

COURT OF SESSION.

Friday, May 30.

FIRST DIVISION.

[Lord Shand, Ordinary.

JOHN SMITH, PETITIONER.

Trust—Alimentary Provision—Security—Bond of Annuity—Judicial Factor.

In a case where certain testators created a trust for the payment *inter alia* of the residue of their estate to A, and of an annuity to B, the said annuity being declared to be "purely alimentary,"—held that the judicial factor, who had been appointed on the death of the last trustee, was not entitled to wind up the trust and pay over the residue to A on her granting a personal bond of annuity in favour of B and discharging the judicial factor.

In this case a petition was presented by Mr John Smith, judicial factor on the estate of the late Misses Robertson, with consent of Miss Isabella Campbell, their residuary legatee, the object of which was to enable him to wind up the trust and pay over the residue to Miss Campbell. The only other person having an interest in the trust-estate was Miss Helen Campbell, a niece of the trusters, who was an annuitant to the extent of £100 per annum, besides having a life interest in £500. To secure her interest it was proposed that Miss Isabella Campbell should grant a personal bond of annuity in her favour for £125. This arrangement the Lord Ordinary was asked to approve of. He pronounced the following interlocutor and note:—

"Edinburgh, 10th March 1873.—The Lord Ordinary having resumed consideration of the petition and proceedings, with the Report by Mr Ralph Dundas, W.S., No. 29 of process, on the petitioner's application for authority to the petitioner John Smith, as judicial factor foresaid, in terms of the second branch of the prayer of the petition, to convey to the concurring petitioner, Isabella Anne Hay Janet Campbell, the whole residue of the trust-estate, and thereupon, in terms of the third branch of the prayer of the petition, for discharge of the petitioner John Smith as judicial factor foresaid, of his whole intromissions and management, and for an order for delivery to him of the bond of caution granted by him and his cautioner; Refuses the application for authority foresaid, and for discharge, and dismisses the petition, and decerns.

"Note.—The Lord Ordinary, by interlocutor of 23d December last, granted authority to the petitioner Mr Smith, as judicial factor, to complete titles in his person to the various heritable subjects belonging to the trust-estate of the late Misses Mary, Elizabeth, and John Robertson, on which estate the petitioner in March 1867 was appointed judicial factor after the death of Mr Mungo Campbell junior, the only trustee who accepted of the trust created by the trust-disposition and settlement of the late Misses Robertson; and at the same time, before disposing of the prayer of the petition otherwise, remitted to Mr Ralph Dundas, W.S., to inquire into the facts and to report, and to Mr William Ross, C.A., Edinburgh, to report as to the petitioner's accounts, with a view to his obtaining a judicial discharge.

"The petitioner has not proceeded with the remit to Mr Ross, but a report by Mr Dundas has been lodged, by which, with reference to the position of the trust-estate, the question is raised whether the petitioner Mr Smith is in a position in which he is entitled now to wind up the estate finally as proposed, and is thereupon entitled to be discharged of his whole actings and intromissions. The Lord Ordinary, after having made avizandum with Mr Dundas' report, intimated to the petitioner his opinion that the application could not be granted in the present state of the trust, and thereafter, at the petitioner's request, heard counsel in support of the application. Farther consideration of the application has, however, confirmed the Lord Ordinary in his original view, and he has therefore refused the application.

"The purposes of the trust created by the trust-disposition and settlement have all been executed with the exception of the payment and conveyance of the residue, and the payment of an annuity of £100, and the interest of a farther sum of £500, to Miss Helen Campbell, who is still in life, and which the trustees were directed to pay to her during her lifetime.

"The residue of the trust-estate was appointed to be paid and conveyed 'after fulfillment of the other purposes of the trust' (which included the payment of debts and various legacies and annuities) to Mungo Campbell, the nephew of the trusters, and his heirs. The concurring petitioner, Miss Isabella Anne Hay Janet Campbell, the surviving child of Mr Mungo Campbell, the residuary legatee, who predeceased the trusters, has right to the residue of the trust-estate, and, subject to the observation made by Mr Dundas in his report as to her obtaining service and confirmation to her late brother, she would be entitled to payment and conveyance of the whole residue of the trust-estate if the trust-purposes had been entirely fulfilled.

"The provisions in favour of Miss Helen Campbell are contained in the fourth and fifth purposes of the trust, and are thus expressed:—'Fourthly, for payment of an annuity to the said Helen Campbell of £100 during her lifetime, commencing the first half-yearly payment at the first term of Whitsunday or Martinmas after the death of the survivor of us, for the half-year preceding, and so forth half-yearly and termly thereafter during her lifetime. Fifthly, for payment to the said Helen Campbell of a further legacy of £500, and the annual interest of the further sum of £500 in the event of her brother, the said Mungo Campbell, predeceasing her, payable at the first term of Whitsunday or Martinmas occurring six months after the death of the survivor of us, if he should predecease us, and failing his predeceasing us, at the first term of Whitsunday or Martinmas occurring six months after his death, and continuing the payment of the said interest of £500 half-yearly and termly during her lifetime.' On the death of the brother Mungo Campbell, Miss Helen Campbell received payment of the legacy of £500 mentioned in the fifth purpose of the trust, and became entitled to the interest half-yearly of the further sum of £500 there mentioned. The deed farther contains directions to pay annuities of £80 each to Elizabeth and Catherine Monro, and a direction and appointment to the trustees to set apart and lend out upon heritable, or personal, or such other security as to them may appear satisfactory, such sum or sums as will yield to the different annuitants

the amounts of their annuities, and to take the rights and title-deeds of the securities in name of the trustees, in trust for payment of the annuities during the respective lives of the annuitants, and thereafter for payment of the principal sums to Mr Mungo Campbell and his heirs and successors in fee: Declaring that the trustees should have power if they saw fit, and were required by Mr Campbell, to purchase from any responsible Life Assurance Company annuities to the foresaid amounts in favour of Miss Helen Campbell and the other annuitants above named, or any of them, 'instead of investing a sum to yield the said amount as above.' There is a similar provision in the deed for setting apart a sum of £1000, and lending and securing the same in name of the trustees for payment, *inter alia*, of the life interest of £500 which now subsists in favour of Miss Campbell.

"The deed further contains this important clause—'And it is hereby specially declared that the said annuities of £100 to the said Helen Campbell, and of £80 each to the said Elizabeth and Catherine Munro, and the said contingent life interest in the sum of £500 provided to the said Helen Campbell, are all purely alimentary provisions in favour of the said Helen Campbell and Elizabeth and Catherine Munro respectively, and not assignable for causes onerous and gratuitous, and not subject to arrestment or other legal diligence of the creditors of any of them, and not affectable by the debts or deeds of any of them.'

"The petitioner and concurring petitioner have produced with the application a discharge by Miss Helen Campbell, dated 9th November 1872, by which, on the narrative *inter alia* that she had obtained a personal bond by the concurring petitioner Miss Isabella Anne Hay Janet Campbell in her favour for an annuity of £125, she has discharged the judicial factor and the trust-estate of the foresaid annuity of £100 and of her right to the interest or life interest of the said sum of £500. With reference to this discharge, it is stated in the petition that the whole purposes of the trust have now been satisfied or discharged excepting the conveyance of the residue, and that it has been arranged between the petitioner and the concurring petitioner Miss Campbell that the factor shall close the factory, convey the residue of the estate to the concurring petitioner, and be discharged of his office—and the authority of the Court is asked for carrying out this arrangement, to be followed by a judicial discharge of the whole actings of the judicial factor.

"The Lord Ordinary is of opinion that the arrangement which the Court is asked to sanction is in violation of the trust, and cannot be granted. The Court is not asked to approve of any security being granted for the payment of Miss Helen Campbell's annuity. But ever if an application for such approval had been presented, the Lord Ordinary is of opinion, notwithstanding the general power conferred on the trustees to lend out the necessary sum 'upon heritable or personal or such other security as to them may appear satisfactory,' that the Court would not authorise a judicial officer to accept of a mere personal obligation by the residuary legatee as a satisfactory security.

"The position maintained by the judicial factor and the residuary legatee is, that Miss Helen Campbell might have discharged her rights if she had thought fit gratuitously, and that her rights under the deed have been validly and effectually dis-

charged by an arrangement satisfactory to her, so that nothing remains to be done except to dispose of the whole residue as directed by the trust-deed. Had the case been one of a fee burdened by a simple life interest, the view thus maintained would have been unquestionably sound, but if the arrangement founded on is to receive effect the important clause of the trust-deed last quoted, by which the provisions in favour of Miss Helen Campbell are declared to be purely alimentary, not assignable for causes onerous or gratuitous, nor subject to arrestment or other legal diligence, and not affectable by her debts or deeds, will be simply treated as of no effect whatever. Under this clause it appears to be obvious that an assignation by Miss Helen Campbell of her right to the annuity would be ineffectual, but a discharge in favour of the residuary legatee is just an assignation to her of the annuitant's right, and is, in the opinion of the Lord Ordinary, one of the deeds by which it is declared in terms that the right to the annuity shall not be affectable.

"It was pleaded for the petitioners that Miss Helen Campbell might decline to receive her annuity from time to time if she thought fit, and that in the same way she must be entitled to renounce the right itself, but the Lord Ordinary is of opinion that the right to discharge the provision entirely does not result from the power, which no doubt the annuitant has, to refuse to take each half-yearly payment as it falls due.

"The application, so far as the Lord Ordinary is aware, is novel. It is not said that any precedent at present exists in the law for the discharge of alimentary rights granted as in the present case, and if the present application were successful, it appears to the Lord Ordinary that serious and important results might follow in the case of many existing trusts. The authorities appear to the Lord Ordinary to be against the contention of the petitioners—*Rennie v. Ritchie*, April 25, 1845, H. of L., 4 Bell's App. p. 221; *Balderstone v. Fulton*, January 23, 1857, 19 D. 293; *Martin v. Bannatyne*, &c., March 8, 1861, 23 D. 705."

The petitioner reclaimed.

Argued for him—that in all the cases referred to there was the speciality of an exclusion of the *ius mariti*. The question here is, whether a truster, who leaves an alimentary provision to a third party whom he is not bound to aliment, can prevent the annuitant from renouncing the benefit. If not, the beneficiary has a right to compel the judicial factor to do that in the way of relaxing the terms of the settlement, which the trustees might have been compelled to do.

Authorities—*Paterson v. Paterson*, Jan. 26, 1849, 11 D. 441; *Anstruther v. Lewis*, Dec. 17, 1852, 15 D. 260; *Ramsay v. Ramsay's Trs.*, Nov. 24, 1871, 10 Macph. 120.

At advising—

LORD PRESIDENT—The petitioner John Smith is the judicial factor on the trust-estate of the late Misses Robertson, and the lady who concurs with him in the petition is Miss Isabella Campbell, residuary legatee under the trust-settlement, and also a special legatee to a considerable extent, and the condition of the estate is such that the only existing interests in it are those of Miss Isabella and Miss Helen Campbell. The petitioner asks for leave to wind up the trust and pay over the residue to Miss Isabella Campbell, after securing the annuity

of Miss Helen Campbell, while she is to grant a discharge in his favour, and Miss Isabella Campbell is to grant a bond of annuity in favour of Miss Helen Campbell in the same terms as those of the trust-settlement. If this had been a simple annuity, and the security of Miss I. Campbell satisfactory, there could have been no legal obstacle to this arrangement; but the annuity in favour of Miss Helen Campbell is a peculiar one, and it is necessary to see that the arrangement is not in violation of the trusters' direction. Now, the settlement under its fourth head provides for payment to the said Helen Campbell "of £100 during her lifetime, commencing the first half-yearly payment at the first term of Whitsunday or Martinmas after the death of the survivor of us for the half-year preceding, and so forth half-yearly and termly thereafter during her lifetime: Fifthly, for payment to the said Helen Campbell of a further legacy of £500, and the annual interest of the further sum of £500 in the event of her brother, the said Mungo Campbell, predeceasing her, payable at the first term of Whitsunday or Martinmas occurring six months after the death of the survivor of us if he should predecease us, and failing his predeceasing us, at the first term of Whitsunday or Martinmas occurring six months after his death, and continuing the payment of the said interest of £500 half-yearly and termly during her lifetime." Then comes a provision that the trustees should have power to purchase an annuity from any responsible Life Assurance Company if they saw fit and were required by Mr Campbell to do so. Lastly comes the special declaration "that the said annuities of £100 to the said Helen Campbell, and of £80 each to the said Elizabeth and Catherine Munro, and the said contingent life interest in the sum of £500 provided to the said Helen Campbell, are all purely alimentary provisions in favour of the said Helen Campbell and Elizabeth and Catherine Munro respectively, and not assignable for causes onerous or gratuitous, and not subject to arrestment or other legal diligence of the creditors of any of them, and not affectable by the debts or deeds of any of them."

In short, by the last clause both the annuity and the life interest are declared to be purely alimentary, and it seems to me that the terms of that declaration are perfectly effectual for their purpose. It was obviously the serious desire and intention on the trusters' part that Miss Helen Campbell should be tied up in this way throughout her life. They probably had their own reasons for this, and we must take care not to free her from the restraint which they have imposed on her, or enable her to sell or dispose of her annuity outright, or expose it to the danger of diligence by her creditors, or deal with it in any other way. It is suggested on behalf of the petitioner that the power given to the trustees to purchase an annuity from an Insurance Company showed that it was not the intention of the trusters that the trust should be kept up simply for the purpose of paying the annuity. This is quite true, but then if the trustees had done so, the Company would have been put under the same restraints as the trustees, and could only have made the termly payments to the annuitant as they fell due. It is needless, however, to pursue this farther, for even on the supposition that the judicial factor may do whatever the trustees might have done, still they could not have done this unless required to do so by Mr Mungo Campbell, who is dead.

The proposed bond of annuity to be granted by Miss Isabella Campbell repeats the alimentary clause in the trust-deed, and, so long as the bond stood, no doubt the alimentary clause might be effectual, but the existence of the bond does not give nearly the same security as the existence of the trust. The existence of the trust cannot be put an end to so long as the purposes for which it was created remain unfulfilled, and so long as the annuity is payable the trust must last; but we have no such security as to the bond of annuity, and so the whole effect of the alimentary clause might be defeated. That consideration is to my mind quite conclusive against this proposal, and I think the Lord Ordinary is quite right.

LORD DEAS—The trusters in this case were certain old ladies, who disposed their means and estates in a certain way; and among other purposes of their settlement was the payment of an annuity to Miss Helen Campbell.—(After reading the provisions of the settlement, his Lordship went on)—Now, these conditions are clear and explicit, and the question is, Whether, when a testator who was not under any legal obligation to give anything to the legatee, makes a provision in his favour and declares it to be purely alimentary, that condition is to be defeasible at the instance of the legatee. If that could really be a question at all, it would be a most important one, but I never had the least doubt that a testator is at perfect liberty to make provision for anyone he pleases, and subject to any lawful condition, and this is a perfectly lawful condition. The testators were not bound to give any provision at all, but if they give it under that condition, it must be taken under that condition or not at all. If this could be done, it would be very much against the interest of donees themselves. Take, for instance, the case of a prodigal son or an imbecile child. In some cases the object may be to lay restraint on the legatee, but in most cases it is for the purpose of protecting him. Nothing can be more clear than this. It is proposed to put an end to the trust and to substitute a bond, but I have strong doubts whether, even if that could be done, it would be effectual. A creditor might put an end to the whole thing at once. It is clear at least that it would be unsafe, and I doubt if any conveyancer could secure it except by a trust. I think neither the trustees, and still less the judicial factor, have power to defeat the testators' will.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor, except in so far as it 'dismisses the petition and decerns:' Recall that part of the interlocutor, and remit to the Lord Ordinary to consider whether any and what part of the trust-estate may now be conveyed or made over to Miss Isabella Campbell, the residuary beneficiary, consistently with maintaining the trust as a security for the alimentary provisions in favour of Miss Helen Campbell."

Counsel for Petitioners—Watson and Readman.
Agents—C. & A. S. Douglas, W.S.