

Friday, July 10.

SECOND DIVISION.

[Lord Shand, Ordinary.]

KIPPEN v. KIPPENS.

Testament—Provision to Children—Discharge—Cumulative Legacies.

A daughter who had attained majority deliberately discharged her father's trustees in consideration of certain payments made to her. Held that the terms of the discharge barred her from raising an action for further payment on the ground of alleged cumulative legacies, and that she was not entitled to plead want of knowledge of her full legal rights.

Observed, that even apart from the discharge, it was sufficiently clear that the father intended her provision under his will to be substitutionary.

This was a reclaiming note in an action raised by Miss Elizabeth Murdoch Kippen, a daughter of the late Mr Kippen of Busbie, against her brothers James Hill Kippen and Richard Kippen. The summons contained conclusions for reduction of a certain discharge granted by the pursuer on 14th April 1856, and also for payment of £800. The circumstances of the case were as follows:—By an antenuptial contract of marriage, dated August 2, 1815, William Kippen of Busbie *inter alia* bound and obliged himself to provide and pay to the children of his marriage the following sums, at the first term of Whitsunday or Martinmas after his decease, with the lawful interest thereof from the time it should become due until it was paid, viz.: if one child, £2000; if two, £4000; if three, £6000; if four, £8000; which sums, if there should be more children than one, William Kippen it was declared should be entitled to divide among them and their issue, in such shares and proportions, and in liferent or fee, as he should think proper by any deed under his hand; which failing, that the same should be divided equally among them, the issue of such of them as might be dead succeeding to their father's or mother's share. The marriage-contract also contained the following declaration: "and the foresaid provisions stipulated in favour of the said children shall be in full to them of all legitim, bairns' part of gear, or any other claim which they might by law be entitled to at the decease of the said William Kippen, or at the dissolution of the marriage, all which is hereby discharged, save and except what further provision the said William Kippen may of his own free will make in their favour, and save and except, in the event of his dying intestate, their claims to a share of his estate and effects." William Kippen died in January 1853, without having exercised the reserved power of apportionment, and survived by ten children of the marriage. By trust-disposition and deed of settlement, dated 17th July 1849, William Kippen made over to certain trustees therein named his whole estate and effects, heritable and moveable, which then belonged, or which should belong to him at the time of his death. He thereby further appointed his trustees to be his sole executors. The trustees so nominated and appointed entered on the possession and management of the trust-estate, made up titles to the heritage, and expedite confirmation of the moveable property. The defender James Hill Kippen is now the sole

survivor of these trustees and executors. By the first purpose of the trust the trustees were directed to pay the trustor's debts, &c., and the expenses of executing the trust, and by the last purpose they were directed to make over the residue and reversion of the trustor's moveable or personal estate, and to dispose and convey the residue of his heritable property which should remain after payment of the legacies and satisfaction of the other purposes of the trust, to and betwixt the defenders James Hill Kippen and Richard Kippen equally, and to their respective heirs, executors, and successors. The trustees realised the estate and paid over to the defenders, James Hill Kippen, and Richard Kippen, a large surplus as residue, the defenders granting an obligation to relieve the trustees of all claims against the estate. The pursuer averred that the trustees never paid to her the £800 due under the marriage-contract, and that this sum, with interest, was still resting-owing. This the defenders denied. Mr Kippen also left several codicils having reference to the provisions made for his daughter, these were dated respectively 10th January 1850, 6th January 1852, and 7th January 1853, and the clauses in them having reference to this matter were as follows:—"Thirdly, I hereby revoke and recall the bequest and provision of £4000 sterling made by me in the said deed of settlement in favour of each of my daughters, Misses Jane Dennistoun Kippen and Elizabeth Kippen, and in lieu of said bequest I direct my trustees immediately after my death to purchase or provide from my means and estate an annuity of £120 sterling in favour of each of my said daughters, payable at the usual terms, the same to be exclusive of the *jus mariti* of their respective husbands in the event of their marriage, and of their debts and deeds, and the diligence of their creditors, which annuities hereby directed to be provided to my said daughters shall be in lieu of the former bequests in their favour, now hereby recalled, and in full of all other claims legally competent to them upon my means and estate." . . . "First, I do hereby revoke and recall the annuity of £120 sterling granted in said codicil to my daughters, Misses Jane Dennistoun Kippen and Elizabeth Kippen, and declare that they shall each be entitled, instead of said annuity, to the bequest or provision of £4000 sterling each, granted to them in my said trust-disposition and deed of settlement, which shall be invested and secured by my said trustees for their behoof in liferent, all in the terms more specially and fully mentioned in said deed of settlement." . . . "Thirdly, I hereby revoke and recall the bequest or provision of £4000 sterling made by me in the said deed of settlement and in the codicil thereto, dated 6th January 1852, in favour of each of my daughters, Misses Jane Dennistoun Kippen and Elizabeth Kippen; and in lieu of said bequest, I renew the provision contained in my codicil, dated the 10th day of January 1850, viz., I direct my said trustees immediately after my death to purchase and provide from my means and estate an annuity of £120 sterling in favour of each of my said daughters, payable at the usual terms, the same to be exclusive of the *jus mariti* of their respective husbands in the event of their marriage, and of their debts and deeds, and of the diligence of their creditors, which annuities hereby directed to be provided to my said daughters shall be in lieu of any former bequest in their favour, and in full of all other claims legally competent to

them upon my means and estate, and with these alterations I hereby approve of and confirm my said deed of settlement in all other respects." On the occasion on which this annuity was provided, after Mr Kippen's death, the pursuer granted the following discharge (dated April 15, 16, and 22, and May 15, 1856):—"I, Miss Elizabeth Kippen, residing in Glasgow, daughter of the deceased William Kippen, Esq. of Busbie, considering that the said deceased William Kippen, on the 10th day of January 1850 and the 7th day of January 1853 respectively, executed two codicils to his trust-disposition and deed of settlement, which is dated the 17th day of July 1849, all recorded in the books of Council and Session on the 2d day of February 1853; by which codicils he, the said William Kippen, directed the trustees therein named and designed, immediately after his death, to purchase or provide from his means and estate an annuity of £120 in favour of me, the said Miss Elizabeth Kippen, payable at the usual terms, the same to be exclusive of the *jus mariti* of my husband, in the event of my marriage, and of his debts and deeds, and of the diligence of his creditors, which annuity thereby directed to be paid to me should be in lieu of any former bequest in my favour, and in full of all other claims legally competent to me upon his means and estate; and considering further that when the trustees of my said father, who have hitherto since his death regularly paid to me the said annuity, were about to lay out the required sum in the purchase of a permanent annuity, it appeared to me that the sum required for said purchase would be entirely sunk, and in the case of my death and previous marriage would be lost to my representatives; and as I was therefore desirous of preserving the said sum so as to make the same available after my death, I requested my brothers, James Hill Kippen and Richard Kippen, the residuary legatees appointed by my said father in said deed of settlement, to consent to the said sum, instead of being so applied, being paid over to trustees to be nominated by me, and sanctioned by them and the trustees of my said father, that the same might be invested and held by said trustees for behoof of me in life rent, and of the person or persons to whom I might destine the same after my death, in fee; and considering further, that the said James Hill Kippen and Richard Kippen having agreed to the said request, I and they applied to the trustees after designed of my said father, and requested them to give effect to the said proposal for preserving the said fund in the event foresaid, and that they, the trustees of my said father, expressed their willingness to comply with said request on receiving a discharge from me of said annuity, and an obligation by me and my said brothers freeing and relieving them, the said trustees, thereof, and of all further responsibility or liability in regard to the same: And now seeing that I have nominated the following persons to be trustees for holding the said sum, viz., John James Alston, merchant in Glasgow; Richard Kippen, residing in Glasgow, my brother; Robert Strang; Andrew Buchanan Yuille; and James Keyden—all writers in Glasgow, conform to deed of trust and demination of them executed by me, bearing date the 14th day of April 1856, and recorded in the Books of Council and Session the 15th day of April 1856, to which reference is hereby had, and that George Marshall Darley, of the *Glasgow Chronicle*, Glasgow, James Hill Kippen of Westerton, pre-

sently residing in Edinburgh, and the said John James Alston, as accepting trustees of my said father, have approved of the trustees so nominated, and have, in fulfilment of said proposal, and at my desire, and with my consent, made payment to the said John James Alston, Richard Kippen, Robert Strang, Andrew Buchanan Yuille, and James Keyden, as trustees after mentioned, of the sum of £2477, being the amount ascertained according to the tables by which annuities are granted by Government, in terms of the Act 10 George IV., chapter 24th, to be the price for which the like annuity of £120 sterling could be purchased for me, to be held by them in trust in the terms and for the purposes after mentioned, and also mentioned in the said deed of trust before referred to, of which sum we, the said Miss Elizabeth Kippen, and John James Alston, Richard Kippen, Robert Strang, Andrew Buchanan Yuille, and James Keyden, as trustees foresaid, hereby acknowledge the receipt, renouncing all exceptions to the contrary: Therefore I, the said Miss Elizabeth Kippen, with the special advice and consent of the said last named trustees, do hereby exoner, acquit, and *simpliciter* discharge the said George Marshall Darley, James Hill Kippen, and John James Alston, as trustees foresaid, and the trust-estate of the said deceased William Kippen, my father, of the said annuity of £120 sterling, and of all claims and demands competent to me against them or the said trust-estate, for or in respect of the same, or on any other ground or cause whatsoever, in all time coming: And we, the said Miss Elizabeth Kippen, James Hill Kippen, and Richard Kippen, hereby bind and oblige ourselves, jointly and severally, and our respective heirs, executors, and successors, to free and relieve the said George Marshall Darley, James Hill Kippen, and John James Alston, as trustees foresaid, of and from all responsibility and liability incurred, or which may be supposed to be incurred, by them in paying over the said sum to the trustees above named and designed, for the purpose before or after mentioned, in place of therewith purchasing the said annuity, the same having been done at our desire, and with a view to the due preservation of the said fund: Further, we, the said John James Alston, Richard Kippen, Robert Strang, Andrew Buchanan Yuille, and James Keyden, with the special advice and consent of the said Miss Elizabeth Kippen, do hereby declare that the said sum of £2477 sterling now paid to us as aforesaid shall be held by us or the survivors or survivor of us, and of such other persons or person as we may from time to time assume as trustees along with us, for payment of the annual interest or income thereof to the said Miss Elizabeth Kippen during her life, exclusive of the *jus mariti* and right of administration of any husband she may marry, and for payment of the principal sum itself to her heirs, executors, or assignees after her death; all in terms of the powers to that effect contained in said deed of trust, and generally for the several ends, uses, and purposes therein specially recited, to which reference is here particularly had *brevitatis causa*, and not otherwise: Declaring further, that in the event of the said Miss Elizabeth Kippen, or any one claiming through her or with her concurrence, effectually challenging the discharge of the said annuity hereby granted, and repudiating the same, and calling upon the said George Marshall Darley, James Hill Kippen, and John James Alston, as trustees foresaid, still to make payment to her of

the said annuity, then we, the said trustees, shall be bound and obliged, at the desire and request of the said George Marshall Darley, James Hill Kippen, and John James Alston, or the survivors or survivor of them, to apply the said sum now paid to us, or such part thereof as shall be necessary, in so far as not previously applied for that purpose, in the purchase of an annuity of £120 for behoof of the said Miss Elizabeth Kippen."

The defenders in their statement of facts averred that the pursuer was, at or immediately after her father's death, fully aware of the existence and of the terms both of the marriage-contract and of the trust deed and codicils. She was at first not satisfied with the provisions under the settlement and codicils, and within a few weeks after her father's death waited upon Mr Alexander Dick, writer in Glasgow, the agent for her father's trustees, and intimated to him her intention of declining to take the annuity provided in the settlement, and of claiming the sum provided to the children of the marriage. Moreover, that subsequently her legal advisers consulted Mr Neaves (now Lord Neaves) as to her rights under her father's trust-settlement and codicils, and under the marriage-contract. About the same time the trustees consulted the late Mr George Patton (afterwards Lord Justice-Clerk) with reference to the same matter. The opinions of the several counsel, and the memorials on which they proceeded, were interchanged between the parties, and were both substantially to the effect that the provisions made by Mr Kippen in his settlement for his daughters were in lieu of the sums provided to them by his own marriage-contract; that the pursuer and her sister were entitled to repudiate the annuity provided by the settlement and codicils, and betake themselves to the marriage-contract, but that if they did so the pursuer and her sister would not be entitled to claim more than one-tenth share each of the £8000 provided by the contract to the children of the marriage. That thereafter, by a letter dated 11th May 1853, written by Mr Dick on behalf of the trustees, to Mr Yuille on behalf of the pursuer and her sister, the trustees called upon these ladies to state whether they were to claim their rights under the marriage-contract or preferred the annuities, and after having fully considered the deeds and opinions, the pursuer and her sister, through their law agent, intimated to the trustees, in July 1853, that they preferred the annuity provided in the deed of settlement, and upon that footing the trustees immediately paid the first term's annuity, and continued to pay the same until the capital sum equivalent to the said annuity was paid as after-mentioned.

Further, the defender stated that from the year 1853, when the pursuer and her sister, Jane Dennistoun, after consulting counsel as to their rights under their father's marriage-contract and trust-deed, intimated their acceptance of the annuities as above set forth, until the institution of the present action, no claim of any kind against the estate of William Kippen, or against his trustees, or against any of the defenders, was ever put forward, made, or hinted at by the pursuer or her sister; but that, on the contrary, about the time when the annuities were settled, Richard Kippen voluntarily made a gift to his sisters of £900. In 1869 their mother, Mrs Kippen, died, and the pursuer and her sister Jane Dennistoun succeeded

to considerable means which she had bequeathed to them, and they then, contrary to Richard Kippen's wish, insisted on his taking back the £900.

The pursuer pleaded—" (1) The pursuer, as one of the ten children of the marriage between the said William Kippen and the said Mariamne Alston or Kippen, is entitled to one-tenth share of the sum of £8000 sterling due by the said deceased William Kippen to the children of the marriage, in terms of the said marriage-contract, with interest from the term of Whitsunday 1853, when the same became payable. (2) The defender, James Hill Kippen, as sole surviving trustee of the said William Kippen, and as an individual, having taken benefit by the said William Kippen's succession, and the said Richard Kippen, are jointly and severally indebted and resting-owing to the pursuer in the said sum of £800 sterling, with interest as concluded for, and the pursuer is entitled to decree therefor, with expenses. (3) Upon a sound construction of the discharge condoned on, it does not apply to or exclude the pursuer's present claims. (4) Assuming the said discharge by its terms to apply to these claims, it is altogether null and void, or at all events reducible, in respect it was granted *sine causa*, and while the pursuer was in ignorance of her legal rights. (5) Generally, in the circumstances condoned on, the pursuer is entitled to decree in terms of the conclusions of the summons."

The defenders pleaded—" (1) The defenders should be assolizied from the whole conclusions, in respect that they are not supported by any relevant statements. (2) The defenders should be assolizied from the reductive conclusions of the summons, in respect that in point of fact the annuity was accepted by the pursuer, and the value thereof paid to her, and the discharge granted by her in the full knowledge of the existence and terms of her father's marriage-contract, and trust-deed and codicils, and after being fully advised by her counsel and agents as to the nature and extent of her claims under these deeds. (3) The defenders should be assolizied, in respect that by the said discharge, when soundly construed, all claims competent to the pursuer in any way against her father's trustees and trust-estate, whether under the said marriage-contract or under the trust-deed and codicils, were effectually and finally discharged. (4) According to the sound construction of Mr Kippen's trust-deed and codicils, the annuity thereby provided to the pursuer was intended by him to be in lieu and satisfaction of the sum provided to her under his own marriage-contract, and the pursuer having elected to take, and having received, full payment of the said annuity or its value, she is not now entitled to make any claim under the marriage-contract. (5) The claim of the pursuer is barred by *mora*, taciturnity, and acquiescence. (6) In any view, the defender, James Hill Kippen, as sole surviving trustee of his father, ought to be assolizied from the whole conclusions, in respect that he has long since and in *bona fide* paid away the whole trust-estate of his deceased father. (7) The whole claims of the pursuer being groundless in fact, and untenable in law, the defenders should be assolizied, with expenses."

The Lord Ordinary (SHAND) pronounced the following interlocutor and note:—

"Edinburgh, 27th May 1874.—The Lord Ordinary having considered the cause, Finds that on a

sound construction of the provisions of the trust-disposition and settlement of the pursuer's father, the late William Kippen, executed in 1849, and codicils thereto executed in 1850, 1852, and 1853, the annuity of £120 finally provided to the pursuer by the last of these codicils was granted in lieu of, and not in addition to, the sum to which the pursuer was entitled under the antenuptial marriage-contract entered into between her said father and her mother in 1815, and that the pursuer, having taken the benefit of said annuity, has no legal right or claim for the sum of £800 now sued for, as her share of the sum provided by her father in favour of the children of the marriage by the said marriage-contract: Therefore sustains the fourth plea in law stated by the defenders, assolizes them from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, &c.

“*Note.*—The claim made in this action is resisted on the ground, *inter alia*, that it was expressly discharged by a deed granted by the pursuer in 1856, but the parties are agreed that before the question raised as to the effect of this deed, or the pursuer's right to have it reduced if necessary, on the grounds maintained by her, can be properly disposed of, a proof will be required.

“If, however, it should be found that the pursuer, in respect of getting the benefit of the annuity of £120 provided to her by her father's settlement and codicils, has no longer any right to the marriage-contract provision, and indeed was bound to have discharged her claim under the marriage-contract, there is an end of the case, and any inquiry into facts is unnecessary. The Lord Ordinary is of opinion that on a sound construction of Mr Kippen's testamentary deeds, the annuity provided to the pursuer was given in lieu and in satisfaction of her claim to any share of the marriage-contract provision in favour of children, and he has therefore decided the case on this ground, the point being one which can be disposed of without farther procedure.

“I. It is settled by the case of *Darley v. Kippen*, 18 D. 1137, and 3 Macq. House of Lords Cases, 203—a leading authority now in the Law of Scotland—a case in which the effect of Mr Kippen's marriage-contract and his testamentary writings was fully considered in this Court and in the House of Lords with reference to the provisions made by Mr Kippen in the marriage-contract of his daughter Margaret, afterwards Mrs Edmiston—that a payment made by Mr Kippen to or for behoof of one of the children of an amount equal to such child's share of the marriage-contract provision, extinguished all further claim under the marriage-contract. Mr Kippen in 1850, as a party to Mrs Edmiston's marriage-contract, bound himself to pay £1000 in the following year, and £4000 after his death, to trustees for the spouses and children of the marriage; and although there were no words of discharge of previous provisions or terms declaring that all such provisions must be held as discharged, all of the Judges in this Court and in the House of Lords held that in the absence of any provision that the obligation was additional to that contained in the marriage-contract, and, as the interlocutor of Court bears, ‘the provision made by the late Mr Kippen for his daughter Mrs Edmiston, in her contract of marriage, and the issue of her marriage with Mr Edmiston, were in implement and satisfaction of the provisions made for children in the marriage-contract between her

father and mother, in so far as she was interested therein.’

“The principle to which effect was thus given was, that where a provision by a father rests in *obligatione*, as by an undertaking by a parent contained in an antenuptial contract, the presumption is that the subsequent payment of money, or granting of a provision or bequest equal in amount and the same in character, is in satisfaction of the existing obligation, and not in addition to it, for in that case the maxim *debitor non presumitur donare* directly applies, and will receive effect if there be not something in the transaction or the deed granting the later provision or bequest sufficient to overcome the presumption, and show that the payment or second provision was intended to be in addition to the amount of the first provision. The Lord Ordinary takes this to be clear from a consideration of the opinions of all the Judges; for while it was held by a majority in this Court, and by a majority of their Lordships in the Court of Appeal, that there was no presumption against double provisions when both of such provisions were voluntary in their character, it seems to be equally clear, both from the judgment and the opinions delivered, that such a presumption was clearly recognised where the first provision arises *ex obligatione*. The Lord Ordinary notices this distinction here because some observations to a contrary effect were addressed to him in the argument for the pursuer, and he refers to a passage in the opinion of Lord Wensleydale (3 Macq. 261) as giving in a few words the view generally of the Judges in this Court and in the House of Lords on this matter.

“II. Keeping in view the decision just referred to, it appears to the Lord Ordinary that in order to a sound decision of the question which he has disposed of by this judgment, it is necessary, in the first place, to consider what was the effect of the provisions of Mr Kippen's deed of settlement of 1840, taken alone and without the subsequent codicils, as affecting his obligations under his marriage-contract. Did that deed leave his children creditors for £800 each under the marriage-contract notwithstanding and in addition to the provisions there made by him in their favour? The Lord Ordinary is clearly of opinion that the provisions thereby given were not additional, but in satisfaction of the marriage-contract provisions, and he thinks the branch of the case of *Kippen v. Darley* to which he has just referred is a strong authority to this effect.

“It is sufficient here to notice that by the third, fourth, and fifth purposes of the deed of settlement Mr Kippen directed that sums should be paid to each of his children William, Margaret, Jane Dennistoun, Elizabeth, and George, considerably in excess of the sum of £800 which each of them would have taken under the marriage-contract, assuming that the power of apportionment was not exercised; and although certain of the bequests were under limitations giving the liferent only to his own children, and the fee to grandchildren, this did not make the testamentary provisions different in quality or character from those contained in the marriage-contract, for by that deed Mr Kippen had power to divide the total sum which he provided among his children ‘and their issue, in such shares and proportions, and in liferent or fee, as he shall think proper by any deed under his hand.’

"Even, therefore, without any clause in Mr Kippen's deed of settlement declaring the provisions thereby made to be in satisfaction of the marriage-contract provisions, the Lord Ordinary holds that these last-mentioned provisions must be held to have been superseded. It seems to be quite clear, for instance, that George Kippen could not have claimed £6000 under the settlement in addition to £800 under the marriage-contract, and there seems to be no good reason for maintaining that the pursuer or the other members of the family were in a different position.

"But the deed concludes with a clause which, according to its fair construction, if the point were otherwise doubtful, seems to show that the testamentary provisions were not in addition to those given by the marriage-contract. The words are: 'And which provisions above written conceived in favour of my said children shall be accepted of by them; and the same are hereby declared to be in full of all legitim, portion-natural, bairns' part of gear, exeoutry, or others whatsoever, which they or any of them can ask or demand by and through my decease, or in any other manner of way.'

"The observations which occur on this clause are—first, that the words used are most comprehensive, covering every claim which could arise to his children through Mr Kippen's decease, and thus including, in the opinion of the Lord Ordinary, every claim under his marriage-contract; and secondly, that no distinction is therein made between the children. The voluntary provisions in favour of the children are to be accepted by all of them as in full of all they can demand. If it was open to the pursuer and her unmarried sister to enforce payment of a share of the marriage-contract fund in addition to the benefits conferred by the deed of settlement, it was equally open to Mr Kippen's sons to demand similar advantages. The Lord Ordinary is satisfied they could not have done so. The question is one of intention, the presumption, however, being that the voluntary provisions were intended to extinguish a previously created and then existing obligation. This presumption, which the Lord Ordinary quite regards as one which may be overcome by comparatively slight evidence of a contrary intention, where the parties, as in this instance, stand in the relation of parent and child, has here nothing to displace it. This circumstance, the clause above quoted being so comprehensive in its terms, and the general scheme and terms of the settlement, which evidently contemplated a partition of the grantor's *whole* estate amongst his children respectively, in certain shares differing in amount, but such as he thought proper in their various circumstances, are all considerations which leave the Lord Ordinary under no doubt that Mr Kippen intended that his children taking the benefit of the provisions in their favour in his settlement should not also have right to the sums provided for children under his marriage-contract.

"III. The question remains, whether, under the codicils to his settlement Mr Kippen made any change either as to the pursuer or any of his other children, to the effect of giving them a claim under his marriage-contract in addition to his bequest in their favour. The Lord Ordinary answers this inquiry in the negative. Mr Kippen seems to have hesitated between giving his two unmarried daughters, as he did by his settlement, a liferent of £4000 each with the fee to their

children, with a power of disposal failing children, and giving instead of this a simple annuity of £120, and ultimately to have fixed on the latter form of bequest in the codicil of 1853, executed shortly before his death. But it seems evident that he regarded the one form of bequest just as much as the other as the total provision of any kind to be given from his estate to each daughter. There is nothing indicating that the annuity should be over and above a share of the contract provision, and that in this respect the pursuer and her unmarried sister were to be put on a different footing from the other members of the family. On the contrary, the last codicil just referred to contains a clause which, in the Lord Ordinary's view, is sufficient to show that Mr Kippen intended the legacy to cover all claims to provisions by the pursuer, viz., 'which annuities hereby directed to be provided to my said daughters shall be in lieu of any former bequest in their favour, and in full of all other claims legally competent to them upon my means and estate.'

"It is true the annuity of £120 is different in character from the provision of £800, even though the pursuer's right to this last provision might have been restricted to a liferent only, with the fee to her children, but the sum given by the testator out of his estate was really much larger than £800, and the benefit in all probability greater than the provision of £800 could afford. The sum actually required to purchase the annuity for the pursuer was £2447, and in the circumstances explained by the defenders this sum was actually paid over to the pursuer.

"The judgment in the case of *Cowan v. Dick's Trustees*, Nov. 1, 1873, 1 *Rettie*, p. 119, cited by the pursuer, does not appear to the Lord Ordinary to bear materially on the present question. The rubric seems to go beyond the judgment, and the specialties regarding the voluntary provision contained in the deed of settlement noticed by the Judges were sufficient to show that the testamentary provision was an addition to the sum which had been provided by the testator's marriage-contract. The Lord Ordinary does not regard this case as throwing doubt on the principle settled by the case of *Darley v. Kippen*, to which he has already fully adverted. Again, the clause in *Dick's* case, declaring the provision given to be in full of other provisions, was not so comprehensive as that which here occurs. All of the claims there enumerated and referred to were claims arising by law—that is, from the common law, as distinguished from agreement or obligation, while here there is no such enumeration as would lead to the inference that claims arising from the force of law alone are referred to; the claims here excluded are those founded on former bequests, and 'all other claims legally competent' to the daughters on their father's estate, an expression which includes claims arising out of contract or obligation as effectually as claims arising at common law."

The pursuer reclaimed, and argued: We rely on the cases of *Cowan, Kippen, and Elliot*. The second of these has much shaken the maxim hitherto laid down, *Debitor non presumitur donare*: [LORD NEAVES—Is there anything in this view of the case that the parties profited by this codicil are not the same parties as those benefited under the marriage-contract: the parties here are the daughters only, whereas, under the marriage-contract the issue of

the daughters would have been benefited also if the daughters themselves had predeceased?] Precisely so, and that is one very strong support to our argument. The provisions under the codicil are not the same at all. There, by the marriage-contract we should get a tenth of £8000, and here we get an annuity of £120. Excluding the clause in the codicil, which says that the annuities shall be "in lieu of any former bequest in their favour," it does not touch their conventional right. If we take what indication of the testator's intention the circumstances give, we find (1) the amount of the estate was ample to provide this augmentation of the daughter's provision; (2) the sum provided is dissimilar in its amount and in its character as an annuity; (3) the persons in whose favour it is provided are not the same; (4) in the trust-deed the marriage-contract clearly is in view of the maker of it, as allusion to it is there made. We have upon record our averments as to the plea of discharge (*Dixon; Fisher*). A newly discovered point of law clearly up and established since this discharge was granted, is not excluded by the action that was here taken (*Ross; Anderson; Greenock Banking Co.*)

Authorities—*Cowan v. Dick's Trs.*, Nov. 1, 1873, 1 R. 119; *Kippen v. Darley*, 18 D. 1137, 3 Macq. 203; *Elliot v. Bowhill*, June 21, 1873, 11 Macph. 735; *Dickson v. Halbert*, Feb. 17, 1854, 16 D. 586; *Fisher v. Dixon*, June 16, 1840, H. L., April 6, 1843; *Ross v. Mackenzie*, 5 D. 151, Nov. 18, 1842; *Anderson v. Hutchison*, 15 D. 570, March 18, 1853; *Greenock Banking Co. v. Smith*, July 17, 1844, 6 D. 1340.

At advising—

LORD JUSTICE-CLERK—My Lords, there were argued to us here two points in the case, and these I propose to consider separately. The first point is, whether the provision of an annuity of £120 under the codicil to Miss Kippen was in satisfaction of or in addition to her share of the £8000 provided to the children of the marriage by the late Mr Kippen's antenuptial contract of marriage. As to this, the defenders have put two pleas upon record, and the Lord Ordinary has sustained the latter of these, the fourth plea in law, but not the plea founded upon the discharge. I have come to think that we should sustain the third plea, that founded on the discharge, which is as follows:—"The defenders should be assolizied, in respect that by the said discharge, when soundly construed, all claims competent to the pursuer in any way against her father's trustees and trust-estate, whether under the said marriage-contract or under the trust-deed and codicils, were effectually and finally discharged." It was maintained that no discharge such as we have now before us could be effectual and binding unless the person by whom it was granted were in full knowledge of his or her legal rights, and that in this instance Miss Elizabeth Murdoch Kippen did not at that time know that this annuity of £120 was in addition to the provision to which she was entitled under her father and mother's marriage-contract. I am not prepared to go so far as that, and I can only say that I think it was pleaded too high. This discharge I have come to regard as no off-hand proceeding, but as partaking of the nature of a very deliberate transaction. Subsequent to the granting of it, in 1856, it has been acted on by all parties, and, what is not unimportant, upon the death

of Mrs Kippen in 1869 her daughters succeeded to a considerable portion of her means, which she left to them by will. [*His Lordship then read from the discharge already quoted.*] Now, considering the whole of this deed, it is clear that there was not here merely a discharge, but there was an agreement between this lady, Miss Kippen, and her brothers and the trustees, and so far from its being a hasty step, it was most deliberate, the opinion of counsel was taken, and that opinion, which we have now before us, returns an answer to a question in the memorial (unfortunately not recovered), an answer which to my mind evidently refers to the £120 annuity. Some recent decisions may have given a colour to the claim here advanced on Miss Kippen's behalf, but that claim, it appears to me, is entirely barred at the outset by this discharge. In the next place, even if we had to decide upon the merits of this case, and apart from the question of discharge, I am clearly of opinion that the annuity was granted in satisfaction of the provisions under the marriage-contract. In two cases lately decided your Lordships took occasion to say that there is not in the law on such a point as this that which amounts to a presumption. I do not mean to call in question the maxim *Debitor non presumitur donare*, but will only refer to the case of *Nimmo*, and the observations there made by the Lord Chancellor. My Lords, applying those remarks, and looking to see what Mr Kippen's intention was, we must conclude that he meant this annuity as in substitution of what was provided in the marriage-settlement, and not as an augmentation of the provisions therein. The words of the codicil are, I think, very strong—[*His Lordship read the codicils above quoted.*]

LORDS BENHOLME and NEAVES concurred.

LORD ORMDALE—I concur. As to the effect of the discharge, I will only add the following observations, which have occurred to me.

(1) The pursuer at the date of the discharge had attained majority: she took time to consider her course, and acted on the most ample advice.

(2) The acceptance of the annuity and the granting of the discharge show that there was in the matter the element of transaction.

(3) Proceeding on the footing that the discharge had put an end to all questions, all parties settled their affairs, and the whole trust was wound-up. We cannot, after the lapse of sixteen years and more, open matters up again.

As to the other branch of the case, I think the Lord Ordinary is right.

The Court recalled the interlocutor of the Lord Ordinary, sustained the third plea in law for the defenders, and assolizied the defenders, with expenses.

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