

being the difference between the contract rate and the market price of the same coal on 1st September, the day after the contract period expired, his view being that under the contract the defenders were bound to deliver 3000 tons in all, and that what was not delivered in one month should have been delivered in another. I am unable to concur in that view of the contract. I have already stated that in my opinion the contract was one for delivery of 3000 tons of coal, but for delivery of that *cumulo* quantity in about equal quantities in each of the four specified months. Even these monthly quantities could only be demanded in shipping lots of from 400 to 600 tons "on due notice being given," so that the pursuers had no right to demand, and the defenders no obligation to deliver the whole monthly quantity at one time. The defenders fulfilled their obligation if they gave 400 tons at one time on due notice being given to them. But there is no stipulation that if the quantity asked or got in one month was less than the monthly quantity agreed on, that such quantity short delivered was to be made up in the following month, or otherwise during the currency of the contract. If that had been intended I should have expected to find it expressed, or something at all events leading by clear implication to the view that that was the contract intention of the parties. There is, however, nothing of the kind. The want of such a stipulation did the pursuers no harm if they wanted the whole coal they had contracted for within the contract time. For each month that there was a short delivery they could have gone into the market and bought in coal to supply the deficiency at the defenders' expense. Just as, on the other hand, the defenders could have sold elsewhere any coal which the pursuers did not take, and charged them with the difference between the price obtained and the contract price had the former been less than the latter. In a word, the contract was for monthly deliveries of about 750 tons of coal until 3000 tons had been delivered between 1st May and 31st August. Each monthly delivery was separate and separable although the rights and obligations *hinc inde* arose out of one contract for 3000 tons of coal. If this view of the contract be the right one, the damage due by the defenders for breach of contract is easily ascertained. There was no breach in May or June. In July there was a breach in respect of a short delivery of 262 tons. On 1st August the market price of the coals was 1s. per ton on advance of the contract price, and at that price the pursuers could have bought in against the short delivery. Had they done so they would have been in the same position as if the defenders had fulfilled their contract, but this would have cost them £13, 2s., and that is the amount of their damage. In like manner there was a breach of contract in August by a short delivery of 71 tons. The market had advanced 3s. per ton on the contract rate; the pursuers therefore could have supplied the deficiency at a cost of £10, 13s., which is their damage

in August through the defenders' breach. I think the pursuers' have thus sustained damage through the defenders' breach of contract to the extent of £23, 15s., which they are entitled to put against the amount sued for by the sellers.

LORD RUTHERFURD CLARK—I concur. If I were to construe this contract with reference to the writings only, I confess I would have considerable difficulty in holding that the monthly payments were to be at the beginning of May. But as that is the meaning which David Ireland & Son put on the contract it is probably the right one.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Lord Ordinary reclaimed against: Decern against David Ireland & Son for payment to the Merryton Coal Company and Wallace Thornycroft of the sum of £240, 0s. 2d. sterling: *Quoad ultra* dismiss the actions: Find the Merryton Coal Company and Wallace Thornycroft entitled to expenses (1) in the action at their instance to the date of conjunction; (2) in the action at the respondents David Ireland & Son's instance from 27th December 1893, the date of the defenders' tender in that action, to the date of conjunction; and (3) in the conjoined actions from the date of conjunction: Find the said David Ireland & Son entitled to expenses in the action at their instance up to the said 27th December 1893."

Counsel for David Ireland & Son—Ure—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Merryton Coal Company—Dundas—Salvesen. Agents—W. & J. Burness, W.S.

Friday, July 6.

SECOND DIVISION.

HUNTER'S TRUSTEES v. HUNTER.

Succession—Trust—Construction of Testament—Equitable Rule—Property Received and Consumed in Good Faith by One not Entitled thereto.

By antenuptial contract of marriage A B bound himself to pay or allow to be retained from his salary as an Indian Civil Servant such contribution as would secure to his widow the usual annuity from the Bombay Civil Fund, and he undertook, if from any cause his widow should not get the benefit of the fund, that she should receive an annuity of £300 after his death.

By his trust-settlement A B provided to his widow an annuity of £600 out of his heritable estate, the annuity his

widow received from the Bombay Civil Fund being imputed as a payment to account of such annuity of £600.

A B did secure the Bombay Civil Service annuity to his widow by contribution, and on his death in 1876 she became entitled to it. After his death his widow also received an annuity of £300 out of his heritable estate over and above the annuity from the Bombay Civil Fund. At first the fund yielded only £300 a-year, but in 1882 by Act of Parliament the Government of India took over the fund, and thereafter continued to pay the annuities formerly paid to widows, with an additional pension of £60 a-year.

From 1882 the widow thus received altogether £660 a-year, viz., £360 from the Indian Government, and an annuity of £300 from the trustees out of A B's heritable estate. The trustees paid this annuity, and the widow received and expended the whole sums in *bona fide*.

In 1894 a question having arisen as to whether the widow was entitled to receive more than £600 a-year—held that the widow was only entitled to receive in each year out of her husband's heritable estate such sum as would, together with the annuity and pension of £360 from the Indian Government as representing the Bombay Civil Fund, give her a total annuity of £600, and that in the circumstances the widow was not bound to repay to the trustees the sum of £60 overpaid her for each year beginning in 1882.

By antenuptial contract of marriage entered into between James Hunter, then of the Indian Civil Service, afterwards of Hafton, and Katharine Christina Meiklejohn afterwards Hunter, his spouse, dated 3rd March 1864, Mr Hunter bound himself, *inter alia*, "to pay, or allow to be retained from his Civil Service salary, such annual or other contributions to the Bombay Civil Fund as will secure to his widow the usual annuity or other benefits of said Bombay Civil Fund after his death: And in the event of the said Katharine Christina Meiklejohn surviving her said husband, and not being on his death entitled to the annuity or other benefits of the said Bombay Civil Fund by reason of the retirement from the service of the said James Hunter, non-payment of the annual or other contributions to said fund during his life, or from any other cause, then and in that event the said James Hunter, in lieu of such annuity or other benefits of said Bombay Civil Fund so lost to his widow by reason of his failure to secure the same, binds and obliges himself, and his heirs and representatives whomsoever, to pay to the said Katharine Christina Meiklejohn, in the event of her surviving him, a free yearly annuity of £300 sterling during all the days of her lifetime, and that at two terms, Whitsunday and Martinmas, by equal portions." The contract bears that the provisions in favour of Mrs Hunter were accepted by her in full satisfaction of

every claim which she could by law demand through the decease of the said James Hunter in case she should survive him.

Mr James Hunter retired from the Indian Civil Service shortly after his marriage, having succeeded to the family estate of Hafton, in Argyllshire. He died without issue on 20th April 1876, survived by his wife. He had made the contributions during his life to secure the usual annuity to his widow from the Bombay Civil Service Fund, and she therefore became entitled to such an annuity on his death. Its amount at the date of Mr Hunter's death was £300 per annum.

Mr James Hunter left a trust-disposition and deed of settlement dated 27th July 1865, by which he granted and disposed to trustees his whole estate, heritable and moveable, for the purposes therein mentioned, and, *inter alia*—"That my trustees shall implement the obligations undertaken by me in regard to the annuity and other provisions settled upon my wife, the said Mrs Katharine Christina Meiklejohn or Hunter, by the said contract of marriage entered into between me and her, dated 3rd March and recorded in the Books of Council and Session 15th June 1864; and I direct my trustees to make payment to the said Mrs Katharine Christina Meiklejohn or Hunter, in the event of her surviving me, of a free yearly annuity of £300 sterling during all the days of her life, in addition to what she is entitled to under said contract of marriage, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, . . . my intention being that the said Mrs Katharine Christina Meiklejohn or Hunter, should she survive me, shall have a free annuity of £600 under said marriage-contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof: But declaring that in the event of the said Mrs Katharine Christina Meiklejohn or Hunter from any cause losing or not receiving from said Bombay Civil Fund the usual annuity of widows of Indian Civil Servants, she shall only be entitled to a free annuity of £500 from my own proper funds, to which sum her annuity under said marriage-contract and these presents shall in that event be restricted." By the fifth purpose of the trust-deed the trustees were directed, on the failure of heirs of the body of the truster (which event happened) to convey and make over the residue and remainder of his means and estates to his brother William Frederick Hunter and the heirs of his body.

On the death of James Hunter without issue William Frederick Hunter by arrangement with James Hunter's trustees made up his title to the estate of Hafton as heir of provision in special, and executed a bond of annuity by which he bound himself to pay to his brother's widow, furth of the estate of Hafton, a free annuity of £600, sterling, under similar conditions to those which were contained in his brother's trust-settlement in regard to the imputing as a payment to account of the annuity of what

she might receive from the Bombay Civil Fund, and as to the restriction of the annuity to £500 in the event of the failure of that fund.

The provision payable to James Hunter's widow from the Bombay Civil Fund at the date of his death being £300 a-year, William Frederick Hunter continued to pay her £300 a-year from the estate of Hafton from that date until his own death in 1880. Thereafter William Frederick Hunter's trustees continued to pay James Hunter's widow £300 from the Hafton estate in the belief that she continued to receive £300 a year from the Bombay Civil Fund.

In 1882 the Bombay Civil Fund was by Act of Parliament 45 and 46 Vict. cap. 45 transferred to the Government of India, and under this Act widows of civil servants received their annuities from the revenues of India "with the additional benefit in the case of widows of a pension of £60 per annum, such additional benefit to take effect as from the 1st of April 1882." Under the provisions of this Act James Hunter's widow from 1st April 1882 was in receipt of the pension of £60 thereby granted in addition to the annuity of £300 formerly received by her from the said fund, and to the annuity of £300 paid her by William Frederick Hunter's trustees from the Hafton estate. She all along received and expended the whole of the said annuities and pension *in bona fide*, and without knowing that there was or could be any doubt of her right to receive the whole, although amounting together to more than £600.

The fact of Mrs James Hunter being in receipt of this additional £60 having come to the knowledge of William Frederick Hunter's trustees, certain questions arose for the decision of which a special case was presented to the Court by (1) the trustees of William Frederick Hunter, and (2) the widow of James Hunter.

The questions at law were—" (1) Is the second party entitled to receive from the first parties an annuity of £300 per annum in addition to her annuity and pension of £360 from the Indian Government as in place of the Bombay Civil Fund? Or (2) Is the second party entitled to receive in each year from the first parties only such a sum as will together with the said annuity and pension of £360 give her a total annuity of not more than £600? (3) In the event of the second question being answered in the affirmative, is the second party bound to repay to the first parties the sums received by her in excess of £600 per annum; and if so, is she liable for interest on such over-payments and at what rate?"

At advising—

LORD JUSTICE-CLERK—The late James Hunter bound himself by his antenuptial contract of marriage to pay or allow to be retained from his salary as an Indian Civil servant the contribution necessary to secure the usual annuity to his widow from the Bombay Civil Fund, and he undertook, if

his widow should not get the benefit of the fund through his failure, that she should receive an annuity of £300 after his death. He did secure the Bombay Civil Service Fund annuity to her by contribution, and on his death she became entitled to it. He succeeded to the estate of Hafton shortly after his marriage, and executed a settlement by which he provided to his widow an annuity of £300 a-year over and above what she was entitled to under the marriage-contract, expressing it to be his intention that she should have a free income of £600 under the contract and the settlement, any annuity coming from the Bombay Fund to be imputed to account of it. There was a subsequent declaration that if the Bombay Fund annuity should fail, then £500 a-year only was to be paid out of his estate.

On James' death without issue he was succeeded in the estate by his brother William to whom he directed his trustees to convey the residue of his means and estate. William on making up his title as heir of provision in special executed a bond of annuity, by which he bound himself to pay to his brother's widow the annuity of £600 a-year, under the same conditions as to the imputing to the annuity what she might receive from the Bombay Fund, and the restriction to £500 in the event of failure of that fund.

Accordingly from that time forward the widow received £300 a-year under the bond of annuity. At first the Bombay Fund yielded only £300 a-year, but the fund having been taken over by the Government of India, widows' annuities were from April 1882 increased by £60. Of this fact William's trustees were ignorant, and accordingly the widow has been receiving £660 annually since that date.

In these circumstances the first question is, whether the widow is entitled still to receive £300 under William's obligation? I am of opinion that she is not. The intention of her husband in his settlement is, I think, clearly expressed to be that she shall have a free annuity of £600, and that any annuity she might receive from the Bombay Fund was to be imputed to account of the £600. The Bombay Fund annuity took full effect from his having fulfilled his obligation to pay the contributions necessary, the annuity at that time was £300 a-year, and therefore to make up £600 an additional £300 was necessary, but the intention being definitely and in terms expressed that he desires her to receive £600, and that what comes from the Bombay Fund is to be imputed to that sum, she cannot in my opinion have right to more than £600, and is not in a position to decline to have any part of what comes from the fund imputed towards the £600. I therefore propose that the first question should be answered in the negative, and as following upon that, to answer the second question in the affirmative.

The third question is, whether the widow is bound to refund to the trustees the sum of £60 for each year during which she has received the additional £60 from

the Bombay Fund, it being held that only the difference between £360 and £600 should have been paid to her? According to the special case the sum was paid to her in good faith, and received by her in good faith, and we must deal with the matter upon that footing. I have felt that there is much difficulty as to how this question should be answered, but have ultimately come to be of opinion that in the circumstances it may be answered in the negative. The trustees were in error in making the payment, but it must be held to have been an error of view as to the widow's legal right, on a question of construction of documents, the view they took being one for which much may be forcibly urged. And the widow was entitled to assume that she was paid only what she was entitled to. It is equitable therefore that she should not be called upon to repay the amount.

LORD YOUNG— I think there is a great deal to be said for the plea of the widow that she is entitled under her husband's settlement to £600 a-year without reference to the pension of £60 given by statute in addition to the annuity previously given to her from the Bombay Civil Fund of £300. The husband's settlement directs that his trustees should pay his widow an annuity of £300 per annum in addition to what she was entitled to under her marriage-contract, *i.e.*, £300 from the Bombay Civil Fund, and if he continued his connection with that fund, then she would get the annuity of £300 from this estate along with the annuity of £300 from the Bombay Civil Fund.

In his settlement, however, he provided for what he thought might be the case that he should cease his connection with the Bombay Civil Fund, and in that event he binds himself to give her £300 per annum out of his estate. Under that marriage-contract she is entitled to all that the Bombay Civil Fund gives her, but then if it gives her nothing she is still entitled to £300 per annum from her husband's estate. By a recent statute there is given a pension of £60 per annum to widows of Civil servants in addition to the £300 annuity from the Bombay Civil Fund, and the question raised by this case is, whether the declaration in her husband's settlement that she is to have a clear annuity of £600 per annum included all that she got from the fund?

Two views have been put before us on that question, the one view being that if from the annuity and pension together she receives a sum of £360 per annum from the Bombay Fund, then that sum is to be imputed to the whole annuity of £600. The other view is that the pension of £60 is to be altogether disregarded, and only the original annuity of £300 is to be taken as part of the clear annuity of £600. There is a good deal to be said for that latter view, which is that of the widow, but upon the whole I have come to the conclusion that the other view is the sound one, and that the obligation upon the estate is simply to make up her annual income to £600, so that

if she receives £60 more from the Bombay Civil Fund the contribution from her husband's estate will be so much less.

It is not at all a clear case, but I think she is only entitled to receive £240 from the estate just now. If anything should happen which would diminish the amount paid by the Bombay Civil Fund, then her claim against the estate for £300 would revive.

Then there is this other question, whether it is the duty of the trustees to recover, and of the widow to repay, this £60 per annum which she has received and spent for many years. I am of opinion that there is no such duty. It is said—and I see no reason to doubt it—that both the trustees and the widow acted in ignorance of their true position, and without making any inquiry. I think that all concerned acted in good faith, and I have come to the conclusion that the reasonable view is that the widow is entitled to receive £240 from the estate for the future without making any deduction in respect of over-payments in the past. I think that the case falls within an equitable rule or principle, that of property received and consumed in good faith. Any other rule might lead to great hardship, even absolute ruin. I do not say that it would here. But the hardship and the possible ruin which might result from requiring repayment from one who has received property to which he was not entitled, and has consumed it in good faith, is the foundation of the equitable rule or doctrine.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—The leading question to be here decided is, what is the amount which Mrs James Hunter is entitled to claim annually under the provisions in her favour contained in her marriage-contract and in her deceased husband's deed of settlement? There is no doubt as to the nature of her right under the marriage-contract. Under it she is entitled to the annuity or other benefits payable to her as her husband's widow out of the Bombay Civil Fund, or in the event of such annuity or benefits being lost to her from whatever cause, then, in lieu thereof, to a sum of £300 a year out of her husband's estate. By his deed of settlement Mr Hunter directed his trustees to make payment to his widow of an annuity of £300 per annum, in addition to what she was entitled to under her contract of marriage, but adding these words—“My intention being that the said Mrs Katherine Christina Meiklejohn or Hunter should she survive me, shall have a free annuity of £600 under said marriage-contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof.” It is contended for Mrs Hunter that under this provision in her husband's settlement she is entitled to an annual payment of £300 in addition to the sum received by her from the Bombay Civil Fund, whatever that sum may be. This contention appears to me to be distinctly at variance with the expressed will of the trustor. It is clearly stated to be his desire and intention that his widow

should have an annual income of £600 under the combined provisions of the marriage-contract and the trust-settlement, and it is just as clearly stated that whatever benefit Mrs Hunter may receive from the Bombay Civil Fund is to be imputed as part of that annual income. The amount payable to Mrs Hunter by her husband's trustees out of Mr Hunter's estate is just so much and no more as, in addition to the sum received by her from the fund, will make up a sum of £600 per annum. I think this result is necessarily reached from a consideration of the provisions of the settlement to which I have referred.

Had this result been in any decree doubtful, I think the doubt would have been removed by a consideration of what Mr Hunter has done by way of provision for his wife in the event (which has not happened) of her losing the benefit of the fund. In that event he has provided that she shall receive out of his estate an annuity of £500 "to which sum her annuity under said marriage-contract and these presents shall in that event be restricted." This is inconsistent with the idea that under the settlement Mrs Hunter was provided with an annuity of £300 absolutely, that is, irrespective of any benefit received by her from the fund, for if so, then the husband's restriction of her right would have been unavailing. If Mr Hunter under his settlement gave his widow absolutely an annuity of £300, then she is entitled to that in any case. But if the benefit of the fund ceased from any cause, then by the marriage-contract, in lieu of such benefit, Mr Hunter bound himself to make payment to his widow of £300 a-year. Accordingly, on the cessation of the benefit from the fund there would be due to Mrs Hunter in respect of her husband's marriage-contract obligation £300 per annum, which with the £300 absolutely hers under the settlement would give her an annuity of £600, although Mr Hunter expressly provides that on the cessation of the benefit from the fund his estate is only to be burdened in favour of his widow to the extent of £500. As he could not restrict his obligation under the marriage-contract it is plain that he intended the burden on his estate to depend on whether his widow received any benefit from the fund, and the amount, if any, which she so received. In short, as I have already said, Mr Hunter desired that his widow should have an income of £600 a-year, to consist (1) of whatever annuity or benefit she might receive from the fund, and (2) so much but no more from his estate as added to the amount received from the fund would make up the £600. I am therefore of opinion that the first question should be answered in the negative, and the second question in the affirmative.

The third question presents more difficulty. In regard to it I assume that the trustees paid Mrs Hunter £300 a-year irrespective of what she was receiving from the fund, in the view that this was her right under the deed of settlement. Although I think that view erroneous, I cannot say that the trustees were in any

way to blame for so construing that deed. It was a view that might very reasonably be entertained. In these circumstances, as both the trustees and Mrs Hunter were in error as to the legal effect of the settlement, I think there is no claim for repetition of what has been already paid to Mrs Hunter. I would therefore answer the third question in the negative.

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

Counsel for First Parties—W. Campbell, Agents—Skene, Edwards, & Garson, W.S.
 Counsel for Second Party—Clyde, Agents—Stuart & Stuart, W.S.

Tuesday, July 17.

SECOND DIVISION.

BURNIE'S TRUSTEE v. LAWRIE.

Succession — Testament — Presumption — Holograph Writ — Unsigned Holograph Postscript to Signed Holograph Testament Held Valid.

An unsigned holograph postscript to a signed holograph disposition and settlement held (*dub.* Lord Rutherford Clark) to be valid and effectual.

Hugh Burnie died at Wigtown on 3rd December 1893. After his death there were found in the deceased's house two holograph testamentary writings. The first was in the following terms—"In the event of my death without heirs of my body, I leave and bequeath to Christina Shaw or Lawrie, wife of Sampson Lawrie, tailor, Liverpool, the property in Whithorn, belonging to her late brother James Shaw, Whithorn, together with the railway stock in my name, of Portpatrick and Wigtownshire Joint Committee, with a legacy of £10 sterling for dividends drawn. As witness my hand at Wigtown the 22nd day of November 1893 years.—(Signed) HUGH BURNIE." The second was a holograph trust-disposition and settlement in the following terms—"I, Hugh Burnie, residing in Agnew Crescent, Wigtown, in order to settle my affairs, Do hereby give, grant, assign, and dispose to and in favour of John Smith, Sheriff-Clerk of Wigtownshire, and Charles Arbuthnot M'Lean, law-agent, Wigtown, all and sundry lands and heritages, goods and gear, debts and sums of money, that shall belong to me at the time of my death, and I nominate and appoint the said John Smith and Charles Arbuthnot M'Lean my sole executors, and I declare the purposes of the trust to be—(first) for payment of my just and lawful debts, deathbed and funeral expenses; (second) for payment of following specific legacies to persons after named—To Margaret Thompson, daughter of Margaret Thompson, sometime in Culkae, £20 sterling; to Janet M'Culloch, Sorbie, £10 ster-