Friday, June 16.

FIRST DIVISION.

SPECIAL CASE—M'DOWALL'S TRUSTEES *v.* M'DOWALL'S TRUSTEES.

Husband and Wife—Mutual Settlement—Mutuality of Obligation—Mortis causa *Conveyance of Whole Estates of Spouses to Trustees—"Nothing Excepted or Reserved"—Savings of Survivor out of Liferent of Joint-Estate, whether subject to Trusts of Mutual Deed*

A husband and wife executed a mutual trust-disposition and settlement of the whole means and estate belonging to them respectively, or that should belong "to us respectively at the time of our death, nothing excepted or reserved," for payment to the survivor of the liferent of the whole estate, and of certain legacies and other bequests after the death of the longest liver. The deed was to take effect as a delivered deed at the death of the first deceaser. The survivor was to have power to revoke the deed to the extent of one-half. The wife survived and enjoyed the liferent for twenty years, during which she made large savings out of her income. *Held* that these savings did not on her death fall under the mutual settlement, but under a separate settlement by which she disposed of them.

On 23d May 1861 Mr John M'Dowall of Glasgow, and Mrs Ann Morris or M'Dowall, his wife, who were then aged about 57 and 56 years respectively, executed a mutual trust-disposition and deed of settlement. There had been no marriage-contract executed either prior or subsequent to their marriage. By their mutual trust-disposition and deed of settlement the spouses "having resolved to settle our worldly affairs during our lifetime, in order to prevent all disputes and differences concerning the same after our deaths, and for the love, favour, and affection which we have and bear to each other, do hereby give, grant, assign, dispone, convey, and make over from us and our respective heirs and successors, to and in favour of the survivor of us, and" certain trustees, declaring that should the husband survive he should be sole acting trustee during his lifetime, "All and sundry the whole means and estate, heritable and moveable, real and personal, of whatever nature and description, and wheresoever situated, now due or belonging to us respectively, or that may pertain and belong or be addebted and resting-owing to us respectively at the time of our death, nothing excepted or reserved." The purposes of the trust were, after payment of debts, sick-bed and funeral expenses, &c., for providing a liferent to the wife if she survived her husband of the free revenue of the whole estate excepting a house in Stranraer, for payment on the death of the longest liver of the spouses of a number of legacies to relatives and religious and charitable objects, including a legacy of £15,000 to Miss M'Dowall, a niece of Mr M'Dowall, who had been brought up by him and afterwards married a Mr Hannay; and lastly, in the event of there being any reversion or revenue of the estates after payment of the legacies, the trustees were directed to apply the same as the spouses should jointly appoint, and failing such joint appointment, then to the extent of one-half the reversion as the survivor should appoint, and the remaining half to the heirs and executors of the first deceaser. The mutual settlement also contained a clause nominating the trustees under it to be the "sole executors and intromitters without respective personal means and estates," and concluded thus—"Lastly, we do hereby revoke and recall all former deed or deeds of settlements made and executed by us or either of us, and reserve full power and liberty to us at any time during our joint lives, and even on deathbed, to alter, innovate, or revoke these presents in whole or in part: And we also reserve to the survivor of us full power and liberty to revoke these presents to the extent of one-half of the whole estates hereby conveyed, and to bequeath and dispose of said one-half in such manner as the survivor shall think proper: Declaring that in the event of such revocation, the legacies above granted shall suffer an abatement *pro rata* so far as the other half of said estates shall be insufficient to pay the same in full: And we dispense with the delivery hereof, and declare these presents, in so far as not altered or revoked, though found lying by us undelivered or in the hands of any third party at the time of the death of the first deceaser of us, to have the effect of a delivered evident."

Mr M'Dowall died on 9th September 1861. Mrs M'Dowall survived him by nearly twenty years, dying on 18th February 1881. At Mr M'Dowall's death his personal estate amounted to £74,000, including a sum of £10,000 to which his wife had succeeded during the marriage, and which had fallen to him *jure mariti.* After his death Mrs M'Dowall enjoyed the liferent of the estate till her own death in 1881. She left two testamentary deeds, by one of which, a deed of bequest, dated in 1874, together with a codicil dated a few weeks before her death, she disposed of the one-half of the residue of which she was empowered to dispose by the mutual deed of 1861. This half of residue she bequeathed to the trustees under the mutual deed, in trust for payment of a number of legacies, any reversion after payment thereof being directed to be given to Mrs Hannay in liferent alimentary, and to her children in fee. By this deed she declared her intention of not exercising the power of revocation of the mutual deed to the extent of one-half.

Her other testamentary deed, which was dated 3d June 1874, proceeded on the narrative of the mutual deed of 1861—"And whereas I am advised that I am entitled to revoke the said deed with the codicil thereto, dated the 22d August 1861, in so far as the same conveys, disposes of, or affects the means and estate acquired by me since the dissolution of the marriage by the decease of my said husband: Therefore I do hereby revoke the said trust-disposition and deed of settlement and codicil in so far as the same conveys and disposes of or otherwise affects the means and estate, heritable and moveable, real and personal, acquired by me since the dissolution of the marriage by the decease of my said husband John M'Dowall." The truster subsequently in the deed disponed to certain trustees—"All and sundry the whole estate and effects, heritable and moveable, real and personal, acquired by me since the dissolution of the marriage be-

tween me and my said husband, or which may hereafter be acquired by and belong, or be due and owing, to me at the period of my decease." The purposes of this trust were for payment of the expenses of the trust, to make over to Mrs Hannay a quantity of jewellery, and for payment to the marriage-contract trustees of Mrs Hannay of the whole residue of her estate for behoof of Mrs Hannay in liferent, exclusive of the *jus mariti* of her husband or any future husband she might marry, and for her children in fee. The means acquired by Mrs M'Dowall since her husband's death consisted of her savings out of the liferent of the joint estate which she enjoyed, and amounted to £18,000.

The question in this Special Case related to the validity of Mrs M'Dowall's deed of settlement disposing of the savings just mentioned. The trustees under the mutual settlement claimed the £18,000 contained in it, on the footing that it was inept, as being contrary to the conveyance in the mutual settlement. On the other hand, Mrs M'Dowall's trustees maintained that it was valid, and claimed the £18,000 contained in it for the purposes of the trust erected by it. This Special Case was then presented. Mrs M'Dowall's trustees were the first parties, and the trustees under the mutual deed were the second parties.

The question of law was—"Are the parties hereto of the first part, or the parties hereto of the second part, for the purposes of their respective trusts, entitled to the whole estate acquired by Mrs M'Dowall since the dissolution of her marriage by her husband's death, or to any and what part thereof?"

Argued for first parties—The settlement of Mrs M'Dowall was not inconsistent with the mutual deed. That deed was only intended to convey to the trustees under it what might belong to the spouses at the date of the dissolution of the marriage. If the contention on the other side was right, and the husband had survived, all that he might have made in business after his wife died would be included under the mutual settlement. That would be an unreasonable result. Further, if everything conveyed by the spouses in the mutual settlement was to be enjoyed by the survivor in liferent, that must mean that the conveyance only included what belonged to the spouses at the dissolution of the marriage. It would be strange if savings from what the lady might have spent could not be included in a *mortis causa* deed. Alternatively, the settlement might be supported as a partial revocation of the mutual deed, as Mrs M'Dowall was entitled to make such revocation. True, she professed not to be making such revocation, but this might be held tantamount to revocation.

Authority—*Nimmo's Trustees* v. *Hogg's Trustees*, Jan. 24, 1840, 2 D. 458.

Argued for second parties—There was a mutual conveyance by the spouses of all their property, "nothing excepted or reserved." These savings would never have gone to the widow's executors if she had died intestate, but would have been held to come under that general conveyance. The mutual conveyance was not only mutual but delivered as at the death of Mr M'Dowall. *Nimmo's* case was distinguishable because there was no mutuality there. It was the case of a husband's will giving a power of disposal to the wife. The deed could not be supported as a revocation, since Mrs M'Dowall had expressly declared that she did not intend to revoke the mutual settlement.

Authorities—*Wood* v. *Fairley*, Dec. 3, 1623, 2 Sh. 549; *Hogg* v. *Campbell*, March 18, 1863, 1 Macph. 647; *Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800; *Main* v. *Lamb*, March 10, 1880, 7 R. 688.

The Lords made avizandum.

At advising—

Lord President—The late Mr John M'Dowall and his wife Ann M'Dowall executed a mutual settlement on 23d May 1861. They were then somewhat advanced in years, and were about the same age. The lady was 56, and the gentleman was about 57. They had no children, and of course they had then no expectation of having any, and so no provision was made for children of the marriage. The general plan of the mutual settlement is that the husband and wife convey to the trustees everything belonging to them or that may belong to them at the time "of our death." The survivor of the spouses is to liferent the entire estate, and after the death of the longest liver a number of special legacies is to be paid to relatives, and to charitable and religious objects, and the residue is to be applied in such manner as the spouses should jointly appoint, and failing such joint appointment, in such manner, to the extent of one-half, as the survivor should appoint, and the remaining half to the heirs and executors of the first deceaser. There is a power of revocation reserved to the spouses jointly during their joint lives, and a reservation to the survivor, of full power and liberty "to revoke these presents to the extent of one-half of the whole estates hereby conveyed, and to bequeath and dispose of said one-half in such manner as the survivor shall think proper; declaring that in the event of such revocation the legacies above granted shall suffer an abatement *pro rata* so far as the other half of the said estates shall be insufficient to pay the same in full." Mr M'Dowall died soon after the date of the will—in September indeed of the same year. Mrs M'Dowall lived till February 1881, and left at her death in that month two deeds of a testamentary character. She had the power under the marriage settlement of disposing of one-half the residue, and also of revoking the joint settlement to the extent of one-half the entire estate. By a deed of bequest, as it is entitled, she exercised one of these powers. She declares in this deed of bequest that as it is her wish and desire that the whole legacies and provisions bequeathed by the said mutual settlement should be paid in full, "I have resolved not to take advantage of the power of revocation hereby conferred upon me, but simply to dispose of the one-half of the foresaid residue;" and thereafter she bequeaths certain legacies, with reversion, should any sum remain over, in favour of Mrs Hannay, her niece by marriage. That is the substance of the first deed. She had also made certain savings out of the liferent which she enjoyed, and that is not surprising, for the estate was large, and the liferent gave her a greater income than she was inclined to expend. The consequence was that when she died these savings amounted to a sum of £18,000, and the other testamentary deed of Mrs M'Dowall was intended to dispose of that sum. It proceeds

on this recital—"Whereas my late husband and myself executed a mutual trust-disposition and deed of settlement on the 23d day of May 1861. . . and whereas I am satisfied it was not our intention when executing the said deed to convey, affect, or dispose of any estate the survivor of us might acquire after the dissolution of the marriage; and whereas I am advised that I am entitled to revoke the said deed, with the codicil thereto, dated 22d August 1861, in so far as the same conveys, disposes of, or affects the means and estate acquired by me since the dissolution of the marriage by the decease of my said husband"—She then, on this narrative, proceeds to "revoke the said trust-disposition and deed of settlement and codicil in so far as the same conveys and disposes of, or otherwise affects, the means and estate, heritable and moveable, real and personal, acquired by me since the dissolution of the marriage by the decease of my said husband John M'Dowall." And then she proceeds to dispose of that which she had acquired by her savings since her husband's death. The question is, whether she effectually disposed of these savings? That depends on the construction of the mutual settlement. She gives us a very plain explanation of what she holds to be the true meaning of her husband and herself in entering into the mutual settlement. I am afraid that is not authoritative as to the mind of both. We must look to the deed itself. Now, the result of the construction which is contended for by the trustees of the mutual settlement is rather startling, for according to that construction, however long one of the spouses might survive, and however great the surplus might be, every shilling which might belong to the last survivor is conveyed by the disposition of 1861. Supposing that the lady succeeded to a large estate after the death of the husband, it must, according to that construction, be carried by that deed to the person entitled under it to residue. If the husband had survived the wife, and entered again into business or into speculation (and being a mercantile man he might quite well have done so), he might have doubled his fortune. Still according to this construction it would all go into residue under the deed of 1861. A construction leading to that result does not commend itself as natural or reasonable, and if another construction can be found I apprehend it will be preferable. The mutual settlement sets out by intimating that the parties "having resolved to settle our worldly affairs during our lifetime, in order to prevent all disputes and differences concerning the same after our deaths, and for the love, favour, and affection which we have and bear to each other," convey their joint property to trustees for certain purposes. Now, there are there two phrases which require notice—First, the words "our worldly affairs during our lifetime," which words mean of course during our joint lives. But, secondly, the spouses desire to prevent disputes "after our deaths"—that is, after the death of both of us—because the deed was not to come into operation until after the death of the longest liver except as regarded the liferent. Then we come to the description of what is conveyed. The words of that description are "All and sundry the whole means and estate, heritable and moveable, real and personal, of whatever nature and description and wheresoever situated, now due or belonging to us respectively, or that may pertain and belong or be addebted and resting-owing to us respectively at the time of our death, nothing excepted or reserved, with the whole writings, title-deeds, vouchers, documents, and instructions,"&c. This clause is expressed in a way which requires careful attention. It is a conveyance of everything that presently belongs to them, or that "shall belong . . . to us respectively at the time of our death." It is not to be, as at the beginning of the deed, at the date "of our deaths." It is in contrast to that. In the former case it means after the death of both, but it does not follow that here, where the word "death" is in the singular number, it is to have the same meaning as it has when in the plural number in the former part of the deeds, where it means after the death of both the spouses. The word "respectively" is used, but it is not our respective deaths that the deed says, but "to us respectively at the time of our death," and neither "deaths respectively" nor respective deaths." It may well be suggested that the term "our death" refers to a different point of time from "our deaths" in the earlier part of the deed, and that the death of the predeceasing spouse must be the time intended, and that view is supported by the provision in the end of the deed that from the time of the death of the first deceaser the settlement is to have the effect of a delivered evident. It was to come into operation and the estate was to pass to the trustees at the death of the first deceaser, and thus when the words "one death" are used in the words of conveyance it is not unimportant that the period there intended was the death of the first deceaser. Further, this deed gives to the predeceaser, whether husband or wife, a liferent of the entire estate, and it would be a singular thing if that which is provided by the machinery of the trust to be for the beneficial use of the survivor should yet be intended to revert to the estate after the death of the survivor. Yet that is the contention of the trustees under the mutual settlement. They say the deed gives the survivor a liferent, but only in this qualified sense, that it at the same time says to him—"The income belongs to you, but only on one condition, that you spend it." Now is there any room for that? The liferent during the survivance of the longest liver is taken out of the region of the rest of the funds. It is not to become part of the residue nor to be spent in payment of the special legacies. It is after providing for it that the special legacies and the residue are to be paid. The liferent being thus out of the scope of the rest of the purposes of the settlement, I apprehend that every part of it is so, and yet the construction of the deed to which I have alluded says that some part of it shall come within that scope.

I am, for these reasons, of opinion that the portion of the liferent which has not been spent by the liferenter was the absolute property of the widow, and does not fall within the purposes of the mutual settlement. I am accordingly for answering the question in favour of the first parties.

Lord Deas—By this mutual settlement the husband and wife "having resolved to settle our worldly affairs during our lifetime, and in order to prevent all disputes and differences concerning the same after our deaths, and for the love, favour, and affection which we have and bear to each

other," conveyed to trustees their whole means and estate, "nothing excepted or reserved." These words are strong and explicit, and whatever construction we arrive at must be one which will give them effect. Then there is a clause giving a liferent to the survivor and a power to the survivor to do as he or she thinks proper to the extent of one-half of the estate. The widow executed deeds by which she disposed of all of which she had power to dispose, and the question in this case is whether that deed by which she disposed of her whole savings out of the liferent is a deed which it was beyond her power to execute. She had no desire to act contrary to the wishes of her husband and herself at the time of the mutual settlement. On the contrary, full effect is given to those wishes, and the legacies in the mutual settlement are quite untouched by what she has done. But the residue of the estate, so far as it was in her power to dispose of it, she gives, after payment of legacies, and along with the whole of the savings she had made during her liferent, to her husband's niece in liferent, with the fee to her children.

Now, I agree in thinking that all the various things which your Lordship pointed out in going over this deed are important considerations. I need not go over them all again. It is plain, however, that on the death of one of the spouses the mutual settlement became irrevocable as a whole, and came into effect and as a delivered deed. But that that mutual settlement does not affect the savings of the widow during the liferent is a view of the case which is borne out by all the clauses read by your Lordship, and is, I think, made plain by the narrative with which the deed sets out. The "love, favour, and affection" which the spouses have for one another is the ground on which the whole deed proceeds. It would be strange if in a deed containing such words, and in which it is provided that the liferent shall go to the survivor, it should be meant that if the survivor does not spend the whole income, that income is to be accumulated for certain purposes over which the survivor has no control. That, I say, is strange even in the case of the survivance of the wife, but it would be still more strange if the wife had died first and the husband had gone again into business and made a second fortune. I do not think that that is a natural construction at all, and, on the whole, though the deed was intended to take, and did take, immediate effect on the death of the survivor, I cannot think that it would be a sound construction, and one in accordance with the love, favour, and affection which were the motives with which it was made, to hold that the survivor was tied up by it so that the liferent did not completely operate in favour of him or her to the effect of giving complete right over the savings out of the liferent.

Lord Mure—By the clause of the mutual deed which has been read by your Lordships, Mrs M'Dowall had conferred upon her a gift of the liferent of the whole property of the husband. That is the express provision of the deed. She survived her husband for 20 years, and left a settlement by which she disposed of her whole savings out of that liferent, and the question is, whether she was prevented by the terms of the mutual settlement from disposing of these savings? That that is the only question is quite clear from the statement of facts in the case. It does seem a startling proposition, considering the nature of the facts which we have here, that it could have been intended to preclude the survivor from disposing of the savings out of the liferent. It is hardly conceivable that anyone could have intended so to hamper himself by a mutual settlement, and I think we should not adopt such a conclusion unless we are driven to it by express words. It appears to me that there are no words here to force us to that conclusion. The only difficulty is as to the words "our death" to which your Lordship has referred. I agree in thinking that the natural supposition is that the period of the dissolution of the marriage is there meant, and I think that it is not a forced construction so to interpret these words. That being so, there is nothing in the will to drive us to the construction which I have referred to. The case of *Nimmo* cited at the debate is one in which the opinions of the Judges substantially come up to what we are here deciding. The words here are "resting-owing to us respectively at the time of our death." In the case of *Nimmo* the words were "at the time of our decease respectively." These words are substantially the same as the words in this case. So far, then, as the case of *Nimmo* goes, I think that it is an authority in point.

Lord Shand—I concur. It is unnecessary for me to resume consideration of the special terms of the mutual deeds, which have been carefully analysed and referred to by your Lordships. I concur in what has been said as to the particular clauses. I would only add, that in dealing with a mutual settlement, and particularly a mutual settlement executed by a husband and wife, it is reasonable to presume at the outset that the estate which is meant to be included in it is the estate possessed by the spouses at the date of the dissolution of the marriage. It is certainly unusual for such persons to have it in view that the survivor is tying up the estate which he or she acquires and (if he be the husband, as your Lordships suggest) may gain by remaining or entering into business. I would be prepared to say, therefore, that even if the question related to the *acquirenda* of the wife by way of succession, or of the husband from the profits of a business carried on after the dissolution of the marriage, it would require very clear terms indeed to convey such estate under the mutual settlement. It is even clearer in this case, where the wife gets a liferent provision out of the trust-estate, and made certain savings from it. It is difficult to suppose that what was given her annually, and was paid out of the estate by the trustees, is to come back to them now. Nothing, I think, but plain and explicit terms would entitle the trustees to reclaim money thus given to the wife as her own, but not expended by her.

The Court therefore answered the question in favour of the first parties (Mrs M'Dowall's trustees).

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