

Thursday, Feb. 1.

FIRST DIVISION.

MP.—GREAT NORTH OF SCOTLAND RAILWAY
CO. v. GORDON AND OTHERS.

Vesting—Marriage Contract Provision. Terms of a provision in an antenuptial contract of marriage which held (diss. Lord Ardmillan) not to vest until the dissolution of the marriage.

Counsel for Mr Gordon—The Lord Advocate and Mr Moncrieff. Agents—Messrs Scott, Moncrieff, & Dalgety, W.S.

Counsel for Mr Mackenzie—The Solicitor-General and Mr Lee. Agents—Messrs Mackenzies & Fraser, W.S.

This was a competition for a sum of £2000 invested on a railway debenture, which involved a question of vesting, in regard to which the following were the material facts:—The Rev. Ludovic William Grant, minister of Boyndie, was married in September 1830 to Miss Helen Anderson, daughter of Alexander Anderson, agent for the Bank of Scotland at Inverness. By their antenuptial marriage contract, William Grant, the father of the bridegroom, bound himself to lay out and secure, at the term of Whitsunday or Martinmas that should happen first after the death of the longest liver of himself and his wife, the whole just and equal half, after deducting £300 otherwise left in his settlement, of his estate and means of every description which might belong to him at the time of his death, upon good and sufficient bonds, "made payable to the said Helen Anderson and Ludovic William Grant and the survivor of them, in conjunct life-tenure, for the life-tenure use of them and the longest liver of them alternarily, and to the child or children to be procreated of the said marriage equally between them; whom failing, to the nearest heirs or assignees of the said William Grant in fee." There was a corresponding provision made by Alexander Anderson, the father of the bride, whereby he bound himself, his heirs, executors, and successors "to lay out, at the term of Whitsunday or Martinmas that shall happen next after his death, or as soon thereafter as circumstances will permit, the sum of £2000 sterling upon sufficient bond, heritable or moveable, for behoof of, and taken payable to, the said Helen Anderson and Ludovic William Grant, and the survivor of them, in conjunct life-tenure, for the life-tenure use of them and the longest liver of them alternarily, and to the child or children to be procreated of the marriage equally between them; whom failing, to the nearest heirs or assignees of the said Alexander Anderson whomsoever in fee; and as often as the said sum or any part of it shall be uplifted, the same shall be again settled and secured in the terms and for the purposes foresaid." It was also declared, in reference to this sum—"which sum of £2000 shall bear interest from the date of the said Helen Anderson and Ludovic William Grant's leaving the family of the said Alexander Anderson; declaring always . . . that the interest of the said sum of £2000 shall be payable to the said Helen Anderson, exclusive of the *jus mariti* of the said Ludovic William Grant." After the marriage, the spouses went to live with the lady's father, and continued to live with him for fourteen months. During this time no interest was paid on the £2000 provision; but afterwards 4 per cent. was paid thereon during Mr Anderson's life. There was only one child of the marriage, a son named William Grant, who was born on 25th August 1831, and died on 15th January 1832. Mr Anderson died in 1838, and was succeeded by his only son, James Anderson of Gorthleck, as heir and residuary legatee of his father. The estates of James Anderson were sequestrated in November 1841. Mrs Grant died in 1862, and her husband in 1863. In 1850 Mr L. W. Grant, having become embarrassed in his circumstances, executed a trust deed for be-

hoof of his creditors, in which he specially assigned and disposed to his trustees the provision of £2000, under reservation of his wife's interest therein. The sum was now claimed by Mr Gordon as the sole surviving trustee under Mr Grant's trust deed of 1850, and by Mr Mackenzie as trustee on the sequestrated estate of James Anderson.

The Lord Ordinary (Mure) found that the only child of the marriage having predeceased the period at which the obligation undertaken in the marriage contract by his grandfather Alexander Anderson became enforceable, the fee of the £2000 in question never vested in him, but now belonged to the trustee on the sequestrated estate of James Anderson, to whom, as heir of his father, it was destined, failing children of the marriage. His Lordship thought that there was not even a fiduciary fee created in the person of Mr and Mrs Grant in favour of the children of the marriage. He therefore preferred Mr Mackenzie, the trustee on James Anderson's sequestrated estate.

Mr Gordon reclaimed, and the Court to-day—Lord Ardmillan dissenting—held that the period of vesting was the dissolution of the marriage. Lord Mure's interlocutor preferring Mr Mackenzie, was therefore adhered to, although not upon the ground upon which his Lordship had proceeded.

The LORD PRESIDENT, after narrating the circumstances said—It is contended, on the one side, that the fee of this sum vested in the child which was born in 1831, and on his death passed to his father, and on the other, that the child which was born and died did not take, and that the fee of this sum has now passed, in terms of the destination, to old Mr Anderson's heirs or assignees. The question is attended with very considerable difficulty, as many questions of vesting are. There are sometimes elements favourable to vesting at a particular time in a deed, and sometimes elements adverse to it. In some cases, again, the deed contains elements some of which are favourable and others of which are adverse. In the present case I would have had very little difficulty had it not been for the clause which provides that the sum shall bear interest from the date of the spouses leaving the family of Alexander Anderson an event which did take place in November 1831, after the child was born. The general doctrine in such cases as the present is that the dissolution of the marriage is to be taken as the period of vesting, and there are circumstances in this case which tend to support that view. There was not a sum invested, but only an obligation to invest a sum after Mr Anderson's death. There is another circumstance tending in the same direction. In the corresponding obligation undertaken by Mr Grant, sen., there is not the provision as to payment of interest which occurs in the other provision, and I don't think it was the intention of parties that the two provisions should vest at different times. For this reason I cannot give the same weight to the circumstances that interest was to be paid on this provision, which I think it might otherwise deserve. The payment of interest seems to have been a separate arrangement betwixt the parties, whereby Mr Anderson agreed to pay so much for the maintenance of his daughter and her husband. It was only to be paid from the time of their leaving his family, and if they had gone back it would have ceased. I rather look upon this stipulation as an arrangement engrafted upon the provision. Therefore, on the whole, I am of opinion that there could be no vesting here until the dissolution of the marriage.

Lord CURRIEHILL concurred. He thought it important that the person who granted the provision was not one of the spouses, and that there was an obligation to constitute a trust, but not till after the death of the granter of it. He thought that peculiarity distinguished this case from the case of *Beattie's Trustee v. Cooper's Trustees*, 14th February 1862 (24 D. 519). There was to be no trust during the granter's lifetime. The provision was, no doubt, onerous; but then it was not to be paid by the

granter, but out of his succession. In all such marriage contract provisions, where there is no trust constituted during the granter's life, and the provision is payable after his death, it is, his Lordship thought, an implied condition that the child shall survive the granter. The same condition is implied in bonds of provision. In this case, failing children, the fund is otherwise destined. The competition here is the same as if it had arisen between the child's nearest agnate and the granter's own heirs. His Lordship therefore thought that this provision had been granted under an implied condition, which had not been fulfilled; but at all events that there was an implied condition that the child should survive the dissolution of the marriage. His Lordship also referred to the case of Thomson v. Scougalls, 9th July 1834 (12 S. 910), and 31st August 1835 (2 S. and M'L. 305), as supporting this view.

Lord DEAS—I agree that the question here is whether the fee vested at the birth of the child or at the dissolution of the marriage. The Lord Ordinary introduces a finding which puts the decision on the ground that the child did not survive the granter. I am very clear that that is not the question. Suppose Mr Anderson had survived the spouses, the interest would have continued payable to their children if any had existed and survived. I think the obligation undertaken was in its nature and terms absolute from the date of the contract. In one sense it was a *mortis causa* provision. It was not to be separated from the granter's own funds and separately invested till after his death. But it is only in that limited sense that the provision can be called a *mortis causa* one. It is contained in an *inter vivos* contract. There was to be a trust for the protection of the sum, but the sum was fixed and due from the beginning. If old Mr Anderson had become bankrupt, there would have been a ranking on his estate for the liferent, and also contingently for the fee. But although the obligation was absolute, it might be conditional. I think it was conditional on there being children. Mr Anderson did not undertake to pay the sum unless there was a child; but if there was one, the obligation to pay the fee was as absolute as that to pay the interest. Was it meant, therefore, that he was to pay the sum in the event of there being a child, or in the event of one surviving the dissolution of the marriage? I think the latter was meant. I agree that in the ordinary case provisions for children in a marriage contract mean children in life at the dissolution of the marriage. This rule may be easily affected by showing that the meaning of parties was otherwise. Are there, then, circumstances in this case to take it out of the general rule? The main circumstance is that the interest is payable from the first, and though it is payable to the parents, it is apparently given for the benefit of the children also; for, so long as the parents were to live in family with Mr Anderson, they were to get no interest. But that circumstance is weakened by the fact that the *jus mariti* of the husband is excluded from the interest; and I don't think it is sufficient to take the provision here out of the ordinary rule.

Lord ARDMILLAN differed. He thought it of the greatest importance to keep in view the character of this deed. It was not a testamentary deed but an onerous marriage contract. Mr Anderson might have bequeathed the sum, in which case survivorship would have been necessary, in order to taking, but he did not do so; he bound himself by an onerous deed, in which the liferent was given to the parents and the fee to the children. There was no trust, and the principle of law was that in such cases there was a fiduciary fee in the parents for the children from the date of the marriage. After careful consideration of all the authorities, his Lordship was of opinion that in this case the *jus crediti* in the fee which the parents held fiduciarily for the child or children opened at the birth of William Grant in 1831, and excluded the ultimate destination. His Lordship referred to the cases of Maxwell v. Wylie, 25th May 1837 (15 S. 1005); Watson v. Marjoribanks, 17th

February 1837 (15 S. 586); Baillie v. Seton, 16th December 1833 (16 D. 216); Beattie's Trustee, *ut supra*; and Romanes v. Riddell, 13th January 1865 (3 Macp. 348). He thought the construction of this deed now adopted by the Court was in most cases most reasonable and proper; but it involved this, that if William Grant, the child, had lived till 1861, when he would have been thirty years of age, and then died, an assignation of the provision in his own marriage contract would not have been valid. The clause as to interest was opposed to this, and in cases as to the vesting of family provisions, an obligation to pay interest is always of the greatest importance (Kennedy v. Crawford, 20th July 1841, 3 D. 1266).

OUTER HOUSE.

(Before Lord Jarviswoode.)

RICHARDS v. CUTHBERT.

Title to Sue—I O U—Delivery—Assignment—Bankrupt. Held (diss Lord Jarviswoode) that a person had no title to sue for payment of an I O U, bearing a specific address, who alleged (1) that the creditor in the document had handed it over to her in payment of a debt; and (2) that he had assigned it to her after the sequestration of his estates.

Counsel for Pursuer—Mr C. T. Couper and Mr A. C. Lawrie. Agent—Mr R. P. Stevenson, S.S.C.
Counsel for Defender—Mr John Burnet. Agent—Mr William Mason, S.S.C.

In this case the pursuer sues for payment of £100 contained in an I O U granted by the defender to his brother William Cuthbert in the year 1855. She alleges that William handed it over to her in 1857 in payment of money he owed to her, and also that the document had been assigned to her by him by a written assignation in 1863. The defender pleaded that the delivery of the I O U in 1857 gave the pursuer no title to sue for payment of it, and that when the assignation was granted in 1863 William Cuthbert had been divested of all right to the document by the sequestration of his estates, which took place in 1858. The Lord Ordinary has dismissed the action in respect the pursuer has no title to sue. To his interlocutor is appended the following

"*Note*—The Lord Ordinary is not altogether free from a feeling that the pursuer may have been hardly dealt with as respects her claim against the bankrupt, in respect of which it is alleged he delivered the I O U to the pursuer. But it appears to him that as regards the merits of the present action against the defender as the granter of that acknowledgment of debt, the pursuer had no title whatever to sue, as in right of that document, until she obtained an assignation from William Cuthbert, who was named as the creditor therein. It was not in its own character a negotiable instrument, and bore, *ex facie*, a specific address.

"But, further, long before she had obtained any formal title by assignation, Wm. Cuthbert had been sequestrated; and consequently, by force of that process, all right which he had in the I O U had been carried to and vested in the trustee in the sequestration, and he (Wm. Cuthbert) was no longer in a capacity validly to assign the I O U to the pursuer.

"If this be so, the assignation now founded on by the pursuer as a title is inept and ineffectual. It is said, it is true, by the pursuer that the trustee in the sequestration has resigned, and that the bankrupt is discharged; but it is not denied, as the Lord Ordinary understands, that the latter was discharged without a composition, and was therefore not reinvested in his estate; and there is no evidence to show that the process of sequestration is truly at an end, while it is denied that it is so.

"However, therefore, the case might have stood, had the pursuer been able to verify all the statements