

LORD M'LAREN and LORD KINNEAR concurred.

The Court answered the first question of law in the affirmative.

Counsel for the Pursuer and Respondent—Garson. Agents—Douglas & Miller, W.S.

Counsel for the Defenders and Appellants—Campbell, K.C.—Lord Kinross. Agents—Anderson & Chisholm, S.S.C.

Wednesday, May 31.

### FIRST DIVISION.

#### PROCTOR'S TRUSTEES v. PROCTOR.

*Succession—Marriage-Contract—Satisfaction of Marriage-Contract Obligation—Clause of Discharge in Settlement—Testamentary Provisions to be Accepted “in Lieu and in Full Satisfaction of All Claims Competent upon my Estate through my Death.”*

By antenuptial contract of marriage A assigned to trustees two policies of insurance and his household furniture, with power to the trustees to demand in lieu of the furniture a sum of £200. He also bound himself to pay his widow a sum of £20 for mournings. The contract provided that in the event, which happened, of the dissolution of the marriage by the predecease of A, the estate was to be conveyed to his widow. The trustees never entered into office, and the policies of insurance lapsed.

By a trust-settlement subsequent in date A conveyed his whole estate to trustees for, *inter alia*, payment of certain legacies to his children and an annuity of £70 to his widow, declaring that these provisions “in favour of my wife and children are made and shall be accepted by them as in lieu and in full satisfaction of all claims competent to them upon my estate through my death.”

On A's death his widow elected to take the annuity of £70 provided to her by the settlement, but contended that she was entitled in addition thereto to the marriage-contract provisions of £200 and £20. She agreed to abandon all her other claims under the marriage-contract.

Held that the widow's claims for the sums of £200 and £20 under the marriage-contract were “claims competent . . . on my estate through my death,” and accordingly were excluded by the clause of discharge in A's settlement.

By antenuptial contract of marriage entered into between the late Alexander Forbes Proctor, M.B., 9 Golden Square, Aberdeen, and Mrs Elizabeth Roger or Proctor, dated 2nd September 1864, Dr Proctor conveyed to the trustees (*first*) two policies of assurance, and (*second*) his whole household furniture and other plenishings then belonging or

which should belong to him at the dissolution of the marriage, with power to the trustees to demand from him and his heirs and successors the sum of £200 “in lieu and place of the said furniture and others.” He also bound himself in the event of his predecease to pay to his widow, *inter alia*, the sum of £20 for mournings.

The marriage-contract provided—in the event which happened, viz., the dissolution of the marriage by the predecease of the husband—as follows:—“(Second) If the said intended marriage shall be dissolved by the predecease of the said Alexander Forbes Proctor, whether there shall be issue thereof alive or not, the said whole estate and effects shall belong to the said Elizabeth Roger for her own absolute use and behoof, and the trustees shall be bound to denude in her favour accordingly, and to account with her for any interests which may have accrued on any of the said trust property, and generally for their disposal thereof.”

Dr Proctor, who died on 25th June 1903, left a trust-settlement dated 30th July 1902, and registered in the Books of Council and Session 29th June 1903. At the time of his death Dr Proctor was living apart from his wife under a contract of voluntary separation dated 8th December 1896, which provided for the payment to her by him of an annuity of £70. The said annuity was paid down to September 1903.

By the fourth purpose of the trust-settlement it was provided as follows:—“(Fourth) My trustees shall continue to pay my wife during the said next three years, if she survive so long, the annuity of £70 per annum she at present receives from me.” . . . (Sixth) As soon as may be after the expiry of the said three years after my death my trustees shall denude and make over equally share and share alike to my said four daughters or the survivors or survivor, the legal issue of any predeceasing daughter coming in their mother's place, *per stirpes*, the residue of my said whole means and estate then remaining in their hands, but that under burden of the continuance, should my wife be then alive, of an annuity to her of £70 per annum which I hereby leave her; Declaring that the foregoing provisions in favour of my wife and children are made and shall be accepted by them as in lieu and in full satisfaction of all claims competent to them upon my estate through my death.” . . .

Mrs Proctor having claimed payment of the marriage-contract provision in addition to the annuity of £70 provided to her by the trust-settlement, an agreement, dated 22nd December 1903, was entered into between her and Dr Proctor's trustees by which she elected to take the provisions in her favour in the settlement, and agreed to abandon her claims under the marriage-contract, except her claim for the sum of £200 in lieu of furniture and the sum of £20 for mournings. As regards her right to demand payment of these two sums in addition to the provision in her favour in the settlement, a Special Case was presented, of which the said agreement was

held to form part. The parties to the special case were—(1) Dr Proctor's testamentary trustees and (2) Mrs Proctor.

The case stated—“5. For many years prior to the death of the said Alexander Forbes Proctor the trust created by the said contract of marriage had practically lain dormant, and was so at the date of said death. There is at present no trustee or judicial factor on the marriage-contract trust-estate. The policies of assurance which had, as before mentioned, been assigned to the trustees had long since lapsed. The furniture and household effects assigned to the said marriage-contract trustees were sold by the said Alexander Forbes Proctor a short time before his death, and the proceeds were paid to and appropriated by him. Upon 15th July 1904 the second party presented a petition under section 14 of the Trusts (Scotland) Act 1867 for authority to complete in her own name, as sole beneficiary, a title to the said marriage-contract trust funds, and by interlocutor pronounced by Lord Low, Ordinary, upon 18th October 1904, proceeding upon said application, the said second party was granted warrant to complete a title in her own name to the moveable or personal property therein specified, viz., the said sum of £200 claimed by the second party in lieu and place of said furniture and others, and the said sum of £20 bequeathed to the second party by the said Alexander Forbes Proctor for mournings. The said Alexander Forbes Proctor died possessed of certain estate, heritable and moveable, which estate is held and is being administered by the parties of the first part who are his executors and testamentary trustees. Any claim therefore that the second party may have under the said contract of marriage becomes in fact a claim against the parties of the first part as the executors and testamentary trustees of the said Alexander Forbes Proctor.”

The first parties maintained “that on a sound construction of the said trust-settlement, and particularly of the clause therein declaring that the provisions in favour of the said Alexander Forbes Proctor's said wife and children should be accepted by them as in lieu and full satisfaction of all claims competent to them upon his estate through his death, the second party is put to her election as between the provisions in her favour in the said contract of marriage and her legal rights in her husband's estate on the one hand and the provision in her favour in the said trust-settlement on the other hand.”

The second parties maintained “that on a sound construction of the said antenuptial contract of marriage and of the said trust-settlement she is entitled, as sole beneficiary, to the whole of the provisions claimed by her” as restricted by the aforesaid agreement, “and to payment of these restricted provisions out of the trust-estate left by the said Alexander Forbes Proctor at his death. The second party claims payment of the said sums of £200 in lieu of household furniture and others and £20 sterling for mournings,

being the provisions in her favour contained in the said antenuptial contract of marriage as the same have been restricted . . . (and to which she has made up a title as aforesaid) and that in addition to the said annuity of £70 sterling provided to her under the said trust-settlement, commencing from the 9th September 1903, under deduction of any sums paid to account thereof by the first parties.”

The question of law was—“On a sound construction of the terms of the said trust-settlement of the said deceased Alexander Forbes Proctor, and of the provisions of the foresaid contract of marriage, is the second party entitled to payment from the first parties out of the testamentary trust-estate of the said deceased Alexander Forbes Proctor of the provisions conceived in her favour under said antenuptial contract of marriage (restricted, as aforesaid, in terms of said minute of agreement between the parties) and that in addition to payment of the annuity conceived in her favour under said trust-settlement?”

Argued for the second party—The question was one of intention. The creditors in the marriage-contract were not the same as those in the settlement. The provision of £200 in the marriage-contract was a *de presenti* gift which the trustees could demand at any time—*Keith Johnston's Trustees v. Johnston's Trustees*, November 3, 1894, 22 R. 28, 32 S.L.R. 24; *Johnstone v. Hairland*, February 17, 1896, 23 R. (H.L.) 6, 33 S.L.R. 511. The provisions in the marriage-contract were not claims competent to Mrs Proctor “through her husband's death,” but were independent gifts which were not inconsistent with the provisions in the settlement—*Elliot v. Bowhill*, June 21, 1873, 11 Macph. 735; *Cowan v. Dick's Trustees*, November 1, 1873, 1 R. 119, 11 S.L.R. 25. There was no presumption against cumulative provisions. The clause of exclusion was meant to distinguish between legal rights and provisions under the settlement and not between the marriage-contract provisions and those of the settlement—*Cowan v. Dick's Trustees*, *ut supra*.

The first parties were not called upon.

LORD PRESIDENT—By his antenuptial contract of marriage the late Alexander Forbes Proctor assigned and disposed two policies of assurance to his trustees, and also all his household furniture and effects of that sort belonging to him, with a power to his trustees to demand instead of the furniture a sum of £200. He also bound himself to pay to his widow a sum of £20 for mournings.

This estate was to be held by his marriage-contract trustees for certain purposes. The first of these was to give to Dr Proctor the free interest or annual proceeds of the trust-estate, and then, in the event which happened (viz., the dissolution of the marriage by the predecease of Dr Proctor), the marriage-contract estate was to be conveyed to the surviving spouse.

The marriage-contract trustees do not seem to have ever entered into office. The

policies were allowed to lapse, and the marriage-contract estate was never vindicated by the trustees.

Things being in that position, Dr Procter died leaving a trust-disposition and settlement by which he conveyed his whole estate to testamentary trustees for certain purposes, one of which was to provide an annuity of £70 to his widow.

The trust-disposition and settlement then goes on—"Declaring that the foregoing provisions in favour of my wife and children are made, and shall be accepted by them, as in lieu and in full satisfaction of all claims competent to them upon my estate through my death."

The widow has elected to take the provision of £70 a-year, but she contends (and this is the subject of this case) that there is nothing to prevent her asking in addition for the £200 in lieu of furniture and the sum of £20 for mournings. She is content to renounce her claims *quoad ultra*.

The simple question therefore is, whether the declaration which I have read does or does not include these two sums of £200 and £20, and that depends on whether they are or are not described as a matter of construction by the words "claims competent to them upon my estate through my death."

It seems to me that they are so included. The position of matters under the marriage-contract was that the widow was entitled to ask the trustees to denude in her favour of a portion of the trust estate which included these sums, and that she could only do so on her husband's death. It was therefore a claim competent to her upon his estate on his death.

If that is so, that is an end of the case. The learned counsel for the widow, however, has cited some authorities. Most of these cases had no bearing on this case, as they were cases dealing with double provisions, the whole point in these cases being whether it was to be presumed that the one provision was in substitution of the other. In none of these cases was there anything said in the deed itself, except in *Cowan v. Dick's Trustees* (1 R. 119), but there the clause of discharge, which was held not to cover a provision in favour of a child, was in these terms—"Which provisions conceived in favour of my said wife and children are hereby declared to be in full satisfaction to them respectively of all terce of lands, half or third of moveables, bairns' part of gear, legitim, portion natural, executry, and every other claim or demand which they or any of them, their heirs or successors, could by law ask or demand by or through my decease."

The judgment of the Court followed upon the distinction to be drawn from the enumeration of "legal claims." This is clear from Lord Cowan's judgment, for he says (p. 121)—"When Mr Dick executed his trust-deed he must be supposed to have had his contract of marriage before him, and several of the clauses establish this to have been so. And if he intended the residue bequest to extinguish the contract provision, he would naturally have included the

claim under it in the clause of discharge. But he confines it to legal claims."

If the clause of discharge here had declared the provisions to be in substitution of all "legal claims," that case would have been in point, but it does not do so. The clause of discharge here is not confined to legal claims, for it includes "all claims competent on my death." Therefore I hold the question in the case should be answered in the negative.

LORD ADAM—I am of the same opinion. The question arises on the construction of the trust-settlement of the deceased Dr Proctor, taken in connection with the antenuptial marriage-contract entered into between him and his wife. By his trust-settlement he directed his trustees, after paying certain legacies to his children, to pay his widow during the three years an annuity of £70, which was thereafter to be made a burden on the residuary estate. It is declared that the provisions in favour of his wife and children are made and shall be accepted as in lieu and in full satisfaction of all claims competent to them upon his estate on his death. The claims of the widow under the marriage-contract are (1) for a sum of £200 in lieu of furniture, and (2) for a sum of £20 for mournings. Counsel drew the distinction that the sum of £200 was made payable to the trustees, whereas in the case of the £20 the direction was to pay to the widow herself. These are the claims made. They are both contingent claims—that is, dependent on an uncertain event, viz., whether the husband should predecease the wife or not. It is true that the claim for the £200 is payable to the trustees, but the trustees are bound to pay over the whole to the widow. Therefore there is really no difference between the two claims. The question therefore comes to be whether these claims are claims competent to the widow on her husband's death. I cannot say I have any doubt that they were so. It was only on his death that the claims became competent. Accordingly I think that these claims under the marriage-contract are expressly excluded by the terms of the testament.

LORD M'LAREN—The question in this case is, what is the true meaning of the provision as to satisfaction of prior claims which are contained in Dr Proctor's settlement. By his settlement Dr Proctor gave his wife, in the event of her surviving him, an annuity of £70, but under the declaration that this provision for his wife was made and should be accepted by her "as in lieu and in full satisfaction of all claims competent to her upon his estate through his death." This is a case of an express exclusion of all claims other than those arising from the settlement itself. There are cases where clauses of express exclusion have been the subject of judicial construction. In the case of *Cowan v. Dick's Trustees*, November 1, 1873, 1 R. 119, the clause under construction expressly mentioned legal claims, and therefore it was held that it did not exclude claims depending upon contract. In the present case the words are "all claims,"

and so cover not only legal claims but also claims arising under the marriage-contract.

Further, this is a settlement by the testator of his whole estate, and it is very unlikely that he would wish to allow old claims under a marriage-contract that had never been operative to interfere with the provisions of his general settlement.

LORD KINNEAR concurred.

The Court answered the question of law in the negative.

Counsel for the First Parties—Kemp—A. M. Mackay. Agents—Waugh & M'Lachlan, W.S.

Counsel for the Second Party—Constable—W. Mitchell. Agent—James F. Mackay, W.S.

Tuesday, February 28.

## OUTER HOUSE.

[Bill Chamber.

CRAWFORD LESLIE, PETITIONER.

*Entail—Disentail Proceedings—Provisions to Younger Children—Free Rental—Anterior Provision by Heir-Apparent to be Deducted in Computing Subsequent Provisions to Children by Heir in Possession—Aberdeen Act 1824 (5 Geo. IV, c. 87), sec. 4—Entail Amendment Act 1868 (31 and 32 Vict. c. 84), sec. 6.*

In 1878 the heir-apparent of an entailed estate, with consent of the heiress in possession, granted a bond of annuity and provision in favour of his wife and younger children, and died in 1898.

In 1885 the said heiress in possession granted a bond of provision in favour of her younger children, and died in 1904.

In a petition by the heir of entail in possession for authority to record an instrument of disentail, held that, in computing the free rental available to satisfy the provision granted in 1885, the provisions granted in 1878 viz., (1) the annuity to the widow, (2) interest on the provision to children, fell to be deducted in virtue of the terms of the Aberdeen Act 1824 (5 Geo. IV, c. 87), sec. 4, and the Entail Amendment Act 1868 (31 and 32 Vict. c. 84), sec. 6.

A petition was presented to the Court by Reginald William Henry Crawford Leslie, heir of entail in possession of the entailed lands of Badenscoth and others, in the county of Aberdeen, for authority to record an instrument of disentail.

A remit was made to Francis J. Dewar, W.S., to report upon the facts and procedure. He reported, *inter alia*, that in 1878 Lieutenant-Colonel Crawford, heir-apparent of his mother Mrs Isabella Crawford Leslie, then heiress of entail in possession of the estate now sought to be disentailed, granted with her consent, under the powers of the Aberdeen Act and of

sec. 6 of the Entail Amendment Act 1868, a bond of annuity and provision in favour of his wife and younger children. The amount of the annuity payable to his wife after his death was to be £200 during the life of Mrs Crawford Leslie, and £500 thereafter, and the amount of the provision to younger children was £4000, payable a year after his death. The said Lieutenant-Colonel Crawford died on 5th December 1898 survived by a widow and six children. Mrs Crawford Leslie, his mother, having obtained the authority of the Court, in February 1899, charged the entailed estates with a bond and disposition in security in favour of her son's younger children for £4000 in implement of her son's said provision in their behalf. On 8th March 1899 the widow completed her title to her annuity by infestment. The statutory affidavit necessary to obtaining the leave of the Court to charge the estate with the £4000 provision to younger children had disclosed the existence of a then unsecured provision for £9500 granted under the powers of the Aberdeen Act 1824 (5 Geo. IV, cap. 87), sec. 4, by Mrs Crawford Leslie in 1885 in favour of her younger children Mrs Margaret E. Gordon and Mrs Isabella Gordon, contingently payable on their survivance, and revocable at her option. Mrs Crawford Leslie died on 25th April 1904 and was succeeded in the entailed estates by the petitioner, and survived by her two daughters, who were thus now creditors in the £9500 provision as far as it did not exceed two years' free rental of the estates as at the death of their mother. The two years' free rental of the estates amounted to £7087, 2s. 11d. In these circumstances the question arose whether the petitioner in computing the free rental was entitled to deduct the sum of the heir-apparent's provisions previously made, viz., two years' annuity to the widow at £500, and two years' interest on children's provision (£4000) at 3 per cent.—in all £1240.

The Aberdeen Act 1824 (5 Geo. IV, c. 87), sec. 4, *inter alia*, after conferring power upon heirs in possession of entailed estates to grant bonds of provision to children provided that the amount of such provision should in no case exceed certain proportions of the free yearly rents or free yearly value of the whole said entailed lands and estates "after deducting the public burdens, liferent provisions, including those to wives or husbands authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever affecting or burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid to the heir of entail in possession."

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84), sec. 6, after enabling heirs-apparent of entailed estates to grant with consent of the heir in possession such provisions in like manner and in similar conditions as were competent to heirs in possession under the powers of the Aberdeen Act 1824, *inter alia*, enacts that "such