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BANNERMAN
v.
BANNERMAN, &c.

[Hume's Decisions, p. 130.]

DAVID BANNERMAN of Letham Hill, *Appellant;*

AGNES BANNERMAN, Wife of James M'Kinlay, Manufacturer in Glasgow, and the said JAMES M'KINLAY for his interest, and WM. and ELIZABETH BANNERMAN, and DAVID SPOTTISWOODE, their Curator *ad litem*, } *Respondents.*

House of Lords, 1st March 1805.

CONTRACT OF MARRIAGE — COLLATION — SUCCESSION AB INTESTATO.—A father having children by a first wife deceased, entered into an antenuptial contract of marriage with his second wife, by which, in the event of his dying intestate, he conveyed all his heritable and moveable estate, share and share alike, among the children, both of that and his former marriage. Many years after this, he executed a disposition of certain heritable subjects in favour of his daughter Agnes, by his first marriage, and her husband. After the father's death, her brother claimed the whole heritable estate, and she claimed her share of the whole heritable and moveable estate. Held that the children of both marriages were entitled to equal shares of the whole, and that the daughter was bound to collate the heritable subject disponed to her, and the other children were bound to collate whatever sum or subject they had received. In the House of Lords, this judgment was in part remitted and part affirmed; the part remitted having reference to collation, the Lord Chancellor doubting whether this could be considered as an *ab intestato* succession, to which alone collation could apply.

The deceased David Bannerman of Letham Hill was twice married. With his first wife he had two children, the appellant, David Bannerman, and Agnes Bannerman, one of the respondents. No contract or deed of settlement was entered into with reference to this marriage, or the issue of it.

In entering into his *second* marriage with Jean Finlay, an antenuptial contract was executed, whereby he made over to his intended spouse, in case she should survive him, one-third of the whole household furniture and plenishing, including heirship moveables, that should belong to him at his death: And also bound himself, his heirs, &c., to pay her an annuity of £15 per annum, this to be restricted to £10 per annum, "in "case of and during the existence of *a child or children of the* "*said marriage*, or their issue." Declaring that the said pro-

" visions to the said Jean Finlay to be in full of all terce of " lands, half or third of moveables and other legal provisions " whatsoever." " Moreover, it is further declared, that in case " the said David Bannerman shall die intestate, and without " leaving any written settlement of his affairs, then, and in " that case, the child or children procreated of this mar- " riage (if any be) shall succeed and have right to, as in " that event he hereby dispones, assigns, and makes over " to them, and each of them, an equal share and proportion, " along with his other children by his former marriage, and " by any future marriage which he may hereafter contract, " *secundum capita* of the whole sums, debts, effects, and " subjects, heritable and moveable, which shall be belonging " and owing to him at his decease; but declaring, that as " the provisions and conveyance in favour of the children of " this marriage, above written, is intended to take place " only in the event of the said David Bannerman his dying " without making a settlement; so he, the said David Ban- " nerman, shall have the full and unlimited use and disposal " of his said sums, debts, effects, and subjects, during his " life, and to settle and destinate the same by deeds, to take " effect at and after his death, in such manner as he shall " think fit."

Of this second marriage he had issue, the other respondents, William and Elizabeth Bannerman.

David Bannerman died in the year 1799, without leaving any written settlement of his affairs; but, sometime previous to his death, and twenty-one years after the date of the above contract, he executed a disposition, conveying to James M'Kinlay, spouse of his daughter Agnes Bannerman, certain heritable subjects, under burden of certain specified provisions, to the said Agnes Bannerman, his said daughter, and her children. This disposition proceeded on the narrative, " that no provision has hitherto been made by me to my said " daughter, which it is just and reasonable I should now do."

After his death, his widow was confirmed *qua relict*, under which title she intromitted with the whole moveable estate, while the appellant, as heir of his father, took possession of his heritable estate, and had, it was said, received large sums from the father during his life.

Agnes Bannerman or M'Kinlay raised the present action of declarator and payment, to have it found, that by the terms of the above contract of marriage, she was entitled to the one-fourth of all her father's estate, both heritable and move-

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able, and concluded for payment of "one-fourth share of "the said heritable property, in terms of, and conform to the "foresaid contract of marriage," she being willing to allow £600, being the value of the subjects disponed by her said father to her by the foresaid disposition. Another action was raised by William and Elizabeth Bannerman, on the same grounds, and claiming that their shares be paid equal to a fourth part of the whole, if Agnes Bannerman were included in the division, or to two-thirds, if she were held to be excluded. These two actions were conjoined.

It was maintained by the appellant, 1. That Agnes Bannerman had no right whatever, under the contract of the second marriage, and she was farther barred by special provision. 2. That the children of the second marriage having intromitted with the whole moveable effects, had already drawn their share of it; and that they could now only claim so much of the heritable property as would be sufficient to make up to each of them one-fourth of the whole; and, 3d, That as his right of succession was as heir at law, and not under any particular deed, he was entitled to the whole heritable property, less that part of it which shall be sufficient to make up to William and Elizabeth their fourth share under the marriage contract, and has no intention of collating, and is not bound to collate, the heritable property, he not wishing to participate in the moveable.

June 14, 1800. The Lord Ordinary found, "that the whole subjects, heri- "table and moveable, which belonged to the deceased David "Bannerman, will fall to be divided into four equal portions, "between the pursuers and defender in these conjoined ac- "tions; each being bound to give allowance for, or throw "into *cumulo* to be divided, such sums or subjects, or the "value thereof, as either of them may have received from Nov. 18, 1800. "their father during his lifetime." On representation, his Lordship adhered. And, on reclaiming petition, the Court July 2, 1801. adhered.

A petition for sequestration of the rents being at this stage July 4, 1801. presented, the Lord Ordinary sequestrated the same, and July 9, 1800. appointed a party receiver. A representation was presented against this interlocutor, but refused: And, on reclaiming petition to the whole Court, this interlocutor was adhered to. The appellant then reclaimed against the interlocutor of 2d July. Dec. 15, 1801. Whereupon the Court adhered, "reserving to the petitioner "to be heard with respect to the claim made against him of "collating any sums received by him from his father, and

" remitted to the Lord Ordinary to proceed accordingly, " and do therein as he should see cause." By two interlocutors he was appointed to condescend and specify all sums received from his father since he became forisfamiliated.

Against these interlocutors the present appeal was brought.

Dec. 18, 1801.
Jan. 16, 1802
Jan. 19, 1802.

Pleaded by the Appellant.—The contract of marriage contains merely a settlement of a jointure on the second wife, Jean Finlay, and of certain provisions on his children, to be procreated of his second marriage, in case he should die intestate, and without leaving any written settlement of his affairs; and it was by no means intended by it to secure any provision to the children of the first marriage; but their succession remains to be settled as between themselves by the rules of law *ab intestato.* And this construction of the disputed clause in the contract is strengthened by the disposition executed in favour of the husband of the respondent Agnes, which proceeds on the narrative of no provision having hitherto been made for her. The appellant therefore is not bound to collate the heritage to which he has succeeded, as heir at law *ab intestato.* Agnes can claim nothing under the contract of marriage, and even if she could, all right would be excluded by the disposition in her favour, which expressly bears to be a provision to her. In regard to William and Elizabeth, the appellant admits that they are entitled to the half of the whole succession left by their father. As they are, however, expressly entitled to part of the moveable succession, or to the whole, if Agnes Bannerman does not choose to collate the separate provision made for her, the appellant insists only that, in taking their share of the real estate, these respondents shall give him deduction for the value of the personal estate to which by law they are entitled.

Pleaded for the Respondents, Agnes Bannerman and Husband.—By the contract of marriage in question, the whole property, heritable and moveable, was conveyed to his children of the first, as well as of the second marriage, in equal shares, in case the granter should die intestate, and without leaving any written settlement of his affairs. Such is the import and construction of the contract, and such being the event that has actually taken place, the respondents are entitled to their share of that succession accordingly. Nor is this right of the respondents to a share of their father's estate, heritable and moveable, in the least affected by the disposition in favour of James M'Kinlay, as the last

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deed contained no revocation of the contract, nor any condition that the respondents should, by acceptance of the right contained in the disposition, discharge their claim under the contract, either in whole or in part.

Pleaded for the Respondents, William and Elizabeth Bannerman.—It seems admitted by the appellant that the respondents are entitled to one half, but then it is stated, that as they intromitted with the whole moveables, they have been paid their share; but this is a mistake. They have not intromitted with the deceased's moveable estate. It is the widow who has done so, and who has raised a multiplepoinding to have these distributed into four shares, according to the contract of marriage. And, therefore, the nature of the contract of marriage being to divide the whole property, heritable and moveable, belonging to the deceased, between the children of the first and second marriage, the appellant is bound to collate the heritage with them. Mr. Erskine says, Inst. B. 3, tit. 9, § 24, that "every "provision given by the father to the child falls under col- "lation," but here there is no provision given to the respondents, and, therefore, in every view, the appellant is bound to collate, not only those sums advanced to him by the father during his life, but also the heritage. Collation is not confined to the heir, but pleadable by all children, according to the tenor of the decisions. In these circumstances, and seeing that the appellant intended to repudiate his father's contract of marriage, which disposed of his whole property, heritable and moveable, among the children of the first and second marriages, and had taken exclusive possession of the heritage, the sequestration was a warranted step.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,

"I rise to move that judgment in this case be delayed till to-morrow, as I wish to reserve for so long the consideration of one point in it, which is that regarding the collation by the children, of those goods which they received from their father during his life-time.

"This point deserves mature consideration. 1. As the doctrine of collation in Scotland seems to differ from that which is held in England. 2. From the peculiar rights which an heir at law in Scotland possesses; and, 3. From the peculiarity of the legal claims of younger children in Scotland.

"Persons of very high authority in the Court below have differed on the effects of the contract of marriage. Of the learned judges,

nine were of the opinion expressed in the interlocutors appealed from. In the minority, however, there were great authorities also.

" The question I shall have to propose to your Lordships will be, Whether you see sufficient reason, in all the circumstances of this case, and particularly in the text of the contract, on which the question arises, to reverse the interlocutor pronounced by the Court of Session or not. I confess that my own individual opinion is, that the majority of the Court is in the right.

" The question at issue depends on the following circumstances. (Here his Lordship stated the circumstances of the case). That in contracting a second marriage, he should have thought of providing for the children of his first marriage, I do not at all wonder at. There is no doubt that in England, the alteration of the father's situation, by entering into a second marriage, would be held as a sufficient consideration for provisions granted by him to the children of the first marriage. He not only in this contract provides for them, but also, as if he fully had in view the contingency of surviving his then intended wife, he, like a most provident man, provides for the children of any subsequent marriage ; but still the engagement he enters into is not very great—for all that his engagement extends to is, to provide that his property should be divided in a certain manner, different from that prescribed by common law in case he shall die intestate. It is in these words,—(Here the Lord Chancellor read the paragraph in the contract, beginning, " Moreover, it is hereby provided and declared, that in case the said D. Bannerman shall die intestate," &c.) It is true, that the main object of this clause was a provision to the children of the second marriage. In England, it would be held that the object is principally a provision for the children of the second marriage, yet provision is also intended to be made for the children of the former marriage ; as what the children of the second marriage are to have, is to be taken and construed from what the other children are to have. This settlement in England would have no efficacy, unless it were effectual for a provision to the children of the first marriage.

" In England, the contract would be construed thus :—The provisions I choose to make are, that my property shall go equally among all my children *per capita*, unless I should hereafter, from the misconduct of any of them, or any other cause, think fit to dispose of my property otherwise. It must, of necessity, be construed thus.

" An argument has been used by the appellant's counsel on the effect of the word dispone. Suppose the words of the contract ran thus :—" I hereby dispone to my son and my daughter an equal " share and proportion, along with the children of any other mar- " riage," &c. Here, upon the same grounds, it might be said, that the children of a second marriage had no right to any thing. But my answer would be, that there was a consideration given for their

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share, and they would be entitled to it: and the converse of this case is what Agnes Bannerman contends for.

"This case might occur. D. Bannerman might have had two children of his first marriage, but one of the second, and twenty of a third, then, according to the appellant's argument, if the father left nothing but heritable property, the single child of the second marriage, in order to ascertain its share of the father's property, must enumerate all his children, and would find that it was entitled only to a twenty-third share, but the younger child of the first marriage, and the twenty children of the third marriage would be entitled to nothing, and the heir would have the remaining twenty-two shares all to himself.

"On the point of the sequestration, I think we may very safely trust the Lords of Session, as it is a matter of regulation in which they are perfectly competent to decide.

"In the matter of collation there is more difficulty. It is to be considered with reference to a contract which has made a disposition, in case intestacy takes place.

"As the party expressly reserved the power of disposing of his property to his children as he thought fit and proper, and the contract was only to operate on what he left at his death, the question here seems to be, Whether, what he gave in his lifetime should by collation be rendered null? There seems in this case little difference between Agnes and the heir at law. Here the question is, not what Agnes as a younger child, or D. Bannerman as heir at law, are obliged to do; but it is, Can the parties, under this contract of marriage, resist that species of collation which might be claimed in another case, supposing them to have stood in their legal character?

"This part of the cause comes here in a whimsical state. The course which it took was this:—Lord Hermand, on 14th June 1800, decided for the collation by all parties of what they had received from the father during his lifetime. On 2nd July 1801, the Court of Session found that the Lord Ordinary had done right. On being applied to to review this opinion, the Court, instead of deciding whether the Lord Ordinary was in the right, they desired the appellant to go to ask the Lord Ordinary himself to review his own judgment. And, on 18th December 1801, the Lord Ordinary adheres to his former opinion.

"It would be of essential benefit to this House to know the opinion of the Court of Session upon the collation, where it is applicable, and where it is not. I feel very unwilling to put the parties to the great expense which would arise in sending back this part of the cause to the Court of Session, and yet have a delicacy to decide the point. In the first instance, however, if that is to be done, I do not think I should be right in forming a hasty opinion upon it, and therefore think it proper to propose that judgment in this cause should be postponed till to-morrow.

"The Lord Chancellor then moved that this cause be further proceeded in to-morrow, which was ordered.

"Adjourned."

Case resumed, 26th February 1805.

THE LORD CHANCELLOR said,—

"My Lords,

"This point was debated yesterday. One point only remains upon which I have alone difficulty, namely, that of collation, arising out of the Lord Ordinary's interlocutor of 14th June 1800. His Lordship then appointed "each of the parties to give allowance for, "or bring into the *cumulo* to be divided, such sums or subjects, or "the value thereof, as either of them might have received from their "father during his lifetime."

Agnes, one of the respondents, had been advanced by her father in his lifetime, as she admitted, to the extent of £800. This advancement she offered to collate with the other parties; making, as a condition of this offer, that the defender also was bound to collate what he had received from his father.

This point comes before us rather in singular circumstances. From the opinion of the Lord Ordinary, a proceeding in the nature of an appeal was taken to the whole Judges, and their Lordships, on the 2nd of July 1801, adhered to the interlocutor of the Lord Ordinary in *omnibus*. But, on a second reclaiming petition, the Court, on the 15th December 1801, remitted to the Lord Ordinary the further consideration of this point of the collation. The Lord Ordinary accordingly directed the defender to give in a condescendence upon this subject; but, instead of doing so, the defender brought his appeal to your Lordships, so that this point comes before us without being distinctly decided upon by the Court.

"The principal question in this cause was, Whether the distribution of the property of the father was to take place by force of the contract entered into on the second marriage, which was only to take effect in case of his intestacy? To this the matter of collation was incidental. Collation is rather considered a privilege of, than an obligation upon, the heir; and my difficulty is, if collation can obtain in a case where intestacy does not operate. The distribution here was regulated by the contract of marriage, which, if it was to operate at all, was to operate upon the property remaining in the person of the father at his death.

"He had reserved a power to dispose of the property, and give it to the children in his lifetime. If collation was necessary, this power of disposing in his lifetime was right. It is said, therefore, that the law of collation does not here apply.

"I am aware that Agnes made an offer to collate; but it was upon the view that the appellant was bound also to collate; and I wish to have this taken care of in the judgment of this House, that this offer should not be taken as absolutely binding, but upon the condition of the appellant so collating also.

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"I shall therefore beg permission to adjourn this matter till Thursday, that I may have time to draw out what I think the judgment of your Lordships in this case ought to be."

On Thursday, his Lordship read the following judgment:—

Ordered and adjudged that the appeal be dismissed, in so far as the same relates to the interlocutors of the 18th December 1801 and 16th January 1802, but with liberty to the appellant, David Bannerman, to apply to the Court of Session, as he may be advised, touching the same; And it is hereby declared, that in case any proceedings be had in consequence of such liberty, it shall be found that the claim made against the said appellant of collating the sums and value of property which he received from his father in his lifetime, cannot be sustained in law, that the pursuer, Agnes Bannerman, is not, in that case, to be held bound by any of the proceedings hitherto had in any of these matters, or by any offer heretofore made on her part to collate, in respect of the provision appearing by the proceedings to have been made by her father by the disposition of the 29th April 1799: And it is hereby ordered that the cause be remitted back to the said Court of Session* to consider whether, if the appellant, David Bannerman, in this case, cannot be required by law to collate, the said pursuer, Agnes Bannerman, ought to be held as being by law, in this case, bound to collate; and it is further ordered and adjudged, that the said several interlocutors complained of in the said appeal in all other respects be, and the same are hereby affirmed, in so far as the same are not inconsistent with the directions hereby given.

For Appellant, *Wm. Adam, John Dickson.*
For Respondents, (Agnes Bannerman), *Samuel Romilly.*
For other Respondents, *Wm. Alexander, Thos. W. Baird.*

NOTE.—In the report of the case by Baron Hume, the point of collation seems not to have been sufficiently adverted to. It was the chief point discussed in the House of Lords—and, in as far as the appellant is concerned, must be taken to refer to those "sums and "value of property" received by him during his father's lifetime, and not to the heritage succeeded to at his death, which, of course, fell under that part of the interlocutor affirmed.

* What was done under this remit does not appear.