

No. 55. Miss JANE FERGUSON, and ROBERT FERGUSON, Esq. Appellants.—*Clerk—C. Ross—Moncreiff—Hope.*

HUGH ANDREW JOHNSTONE MUNRO, Respondent.—*Warren—Mackenzie.*

Clause, Construction of.—A party having conveyed to trustees his estate, to be made over to particular heirs, in terms of a relative deed of entail, and having also conveyed all the estates and effects he might subsequently acquire; and having thereafter purchased an estate, which, by the letters exchanged at the time, was to be disposed to himself and his heirs generally; but having afterwards taken a minute of sale in favour of himself and the heirs of entail; and the Court of Session having held that the heir of entail, and not the heir at law, had right to the new estate, the House of Lords, of consent, remitted the case to the Court of Session.

March 5. 1823.

2D DIVISION.
Lords Meadow-
bank and Pit-
milly.

IN 1798 the late Sir Hector Munro executed an entail of his estate of Novar, and at the same time a relative trust-deed of settlement narrating the entail, and conveying to Mr. Coutts and others, as trustees, his whole estates, including that of Novar, and his moveable effects, for various purposes. Among these it was declared that the trust should continue till the burdens on the estate of Novar were cleared off, when the heir of tailzie, if then of age, should be put in possession. After specially conveying that estate for behoof of the heir of entail, the deed contained a general conveyance to the trustees of ‘all and sundry other lands, heritages, tenements, annual rents, heritable bonds, adjudications, and other heritages whatsoever, presently belonging to me, or that shall pertain and belong to me at the time of my death, and all and sundry debts and sums of money, &c., together with the whole vouchers, documents, and instructions of my said real and personal estate, and all that has followed, or is competent to follow on the same.’ He also appointed the trustees to make over the residue of his estates to the late Mrs. Ferguson and others. These deeds he placed in the hands of his banker, Mr. Coutts, in London.

In October 1805 he wrote to his agent, Mr. M’Intosh, the following letter:—‘As I do not find by your letter that it is certain you will be here, I send you the codicil which I wish to be made to my last will and testament. The reason for my wishing as much land as possible to be purchased is, that the estate, I find, I can now leave is not sufficient to let the proprietor live as he should do, and keep up the place and improvements. And as to the alterations in the trustees, my worthy friend, Provost M’Intosh, is now of such an advanced age, he would not long be one; and Mr. John Ogilvie has enough of his own affairs to mind, and could not attend much to mine.’

The paper alluded to, and enclosed in the above letter, was as follows:—*March 5. 1823.*
 ‘*Novar-house, 21st October 1805.—I wish a codicil*
 ‘*to be made to my last will and testament in the following man-*
 ‘*ner: All the money I directed to be divided in different pro-*
 ‘*portions to such and such persons by name, after my debts were*
 ‘*paid, and my bequests &c. discharged; that is to say, whatever*
 ‘*part of my personal estate was unappropriated, including what-*
 ‘*ever I might be entitled to receive from the Nabob of Arcot’s*
 ‘*debt to me, I now revoke, and make null and void by this codi-*
 ‘*cil; and instead of applying such monies as above stated, it is*
 ‘*my will and pleasure, and I now direct, that what remains of*
 ‘*my personal estate, together with the patrimony or portion I*
 ‘*directed after my death to be given to my natural son Alexan-*
 ‘*der Munro, who died in November 1804 at Bombay, shall be*
 ‘*laid out by my trustees in the purchase of lands as contiguous*
 ‘*to any of my estates of Novar, Culrain, or Muirton as possible,*
 ‘*and entailed with the rest of my landed property six months*
 ‘*after the purchase is made, and to be immediately afterwards*
 ‘*put upon record: And if I have given as a patrimony or por-*
 ‘*tion, after my death, to my natural son Hugh Munro, more than*
 ‘*£10,000 sterling money, I revoke and recal all the rest of the*
 ‘*money, if any more is given to him in my last will and settle-*
 ‘*ment, and direct it to be laid out in the purchase of lands with*
 ‘*the rest of my unappropriated personal estate, as before men-*
 ‘*tioned, and to be entailed and put upon the record in the same*
 ‘*manner with the other purchases to be made. It is also my will*
 ‘*and pleasure that the following gentlemen shall be my trustees,*
 ‘*and I desire that such as were formerly named by me, and who*
 ‘*are not included in the following list, shall be left out. Those*
 ‘*now named by me are Thomas Coutts, Esq. banker in the*
 ‘*Strand, Edmund Antrobus, Esq., Coutts Trotter, Esq., Ed-*
 ‘*ward Marjoribanks, Esq., partners of the banking-house of*
 ‘*Thomas Coutts, Esq., and Alexander Brodie, Esq. of Arnhall;*
 ‘*and that the directions I gave to my former trustees may be*
 ‘*followed by my present ones in all respects, except so far as this*
 ‘*codicil may make any alteration necessary.’*

A good deal of correspondence ensued between him and his agent relative to the above instructions, which were never put into the form of a codicil, as proposed. In November of the same year, Sir Hector agreed to purchase the estate of Culcairn from the proprietor, Mr. Munro; and accordingly, on the 12th, they exchanged the following letters, both written at Novar-house. The letter by Mr. Munro was in these terms:—‘*In consequence*
 ‘*of our conversation of this date, I hereby sell and dispone to*

March 5. 1823. ‘ you and your heirs all and whole my lands and property lying
 ‘ within the parish of Alness, as well highlands as lowlands, &c. ;
 ‘ and I oblige myself immediately to execute a regular disposition
 ‘ of the said lands and pertinents, (reserving always to me so much
 ‘ of the superiority as will, with the superiority of my lands and
 ‘ estate of Obsdale in the parish of Rosekeen, create two votes,
 ‘ being £.800,) containing all the ordinary clauses ; and hereby
 ‘ agree that our joint agents at Edinburgh be immediately in-
 ‘ structed to draw out the proper deeds, and make up a progress
 ‘ to the said lands, and to transmit the whole for my subscription.’

The letter by Sir Hector was thus expressed :—‘ I am favoured
 ‘ with your letter of this date, making offer of selling to me all
 ‘ and whole your lands and estates in the parishes of Alness and
 ‘ Kiltearn and county of Ross, which offer I hereby accept, and
 ‘ bind and oblige myself, my heirs and successors, to make pay-
 ‘ ment to you of the sum of £30,000 sterling, and that at and
 ‘ against the term of Whitsunday, or 15th day of May next, being
 ‘ the term of my entry to the said lands and pertinents, but longer
 ‘ delay to make payment of the lawful interest of said sum till
 ‘ payment ; it being understood that you will immediately exe-
 ‘ cute a regular disposition of the said lands in my favour, and
 ‘ deliver proper titles, and a progress of the same, for which pur-
 ‘ pose our joint agents in Edinburgh will be employed by us.’

Thereafter, on the 4th of December, a minute of sale was exe-
 cuted, by which ‘ the said Duncan Munro, in consideration of
 ‘ the price agreed to be paid in manner under written, agrees to
 ‘ sell to the said Sir Hector Munro, and his heirs of entail suc-
 ‘ ceeding to him in the lands and estate of Novar, all and whole,’
 &c. ; and ‘ binds and obliges himself, and his heirs and success-
 ‘ ors, upon receiving payment of the price as after mentioned, to
 ‘ make, grant, subscribe, and deliver to the said Sir Hector Munro,
 ‘ and his heirs of entail succeeding to him in the said lands and
 ‘ estate of Novar, an ample and valid feu-disposition,’ &c.

At this time Sir Hector was on his deathbed, and died within
 a few days thereafter. On this event taking place, the trustees
 nominated in the document dated 21st October 1805 brought an
 action of declarator to have it found, inter alia, first, That the
 nomination of trustees in the original trust-deed had been recalled ;
 and, second, That the estate of Culcairn ought to be entailed by
 them on the heir of entail of the estate of Novar. To this action
 they called the respondent, (who had right to Novar in virtue of
 the entail,) and the appellants, who claimed the residuary funds,
 including the estate of Culcairn, under the general conveyance
 in the trust-deed.

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The leading question was, Whether the document of the 21st of October 1805 was to be held as a valid testamentary deed, and as explanatory of, and modifying the trust-deed? On this point the Court, on the 20th of January 1808, ‘sustained the codicil libelled on, executed by Sir Hector Munro upon the 21st of October 1805, as explanatory of, and modifying his latter will and testament;’ and remitted to the Lord Ordinary to proceed accordingly. The question then came to be, Whether or not the heir of entail had right to Culcairn; and if so, whether in fee-simple or otherwise? On this point Lord Meadowbank ‘found, that though, by the trust-deed in 1798, all lands that might belong to Sir Hector Munro at his death were conveyed to the trustees, no power was granted to them, in executing or winding up the trust, to entail the same on the heirs of entail of Novar; and, on the contrary, it rather appears to the Ordinary that, by the import of that deed, all lands not entailed by Sir Hector himself were to be applied by the trustees to the purposes of the trust, and so ultimately to augment the residuary purposes thereof: That by the codicil or testamentary document of 21st October 1805, no provision is made as to the disposal of acquisitions of lands made by Sir Hector himself subsequent to the entail 1798; and that though the alteration thereof made in the residuary purpose of the trust, directing the application of the residuary fund in making purchases of lands to be entailed, indicates what Sir Hector would have ordered to be done with his own acquisitions, had his attention been directed to making provisions as to this matter, such inference is merely a probable conjecture of intention not even attempted to be executed, and can form no ground of action of implement falling within the brocard, non fecit etsi voluerit: Therefore that the acquisition of Culcairn must descend in fee-simple to the heir of entail of Novar, in terms of the simple destination in the minute of sale; and sustained the defences accordingly.’

To this interlocutor the following note was attached:—‘A view of argument occurred to the Ordinary in behalf of the heirs of entail, which is not mentioned in the papers, but may be considered, first, To show that the acquisition of Culcairn, being an act in pursuance of the codicil of October 1805, cannot be considered as the disposal of a particular subject, not to be affected by the general settlement of the succession; secondly, That accordingly it fell under the conveyance of acquirenda in the trust-deed 1798, and of course, under that deed as altered by the codicil 1805, formed part of the residuary fund to be laid out on land to be entailed. Had the minute of sale been conceived in

March 5. 1823. ‘ favour of heirs-general, the Ordinary would have given effect to
 ‘ this argument ; but as the minute is taken directly in favour of
 ‘ heirs of entail, he found it very difficult to find that the estate
 ‘ acquired was carried by the conveyance in the trust-deed 1798
 ‘ in prejudice of those heirs, in order that it might be entailed on
 ‘ them by the power in the codicil 1805 to entail lands purchased
 ‘ by the residuary fund ; and yet this difficulty sounds very like
 ‘ a subtlety, and I should be very well pleased to see it sifted.
 ‘ At the same time it is a sort of indication of intention to have
 ‘ taken the conveyance to the heirs of entail directly, that it should
 ‘ not perform the circuit of falling under the trust-deed 1798 ;
 ‘ and yet it is highly probable that this circumstance proceeded
 ‘ entirely from a mere incorrectness of thought in contemplating
 ‘ the result of that circuit, viz. that the lands were ultimately to
 ‘ go to the heirs of entail.’

In the mean while an appeal had been entered against the judgment of the Court sustaining the above document, in consequence of which, further procedure was stopped. Thereafter the House of Lords, on the 7th of July 1813, ordered and adjudged,
 ‘ That the said interlocutors complained of in the said appeal be,
 ‘ and the same are hereby reversed, so far as they sustain, or can
 ‘ be taken to sustain, the paper libelled on, (in the interlocutor of
 ‘ 20th January 1808 termed a codicil, and therein expressed to
 ‘ have been executed by Sir Hector Munro upon the 21st of Oc-
 ‘ tober 1805,) as explanatory of, and modifying the latter will
 ‘ and testament of Sir Hector Munro : And it is further ordered,
 ‘ that, with this reversal, the cause be remitted back to the Court
 ‘ of Session in Scotland, to proceed therein as is just.’ *

This judgment having been applied, and the case having been remitted to Lord Pitmilley in place of the late Lord Meadowbank, the respondent pleaded,—

1. That the general clause in the trust-deed was not sufficient to include lands afterwards acquired by Sir Hector, as it appeared from the terms of the trust-disposition that he did not contemplate any conveyance of lands, other than the entailed estate to the trustees, so that the appellants could make no claim under that clause.

2. That supposing that clause were sufficient, yet the terms of the minute of sale demonstrated that the intention of Sir Hector was, that the estate of Culcairn should not pass under this general disposition, but should go to his heirs of entail, and that effect ought to be given to that intention : And,—

* See 1. Dow, p. 437.

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3. That although Sir Hector probably meant to have entailed the estate of Culcairn by adding fetters to the destination in favour of his heirs of entail, yet quod potuit et voluit non fecit; and therefore the estate must be held to have passed in fee-simple to these heirs.

On the other hand it was contended by the appellants, That in consequence of the general clause of conveyance in Sir Hector's trust-deed, the lands in question fell under the trust, and formed a part of the residue of his estate, descendible to his residuary legatees, and not to his heirs of entail in the Novar estate, or to his heir of provision in the minute of sale; and in support of this proposition they referred to the terms of the letters which had been exchanged between Sir Hector and Mr. Munro, and by which they alleged the sale was completed.

Lord Pitmilley pronounced this interlocutor:—‘ Finds that, by the trust-disposition in 1798, all lands that might belong to Sir Hector Munro at the time of his death were conveyed to the trustees for the purposes of the trust: Finds, that although the trust-deed does not in express terms give power to the trustees to sell any of the lands falling under the trust, or to dis-
‘ pone or make over land to the residuary legatees at the winding up of the trust; yet, that there being an express conveyance to the trustees in the trust-deed of all lands that might belong to Sir Hector Munro at his death, and the obligation on the trustees to yield possession to the heir of entail at the termination of the trust being clearly limited to the lands conveyed by the entail, to which accordingly the trustees were to make up titles by charter and sasine on the deed of entail, all other lands which might belong to Sir Hector at his death, and of which no other and different destination was made by Sir Hector by a separate deed, must, at the winding up of the entail, have formed part of the residuary fund, and as such must have belonged to the residuary legatees: But finds, that although the trust-deed expressly conveyed to the trustees all lands that might belong to Sir Hector at the time of his death; and although this conveyance would have brought under the trust all lands which Sir Hector had purchased by minute of sale, or other title in his own favour, or in favour of himself, his heirs and successors, in general terms; yet that Sir Hector had it in his power, when purchasing any particular lands, subsequent to the date of the trust, to take the seller of the lands bound to convey the lands to particular heirs or disponees different from the trustees, and, by so doing, to prevent the lands purchased from falling under the clause of the trust-deed referred to; and finds that Sir Hector did so with regard to Culcairn by the minute of sale 4th

March 5. 1823. ‘ December 1805, by which he took the seller bound to sell the
 ‘ said lands ‘ to the said Sir Hector Munro, and his heirs of entail
 ‘ succeeding to him in the lands and estate of Novar,’ and, on re-
 ‘ ceiving payment of the price, ‘ to deliver to the said Sir Hector
 ‘ Munro, and his heirs of entail succeeding to him in the lands and
 ‘ estate of Novar, an ample and valid feu-disposition :’ Finds
 ‘ that the effect of this minute of sale was to prevent the lands of
 ‘ Culcairn from falling under the general conveyance to the trus-
 ‘ tees in the trust-deed of all lands that might belong to Sir Hec-
 ‘ tor at the time of his death, and to destine these lands specially
 ‘ by separate titles to Sir Hector and his heirs of entail; and
 ‘ finds, that although it is sufficiently proved by the minute and
 ‘ codicil of 1805, (which, though set aside as a settlement, affords
 ‘ evidence of Sir Hector’s intention,) as well as by the letters to
 ‘ his agent, that he had resolved to subject the lands of Culcairn
 ‘ to the fetters of his entail, and that his death only prevented
 ‘ this arrangement taking place, and that he never contemplated
 ‘ the settling of Culcairn on the heirs of entail in fee-simple; yet
 ‘ that these considerations cannot authorize the setting aside of
 ‘ the legal effect of the destination contained in the minute of
 ‘ sale, and the subjecting the lands of Culcairn to the clauses of
 ‘ the trust-deed, under which, notwithstanding the general con-
 ‘ veyance in the deed of all lands which should belong to him at
 ‘ his death, this particular purchase never fell, nor was intended
 ‘ by Sir Hector to fall,—he having made a special destination of
 ‘ these lands to other heirs by the minute of sale: Finds, on these
 ‘ grounds, that the lands of Culcairn belong in fee-simple to the
 ‘ heir of entail now in possession of the estate of Novar, Hugh
 ‘ Andrew Johnstone Munro; and that the rents which have fallen
 ‘ due since the death of his father, Alexander Munro, belong to
 ‘ the said Hugh Andrew Johnstone Munro; and that the rents
 ‘ from the death of Sir Hector to the death of Sir Alexander
 ‘ Munro belong to the executors of Sir Alexander; and decerns
 ‘ and declares accordingly.’

The appellants having reclaimed, the Court, on the 12th of
 May and 10th of June 1819, adhered. *

Against these judgments the appellants entered an appeal;
 and the House of Lords ‘ ordered, that the said cause be remitted
 ‘ back generally (by consent of both parties) to the Court of Ses-
 ‘ sion in Scotland.’

J. RICHARDSON,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 5.*)

* Not reported.