liable. The money sued for has been paid by the pursuers in satisfaction of the creditors' claims under the contract, and therefore I have no hesitation in saying that the pursuers are entitled to decree for the sum so paid.

LORD JUSTICE-CLERK—I have found this case, I confess, attended with difficulty, and for a considerable period of the debate the impression in my mind was adverse to the views propounded by your Lordships. But I am not disposed to place my impression in opposition to those views, nor do I desire formally to dissent from the result at which your Lordships have arrived. I think that the matter, so far as it depends on written evidence, has been left in a very ambiguous condition, and I think it is not wonderful that a different meaning has been placed on it by the two parties concerned. But I do not want to say anything which may add strength to the defenders' interpretation, which your Lordships have negatived. I am quite clear that the agreement of all to a composition contract would be a most material part of the obligation if it were expressed, but whether it is or is not in the present case, is a question which in my view is doubtful, and at all events is not sufficiently clear to induce me to dissent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for the Appellant—Balfour, Q.C.—Ure. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel the for Respondents—Jameson—Dickson. Agents—Henry & Scott, S.S.C.

Wednesday, November 30.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

CAMPBELL *v.* CAMPBELL AND OTHERS.

Succession — Marriage-Contract — "Means and Estate," whether intended to include Heritage.

By an antenuptial marriage-contract the husband, after giving to his wife, if she should survive him, his whole household furniture and plenishing, a liferent of his house, and an annuity payable out of the rents of other heritable subjects, gave her a power to dispose by *mortis causa* deed of his "whole means and estate," in the event of his leaving no settlement disposing thereof, and "to that end" he appointed her his executrix "with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid." There was no issue of the marriage, and the husband predeceased his wife, leaving no will. He was survived by a son of a previous marriage. *Held*, in a question between the widow and the son of the previous marriage, that the words "means and estate" were not intended to operate as a bequest in her favour of the heritable estate.

By antenuptial marriage-contract entered into between Donald Campbell and Ann Fraser, dated and recorded 7th January and 18th April 1882, it was provided that in contemplation of the marriage the said Donald Campbell "hereby gives, assigns, and dispones to the said Ann Fraser, if she shall survive him, the whole household furniture and plenishing, including silver plate, china, books, and wines that shall belong to him at the time of his death, wherever the same may be situated; and further, the said Donald Campbell hereby assigns and dispones to the said Ann Fraser, in case she shall survive him, the liferent use and enjoyment of the cottage in which he at present resides, called Lorne Cottage, with full power to her to uplift and receive the rents payable from any portion thereof, during all the days and years of her life, or to retain the same in her own possession; and it is hereby declared that as the cottage was built upon a piece of ground belonging to me, on which houses had already been erected, and no allocation of the ground has taken place, it is hereby declared that one-half of the garden ground at the back shall belong to and be liferented by the said Ann Fraser, along with Lorne Cottage; and further, the said Donald Campbell hereby binds and obliges himself, his heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, to content and pay to the said Ann Fraser, in the event of her surviving him, for and towards her aliment, a free liferent annuity of £15 sterling, and that in equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall happen after the death of me the said Donald Campbell, and the next term's payment at the first term of Whitsunday or Martinmas thereafter, and so forth half-yearly, termly, and continually thereafter, and which annuity of £15 a-year before provided to the said Ann Fraser shall be payable and upliftable by her out of and from the rents of the shop and bakehouse situated in the property belonging to me in Main Street, Callander; and the said Donald Campbell hereby further gives to the said Ann Fraser full power and liberty by *mortis causa* deed to test upon and divide and apportion among my lawful children, whether by my first or this intended marriage, and my friends, in such shares as she may think proper, my whole means and estate in the event of my death without having left any settlement regulating the disposal thereof, and to that end I hereby appoint the said Ann Fraser to be my executrix, with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid, and which provisions above written, conceived in favour of the said Ann Fraser, she hereby accepts in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she, *jure relictæ* or otherwise, could ask, claim, or demand from the said Donald Campbell, or his heirs, executors, and representatives, by and through his death, if she shall survive him; and the said Donald Campbell hereby for ever renounces and discharges his *jus mariti* and right of administration over any estate presently belonging or that shall hereafter belong to the said Ann Fraser: And both parties consent to the registration hereof for preservation and execution," &c.

There was no conveyance of property by the wife to her husband.

The marriage took place in January, and Campbell died on 1st April 1882. There were no children born of the marriage, and Campbell left no will. By a former marriage he had one son, Donald Campbell, and two daughters, Mrs Katie Campbell or Stott, and Mrs Margaret Campbell or M'Beth.

This was an action at the instance of the widow, Mrs Ann Fraser or Campbell, as an individual and also as executrix of her husband under the antenuptial contract of marriage before referred to, against Donald Campbell, the heir-at-law, Mrs Stott, and the children of Mrs M'Beth, who was then deceased, in which the pursuer sought to have it found and declared—"(*First*), that by antenuptial contract of marriage entered into between the said deceased Donald Campbell and the pursuer, dated and recorded as aforesaid, the said deceased Donald Campbell gave to the pursuer full power and liberty by *mortis causa* deed to test upon and divide and apportion among his lawful children, whether by his first marriage or by the marriage between him and the pursuer, and his friends, in such shares as the pursuer might think proper, his whole means and estate in the event of his death without leaving any settlement regulating the disposal thereof; (*second*), that the said deceased Donald Campbell died on or about 1st day of April 1882 without leaving any such settlement, survived by the pursuer; (*third*), that upon the death of the said deceased Donald Campbell, the pursuer became entitled to be duly and validly infeft in trust, in terms of the said contract of marriage, in" the heritable subjects in Callander belonging to her late husband; and further, that it be found and declared "that the defender the said Donald Campbell has no right or title, whether of property or possession, in or to the subjects and others above described; and the defender the said Donald Campbell ought and should be decerned and ordained by decree foresaid immediately to cede to the pursuer possession of the said subjects and others, and to flit and remove himself, his family, servants, cottars, and dependents, and goods and gear, furth and from the same, or any part thereof, in order that the pursuer may enter into and possess and test upon, divide, and apportion the same, all in terms of the said antenuptial marriage-contract."

The deceased Donald Campbell left no moveables except the furniture and plenishings, which his widow received under the marriage-contract.

The heritable subjects were estimated by the pursuer to be of the value of £1200, and were burdened with a bond for £250.

Defences were lodged for Donald Campbell, who stated—"For many years prior to 1875 the defender's father, the said deceased Donald Campbell, carried on the business of a baker, and resided in the said tenement in Main Street, Callander. For at least sixteen years prior to 1875, and until he was twenty-seven years of age, the defender, who was the only son of the said deceased Donald Campbell, wrought as a baker in the employment of his father, his only remuneration being his board, lodging, and clothing. In or about said year 1875 the defender was married, and his father thereupon, in consideration of the defender's previous and largely gratuitous services to him, made over and gifted his business and all his trade utensils to the defender, arranged to give him the occupation of the dwelling-house and bakehouse, and the use of his furniture, for an annual rent of £30 sterling, and commenced to live with the defender, and work in his employment at the remuneration of 9s. per week, and bed and board. This arrangement continued till the date of his father's marriage with the pursuer in January 1882, and was and has all along been well known to the pursuer."

This was substantially admitted by the pursuer, under the explanation that the defender had not paid any rent.

The pursuer pleaded—"(1) No relevant defence; (2) in the circumstances condescended on, the pursuer is entitled to declarator with expenses as concluded for; and (3) on a sound construction of the said antenuptial contract of marriage, the pursuer is entitled to the subjects described in the summons."

The defender pleaded—"(1) No title to sue. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (3) On a sound construction of the said antenuptial contract of marriage, the pursuer is not entitled to decree as concluded for. (4) The pursuer is barred by acquiescence and actings from insisting in the conclusions of the summons. (5) The defender being heir-at-law of the deceased Donald Campbell, is entitled to the subjects described in the summons."

The Lord Ordinary (M'Laren) on 14th June 1887 found and declared in terms of the first and second declaratory conclusions; *quoad ultra* assoilzied the defender; and found no expenses due to or by either party.

"*Opinion.*—I am of opinion that under the antenuptial contract founded on the right claimed by the pursuer of this action does not arise. The clause founded on begins by giving the pursuer, the wife, full power and liberty to test upon and divide and apportion among the husband's lawful children, whether by his first or intended marriage, and his friends, in such shares as she might think proper, his whole means and estate, in the event of his death without having left any settlement regulating the disposal thereof, and that power is applicable to heritable and moveable estate. In the same deed the wife is given a liferent of one of the two heritable properties in Callander, which belonged to the husband, the disponer. Now there is, in my apprehension, nothing to indicate that these words, purporting to give a power of appointment and division, import any larger interest or right given to the wife than in their strict meaning they convey. I think it is a power of appointment—and nothing more—that is given to Mrs Campbell under the clause. But I quite assent to the argument for the pursuer that whatever is necessary to the due execution of that power by the donee is implied in the contract of marriage. I think that in the contract there is implied the necessary machinery for enabling the lady to make up a title as trustee if such title were necessary to enable her to exercise the power; because under the recent Conveyancing Statute words in a deed purporting to deal with heritable property, which if used with reference to moveable property would entitle the donee to receive and apply it, are to have the same effect with reference to the heritable estate that is associated

with the moveables in the conveyance. Accordingly, in the series of decisions that have followed upon these statutes, it has been held that conveyances in trust, although not expressed in the form of *de presenti* transfers, may be the ground of adjudication, or for the execution of a notarial instrument, in virtue of the facilities given by the Conveyancing Act for the testamentary disposal of landed property. But the real question here is, whether the antenuptial contract contains any evidence of an intention on the part of the husband, or an expectation on the part of the wife in consequence of the husband's words, that she should be the trustee of his heritable estate. If she is trustee, she may make up a title in the form contemplated by the conclusions of the action. If she is not a trustee, then the action falls. Now, nothing can be more clear than that the donee of a simple power of appointment may execute the appointment without being vested in the estate, and therefore it is not at all necessary to the fulfilment of the husband's obligation that his wife should be vested in his estate. I think she may have all the control that it was intended she should have over the estate by executing the power in the terms in which it is given. And further, there is nothing, so far as I can see, in the other averments of the record which appear to interfere with or militate against the capacity or power of the wife to execute a deed of division. As regards one of the subjects, she is the liferenter, as the fee is undisposed of except through this power. As regards the other subject, there was some arrangement made by the husband in his lifetime in favour of his eldest son which apparently terminated at his death, and the eldest son is now possessing that property on the title of apparency. But if the pursuer should think fit to exercise the power of appointment, which I think is a testamentary power coming into effect upon her death, then the result is that the obligation created by the marriage-contract will devolve upon the husband's heir. He is bound to fulfil his father's obligation, and therefore he must either make up his title, and convey to the persons in whose favour the deed is executed, or he must submit to their making up a title at their own hands in one or other of the forms which are now provided by statutory enactment for that purpose. While therefore I do not doubt that the pursuer is well founded in the substance of the claim which she asserts, I think she is wrong in the mode she has taken to assert it.

"In what I have already said regarding the interpretation of this antenuptial contract I have been assuming that, in so far as the deed gives the power, it is a power to divide and apportion heritable estate as well as moveable estate. But it is not a question under the Conveyancing Acts at all. I have considered these Acts with reference to the pursuer's contention that she is entitled to expede a title to these lands in her own name. I have decided against her on the ground that there is not such an indication of intention that she should be vested in the estate in her lifetime as would satisfy the requirements of the Conveyancing Acts.

"But in the interpretation of powers of disposal technical language is not necessary, nor was it ever necessary; and if I had been dealing with this language in a deed executed before the passing of the Acts 1868 and 1874 I should equally have held that, in a marriage-contract where heritable as well as moveable estate is regulated, a power to test upon the granter's whole means and estate is a power to test upon heritage.

"The result will be, that the pursuer, according to my judgment, is entitled to decree in terms of the first and second declaratory conclusions, and that the defender is entitled to absolvitor from the third conclusion.

"I think this is not a case for expenses to either side. The difficulty has been occasioned by the parties to this antenuptial contract not having made their meaning clear, and there has been divided success. It was necessary for the pursuer to come into Court, but she has claimed too much. I think the defender had a material right to object to the property being taken out of his hands during his lifetime."

The defender reclaimed, and argued—(1) That the Lord Ordinary was right in assoilzieing the defender from the third conclusion of the summons, but that as regarded the first two conclusions of the summons these were only introductory to the third, and could not be the subject of a decree of declarator. (2) The words "means and estate," looked at with reference to the context of the deed, did not include heritage. No doubt these words were habile to convey heritable property if the truster so intended—31 and 32 Vict. c. 101, sec. 20. But they were words which required construction—*Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026, The question was, in what sense did the maker of the deed use them? If they were read as meaning moveable estate only, then the deed was intelligible, but if read as including heritage, then it was a mass of contradictions. There was an antecedent probability that the husband was in the deed dealing with his moveable property only. He gave no power of making up a title to his heritage, which indicated that the power of dividing and apportioning applied only to moveables. The words "as executrix foresaid" were conclusive. The pursuer was substantially made legatee of the whole moveable estate. Assuming that the words of bequest included heritable estate, they were inconsistent with the liferent provision which the heir was bound to pay. According to the view of the other side, the pursuer had got a bequest of heritage in trust which had been restricted in a former part of the same deed to a liferent. —[Lord President—If we agree with the Lord Ordinary we should dismiss the action. In that point of view the only question is, whether the words "means and estate" include heritage?]

The defender argued—1. That the pursuer had the entire administration of the whole estate, and though only termed an executrix she was really a trustee—*Ainslie, &c.*, v. *Ainslie*, December 8, 1886, 14 R. 209. She was trustee of all the heritable and moveable property left by her husband. The words "means and estate" clearly included heritage, unless there was something in the deed restricting their meaning, and there was nothing in the present deed—*Urquhart* v. *Dewar, supra cit.*; *M'Leod's Trustees* v. *M'Luckie, &c.*, June 28, 1883, 10 R. 1056; *Robb's Trustees*

v. *Robb*, May 14, 1872, 10 Macph. 692. Until the pursuer exercised her power the defender had no right to, or interest in the estate—*Bryson's Trustees* v. *Clark, &c.*, November 26, 1880, 8 R. 142. The rents were to be accumulated for the pursuer, and she could test on these.

At advising—

LORD PRESIDENT—It appears to me that if the Lord Ordinary is right in the opinion expressed in his note his proper course was to dismiss the action. The first two declaratory conclusions of the summons cannot mean more than that the marriage-contract between the spouses contained certain words, and that the husband died on 1st April 1882 without leaving any other settlement.

The first of these conclusions cannot be the subject of a decree of declarator, because it simply repeats the words of the deed. The second declaratory conclusion is a mere statement of fact. The Lord Ordinary is against the pursuer upon the other conclusions, and these being unnecessary, the plain result is that there is no foundation for the action.

As regards the merits of the question discussed in the Lord Ordinary's note, I entirely agree. I think there is no appearance of any intention to give the wife any title to the heritage. It must be kept in view that the deed is drawn by a conveyancer. It is not like some of the wills we have had to construe, where the testator has expressed his meaning in his own words, and where greater latitude has been allowed in respect the words were not used nor meant to be understood in any technical sense. Here, however, as I have said, the deed was drawn by a firm of Glasgow conveyancers, and it is presumed that they have expressed in technical language what the contract was between the spouses. In the earlier part of the deed there is a conveyance to the lady of the household furniture and plenishing, which is to include certain things, and then there is a clause by which the husband "assigns and dispones the liferent use and enjoyment of the cottage in which he at present resides, called Lorne Cottage, with full power to her to uplift and receive the rents." Then follows a declaration that one-half of the garden ground at the back shall be liferented by his wife, showing that the other half was to be excepted. Then there is also given to the wife an annuity of £15, in the form of an obligation, in which the husband binds his "heirs, executors, and successors whomsoever," to pay the same, and this annuity is declared "payable and upliftable by her out of and from the rents of the shop and bakehouse situated in the property belonging to me in Main Street, Callander."

So far as I have gone in construing the deed there is no room for doubt, the lady being entitled to the provisions I have adverted to.

We must now look at the rest of the deed, and if possible read what follows consistently with what has preceded. The first thing mentioned in the part of the deed now under consideration is the power—"And the said Donald Campbell hereby further gives to the said Ann Fraser full power and liberty by *mortis causa* deed to test upon and divide and apportion among my lawful children, whether by my first or this intended marriage, and my friends, in such shares as she may think proper, my whole means and estate in the event of my death without having left any settlement regulating the disposal thereof." Now, I do not think it is necessary for the present purpose to determine whether this power applies to heritage or not. But be that as it may, the next part of the deed which does require construction follows—"And to that end I hereby appoint the said Ann Fraser to be my executrix, with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid." Now, in the first place, it is plain that this is not an absolute bequest, but is given to enable her to exercise the power. Then, in the second place, it is given "as executrix," and in no other capacity whatever. It is said the words used—"means and estate"—include heritage. In many cases they may be sufficient to do so, but they cannot have that effect where such a construction is utterly inconsistent with the rest of the deed. The husband has already mentioned heritage, and disposed of a part of it. Is it at all consistent that the word "estate" means heritage which has been already dealt with to some extent. I have come to the conclusion, without the smallest hesitation, that the words "means and estate" were not intended to include heritage, but were intended to apply to moveable estate alone.

How far that may have the effect of restricting the power of appointment and apportionment it is not necessary to consider. It is enough to say that the bequest does not apply to heritage.

LORD MURE—I entirely concur in all the observations your Lordship has made, and assuming the Lord Ordinary is right in his conclusion, I think the action should have been dismissed.

There was no necessity for the first two conclusions. The general construction of the Act of Parliament by which heritage can be conveyed by words which are sufficient to convey moveables does not admit of any question. They are always sufficient if it is clearly the intention of the testator to make them so.

My opinion in the case of *Urquhart* has been referred to. In that case I held that there was nothing in the deed under consideration to limit the meaning of the word "estate." Here, when we look at the clause where the widow is appointed executrix, it shows that the moveables only were intended to be conveyed to her. Mr Asher remarked—and I thought there was a good deal in it—that there are no words as to the making up of titles to the heritable estate.

On the whole matter, as I have said, I entirely agree with your Lordship.

LORD ADAM—I think the question lying at the bottom of this case is whether the husband, by bequeathing his "whole means and estate," meant to include heritage. Now, I think there is no doubt that these words are sufficiently wide to embrace both moveables and heritage, and perhaps if they stood by themselves they would do so in the present case. But when we find them here in contiguity with the words "as executrix," this, to my mind, raises the presumption that the husband meant to limit their meaning. I have no doubt you must look at the whole deed, and applying this test, I have no doubt that heritage was not intended to be included by the husband. I think he meant to

leave his heritage to his son, burdened with a liferent to his widow of the cottage, and also an annuity to her of £15 to be paid out of the other subjects. The son, as we see, had been in possession of the subjects for some years, and I do not think the father meant to give his widow the power at his death to turn him out.

Now, that being so, I think the husband only meant to give the pursuer the power of testing upon his moveable estate. If you read "means and estate" as including heritage, then that interpretation is totally inconsistent with the other terms of the deed. You would have expected that the widow would have got the fee of the property if that had been intended. But the obligation to make his heirs and successors pay the annuity makes his intention clear. If the pursuer's view is right, that was an obligation laid on the person who is not proprietor to pay to one who is. That is really a *reductio ad absurdum*. When the other parts of the deed are looked at, where the words "means and estate" are used, they are also used with reference to the powers given to, and the duties of, the wife as executrix.

On the whole matter I have no doubt that your Lordships have put a right construction on this deed.

Lord Shand was absent from illness.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action with expenses.

Counsel for the Defender (Reclaimer)—Asher, Q.C.—Baxter. Agent—James Gavin, L.A.

Counsel for the Pursuer (Respondent)—Balfour, Q.C.—Craigie. Agents—Fodd, Simpson, & Marwick, W.S.

Friday, December 2.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SCOTTISH DRAINAGE AND IMPROVEMENT COMPANY *v.* CAMPBELL.

Personal or Real—Absolute Order Charging Fee of Lands—Glebe—Parish Minister — Scottish Drainage and Improvement Company's Acts 1856 *and* 1860 (19 *&* 20 *Vict. cap. lxx., and* 23 *&* 24 *Vict. cap. clxx.*).

The Scottish Drainage and Improvement Company's Act 1856, sec. 49, provides for the execution by the Inclosure Commissioners of an absolute order charging the amount of improvement expenditure "upon the fee of the lands improved." The form of the absolute order is prescribed by Schedule C of the statute, and by it the fee of the lands is charged, but no personal obligation is imposed. Section 61 provides —"Every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same means and in like manner, in all respects, as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

In a case where an absolute order had been granted in the form prescribed by Schedule C, charging the fee of a glebe with an annual rent-charge in respect of an advance made to the parish minister for improvements on the glebe—*held* that the Inclosure Commissioners had not a personal action against the succeeding minister for the rent-charge, and that their only remedy was by real diligence against the land.

This was a personal action at the instance of the Scottish Drainage and Improvement Company, incorporated under the Scottish Drainage and Improvement Company's Acts of 1856 and 1860 (19 and 20 Vict. cap. lxx., and 23 and 24 Vict. cap. clx.), against the Rev. John Peter Campbell, minister of the parish of Urquhart, Drumnadrochit, Inverness, to recover payment of certain rent-charges upon the glebe for improvement debt incurred during the tenancy of the previous incumbent.

These rent-charges were constituted by absolute orders executed by the Inclosure Commissioners under the said Acts according to the form prescribed by Schedule C, appended to the Act of 1856. The following is a specimen :—"The Inclosure Commissioners for England and Wales, in pursuance of the Scottish Drainage and Improvement Company's Acts, do, by this absolute order under their hands and seal, charge the fee of the lands mentioned in the schedule annexed hereto with the payment to the Scottish Drainage and Improvement Company, their successors and assignees, of the yearly sum of Sixteen pounds eight shillings and eightpence, payable half-yearly on the 15th day of May and the 11th day of November in every year, for the term of twenty-five years, and being a proportionate repayment, according to the table annexed, of the capital sum of Two hundred and forty-five pounds five shillings, with interest at Four pounds ten shillings per centum per annum, the first half-yearly payment to be made on the 15th day of May One thousand eight hundred and seventy-eight."

The Scottish Drainage and Improvement Company's Act 1856 (19 and 20 Vict. cap. lxx.) provides as follows:—

"Section 49. When a provisional order for charging any lands to be improved has been made, and the commissioners are satisfied that the works of improvement contracted to be executed, or some part of such works, have been properly executed, the commissioners shall execute a charge under their hands and seal, upon the fee of the lands improved, or to be improved, or some sufficient part thereof, for the whole amount by the contract agreed to be charged on the land to be improved, if all the works contracted for are so executed or a proportional part of such amount, if part only of such works are executed, as the case may be, to be paid with interest to the company."

"Section 52. When the fee of any land is, in pursuance of this Act, charged with any money, the company shall be entitled to, and shall have from the time from which such rent-charge shall commence and take effect, a charge upon such land for the money ascertained and approved by the commissioners