

The House of Lords ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed. June 16. 1824.

Respondent's Authorities.—Homphray v. Nate, Feb. 18. 1814, (Ferguson's Rep.); St Aubine v. O'Brian, March 3. 1814, (Ferguson's Rep.); 1. Stair, 4. 20.; 1. Ersk. 6. 48.

A. GORDON—SPOTTISWOODE and ROBERTSON, Solicitors

(Ap. Ca. No. 67.)

JAMES BUCHANAN and Others, Appellants.—Bosanquet—Greenshields.

No. 52.

Mrs CRAWFORD or MOLLISON, Respondent.—Moncreiff—Cunningham—Gillies.

Donation, or Anticipated Payment of Legacy.—Circumstances under which it was held, (affirming the judgment of the Court of Session); That a sum of money paid by a testator to persons to whom he had bequeathed one-half of his effects, was an anticipated payment of their provision, and not a donation.

STEPHEN ROWAN, who had been the master of a merchant vessel, and afterwards a partner in a mercantile house in Port-Glasgow, married Mrs Margaret Crawford about 1764. Partly by his own exertions, and partly by the most penurious habits, he realized upwards of L. 28,000. No contract of marriage had been executed, and he had no children. His nearest relations were the family of his niece, Jean Miller, wife of George Buchanan, merchant in Glasgow. In August 1805 he executed a trust-deed of settlement, with the consent of his wife, by which he conveyed to her and certain other persons, chiefly her relations, (among whom was Mr James Crawford), as trustees, his whole estates, real and personal. By this deed, after appointing certain specific legacies to be paid, he directed the trustees to dispose of the remainder and reversion of my said estates, real and personal, by paying one-half thereof to my said wife; whom failing, to her disponees or assignees; whom failing, to her nearest heirs whatsoever: And, of the other half, to pay L. 1000 to the said Jean Miller, wife of George Buchanan, at the expiry of one year after my death, for her liferent thereof, and to be at her disposal to and among her lawful children; but the rest of said half shall be liferented by my said wife, if she survive me, during all the days of her life, and thereafter by the said Jean

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June 16. 1824. ' Miller, wife of George Buchanan, during all the days of her
 ' life, if she survives my said wife; and, on being freed of said
 ' liferents, shall be paid to and among the children of the mar-
 ' riage between the said Jean Miller and George Buchanan,
 ' equally; declaring, that what is by this settlement ordained to
 ' be paid to their mother shall, in case of her death, go to her
 ' said children, equally among them; and if any of these children
 ' die, leaving lawful issue of their bodies, the share designed by
 ' this deed for such child so deceasing shall go to the deceaser's
 ' said lawful issue; and the trustees shall be at full liberty to pay
 ' over to the said children their respective shares, if they think
 ' proper, without waiting their coming to the age of majority, or
 ' apply the same for them in any other manner they may think
 ' proper.' And he further declared that this ' provision of pro-
 ' perty and liferent so appointed for my said wife and her afore-
 ' saids, shall be, and she hereby accepts of, in full of all that she,
 ' or her heirs, executors, or representatives, can ask or claim
 ' from me or my estate, by or through my death or her's, or by
 ' law, contract of marriage, deed of settlement, bond of provi-
 ' sion, or otherwise.' But he reserved ' power, at any time, to
 ' sell, convey, and dispose of my said estates, real and personal,
 ' and to burden and affect the same with debts, gifts, legacies,
 ' and provisions, and to revoke or alter these presents at plea-
 ' sure; declaring, however, that this deed, so far as not so revoked,
 ' altered, or changed, shall remain good and effectual, whether
 ' found in my own custody or that of any other person at my
 ' death, the delivery thereof being hereby dispensed with.'

On the 12th December 1812 Mr Rowan added a codicil to the trust-settlement, by which he nominated additional trustees, but in other respects confirmed the deed; and this codicil, as well as the deed itself, was signed by his wife. In the month of October 1813 Mr James Crawford, one of the trustees, received from Mr Rowan four bills, which were then current, amounting to L. 4270, payable by certain mercantile companies in Glasgow, blank indorsed by Mr Rowan, and which he requested Mr Crawford to deliver to Mr Buchanan. No written instructions were given to Mr Crawford, but it was stated by him in a judicial declaration which he emitted by order of the Court, that Mr Rowan told him that he intended these bills as an anticipated payment of what Mr Buchanan and his family were to receive at his death, as at this time two of Mr Buchanan's sons were about to enter into commercial business, and the money might be useful to them; and that he further

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desired him to get from Mr Buchanan an acknowledgment of receipt of the money, with an obligation to pay interest during his life. Mr Crawford accordingly carried the bills to Glasgow, and there delivered them to Mr Buchanan, from whom he received the following acknowledgment, subscribed by himself and the whole family:—‘ With grateful hearts we, Jane Miller your niece, George Buchanan her husband, James Buchanan their eldest son, George Buchanan their second surviving son, Margaret Buchanan their eldest daughter, Jane Buchanan their second daughter, and Elizabeth Buchanan their youngest daughter, acknowledge to have received from you, Stephen Rowan, Esquire, by the hands of James Crawford, Esquire, the following bills:—viz.

‘ Hopkirk Cunningham and Company’s acceptance	
‘ to you, dated 17th May 1813, at six months, for L. 560	0 18 0
‘ Graham, Bell and Company’s acceptance to you,	
‘ 17th May 1813, at six months, for	1575 0 0
‘ Hopkirk Cunningham’s acceptance to you at twelve	
‘ months, for	560 0 0
‘ Graham, Bell and Company’s acceptance to you,	
‘ 17th May 1813, at twelve months, for	1575 0 0

‘ making together the sum of L. 4270 sterling; for which sum we become bound to pay you interest when required, agreeably to your desire. We are, with sincere gratitude and respect, Sir, your obliged humble servants, Jane Miller, George Buchanan, James Buchanan, George Buchanan, junior, Margaret Buchanan, Jean Buchanan, Elizabeth Buchanan. X her mark. Glasgow, 1st October 1813.’ This acknowledgment was enclosed in the following letter by Mr Buchanan to Mr Rowan, and thereupon delivered to Mr Crawford:—‘ Glasgow, 1st October 1813. Stephen Rowan, Esquire. Sir,—I received to-day from the hands of James Crawford, Esquire, four bills, amounting to L. 4270 sterling, which is gratefully acknowledged by Mrs Buchanan, myself, and all our family, which is enclosed. I do not know, Sir, how to find words to express my sense of this generous kindness bestowed by you on Mrs Buchanan and my family in such handsome terms. It is a rare instance of kindness bestowed in the lifetime of the giver; and this we reverence with sentiments which we cannot express. We also feel our obligations to our highly respected and kind friend Mrs Rowan. It has been with sincere regret that I have been in-

June 16. 1824. 'formed by Mr Crawford that you continue considerably indis-
 'posed. I hope we shall hear of a favourable turn. With
 'the kindest respects of Mrs Buchanan and all my family to
 'you and Mrs Rowan, I am, most respectfully, Sir, your
 'much obliged and humble servant, George Buchanan.' This
 letter, with the enclosure, was carried by Mr Crawford to Mr
 Rowan, and soon thereafter Mr Buchanan went to Port-
 Glasgow, and waited upon Mr Rowan to express his gratitude.
 On that occasion it appeared, from a declaration which Mr
 Buchanan emitted by order of the Court, that when he men-
 tioned the object of his visit, Mr Rowan stated that he had made
 his will some time ago; and being then at an advanced age, and
 in bad health, he burst into tears: that Mrs Rowan, who was
 present, said, that it had been done to save expense, and that
 Mr Rowan had left his property betwixt her and Mr Buchanan's
 wife: that in the course of conversation Mr Rowan again intro-
 duced the subject of his will, in which he said, if it was to be
 made again, he would insert Mr Buchanan as a trustee, and
 hoped that he would not take it amiss that he was not named in
 the will. Within a few days thereafter Mr Rowan died; and
 the trustees thereupon took possession, and made up inventories
 of his effects, in which they included the amount of the bills
 which had been delivered to Mr Buchanan, and which they
 stated they were obliged to do by the Stamp-office, in consequence
 of the terms of the acknowledgment. A question then arose
 between Mrs Rowan and the family of Mr Buchanan, as to whe-
 ther these bills were to be considered as an anticipated payment
 of their half of the effects as provided by the settlement, or as
 a pure donation. The former proposition was maintained by
 Mrs Rowan, while the latter was asserted by Mr Buchanan and
 his family. To settle this question the trustees raised a process
 of multiplepoinding, in which claims were lodged for these
 parties. Before any judgment was pronounced Mrs Rowan
 died, and was succeeded by the respondent her sister, Mrs
 Mollison, as executrix.

On advising the cause, Lord Pitmilley found, 'that the bills
 'cannot be imputed in payment of the provisions to which Mr
 'Buchanan and his family have right by the settlement of Mr
 'Rowan; and that they are entitled to these provisions over
 'and above the amount of the bills, in respect it has not been
 'averred and offered to be proved by competent evidence on the
 'part of the competitor, Mrs Euphemia Crawford or Mollison,
 'that on the 1st October 1813, when Mr Buchanan and his

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‘ family received the four bills in question from Mr James Crawford, and granted their acknowledgment for these bills, they were in the knowledge of Mr Rowan’s settlement, and of their eventual interest under it, and granted their acknowledgment for the bills with reference to the settlement; and in respect the presumption of law with regard to Mr Rowan, arising from the undisputed circumstances of the case, and from the writings produced, is, that he did not intend to give the bills in question to Mr Buchanan and his family, either in advance of what he had bequeathed to them by the settlement, or as a loan, but that he gave the bills as a donation during his lifetime.’

The respondent, Mrs Mollison, having lodged a representation, the Lord Ordinary found, that although Mr Crawford, from his interest in the succession and relationship, was inadmissible as a witness, yet it was proper that both he and Mr Buchanan should be judicially examined; which was accordingly done. Thereafter, on advising memorials with the declarations, his Lordship recalled the above interlocutor, and in respect of the nature and circumstances of the case, reported it on informations to the Court. On the part of Mr Buchanan and his family, it was maintained,—

1. That as the bills had been delivered blank indorsed during the life of Mr Rowan, the presumption was, that they were intended as a donation; that as his settlement must be considered as the last act of his life, and consequently posterior to the delivery of these bills; and as by that settlement they were entitled to one-half of what he should die possessed of, it was impossible, consistently with the established principles of law, to regard the delivery of the bills as an anticipated payment of part of that half.

2. That this was confirmed by the circumstances of the case; the family of Mr Buchanan being the only blood-relations of Mr Rowan, and as such his natural heirs; and he having, without objection, received and kept the letter of Mr Buchanan, in which the act was described as one of great generosity; and as he must have been fully aware that they knew nothing of his will, and must consequently have regarded it as a simple donation. And,

3. That although it was true that, by the deed of settlement, the fee of one-half was to go to Mrs Rowan, and she was to enjoy the liferent of the other, and had in consideration thereof renounced her legal rights, yet he had reserved power to dispose

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of his effects by gift or otherwise as he should think fit; and, therefore, he had not exceeded his powers in making this gift.

On the other hand, it was maintained by Mrs Mollison,

1. That the terms of the acknowledgment and relative letter, (which formed the only written evidence), were entirely exclusive of the idea that the bills were meant as a donation, and that the only consistent view of the case was, that they were intended as an anticipated payment; that the settlement had been made on the footing of an equal division between Mrs Rowan and the family of Mrs Buchanan; that the half to be payable to the latter was to be subject to her liferent; that Mr Rowan had recently, prior to the transmission of the bills, confirmed his settlement by the codicil, so that it could not be alleged that he had changed his intentions; but if the theory of Mr Buchanan and his family were correct, he must have altered his views entirely, by allotting to them more than a seventh part of his whole effects, and depriving his wife of the liferent of this part.

2. That it was farther established by the declaration of Mr Buchanan, that the bills were a mere anticipated payment, because he admitted that, when the subject was mentioned to Mr Rowan, he immediately alluded to his will and burst into tears, thereby shewing that he considered the delivery of the bills as connected with his will, and bearing reference to his death, which he saw was rapidly approaching. And,

3. That Mr Rowan, consistently with the obligations which he had undertaken to his wife by the deed of settlement to which she was a party, could not make such a donation.

Lords Craigie and Bannatyne were of opinion that the bills were to be considered as a donation, while the Lords Justice-Clerk, Glenlee and Robertson, held that they must be regarded as an anticipated payment; and the Court, therefore, on the 22d February 1822, 'found, that the amount of the four bills in question falls to be imputed in part payment of, the provisions to which Mr Buchanan and his family have right by the settlement of Mr Rowan, and that they are not entitled to these provisions over and above the amount of the bills; and remitted to the Lord Ordinary to proceed accordingly.'

Mr Buchanan and his family appealed, but the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

* See 1. Shaw and Ballantine, No. 390.

Appellants' Authorities.—Stewart, July 24. 1623, (11,439); Stirling, June 20. 1704, June 16. 1824.

(11,442).

Respondent's Authorities.—(3.)—3. Stair, 843.; 3. Ersk, 9. 16.; Sorlies, Dec. 5. 1771, (5947.); Hogg, July 16. 1804, (No. 2. App. Legitim.)

J. RICHARDSON—A. MUNDELL, Solicitors.

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the footing of an equal division between Mrs Rowan and the family of Mrs Buchanan that the debt to be payable to the latter was to be apportioned to the latter.

MAXWELL HYSLOP and Company, and WELLWOOD and MAX-

No. 53.

WELL HYSLOP, Appellants.—Adam—Jameson—McNeill.

DAVID GORDON, Respondent.—Wetherell—Shadwell.

Et e Contra.

Jurisdiction—Interest—Process.—A party who was a native of Scotland, but resident at New-York as a merchant, having brought an action before the Court of Session against two Scotsmen carrying on business in Jamaica, in regard to transactions which took place in America and the West Indies, without founding a jurisdiction; and having concluded against them for payment of a sum in sterling money, with the legal interest thereon; and the Court of Session having, under the circumstances of the case, sustained their jurisdiction; and the parties having then gone into a long and intricate litigation; and the Court having decerned for a sum in dollars, (being the money in which the accounts were kept), and found, that under the conclusions of the summons the pursuer could not insist for American interest; —The House of Lords refused to open up the question of jurisdiction; found that decree should have been given in sterling money; that interest at five per cent was due on the principal; and in part reversed the judgments as to the amount of the principal sum.

THE respondent, David Gordon, was a native of Scotland, but left that country early in life, and in 1799 settled in New-York as a merchant. The appellants, Wellwood and Maxwell Hyslop, were also natives of Scotland, the former of whom settled in Kingston of Jamaica as a merchant, and Maxwell, after having gone to New-York, and been educated there as a merchant by Gordon, entered into partnership with his brother at Kingston, under the firm of M. Hyslop and Company. Their father had been proprietor of an estate in Dumfries-shire, which he sold, and L.2000 of the price were retained by the purchaser to meet an annuity constituted on the estate, and to which sum, on their father's death, they acquired right. Various commercial transactions took place between Hyslop and Company and Gordon, of a very complicated and intricate nature, and of which it is only necessary to notice as much as may be

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