

Thursday, January 7.

SECOND DIVISION.

NEISH'S TRUSTEES v. NEISH AND GORDON.

*Discharge—Marriage-Contract—Revocation of Discharge of Rights under Marriage-Contract.*

A husband who survived his wife died indebted to his marriage-contract trustees in the whole amount of the trust funds. His estate was sufficient to meet this indebtedness, but as it appeared to his beneficiaries undesirable to realise it for this purpose, they authorised the marriage-contract trustees to discharge the testamentary trustees from the obligation, and discharged all their rights under the marriage-contract. The beneficiaries, who were the six sons and two daughters of the testator, were all *sui juris*. By both deeds provision was made for an equal division among the sons and daughters, the marriage-contract conferring an absolute fee, while the testament limited the daughters' provisions to a lifeferent, with a fee to their children and a destination-over, failing children, to their brothers and sisters. The daughters subsequently claimed that they were entitled to revoke the discharge in so far as it restricted this provision to a lifeferent, the renunciation of their rights having been without consideration.

*Held* (1) that the discharge was irrevocable, and (2) that the marriage-contract funds fell to be administered as part of the testamentary trust-estate.

*Trust—Marriage-Contract. Trust—Lifeferent and Fee—Whether Right of Fee under Settlement of Wife's Father Validly Conveyed to Marriage-Contract Trustees.*

A testator by his settlement provided that the shares of residue falling to his daughters should, on their attaining majority or marriage (with the exception of £1000 to be paid over to each of them) be invested, that the interest should be paid to them for their lifeferent use only, and that after their deaths the principal should be divided among their children in such shares as the daughters should appoint, and failing appointment equally. One of the daughters, with consent of her father's trustees, by her marriage-contract conveyed to her marriage-contract trustees her right and interest in the estate of her father, to be held by them in terms of her father's settlement. *Held* that the fee of this provision had been validly conveyed to the marriage-contract trustees.

By antenuptial contract of marriage entered into between the deceased William Neish and Miss Margaret Ann Watson, afterwards his wife, dated 12th and 14th September 1848, Mr Neish assigned, transferred, con-

veyed, and made over to the trustees thereby appointed a sum of £8000 out of the first and readiest of his means and estate, and directed it to be paid at the first term of Whitsunday or Martinmas which should happen six months after his decease; and for the further security and more sure payment *pro tanto* to the trustees, he assigned to them two policies of assurance on his life as therein specified. The trustees were directed by the contract of marriage to hold the said sum of £8000, and to pay the annual income thereof to Mrs Neish in the event of her surviving her husband, and after her death, or in the event of him surviving her, at the first term of Whitsunday or Martinmas which should happen six months after his death, to pay "the said principal sum of £8000 to the child or children of the marriage, and the heirs of their bodies, *secundum stirpes* equally or in such proportions, if more than one child, and with and under such conditions and restrictions as the father should have directed by any writing under his hand, and failing which, as the mother might direct in the event of her surviving him." On the other part, by the said contract of marriage Miss Watson, afterwards Mrs Neish, assigned to the trustees thereby appointed certain interests she had in the trust-estate of her deceased father. By her father's trust-disposition and deed of settlement it was provided that the shares of the residue of his estate falling to his daughters should, on their respectively attaining the age of twenty-one years or being married, under deduction of £1000 sterling, which should be paid to them respectively on either of the said events happening, be lent out on heritable security, or upon the Parliamentary funds of Great Britain; that the interest arising therefrom should be paid to his daughters in lifeferent for their lifeferent use only, and that after their deaths the principal should be divided among their children in such proportion as his said daughters might appoint, and failing such appointment, to their children equally on their respectively attaining twenty-one years. Miss Watson attained the age of twenty-one years on 15th January 1840. Her father's trustees, on 1st August 1840, set apart for her credit in account with them, a sum of £3000 as an interim payment to account of her share of the residue of his estate, whereof she was entitled to £1000 for her own absolute use and disposal, and said sum amounted to £3975 at 1st August 1848. By the marriage-contract Miss Watson, with consent of her intended husband, and also of her father's then trustees, assigned, transferred, disposed, conveyed, and made over to and in favour of the trustees named in the contract of marriage, and to those they might assume, the sum of £3000, part of the said sum of £3975, with the interest thereof from 1st August then last; as also her, the said Margaret Ann Watson's remaining right and interest in the estate of her said father when realised, but always in trust for these purposes.—That the trustees in whose favour the assignation was granted should, in terms of her father's

deed of settlement, lend out on heritable security, or upon the Parliamentary funds of Great Britain, the said sum of £3000, as well as the principal of the said remainder or balance of the said Margaret Ann Watson's share of the residue of her said father's estate, and should pay the income thereof to the said Margaret Ann Watson during all the days of her life in life rent for her life rent use only, and after her death should "pay the principal to her children in such proportions as she might appoint by any writing under her hand, and failing such appointment to her children equally on their respectively attaining twenty-one years of age."

There were six sons of the marriage of Mr and Mrs Neish, and two daughters, all of whom were still alive. One of the daughters was still unmarried. The other was married, and had two children still in pupilarity.

Mrs Neish predeceased her husband. She died intestate, and left no writing or appointment with reference to her share of the funds in the marriage-contract trust or falling to her under her father's settlement. Mr Neish died on 16th March 1886, leaving a will dated 19th July 1883, with two codicils thereto dated respectively 20th October 1884 and 12th March 1886. By his will, after directing various legacies to be paid, he devised, bequeathed, and disposed, to the trustees therein named, "all the real and personal estate not hereinbefore disposed of to which at my death I shall be beneficially entitled, or of which I shall have power to dispose beneficially by will for any purpose I may think proper."

The trustees under the will were directed to hold the trust-estate for the testator's children in equal shares, but so far as the shares of the testator's two daughters were concerned, they were directed to pay the income only to each daughter during her life, and after her death to hold the capital and income in trust for her issue, whether children or remoter descendants, payable at such age or time, in such manner, and if more than one, "in such shares as each such daughter shall appoint," or failing any such appointment, for such daughters' children equally; and in the event of any daughter dying without leaving issue, then the capital of such daughter's share was appointed to accrue to the testator's other children, sons and daughters, but so that the further share accruing to each such daughter should be retained and held by the trustees, subject to the like trusts and powers as were thereinbefore declared concerning the original share of that daughter.

During his life Mr Neish did not do anything beyond granting the assignation contained in his marriage-contract towards paying or securing the provision of £8000 appointed to be paid at the first term of Whitsunday or Martinmas which should happen six months after his decease. On his death the amounts due under the life policies assigned were paid to his executors.

In the year 1854 Mr Neish borrowed from the trustees under the contract

of marriage, from funds which had come into their hands in virtue of the assignation by Mrs Neish and her father's trustees in their favour contained in the contract of marriage, the sum of £8000, for which sum he granted a bond and disposition in security in their favour over his estate of Clepington. That bond, which was recorded in the General Register of Sasines 24th May 1854, was undischarged at the date of Mr Neish's death.

By a discharge dated 29th September and 3rd and 10th October 1886, executed by all the children of the late Mr Neish, including his two daughters, the married daughter acting with the special advice and consent of her husband, and her husband also granting the discharge for his own interest and as taking burden on himself for his wife, certain provisions were made regarding the marriage-contract trust-estate. It proceeded on the narrative of the marriage-contract, and on the further narrative that neither Mr Neish nor his spouse left any writing under their hands relative to the disposal or division of the funds embraced in or falling under said marriage-contract trust; that the funds of the marriage trust consisted of (1) the sum of £8000 contained in the before-mentioned bond and disposition in security granted by Mr Neish in favour of his marriage-contract trustees; and (2) the provision of £8000 which under said marriage-contract Mr Neish bound himself to provide for his wife and children; that the trustees acting under said contract of marriage would, in the due execution of the trust created by said contract, now fall to obtain payment from the testamentary trustees and executors of Mr Neish of the sum due under the foresaid bond and disposition in security, as well as of the foresaid provision of £8000, and to pay over the same to them, the children of Mr Neish, they having all attained majority, and there being no children who had died leaving issue, in terms of the directions contained in said marriage-contract; that they, the granters thereof, in place of requiring fulfilment of the provisions in their favour contained in the said contract of marriage, had agreed and resolved to request and authorise the trustees acting under said contract not to require repayment of the sum due under said bond and disposition in security or payment of said provision, and had further agreed and resolved to renounce and discharge their whole claim, rights, and interests under said marriage-contract to the effect that the funds falling under the same might be retained and administered by the testamentary trustees of the late Mr Neish as part of his testamentary trust-estate. After this narrative the discharge proceeded:—"Therefore we, the whole granters hereof, do hereby (*first*) request, authorize, and desire the foresaid trustees acting under said contract of marriage to discharge the foresaid bond and disposition in security and the foresaid provision of £8000, made and undertaken by the said William Neish under said contract of marriage; (*second*) discharge and renounce the whole provisions in favour of

us, or any of us, contained in or falling to us in virtue of said contract of marriage in any way, as well as the said contract of marriage itself, whole tenor, contents, and clauses thereof."

In connection with the discharge and partly as authorised by the provisions thereof, an additional discharge was executed by the only surviving original trustee acting under the contract of marriage, with the consent and concurrence of the assumed trustees, viz., the six sons of the late Mr Neish, and by the assumed trustees for themselves and their own right and interest, and at the special desire and request of, and as authorised by, the whole sons and daughters of Mr Neish as the beneficiaries under the contract of marriage, dated the said additional discharge the 29th September and 3rd and 5th October 1886, and recorded in the division of the General Register of Sasines 20th April 1892, by which deed, and, *inter alia*, upon the narrative that no consideration had been paid to them, the said trustees, for executing the same, the said granters thereof discharged (*first*) the said bond and disposition in security for £8000 and all interest due thereon, and they declared to be redeemed and discharged thereof, and of the infertment following thereon, all and whole the lands and others thereby conveyed in security; and (*second*) all and whole the provision of £8000, which under said contract of marriage Mr Neish had bound himself to provide, from payment of which provision it was by said additional discharge declared the testamentary trustees and executors of Mr Neish should be for ever freed and discharged.

The object of the discharges was to release the then trustees of the contract of marriage, because at that time there was no cash fund available for payment of these two sums of £8000 each, and it was thought expedient to obviate the necessity of a forced sale of part of the testator's estate. The discharges were duly delivered to the trustees of the will, and in consequence of their provisions no payment was made from Mr Neish's trust-estate to the marriage-contract trustees.

At a subsequent period funds amply sufficient to satisfy the daughters' shares having come into the hands of the testamentary trustees, questions were raised on behalf of Mr Neish's two daughters, as to whether, in view of the provisions of the marriage-contract, and notwithstanding the terms of the will and of the discharges referred to, they were entitled to obtain payment of their shares of the marriage-contract funds, and the present special case was presented for the opinion of the Court.

The parties to the case were (1) the marriage-contract trustees; (2) the executors and trustees, original and assumed, of Mr Neish's will (being four of his sons), the six sons of Mr Neish as individuals, and the two pupil children of his married daughter; (3) Mr Neish's unmarried daughter, his married daughter with the consent of her husband, and her husband for his own interest.

The opinion and judgment of the Court was desired upon the following questions of law:—“(2) Was the sum of £8000 derived from the trust-estate of Mr Watson, the father of Mrs Neish, effectually assigned and conveyed by the contract of marriage to the trustees acting under the same? or Did it fall to be administered by the trustees under Mr Watson's deed of settlement, as if no assignation thereof had been contained in the marriage-contract? (3) Did the said deeds of discharge apply to the said last-mentioned sum of £8000, and effect a transfer thereof to the administration of the trustees under the will of Mr Neish as if it formed a part of his testamentary estate? (4) Assuming that, by virtue of the said discharges, the said two sums of £8000 each were transferred to the trustees acting under the will of Mr Neish, and to be administered as if they formed portions of his testamentary estate, is this transfer, so far as effected by the third parties, revocable by them.”

Argued for the first and second parties—(1) The fee of the sum of £8000 which came from the maternal grandfather's estate was validly conveyed to the marriage-contract trustees, and therefore fell under the discharges granted by the children. (2) The discharges effected a valid and effectual renunciation by the daughters of their rights under the marriage-contract. The result of the transaction was that the sum due by the testamentary trustees to the marriage-contract trustees ceased to be due to them, and became part of the testamentary trust-estate. It was impossible now to make the provisions of the marriage-contract binding in the disposal, not of the marriage-contract estate, but of the testamentary estate. The funds in question were just part of the testamentary estate, and as such must be dealt with in terms of the will. (3) The daughters were not now entitled to revoke the discharges to any effect. No trust was created by them, but even if it were held otherwise, the discharges were still not revocable, for upon delivery, rights were conferred upon third persons which constituted a *jus quesitum* in them sufficient to bar revocation. (4) The father had a power of appointment under the marriage-contract, and it had been validly exercised by him in his will to the effect of restricting the daughters to a life interest—*Lennox's Trustees v. Lennox*, October 16, 1880, 8 R. 14; *Wallace's Trustees v. Wallace*, June 12, 1891, 18 R. 921.

Argued for the third parties—(1) The sum of £8000 which came from the maternal grandfather's estate did not as regards the fee, come under the marriage-contract, but remained part of the maternal grandfather's estate, and subject to the provisions of his will. Consequently the fee of that sum was not effectually dealt with by the discharges, and under the grandfather's will, which alone governed the disposal of it, the daughters were entitled to the fee of £1000 each. (2) At the time when the discharge was granted, the daughters were entitled to a fee of £2000 each. It was so stated in the

narrative of the first discharge, and the first and second parties were not now entitled to contradict that narrative. Apart from that, it was clear that the marriage-contract funds were not effectually dealt with by the father's will. This was not a case in which a power could be held to have been exercised without reference. (3) The third parties did not desire to revoke the discharges *quoad* the trustees. What they claimed right to revoke was only that portion of the discharge by which a trust was created, and by which their rights were restricted from a fee to a life rent. There was no consideration given for the restriction; there was no contract. It was perfectly gratuitous on the part of the daughters. Third parties were not entitled to enforce such a gratuitous benefit so conferred upon them as a *jus quæsitum*. The case was just the same as if the daughters had got payment of their shares, and had gone to the trustees and asked them to take charge of them. They would have been entitled to revoke any deed by which they had effected such a purpose—*Mackenzie v. Mackenzie's Trustees*, July 10, 1878, 5 R. 1027; *Wightman v. Costine*, March 20, 1879, 6 R., H. L., 13. This was especially so in the case of the unmarried daughter, for no rights were conferred upon existing children in her case. In the case of both daughters, the provisions in favour of children and brothers and sisters were, though not in form, yet in substance and effect, practically testamentary—*Byre's Trustees v. Gemmell*, December 20, 1895, 23 R. 332. The discharge was therefore revocable, except in so far as it freed the marriage-contract trustees from demanding payment from the testamentary trustees. The effect of the transaction was, that a certain sum which the testamentary trustees would have had to pay, remained in their hands subject to certain directions given by the persons to whom that sum would otherwise have had to be ultimately paid, and these persons were entitled to revoke and alter these directions.

LORD YOUNG—This case appears simple enough, and the law regarding the rights of the parties, as to which it is very proper that the trustees should be informed, is, I think, not difficult, and capable of being stated without direct reference to the questions put in the case.

Mr Neish died in 1886 leaving a family of six sons and two daughters. He had entered into an antenuptial marriage-contract in 1848 with Miss Watson, and by that marriage-contract he came under an obligation that his executors after his death should pay over £8000 to the marriage-trustees, and he also assigned two policies of insurance, which are of no significance in this case.

The lady whom he married conveyed to the same marriage-trustees—of course by the same contract—all that she should be entitled to under the will of her father Mr Watson; and one of the questions before us is, whether a sum of £8000—for the sum

is admitted—derived from the trust-estate of Mr Watson, the father of Mrs Neish, was effectually assigned and conveyed by the contract of marriage to the trustees acting under the same.

I am of opinion that it was. They got the £8000, and they got it in terms of the obligation in the will under which Mrs Neish took, and that sum is what they lent to Mr Neish, the husband, subsequently upon his bond.

He died in 1886 as I have mentioned, his wife predeceasing him, and he died leaving a will, and, with a trifling exception, the trustees under his will are the trustees under the marriage-contract. He had borrowed a sum of £8000 from the marriage-trustees, as I have stated, being the very sum of £8000 which they had received from the wife's father's estate under her marriage-contract obligations. He never implemented his obligation to pay £8000 over to the marriage-contract trustees, so that at his death he was indebted to the marriage-contract trustees in these two sums of £8000 each, the one of them being his marriage-contract obligation to pay that sum to the trustees, and the other being his bond for the £8000 which he had borrowed from these trustees. His estate was so situated—though it turned out very well ultimately—that it appeared to his family of six sons and two daughters that it would not be desirable that any part of the testamentary estate should be sold for these two sums, and to avoid that they entered into a deed whereby they requested and authorised the marriage-trustees to discharge the foresaid bond and disposition in security and the foresaid provision of £8000, and they then renounced all their rights under the marriage-contract. The marriage-trustees, as so requested and authorised by the only persons who had an interest in the marriage-contract, and who were *sui juris*, did discharge the testamentary trustees of these two sums; and it was explained to us that there was no other marriage-contract estate. The one sum of £8000 was that under the husband's obligation, the other £8000 was that which had been paid under the wife's obligation, and had been lent to the husband subsequently. By the same deed by which these discharges are granted, the parties thereto say really in terms that they will be satisfied to take under their father's will—his testamentary disposition. Well, none of the children have suffered from this, because the testamentary estate consists of more than £16,000, only the sons benefit a little at the expense of the daughters, for the daughters are limited to a life rent, with a fee to their children. One of the daughters has two children, and therefore, the fee will go to them if they live. The other is unmarried, and therefore has only a life rent, and if she dies unmarried and without children that share of hers—about £2000 I think it was stated—will go to the brothers; and if the other dies childless—that is to say, if her existing children die—her share will also go to the brothers.

But what we have to deal with is the

question, whether this authority given to the trustees to discharge the debtors to the trust, and whose debts constituted the whole trust-estate, and which was acted on, was valid and effectual, and is now binding; and I am very clearly of opinion that it was and is valid and effectual, that the marriage trustees have well discharged these claims—and I think that was not disputed by Mr Macfarlane—and that to that extent it is quite good.

But then Mr Macfarlane argued that "Notwithstanding of that, and notwithstanding that there is no marriage-contract estate, I am entitled, or we the daughters are entitled, to have the testamentary estate under the will of the deceased, to the extent of our shares under the marriage-contract, administered, not according to the will under which they are trustees, but according to the marriage-contract, which is at an end, and our rights under which are discharged, and under which there is no estate." Now, I cannot assent to that argument. I am of opinion that, notwithstanding the apparent—not great but still stateable—hardship to the daughters, they must stand by what they have done, and that they must take from the testamentary trustees according to the provisions of the testament, and not according to the provisions of the marriage-contract.

I think we will have to express that result, if that should be the opinion of the Court, otherwise than by answering the questions, and I do not think there will be any considerable difficulty in doing so. Perhaps, however, we may answer that one question about the £8000 which came from the wife's father's estate,—that it fell under the marriage-contract, and that the trustees received it under the marriage-contract, and invested it under the marriage-contract, in however questionable a manner, by lending it to the husband.

LORD TRAYNER concurred.

LORD MONCREIFF—I also concur. The discharge blocks the way. Owing to the shape which that transaction took, it is now too late to separate the marriage-contract funds from the testamentary funds of Mr Neish. Therefore the parties must take under the will and in terms of the will.

The LORD JUSTICE-CLERK concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel for the parties to the special case, Answer the first alternative of the second question therein stated in the affirmative: *Quoad ultra*, find and declare that the discharge dated 29th September and 3rd and 10th October 1886 is valid, binding, and irrevocable; that the whole children of the late William Neish have thereby renounced and discharged their whole claim, rights, and interests under the marriage-contract of the said William Neish and his wife; and that the funds which fell under the said mar-

riage-contract fall to be administered by the testamentary trustees of the said William Neish as part of his said testamentary trust-estate: Find and declare accordingly, and decern: Find the whole parties to the case entitled to their expenses as the same may be taxed, out of the testamentary trust-estate of the said William Neish.

Counsel for the First and Second Parties—Chisholm.

Counsel for the Third Parties—Macfarlane.

Agents for all the Parties—Henderson & Clark, W.S.

## TEIND COURT.

Friday, January 8.

(Before the Lord President, Lord Adam, Lord Kinnear, Lord M'Laren, and Lord Low.)

MINISTER OF PEEBLES  
v. THE HERITORS.

*Teinds—Augmentation—Process.*

In a process of augmentation, when the heritors deny the existence of sufficient free teind to meet the number of chalders asked for, but do not support their objection by the production of decrees of valuation, or other written evidence *ex facie* conclusive, the Court will not ordain the minister to condescend upon the free teind, but will award an augmentation, reserving the question of sufficiency of free teind to be decided by the Lord Ordinary in the locality.

Form of declaration inserted in the decree of augmentation.

In a process of augmentation raised by the Rev. Matthew Gardner, minister of the parish of Peebles, concluding for an augmentation of five chalders, the heritors lodged defences, alleging that there was not sufficient free teind in the parish to provide more than three chalders, and prayed the Court to ordain the minister to condescend upon the free teind. They maintained that it lay upon the minister to prove the existence of free teind before an augmentation was granted—*Flood (Minister of Glenluce) v. Earl of Stair*, November 9, 1874, 2 R. 76.

The minister moved for an immediate augmentation, and argued—The case was not analogous to the *Glenluce* case, because the allegation of the heritors was not supported by any *prima facie* conclusive evidence. The proper course was to grant the augmentation—reserving the question of sufficiency of free teind—*Minister of Banchory Devenick v. The Heritors*, January 1, 1863, 1 Macph. 1014; *Minister of Bonhill v. Orr Ewing*, February 22, 1886, 13 R. 594.

LORD PRESIDENT—We will grant the five chalders, putting into the decree the declaration in the *Bonhill* case.