

Friday, March 14.

SECOND DIVISION.

SALVESEN AND OTHERS (PARK'S TRUSTEES) v. PARK AND OTHERS.

*Succession—Trust—Disposition to Heirs, Executors, and Assignees whomsoever.*

By will dated 17th February 1886 a husband bequeathed his whole estate to his wife and appointed her his sole executrix.

By deed of trust and agreement, dated 17th May 1886, which embodied a post-nuptial contract, he conveyed his whole means to trustees, and directed them, *inter alia*, (2) to pay to his wife a free annual allowance out of the trust funds for her alimentary use and for her separate maintenance while the spouses lived separately; (6) and failing issue of the marriage, to pay the trust funds or the residue thereof upon his own and his wife's deaths to his nearest heirs, executors, and assignees whomsoever.

*Held*—on the death of the husband—(1) that the will was not revoked by the trust-deed, which did not dispose of the capital of the trust funds, and (2) that the trustees were bound to retain a sum sufficient to provide for payment to the wife of her annual allowance provided by the trust-deed.

Frederick William Park died 9th June 1888 survived by his wife. The only child of the marriage predeceased him. He executed a will, dated at London 17th February 1886, by which he gave, devised, and bequeathed to his wife Mrs Annie Ingersent or Park his whole means and estate, heritable and moveable, that should belong to him at the time of his decease. He appointed his wife to be his sole executrix, and directed her to pay his just and lawful debts, deathbed and funeral expenses, out of his means and estate. He revoked all previous wills executed by him, and he reserved his own liferent in the premises, with full power to alter or revoke the said deed.

On 17th May 1886 a deed of trust was executed by him along with his wife and Edwin Ingersent, her father. The deed proceeded on the narrative that he had no means other than the amount remaining due to him as one of the beneficiaries under the contract of marriage entered into between his father and mother dated 15th September 1855, and that certain questions had arisen between him and his wife, who was not at the time residing with him, and it had been agreed by him and his wife that all questions between them and rights competent to them or either of them should be settled on the terms provided by the said deed, and on his executing the trust thereby created. He therefore conveyed to Edward T. Salvesen and others, the trustees named therein, his whole right, title, and interest to a share of the means and estate falling to him under the contract of marriage between his father and mother

under the following directions:—“(2) The trustees shall pay over to my said wife, Annie Ingersent now Park, on her own receipt, a free annual allowance of £18 sterling out of the proceeds of the trust funds, for her alimentary use and for her separate maintenance, which sum shall be payable half-yearly, or at such other periods in each year as the said trustees shall think proper, during such time or times, now or at any future periods, as we shall both agree not to live together, and shall continue to live separately: Declaring that the said allowance shall begin as from the date of these presents, and that the first payment shall be made by the trustees within one month thereafter; (3) the trustees shall, subject to the contingency after mentioned, pay over to me, or apply for my benefit, in such way as they may think proper, the remainder of the free annual proceeds of the trust funds for my alimentary use, declaring that the sums so paid shall not be affectable by my debts or deeds, legal or voluntary, or be subject to the diligence of my creditors.” By the 5th purpose the trustees were to hold the trust funds on the deaths of the deceased and his wife for behoof of issue of the marriage. And by the 6th purpose the deceased provided as follows:—“In the event of the failure of issue the said trust funds or residue thereof shall be paid over by the trustees upon my own and my said wife's deaths as aforesaid, to my nearest heirs, executors, and assignees whomsoever.”

Mrs Park accepted these provisions in full of all she could claim on the death of her husband or in name of aliment during their joint lives.

Immediately after the execution of the said deed the trustees therein named accepted office and entered into possession of Park's interest under his parents' marriage-contract, and paid the allowance provided by the deed to his wife, who was then living apart from him, and the balance of the income to Park down to October 1886. In that month Mrs Park returned to her husband's house, and continued to reside with him till within a few weeks of his death. At the date of his death she was again living separate from him.

Upon 16th October 1886 Park executed a deed of directions, in which, after narrating the deed of trust referred to, he proceeded—“And whereas my said wife has agreed, that upon my making provision for payment to her on her own receipt of the whole free income arising upon the trust funds referred to, and for payment to her of the capital or residue of the capital thereof in the event of my predeceasing her, and there being no issue of our marriage or descendants of such issue then surviving, she will return and again reside in family with me: Therefore, in consideration foresaid, and for other good and onerous causes and considerations, I do hereby request, authorise, and direct the said trustees and their successors in office to pay the whole of the free annual proceeds of the trust funds in their hands now due, and henceforth to become due, to my wife the said Annie Ingersent

or Park, on her own receipt alone, for her alimentary use. . . . And further, I direct the said trustees, in the event of my predeceasing my said wife, and there being then no issue of our marriage or their descendants in existence, to pay or make over to her absolutely the whole capital of the trust funds, or residue thereof remaining, and that whether she shall at my death be living in family with me or not; but in case we should at any time again separate, she shall accept the provisions now made for her in full of all she could have claimed under the foresaid deed of trust and agreement, or by law by way of aliment, or legal right of succession, or otherwise."

Upon 4th July 1887 he wrote a letter to the trustees appointed under the former trust-deed, which contained the following terms—"I now hereby request and direct you to hold the said deed of directions, dated 16th October 1886, as withdrawn and cancelled, and I further request and direct you to act in the same manner as if the said deed of directions of 16th October 1886 had not been executed by me."

Between October 1886 and 4th July 1887 the whole income arising from the trust funds was paid to Mrs Park, and from the latter date to the date of Park's death his authority was obtained to all payments to Mrs Park in excess of the annuity provided to her by the said trust-deed.

In these circumstances questions arose as to the proper mode of dealing with the funds in the hands of the trustees, and a special case was presented for the opinion of the Court by (1) the trustees under the deed of trust, dated 17th May 1886; (2) Mrs Park, the widow of the deceased; and (3) the deceased's next of kin, on these questions of law:—“(1) Is the second party entitled to immediate payment of the trust funds in the hands of the first parties, or such part thereof as may not be required to be retained to meet her annuity? or, are the third parties entitled to immediate payment of the said trust funds except in so far as the same may be necessary to provide the said annuity to the second party? (2) If the first question be answered in the negative in both of its alternatives, are the said trust funds payable on the death of the second party to her heirs, executors, and assignees, or are they payable, on the said event taking place, to the third parties or their representatives? (3) If the second question be answered affirmatively in either of its alternatives, is the second party, during her life, entitled to be paid the whole free balance of the interest of the trust funds as it accrues; or are the first parties bound to accumulate the same for the purpose of paying it over to the party entitled to the capital on the death of the second party?”

The second party, as between her and the third parties, maintained (1) that she was entitled to the capital of the trust-estate as sole executrix of her husband under his will of 1886, and (2) that as she had returned to live with her husband in consideration of his granting the deed of directions, that was an onerous and irrevocable deed, and

that she was in virtue of it entitled to immediate payment of the residue of the trust funds remaining at her husband's death—*Manson v. Hutcheon*, January 16, 1874, 1 R. 371; *Scott's Trustees v. Methven's Trustees*, January 30, 1890, 27 S.L.R. 314; *Martin v. Bannatyne*, March 8, 1861, 23 D. 705. As against the trustees she maintained that she was entitled to have the residue of the trust-estate immediately paid to her, or otherwise that she was entitled to payment with the exception of a sum sufficient to pay the annuity of £18 per annum.

The third parties maintained that under the conveyance in the trust-deed of 17th May 1886 of the trust-estate to the deceased's "heirs, executors, and assignees whomsoever," they were entitled to immediate payment of the trust-estate, the trustees only retaining sufficient to pay the annuity of £18 to the widow.

The trustees maintained that they were bound to pay the annuity of £18 per annum to the widow during her life, and retain the residue of the trust-estate in their hands with all accumulations of income until the widow's death, to be then distributed as the Court might direct in answering the question between the second and third parties.

At advising—

LORD KINNEAR—The questions raised in this case depend upon the meaning and effect of a deed of trust and agreement executed on the 17th of May 1886 by the late William Park, the husband of the second party to the case, and by Mrs Park, the second party herself, with the advice and approval of her father.

By this deed, which embodied a post-nuptial contract, the husband, on the narrative that his wife had for good and sufficient reasons instituted judicial proceedings against him and claimed a separate aliment, conveys to trustees his whole right and interest in a certain estate settled by the contract of marriage between his father and mother, and directs them in the first place to pay the expenses of the trust, and secondly to pay over to his wife "on her own receipt a free annual allowance of £18 sterling out of the proceeds of the trust funds for her alimentary use and for her separate maintenance during such time as" the spouses shall continue to live separately, and thirdly, to pay the remainder of the proceeds to himself. He makes certain provisions for behoof of the issue of the marriage, which it is unnecessary to consider, because there was no issue; and failing issue he directs that the trust funds shall be paid over to "his nearest heirs, executors, and assignees whomsoever." Then follows a special provision that the allowance to be enjoyed by the wife shall be "alimentary and not subject to her debts and deeds," and that it shall be continued to her during such period as she may survive her husband, and the wife accepts these provisions in full of all that she can claim on the death of her husband, or in name of aliment during their joint lives.

The marriage having been dissolved by

the death of the husband without issue, it appears to me that the only purpose of the trust which still remains operative is the payment of an alimentary annuity of £18 to the widow. The capital of the trust fund is not disposed of by the deed, because a direction to trustees to pay on a certain event to the "nearest heirs, executors, and assignees whomsoever" of the truster, is not in itself a disposition of the trust-estate but a mere declaration that the estate is to belong in that event to the persons who may be entitled to it, not under the trust-deed, but by virtue of any extrinsic right which may be found to be effectual when the trust purposes have been served. A direction in these terms creates no right in anybody, because nobody can claim under it, except by virtue of some extrinsic right, which is assumed to be effectual irrespective of the trust-deed, and which would be equally effectual if the trust-deed contained no direction whatever as to the ultimate disposal of the estate.

But if the capital of the trust-estate is not disposed of by the deed of trust, the question is whether it is disposed of by either of the other instruments set forth in the special case. These are, firstly, a deed of directions executed 16th October 1886, by which the husband, in consideration of his wife having consented to return and again reside in family with him, agrees to make provision for payment to her on her own receipt of the whole free income arising upon the trust-funds, and also for payment to her of the capital in the event of his predeceasing her and there being no issue of the marriage, and directs the trustees accordingly; and secondly, a will executed on the 17th of February 1886, which is the earliest in date of all the instruments in question, and by which the husband leaves to his wife his whole means and estate, heritable and moveable, and appoints her to be his sole executrix.

The deed of directions was recalled by a letter dated 4th July 1887, and one of the questions in dispute is whether the recall was effectual, or whether the deed was not onerous, and therefore irrevocable. I do not think it necessary to determine this question, because if the deed of directions has been revoked, the only effect of the revocation will be to bring the will into operation, and the will gives the whole estate belonging to Mr Park at his death, and therefore the whole of the trust-fund, to Mrs Park.

It is said that the will is revoked by the trust-deed. But the trust-deed contains no disposition inconsistent with the will—because, as I have already said, it contains no special disposition of the estate at all, but leaves it to be carried by any testamentary deed that the truster might leave, or to pass *ab intestato* to his next-of-kin. The only remaining question is, whether Mrs Park is entitled to immediate payment of the whole trust-funds, or only of "such part as may not be required to be retained to meet her annuity."

I am of opinion that Mrs Park has no power to discharge her annuity, and therefore that the trustees are entitled for their own safety, and bound by their trust, to retain a sum sufficient to provide for payment to her of £18 a-year. The trustees are directed to pay over term by term a certain sum to Mrs Park on her own receipt for her alimentary use. They cannot, without a breach of trust, pay it otherwise than half-yearly, and I think it a settled law that the annuitant cannot relieve them of that duty or defeat her own right by any renunciation or discharge. The case of *White v. White*, 4 R. 786, is directly in point.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK — That is the opinion of the Court.

The Court answered the second part of the first alternative of the first question in the affirmative.

Counsel for the First Parties—Guthrie.

Counsel for the Second Parties—Jameson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Third Parties—W. Campbell. Agents—Fraser, Stodart, & Ballingal, W.S.

Saturday, March 15.

## SECOND DIVISION.

### RITCHIE AND OTHERS v. DAVIDSON'S TRUSTEES.

(*Ante*, *Thomson v. Davidson's Trustees*, June 9th 1888, vol. xxv. p. 547; 15 R. 719.)

*Trust—Charitable Trust—Administration of Trust—Discretion of Trustees.*

A truster directed his trustees (3) to pay an annuity of £20 to his half brother, and further (5) to hold his estates, which were heritable, and apply the free yearly revenue "for preserving the aged and infirm among the descendants of my father from want or from the necessity of applying for public relief, and for obtaining for the young among the said descendants, both boys and girls, such a good, sound, plain and useful education as will enable them to earn a livelihood for themselves, with power . . . to maintain the young among the said descendants either in family with their parents or otherwise, while at their education . . . and I hereby declare that my trustees shall not be entitled to apply any sum beyond twenty pounds sterling per annum for the benefit or relief of any one either young or old of said descendants."

The truster directed the surplus revenue to be divided among certain of his relatives and their representatives *per stirpes*.