insolvent, being pressed by B, a creditor, to obtain security for his debt, asked the pursuer, a retired butler seventy-eight years of age, who was infirm and facile, to become cautioner in a bond. On the pursuer's refusal to do so without consulting his law-agent, A, acting by arrangement with and on the instructions of B, assured the pursuer that there was no need to consult a law-agent, and that he would never likely be called upon to pay. The pursuer was thereby induced to sign the bond. The fact that A was insolvent was not disclosed to him. He was called upon to pay the sum in the bond. *Held* that the deed fell to be reduced as against both A and B.

Benjamin Sutherland, retired butler, Edinburgh, brought an action against W. M. Low & Company, Limited, Burgh Sawmills, Leith, and Robert Thomson, joiner, Kirkcaldy, and Robert Hunter, builder, Kirkcaldy, trustees under a trust-disposition granted by Robert Thomson for behoof of his creditors, in which the pursuer concluded for reduction of a bond for £303, 15s. Id., which bore to be granted by Robert Thomson as principal and by the pursuer as cautioner, surety, and full debtor for and with Thomson, at least in so far as the same affected the pursuer.

The pursuer pleaded, *inter alia*--“(1) The pretended bond described in the summons should be reduced, in any case so far as it affects the pursuer, in respect—. . . (b) That it was fraudulently impetrated from the pursuer by the defender Robert Thomson; (c) that the pursuer, when he executed the deed, was weak and facile, and easily imposed on, and that the said Robert Thomson taking advantage thereof did by fraud or circumvention procure the pursuer's signature thereto to his lesion. (2) In respect that the defenders W. M. Low & Company, Limited, instructed the said Robert Thomson to procure the pursuer's signature to the said pretended bond by the misrepresentations and in the circumstances libelled, or otherwise in respect that they had reason to suspect and knew, or ought to have known, that the said Robert Thomson had procured the pursuer's signature by the misrepresentations and in the cir-

cumstances libelled, the pursuer is entitled to decree of reduction as concluded for.” They also pleaded (3) that the deed was not duly executed in accordance with law.

Proof was allowed and led. The import of the evidence sufficiently appears from the opinion of the Lord Ordinary, *infra*.

The Lord Ordinary (KINCAIRNEY) on 22nd January 1901 pronounced this interlocutor:—“The Lord Ordinary having considered the proof, productions, and whole cause, Finds in fact (1) that the bond libelled was duly executed; (2) that when it was granted the pursuer was facile, and that the defender Robert Thomson, by fraud or circumvention, and by arrangement with the defenders W. M. Low & Company, Limited, procured his signature thereto; (3) That he did so on the instructions of the defenders the said W. M. Low & Company, Limited; (4) That these defenders are not entitled to retain the benefit of said bond procured as aforesaid: Therefore sustains plea one, subdivisions (b) and (c), and plea two for the pursuer; Repels the third plea-in-law for the pursuer, and reduces, decerns, and declares in terms of the conclusion of the summons so far as the bond mentioned in said conclusion affects the pursuer, but subject always to the obligation by the pursuer contained in the minute for the pursuer: Finds the defenders W. M. Low & Company, Limited, liable in expenses to the pursuer, reserving the question of modification: Allows an account,” &c.

Opinion.—“The grounds of reduction are (1) essential error, fraudulent impetration by Thomson, and facility of Sutherland; (2) that the deed was procured by Thomson on the instructions of Low & Company, and that Low & Company knew, or ought to have known, that it was procured by Thomson's fraud, and (lastly) defective execution.

“There is not much important conflict of evidence, and the facts are brought out sufficiently clearly. The circumstances under which the bond was granted are these. It appears that in or about March 1899 Thomson owed Low & Company above £300, and it also appears that Thomson had then several other pressing creditors, and that he was hopelessly insolvent, so much so that he granted a trust-deed for behoof of his creditors on 11th April 1899. He was, however, owner of a property in the burgh of Dysart, which was burdened by a bond for £500. It may, however, have been worth more than that, and if conveyed to Low & Company it might have afforded security to some extent for Thomson's debt. But then it seems clear that if Low & Company had taken a disposition of it in security it would almost certainly have been reduced as a gratuitous deed in favour of prior creditors, and therefore as a fraud on the other creditors of Thomson.

“Low & Company, as Mr John Low admitted in his evidence, were aware of the embarrassed state of Thomson's affairs, and they were confessedly desirous of obtaining security for their debt, even although it might have been a preference. But this simple mode of obtaining such a

security and preference could not be adopted with safety. But Thomson's sister was married to a retired butler Benjamin Sutherland, who apparently had money enough to be able to give sufficient security for the debt due to Low & Company, and it was arranged between Low & Company and Thomson—it is not very clear which suggested the idea—that Sutherland should be asked to become security for the debt due by Thomson, and that Thomson should dispose to him his property in Dysart. This plan was carried out; Sutherland granted the bond now sought to be reduced, bearing date 21st March 1899, and Thomson by an *ex facie* absolute disposition, dated 20th March 1899, disposed the subjects in Dysart to Sutherland. Sutherland had not asked this deed, and did not understand why it was granted. More motives than one might be imagined, but that is a question which it is not necessary to follow. The consequence of these transactions so long as unchallenged was this, that the defenders Low & Company obtained the security of Sutherland for Thomson's debt, and Sutherland in exchange received Thomson's Dysart property for what it was worth, and Thomson's other creditors are deprived of that property. The whole benefit accrued to Low & Company, and the loss to Thomson's other creditors, and also to Sutherland if the value of the Dysart property burdened by the bond for £500 should prove to be less than Thomson's debt to Low & Company. This, however, is not an action of reduction by Thomson's trustee, and he has not as yet taken any step to recover the Dysart property. I do not suggest that he could have done so, seeing that it might be maintained that the disposition to Sutherland was an onerous deed.

“This action is by the cautioner Benjamin Sutherland, who was at the date of the bond a very frail old man, and who seeks reduction on the grounds which have been stated.”

[His Lordship then considered the pursuer's plea (3) as to the defective execution of the deed, which his Lordship held not to be established]—“On the other grounds of reduction, however, I have come to a different conclusion, and think that the pursuer is entitled to prevail, although the point is narrow and not free from difficulty. It was no doubt natural and legitimate that Low & Company, who have been represented in this case by Mr John Low, should endeavour to get security for the debt due to them by Thomson; and no objection can be taken to Mr Low's request or demand that Thomson should procure such security, and that he should procure the security of his brother-in-law, if Low did not know—as he says he did not—of his great age and frail condition. But when the idea occurred to Low—it was to him and not to Thomson that the idea occurred—that Sutherland might be protected really or apparently by a disposition of Thomson's Dysart property, he came perilously near to a fraud on Thomson's other creditors. That, however, is not the question here raised, which

is about fraud said to have been practised on Sutherland, not on Thomson's creditors.

“Now, it is clear that Mr John Low never saw Sutherland, and any influence which he may have exerted to induce Sutherland to sign the bond must have been exerted through the instrumentality of Thomson. The first question therefore is whether Thomson induced Sutherland to sign the bond, and how he did so, and the second is whether Low and W. M. Low & Company, Limited, are implicated in or answerable for the acts or representations of Thomson.

“But, in the first place, it is of course necessary to advert to the mental and bodily condition of Sutherland. I unfortunately did not see him because he was not able to come to the Court, and it was necessary to take his evidence on commission. I do not think it proved that he was quite incapable of understanding the deed, or that he had not some idea about its nature. Indeed, the pursuer does not make that case on record, and does not plead that the deed was not Sutherland's deed. But he avers and pleads that he was feeble and easily imposed on, and that, in my opinion, has been proved. He was seventy-eight years old, and had apparently fallen into a condition of senility. Thomson was his brother-in-law, Mrs Thomson his sister, and Jane A. Thomson (Thomson's daughter) his niece and housekeeper. On this old man, Thomson, by arrangement with Low, called on 21st March, and he asked him to become security for him (Thomson). Thomson says that the sum he mentioned was £200. Considering the connection between them, it may be that Thomson thought that his request was not extravagantly unreasonable, and was one with which he might fairly hope that Sutherland would comply. But there is no doubt that on this occasion Sutherland did not consent, but declined to comply without consulting Mr Patrick Blair, W.S. Sutherland had been for many years in the service of Mr Blair and his father, and he was accustomed to consult Mr Blair whenever any business had to be done, and there could be nothing more natural and reasonable than that he should desire to consult him when asked to do so serious a thing as to sign a bond of caution. On getting this answer Thomson did not then press his request further, but called on Low & Company at their office in Leith, where he saw Mr John Low, and informed him that Sutherland would not sign the bond without Mr Blair's advice. One might have expected that Mr Low would have recognised the reasonableness and propriety of Sutherland consulting Mr Blair on the occasion, and might have expressed his approval of that course, and so through Thomson's intervention have encouraged Sutherland to follow it. That would have been an honest course to take, although I do not say that Low was under a legal obligation to take it. But it is clear that Mr Low did not do that. He told Thomson that Sutherland would incur no danger, and that if the matter were fully explained to him there would be no difficulty. Mr

Low's evidence does not strike me as perfectly frank, but I cannot doubt that he at least discouraged the idea of consulting Mr Blair. It is impossible to doubt that he felt that if Mr Blair were consulted there was little chance of the bond being executed, and that he sent Thomson back to Sutherland in order to persuade him that he incurred little or no risk in signing the bond, and that he might do it without consulting Mr Blair.

"After this interview with Mr Low, Thomson returned to Sutherland's house, having with him the bond prepared and ready for execution. Thomson depones that he then repeated to Sutherland what Low had said to him, namely, that there was no necessity for Mr Blair knowing anything about it, and that all that was wanted was his name. Mrs Thomson and Jane Thomson, who were present, substantially corroborate that evidence, and although I agree that the evidence of the Thomsons is not above suspicion, it is consistent with Low's evidence, or nearly so, and I think I may hold that Thomson is substantially correct in his account of what he said to Sutherland.⁽¹⁾ Sutherland then signed the bond without consulting Mr Blair, persuaded to do so—as may be fairly presumed—by what Thomson had said. . .

"A creditor or his debtor may be under no absolute obligation to make a full disclosure to a person who agrees to be a cautioner. But if a creditor or debtor actively dissuades the cautioner from consulting his legal adviser, then I think that very little more is necessary to warrant reduction. Although there may be no absolute duty of disclosure in a contract of surety, yet (to adopt the words of Justice Fry in *Davis v. The Provincial Marine Insurance Company*, February 28, 1878, 8 Ch. Div. 469, 475, quoted by the pursuer's counsel) very little said which ought not to have been said, and very little omitted which ought to have been said, will avoid the deed. On this point the pursuer referred also to *Owen v. Homan*, 1852, 4 H.L. Ca. 997, 1033.

"Mr Low explains that he considered that Sutherland undertook no risk because of the conveyance by Thomson of the Dysart property, but I think that reason quite insufficient. There has been no reliable proof of the value of that property, and it appears to have been burdened with the full sum which could be borrowed over

it, and there is no adequate proof that it was worth more, certainly none that it was worth the sum in the bond.

"I am therefore of opinion that—having in view the facility of Sutherland, the fact, which I think of great importance, that Sutherland was prevented from consulting his law-agent, and the false representation that he incurred no risk in signing the bond—enough has been proved to warrant the reduction of the deed in a question with Thomson, and as it appears to me that Thomson but repeated what Low had told him, with the view that he should repeat it to Sutherland, I think that the deed must be reduced in a question with Low also. I have assumed that Low in this matter binds the Company by what he said and did. The contrary has not been pleaded or argued. I am of opinion on these grounds that plea 1 (b) and (c) and plea 2 for the pursuer should be sustained, and plea 3 repelled.

"I understood the pursuer to argue further that the deed ought to be reduced apart from all connection of Low or Low & Company with the representations of Thomson, on the ground that Low & Company are not entitled to retain any benefit derived from Thomson's fraud in terms of the brocard *nemo debet locupletari aliena jactura*, referring to *Clydesdale Bank v. Paul*, March 8, 1877, 4 R. 626, and *Wardlaw v. Dunlop*, June 10, 1859, 21 D. 940. I am disposed to think that this argument is well founded and applicable to the circumstances. Perhaps it is not very well pleaded, although I think the pleas may cover it.

"The pursuer lodged a minute to the effect that if the bond were reduced he undertook to execute and deliver in favour of the trustee for the creditors of Robert Thomson a disposition of the Dysart property which was conveyed by Robert Thomson to Sutherland. It is clear that the obligation to do so follows from reduction of the bond of caution."

The defenders reclaimed, and argued—Even if the deed fell to be reduced in a question between the pursuer and Thomson as having been procured by the misrepresentations of the latter, it should not be reduced as in a question with Low, unless it were proved (which it was not) that he had employed Thomson as his agent to make the misrepresentations to the pursuer—*Hamilton v. Watson*, March 11, 1845, 4

⁽¹⁾ Thomson depones as follows:—After Sutherland told me he could not be cautioner without consulting Mr Blair, I went to the Leith office of Low & Company and reported the result of my meeting with Sutherland to Mr John Low. I told what I have said to-day. Mr Low said it was not necessary that Mr Blair should know anything about it, that possibly the money would never be called for, and at least I would have two years to pay it. I would have the interest to pay during the two years, but not the cautioner. When I had that conversation with Mr John Low, Mr William Low was in the room for a short time. He is a brother of Mr John Low. Mr John Low said, if I got the security they were to keep me supplied with wood, so that I would not need to stop. The bond was then handed to me by Mr Low. That was the first time I had had the bond. Mr Low asked me to go up and see Mr Sutherland to see if I could get him to sign it. I left the office in company with Mr Low and we went along to the foot of Leith Walk together. When we got to the foot of Leith Walk I intended taking a car up, and Mr Low said I would not have time. We then went along to a restaurant and had a refresh, at his expense, and then he got a cab for me and I got into it with the bond. I went up to Sutherland to get him to sign it. Mr Low paid for the cab. When I arrived at Sutherland's, I told Sutherland what Mr Low had said to me—namely, that there was no necessity for Mr Blair knowing anything about it, that he would never likely be called upon to pay anything, and all that was wanted was his name. I told him that I would have two years to pay it, and would have to pay the interest in the interval.

Bell's App. 67; *Railton v. Matthew*, June 14, 1844, 3 Bell's App. 56; *Young v. Clydesdale Bank*, December 6, 1889, 17 R. 231; *Wallace's Factor v. M'Kissock*, February 23, 1893, 25 R. 612, per Lord M'Laren at p. 652.

Argued for the pursuer and respondent—It was established by the evidence that Low had instructed Thomson to make the misrepresentations by which the pursuer was induced to sign the deed. If that were so, the case was the same as if Low had himself made the statements to the pursuer. In any view the non-disclosure of Thomson's circumstances—the fact that he was insolvent—was sufficient as in a question with the proposed cautioner to void the deed—*Owen & Gatch v. Homan* (1853), 4 H.L. Ca. 997, per Lord Chancellor Cranworth, at p. 1033; *Davies v. London and Provincial Marine Insurance Company* (1878), 8 Ch. D. 469, per Fry, J., at p. 475. Alternatively, Low was not entitled to retain a benefit derived from Thomson's fraud, on the principle *quod nemo debet locupletari aliena jactura*; *Clydesdale Bank v. Paul*, March 8, 1877, 4 R. 626; *Wardlaw v. Mackenzie*, June 10, 1859, 21 D. 940.

At advising—

LORD YOUNG—I have given my best attention to this case, which is certainly peculiar, but depends, in my opinion, on principles which are well-established.

I quite assent to the general proposition that a creditor who calls upon his debtor to find security for the sum which he is due is not at all responsible for any misrepresentations which his debtor may make to anyone to whom he goes for the purpose of getting him to become security for the debt. But the circumstances of a particular case may be such, and the conduct of the creditor in a particular case may be such, as to make him responsible if the security has been obtained in an objectionable manner; and the question here is simply whether, on the facts disclosed by a very voluminous proof and by the documents produced, the creditor, that is Low, so acted as to be responsible for the manner in which this security was obtained, and whether it was obtained in such a manner and under such circumstances as to enable the surety to be relieved—to be “restored against”—what he ought never to have been required to do.

Now, the circumstances of this case, although as I have said peculiar, are capable of being simply stated. The defenders' firm seem to be traders not in a large way of business, and their customer Thomson seems to have been a trader in a comparatively small way of business. He had become indebted to Low in a sum rather over £300, and Low was getting anxious about the debt, and accordingly made such inquiry as was necessary to inform himself beyond what he already presumably knew as to the circumstances of his debtor Thomson. Now, without going into the evidence at all, I think the result of that inquiry was that he knew he was absolutely insolvent. He had a small property worth some £500,

but still his debts were such that the property would not pay them, and left him insolvent, so that if his estate were wound up he would only pay a small dividend. Low was therefore anxious to have the payment of his debt secured as well as he could. He also ascertained that Thomson had a brother-in-law, a retired butler, who was from his savings during the many years he had been a butler in a position, as his debtor Thomson quite truly informed him, to be good security for a debt of £300. Now, that was all he ascertained, so far as I think we are interested to inquire about it in the present case—that his debtor had a small property and had a brother-in-law in circumstances which would enable him to be good security. I think we must take it that Thomson also informed him that he was old and infirm, and—without using the word “facile”—that he was in such a condition that no man acting properly would go to him and ask him to put his name to a deed without the aid of a man of business.

Now, Low under these circumstances prefers to have this old butler's security to having the conveyance of his debtor's property, and one can see the reason for that, irrespective of a good moveable security being better than a conveyance of house property. What Low desired was that his debtor should get his old brother-in-law as security, and accordingly Thomson goes and tries, with the result that he comes back and communicates to Low that the pursuer would not put his name to a deed without consulting a man of business—that he declined it. Well, I think Low had intelligence enough to know that if the pursuer went to a man of business he would not allow him to become security for £300; he would certainly know his brother-in-law's condition, and that he was absolutely insolvent and would not allow him to sign the deed. Now, what does he do in these circumstances? He says—“Oh, go back and urge him to sign the deed without consulting a man of business. Tell him he is in perfect safety; that a man of business is of no use; that he will never be required to pay anything, and that he ought to sign the deed as your brother-in-law without consulting a man of business.” Now, assuming that to be true, as I think it is, then in my opinion it puts Low in much the same position—I should say in entirely the same position—as if he had gone instead of Thomson, being acquainted with the pursuer, and had said this—“Oh, sign this. It will be a good thing for your brother-in-law, a man of business is absolutely useless and unnecessary for your protection.” I think it absolutely clear that if he had done that himself he could not have enforced a bond which he had so persuaded the pursuer to sign. Now, I think he put himself in the same position in legal estimation, and for the purposes of those just and honest considerations which the law not only allows but requires, by sending Thomson with his instructions, and on his strong and urgent advice to do that.

Now, what we have to consider, then, is

this, whether the pursuer—looking at the evidence as to his condition, his age, infirmity, and facility—should have been asked by any honest man to sign this bond for an insolvent brother-in-law without consulting his man of business. He would say—"I cannot understand any deed without consulting my man of business. He knows all my affairs. I was his butler and the butler of his father, and I have never done any piece of business without him." Now, I ask the question, Ought we not on the principles of justice which we are administering in this Court to restore the man against the position into which he was reduced by being induced by means of urgency—for it was urgency—to put his name to that deed? Now, urgency is just desperation. It is cause for the reduction of a deed and the restoring of a party who put his name to it to the position in which he was before he put his name to it.

Now, I think these considerations of justice require that the pursuer should be restored by the reduction of the deed to the position in which he was before he was induced to sign it. If Low had no connection with the proceedings the restoration could not have been made without injustice to him. If he had taken the deed *in bona fide* it would have been impossible to restore the pursuer without inequity to Low, who had no hand in getting it in that way. But in the first place I think he had, for the reasons I have already stated, a hand in getting it done; and in the second place, even if he had not, I think restoration might have been made as required by justice to the pursuer without doing any injustice to him. What the Court inquires into in a matter of that kind is, has the other party, by the signing of the deed and giving it to him, been deprived of any advantage, of anything which he would have had had the deed not been signed. Now, I think it is clear upon the evidence here that Low was not, and that the restoration of the pursuer, which in my opinion justice requires, might be made without doing any injustice to Low. But that is unnecessary, for it is only a second ground if my opinion is sound, that Low is himself responsible for the way in which the pursuer was induced to do what honestly he ought never to have been required to do.

I am therefore of opinion, on these grounds, and upon those which have been stated by the Lord Ordinary in his note, that his Lordship's judgment ought to be affirmed.

LORD TRAYNER—I agree. I think the proof amply supports every fact on which the Lord Ordinary has pronounced, and if these findings in fact are right, I think the Lord Ordinary's conclusion in law follows as the necessary conclusion.

LORD MONCREIFF—I am of the same opinion, and have very little to add. I think that in his note the Lord Ordinary correctly summarises the facts of the case, and I agree in the inferences which he draws from those facts. The question which we have to decide is really now nar-

rowed to a very narrow and very sharp one. It is now admitted—at least I do not think it was strenuously disputed—that Sutherland was facile, and that he was induced to grant the bond of caution through the circumvention of Robert Thomson. The only question we have to decide is, whether the defender Low is affected by the fraud and circumvention used by Thomson in procuring this deed. Now, I think the case is a special one, and I quite recognise the general law that a creditor is entitled to call on his debtor to furnish him with security, and that if he does not interfere he will not be affected by the means taken by the debtor to obtain it, unless indeed fraud is used and the creditor gets a gratuitous benefit through the fraud of his debtor. We have not to decide that question. I think there might have been room for argument if the circumstances of this case had raised it. But the case we have to deal with is a very different one, namely, that of a creditor who, not content with calling on his debtor to furnish security, himself interferes in the selection of the cautioner and puts unfair pressure on the cautioner, instructing the debtor to dissuade him from taking steps for his own protection which, if taken, would certainly have prevented him from becoming cautioner. In such a case I think the creditor forfeits all the benefit which enures to a creditor who abstains altogether from interference in such a matter. In the present case, therefore, the only question we have to consider is, whether in making his representations to Sutherland and preventing him from consulting his own agent Thomson was acting as the hand or agent of Low; and on that point I have not the slightest doubt. I think the evidence, to which I shall not refer, amply instructs that it was at Low's instigation that Thomson returned to Sutherland and induced him to abstain from seeing his own law-agent before signing this deed. And on the whole matter I quite concur with your Lordships that the interlocutor should be affirmed.

LORD JUSTICE-CLERK—I am of the same opinion. This is not a case of the general kind where a party gets into low water, goes to a friend and persuades him to grant caution—on persuasions which are of the nature of professions of hope. In the ordinary case, when a man does that there is nothing in it which can be founded on as misrepresentation. But if he makes misrepresentations in regard to fact then of course it becomes quite a different question. Now in this case this man was certainly hopelessly insolvent, and whether he went first when instigated by Low, or even on the suggestion of Low, he came back from Sutherland with the knowledge that his brother-in-law would not act as he desired him to act without laying the matter before his law-agent. Now Mr Low, I think, is proved on the evidence, indeed he practically admits it himself—although he admits very little unless under very great pressure—to have told Thomson there was no need to go to an agent. Now I think

no honest man of intelligence would have given that advice. He gave plainly, I think, dishonest advice. I think Mr Low must have known perfectly well that if his advice was not acted upon and the person to whom the advice was given did see an agent no bond would ever have been granted. Therefore the only other question is whether Thomson in pressing that advice on the cautioner was acting for Low. I think it is satisfactorily made out that he was, and that he was in the same position as Low who had given advice which certainly was not honest advice in such a case. Therefore I agree that the judgment of the Lord Ordinary is right.

The Court pronounced this interlocutor:—

“Refuse the reclaiming-note and adhere to the interlocutor reclaimed against and decern.”

Counsel for the Pursuer and Respondent
—W. Campbell, K.C.—Constable. Agents
—Blair & Cadell, W.S.

Counsel for the Defenders and Reclaimers
—Salvesen, K.C.—M'Lennan. Agent—
John Baird, Solicitor.

Friday, June 21.

SECOND DIVISION.

MEIN'S TRUSTEES v. MEIN.

Succession—Liferent—Residue—Capital and Income—Profits from Lease of Colliery—Free Annual Income and Produce of Residue.

By trust-disposition and settlement a testator directed his trustees to pay the free annual income and produce of the residue of his estate to his widow during her lifetime. The trustees were empowered to carry on for behoof of his whole estate any business in which he was interested. At his death he was tenant of a colliery, and his trustees carried it on.

Held, that the net profits derived from the colliery business were part of the free annual income and produce of the residue of the estate, and fell to be paid by the trustees to the widow during her lifetime without any deduction being made from them in order to secure that the amount, at which the deceased's interest in the colliery was valued as at the testator's death, should be extant as part of the capital of the estate at the end of the lease.

Strain's Trustees v. Strain, July 19, 1893, 20 R. 1025, followed.

Alexander Mein junior died on 23rd June 1899, leaving a trust-disposition and settlement dated 7th May 1897, and a codicil dated 18th March 1899.

By his settlement he assigned and disponent to trustees for the purposes therein-mentioned his whole means and estate, heritable and moveable. The fourth pur-

pose was in the following terms:—“I direct my trustees to hold and apply, pay or convey, the free annual income and produce of the residue of my means and estate for behoof of my said wife in the event of her surviving me, during all the days and years of her life, and that at such terms as they may think proper, having reference to the dates of receipt by themselves of the income, and that in liferent for her liferent alimentary use alienarly: Declaring that it shall be in the power and option of my trustees to apply from time to time, and in such way as they may think proper, in addition to the income, such portion of the capital of my means and estate as they may think necessary for the comfortable support of my wife.”

By the codicil he directed his trustees to apply and convey the residue of his estate to and for behoof of such charitable and benevolent institutions connected with Glasgow as they might select, including certain institutions named by him, in such amounts as they might think proper. By this codicil, in addition to wide powers of management, investment, and sale conferred on the trustees by the trust-disposition and settlement, the testator empowered his trustees “to carry on and continue under the superintendence of themselves, or of any party they may appoint for that purpose, for behoof of my whole estate, for such period of time, and in such manner as they may think proper, any or all of the businesses in which I alone am interested at the time of my death, and that either by themselves alone or along with a partner or partners, whom I hereby authorise and empower them to assume on such terms and conditions as they shall think proper; . . . and generally to do in regard to any business or businesses in which I may be interested as aforesaid whatever in the circumstances they may deem most beneficial to my estate though not herein expressed: Declaring that in connection with their transactions or intromissions in regard to said business or businesses my trustees shall be free from all blame or responsibility further than that they acted in good faith and with ordinary judgment.”

The net value of the testator's estate, including his interest in the colliery and lease after-mentioned, amounted to £26,587, 19s. 11d. At the time of his death the testator, as sole partner of the Barnsmuir Coal Company, was tenant of a coalfield in Stirlingshire under a lease from Robert Inglis, Avonbridge, for twenty-one years from Whitsunday 1882, with power to the lessees to put an end to the lease at Whitsunday 1885, Whitsunday 1888, Whitsunday 1890, and every third year thereafter, on giving six months' written notice to the proprietor. The lease would expire at Whitsunday 1903 unless Mr Mein's trustees should avail themselves as tenants of the above-mentioned power to terminate it at Whitsunday 1902. The lease expressly excluded assignees and sub-tenants except with the consent of the proprietor. The value of the deceased's interest in the colliery at the date of his