No. 28. Mrs Isobel Little or Murray, and Husband, and Margaret Little, Appellants.—*Shadwell—Stephen.*

James and John Little, Respondents.—*Warren.*

***Clause.*—Construction of a clause of a deed of settlement.**

May 20. 1824.

2d Division. Lord Pitmilly.

The late James Little, writer to the signet, had two natural sons, the respondents, by Elizabeth Kinnaird; a brother John; and two sisters, Margaret (who was unmarried), and Isobel, wife of William Murray, agent for the Church of Scotland. In 1810 Mr Little executed a trust-deed, by which he conveyed his whole effects to Thomas Cranstoun, Esq. writer to the signet, and others; and after declaring that the first purpose was for payment of his debt, he expressed the second and third objects in these terms:—'I appoint my said trustees to pay L.25 sterling 'annually towards the maintenance and education of my two 'natural sons, James and John, whom I had by Elizabeth Kin- 'naird, until they severally arrive at the age of 21 years, at which 'periods, if my said trustees shall be of opinion that these two 'boys, or either of them, are deserving, and likely to do well, 'then I appoint my said trustees to pay to them, in such propor- 'tion as they may think proper, the sum of L.400 sterling, to 'enable the said two children, or either of them, to commence 'business; and if either die, my said trustees may, if they shall 'think proper, give the whole to the survivor. But if it shall 'be the opinion of my said trustees, that both or either of these 'boys are not by their conduct deserving of what I have intended 'for them, then they shall draw nothing whatever out of my 'said trust-estate.'

'*Tertio*, I appoint my said trustees, under the power herein- 'after vested in them, to give to the said Elizabeth Kinnaird, 'daughter of the deceased Kinnaird, teacher at Saint 'Madoes, not only the liferent use and enjoyment of my said 'two houses or flats in Robertson's Court or Close, but my said 'trustees shall also pay to the said Elizabeth Kinnaird, in case 'she survive me, an annuity of L.15 sterling, in consideration of 'her fidelity and respect to me, and that at two terms in the 'year, Whitsunday and Martinmas,' &c. The fourth and fifth provisions related to special legacies, of no importance to the present question; and he then proceeded to declare the further objects of the trust to be as follows:—'*Sexto*, After all the above 'purposes are answered, and such other legacies or provisions

'as I may hereafter leave likewise paid and provided for, my 'said trustees shall divide the *free* residue of my estate and effects 'equally among my brother and sisters, John Little, merchant 'in Edinburgh, Margaret Little, presently residing in family with 'my said brother in Edinburgh, and Isobel Little, spouse of 'William Murray, agent for the Church of Scotland; or among 'such of them as may survive me. But it is hereby specially 'provided and declared, that the share, or the whole, as the case 'may happen, that shall be allocated to my said brother, John 'Little, shall not be paid to him; but such capital or residue 'shall be lent out by my said trustees, in their own names, and 'the interest arising therefrom shall only be paid to the said 'John Little, during all the days of his life, by way of annuity; 'which annuity I hereby declare to be purely alimentary, and 'not to be adjudgeable or arrestable by creditors, or affectable 'by the acts or deeds of the said John Little. And at the death 'of the said John Little, the capital set apart to answer the fore- 'said annuity, shall be divided equally betwixt my said two 'sisters, or the survivor of them shall draw the whole. *Lastly*, 'In the event of both of my said sisters predeceasing me, or at 'the death of the said John Little, in the event of his suc- 'ceeding to the whole free residue, then I appoint such free 'residue to be divided equally among the children, male or 'female, procreated of the marriage betwixt Walter Greig, 'builder in Edinburgh, and Rebecca Sharp, his present spouse; 'that is to say, among such of these children as may happen to 'be in life when such residue falls to that family; and if any of 'these children die, leaving issue, then such issue shall draw 'equally the share which would have been allocated to the child 'or children so predeceasing.' The deed reserves the granter's liferent, and full power to alter, revoke, innovate, &c. May 20. 1824.

Thereafter, in 1811, he executed a codicil in these terms:—
'In respect that since the date of the within deed I have, in con- 'sideration of a certain sum paid to me by the within named 'Margaret Little, granted her a bond of annuity for L.100 'sterling, therefore I hereby revoke and recall the whole provi- 'sions in favour of the said Margaret Little contained in the 'within deed, and hereby declare that she is to derive no benefit 'whatever from the reversion of my trust-estate, the bond of 'annuity which I have granted to her being, in existing circum- 'stances, amply sufficient for her support; and, with this altera- 'tion, I approve of and hereby homologate the within deed.'
In 1814 he executed a second codicil, which was thus expressed:

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—'I hereby revoke and recall the appropriation of the residue 'of my estate; and appoint my trustees to divide the same 'equally betwixt my said two sons, James and John, and in the 'event of either of them dying without lawful issue, the survivor 'shall be entitled to draw the whole; and till said succes- 'sion opens to them, I appoint my said trustees to apply annually 'towards their maintenance and education such sum as they may 'think proper, not exceeding L.100 sterling per annum; and as 'I have now sold the house in Robertson's Court, I appoint my 'said trustees, under the provision and declaration within men- 'tioned, to pay to the said Elizabeth Kinnaird a free yearly 'annuity of L.25 sterling.'

In September 1816 Mr Little died without lawful issue, and a question then arose between his two natural sons, (who were in pupillarity, and to whom a tutor ad litem was appointed), and his sister Mrs Murray, and his brother John Little, as to their respective interests under the trust-deed and relative codicils.

A multiplepoinding was then brought by the trustees, in which claims were made by each of these parties, and appearance was also entered by Margaret Little, who did not allege that she had any claim under the deed of settlement, but stated that she was a creditor of the defunct for L.1700.

On the part of Mrs Murray it was contended, that, under the trust-deed, the defunct had made reference to a 'free residue' in two different senses; the one relating to the free residue of his whole effects, and which, in the event of being survived by his brother and two sisters, was to be divisible into three equal parts, of one of which his brother was to enjoy the liferent, and his sisters were to have right to the fee of the whole under that burden; and the other sense in which he had employed the term had reference to the event of the two sisters predeceasing him, and of his brother John surviving him, and so acquiring right to the free residue, in which case he appointed it to be divided among the family of Walter Greig: That by the first of the codicils, he had deprived his sister Margaret of any share of the estate; and by the second, he had substituted his natural children in the place of the Greigs; but that he never intended that, in the event of being survived by his sister, his natural children should have right to the free residue—his intention being that they should come into the place of the Greigs, in case she predeceased him, an event which had not occurred; and therefore she was entitled to the whole of the free residue, subject to the burden of paying the interest of one-half thereof to her brother John.

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On the part of John, the same construction was contended for, to the effect of entitling him to draw the interest of one-half of the free residue; and he maintained, that, even if the natural children should be found entitled to the free residue, they could only take it under that burden.

On the part of the children it was contended, that as, by the last codicil, the defunct had expressly revoked the appropriation of the free residue of his estate in general and unlimited terms, it was impossible to restrict it in the manner alleged by their opponents, and that the effect of that revocation was, to set aside the whole trust-deed in so far as it related to a disposition of the free residue, and to annex the codicil in place thereof; so that they were entitled to draw the whole free residue.

The Lord Ordinary pronounced this interlocutor:—'In respect the trust-disposition of the 21st of April 1810, makes twice 'mention of the free residue of the testator's estate, declaring, 'when the free residue is first mentioned, that after the purposes 'of the trust are answered, the trustees shall divide the free residue among the testator's brother and sisters, and thus having 'in view the succession which is to open on the death of the testator; but declaring, when the free residue is mentioned the 'second time, that it shall be that share of the estate which, in 'certain events, is to be set apart for providing an annuity for 'John Little, one of the testator's brothers, and is, after the 'death of John Little, to be divided among the children of Walter Greig and Rebecca Sharp; and thus having in view the 'free residue, not at the death of the testator, but at the death 'of the testator's brother, John Little; and in respect of the 'clause of the codicil of 8th September 1814, founded on by the 'claimants, James and John Little, the testator's natural children, in which the free residue is provided to them; but it is declared, that "until said succession opens to them," the trustees may employ a certain sum annually, not exceeding L.100, 'in their maintenance and education: finds, That the free residue mentioned in the codicil means the free residue which was 'eventually to arise at the death of the testator's brother, John 'Little, in manner before mentioned, and not the free residue at 'the testator's death, the succession to which opened on that 'event: On these grounds, repels the claim of the said James 'and John Little to the fund in medio, and prefers the claimants Isobel Little or Murray, and John Little, upon their 'claims to the free residue in question.'

Against this judgment the natural children reclaimed, and

May 20. 1824. the Lord Justice-Clerk being absent from indisposition, and the other four Judges being equally divided in opinion, Lord Pitmilly was called in, and their Lordships thereupon adhered to the interlocutor, 'reserving to the petitioners to be farther heard 'before the Lord Ordinary on their claim to such sum as the 'trustees shall think proper to apply annually towards their 'maintenance and education, not exceeding L. 100 sterling per 'annum.'

Having again reclaimed, the Court, on considering the petition, with answers, 'and whole circumstances of the case, found 'the petitioners entitled to the residue of the estate in question, 'and in so far altered the interlocutors complained of; but re-'mitted to the Lord Ordinary to hear the respondent, John 'Little, farther upon his claim to an annuity payable to him as 'a burden on the said residue.' And to this judgment their Lordships adhered on the 19th of January 1820.*

Mrs Murray then appealed; but no appeal was entered by John Little. When, however, the case came to be heard, it appeared to the House of Lords that John Little ought to have been a party to the appeal, and that as he was now dead, his representative ought to be called in his place. In consequence of this, the further hearing was adjourned, and his sister Margaret having obtained herself decerned executrix-dative of John, she presented a petition, praying that she might be admitted as an appellant; and this having been granted, their Lordships, after hearing the appellants, on the motion of the Lord Chancellor, 'ordered and adjudged, that the appeal be dismissed, and the 'interlocutors complained of affirmed.'

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 40.)

No. 29. HECTOR F. M'NEILL, Appellant.—*Warren—Abercromby.*

WALTER MOIR and Others, Trustees of the late Dr M'NEILL, Respondents.—*Keay—Brougham.*

Facility—Fraud.—Circumstances under which (affirming the judgment of the Court of Session) a deed was set aside, which had been obtained from a facile person,

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* Not reported.