

pany in this question; and thirdly, because, even if it were entitled to represent the Caledonian, it would be in no better position than the Caledonian itself, being then equally affected by the equity which disables the Caledonian Company from insisting in such an action in its proper name.

The Court recalled the Lord Ordinary's interlocutor, repelled the first plea-in-law for the defenders, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuers—Sir C. Pearson—Ferguson. Agents—Gordon & Falconer, W.S.

Counsel for the Defenders—Comrie Thomson—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

## HOUSE OF LORDS.

Tuesday, February 25.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Bramwell, and Herschell.)

SIR WILLIAM M'ONIE AND ANOTHER  
(BUCHANAN'S TRUSTEES) v.  
WHYTE AND ANOTHER.

*Husband and Wife—Postnuptial Contract—Antenuptial Contract inapplicable by Change of Circumstances—"Heirs and Assignees," Meaning of—Power of Apporportionment.*

A husband and wife, on the narrative that their antenuptial contract had become unsuitable, executed a postnuptial contract, whereby the husband bound himself and his heirs, in the event of his predecease, to make certain provisions for his wife, who accepted thereof in satisfaction of her legal claims, and further gave, granted, and disposed from her, her heirs and successors, to her husband and his heirs and assignees whomsoever, her whole estate real and personal now belonging to her or that might belong to her at the time of her death. She bound herself to infest and seise her husband and his heirs and assignees in the heritable property so disposed, and she empowered her husband to uplift and discharge the whole estate, and appointed him to be her sole executor and universal legator. Further, she constituted her husband and his foresaids her assignees to the rents and duties of the said lands and others "from and since the term of Whitsunday last, which is hereby declared to have been the term of the said husband's entry to the said subjects, and in all time coming, surrogating hereby and substituting the said husband in her full right and place of the premises for ever."

The parties reserved power to alter the contract.

Under her grandfather's will the wife was entitled to a share of the residue of his estate, which was secured to her in life rent (exclusive of the *jus mariti*), and in fee to anyone whom she might appoint by a writing under her hands.

The husband predeceased, having conveyed his whole estates to trustees.

The First Division found that the wife had validly exercised her power of appointment over the share of the residue of her grandfather's estate by the general conveyance in her postnuptial contract, and this decision was not questioned.

But *held* (rev. the decision of the First Division) that the postnuptial contract was not of a testamentary character, but rather a deed of contract granting to each of the parties the right of a creditor, which vested at once, and therefore that the wife's share of residue which had been conveyed to the husband was carried by his disposition, and now vested in his trustees.

This was a Special Case presented for the opinion of the First Division by (1) the trustees of the late Mr James Rodger, who died in 1834; (2) Sir William M'Onie and others, trustees of the late Mr James Buchanan, for the interest of the City of Glasgow; and (3) Mr Buchanan's heirs *in mobilibus*, and representatives of heirs.

Mr Rodger, who was the grandfather of Mrs Buchanan, by codicil to his disposition of August 1831, directed his trustees to make payment to her of certain sums, exclusive of *jus mariti*, and declared that she should have the same share of the residue of his estate as any other grandchild. By the 7th codicil he gave her an additional legacy. These legacies were paid. By the 9th codicil of 3rd September 1833 he directed:—"Secondly, that the share in the residue of my estate, directed to be set apart for my granddaughters, shall be secured by my trustees to them in life rent for their life rent use alienarily (exclusive of the *jus mariti* of their respective husbands, &c.), and to their respective children equally among them in fee, and failing any of them without children, then to any person or persons whom they may appoint by a writing under their hands."

Mr and Mrs Buchanan executed an antenuptial contract of marriage in 1817, and a postnuptial contract in 1850. Mr Buchanan died in 1857, aged seventy-two; and Mrs Buchanan in 1883, aged eighty-six, without issue.

By the antenuptial contract Mr Buchanan obliged himself to pay £4000 if Mrs Buchanan survived him, to be invested upon heritable security for an annuity for her. And further he renounced his legal rights. Mrs Buchanan accepted this provision as in full of her legal rights.

The postnuptial contract was executed while the parties were living at 49 Moray Place, Edinburgh, and Mrs Buchanan was then childless and 53 years of age. It narrated that the antenuptial contract had become unsuitable. Mr Buchanan thereby

obliged himself and his heirs to pay to his wife during all the days of her life, in case she should survive him, the sum of £2000 yearly. He "alienated and disposed, and he does hereby alienate and dispose to and in favour of his wife in liferent, for her liferent use allenarly after his death," the piece of ground and dwelling-house No. 49 Moray Place, with entry immediately after his death. He bound himself that if he should sell the said house during his life then she was to be entitled to the liferent use of any other dwelling-house belonging to him at the time of his death, with the liferent of his whole furniture and plenishings, &c., in that or any other house possessed by him; Mrs Buchanan was taken bound to repair the said house so as to maintain it as a tenantable habitation for herself.

Mrs Buchanan accepted these provisions in satisfaction of her legal claims and contracted as follows:—"For which causes, and on the other part, she the said Jane Jack or Buchanan has given, granted, and disposed, as she does hereby give, grant, assign, and dispose from her, her heirs and successors, to and in favour of the said James Buchanan, his heirs and assignees whomsoever, heritably and irredeemably, all and sundry her the said Jane Jack or Buchanan's whole estate, goods, chattels, and effects, heritable, and moveable, real and personal, now pertaining and belonging to her, or that shall happen to pertain and belong to her in any manner of way, and wherever situated, at the time of her death," including and comprehending all sums of money to which she is or may be entitled under the antenuptial contract, and all her provisions under that contract, with the whole vouchers and conveyances of said estate, heritable or moveable, real or personal, together with all interest she can claim to the said estate and effects pertaining and belonging to her at the time aforesaid of her death, dispensing with the generality hereof, and declaring the same to be as valid and effectual as if the whole estate, heritable and moveable, &c., belonging to her were herein particularly described. Moreover, she hereby binds and obliges herself, and her heirs and successors, to infest and seise the said James Buchanan, and his heirs and assignees, in the whole lands and other heritages above disposed requiring infestment, and to make, grant, subscribe, and deliver to him and his foresaids all writs, &c., containing clauses necessary for fully vesting and establishing the premises in their persons; with power to the said James Buchanan and his foresaids to call and pursue for, uplift, receive, and discharge the whole estate and effects, heritable and moveable, real and personal, hereby assigned and disposed, and generally to do everything in relation to the premises which she the said Jane Jack or Buchanan might have done before granting hereof; and she the said Jane Jack or Buchanan does hereby nominate and appoint the said James Buchanan to be her sole executor and universal legator, excluding all others therefrom." Mr Buchanan and his fore-

said were constituted her assignees, not only to the whole titles of the said lands and others, "but also in and to the rents, mails, and duties of the said lands and others due and payable for and furth thereof from and since the term of Whitsunday last, which is hereby declared to have been the term of the said James Buchanan's entry to the said subjects, and in all time coming, surrogating hereby and substituting the said James Buchanan and his foresaids in her full right and place of the premises for ever, which lands and others above disposed, with this right and disposition of the same, and infestments to follow hereon, with the assignation above written to the writs and evidents, the said Jane Jack or Buchanan binds and obliges herself and her foresaids to warrant to the said James Buchanan and his said foresaids to be free of all burdens and incumbrances and grounds of eviction whatever. And further, she relieved him of all feu-duties, &c., exigible out of the said subjects preceding the said term of Whitsunday last, "the said James Buchanan and his foresaids being bound to relieve her and her foresaids of the same thereafter in all time coming." She delivered up to the said James Buchanan the title-deeds of the said subjects, declaring always that he should have full liberty to sell and dispose the house 49 Moray Place, either gratuitously or otherwise, but always under the condition that he shall immediately secure her in the liferent use and possession during all the days of her life of any similar dwelling-house in which the parties may happen to reside at the death of the said James Buchanan. The deed then reserved to James Buchanan, during the joint lives of the parties, his liferent right of the sums and subjects disposed and assigned by him as above mentioned to his wife, and "also reserved power to both of them during their joint lives to alter these presents in whole or in part as they may think fit." It also declared that these presents should be valid although not delivered during the joint lives of the parties, but found in the custody of the survivor of them, or in the custody of any other person at the death of both or either.

Mrs Buchanan continued to enjoy the interest of her share of the residue of her grandfather's estate until her death. She left no testamentary writing dealing with the said share. Her husband by a trust-disposition dated February 17, 1852, conveyed his whole estate to trustees, represented by the second parties.

The opinion of the Court was craved on these questions of law—(1) Whether the power of appointment over the share of the residue of her grandfather's estate had been properly exercised by Mrs Buchanan's general conveyance in her postnuptial contract. (2) Whether, assuming the power of appointment was validly exercised, the share of residue now belonged to the testamentary trustees of Mr Buchanan or to his heirs *in mobilibus ab intestato*.

At advising—

LORD PRESIDENT (after pronouncing the conveyance, as exercising the power under her grandfather's will, to be sufficient in its terms to embrace all that she was in right to at the time, and finding that the power was well exercised, continued):—

The next question comes to be, whether the fund which was thus appointed was carried by Mr Buchanan's trust-disposition and settlement to the trustees therein named? Now, that depends entirely upon the nature of the deed which Mrs Buchanan made. The postnuptial contract deed which we have here is certainly a deed requiring a good deal of attention, and not very easy to construe, for there are mixed up in it a good many clauses which appear to me to harmonize with the notion of it being a *de presenti* conveyance to take immediate effect, and others, again, which give it a very testamentary character, and whether it is in whole of a testamentary character or not we have to determine at least whether it is a testamentary deed as regards the appointed fund. Now, as regards the heritable estate of Mrs Buchanan, if that question were directly before us, I must say I should have great difficulty in arriving at a conclusion, because although there are a great many words that seem to indicate an intention to vest in Mr Buchanan a right by infestment to the heritable estate immediately upon the execution of this deed, there are others again, even in that part of the deed, which have an opposite effect, for in those clauses to which I am referring the estate is thus described, "The whole estate, goods, chattels, and effects, heritable and moveable, real and personal," pertaining and belonging to her at the time of her death; and that looks as if the heritable as well as the moveable estate could not belong to Mr Buchanan until after his wife's death. But although a difficulty might exist if I were dealing with the heritable estate, I confess I have not much difficulty as regards the moveables. In the first place, I think the words in which the conveyance is made are of a testamentary character. She gives grants and conveys to and in favour of her husband, his heirs and assignees whomsoever, heritably and irredeemably, "all and sundry her the said Jane Jack or Buchanan's whole estate, goods, chattels, and effects, heritable and moveable, real and personal, now pertaining and belonging to her, or that shall happen to pertain and belong to her in any manner of way and wherever situated at the time of her death." Now, these are the words of an ordinary testamentary settlement. If she had been conveying to trustees for testamentary purposes, that is just the very clause by which she would have expressed her intention to convey her estate as at the time of her death. The words "now pertaining and belonging" have really no legal effect at all, for nothing could go to the trustees at her death except the estate which belonged to her. And then, in the next place, it must be observed that Mr Buchanan is appointed her sole executor and universal legator. Now that has certainly a very testamentary appearance, and

I do not see what the use of that appointment would be at all if he were to acquire right to the whole estate, heritable and moveable. Then, again, the deed is looked upon by both parties as a settlement to take effect at death, seeing that they reserve power during their joint lives "to alter these presents," and that certainly looks as if the deed were to receive effect immediately on the death of the wife. And then there comes a clause dispensing with delivery—a clause that one never finds except in testamentary deeds; and so far as the moveable estate is concerned, I have come to the conclusion that this is the testamentary deed of Mrs Buchanan. Now, if that be so, we must give effect to the words in which she has expressed her intention to give her estate to "James Buchanan, his heirs and assignees whomsoever." I think, according to the ordinary construction of these words, as settled in our law very conclusively, that the event of James Buchanan, the husband, predeceasing the maker of this bequest lets in his heirs as conditional institutes, and it appears to me therefore that the third parties here, the heirs *in mobilibus* of Mr Buchanan *ab intestato*, are entitled to succeed.

LORD MURE (after stating that he considered that the power given to Mrs Buchanan in her grandfather's will had been properly exercised, continued):—

I take the same view as your Lordship, and that it was the nature of this postnuptial contract to make a settlement between the parties of something that has been forgotten at the time of the marriage. They wanted to make a new settlement, and so each party provides for something that is to take place after the death of the other. I always understood that a marriage-contract is a kind of thing that is meant to regulate the position of parties and their families after their death, and they are, or are intended to be, substantially of a testamentary nature. And although there may be provisions in a marriage-contract of a *de presenti* nature, that cannot, I think, have the effect of derogating from the general conveyance, and although there may be provisions inserted to regulate certain things during the lifetime of the parties, these cannot be held in the ordinary case to do away with this testamentary character. No doubt there is here a peculiarity in the phraseology which causes the difficulty that arises, but what I have just said leads me to think that this deed is of a testamentary character, and that by virtue of the clauses to which your Lordship has referred this fund must go in respect of Mr Buchanan's death to his representatives.

LORDS SHAND and ADAM concurred.

This judgment was pronounced:—

"Find that Mrs Buchanan validly exercised the power of appointment conferred upon her by Mr Rodger by the general conveyance of her estate to her husband, his heirs and assignees whomsoever, in the postnuptial contract

entered into between her and her husband, and that the third parties are entitled to the share of the residue life-rented by Mrs Buchanan under the said destination, being the fund in dispute, as heirs *in mobilibus* of Mr Buchanan *ab intestato*, and as such conditional institutes under the conveyance by Mrs Buchanan in said postnuptial contract of marriage, and decern.”

The parties accepted the decision of the Court of Session on the first question. *Quoad ultra* Mr Buchanan's trustees appealed against the interlocutor.

At delivering judgment—

LORD CHANCELLOR—My Lords, I think it is unnecessary to hear the reply in this case. But for the respect which one must entertain for Judges dealing with such a subject as the Court of Session were here dealing with, namely, a matter of Scotch conveyancing, I should have thought that this was a particularly plain case. I am unable to read this instrument as other than what it is, and the history of the instrument appears to me to be not immaterial.

These spouses in the year 1817 entered into an antenuptial contract, and in the year 1850 they recite that “it is matrimonially contracted and agreed upon between” them “in manner following, that is to say, the said parties, taking into consideration that the provisions in the contract of marriage entered into by them at the time of their marriage are not suitable to their present circumstances, have in order to supply that defect”—and then they proceed with the different provisions of the deed. The whole argument is apparently reduced to the single question whether the passage (quoted above, p. 1015, 23rd line) is intended to have a present actual operation under the circumstances of this deed, it being a mutual deed, and each giving to the other something by way of contract, or whether it is only intended to be a testamentary disposition and to operate only after the death of the parties.

I confess that with the single exception of the passage (quoted above, p. 1015) in which there is the appointment of Mr James Buchanan by Mrs Buchanan as her sole executor and universal legator, I am unable to see anything in this deed other than language and provisions appropriate to a deed such as it purports upon the face of it to be, namely, a matrimonial contract between the parties, each undoubtedly in some respects giving presently something to the other; and in respect of the heritable property apparently the Lord President impliedly admits that if the question were before him, and he had to decide that question alone, although the phrase which his Lordship uses is that he would have great difficulty in determining it either way, I think the obvious intuis of his Lordship's observation is that he would have to decide that it had a present operation; and indeed whether that was what the Lord President meant or not, it certainly must be so when one looks at the other provisions of the deed. There was to be an absolute transfer of the heritable property; there was to be

a burden taken from the one to the other, and the actual time when the transfer of the property was to date from is specified by the instrument itself.

Then the question which your Lordships are asked to solve is, whether these words which contain all these subject-matters of property in one clause and are operated upon by the same verb are to have a different construction according to whether you are dealing with the moveable or with the heritable estate? My Lords, I confess that I am unable to see my way to regard as plausible the contention on the other side; and I would only like to say, with respect to the principle which Lord Mure appears to lay down, that I entirely deny that a marriage-contract between the parties is a thing which is meant to regulate the position of the parties and of their family after their death, and that the provisions of that contract are or are intended, at least substantially, to be of a testamentary nature. I believe that it would be impossible to lay down such a canon of construction for marriage-contracts upon such a ground. In ninety-nine cases out of a hundred I should think that a marriage-contract does provide and is intended to provide for the relations of the parties during their lifetime; and although it may and very often does provide for the destination of the property after the death of the parties or of one of those parties, yet the provisions of the instrument itself are primarily intended as much and even more to regulate the reciprocal rights of the parties during the continuance of the marriage than to determine the destination of the several properties contained in the instrument after their death.

For these reasons, my Lords, I am unable to concur with the judgment of the Court of Session. I speak with the utmost respect for the learned Judges who have arrived at the conclusion to which they have come. I should have had more hesitation in disagreeing with them if the reasons given for their judgment had been more satisfactory upon the face of them. Some of the judgments are mere concurrences; and with reference to the judgment of the Lord President, whose judgment appears to be the leading judgment, it is a very remarkable fact that in giving his reasons for his conclusion upon that which is the only real controversy in the case, he unconsciously misquotes the language of the instrument upon which he is relying, and misquotes it on a very vital matter. Under these circumstances I move your Lordships that this interlocutor be reversed.

LORD WATSON—My Lords, the document which we have to construe in this case is not a very artistic production. It contains passages which may be said to be inconsistent with each other. It also contains at least one provision which is commonly found in a will or testamentary disposition. I refer to the clause appointing Mr Buchanan to be the sole executor and universal legator of his wife. But, after all, the character of the deed and of the leading provisions of

the deed cannot be determined by a reference to clauses of that kind. We must look to the provisions themselves—we must look to the whole tenor and purpose of the deed, and to the arrangement that is embodied in the leading clauses, and more particularly in that clause which it is our duty to construe.

Now, the result of the examination of the deed, to which I have listened with pleasure from both sides of the bar, has been to satisfy me that it is in reality and in substance a deed of contract between two spouses, not intended to affect and not purporting to affect the interests of third parties or to constitute any rights in favour of third parties, which might probably have been held to be testamentary in their nature. The deed comes in lieu of a previous contract between the parties, executed before marriage for the purpose of settling their rights and interests in each other's property, and in particular settling the interests which they were to take in the property of each other after the death of the first decessor.

It has been suggested that the language in which Mrs Buchanan gives, grants, and disposes to her husband is such as might be expected in a testamentary deed. I do not doubt it. It is also language which might be naturally expected in what I venture to call a deed *inter vivos* or *mortis causa* in contradistinction to a testamentary deed. But this is not only a deed *inter vivos* with that view—it is a deed of contract. The parties bind each other, and they each make a conveyance in implement of these obligations. It was suggested that the clause of conveyance might be read thus, as giving an immediate right to Mr Buchanan to all the property, heritable and moveable, of which his wife then stood possessed, with a right to subsequent *acquirenda* of his spouse not exigible until the date of her death. There is some plausibility in that reading; but it is a little difficult to hold that it is the right construction upon comparing it with the terms in which the lady conveys all right and title to estate vested in her at the time of her death. But whichever way you read it, whether the property is to pass at her death or before her death, part of it at least is not to pass until that time; and in that view the appointment of Mr Buchanan to be her executor and universal legatory might give him a useful ancillary title for the purpose of enabling him to get in the estate which was conveyed to him.

But I do not desire to rest my decision in this case upon any of these peculiarities. I think the appellants are entitled to judgment on this broad ground, that the deed is a deed of contract—that the right which each party gets to the estate of the other is the right of a creditor and not of a legatee—that each has a right of credit which vests at once. In that view of the deed, I do not think it admits of dispute, that according to the law of Scotland, "A. and his heirs and assigns" simply means a present right of credit in A., no matter how long the enforcement of it may be delayed.

LORDS BRAMWELL and HERSHELL were entirely of the same opinion.

Ordered, that the interlocutor of the 18th of March 1887, in so far as the same is appealed against, be reversed; and found that the second parties (the appellants), as the testamentary trustees and assignees of Mr Buchanan, are entitled to the fund in dispute; and further ordered, that the parties at the bar by their counsel consenting thereto, the costs of the appellants and respondents, in respect of this appeal, be paid out of the said fund; cause remitted to the Court of Session in Scotland to do therein as shall be just and consistent with this finding and judgment.

Counsel for the Appellants—The Lord Advocate, Q.C.—Finlay, Q.C.—A. Mitchell. Agents—Loch & Goodhart for R. R. Simpson & Lawson, W.S.

Counsel for the Respondents—Sir C. Pearson—J. Wallace. Agents—Wilkins, Blyth, & Dutton for John Rhind, S.S.C.

Tuesday, March 25.\*

(Before Lords Herschell, Watson, and Morris.)

SUTTON & COMPANY v. CICERI & COMPANY.

*Contract—Implement—Carrier—Goods Injured—Statuary, Meaning of—Onus.*

Ciceri & Company, Edinburgh, informed Sutton & Company, London, that they had at Venice and Leghorn a large quantity of goods for shipment "consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames," &c., and requested a quotation of rates for such goods from both these ports to Glasgow by steamer. Sutton & Company, who contracted with steamship and railway companies for the carriage of goods, and charged through rates to the owners, in reply quoted "for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot." Ciceri & Company wrote, "you seem to make a difference between marble busts and columns and alabaster. Please let us know about this." Sutton & Company stated that the quoted rates only applied to freight and did not cover insurance risks, but did not reply to the question as to the supposed difference between the classes of goods. On these terms various large terra-cotta figures, and small figures of men and animals were carried for Ciceri & Company through the agency of Sutton & Company from Leghorn to Edinburgh. The goods arrived injured, and Ciceri & Company sued Sutton & Company for damages

\*Decided March 20, 1889—Reported June 21, 1889, 16 R. 814.