

tion was made to the pursuer's husband with whom she was living at the time and he declined to sist himself.

The defender thereafter in the Single Bills moved the Court to dismiss the appeal on the ground that a married woman could not sue in her own name—Fraser, Husband and Wife, 2nd ed. i, p. 566. The pursuer opposed the motion, and argued that a wife was entitled to sue an action in which her husband had no interest, without his consent, and alternatively that any defect in the pursuer's title could be cured by the appointment of a *curator ad litem*—Burns, &c. v. Blair, December 17, 1829, 8 S. 264; Fraser, *op. cit.* i, p. 568-9; Ersk. Inst., i. 6, 21.

The defender opposed the motion for the appointment of a curator, and argued that where the husband, the wife's natural guardian and curator, was as here living with her, and refused to concur, the Court would not appoint a *curator ad litem*, though that course was no doubt competent where the spouses were living apart.

The Court, without delivering opinions, appointed a *curator ad litem*.

Counsel for the Pursuer (Appellant)—Inglis. Agent—John Grieve, W.S.

Counsel for the Defender (Respondent)—J. H. Henderson. Agent—Wm. Considine, S.S.C.

Saturday, May 22.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson,
and Lord Dundas.)

YOUNG v. HEALY.

Process—Proof or Jury Trial—Action of Reduction—Discretion of Lord Ordinary—Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112), sec. 4.

In an action of reduction of a deed on the ground of "force and fear," the Lord Ordinary refused to send the case to a jury, and pronounced an interlocutor allowing a proof.

On a reclaiming note the Court refused to interfere with the discretion of the Lord Ordinary.

The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112), sec. 4, enacts—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section 1 hereof (*i.e. before himself*), in any cause which may be in dependence before him, notwithstanding of the provisions contained in the Act passed in the sixth year of the reign of H. M. King George IV, cap. 120, section 28, and the provisions contained in the Act passed in the thirteenth and fourteenth years of the reign of Her present Majesty, cap. 36, section 49; and the judgments to be pronounced by

him upon such proof shall be subject to review in like manner as other judgments pronounced by him."

The enumeration of actions appropriated for trial by jury under the Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 28, includes actions of reduction on the ground of force and fear.

Elizabeth James Young, residing at Uddingston, brought an action of reduction against Christopher John Healy, writer, Glasgow, and James Craig, C.A., Edinburgh, as trustee acting under a trust-disposition for creditors granted in his favour by the said Christopher John Healy, and the firm of Healy & Young, writers, Glasgow, of which Christopher John Healy was a partner. The pursuer sought reduction of a certain assignation alleged to have been granted by her in favour of the defender Healy.

The pursuer, *inter alia*, averred—" (Cond. 1) In or about January 1898 the defender Christopher John Healy and John Ross Young, writer, Glasgow, entered into partnership and commenced business under the firm name of Healy & Young, as writers, law agents, and conveyancers in Glasgow. The said John Ross Young is a brother of the pursuer. . . . (Cond. 2) The said firm of Healy & Young became agents for the trustees of the late John Ross, sometime coppersmith, Glasgow, who was grandfather of the said John Ross Young and the pursuer. The said John Ross Young's mother was liferentrix on the estate, and the sole beneficiaries were the said John Ross Young, the pursuer, and James Gladstone Young, another brother of the pursuer. These four persons were latterly also the trustees on the said estate, and at the date of the said John Ross Young's disappearance, as after mentioned, the trustees were the pursuer, the said John Ross Young, and the said James Gladstone Young. The said trust estate consisted of heritable properties and heritable bonds valued at £13,000. (Cond. 3) In or about May 1898, after the said firm's appointment as agents, the said John Ross Young, who was the partner in charge, proceeded to administer and manage the trust estate of the said John Ross, but did not keep a separate bank account for the trustees, and immixed the funds of the estate with those of his firm of Healy & Young. About the same time the said John Ross Young and his firm of Healy & Young began to finance several speculative builders in Glasgow, and in order to do so they lent the funds of the said trust estate. This was done by the said John Ross Young outwith the knowledge of the said James Gladstone Young and the pursuer. By these actions, along with other fraudulent acts on the part of the said John Ross Young, and including speculations upon the Stock Exchange, the trust estate of the said John Ross was deprived of the sum of about £6000. . . . (Cond. 4) On or about 18th June 1908 the said John Ross Young, who is married, and resided then at Mount Vernon, Glasgow, disappeared from his home. On 19th June a letter and a brown paper parcel addressed

to the said James Gladstone Young were received by him at the house where the said James Gladstone Young and the pursuer resided. The letter was from the said John Ross Young, and stated that he had ruined pursuer and her brother, and that the box which was in the brown paper parcel contained notes to tide them over until things were straightened out. On the said notes being subsequently counted they were found to amount to £2700. The said James Gladstone Young requested the pursuer to lock the notes safely away till they saw further about the matter, which she accordingly did. . . . (Cond. 6) On 7th July the pursuer, in consequence of a message that the said John Ross Young was lying unconscious, proceeded to Larne to nurse him. Her brother James followed her shortly after that, and the defender Christopher John Healy was wired to on or about 10th July 1908 by James Gladstone Young, and informed that £2600 had been found. The pursuer believes that her brother the said James Gladstone Young also wrote to Mr Healy to the same effect. Mr Healy crossed to Ireland on 11th July, and, as instructed by her brother James who had that morning returned to Scotland, pursuer handed Mr Healy a parcel of notes which amounted to £2600. Mr Healy returned to Scotland that night. (Cond. 7) On or about 14th July 1908 the defender Mr Craig, who had been appointed factor *loco absentis* to the said John Ross Young, went to Larne and saw the pursuer. She gave him all the information in her power. Mr Craig represented that there was to be a meeting in Glasgow on the 16th July 1908 between him, Mr Healy, the said James Gladstone Young, and Mr Ross, writer, Glasgow, who had been appointed, by the said James Gladstone Young and the pursuer, agent in the said John Ross' trust, and Mr Craig suggested that the pursuer should send a mandate to her brother, the said James Gladstone Young, to act for her as he might think best in any matters that would require her consent. Acting on this suggestion pursuer sent such a mandate to her brother James, but next morning she wired to her brother and to Mr Ross withdrawing the mandate. (Cond. 8) On 16th July 1908 Mr Healy returned to Larne and demanded to see the pursuer. This would be between 10 and 11 p.m. He was very angry, and used threatening language towards the pursuer. He accused the pursuer of being as guilty as her brother John Ross Young of concealing or trying to conceal the assets of the said firm, and said that he would put her in the dock along with her brothers. He informed her that she had committed herself, and that in order to save herself from criminal proceedings she would require forthwith to grant a similar assignation to one which her brother James Gladstone Young had granted. These statements made by Mr Healy were false and were known to him to be false, and but for them and the threats and compulsion used by Healy the pursuer would not have granted the assignation after mentioned. Further, the said

statements were made for the purpose of frightening and did frighten the pursuer into complying with his wishes. Mr Healy thereupon produced an assignation granted by James Gladstone Young of his interest in the estate of his said grandfather John Ross, in favour of himself. The pursuer was frightened at the threat of criminal proceedings held over her by Mr Healy, and by his angry and threatening conduct towards her; she was also deceived by his said false misrepresentation, and led thereby to sign the document. Mr Healy insisted on pursuer signing the assignation, and forced her to do so. The pursuer accordingly proceeded to do what he demanded, and signed the assignation. The assignation was not completed before three o'clock on the morning of 17th July. The pursuer granted the said assignation under force and intimidation exercised, and fear induced by, Mr Healy. The said assignation was entirely gratuitous and without consideration. She had no one near her whom she could consult, and this was known to the defender Mr Healy. The said assignation was obtained by Mr Healy through force, fear, and intimidation. Mr Healy took the said assignation and statement away with him, and returned to Glasgow on 17th July. . . . (Cond. 10) On or about 21st July 1908 the said James Craig obtained a trust-disposition signed in his favour by the firm of Healy & Young and the individual partners of said firm, the said Christopher John Healy and John Ross Young, as such partners and as individuals. By said trust-disposition the rights of Mr Healy in said assignation by the pursuer have been transferred to Mr Craig as trustee foresaid. . . ."

The defenders, *inter alia*, averred that James Gladstone Young was closely associated with John Ross Young in the building transactions above referred to. They further averred that, previous to the granting of the assignation in question, both the pursuer and James Gladstone Young had expressed their intention of assigning their respective interests in their grandfather's trust estate in order to satisfy the claims of the creditors of the firm, and that the assignation was deliberately granted by the pursuer in pursuance of that expressed intention, and they denied that it was extorted from her by any threat of criminal proceedings.

The pursuer pleaded—“(2) The pursuer having been induced to grant the said assignation by force and fear, and under threats by the said Christopher John Healy, and the said assignation being to her prejudice, it ought to be reduced. (3) The pursuer having been induced to grant the said assignation by the false misrepresentations of the said Christopher John Healy as condescended on, the same should be reduced.”

The defenders pleaded—“(1) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons. (2) The pursuer's averments, so far as material, being unfounded in fact, the defender is entitled to absolvitor. (3)

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