LORD M'LAREN was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, and remitted to the trustee to rank the respondent for £192, 6s. 7d.

Counsel for Appellant—H. Johnston—Dundas. Agent—David Turnbull, W.S.

Counsel for Respondents—Lees—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

---

*Friday, March 20.*

## FIRST DIVISION.

## BLACKBURN'S TRUSTEES *v.* BLACKBURN AND OTHERS.

*Marriage-Contract—Vesting of Provisions to Children—Whether at Dissolution of Marriage or Term of Payment—Survivorship Clause—Power of Appointment.*

By antenuptial contract of marriage a husband bound himself to make payment to the child or children of the marriage of a certain sum of money, varying according to their number, "to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of the spouses." The provision was to be divisible among the children, if more than one, in such proportions as the husband should appoint by writing under his hand at any time of his life, "and failing such appointment, to be divided equally among the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding only to the shares to which their parents would have been entitled had they been in life."

By a subsequent deed the husband apportioned certain sums to each of the four children then surviving, "and the survivors and survivor of them, and the issue of such as may have predeceased *the term of payment* leaving issue, equally between and among them, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life,"—this clause differing from the survivorship clause in the marriage-contract by the addition of the words in italics.

In a competition between a son's widow and two surviving children of the marriage, *held* (1) that the words of survivorship in the marriage-contract referred, in accordance with the general rule, to the period of payment, and that consequently the provisions to children did not vest till after the death of the longest liver of the spouses; and (2) that the deed of appointment, which merely carried out the provisions as to survivorship of the marriage-contract, and confined the provisions to the same persons, was valid.

By antenuptial contract of marriage dated 4th June 1850 Andrew Blackburn bound and obliged himself to make payment to the child or children of his marriage with Mrs Elizabeth Blackburn of the following sums of money, viz., "if one child Five thousand pounds, if two children Six thousand pounds, and if more than two Eight thousand pounds, to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him and the said Elizabeth Mary Buchanan, with interest during the non-payment thereof, which sum, in the event of there being more children than one, shall be divisible in such proportions as the said Andrew Blackburn shall appoint, by a writing under his hand at any time of his life, and, failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life." He further bound himself to make payment to trustees of the sum of £5000, to be applied after his death in paying an annuity to his widow, and after her death to form part of the provisions in favour of the children, "failing whom the same shall upon the death of the said Elizabeth Mary Buchanan be paid over to the heirs and assignees of the said Andrew Blackburn." On 5th March 1885 Mr Blackburn executed a deed of apportionment in which, on the narrative of the marriage-contract, and in consideration that there were then four children of the marriage surviving, viz., John Blackburn, Andrew Buchanan Blackburn, David William Ramsay Blackburn, and Mrs Euphemia Mary Ramsay Blackburn or Fergusson, he apportioned the provisions as follows:—"Therefore I do hereby apportion out of the said sums of Six thousand pounds or Eight thousand pounds as the case may be, to the said David William Ramsay Blackburn, whom failing by his predeceasing the term of payment, his issue, Two hundred pounds: And I apportion the remainder of the said sums of Six thousand pounds or Eight thousand pounds as the case may be to and between and among the said John Blackburn, Andrew Buchanan Blackburn, and Euphemia Blackburn or Fergusson, and the survivors and survivor of them, and the issue of such as may have predeceased the term of payment leaving issue, equally between and among them, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life."

Mr Blackburn died in 1885 survived by Mrs Blackburn (who is still alive) and the four children mentioned above. David William Ramsay Blackburn died in October 1888 unmarried and intestate, and Andrew Buchanan Blackburn died on 6th August 1895 survived by a widow (Mrs Elizabeth Blackburn) but without issue. The said Andrew Buchanan Blackburn by testamentary writing bequeathed his whole estate to his widow, and appointed her his sole executrix.

Questions having arisen as to their re-

spective rights under the obligation in the marriage-contract, a special case was presented by (1) the marriage-contract trustees, (2) The surviving children of Andrew Blackburn, viz., John Blackburn and Mrs Fergusson, (3) The said Mrs Elizabeth Blackburn, widow of Andrew Buchanan Blackburn.

The third party contended that on a sound construction of the marriage-contract the fee of the provision of £8000 vested in the said Andrew Blackburn's children as they came into existence, or otherwise at the date of the dissolution of the marriage, and that the said deed of apportionment with regard thereto was *ultra vires* of the said Andrew Blackburn, and that accordingly she was entitled to the fee which had vested in her husband at the time of his death.

The second parties contended that the deed of apportionment was *intra vires*, and that even if it were inept, no fee vested in any of the children till the death of the survivor of the spouses.

The questions for the consideration of the Court were—"1. Was the said deed of apportionment within the power of the said Andrew Blackburn, and does it now regulate the succession to the fee of the provisions made by the said Andrew Blackburn in favour of the children procreated of his marriage? 2. In the event of question No. 1 being answered in the affirmative, is vesting of said provisions postponed until the date of the death of Mrs Elizabeth Mary Buchanan or Blackburn? 3. If question No. 1 is answered in the negative, did said provisions vest, on a sound construction of said contract of marriage, in said children—(1) as they came into existence; (2) or on the dissolution of the marriage; or (3) is vesting thereof postponed until the date of the death of Mrs Elizabeth Mary Buchanan or Blackburn?"

Argued for third parties—(1) There was a presumption in marriage-contracts in favour of vesting either on the birth of the children or at the date of the dissolution of the marriage. The provisions to children were onerous, for the children gave up certain provisions to which they were entitled by law, and it was unlikely that the vesting of any benefit in them should be conditional on their surviving the liferentrix. The only reason for postponing payment was to provide for keeping up the liferent. There were really no expressions in the deed to indicate the intention that vesting should be postponed, and accordingly the general principle should apply—*Rogerson's Trustees* v. *Rogerson*, March 10, 1865, 3 Macph. 684, at 691; *Wright's Trustee* v. *Wright*, February 20, 1894, 21 R. 568. There was not a real destination-over here, it not being to a stranger, and only in case of failure of issue. The clause was practically the same as that in *Romanes* v. *Riddell*, January 13, 1865, 3 Macph. 348, where there was held to be vesting at the dissolution of the marriage. (2) The power of appointment had not been validly exercised in respect (*a*) that it fixed a term of vesting different from that in the marriage-contract, (*b*) that it included persons, viz., the issue of children not predeceasing him, but predeceasing the liferentrix, who were not the subjects of the gift, (*c*) that it was exercised not in favour of individuals ascertained, but included an unascertained class to be determined by survivorship.

Argued for first and second parties—(1) Vesting was postponed till the death of the survivor. There were in this deed thus three essential indications of an intention to postpone vesting, viz., a clearly defined term of payment, a destination-over, and a survivorship clause. When the first and last of these were present there could be no vesting in the children individually at the dissolution of the marriage, but in them only as a class—*Vines* v. *Hillon*, July 13, 1860, 22 D. 1436; *Boyle* v. *Earl of Glasgow's Trustees*, May 14, 1858, 20 D. 925. The word "divisible" as used in this deed was equivalent to "payable." (2) But even if it were held that there was vesting *a morte*, the deed of appointment did not exceed the powers given in the marriage-contract. Mr Blackburn had powers under it to apportion either among children or grandchildren. It was not incompetent to make a conditional appointment; the holder of a power might apportion the whole estate to one son on condition of his attaining a certain age. The appointment here in favour of children who might survive a certain event was equally competent. Even if part of the appointment were *ultra vires*, that would not affect the validity of the rest—*Wright's Trustee* v. *Wright*, *supra*.

At advising—

LORD M'LAREN—The case submits to the decision of the Court, first, the question whether a deed of appointment executed by Mr Andrew Blackburn in the year 1885 is a deed within the powers reserved by him in his contract of marriage, and then in alternative questions, in what manner and at what time did the children's right under the contract vest. But it is evident that the question, whether the deed of apportionment is or is not a valid exercise of the power, must depend on the true construction of the destination in the contract of marriage, and I shall therefore consider this question first in order.

The obligation undertaken by Mr Blackburn in contemplation of marriage is thus expressed—leaving out of view for the moment the power of apportionment—it is to make payment to the child or children of the marriage of the following sums of money, viz., if one child £5000, if two children £6000, and if more than two £8000, to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him and his spouse, with interest. Then, passing over the power of apportionment, the deed proceeds—And failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which

their parents would have been entitled had they been in life.

There is nothing unusual in this destination; it is neither elliptical nor redundant in expression; and there is nothing in the context that suggests a different construction from that which would be put on the destination if it stood alone. Now, if we apply to this destination the established principle of construction, that words of survivorship are presumed to refer to the period of payment or conveyance, the clause which I have quoted must be taken as confining the benefit of the provision to such of the issue of the marriage as may survive the longest liver of Mr Blackburn and his spouse. The fund which he undertakes to provide is to be divided equally amongst the members of his family who may be then surviving, amongst whom it is explained the issue of a deceased son or daughter are to be included, but only to the effect of taking the parent's original share. It is quite true that where a marriage obligation in favour of children is expressed in general terms the law presumes that the obligation is prestable at the dissolution of the marriage. But all such presumptions must give way before the plainly expressed conditions of the obligation, and I cannot admit the existence of any *jus crediti* on the part of children of such weight as should compel a father or his representatives to confer a benefit at an earlier period than he intended, or to include in the benefit of the provision members of his family for whom he has not undertaken to provide in this particular way. I have only to add on this question that the words of the power which I am about to read do not in my judgment affect the construction of the destination, because the power only enables the father to divide the fund unequally amongst the objects of the gift, whoever these may be. The same observation may be applied to the provisions vesting the sum of £5000 in trustees; this trust fund is applicable to the purposes of the destination, but the trust purpose has no influence on the construction of the destination, which, as I have already said, stands by itself.

Coming now to the power of apportionment, I see no reason to doubt that the persons amongst whom the fund is to be apportioned are the same as those who would take under the provision for equal division in case of the power not being exercised. The meaning of any power of apportionment is that the fund is to be divided, but may be divided unequally, amongst the members of the class who would take failing apportionment. Any other construction, if not exactly a contradiction in terms, would at least involve a departure from the principle of apportionment. I do not read the power as meaning anything different from a division amongst the class, because nothing more is said than that in the event of there being more children than one the fund "shall be divisible in such proportions as the said Andrew Blackburn shall appoint." If this be the meaning of the power, then I cannot doubt that it was well exercised by the deed of 8th March 1885, because the deed of division is an echo of the destination in the marriage-contract, and follows closely the lines of that destination. The result is that, in my opinion, the power of apportionment is well exercised, and that the vesting of the estate is postponed until the death of Mrs Blackburn.

In this view the first and second questions of law will be answered in the affirmative, and it will not be necessary to answer the third question.

Lord Adam—In this case Mr Blackburn bound and obliged himself, his heirs, executors, and successors, to make payment of £5000 or £8000, according to what the number of children might happen to be, to the child or children of the marriage. The period of payment was to be the first term of Whitsunday or Martinmas after the death of the longest liver of him, and Mrs Buchanan if she should be his widow. Now it is clear that that being the term of payment, there could be no period of division different from, or at least prior to, the period of payment, for the simple reason that the sum was in the hands of nobody to divide. By his will the executors are in possession of the money and they are debtors in the obligation undertaken by Mr Blackburn; they are not in any sense trustees, and in no sense do they hold the fund for the children. Now, if that be so, the next thing is that Mr Blackburn has a power of appointment, and the direction in this deed is to divide the money according to such proportions as he may appoint by deed of apportionment, and failing apportionment, equally, and the parties to whom this payment or division is to be made are the survivors of the same, and the issue of such as may predecease leaving issue, such issue succeeding always to the shares which their parents would have been entitled to if in life. Now, I entertain no doubt that the survivors, to whom payment is to be made, are the children surviving at the date of payment, that is, at the first term of Whitsunday or Martinmas after the death of the longest liver of the spouses, and failing such survivance, to the issue—that is to say, to the issue of such as may predecease, that is, of such of the children as may predecease. They are to take their parent's share. Now, if that be so, there can be no doubt at all, in my humble opinion, that this fund vested, and could vest only, on the death of the longest liver of the spouses. I can see no other possible period at which it could vest. It is quite true that there was a sum of £5000 held by the trustees in security of an annuity which Mr Blackburn provided for his widow, if that should be necessary for that purpose, but that would make no difference on that sum, for the direction is that the fee of that £5000 is to be applied in manner after directed, the manner after directed being the manner prescribed in the clause which I have just been dealing with.

If that be so, and if there was no vesting at any prior period to the period of pay-

ment, then it follows, and was not disputed, that the deed of appointment was perfectly valid. I therefore agree that the first two questions must be answered in the affirmative, and that the other requires no answer.

LORD KINNEAR—If we were to read the obligation contained in this marriage-contract as we ought to do, for the purpose of ascertaining the fair meaning of the words used in it according to the ordinary acceptation of language, irrespective of any previous decision, there could be very little doubt indeed as to the meaning of the obligation. The husband obliges himself to pay a certain sum or certain sums, varying according to the number of children, at the first term of Whitsunday or Martinmas after the death of the longest liver of himself and his wife, and then he goes on to provide—(omitting words which are not necessary for the construction of the obligation itself, but only describing the qualifications which pertain to the right created by that obligation)—that this sum which he obliges himself to pay at that time is to be divisible, failing apportionment by him, among the survivors of his children and the issue of such as may have predeceased. That appears to me to be an obligation to the children surviving the term of Whitsunday or Martinmas after the death of the longest liver of the spouses, and to the issue of those who predecease, and to nobody else; and therefore I have no hesitation in coming to the conclusion which your Lordships have expressed that the husband had undertaken no obligation in favour of anybody except the children surviving at the time.

If that be the natural meaning of the words used, the only question is whether there is any rule in law founded on prior decisions which obliges us to put upon this marriage-contract a construction different from that which we would otherwise place upon it. I am not aware of any such rule, and, taking it by itself, I concur.

The LORD PRESIDENT concurred.

The Court answered the first two questions in the affirmative and found it unnecessary to answer the third.

Counsel for the First and Second Parties—Craigie—Blackburn. Agents—Mackenzie & Black, W.S.

Counsel for the Third Party—Guthrie—Macfarlane. Agents—J. C. Brodie & Sons, W.S.

---

*Friday, March 20.*

## FIRST DIVISION.

[Lord Low, Ordinary.

## FERRIER *v.* COWAN.

*Right in Security — Bond of Annuity — Separation of Estates Burdened by Bond —Apportionment of Liability—Contribution—Relief.*

When two estates in land upon which a debt is secured come into the hands of different proprietors, they are liable for the debt ratably according to the value of the estates. In applying this rule to the case of a bond of annuity, *held* that the contributions must be in proportion to the annual rents or proceeds of the estates, and that in estimating the annual rents or proceeds the interest due upon preferable heritable bonds must be deducted.

This was an action at the instance of William Cochrane Ferrier of Birkenshaw, as an individual and as assignee of Mrs Elizabeth Mary Hancock or Cowan, widow of William Cowan of Kirkton, Boghall, and Linburn, the annuitant after mentioned, against James Henry Cowan of Boghall and Drumcrosshall.

The facts of the case and the contentions of the parties appear from the following note by the Lord Ordinary:—"By his trust-disposition and settlement the late William Cowan conveyed his whole estates to trustees and directed them to infeft his widow in an annuity of £200 to be paid to her out of the rents of the estate of Boghall. He also directed his trustees to convey the estate of Boghall to his eldest son, the present defender, under burden of the annuity to his widow, and to convey to his second son John Robert Cowan the estates of Drumcrosshall and Kirkton.

"By a codicil Mr Cowan directed his trustees 'when the time arrives, to convey my estates of Drumcrosshall and Kirkton to John Robert Cowan, my second son, to do so under burden of the annuity of £200 in favour of my wife . . . and I declare that my estate of Boghall shall be conveyed when the time arrives to James Henry Cowan, my eldest son, entirely free from said annuity.'

"The trustees duly carried out the truster's instructions, and conveyed, at the appointed time, Boghall to the defender free of the annuity, and the estates of Drumcrosshall and Kirkton to John Robert Cowan under the real burden of the annuity.

"In 1886 the estate of Kirkton was sold by a heritable creditor and purchased by the pursuer. The disposition in the pursuer's favour disponed the lands under the real burden of the annuity to Mrs Cowan.

"In 1887 John Robert Cowan disponed the estate of Drumcrosshall to his brother, the defender. There is excepted from the warrandice 'any right which Mrs Cowan has to receive payment of her annuity, or part thereof, out of the lands of Drumcrosshall.'