

of the vehicle and the extent to which it obstructed the road; and that he accordingly tried to pass by running the side-car along the hill side but failed to clear the traction-engine and collided with its rear off wheel, whereby injuries were caused to himself and his motor cycle and side-car; (5) that pursuer was carrying on the head of his motor-cycle a single cycle lamp in efficient condition, and that defenders were carrying on the front axle of the traction-engine two hurricane lamps placed 2 feet apart, and both within the front wheels; (6) that pursuer's light was in conformity with statutory lighting regulations, but that defenders' lights were not, and that the lights on the traction engine gave no warning as to the projection of both front and rear wheels beyond the body of the engine, and that defenders have failed to prove that pursuer by any fault contributed to the accident": Found in law that the defenders were guilty of negligence and that the pursuer was not guilty of contributory negligence, and that the defenders were liable in damages: Assessed the damages at £70, and decreed against the defenders for payment thereof.

Counsel for Pursuer and Appellant — Watt, K.C.—D. R. Scott. Agents—Alex. Morison & Co., W.S.

Counsel for Defenders and Respondents — MacRobert. Agents — Pringle & Clay, W.S.

Friday, March 2.

SECOND DIVISION.

GARIOCH AND ANOTHER (GARIOCH'S TRUSTEES) AND OTHERS.

Succession—Testamentary Writings—Husband and Wife — Mutual Settlement — Power of Survivor to Revoke.

A husband and wife executed a will in favour of the survivor. They subsequently by a codicil provided that in the event of the survivor dying without leaving lawful issue the whole means belonging to the survivor should be equally divided between a relative of the husband and a relative of the wife. The wife having died, the husband executed a will in favour of persons other than the beneficiaries designated in the codicil. *Held* that as there was nothing in the will and codicil to constitute it a contract the husband was not restricted in his testamentary powers, and his will was valid.

Peter Grant Garioch, 74 Clifton Road, Aberdeen, and Alexander Wood, Stonehaven, as trustees and executors appointed by a mutual settlement and codicil of James Garioch and Agnes Wood or Garioch his wife, both deceased, and John Grant Garioch, 16 Roslin Street, Aberdeen, and John Wood, 44 Jasmine Terrace, Aberdeen, the beneficiaries thereunder, *first parties*, and William Gordon Garioch and Peter Adam Garioch, both of 150 Victoria Road, Torry,

Aberdeen, as executors appointed by the last will and testament of the said James Garioch, and as individuals, *second parties*, brought a Special Case to decide the question whether the deceased James Garioch was entitled to defeat by his will the destination set forth in the codicil to the above-mentioned mutual settlement, or whether that mutual settlement and relative codicil was irrevocable.

The Case set forth—"1. The said James Garioch and Agnes Wood or Garioch, his wife, executed a mutual settlement dated 25th April 1894, under which they left and bequeathed in favour of the longest liver of them their whole property, means, estate, and effects heritable and moveable, and appointed the survivor of them to be executor or executrix. On 22nd October 1894 the said James Garioch and his wife executed a codicil to the said mutual settlement. By that codicil they directed that on the death of the survivor of them without leaving lawful issue, their whole means and estate, heritable and moveable, belonging to the survivor, should be divided equally between their nephews John Grant Garioch, apprentice builder, residing at 20 Broadford Place, Aberdeen, and John Wood, residing at Menzies Road, Torry, there. By that codicil they further appointed Peter Grant Garioch and Alexander Wood to be trustees and executors for carrying out the provisions of the mutual settlement and codicil with respect to the estate of the survivor. The said Peter Grant Garioch, Alexander Wood, John Grant Garioch, and John Wood are the parties of the first part. The said Peter Grant Garioch, one of said executors, and John Grant Garioch, one of said beneficiaries, are brothers of each other and nephews of the said deceased James Garioch, and the said Alexander Wood the other executor and John Wood the other beneficiary are also brothers of each other and nephews of the said deceased Agnes Wood or Garioch. 2. The said Mrs Agnes Wood or Garioch died on 25th September 1915, being survived by her husband but leaving no issue. On her death the said James Garioch, in virtue of the mutual settlement and codicil, uplifted the free residue of the estate of his wife which was wholly moveable, amounting to £83, 9s. 10d. He died on 8th February 1916 without issue, leaving estate wholly moveable amounting to £139, 15s. 9d. 3. The said James Garioch on 6th January 1916 executed a will under which he nominated and appointed William Gordon Garioch, labourer, and Peter Adam Garioch, patternmaker, both residing at 150 Victoria Road, Torry, Aberdeen, 'to be his executors or executor and legatees or legatee.' The said William Gordon Garioch is a nephew of the said James Garioch, and the said Peter Adam Garioch is a son of the said William Gordon Garioch. They are the parties of the second part. . . . 4. Questions have arisen as to the validity and effect of the last-mentioned will, and particularly as to whether the deceased James Garioch was entitled to defeat and has defeated the destination in favour of John Grant Garioch and John Wood set forth in the codicil

to the mutual settlement. The first parties maintain that the mutual settlement and relative codicil was irrevocable, and that under it the said John Grant Garioch and John Wood acquired a right to the estate left by the survivor of the spouses which could not be defeated by the testamentary writings of the said James Garioch. They further maintain that in any event the said will of James Garioch did not convey to the second parties as executors or as individuals any right or interest in the estate in dispute. The second parties maintain that James Garioch after the death of his wife was entitled to dispose of his estate by testamentary or other writing notwithstanding the terms of the said mutual settlement and codicil, and did dispose of his estate by his said will."

The following questions were submitted:—"1. Is the said will of James Garioch, executed on 6th January 1916, valid to convey to the second parties as executors and legatees the estate in dispute? or 2. Does the said estate fall to be divided in terms of said mutual settlement and codicil?"

The first parties argued—The will was contractual. The spouses were possessed of an almost equal amount of property. One legatee was taken from each side, and the same was the case with the trustees appointed. The main point was what estate the parties had at the time of death, not at the time of making the will. In the case of *Corrance's Trustees v. Glen*, (1903) 5 F. 777, per Lord Kyllachy at p. 780 and Lord Trayner at p. 782, 40 S.L.R. 526, the wife had no separate estate, and yet the deed was considered to be pactional. It was sufficient that the wife had estate at the date of her death. Other cases cited were—*Robertson's Trustees v. Bond's Trustees*, (1900) 2 F. 1097, 37 S.L.R. 833; *Mudie v. Clough*, (1896) 23 R. 1074, 33 S.L.R. 775; *United Free Church of Scotland v. Crawford's Trustees*, 1909 S.C. 25, 46 S.L.R. 87; *Mitchell v. Mitchell's Trustees*, (1877) 4 R. 800, per Lord Gifford at p. 806, 14 S.L.R. 515.

The second parties argued—Even if the deed was contractual it was revocable, so far at least as regarded the destination to strangers. No trust was created until the death of the survivor. It was contrary to public policy that money should be tied up so long before. Circumstances might so alter as to render previous arrangements inexpedient. Counsel referred to *Davidson v. Mossman*, (1870) 8 Macph. 807, 7 S.L.R. 498; *Nicoll's Executors v. Hill*, (1887) 14 R. 384, per Lord Craighill at p. 393, 24 S.L.R. 271.

LORD JUSTICE-CLERK—The question in this case is one of a class of which there are a great many, but so far as I can see this is the first case where it has arisen quite clearly without any qualifying terms in a deed of settlement, unless, indeed, the case of *Davidson*, 8 Macph. 807, may be said to be of the same character in that respect. We start with this, that there were two mutual wills in the same document—a deed dated 25th April 1894—and in that deed the two spouses made a will each in favour of the other. They altered that by a codicil, which began

by approving of the mutual will, and then made a destination-over or a substitution. I think the result of these two documents was to leave the testamentary settlement in favour of each of the spouses and to make a substitution in favour of other people, relatives—one of the husband and one of the wife—yet still not giving any more than a substitutionary right to those third parties, and there is no declaration either that it might be evacuated in certain circumstances or that it might be evacuated at all.

In these circumstances I do not think we are entitled from the terms of the deed to declare that there was such a contract constituted as prevented the surviving spouse from exercising his or her testamentary rights after the death of the predeceaser. The view of the law which commends itself to my mind as accurate is expressed by Lord M'Laren in his book on Wills. At page 421 he says—"If the provisions of the mutual settlement are contractual, the contract must receive effect; and the most general rule to be extracted from the decisions (but rather by implication than by express statement) is that reciprocal provisions in favour of the granters are presumed to be contractual, but that this presumption does not extend to the provisions in favour of third parties. In regard to these it must appear from the will or instrument that it was a term of the contract that the testamentary part of the instrument should not be altered."

Later on occurs the expression—which was adopted by Lord President Dunedin in the *United Free Church of Scotland v. Black*, 1909 S.C. 25—namely, "With respect to settlements in which the rights given to heirs of the destination are contractual, the best illustration is the case of one of the spouses making a provision for the heirs of the other. The contract in each case must be found in the words of the instrument, and no general rules can be given."

It seems to me that these expressions apply here. The cases which were referred to in support of the argument, that, so far as it is legitimate, reference may be made to the case of one deed to explain the meaning of another, were two—the cases of *Davidson* and of *Nicoll's Executors v. Hill*, 14 R. 384—with regard to which Lord M'Laren says at page 422 of his book—"If the mutual settlement includes a destination of the estate of the predeceaser to the survivor in fee, whom failing to other parties, then, unless the destination is protected by being made matter of contract (which will not be presumed) the substitution is defeasible by the will of the survivor."

The result at which I have arrived is that whatever our views might have been as to the intention of parties if we had been unfettered by authority, the expressed intention here would not warrant us in holding that there has been such a contract as deprived the husband of his testamentary powers, and that accordingly the first question should be answered, as Mr Forbes contends, in the affirmative.

LORD SALVESEN—I do not differ, but I

certainly think, if one were dealing with a case of this kind for the first time and approached it with the view of giving effect to the intention of parties, that these parties intended that this should be a contract to take effect after the death of the survivor.

The position of matters was that the spouses first executed a simple will in favour of each other. Each must be assumed to have had property at the time or else there would have been no reason for a mutual will at all. We are told that the wife carried on a separate business and that in fact she left estate which passed to her husband, who was the survivor, and which amounted to considerably more than half of what he ultimately left. The parties were not satisfied with the original will and they made a codicil in which they directed that on the death of the survivor without leaving lawful issue the whole means belonging to the survivor should be divided between a relative of the husband and a relative of the wife, and trustees were appointed for carrying out the provisions of the settlement.

It is very difficult to understand why that codicil was ever executed except on the view that Mr Wilson put forward—that the parties thought that it was not right if there was anything left of the joint estate that it should go to the relative of one entirely or to his nominees, and they wished to provide for a more equitable distribution between the relatives of those from whom the estate was derived. Mr Forbes said that it was to prevent intestacy, but I doubt very much whether the parties would have thought it worth their while to execute a codicil which could be defeated if the survivor made a testamentary disposition to the opposite effect, which he argued was the effect of the codicil. Therefore I think these parties probably intended to make a contract with regard to the ultimate disposal of the estate.

But there is a good deal of authority upon that matter, and the presumption is very strong for freedom. As your Lordship in the chair has pointed out, freedom will be presumed unless from the terms of the instrument itself you can infer that the parties intended it to be contractual. I agree that there is nothing in either of these documents from which you can draw such an inference. The inference is drawn from purely external facts—the facts that the two parties each had property, and that the ultimate beneficiaries were drawn from the relatives of the wife and of the husband. Probably it would have made the whole difference if there had just been a simple clause in the codicil that this provision should be irrevocable except with the joint assent of the spouses during their lifetime. There is no such provision in the present case, and therefore we are taking the line of least resistance so far as the authorities are concerned if we decide as your Lordship proposes.

LORD GUTHRIE—I am of the same opinion. In dealing with a mutual settlement between spouses there may or may not be a presumption in favour of contract in relation

to the rights of the spouses, but it is quite certain that there is no presumption in favour of contract so far as the rights of third parties are concerned. The element of contract may be found in the clause itself. That is not necessary however, because it may be found in other clauses; the cases of *Corrance's Trustees*, 5 F. 777, and *Robertson's Trustees*, 2 F. 1097, where there was a provision providing expressly for a complete or partial power of revocation in the survivor, were mere illustrations of such a case.

It is said that here in the element of a provision in favour of the relatives of both spouses is enough to constitute contract. That has been held to be an important element, but I do not find it has been held to be enough in itself to show contract in relation to third parties. It was also said that the fact that both spouses had estate was enough. It is clear that at the date of her death the wife had estate, but it is not said that in 1894, the date of the codicil, she had any estate. In the case of *Mitchell*, 4 R. 800, the question was discussed which date was to be looked at in the matter of a mutual will. It seems to me that the date that must be looked to here is the date when the contract was entered into, namely, in 1894, when it is not said the wife had any estate.

In any view surrounding circumstances have never by themselves been held enough if the contract cannot be spelled out of the deed itself. Here I think the deed is not one that, taken by itself or along with the surrounding circumstances, will support the case of contract made by Mr Wilson, and I think we must decide the case as your Lordship proposes.

LORD DUNDAS was not present.

The Court answered the first question in the affirmative.

Counsel for the First Parties—D. M. Wilson. Agents—Lyle & Wallace, Solicitors.

Counsel for the Second Parties—Forbes. Agents—Mackay & Young, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

SCHULZE, PETITIONER.

Succession—War—Alien Enemy—Executor-Dative—Right of Unnaturalised Alien Enemy to Apply to be Appointed Executor-Dative—Aliens Restriction Act 1914 (4 and 5 Geo. V, cap. 12)—Aliens Restriction Order 1914.

A non-naturalised alien enemy who has duly complied with the requirements of the Aliens Restriction Act 1914 and relative Order in Council, resident in this country, may be appointed to and hold the office of an executor-dative to a deceased British subject.

William Schulze, Brunswickhill, Galashiels, *petitioner*, a non-naturalised alien enemy,