

Friday, July 6.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ELLIOTT v. PURDOM.

*Husband and Wife—Marriage-Contract—Annuity to Wife during Husband's Lifetime for Maintenance of his Establishment—Trust.*

By antenuptial contract of marriage an annuity of £1000 was provided for the wife by the husband "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life," he renouncing his *jus mariti* and right of administration of and in relation to his wife's estate and effects, including said annuity.

Held that the wife was truly a trustee for her husband, and was not entitled to rank as one of his creditors.

The antenuptial contract of marriage between Sir William Elliott of Stobs, Bart. and his wife Dame Hannah Birkett or Kelsall or Elliott dated 24th March and recorded 22nd July 1879 was in the form of a bond of annuity in favour of Dame Elliott, and contained the following provisions— . . . "Therefore I the said Sir W. F. A. Elliott, in terms of said agreement, and in contemplation of our said marriage, do hereby bind and oblige myself, and my heirs, executors and representatives whomsoever, . . . to pay to the said Mrs Hannah Birkett or Kelsall, to be applied by her towards the expenses of my household and establishment, and that during all the days of my life, an annuity or yearly sum of £1000 sterling, free of all burdens and deductions whatsoever, . . . and in security of the personal obligation before written I dispose to and in favour of the said Mrs Hannah Birkett or Kelsall heritably all and whole the lands and barony of Stobs and others, . . . and I assign the rents so far as necessary for supporting the right and security hereby granted: . . . And further, I bind and oblige myself, . . . to grant and deliver to the said Mrs Hannah Birkett or Kelsall a bond and disposition, . . . providing and securing to her in case she shall survive me, . . . a yearly annuity of £2000 sterling free of all burdens and deductions whatsoever: . . . Moreover, I do hereby renounce and discharge my *jus mariti* and right of administration of and in relation to the estate and effects now belonging or which may pertain and belong to the said Mrs Hannah Birkett or Kelsall, including the foresaid annuity payable to her during my lifetime, declaring that the same shall be and remain a separate estate in her person free of any right or claim on my part whatsoever."

In May 1886 Sir William Elliott executed a trust-deed in favour of creditors, the trustees under which paid Lady Elliott the annuity of £1000 until Martinmas 1887, and a lesser sum for the next two years, when

they stopped payment altogether on the ground that the income from Sir William Elliott's whole means and estate was insufficient to pay his creditors.

In June 1893 Lady Elliott, with concurrence of her husband, brought an action against Robert Purdom, solicitor, Hawick, sole trustee surviving and acting under said trust-deed, for payment of the arrears of the annuity with interest thereon. She averred that she had repeatedly demanded payment of the sums due to her, but had always been refused.

The defender pleaded—" (2) The said bond of annuity being ineffectual to give the pursuer a preference in a question with her husband's creditors, the defender should be assolizied. (3) The said bond of annuity, amounting to an attempt to place a portion of the grantor's means *extra commercium*, while retaining a participation in the enjoyment of it, is ineffectual in a question with the grantor's creditors."

Upon 14th March 1894 the Lord Ordinary (KYLACHY) assolizied the defender.

"*Opinion.*—The question in this case is whether Lady Elliott is a creditor under the antenuptial contract between her and Sir William for an annuity of £1000 per annum, which is provided to her during Sir William's life. There is no dispute as to the annuity provided to her in the event of her widowhood. The question is whether she can rank as a creditor for £1000 per annum, which Sir William undertook to pay to her, 'to be applied by her towards the expenses of my household and establishment, and that during all the days of my life.'

"The defender, who is trustee for Sir William's creditors, contends that this is not a proper marriage-contract provision conferring upon Lady Elliott an individual and independent right, but is, on the contrary, truly a trust for Sir William's own behoof. The express purpose of the provision, he says, makes that clear. The pursuer, on the other hand, contends that the purpose expressed does not qualify her (Lady Elliott's) right, but merely expresses the motive of the trust, Lady Elliott being no doubt expected to apply the money in the way mentioned, but not being bound to do so, and this being, it is said, made clear by the subsequent clause in the contract by which Sir William renounces his *jus mariti* and right of administration, *inter alia*, over the foresaid annuity, 'declaring that the same shall be and remain a separate estate in her (Lady Elliott's) person, free of any right or claim on my part whatsoever.'

"Now, I do not doubt that if this annuity had been granted to Lady Elliott simply for her separate use, she would have been a creditor for its amount. That, I understood, was conceded. Neither am I prepared to say that the result would have been different if the annuity had been granted for her separate use to be applied by her for the upkeep of the joint establishment of the spouses while they both survived and lived together. It may be (I have not considered the question) that

there would thereby have been constituted an independent interest in the pursuer's person which, as one of the conditions of the marriage, she might have been entitled to vindicate. But the difficulty is that the application in fact prescribed is not even in terms an application for the lady's benefit. She might come to live apart from her husband, and yet the annuity would, I suppose, still be applicable to the upkeep of the husband's establishment. Moreover, the upkeep of the husband's establishment is after all simply payment of the husband's debts, and therefore if the application expressed is obligatory, I do not, I confess, understand how the pursuer's position is to be maintained. Accordingly the pursuer's proposition really comes to be, as I have said, that the purpose or application of the annuity is not expressed as part of the contract, but only mentioned by way of expressing the granter's motive and expectation. Now I am not able to so read the contract. I think the words used must, if possible, be read as operative, and as expressing part of the contract. And that being so, I think the result is that the pursuer has no independent right which can compete with that of her husband's creditors. I think the arrangement in question comes in fact merely to this—that Lady Elliott should receive during the marriage a fixed allowance for housekeeping, and should also be free from her husband's control in its disposal. Now, that may have been a quite good agreement between husband and wife, but it is not an agreement which in my opinion is good against the husband's creditors. I must therefore assoilzie the defender from the conclusions of the summons, with expenses."

The pursuer reclaimed, and argued—This annuity was separate estate of the wife, secured to her by onerous deed, viz., antenuptial contract of marriage. The husband had no control over it whatever, unless possibly a right to a bare subsistence. The Lord Ordinary had laid undue stress on the words "my household," as if there were some imaginary household of the husband separate from that of the wife. The adjective merely meant the household which would be set up after the marriage, but over the expenditure of which to the extent of £1000 the wife was to have unfettered control. She was not merely a trustee for her husband. She was entitled to arrears, because she had again and again demanded payment, which had apparently not been done in the case of *Muirhead*, relied on by the defender. If she got the money it would be expended in paying outstanding debts.

Argued for the respondent—This was merely a device to benefit the husband at the expense of his creditors. It was a trust for him. The wife was not free to expend the annuity upon herself; she got it under condition it should be applied to the keeping up of the husband's house. It is for "my household" during all the days of "my life." Lady Elliott was in no more

favourable position than any other trustee for the husband—*Wood v. Begbie*, June 7, 1850, 12 D. 963; *Ker's Trustees v. Justice*, November 7, 1866, 5 Macph. 4 (espec. Lord Deas' opinion on p. 10); *Learmonth, &c. v. Miller*, May 3, 1875, 2 R. 62, although no doubt there the marriage-contract was postnuptial. In any case, Lady Elliott had no right to arrears, for the annuity was alimentary. She had been alimented, and it was not averred that any alimentary debts were still unpaid—*Muirhead v. Miller*, July 19, 1877, 4 R. 1139.

At advising—

LORD PRESIDENT—I think the interlocutor of the Lord Ordinary is right.

We have to consider the substance and effect of the provision in this bond of annuity binding Sir William Elliott to pay to his wife a yearly sum of £1000. I take it that the purpose to which this £1000 is to be applied being set out, and that that only is the purpose to which it can lawfully be applied. It is plainly expressed to be for the expenses of the husband's household and establishment during all the days of his life. If that is the condition on which alone the wife is entitled to receive this money, does the fact that she makes herself the distributor of it, make the case in any way different from what it would have been if she had stipulated that some one else should be the president or steward of the household for its administration? I think not. We were referred to the clause at the end of the deed, which says that the annuity shall be and remain a separate estate in her person, free of any right or claim whatsoever on the husband's part. But Mr Rankine justly observed that that must be read along with the clause to which it is relative. The wife is to distribute the money, but for the purposes set forth in the beginning of the deed. Free of any right on the husband's part must mean other than the right set out at the beginning. She, and not he, is to be the judge of the mode in which the money is to be expended, but the purpose for which it is spent remains the same as that at first laid down. I take it that the plain sense of the clause is simply this—The lady marries and wishes to make sure that the house shall be kept up in proper style. She therefore stipulates for an expenditure upon the maintenance of the house of £1000, and makes herself the recipient and disbursing of that part of her husband's means. She bargains that not less than £1000 shall be spent upon his establishment. But it cannot be said that the household is to be kept up at that style while the husband's creditors are unpaid.

LORD M'LAREN—I entirely agree. Lady Elliott virtually became trustee for her husband. This obligation, while obligatory as between husband and wife, does not enable the wife to claim as a creditor upon her husband's estate. By this bond of annuity the husband did not put his funds where they were no longer available for his ordinary debts. It appears to me that

no separate interest was here given to the wife so as to be separate estate in her person unattachable for her husband's debts, and I think therefore that the trustee for creditors was right in refusing to recognise this claim.

LORD KINNEAR—I agree. The effect of this provision was to give £1000 belonging to the husband to the wife to administer for his benefit, and I do not see how her claim to money thus set aside for her husband's benefit can be preferred to that of his creditors.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Ure—Cullen. Agents—Dundas & Wilson, C.S.

Counsel for the Defender and Respondent—Rankine—Maconochie. Agents—Maconochie & Hare, W.S.

Tuesday, July 10.

## FIRST DIVISION.

[Court of Exchequer.

### THE BURNLEY STEAMSHIP COMPANY, LIMITED v. AIKEN (SURVEYOR OF TAXES).

*Revenue—Income-Tax—Profits of Trade—Allowance for Depreciation of Plant—Income-Tax Act 1842 (5 and 6 Vict. cap. 35), Schedule D—Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), sec. 12.*

Section 12 of the Customs and Inland Revenue Act 1878 provides that in assessing the profits of any trade or adventure chargeable under Schedule D of the Income-Tax Act, the Commissioners shall allow such deduction as they may think reasonable as representing "the diminished value by reason of wear and tear during the year" of any plant used for the purposes of the concern.

Held that a shipowner was not entitled under this section to an allowance for depreciation in the value of his ship caused by better vessels being built.

The Burnley Steamship Company, Limited, the owners of the steamship "Burnley," which was employed for carrying cargo for hire, were assessed, under Schedule D of the Income-Tax Acts for the year ending 5th April 1894, on the sum of £327. They appealed against the assessment to the Commissioners for General Purposes, objecting that a sufficient sum had not been allowed in respect of diminished value under the provisions of the Customs and Inland Revenue Act 1878. The depreciation allowed to the company under the assessment had been fixed on the basis of deducting 5 per cent. from the cost of the

ship for the first year of the existence, and of deducting 5 per cent. from the written down value from each subsequent year.

After hearing evidence the Commissioners found the deduction at the rate of 5 per cent. upon the written-down value from year to year reasonable in the case of a vessel such as the "Burnley," if applied as an average rate over a series of years, and accordingly confirmed the assessment.

The company being dissatisfied with this decision, the present case was stated for the opinion of the Court of Exchequer.

The following note was appended to the case—"The Commissioners in this case were asked by the appellants to take into consideration, in deciding what rate was just and reasonable, the facts (1) that ships frequently become obsolete and of less earning power before they were physically worn out; and (2) that their market or sale value might and frequently did fall below their value as fixed by the depreciation rate allowed in making the assessment or even that proposed by the appellants. Evidence was led on both these points. The Commissioners are of opinion that the words 'diminished value by reason of wear and tear,' used in section 12 of the Customs and Inland Revenue Act 1878, do not cover (a) loss of earning power owing to plant being rendered more or less obsolete through the introduction of improved or other plant, or (b) diminution in market value apart from its having been caused by wear and tear."

Section 12 of the Customs and Inland Revenue Act of 1878, provides—"Notwithstanding any provision to the contrary contained in any Act relating to income-tax, the Commissioners for General or Special Purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade, chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on." . . .

Argued for the Burnley Steamship Company—The Act of 1842 only provided that allowance should be made for the actual cost of repairs, but under the Act of 1878 it was provided that allowance should be made for diminished value by reason of "tear and wear." These words were susceptible of construction, and should be construed liberally, for the object of the clause was to remove an injustice, and the same considerations which justified an allowance for tear and wear would justify the allowance for which the company contended. Liberally construed, the words "tear and wear" would cover depreciation caused by newer and better vessels being built. This contention derived support