Tuesday, January 4, 1876.

SECOND DIVISION.

SPECIAL CASE—GRANT AND OTHERS.

Marriage-Contract—Trust—Renunciation of Liferent.

By an antenuptial contract of marriage it was provided, in the event of the husband predeceasing his wife, that certain sums should go to her in liferent, and to the children of the marriage upon her death, either in such proportions as the spouses might direct by a joint-deed, or failing such deed equally amongst them, and that if any of the children predeceased the term of payment leaving issue, such issue should have right to their parent's share. The husband predeceased his wife, leaving three children, and the interest of these sums continued for some time to be paid to the widow.—*Held*, in a Special Case submitted by the parties interested, that (in conformity with the case of *Pretty* v. *Newbigging*, 2d March 1854, 16 D. 667) the trustees were not bound to keep up the trust until the arrival of the period fixed in the contract of marriage for the division of the fee, but that they might denude, upon receiving a renunciation of the widow's liferent interest, and a discharge from her and the children of the marriage.

This was a Special Case submitted by Mrs Emilia Baillie or Grant, widow of the deceased Patrick Grant, Writer to the Signet, her son and two daughters, the only surviving children of the marriage between her and the late Mr Grant, and her marriage-contract trustees.

By the antenuptial contract of marriage entered into by Mr and Mrs Grant, Mr Grant made over to certain trustees two certificates or policies of insurance on his own life for the respective sums of £1000 and £999, 19s., and Mrs Grant also assigned and conveyed to the trustees the sum of £4000 sterling. By the third purpose of the contract of marriage the trustees were directed to lend out or invest the said sum of £4000 in their own names, and to pay the interest or yearly profits to Mrs Emilia Baillie or Grant during her lifetime, exclusive of the *jus mariti* of her husband; and it was thereby declared that in the event of the death of Mr Grant before Mrs Grant, £3000 of the said sum of £4000 should be paid to Mrs Grant for her own right and use, and subject to her own absolute and uncontrolled disposal, and that the remaining portion of the said sum of £4000, as well as the fee of the sums that might become due on the said policies of insurance, should be paid to the child or children of the marriage after the death of Mrs Grant in such proportions as the spouses might direct by any joint-deed under their hand, and failing thereof, the same should be divided equally among the children, "declaring always that if any child or children of the said marriage shall die before the said sum provided to him, her, or them under these presents, or the exercise of the said power of division, shall be paid or become payable, leaving lawful issue of his, her, or their bodies, the said issue shall have right to the share of such deceasing child or children in the same manner as if such parent had received payment or the same had become payable during the parent's lifetime."

Mr Grant died in April 1870. He was survived by his widow and three children, who had all reached majority. No deed of apportionment was ever executed. The £3000 provided by the marriage-contract to Mrs Grant was paid to her by the trustees shortly after her husband's death, and the whole fund remaining under trust management consisted of the remaining £1000 and the policies on the life of Mr Grant. The widow and children being anxious to have the trust brought to an end, offered to execute a renunciation of Mrs Grant's liferent interest in the trust-funds and discharges by all the parties interested. The trustees, however, maintained that they were bound to keep up the trust until the arrival of the period fixed in the contract of marriage for the division of the fund. The two following questions were submitted to the Court:—"Whether the parties of the third part are bound now to denude of the trust and to pay over the proceeds of the trust-estate to the parties of the first and second parts, on receiving a renunciation from Mrs Grant of her liferent interest, and a discharge from her and her family of the whole of their intromissions and actings in usual form? or, Whether they are bound to keep up the trust until the arrival of the period fixed in the contract of marriage for the division of the fee of the estate?"

At the debate the counsel for the trustees admitted that the point was decided by the case of *Pretty* v. *Newbigging*.

Authorities—*Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667; *Routledge* v. *Carruthers*, May 19, 1812, F.C.

At advising—

Lord Ormidale—Had it not been for the case of *Pretty*, I would have considered this a question of some difficulty, but when I find that case to be quite in point, and the counsel at the bar concurring in holding it to be in point, I can have no doubt as to the answer which we should give to the question put.

Lord Gifford—I am of the same opinion. *Pretty* is a binding authority, and there being no distinction between that case and the present, we must follow it. Apart from this, I am not disposed to say that, in the case of a marriage-contract, those who are not creditors under the deed can prevent those who are from winding up the trust created. The purposes have all been served, and it would require a strong case to establish that the grandchildren were creditors. I am of opinion that they are not, and that the children can along with the widow concur in bringing this trust to an end.

Lord Neaves—The case of *Pretty* is quite in point, and was, I think, rightly decided. It often happens that access to a fee may be propelled, and this is only reasonable if there be no proof of any necessity for keeping it up. I think, therefore, that on the concurrence of all these parties, who are the only creditors, the trustees are bound to wind up the trust.

The Lord Justice-Clerk was absent.

The Court accordingly answered the first question in the affirmative.

Counsel for Mrs Grant—Mackintosh.

Counsel for Miss Grant—Young. Agents—Adam & Sang, W.S.

Counsel for Trustees—Campbell Smith. Agents—Horne, Horne, & Lyell, W.S.

Friday, January 7.

FIRST DIVISION.

SMITH, LAING, & COY. *v.* MAITLAND.

Superior and Vassal—Feu-Charter—Construction—Poor-Rates.

A feu-charter, dated in 1814, contained the following declaration:—"That during the existence of the present feu-right all public and parochial burdens or taxes, imposed or to be imposed, shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him."—*Held*, on a construction of the deed, that for the purposes of taxation the superior and vassal were to stand to one another in the relation of landlord and tenant, and that the feu-duty was to be taken as the rent on which the superior had to pay.

Opinions—That it was not competent to refer to the relations and circumstances of the parties at the time when the feu-charter was granted, as explained in previous deeds.

Smith, Laing, & Coy., flax-spinners at Russell Mill, near Cupar-Fife, brought this action against James Maitland of Lindores, Fife, whereby they asked for a declarator that the defender was bound, in terms of a feu-charter granted by Charles Maitland younger of Rankeillour, dated 5th May 1814, to free and relieve them of all poor-rates imposed on or paid by them from 15th October 1856, or to be imposed on them in respect of the property of the subjects at Russell Mill conveyed in the feu-charter, and belonging to them. There was a further conclusion for payment of £35, 11s. 3d., being the sum they had paid as poor-rates, less six half-years' feu-duties, of which they had withheld payment from the defender in respect of their claim for reimbursement of poor-rates.

By the feu-charter above mentioned Charles Maitland, on the narrative that he was heritable proprietor of the mills and lands thereinafter disponed, and in consideration of the feu-duty thereinafter mentioned, sold, alienated, and in feu-farm disponed to George Moon, yarn-spinner at Russell Mill, "All and Whole the corn, barley, and lint mills of Russell Mill, now converted into a flax spinning-mill, with the houses and yards belonging thereto; also the ground adjoining to the said mills, consisting of about two acres, and the haugh, the whole of which lands and mills are now possessed by the said George Moon, with full power and privilege to the said George Moon and his foresaids to erect houses, mills, and every other kind of buildings and machinery upon the grounds and river hereby feued; and to hold all and sundry the mills, lands, and others above disponed by the said George Moon and his foresaids of and under me the said Charles Maitland, and my heirs and successors whomsoever, as their immediate lawful superiors of the same, in feu-farm, fee, and heritage for ever, giving yearly the said George Moon and his foresaids for the saids mills, lands, and others above disponed to me and my foresaids, immediate lawful superiors of the same, the sum of £36, 15s. sterling in name of feu-farm duty, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at Whitsunday 1812, and the next payment at Martinmas thereafter, and so furth, yearly and termly thereafter, during the existence of the present feu-right, but always with and under the following express declarations, and not otherways:—*First*, That the vassal for the time being shall keep the mill-dam and mill-lead always in good order, and buildings at all times on the lands hereby disponed of the value of £150 sterling, and in case of the irritancy of the present feu-right in any manner whatever, the vassal shall put the whole houses, mills, and others, standing at the period of his removal, although exceeding in value the foresaid sum of £150 sterling, in a tenantable order and condition. *Secondly*, That if two full years' feu-duty shall remain unpaid after the term of payment thereof, then this present feu-right shall, in the option of the superior, cease and determine without any process of declarator for that effect, and it shall not be lawful to purge this irritancy at the bar. *Thirdly*, That during the existence of the present feu-right, all public and parochial burdens or taxes, imposed or to be imposed, shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him. *Fourth*, That these declarations shall be inserted in the infeftment to follow hereon, as well as in every subsequent precept of sasine and infeftment that may be granted of and taken over the said mills, lands, and others, otherways such precept and infeftments, and deeds following thereon, shall be null, void, and of no effect." Moon was infeft on the feu-charter, the instrument of sasine in his favour being dated 7th, and recorded 11th, May 1814.

The pursuers acquired the subjects and others described in the charter in 1856, and obtained entry on 15th October of that year. At that time, and until March 1865, when she died, Lady Maitland, as liferentrix of the subjects in question under the trust-disposition and settlement of her husband, had drawn the whole feu-duties. The said subjects, by the same deed, were destined to the present defender in fee, and from the date of Lady Maitland's death he was in receipt of the feu-duties.

The annual value of the subjects feued by the charter did not at its date exceed £36, 10s., but the erection of extensive works and machinery had increased the value to about £400.

The defender upon record made offer to relieve the pursuers of a proportion of poor-rates payable by the landlord corresponding to a rent of equal amount with the feu-duty, *i.e.*, of £36, 15s.

The defender pleaded, *inter alia*,—"(1) The conclusions of the action are not warranted by the terms of the feu-charter upon