

estimated by Mr Reith to be of the value of £130; and Mr Weir executed this document, dated 14th June 1912:—"Received from Mr W. Law, Kirktown of Rayne, Rayne, the sum of one hundred and thirty pounds sterling, in payment of the following specified articles of furniture belonging to me in the manse of Rayne, and sold to him at date hereof,"—and there was appended the inventory of the furniture, also signed by Mr Weir.

The further facts are that no discharge of this indebtedness was granted by Mr Law to Mr Weir; that the document of debt, if any existed, was not returned to Mr Weir; that no money passed, and that possession was not taken of the furniture, which was left with Mr Weir. Mr Law explained in his evidence—"I did not want to raise a 'claick' throughout the parish; and I allowed the furniture to remain in the manse." And it remained in the manse in Mr Weir's possession until the pointing. Nor was the policy of insurance transferred.

I have no doubt that Mr Reith intended that an out-and-out sale should be made, and thought that he had effected his object. But it is not his intention that rules, but that of the principal parties to the sale. The Sale of Goods Act 1893, to comply with the provisions of which the men of business concerned were working, provides (section 17 (1))—"Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred"; and (2) "for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." Having regard to these three considerations, I think it is impossible to hold that the principal parties to the contract intended the property to be transferred on the signature of the document above quoted, or that as between them there was anything but the form of a contract of sale without the reality, for it was admittedly fully understood between them that Mr Weir was to be entitled to redeem his furniture if he paid the £130, though Mr Law might, if he chose, take possession, remove, and realise the furniture in the meantime. The reality of the transaction was, I think, nothing but a security, and a bad security, over the furniture. The transaction is exactly struck at by section 61 (4) of the statute, which says—"The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

I refer to the case of *Robertson v. Hall's Trustees*, 24 R. 120, and particularly to the opinion of the late Lord Moncreiff. As in that case, there was perfect *bona fides* on the part of those concerned in this transaction. All concerned intended to take effectual steps to exclude the diligence of Mr Weir's creditors, and thought they had done so. They came nearer to it than did the parties in *Robertson v. Hall's Trustees*.

But for all that the transaction in substance was not a sale. For these reasons, concurring with the Sheriff-Substitute, I think that Mr Law's claim to have the articles inventoried withdrawn from the pointings must be refused.

The LORD PRESIDENT (DUNEDIN), LORD KINNEAR, and LORD MACKENZIE concurred.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellant—A. M. Stuart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent (Claimant)—Lippe. Agent—W. Croft Gray, S.S.C.

Friday, February 20.

SECOND DIVISION.

[Lord Skerrington, Ordinary.]

MACKIE'S TRUSTEES v. MACKIE.

Husband and Wife—Succession—Donation inter virum et uxorem—Mutual Codicil to Onerous Mutual Settlement—Bequest under Codicil by Wife to Husband's Relations—Revocability.

A husband and wife, by a codicil to a mutual settlement which was onerous and contractual, made certain provisions in favour of the husband's relatives, to be paid out of the estate belonging to the wife at her death in the event of her surviving her husband. The wife after her husband's death having executed a settlement and codicils revoking these bequests, held that the codicil to the mutual settlement was revocable by the wife as being a donation *inter virum et uxorem*.

Opinion (per Lord Guthrie) that apart from the relationship of husband and wife the codicil was revocable.

James Guthrie Shiell and another, testamentary trustees of the late Mrs Elizabeth Mackie, *pursuers* and *real raisers*, brought an action of multiplepointing and exoneration for the purpose of determining whether a mutual codicil, dated 6th November 1879, executed by Mrs Mackie and her husband to an onerous and contractual mutual settlement, dated 28th June 1855, between them and Mrs Mackie's father, had been revoked by a subsequent trust-disposition and settlement, dated 25th June 1881, and codicils executed by Mrs Mackie after the death of her husband. Claims were lodged by Miss Jessie Bruce Mackie and others, *claimants*, who were beneficiaries mentioned in the mutual codicil, or their representatives, and by Mrs Menzies and others, *claimants*, beneficiaries under Mrs Mackie's subsequent trust-disposition and settlement and relative codicils.

The mutual codicil, the legal effect of which was in dispute, was in the following terms:—"I, Dr Archibald Mackie and Mrs Elizabeth Todd or Mackie, spouses within designed, have resolved, with mutual advice

and consent, to make the following alteration on and addition to the within deed. Without prejudice to the said Elizabeth Todd or Mackie's power and rights under said deed, should she be the survivor, and reserving her full interest, we hereby direct and appoint that in so far as the funds falling under the same may remain at her death, after meeting all claims and liabilities, the free residue remaining at that date shall be apportioned and divided as follows, viz.—Three-tenths to Andrew Wallace Mackie and Jessie Bruce Mackie, children of the late Dr Andrew Mackie, or their heirs; four-tenths to Dr James William Reid Mackie of Cupar, whom failing to his children equally or their heirs; and the remaining three-tenths shall be at the disposal by will or otherwise of me, the said Elizabeth Todd or Mackie: Declaring that it shall not be in the power of any of the said legatees to interfere with the management of the funds or estate or their investment during the survivorship of the said Mrs Elizabeth Todd or Mackie, or her control or use of the same, under which alteration and addition the foregoing will is hereby confirmed."

The facts of the case appear from the opinion of the Lord Ordinary (SKERRINGTON), who on 12th December 1912 found "that on a sound construction of the deed of revocation and disposition and settlement and relative codicil by Dr and Mrs Mackie, Mrs Mackie had power to dispose as she thought fit of the whole estate which belonged to her at the time of her death, and that her testamentary writings must receive effect according to their terms."

Opinion.—"The fund *in medio* consists of the estate and effects, amounting to about £37,000, which belonged to the late Mrs Mackie, who died on 24th April 1911. Upon the death of her husband Dr Mackie, on 11th December 1879, she succeeded to his whole estate, amounting to about £21,000. The question which I have to decide is whether Mrs Mackie had full testamentary power to dispose of the whole estate of which she died possessed as she chose, or whether a writing which she and her husband had executed on 6th November 1879, about five weeks before his death, compelled her to allow certain of his relations to succeed upon her death to seven-tenths of the whole or of some part of her estate. The writing in question was in the form of a codicil to a mutual will which Dr and Mrs Mackie had executed in the year 1855. This mutual will purported to revoke their antenuptial contract of marriage, dated 26th August 1848. There were no children of the marriage.

"It appears from the antenuptial contract of marriage that at its date in 1848 neither Dr Mackie nor Mrs Mackie had any estate to put into settlement, but her father Mr Todd was a party to the contract and bound himself on his death to pay £1500 to the spouses or the survivor of them. Mrs Mackie assigned to trustees any further estate to which she might succeed by or through the death of her father. An alimentary life-tenant of the trust estate was settled upon the spouses and the survivor of them, and

failing children, the capital of the trust estate was on the death of the survivor of the spouses to return to the heirs of the settlor, namely, certain nephews and nieces of Mr Todd. By the marriage contract Dr Mackie renounced his *jus mariti* as regards the portion of Mr Todd's succession which might accrue to his wife, and he further bound himself to insure his life in her favour for a sum of £1000. No children having been borne of the marriage, and Mr Todd having altered his testamentary arrangement, Dr and Mrs Mackie along with Mr Todd executed on 28th June 1855 a deed of revocation and disposition and settlement which purported to revoke the marriage contract. The intention of the parties seems to have been that Mrs Mackie's prospective share of her father's estate should be handed over absolutely to Dr Mackie on the death of Mr Todd. The parties expressly revoked and recalled the renunciation contained in the contract of marriage of Dr Mackie's *jus mariti* so far as concerned his wife's succession to her father. After revoking clause by clause the provisions of the marriage contract, the deed contains a disposition and settlement, or, as I prefer to call it, a mutual will of a very simple kind. Dr and Mrs Mackie disposed and assigned to the survivor of them the whole estate which should belong to the predeceaser at the time of his or her death. The parties are agreed that this deed was highly onerous, seeing that it came in place of the marriage contract and partook of its onerosity—*Croll's Trustees v. Alexander*, 1895, 22 R. 677. It contains a clause reserving full power and liberty to the spouses with the consent of each other to alter and revoke. In pursuance of this reserved power Dr and Mrs Mackie executed on 6th November 1879 a codicil, the legal effect and construction of which are in dispute. The codicil is a short one, but instead of quoting it I shall state what I understand to be its meaning and effect.

"(1) It is expressly stated both at the beginning and at the end that the parties had resolved to make an alteration on and addition to the mutual will, subject to which they confirmed the will.

"(2) Though it is not said in so many words, it is clearly implied that the codicil was intended to take effect only in the event of Mrs Mackie surviving her husband. It is apparent that the spouses signed this codicil in contemplation of the death of Dr Mackie, which occurred not long afterwards.

"(3) The codicil purports to regulate the succession of Mrs Mackie's estate after her death by directing that seven-tenths of the funds falling under the mutual will are, so far as remaining at her death, to be divided among certain of Dr Mackie's relatives in the proportions therein set forth. It was declared that the remaining three-tenths should be at the disposal by will or otherwise of Mrs Mackie.

"(4) The codicil did not alter the scheme of the will which made Mrs Mackie the full fiar of her husband's estate in the event of

her surviving him. It merely regulated the succession to a part of her estate upon her death.

"(5) The codicil contained a clause to the effect that it should not be in the power of any of the legatees to interfere with the management or investment of the estate during Mrs Mackie's survivance or with her control or use thereof.

"(6) The codicil bears to be 'without prejudice to the said Elizabeth Todd or Mackie's power and rights under said deed should she be the survivor, and reserving her full interest.'

"By her testamentary writings, to which it is unnecessary to refer in detail, Mrs Mackie innovated to some extent upon the terms of this codicil. The first of these writings was dated in 1881, within two years of her husband's death, and it shows that according to her understanding she was entitled to make such testamentary dispositions as she thought fit of the estate to which she had succeeded from her husband. The question between the parties is whether she was right in so understanding, or whether, on the contrary, the codicil conferred a protected succession upon her husband's relatives, leaving only three-tenths to be disposed of by her will. Dr Mackie's relatives maintain that the codicil ought to take effect as if it formed part of the mutual will, and as if it expressed part of the agreement which the spouses had come to in 1855, at the time when they decided to revoke their marriage contract. In this view the codicil would be irrevocable except by mutual consent. They further argued that it was the clear intention of the parties that Mrs Mackie was to be entitled to dispose by will of three-tenths of the estate and no more. Lastly, it was clear that the legatees were to acquire a *jus quaesitum* upon the death of Dr Mackie, as otherwise it would have been unnecessary to prohibit them from interfering with Mrs Mackie in the management or use of the funds. There is great force in these arguments if the matter is looked at from a purely technical point of view, but when one looks at the substance of the thing it is seen that the codicil was purely gratuitous, and that the bequest would have been equally effectual if it had been contained in a codicil executed by Mrs Mackie alone. The codicil did not in any way partake of the nature of a contract or of a mutual will, because Mrs Mackie, without receiving any consideration whatsoever, bequeathed to her husband's relations a portion of the estate to which she was entitled to succeed upon his death in virtue of the antecedent contract contained in the mutual will. I know of no case in which a gratuitous bequest by a wife in favour of her husband's relations has been held to be irrevocable by her merely because it was embodied in a writing which was in the shape of a mutual will or codicil. Further, the clause which reserved to Mrs Mackie her full interest under the mutual will is significant. It was not necessary to reserve her right to dispose of the property *inter vivos*, because the codicil did not purport

to operate upon any property except what might be extant at her death. Accordingly, if any meaning is to be given to the reservation, the parties must have intended that notwithstanding the terms of the codicil she should have full power to dispose of the whole estate as she pleased by will or otherwise. As Dr Mackie was presumably in bad health at the time when the codicil was executed, it was natural that he and his wife should consider what was to become of his property after her death, and it was equally natural that they should arrange what proportion should go to his relatives and what proportion to hers. The matter was urgent in his case, and accordingly the codicil contains careful provision as to the division of the seven-tenths among his relatives, whereas the destination of the three-tenths, which was to be at his wife's disposal, was left over for her future consideration. I do not doubt that both parties intended at the time that after the death of Mrs Mackie the estate to which she had succeeded from her husband should be divided in the manner and in the proportions stated in the codicil, but I see no reason to infer that Mrs Mackie contracted that she would not change her mind as to the disposal of the estate which might belong to her at her death. It is a fallacy to suppose that a codicil necessarily takes effect in the same way as if it had been contained in the will. The same words may bear different meanings according to the circumstances in which they are used. If the words of the codicil had been contained in the mutual will it would have been difficult to maintain that the bequest to Dr Mackie's relatives was revocable by Mrs Mackie alone. I doubt whether the observations of the Lord President in the case of *United Free Church v. Black*, 1909 S.C. 25, were intended to apply to a substitute marriage contract like the deed in the present case and in *Croll's* case. Further, I know of no case where a clause in a contractual will to the effect that the wife should have at her disposal by will a certain proportion of the estate was construed as leaving her free to dispose of the whole estate. Accordingly my decision is based upon the specialty that the claim of Dr Mackie's relatives has no other foundation except a gratuitous codicil which was executed by Mrs Mackie in concert with her husband for the purpose of giving effect to their joint wishes at the time. She was, in my opinion, entitled to change her mind as she subsequently did.

"I shall pronounce a finding to the effect that Mrs Mackie had power to dispose as she thought fit of the whole estate which belonged to her at the time of her death, and that her testamentary writings must receive effect according to their terms."

The claimants Miss Jessie Bruce Mackie and others reclaimed, and argued—The later deed was part of the earlier and was to be read along with it. The whole was contractual and onerous, and could not be altered by the survivor. It dealt with the joint estate, and even if the claimants were wrong as to the wife's estate, the husband's estate must go as directed—in *re Fraser*,

[1904] 1 Ch. 726, *per* Stirling, L.J., at p. 434; *Corrance's Trustees v. Glen*, March 20, 1903, 5 F. 777, 30 S.L.R. 526; *Croll's Trustees v. Alexander*, June 13, 1895, 22 R. 677, 32 S.L.R. 535; *United Free Church of Scotland v. Black*, 1909 S.C. 25, *per* L.P. at p. 29, 46 S.L.R. 87 (*s.v. Crawford's Trustees v. Crawford's Trustees and Others*); *Lawrie's Executor v. Haig*, 1913 S.C. 1159, *per* L.P. at p. 1161, 50 S.L.R. 898. In these cases the deed in question was not taking the place of an admittedly onerous contractual deed as in the present case. Reference was also made to *Tweeddale's Trustees v. Tweeddale*, December 16, 1905, 8 F. 264, *per* L.P. at p. 273, 43 S.L.R. 193, as to the way in which different testamentary writings were to be read.

Argued for the claimants Mrs Robertson and others—The codicil was not mutual except in form. By it Mrs Mackie gave up a valuable right which was secured to her by the onerous settlement which took the place of the marriage contract. It reserved her right and interest under the settlement expressly. Neither settlement nor codicil carried anything but the estate of the predeceaser. Even if the codicil were regarded as a contractual obligation by Mrs Mackie, it was gratuitous and therefore revocable—*Melville v. Melville's Trustees*, July 15, 1879, 6 R. 1286, 16 S.L.R. 742.

At advising—

LORD SALVESEN—The question in this case is whether a so-called mutual codicil executed by Dr and Mrs Mackie is to be read as if it formed part of the mutual will on which it bears to make an alteration and addition. If so, it would not be revocable at the instance of Mrs Mackie, for it is conceded on all hands that the mutual will which took the place of a previous marriage contract was contractual and therefore not revocable by either of the parties to it without the consent of the other. If the granters of this document had not stood in the relation of husband and wife it may well be that the reclaimers' argument would have prevailed, because a contract cannot be revoked by one of the parties to it merely on the ground that so far as that party was concerned it was entered into without consideration. The case is otherwise where mutual deeds are granted by spouses *stante matrimonio*. Under the mutual will Mrs Mackie obtained a disposition in her favour of the whole heritable and moveable estate which should belong to her husband at the time of his death in the event, which happened, of his predeceasing her. This disposition could not be revoked by him without her consent. When therefore he afterwards induced her to execute a codicil along with himself under which she bound herself to dispose of the estate to which she was entitled under the will in so far as it remained extant at her death in favour—to the extent of seven-tenths—of Dr Mackie's relatives, I think this obligation falls to be regarded as a gift at her husband's instance, and being undelivered was revocable by her. It is true it was not a donation to the husband, for he could take no benefit by it, and the deed was executed on the assumption

that he would in all probability predecease her, as indeed he did within a few weeks of its execution. But the case of *Melville v. Melville's Trustees*, 6 R. 1286, is an authority that a gift made to a third party without consideration by one spouse acting at the request or at the instance of the other comes under the same rule as proper donations between husband and wife, and is revocable by the granter after the dissolution of the marriage. That the mutual codicil was gratuitous is plain, for its sole effect if it had remained unrevoked was to fetter the free disposal of the property in which Mrs Mackie had already acquired an indefeasible although contingent right. On this ground therefore I think the Lord Ordinary has reached a sound conclusion, although I am far from saying that the peculiar terms of the reservation on which he founds might not also imply a power of revocation. There is only one passage in his opinion which does not commend itself to my mind, where he says, "It is a fallacy to suppose that a codicil necessarily takes effect in the same way as if it had been contained in the will. The same words bear different meanings according to the circumstances in which they are used." I think it would be more correct to say that the same words may have different effects according to the character of the deed in which they appear. I agree with him that if the words of the codicil had been contained in the mutual will the bequest to Dr Mackie's relatives would not have been revocable by Mrs Mackie alone, but that would be so because the provision in favour of his relatives would fall to be treated as part of the consideration in respect of which he contracted in the event of his wife's survivance to give her his whole estate—this provision being far in excess of anything she was entitled to under the marriage contract. I accordingly move your Lordships that we should affirm the interlocutor reclaimed against.

LORD GUTHRIE—The late Dr Archibald Mackie, surgeon, Cupar-Fife, died on 11th December 1879. After his death his widow executed several testamentary writings which proceeded on the footing that she was entitled to dispose as she thought fit of the estate to which she had succeeded from her husband. I think the Lord Ordinary is right in holding that Mrs Mackie was justified in acting on this assumption, and that her right of testamentary disposal was not limited, as the reclaimers maintained, to three-tenths of so much of the estate coming to her at her husband's death as might remain at her death.

The reclaimers argued that the document of 6th November 1879, which they called a codicil (as indeed it is called by Mrs Mackie herself in her trust-disposition and settlement of 25th June 1881), is to be read as part of the undoubtedly mutual and onerous deed of revocation and disposition and settlement executed by the spouses on 28th June 1855. No doubt it expressly bears to be an alteration on and addition to the deed of revocation, and it is subscribed by both spouses. But it is in essence a unilateral deed, because

every provision it contains might have been embodied in a deed by Mrs Mackie alone. It provides for her survivance, not for her husband's. The funds which are dealt with are those remaining not at his death but at hers, and the clause designed to prevent the legatees interfering with the management of the estate applies only to Mrs Mackie's survivance. I accordingly read the document as in essence a will by Mrs Mackie, assented to by her husband, expressing her testamentary intentions at its date, but which she could revoke and did revoke.

Further, I think the document contains words which effectually preserved Mrs Mackie's right under the deed of revocation of 1855. I refer to these words "without prejudice to the said Elizabeth Todd or Mackie's power and rights under the said deed" (the deed of revocation, etc.) "should she be the survivor." It seems to me that these words are apt to retain for Mrs Mackie the right which she assumed she had, and that the reclaimers are unable to assign to them, on their view of Mrs Mackie's restricted rights, any intelligible meaning.

But, thirdly, I agree in thinking that, in any view, Mrs Mackie was entitled to treat the benefit conferred by her under the document of 1879 on Dr Mackie's relatives as a donation by a wife to a husband, and therefore revocable. The Lord Ordinary does not proceed expressly on this ground, although he speaks of the codicil as "purely gratuitous," and thinks she was "entitled to change her mind as she subsequently did." In my opinion she was entitled to treat what she had done as a donation to her husband, and to revoke it, as I think she effectually did.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for Mrs Mackie's Trustees—Shiell. Agents—Henderson & Munro, W.S.

Counsel for the Reclaimers—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondents, Mrs Menzies and Mrs Brown—Horne, K.C.—C. H. Brown. Agent—Henry Smith, W.S.

Counsel for the Respondents, Mrs Robertson and Others—Chree, K.C.—Maitland. Agents—Henderson & Munro, W.S.

Friday, February 20.

SECOND DIVISION.

[Lord Dewar, Ordinary.]

HUTCHISON v. HUTCHISON.

Marriage Contract—Estate Conveyed—Provision to Wife—Obligation to Pay—"As soon as he is able."

By an antenuptial marriage contract a husband bound himself to secure, to the satisfaction of the trustees therein named, the provision of an annuity of £300 to his wife in the event of her surviving him, "as soon as he is able to do so." In an action at the instance of the wife for implement of this obligation it was proved that the husband had at his disposal at the date of the action a mortgage of £2000 and investments amounting to about £1270, and that he had an income independent of that capital sufficient for his maintenance. These sums, however, had been diminished by the expenses of an action of divorce at his wife's instance in which he had been successful. The husband, who was about sixty years of age, maintained that he required the money for the purpose of resuming business. *Held* (rev. judgment of Lord Dewar, Ordinary) that to the extent of the mortgage for £2000 the defender was able and bound to implement the obligation. *Question*, if any, further.

Mrs Elizabeth Annabella Turnbull or Hutchison, residing at Royal Circus, Edinburgh, *pursuer*, brought an action against William Marshall Hutchison, sometime commission agent in Glasgow, and residing in Oban, *defender*, in which she sought, *inter alia*, to have the defender ordained to implement an antenuptial contract of marriage dated 13th June 1876 between him and the *pursuer*, by placing in the hands of the trustees acting under the antenuptial contract £5000, or such other sum as should be sufficient to secure to the satisfaction of the trustees a free yearly annuity of £300, which the defender by the antenuptial contract bound himself and his heirs, executors, and successors to pay to the *pursuer* after his death. Under the antenuptial contract the defender bound himself to secure these provisions to the satisfaction of the marriage-contract trustees "as soon as he is able to do so."

The *pursuer* pleaded, *inter alia*—" (2) The defender having come under the obligations set forth under the second conclusion of the summons, and these being still unimplemented, should be ordained to implement the same in terms of the second conclusion of the summons."

The defender pleaded, *inter alia*—" (6) There being no obligation on the defender to implement the obligations undertaken by him under his marriage contract at the present time, the defender should be assoilzied. (8) The defender having implemented so far as in his power the obligations undertaken by him in said antenuptial contract