

No. 24.

Whether a deed referring to a counter-obligation, was in its nature irrevocable, or gratuitous and testamentary, subject to revocation?

1775. December 7. JOHN and ANN CURDY against THOMAS BOYD.

The deceased John Curdy was by profession a quarrier. The defender, Thomas Boyd, was a farmer in the county of Ayr. An intimacy had subsisted between them; and, in 1755, when Boyd was about 30 years of age, and Curdy was 54, a bargain was concluded between them in the following terms:

On the one hand, Thomas Boyd granted an obligation, by which he became bound and obliged, not only to maintain John Curdy in bed and board all the days of his life, when required, but also, in case Curdy should survive him, to pay to him or his heirs the sum of £.1000 Scots:

On the other hand, John Curdy executed an assignation and settlement, bearing love and favour; and on the recital of said mutual obligation granted by Thomas Boyd; by which he sold, assigned, and disposed, absolutely and irrevocably, to and in favour of Thomas Boyd, his heirs and assignees, under the express burden of paying all his debts and funeral charges, all goods, gear, &c. lying money, bills, bonds, debts, &c. that presently did, or which should belong to him at the time of his death, his body clothes excepted.

Curdy being of a laborious and penurious turn, continued to work and earn wages subsequent to the above transaction, and, at different periods, had lodged money with Boyd to the amount of £.40, for which a bill was granted, and renewed from time to time, the interest being regularly paid to him.

In December 1760, John Curdy executed a disposition in favour of his nephew and niece, John and Ann Curdy, by which he expressly revoked all former dispositions granted by him, and appointed them his executors and universal legatees.

John Curdy died in July 1771, aged 80 years or thereby. Upon this, Thomas Boyd applied to the Commissary of Glasgow for the office of executor, to which he was preferred. Thereafter, John and Ann Curdy, on the title of the disposition executed in 1760, brought an action of reduction in this court against Thomas Boyd, for reducing the disposition and settlement executed in his favour.

The pursuers alleged, *1mo*, In regard to the deed challenged, there appears from the whole of this transaction evident marks of fraud, and gross inequality; *2do*, They denied the existence of any obligation said to have been granted by the defender to the said John Curdy; and, *3tio*, They contended, that the disposition in favour of the defender was gratuitous in itself, testamentary in its nature, and consequently subject to revocation by the granter, who did accordingly revoke it by the settlement in 1760.

On the other hand, the defender denied the charge of fraud and deceit; alleged that the transaction was fair in every respect, and nowise a gainful one for him; that his door was always open to the defunct after, as well as before the date of that transaction; and that he was received and entertained in his house subsequent thereto, for considerable spaces of time, and as often as he chused it himself. And the clamorous averments made by the pursuers, were it true that

the defender had never bestowed a sixpence on the defunct, were irrelevant, because John Curdy, in consequence of the obligation engrossed in the disposition executed in the pursuer's favour, had the defender effectually and irrevocably bound; and, if he had chosen not to insist strictly for implement thereof, the defender could not have been prejudged thereby, as he was bound, as well as willing, to perform, and it was opinional in him to insist for performance or not.

As to the counter obligation, that deed fell to be in the hands of the other party; and the recital of it in the deed granted by Curdy, appeared to be sufficient evidence of its existence. It is true the transaction itself did not appear in a favourable light to the Court, but there was no proper evidence of fraud before them; and inequality alone is not a good ground by our law for setting aside a contract. The question therefore came to this, how far the deed in question was alterable? which the Judges generally thought it was not; for that here there was not a disposition merely gratuitous, but proceeding upon an onerous cause, which the other party could have required implement of; besides, that *facta de successione viventis* are valid by our law, when granted for an onerous cause; and the onerosity was thought sufficiently instructed in this case. Accordingly, the following judgment was pronounced:

“The Lords sustain the defence, and assoilzie the defender.”

Act. R. *White, Maconochie.*

Alt. Geo. *Wallace.*

Clerk, *Campbell.*

Fac. Coll. No. 03. p. 145.

1785. June 17. JOHN ROBERTSON *against* GEORGE ROBERTSON.

The now deceased father of the parties executed a deed, in which after promising his intention to dispose of all his means and estate, and that John Robertson, his eldest son, had formerly received an ample share of his effects, he disposed, assigned, and conveyed, to George Robertson, his youngest son, “all the stocking upon his farms, with all other goods, gear, debts, or sums of money presently pertaining to him, or that should happen to pertain to him at the time of his death, with all bills, bonds, decreets, and every other kind of goods, debts, subjects, and effects that belonged to him, or should appear to belong to him at his decease.”

At the period of executing this settlement, the deceased was creditor by a personal bond, upon which an adjudication afterwards followed; a circumstance from which John Robertson, the eldest son, contended, that the debt contained in it had become heritable, and therefore could not be transmitted in consequence of a settlement which appeared to relate only to moveable funds.

Observed on the Bench: Heritable effects, such as a debt secured by adjudication, will not be carried by a deed conceived in a testamentary form. Where, however, proper dispositive words have been used, the only question is concerning the intention of the deceased, which, in this case, is sufficiently evident.

No. 24.

No. 25.

A settlement chiefly relating to moveables, effectual to convey heritable property, where *dispositive* words are used.