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Tuesday, January 25.

FIRST DIVISION.

GREVILLE-NUGENT'S TRUSTEES *v.* GREVILLE-NUGENT.

Fee and Liferent — Marriage-Contract — Construction—Mineral Royalties.

A husband and wife by an antenuptial marriage-contract conveyed the estate of C, belonging to the latter, to trustees, who were directed to sell it on the request of the spouses or the survivor of them, or after the death of the survivor, at their own discretion. The trustees were to hold the proceeds arising from the sale and pay the "annual income" to the wife during her life, and thereafter, on certain conditions, to her husband.

It was further provided that until the estate should have been sold the trustees should have power "in the meantime to lease the unsold parts, and as to the mansion, whether furnished or unfurnished, for occupation or other purposes, for the best rent that can be reasonably gotten, and to hold the nett proceeds of such sale, and the nett rents and profits of the said Cove estate until sale," for the purposes thereafter declared, with such powers of leasing the lands and hereditaments and other powers necessary and expedient in the execution of the trust.

These "rents and profits" were to be paid to the wife during her life. No express power to work or lease the minerals was conferred upon the trustees.

Quarries had been worked upon the estate at intervals during 100 years, but there had been no working for four years previous to the execution of the contract, the last quarries worked having extended over 13 acres.

The estate not having been sold, the trustees let certain quarries extending over 46 acres, which included the 13 acres last let. In the course of opening the quarries a quantity of timber had to be cut down.

Held that the rent and royalties obtained for the quarries, and the price of the timber, fell to be regarded as capital, and not as "rents and profits," in a question with the liferentrix, and that she was entitled only to the interest of the amounts so received.

By indenture of settlement dated 3rd June 1882, entered into in contemplation of the marriage of the Honourable Patrick Greville-Nugent and Miss Emma Ogilvy, it was agreed that the spouses should convey to trustees, *inter alia*, the estate of Cove in Dumfriesshire, which was the property of Miss Ogilvy, for the following purposes —"upon trust at the request in writing of the said Patrick Emilius John Greville-Nugent and Emma Ermengarda Ogilvy during their joint lives, and of the survivor of them during his or her life, and after the death of both, at the discretion of the said trustees, to sell the same, for which purpose all necessary and usual powers, including power to sell by public auction or private contract, shall be and are hereby given to the said trustees or trustee to contract for and complete the sale and give absolute conveyances and dispositions of the lands and heritages and discharges for the purchase moneys to the several purchasers paying the same, but with the application of which purchase-moneys the purchasers shall have no concern, And in the meantime to lease the unsold parts, and as to the mansion, whether furnished or unfurnished, for occupation or other purposes, at the best rent that can be reasonably gotten, and to hold the net proceeds of such sale and the net rents and profits of the said Cove estate until sale, upon the trusts hereinafter declared of and concerning the same respectively, with such powers of leasing the lands and hereditaments and other powers necessary and expedient in the execution of the trust: And this indenture also witnesseth that in consideration of the premises it is hereby agreed and declared that the said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor or other, the trustees or trustee of these presents (all of whom are herein referred to under the designation of 'the said trustees or trustee') shall hold [certain investments including] the net moneys to arise from the sale of the said estate of Cove and hereditaments in Scotland under the like trusts for sale herein contained, upon trust, to retain any of the investments forming part of the said trust premises in their actual state of investment, or with the consent of the said Emma Ermengarda Ogilvy and Patrick Emilius John Greville-Nugent during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor, at the discretion of the said trustees or trustee to vary the investment thereof, and with such consent or at such discretion as aforesaid, to invest any moneys from time to time forming part of the said trust premises, or held upon the trusts thereof in or upon any of the investments hereinafter authorised, and [subject to the above-mentioned burdens] the said trustees or trustee shall hold all the said trust premises and the investments and annual income thereof upon trust to pay the said annual income during the life of the said Emma Ermengarda Ogilvy to the said Emma Ermengarda Ogilvy for her sole and separate use, and

as to such portion thereof as shall be subject to the law of Scotland, for her sole and separate alimentary use, exclusive of the *jus mariti* and right of administration and courtesy and all other claims of the said Patrick Emilius John Greville-Nugent, and the diligence of creditors, or to such banking account, whether of the said Emma Ermengarda Ogilvy or of the said Patrick Emilius John Greville-Nugent, or partly of one and partly of the other, as the said Emma Ermengarda Ogilvy may from time to time by any revocable writing direct or appoint, but so that the said Emma Ermengarda Ogilvy shall not have power to deprive herself of the benefit of the said annual income or any part thereof by way of anticipation, . . . and it is hereby agreed and declared that until all the said heredi-taments in Ireland, by the hereinbefore recited indenture of even date, expressed to be granted to the said trustees upon trust for sale, and all the said hereditaments in Scotland, known as the estate of Cove, hereinbefore covenanted to be conveyed, assured, or otherwise vested in the said trustees or trustee, upon trust for sale, shall have been sold in pursuance of the aforesaid trust in that behalf, the said trustees or trustee shall pay or apply the rents and profits of the same respective hereditaments and premises, or of so much thereof as for the time being shall not have been sold (after payment thereout of all rates, taxes, payments for insurance against loss by fire, agency charges, costs of repairs, annuities, and other outgoings, which they or he shall think fit and are hereby empowered to pay) to the person or persons for the purposes and in manner to whom and for, and in which the annual income of the investments of the residuary or net moneys to arise from such respective sales would be payable or applicable under the trusts herein contained, if the sale and investment thereof respectively were then actually made." . . .

Mr and Mrs Greville-Nugent were married on 5th June 1882, and thereafter a disposition was executed in accordance with the provisions of the marriage settlement. There was one child of the marriage, Miss Rosa Greville Nugent, who was born in March 1883.

Mrs Greville-Nugent's predecessors had at various periods during the last 100 years worked and let to mineral tenants stone quarries on different parts of the estate of Cove, and one had been worked during her minority, but no quarries had been worked for four years previous to the execution of the marriage settlement, the ground opened up by the workings being about 13 acres at the last date of working. In 1895, the estate not having yet been sold, the trustees granted a lease of quarries over an extent of 46 acres, including the 13 mentioned above, at a yearly rent of £100, with a royalty which in 1896 amounted to £255. In connection with the quarry it had been necessary to cut down some trees on the ground to be excavated. For the purpose of ascertaining the rights of parties in the quarry rents and royalties, and in the proceeds of the sale of the timber, a special case was presented by (1) the marriage-contract trustees, (2) Miss Greville-Nugent, and (3) Mr and Mrs Greville-Nugent. The first two parties contended that these were to be treated as capital in a question with the third parties, and that Mrs Greville-Nugent was entitled only to interest on the amount, while the third parties contended that her right being that of a liferentrix by reservation, she was entitled to the whole amount as income.

The questions submitted for the judgment of the Court were—"(1) Is Mrs Greville-Nugent entitled, under the provisions of the said marriage settlement, to receive as part of the annual income of the trust settlement (*a*) the rent and royalties received in respect of the stone quarries on the estate of Cove, and (*b*) the price of the trees on the said estate cut down in connection with the quarry workings and operations? or (2) Do the said rent and royalties, and the price of the said trees, fall to be regarded as capital in a question with the third parties, and is Mrs Greville-Nugent only entitled to receive interest at 4 per cent. on the principal sums received by the first parties as rent and royalties of the said quarries, and as the price of the said trees?"

Argued for the first and second parties—The proceeds of this quarry were to be treated as though they were invested money, and the interest of them was to be paid to the liferentrix. The general scheme of the settlement was that Cove should be held for the purposes of realisation, the sale being the principal purpose, the fee going to the child, and the yearly proceeds *salva substantia* to the liferentrix. If the estate were sold, the price obtained for the minerals would be looked on as capital, and there was no reason that it should be differently treated now. The position of the liferentrix did not fall under the principles of the cases quoted by the third parties, for the quarry was not being worked at the date of the settlement, and no power to reopen or to let it was conferred on the trustees. It might be that where a quarry was opened at the time the trust was constituted, a liferenter would be entitled to the profits, but the fact that it had been previously worked did not give any such right if it were not open at the time—*Guild's Trustees* v. *Guild*, June 29, 1872, 10 Macph. 911, did not apply, because there the *corpus* of the estate was not diminished by the operations. As regards the contention that there was here a liferent by reservation, and that accordingly the liferentrix was outside the ordinary rule, this was not in point of fact a liferent by reservation, and the rights of the parties must depend upon the conditions in the settlement. But in any case the opinion of the Lord Justice-Clerk in *Guild* v. *Guild* on the rights of such a liferenter to mineral rents, was *obiter*, and in opposition to Erskine's views — Ersk. ii. 9, 58. The only other exception to the general rule was where a right to minerals was expressly conferred, as in *Baillie's Trustees* v. *Baillie*, December 8,

1891, 19 R. 220. The power given to the trustees to let during the period before selling was clearly only temporary, for administrative purposes, and could not enlarge the right of the liferentrix. Nor was she entitled to the timber—*Macalister's Trustees* v. *Macalister*, June 27, 1851, 13 D. 1239; Erskine, *ut supra*.

Argued for third parties—This was a case of a fiar conveying an estate for matrimonial purposes, who might possibly become a fiar again, and accordingly this deed was not to be treated as a will establishing a liferent by constitution. Accordingly, the case of *Eiston* v. *Eiston*, June 10, 1831, 9 S. 716, was precisely in point—*Guild's Trustees* v. *Guild, supra;* Stair ii. 3, 74; ii. 6, 11. If the property were sold the liferentrix would undoubtedly get the interest on the whole amount realised, and it was only natural to suppose that she was intended to get the whole yearly proceeds before such sale. The quarries had been already worked, and accordingly the parties must have had in contemplation the probability of their being worked again—*Campbell* v. *Wardlaw*, July 6, 1888, 10 R. (H. of L.) 65. Moreover, there was here no danger of exhaustion of the minerals, and no damage to the amenity of the estate. Looking to the general terms of the deed, it was clearly intended that the trustees should be entitled to let the minerals, and that the liferentrix should get the proceeds. As regards the wood, in the same way, as being practically a liferentrix by reservation she was entitled to the price obtained —*Ferguson* v. *Ferguson*, July 26, 1737, M. 8254.

At advising—

Lord President—The main question in this special case is as to certain rent and royalties received by the marriage-contract trustees in respect of stone quarries on the estate of Cove which have been let by them.

Mrs Greville-Nugent had succeeded to the estate of Cove, and on her marriage she conveyed it to her marriage-contract trustees. Her rights in that estate are now governed by a deed of settlement or indenture between the bride, the intended husband, and the trustees. Accordingly Mrs Greville-Nugent's right to the rent and royalties now in dispute, however it may be illustrated by a regard to her original rights as proprietrix, or the common law rights of a liferentrix, or other cognate topics, is to be determined by the stipulations of this deed of agreement.

The argument for Mrs Greville-Nugent is plain enough. The trustees, says she, have power to let the lands of Cove; the rents and profits of those lands, so long as unsold, are to be paid to the person who under the deed is to receive the interest on lands sold, and I am that person. So far I think that Mrs Greville-Nugent is right. The passages which show what the lady is entitled to are on p. 9, on p. 10, and on pp. 12 and 13. This last passage, I am satisfied, applies to Mrs Greville-Nugent; and the result of the whole is that the rents and profits of land let by the trustees, under the powers appointed to them until Cove is sold, go to Mrs Greville-Nugent, she being the person who is entitled to the income of money arising from sale.

But then the question remains, Is this a lease authorised by the deed of settlement? and are the rents and royalties paid for this stone rents and profits of the Cove estate in the sense of the deed?

Now, the main purpose of the trust, so far as the estate of Cove was concerned, was to sell it. It is true that this is to be done at the request of the spouses during their joint lives, and of the survivor during his or her life, and after the death of both, at the discretion of the trustees. But not the less is the sale of the estate the leading purpose of the trust, and the directions as to its use until sale are conceived as being temporary. It is in this view that the trustees are given power to lease "in the meantime"—(it is rather curtly expressed, and with no great amplitude of expression)—"to lease the unsold parts, and, as to the mansion, whether furnished or unfurnished, for occupation or other purposes, at the best rent that can be reasonably gotten, and to hold the net proceeds of such sale and the net rents and profits of the said Cove estate until sale upon the trusts hereinafter declared, of and concerning the same respectively, with such powers of leasing the lands and hereditaments and other powers necessary and expedient in the execution of the trust." The trustees, deeming themselves to have power to do so, have granted a lease of the stone within an area of 46 acres; the stone is being worked out by the mineral tenants; they have paid to the trustees the rents and royalties now in dispute; and the question is whether these moneys are rents and profits payable to Mrs Greville-Nugent.

The power to let, as already pointed out, does not purport to relate to minerals. Accordingly, I take it to be clear that the power to let, being, as it is, related to and in support of a life interest in rent and profits, would not apply, even in the case of a testamentary trust to more than opened quarries. The present deed being not the will of the proprietor of the estate, but a contract, it is far from clear that the same inference of intention is admissible to affect the stipulation of parties, of whom one is the proprietrix and the other a stranger. Again, the facts as stated in the special case do not bring the case within the rule in question. There was no quarry being worked at the date of the deed of settlement, and no stone had been quarried for four years previously. The stone let under the lease in question is the stone over an area of 46 acres, of which area only 13 acres had been let before, while as regards the remaining 33 acres all that can be said is that there had been intermittently more or less working at several places. The fact that there had been working, within the area of the present lease at one place or another at intervals over 100 years, according as it was found profitable, does not materially alter the situation or assimilate

this case to that of an opened mine.

When we accordingly revert to the terms of the deed of settlement, the view that mineral leases are not contemplated is greatly supported by the fact that in the scheme of the deed of settlement the stage of the trust before the sale of Cove is transitory and provisional. In the administration during this period it is not readily to be held that a fresh start is to be made with quarrying, and that the substance of the estate is to be treated as profits. Reading the power to let and the disposition of the rents as correlated, it seems to me that the just conclusion is that they do not apply to minerals. The minerals having *de facto* been wrought, the money paid for them must follow the destination of the fee of the estate and be treated as capital.

It seems perfectly clear that the price of the timber is also to be held to be capital.

I am for answering the first alternative query in the negative, and the second alternative in the affirmative.

LORD ADAM—The questions in this case arise upon the construction of a deed of settlement on the marriage of Mr and Mrs Greville-Nugent dated 3rd June 1882, and which we should call an antenuptial marriage-contract.

At that date Mrs Greville-Nugent, then Miss Ogilvie, was proprietrix of the estate of Cove in Dumfriesshire, and by the contract she bound herself to convey that estate to the trustees therein named, upon trust, at the request of her husband and herself during their joint lives, or of the survivor of them, and after the death of both, at the discretion of the trustees, to sell the same, and all necessary powers of sale were given them for that purpose. Power was also given to them in the meantime to lease the unsold parts of the lands, and they were directed to hold the proceeds of the sale, and the net rents and profits of the Cove estate until sale, upon the trusts therein declared.

These were that they should hold certain investments, including the nett moneys to arise from the sale of the estate, but not, it will be observed, including the rents and profits of the estate until sold, in trust to pay the annual income thereof to Mrs Greville-Nugent for her sole and separate use, and after her death, to her husband, under certain conditions which need not be mentioned, and after their death for the children of the intended marriage.

As regards the rents and profits of the estate until sold, or of so much thereof as should not have been sold, the trustees were directed to pay and apply them to the person or persons, for the purposes and in manner, in which the annual income of the residue or nett money to arise from such sales would be payable or applicable, if the sale and investment thereof were then actually made. Mrs Greville-Nugent is the person who would at present be entitled to the annual income of the moneys arising from the sale of the estate.

These being the provisions of the trust settlement, the facts which raise the present questions are that the estate not having yet been sold, the trustees on 11th June 1895 let certain quarries in the estate to tenants who pay therefor a fixed yearly rent of £160 or a royalty of one-twelfth of all stone quarried. These yielded in the year ending July 1896 a rent or profit of £225, 19s.

There is only one child of the marriage, Miss Greville-Nugent, who is the party of the second part, and the question is whether Mrs Greville-Nugent is entitled to receive the rent and royalties received in payment of the quarries so let, or whether the rent and royalties are to be regarded as capital of which she is only entitled to the income.

It appears to me that the rents and profits which the trustees are directed to pay to the liferenter are the annual rents and profits arising from the estate — the *corpus* of the estate being kept intact.

But the lease under which the rents and royalties are received is a lease of minerals, and the true nature of such a lease was pointed out by Lord Cairns in the case of *Gowans* v. *Christie*, and was adopted by the House of Lords in the case of *Campbell* v. *Wardlaw*.

Speaking of such leases he says :—"There is no fruit—that is to say, there is no increase, there is no sowing and reaping on the ordinary terms, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out-and-out of a portion of land. It is liberty given to a particular individual for a specific length of time to go into and under the land and to get certain things there if he can find them, and to take them away just as if he had bought so much of the soil."

If, then, the rent and royalties payable under the lease are to be considered as the equivalent or price of a portion of the estate sold and removed, it is sufficiently clear that they must be treated as capital, to the income of which only Mrs Greville-Nugent is entitled—unless it appears from the contract that the parties thereto otherwise intended.

It is true that in previous years quarries had been opened and worked at different parts of the lands included in the mineral lease, but at the date of the contract, and for years before, no quarries were being worked. Had the lease of the quarries been in force at the date of the contract, it might perhaps have afforded a presumption that the contracting parties intended that the rents and royalties thence arising should be included in the rents and profits which they were directed to pay to the liferenter. But I do not think that there is any such presumption when the quarries were neither let nor being worked at the time.

I think, therefore, that Mrs Greville-Nugent is not entitled to payment of the rents and royalties in question, and on the same grounds I think that she is not entitled to the price of the wood cut down.

I am of opinion, therefore, that the first question should be answered in the negative.

LORD M'LAREN and LORD KINNEAR concurred.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for First and Second Parties—Guthrie, Q.C.—Taylor Cameron. Agents—Menzies, Black, & Menzies. W.S.

Counsel for Third Parties—Rankine, Q.C.—Sym. Agents—Torry & Sym, W.S.

Tuesday, January 25.

FIRST DIVISION.

[Lord Low, Ordinary.

DUNN *v.* PRATT.

Trust— Proof—Mandate—Act 1696, *c.* 25.

In an action raised against the purchaser of certain heritable subjects to have it declared that the missives of sale had been entered into by him on behalf and for behoof of the pursuer, and that he should be ordained to denude of the subjects, the pursuer averred an agreement between himself and the defender to the effect that the pursuer should purchase the subjects, but that the defender should conclude the purchase in his own name, and that the disposition should thereafter be taken in the pursuer's name. The defender, who was not a law-agent, pleaded that this averment could only be proved by his writ or oath.

Held (*aff.* judgment of Lord Low—*diss.* Lord Kinnear) that the defender's plea must be sustained, in respect (1) that the pursuer's averments disclosed a case of trust, not of mandate; and (2) that the missives of sale were "a deed of trust" in the sense of the Statute 1696, c. 25.

Duggan v. *Wight*, 3 Pat. App. 610, *followed.*

John Armstrong Dunn raised an action against Adam Pratt, clothier, Aberdeen, to have it declared that the missives of sale of the shops 15 and 17 Broad Street, Aberdeen, entered into between Alexander Blacklaw, solicitor, and the defender, whereby the latter purchased these subjects from the former, "were entered into and subscribed by the said Adam Pratt on behalf of the pursuer, and for behoof of the pursuer, his heirs and assignees, and the defender ought and should be decerned and ordained to denude of the said shops, . . . and of all right, title, or interest which he may have or pretend to have in the same, and to convey and make over the said shops . . . to the pursuer, and that by granting all deeds requisite and necessary with the writs and evidents thereof."

The pursuer averred that in January 1897 Mr Blacklaw was employed to sell the subjects in question, of which the premises occupied by the pursuer formed part. "(Cond. 3) Mr Blacklaw had been in communication with Messrs Esslemont & Macintosh, warehousemen, who occupy neighbouring premises, regarding a sale of the said property to them, when the defender, fearing lest he should have to remove from his shop in the event of Messrs Esslemont & Macintosh acquiring the property, on or about 22nd January 1897, and in the pursuer's shop, asked the pursuer to enter into a joint speculation for the purchase of the property. The pursuer declined this proposal, but as the property is almost contiguous to his own, the pursuer said he would not be averse to buy it himself. It was then agreed between the pursuer and the defender that the pursuer should buy the property on his own account, and should let to the defender the premises which he (the defender) occupies at a rent of £100. The pursuer thereupon sent the defender to Mr Blacklaw to ascertain the lowest figure the sellers would accept. The defender, after an interview with Mr Blacklaw, reported that nothing less than £3650 would be accepted, and that Mr Blacklaw was to let him know next day if such offer would be accepted from anyone other than Esslemont & Macintosh. (Cond. 4) Next day the defender visited the pursuer's shop several times regarding the proposed purchase, and at one of these interviews produced a letter from Mr Blacklaw stating that he was authorised to accept the first offer for £3650, and that a deposit of £500 would be required. The pursuer and defender thereupon confirmed the agreement to which they had come, that the pursuer would buy the said property, and lease the premises occupied by the defender to him at an advanced rent. The pursuer also consented to be responsible for the deposit of £500. The pursuer and defender, then, in the pursuer's back shop, drafted a letter of offer in the defender's name, and on the same being extended, the pursuer authorised the defender to go with it to Mr Blacklaw and to conclude the purchase of said property. It was agreed between the pursuer and the defender that the pursuer's name as purchaser was not to be divulged to Mr Blacklaw in the meantime, the view of both pursuer and defender being that the sellers would deal more favourably with the sitting tenant than with an outsider. (Cond. 5) The defender thereupon returned to Mr Blacklaw with the said offer, and asked Mr Blacklaw to accept the pursuer as cautioner for £500 instead of insisting on a deposit to that amount." Mr Blacklaw agreed to do so, missives of sale between him and the defender were signed, and the pursuer's signature as cautioner was obtained. "(Cond. 6) The pursuer gave the defender the said authority to conclude said bargain in his own name on the understanding and agreement that the disposition by the seller of said property would be granted and taken in the pursuer's name, and that the pursuer would, before the settlement of the transaction between the seller and the pursuer, grant the defender a lease of the said premises occupied by him."