

add to the evidence, but he had ample opportunity of leading evidence before the Lord Ordinary gave his judgment, and never applied for leave until after that judgment. The evidence in the case is quite conclusive in favour of the pursuer. She kept this document, which declared the marriage, in her own possession, and even though she had not herself signed it, it might well be deemed a declaration made by both of the parties. That being so, the declaration was clearly evidence of a marriage *de presenti*, and the judgment of the Court below is right.

LORD CAIRNS concurred.

LORD CHANCELLOR—With regard to the costs, the House will not draw up the order at once, so as to allow of any application by the appellant, but probably the effect of the judgment of the House will be to make the husband liable for the wife's costs in any event.

Judgment affirmed.

Friday, July 12

CHAPMAN v. COUSTON, THOMSON, & CO.

(*Vide ante*, vol. viii, p. 415.)

Sale—Sample—Timeous Rejection.

Circumstances in which it was held that timeous rejection as not conform to sample of goods sold had not been made. Judgment of Court of Session affirmed.

The circumstances of this case and the decision of the Court below will be found reported *ante*, vol. viii, p. 415 *et seq.*

Against the judgment holding them liable for want of timeous rejection of the wines, the defenders appealed. The discussion was limited to two particular lots of the wine sold, and to the question of timeous rejection.

Mr MANISTY, Q.C., and Mr J. C. SMITH, for the appellants.

LORD ADVOCATE and SOLICITOR-GENERAL for the respondent, were not called on.

At delivering judgment—

LORD CHANCELLOR—(After minutely reviewing the facts of the case and the correspondence which had taken place between the parties)—There can be no doubt that the Court below have come to a proper decision in this matter. The question related to two lots of wine bought by the defenders at a sale in Edinburgh, which were not conform to sample, there being four or five other lots bought as to which no question of quality has arisen. Both parties acted *bona fide*, but there appears to have been some unfortunate misapprehension between them as to the law applicable to the case. The law of Scotland is this:—It is not competent for a person receiving articles he has purchased, not conform to description of the sample, to retain the goods, and at the same time to raise any question about the payment of the price. There is only one of two courses open to him—either that of retaining them and paying the price, subject to any right or claim he may have as to any difference between the price and the actual value; or of notifying immediately, or within reasonable time, to the person from whom he purchased the articles that he rejects them, and that the contract is at an

end between him and the vendor, and that the articles, if not removed, will be held at the risk of the vendor. Having regard to the nature of the article, I am disposed to think that timeous objection was made to the quality of the lots in question, but, on the other hand, I have failed to discover in the negotiations and correspondence which have taken place that any distinct intimation was given by the purchasers that the goods were rejected, and that they were held at the vendor's risk. The goods objected to were retained, not returned, and the price was refused. No distinct offer was made to return the goods even on the 15th June, the day after the action was commenced, and it was then too late. The defenders had no *locus penitentiae*. The interlocutor complained of must therefore be affirmed, and the appeal dismissed, with costs.

LORDS CHELMSFORD, COLONSAY, and CAIRNS concurred.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defenders—Leburn, Henderson, & Wilson, S.S.C.

SMITH CUNINGHAME v. ANSTRUTHER'S TRUSTEES.

MERCER v. ANSTRUTHER'S TRUSTEES.

(*Ante*, p. 431.)

The following judgments were pronounced:—

"9th August 1872.—After hearing Counsel, as well on Tuesday the 12th as Thursday the 14th, Friday the 15th, and Monday the 18th days of March last, upon the original petition and appeal of Mrs Maria Anstruther or Smith Cuninghame, spouse of William Cathcart Smith Cuninghame of Caprington, with consent of the said William Cathcart Smith Cuninghame, as administrator-in-law for his said wife, and for his own right and interest, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage, dated 24th and 26th March 1828, the fee of the sum of £4000 was vested in James Anstruther, and that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs Marian Anstruther was vested in her, and in so far as the same does not find that under the said contract of marriage the children of the marriage became respectively absolutely entitled to a share of the provision of £4000 by Mr Anstruther, and to a share of the provision therein contained of the whole means and estate of Mrs Anstruther, subject only to a power of apportionment among them by Mr and Mrs Anstruther, or the survivor of them; and also of an interlocutor of the said Lords of Session there, of the First Division, and three Judges of the Second Division, of the 11th (signed 14th) of July 1870, and praying their Lordships to reverse, vary, or alter the said interlocutors to the extent complained of, or to give the petitioners such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the joint and several answer of Mrs Anabella Agnes Anderson or Anstruther, widow of the deceased James Anstruther, Writer to the Signet, sometime residing at Treesbank, in

the county of Ayr, Miss Lucy Sarah Anstruther, youngest daughter of the said deceased James Anstruther, sometime residing at Treesbank aforesaid, and Thomas Anderson, Esquire, of Glendri-shaig, advocate, Sheriff-Substitute of the county of Ayr, surviving and accepting trustees of the said deceased James Anstruther, conform to trust-disposition and settlement made and granted by him, dated 8th October 1866, and recorded in the Books of Council and Session 6th June 1867; and also of the said Mrs Anabella Agnes Anderson or Anstruther, and Miss Lucy Sarah Anstruther, as individuals, put in to the said original appeal (and which said appeal was, by an order of this House, of the 21st of April 1871, ordered to be heard *ex parte* as to Mrs Annie Catherine Anstruther or Mercer and John Henry Mercer, as her administrator-in-law and for his own right and interest, they not having answered the said appeal, though peremptorily ordered so to do); as also upon the petition and cross appeal of the said Mrs Anabella Agnes Anderson or Anstruther, widow of the deceased James Anstruther, Writer to the Signet, sometime residing at Treesbank, in the county of Ayr, Miss Lucy Sarah Anstruther, youngest daughter of the said deceased James Anstruther, sometime residing at Treesbank aforesaid, and Thomas Anderson, Esquire, of Glendri-shaig, advocate, Sheriff-Substitute of the county of Ayr, surviving and accepting trustees of the said deceased James Anstruther, conform to trust-disposition and settlement made and granted by him, dated 8th October 1866, and recorded in the Books of Council and Session 6th June 1867; and also of the said Mrs Anabella Agnes Anderson or Anstruther and Miss Lucy Sarah Anstruther, as individuals, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage of the deceased James Anstruther and Mrs Marian Anstruther, dated 24th and 26th March 1828, the children of the marriage had, in regard to the sum of £4000 therein mentioned as provided by Mr Anstruther, a right of succession which could not be gratuitously defeated, and in so far as it finds that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs Anstruther was vested in her, the said Marian Anstruther, subject to a right of liferent by the said James Anstruther in the event of his surviving his said wife, and that the children of the marriage had, in regard to the said means and estate of Mrs Anstruther, a right of succession which could not be gratuitously defeated; and in so far as it finds that neither by the said James Anstruther and Marian Anstruther jointly, nor by him as the survivor, was any deed executed purporting in terms to be a deed of division and apportionment amongst the whole of the children, either of the said sum of £4000, or of the means and estate of Mrs Anstruther aforesaid; and praying their Lordships to reverse, vary, or alter the said interlocutor to the extent complained of, or that the petitioners might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the joint and several answer of Mrs Maria Anstruther or Smith Cunninghame, spouse of William Cathcart Smith Cunninghame of Caprington, with consent of the said William Cathcart Smith Cunninghame, as administrator-in-law for his said wife and for his own right and interest, put in to the said

cross appeal, and due consideration had, as well on Thursday the 25th of April last as this day, of what was offered on either side in this cause—it is ordered and adjudged, by the Lords spiritual and temporal in Parliament assembled, that the said interlocutor of the 11th (signed 14th) of July 1870, complained of in the said original appeal, be, and the same is hereby reversed, and that such parts of the said interlocutor of the 18th (signed 20th) of March 1869 (in part complained of in the said original and cross appeals) as are inconsistent or at variance with the findings and declarations and order hereinafter expressed, be, and the same are hereby also reversed; and this House doth find and declare that the marriage-settlement of Mrs Cunningham and the marriage-settlement of Mrs Mercer, in the proceedings mentioned, were respectively valid appointments of the two sums of £5000, in exercise of the power contained in the settlement of 1828, also in the said proceedings mentioned, but that such appointments did not exclude Mrs Cunningham or Mrs Mercer from participating in so much of the funds or property comprised in the said deed of 1828 as have not been appointed under the powers therein contained: And this House doth further find and declare that the trust-disposition and settlement of Mr Anstruther, of 8th October 1866, in the proceedings mentioned, was a good appointment under the power in the said deed of 1828 to Lucy Anstruther of the sum of £20,000, part of the funds comprised in the said deed of 1828, but that she is not thereby debarred from participating equally with Mrs Cunningham and Mrs Mercer in the residue of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments: And this House doth further find and declare that, according to the true construction of the powers contained in the said settlement of 1828, the same admitted of being validly exercised from time to time by several appointments; And this House doth further find and declare that the estate of Mr Anstruther is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs Cunningham's and Mrs Mercer's settlements, and for any sum received by Miss Lucy Anstruther on account of the sum of £20,000; And this House doth further declare and direct that a reference be made to such person as the Court of Session shall appoint under the remit hereby made to take the following accounts:—1. An account of all the funds, moneys, and property that were comprised in or became subject to the trusts or dispositions expressed or made in and by the said settlement of 1828, and of the manner in which the same have been from time to time invested, and what were the particulars, value, or amount of all such funds, moneys, and property at the death of the said James Anstruther, and to ascertain and state what, if anything, was at the time of his decease due from the said James Anstruther (subject as aforesaid) in respect of any trust-property or principal trust-moneys received by him and applied to his own use, and to ascertain and state the balance due from the estate of the said James Anstruther to the trust-estate under the said settlement of 1828, and, if necessary, to take an account of all the estate of the said James Anstruther not comprised in or subject to the trusts of the said settlement of 1828, and of the receipts and payments of his trustees or representatives in respect of such estate (not subject as aforesaid), and to ascertain what estate of the said James

Anstruther is applicable to the payment of the balance that may be found due from him to the trust-estate under the said settlement of 1828 as aforesaid: And it is further ordered that the expenses of all parties in the Court of Session being taxed under the direction of the said Court, and the costs of all parties in respect of this appeal, the amount thereof being certified by the Clerk of the Parliaments, be paid as follows,—namely, the costs and expenses of the trustees of the said James Anstruther shall be paid out of the free estate of the said James Anstruther; and if any balance of the said free estate shall remain after such payment, the costs and expenses of the several other parties shall be paid out of the said balance; and if the same be deficient, then the last-mentioned costs and expenses, or any balance thereof, shall be paid out of the residue of the said settlement funds remaining unappointed or unexhausted as aforesaid: And it is also further ordered that the cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with these declarations, findings, and directions, and this judgment.”

MERCER v. ANSTRUTHER'S TRUSTEES.

“9th August 1872.—After hearing Counsel as well on Tuesday the 12th as Thursday the 14th, Friday the 15th, and Monday the 18th days of March last, upon the original petition and appeal of Mrs Anabella Agnes Anderson or Anstruther, widow of the deceased James Anstruther, Writer to the Signet, residing at Treesbank, in the county of Ayr, Miss Lucy Sarah Anstruther, youngest daughter of the said deceased James Anstruther, sometime residing at Treesbank aforesaid, and Thomas Anderson, Esquire, of Glendrisshaig, advocate, Sheriff-Substitute of the county of Ayr, surviving and accepting trustees of the said deceased James Anstruther, conform to trust-disposition and settlement made and granted by him, dated 8th October 1866, and recorded in the Books of Council and Session 6th June 1867, and also of the said Mrs Anabella Agnes Anderson or Anstruther, and Miss Lucy Sarah Anstruther, as individuals, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage of the deceased James Anstruther and Mrs Marian Anstruther, dated 24th and 26th March 1828, the children of the marriage had, in regard to the sum of £4000 therein mentioned as provided by Mr Anstruther, a right of succession which could not be gratuitously defeated; and in so far as it finds that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs Anstruther was vested in her, the said Marian Anstruther, subject to a right of liferent by the said James Anstruther in the event of his surviving his said wife, and that the children of the marriage had, in regard to the said means and estate of Mrs Anstruther, a right of succession which could not be gratuitously defeated; and in so far as it finds that neither by the said James Anstruther and Marian Anstruther jointly, nor by him as the survivor, was any deed executed purporting in terms to be a deed of division and apportionment among the whole of the children, either of the said sum of £4000, or of the means and estate of Mrs Anstruther aforesaid; and in so far as it finds it not averred that, in regard to the

pursuer Mrs Annie Catherine Anstruther or Mercer, individually, any other deed or apportionment was executed except what is alleged to be contained in her marriage-contract with Mr Mercer, bearing date 10th December 1861; and in so far as it allows to the pursuers a proof of the averments in articles 16, 17, 18, 19, and 20 of their revised condescendence; and appoints the said proof to proceed before Lord Ardmillan on a day to be afterwards fixed by his Lordship; and also of an interlocutor of the said Lords of Session of the First Division, and three Judges of the Second Division, of the 6th (signed 7th) of March 1871, except in so far as it sustains the defences, and assoilzies the defenders from the conclusions of the summons, in so far as they apply to and embrace the sum of £4000, provided by the deceased James Anstruther in his contract of marriage with his spouse, the now deceased Marian Anstruther, dated 24th and 26th March 1828, and decerns; and praying their Lordships to reverse, vary, or alter the said interlocutors to the extent complained of, or that the petitioners might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the answer of Mrs Annie Catherine Anstruther or Mercer, John Henry Mercer, and Græme Reid Mercer, put in to the said original appeal; as also upon the petition and cross appeal of the said Mrs Annie Catherine Anstruther or Mercer, spouse of John Henry Mercer, Esquire, secretary to the Ceylon Company, Port Louis, Mauritius, and presently residing there, and the said John Henry Mercer as administrator-in-law for his said wife and for his own right and interest, and Græme Reid Mercer, Esquire, of Gorthy, in the county of Perth, their mandatory, complaining of an interlocutor of the Lords of Session in Scotland of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage of the deceased James Anstruther and Mrs Marian Anstruther, dated 24th and 26th March 1828, the fee of the sum of £4000, therein mentioned as provided by Mr Anstruther, was vested in him, the said James Anstruther, and that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs Marian Anstruther was vested in her; and in so far as the said interlocutor does not give full effect to the first plea in law stated by the petitioners in the cause; and also of an interlocutor of the said Lords of Session there of the First Division, and three Judges of the Second Division, of the 6th (signed 7th) of March 1871, in so far as the same sustains the defences, and assoilzies the defenders from the conclusions of the summons, in so far as these conclusions apply to and embrace the said sum of £4000 provided by the said deceased James Anstruther in the said contract of marriage with his spouse the deceased Marian Anstruther, and in so far as the said last mentioned interlocutor finds that of the estate and effects of the said deceased Marian Anstruther, the sum of £20,000, settled on the defender Lucy Sarah Anstruther by the trust-disposition and settlement of her father James Anstruther, dated 8th October 1866, must, in the circumstances of the case, for the purpose of fixing the principle of division of the unappropriated balance of the said Marian Anstruther's estate between her children, be held and taken to have been settled and apportioned as therein stated; and praying their Lordships to reverse, vary, or alter the said interlocutors to the extent complained of,

or give the petitioners such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the joint and several answer of Mrs Anabella Agnes Anderson or Anstruther, widow of the deceased James Anstruther, Writer to the Signet, sometime residing at Treesbank, in the county of Ayr, Miss Lucy Sarah Anstruther, youngest daughter of the said deceased James Anstruther, sometime residing at Treesbank aforesaid, and Thomas Anderson, Esq., of Glendrishaig, advocate, Sheriff-Substitute of the county of Ayr, surviving and accepting trustees of the said deceased James Anstruther, conform to trust-disposition and settlement made and granted by him, dated 8th October 1866, and recorded in the Books of Council and Session 6th June 1867, and also of the said Mrs Anabella Agnes Anderson or Anstruther, and Miss Lucy Sarah Anstruther, as individuals, put in to the said cross appeal; and which said cross appeal was, in pursuance of an order of this House of the 20th February last, heard *ex parte* as to Mrs Maria Anstruther or Smith Cunninghame, and William Cathcart Smith Cunninghame as her administrator-in-law and for his own right and interest, they not having answered the said appeal, though peremptorily ordered so to do; and due consideration had, as well on Thursday the 25th of April last as this day, of what was offered on either side in this cause: It is ordered and adjudged, by the Lords spiritual and temporal, in Parliament assembled, that such parts of the said interlocutors of the 18th (signed 20th) of March 1869, and 6th (signed 7th) of March 1871 (in part complained of in the said original and cross appeals), as are inconsistent or at variance with the findings and declarations and order hereinafter expressed, be, and the same are hereby reversed; and this House doth find and declare that the marriage-settlement of Mrs Cunninghame, and the marriage-settlement of Mrs Mercer, in the proceedings mentioned, were respectively valid appointments of the two sums of £5000, in exercise of the power contained in the settlement of 1828, also in the said proceedings mentioned; but that such appointments did not exclude Mrs Cunninghame or Mrs Mercer from participating in so much of the funds or property comprised in the said deed of 1828 as have not been appointed under the powers therein contained: And this House doth further find and declare that the trust-disposition and settlement of Mr Anstruther, of 8th October 1866, in the proceedings mentioned, was a good appointment under the power in the said deed of 1828 as to Lucy Anstruther of the sum of £20,000, part of the funds comprised in the said deed of 1828, but that she is not thereby debarred from participating equally with Mrs Cunninghame and Mrs Mercer in the residue of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments: And this

House doth further find and declare that, according to the true construction of the powers contained in the said settlement of 1828, the same admitted of being validly exercised from time to time by several appointments: And this House doth further find and declare that the estate of Mr Anstruther is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs Cunninghame's and Mrs Mercer's settlements, and for any sum received by Miss Lucy Anstruther on account of the sum of £20,000: And this House doth further declare and direct that a reference be made to such person as the Court of Session shall appoint under the remit hereby made to take the following accounts—(1) An account of all the funds, moneys, and property that were comprised in, or became subject to the trusts or dispositions expressed or made in and by the said settlement of 1828, and of the manner in which the same have been from time to time invested, and what were the particular value or amount of all such funds, moneys, and property at the death of the said James Anstruther; and to ascertain and state what, if anything, was at the time of his decease due from the said James Anstruther (subject as aforesaid) in respect of any trust, property, or principal trust-moneys received by him, and applied to his own use; and to ascertain and state the balance due from the estate of the said James Anstruther to the trust-estate under the said settlement of 1828; and, if necessary, to take an account of all the estate of the said James Anstruther not comprised in or subject to the trusts of the said settlement of 1828, and of the receipts and payments of his trustees or representatives in respect of such estate (not subject as aforesaid); and to ascertain what estate of the said James Anstruther is applicable to the payment of the balance that may be found due from him to the trust-estate under the said settlement of 1828 as aforesaid: And it is further ordered that the expenses of all parties in the Court of Session, being taxed under the direction of the said Court, and the costs of all parties in respect of this appeal, the amount thereof being certified by the Clerk of the Parliaments, be paid as follows—namely, the costs and expenses of the trustees of the said James Anstruther shall be paid out of the free estate of the said James Anstruther; and if any balance of the said free estate shall remain after such payment, the costs and expenses of the several other parties shall be paid out of the said balance; and if the same be deficient, then the last mentioned costs and expenses, or any balance thereof, shall be paid out of the residue of the said settlement funds remaining unappointed or unexhausted as aforesaid: And it is also further ordered that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with these declarations, findings, and directions, and this judgment.”