

of Guild to resume proceedings under the statute, —to grant warrant for execution of the work,—to ascertain the cost, and to decern against the appellant for the amount.

The other Judges concurred.

The Court recalled the interlocutor appealed against, and remitted to the Dean of Guild to resume proceedings under the statute,—to grant warrant for execution of the fence,—to ascertain the cost, and to decern against the appellant for the amount.

Counsel for Pursuer—Balfour. Agents—Campbell & Smith, S.S.C.

Counsel for Defender—Fraser and Mair. Agent—John Galletly, S.S.C.

Wednesday, February 5.

FIRST DIVISION.

SPECIAL CASE—KINMOND AND OTHERS.

Disposition—Trust—Widow—Annuity, payment of—Capital.

A testator disposed his estate to trustees. The first purpose of the trust was to pay the testator's debts, and the second was to pay an annuity to his widow, and then followed a number of bequests. The income of the trust-estate being found insufficient to meet the widow's annuity—*held* that the trustees were bound to make up the deficiency out of capital.

This case was brought (1) by the trustees of the deceased Alexander Kinmond, merchant in Dundee, and (2) by Mrs Jane Wedderburn Jolly or Kinmond, his widow. The facts of the case were as follows:—Mr Kinmond left a trust-disposition and settlement and relative codicils, dated respectively 30th August 1867, 12th August 1868, and 6th September 1870.

By the second purpose of his said trust-disposition and settlement, Mr Kinmond directed his trustees to pay to his widow annually the sum of £600, payable half-yearly, commencing with the first term of Whitsunday or Martinmas after his death, and to give her the life-estate of his house in Douglas Terrace, Broughty Ferry, which life-estate use is by the fourth purpose continued to his sister-in-law, Miss Marion Blair Jolly, after Mrs Kinmond's death. He further bequeathed to Mrs Kinmond the sum of £600, to be paid within three months after his death. By the third purpose of the said trust-disposition and settlement Mr Kinmond bequeathed certain special legacies, amounting to £1300, payable within three months after his death. These two latter sums of £600 and £1300 respectively were paid by the trustees before this case was raised.

By the fifth purpose of the said trust-disposition and settlement Mr Kinmond bequeathed legacies to certain of his relations, amounting to £18,500, payable only after Mrs Kinmond's death. By the sixth purpose he bequeathed legacies, amounting to £4500, to various charitable and religious institutions, likewise payable only after Mrs Kinmond's death, but declaring that in the event of his estate being found insufficient to meet the

debts and legacies, &c., already provided, the deficiency should fall equally upon these bequests contained in this sixth purpose. And declaring, on the other hand, that in the event of his estate proving more than sufficient to meet the said debts, legacies, &c., the residue should go to increase proportionally the legacies left to his nephews and nieces under the fifth purpose of his trust-disposition and settlement.

By the second codicil, dated 12th August 1868, the annual payment to Mrs Kinmond was increased to £1000.

After Mr Kinmond's death it was found that there was not sufficient annual income in the hands of the trustees to pay Mrs Kinmond the full annuity of £1000, and a question arose whether Mrs Kinmond was entitled to have the sum made up out of the capital funds of the trust.

The following questions were therefore submitted to the Court:—

- "I. Is the second party entitled, under the said trust-disposition and settlement and codicils, to an annuity of £1000, whether the revenue of the trust-estate yields that amount or not?
- II. In the event of the first question being answered in the affirmative, are the first parties bound to make up to the second party any deficiency which there may be of income to meet the annuity out of the capital of the trust-estate?"

At advising—

LORD PRESIDENT—In this case the testator appointed his trustees, after payment of his debts, to give his wife the life-estate of his house, and also to pay to her £600, and he afterwards appointed them to pay her an annuity of £600 a-year, and in a codicil he increased this annuity to £1000 a-year. Now, looking at the wording of the clauses in which these provisions are made, it would appear that the trustees are as much bound to pay the £600 annually as they are to pay the legacy of £600 once and for ever. It does not make any difference that the former payment is the payment of an annuity, for it must be remembered that there is a difference between a life-estate and an annuity. A life-estate is attached to a particular estate or capital fund, whereas an annuity is not, but is a sum of money to the payment of which the annuitant is entitled year by year, without reference to any fund from which it comes, whether it is paid out of interest or capital. Of course it is proper that if the annuity can be paid out of the interest the trustees should not encroach on the capital, but if the interest is insufficient then the capital must be drawn upon.

In this case there are certain small legacies which the trustees are directed to pay within three months of the death of the testator. These legacies have been paid, and it is quite in conformity with the intention of the testator that they should be so, for his direction as to the payment of these legacies shows that they were preferable even to the widow's provisions. But everything else is postponed, and must, if necessary, yield to her claims. The legacies which have been paid being out of the question, the first duty of the trustees is to pay to the widow her annuity.

LORD DEAS—The trustor here conveys his whole estate for certain purposes. The first purpose is

"to pay all my just and lawful debts, sick-bed and funeral charges, and the necessary expenses of managing this trust, and they are hereby specially authorised to pay all such debts, claims, or expenses that may to them seem just and proper, without requiring strict legal constitution of the same by decret or otherwise." Then the second purpose is "to pay to the said Mrs Jane Wedderburn Jolly or Kinmond, my wife, annually the sum of £600." Then by a codicil he increases the annuity by £400, and puts this further sum upon the same footing as the £600, for he provides that the trustees are—"to pay to my wife, Jane Wedderburn Jolly or Kinmond, annually, the sum of £400, and that over and above the annuity of £600 granted to her by my settlement foresaid, making together an annuity of £1000, and such increase shall be paid to her at the same times, in the same manner, and under the same conditions and penalties, as are provided for in respect of the said annuity of £600." It is very important to observe the order in which the testator disposes of his estate, and the fact that the widow's annuity is the second purpose of the deed of itself shows that it is preferable to the purposes which come afterwards, unless, of course, the other parts of the deed are contrary to this supposition.

We must also remember that this is not an annuity to a stranger, but to the testator's widow, to whom he is under obligations both natural and legal, and the presumption always is that an annuity to a widow is preferable to anything else. Therefore I am of opinion that this annuity must be provided for by the trustees before anything else, except the testator's debts. I therefore concur with your Lordship.

LORDS ARDMILLAN and JERVISWOODE concurred.

The Court held that the first parties were bound to make up to the second party any deficiency which there might be of income to meet the annuity out of the capital of the trust-estate.

Counsel for the First Parties—Watson and J. Gray Webster. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for the Second Party—Marshall and Johnston. Agent—Alexander Howe, W.S.

Thursday, February 6.

SECOND DIVISION.

SPECIAL CASE—GRANT AND OTHERS.

Trustee—Marriage Contract—Mutual Disposition and Settlement—Executor.

In an ante-nuptial contract of marriage between A and B, B conveyed all the property then belonging to her to trustees for certain purposes, and, *inter alia*, (1) for the purpose of paying the annual produce of the trust-estate to A in case of her (B's) predeceasing him; and (2), in the case of both A and B dying without children, for the purpose of paying the whole trust funds to B's heirs, executors, and assignees. After their marriage A and B executed a mutual disposition and settlement bearing to be "in supplement of, but without prejudice to, the provisions" of the marriage-contract. In this deed A and B

conveyed to each other their whole estate which they might possess at the time of their death, in liferent allenary, and to the children of the marriage, whom failing, to their heirs whomsoever; and each appointed the other sole executor. B predeceased A without any children of the marriage. Held that the marriage-contract trustees were not bound to denude of the trust funds in favour of A as B's executor, but that they were entitled and bound to retain and administer the said funds.

This Special Case was presented by Mr Alexander Grant, member of the Institute of Civil Engineers, London, and of the Punjab, Upper India, and the trustees under the marriage-contract of the said Mr Grant and Dora Scott Lorrain or Grant, his wife. The facts of the case were as follows:—On 1st August 1868 Mr Grant and Miss Lorrain, afterwards his wife, entered into a contract of marriage, by which Miss Lorrain on her part disposed to trustees therein named her whole means and estate, heritable and moveable, then belonging to her, or to which she might acquire right during the subsistence of the marriage, either under the trust-disposition and settlement of her grandfather and grandmother, or the contract of marriage between her father and mother, or the last will and testament of her father, with the exception of the money coming to her from a certain estate of her late mother. The purposes of the trust were, *inter alia*, (1) to pay the annual produce of the trust-estate to the said Miss Lorrain, excluding the *jus mariti* of her husband; (2) in event of Miss Lorrain's death, to pay the annual produce of the estate to her husband; and (3) in event of both the spouses dying without children, to pay the whole trust-funds to the heirs, executors, and assignees of the said Miss Lorrain.

The marriage took place on the 4th August 1868, and Mr and Mrs Grant shortly afterwards proceeded to India. While at Alexandria, *en route* for India, Mr and Mrs Grant executed a mutual disposition and settlement on the 26th September 1868. This disposition and settlement proceeded upon the narrative of the ante-nuptial contract of marriage, bearing to be in supplement thereof and without prejudice thereto; and thereafter each of the spouses disposed to the other in case of survivance in liferent allenary, and to the child or children of the marriage, and to the issue of such as might predecease, equally among them *per stirpes*, whom failing, to his (or her) own heirs, executors, or assignees whomsoever in fee, "all and sundry my heritable and moveable estate, of whatever nature or denomination the same may be, which shall belong and be added to me at the time of my decease, with the whole writs and evidents, vouchers, and securities thereof;" and each nominated the other sole executor in case of survivance.

Mr Grant died in India on 27th January 1871, without leaving issue. In virtue of the conveyance by Mr Grant in the said marriage-contract, the trustees (the parties of the second part in this case) became possessed of funds to the amount of £2300. Mr Grant, the party of the first part, called upon the parties of the second part to make over to him, as executor-nominate of his said wife under the said mutual disposition and settlement, the whole of the said funds, and any other funds which might come to them through or as in right of Mrs Grant.