Wednesday, June 16.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MOUBRAY'S TRUSTEES *v.* MOUBRAY.

(*Ante*, vol. xxxii., p. 593, and 22 R. 801.)

Entail—Destination—Direction to Entail on Persons so long as Another Estate was theirs—Clause of Devolution.

In the will of Robert Moubray, who died in 1875, he directed his trustees to accumulate the income of his estate till it reached a certain sum, and then to purchase therewith lands "as near to the estate of Cockairnie as possible, and as strictly as the law of Scotland will allow to entail such lands purchased as above on my heirs direct or collateral so long as the estate of Cockairnie is theirs."

When this will was written the estate of Cockairnie was possessed by William Moubray, a younger brother of the truster. William Moubray died in 1885, leaving a trust-disposition and settlement, by which he directed his trustees to hold the estate of Cockairnie for the use and behoof of Captain Moubray, his eldest son, and the heirs-male of his body, whom failing of his second or other sons in their order respectively, and the heirs-male of their bodies respectively, subject, *inter alia*, to the condition that William Moubray was the next heir to the estates of Upwood and Woodwalton, and as it was his wish that the heir who should succeed after him to these estates should not also take the estate of Cockairnie, his trustees were to convey Cockairnie to the child who might be entitled thereto other than the heir who should succeed to Upwood and Woodwalton.

The sum specified in the will of Robert Moubray was accumulated in 1894.

Held that in the deed of entail of the estate to be purchased with the accumulated sum, to be executed by Robert Moubray's trustees in favour of Captain Moubray as institute of entail and of the other heirs of entail, the trustees were not entitled to insert a clause of devolution by which, in the event of the heir in possession succeeding to the estates of Upwood and Woodwalton, the entailed estate should devolve on the next heir who took the estate of Cockairnie.

Res judicata—Opinion on Point not Debated or Included in Judgment.

In the case of *Moubray's Trustees* v. *Moubray* (*ante*, vol. 32, p. 593, and 22 R. 801), which decided that a direction to entail lands was valid, the opinion of the Court contained the following sentence—"of course the entail will contain a clause of devolution, by which, in the event of the heir in possession succeeding to the English estates, the estate shall devolve on the next heir who takes the estate of Cockairnie." The question whether the entail should contain such a clause of devolution was not debated and was not involved in the judgment. The case was remitted back to the Lord Ordinary, and the question as to the clause of devolution was raised. *Held* that consideration of that question was not foreclosed by the sentence in the opinion above quoted.

This is a sequel to the case reported *ante*, vol. xxxii. p. 593, and 22 R. 801, in which the narrative is set out at length.

The present question arose on account of the concluding sentence in Lord Rutherfurd Clark's opinion, which was read as the judgment of the Court, viz., "Of course the entail will contain a clause of devolution, by which, in the event of the heir in possession succeeding to the English estates, the estate shall devolve on the next heir who takes the estate of Cockairnie."

In accordance with this opinion the trustees proposed to insert in the draft disposition and deed of entail the following clause:—"But providing and declaring always that whereas it was the wish and intention of the said Robert Frederick North Bickerton Moubray that the lands directed by him to be purchased and entailed as aforesaid should be permanently held and enjoyed along with the estate of Cockairnie in the county of Fife, so long as the latter estate should be in the possession of any member of the Moubray family. And whereas the said deceased William Hobson Moubray was the last heir in possession of the said estate of Cockairnie, and the same is now held by the trustees acting under his settlement for behoof of his eldest son and the heirs-male of his body, whom failing of his second or other sons in their order respectively and the heirs-male of their bodies respectively, but subject to this direction, that upon the succession opening to the estates of Upwood and Woodwalton in the county of Huntingdon, to which he the said William Hobson Moubray was the next heir of entail, his trustees should convey his estates of Otterston and Cockairnie to the child who should be entitled thereto under the destination contained in his said settlement and above narrated other than the heir who should succeed to the said estates of Upwood and Woodwalton and to the heirs and assignees whomsoever of such child. Therefore in case the institute or any one of the heirs of entail called to the succession of the lands and estate hereby conveyed by virtue hereof shall succeed to the said lands and estates of Upwood and Woodwalton upon the failure of Richard Hussey Hussey, the present proprietor thereof, and any son or sons he may leave, then and in that case the said lands and estate hereby conveyed shall immediately descend to and devolve upon the person who being an heir called to succeed thereto under the destination before written, shall

also be the person to whom the said estates of Otterston and Cockairnie are to be conveyed under the settlement of the said William Hobson Moubray, and the institute or heir of entail so succeeding to the lands and estates of Upwood and Woodwalton shall be bound immediately upon so succeding to denude and divest himself or herself of the said lands and estates hereby conveyed in favour of the person entitled thereto as above mentioned. But the said institute or heir of entail shall have the same power or right of election (if any) between the said estates of Upwood and Woodwalton and the lands and estate hereby conveyed as may be competent to him with regard to the said estates of Otterston and Cockairnie."

Captain William Moubray objected to any clause of devolution being inserted in the deed of entail.

Arthur Moubray contended that the deed of entail must contain a clause of devolution, but was of opinion that in place of the latter portion of the clause suggested by the trustees the following should be inserted:—"Therefore in terms of the direction contained in the testamentary writings of the said Robert Frederick North Bickerton Moubray, and his intention that the lands and estate above disponed shall be held along with the estate of Cockairnie and Otterston, it is hereby provided and declared that in case the institute or any one of the heirs of entail called to the succession of the lands and estate hereby conveyed by virtue of these presents, who would have been the heir entitled to a conveyance of the said estates of Cockairnie and Otterston from the trustees of the said William Hobson Moubray, shall succeed to the said lands of Upwood and Woodwalton and be thereby debarred from demanding a conveyance of the said estates of Cockairnie and Otterston, then and in that case the heir so succeeding shall, for himself and the heirs of his body, forfeit all right to the lands hereby conveyed, and the said lands and estate hereby conveyed shall immediately descend to and devolve upon the person who being an heir called to succeed thereto under the destination before written shall also be the person to whom the said estates of Cockairnie and Otterston shall fall to be conveyed, in the same manner as if the heir succeeding to Upwood and Woodwalton as aforesaid, and the heirs of his body, had all deceased, and the institute or heir of entail so succeeding to the said lands and estate of Upwood and Woodwalton shall be bound immediately upon so succeeding to denude and divest himself or herself of the said lands and estate hereby conveyed in favour of the heir of entail of the lands and estate hereby disponed, who shall then be entitled to receive the conveyance of the said estates of Cockairnie and Otterston from the trustees of the said William Hobson Moubray."

On 4th December 1895 the Lord Ordinary pronounced the following interlocutor:—"Having considered the arguments for the parties in the procedure roll with reference to the terms of the proposed deed of entail, submitted by the pursuers, and the alterations suggested by Captain Moubray and by Arthur Moubray respectively—Finds (1) that the clause of devolution inserted in said form falls to be deleted . . . and subject to these corrections, approves of said form as the form of the deed to be executed by the pursuers in fulfilment of the direction given by the deceased Robert Frederick North Bickerton Moubray in his testamentary writing dated 30th April 1868, and referred to in the interlocutors pronounced in the cause of dates 30th October 1894 and 26th June 1895: Appoints the cause to be enrolled for further procedure: Grants leave to reclaim."

Note.—"In this case, by interlocutor of 30th October 1894, I found that Robert Moubray, who resided at Cockairnie, Fifeshire, and who died on 31st March 1875, had directed that certain funds should be invested in the purchase of lands as near the estate of Cockairnie as possible, and that his testamentary writings imported a direction to entail the lands when purchased 'on the heirs in heritage of the 'testator, being the heirs of his blood in the order of heritable succession.' I reached the conclusion that that was the destination directed on a construction of the whole of Mr Moubray's testamentary writings, all of which had, by a previous interlocutor pronounced by Lord M'Laren on 13th July 1883, been decided to be his 'testamentary acts.'

"My interlocutor was taken to review, and the opinion of the Court was delivered by Lord Rutherfurd Clark, who reached the same conclusion, but proceeded on only one of the testamentary writings, that dated 30th April 1868, which his Lordship conceived to be 'the only existing will.' But Lord M'Laren's judgment was not altered, and my interlocutor was affirmed *simpliciter*.

"The case has been enrolled for the adjustment of the deed of entail to be executed by Mr Robert Moubray's trustees. No estate has been purchased, and it is possible that no suitable estate may be in the market for some time—it may be for some years. But it was represented that the terms of the deed of entail directed ought now to be adjusted, because of the provisions of the 27th section of the Entail Amendment Act 1848, to the effect that money vested in trust for the purchase of land to be entailed may be disentailed. The institute, Captain Moubray, maintains that he is entitled to be put in a position which will, he says, enable him, if he thinks proper, to acquire the money or part of it in fee-simple, and that he cannot do so until the terms of the deed of entail to be granted, and in particular of the destination, are adjusted. It appears to me that the contention thus stated by Captain Moubray is well founded, and that it is proper that the deed be now adjusted, notwithstanding that no lands have been purchased to which it can be applied.

"The trustees have lodged a draft of the deed which they suggest. Since the debate that draft deed has been printed, and I

have also been furnished by the parties with a print of it, on which are shown the modifications suggested on the one part by Captain Moubray, the institute, and on the other part by Arthur Moubray, who is at present the first substitute. The parties have not expressed a desire to be reheard on these prints, and as the deed must doubtless be ultimately adjusted in the Inner House, I think it unnecessary to order such a rehearing.

"The main question relates to a suggested clause of devolution. By the testamentary writing dated 30th April 1868 Mr Robert Moubray directed his trustees to execute a deed of entail of the lands to be purchased on his heirs, direct or collateral, 'so long as the estate of Cockairnie is theirs;' and when the case was debated before me at first, the question was raised, whether in order to give effect to that qualification a clause of devolution or other conditional clause should be inserted. There appeared to me to be great difficulty in inserting such a clause. I came to think that the clause ought to be read as referring to the point of time when the deed fell to be executed, and as practically meaning—if the estate of Cockairnie is theirs. I thought that construction justified by the testamentary writings read together, and I therefore expressed the opinion that the deed of entail should not contain any clause of devolution. But the interlocutor which was affirmed does not decide that point. Lord Rutherfurd Clark, however, at the close of his opinion, says—'Of course the entail will contain a clause of devolution, by which, in the event of the heir in possession succeeding to the English estates, the estate shall devolve on the next heir who takes the estate of Cockairnie.'

"The trustees now represent that in the draft deed submitted by them they have inserted a clause of devolution in accordance with this opinion. But it is contended on behalf of Captain Moubray, the institute, that there should be no clause of devolution, and this is the main question now between the parties. Its practical importance as between Captain Moubray and Arthur Moubray is great, because of the advanced age of the proprietor of the English estates alluded to.

"I was informed that at the debate in the Inner House a clause of devolution was not so much as alluded to, and it was maintained that it is still competent to decide that there should be no such clause, and that against such a decision there is no judgment of the Court, but only an opinion on a question which was never debated at the bar, although an opinion, no doubt, of great weight and importance, but yet an opinion for which no reasons are assigned. In that position of matters I apprehend that I cannot with propriety avoid the duty of deciding the question according to my own opinion, and I remain of opinion —although, of course, with no confidence— that there should be no clause of devolution, and that the contention of Captain Moubray to that effect should be sustained.

"I suppose that the ground and reason for such a clause must be found in the testamentary writings of Robert Moubray, and in the testamentary writing dated 30th April 1868, if that be held (as was the opinion of the Court) to be Mr Robert Moubray's 'sole testamentary deed.' There are no words in that writing which suggest such a clause, except the words 'so long as the estate of Cockairnie is theirs.' Now, if these words import the desire of Mr Robert Moubray that there should be a clause of devolution in the deed of entail, it must be a clause expressing that whenever the heir in possession of the lands directed to be entailed shall cease to be proprietor of the lands of Cockairnie, he shall forfeit the lands directed to be entailed. The words do not indicate the person on whom these entailed lands shall in that event devolve. Now, the lands of Cockairnie might cease to belong to their owner in more ways than one. They might be adjudged by his creditors, or he might sell them, seeing they are not entailed, or he might forfeit them by succession to the English estates, or they might descend to different persons by reason of the difference in the destinations of Cockairnie and of the lands to be entailed. Such a clause of forfeiture might be at once extinguished by anyone who came to be the uncontrolled proprietor of Cockairnie; and I do not consider that such a clause was contemplated.

"Nobody has contended that there should be a clause of devolution to that effect. Lord Rutherfurd Clark's opinion indicates a clause of a totally different character. It indicates a clause forfeiting the estates to be entailed on the succession of any heir of entail in possession to the English estates—that is to say, Upwood and Woodwalton — and in that event only, and a devolution to the heir next in the tailzied destination if he should be the heir (as might or might not be) to the estate of Cockairnie. The clause suggested does not appear to indicate one single forfeiture to occur on the first opening of the succession to the English estates, but a clause qualifying the right of all the heirs of entail so long as the entail should endure.

"Captain Moubray submits that there is no suggestion of such a clause as this in Robert Moubray's testamentary writings; and I cannot find any such suggestion. It is maintained that in order to find any warrant for such a clause of devolution it is necessary to go to the title-deeds of Cockairnie; and Captain Moubray maintains that it is illegitimate to refer to these title-deeds in order to construe Robert Moubray's testamentary writings. I confess I am somewhat at a loss to know what the deed is in which the suggestion is to be sought for. It can hardly be the trust-disposition of William Hobson Moubray, who was proprietor of Cockairnie, although Robert Moubray resided there, and that for the apparently unanswerable reason that Robert Moubray was dead before that deed was executed. It is apparently necessary to go back to the trust-disposition of Sir Robert Moubray, which has not been printed or produced, but is described

in the joint minute of admissions. I understand it to be averred that he there expressed his wish that his estates in Fife should not be united with the estate of Woodwalton. But in the same minute of admissions it is stated that in 1867 William Hobson Moubray conveyed the estates to himself free of any condition relating to the devolution of his estates. In these circumstances I confess that I find it impossible—whether it be legitimate or not—to interpret Mr Robert Moubray's testamentary writings by a reference to any other title-deeds.

"I may only further notice (although perhaps this may hardly be relevant) that it appears to me that William Hobson Moubray did not by his trust-disposition and settlement declare that there should be any recurring forfeiture of Cockairnie by reason of succession to Upwood and Woodwalton, but only directed his trustees to hold the estate of Cockairnie until the succession to Woodwalton should open, and then to convey it to the heir next in the destination of Cockairnie to whom the English estates did not descend. But of course it is impossible that this condition—imposed after Robert Moubray's death—could have any bearing on his testamentary writings, or on the entail directed by him. It may have been the wish of Robert Moubray that the estate of Cockairnie and the estates to be purchased and entailed should always belong to the same proprietor, but I think he has taken no adequate means to secure that object.

"On the whole, I feel compelled to adhere to my original opinion, and to adjust the deed of entail in the manner for which the institute Captain Moubray contends, that is, by deleting the clause of devolution."

Arthur Moubray reclaimed, and argued—The Lord Ordinary's judgment was wrong. The point had already been decided by the Court, because, although the matter was not technically *res judicata*, yet the expression of opinion by Lord Rutherfurd Clark adopted by the Court practically settled the matter. *On the merits*—It was plain from the testator's settlement that he desired that a clause of devolution should be inserted so that the lands to be bought might permanently be possessed along with Cockairnie, because (1) he directed that the lands to be purchased were to be contiguous to Cockairnie; and (2) he specially directed that the lands were to belong to his heirs "so long as the estate of Cockairnie is theirs." The Court was entitled to look at W. H. Moubray's trust-disposition, because it showed that in a certain event happening, his eldest son would not succeed to Cockairnie and this clause of devolution would prevent the accumulated funds or the estate to be purchased with them getting into the hands of one who might never be the possessor of Cockairnie at all.

Argued for claimant Captain William Henry Hallowell Carew Moubray — The Lord Ordinary's interlocutor should be affirmed. The point was entirely open. On the last occasion the question had never been argued before the Second Division, and the dates of the various documents could not have been present to Lord Rutherfurd Clark's mind when he wrote the last sentence of his opinion. His view on this matter did not in such circumstances affect the question. *On the merits*—If Robert Moubray's will alone was looked at, there was no hint in it that if a Moubray of Cockairnie should succeed to the English estate of Woodwalton he was to forfeit his right to the estate to be bought with the £40,000. There being no warrant in the will for the clause of devolution, it was impossible that the trustees could take instructions from any deed but the trust-deed appointing them. In his will there was no trace of a disinclination on the part of Robert Moubray that the same person should get Cockairnie, Woodwalton, and the new estate. It was impossible to make the new entailed estate an adjunct of the fee-simple estate of Cockairnie.

At advising—

LORD JUSTICE-CLERK read the following as the opinion of the Court, consisting of himself, LORD YOUNG, and LORD TRAYNER—We think that consideration of the question raised by the present reclaiming-note is not foreclosed by the judgment pronounced in this case on 27th June last, nor by the sentence in the opinion then delivered which the Lord Ordinary quotes. Having considered that question with the argument addressed to us thereon, we are of opinion that the judgment of the Lord Ordinary is right and should be affirmed.

LORD RUTHERFURD CLARK was not present when the case was heard on January 16th.

The Court adhered.

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