DENNEL *v.* SMELLIE.

Faculty — Reserved Power — Informal Will. A father purchased a property and took the title to himself and his wife in conjunct fee and liferent and to their children in fee, reserving power to himself to sell or burden either onerously or gratuitously. Before his death he executed an informal holograph will, in which he said, "that if my son Hendrie wishes he will get the property at £160 sterling." *Held*, that this was a privilege of option that the father could confer under his reserved power, and that he had validly done so. *Question*, whether it was a revocation of the original destination.

Robert Smellie, grocer in Edinburgh, died in 1847. During his lifetime he acquired two small properties, one in Canongate and the other at Dechmont. The title to the former was taken "to and in favour of the said Robert Smellie and Ann Hay, his wife, in conjunct fee and liferent, and to the survivor of them in liferent, and to the children procreated or to be procreated of the marriage between the said Robert Smellie and Ann Hay, equally among them in fee, and their heirs and disponees whomsoever heritably and irredeemably, all and whole, &c. . . . Declaring also, that notwithstanding the above written destination it shall be lawful to, and in the power of, the said Robert Smellie, at any time during his life, to sell, alienate, burden, or otherwise dispose of the said subjects at pleasure, and that either onerously or gratuitously." The title to the other property was "to and in favour of the said Robert Smellie and Ann Hay or Smellie, his spouse, in conjunct fee and liferent, for her liferent use allenarly, and to the children of the marriage between the said Robert Smellie and Ann Hay or Smellie, equally between them, share and share alike, in fee, heritably and irredeemably, all and whole, &c. . . . But reserving always full power, faculty, and liberty to the said Robert Smellie, at any time of his life, and without consent of the said Ann Hay or Smellie, his wife, or of their said children, to sell, burden, wadset, or affect with debt, and even gratuitously dispone the subjects before disponed, and generally to do everything thereanent as if he was absolute fiar of the same."

On 16th Feb. 1846, Robert Smellie executed the following holograph will :—

"February 16, 1846.

"Know all men by this present, that I, Robert Smellie, make out my last will in favour of my wife and children, of my eritabel and all moveble property belonging to me. My wife is to have the rents and intres of all her lifetime for her suport, the above is to be davided equally amongst our saven children at her death—that is, Jean, Hendrie, James, John, Thomas, Elizabeth, and Janet Smellies, and I reserve to Marie Ann Kirkwood the eight-days cloke that belonged formerly to her father; and I farther aloe, that if my son Hendrie wishes, he will get the Cannongat property at one hundred and sixty pounds sterlien; and my son John will get my property at Dechmount for one hundred pounds sterling, if not agreabel and now of the rest of the femlie will take at the above rates, the must be sold and the monie equallie divided, and what eich one is got from me will be kept of there part, that is cash given or owen; the above is my wish.

(Signed) "Robert Smellie."

Mr Smellie was survived by his wife, and there were six children, who either survived him, or, having predeceased him, left children who represented them. The pursuer was married to the only child of Smellie's eldest daughter, and claimed to be entitled under the destinations in the titles to one-sixth share of the properties in virtue of his *jus mariti*, and as administrator in law to his pupil child, his wife having died in 1861.

On the father's death his eldest son, the defender, exercised the option conferred on him by making up titles to the Canongate property, and entered on possession of it. He drew the rents from his mother's death in 1857 until the present action was raised in 1864. The rents of Dechmont were divided among the family, with the exception of the share in which the pursuer was interested, which was retained in respect of advances alleged to have been made by Smellie to his eldest daughter during his life.

The pursuer now raised this action of count and reckoning in regard to the sixth share of the rents of both properties to which he alleged he had right. He pleaded that "the said document cannot have the effect of revoking the destination in the title-deeds set forth in article second, or of conveying the subjects destined in said title-deeds to the defender, or of conferring upon him the power or option of taking said subjects, or any other effect whatever." The defender, on the other hand, pleaded that "the said last will or settlement of Robert Smellie constitutes a valid exercise of the powers reserved to him by the said dispositions; and by the said will or settlement he effectually revoked the destinations of the fee of the said properties in favour of the children of the said marriage by the said dispositions."

The Lord Ordinary (Jerviswoode) found that the holograph will above referred to was valid and sufficient in law to operate as an exercise of the powers reserved in the titles. He therefore sustained the defender's plea above quoted, and repelled that of the pursuer. The following is his

"*Note.*—This case, which relates to property which is apparently of no very great pecuniary value, involves questions of considerable nicety. The Lord Ordinary is, however, of opinion, on the authority of the doctrine fully recognised in the case of Leith *v.* Leith, 6th June 1848, and which was again mooted and considered, though not expressly dealt with in the decision in the case of Purvis *v.* Purvis' Executors, 23d March 1861, that the holograph writing set forth in statement three of the revised defences, and which is itself now produced in process, is sufficient in its terms, being holograph of the granter, to operate as a revocation of the destination contained in the disposition of 1835, and must to that extent have effect accorded to it here. The Lord Ordinary does not feel himself in a position to go farther here in the matter of judgment at present; but as the defender admits, as the Lord Ordinary understands, that he must account to the pursuers to some extent, and does not deny his liability so to do, in respect of his intromissions with the rents of the Dechmont property, the Lord Ordinary has appointed an account of these to be lodged with a view to further the procedure."

The pursuer reclaimed.

Orr Paterson for him argued—The holograph will is ineffectual to alter the destination or to revoke it, and the pursuer is entitled to the rents prior to Whitsunday 1861 in virtue of his *jus mariti*, and since that date as administrator in law of his pupil child. He cited Leith *v.* Leith, 6th June 1848, 10 D., 1206 (Lord Ivory's opinion);

Purves *v.* Purves' Executors, 23d March 1861, 23 D. 812; 1 Ross' L. C., 615.

GIFFORD and BALFOUR for the defender replied —The subjects were purchased by Smellie, and the destination was taken as it is by him. He might have drawn his pen through it in so far as it favoured his children. The holograph will is as effectual a revocation, and vacated the *spes successionis* which the children had, so that the defender was now entitled to the Canongate subjects as heir-at-law. They cited Balvaird, 5th Dec. 1816, F. C.; Ersk., 3, 8, 36; Bell's Princ., sec. 1954; Menzies' Lectures (3d ed.), p. 697.

At advising,

Lord CURRIEHILL—This is an action of count and reckoning. The pursuer calls on the defender to count and reckon for the rents which he has intromitted with, of two properties in the Canongate and at Dechmont during the period mentioned in the record. The ground on which that demand is made by the pursuer is that a certain proportion—one sixth of the properties—belonged to the pursuer's wife, when she was alive in liferent, and now belongs to his pupil child in fee, but the subject which is now claimed is the rents during that period. The pursuer says that the pupil is one of the heirs of investiture of these subjects, that investiture being the title by which the late Robert Smellie obtained the properties. The defence is that the destination has been altered or revoked, or, in another view, that a faculty in the deed has been exercised. That is said to have the effect of doing away with the destination and giving the one property to the eldest son, and the other to a younger son on certain conditions, and of destroying the right of this pursuer's son as an heir of provision. If I found it necessary to decide the very nice and difficult questions which were argued to us yesterday before I reached a conclusion, I would not be prepared to do so without further consideration; but I think it is not necessary to decide these questions in the present action. As to the Canongate property, the defender admits that he has drawn the rents, but he says he has done so as proprietor of the subjects; and he has produced an infeftment in his favour, proceeding on a precept of *clare constat* by the superior. That infeftment has never been challenged. Whether or not there are grounds for challenging it, they cannot be competently urged in this process; and so long as that feudal title remains unchallenged, we must give effect to it in a petitory action for the rents. Accordingly, the defender's eighth plea-in-law is—"At all events, the pursuer cannot in any view maintain action for, or recover any part of, the said rents while the defender's absolute and unlimited title to the said Canongate property stands unreduced." In my opinion that plea is well founded. I therefore think the defender is entitled to *absolvitor* in so far as the demand is made for the rents of that property. In regard to the rents of the Dechmont property there is a difference, there being no such defence, but the defender is willing to account for them.

Lord DEAS—I should be very glad to get quit of any other question in this case by taking your Lordship's view, but I am sorry to say that I cannot do so. I cannot hold that the 8th plea is a sufficient defence. I don't think reduction is necessary. Supposing the destination under the former deed to remain entire, that would not prevent the heir-at-law from serving or making up his title, because it would be held that that title was to be used in aid of the subsisting destination. It is accordingly not pretended that he made up his title on the footing that the property belonged to him as his father's heir-at-law. What he says is that this will which his father left had the effect of revoking the prior destination, and of bringing him into the position of heir-at-law, a position which he would not otherwise have occupied. But suppose we are driven to consider the effect of that writing. The first thing we have to do is to make up our minds as to what is really its import, more particularly as regards the Canongate property. Now, I think its import is simply this, that under his reserved power in the destination, Mr Smellie stipulates that his son Henry shall have an option to take the Canongate property at the price of £160. That seems to me to leave the destination as it was. The title would still fall to be made up by the heirs of provision, but they would be under an obligation to sell to Henry, the defender, for £160. I am not prepared to say that that was a stipulation which Mr Smellie had not the power to make under the reserved power. I think he had the power to make it without revoking the destination, and I cannot hold that he has revoked it. The same observations apply to the Dechmont property as far as regards the option. Well, that exhausts the import of the writing except that it also says that if the option is not exercised by Henry or any other member of the family there is to be a sale. I don't look upon that as a stipulation that there must be a sale, and it does not raise the question whether Mr Smellie had the power to make it. I think, when he says, in his own way, that the properties "must be sold," all he meant was that if the option was not to be exercised there was no help for it, and there must be a sale in order to a division. The properties might no doubt have been held *pro indiviso*, but he looked upon it as a reasonable thing to sell them. All he does is to give an option, and as I must form an opinion about it I think he had the power to do so. The defender has exercised his option, and of course it follows that he is not bound to pay the rents. In regard to the Dechmont property, the option is not exercised, and the defender must account for the rents, but this he concedes.

Lord ARDMILLAN—I have arrived at the same result. The question argued to us is one of extreme nicety, and I am glad to be relieved of the necessity of deciding it. It was whether the holograph writing operates as a revocation of the destinations. I am not prepared to say that the defender's argument on that point is ill founded, but I am not now prepared to say more. I do not wish to commit myself on the point. There is great weight in the observation that the property was purchased by Smellie himself, and if the persons called to succeed him in the destinations had not been his children my difficulty would not have been so great. It is just because he was their father that I have so much difficulty. But there is another view which has been taken by Lord Deas, and which occurred to myself during the argument. It appears to me that under the reserved power Mr Smellie had the power to engraft on the original destinations the privilege of option, and I think the destinations may quite well stand so qualified, and that we do not need to hold that there was an absolute revocation. I would rather not rest my opinion on the question of pleading as to reduction.

The defender was therefore assoilzied in regard to the Canongate property, and *quoad ultra* the case was remitted to the Lord Ordinary. No expenses

were found due to either party since the date of the Lord Ordinary's interlocutor, and all other expenses were reserved.

Agents for Pursuer—J. & A. Peddie, W.S.
Agent for Defender—George Cotton, S.S.C.

Saturday, Feb. 23.

FIRST DIVISION.

DUNLOP'S TRUSTEES *v.* ANSTRUTHERS.

Irritancy of Contract of Ground-Annual—Defence—Relevancy. Held that it was not a relevant defence to a declarator of irritancy of a contract of ground-annual, that the superior had not given the vassal possession of a material part of the subjects, in respect that merely founded an illiquid claim of damages.

This was an action of declarator of irritancy of a contract of ground-annual. The summons concluded for declarator "that the ground-annual or yearly ground rent of £68, 5s. 2d. sterling, aftermentioned, payable by the defender, the said John Fulton Anstruther, and his heirs, executors, and successors, in the lands and others after described, and which said ground-annual or yearly ground rent it was, by the contract of ground-annual aftermentioned, provided and declared, should be uplifted and taken by the said Elizabeth Lyon Dunlop, and by William or Willie Dunlop, residing in Port Glasgow, sister of the said Elizabeth Lyon Dunlop, equally between them, and their respective heirs and successors, furth of and from the subjects respectively hereinafter described, and whole houses and buildings erected, or to be erected thereon, and furth of any part or portion thereof, readiest, rents, maills, and duties of the same has fallen into arrear, and that two years' payments thereof (being the half-year's ground rents or ground-annuals due respectively at the terms of Whitsunday and Martinmas 1863, and Whitsunday and Martinmas 1864) are resting-owing and unpaid, and that thereby the irritancy specified and provided in the said contract of ground-annual has been incurred; and that the contract of ground-annual before referred to, dated the 18th day of March and 9th day of April, both in the year 1858, entered into between the said William or Willie Dunlop for herself, and as factor, commissioner, and attorney for the said Miss Elizabeth Lyon Dunlop, her sister, couform to factory and commission granted by the said Elizabeth Lyon Dunlop in her favour, of date the 18th day of February 1857, the said William or Willie Dunlop and Elizabeth Lyon Dunlop, being heritable proprietors of the subjects, lands, and others after described; and also with the special advice and consent of the defender, the said Mrs Margaret Adam or Anstruther, spouse of the said John Fulton Anstruther, as therein mentioned of the first part, and the said John Fulton Anstruther of the second part, with all that has followed thereon, has become void and null; and that the said subjects, lands, and others, and whole houses and buildings thereon, described in the said contract of ground-annual as follows—(Here follows description of lands)—have reverted to, and do now belong to the pursuers, trustees foresaid and their foresaids, successors of the said Elizabeth Lyon Dunlop and William or Willie Dunlop, in, and having right to the said contract of ground-annual the said ground-annual or yearly ground-rent subjects and others therein mentioned; and that the pursuers, trustees foresaid, and their foresaids may enter into possession of the said subjects, lands and others, and whole houses and buildings thereon, and dispose thereof at pleasure." There were also conclusions for decree of removing and for expenses.

The defenders pleaded, *inter alia*, "The pursuers having, *inter alia*, wrongfully failed to put the said defender into possession of a material part of the subjects, of which the pursuers' authors, Miss William or Willie Dunlop and Miss Elizabeth Lyon Dunlop, who is represented by the pursuers, became, under the contract of ground-annual libelled on, bound to give the said defender possession, the said defender is not bound to pay to the pursuers the ground-annual specified in said contract."

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"*Edinburgh, 6th March* 1866.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, productions, and whole process—Sustains the first plea in law stated for the pursuers; and, in respect thereof, finds, declares, and decerns in terms of the first conclusion of the summons; and, before answer on the remaining conclusions, allows the defender to state, within ten days from the date hereof, whether or not he is prepared to purge the irritancy referred to in the said first conclusion of the summons—reserving meanwhile all questions of expenses.

"CHARLES BAILLIE.

"*Note.*—The Lord Ordinary does not mean to prejudge in any respect the merits of the question raised in the action of damages at the instance of the defender against the present pursuers. But he is of opinion that the claim for damages, as stated, cannot be relevantly pleaded against the demand of the pursuers here for present payment of the ground-annual, as sued for.

"C. B."

The defenders reclaimed. When the reclaiming note came to be discussed, the irritancy was purged at the bar by payment of the arrears of ground-annual, and it was stated that the cause of complaint on which the defender's plea was founded had been removed. It became necessary, however, to review the interlocutor in order to determine the question of expenses.

BLACK was heard for the defenders and reclaimers.

GIFFORD and GLOAG for the pursuers.

At advising,

Lord ARDMILLAN—This is an action of declarator of irritancy brought to enforce a forfeiture of a right conferred by a contract of ground-annual. The contract bears that, "in the event of the said ground-annual or yearly ground-rent, created by the said contract of ground-annual, falling into arrear, and two years' payment thereof being at any time resting-owing and unpaid, or in the event of the said John Fulton Anstruther, or his foresaids, failing to erect and continually to maintain houses and buildings of the description and value provided for by the said contract of ground-annual on the subjects before described, or to keep the said houses and buildings constantly insured, as also provided for in the said contract of ground-annual, then, and in any of these cases, the said contract of ground-annual, and all following thereon, should, in the option of the said first party and their foresaids, become *ipso facto* void and null, and the said subjects should revert and belong to the said first parties and their foresaids having right to the said ground-annual or yearly ground-rent, but without prejudice to the said