of all the special destinations to which I have referred must, it is true, be taken into account in assessing the amount of the legitim fund, which depends not upon the testator's testamentary dispositions but upon the amount of goods—the *bona*—which he has to dispose of at the time of his death. But the question remains as regards liability to pay between the widow on the one hand and the residue on the other. Here it is admitted that there is ample residue to pay the amount of the legitim if claimed, and that being so, it seems to me clear that the widow is entitled to relief as against the residue. I think the case to which we were referred — *Tait's Trustees* v. *Lees, &c.* — throws a good deal of light on this matter. We should therefore answer the branches of the question in the manner I have proposed.

LORD MACKENZIE — [*After stating his opinion that the trust-disposition and settlement did not revoke the destinations*] —With regard to the only other matter to which I think it necessary to refer, it was maintained to us for the second parties that the proper way to regard the special destinations and the general settlement was to look upon them as putting the different parts of the testator's estate into two water-tight compartments, and that no regard was to be had to the estate regulated by the special destinations when we are considering the rights of the children as in a question of legitim. It appears to me that the cases of *Breadalbane* and *Black* v. *Watson*, to which we were referred, are exactly applicable to the present case. I regard the investments made by the testator and his general settlement as parts of a general scheme to regulate the disposition of his estate on his death. There is one passage in the opinion of Lord Moncreiff in the case of *Black* v. *Watson* which I think applies—"There is no doubt of the principle that all a testator's deeds are to be taken as one settlement. But the question is, to what effects? It is clear that it is so in construing them to discover the true intention. It is clear also that it is so in this question of approbate and reprobate generally, and that if the party by making a claim at law which is adverse to the general design of the testator, and thereby his intention in the whole is deranged, that party cannot also take a special benefit given in any part of the deeds."

Accordingly the second parties will be put to their election as in a question between their legal and their conventional provisions. If they elect to claim legitim, then I think it is settled by the case of *Tait's Trustees* that the order of preference will be as stated in Lord M'Laren's work on Wills, vol. i, p. 588—"One question of abatement of general importance (amongst a multitude of cases which are circumstantial) has been decided, viz., that where the deficiency of the testamentary estate results from the election of a widow or child in favour of legal claims the order of abatement is unaltered, the order of preference being, 1st, the specific legacies, 2ndly, general legacies, and lastly, the residue." Accordingly the children being residuary legatees under the settlement it does not seem to me that they can claim any part of their legitim at the expense of the widow who is the beneficiary in the special destinations.

LORD CULLEN—I concur. I think the residue clause of the testator's settlement does not constitute a special legacy within the meaning that Mr Dunbar attached to these words. The settlement in its conception is a universal one, and the clause of residue is a general clause. In these circumstances it appears to be in accordance with the authorities cited to us that the legitim claim lies primarily against the residue.

The Court found, in answer to the foregoing questions of law, 1 (*a*) that all the investments enumerated in the appendix to the case belonged to the third party in virtue of the special destinations; (*b*) that none of these investments formed part of the trust estate to be administered by the first parties; and answered questions 4 and 5 (*a*) in the negative and 5 (*b*) in the affirmative.

Counsel for First and Third Parties—A. O. M. Mackenzie, K.C.—D. Jamieson. Agents—Hyslop & Shaw, W.S.

Counsel for Second Parties—Hon. W. Watson, K.C.—Dunbar. Agents—Drummond & Reid, W.S.

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*Thursday, March* 1.

## FIRST DIVISION.

## BATTYE'S TRUSTEES *v.* BATTYE AND OTHERS.

*Succession—Foreign—Marriage Contract—Wife's "Own Heirs, Executors, and Assignees"—Construction—Lex domicilii—Lex loci actus.*

By antenuptial contract of marriage between a domiciled Englishman and a domiciled Scotswoman it was, *inter alia*, provided that the funds settled by the wife should, in the event, which happened, of their being no issue of the marriage, belong to her "own heirs, executors, and assignees." The contract, which was prepared by Scottish agents in Scotland, was in Scottish form; the funds settled by the wife were in part secured over Scottish heritage; the *jus mariti* and right of administration of the husband were excluded and the funds conveyed not to be affectable by the diligence of his creditors; the provisions in favour of the issue of the marriage were declared to be in full satisfaction of legitim. The contract also contained a clause of consent to registration for preservation and execution. The wife died domiciled in England. *Held*, in a special case, that

the wife's fund did not fall to be treated as intestate succession, and that under the destination in the marriage contract the wife's heirs according to the law of Scotland and not according to the law of England were entitled to it.

Henry Smith, W.S., the sole trustee acting under the antenuptial marriage contract of Captain (afterwards Major-General) Henry Doveton Battye and Miss Susan Wellwood Boswell, afterwards Mrs Battye, *first party;* Colonel Montague M'Pherson Battye, as administrator of Major-General Battye, appointed by the English Courts, *second party;* Hugh Mitchell, solicitor, Pitlochry, executor of Major-General John James Boswell, C.B., only brother of Mrs Battye, *third party;* Charles John Rattray and others, the representatives of Mrs Maria Ann Boswell or Rattray, a sister of Mrs Battye, and others, the representatives of Mrs Sibella Boswell or Hill, the other sister of Mrs Battye, *fourth parties;* Alexander Guild, W.S., Edinburgh, as testamentary trustee of a son of Mrs Rattray, *fifth party;* and Sir Christopher Nicholson Johnston, K.C., and another, testamentary trustees of the husband of Mrs Hill, *sixth parties*, brought a Special Case to decide who were entitled to certain funds of Mrs Battye's as her "own heirs."

The *marriage contract* of Major-General Battye and Mrs Battye, in which the husband was designed as "Captain in Her Majesty's Indian Army," provided as follows—"... Henry Doveton Battye hereby binds and obliges himself and his heirs, executors, and successors to provide and secure to the said Susan Wellwood Boswell in liferent for her liferent use allenarly in the event of her surviving him, and to the child or children of the said marriage in fee, the sum of one thousand pounds sterling ... for which causes and on the other part the said Susan Wellwood Boswell ... hereby dispones, assigns, conveys, and makes over to and in favour of William John Sands, Writer to the Signet, and David Robertson Williamson Huie, assistant accountant in the Royal Bank of Scotland, and the acceptor or survivor of them, as trustees ... the legacy of one thousand pounds sterling bequeathed to her by the deceased Andrew Moffat Wellwood, Esquire, of Garvock, her grandfather, in his trust-disposition and settlement dated the thirteenth day of February and recorded in the Books of Council and Session the fifth day of March One thousand eight hundred and forty-seven, and which in terms of said settlement is now secured as a real and preferable burden upon the lands of Foleyhills in the county of Berwick and Colinton Mains in the county of Edinburgh ... and likewise all sums of money and all right and interest which she the said Susan Wellwood Boswell now has or may hereafter have or acquire under the contract of marriage between the said Ralph Clark and her mother dated the fourteenth day of April One thousand eight hundred and forty-eight, or in any other manner, excepting, however, all sums under one hundred pounds sterling, but in trust always for the following uses and purposes, namely, the said trustees shall allow the said sum of one thousand pounds to remain a burden on the said lands of Foleyhills and Colinton Mains so long as the heir of entail in possession of these lands shall pay interest thereon at five per cent., but should the interest be reduced the said trustees shall then either uplift the said sum or allow it to remain at a reduced rate of interest as may appear to them most prudent and advisable, according to the state of the money market at the time; and if the said sum of one thousand pounds shall be uplifted by the trustees or paid up at any time by the heir of entail the said trustees shall invest the same and also the sums of money and means and estate last above conveyed to them when they shall receive the same in heritable security or in the Government funds, or in the purchase of such stocks as they may consider most safe and beneficial, or as may be approved of by the said Henry Doveton Battye and Susan Wellwood Boswell if in Great Britain at the time: And power is hereby given to the said trustees to vary the investments of the said trust funds at the joint request of said Susan Wellwood Boswell and Henry Doveton Battye, the investments so to be made being approved of by the said trustees: And the said trustees shall pay the interest, dividends, or other annual produce of the whole funds, means, and estate hereby conveyed to them to the said Susan Wellwood Boswell during her life upon her own receipts which shall be sufficient discharges to them therefor, and after her death to the said Henry Doveton Battye, in the event of his surviving her, during his life, and on the death of the survivor of them then the said trustees shall pay or convey and make over the principal sums and means and estate in their hands to the child or children of the said marriage in such manner and in such proportions as the said Henry Doveton Battye and Susan Wellwood Boswell or the survivor of them may direct and appoint by any writing under their hands, and failing any such direction and appointment then to the said children equally among them, share and share alike, and failing children then to the said Susan Wellwood Boswell's own heirs, executors, or assignees whomsoever, declaring that the *jus mariti* and right of administration of the said Henry Doveton Battye in the sums, means, and estate conveyed to the said trustees by the said Susan Wellwood Boswell as aforesaid are hereby expressly excluded and renounced by him, nor shall the same nor the interest or produce thereof be liable for his debts already contracted or to be contracted nor affectable by the diligence of his creditors in any manner of way ... which provisions above made for the child or children of the present intended marriage shall be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry and everything else that they could ask or claim by and through the decease of the said Henry Doveton Battye, their father, excepting what he may think fit to bestow of his own good will only: And it is hereby agreed that all manner of

action and execution competent shall pass upon this contract for implement thereof at the instance of the trustees before named or to be assumed, or at the instance of any of them: And both parties consent to the registration hereof in the Books of Council and Session or others competent for preservation, and that all necessary execution may pass upon a decreet to be interponed hereto in common form, and thereto they constitute their procurators. . . ."

The Case set forth—"1. Major-General Henry Doveton Battye, who throughout his life was a domiciled Englishman, and Miss Susan Wellwood Boswell (hereinafter referred to as Mrs Battye) were married in or about the year 1862. . . . 2. Prior to her marriage the said Mrs Susan Wellwood Boswell or Battye was a domiciled Scotswoman, and the said contract of marriage is a deed in Scottish form . . . and was entered into by the parties thereto in Scotland. The trustees named therein were domiciled Scotsmen, and the trust has throughout been managed by Scotch agents. The whole funds put in trust by the said Mrs Battye were situated in Scotland. . . . 3. After the marriage the spouses resided for a short time in England and then proceeded to India, where the said Mrs Battye died on 17th August 1863 intestate and without issue, and without having assigned or disposed of the said trust funds in any way. She was survived by her mother Mrs Anna Mary Wellwood or Boswell, afterwards Clarke, who is now dead and is represented by the third, fourth, fifth, and sixth parties. Thereafter the trustees acting under the said contract of marriage regularly paid the income of the trust estate to Major-General Battye until his death, which occurred on 10th February 1915. The trust funds presently in the hands of the trustee now acting, who is the first party to this case, consist of (1) £800 Caledonian Railway 4 per cent. consolidated guaranteed stock, and (2) the sum of £59, 15s. 4d. on deposit-receipt with the Royal Bank of Scotland, dated 7th September 1914. 4. . . . At the date of Mrs Battye's death in 1863 her heirs *in mobilibus* according to the law of Scotland were (1) her mother, Annie Mary Wellwood or Boswell, afterwards Clarke; (2) her brother, the said John James Boswell; (3) her sister, the said Sibella Boswell or Hill; and (4) the children of her deceased sister Mrs Maria Ann Boswell or Rattray. The surviving children of Mrs Hill and Mrs Rattray and the children of their deceased children are the parties of the fourth part. 5. By the law of England the husband of a married woman dying intestate becomes entitled by succession to the whole beneficial interest in her personal property left undisposed of at the date of her death. The word 'heirs' in English law means primarily the person or persons entitled by succession on intestacy to the real property of a deceased person, but when the word is used with reference to personal property it may be construed, according to the context, as meaning the person or persons entitled by succession on intestacy to the personal property of a deceased person. In the case of a grant of personal property to a person's 'heirs, executors, and assignees whomsoever,' the word 'heirs' would be construed as meaning the person or persons entitled to the deceased's personal property by succession on intestacy, including the husband of a married woman; the word 'executors' would be applicable only to the case of a person dying testate and appointing an executor or executors by his will; and the word 'assignees' would be construed as meaning persons entitled by assignation *inter vivos*, or as trustee in bankruptcy, or otherwise by operation of law during the lifetime of the deceased, and also as including all persons entitled beneficially under the will of the deceased."

The *contention* of the second party was—"That he is entitled to payment of the trust funds, because (1) upon a sound construction of the said marriage contract the trust funds reverted on the failure of children of the marriage to Mrs Battye and became part of her own personal estate which passed on her intestacy to Major-General Battye by the law of England, where she was domiciled at her death; or alternatively (2) because Mrs Battye having become by her marriage a domiciled Englishwoman, her heirs, to whom in the events which have occurred the trustee is by said marriage contract directed to make payment, fall to be ascertained according to the law of England, and the said Major-General Battye was her heir *in mobilibus* according to that law."

The *contention* of the third, fourth, fifth, and sixth parties was—"That upon a sound construction of the said contract of marriage, and in particular the contingent destination of the funds put in trust by Mrs Battye to her 'own heirs, executors, or assignees whomsoever,' the persons to whom, in the events which have occurred, the funds now in the hands of the first party fall to be paid, are her heirs according to the law of Scotland, and that according to that law the said Major-General Battye was not called under but was excluded by the said destination."

The *questions of law* contained, *inter alia*—"1. Do the trust funds fall to be paid to the heirs and executors of the said Mrs Battye ascertained according to the law of Scotland, or to the second party as administrator of her husband?"

Argued for the second party—By her marriage Mrs Battye became a domiciled Englishwoman, and her domicile at the date of her death was English. Her marriage contract fell to be construed by the rules of Scots law, which provided that the heirs of a deceased person were to be ascertained by the law of that person's domicile at the date of his death. Hence when the contract referred to Mrs Battye's own heirs, &c., that meant her heirs as fixed by the law of her domicile at the date of her death, *i.e.*, her heirs according to English law, who were represented by the second party. The calling of Mrs Battye's own heirs, executors, or assignees did not constitute a true destination, but merely expressed the intention that Mrs Battye should never be

divested of the fee except in the event of her having children, which event had not occurred—*Montgomery's Trustees* v. *Montgomery*, 1895, 22 R 824, 32 S.L.R. 628; *Smith* v. *Stuart*, 1894, 22 R. 130, 32 S.L.R. 87. The calling of heirs, &c., simply meant the right was to be one of fee, as was indicated by the calling of the heirs of a disponee in a disposition of heritage—*Thompson's Trustees* v. *Jamieson*, 1900, 2 F. 470, *per* Lord Stormonth Darling at p. 493, 37 S.L.R. 346. If, however, those words were to be read as a destination, then they meant Mrs Battye's heirs, &c., as at the date of her death as ascertained in intestacy—*Nimmo* v. *Murray's Trustees*, 1864, 2 Macph. 1144, *per* Lord Cowan at p. 1147; *Hannay's Trustees* v. *Graham*, 1913 S.C. 476, *per* Lord Dundas at p. 478, 50 S.L.R. 310; *Johnston's Trustees* v. *Dewar*, 1911 S.C. 722, 48 S.L.R. 582; *Scott's Executors* v. *Methven's Executors*, 1890, 17 R. 389, 27 S.L.R. 314. If so Mrs Battye's heirs at the date of her death were her heirs according to English law, for that was the law of her domicile at that date. But if the clause in question was to be regarded as testamentary in effect, then it fell under the operation of the Wills Act 1837 (1 Vict. cap. 36), secs. 18 and 35. That was not a matter of foreign law to be stated as matter of fact, for the Wills Act was a public statute of which the Courts were seised with knowledge—Dickson, Evidence, sec. 1105. If so the marriage of Mrs Battye revoked that testamentary provision, leaving intestacy on that point and letting in Mrs Battye's intestate heirs according to her domicile at the date of her death. *Westerman's Executor* v. *Schwab*, 1905, 8 F. 132, 43 S.L.R. 161, was the converse of the present case. *Earl of Stair* v. *Head*, 1844, 6 D. 904, *vide* Lord Cuninghame at p. 917, was distinguished, for there the parties had expressly contracted that the law of Scotland was to regulate their rights. *Lister's Judicial Factor* v. *Syme*, 1914 S.C. 204, 51 S.L.R. 166, was distinguished, for the contract was concluded in contemplation of residence in Scotland; the husband had resided in Scotland for a long period, and held an appointment in Edinburgh, and the words in question were "next-of-kin," which indicated an intention to benefit the nearest in blood as a matter of fact, not those who were called to succeed as a matter of law.

Argued for the third, fourth, fifth, and sixth parties—The sole question was what was the intention of Mrs Battye in using the words "her own heirs, executors, and assignees"? That intention was to be inferred from the terms of the deed. Here the deed was executed by a domiciled Scotswoman in anticipation of a change of domicile. It was in Scots form, the trustees were Scottish, part of the funds was a real burden over Scottish heritage, the deed was couched in technical terms of Scots law unknown to the law of England, affecting rights peculiar to Scots law, *e.g.*, legitim, and making provisions totally ineffectual in England, *e.g.*, registration for execution. The fact that the estate had been converted was of no moment. In those circumstances it was clear that Mrs Battye's "own heirs," &c., meant her heirs according to the law of Scotland notwithstanding the change of her domicile. The contention of the second party was contrary to that intention, for if his contention was adopted Mrs Battye's funds would pass not to her own heirs but to her husband's heirs—*in re Fitzgerald*, [1904] 1 Ch. 573. Further, if her husband survived her he would by English law take the fee, and it would be inept, as Mrs Battye had done, to give him a mere liferent. Further, the present was not a case of intestacy. Mrs Battye had disposed of her estate in the marriage contract. She had expressed a testamentary intention, and referred to the law of intestacy merely to express a testamentary intention, fixing the class of persons to whom the property should go, viz., those who were her own intestate heirs, but that did not amount to leaving the whole question of her succession to the law of intestacy—*Head's* case (*cit.*); *Brown's Trustees* v. *Brown*, 1890, 17 R. 1174, 27 S.L.R. 414. *Syme's* case (*cit.*) was precisely in point.

At advising—

LORD PRESIDENT—The question raised in this Special Case appears to me to be concluded by authority. The decision of the Whole Court in the case of the *Earl of Stair* v. *Head and Others*, 1844, 6 D. 904, and the decision of this Division of the Court in the case of *Lister's Judicial Factor* v. *Syme*, 1914 S.C. 204, 51 S.L.R. 166, appear to me to be strictly in point.

By her antenuptial contract of marriage, dated in 1862, Miss Susan Wellwood Boswell, a domiciled Scotswoman, settled certain funds in trust. The income of these funds was to be paid to her during her lifetime, and after her death to her husband, a domiciled Englishman, if he survived her. On the death of the survivor the money was to be divided among the children of the marriage, and failing children of the marriage then to the said Susan Wellwood Boswell's "own heirs, executors, or assignees whomsoever." There were no children of the marriage. The wife died in 1863, a domiciled Englishwoman. Her husband, who survived until 1915, enjoyed the income of the fund and died then a domiciled Englishman. The question we have to decide is whether the wife's heirs and executors are to be ascertained according to the law of Scotland or according to the law of England.

I am of opinion that the heirs of the wife fall to be ascertained according to the law of Scotland. The antenuptial marriage contract was in the Scottish form. From beginning to end it contains not a single phrase or expression peculiar to English law. It contains a consent to registration for preservation and execution in the Books of Council and Session. It was executed by the parties in Scotland. The trustees were domiciled in Scotland. The trust has throughout been managed by Scottish law agents, and the whole funds put in trust by the lady were situated in Scotland.

It is common ground that the meaning and effect of the deed are to be judged of according to the law of Scotland. But the second parties maintain that the law of

Scotland directs that the capital of this fund shall be paid to those persons who are designated by the law governing the wife's moveable succession at the date of her death. That was the contention which proved unsuccessful in the case of the *Earl of Stair* v. *Head and Others* (*cit.*), as may be seen by an examination of the opinions of Lord Fullerton, Lord Jeffrey, and especially of Lord Cockburn. And the effect it must be noted in this case would be if this contention prevailed to give the money to the husband's heirs and to take it from the wife's own heirs. That would in my opinion be to defeat the obvious intention of this deed, because it may with truth, I think, be said of this lady that at the time when the marriage contract was executed she knew nothing whatever about the law of England and was thinking only of the law of her own land.

On the other hand the contention of the third parties appears to me to be in harmony with the decision of the majority of the Whole Court in the *Earl of Stair* v. *Head and Others* (*cit.*), and is in complete agreement with the reasoning especially of Lord Ivory, who said—"Whether the words 'heirs and executors' as they stand in the clause of destination which has given rise to the dispute are to be read in that more general sense where, in the absence of all special intention on the part of the makers of the deed, it is necessary in order to discover the heirs or executors entitled to succeed to resort to the law of the party's succession *ab intestato;* or whether on the contrary (as in a case of testate succession) they are not rather to be read as designating one particular class or description of heirs and executors, expressly chosen and intended as such by the makers of the deed themselves, and who are accordingly destined to take expressly in the character of grantees under the deed and by force of the specific provisions in their behalf therein contained. In the first case the result would of course fall to be regulated by the law of the domicile at the time of the party's death; but in the second it would be regulated and controlled by the declared intention of the party as to be found within the four corners of the written instrument. Now although there be difficulties in either view, I think they are fewer and less formidable in the latter case than in the former. And if such be the reading there appears to be quite enough in the declaration that the import and effect of the deed 'shall be construed and regulated by the law of Scotland' . . . to establish a positive intention that the operation of the destination should be confined to that particular class and description of heirs and executors only who would have been entitled to the character, agreeable to the known rule of succession by the law of Scotland, as applied to the case of a party whose decease had occurred in that country."

In accordance with that view it appears to me that the expression here "heirs and executors" of the wife was intended to mean one "particular class or description of heirs and executors expressly chosen and intended as such" by the maker of the deed. If that be so, then at once the authority of the case of *Lister* v. *Syme* (*cit.*) is let in, and it is decisive of the controversy.

The conclusion I have reached appears to me to be in harmony also with the principles expressed in the 3rd section of the Wills Act of 1861 (24 and 25 Vict. cap. 114, sec. 3), and with the comment upon that statute made by Professor Dicey quoted in my opinion in the case of *Lister* v. *Syme* (*cit*). In this case as in that I am of opinion that all questions of interpretation must be dealt with exactly as they would have been dealt with had the granter of the deed not changed her domicile.

LORD SKERRINGTON—The parties to this antenuptial contract were married in 1862, and the bride died in 1863, there being no issue of the marriage. As directed in the contract the trustees paid to the widower until his death on 20th February 1915 the income of the trust estate, which consisted solely of property settled by the lady. At the time of the marriage her fortune consisted of a legacy of £1000, secured as a real burden over lands in Scotland. This legacy was subsequently paid to the trustees, and according to the admission of the counsel for all the parties it was thus converted from heritable into moveable estate. On the death of the survivor of the spouses the trustees were directed by the marriage-contract, failing children of the marriage, to pay or convey and make over the principal sums and means and estate in their hands to the lady's "own heirs, executors, or assignees whomsoever." The fund is claimed (*a*) by the second party as the administrator of the deceased husband's estate, appointed by the Probate Division of the High Court of Justice in England on 27th March 1915, who maintains that the fee of the fund vested in the husband by the law of England upon the death of the wife; and (*b*) by the third, fourth, fifth, and sixth parties, who are or represent the persons who would have been entitled to take the fund as the wife's heirs *in mobilibus* if she had died intestate and domiciled in Scotland. The latter were originally in dispute among themselves as to whether the wife's heirs *in mobilibus* must be ascertained as at her death or as at the husband's death, but at the debate it was agreed that the former was the correct view in respect of the recent decision by the Whole Court in the case of *Anderson and Others* (*Anderson's Marriage-Contract Trustees*), 1917, 54 S.L.R. 282 (13th February 1917).

We are informed in the Special Case that the lady at the time of her marriage was domiciled in Scotland, but that her husband was throughout his life a domiciled Englishman. Beyond the fact that he was described as an officer in the Indian army, and as "presently residing" in London, the antenuptial contract contains nothing to suggest that either party had any legal connection either present or prospective with any country except Scotland. The deed is expressed in the technical language of Scots law, and in particular it bears that the husband

renounced his *jus mariti* and right of administration over the estate conveyed by the wife to the trustees, which besides the legacy included also *acquirenda*. The second party's case must be that this renunciation of marital rights was a farce, but that the law of England conferred upon the husband on his marriage a right to "administer" his wife's fortune so far as undisposed of at her death, which right he was not asked to renounce. One may conjecture that if the legal position had been explained to the lady before her marriage she would probably have stated that the contract was quite satisfactory, in respect that (on her reading of it), after the death of herself and her husband, and failing children, her fortune was destined in so many words to her own relations and not to her husband's relations. On the other hand it is possible, though I think unlikely, that she would have said that if her husband should happen to survive her he was very welcome to the capital of her fortune over and above the life interest conferred upon him by the contract in the same event.

It is I think clear that both parties intended that the law of Scotland should regulate the interpretation and effect of their contract. This view was not controverted in the argument, and it is in harmony with decisions pronounced both in Scotland and in England in circumstances very similar to the present—*Corbet* v. *Waddell*, 1879, 7 R. 200, 17 S.L.R. 106; *in re Fitzgerald*, [1904] 1 Ch. 573. What then is the meaning and effect which the law of Scotland gives to the direction that on the death of the survivor of the spouses, and failing children, the trust estate should be paid to the settler's "own heirs, executors, or assignees whomsoever?"

The Special Case states in so many words that the lady died "intestate," but the context shows that this expression signifies merely that she left no writing disposing of her estate other than the marriage contract. The first argument, however, submitted by the counsel for the second party was to the effect that the case was one of true intestacy, and that, according to the admission in article 3 of the Special Case, the law of England entitles a surviving husband to succeed to the personal property of his wife left undisposed of at her death. In short, it was argued that the language under construction had no meaning and effect except to express the legal consequences which would result from the failure or termination of the matrimonial purposes of the contract, viz., that the wife being in that event the undivested beneficial owner of her fortune, would on her death be succeeded by her testamentary heirs if she should leave a will disposing of the fund, or by her heirs *ab intestato* if she should leave no such will. Counsel referred to the case of *Montgomery's Trustees* v. *Montgomery*, 1895, 22 R. 824, 32 S.L.R. 628, where the ultimate destination in an antenuptial contract was in favour of the "assignees, executors, or nearest of kin" of the wife in the event (which happened) of there being no children alive at the death of the survivor of the spouses. The only question which the Court required to decide was whether a holograph will made by the wife was so expressed as to dispose of the fund settled by her marriage contract, but there are passages in the opinion of Lord M'Laren which favour the view that if the trust fund had not been carried by the will it would have passed to the wife's next-of-kin, not under the destination but as part of her intestate estate. A similar opinion was expressed by Lord Fullerton, and by the other Judges of the minority, in the case of *Earl of Stair* v. *Head*, 1844, 6 D. 904. Lord Fullerton said—"This argument rests on the assumption that the words 'heirs, executors, or assignees' are expressive of a testamentary intention. This is not the view of such an expression, in such a deed, by the law of Scotland. The deed just declares that the sum shall be part of the wife's succession, testate or intestate. It is a provision in her favour. There is no decision that such a provision should be construed as a will. If it were a will, neither party could alter it." It does not seem to have occurred to Lord Fullerton that unless the case was one of testate succession the persons whom he describes as the "English executors" (in other words, the lady's relations by the half blood) had no better claim than the "Scotch executors" (her relations by the full blood), seeing that as the Lord Justice-Clerk pointed out (p. 912) it was not disputed that "but for the terms of the marriage contract Mr Stuart would have been his wife's executor by the law of England." The legal representative of the deceased husband made no claim as he does in the case now before us. With all deference to the eminent Judges who have expressed a contrary opinion, it does not seem to me to be reasonable to attribute a desire to die intestate to a person who gives specific directions as to the disposal of his property after his death. I prefer the opinion of Lord President Inglis in the case of *Brown's Trustees* v. *Brown*, 1890, 17 R. 1174, at p. 1180, 27 S.L.R. 414. It is true that the clause which the Court had there to construe did not, like the one before us, contain the word "executors," and that it occurred not in a marriage contract but in a trust-disposition executed by a lady with a view to her marriage. These differences do not seem to me material. The Lord President said—"Now in the circumstances which have occurred the first question arises upon the construction of the destination 'failing issue, to my heirs or assignees in fee.' That is a form of expression with which we are perfectly familiar in deeds of this description, and the meaning of it is quite fixed in our practice. If the estate be heritable it would go to the heir; if it be moveable it would go to the heirs *in mobilibus*; and if it be partly the one and partly the other it would be divided accordingly. But it would be quite a mistake to suppose that because that effect is given to these words this is a case of intestacy. The heirs or assignees do not take by reason of failure of the deceased to make any will. On the contrary, they take by the operation of the will. They take as conditional institutes after the children,

and as such they are entitled to uplift and possess the estate under the title of a disponee, and not under a title made up by confirmation or service." At first sight it seems anomalous that "assignees" should be regarded as members of a marriage-contract destination, but, as the Lord President indicated, it was in a former state of the law a great advantage to a general disponee *mortis causa* to be also in right of a special assignation which made confirmation unnecessary—(Ersk., iii, 9, 20). For these reasons I reject the contention that the wife died intestate.

Counsel for the second party argued, in the second place, that if the clause in the marriage contract was intended to have a testamentary effect it was a will within the meaning of the English Statute of Wills (Wills Act 1837 (1 Vict. cap. 26)), and was by section 18 thereof revoked by the lady's marriage with a domiciled Englishman. He founded upon some of the observations of the Judges in the case of *Westerman's Executor* v. *Schwab*, 1905, 8 F. 132, 43 S.L.R. 161. There is no reference to this contention in the Special Case. By section 35 it is enacted that the Act shall not extend to Scotland. If the question had been competently before us I should, as at present advised, have been prepared to decide that section 18 does not have the effect of nullifying a stipulation in an antenuptial contract executed in Scotland on the marriage of a domiciled Scotswoman.

Assuming that the clause in the contract, though pactional as between the spouses, conferred a testamentary interest upon the wife's "heirs, executors, or assignees," and assuming that this clause was still operative at the date of the wife's death, counsel for the second party argued, in the third place, that the trust estate being moveable the effect of the destination—there being no "assignees"—was to vest the beneficial right to the trust-fund in the wife's "heirs," or "heirs and executors"—expressions including her heirs *in mobilibus ab intestato*, and designating the person (in this case the husband) who upon the wife's death became actually entitled to succeed to her moveable estate if and in so far as undisposed of. According to the rules of private international law as administered in Scotland, which rules form part of our municipal law, the persons so entitled to succeed cannot be ascertained without invoking the assistance of the law of the wife's last domicile, which in this case happens to be England. This argument seems to me to have the merit of construing the expression "heirs" or "heirs and executors" in its primary sense. It is not essential to the notion of heirship that there should be estate either heritable or moveable, as the case may be, to which the heir or heirs can succeed. But *prima facie* it is essential that if there should be estate at the death of the ancestor and it is undisposed of, the person described as the heir should be entitled to succeed to it. The opponents of the second party propose to attribute the character of heirship to persons who in fact are not regarded as the wife's heirs either by the law of Scotland or by that of England, and who in no event could succeed to anything upon her death. On the other hand it must be kept in view that the question for decision is purely one as to the meaning of a contract, and that if the intention is otherwise clear even a highly technical term such as that with which we are concerned must, if necessary, be construed in a sense which is secondary and inaccurate. There is one circumstance which makes it comparatively easy to come to the conclusion that the expression "heirs" or "heirs or executors" when used with reference to moveable succession might be intended to be merely descriptive of a certain relationship with the deceased quite irrespective of any actual right of succession, and that is the distributive meaning which the law of Scotland gives to the word "heirs" in destinations like the present. The word includes the heir in heritage, and undoubtedly this kind of heirship involves a reference solely to the local rules of succession in Scotland. A settler or testator might not unnaturally be supposed to intend that the heirs *in mobilibus* whom he calls to the succession by a phrase which includes his heirs in heritage should be ascertained by the application of the same local rules, and not by reference to the rules of private international law. Prior to the Intestate Moveable Succession Act of 1855 it must have been still easier to construe the word "heirs" when used with reference to moveable estate as equivalent to "next-of-kin"—an expression indicating propinquity, which in a case somewhat similar to the present one we recently held ought to bear its Scottish and not its English meaning in a Scotch marriage contract—*Lister's Judicial Factor* v. *Syme*, 1914 S.C. 204, 51 S.L.R. 166. A somewhat similar decision was pronounced in the case of *Machargs* v. *Blain*, (1760) M. 4611.

The only case cited to us in which the present question came before the Court without any specialty was that of *Brown's Trustees* v. *Brown*, already referred to. The Lord Ordinary (Fraser) there repelled a claim at the instance of a domiciled Australian to the estate of his deceased wife who was domiciled in Scotland at the time of her marriage, and who in contemplation thereof had settled her property by a Scotch trust-disposition which contained an ultimate destination in favour of "her heirs or assignees." Lord Fraser proceeded upon the presumed intention of the lady, and cited Story (section 479) in support of his opinion. He concluded as follows—"At the time when the trust conveyance was executed by Josephine Bayne she knew nothing about the law of Australia, and was thinking only of the law of her own land." An opinion of Lord Fraser on a question of private international law is entitled to great weight, and in the Inner House Lord Adam expressly agreed with him. The other Judges of the First Division, without disapproving of Lord Fraser's reasons, adhered upon the ground that an opinion of an Australian counsel obtained by order of the Inner House showed that the husband was not an "heir" according to the law of New

South Wales. In addition to Story one may cite Voet (28, 5, 16) and Burge (vol. ii, p. 857, vol. iv, pp. 590-4) in favour of the view that a bequest in favour of legal heirs ought to receive effect according to the local rules of the legal system with which the testator was presumably familiar, and that even in the case of wills disposing of immoveable property situated in different countries. On the other hand Lord M'Laren's opinion as stated in his work on Wills and Succession (3rd ed.), ii, sec. 1417, i, sec. 67, is that there is no *delectus personæ* in a bequest to heirs, and that the reference in a case of moveable succession must be to the law of the testator's last domicile.

Counsel for the third, fourth, fifth, and sixth parties relied upon the decision of the majority of the Judges of the Whole Court in the case of *Earl of Stair* v. *Head*, already referred to. Both spouses in that case were natives of Scotland, though domiciled in England, but their antenuptial contract was in Scotch form, and it contained a declaration in the following terms—"And lastly it is declared that although the parties happen to be at present in England, where they have the prospect of remaining some time in consequence of the said Hugh Stuart's professional avocations, yet they intend when circumstances shall permit to return to Scotland and fix their residence there, and therefore it is agreed that the import and effect of this contract and all matters and questions connected with their intended marriage shall be construed and regulated by the law of Scotland." The majority construed this clause as meaning that the spouses wished their contract to receive effect as if they had actually returned to Scotland and had thereafter remained domiciled in that country. Accordingly they interpreted the expression "heirs, executors, and assignees whomsoever" according to the law of Scotland as excluding, and not according to the law of England as including, relatives of the half blood. Though the clause was special and unusual the decision may on the whole be regarded as unfavourable to the second party. On the other hand, as I have already pointed out, it seems to have been matter of admission in that case that the effect of the marriage contract was to exclude any right of succession on the part of the husband as "executor" or administrator of the estate of his wife in the event of her predecease. Accordingly the decision cannot be regarded as a direct authority upon the question which we have to decide.

In choosing between the two possible opinions as to what the lady really intended it is necessary to notice that the conveyance to the trustees of her *acquirenda*, though peculiarly expressed, might, in one view of its meaning, and in certain events, have resulted in the trustees becoming the owners of real estate situated in one or more foreign countries. In that somewhat remote contingency one might have been faced by the problem put by Burge and borrowed by Story, sec. 479 (*h*), as to the construction of a will made in England in favour of the heir of a person who had no children, and whose heir in heritage would be different according to the law of England, of Jamaica, and of British Guiana, in all of which countries the testator was assumed to possess real estate. I have come to the conclusion that the opinion expressed by Lord Fraser and by the jurists whom I have cited is in accordance with what a settler or a testator would really intend in the great majority of cases, and that it ought *prima facie* to be given effect to in the absence of some counter consideration more substantial than the technical difficulty to which I have adverted. The present case affords an excellent illustration of the anomalous and unexpected consequences which would result from reading into a Scotch marriage contract a tacit invocation of the rules of a foreign legal system of which the settler and her legal advisers were presumably ignorant. The fact that the destination is conceived in language of a highly technical character is a circumstance which tends to support the view at which I had arrived on more general grounds. If I had come to an opposite conclusion upon this important question I should have desiderated a much more careful statement than is to be found in the Special Case with regard to the nature of an English husband's right to administer the undisposed of property of his predeceasing wife, before I should have thought it safe to decide that he is her "heir" according to the Scotch conception of the term. To one not conversant with English law it is not easy to discover whether the husband succeeds his wife as a fictional next-of-kin or in virtue of his *jus mariti*, the quality of separate estate having ceased upon her death in regard to her undisposed of property It might, however, be argued that even if the latter view of English law be accepted the husband would still be his wife's "executor" according to Scots law in respect of his right to be appointed her administrator on her predecease. But the question does not arise if I am right in thinking that the wife's heirs and executors must be determined without reference to any legal system except that of Scotland.

LORD ANDERSON—It is a well-recognised rule of private international law—a rule which is part of the municipal law of Scotland—that the law of the domicile regulates the moveable succession of a defunct. In the case of intestacy this rule is absolute and invariable, as the deceased has had no occasion to qualify or modify the rule. Accordingly it is not surprising that the second party's counsel maintained as their leading argument that Mrs Battye died intestate. If this argument could have been successfully maintained the second party would take the succession, as Mrs Battye died a domiciled Englishwoman and by the law of England her husband was her heir. Two contentions were submitted on this head. The first, as I understood the argument, was to the effect that inasmuch as the fund in question had been provided by Mrs Battye for certain trust purposes it remained all along *in bonis* of her subject to the fulfilment of these trust purposes;

that when these purposes had been satisfied the fund became the absolute property of Mrs Battye, and as she had not tested upon it there was intestacy. The authorities founded upon on this branch of the case were *Montgomery's Trustees* v. *Montgomery*, 1895, 22 R. 824, 32 S.L.R. 628, and *Thompson's Trustees* v. *Jamieson*, 1900, 2 F. 470, 37 S.L.R. 346, which I do not think support in any degree the contention of the second party. The view proponed was that which was taken by Lord Jeffrey in the case of the *Earl of Stair* v. *Head*, 1844, 6 D. 904, but it does not appear that any other Judge who took part in the decision of that case, with the possible exception of Lord Fullerton, agreed with Lord Jeffrey's view. The contention can only be successfully maintained by ignoring the destination in the marriage contract to heirs, executors, or assignees, and the conclusive answer to this argument of the second party is furnished by the Lord Ordinary (Cunninghame) in the last-mentioned case, when he says—"When a party in Scotland makes a destination or substitution of a legacy not solely to an individual but to a class of his heirs, the succession of the parties called is not the less a testate succession because they are preferred as a class."

The second argument for intestacy was based on the provisions of the 18th section of the Wills Act 1837, which enacts that a will made by a single woman is revoked by her marriage to an Englishman—*Westerman's Executor* v. *Schwab*, 1905, 8 F. 132, 43 S.L.R. 161. This contention implies that the marriage contract is partly valid and partly invalid, for it was not maintained that the deed as a whole fell to be set aside. Our law does not favour such a result. But it seems to me that the conclusive answer to this point is that the deed under consideration is not a "will" in the sense of the English Act. The first section of the Act, which is the interpretation clause, defines "will" as extending to a testament, a codicil, an appointment by will or by writing in the nature of a will in the exercise of a power, also to a disposition by will and testament or devise of the custody and tuition of any child and to any other testamentary disposition. I am of opinion, from a consideration of these provisions and of the terms of the other sections of the Act, that it applies only to a will or testament in the ordinary signification of these terms, and that a marriage contract containing a clause which is in reality contractual alhough with testamentary effect is not a "will" in the sense of this Act.

The alternative contention of the second party was urged on the footing that there was not intestacy. The rule of private international law before alluded to is applicable to testate as well as to intestate succession. In the former case, however, the defunct has opportunity to qualify or modify the operation and effect of the rule. This modification may be express or implied—*In re Fitzgerald*, [1904] 1 Ch. 573. In the present case there has been no express modification, but it is maintained by the parties other than the second party that by clear implication Mrs Battye has declared her intention that her succession shall be regulated by the law of Scotland. I am of opinion that this contention is well founded and that the present case is ruled by the decisions in the *Earl of Stair*, and *Lister's Judicial Factor* v. *Syme*, 1914 S.C. 204, 51 S.L.R. 166. In the *Earl of Stair* it is true that the deed contained a clause, held to be applicable to the whole deed, declaring that its import and effect, and all matters and questions connected with the intended marriage, should be construed and regulated by the law of Scotland, and there is no such clause in the deed with which this case is concerned. But this does not seem to be a material difference, as it is common ground that the marriage contract in the present case having been prepared and executed in Scotland falls to be construed according to Scots law. The second party accepts this position and maintains that by the law of Scotland the heirs must be ascertained according to the law of England. This was just the argument which was so forcibly put by Lord Cockburn in the case of the *Earl of Stair*, and which was rejected by the majority of the Court. The clause in the marriage-contract which was to be construed contains a special destination to a class, who are called as conditional institutes, and although the destination occurs in a contract of marriage the clause is testamentary in its nature. The question is thus one of intention which falls to be ascertained from a consideration of the language of the deed as a whole. The case of *Lister's Judicial Factor* appears to me to be a direct authority against the contention of the second party. Indeed this case is *a fortiori* of that, for here there are none of those embarrassing considerations which induced the dissent of Lord Johnston. There are in the deed we are concerned with no terms or phrases of English conveyancing pointing to the application of English law, and the husband is not expressly excluded from the class of heirs. I reach the conclusion that Mrs Battye intended that her succession should go to her heirs according to the law of Scotland, as if she had died domiciled in that country, from these considerations—(1) that the deed was prepared by Scottish solicitors in Scotland, and executed there; (2) that it is in form a Scottish deed with terms and phrases peculiar to Scottish conveyancing; (3) that the trustees nominated in the deed were Scotsmen; (4) that the trust estate was heritably secured over land in Scotland; (5) that the deed contains a clause of registration in the Books of Council and Session for preservation and execution; (6) that the conditional institutes are Mrs Battye's "own" heirs, executors, or assignees; and (7) that these institutes are described by terms distinctive of Scottish conveyancing and different from those which would have been used in an English deed. These considerations satisfy me that the lady intended her estate to go to her own relatives and not to those of her husband.

I am therefore of opinion that the first question should be answered as suggested by your Lordship.

LORDS JOHNSTON and MACKENZIE were absent.

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

Counsel for the First, Third, and Fifth Parties—Burnet. Agent—Henry Smith, W.S.

Counsel for the Second Party—M'Phail, K.C.—R. C. Henderson. Agents—Mackenzie & Kermack, W.S.

Counsel for the Fourth and Sixth Parties—Chree, K.C.—Dykes. Agents—J. L. Hill, Dougal, & Co., W.S.

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*Thursday, March* 15.

## FIRST DIVISION.

[Lord Cullen, Ordinary.

## KEITH *v.* CAIRNEY.

*Right in Security—Bond and Disposition in Security—Diligence—Competency of Summary Diligence on a Bond which did not Truly Express the Transaction between the Parties.*

The creditor in a bond and disposition used summary diligence upon it against the debtor. The bond bore that a sum of money had been instantly borrowed and received by the debtors. One of the debtors brought a suspension of the charge. He alleged and proved *scripto* that the bond was not granted in respect of money instantly advanced but in security of balances due by a third party to the creditor. The parties were at issue as to whether those balances had been paid off in whole or in part, but no proof of payment in whole or part was adduced. *Held* (*sus.* Lord Cullen) that it being proved that the bond was not in consideration of money instantly advanced, the *onus* was upon the creditor to prove the amount of the balance for which the bond was truly granted, and the charge fell to be *suspended.*

Alexander Aberdein Keith, *complainer*, brought a note of suspension against Douglas Cairney, *respondent*, craving suspension of a charge at the instance of the respondent upon a bond and disposition in security.

The complainer pleaded—"3. In respect that (1) the terms of the said bond and disposition in security do not represent the true nature of the obligations between the parties thereto; and (2) the debt, if any, due by the complainer to the respondent has not been properly constituted against the complainer, personal diligence upon the said bond and disposition in security is incompetent, and decree of suspension of the said charge should be pronounced as craved."

The respondent pleaded—"5. The complainer's averments can be proved only by the writ or oath of the respondent."

The *facts* of the case and the procedure appear from the opinion of the Lord Ordinary (CULLEN), who on 5th February 1916 suspended the charge.

*Opinion.*—"In this case the complainer seeks to suspend a charge on a bond and disposition in security for £500, dated 4th July 1903, granted by him, his now deceased brother William Leslie Keith, and his sister, in favour of the respondent, with whom the said William Leslie Keith had stock-broking transactions.

"The bond bears that the granters 'have instantly borrowed and received' from the respondent the sum of £500 sterling, which sum they bind and oblige themselves to repay at Whitsunday 1904, with the usual provisions for interest and penalties. It contains a clause of consent to registration for execution.

"The complainer avers that the bond sets forth a fictitious transaction; that neither the sum of £500 nor any other sum was borrowed and received by the granters in exchange therefor; and that the true cause of its being granted was to secure payment to the respondent of any balance (to the extent of £500) which was due to him at the date thereof by the said William L. Keith. He further avers that he signed the bond subject to a condition not expressed in it that he 'should incur no personal obligation and should be involved in no personal obligation to pay the sums due thereunder.' He further avers that, if any balance was in fact due to the respondent at the date of the bond—which he does not admit—it was wiped out by subsequent transactions between him and the said William L. Keith. The respondent admits that the bond was granted not for money borrowed and received by the granters in exchange therefor but to secure payment to him (up to £500) of the balance then due him by the said William L. Keith, which balance he avers amounted to more than £700. He denies that any part of this indebtedness has been paid off. He further denies the alleged condition as to the complainer coming under no personal liability.

"At the discussion in the procedure roll the complainer asked to be allowed a proof of his said averments *prout de jure.* The respondent did not move for any proof on his side, but confined himself to maintaining his fifth plea-in-law. I allowed the pursuer a proof *scripto*, being of opinion (1) that while the bond falsely stated the consideration therefor the parties were on record agreed as to this, and were further agreed that the true cause for which it was granted was to secure payment to the respondent of whatever balance might be due to him by the said William L. Keith at its date, and (2) that as regards the complainer's averments of no personal liability under the bond and discharge of any indebtedness at its date, the respondent's fifth plea-in-law was sound.

"The complainer's proof *scripto* consists of documents which do not go further than to show that no money was given in exchange for the bond, and that it was granted, as stated on record, as security for the indebt-