Tuesday, July 19.

FIRST DIVISION.

LESLIE'S TRUSTEES *v.* LESLIE AND OTHERS.

Husband and Wife—Antenuptial Marriage Contract between Husband and Second Wife—Disposition by Husband to Third Wife of Part of his Estate as a Marriage Provision—Right of Third Wife to Jus relictæ in Addition to Marriage Provision.

By antenuptial contract of marriage the spouses conveyed to trustees the whole estate belonging to each of them at the date of his or her death for the purpose of providing for the children of the marriage and the child of the husband's former marriage. They reserved their rights of control and disposal *inter vivos* during their lives. The wife died leaving two children, and the husband married a third time. There was no marriage contract on the occasion of the third marriage, but during its subsistence the husband conveyed to the wife by disposition, which bore to be "for love, favour, and affection," and to be a provision, certain heritable property. The third wife survived her husband. *Held* that she was entitled to both the heritable property conveyed to her and *jus relictæ*.

Marriage Contract — Antenuptial Marriage Contract—Provision to Child of Former Marriage—Revocation.

An antenuptial marriage contract by which the spouses assigned to trustees the whole estate belonging to each of them at the time of his or her death, provided, *inter alia*, for payment of the income of the predeceasing spouse's estate to the survivor, and on the death of the latter for division of the estates of both equally *per capita* among the surviving issue of the marriage and a son of the husband by a former marriage. Each of the spouses reserved the right to control and dispose of his or her estate *inter vivos*, and the husband renounced his right of administration. During the marriage the spouses, by postnuptial contract of marriage, cancelled the provisions of the antenuptial marriage contract in favour of children, and provided, *inter alia*, that on the death of the surviving spouse the son of the former marriage should share equally with the children of the marriage in the husband's estate, but should receive no share in the estate which belonged to the wife. The children of the marriage and the son by the husband's former marriage survived both spouses. *Held* that the provision in the antenuptial marriage contract in favour of the son by the husband's former marriage was irrevocable.

Mackie v. *Gloag's Trustees* (1884, 11 R. (H.L.) 10, 21 S.L.R. 465) *followed.*

Magnus Harper Sinclair, seedsman, Kepplestone, and others, trustees acting under the antenuptial contract of marriage and the postnuptial contract of marriage entered into between the late Captain John Leslie, retired marine superintendent, Bieldside, Aberdeen, and Margaret Hector, his second wife, *first parties*, Mrs Jane Hector Taylor or Leslie, widow of Captain Leslie, *second party*, John Cadenhead Leslie, formerly named John Leslie junior, *third party*, and Norman Hector Leslie and Andrew Edward Hector Leslie, *fourth parties*, brought a Special Case for the opinion and judgment of the Court upon questions as to the effect of the said contracts of marriage and a disposition by Captain Leslie in favour of the second party.

The late Captain Leslie died on 26th October 1918. He was married three times. On 1st April 1869 he married Margaret Coutts, who died on 6th January 1898, and of this marriage there was one child, John Leslie junior, the third party. On 1st February 1899 Captain Leslie married Margaret Hector, who died on 9th May 1915, and of this marriage there were two children, the said Norman Hector Leslie and Andrew Edward Hector Leslie. On 30th June 1917 Captain Leslie married the said Mrs Jane Hector Taylor or Leslie, the second party. Of this marriage there was no issue.

On the occasion of his second marriage an antenuptial marriage contract, dated 31st January 1899, was entered into between Captain Leslie and the said Margaret Hector by which each assigned and disponed to trustees the whole estate, heritable and moveable, which might belong to him or her at his or her death for the following purposes, *inter alia*—"(*First*) On the death of the predeceaser of the spouses the trustees shall make over and deliver to the surviving spouse absolutely whatever household furniture, books, pictures, and other articles of personal or domestic use may have belonged to the predeceasing spouse, and the remainder of his or her estate, heritable and moveable, shall be invested in the names of the trustees, and the free annual income arising from the investment thereof shall be paid to the survivor of the spouses during all the days of his or her life . . . ; (*second*) on the death of the surviving spouse, leaving issue of this marriage, his or her estate, heritable and moveable, shall be realised by the trustees, along with the estate of the predeceasing spouse then invested in their names, and the free proceeds of both estates shall be divided equally *per capita* among the surviving issue of this marriage and John Leslie jun., the son of the said John Leslie by his former marriage. . . . Each of the parties hereto reserves the rights of control and disposal, *inter vivos*, of his and her respective estates during their respective lives, and the said John Leslie renounces his right of administration in the estate of the said Margaret Hector. . . ."

On 25th February 1909 Captain Leslie and his second wife entered into a postnuptial contract of marriage which, after narrating their antenuptial contract, proceeded as follows: — "And whereas we have reconsidered the terms of the said antenuptial

contract of marriage in their application to the circumstances of John Leslie jun., son of me the said John Leslie by my former marriage, surviving and taking a share of the estate left by me the said Margaret Hector or Leslie, and we are now of opinion that such an arrangement would be unfair and inequitable to the children of the present marriage or other next-of-kin of me the said Margaret Hector or Leslie, and we have accordingly resolved to alter this provision and to make certain other alterations . . . : Therefore we hereby make the following alterations upon the said antenuptial contract of marriage, namely :—(*First*) We hereby cancel and annul the 'second' and 'third' articles thereof, and instead of these we hereby provide and declare that the following two articles shall have effect, namely :—(*One*) On the death of the surviving spouse leaving issue of the marriage between us, his or her estate, heritable and moveable, shall be realised by the trustees along with the estate of the predeceasing spouse, and the free proceeds of the estate left by me the said John Leslie shall be divided equally *per capita* among the said John Leslie jun. and the surviving issue of the present marriage, and the estate left by me the said Margaret Hector or Leslie shall be divided equally among the issue of the present marriage alone. . . ."

No marriage contract was entered into between Captain Leslie and his third wife Mrs Jane Hector Taylor or Leslie, but on 7th December 1917 he granted in her favour, and in favour of her heirs and assignees, a disposition of a dwelling-house known as "The Briars" at Bieldside, Aberdeen, in which the spouses resided. The disposition bore to be granted "for the love, favour, and affection which I bear to my wife Mrs Jane Hector Taylor or Leslie . . . and in order to make a suitable provision for her. . . ." Entry was declared to be as at the date of the disposition. The disposition was recorded in the Register of Sasines on 18th March 1918.

The Case set forth—"On the death of Captain Leslie the trustees acting under the said antenuptial and postnuptial contracts of marriage (the trustees acting under the two deeds being the same parties) made up their title to his estate. The said estate, excluding the subjects contained in the said disposition, consists of moveable property valued at £1869, 4s. or thereby, and heritable estate valued at approximately £1900. The value of the heritable and moveable subjects disponed to the said Mrs Jane Hector Taylor or Leslie in the said disposition is approximately £1100. The value of the second wife's estate is about £6000. A claim for her legal rights of *jus relictæ* and terce has been intimated to the trustees on behalf of the said Mrs Jane Hector Taylor or Leslie, whose private income amounts to only £100 per annum.

"In these circumstances questions have arisen as to (1) whether Mrs Leslie is or is not put to her election as between her said legal rights and her rights under the said disposition in her favour; and (2) whether Captain Leslie and the said Mrs Margaret Hector or Leslie were entitled to revoke and cancel the provision in favour of the said John Leslie junior contained in the said antenuptial contract of marriage dated 31st January 1899, and whether the said provision was validly and effectually revoked by the said postnuptial contract dated 25th February 1909. Accordingly parties have found it necessary to present this Special Case for the determination of these questions. . . .

"The first parties do not find it necessary to submit any contention.

"The second party maintains that the conveyance in her favour of 7th December 1917 was an absolute *inter vivos* gift which has now become irrevocable, and that in the absence of any indication of a contrary intention on the part of Captain Leslie, either in the said disposition or elsewhere, she is under no obligation to elect as between her legal rights and her rights under the said disposition, but is entitled to retain the subjects conveyed to her and to claim her legal rights in addition thereto.

"The third and fourth parties maintain that the second party is not entitled to both the subjects provided to her in the disposition by her husband in her favour and her legal rights of terce and *jus relictæ*, but is bound to make her election between the said provision to her and her legal rights.

"The third party further maintains that the provision in his favour contained in the said antenuptial contract of marriage between Captain Leslie and Mrs Margaret Hector or Leslie was not revocable and was not validly revoked by the said postnuptial contract of marriage.

"The fourth parties further maintain that the provision in favour of the third party contained in the said antenuptial contract of marriage was revocable at the will of Captain Leslie and the said Mrs Margaret Hector or Leslie, and was validly revoked by the said postnuptial contract.

The *questions of law* were—"(1) Is the second party entitled to both the subjects provided to her in the said disposition in her favour and also to her legal rights of terce and *jus relictæ*? *or* (2) Is she bound to elect between the subjects provided to her in the said disposition and her said legal rights? (3) Were Captain Leslie and the said Mrs Margaret Hector or Leslie entitled to revoke the provision in favour of the third party contained in the said antenuptial contract of marriage, and was the same validly revoked by the said postnuptial contract? *or* (4) Was the said provision irrevocable, and is the third party entitled to payment thereof?"

Argued for the fourth parties — (1) The first question should be answered in the negative. The antenuptial marriage contract and the disposition, which was a marriage provision, were to be read together as a settlement of the husband's whole estate at death—*Stewart* v. *Pirie and Others*, 1832, 11 S. 139; *Farmer's Trustees* v. *Taylor*, 1917 S.C. 366, 54 S.L.R. 323. The second party was in the same position as if she had acquired right to the property under a

marriage contract, and was bound to elect between it and her legal rights—M'Laren, Wills and Succession, vol. i, p. 145; *Keith's Trustees* v. *Keith and Others*, 1857, 19 D. 1040, *per* Lord Ardmillan at p. 1048. There was no reason why a conveyance taking effect during life should not be treated as a marriage provision—*Galloway* v. *Craig's Trustees*, 1861, 4 Macq. 267. The cases of *Haldane* v. *Hutchison*, 1885, 13 R. 179, 23 S.L.R. 119, and *Robertson's Trustee* v. *Robertson*, 1901, 3 F. 359, 38 S.L.R. 279, did not prevent its being so treated. The second party's claim for terce was excluded by statute—Act 1681, cap. 10. M'Laren, Wills and Succession, vol. i, p. 148; Ersk. Inst. iii, 9, 16. (2) The third question should be answered in the affirmative. The third party was merely a beneficiary and had no contractual right. The case of *Mackie* v. *Gloag's Trustees*, 1883, 10 R. 746, 20 S.L.R. 486, *rev.* 1884, 11 R. (H.L.) 10, 21 S.L.R. 465, was distinguishable. The dicta in that case to the effect that a stranger might be put on the same footing as the children of the marriage by antenuptial marriage contract were not applicable. They depended on the intention to make the stranger part of the consideration, and there was nothing here from which such an intention could be inferred. On the contrary, the retention by the wife of the control of her own property supported the view that there was no such intention. If there had been no children of the second marriage there could have been no *jus quæsitum* in favour of the third party—*Lang* v. *Brown*, 1867, 5 Macph. 789.

Argued for the second party—The cases relied on by the fourth parties did not apply. They referred to testamentary deeds, whereas here there was an absolute and unconditional disposition which transferred the property to the third wife during the lives of the spouses. Such a deed could not be treated as part of a general settlement. The second party was therefore not put to her election between the disposition and her legal rights—*Crum Ewing's Trustees* v. *Bayly's Trustees*, 1910 S.C. 484, *per* Lord President at p. 489, 47 S.L.R. 423. The mere fact that the disposition was called a provision did not make it testamentary.

Argued for the third party—It was the clear intention of the antenuptial marriage contract to include the child of the first marriage among the family of the second, and to give all the children equal rights. The deed therefore being irrevocable as regards the children of the second marriage, was irrevocable as regards the third party—*Mackie* v. *Gloag's Trustees*, *supra*, *per* Lord Rutherfurd Clark at 10 R. p. 758, *per* Lord Selborne, L.C., at 11 R. p. 11, and Lord Watson at pp. 15 and 16. It was a question of intention unaffected by the period of possession or infeftment. *Mackie* v. *Gloag's Trustees* was in line with the other cases—*De Mestre* v. *West*, [1891] A.C. 264. In *Montgomerie's Trustees* v. *Alexander's Trustees*, 1911 S.C. 856, 48 S.L.R. 761, there was no intention to make the children one class, and in *Barclay's Trustees* v. *Watson*, 1903, 5 F. 926, 50 S.L.R. 693, the parties claiming were substitutes.

LORD PRESIDENT—The first question is whether the second party is entitled both to the subjects provided to her in the disposition of 7th December 1917 and also to her *jus relictæ*? It is conceded that the Act of 1681 negatives her right to terce.

The second party is the third wife and widow of Captain Leslie. Captain Leslie by his first wife had one child; by his second, two; he had no family by the third wife. When he married his second wife he made an antenuptial contract of marriage with her by which he settled in favour of her and any children he might have by her and the child he had already by his first marriage, his whole estate as that estate might be at the date of his death. He made no antenuptial or postnuptial contract of marriage with his third wife, but he did, during the subsistence of the marriage, convey to her out and out and *inter vivos* the house in which he and she lived. The disposition bears to be "for love, favour, and affection," and it also bears to be as a provision for her, but there is nothing in it, and of course nothing extrinsic of it, to make it in any shape or form testamentary or to postpone its operation until his death.

The solution of the question is accordingly simple. His antenuptial marriage-contract with the second wife receives full effect according to its terms. The only thing is that during his life he has disponed (as he was perfectly entitled to) of a part of the estate of which he remained undivested proprietor during his life. The effect of the disposition granted in 1917 in favour of his third wife was no doubt intended by him to be in the nature of a security for her viduity, but it was not a provision for her after his own death. It cannot be combined—as the argument for the fourth parties sought to combine it—with the antenuptial contract made on the second marriage so as to form one deed for the total settlement of his estate upon his death with the result of putting his widow to her election. On the contrary it leaves the widow free to claim her legal rights out of her husband's estate.

I propose that we should answer the first question in the affirmative.

The second question is whether the late Captain Leslie and his now deceased second wife effectually revoked (by means of their postnuptial contract of marriage) clauses 2 and 3 of their antenuptial contract of marriage, and the real point for decision is whether those clauses, and clause 2 in particular did or did not confer a *jus crediti* on the husband's son by a former marriage. I should say that the antenuptial contract of marriage had a clause according to which the parties reserved right of control and disposal, *inter vivos*, of their respective estates during their respective lives, and according to which the husband renounced his right of administration of his wife's estate. It appears that after the birth of children of Captain Leslie's second marriage his wife and he had changed their minds as to the propriety of including the husband's son by his first marriage in the benefits of clause 2 equally with the issue

of the second marriage in so far as the said son's participation along with the said issue extended to the second wife's estate. They accordingly attempted by means of the postnuptial contract of marriage to cut that son out of any benefits in such estate as the wife might leave at her death and to appropriate that estate entirely to her own children. If it can be shown that by the antenuptial contract of marriage John Leslie junior, the husband's son by his first marriage, got a *jus crediti* of the same onerous character and quality as that which the issue of the second marriage undoubtedly got, it will follow that the postnuptial contract was ineffectual to detract from or alter it, and that is the crux of the whole matter.

When I turn to the provisions of clause 2 I find myself quite unable to read them otherwise than as expressing a clear and unambiguous intention to treat the son of the husband by his first marriage in exactly the same way in all respects, so far as the benefits of that clause are concerned, as the issue of the second marriage. I do not see how the words of that clause can be given effect to otherwise. In short, it seems to me that (as was said in the House of Lords in *Mackie* v. *Gloag's Trustees*, 1884, 11 R. (H.L.) 10) what was intended was to confer upon John Leslie junior an estate and interest absolutely identical with that which was being pactionally secured to the children of the marriage into which the parties were at the time entering. The pactional quality of those children's interests is dependent on the rule of law which attaches that quality to provisions in an antenuptial marriage contract in favour of the wife and the issue of the marriage. It is true that that rule of law denies a similar quality to provisions given in such a contract to anybody else. But what is there to prevent parties if they please from making an effectual settlement to the effect that a person who is in his own right outside the consideration of the marriage shall be admitted to participation — equally in all respects both as to the amount and as to the quality of his interest—with the issue of the marriage who are within that consideration? Why should it be supposed to be beyond the power of the spouses to admit, if such be their contractual intention, a stranger into the privileged class of beneficiaries, especially if the stranger is the child of one of them by a former marriage? I think that *Mackie* v. *Gloag's Trustees* is authority for the proposition that this can be effectually done, and I can find nothing in clause 2 which militates against the plain expression of intention contained therein that that shall be done. Lord Selborne in *Mackie* v. *Gloag's Trustees* expresses the opinion that there is nothing in the law of Scotland which says that because the settlement is a marriage contract, and because the children of an earlier marriage are outside the matrimonial consideration as such, therefore a deed with a plain intention that they should take *pari passu inter se* is not to receive effect. I think such is the plain intention of the antenuptial contract of marriage.

If that be sound it is immaterial whether the contract be one which takes effect by the immediate conveyance to trustees of the spouses' estates, or one which deals with their estates as these may stand at their respective deaths. The security provided by the former kind of marriage contract is very preferable to that which is obtainable under the second, because it cannot be impinged on by *inter vivos* dispositions. But it can make no difference to the pactional character of the provision in favour of the children of the marriage, or to the effect of admitting a stranger into that class, whether the estates dealt with are settled *de præsenti*, or whether they are settled only as they may stand at the deaths of the spouses. I am therefore of opinion that what was done in the postnuptial contract here had no effect of taking away or altering the right which the parties had onerously agreed should be enjoyed by John Leslie junior equally with the children of the second marriage. I propose to answer question 3 in the negative and question 4 in the affirmative.

LORD MACKENZIE—I concur. The estate upon which the contract of marriage operates is declared to be the estate belonging to the husband at the time of his death. On turning to the conveyance which he granted in 1917 it is plain that "The Briars" did not belong to him at the time of his death. Therefore the two deeds cannot be said to form one testamentary settlement to the effect of putting the third wife to her election.

With regard to the remaining questions, I agree that these should be answered as your Lordship proposes. The decision of the case depends entirely upon the construction to be put upon the terms of the antenuptial contract of marriage, and I am satisfied that what the parties intended, and what they accomplished by their marriage contract, was to confer upon the child of the first marriage an estate and interest absolutely identical with that which was being pactionally secured to the issue of the marriage which was then being entered into. And on a full consideration of the effect of the clause which gave to either of the parties power to diminish the subject which was settled by the marriage contract by disposal *inter vivos*, I do not think that that affects the principle to be applied in the determination of the case.

LORD SKERRINGTON — It is matter of admission that there is nothing in the antenuptial contract of marriage between Captain Leslie and his second wife which can prevent his third wife from claiming *jus relictæ* out of the moveable estate belonging to him at his death. It was argued, however, on behalf of the third and fourth parties that she was put to her election as between her legal right of *jus relictæ* and a provision made by an *inter vivos* disposition whereby her husband conveyed to her the house in which they resided, together with the moveable contents thereof. There would have been force in this contention if there had been any inconsistency between

the *inter vivos* disposition and the antenuptial contract of marriage, but there was none. The antenuptial contract purported to operate only on the estate which might happen to belong to Captain Leslie at the time of his death. The *inter vivos* disposition on the other hand purported to operate upon certain property, heritable and moveable, which belonged to him at its date, and the property thereby conveyed formed no part of his estate at his death. He never attempted to revoke this disposition even if he had the power to do so. I am therefore of opinion that the second party is not put to her election between the subjects conveyed to her by the disposition and her *jus relictæ*. Her counsel admitted that she could not claim terce.

As regards the third and fourth questions of law, I agree that the antenuptial contract between Captain Leslie and his second wife secured to John Leslie junior (the son of Captain Leslie by his first marriage) an interest in the estates of the two spouses equivalent in all respects to the interest secured to the issue of the proposed marriage. The present case differs from that of *Mackie* v. *Gloag's Trustees* (1884, 11 R. (H.L.) 10), where the marriage-contract operated as an immediate conveyance of property which was placed in the hands of trustees for behoof of the children of the lady both by her first marriage and also by the second marriage then in contemplation, whereas in the present case the interests conferred upon Captain Leslie's son by his first marriage and upon the issue of the second marriage take effect only out of the free estates of the spouses at their respective deaths and vesting is postponed until the death of the survivor of them. None the less the opinions delivered in the case of *Mackie* support the judgment about to be pronounced, viz., that the interest conferred upon the child of the first marriage was contractual and irrevocable in like manner as was the interest conferred upon the children of the second marriage.

LORD CULLEN—I concur. As regards the *jus relictæ*, we have not to do here with the class of case referred to by Mr Sandeman, where under a universal settlement contained in one or more writings a provision is made for the widow which impliedly puts her to her election. The husband on the occasion of his second marriage settled the whole free estate belonging to him at his death on the issue of the first and second marriages, which left that estate subject to the second party's claim of *jus relictæ*. The deed of 1918 was not a testamentary deed, but was, as regards its operation after the husband's death, one whereby he made *inter vivos* an irrevocable provision for the second party in the event of her surviving him. He did not attach to this provision any conditions putting her to an election, and I do not think that such a condition can be implied.

As regards the other question in the case I think that by the delivered antenuptial deed of 1899 the parties contracted together that the child of the first marriage should be put on the same footing, and be given precisely the same species of right, as if he had been one of the children of the second marriage, to whom the consideration of the marriage primarily and properly applied, and that accordingly the contract created in his favour a *jus quæsitum* which was not defeated by the deed of 25th February 1909.

The Court in answer to the first question of law found that the second party was entitled to both the subjects provided to her in the disposition in her favour and also to her legal right of *jus relictæ* but excluding her right of terce; and answered the second and third questions of law in the negative, and the fourth in the affirmative.

Counsel for the First and Third Parties—C. H. Brown, K.C.—R. C. Henderson. Agents for the First Parties—Melville & Lindesay, W.S. Agents for the Third Party—Scott & Glover, W.S.

Counsel for the Second Party—Macmillan, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Counsel for the Fourth Parties—Sandeman, K.C.—Aitchison. Agents—Alex. Morison & Co., W.S.

Friday, July 15.

FIRST DIVISION.

[Lord Anderson, Ordinary.

STOBIE *v.* STOBIE AND OTHERS.

Service of Heirs—Decree of Service—Reduction—Decree of Special Service in Favour of Persons not the Nearest Lawful Heirs of Last Proprietor—Disposition by Persons so Served in Favour of Onerous and Bona fide Third Parties—Bond and Disposition in Security by said Disponees—Reduction of Disposition and Bond and Disposition in Security—Prescription—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 46.

The proprietor of certain heritable subjects having died intestate a decree of special service was erroneously granted in favour of persons who were not his nearest and lawful heirs. In an action at the instance of the true heir-at-law for reduction of the said decree, and also of a disposition of the subjects granted by the persons so served in favour of certain onerous and *bona fide* third parties, and of a bond and disposition in security over the subjects granted by the said disponees, *held* that the heir-at-law was entitled to challenge these writs within the period of the vicennial prescription, and reduction *granted*.

The Titles to Land Consolidation (Scotland) Act 1868, enacts—Section 46—"On being recorded and extracted as aforesaid every decree of special service . . . shall to all intents and purposes, unless and until reduced, be held equivalent to and have the full legal operation and effect of a disposi-