

Tuesday, May 23.

FIRST DIVISION.

HUNTER AND ANOTHER
(MONTGOMERIE'S TRUSTEES) v.
ALEXANDERS.

Succession—Trust—Faculties and Powers—Power of Disposal by Mortis causa Deed—Marriage Contract of Donee of Power, Prior in Date to the Gift of the Power and Conveying Acquisita and Acquirenda—Exercise of Power.

Marriage Contract—Provisions by Wife, Failing Children of the Marriage, in Favour of Husband's Children by Former Marriage—Contractual or Testamentary—Revocability.

Mrs A. by her antenuptial contract of marriage, dated 20th March 1878, conveyed to trustees "the whole property, heritable and movable, now belonging or resting-owing to her, or that shall in any way pertain and be owing to her during the subsistence of the said marriage, including therein the means, estate, and provisions made or to be made in her favour by her mother" Mrs M., "surrogating and substituting the said trustees and their foresaids in her full right and place of the premises, with the same powers in every respect as she herself enjoyed before the granting hereof." The contract provided that in the event, which happened, of the marriage being dissolved by the death of A, the husband, without issue surviving, the trustees should pay the income to Mrs A. during her life, and on her death convey the capital to the children of A in fee. Mrs M. died on 28th May 1878, *i.e.*, about two months after her daughter's marriage, leaving a trust-disposition by which she conveyed her whole estate to trustees, and directed them to divide the residue thereof equally between her two daughters, Mrs A. and another, and to hold their respective shares for their liferent use allanarly, and on the death of the daughters respectively to divide their respective shares equally amongst their children respectively "and in the event of the death of my daughters without issue . . . the shares of my daughters shall be disposed of in such way and manner as my daughters shall direct by any *mortis causa* deed or deeds to be executed by them respectively to take effect at their deaths, and failing any such deed or deeds then the respective shares shall be divided by my trustees amongst their nearest in kin." Mrs A. died on 12th July 1910, predeceased by her husband and without issue of the marriage, but survived by four children of her husband by a former marriage. She left a trust-disposition and settlement by which she conveyed the whole estate belonging to her or over which she might have a power of disposal, and

particularly the estate falling to her under her mother's settlement, to trustees.

Held that the shares of Mrs M.'s estate, over which Mrs A. had a power of disposal, fell to be paid over to Mrs A.'s testamentary trustees, and not to her husband's children, because (1) the conveyance of *acquirenda* in a marriage contract was not a good exercise of a power of appointment which did not exist at the date of the contract; and (2) in any case, the provisions in the contract by the wife in favour of the husband's children by a former marriage were not contractual, and had been revoked by Mrs A.'s settlement.

A Special Case was presented for the opinion and judgment of the Court by Adam Hunter and others, the trustees acting under the trust-disposition and settlement of Mrs Helen Hamilton or Montgomerie, dated 22nd November 1876 (*first parties*); James Cotton or Colin Montgomerie and others, the trustees acting under the contract of marriage, dated 20th March 1878, between John Alexander and Miss Katherine Mary Montgomerie (*second parties*); Andrew Snodgrass Muir Alexander and others, the only children of the said John Alexander by his first marriage (*third parties*); James Burness and others, the trustees acting under the trust-disposition and settlement by Mrs Katherine Montgomerie or Alexander, dated 17th November 1909 (*fourth parties*); and the said James Cotton or Colin Montgomerie, as an individual, being the heir-at-law of both Ellen Jane Montgomerie and Mrs Alexander (*fifth parties*).

Mrs Helen Hamilton or Montgomerie, who resided at Taymouth Terrace, Broughty Ferry, died on 28th May 1878, leaving a trust-disposition and settlement, dated 22nd November 1876, and registered in the Books of Council and Session 8th June 1878. Mrs Montgomerie by her said trust-disposition and settlement gave, granted, assigned, and disposed to and in favour of her trustees therein named and to be assumed her whole estate as therein mentioned, *inter alia*, for the following purposes, *viz.*—In the third place, she directed and appointed her trustees to divide and apportion the residue and remainder of her estate equally between her daughters, the said Ellen Jane Montgomerie and Mrs Alexander, and hold the shares falling to them respectively for their liferent use allanarly, and pay over to them respectively during their respective lives the interest or annual produce of their respective shares as strictly alimentary provisions—"In the last place, I direct and appoint my trustees, on the death of my daughters respectively, to divide and apportion their respective shares equally amongst their children respectively, share and share alike, and the survivors and survivor of the children of my said daughters respectively, and the issue of any of the said children respectively who

may die leaving issue, such issue being entitled equally to the shares of their respective deceased parent: And in the event of the death of my daughters without issue or issue who may have predeceased them without themselves leaving issue, the shares of my daughters shall be disposed of in such way and manner as my daughters respectively shall direct by any *mortis causa* deed or deeds to be executed by them respectively to take effect at their deaths, and failing any such deed or deeds then the said respective shares shall be divided by my trustees amongst their nearest in kin."

Mrs Montgomerie was survived by her said two daughters. In contemplation of her intended marriage to the said John Alexander, who then resided in Broughty Ferry, Mrs Alexander entered into an antenuptial contract of marriage with him, dated 20th March 1878 (fully two months prior to the death of the said Mrs Montgomerie). Mrs Montgomerie was not a party to the marriage contract. By said marriage contract John Alexander made certain provisions in favour of his intended wife, and renounced his *jus mariti* and right of administration over the whole means and estate, heritable and movable, which then belonged or which might belong to or be acquired by his intended wife during the subsistence of the intended marriage, and declared as regards the same that all deeds, writs, and receipts signed by her should be as sufficient to the grantee and receiver and otherwise as valid and effectual as if she were a single person, or as if the same were concurred in and signed by him as her administrator-in-law. On the other part, the said Mrs Alexander, with the special advice and consent of John Alexander as her intended husband, assigned, disposed, conveyed, and made over to and in favour of the trustees therein mentioned — "All and sundry lands, heritages, goods, gear, debts, and sums of money, and generally the whole property, heritable and movable, now belonging or resting-owing to her, or that shall in any way pertain and be owing to her during the subsistence of the said marriage, including therein the means, estate, and provisions made or to be made in her favour by her mother Mrs Ellen Hamilton Montgomerie, surrogating and substituting the said trustees and their foresaids in her full right and place of the premises, with the same powers in every respect as she herself enjoyed before the granting hereof: Excepting always from this conveyance her paraphernalia; as also any provisions which the first party may hereafter think fit to make in her favour; as also the means and estate acquired or bequeathed to her by Mrs Montgomerie or Carnegie, her aunt; as also any other legacies, bequests, donations, or acquisitions, which she may acquire under any deed of settlement or testamentary writing, all which she hereby reserves to herself."

The trust purposes were—*First*, to pay over the interest or annual proceeds of the said trust property to John Alexander and

Mrs Alexander jointly during the subsistence of the said marriage, and to the survivor of them as a strictly alimentary provision. *Second*, upon the death of the survivor of the said John Alexander and Mrs Alexander, and there being a child or children of the said intended marriage, to hold the trust property until the child or children of said intended marriage had attained majority, or being daughters until marriage, whichever event should first happen, and on the youngest of said children attaining majority, or being married as aforesaid, to make payment of the capital of the said trust property to the said child or children, and the survivors and survivor of them. "*Third*, In the event of the said intended marriage being dissolved by the death of the said Katherine Mary Montgomerie without issue surviving, the said trustees shall pay or convey the capital of the trust property derived from her to and in favour of the said John Alexander in liferent, but for his liferent use alienably, and to his children in fee, in such proportions and manner as shall be directed in any *mortis causa* deed granted or to be granted by the said John Alexander, and failing such *mortis causa* deed then equally amongst the said children and survivors and survivor of them in fee, the issue of any of the said children who may die being entitled to their parent's share: And *Lastly*, In the event of the said intended marriage being dissolved by the death of the said John Alexander without issue surviving, or if the issue should fail before acquiring a vested interest in the capital of the trust property, the said trustees shall pay the annual income of the trust property to the said Katherine Mary Montgomerie during all the days and years of her life, and upon her death shall pay or convey the same to the children of the said John Alexander in fee, in such proportions and manner as she shall direct by any *mortis causa* deed to be granted by her with reference hereto, and failing such deed then equally amongst the said children and survivors and survivor of them in fee, the issue of any of them who may die being entitled to their parent's share."

Ellen Jane Montgomerie died unmarried on the 31st day of December 1879, leaving a trust-disposition and settlement dated 19th November 1879, in which she, *inter alia*, exercised the power of disposal which was conferred upon her by her mother. No question accordingly arose in connection with her share.

Mrs Alexander died on 12th July 1910, predeceased by her husband without issue of the marriage between them, but survived by five children of the said John Alexander by a former marriage. She left a trust-disposition and settlement dated 17th November 1909, and registered in the Books of Council and Session 19th July 1910. By the said trust-disposition and settlement Mrs Alexander assigned, disposed, and conveyed to trustees, for the ends, uses, and purposes therein mentioned, the whole estate, heritable and movable,

real and personal, then belonging and addebted, or which should belong or be addebted to her at the time of her decease, or over which she should have any power of disposal, and particularly the estate falling to her under the trust-disposition and settlement of her mother, with the whole vouchers and instructions, writs, titles, and securities of and concerning the same and all that had followed or might be competent to follow thereon. She also thereby expressly revoked all writings of a testamentary nature previously executed by her.

The fifth party, the heir-at-law of both Ellen Jane Montgomery and Mrs Alexander, intimated to the first parties that he did not dispute the validity of the exercise by Mrs Alexander by her said trust-disposition and settlement of the power of disposal conferred on her by the said Mrs Montgomery, but, at the request of the first parties, he consented to become a party to this case so that all possible interests might be represented therein.

The contentions of the parties were—“The second and third parties maintained that the share in question was payable to them in respect that, in the circumstances which had occurred, the conveyance and directions by Mrs Alexander in her marriage contract operated as an effectual exercise in favour of the third parties as beneficiaries of the power of disposal conferred upon her by her mother's settlement, and that the provisions thereby made for the third parties were irrevocable, and accordingly were not revoked by Mrs Alexander's settlement. The fourth parties maintained that under Mrs Montgomery's trust-disposition and settlement Mrs Alexander had no right to the fee of a share of Mrs Montgomery's estate, but a mere power of disposal thereof, *mortis causa*, in the event of her dying without issue, and that the fee of said share was not conveyed to Mrs Alexander's marriage-contract trustees. Alternatively, they maintained that in the event of the fee of said share being conveyed to the marriage-contract trustees, the contingent interest thereby provided to the children of Mr Alexander's former marriage was not contractual, but only testamentary, and was revoked by Mrs Alexander's trust-disposition and settlement.”

The questions of law were—“(1) Does the share in question fall to be paid over to the second parties for behoof of the third parties? (2) Does the share in question fall to be paid over to the fourth parties?”

Argued for the second and third parties—(1) Mrs Alexander in her marriage-contract had validly exercised the power of disposal given by her mother. She had conveyed her whole property to trustees, and a general conveyance carried property over which the granter had a power of disposal—*Hyslop v. Maxwell's Trustees*, February 11, 1834, 12 S. 413. There was an express conveyance not merely of *acquirenda* generally, but of “provisions made or to be made in her favour by her

mother.” Accordingly it was clearly her intention to exercise any power of disposal she might be given by her mother. This intention must receive effect, and it made no difference that the contract was executed before the power of disposal was conferred—*M'Tavish's Trustees v. Ogston's Executors*, March 10, 1903, 5 F. 641, 40 S.L.R. 458. (2) The provisions in the marriage-contract in favour of her step-children were irrevocable, as being contractual, and they were *mortis causa*, even though the deed as a whole was *inter vivos*—*Barclay's Trustees v. Watson*, June 9, 1903, 5 F. 926, per Lord M'Laren at p. 930, 40 S.L.R. 693; *Macdonald v. Hall*, July 24, 1893, 20 R. (H.L.) 88, per Lord Watson at 94-5, 30 S.L.R. 279; *Mackie v. Gloag's Trustees*, March 6, 1884, 11 R. (H.L.) 10, Lord Watson at p. 17, 21 S.L.R. 465; *Paterson v. Paterson*, February 3, 1893, 20 R. 481, 30 S.L.R. 646; *Nicol's Executors v. Hill*, January 15, 1887, 14 R. 384, 24 S.L.R. 271; *Wood v. Fairley*, December 3, 1823, 2 S. 549 (477); *Kinsman v. Scot*, 1687, M. 12,980; *Fraser on Husband and Wife*, ii, 1410; *Stair*, iii, 8, 28.

Counsel for the fourth and fifth parties were not called upon.

LORD PRESIDENT—The late Mrs Montgomery or Alexander left a trust-disposition and settlement conveying all her property to the fourth parties to this case as trustees. She died without issue, and consequently under the trust-disposition and settlement of her mother, Mrs Hamilton or Montgomery, she had at the time of her death a right of disposal by *mortis causa* deed of a share in her mother's estate. The fourth parties contend that they are entitled to take the property over which that power of disposal existed, but their contention is opposed by the trustees under the marriage contract of Mrs Alexander and her husband and the children of her husband by a former marriage. These are the second and third parties to this case, and they contend that in respect that Mrs Alexander in her marriage contract had made a conveyance of *acquisita et acquirenda*, that conveyance was an irrevocable exercise of the power of disposal which was given to her afterwards under her mother's trust deed.

At the time when Mrs Alexander was married, and at the date of her marriage contract, her mother Mrs Montgomery was alive. Mrs Montgomery's settlement, to which I have referred, provided for the residue of her estate being divided equally between two daughters, Katherine Mary Montgomery, afterwards Mrs Alexander, and another, in equal shares for their life-tenant use alienarily, and at their death equally amongst their children. In the event, which happened in the case of Mrs Alexander, of the death of her daughters without children, she directed that their respective shares should be disposed of in such manner as they respectively might direct by any *mortis causa* deed.

In her marriage contract Mrs Alexander conveyed to the trustees thereunder gener-

ally "the whole property, heritable and moveable, now belonging or resting-owing to her or that shall in any way pertain and be owing to her during the subsistence of the marriage, including therein the said means, estate and provisions made or to be made in her favour by her mother Mrs Ellen Hamilton Montgomerie." The purposes of the marriage-contract trust were to pay the trust income to the spouses jointly during the subsistence of the marriage, and on the death of the survivor of the spouses to pay to the children of the marriage, if there were any, and in the event of the death of the wife without issue surviving to pay and convey the capital of her property to her husband in liferent and to his children by a first marriage in fee. The children of her husband's first marriage are the third parties to this case.

The power of disposal given by Mrs Hamilton or Montgomerie was in these terms—after directing that shares of her residue should be enjoyed by her daughters in liferent and their children, if any, in fee, *quoad* their respective shares, then it was directed that in the event of the death of her daughters without issue, their shares should be disposed of "in such way and manner as my daughters respectively shall direct by any *mortis causa* deed or deeds to be executed by them respectively, to take effect at their deaths."

It seems to me that the contention of the third parties fails in several ways. The cases have gone far enough in holding that where a testator in a general settlement conveys all his property, that carries property that never was his but over which he had only a power of disposal. It has been so decided, and the ground of the decision must be that a testament is ambulatory, and is the last expression of the testator's desire that so far as in him lies his testament should carry everything that it possibly could carry. It seems to me an extension, for which there is no authority whatever, to say that when *acquirenda* are conveyed in a marriage contract, that is a good exercise of a power of appointment which did not exist at the date of the contract. Even if the third parties' contention did not fail in that, when one comes to the marriage contract I find nothing in it that makes the provision in favour of the children of a former marriage contractual. I think that the marriage-contract provisions so far as they applied to these children, were not contractual, and that they were revoked by Mrs Alexander's subsequent settlement. On both of these grounds I am of opinion that the first question should be answered in the negative and the second question in the affirmative.

LORD JOHNSTON—I agree with your Lordship and have nothing to add, except that there is nothing in Mrs Alexander's marriage contract to indicate that she intended to exercise this power to test, even if the terms of her mother's settlement, which had not yet taken effect—for

she survived her daughter's marriage—had been known to her. For the disposal of Mrs Alexander's estate proceeds on the footing that her trustees could be substituted and surrogated in her place, and could apply what they take under her conveyance for the purposes of the marriage contract. The terms of Mrs Montgomerie's settlement precluded the former, and, if they did not, would preclude the latter, except to a limited extent.

LORD SKERRINGTON—I concur.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

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

Counsel for the First Parties—Dunbar. Agents—J. & D. Smith Clark, W.S.

Counsel for the Second and Third Parties—Constable, K.C.—Hamilton. Agents—Mackenzie & Wylie, W.S.

Counsel for the Fourth and Fifth Parties—Chree—R. C. Henderson. Agents—W. & J. Burness, W.S.

Thursday, May 25.

SECOND DIVISION.

(SINGLE BILLS.)

BONNAR v. BONNAR.

Expenses—Husband and Wife—Action of Separation and Aliment at Wife's Instance—Reclaiming Note by Her—Interim Aliment and Expenses.

A wife raised an action of separation and aliment against her husband. The Lord Ordinary, after a proof, assolizied the defender. The pursuer, having reclaimed, presented a note to the Inner House craving interim aliment and an award of expenses.

The Court *refused* her application.

Mrs Agnes Swift or Bonnar, 75 Main Street, Neilston, Renfrewshire, wife of Neil Bonnar, clerk, residing at 28 Langside Road, Glasgow, raised an action of separation and aliment in the Court of Session against her husband. On 3rd March 1911 the Lord Ordinary (ORMIDALE), after a proof, assolizied the defender from the conclusions of the summons, but found him liable in the expenses of the action. On 6th April 1911 the pursuer reclaimed against the Lord Ordinary's interlocutor. She thereafter presented a note to the Court craving, *inter alia*, an interim award of aliment at the rate of 10s. per week and a sum of £20 towards her expenses.

When the case was called in the Single Bills on 25th May 1911 counsel for the defender (respondent) objected to any award being granted, and argued—After proof the Lord Ordinary had assolizied the defender. The pursuer could not, therefore, be said to have a *prima facie* case.