Wednesday, February 18.

FIRST DIVISION.

[Lord Low, Ordinary.

MATHESON *v.* GEMMELL.

Title to Heritage—Objection to Title—Description by Reference—Incorrect Reference—Sale — Sale of Heritage — Writ — Falsa demonstratio—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 141), *sec.* 61, *Sched. O.*

Lands purchased at public roup were described in the seller's titles and in the articles of roup as — "All and Whole that piece of ground consisting of 2 roods 2 falls and 11½ ells or thereby lying on the north side of Garngad Hill, within the territory of the burgh of Glasgow and county of Lanark, being the lands and others particularly described and disponed in the second place in the disposition granted by Mrs Jane Robertson or Willis, wife of George Willis, surgeon, Baillieston, near Glasgow, with consent of Andrew Yeats, coalmaster in Glasgow, in favour of John Gray Macfarlane, merchant in London, dated the 5th, and recorded in the Burgh Register of Sasines at Glasgow on the 7th, both days of July 1865." No such disposition had in fact ever been granted by Mrs Willis. A disposition of 2 roods 2 falls 11½ ells, situated as stated, in favour of Macfarlane, dated and recorded as specified, was granted by George Willis himself. The purchaser refused to implement the contract on the ground that the title was bad. He maintained that without the reference to the previous disposition the lands were not sufficiently identified, and that the clause of reference was not in the terms required by section 71 of the Conveyancing Act 1874 and Schedule O therein referred to, in respect that the description referred to a disposition which had no existence.

Held that a description by reference to a previous deed was competent at common law, and apart from the Conveyancing Act 1874; that the misdescription of the deed referred to was merely a *falsa demonstratio;* that the deed was sufficiently identified by the other particulars given; and that in the circumstances the title was such as the purchaser was bound to accept.

On 11th December 1901 certain lands were exposed by public roup by John Matheson, warehouseman in Glasgow, and were purchased by Matthew Gemmell, property agent there.

Gemmell having objected to the validity of the title offered to him, Matheson brought an action against him concluding for implement of the contract of sale, or, alternatively, for damages.

In his defences Gemmell explained that his objection to the title was that the lands were not sufficiently described or identified, the only description given being by reference to a disposition which had no existence.

The state of the title was as follows:—The pursuer's immediate title as heritable proprietor of said subjects consisted of—(1) a bond and disposition in security for £7000 granted by James Ritchie Monteath, writer, in Glasgow, in favour of the trustees of the deceased Archibald Russell, brickmaker, Glasgow, dated and recorded in the Burgh Register of Sasines (Glasgow) 6th July 1874 (which was afterwards discharged to the extent of £1300), with assignations of the said bond for the balance of £5700, and of the security-subjects, by the said trustees to Archibald Russell, coalmaster, Glasgow, and subsequently by said Archibald Russell to the pursuer; and (2) a decree of the Sheriff of Lanarkshire dated 17th August, and recorded in the said Burgh Register 20th December 1899, in favour of the pursuer under the Heritable Securities (Scotland) Act 1894, following upon an unsuccessful exposure of the subjects contained in the bond by him to public roup under his security, decerning him absolute proprietor of the said subjects. In the said bond and disposition in security, which formed the foundation of the pursuer's title, so much of the subjects thereby conveyed as were affected by the conclusions of the present action were not particularly described, but bore to be identified by means of a description by reference in the following terms — "All and Whole that piece of ground consisting of two roods 2 falls and 11½ ells or thereby lying on the north side of Garngad Hill, within the territory of the burgh of Glasgow and county of Lanark, being the several lands and others particularly described and disponed in the disposition granted by *Mrs Jane Robertson or Willis, wife of* George Willis, surgeon, Baillieston, near Glasgow, with consent of Andrew Yeates, coalmaster in Glasgow, in favour of John Gray Macfarlane, merchant in London, dated the 5th, and recorded in the Burgh Register of Sasines at Glasgow on the 7th, both days of July 1865, together with the whole parts, privileges, and pertinents thereof, and whole houses and other buildings erected thereon."

The description in the assignations of the bonds, and in particular in the decree vesting the security-subjects in the pursuer, and also in the articles of roup under which they were sold to the present defender, was in exactly similar terms.

There was no disposition by Mrs Jane Robertson or Willis, wife of George Willis, in favour of the party, or dated or recorded of the dates specified. The disposition intended to be referred to in the description was in fact granted by George Willis himself and not by his wife. The disposition granted by George Willis was dated and recorded of the dates above mentioned, and conveyed to the said John Gray Macfarlane "2 roods 2 falls 11½ ells or thereby lying on the north side of Garngad Hill within the territory of the burgh of Glasgow and county of Lanark."

The defender averred as follows:—Said description was ineffectual to vest the pursuer or his authors in the security-subjects, in respect the reference is to a non-existent disposition as hereinbefore explained. Apart from the attempted identification by reference, the lands attempted to be conveyed are quite unidentified, there being nothing to distinguish them from any similar area of the lands of Garngad Hill, which are of considerable extent."

The defender pleaded, *inter alia*—"(4) The pursuer's titles to the subjects alleged to have been sold not containing a particular description, or a valid description by reference in statutory form sufficient to identify the subjects purporting to be conveyed, said titles are invalid and inept to confer on the pursuer a right to said subjects, and they along with the disposition offered by pursuer do not form such a valid progress of titles as the defender is bound to accept."

The Conveyancing (Scotland) Act 1874 enacts (section 61)—"In all cases where any lands have been particularly described in any conveyance . . . recorded in the appropriate Register of Sasines, it shall not be necessary in any subsequent conveyance . . . conveying or referring to the whole or any part of such lands, to repeat the particular description of the lands at length, but it shall be sufficient to specify the name of the county . . . in which the lands are situated, and to refer to the particular description of such lands as contained in such prior conveyance . . . in or as nearly as may be in the form set forth in Schedule O hereto annexed."

On 8th July 1902 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds, decerns, and ordains against the defender in terms of the conclusions of the summons for implement and payment, and in the event of the defender failing to fulfil the conclusion for implement within the next three weeks, decree will be pronounced in terms of the conclusion for damages."

The defender reclaimed, and argued—The title offered was not such as the purchaser was bound to accept. Apart from the reference to the disposition alleged to be granted by Mrs Jane Robertson or Willis, there was no description by which the lands sold could be identified. The reference clause was not sufficient, because it was not in the terms authorised by section 61 of the Conveyancing Act 1874 and Schedule O therein referred to. Under that Act the clause of reference must "refer correctly to the prior recorded conveyance, deed, or instrument containing the particular description of such lands." Where a statutory form was used it must be used in exact accordance with the statutory forms—*Thomson* v. *M'Crummen's Trustees*, February 1, 1856, 18 D. 470, *affd.* 31 Scot. Jur. 425; *Johnston* v. *Pettigrew*, June 16, 1865, 3 Macph. 954; *Murray's Trustee* v. *Wood*, July 2, 1887, 14 R. 856, 24 S.L.R. 614. A purchaser was entitled to object to any title which was not marketable—*Carter* v. *Lornie*, December 20, 1890, 18 R. 353, 28 S.L.R. 197.

Argued for the respondent—The description of the lands was sufficient for identification at common law, apart from section 61 of the Conveyancing Act. All that was required was that the lands should be identified, and this could at common law be done by reference to another deed, or even by parole evidence—*Macdonald* v. *Newall*, November 16, 1898, 1 F. 68, 36 S.L.R. 77.

LORD M'LAREN—This is a reclaiming-note from an interlocutor of Lord Low, in which his Lordship has in effect ordained the purchaser of certain subjects to accept the title which has been offered to him, and to pay the price. The subjects consist of 2 roods 2 falls and 11½ ells of land, and the land is described as situated "on the north side of Garngad Hill within the territory of the burgh of Glasgow and county of Lanark." That is rather an indefinite description, but I think that the pursuer is well-founded in his observation that we may read into it as an implied term that the lands are the property of the seller. Indeed, I understand it is not disputed that on the face of earlier titles it is apparent that the seller had property to the extent specified at Garngad Hill, and no other property in that locality.

But then the description does not stop with what I have read but goes on to say, "being the several lands and others particularly described and disponed in the disposition granted by Mrs Jane Robertson or Willis, wife of George Willis, surgeon, Baillieston, near Glasgow, with consent of George Yeates, coalmaster in Glasgow, in favour of John Gray Macfarlane, merchant in London," and then the date of recording the deed in the Burgh Register of Sasines in Glasgow is given. Now, apart from the modern conveyancing statutes, which entitle the seller to describe the subjects of sale purely and simply by reference to another deed, I see no reason for doubting that a reference to an earlier deed as containing a full description of the lands sold was a perfectly legitimate mode at common law of eking out a generalised or incomplete description of the subjects of sale. In practice it was not infrequent to give a reference to prior deeds for the purpose of enabling subjects to be the more easily identified. Accordingly, if Mrs Willis had really been the disponer in the deed referred to I see no reason to doubt that these two descriptive clauses taken together would have constituted a valid and sufficient description, containing all that was requisite to define the subjects of the sale. The difficulty arises from the fact that it was not Mrs Willis but her husband who was the true disponer in the deed referred to. I do not regard the objection taken to the title as a merely frivolous objection. I can quite understand the purchaser's agents taking exception to a title with such a flaw in it. But we must consider whether the existence of this error of description so invalidates the purchase as to release the purchaser from

his bargain. Unfortunately there is no way of curing the error, for it occurs in the articles of roup under which the subjects were exposed to sale by a bond holder, but no purchaser having come forward the subjects were adjudged to the bond holder by the Sheriff under the Heritable Securities Act 1894. The question is then, as I have said, whether there is such a misdescription of the deed referred to as to invalidate the sale. My opinion is that there is not. I think that there is merely such a misdescription as falls under the category of *falsa demonstratio*, and the deed referred to for the purposes of description is sufficiently identified by the family name of the disponer, the full name of the disponee, and the date of recording. In all the circumstances of the case I think that the judgment of the Lord Ordinary is well founded. There is no possibility of a competing title, and I think the contract of sale can be executed by a conveyance substantially in terms of the articles of roup.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Craigie. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender and Reclaimer—J. R. Christie. Agent—W. B. Rainnie, S.S.C.

Tuesday, February 24.

FIRST DIVISION.

ROBERTS' TRUSTEES *v.* ROBERTS.

Succession—Legacy—Accretion.

A trust-disposition contained the following direction:—"I direct my trustees upon the youngest of my sons now born or that may be born to me reaching the age of twenty-one years to convey and make over to them, equally among them" certain specified property. The truster was survived by three sons, of whom the youngest died before attaining twenty-one. *Held* that his share accresced to the other two.

Paxton's Trustees v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, *distinguished.*

Henry Roberts, manufacturer in Galashiels, died on 23rd May 1891, leaving a trust-disposition and settlement, with relative codicils, by which he conveyed his whole estate to his wife Mrs Marion Alison Lucas or Roberts, and others, as trustees. He was survived by his wife, six daughters, and three sons, William John Roberts, Henry Lucas Roberts, and Hugh Sanderson Roberts.

By his second codicil he made the following provision:—"I direct my trustees upon the youngest of my sons now born or that may be born to me reaching the age of twenty-one years, to convey and make over to them, equally among them, all mill property and machinery and all house or other heritable property in Galashiels (with the exception of my dwelling-house there) belonging to me at the time of my death, but should any one or more of my said sons wish to have their shares of said property in cash, then they may have the same at a moderate valuation, my sons who get said property conveyed to them paying their brothers the equivalent." The third codicil contained the following clause:—"With regard to the second codicil to said settlement, I hereby declare that my son William John shall, at the first term of Whitsunday or Martinmas that shall happen after he reaches the age of twenty-five years, be entitled to his third share of the rents of the mill property and machinery and all house or other heritable property in Galashiels, with the exception of my dwelling-house there."

On 13th March 1900 the youngest of the truster's sons, Hugh Sanderson Roberts, died, unmarried and a minor.

Questions having arisen as to whether the share provided to Hugh Sanderson Roberts in the second codicil quoted above accresced to the two remaining sons or fell into residue, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were, *inter alios*, (1) Mr Roberts's trustees, (3) the testator's married daughters, (4) William John Roberts, (5) Henry Lucas Roberts, and (6) the testator's unmarried daughters.

There were other questions arising under the trust-deed which were dealt with in the special case, but which it is unnecessary to report.

The first question of law was—"Are the fourth and fifth parties now jointly entitled to (*a*) the mill and other property specified in the second codicil, or (*b*) only to two third shares thereof?"

On this question it was argued for the third and sixth parties, being the residuary legatees other than the sons, that the case fell under the general rule laid down in *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, that when a legacy is given to a plurality of persons sufficiently described for identification, equally among them, there is no accretion on the failure of one of these persons. It was equivalent to a legacy of one-third of the total sum to each. This view was strengthened in this particular case by the words of the third codicil (quoted *supra*) where the share of the eldest son was spoken of as his "third." *Graham's Trustees* v. *Graham*, November 30, 1899, 2 F. 232, 37 S.L.R. 163, was also an authority for this view.

For the surviving sons it was argued that the provision in the second codicil was a gift to sons as a class, and therefore that the share of the son who died accresced to the survivors—*Menzies' Factor* v. *Menzies*, November 25, 1898, 1 F. 128, 36 S.L.R. 116.

At advising—