vagant marriage-contract, but a very reasonable one.

Lord Neaves—I cannot concur in the ground upon which the Lord Ordinary has noted his judgment. Nor can I lay down any general proposition that there can be no reduction or setting aside of a marriage-contract, so far as its provisions are excessive, under the Act of 1621; on the contrary, I am disposed to think that either the application of the statute or of common law may be a good ground of reduction. His Lordship, after examining the case of *Duncan* v. *Sloss*, concurred with the other Judges that it was no authority to set aside a contract which was in every respect reasonable.

The Court accordingly adhered to the interlocutor of the Lord Ordinary.

Agent for Pursuer—A. K. Morrison, S.S.C.

Agent for Judicial Factor—John Henderson, S.S.C.

## HOUSE OF LORDS.

*Thursday, May* 16.

### DICKSON *v.* PAGAN AND OTHERS (SOMERVILLE'S TRUSTEES).

*Husband and Wife—Postnuptial Contract—Conditional Settlement.* Terms of settlement by a husband in postnuptial contract which held intended to take effect only in case of the wife surviving; and the wife having predeceased, the husband held to have full power to dispose of his estate.

This was an appeal against a judgment of the Second Division of the Court of Session as to the construction of a postnuptial settlement of the late Colonel Somerville. Dr Pagan and the other trustees and executors of the late Colonel Somerville raised an action of multiplepoinding against Mrs Dickson, wife of Mr William Dickson, and only daughter of the late Colonel Somerville, and her husband and others.

The following were the facts of the case:—Colonel Somerville, a captain in the service of the East India Company, was married in June 1816 to Miss Eleanor Dixon. There was no antenuptial contract of marriage; but on the 17th August 1818 Colonel Somerville and his wife executed a mutual postnuptial contract, in order to regulate the interests which the spouses were to have in the property then belonging to them, or that they might afterwards come to have right to.

Captain Somerville conveyed to his wife, "in case she survives him, the full liferent right of every property, money, means, and effects of every denomination that may pertain and belong to him at his death, for the said Eleanor Dickson, her liferent use allenarly; but reserving to the said Henry Erskine Somerville full power to burden his said effects or estate with an annual payment or payments, not exceeding in all £25 sterling, to such person or persons as he shall bequeath the same to by any deed or writing under his hand; and it is hereby declared that the said liferent, under the above reservation, shall be subject always to the maintenance, clothing and education of the child or children that may be procreated of the marriage; and upon the decease of the said Eleanor Dickson, the whole subjects, money, means, and effects liferented by her as aforesaid, are hereby conveyed to the child or children of the marriage and if more than one, to be divided in such proportions as the said Henry Erskine Somerville, and failing him the said Eleanor Dixon, shall see proper, by a writing under his or her hand; and in case of no children existing of the present marriage, it is hereby understood and agreed that the whole property, &c., to be liferented as aforesaid, shall belong and accresce to the heirs and executors of the said Henry E. Somerville, or his assignees, upon which he reserves the power of bequeathing and disposing of as he may think proper."

On the other part Mrs Somerville conveyed to her husband and the children of the marriage in fee, whom failing to her husband and his heirs, executors, and assignees, all goods, money, &c., then belonging to her, or which she might succeed to, and particularly a sum of £1000 to which she was entitled under her father's settlement; with power to her, however, in case she should survive her husband, and there should be no children, to will and dispose of that sum. In 1825 the first and the only surviving child of the marriage Eleanor, now Mrs Dickson, the appellant, was born. In January 1826 the trustees under Mrs Somerville's father's settlement paid over to Colonel Somerville the sum of £1000 above mentioned. In August of the same year Colonel Somerville executed a will, in which he stated it to be his desire that the postnuptial contract should be valid in every respect, and, to the full extent therein expressed, he exercised the power therein assigned to him, and bequeathed an annuity of £25 to his sister Harriet. On the 10th November 1840 Mrs Somerville died, survived by her husband, and by the appellant Mrs Dickson. In February 1841 Colonel Somerville executed a holograph will, in which he bequeathed all his property to his daughter, after deducting, however, a considerable number of legacies and annuities. In February 1852 he executed the will, which with the codicils attached constitutes the final disposition of his property. He thereby directed that various legacies should be paid to his relations, and that his trustees should hold the residue for behoof of his daughter and her children, but that, should she die without children, she should have power of disposing only of £500. The rest of the residue was to be divided among the testator's sisters, nephews, and nieces, whom he named. In December 1854 a contract of marriage was entered into between William Dickson and Eleanor, daughter of Colonel Somerville, by which the last named bound himself *inter alia*, to make over, within three months after the marriage, the sum of £8000 to trustees for his daughter's and her husband's behoof in liferent, and to their children in fee. Colonel Somerville died in 1863. He left estates amounting to about £28,000, besides the £8000 transferred to the trustees under the marriage-contract of his daughter. Mrs Dickson (who had no children) and her husband now claimed the whole trust-fund, on the ground that as the only surviving child of the marriage she was entitled to the whole under the postnuptial contract of 1818. The legatees to whom the fee of the estate, failing Mrs Dickson's children, was to be paid, claimed under the deed, and contended that the residue should be held by the trustees during Mr and Mrs Dickson's life.

The Lord Ordinary (Barcaple) held that the postnuptial settlement of 1818 was bindiug, and had not been competently revoked, and therefore

that Mrs Dickson was entitled under such settlement to the whole free estate of the testator. The Second Division unanimously recalled this interlocutor, and held that the postnuptial settlement was intended only to operate in the event of the testator's wife surviving him; and that the testator having survived his wife, had full power to settle and dispose of his succession, heritable and moveable, notwithstanding the postnuptial contract.

Mrs Dickson and her husband appealed.

Sir ROUNDELL PALMER, Q.C., and SELWYN, Q.C., for appellants.

The Attorney-General (ROLT), ANDERSON, Q.C., and JOHN A. SHAND, for respondents.

LORD CHANCELLOR—My Lords, two questions were raised upon this appeal—1st, Whether upon the true construction of the postnuptial settlement of the father and mother of the appellant Mrs Dickson, any interest accrued to her as the only surviving child of the marriage?

2d, Whether this postnuptial settlement was revocable at the father's pleasure, or at all events whether it was not good against his gratuitous alienation?

If the first question is answered in the negative, an answer to the second question will become unnecessary.

The first question is one purely of intention, to be collected from the language of the deed, and therefore decisions upon other cases, or the principles of the law of Scotland with respect to dispositions to parents or children are of little use, except so far as they may assist in giving a meaning to the words which are employed. The recital or narrative of the deed from which the purpose of it may be collected, consists of two parts, one containing the reason of its being made, the other the object intended to be carried out. The reason for the settlement is expressed to be, to supply the want of written articles previous to the marriage of the spouses, as to the division of or succession to any property then belonging to them or which they might acquire or succeed to, or interest which they or their children or heirs might have in the event of a dissolution of the marriage by the death of one or both of them.

All these events will not be provided for if the settlement of the husband's property is restricted to the single event of his wife surviving him. But the reason being thus stated, the object and intention of the settlement are expressed to be "in order to regulate the interests which the said Henry Erskine Somerville and Eleanor Dixon are to have in the property presently belonging to them, or that they may acquire or succeed to during their marriage, or that they may afterwards come to have right to." To accomplish this object Henry Erskine Somerville dispones, &c., "to and in favour of Eleanor Dixon, his spouse, in case she survives him, the full liferent of every property, money, means, and effects of every denomination that may pertain and belong to him at his death, for the said Eleanor Dixon for her liferent use allenarly."

It was said on behalf of the appellant that the disposition being of everything belonging to the husband at his death, and being for the liferent use of the wife, the words "in case she survives him," were necessarily involved in the subject of the disposition and the term of enjoyment, and according to the maxim "*Expressio eorum quæ tacitè insunt nihil operatur*" are mere surplusage. But there is also another rule in the construction of deeds, which must not be disregarded, that no words are to be rejected if they can receive a sensible interpretation. Now the words "if she survives him" appear to me to be not only susceptible of a consistent application, but to be of essential service in ascertaining the meaning. Even if those words are included in those which follow, they may, from that circumstance alone, indicate the intention of the settlement more clearly. If the disposition of what might belong to the husband at his death, and the liferent given to the wife, would have been sufficient in themselves to denote that her interest would depend on her husband predeceasing her, then the words "if she survive him" appear to me to become emphatic words, expressive of an intention that only upon that contingency the wife was to have what was provided for her. In other words it was a gift, upon the condition of her surviving, of a liferent of all that the husband should have at his death.

If this is the proper construction of this first proposition, then all the subsequent ones hinge upon it, and the words in which they are expressed sufficiently induce this intention. The words "upon the decease of the said Eleanor Dixon, the whole subjects, money, means, and effects liferented as aforesaid," may certainly mean, and the dispositions are perfectly consistent if they do mean, liferented to the wife in case she survives. Even in this event the husband does not relinquish all power over his property, for he has reserved a right to designate the proportions in which the children shall take after the death of their mother. This appears to me to justify the opinion I have formed. For if the father thus reserves to himself a power to regulate the mode of succession of his children in the event of his wife surviving him, it could hardly have been his intention, if he survived his wife, that he should lose all power of disposition over his own property. The settlement then proceeds—"in case of no children existing of the present marriage" (which to be consistent with what has preceded must mean children at the decease of the wife) "the whole property, means, and estate to be liferented as aforesaid shall belong and accrue to the heirs and executors of the husband or his assignees." I think that these words strengthen the construction which was adopted by the Judges of the Second Division, and with which I agree, that the close of the limitations shows that they were all framed upon the event of the husband being dead upon their taking effect, and that they all depend upon this contingency.

I think that no aid in the construction can be derived one way or the other from the absolute disposition of the wife's property to the husband, on the one hand, compared with the contingent disposition of his property to her, on the other. All that can be said upon the subject is, that the settlement was the result of a mutual agreement, and that there is nothing in the value of the wife's property that renders such an agreement improbable.

Being of this opinion, it becomes unnecessary to consider the other question as to the husband's power of revocation, and I therefore forbear to say anything upon it. I think, therefore, that the interlocutor appealed from ought to be affirmed.

LORD CRANWORTH—The question, my Lords, in this case is whether, according to the true construction of this postnuptial contract, Mrs Dickson, as the only child of the marriage who attained majority, became entitled on her father's death, in

1863, to all the property of which he was then possessed; and this depends on the interpretation to be put on the words "in case she survives him," which are connected with the gift of liferent to Eleanor Somerville, her mother. If the contingency which these words naturally import is to be treated as applying to what is given to the daughter, then she took nothing under the clause in question, for her mother did not survive her father. But if those words are not to be read as really importing contingency, but are to be rejected as being merely *expressio eorum quæ tacitè insunt*, then unless other expressions can be discovered in the instrument affecting her rights, or unless by the law of Scotland those rights could be varied by her father's testamentary disposition, she became entitled on his death to the whole of his property.

From the time of the death of Mrs Somerville in November 1840, Major Somerville appears to have supposed that he had a power to dispose of his property by will as he might think fit. For soon after her death he made a will disposing of it in a way inconsistent with the notion that it all belonged absolutely to his daughter. This was inconsistent with a construction of the postnuptial contract which should deprive him of such a power; but it was not, indeed it could not be, argued that his belief as to what his rights were under the instrument in question should influence us in the construction we ought to put upon it. It is, however, consistent with principle that a Court, in endeavouring to construe an instrument ambiguously worded should so far take into account the probable intention of the parties, so that if the instrument is capable of two constructions, one consistent and the other inconsistent, or less consistent with what, according to the ordinary motives which influence mankind, the parties may be supposed to have intended, that circumstance may not unreasonably be taken into account by the Court in its endeavour to interpret that which is obscure. Now here it seems to me highly improbable that Major Somerville, who was still a young man, could have intended to execute a deed whereby he should bind himself to secure to the issue of his then marriage everything he should possess at his death, to the exclusion of the issue he might have by any subsequent marriage. He might reasonably be willing to secure it for the benefit of the children of his then marriage if he should die in the lifetime of his wife. I cannot think it probable he should have intended so to deal with it if he should survive his wife and have a family by a subsequent marriage. Although, however, this appears to me to be an improbable intention to impute to him, yet, if the language of the deed, fairly construed, leads necessarily or naturally to such a result, we are not at liberty to indulge in speculation, and to give to it an unnatural interpretation, in order to effectuate what we think it probable the parties using it really intended. But I do not think the language here used necessarily, or even naturally, leads to the result contended for by the appellants. Their argument is, that the words "in case she survives him" are to be regarded as merely *expressio eorum quæ tacitè insunt.*

So far as relates to the estate and interest given to the wife in liferent, it is correct to say that these words are necessarily implied; because unless she should survive her husband she could not take anything. But the same reasoning does not apply to the daughter. If the words are to be read as governing the whole sentence, then as to the daughter they express something not implied in the gift to her, so that the question is, whether these words are to be read as applicable to the wife's liferent only, or are to be carried on through the whole gift? I am of opinion that they govern the whole. It is a well known canon of construction that effect is to be given if possible to every word used, and acting on that rule we ought, I think, to hold th at the words here in question apply to the interest of the daughter as well as of the mother, for otherwise they have no operation. This construction is strongly favoured by looking to what it is which is given to the daughter. She is to have the whole subjects, money, means, and effects liferented by the mother. I do not mean to say if the construction required it, that these words taken *per se* necessarily import that the mother must have previously enjoyed for life that which is to go to the daughter. The words "*liferented as aforesaid*" might if the context so required be taken to mean *in which the mother if she should survive her husband was to have a liferent, i.e.*, to be a mere description of the thing given. But the more obvious meaning is that the daughter was to succeed to what the mother had previously enjoyed in liferent.

The clause it will be observed does not provide that if there should be no child of the marriage, then the whole, on the decease of the wife, should revert to Major Somerville himself, but says that it is to "belong and accresce to his heirs, executors, and assignees. This, it was strongly argued, shows that the deed in the clause before us contemplated the death of Major Somerville in the lifetime of his wife, otherwise the provision would have been that the property should for default of issue revert to himself, or to some such effect. The argument appears to me unanswerable if the words "upon the decease of the said Eleanor Dixon" are to be read as meaning *immediately* upon her decease, or as referring only to property which she should actually have enjoyed in liferent. But if the previous part of the deed is to be read as contended for by the appellants, *i.e*, as a mere gift to Eleanor for life, and upon her decease to the children of the marriage, or if no children, to the heirs and executors of Major Somerville, then inasmuch as the subject-matter of the deed is the whole property which Major Somerville should be possessed of at his decease, there is no absolute inconsistency in saying, that in default of issue of the marriage it should go to his representatives. I must, however, say that as he must, in such a case as is supposed, have become in his own lifetime absolutely entitled to the whole in possession, the provision that at his death it should belong and accresce to his heirs executors, or assignees is very strange and leads to the supposition that it could not have been what the parties intended. All this difficulty is removed by giving to the previous part of the deed the construction, which I venture to think is the natural one.

The view of the case which I have thus taken is rendered more clear by the nature of the deed, and the objects which it contemplated. It is a postnuptial deed. By such a deed the spouses according to the law of Scotland could not affect any interest which the children would have independent of marriage-contract in the estate of his father at his decease, though they might bind the rights of the wife in her *jus relictæ*. The settlement begins by reciting that the parties to it (Major, then Captain Somerville and Eleanor Dixon) had married two years previously without written articles as to the

succession to any property then belonging to them or which they might acquire or succeed to, or which they or their children might have in the event of a dissolution of the marriage by the death of one or both of them. Therefore, in order to regulate the interests which they, the said Henry E. Somerville and Eleanor Dixon are to have in the property presently belonging to them, or that they may acquire or succeed to during the marriage, they proceed to make the provisions to which I have already adverted.

The object of the parties, it will be observed, is not stated to be to make any provision for the children, whom they probably knew they could not bind, or having any reference to their interests, but only to regulate the rights of the spouses themselves in their present and future property, acquired during the marriage, or that they might afterwards come to have right to. Now, this object was fully carried into effect on the part of Major Somerville by securing to his wife, if she should survive him, a liferent in all the property of which he should die possessed, and giving to the children of the marriage, at her death, what she should have enjoyed for her life. There is nothing to be collected from the recital showing an intention on the part of Colonel Somerville to make provision for the children in case his wife should die in his lifetime, and so he should never be called on to make provision for her. The deed, construed according to the literal meaning of the words, carries into full effect the recited intention, and I see no reason for endeavouring to extend its operation beyond what the language, literally construed, imparts. On these grounds, I have come to the conclusion that the decision of the Court of Session was right.

I will only add, that the doctrine of the English courts, to which we were referred by Sir R. Palmer, in such cases as *Key* v. *Key*, 4 De Gex., M. and G., 70; and *Howgrave* v. *Carter*, 3 V. and B., 79, even if the rules of construction there acted on, and which had been established with great hesitation by Lord Thurloe and Lord Eldon, are to be acted on in Scotland, do not apply to the present case. In all these cases the Court of Chancery felt itself warranted in holding that the object of the will or settlement must have been to make an absolute provision for all the children attaining twenty-one, though the language seemed to indicate the surviving of their parents as a condition precedent. No such doctrine can, in my opinion, be attributed to the deed now under consideration.

Lord Westbury—My Lords, I regret that I cannot concur in the opinion of my noble and learned friends; but as this is a question not involving any general principle or point of law, but turning entirely upon the construction of a private instrument, I abstain from stating my reasons at length. It would be useless with regard to the decision itself, and if there be any validity or force in the reasons, it would only have the effect of weakening the confidence of the parties in the judgment to which they must submit.

Sir Roundell Palmer—I do not know whether your Lordship will allow me to say a single word on the subject of costs. Your Lordship will recollect that this is a family case arising under the provisions of a will. The property in substance goes to the parties for their own life, though with remainders to the children, and even in case there should be no children. I do not know whether your Lordships will think that should be considered with reference to the question of costs.

Mr Anderson—There is no question upon the consideration of the will. It is upon the marriage-settlement.

Lord Chancellor—I do not know what my noble and learned friend thinks on the subject of costs; of course I intended to put the question to the House. "That the appeal be dismissed with costs." I do not know whether my noble and learned friend is of that opinion.

Lord Cranworth—My Lords, I am sorry to say that that is my opinion. I have always an inclination in family suits to make the costs of the parties come out of the estate; but this is not an ambiguity created by the testator.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Agent for Appellants—J. T. Mowbray, W.S., and Loch & Maclaurin, Westminster,

Agents for Respondents—J. Shand, W.S., and Simson & Wakeford, Westminster.

## *Monday, May* 20.

### DIGGENS *v.* GORDON.

(The Court of Session, 6 Macph. 609.)

*Husband and Wife—Antenuptial Contract—Conquest—Succession.* Held (aff. C. S.) that a conveyance by a wife in an antenuptial contract of whatever she might "conquest or acquire" during the marriage, was not to be construed technically, but comprehended estate to which she succeeded under her parents' marriage-contract, and as heir *ab intestato* of her father.

On 4th January 1860 an antenuptial-contract of marriage was entered into between Francis John Diggens and Mary Nisbet, daughter of Mr Ralph Nisbet of Mainhouse. Mr Diggens conveyed to trustees a policy of insurance on his life for £200, to be held for his wife and the children of the marriage. Miss Nisbet, on the other hand, conveyed to the trustees, to be held for herself and the children of the marriage, 100 shares of the stock of the North of Scotland Banking Company; and farther, "all sums of money, goods, gear, and effects, and heritable and moveable estates of every description, wheresoever situated, which she may conquest or acquire during the subsistence of the said intended marriage." On 5th January the marriage took place. In November 1863 Mr Nisbet died. By deed, dated in 1855, he directed his marriage-contract trustees to pay over to his daughter a sum of £1500, being one-half of a sum of £3000 which had been settled on his children by his marriage-contract. Mr Nisbet died intestate as to the rest of his estate, heritable and moveable, which was of considerable value. He left two daughters, of whom Mrs Diggens was the elder.

Mrs Diggens, with concurrence of her husband, brought an action against the surviving trustee under their marriage-contract, to have it found that the property to which she had succeeded from her father's estate belonged absolutely to her and her husband, and was not carried to the trustees under her marriage-contract by the clause of conveyance in that deed. The plea upon which she rested her claim was, that the conveyance of "conquest" in her marriage-contract was to be construed in the strict sense of the term—that is, did not comprehend sums to which she succeeded.