Counsel for the Pursuer—Asher, Q.C., A. J. Young. Agent—Solicitor of Inland Revenue.

Counsel for the Defender—C. S. Dickson—A. S. D. Thomson. Agent—Andrew Newlands, S.S.C.

Thursday, June 13.

FIRST DIVISION.

CROLLS' TRUSTEES *v.* STARK AND OTHERS.

Husband and Wife—Marriage-Contract—Mutual Trust-Disposition and Settlement—Power of Survivor to Revoke—Succession.

By antenuptial contract of marriage intending spouses mutually conveyed to each other, in case of survivance, and to the heirs of the survivor, their whole respective estates. Subsequent to the marriage the spouses executed a mutual trust-disposition and settlement by which they severally conveyed the whole estates which should respectively belong to them at their deaths to trustees, directing them to pay the annual income of the estate of the predeceaser to the survivor, and on his or her death, after paying certain specified legacies, to divide the whole residue of the estates conveyed into four equal parts, and pay one part to each of four residuary legatees, who were relatives of the spouses. Power was reserved by the spouses "by any joint writing under our hands to revoke or alter these presents," but it was declared "that, so far as not altered or revoked as aforesaid, the same shall remain effectual."

The marriage was dissolved (without issue) by the death of the wife, and after her death the husband executed a settlement dealing with his own estate, and altering the provisions of the mutual settlement.

Held that the provisions of the marriage-contract were contractual; that in consenting to execute the mutual settlement, and thus surrender their rights under the marriage-contract, the spouses did so on the condition that the substituted provisions should receive effect; and therefore that, the husband was not entitled after the wife's death to alter the provisions of the mutual settlement even as to his own estate.

Mr and Mrs Croll were married in 1864. At the time of the marriage they were both about fifty years of age.

Shortly before the marriage they had executed an antenuptial contract of marriage whereby they mutually conveyed, each of them to the other, in the case of his or her survivance, and to the heirs and assignees of the survivor, the whole heritable and moveable estate that might belong to either of them at the dissolution of the marriage.

On 31st January 1890 the spouses executed a mutual trust-disposition and settlement, whereby each conveyed to the trustees named in the deed the whole means and estate "which shall belong to me at the time of my decease" for the following purposes:—(1) Payment of debts; (2) the spouses directed the trustees to pay to the survivor of them the free annual income of the estates of the predeceaser hereby conveyed; (3) on the death of the survivor the trustees were directed to pay certain legacies; and (4) with regard to the residue of the estates conveyed, the trustees were directed, upon the said event, to divide the same into equal parts, and pay one part to Mrs Helen Low, sister of Mr Croll, whom failing to her children; another part to Mrs Elizabeth Munro, also a sister of Mr Croll, whom failing to her children; a third part to John Adam Ewart, a relative of Mrs Croll, whom failing to his children; and the remaining part to Francis Stark, a nephew of Mr Croll, whom failing his children. It was declared that, should any of the residuary legatees above named predecease the survivor of the spouses without leaving lawful issue, then, and in that event, the share which such predeceaser would have taken by survivance should fall into and form part of the residue of the estates thereby conveyed, and the whole residue should then be divided among the remaining residuary legatees *per stirpes et non per capita*. Power was reserved to the spouses "by any joint writing under our hand to revoke or alter these presents, but declaring that in so far as not altered or revoked as aforesaid, the same shall remain effectual."

Mrs Croll died on 25th April 1893, survived by Mr Croll, but without issue of the marriage. She left estate to the value of several hundred pounds.

Mr Croll died on 8th October 1894, leaving a trust-disposition and settlement executed by him on 10th January 1894, by which he conveyed to trustees his whole estate, which amounted at his death to about £1850. He directed the trustees, after paying certain legacies to divide the residue of his estate into two equal parts, and pay one part to Mrs Helen Low, and the other part to Mrs Elizabeth Munro. He further revoked "all writings of a testamentary nature executed by me heretofore."

Questions having arisen as to the validity and effect of this trust-disposition, a special case was presented by (1) the trustees under the mutual trust-disposition and settlement; (2) and (3) the special legatees under the mutual deed; (4) and (5) Francis Stark and John Adam Ewart, two of the residuary legatees under the mutual deed; (6) the trustees under Mr Croll's settlement; (7) Mrs Low and Mrs Munro, who were two of the residuary legatees under the mutual deed, and were the sole residuary legatees under Mr Croll's settlement; (8) a legatee under Mr Croll's settlement.

The opinion of the Court was asked upon the following question—"Was it within the power of Mr Croll after the

death of Mrs Croll to revoke the mutual trust-disposition and settlement of 1890 *quoad* the disposal of his own estate to any extent?"

The third, fourth, and fifth parties united in maintaining that Mr Croll's trust-disposition and settlement was ineffectual to any extent, in respect that he had no power after Mrs Croll's death to innovate in any way upon the provisions of the mutual settlement, which was onerous and contractual both as regarded the interest conferred upon the surviving spouse, and the disposal of the joint estates upon the survivor's death to the respective relatives of the spouses.

The seventh and eighth parties maintained that the mutual settlement was not meant to be, and was not onerous or contractual with reference to the benefit conferred on third parties thereunder, and that *quoad* Mr Croll's estate it was revoked by his subsequent trust-disposition and settlement.

Argued for third, fourth, and fifth parties —The antenuptial marriage-contract was evidently onerous and irrevocable without the consent of both parties. By the subsequent mutual disposition they mutually resigned certain rights, the survivor having the liferent only in lieu of the fee of the predeceaser's estate, and accordingly the provisions were onerous and irrevocable after the dissolution of the marriage—*Ferguson's Curator* v. *Ferguson's Trustees*, June 20, 1893, 20 R. 835; *Hogg* v. *Campbell*, March 18, 1863, 1 Macph. 647. The reasoning of the Court in *Kay's Trustees* v. *Stalker*, July 20, 1892, 19 R. 1071, applied to dispositions of residue as well as to legacies. In order to make the deed non-onerous, an absolute disproportion in the estates of the contracting parties must be made out such as did not exist here—*Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800.

Argued for seventh and eighth parties—The contract of marriage certainly was irrevocable by one of the parties, but was mutually revoked by the mutual disposition and settlement. The claimants under the disposition of 1890 must therefore make out that it also was contractual, and this they had failed to do, as regards the provisions in favour of third parties. The deed was *ex facie* testamentary, there was no joint conveyance, and there was nothing to give it a contractual effect, the reference to the relationship of the legatees being purely incidental. With regard to the clause of joint revocation, there was one in almost identical terms in the case of *Traquair* v. *Martin*, November 1, 1872, 11 Macph. 222, and yet the deed was not held to be contractual; and also in *Nicoll's Executors* v. *Hill*, January 25, 1887, 11 R. 384. In the case of *Ferguson's Trustees* the mutual deed was contractual in its terms; this was not, and the mere fact of the existence of the marriage-contract did not make it irrevocable.

At advising—

LORD ADAM—There are numerous questions in this case, but we have only heard argument upon the first, for if we decide it in the negative it will be unnecessary to consider the others.

The question is—"Was it within the power of Mr Croll after the death of Mrs Croll to revoke the mutual trust-disposition and settlement of 1890 *quoad* the disposal of his own estate to any extent?"

The facts of the case are that Mr and Mrs Croll were married in 1864, and at the time were both about 50 years of age. They did not anticipate the birth of any children of the marriage, and accordingly they executed an antenuptial contract of marriage by which in contemplation of their marriage they mutually disponed each to the other in case of survivance the fee of the whole estates of the predeceaser. That was the purport of the marriage-contract, and it is clear that its effect was that, on the dissolution of the marriage by the death of one of the spouses, all the estate of the contracting parties accrued to the survivor absolutely. Something has been said as to the relative amounts of the estate belonging to the parties at this time, but that is immaterial, for the consideration in the contract was marriage.

These therefore were the conditions under which the parties entered upon their married life.

In 1890 the parties executed a mutual trust-disposition and settlement, under which the present question arises. By it they materially altered the conditions of the marriage-contract, as no doubt they had full power to do, there being no children of the marriage, and they themselves being the only parties with any right or interest under it. They both conveyed their whole estate to the same set of trustees, and instead of their providing, as in the marriage-contract, that the survivor should enjoy the whole fee of the estate after the dissolution of the marriage, the survivor was to take only the liferent of the predeceaser's estate, and on his or her death, after payment of certain legacies, the fee of the residue was to be divided among certain stated beneficiaries. Then follows the clause reserving power of revocation "by any joint writing under our hands." Now, it appears to me that this mutual settlement is as much a contract as was the ante-marriage contract. It is clear that the parties were at this time equally situated as regards the estate with which they dealt. By the marriage-contract the survivor acquired the fee of the whole estate, and neither of them could alter or revolve its provisions without the consent of the other. They did materially alter these provisions by executing this mutual settlement by mutual consent. If then they did agree to do this, what is that agreement but a contract to dispose of the estate in the particular way in which they did dispose of it? Then the question is, could Mr Croll alter that disposition? My opinion is that he could not because of this agreement with his wife. No doubt the parties chosen to be benefitted were *personæ gratæ* to one or both of the spouses—perhaps the husband preferred some, and the wife others of them. It has been said that the mutual disposition was only a settle-

ment, and of a purely testamentary character, and that it has not been shown to be in favour of the next-of-kin of the parties, but the case is *a fortiori* of this, since it is in favour of certain specified persons deliberately selected by the parties.

I am therefore of opinion that we should answer the first question in the negative.

LORD M'LAREN—If the first question be answered in the negative, then it follows that all the other questions in the case disappear, because they depend on the power of revoking or altering the mutual trust-disposition and settlement having been lawfully exercised by Mr Croll after the death of his wife. I agree with Lord Adam that the chief element in the case is the consideration that the spouses began by executing an antenuptial contract of marriage by which each disposed of his and her estate, giving it to the other in the event of survivance. Accordingly, there is a strong implication that any subsequent deed dealing with those estates is a deed in substitution for the contract of marriage, and subject to the same conditions of onerosity which affected it. It is to be observed that the spouses had no disposable estate which was not already regulated by the marriage-contract, because the contract dealt with the *universitas* of the estates of each. The deed of 1890 contains separate dispositions of the estates of the spouses to the same set of trustees, a circumstance which may be important in some cases, for it may suggest the idea of two wills contained in one deed, rather than a joint-will, the two estates being separately dealt with in the most important part of the deed. Then we have a clause reserving power to revoke in these terms "with power to us by any joint-writing under our hands to revoke or alter these presents, but declaring that in so far as not altered or revoked as aforesaid the same shall remain effectual." Now, if we were to consider the construction of this mutual settlement independently of the contract of marriage, and if there were nothing in the deed itself to make it evident that the deed was contractual, then there would have been great force in Mr Constable's argument in favour of the heirs of the surviving spouse; because the clause of revocation would in that case have been satisfied by holding that it was only intended to make it incompetent for the parties to exercise the power of separating the estates during their joint lifetime, but that it was not to be competent for the survivor to alter the destination of his individual estate. There would be nothing inequitable in such a construction. Where there is no clearly expressed or implied element of onerosity the will may be contractual only *quoad* liferent, for each spouse has an equal chance of survivance, and it may well be that each desires to remain unfettered as regards the ultimate disposition of the residue. There is a considerable body of authority to the effect that in the ordinary case a mutual will is to be construed rather as two wills embodied in the same deed, each party retaining a power over the ultimate disposition of his own estate, on the general principle that all testamentary deeds are presumed to be ambulatory until the testator's death. But then in the present case we are not left to determine the question of onerosity from the terms of the deed itself, for I agree with Lord Adam that where the effect of the mutual settlement is to entirely displace a marriage-contract, and to introduce new machinery for regulating the rights of parties in a different way, then the will must be read along with the marriage-contract—although displacing it—and subject to the same conditions as to onerosity. Bringing that principle to bear on the present case, I am of opinion, especially in view of the carefully expressed clause giving power of revocation, that this deed was intended to be irrevocable, or at least revocable only during the subsistence of the marriage by joint consent, and irrevocable after its dissolution.

LORD KINNEAR—I am of the same opinion. I think the material point is that under the marriage-contract each of the spouses had an absolute right, in case of survivance, to the entire succession. That contract could only be displaced or altered by mutual agreement, and accordingly the parties desiring to alter it entered into what is described as a mutual trust-disposition and settlement, in which they purport to agree to a new disposition of the succession of either on the dissolution of the marriage. Now, in that deed each spouse surrenders a valuable right, and stipulates for a new disposition of the entire succession. But, then, each does so on the condition expressed in the mutual disposition itself, that that disposition is not to be revoked or altered except by a joint writing under the hands of parties. It appears to me that there can be no question at all of the pactional nature of this disposition, and that it cannot be represented as a combination of two wills, each of which is ambulatory and revocable until the death of each testator. Its pactional character is fixed by the antecedent contract of marriage, for each of the spouses is necessarily surrendering an ascertained right, and so giving valuable consideration for the right acquired under the later deed. It was said, and said with much ingenuity by Mr Constable, that there is no evidence in the deed of a stipulation on the part of the wife on behalf of any of the residuary legatees, for they are not described as her relatives or next-of-kin. But then it is part of the contract embodied in this special case that some of the legatees are relatives of the wife and others of the husband, and it does not therefore appear to me to be very material that the fact of the relationship which is instructed by the contract of parties is not set out on the face of the deed itself. But I agree with Lord Adam that there is a much stronger ground for holding the deed to be pactional, and that each spouse was contracting on behalf of specified sets of legatees, than the mere recital of the fact of relationship to the spouses would have

been—namely, that each spouse was surrendering a valuable right for the purpose of providing for the disposition of the estate in the way set forth in the deed.

The LORD PRESIDENT concurred.

The Court answered the question in the negative.

Counsel for the First, Third, and Fourth Parties—Cullen. Agent—Marcus J. Brown, S.S.C.
Counsel for Second Parties — A. S. D. Thomson. Agent — Marcus J. Brown, S.S.C.
Counsel for the Fifth Party—Dundas—Wilton. Agent — Alexander Mitchell, Solicitor.
Counsel for the Sixth, Seventh, and Eighth Parties—Rankine—Constable. Agent for Sixth and Eighth Parties—Marcus J. Brown, S.S.C. Agents for Seventh Parties—Jamieson & Donaldson, S.S.C.

Wednesday, June 19.

FIRST DIVISION.

MARSHALL AND OTHERS, PETITIONERS.

Company — Winding-up — Foreign Company having Branch Office, Assets, and Liabilities in Scotland—Jurisdiction to Wind up—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 199.

Petition under section 199 of the Companies Act 1862 for the winding-up by the Court of a company incorporated and having its principal place of business in the United States of America, but having a branch office, assets, and liabilities in this country, *granted.*

The Fidelity Loan and Trust Company was a finance company incorporated under the laws of the State of Iowa, U.S.A., and had its principal place of business at Sioux City, Iowa.

It also carried on business in England and Scotland, its principal place of business in the United Kingdom being 63 Castle Street, Edinburgh, but it was not registered in the United Kingdom and had no separate office of its own.

Its business in this country consisted chiefly of borrowing money on debentures which were secured by mortgages over land in America deposited with and held by the Hon. F. J. Moncreiff, C.A., Robert Strathern, W.S., and J. P. Wright, W.S., as trustees under a deed of trust entered into between them and the said company. The chief assets of the company in this country consisted of the mortgages lodged to secure payment of the debentures. In addition, the company held various bonds, stocks, and other assets, but these were to a large extent pledged in security of advances made to the company in America.

On 2nd January 1895 the company became unable to meet its liabilities, and was obliged to suspend payment.

On 10th January a receiver was appointed by the Court at Iowa, and subsequently a scheme was drafted for the reconstruction of the company.

A petition was presented to the Court of Session by the Rev. Theodore Marshall, Edinburgh, and other creditors of the company under the 199th section of the Companies Act 1862, which provides for the winding-up by the Court of unregistered companies, for an order to have the said company so wound up and the trustees above named appointed official liquidators.

The objects of the petition were to protect the rights of the debenture holders in the mortgages and other securities held by the said trustees, and to make the scheme of reconstruction, if agreed to by the majority of the creditors, binding upon all under the provisions of the Joint Stock Companies Arrangement Act 1870.

It was stated by the petitioners that the receiver in America did not object to the petition being granted, and that the recent cases in England of *in re Matheson Brothers, Limited*, 1884, L.R., 27 C.D. 225, and *in re Commercial Bank of Southern Australia*, 1886, L.R., 33 C.D. 174, were authorities for this being done.

The Court pronounced the following interlocutor:—

"The Lords . . . order that the Fidelity Loan and Trust Company be wound up by this Court under the provisions of the Companies Acts 1862 to 1890: Appoint the Hon. F. J. Moncreiff, C.A., Edinburgh, and Robert Strathern and J. P. Wright, both Writers to the Signet, Edinburgh, to be official liquidators of the said company in terms of the said Companies Acts, they finding caution in common form before extract, the same being limited in amount, with all the powers conferred by the said Acts; and declare that all acts required or authorised to be done by them may be done by any one or more of them: Further, direct all subsequent proceedings in the winding-up to be taken before Lord Stormonth Darling, Ordinary, and remit to his Lordship with power to fix the amount of caution to be found by the liquidators, declaring that no proceedings are to be taken under this order without the leave of the said Lord Ordinary: Find the petitioners entitled to the expenses of this application, and direct the same to be expenses in the winding-up."

Counsel for the Petitioners—Asher, Q.C. —Burnet. Agents — Guild & Shepherd, W.S.
