

Wednesday, December 3.

## SECOND DIVISION.

[Lord Adam, Ordinary.]

WHYTE AND OTHERS (ANDERSON'S TRUSTEES) v. WHYTE AND OTHERS.

*Revocation—Mutual Trust Settlement—Power of Survivor to Alter or Revoke—Where the Provision is for a Charitable Object.*

A brother and sister executed a mutual trust-deed which was stated to be irrevocable; the residue of their estates by it were to be distributed in terms of a deed of instructions which provided for the formation of "a fund to be called 'The Anderson Bequest,' their sincere intention and wish being that the same might give great relief to parties residing in the town of B from their poor-rates, and also to assist respectable young people with a sum of money on their setting out in the world." The manner in which this was directed to be done was that half the income should be laid out in the payment of pensions to various classes of persons specified, and the other half in effecting two classes of insurances on the lives of young persons. Various powers were reserved—*inter alia*, a power to the survivor "to alter or enlarge the instructions and powers of the board who were to manage the fund, but that only so as the principal design and object of the bequest should not be interfered with or in any way altered." After the sister's death the brother executed a codicil directing his trustees to keep up a school which he was establishing in B, and to pay a certain salary to the school-mistress. A question having arisen as to whether that was within the brother's power, *held (rev. Lord Adam, Ordinary—diss. Lord Ormidale)* that having in view the wide discretion vested in the survivor in the bestowal of the fund so far as regarded the carrying out the objects of the settlement, the provisions made in the codicil were a reasonable adjustment of the purpose indicated in the deed, and must receive effect.

*Observed per Lord Justice-Clerk*—"I am not able to say that it is impossible to create a vested interest in certain well-defined and specific objects of charity; but at the same time I have great doubt whether it is possible by a mutual settlement of this kind so to bind the parties that the survivor cannot deal with any part of his fortune. My impression is that the survivor would sufficiently discharge himself by accounting for the amount he had received under the contract, and I am not sure whether I should be disposed to go further than that."

Two questions were raised in this case—*First*, Whether certain testamentary deeds executed by Mr and Miss Anderson were mutual, and therefore obligatory between them, to the effect that they could not alter them except by mutual consent? and *Second*, Whether various codicils executed by Mr Anderson after his sister's death, by which certain alterations were made on the original deeds, were within his power?

On 6th April 1857 Mr and Miss Anderson executed six deeds. By the first of these Mr Anderson, with consent of his sister, disposed to her his whole heritable estate in liferent if she should survive him, and to various trustees in fee. His trustees were to hold the same, after payment of his debts, in so far as his personal estate might not be sufficient for the purpose, for the purposes set forth in a deed of instructions subscribed by him and Miss Anderson of even date therewith, and as the same might be altered or revoked by any writing or deed subscribed by them during their joint lives, or if by the survivor, to the extent only authorised by the deed of instructions. The disposition also contained a clause to the effect, that in respect Miss Anderson had, by deed executed by her of even date therewith, conveyed to him her heritable estate after her death, whom failing to the foresaid trustees, he renounced his right to alter or revoke the same, in whole or in part, excepting with her consent, and in the event of his surviving her, to the extent particularly authorised by the deed of instructions. By a second disposition and settlement Mr Anderson disposed to Miss Anderson his whole moveable estate, and appointed her to be his sole executor and universal legatory; and in the event of her declining to accept of the said office of executor, he appointed the same persons whom he had appointed trustees under the disposition of his heritable estate to be his executors. This disposition also contained a clause to the effect, that in respect Miss Anderson had, by deed executed by her of even date therewith, disposed to him the whole of her moveable estate in the event of his surviving her, he renounced his right to alter or revoke the same, in whole or in part, to her prejudice, and declared that the same should not be revocable by him during their joint lives unless with her consent in writing. The *third* and *fourth* deeds were executed by Miss Anderson, and disposed of her heritable and moveable estate in the same way as her brother had disposed of his by the two deeds last mentioned.

The *fifth* deed was a mutual trust-disposition and settlement by which Mr and Miss Anderson disposed to the same trustees the whole moveable estate of the survivor, to be held by them for the purposes, and subject to the directions, contained in the after-mentioned deed of instructions. This disposition also contained a clause to the effect, that in consideration of the destination in favour of them respectively contained in the disposition and settlement of their respective estates, they renounced their right to alter or revoke the same, in whole or in part, and declared that the same should not be revocable or altered by them during their joint lives, unless by a writing subscribed by both of them, and by the survivor only, to the extent specified in the deed of instructions.

The *sixth* deed was the deed of instructions already referred to. It bore that Mr and Miss Anderson, on the narrative of the foresaid deeds, had resolved that their estates, heritable and moveable, under the reserved power therein mentioned, should form a fund to be called 'The Anderson Bequest,' their sincere intention and wish being that the same might give great relief to parties residing in the town of Borrowstounness from their poor-rates, and might assist respectable young people with a small sum of money

on their setting out in the world. For that purpose they directed that their estates should, subject to the foresaid reserved power, be under the management of certain persons, who should act as a board of management or board of trustees. They directed that on the said bequest amounting to £20,000 sterling (which provision was afterwards modified as regarded the amount), or as soon thereafter as should be convenient, the board should expend the clear income thereof (10 per cent. being set aside as a sinking fund) for the following purposes, viz.—That one-half of the income should be laid out in the payment of pensions or annuities to persons of the description and in the order of preference therein specified. They further directed that the board should lay out the other half of the income of the bequest for the purpose of effecting two classes of insurances on the lives of persons of either sex, as the board should from time to time consider proper. One class of insurances was directed to be the insurance of the lives of young healthy persons who might be at the time of effecting such insurances from twelve to twenty years of age, and residing in the parish of Borrowstounness, so as to receive payment of a sum not exceeding £150 on any one life when the person whose life to be insured should have reached any age in the option of the board from twenty-one to twenty-five years. The other class of insurances was directed to be insurances of the lives of young healthy persons who might be at the time of effecting such insurances twelve to twenty-one years of age, and residing in the parish of Borrowstounness, natives thereof to be preferred, so as to secure payment of a sum not to exceed £150 sterling on the death of the persons whose lives were insured. It was further declared, that in the event of the board finding it not practicable to carry the directions into effect in regard to the life insurance, they should lay out that portion of the bequest applicable to the life insurances in the increase of the number of the recipients of the pensions. The parties reserved full power to alter or revoke the deed of instructions, in whole or in part, by any writing or deed to be subscribed by both during their joint lives, and to the survivor to alter or revoke the deed of instructions to the extent of one-fourth part of the heritable and moveable estate of the predeceasing or survivor of them, and to the full extent of the liferent of the estates of both from the death of the predeceasing; and they further reserved power to the survivor to alter or enlarge the instructions and powers of the board, but that only so as the principal design and object of the bequest should not be interfered with or in any way altered.

Miss Anderson died on 16th April 1862. She was survived by her brother, who died on 14th April 1870. Miss Anderson left moveable estate to the amount of £1829, 9s. 5d., to which her brother succeeded under her settlements. The estate left by Mr Anderson, and falling to be administered under the trust, amounted to about £7870, 12s. 1d.

After Miss Anderson's death Mr Anderson executed several codicils, the provisions of which gave rise to this case. The first of these was a codicil executed by him of date 16th March 1869. By it he directed his trustees to complete the building of the school and dwelling-house which

he intended to erect in the garden belonging to him at Providence, Borrowstounness, in the event of the same being begun and not completed during his lifetime. He further exercised the above-mentioned reserved right to dispose of the estate to the extent of a fourth.

On 16th July 1869 Mr Anderson executed another codicil, by which, on the narrative that since the date of the codicil of 16th March 1869 he had so far proceeded with the erection of the schoolhouse and dwelling-house therein referred to, and which he hoped to see in operation in his lifetime, his wish being to assist in supplying good education to boys and girls, and that it was proper that he should supply so far for the proper support of the principal teacher and his or her assistants after his death; therefore, without prejudice in any way to the legacies and provisions to his surviving sister and her family, and other family relations, he directed his trustees or the board to complete the said schoolhouse, teacher's house above the same, and school furniture of the same, should they not be completed in his lifetime, and to keep up and maintain the same in proper repair and condition. He further directed that a sum not exceeding £50 per annum should be expended in payment of salaries to the principal teacher and any assistants that might be found necessary, with a sum not exceeding £3 sterling annually for prizes to the best scholars, to be called the 'Anderson Prizes.' He further directed that the dwelling-house in connection with the schoolhouse should be occupied by the principal teacher and her or his family during the tenure of her or his office, as part of the emoluments of office, and that he or she should also have a salary at the rate of £20 per annum at least. He further directed that the assistant teacher or teachers, if more than one teacher should be found necessary, should each receive a salary at the rate of £10 per annum at least. He further directed that Mrs Agnes Paul should be nominated principal teacher, and her daughter Miss Charlotte Paul assistant teacher, and that she should succeed her mother in the office of principal teacher. He further directed that the instructions regarding the school should be carried into effect immediately after his death, and that one-half of the salaries of said principal teacher and assistant teacher should be paid out of the sum set apart for the payment of annuities or pensions in the deed of instructions, as soon as the trustees or board should find the same practicable.

The erection of the schoolhouse and teacher's house was completed, and the school was opened, shortly before Mr Anderson's death. The school had been carried on ever since by Mrs Paul and her daughter, who had been allowed to occupy the schoolhouse, but they had not been paid any salaries. Mrs Paul and Miss Paul, as principal teacher and assistant teacher now claimed salaries from the date of Mr Anderson's death.

By another codicil the testator directed that the United Presbyterian Church, Borrowstounness, should be allowed in perpetuity the free use of the schoolhouse, &c., for the accommodation of their Sabbath School.

The validity of the directions contained in these two codicils with reference to the school and schoolhouse was in this case called in question as being an interference with and an alteration of the principal design and object of the bequest

contained in the deed of instructions, which Mr Anderson had no power to alter.

The questions were raised in a multiplepounding brought by Robert Whyte and others (Anderson's trustees).

The claimants were (1) and (2) Mrs Agnes Anderson or Whyte and others, beneficiaries under the deeds in question; (3) Mrs Paul and Miss Charlotte Paul, who claimed to be ranked and preferred to the fund *in medio* for the amount of salary provided to them respectively by the codicil of 16th March 1869, from 10th March 1870, when the school was opened, to 10th March 1879; (4) the Managers of the United Presbyterian Church, Borrowstounness.

It was pleaded for the two latter sets of claimants that although the provisions in favour of Mr Anderson and his sister respectively, contained in the various deeds, might be irrevocable, yet in so far as the further testamentary dispositions were concerned they were revocable by the survivor. And further, that the directions in question were not inconsistent with the powers of alteration reserved to the survivor by the deed of instructions.

The Lord Ordinary (ADAM) on 15th July 1879 pronounced an interlocutor, *inter alia*, repelling Mrs and Miss Paul's claim, and also that for the Church Managers. His Lordship added the following note:—

“*Note.*—[After stating the substance of the deeds and the facts *ut supra*].—It is not clear what is meant by the power given to the survivor to alter or revoke the deed of instructions ‘to the full extent of the liferent of the estates of both from the death of the predeceaser,’ but it seems to the Lord Ordinary that what was intended was to give the survivor a power of testing on such part of the income of the joint estates as might not have been used by the survivor.

“The parties, both jointly and separately, executed various codicils to these deeds. These, however, with the exception of those after mentioned, do not call for any particular remark.

“The effect of these settlements would appear to be that each party retained during life the control of his or her estate, but that upon the death of either the several deeds became irrevocable, and could not be altered by the survivor except to the limited extent provided for by the deed of instructions.

“As regards the moveable estate of the parties, on the death of either, the whole vested in the survivor, and on the death of the survivor it was destined to the trustees, under the deed of instructions, to be administered under that trust.

“As regards Mr Anderson's heritable estate, if he predeceased his sister a liferent of it was given to her, the fee vesting in the trustees for the purposes of the trust contained in the deed of instructions. If she predeceased him, the disposition became irrevocable, and in that event also it was destined on his death to the same trustees.

“As regards Miss Anderson's heritable estate in the event of her predecease, it went to her brother absolutely, and so would fall under and be regulated by his settlements as a part of his heritable estate. If he predeceased her, her disposition of it to the trustees under the deed of instructions became in that event irrevocable. In this way the whole estates, heritable and moveable, of Mr and Miss Anderson were destined to these trustees.

[His Lordship then stated the substance of the codicils as already narrated.]

“It appears to the Lord Ordinary that Mr Anderson was not entitled to revoke the testamentary dispositions contained in the deed of instructions except to the extent of the power thereby reserved to him. He had taken a considerable succession under Miss Anderson's settlement, which had been executed by her in the faith that the disposition of the joint estates contained in the deed of instructions should receive effect. Mr Anderson was under an obligation therefore not to revoke that disposition. It cannot be said in this case that there was no mutuality of settlement. See Bell's Lectures, ii. 962.

“With reference to the question whether the principal design or object of the bequest has not been interfered with or in any way altered by the directions with reference to the maintenance of the school and payment of the salaries of the teachers, the Lord Ordinary is of opinion that it has.

“The principal design or object of the bequest is stated in the deed itself to be, to give relief to parties residing in the town and parish of Borrowstounness from their poor-rates, and also to assist respectable young people with a small sum of money on their setting out in the world, and the particular directions given to the board for carrying into effect this design or object are in entire conformity with it.

“The expenditure of money in maintaining a school and schoolhouse and in paying the salaries of the teachers does not appear to be calculated to give relief to persons from their poor-rates, and therefore does not seem to be in conformity with that branch of the bequest. Neither does it seem to be in conformity with the direction to pay small sums of money to respectable young people on their setting out in the world.

“It does not appear to the Lord Ordinary to have been the intention of the parties, at the time the various deeds were executed, merely that the money should be applied to some charitable or benevolent object, and that so long as the money was applied to a charitable or benevolent object it was immaterial what the object was. He thinks that it was intended to be applied to the particular object specified in the deed of instructions. It appears, therefore, to the Lord Ordinary that however desirable and praiseworthy Mr Anderson's object may have been in directing a portion of the money to be applied for educational purposes, yet that it amounts to an interference with and an alteration of the principal design and object of the bequest as set forth in the deed of instructions. It is not merely an alteration or enlargement of the powers of the board in conformity with that design or object. The Lord Ordinary therefore thinks that the directions in question are invalid, and cannot receive effect, and therefore that the claim of Mrs and Miss Paul for their salaries as teachers of the school must be repelled.

“If the Lord Ordinary is right in holding that the board are not entitled to apply the trust-money in the maintenance of the school and schoolhouse, he cannot find that the claimants, the managers or trustees of the United Presbyterian Church, are entitled to the free use of the schoolhouse in perpetuity. It may at any time become the duty of the board to sell the school-

house. Their claim therefore must also be repelled."

Mrs and Miss Paul and the managers of the United Presbyterian Church reclaimed, and argued—(1) Taking the deeds as they were, the provision in favour of the reclaimers was within the power of Mr Anderson as conferred by the trust-deeds and the deed of instructions. The general idea in those deeds was to benefit the inhabitants of Borrowstounness by raising the poor and making them independent of the poor-rate. The method suggested in the deeds was almost incomprehensible, and no better method could be adopted for the end in view than supplying education to the poor of the town, and so enabling them to help themselves. (2) The clause stating the deed to be irrevocable was not binding on Mr Anderson. The deeds here were in their nature revocable, and a declaration of irrevocability would not alter the nature of such deeds—*Mitchell v. Mitchell's Trustees*, June 5, 1877, 4 R. 800. There was here no onerosity which could prevent the survivor selling his own estate. To render such deeds irrevocable there must be a stipulation made in favor of parties, either *nominatim* or distinctly pointed out; there must be a *jus quæsitum* in favour of some one, and here the only people in whom there could be said to be a *jus quæsitum* were the inhabitants of Borrowstounness, which was much too vague and uncertain.

Authorities—*Renton's Trustees v. Alison and Others*, July 20, 1876, 3 R. 1142; *Hogg and Others v. Campbell and Others*, March 18, 1863, 1 Macph. 647; *Craich's Trustees v. Mackie and Others*, June 24, 1870, 8 Macph. 898.

At advising—

**LORD JUSTICE-CLERK**—The question here raised is one of a very unusual and difficult description. It appears that Mr John Anderson and his sister executed a mutual trust-disposition and settlement *mortis causa* in 1857, whereby they bequeathed their whole estate to certain trustees for purposes which were named in a deed of instructions. Mr Anderson survived his sister, and executed several codicils, by one of which he exercised a reserved power to dispose of one-fourth of the capital of his estate, and by another of which he directed his trustees to keep up a school which he was establishing, and to pay a certain salary to the schoolmistress and her assistant. In other respects the deed of instructions remained substantially unaltered. The question now is, whether the schoolmistress and her assistant are entitled to payment from the trustees of the salaries referred to. The objection stated by the trustees is that they have no power to recognise the school, or to give effect to the instructions to pay the salaries; and we are therefore called upon to say whether the trustees have or have not power so to do.

There are many authorities in regard to the effect of mutual settlements, but I am not aware of any case where the beneficiaries under such a settlement were merely an unnamed community. I am not able to say that it is impossible to create a vested interest in certain well-defined and specific objects of charity; but at the same time I have great doubt whether it is possible by a mutual settlement of this kind so to bind the parties that the survivor cannot deal with any

part of his fortune. My impression is that the survivor would sufficiently discharge himself by accounting for the amount he had received under the contract; and I am not sure whether, if that were the question before us, I would be disposed to go further than that. Suppose that a brother and sister in early life, enthusiastic for some cause, execute a mutual settlement such as I have referred to, and that one dies while the other acquires a fortune and marries—it would be a strange result that the survivor might deal with the estate as he pleased during his life, but could not dispose of any part of it after his death.

This, however, is quite clear, that the very nature and conception of such a contract as we have in the present case implies a very wide discretion vested by virtue of the mutual settlement in the survivor as regards the mode of carrying out the objects of the settlement. Applying this principle to the present case, I have come to have no doubt that what Mr Anderson did was so entirely a reasonable adjustment of the purposes indicated in the deed that your Lordships should not think of disturbing it.

The original mutual settlement does not contain the purposes of the trust, but only the nomination of the trustees. The ultimate purposes are contained in the deed of instructions of 6th April 1857, and I think it right to draw attention to the very singular nature of the purposes contemplated by the deed. The estates of the parties are to form a fund to be called the Anderson Bequest, "our sincere intention and wish being that the same may give great relief to parties residing in the town and parish of Borrowstounness from their poor-rates, and also to assist respectable young people with a small sum of money on their setting out in the world." That is the general statement of the object of the trust. It is quite plain that if there be any beneficiaries here with a *jus quæsitum* under this contract, the parties are ratepayers of Borrowstounness and respectable young people. That is very vague, but the generality is made more specific by the deed. It seems that the mode by which the ratepayers were to receive benefit was by half of the annual proceeds of the fund being laid out in the payment of small pensions or annuities to deserving persons, thereby I presume keeping them off the poor-rates, and by the other half being applied in a very singular process of insuring the lives of young persons, with the object, I presume, of enabling them to put themselves out in the world. But these provisions are vague, and I find that a preference is to be given to persons bearing certain names. How far these provisions do or do not create a *jus crediti* that can be enforced against Mr Anderson I think very doubtful indeed. But there are other clauses in the deed bearing on this question. The parties reserve full power to themselves to alter or revoke the deed in whole or in part, by any writing or deed subscribed by both during their joint lives, "and to the survivor of us to alter or revoke these presents by any writing or deed to be subscribed by the survivor alone to the extent of one-fourth part of the value of the capital of the heritable and moveable, real and personal, estates of the predeceaser and survivor of us, . . . and to the full extent of the liferent of the estates of both of us from the death of the predeceaser of us; and we also reserve to the survivor of us to alter

the nomination of trustees under said deeds, and to appoint additional or new trustees, and to alter and enlarge the instructions and powers to said board, but that only so as the principal design or object of said bequest shall not be interfered with or any way altered." Now, holding, as I do, that the purposes of the bequest were to free the community from pauperism, and to enable young persons to set out in the world, I do not think that these purposes could be better promoted than by what Mr Anderson, the survivor, has done, viz., establishing a school and providing salaries to the schoolmistress and her assistant. In my opinion, this is not only clearly within the words of bequest, and the discretion thereby implied, but also strictly within the words of the clause which I have just read, conferring on the survivor power to alter and enlarge within the purposes of the deed.

On the whole, therefore, and without deciding the general question to which I have adverted, I am of opinion that we should find the direction given by Anderson to the trustees to pay the salaries in question to the schoolmistress and her assistant to have been a valid and legal direction.

LORD ORMDALE—The very full, and, as it appears to me, accurate exposition of the deeds of settlement, upon the construction and effect of which this case depends, which has been given by the Lord Ordinary in the note to his interlocutor enables me without much detail to deal with the only two questions which appear to me to require consideration. These two questions are—*first*, Whether the deeds referred to are to be held as mutual, and of the nature of contracts, and therefore obligatory as between the parties Mr and Miss Anderson, by whom they were executed, to the effect that they could not have been revoked or materially altered except by joint consent? And *secondly*, Whether certain codicils executed by Mr Anderson after the death of Miss Anderson, by which alterations are said to have been effected by him upon the mutual deeds of settlement, were within or beyond his powers?

With regard to the first of these questions, it cannot be doubted, I think, that looking merely at the form and terms of the deeds themselves, including what is called the deed of instructions of 6th April 1857, which was executed by both the parties, Mr and Miss Anderson, that it must be answered in the affirmative. This, indeed, was not disputed at the debate; and, at any rate, in my apprehension it seems too clear to be disputed, having regard to the case of *Hogg and Others v. Campbell and Others*, March 18, 1863, 1 Macph. 647. But then it was maintained—and ultimately it was the only point, as I understood the argument, attempted to be made on the part of the reclaimers—that be it that the deeds in question must according to their terms be held to be mutual and binding between Mr and Miss Anderson, so as to put it out of the power of either without the consent of the other to revoke or materially alter them, they cannot have this effect in respect that *no jus quaesitum tertio* was created by them in favour of any particular individual, or any well-defined and certain class of persons, as, for example, in favour of a series of heirs of entail, as in the case of *Hogg's Trustees v. Campbell and Others*. In considering whether there is anything in this supposed distinction it must be

kept in view that there has been in the present case a well-constituted trust for certain purposes perfectly legitimate in themselves, and although the objects of the testator's bounty are not named, and are not a series of heirs of entail, it was not contended that they have not been sufficiently denoted to enable the trustees, whose duty it will be to carry into effect the objects and directions of the trusters, to do so with, it may be, the assistance of the Court. In other words, it was not said that the deeds of settlement were void for uncertainty, as regards either the objects intended to be served or the classes of persons intended to be benefited. That questions regarding these matters may arise, and have to some extent already arisen, in the present as in many other well-constituted trusts, is no doubt true, but that is quite a different thing from holding that the deeds of settlement now under consideration are for that reason wholly void or incapable of being carried into operation.

I am therefore of opinion, in concurrence with the Lord Ordinary, that the first question ought to be answered in the affirmative—that is to say, to the effect that the deeds of settlement referred to are to be held and dealt with as mutual and binding between Mr and Miss Anderson, and could not be revoked or materially altered by either of them without the consent of the other, except to the extent to which power has been expressly reserved to them to do so.

And this leads me to the consideration of the second question, Whether the alterations made by Mr Anderson after the death of Miss Anderson are or are not within the meaning and scope of his reserved powers?

By the joint deed of instructions, which was granted by Mr and Miss Anderson on the same date as the deeds of settlement, and with express reference thereto, it is declared—[states purposes *ut supra*]. These (the purposes already narrated) being the two objects of Mr and Miss Anderson, I am unable to see that education, in any form or to any extent of any class of persons is an element in them. But possibly Mr and Miss Anderson intended that it should be so, and that this appears from the directions they gave for carrying their objects into effect. Now, the directions, as we find them in the deed of instructions, are to the effect—[reads *ut supra*]. Clearly in all this, which is the mode in which the income of the first half of the bequest is to be applied, it is impossible, I think, to find any trace or indication of an educational element; and in regard to the income of the other half of the bequest, it is provided that the sums shall be laid out in effecting insurances on the lives of such persons of either sex as the board of management may from time to time select for that purpose. This may be an odd way of carrying out Mr and Miss Anderson's objects, but I am still unable to find in it the element of education. And it is of importance to observe that the deed of instructions concludes in these terms:—[Quotes power of reservation *ut supra*].

Such being the objects and design of Mr and Miss Anderson, and the mode in which they are to be carried into effect, as stated in their deed of instructions, and also the powers of alteration reserved in that deed, the nature of the alterations made by Mr Anderson which are now challenged fall next to be considered, in order that it may be

determined whether and how far they are within or beyond his reserved powers. The alterations objected to are to be found in what is called the fifth codicil executed by Mr Anderson on 16th July 1869. It will be seen that he there refers to "a school-house and teacher's house" which he is in the course of erecting, and on the narrative that he hopes to see them in operation during his life, his wish being, he says—[states object of codicil *ut supra*].

It was contended on the part of Miss Paul, the teacher whose claim has been repelled by the Lord Ordinary, that these directions of Mr Anderson were not beyond his reserved powers, and consequently that her claim ought to have been sustained in place of being repelled. Now, I must own that my opinion coincides with that of the Lord Ordinary, to the effect that the educational purposes and the elaborate school scheme, with the relative directions of Mr Anderson, as contained in his codicil of 16th July 1869, as now referred to, are beyond the "principal design and object" of him and his sister Miss Anderson, as set out in their joint deed of instructions, and were therefore not permissible under his reserved powers. As already remarked, I cannot discern any trace or indication even of educational purposes in the objects set out by Mr and Miss Anderson in their joint deed of instructions. On the contrary, the objects of their bounty, according to that deed, were, first, "the relief to parties residing in the town and parish of Borrowstounness from their poor-rates," whatever that may mean; and, secondly, assistance to "respectable young people with a small sum of money on their setting out in the world." And the directions given to the trustees for carrying these objects into effect are just as incompatible as the objects themselves with the establishment of a school for children and payment of teachers in that school. I am unable to see how either the payment of sums of money by way of pensions or annuities to necessitous persons residing in Borrowstounness, or the effecting of insurances on the lives of persons of either sex in Borrowstounness, can in any reasonable sense be held to warrant the building or completion of a school and of a dwelling-house for the teacher, or the payment of salaries to the teachers. And if I am right in this, it follows that to apply the trust-funds for such purposes would be beyond the "principal object and design" of Mr and Miss Anderson as set out in their joint deed of instructions, and therefore not within the reserved power of Mr Anderson, which appears to me to have been the offering of relief or aid to certain persons in regard exclusively to their material merits.

It is unnecessary for me to say anything as to the power of Mr Anderson, who survived his sister, to deal as he pleased with one-fourth of the capital of his and his sister's heritable and moveable estates, and also with the liferent of these estates, for that was expressly reserved to him; but I understand from what passed at the debate that in respect the fourth of the capital has been otherwise exhausted by him, and that the liferent, besides being uncertain as regards its proper meaning, referred to by Mr Anderson, is altogether inadequate to meet the requirements of his fifth codicil, it became necessary to deal with the broader questions to which I have addressed myself.

With this explanation, and for the reasons stated, I am of opinion that the interlocutor of the Lord Ordinary is right. At the same time, I may add that I regret being unable to agree with your Lordships in holding that the scheme of education directed to be established by Mr Anderson was within, and not beyond, his reserved powers, for I think it not unlikely that such a scheme would be more beneficial in its effects than the payment of pensions and sums of money, as directed to be made by the parties in their joint deed of instructions.

LORD GIFFORD—In common with your Lordship in the chair, I have felt great difficulty in construing the provisions of the mutual settlement, and in saying what alterations the surviving brother had power to make. I concur in the remarks made by your Lordship as to the *vis quæsistum* enabling anyone to enforce the provisions of the deed. But that matter is not in the case, except that it enables me to give very large powers to the survivor. Assuming that the deeds are binding and irrevocable, according to their true nature—and I am willing so to take it—what were the powers of the survivor? He was entitled to spend the whole or a large portion of the capital, and it is only what remains at his death that is dedicated to the purposes of the trust. Now, it is very material to attend to the precise terms of the deed in regard to the primary and legal intention of the trust. The first purpose is to relieve the whole ratepayers of Borrowstounness from payment of poor-rates in whole or in part. That could only be done by diminishing the poor who form a charge on the rates. The object is, not to pay the rates exigible from poor people, but to relieve all classes, which could be done only by reducing the number of the poor. It is difficult to conceive a wider purpose than that—the diminishing of pauperism in Borrowstounness. The second purpose is more definite. It is to assist respectable young people on their setting out in the world. Probably that has relation also to the possibility of their being ultimately chargeable on the poor-rates, for the parties may have thought that those who were able to start well in life would not thereafter become paupers. The mode of carrying out these two purposes occupies the greater part of the deed of instructions. The first purpose is to be carried out by the giving of small pensions or annuities, and the second by a system of insurances. How these insurances are to enable young persons in setting out in the world I cannot understand, as the sums are payable only on the young persons' deaths. The whole thing seems to be so involved as to partake of the nature of absurdity; and I prefer to fall back upon the leading purposes of the trust to see what powers the survivor had. There was necessarily a large discretionary power in the survivor as to the mode of carrying out these leading purposes. Further, I am of opinion that the clause which your Lordship in the chair has read gave the survivor the power of carrying out the leading purposes of the trust in a different way than by the system of insurances. I think it must have occurred to the mind of Mr Anderson that he might by establishing a school more effectually promote the purposes which he and his sister had in view than by adhering to the particular mode which they originally thought

of. On the whole, therefore, I have come to think very clearly that Mr Anderson did not exceed his powers.

Their Lordships therefore sustained the claims for Mrs and Miss Paul and for William White and others, and *quoad ultra* adhered to the Lord Ordinary's interlocutor.

Counsel for Mrs Paul and Others (Reclaimers)—Kinnear—Young. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Real Raisers and Robert Whyte and Others (The Board of Management of the "Anderson Bequest")—Black. Agent—Thomas Padon, S.S.C.

Counsel for Mrs Whyte and Others—Lorimer. Agent—S. Greig, W.S.

Thursday, December 4.

## FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

### CUMMING v. HAY & STEPHEN.

*Partnership—Liability of Firm for Money Borrowed by Managing Partner whose Name was also Firm's Name.*

A, B, and C were partners of a firm, of which A had the sole management and charge. A having borrowed money from D, and given receipts signed with his name (which was also that of the firm), D on the dissolution of the partnership sued the partners for repayment. *Held* that the money having been proved to have been borrowed by A from D for the purposes and on the credit of the firm, the partners were bound in repayment, it not being requisite that it should be further proved that A had actually applied the money to firm purposes.

George Henry, Alexander Hay, and George Stephen carried on business as fishcurers in Peterhead, under the firm of George Henry, from 29th September 1873 till 14th December 1877, when the firm was of mutual consent dissolved. George Henry had the sole management and charge of the business, the firm's bank account was kept in his name, he accepted all the company bills, and was in the habit of borrowing money for the firm's use from private persons. It appeared that on March 21, 1874, he borrowed £20, and on 18th July 1875, £25, from Mrs Cumming, his mother-in-law. Both sums were alleged to have been borrowed on behalf of the firm, and their proceeds to have been applied to the firm's purposes, and receipts for both were produced signed in his name, which was also that of the firm. Mrs Cumming raised this action for payment of the two sums against the now dissolved firm and their partners.

The pursuer pleaded, *inter alia*—“(1) The said George Henry being the managing and only ostensible partner of the firm condescended on, and having borrowed the sum sued for, for or on behalf of the said firm and applied it towards the firm's business, and the defenders Hay and Stephen being partners of the said firm, the

pursuer is entitled to decree against all the defenders as concluded for, with expenses.”

The defenders pleaded, *inter alia*—“(4) The alleged loan not being authorised by the firm, nor made on the credit thereof, nor the money applied to the purposes thereof, nor on the credit or with the consent or knowledge of the defenders Hay and Stephen, they and the said firm of George Henry are entitled to absolvitor, with costs.”

A proof was led, the result of which appears from the Lord President's opinion, *infra*, and on 6th June 1879 the Sheriff-Substitute (COMRTE THOMSON) pronounced an interlocutor containing the following findings:—“Finds as a matter of fact that the defenders were copartners; that the defender George Henry was managing partner; that he borrowed from the pursuer the sum sued for; that the other defenders who deny liability have failed to prove that the sum was borrowed for any other purpose than the business of the firm: Finds as matter of law that the whole defenders are jointly and severally liable; therefore decerns against the whole of the defenders in terms of the conclusions of the summons.”

The defenders Hay & Stephen appealed to the Court of Session.

Authorities—*Blair v. Bryson*, June 11, 1835, 13 S. 901; *Lindley on Partnership*, i. 361, and case of *Bonbonus* (8 Ves. 544) there; *Johnston v. Phillips*, July 24, 1822, 1 Shaw's App. 244; *M'Leod v. Howden*, June 27, 1839, 1 D. 1121.

At advising—

LORD PRESIDENT—It is averred in the condescence, first, that the defenders Henry, Hay, & Stephen carried on business as fishcurers at Peterhead under the firm of George Henry, from 29th September 1873 to 14th December 1877. That is admitted, and we may therefore deal with this case as a case of a proper partnership business carried on under a firm name. It is averred, in the second place, that Henry was the managing partner, and did the whole business of the firm; and that is admitted by the defender Hay, and not disputed by the other partner Stephen. Hay says—“Henry contracted all the company's debts and signed all the company's bills. The bank-book was kept in his name, and was operated upon by him on the firm's account.” Now, the the next averment, and the most important one in the case, is, that Mrs Cumming, the pursuer, lent two sums of £20 and £25 to George Henry for the purposes of the business; that is, that he borrowed them expressly for the business, and she advanced them to him on account of it. It is further stated that the sums were applied to the purposes of the business. But that is not a necessary part of the pursuer's case. This being a proper partnership, and Henry being entrusted with the whole management of it, if he borrowed for the purposes of the business, the creditor making the advance had nothing to do with the purposes to which it was applied.

The question is, Was this money borrowed by him for the partnership purposes? Now, if that question depended solely on the evidence of Henry, I should be very slow to find it proved, for I do not give much credit to his evidence; his conduct throughout is open to the gravest suspicion, and except in so far as he is confirmed by other wit-