COURT OF SESSION.

Wednesday, November 4.

FIRST DIVISION.

[Lord Gifford, Ordinary.

EDWARD J. STOPFORD BLAIR AND OTHERS (MAXWELL'S TRUSTEES) *v.* MR AND MRS HERON MAXWELL.

Trust—Trusts Acts 1861 *and* 1867—*Resignation of Trustees—Judicial Factor.*

A body of trustees under a marriage-contract being desirous of resigning, and being unable to find new trustees who were willing to be assumed, presented a petition for the appointment of a judicial factor. Some of the beneficiaries objected, but *held* that the action of the trustees was competent.

Mr Stopford Blair and others, trustees under the marriage-contract of Mr and Mrs Heron Maxwell, being desirous of resigning their office, presented a petition to the Court, praying for the appointment of a judicial factor and the discharge of themselves. To this Mr and Mrs Maxwell lodged answers, in which they objected to the appointment of a judicial factor as a needlessly expensive way of managing the trust property, and objected also to the discharge of the trustees without an accounting.

The Lord Ordinary (GIFFORD) pronounced the following interlocutors:—

"*Edinburgh, 7th July* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the petition, answers, minute for the respondents, and whole process—On the motion of the respondents, nominates and appoints William James M'Haffie, Esq. of Torhousemuir, in the county of Wigtown, Robert Jardine, Esq. of Castlemilk, in the county of Dumfries, John Johnstone, Esq. of Halleaths, in the county of Dumfries, and John Robert Heron Maxwell, Esq., younger of Springkell, residing at Carlisle, to be trustees under the antenuptial contract of marriage between the respondents, Edward Heron Maxwell and Helen Stopford Blair or Heron Maxwell, his spouse, dated 14th October 1847, with all the powers competent to trustees under the said antenuptial contract of marriage, and decerns: Appoints the petitioners to intimate this appointment to the parties hereby named as trustees, and them to intimate whether they accept of the office, and that within eight days after such intimation: And, *quoad ultra*, continues the cause for further procedure, reserving all questions of expenses.

"*Note.*—The Lord Ordinary cannot help thinking that the conduct of the respondents in this case has been somewhat unreasonable, and that they have thrown undue obstruction in the way of the petitioners' resignation.

"The Lord Ordinary is of opinion that the petitioners are entitled to resign the office of trustees now held by them. It is true that the marriage-contract confers on the trustees only a limited power of resignation, and it was ingeniously urged that when this is the case the Trusts Act of 1861, of 1863, and of 1867 cannot be held as conferring any wider or ampler power of resignation. The Lord Ordinary cannot so read the statutes. They are all expressly declared to apply to past trusts, whatever be the date of the trust-deed, or whensoever the trust came into operation; and although it may be true that an express prohibition against the resignation of trustees who accept under that condition might form a special contract and take the case out of the statutes, it would be very strong indeed to hold that a limited power of resignation deprived the statutes *quoad* this matter of all effect whatever. If no power of resignation at all had been given by the deed, it was conceded that the statutes now confer that power. It would be very strict indeed to hold that when a limited power of resignation is given, the statutes cannot extend it

"In the next place, the respondents contended that, although a sole trustee may resign under a petition like the present, such petition is incompetent where there are two or more trustees, all of whom are desirous of resigning at once. The Lord Ordinary thinks that this view also is founded on a reading of the statute which is much too strict and technical. Two or more trustees are often called, and rightly called, 'sole accepting and acting trustees,' and the world 'sole' is not necessarily confined to a single individual. That was its primary meaning, but in common use it has the force of the word 'only,' and has a collective as well as a singular meaning. Besides, there is no reason in the statute for the construction contended for by the respondents. At best it would only lead to a circuitous form of resigning, for all the trustees excepting one might resign by minute, and then the very same day the single trustee left might resign by petition. It would be absurd to insist upon this roundabout process.

"The Lord Ordinary therefore came to the conclusion that the petition was competent, and that the petitioners were all entitled to resign.

"The Lord Ordinary then, under the 10th clause of the Act of 1867, called upon the respondents to say whether they wished new trustees appointed, or whether he must appoint a judicial factor; and by interlocutor of 9th June he allowed the respondents to lodge a minute stating the names and designations of any parties whom they might wish to be appointed trustees. On 16th June the respondents lodged the minute No. 9 of process, which gives a somewhat uncertain sound, for while it names certain gentlemen, all of whom are quite unexceptionable, as trustees, it does so with reference to the answers, and makes the nomination 'on the footing therein expressed.' The Lord Ordinary does not know the precise meaning of this, and although he invited the respondents to make their minute more explicit, they declined to do so.

"The truth seems to be, and it was scarcely disguised by the respondents, that the respondents wish to compel the petitioners to enter into a count and reckoning before they resign, and as a condition of being allowed to resign. There might be some reason in this if there were any person *in titulo* and in a position to grant the petitioners a full and effectual discharge. But the accounts will be best adjusted, and the discharge best granted, by the new trustees or by the judicial factor, and the statutes do not make any count and reckoning a pre-requisite to resignation. On the contrary, the statute contemplates that the count and reckoning shall follow, and not precede, the resignation.

"In the circumstances, therefore, and assuming, notwithstanding the ambiguity of the respondents pleading that they would prefer the new trustees suggested by themselves rather than a judicia

factor, the Lord Ordinary has appointed the persons suggested in the minute. But the respondents themselves suggested a doubt whether these gentlemen would accept, and this has made it necessary to call for their acceptance. The Lord Ordinary is of opinion that, unless the respondent's name parties willing to accept, he must appoint a judicial factor."

"*Edinburgh*, 21*st July* 1874.—The Lord Ordinary having resumed consideration of the petition, answers, and whole process—In respect that the whole persons nominated and appointed as trustees by the interlocutor of 7th current have failed or declined to accept the office, and in respect that the respondents decline to name or suggest any other persons as trustees, nominates and appoints Mr Thomas Martin, chartered accountant in Edinburgh, to be judicial factor upon the trust-estate created by the antenuptial contract of marriage between the respondents Edward Heron Maxwell and Helen Stopford Blair or Heron Maxwell, his spouse, dated 14th October 1847, with all the usual powers, he always finding caution before extract: *Quoad ultra* continues the cause for such further proceedings as may be competent: Finds the petitioners entitled to payment of the expenses hitherto incurred by them in the present petition and proceedings, and that out of the trust-estate, and remits the account thereof, when lodged, to the Auditor of Court to tax the same, and to report.

"*Note.*—Assuming the Lord Ordinary to be right in the views expressed in his note of 7th current, it seems to follow that he must appoint a judicial factor. The petitioners are entitled to resign. They cannot resign without previously obtaining the appointment either of new trustees or of a judicial factor. New trustees willing to accept cannot be had, so that the appointment of a judicial factor is the only alternative."

The respondents reclaimed, and argued—The circumstances did not warrant the appointment of a judicial factor, looking either to the terms of the marriage-contract or of the Trusts Act 1867, 30 and 31 Vict., cap. 97. The trust-deed itself contained the machinery for keeping up the trust or relieving any trustee who wished to give up his duties, and therefore the Act by its own terms was not to be used as an alternative machinery. The marriage-contract was executed before the passing of the Trusts Act 1867. The only circumstances in which a trustee was entitled to apply for the appointment of a judicial factor was when he was sole trustee, and desirous of resigning, and failed to find other trustees whom he could assume. Even if the appointment of a judicial factor was competent, it was inexpedient. The trust-deed intended that the trustees should have no power to resign, except upon the footing of providing for the continuance of the trust. The trustees contemplated the continuance of the trust by the exercise of the power of assumption. It was plain, therefore, that no power of resigning in a body was ever contemplated to the effect of bringing the trust management to a close. The power of resignation was a relaxation of legal duty, only granted on condition of providing for the continuance of the trust.

Argued for the Trustees—Section 19 applied only to trust-deeds executed after the passing of the Act. The machinery provided by the deed for discharging a resigning trustee was adequate only up to a certain point. The case of there being only one trustee left was a *casus improvisus*—a state of things which the trustees were quite at liberty to bring about at any moment. They were either in the position of a single trustee, or they were entitled to resign in a body. The Act of 1861 conferred an absolute right of resignation on gratuitous trustees. That right was not limited and not meant to be limited by the Act of 1867, which was only meant to deal with the administration of the trust. The provisions of section 10 only applied to two cases, of which this was not one; and the Act of 1867 did not take away the individual right of each trustee to resign. The case must turn on the construction of the Act of 1861; and its purpose was to enable trustees who wished to do so to relieve themselves of office. The trustees by resigning did not shake off responsibility; they could not divest themselves of the estate without providing some one to take it up, and they proposed to do so by applying for the appointment of a judicial factor. They objected to count and reckon with Mr and Mrs Maxwell, who had only a life interest in the trust, and could not give them a discharge sufficient to protect them from a similar claim by future trustees, who would represent the whole interests under the trust.

At advising—

Lord President—This is a petition presented by the whole trustees under the marriage-contract of the reclaimers; and the object of the petition is to enable the trustees to resign. The mode in which the trustees propose to carry this through is very reasonable in itself if consistent with statutory requirements. All the trustees being desirous to resign, they don't want to cause any embarrassment in the management of the trust-estate, and propose that a judicial factor should be appointed as a preliminary; and further, they are willing to give every facility for the nomination of new trustees in their place. The question is whether the proceeding is competent under the statute of 1867; and there are two objections, taken on the ground of incompetency. It is said, in the first place, that the trust-deed under which the petitioners were appointed contains clauses which prevent the application of the statute. In the second place, it is said that there is no authority in the statute for a plurality of trustees taking steps for the appointment of a judicial factor in view of resignation; and that it is only in the case of a single remaining trustee that such a course is sanctioned.

As to the first objection:—It is necessary to attend to the following clause in the marriage-contract—"and, in case any trustee should become incapable of acting as such, or should desire to be relieved of the said trust, it should be in the power of the other accepting and surviving trustees therein named, or to be assumed, if they should deem it expedient, to discharge and exoner him of the said trust upon his denuding thereof in favour of the others."

This deed, which is dated in 1847, was executed before the first of the Trusts Acts, and could therefore have no reference to that Act, but was executed with a view to the law as it stood prior to the statutes, which was that trustees could not resign. In the deed, power was given to a trustee to resign upon the condition that he was not to resign unless the other trustees agreed, and granted him his discharge. It is now said that none of the marriage-contract trustees can resign except under the conditions contained in the deed.

The Trusts Act of 1861 provides in sec. 1 "All trusts constituted by virtue of any deed or local

Act of Parliament, under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign the office of trustee." If the matter stood upon this statute, it is plain that this case would be within this clause of the Act, for in the marriage-contract "the contrary" is not expressed.

But it is said that the Act of 1867 contains a certain limitation of the effect of these words in the prior statute "unless the contrary is expressed." The 19th section of the Act of 1867 is to the following effect:—"Nothing herein contained shall be construed as innovating, revoking, or restricting any express powers or directions given to trustees acting under any trust deed, or shall effect the decision of any question which may at the passing of the Act be the subject of a depending action; and none of the powers and incidents by this Act conferred or annexed to the office of trustee shall take effect or be exercised if it is declared in the trust deeds that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or annexed are contained in such trust deeds, such powers or incidents shall take effect or be exercised only subject to said variations or limitations."

Now, it is obvious in the first place that this refers entirely to the power conferred by the Act of 1867 itself, and does not in any way alter the Act of 1861. But even supposing that that were not so, and that the Act of 1861 was modified by the Act of 1867, I would still hold that there is nothing there applicable to the present case that can restrict the power of the trustees to resign.

The only part of the clause under which the case falls at all is the last—viz., "And where there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or annexed are contained in such trust deed, such powers or incidents shall take effect or be exercised only subject to such variations or limitations." Now, in a deed executed before the statute it is difficult to see how a limited and conditional power of resignation can be called a limitation, when by the law as it then stood trustees were prohibited from resigning at all. For there is not in a marriage-contract a prohibition against resigning, there is a power to resign under certain conditions, and it is left to the law to prevent them resigning in any other way. But the law has been altered, and the legal prohibition against resignation taken away.

As to the second objection: It is said that the only authority to resign is contained in the 10th section of the Act of 1867, and that that provision does not contemplate the resignation of a plurality of trustees. Now I think it a mistake to say that the only authority for presenting a petition of this sort is contained in the 10th section of the Act of 1867. I think that a petition of this sort is competent under the Act of 1861, which does not provide any particular form, but only gives the right to resign in very general terms. The provisions of that statute must mean that each and every trustee may resign. Now in what form are they to do so? If the beneficiaries are all of full age, and are reasonable people, there is no difficulty, for they can concur in the nomination of new trustees. But if the beneficiaries are not reasonable people, then there must be some other mode of carrying through the resignation consistently with due regard to the management of the trust estate. Now what better course for effecting that purpose could the trustees have taken than to ask for a judicial factor as a preliminary. Therefore this petition requires no aid from the 10th section of the Act of 1867.

But looking at the 10th section of the Act of 1867, it is clear that it has not the effect contended for. After providing that any trustee may resign, the clause proceeds, "and if any trustee entitled to resign his office is at the time sole trustee, he shall not be entitled to resign until, with the consent of the beneficiaries under the trust, of full age and capable of acting at the time, he shall have assumed new trustees, who shall have declared their acceptance of office, or he may apply to the Court, stating his wish to resign, and praying for the appointment of new trustees or of a judicial factor to administer the trust, and the Court, after intimation to the beneficiaries under the trust, or such of them as the Court may direct, shall thereafter appoint a judicial factor, or on the application of the beneficiaries, or any of them, may appoint trustees, in the same manner as is provided under the twelfth section of this Act; and after such appointment either of judicial factor or of trustees, the petitioning trustee will be entitled to resign."

Now this is a prohibitory provision, not an empowering one. The empowering part of the section is that allowing any trustee to resign, but a single remaining trustee may not resign until he has gone through the preliminary procedure provided. Now if in the prohibition that section only applies to a sole remaining trustee, preventing him from resigning in circumstances under which other trustees may resign, I think that it is not applicable here, and is not required in this case.

It must be kept in mind that the statutory right of resigning is created by the Act of 1861, and not by the Act of 1867. The latter Act only imposes certain conditions, and to a certain extent alters the former. It is therefore clear that the present application is both proper and competent.

The other Judges concurred.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming-note for the respondents Mr and Mrs E. H. Maxwell of Teviotbank, and others, against Lord Gifford's interlocutor dated 21st July 1874, Vary the said interlocutor by adding the words 'and decerns' after the words 'finding caution before extract;' *Quoad ultra* adhere to the said interlocutor reclaimed against, and refuse the reclaiming-note; and remit the cause to Lord Curriehill, Ordinary, in place of Lord Gifford, to proceed further as may be just; find the petitioners entitled to payment of additional expenses, and that out of the trust-estate allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and to report to the Lord Ordinary, with power to his Lordship to decern for the taxed amount."

Counsel for Heron Maxwell—Dean of Faculty (Clark) Q.C., and J. M. Duncan. Agents—J. C. & A. Stewart, W.S.

Counsel for Trustees—Solicitor-General, (Watson) and Mackintosh. Agents—Mackenzie & Black, W.S.