

THE LORDS adhered to their former interlocutor; and found, that the deed in question bars the legitim as to the principal sums; but remitted to the Lord Ordinary to hear parties as to the annualrents, and any other points in the cause.

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Act. *Ilay Campbell, Dean of Faculty.*Alt. *W. Baillie, Sol. Dundas.*Clerk, *Kirkpatrick.**Fol. Dic. v. 3. p. 382. Fac. Col. No 165. p. 54.*

1803. June 7.

MILLIE against MILLIE.

IN the year 1791, David Millie, manufacturer in Pathead, by a general disposition, conveyed his estate, heritable and moveable, to his only son, under the burden of an annuity of L. 100 per annum, which he reserved to himself; and by a deed of the same date, he provided a small annuity to each of his daughters. This disposition was declared to be irrevocable, and was recorded.

The father and son had been for many years engaged in a copartnership for carrying on business. But the effects of this copartnership were never regularly delivered over by an inventory to the son, although notification was made to some of their correspondents, that the affairs of the company were to be wholly managed by him after the date of this general conveyance. Nor did the annuity reserved to the father appear to have been regularly drawn. In 1793, a submission was entered into between Millie and his Son, upon the one part, and Elizabeth, his daughter, on the other, narrating, that no settlement had been made upon her, nor any discharge granted by her to the claims competent to her out of the estate and effects of her father. But after some procedure, the submission was given up by the arbiters, without pronouncing any final decision.

Millie senior died in 1795, possessed of a considerable fortune; and his daughter soon after brought an action against her brother, concluding to have the disposition in his favour set aside, on the head of imbecility and circumvention, and for payment of L. 10,000 as her legitim. She brought likewise an action for payment of her share of her mother's executry; but some circumstances prevented her from following out her claims, and the defender was assoilzied from the conclusion of both processes.

Elizabeth Millie, however, raised a new action against her brother, concluding for payment of her legitim; and the plea of *res judicata* being repelled, she

Pleaded, The general disposition executed by her father, was intended for the sole purpose of defeating the legitim, which the law provides for younger children. A father may virtually defeat this claim, by converting his moveable into heritable property, or by divesting himself of his moveable effects altogether. But he cannot defeat the provisions of law by a simulate conveyance. The

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The claim of legitim not affected by a general disposition of a father to his eldest son, upon which no actual delivery ensued, although the disposition was declared irrevocable.

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conveyance in this case, though conceived in the form of a deed *inter vivos*, was not in reality intended to take effect till after Millie's death, and can be considered in no other light than as a fraudulent device between a father and a son, by a deed of testamentary nature, to defeat the claim of legitim, (which the law can never sustain;) Allan against Callender, 17th June 1762, No 35. p. 8208. The claim of the widow to the *jus relictæ* is founded upon the same principles with this claim of the younger children; Erskine, b. 3. tit. 9. § 16.; and the *jus relictæ* cannot be defeated by a deed *mortis causa*, Sorlies against Robertson, 5th December 1771, No 147. p. 5947.

With respect to the special circumstances of the case, independent of the general presumption of a simulate conveyance by such a gratuitous alienation, it was urged, that the deed in 1791 was not a *bôna fide* conveyance, because no actual delivery or transfer of the copartnery and other effects had ever taken place in consequence of it, nor was the partnership truly dissolved; that the settlement of an annuity upon the father was quite fictitious, for no regular account had ever taken place; and that the submission entered into afterwards, to which the father was a party, explicitly recognised the pursuer's eventual claim of legitim, which could have no place if her father had conceived himself to have been really divested of all his moveable estate.

Answered, *Nemo agit dolose qui jure suo utitur*. The right of legitim is not a right of property, nor does it even bestow a *jus crediti* in favour of children. It is merely a right of succession in the moveable estate of which the father may die possessed; and as he is by law entitled to alienate this estate, it is of no consequence to inquire, what may have been his intentions in making the alienation. The law has sufficiently secured the claim of legitim, by sustaining it against death bed or testamentary deeds; but it does not allow children to challenge every transaction of their father, executed *in liege poustie*, with respect to his moveable estate, by which their claims may be affected, Bankton, b. 3. tit. 8. par. 26. If, therefore, a father is the unlimited proprietor of his moveable estate, and can dispose of it by deeds *inter vivos* to a stranger, he cannot be said to act fraudulently when he conveys it by such a deed to his son. Accordingly, it has been found, that an irrevocable conveyance to an eldest son of moveable property, even when the father reserves the liferent, is sufficient to defeat the legitim of the younger children; Agnew against Agnew, 28th February 1775, No 36. p. 8210.

And with regard to the particular circumstances of the conveyance in 1791, it was *answered*, That the pursuer had been unable to point out any act of possession on the part of her father subsequent to the deed; that the nature of the effects conveyed rendered any inventory unnecessary, when his son had been for many years in partnership with him; and that the object of the submission could never be to ascertain what was due to the pursuer as legitim, because that must be regulated entirely by the amount of the moveable estate at the father's death, which could not be previously ascertained.

THE LORD ORDINARY found “ the pursuer’s claim for a proportion of her deceased father’s effects, being founded upon the obligation laid upon parents, both by the law of nature and positive institution, to provide for their children, cannot be defeated but by a *bona fide* alienation and transfer of property during the lifetime of the parent; and, upon the whole circumstances of the case, that the voluntary and gratuitous disposition by David Millie senior, in favour of his son, the defender, cannot be held as a *bona fide* alienation and transfer of his property, but a collusive transaction, devised for the purpose of defeating the claim of legitim competent to the pursuer: Therefore repels the defences founded on this deed; sustains the claim; and appoints the pursuer to lodge a state of the amount of the personal funds belonging to her father at the time of his death.”

A petition was presented to the Court against this interlocutor; which, upon being advised with answers, was refused, (16th February 1803.) And afterwards, upon considering a reclaiming petition with answers, the Court adhered.

Lord Ordinary, *Balmuto.* Act. *Campbell, jun. Boyle.* Agent, *D. Lister.*
 Alt. *Robertson.* Agent, *John Tawse.* Clerk, *Pringle.*

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Fac. Col. No 106. p. 233.

See HUSBAND AND WIFE.

COLLATION.

GENERAL DISCHARGE AND RENUNCIATION.

APPENDIX.