1807.

MILLIE
v.
MILLIE, &c.

[Fac. Coll. vol. xiii. p. 233; et Mor. 8215.]

(First Appeal.)

DAVID MILLIE, Linen Manufacturer in Pathhead, *Appellant;*
ELIZABETH WHYTE, formerly ELIZABETH MILLIE, and WILLIAM WHYTE, her Husband, } *Respondents.*

(Second Appeal.)

The said ELIZABETH WHYTE, and WM. WHYTE, *Appellants;*
The said DAVID MILLIE, . . . *Respondent.*

House of Lords, 18th March 1807.

LEGITIM—RES JUDICATA.—1. A father, after bestowing provisions upon his children, conveyed all his heritable and moveable estate (a valuable portion of which consisted of a concern, in which the son had been for some years a partner with the father) to his son absolutely, reserving to himself only £100 per annum. He lived three years after this conveyance and died. All the children, except the respondent, had accepted of their provisions as in full of their legitim. In a claim made by the respondent (first appeal) for legitim, as due at her father's death; Held that the conveyance by the father to the son could not be held as a *bona fide* alienation of his estate, but, from the circumstances, was to be viewed as an alienation devised to defeat the legitim at his death, and, therefore, that the daughter was entitled to her legitim. 2. Held, that the former decree, in regard to the same question, was not a *res judicata.*

Sept. 22, 1791. At first this action was brought by the respondents, Elizabeth Millie or Whyte, with consent of her husband, against the appellant, to reduce and set aside a deed executed in his favour by David Millie, senior, their father, on the ground of imbecility. And also for a share of the goods in communion as at the death of the pursuer's mother. And also for her share in the legitim due on her father's death.

David Millie, senior, of this date, after various deeds, executed a general disposition, by which he instantly assigned, conveyed, and made over to his son, the appellant, then engaged with him in business, all and whole my share and interest in the stock of the foresaid copartnery, and whole debts due, and utensils and implements pertaining thereto. As also all and sundry his heritable and moveable effects, together with his whole household furniture, plenishing, and all and sundry debts and sums of money, bonds,

bills, accounts, account debts, &c., with all writs, title-deeds of said heritages, with the whole vouchers and instructions of the same. This deed was granted under burden of his debts, both as a partner with his son and as an individual. Also of £100 to the grantor, payable at two terms in the year, Whitsunday and Martinmas, during all the years of his life; and also of annuities to his daughters *Elizabeth* and Janet, and provisions to his children by separate bonds as relative hereto.

The father's estate, at the date of this deed, was supposed to be upwards of £20,000.

Of same date, he executed a bond of provision in favour of his daughters, conceived in these terms:—And "Con-"sidering that I have formerly advanced and paid several "sums of money to my daughter Elizabeth Millie, wife of "William Whyte, stationer in Kirkaldy, and to her said "husband, and their children, to the amount of £490, of "which £182 was contained in bills to her said husband, "and have also, during the twenty-five years last past of "their marriage, given them occasionally such support, and "even maintained their family in a great measure for ten of "these years; and that I have also paid the sum of £150 "Sterling of tocher with my daughter Janet Millie, wife of "James Barr, weaver in Gorbals of Glasgow; and the sum "of £200 Sterling with my daughter Christian Millie, now "deceased, wife of Thomas Porteous, minister of the seced-"ing congregation Milnathort; and that although the sums "paid to my said daughter Elizabeth Millie, and her hus-"band, exclusive of the sums I have advanced to some of "their children, exceed the proportion of my funds which "I have already given, or propose to bestow upon my other "daughters or their children, yet, nevertheless, I consider "necessary to provide her, and the said Janet Millie, my "only surviving daughters, in annuities." Then follows an annuity of £20 per annum to Elizabeth, and £370 to her children, and £12 per annum to Janet, with £400 to her children. The deed further provided, that these provisions were to be in satisfaction to them and their issue, of all legitim, portion natural, executry, &c.

Mr. Millie, senior, continued to live in family with his son for many years after the execution of this deed, and until his death in Dec. 1795; but, notwithstanding the conveyance of his heritable property, it was stated he continued to uplift the rents of the same himself up to his death; and, subsequent to the deed 1791, it appeared from the co- 1795.

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partnery books that the old copartnery still subsisted, and bills and letters were drawn and written in Millie & Son's name down to the day of his death.

All the daughters accepted of their provisions in satisfaction of their legitim, and all they could claim, either by their father or mother's death, except Elizabeth.

Elizabeth claimed her legitim, and also a share of the dead's part of the goods in communion as at her mother's death. Various steps of procedure took place, adopted with the view of adjusting these claims, but without effect.

A submission had been gone into, even before the father's death, in regard to her claims, but was afterwards given up. He was a party to it. And it was alleged that this transaction, to which the son was also a party, was incompatible with the supposition that the deed was absolute and irrevocable, or exclusive of the respondent's rights of legitim.

At first, two actions were raised by the respondents, one, to set aside and reduce the deed of 1791, on the ground of imbecility, and fraud and circumvention, and containing a conclusion for £10,000, as Mrs. Whyte's share of the legitim. The other, for payment of one half of the goods in communion as at her mother's death. Defences were lodged in these actions. In the reduction, the term for proving was
June 6, 1797. circumduced *of consent*, and the defender assoilzied. And, in regard to the claim for legitim, decree by default, was pronounced for not giving in condescendence. In the other action, decree by default also was pronounced, assoilzing the appellant.

Other two actions were brought, the one, for accounting and calling for exhibition of bonds, bills, books, and vouchers, belonging to David Millie at his death. The other, an action of reduction to set aside the disposition 1791, and for payment of her legitim, and for reducing the former decrees.

The questions therefore raised were, 1st, Whether the right of legitim can be cut off by any deed executed by a father *in liege poustie* divesting himself, during his own life, of his whole moveable and heritable estate, for the avowed purpose of defeating the claim of legitim? And, 2d, Whether such a deed, executed by the father in favour of his son, in the present case, was a *bona fide* disposition, or merely a simulate conveyance of his property?

The appellant rested his defence entirely upon the plea of *res judicata* as barring the action grounded on the de-
Jan. 13, 1801. Nov. 27, 1801. crees in the former actions.

July 6, 1802. After interlocutors of these dates, the first of which repelled

the plea of *res judicata*, on the ground that the one decree was a decree of consent, and the other a decree in absence, and therefore reduced the same, the Lord Ordinary pronounced this interlocutor :—" Finds that the de-
" ceased David Millie, father to the pursuer and defender,
" did, in September 1791, execute a voluntary and gratuitous
" disposition and conveyance, in favour of his son, the defend-
" er, proceeding on the narrative, that for several years
" past, he had carried on business in partnership with his
" son, by whose attention and industry their labours had
" been crowned with success; and it being his intention to
" continue his residence with his son, where he had lived for
" so many years past; and having formerly paid consider-
" able sums to his daughters, and by a bond of the same
" date, had made additional provisions in their favour,
" therefore, on all these considerations, he conveyed to his
" son irrevocably the whole of his property, both heritable
" and moveable, with power to his son to carry on the joint
" trade in future, either in his own name, or under the firm
" of David Millie & Son, only reserving an annuity of £100,
" obliging himself to grant special dispositions to the sub-
" jects disponed. That the said David Millie survived the
" execution of this deed several years: That no inventory of
" effects, or list of debts due to the said David Millie was ever
" made out, or any special conveyance executed by him,
" either to the heritable or moveable property: That no
" dissolution of the copartnery ever took place; but the
" trade continued to be carried on under the firm of David
" Millie & Son: That it is now admitted no part of the
" annuity of £100 was ever paid to the said David Millie,
" which, it is now alleged, was allowed by the old man to
" go in compensation of the entertainment afforded him by
" his son, although residence in his son's family was one of
" the inductive causes for granting the disposition 1791:
" Finds, that in October 1795, a submission was entered
" into. (Here the abortive submission proceedings were
" narrated). Finds the pursuer's claim for a proportion of
" her deceased father's effects, being founded upon the ob-
" ligation laid upon parents, both by the law of nature and
" positive institution, to provide for their children, cannot
" be defeated but by a *bona fide* alienation and transfer of
" property during the lifetime of the parent: Finds, from
" what is above stated, and upon the whole circumstances
" of the case, the voluntary and gratuitous disposition by
" David Millie, senior, in favour of his son, the defender,

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"cannot be held as a *bona fide* alienation of his property, "but a collusive transaction, devised for the purpose of de- "feating the claim of legitim competent to the pursuer; "therefore repels the defences founded on this deed, sus- "tains the claim, and appoints the pursuers to lodge a state "of the amount of the personal funds belonging to her "father at the time of his death, and the evidence by which "they mean to establish such state: and allows the de- "fender to see and answer within ten days." On reclaim-
Feb. 16, 1803. ing petition to the Court the Lords adhered. On further
June 7, 1803. petition they adhered.

Against these interlocutors the present appeal was brought by the appellant; a second appeal was brought by the respondents, intended as a cross appeal, but, being too late, according to the standing orders of the House, it was allowed to stand as a second original appeal against the interlocutors in the former actions, which terminated by absolvitor in favour of the appellant David Millie.

Pleaded for the Appellant.—The plea of *res judicata* is a bar to the present action, but on this plea the appellant does not rest his case. The law of Scotland, on the question of legitim, is clear; that a father cannot, by a mere deed, executed on deathbed, nor by a *mortis causa* deed, or a deed of a testamentary nature, defeat his children's right to legitim, falling due to him at his death; but, although this be the law, it does not follow that the father cannot in any way, or by any deed whatever, disappoint the legitim. This claim on the part of the children may be disappointed in various ways. It is due only out of moveable estate; and the father may entirely disappoint it, by converting all his moveables into heritable estate. Besides, the father, notwithstanding such claim, has entire control over his moveable estate during life; and, if a contrary rule obtained, then every deed by which the father exercised this control over his moveables might be questioned. It may therefore be disappointed by contracting debts, by spending his estate, or by voluntary and gratuitous gifts and alienations made in *liege poustie*, such being the law laid down by the authorities. The deed in question totally and absolutely divested the father of his whole property, and that estate was vested irrevocably in the appellant several years before his death. It is a fair *bona fide* deed, executed *inter vivos*, absolute and irrevocable in its terms, and was a delivered deed; and as the father by it was totally divested, he had nothing at his death upon which a claim of legitim could attach.

The second appeal brought by the respondents, in reference to the decrees of absolvitor in the former actions, was quite unnecessary, as the interlocutor of the Court below has reduced those decrees.

Pleaded for the Respondents.—By the law of Scotland the right of legitim cannot be excluded by a deed of a testamentary nature. The deed executed by Mr. Millie, senior, though purporting to be a *bona fide* and absolute transference of property in favour of the appellant, was never carried into effect during the lifetime of the grantor, who continued in full possession of all his property so conveyed, for at least three years subsequent to the date of the deed; and had actually entered into a transaction within a few months of his death, which was utterly exclusive of the validity of the deed 1791 as an absolute and irrevocable conveyance *inter vivos.* This was the submission entered into by him in regard to this daughter's claims, which necessarily implied that this deed could not bar these claims; and that she had not otherwise discharged them. The decision in the House of Lords, in Lashley *v.* Hog, must govern the present question. It is impossible in principle to distinguish that case from the present. The transfer of stock had been made, in that case, to the son, as the conveyance was executed in the present, for the purpose of disappointing the legitim, but old Mr. Hog had continued, notwithstanding the transfer, to receive the dividends, as old Mr. Millie, notwithstanding the conveyance here, continued to receive the rents and profits; and your Lordships found that all such stock, the dividends of which had been so received, was subject to the claim of legitim.

July 16, 1804. Vide ante, vol. iv. p. 581.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Sir Sam. Romilly, Wm. Adam, Mat. Ross.*
For Respondents, *Wm. Alexander, Arch. Campbell, David Boyle.*

ARTHUR DINGWALL FORDYCE, Esq. of Culsh, Trustee on the Sequestrated Estate of John Durno, Advocate in Aberdeen, *Appellant;*
SIR JOHN GORDON of Park, Bart., & ALEX. MOIR, *Respondents.*

House of Lords, 26th March, 1807.

CONVEYANCE IN SECURITY—ACT 1696, c. 5.—Cautioners for a col-