

as being within the burgh, for though the proof is conflicting, I think the Magistrates have established the fact that the property is within the burgh. I do not hold, with Lord Benholme, that because the other side is not occupied by a similar feu, you cannot come to the conclusion of dividing this stream, because supposing the Magistrates had feued it, and in the same terms, the result would unquestionably have been the division of the subject. I may say, moreover, that I do not consider, with reference to a subject of this kind, which appears to be a considerable extent of ground, it is to be dealt with as a mere stance for the house. I think it is of the nature of a villa subject; and with reference to villa subjects, I should apprehend that the vicinity of a stream, which whatever its character may be at the present day, at the time these grants were made, does not appear to have been otherwise than pure and limpid, would be a consideration to a man who is to build. So far as the actual fact is disclosed it would appear that the principal portion has been laid out as a garden, and as regards a garden it must make a considerable difference whether you are on the margin of a running stream, or whether you are to have thrown over the space immediately opposite your garden a stance for carts on market days. I agree, therefore, with your Lordships in holding that there has been here an innovation of the original grant to the effect of it being an attempted substitution of a boundary differing essentially in its nature and conditions. In point of fact the effect of these operations is plainly making the boundary not the stream, but the 14-inch abutment on which the archway of the bridge is to be raised. The fear will therefore no longer be able to get at the stream, which is said to be his boundary, but will have interposed between him a wall of thickness sufficient to deter him from getting at the water. No doubt it is said you should not have built your wall there. That is another matter. It seems to me the wall so built might be altered if the fear pleased, or he might have made other arrangements, and therefore I think, independently of the question of property, as to which I agree with the Lord Ordinary, there is here an invasion of a right, against which the party is entitled to obtain redress. I think the party has the rights of a riparian proprietor, and that this is an attempt to exclude him from the stream, and that therefore these are operations which cannot be justified. I think therefore there are clear grounds on which this interlocutor of the Lord Ordinary's should in its substance be maintained. I hold, in the first place, that the property is clearly vested in these suspenders, and, in the second place, that the operations involve an alteration in the essential condition of the boundary, and an alteration which is injurious to these suspenders.

The Lord Ordinary's interlocutor was accordingly adhered to, subject to a modification in the prayer of the petition for interdict as referred to in the opinion of Lord Neaves.

Agents for Suspenders—Jardine, Stodart, & Fraser, W.S.

Agent for Respondents—W. Mitchell, S.S.C.

Friday, May 24.

LANG AND HUSBAND v. BROWN AND OTHERS.
Husband and Wife—Postnuptial Settlement—Mutual Conveyance—Onerosity—Power to Revoke—

Liferent—Fee—Spes successiois. Held that a mutual conveyance by spouses of their property which should be possessed at the time of death to one another in liferent and to a third party in fee, with a reserved power to revocation during the joint lives of the granters, imported no more than a *spes successiois* in that party, and a gratuitous conveyance made by one of the spouses after the death of the other, to the prejudice of the far under the mutual settlement, sustained as valid.

The late Robert Marshall and his wife executed a mutual postnuptial settlement with a view "to regulate their respective successions," by which the husband conveyed to the wife in fee all the property of which he should be possessed at the time of his death; and the wife, on her part, conveyed all the property of which she was or should be possessed at the time of her death to the husband in liferent and her daughter by a previous marriage, the pursuer, Mrs Lang, in fee, power of revocation being reserved to both parties during their joint lives. Mrs Marshall survived, and subsequently made a gratuitous conveyance of all her property to her sister, the defender Mrs Brown. Mrs Lang brings a reduction of this conveyance, on the ground that the provision in her favour, contained in the settlement of her mother and Mr Marshall, was onerous, and could not be defeated by a gratuitous deed, and that under it she was entitled to all the property of which her mother died possessed.

The Lord Ordinary (ORMIDALE) sustained this contention, and reduced the deed.

The pursuers reclaimed.

D. F. MONCRIEFF and MACKENZIE, for them.

SOLICITOR-GENERAL and CRICHTON, in answer.

At advising—

LORD COWAN—The deed under reduction was executed by the now-deceased Mary Murray or Marshall, of date 4th September 1852. It conveys irrevocably certain heritable subjects situated in East Regent Street, Glasgow, to the defenders in liferent and fee respectively, under reservation of the grantor's own liferent. It was followed by infetment, the instrument of seisin being expedite and duly recorded the same date with the deed. While the conveyance in fee took instant effect, the subjects remained in the possession of Mrs Marshall under her reserved liferent until her death. This occurred shortly previous to the institution of this action in 1865.

It is not disputed by the defenders that this deed was gratuitous. The narrative states in express terms that it is granted for "love and favour which I have and bear to my sister" and to her children, to whom in liferent and fee the subjects are conveyed. And although "other good causes and considerations" are mentioned, the argument, it is conceded, must proceed on the footing of the conveyance being purely gratuitous.

The pursuer is the only child of Mrs Murray or Marshall, by her first marriage to William Gillespie. This marriage was dissolved by Gillespie's death in 1832. Something is said in the record as to the property which the pursuer's father, Gillespie, possessed at his death, and as to his widow's (after Mrs Marshall) intromissions therewith. But it is to be kept in mind that in the present action we have nothing whatever to do with these matters, or with any question connected with Gillespie's affairs. The whole statements of that kind are quite irrelevant, as will be immediately apparent.

Mrs Murray or Gillespie was married to her second husband Robert Marshall in 1833; and it is

upon the terms of a mutual disposition and settlement, entered into between these parties in November 1843, that the pursuer maintains her right to challenge the conveyance by Mrs Marshall in 1852 in favour of the defenders.

The ground of reduction is, that by the mutual deed of 1843 a *jus crediti* was vested in the pursuer, entitling her to challenge any deed executed by her mother, having the effect of conveying gratuitously any of the estates or effects which should belong to her at death, to the prejudice of the pursuer's right of succession, so secured to her, as alleged, under the postnuptial deed of her mother and her second husband Robert Marshall. A protected right of succession—rendering nugatory every gratuitous alienation of her property by Mrs Marshall to the pursuer's prejudice, no matter what, whether heritable or moveable estate, and whether valuable or comparatively trifling, nay whether *inter vivos* or *mortis causa*—was bestowed by that deed upon the pursuer; and on this sweeping general ground it is, and on no other, that the conveyance in 1852 of this special heritable property in East Regent Street is pleaded to be reducible as *in fraudem* of the pursuer's alleged right.

That this is the true issue to which the case comes, cleared from the irrelevant matter in the record, and which has been the subject of much unnecessary proof, will be at once appreciated—when the fact is explained, that the subjects of the conveyance under reduction were purchased, one-half of them by Robert Marshall and the other half by Mrs Marshall, after her second husband's death. By the mutual deed, Mrs Marshall acquired her husband's half, and the other was purchased with her own money. In the whole subjects she was feudally vested at the date of the deed under reduction, in 1852. Unless, therefore, the pursuer be successful in establishing her alleged right of protected succession, or *jus crediti* as she calls it, to succeed to her mother in respect of the provisions of the mutual settlement, to which she was no party, of November 1843, there is absolutely no ground on which the conveyance of 1852 can be impugned. The whole question resolves into and depends on the legal import and effect of the mutual deed.

The parties to the mutual deed had been married for ten years without any children of the marriage. The wife had been previously married to a person of the name of Gillespie, and had an only child, the pursuer, Jane Gillespie, afterwards married to John Lang. In this state of matters the mutual settlement was executed by the spouses on the narrative that at the date of their marriage no contract was entered into between them, and that it was proper to make arrangements “to prevent dispute relative to our respective successions at the death of either or both of us.” Marshall on the one hand, in consideration of his wife's conveyance, makes over to her and her heirs, executors, and assignees whomsoever, the whole estate, heritable and moveable, belonging or that should belong to him at the time of his decease; and, on the other hand, his wife, in consideration of her husband's conveyance, makes over to him in liferent for his liferent use alienarily, and to and in favour of her daughter, her heirs, executors, or assignees in fee, the whole estate, heritable and moveable, belonging or that should belong to her at the time of her decease. An obligation is imposed upon the respective heirs of the spouses, to make effectual the deed, and the survivor of them is nominated sole executor or executrix of the first predecessor. The deed further

contains reservation of their respective liferents in the several estates, “with full power to us at any time during our joint lives to alter, innovate, or revoke these presents in whole or in part as we may see proper; but declaring always that the same so far as not altered, innovated, or revoked shall be effectual though found lying by either of us at the time of his or her decease, or in the custody of any other person for our behoof,” &c.

The legal character of this deed, in so far as the rights and interests of the spouses are concerned, does not admit of dispute. It was a contract, the provisions of which neither the one nor the other could alter or recal by any act or deed not consented to by the other, whether *inter vivos* or *mortis causa*. The administration of their several properties remained in them respectively on the same legal footing as if the deed had not been executed, but upon the death of either, the conveyance in favour of the other became operative, and could not be disappointed by the gratuitous acts or deeds of the predecessor. On the one hand, the husband's predecease carried to his wife the whole of his estate belonging to him at his death in fee. On the other hand, the wife's predecease must have had the effect of carrying to her husband the liferent of the whole of the means and estate, heritable and moveable, which belonged to her at the time of her death. So far there was mutuality in the deed, fixing on it the character of an onerous deed, and irrevocable, unless by the joint act of the parties in terms of the reserved power to that effect. But beyond the several provisions contracted for and arranged between the spouses, there was no mutuality in the deed to impress upon it an irrevocable character. On the contrary, the destination to take effect at her death of the fee of her estate, heritable and moveable, in favour of her daughter and her heirs, executors, and assignees, was gratuitous and testamentary, and therefore revocable at any time of Mrs Marshall's life.

There may be inserted in a mutual deed of this kind an obligation in favour of the respective heirs of the spouses under which the heirs of the predecessor may enforce their right of succession upon the death of the surviving spouse in competition with his or her gratuitous donees or executors. And all the cases which have a real bearing on the question to be decided were of this character. Take in illustration the case of *Wood v. Fairlie or Millar*, 4th December 1823. The parties having no issue executed a mutual settlement of postnuptial contract, disposing to themselves and the longest liver of them, and to the heirs and assignees of the survivor, the whole estates, heritable and moveable, belonging to them or either of them at the dissolution of the marriage—*subject to the declaration* that after the death of the survivor, his or her heirs or executors should be obliged to pay to the heirs, executors, or assignees of the predeceaser the just and equal half of the value of the subjects belonging to them at the dissolution of the marriage, in so far as the same should remain free and undisposed of at the time of the survivor's death. The Court had no difficulty in giving full effect to this obligation in a question with the surviving spouse's gratuitous donees. And in like manner the case of *Gentles v. Aitken*, 22d June 1826, merely established this proposition, that “provision by a wife in a postnuptial contract in favour of her husband's children by a former marriage was not revocable by her after her husband's death”—payment

of that provision being held to have been the stipulated consideration for the liferent of the husband's moveable estate given to the wife. Lord Glenlee states the principle thus:—"This provision is an ingredient in the counter stipulations to what is given to the wife." And he adds that legacies may be given in a contract to strangers: "And where it is clear that they are not in lieu of the other stipulations, they will be revocable, as if in a separate deed; but the provision here was a counter stipulation in favour of the husband's family, and irrevocable."

The destination contained in the deed now under consideration is of an essentially different character. It forms no part of the mutual stipulations of the spouses. The second husband of Mrs Gillespie or Marshall was noways interested in the daughter of his wife's first marriage, and no question arises with which any relation of his, as his heirs and representatives, are concerned. On his predecease he gave over all the estate he might possess to his wife and her heirs and assignees. This conveyance took effect. The counter stipulation in the contract by which, had he been the survivor, he would have got the liferent of his wife's whole estate, heritable and moveable, became abortive by his predecease. No counter stipulation remained to be fulfilled by his wife under the provisions of the deed, in so far as it constituted a mutual contract. And from the moment of her husband's death Mrs Marshall, as owner of her own estate and effects, possessed them disburdened of the liferent right for which her husband had stipulated as absolutely as if the mutual deed had not been executed. The destination to her daughter, Jane Gillespie, contemplated the survival of her mother's second husband, which did not occur. That might suffice to render it thenceforth of no avail; but the bequest was, moreover, revocable from its very nature as testamentary.

The true view of the deed is, that, in so far as the interest of the contracting spouses respectively were concerned, it was irrevocable unless by mutual consent; but that in providing, on a certain event which did not occur, for the succession to Mrs Marshall's estate when she should die, it was testamentary and revocable. Deeds intended for this very purpose are frequently met with in practice, and have been the subject of decision. The case of *Sommerville's Trs.*, decided in this Division of the Court 3d March 1865 (recently affirmed in H. of L.), may be referred to in illustration, where, in a postnuptial-contract, even in a question with the child of the marriage, a destination of his whole estate, as at his death, was held to be revocable. No doubt every deed of the kind requires to be construed in reference to its own terms and provisions. But where onerosity cannot be pleaded by parties for whose behoof the predeceasing spouse has made special stipulation, the gratuitous regulation of the surviving spouse's own succession, as it should exist at death, is inherently revocable. Nor is its character in that respect in the least affected by the destination being made in favour *nominatim* of the party at the time intended to be benefited by his succession. This is the case in every testamentary deed.

On these grounds I consider that the special conveyance of the heritable subjects by the deed under reduction of 1852 was not *ultra vires* of Mrs Marshall, nor *in fraudem* of any right of succession to the *universitas* of her estate conferred on the pursuer by the mutual deed of 1842. What be-

came of Mrs Marshall's general estate and effects—whether the pursuer, as her only daughter, succeeded thereto under the destination in her favour by the mutual deed, or by any other deed, or as her heir and representative, does not appear from any facts in the record. Nor is it of any consequence. The sole question is, Whether the granter had deprived herself of the power to execute the deed of 1852? I think she clearly had not, and am therefore of opinion that the interlocutor of the Lord Ordinary ought to be altered, and the defenders assolvizied from the reduction.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly recalled, and the defenders were assolvizied.

Agents for Pursuers—Morton, Whitehead, & Greig, W.S.

Agents for Defenders—Duncan & Dewar, W.S.

Friday, May 24.

MURRAY'S EXECUTORS v. CARPHIN AND OTHERS.

(*Ante*, vol. ii. p. 198.)

Fraud—Common Law—Bankrupt—Act 1621, c. 18—Antenuptial Contract—Jus crediti—Reduction. 1. Held that an antenuptial-contract of marriage is an onerous deed in the sense of the Act 1621, c. 18, and is not liable to be set aside under the statute at the instance of prior creditors of one of the parties to it. 2. Circumstances in which held that an antenuptial-contract of marriage creating a *jus crediti* in favour of children was reasonable and not liable to be cut down as excessive. Question, How far an antenuptial-contract of marriage is liable to be cut down *quoad excessum*, either under the Act 1621, c. 18, or at common law?

This is a question between Mr Clapperton and Messrs Kennington & Jenner, merchants, Edinburgh, and Mr James Rhind Carphin, judicial factor on the estate of Mr and Mrs Johnstone. Mrs Johnstone's father died leaving three children (two daughters and a son) and a will, by which he provided that his estate should be divided into three equal shares, one to be taken by each of his children, the shares to vest in the daughters upon their attaining majority or their being married, and the share in the son at majority. Mr Murray's will declared these shares to be alimentary and exclusive of the *jus mariti* of the daughters' husbands. Before majority Mrs Johnstone became engaged to her present husband, and as he had no means wherewith to set up a house, it was arranged with Mrs Johnstone and her father's executors that a sum of £400 should be uplifted from her share in her father's estate, and set apart for the purchase of furnishings for the house. She then entered into a contract of marriage with her husband, by which she conveyed to trustees the balance of her funds, amounting to about £1200, that they might, in the first place, pay to herself the annual proceeds of it, and on her death to her husband, and on the failure of both, keep it for the benefit of children to be born of the marriage. Mr Johnstone, on his part, undertook reciprocal obligations in favour of his wife. The parties were married on the 14th April 1863, and soon after the husband's estates were sequestrated.