

The pursuer having granted the assignation sought to be reduced freely and deliberately, in full knowledge of the circumstances and of the effect of said assignation, the defender is entitled to absolvitor. (4) The pursuer is barred by her actings from now challenging the assignation sought to be reduced."

At the adjustment of issues the following issue was proposed by the pursuer—"Whether the assignation bearing date on or about the 16th day of July 1908 was obtained by the defender Christopher John Healy from the pursuer by force and fear, without the pursuer having received any value therefor?"

On 17th March 1909 the Lord Ordinary (JOHNSTON) pronounced the following interlocutor—"The Lord Ordinary having heard parties, holds the production satisfied: Finds that the action is one more suited for trial by proof than by jury trial; therefore dispenses with the adjustment of issues: Allows the parties a proof of their averments, to proceed on Tuesday, 15th June next, at ten o'clock forenoon, and grants diligence for citing witnesses and havers."

The pursuer reclaimed, and argued—This was a typically suitable case for jury trial. By the Judicature Act 1825 (6 Geo. IV, cap. 120), section 28, an action of this nature fell to be tried by jury, and the only discretion in the matter conferred on the Lord Ordinary by the Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112), section 4, to vary this form of trial, was in the event of consent of both parties, or on special cause shown. Here no special cause had been shown, and the Lord Ordinary had given no reasons for his decision. In similar circumstances the Inner House had interfered with the discretion of a Lord Ordinary in *M'Avoy v. Young's Paraffin Light Company*, November 5, 1881, 9 R. 100, 19 S.L.R. 61; *Rhind v. Kemp & Company*, December 13, 1893, 21 R. 275, 31 S.L.R. 223. Counsel also referred to *Cass v. Edinburgh and District Tramways Company*, 1908 S.C. 841, 45 S.L.R. 675, and *Gelot v. Stewart*, March 4, 1870, 8 Macph 649, 7 S.L.R. 372.

Counsel for the respondents was not called upon.

LORD M'LAREN—This is an action of reduction of an assignation, and *prima facie* a strong case for reduction is set out on record. There are averments of force and fear, and also of false representation, and further there is the circumstance, to which I called the attention of counsel, that the party who obtained the deed was a solicitor, who ought to have known the precautions to be taken in obtaining a gratuitous deed from a client. There are no conclusions for damages; it is simply a case of reduction.

The Lord Ordinary, in the exercise of the discretion conferred upon him by Act of Parliament, thought the case unsuitable for jury trial, or at any rate more suitable for trial by a Judge sitting alone. I see no reason for interfering with the Lord Ordinary's discretion. No doubt there are cases

where judgments on this point have been brought under review, but following Lord Robertson's dictum in a case which has been quoted to us (*Rhind v. Kemp & Company*, 21 R. 275) I should not be willing to interfere except on some general ground which would apply to a class of similar cases. There is no general ground here, and I therefore propose we should adhere to the Lord Ordinary's judgment.

LORD PEARSON—I am of the same opinion. I may say that I should probably have reached the same conclusion as the Lord Ordinary, and in any case I should be unwilling to interfere with his Lordship's discretion.

LORD DUNDAS—I also am of the same opinion.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Watt, K.C. — M'Robert. Agent — Peter Clark, Solicitor.

Counsel for the Defenders (Respondents) — Chree. Agents—Macpherson & Mackay, S.S.C.

Saturday November 28, 1908.

OUTER HOUSE.

[Lord Salvesen.

PATTULLO, PETITIONER.

Succession—Trust—Testamentary Writing—Omission to Appoint Trustees—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 12—Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. c. 39), sec. 18.

A testatrix by will bequeathed her whole estate to certain beneficiaries, under burden of a liferent to certain other beneficiaries, but she nominated no trustees for carrying her directions into effect. In a petition, under the Trusts (Scotland) Act 1867, section 12, for the appointment of trustees to act under the will, to which no answers were lodged, the Court (Lord Salvesen) granted the prayer of the petition, but directed that the trust should be placed under the supervision of the Accountant of Court.

The Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), section 12, enacts—"When trustees cannot be assumed under any trust deed . . . the Court may, on the application of any party having interest in the trust estate, after such intimation and inquiry as may be thought necessary, appoint a trustee or trustees under such trust deed, with all the powers incident to that office. . . ."

The Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. c. 39), section 18, enacts—" . . . Where a person deceased has left a settlement appointing trustees or other persons with power to manage his estate, it shall be competent for such trustees or

other persons to apply to the Court of Session for an order on the Accountant to superintend their administration of the estate, in so far as it relates to the investment of the estate, and the distribution thereof among the creditors of the deceased and the beneficiaries under the settlement; and the Court may grant such order accordingly. . . .”

Mrs Isabella Bell or Doig, widow of Andrew Doig, farmer, Middle Drums, Brechin, died on 17th October 1908 without issue, leaving a holograph will in the following terms:—“After my own and my husband’s death I wish Mamma and Kate my sister to get the interest of my money, at their death the money to be equally divided amongst my nieces and nephews, the share falling to the Pattullo family only to be divided amongst them at their mother’s death, she to get the interest of it all her life, the same with the share falling to the Wrights, their mother to get the interest of it all her life, Ella and Jessie Bell to get their shares at my sister Kate’s or Mamma’s death, that is, at the death of the last survivor of the two.

“At the present time I have £800 invested on Balnamoon, £500 on property in Brechin, John Pattullo has £500 on loan, £20 on the Glenesk Hotel, and £30 in Clydesdale Bank. ISABELLA DOIG.

“Middle Drums,

“21st February 1898.

“If Kate should be married after Mamma’s death, I wish the money to be divided at her marriage, she getting a fourth of the whole, the remainder being divided amongst my nieces and nephews.

“I.D.”

The deceased left no heritable property, but her moveable estate amounted to about £3330.

Mrs Annie Bell or Pattullo and others, some of the next-of-kin of the deceased, presented a petition under the Trusts (Scotland) Act 1867, sections 12 and 13.

The petitioners, *inter alia*, stated—“That the testatrix made no appointment of trustees or executors. The petitioners are advised that it is desirable, looking to the facts that the number of beneficiaries is large, that some of them are resident abroad, and some are in minority, and that the provisions of the will will involve the continued administration of the estate for a number of years, that the administration of the estate and the purposes of the will should be carried out by trustees to be appointed by the Court, with power to assume new trustees.”

The petitioners craved the Court to appoint trustees under Mrs Doig’s will with power to assume new trustees.

The following authorities were referred to:—*Fiddes*, February 9, 1874 (Lord Gifford); and *Lee*, December 7 1889 (Lord Kyllachy); Currie on Confirmation (3rd ed.), p. 58; *Milroy v. Tarwse*, February 23, 1905, 12 S.L.T. 777.

LORD SALVESEN—“I do not think it absolutely clear that section 12 of the Trusts Act 1867 covers this application, and if it

had been opposed I by no means say I should have granted it even in the form in which it is now presented. But the statute itself is a remedial one, and I think it is possible to construe the introductory words of section 12 as applicable to the present case. They are as follows—‘When trustees cannot be assumed under any trust-deed . . . the Court may, on the application of any person having interest in the trust estate, after such intimation and inquiry as may be thought necessary, appoint a trustee or trustees under such trust-deed with all the powers incident to that office. . . .’ Now it is plain that trustees cannot be assumed under this will, and the only question is whether it can be held to be a trust-deed. It is quite obvious that a will of this kind, which provides for the capital being held up for many years and only a liferent being in the first instance provided to the beneficiaries, is a deed which requires the interposition of trustees in some shape to carry it into effect, and therefore it seems to me that, construing, as I think I am entitled to construe this statute, generously, it may be described as a trust-deed. If that be so, the difficulty about the competency of the appointment is removed, and I am accordingly prepared to follow the course taken by Lord Kyllachy in the similar case to which I was referred. There, I understand, trustees were referred to, although none were named, but I do not think that creates any real distinction. At the same time, in order to safeguard the interests of minor beneficiaries who, if a judicial factor were appointed, would have the protection which the obligation of that officer to find caution affords, I think it right that these trustees should be placed under the supervision of the Accountant of Court. That will provide against any possible abuse in similar applications in the future should this case be referred to as a precedent for making such an appointment. The petitioners have now stated their willingness to amend the prayer to this effect, and I shall accordingly make the appointment which they crave.”

The Court granted the prayer of the petition on its being amended so as to bring the trustees under the supervision of the Accountant of Court.

Counsel for the Petitioners — Chapel. Agent—H. Bower, S.S.C.