

dent Mrs M'Vean, and decerns and declares accordingly."

This interlocutor was allowed to become final; and it was not until after an interval of six years that the claimant renewed the contention. He was ultimately, without opposition, allowed to bring the judgment before the Court, but it appears from the pleadings that these facts were strongly founded on, and there was some evidence that he had expressly stated that he meant to acquiesce in the Lord Ordinary's finding.

While, therefore, the case certainly raised the same question as that before us, it arose under very unfavourable circumstances, which must have impressed the Court adversely to the petitioner.

The note of what fell from the Bench, which Lord Moncreiff has written on the papers, is as follows:—

"HERMANN.—Thinks interlocutor quite right. Goes over ground stated in answers.

"BALMUTO.—Of same opinion. Thinks interlocutor could not be opened.

"BALGRAY, SUCCOTH, PRESIDENT, of the same opinion.

"Whole turns on distinction between special legacy and general settlement."

I cannot resist the opposite current of authority since the date of this judgment.

LORDS MURE, SHAND, YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court recalled the interlocutor of the Lord Ordinary and sustained the claim for the truster's heirs *in mobilibus*.

Counsel for Mrs Aikman and Others—Pearson—M'Watt. Agents—H. & H. Tod, W.S.

Counsel for Trustees (Real Raisers) and for Heirs *in mobilibus* of the Truster—D. F. Mackintosh, Q.C.—Blair. Agents—Hunter, Blair, & Cowan, W.S., and H. B. & F. J. Dewar, W.S.

Friday, July 16.

FIRST DIVISION.

BELL v. BELL.

Husband and Wife—Marriage-Contract—Surviving Spouse—Provision.

A contract of marriage provided that during the subsistence of the marriage the free proceeds of the trust estate, which included the estate of L, which had been conveyed to the trustees by the wife, should be paid to the husband, after deduction of all public and parochial burdens, for the use of the spouses, and in the event, which happened, of the predecease of the wife the trustees should pay to the husband an annuity equal to one-half of the rental of the estate of L after deduction of all public and parochial burdens, and the remaining half of the said rental of the proceeds of the trust-estate should be applied in maintaining the children of the marriage. *Held* that the meaning was not that the husband should

have an annuity consisting of one-half the rents payable out of the existing leases, but one-half of the free rents.

In June 1846 Robert Bell, Sheriff-Substitute of Zetland, and Miss Robina Hunter of Lunna entered into an antenuptial marriage-contract by which certain provisions were made for the spouses and for the children of the intended marriage, which took place immediately thereafter, and was dissolved by the death of Mrs Bell in 1863, leaving seven children, of whom three sons, R. H. Bell, B. D. C. Bell, G. J. H. Bell, and one daughter, Miss C. C. Bell, were alive at the date of this case. By the contract Mrs Bell on her part conveyed to trustees her whole heritable and moveable estate, and in particular the lands of Lunna, for the purposes of the trust conveyance, of which the 3d and 4th were—
"Third—For payment during the subsistence of the intended marriage of the free yearly proceeds of the residue of the trust-estate, after deduction of all public and parochial burdens and existing annuities, to the said Robert Bell for the use of the spouses. And in the event of the predecease of the said Robert Bell" (which event did not occur) "for payment thereafter of the said free yearly proceeds to the said Robina Hunter.
Fourth—In the event of the predecease of the said Robina Hunter" (which event happened) "the said trustees shall pay to the said Robert Bell an annuity equal in amount to one-half of the rental of the estate of Lunna, after deduction of all public and parochial burdens; the said annuity to commence at the first term of Whitsunday or Martinmas after the death of the said Robina Hunter, and to be payable in equal moieties at the said two terms. And it is hereby declared that the remaining half of the said rental, and the free proceeds of the residue of the trust-estate, or so much thereof as in the discretion of the said trustees may from time to time appear to be necessary, shall be applied in maintaining and educating the children of the marriage."

The moveable estate falling under the trust-conveyance consisted, after certain deductions, of about £7000, which at the date of this case had been invested on permanent improvements on Lunna, and was thus represented by capital expenditure thereon. After the death of Mrs Bell Mr Bell was paid his annuity under the fourth purpose of the said marriage-contract. The manner in which the amount thereof was fixed by the trustees up to the time of this question being raised was thus stated in the case:—
"From the gross rents receivable there have been deducted (*first*) the public and parochial burdens for the year, and (*second*) interest at 4 per cent. on the whole sum laid out on capital expenditure, under which term are included large outlays on churches and manses, and law expenses incidental thereto. The balance has then been divided into two equal portions, one portion being stated as the annuity payable to" Mr Bell. "To the other equal portion there has been added interest at 4 per cent. on the whole sum expended on capital expenditure, and from the total there have been then deducted (*first*) repairs and current expenses (including expenses of management) and (*second*) arrears of rent, the balance being stated as the sum available for the education and maintenance of the children."

The present Special Case was presented by

Robert Hunter Bell, the eldest son of the marriage, and sole surviving trustee under the marriage-contract (*first party*), and Mr Bell, his father (*second party*), did not raise any question in regard to the apportionments up to Martinmas 1884, as the whole revenue from the trust-estate had been paid to the second party, and he had, on the other hand, expended on the education and maintenance of the children of the marriage, including the first party, sums considerably in excess of what would have been available therefor under the interpretation of the fourth purpose now contended for by the first party. As regarded the division of the rental of Lunna estate subsequent to Martinmas 1884, however, the first party maintained that the mode of apportionment hitherto adopted was erroneous and not warranted by the fourth purpose of the marriage-contract and that in ascertaining the amount of the second party's annuity there should be deducted from the gross rents of Lunna, as reduced by the deduction of 4 per cent. interest on capital expenditure, not only public and parochial burdens, but also arrears of rents not actually received, and the cost of repairs and current expenses. The second party maintained that in fixing the amount of his annuity under the fourth purpose there fell to be deducted from the gross rents receivable from the estate of Lunna, reduced as aforesaid, only public and parochial burdens.

At advising—

LORD PRESIDENT—The question raised by this Special Case depends upon the construction which is to be put upon certain clauses in a contract of marriage entered into in June 1846, and the difficulty has arisen from the ambiguity of the language there used.

Miss Hunter was heiress of entail of the estate of Lunna, and she was also possessed of considerable personalty. She by this deed conveyed all her estate, both heritable and moveable, to trustees for the purposes of the marriage, while Mr Bell, as an equivalent, came under various personal obligations which are fully narrated in the deed.

The purposes of the trust included in the first place a payment to the spouses of a sum of £1000, and then the deed goes on to provide as follows:—"For payment during the subsistence of the intended marriage of the free yearly proceeds of the residue of the trust-estate, after deduction of all public and parochial burdens and existing annuities, to the said Robert Bell, for the use of the spouses."

Now, this clause is quite clear, and raises no difficulties whatever, for it only provides for the nett proceeds of Mrs Bell's estate being paid over to the spouses for their maintenance during the subsistence of the marriage. If Mr Bell predeceased his wife, then payment was to be made to Mrs Bell of the said free yearly proceeds, but if Mrs Bell was the predeceaser then a different provision was to take effect, and it is the way in which this purpose of the trust-deed is expressed that has given rise to the present question. The words are—"In the event of the predecease of the said Robina Hunter the said trustees shall pay to the said Robert Bell an annuity equal in amount to one-half of the estate of Lunna after deduction of all public and parochial burdens."

Now, the meaning of this is said to be that Mr Bell is to get an annuity out of the trust-estate, the measure of which is to be the rents payable under the existing leases out of the estate of Lunna, limited, however, to the extent of one-half.

If these words had stood alone I confess I should have had considerable difficulty in rejecting this theory, because an annuity in many respects resembles a legacy, and it is paid out of the entire estate of the testator. An annuity may, and sometimes does, exhaust the entire interest of a trust-estate. We have had cases in which it has—and even made encroachments upon capital. But the deed here goes on to say—"And it is hereby declared that the remaining half of the said rental, and the free proceeds of the residue of the trust-estate, or so much thereof as in the discretion of the said trustees may from time to time appear to be necessary, shall be applied in maintaining and educating the children of the marriage." And then the whole residue goes to the heir of the marriage, burdened with certain provisions in favour of younger children.

Now, when it is said that "the remaining half of the said rental" is to go otherwise than to Mr Bell, what is there meant is I think this—that Mr Bell and the others are to share equally, not the rents payable by the tenants of this estate, but the free rents. I think, therefore, not without some hesitation, that what it was intended to be expressed by this deed was, that Mr Bell in the event of his survival was to be entitled to one-half of the free rents of Lunna.

LORDS MURE, SHAND, and ADAM concurred.

The Court pronounced the following interlocutor:—

"Find and declare that the annuity payable to the second party consists of one-half of the free yearly rents of the estate of Lunna, and decern; and appoint the expenses of both parties to be paid out of the trust-funds in the hands of the first party."

Counsel for First Party—Cheyne—Wilson.
Agent—W. Kinniburgh Morton, S.S.C.

Counsel for Second Party—Moncreiff. Agent
—R. C. Bell, W.S.

Tuesday, July 20.

FIRST DIVISION.

LEYS v LEYS.

Parent and Child—Custody of Child—Father's Right to Custody.

A father placed his two children under the care of their paternal grandfather, a Protestant clergyman, and for six years they remained in his house, and were in great part maintained and educated by him. Thereafter the father desired to resume their custody; the grandfather opposed this, on the ground that the father, who had become a Roman Catholic, was in poverty and unable to maintain them, and