

"to pay all my just and lawful debts, sick-bed and funeral charges, and the necessary expenses of managing this trust, and they are hereby specially authorised to pay all such debts, claims, or expenses that may to them seem just and proper, without requiring strict legal constitution of the same by decret or otherwise." Then the second purpose is "to pay to the said Mrs Jane Wedderburn Jolly or Kinmond, my wife, annually the sum of £600." Then by a codicil he increases the annuity by £400, and puts this further sum upon the same footing as the £600, for he provides that the trustees are—"to pay to my wife, Jane Wedderburn Jolly or Kinmond, annually, the sum of £400, and that over and above the annuity of £600 granted to her by my settlement foresaid, making together an annuity of £1000, and such increase shall be paid to her at the same times, in the same manner, and under the same conditions and penalties, as are provided for in respect of the said annuity of £600." It is very important to observe the order in which the testator disposes of his estate, and the fact that the widow's annuity is the second purpose of the deed of itself shows that it is preferable to the purposes which come afterwards, unless, of course, the other parts of the deed are contrary to this supposition.

We must also remember that this is not an annuity to a stranger, but to the testator's widow, to whom he is under obligations both natural and legal, and the presumption always is that an annuity to a widow is preferable to anything else. Therefore I am of opinion that this annuity must be provided for by the trustees before anything else, except the testator's debts. I therefore concur with your Lordship.

LORDS ARDMILLAN and JERVISWOODE concurred.

The Court held that the first parties were bound to make up to the second party any deficiency which there might be of income to meet the annuity out of the capital of the trust-estate.

Counsel for the First Parties—Watson and J. Gray Webster. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for the Second Party—Marshall and Johnston. Agent—Alexander Howe, W.S.

Thursday, February 6.

SECOND DIVISION.

SPECIAL CASE—GRANT AND OTHERS.

Trustee—Marriage Contract—Mutual Disposition and Settlement—Executor.

In an ante-nuptial contract of marriage between A and B, B conveyed all the property then belonging to her to trustees for certain purposes, and, *inter alia*, (1) for the purpose of paying the annual produce of the trust-estate to A in case of her (B's) predeceasing him; and (2), in the case of both A and B dying without children, for the purpose of paying the whole trust funds to B's heirs, executors, and assignees. After their marriage A and B executed a mutual disposition and settlement bearing to be "in supplement of, but without prejudice to, the provisions" of the marriage-contract. In this deed A and B

conveyed to each other their whole estate which they might possess at the time of their death, in liferent allenerly, and to the children of the marriage, whom failing, to their heirs whomsoever; and each appointed the other sole executor. B predeceased A without any children of the marriage. Held that the marriage-contract trustees were not bound to denude of the trust funds in favour of A as B's executor, but that they were entitled and bound to retain and administer the said funds.

This Special Case was presented by Mr Alexander Grant, member of the Institute of Civil Engineers, London, and of the Punjab, Upper India, and the trustees under the marriage-contract of the said Mr Grant and Dora Scott Lorrain or Grant, his wife. The facts of the case were as follows:—On 1st August 1868 Mr Grant and Miss Lorrain, afterwards his wife, entered into a contract of marriage, by which Miss Lorrain on her part disposed to trustees therein named her whole means and estate, heritable and moveable, then belonging to her, or to which she might acquire right during the subsistence of the marriage, either under the trust-disposition and settlement of her grandfather and grandmother, or the contract of marriage between her father and mother, or the last will and testament of her father, with the exception of the money coming to her from a certain estate of her late mother. The purposes of the trust were, *inter alia*, (1) to pay the annual produce of the trust-estate to the said Miss Lorrain, excluding the *jus mariti* of her husband; (2) in event of Miss Lorrain's death, to pay the annual produce of the estate to her husband; and (3) in event of both the spouses dying without children, to pay the whole trust-funds to the heirs, executors, and assignees of the said Miss Lorrain.

The marriage took place on the 4th August 1868, and Mr and Mrs Grant shortly afterwards proceeded to India. While at Alexandria, *en route* for India, Mr and Mrs Grant executed a mutual disposition and settlement on the 26th September 1868. This disposition and settlement proceeded upon the narrative of the ante-nuptial contract of marriage, bearing to be in supplement thereof and without prejudice thereto; and thereafter each of the spouses disposed to the other in case of survivance in liferent allenerly, and to the child or children of the marriage, and to the issue of such as might predecease, equally among them *per stirpes*, whom failing, to his (or her) own heirs, executors, or assignees whomsoever in fee, "all and sundry my heritable and moveable estate, of whatever nature or denomination the same may be, which shall belong and be added to me at the time of my decease, with the whole writs and evidents, vouchers, and securities thereof;" and each nominated the other sole executor in case of survivance.

Mr Grant died in India on 27th January 1871, without leaving issue. In virtue of the conveyance by Mr Grant in the said marriage-contract, the trustees (the parties of the second part in this case) became possessed of funds to the amount of £2300. Mr Grant, the party of the first part, called upon the parties of the second part to make over to him, as executor-nominate of his said wife under the said mutual disposition and settlement, the whole of the said funds, and any other funds which might come to them through or as in right of Mrs Grant.

The questions submitted to the Court were:—

- (1) Whether the parties of the second part are bound now to denude of the whole funds of which, under the said ante-nuptial contract of marriage, they have become, or may hereafter become, possessed, coming through Mrs Grant, in favour of the party of the first part, as executor of his deceased wife, nominated by the said mutual disposition and settlement, upon his producing a confirmation in usual form, and tendering a discharge for the said funds;
- Or,
- (2) Whether, notwithstanding the execution of the said mutual disposition and settlement, nominating Mr Grant executor to his wife, and disposing of her whole estate, and the failure of children of the marriage, the parties of the second part are entitled and bound to retain and administer the said funds."

At advising—

LORD PRESIDENT—The question here is, whether the trust created by the marriage-contract is to hold, and the trustees to continue to administer the estate, or whether the trust has been revoked by the mutual disposition and settlement of the spouses? The answer to this question depends—

(1) On the power of the spouses to make such a revocation, and (2) upon their intention. I do not doubt that, failing children of the marriage, the spouses were entitled to revoke the provisions of the marriage-contract, and the question is, Whether, in event of there being no children, the spouses really intended to revoke the marriage-contract? The first thing which strikes me in looking at this disposition and settlement is that the granters say that it is in "supplement of, but always without prejudice to the said provisions"—that is the provisions of the marriage-contract. In short, they say that they intend the provisions of the marriage-contract to subsist as regards themselves, as well as regards their children. So the reason for executing the deed must have been that the marriage-contract was not sufficient to dispose of the estate which they might leave in case of death; and as matter of fact, Mrs Grant had an estate in prospect, and her husband had conveyed no estate in his marriage-contract, and so, if he had any, that is sufficient to account for the mutual deed. In that deed both the husband and wife convey their entire estate each to the other in liferent, and "to the child or children of our marriage, and the issue of such as may predecease, equally between or amongst them *per stirpes*, whom failing, to my own heirs, executors, or assignees whomsoever, in fee;" and each appoints the other executor. Mrs Grant under the marriage-contract had a *jus crediti* as regarded her whole estate, which she conveyed to the trustees, except a certain fund which she retained in her own hands. Now this mutual deed raises the question, whether the husband, as executor-nominate under that deed, is entitled to take up the funds which are in the hands of the trustees, as being *in bonis* of his dead wife. I don't think he is entitled to do so, for the funds are already ingathered, and there is nothing for him to do in the character of an executor. If he had been universal legatee, then he would have been entitled to call upon the trustee to denude, or he would have been entitled to do so if power had been specially given to that effect. So the trust still subsists, and the trustees are bound to hold the fund for

Mr Grant in liferent, and in event of his death for the heirs of Mrs Grant. So we must answer the first question in the negative, and the second in the affirmative.

The other Judges concurred.

The Court held that the parties of the second part were not bound to denude of the whole funds of which they were possessed under the said contract of marriage, but were entitled to retain and administer the said funds.

Counsel for the First Parties—Marshall and M'Laren. Agents—Horne, Horne, & Lyell, W.S.

Counsel for the Second Parties—Balfour and Mackiutosh. Agents—Traquair & Dickson, W.S.

Thursday, February 6.

FIRST DIVISION.

SPECIAL CASE—DENNISON AND OTHERS.

Disposition—Heritable Rights—Fees—duties, Purchase of.

A provided in her trust-disposition and settlement that all "heritable subjects, of whatever nature or denomination the same may be, which I may acquire after the date of these presents," should go to a certain person. A's lands were held direct of the Crown, but certain duties were payable out of the lands to B, who had acquired right to them by a charter from the Crown. Subsequently to the date of her trust-disposition, A purchased the right from B. Held that the said duties were not a heritable subject within the meaning of the above clause of the trust-disposition.

This was a Special Case for Mr Jerome Dennison, West Brough, Orkney, and the Trustees of the deceased Misses Barbara and Helena Fea. The facts of the case were as follows:—By trust-disposition and settlement, dated 21st July 1810, the Misses Fea assigned and disposed to each other, and the longest liver of them, and after the decease of the survivor to Mr Patrick Neill, printer in Edinburgh, and James Dennison, of North Myre, in Sanda, and the other persons therein named, as trustees for the purposes therein specified, the whole means and estate, heritable and moveable, then belonging to them, or which should belong to them or either of them at death; and in particular certain lands called Arie and Mussater, situated in the Island of Stronsay in Orkney. The Misses Fea and Messrs Patrick Neill and James Dennison were deceased before this case was brought.

By the eighth purpose of the trust it was declared that after the death of certain liferenters, all of whom are now dead, the farm of Mussater and the farm of Arie, together with the mansion-house of Arie, and park and garden adjacent thereto, should form and constitute a fund or mortification for certain charitable purposes therein specified.

The tenth purpose of the trust is in the following terms:—"Tenthly, We hereby appoint our said trustees, after the death of the survivor of us, to assign, dispone, convey, and make over to and in