

and can be apprehended and brought to Court for identification, and if this case is to depend upon the identification of the woman who instructed the entry to be made in the register that the child was illegitimate, I must delay further procedure in it till that woman is brought here and confronted with the registrar.

Other evidence which did not require the defender's presence for identification being led, the Lord Ordinary gave decree of divorce.

Counsel for Pursuer—Steele. Agents—Smith & Mason, S. S. C.

Wednesday, May 27.

SECOND DIVISION.

BONHOTE v. MITCHELL'S TRUSTEES.

Provisions to Children—Marriage-Contract—Power of Appointment—Election.

By antenuptial marriage-contract a husband and the wife's father bound themselves respectively to pay to the marriage-contract trustees a sum of money to be held for behoof of the issue of the marriage, to be paid to such issue after the death of the survivor in such shares as might be appointed by him, or failing him by her. The wife predeceased without having made any appointment. The husband executed a trust settlement by which he directed his whole estate to be realised and divided into three equal portions, to be paid one share to his son, and the other two to the respective marriage-contract trustees of his two daughters. He also directed that in virtue of the power of appointment in his marriage-contract, the means derived from his wife should be divided into three equal parts, to be paid to the children in the same proportions, and under the same terms and conditions as the disposal of the residue of his own estate. A daughter claimed her share of her mother's estate as payable on her father's death to herself, and not to her marriage-contract trustees. *Held* that the father's direction that the mother's means should be paid to the daughters' marriage-contract trustees was a condition imposed upon her taking her share of her father's estate, and that she must elect to take the latter under that condition or renounce it on having her mother's money paid to herself instead of her marriage-contract trustees.

By antenuptial contract of marriage dated in 1841, between Joseph Mitchell, civil engineer, Inverness, and Miss Christian Dunsmore, Joseph Mitchell bound himself to make payment to his intended wife of *inter alia* a free yearly annuity of £150; and with the view of securing the said annuity he further bound himself to make payment to the trustees nominated and appointed in the marriage-contract, of the sum of £3000 at the first term of Whitsunday or Martinmas which should happen after his death; the trustees being directed to pay over the annual interest of the same to Mrs Mitchell if then alive, in satisfaction *pro tanto* of the annuity before mentioned;

and being further directed to hold the fee or capital of the said sum of £3000 for behoof of the issue of the marriage, and pay it over to them or their descendants at the first term of Whitsunday or Martinmas that should happen after the death of the survivor of the spouses, in such shares as might be appointed by Mr Mitchell, whom failing by Mrs Mitchell, or failing any appointment, then equally among the issue or their descendants.

It was likewise stipulated that the provisions therein should be in full satisfaction to the issue of the marriage of all claim for bairns' part of gear, legitim, portion natural, and executry, and in short, of everything they could demand through the decease of their father or mother.

For which causes, and for the other part, James Dunsmore, the father of Mrs Mitchell, bound himself, and his heirs and executors, to make payment of the sum of £2000 to the marriage-contract trustees, and further, so soon after the death of the survivor of himself and of his wife as the same could be realised, to make payment to the marriage-contract trustees of such additional share of his funds and property as with the said sum of £2000 should have the effect of placing Mrs Mitchell on an equal footing with his other daughters, and afford to each of them £1000 sterling more from his succession than each of his sons, but always upon the trusts set forth in the said marriage-contract. These provisions, it was declared, were accepted by Mrs Mitchell in full of everything she could claim through the demise of her father or mother, with certain exceptions specified in the deed. Mrs Mitchell assigned to the said trustees all estate, heritable and moveable, to which she might succeed during the subsistence of her marriage with Mr Mitchell.

The contract further contained the special declaration that the whole sums of money and property to be received by the trustees under the obligations therein undertaken by James Dunsmore or in respect of the conveyance by Mrs Mitchell, were to be held, *inter alia*, for the following purposes:—*First*, That the trustees might pay the free annual proceeds of the said whole property to Mr Mitchell during his life, and after his death to Mrs Mitchell during her life, independently of the annuity of £150 sterling. And *Second*, That the trustees should hold the capital of the whole property for behoof of the children of the marriage alive at the death of the survivor of Mr and Mrs Mitchell, or the lawful issue of such children, or of any predeceasing child or children, to be paid in the case of sons at majority, and of daughters at majority or marriage, but not before the death of the survivor of the spouses. The payments to children were to be made in such proportions as Mr Mitchell, whom failing Mrs Mitchell, should appoint by any writing under his or her hand, at any time during his or her life; and failing such appointment, the trustees were directed to divide the said trust property equally among the children of the marriage, the lawful issue of a predeceasing child being entitled to his or her parent's share.

Mrs Mitchell survived her father, but predeceased her husband intestate, and without having exercised any power of appointment competent to her under the said marriage-

contract. Mr Mitchell died on 26th November 1883, leaving a son, James Robert Mitford Mitchell, who was then married, and two daughters also married, Christina Grace Mitchell or Bonhote, and Susan Mitchell or Mitford. These children were the whole issue born of the marriage, and to these children Mr Mitchell left property of the value of £100,000, exclusive of the money which had belonged to his wife, and which was held by the trustees under the marriage-contract.

Mr Mitchell left a trust-settlement, dated 18th December 1881, by which he conveyed his whole means and estate to trustees for certain purposes. By the fifth purpose he directed his trustees to realise his estate, to convert the same into money, and thereupon to divide it into three equal parts, to pay to his son James Robert Mitford Mitchell one-third of said parts, including as a portion of said third a sum of £10,000 provided to be paid by the truster to his (the son's) marriage-contract trustees. He likewise directed his trustees to pay a third part to the marriage contract trustees of his daughter Christian Grace and Captain John Bonhote, including therein a sum of £10,000, similarly provided to them in their marriage-contract. The trust-deed contained a further special direction by Mr Mitchell to his trustees to pay the income of her third to Mrs Bonhote, exclusive of the *jus mariti* and right of administration of her husband, and to pay the principal or capital to their children in such portions and on such conditions as she, whom failing her husband, might by a writing under his or her hand direct, and failing such direction, equally among them, share and share alike. The remaining one-third was to be paid to the marriage-contract trustees of his other daughter Mrs Mitford.

The sixth purpose of the trust-deed contained the following clause:—“And in virtue of the powers given to me by marriage-contract to apportion among the children of the marriage between me and my said late wife, the means and estate derived through my said wife, and therein conveyed to trustees, I do declare and direct that the same shall be divided into three equal parts, which shall be conveyed or paid to my said children in the same proportions and under the same terms and declarations as are mentioned in article fifth hereof with reference to the residue or remainder of my own estate.”

In these circumstances the parties of the first part, Mr and Mrs Bonhote, maintained that they were entitled to receive payment from the parties of the second part of the sum of £1000, being the share of the £3000 now falling to Mrs Bonhote, as one of the three children of the marriage, between Joseph Mitchell and Miss Christian Dunsmure, as provided in Mr and Mrs Mitchell's marriage-contract. For they contended that under its provisions Joseph Mitchell was entitled to apportion the payment of the £3000 amongst the children of the marriage, but that he was not entitled to direct that payment of the apportioned shares should be made to trustees or otherwise than to the several children of the marriage direct.

The parties of the first part further maintained that the clause in Joseph Mitchell's trust-deed dealing with the moneys coming through his wife, did not amount to a direction that these moneys

shall be conveyed to the trustees under the marriage-contract between the parties of the first part; and, *separatim*, that such a direction was *ultra vires* of Joseph Mitchell, and that they were entitled to payment, without burden or qualification, of one-third of the trust-moneys, either in virtue of the apportionment contained in the trust-deed and settlement, or failing the apportionment being effectual, then in right of Mrs Bonhote, as one of the three children of the marriage

The marriage-contract trustees maintained the negative of the proposition.

The questions of law were—“(1) Whether the parties of the first part are entitled to receive instant payment from the parties of the second part of £1000, being the one-third part falling to the said Christian Grace Mitchell or Bonhote of the sum of £3000, undertaken by the said Joseph Mitchell in his said contract of marriage to be paid by him to the children of his marriage at the first term of Whitsunday or Martinmas that should happen after the death of the survivor of himself and his wife? (2) Whether the parties of the first part are entitled to receive instant payment from the parties of the third part of the one-third falling to the said Christian Grace Mitchell or Bonhote of the moneys derived through the said Christian Dunsmure or Mitchell under the said contract of marriage? (3) In the event of the first question being answered in the affirmative, whether Mrs Bonhote is put to her election between the said provisions and the provisions in her favour under her father's settlement? And (4) In the event of the second question being answered in the affirmative, whether Mrs Bonhote is put to her election between the said provisions and the provisions in her father's settlement?”

Authorities cited at the debate—*M'Donald v. M'Donald*, November 1, 1876, 4 R. 45 (*per* Lord Ordinary, p. 52); *Douglas v. Douglas* June 27, 1862, 24 D. 1191; *Carver v. Bowles*, 2 Russel & Mylne, 304. See also *Lennox's Trs.*, October 16, 1880, 8 R. 14.

At advising—

LORD CRAIGHILL—This is a Special Case to which one of the daughters of the late Mr Joseph Mitchell, C.E., with her husband, his testamentary trustees, and the trustees of his marriage-contract, are parties of the first, second, and third parts respectively.

They ask the opinion and judgment of this Court on the four queries appended to the Case. By his marriage-contract with Miss Dunsmure the late Mr Joseph Mitchell *inter alia* bound himself to pay to the marriage-contract trustees £3000 at the first term of Whitsunday or Martinmas happening after his death, the fee whereof was to be held for the behoof of the issue of their marriage, to whom payment was to be made after the death of the survivor of Mr and Mrs Mitchell, in such shares as should be appointed by him, or failing his making an appointment, by Mrs Mitchell, or failing any appointment by either, then equally among such issue or their descendants. This provision, it was stipulated, should be in full satisfaction of all claims for bairns' part of gear, legitim, portion natural, and executry, and, in short, of everything that the children could claim

through the decease of their father or mother.

By the same contract Mr Dunsmore, the father of Mrs Mitchell, bound himself to pay £2000 to the trustees of the marriage, and further, so soon after the death of the survivor of himself and his wife as the same could be realised, to pay to the same trustees such additional share of his estate as with the said sum of £2000 should have the effect of placing Mrs Mitchell on an equal footing with his other daughters, and afford to each of them £1000 stg. more from his succession than each of his sons, but always on the trusts set forth in the marriage-contract. These provisions it was declared were to be accepted by Mrs Mitchell in full of everything she could claim through the decease of her father or mother, with certain exceptions specified in the contract.

Three children, of whom Mrs Bonhote is one, were born of the marriage, and all three survived their parents. Mrs Mitchell predeceased her husband without having exercised any power of appointment competent to her under her marriage-contract. Mr Mitchell afterwards died leaving a fortune of over £100,000, exclusive of the money which had come from Mr Dunsmore, and which is held by the marriage-contract trustees for the purposes specified in that deed.

The succession to Mr Mitchell's estate is regulated by a trust-deed whereby he directed the trustees to whom the estate was conveyed for the purposes of his settlement, to divide his property, when realised, equally among his three children, the sums which had been paid to each upon marriage being to be considered as a payment on account of the third of estate to which they were severally to be entitled. The income of the shares of each of the daughters was to be paid to them during their lives, exclusive of the *jus mariti* and right of administration of their husbands, and the capital was afterwards to be paid at the times appointed to their children, in such portions and on such conditions as might be directed by the parents of the two families. This is the import of the 5th article of Mr Mitchell's settlement, but by the 6th two additional provisions were introduced. By the first of these Mr Mitchell, as the deed bears, in virtue of the powers given to him by his marriage-contract to apportion among the children of his marriage the means and estate derived through his said wife, and therein conveyed to trustees, directed that the same "shall be divided into three parts, which shall be paid or conveyed to my said children, in the same proportions and under the same terms and declaration as are mentioned in article 5th hereof, with reference to the residue or remainder of my own estate." By the second he, *inter alia*, directed—"The sums hereby provided to my children are in full, not only of all claims of legitim or executry competent to them by or through my decease, and in any manner of way, but also in full of all claims competent to them under my said contract of marriage."

Differences have arisen among those who are parties to this Special Case as to the meaning and effect of Mr Mitchell's testamentary deed; and the Court is now asked, in answer to the several queries which have been presented for our opinion and judgment, to put on these portions of it as to which the parties are in controversy

the true interpretation. The queries submitted to the Court involve only one general question—May Mr Mitchell's daughters insist on payment of the provisions conferred on them in their father's and mother's marriage-contract, at the terms and in the form thereby directed, without forfeiting their interest under their father's trust-deed? Mr Mitchell has not sought to diminish the sums his daughters and their children are to get, for they are to have not only their shares of his own estate, of which he could dispose, but they are also to get the sums for which he and Mr Dunsmore became bound by their father and mother's marriage-contract. The difference in the result is simply this, the marriage-contract money as settled by that deed was to be paid to the children themselves, while according to the trust-deed the shares of the daughters are to be paid as directed by the fifth purpose of his settlement—that is to say, the fee to the daughter's children and only the income to the daughters themselves, the *jus mariti* of their husbands being moreover excluded. This is not a very large thing about which to differ, but it has been thought large enough for a difference on which the opinion and judgment of the Court should be taken.

Apart from the question as to election there can be no doubt that the parties of the first part are entitled to receive instant payment from the parties of the second part of £1000, being the one-third part falling to Mrs Bonhote of the sum of £3000, undertaken by Mr Mitchell in his contract of marriage to be paid by him to the children of his marriage at the first term of Whitsunday or Martinmas that should happen after the death of the survivor of himself and his wife. The marriage-contract rights were absolute, and without the consent of the beneficiaries could neither be revoked, diminished, nor qualified. Mr Mitchell, however, though of his own power he could do none of those things, could dispose of his own property as he pleased, and any condition which he imposed directly or indirectly would be binding upon those by whom the provisions he left were to be received. If, therefore, it is his will according to the true reading of his trust-deed that the marriage-contract provisions were to be satisfied in the way pointed out in the fifth article of his settlement it will receive effect, and this I think was Mr Mitchell's intention, seeing the sixth article of his trust-deed declares and directs that the means and estate derived through his wife "shall be divided into three equal parts, which shall be conveyed and paid to my said children in the same proportions and under the same terms and declarations as are mentioned in article fifth hereof with reference to the residue or remainder of my own estate," and that further he declares that "the sums hereby provided to my children are in full satisfaction *inter alia* of all claims competent to them under my said contract of marriage." These directions and declarations, as I think, can be read only in one way. His will was—the daughters are to take their marriage-contract provisions, not as they were given by the marriage-contract, but as he in his trust-deed directed them to be paid. If the daughters agree, there will be homologation thereof; if they refuse, there will be repudiation, or, in other words, a forfeiture of the provisions left to

them by their father's settlement. The conclusion consequently to which I have come is, that the first and second queries ought to be answered in the affirmative conditionally, and our answer to the third and fourth should be a simple affirmative.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

“The Lords having considered the Special Case and heard counsel for the parties thereon, Answer in the affirmative each of four questions therein put: Find and declare accordingly: Find that the parties to the Special Case are entitled to payment out of the estate of the testator Joseph Mitchell of the expenses incurred by them in relation to said case: Remit to the Auditor to tax the same and to report; and decern.”

Counsel for Parties of the First Part—Mackintosh—Lyell. Agents—Horne & Lyell, W.S.

Counsel for Parties of the Second Part—Brand—Guthrie. Agents—J. & A. Peddie & Ivory, W.S.

Wednesday, May 27.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BLACK V. CURROR & COWPER.

Agent and Client—Instructions to Invest Money on Heritable Security—Act 1696, c. 5.

A lady entrusted to her law-agent a sum of £800 which had previously been invested by him on heritable security in her name, to be reinvested on heritable security. The agent informed her that he had lent the sum again to the same borrower on the security of certain house property, adding that the whole sum to be lent to him was £4000, of which her sum was a portion. The agent took a bond from the borrower for £4000 acknowledging the money to have been lent by him (the agent) out of funds in his hands belonging to other parties, but the money was not then paid to him, but advanced in different sums at various dates after the date of the bond. On the back of the bond the agent, some time after it was granted, wrote a docquet to the effect that the bond was held by him in trust for certain parties in certain proportions, and among others the client in question to the extent of £800. The borrower became insolvent, and the property turned out insufficient to meet the loans. In an action by the client against her agent for payment of the £800, held that the agent had failed duly to invest the client's money on heritable security according to her instructions, and was therefore bound to account to her therefor, and (*per* Lord Fraser, Ordinary) that the loan being granted for money not yet paid was invalid under the Act 1695, c. 5.

This was an action for payment of a sum of £800

raised by Mrs Jane Christie or Black, a widow, against Curror & Cowper, S.S.C. The following narrative of the facts of the case is taken from the opinion appended to the interlocutor of the Lord Ordinary:—“The pursuer of this action obtained in the year 1873 an assignation to a bond for £2000 to the extent of £800 thereof, which bond had been granted to Milne's trustees—the cedents—by Thomas Hope over certain property in Castle Street, Edinburgh. The defenders acted as agents for the pursuer in obtaining this assignation.

“The bond for £2000, and consequently the pursuer's right to £800 thereof, were paid off in 1877. The sum of £800 was paid on behalf of the pursuer to the defenders as her agents. They by letter dated 28th May 1877 intimated this fact to her in the following terms:—‘The £800 invested in your behalf was paid up at this term, and we now send you an assignation of it, in order that you may sign it before witnesses in terms of the printed note of instructions. We have reinvested the sum for you at five per cent over property at Moncrieff Terrace.’ No further intimation of the mode in which this investment was made was given to the pursuer.

“The new investment was made over property in Moncrieff Terrace, Edinburgh, belonging to Alexander Finnie, builder, who granted a bond and disposition in security, dated 25th June 1877, whereby he acknowledged to have borrowed the sum of £1600, ‘and that from Mrs Jane Christie or Black, residing at Seton Hill, Longniddry, to the extent of £800; and from Mrs Mary Simpson or Welsh, wife of Matthew Welsh, lately merchant in Melbourne, Australia, now residing in Edinburgh, to the extent of the remaining sum of £800.’ The property in Moncrieff Terrace was disposed in security of this loan—in favour of the two lenders, the pursuer and Mrs Welsh.

“This loan was paid up in the year 1878, the intention to do which was communicated by the defenders to the pursuer by a letter dated 3rd June 1878, wherein they say as follows:—‘The £800 which you had lent over property in Moncrieff Terrace requires to be paid up, the greater part of the houses having been sold. We have lent the money again to the same person, Mr Finnie, over seven houses at Moncrieff Terrace, and over a large tenement at Morningside. The large tenement is to cost fully £4000, while the houses still remaining in Moncrieff Terrace will be worth from £1200 to £1500. The whole sum to be lent to Mr Finnie is £4000, of which your sum is a portion. Will you be so good as sign the enclosed discharge and return it to us at your early convenience, with information for the testing clause.’ The discharge was duly signed by the pursuer, and thus this second security was brought to an end. The £800 thus came once more into the hands of the defenders, and they proceeded to lend the money of new over property belonging to Finnie at Morningside and Moncrieff Terrace, Edinburgh.

“This new investment was made in a way somewhat peculiar. On the 27th February 1878, four months before the £800 under Finnie's bond above-mentioned was paid up (which was at Whitsunday 1878), Finnie granted a bond in favour of the defenders, whereby he acknow-