

of this action. Its object is to prevent a person who has no right coming on the farm and taking water at the well which is in the quarry. That can raise no question of the use of the quarry as such, and was not intended to do so. The quarry is situated on pursuer's farm and it has a well on it, which he is of course entitled to use; the defender, who is a neighbouring tenant on the same estate, chooses to use the well also for watering his cattle, and he uses as an access a road which was made by the pursuer through his field in place of another road which he had ploughed up, and which in a question with the landlord he would probably be bound to restore and keep open. The question is, Is the defender entitled to use this road as a matter of right? There is no doubt that the quarry is situated entirely on the pursuer's farm. On this point Mr Dunnet, the land-steward, says—"The quarry is surrounded by Simpson's land; and the quarry and road are entirely on Simpson's farm." The only point, then, is the allegation that this was an estate well, and that the tenants had a right to use it, involving a right of access to it as a right of servitude. There are such things as rights of this kind, and I think there is not sufficient evidence of any such right here. Some tenants say they thought they had such a right; others know nothing of it. It would require a much stronger case than we have here to set up such a right. I therefore think we should recal the Sheriff's interlocutor, and revert to the Sheriff-Substitute's view, which substantially disposes of the merits of the case.

LOED YOUNG—I am of the same opinion. I can scarcely comprehend the Sheriff's view of the case. There is, indeed, something to be said against that of the Sheriff-Substitute on its own proper merits, but there is nothing to be said in support of the Sheriff's. One can see how a question of quarrying minerals would be determined with a tenant who objected to give access to them. He would be turned out. But we have no parties before us raising any question of quarrying minerals. A hole has been made in this farm by stones having been taken out; that is all. Many farms have such holes. I do not know whether all the stones have been taken out here, but if they have, there is no longer a quarry but only a hole made by a quarry. Now, if such a hole is on a man's land, he is entitled to use it to the exclusion of all the world, apart from any question of quarrying. It appears that this quarry is covered by water. It might have been covered by soil and vegetation, and if it had been so, being within the boundaries of his farm, the tenant would be entitled to the exclusive use of it, and he is equally entitled to a part of the *solum* of his farm covered as this is with water. Therefore I say the Sheriff's view of the case is not intelligible. There remains the question—meeting the Sheriff-Substitute's view—whether a right on the part of the adjoining tenant has been established? He alleges a right to go to this quarry for water, but a right which he has not except in common with other tenants of the same landlord. Now, if all the tenants have a right, it is impossible to imagine that the landlord would not have been here to assert the right of all against one. But the landlord is asserting no such right. I am of opinion with the Sheriff-Substitute that there is no evidence of any such right

on the part of the defender. On the whole matter, therefore, I concur in the result of the Sheriff-Substitute's judgment, and differ from that of the Sheriff. Of course if there are any stones in this quarry the landlord is entitled to quarry them himself or grant the right to do so to anyone, and to use the most direct road to it on paying surface damage to the tenant according to the common law, but no such question arises here.

LORD CRAIGHILL—I have come to the same conclusion. The first question which arises here is that which has been dealt with by the Sheriff, relative to the pursuer's title to complain of the defender making use of this quarry for watering purposes. He is within the boundaries of his farm, and the burden of proof therefore lies on the defender to show a right to use the road and the quarry. The second question therefore is, Has the defender established any right to use the road and quarry? and if he has not, the pursuer must prevail. After reading the evidence in this case, I do not think that the defender has shown anything like a right which could be made good against the landlord, and so against the man whom the landlord has put there in his place. I therefore concur in your Lordship's judgment.

LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

"The Lords . . . find that the *solum* of the quarry in question and the road thereto form integral parts of the subjects held by the pursuer as tenant of the proprietor, and that the defender has not proved that he has by use or otherwise acquired right of access by the road to the quarry, or right to take water from the quarry: Therefore sustain the appeal; recal the interlocutor of the Sheriff appealed against; affirm the interlocutor of the Sheriff-Substitute of 6th November last," &c.

Counsel for Pursuer (Appellant)—Graham Murray—M'Lennan. Agent—William Gunn, S.S.C.

Counsel for Defender (Respondent)—Watt. Agents—Sutherland & Clapperton, W.S.

Friday, May 23.

FIRST DIVISION.

SPECIAL CASE—BEATTIE AND OTHERS.

Husband and Wife—Marriage-Contract—Mutual Settlement—Donatio inter Virum et Uxorem—Revocation.

By antenuptial contract of marriage, provisions, including an annuity of £500, were made for the wife—who had no estate—in the event of her survivance. After the marriage the spouses executed a mutual settlement, by which in the event of there being no children of the marriage the survivor was to take the whole estate of the predeceaser. The husband was then possessed of estate of the value of £16,000, the wife having nothing but expectations from a maternal uncle. The wife's

beneficial interest in her uncle's succession ultimately proved to be one-fifteenth of £12,000, the payment of which was postponed until after the death of several annuitants. The husband, after coming to know this, revoked the mutual settlement without his wife's knowledge or consent, and made provisions inconsistent with it. He predeceased his wife, leaving estate worth £18,000. There were no children of the marriage. Held that the husband was entitled to revoke the mutual settlement as being a *donatio inter virum et uxorem*.

Mr and Mrs William Beattie were married on 10th June 1870, and in view of their marriage executed an antenuptial marriage-contract, dated 6th and 8th June 1870, by which Mrs Beattie was provided, in the event of her surviving her husband, with an annuity of £500 and the life-rent of Mr Beattie's household furniture, the fee of which was to go to the children of the marriage, if any, whom failing to the husband's heirs and executors. On the other part Mrs Beattie conveyed to trustees the whole estates, heritable and moveable, then belonging to her, or to which she might succeed during the marriage, for her own life-rent use alienarily, and in the event of her predeceasing her husband then for his life-rent use alienarily, and for the children of the marriage in fee, whom failing her own heirs and executors. Mrs Beattie had no estate at the time of her marriage.

On 15th October 1873 Mr Beattie and his wife executed a mutual settlement, which set forth "that for the love and affection we mutually bear towards each other, I, the said William Beattie, have now resolved to make the testamentary settlement contained in these presents, and we both, with mutual advice and consent, have resolved to alter said marriage-contract as after-mentioned." After two small bequests by Mr Beattie, there was this provision—"And with these exceptions, I do hereby give, grant, assign, dispose, and bequeath to and in favour of my said wife, in case she shall survive me, in life-rent, for her life-rent use alienarily, and to the issue of our marriage equally among them in fee, or failing such issue, to her and her heirs, executors, and assignees whomsoever, All and Sundry, my heritable and moveable estate, of whatever nature or denomination the same may be, which shall belong and be addebted to me at the time of my decease, in so far as the same has not been conveyed by me in our said contract of marriage." Mrs Beattie on her part, with consent of her husband, bequeathed to her father and mother, or to the survivor of them, the sum of £250, and then followed these clauses—"And further, we with mutual advice and consent, revoke the clauses of return contained in said contract of marriage in favour of our respective heirs, executors, and successors, and direct, authorise, and request the trustees appointed by us in said contract, who are also hereby appointed executors in the event of the death of either of us without there being issue of our marriage, to pay over and convey the whole estate and effects of the predeceaser, heritable and moveable, real and personal, together with his or her share of the whole goods in communion to the survivor as his or her absolute property. . . . And we reserve our respective life-rents of our estates

hereby conveyed, and power to us jointly to alter or revoke these presents." At the date of this mutual settlement Mr Beattie was possessed of estate of the value of upwards of £16,300. He was then thirty-four years of age, and his wife twenty-nine.

At the date of her marriage Mrs Beattie, though, as above mentioned, she had no estate or effects, entertained expectations that she would succeed to considerable funds on the death of her maternal uncle Mr Cook, and these expectations were known to her husband before 1873, when the mutual settlement was executed. In June 1870, when Mr and Mrs Beattie were married, Mr Cook was a widower, having one child, a daughter, who was then married, but with whom Mr Cook was not on friendly terms. In October 1873, being the date of the mutual settlement, Mr Cook was seventy-two years of age, had retired from business, and was still a widower; but in 1874 he married a second time, and he died on 28th November 1874, leaving a will dated 28th August 1874. Mr Cook was survived by his wife and daughter, by twelve nephews and nieces, the children of his deceased brother John—by his sister (the mother of Mrs Beattie), and her children, five in number,—and by his sister Jane (who was the wife of James Strachan), and her children, seven in number, these being all his nearest relatives who survived him. The result of Mr Cook's settlement was that Mrs Beattie became entitled only to one-fifteenth of the residue of his estate, which however was not payable until after the death of several annuitants. The whole residue amounted to £12,000.

On 13th October 1878 Mr Beattie made a codicil by which he, *inter alia*, revoked the mutual settlement, except as to two small legacies, and declared that his wife should have no further claims on his estate through his death except such as were conferred on her by the antenuptial marriage-contract, and appointed the residue of his estate to be divided among his brothers and sisters or their heirs. By another codicil, dated 20th October 1879, Mr Beattie left three legacies of £500 each. These deeds were executed without the knowledge or consent of Mrs Beattie, and were not known to her until after her husband's death.

Mr Beattie died on 16th April 1883, survived by his wife, leaving estate, heritable and moveable, of the value of £18,000. No children were born of the marriage.

This was a Special Case presented after Mr Beattie's death by the trustees under the antenuptial marriage-contract, who were also the executors under the mutual settlement, of the first part, and the beneficiaries under the deeds of 13th October 1878 and 20th October 1879, of the second part.

The parties of the first part maintained that the mutual settlement was irrevocable except by the joint consent of Mr Beattie and his wife. The parties of the second part maintained that the mutual settlement was revocable by Mr Beattie alone, in so far as it disposed of his estate, and was validly and effectually revoked by him by the deed of 13th October 1878.

Argued for the first parties—The mutual settlement could not be revoked as a donation *inter virum et uxorem*. The necessity of the deed was to be regarded as at the date of its execution. In

point of fact the wife's expectations had been realised to a certain extent. The husband could not revoke without disclosing the revocation to his wife.—*Bakton*, i. 5, 96; *Shearer v. Somerville*, 1733, M. 6121; *Children of Woolmet v. Douglas*, 1662, M. 6118; *Hepburn v. Brown*, May 18, 1814; 2 Dow's App. 342; *Kidd v. Kidds*, Dec. 10, 1862, 2 Macph. 227; *Kerr v. Ure*, June 28, 1870, 11 Macph. 780; *Lang v. Brown*, May 24, 1867, 5 Macph. 789; *Gibson's Trustees v. Gibson*, June 8, 1877, 4 R. 867.

Argued for the second parties—The marriage-contract contained reasonable provisions for the wife, and any increase was to be regarded as a donation.—*Ersk. Inst. i. 6, 30*; *Stair, i. 4, 18*; *Hunter v. Dickson*, Sept. 19, 1831, 5 W. & S. 455; *Rae v. Nielson*, May 14, 1875, 2 R. 676. The onerosity of the deed was to be considered as at the date of its coming into operation—*Mitchell v. Mitchell's Trustees*, June 5, 1877, 4 R. 800; *Melville v. Melville's Trustees*, July 15, 1879, 6 R. 1286; *N'Neill v. Steel's Trustees*, Dec. 8, 1829, F.C., 8 S. 210; *Thomson v. Thomson*, Feb. 20, 1838, 16 S. 641.

At advising—

LORD PRESIDENT—The only question of any importance in this Special Case is, whether the mutual settlement executed by Mr and Mrs Beattie on the 15th of October 1873 was revocable by Mr Beattie alone without his wife's consent? for if the settlement was revocable by Mr Beattie alone there is no doubt that it was revoked by his codicil of 13th October 1878. The other questions appended to the Special Case all in like manner depend upon the single question whether the mutual settlement was revocable by him alone or not.

The first important fact to be noticed is that when the spouses were married in 1870 they executed an antenuptial contract of marriage, and this contract seems to contain very rational and suitable provisions, considering the position of the spouses, and the fact that Mr Beattie had at the time estate of considerable amount while Mrs Beattie had none. By it Mr Beattie gives an annuity of £500, and the liferent of the entire furniture and plenishing of his house in Lauriston Place, Edinburgh, to Mrs Beattie, and the fee of the furniture to the children of the marriage, and if there are no children then to his own heirs and executors. On the other hand, Mrs Beattie conveys to trustees all the estate in her possession, and any estate to which she may succeed, for her own liferent use alienarily, exclusive of the *jus mariti*, and in the event of her predeceasing her husband, then for his liferent use alienarily, and for the children of the marriage in fee, whom failing to her own heirs and executors.

Now, Mr Beattie must have been possessed of considerable personal estate at the date of the marriage-contract, for at the date of the mutual settlement, which was executed only three years after, he was possessed of £16,300, so that he probably did not possess much less in 1870. Therefore I think that the provisions in the marriage-contract were very suitable and reasonable.

The mutual settlement proposes to alter all this, and to make an entirely different arrangement of a testamentary nature. It sets forth

that for the love and affection they bear to one another Mr and Mrs Beattie have both resolved to alter the marriage-contract, and then Mr Beattie proceeds, after giving his mother a legacy of £250, and making other trifling bequests, to "give, grant, assign, dispone, and bequeath to and in favour of my said wife, in case she shall survive me, in liferent, for her liferent use alienarily, and to the issue of our marriage equally among them in fee, or failing such issue, to her and her heirs, executors, and assignees whomsoever, All and Sundry, my heritable and moveable estate." Then Mrs Beattie leaves and bequeaths £250 to her father, and then both, "with mutual advice and consent, revoke the clauses of return contained in said contract of marriage in favour of our respective heirs, executors, and successors, and direct, authorise, and request the trustees appointed by us in said contract, who are also hereby appointed executors in the event of the death of either of us without there being issue of our marriage, to pay over and convey the whole estate and effects of the predeceaser, heritable and moveable, real and personal, together with his or her share of the whole goods in communion, to the survivor as his or her absolute property." The liferents of both the spouses are reserved, and also power to them jointly to alter or revoke the settlement. In the event which happened, viz., Mr Beattie dying on 16th April 1883 survived by his widow, but without leaving any children, the effect of the mutual settlement was to give to Mrs Beattie the fee of the sum of £18,000. It appears to me settled law that if this deed, which is called a mutual settlement, is in fact a gratuitous deed, and if no valuable consideration was given on the other side, then it was liable to be revoked by Mr Beattie alone without the consent of his wife. The joint power of revoking therein reserved could never take away any common law power of revoking which the husband had if the deed was gratuitous. The sole inquiry therefore in the present case is whether the mutual settlement was or was not gratuitous.

It was not necessary as a deed for making reasonable provision for Mrs Beattie, for a reasonable provision had already been made for her in the marriage-contract, and the only valuable consideration given by Mrs Beattie in return for her interest under the mutual settlement was an expectation of inheriting money from her uncle Mr Cook. There is a description in the marriage-contract of what that prospect was, from which it appears that Mr Cook was supposed to be a man of some substance, and he turned out to be so. But then he was a widower with a daughter, and had a number of relatives as near as Mrs Beattie; there was also the possibility of his marrying and having other children, and in point of fact he did marry again shortly afterwards. The result of his settlement was that Mrs Beattie's succession did not exceed £800, which however is not yet payable, being burdened with liferents. That is all that Mrs Beattie got in point of fact as the result of the expectations which she had at the date the marriage-contract was entered into. It appears to me that at the date of the mutual settlement Mrs Beattie had merely a vague possibility, and was not in a position to give any valuable consideration at all. She had nothing to build upon except the prospect of Mr Cook's viewing

her with favour. But that is not a consideration such as must be taken into account in regard to the question whether the deed was gratuitous or not. The benefit was all on one side, and I do not see that there is any mutuality in it. It was purely gratuitous so far as the husband was concerned. The existence of the marriage-contract and the provisions it contains put out of view altogether the obligation which there is upon him to make a sufficient provision for his wife in the event of her surviving. That had been already done by the marriage-contract.

The conclusion therefore to which I come without any hesitation is that the mutual settlement was a gratuitous deed, and has been revoked by the codicil executed by Mr Beattie in 1878.

LORD MURE—I am of the same opinion. I think that the general rule of law is quite settled, that a mutual settlement executed by spouses is revocable—if it is not for an onerous consideration, or in fulfilment of some obligation to make a provision—on the ground that it is a donation *inter virum et uxorem*.

The only question to be considered then is, whether there was, at the time of the mutual deed, any obligation on Mr Beattie to provide for his wife? I think there was no such obligation, for there was an antenuptial marriage-contract in which proper provision was made for her on the death of her husband. Therefore there was in the case of *Mitchell*, and the other cases to which we were referred, the element which is here wanting, viz., that in them there was no provision by marriage-contract for the wife. As regards the question, whether there was here such a consideration as the cause of the deed as to make it onerous, I do not think that there was, for all that Mrs Beattie made over was a bare expectancy.

LORD ADAM—The only question in this case is, whether the mutual settlement executed by Mr and Mrs Beattie has been duly revoked by the husband as being a donation *inter virum et uxorem*?

Here there was an antenuptial marriage-contract, by which there was secured to the wife an annuity of £500 and a liferent of the household furniture belonging to the husband, which were, in my opinion, looking to the circumstances of the parties, rational and proper provisions for the widow in the event of her surviving her husband. Anything which the mutual settlement gave her over and above these provisions seems to be a donation, except in so far as it can be sustained by Mrs Beattie giving what the law will consider a valuable consideration. I think that the rule of law on this matter is accurately stated by Mr Erskine (i. 6, 30), where he says—“*First*, Mutual remuneratory grants between the spouses made in consideration of each other are not revocable (*Chisholm*, Jan. 26, 1669, M. 6137) where there is any reasonable proportion between the value of the two; for as trifling inequalities ought to be overlooked in the transactions of those who are so closely united, the excess on the one side ought to be considered in order to found the party who is hurt in a right of revocation. But where an onerous cause or remuneration is simulated, and a donation appears truly intended, the grant is revocable as a pure donation. Hence, *Secondly*, Grants given in consequence of a natural obli-

tion are not subject to revocation.” The question here therefore is, whether the counterpart which the wife is said to have given is of such value as to bear a reasonable proportion to that given by the husband? There has been a good deal of argument as to the date at which the proportion is to be estimated—whether at the time of the execution of the deed or at the date of the dissolution of the marriage. I do not think that point is of the slightest consequence here—the wife gets under the mutual deed the absolute fee of about £16,000. The consideration she gives for this sum is an expectation that she will succeed to something substantial on the death of an uncle who married a second time, and who had a daughter by his first marriage alive at the time when the mutual settlement was executed. It is made matter of admission that she had nothing beyond this expectation, and I cannot think that was sufficient to support a gift of £16,000. Whether that date is to be taken as a basis for the calculation, or the date of the dissolution of the marriage is to be so taken, it is all the same. The expectation was realised at the latter date, and it amounted to the one-fifteenth part of £12,000, payable at some future time—it is not known when. If I ask myself the question, as Mr Erskine puts it, whether this latter sum bears a reasonable proportion to the £18,000—to which sum Mr Beattie’s estate had increased, and which fell to the wife from her husband—or whether there is a merely trifling inequality between them—or whether the excess of the one over the other is inconsiderable—I cannot but answer in the negative. I think therefore that the mutual settlement was nothing else than a donation by the husband to the wife, and that being so, it was revocable by the husband alone, and was in point of fact effectually revoked by him.

LORD DEAS and LORD SHAND were absent.

The Court found that the mutual settlement of Mr Beattie was revocable, and had been validly revoked.

Counsel for First Parties—Gloag—Darling. Agents—J. & F. Anderson, W.S.

Counsel for Second Parties—Keir—Dickson. Agents—Curren & Cowper, S.S.C.

Wednesday, May 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MAGEE v. DALGLISH, FALCONER,
& COMPANY.

Process—Jury Trial—Issue—Reparation—*Employers Liability Act 1880* (43 and 44 *Vict. cap. 42*)—*Factory and Workshop Act 1878* (41 *Vict. c. 16*), *secs. 82, 89.*

A lad employed in a calico factory was killed by being caught and crushed in some revolving machinery. His mother raised an action of damages and for *solatium* against his employers, and laid her claim at common law, and alternatively under the *Employers Liability Act*. Form of issue *adjusted* for the trial of the cause.