and authorised the petitioners to borrow on the security of the said farm and property of Shenrick a sum not exceeding £1562, 2s. 6d., and to grant a bond and disposition in security, or bonds and dispositions in security, for sums not exceeding in whole that amount in favour of any party or parties lending the same, and decerned.

Counsel for Petitioners (Reclaimers)—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—J. H. Millar. Agents—Mackenzie & Black, W.S.

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*Saturday, March 9.*

## FIRST DIVISION.

[EXCHEQUER CAUSE.]

[Lord Johnston, Ordinary.

## INLAND REVENUE *v.* GUNNING'S TRUSTEES.

*Revenue—Estate-Duty—Property Passing on Death—Donations inter virum et uxorem—"Competent to Dispose"—Finance Act* 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*a*) *and* 22 (2) (*a*).

Donations *inter virum et uxorem* unrevoked at the donor's death form by the law of Scotland part of his, or her, estate of which he, or she, was "competent to dispose," and on which consequently estate-duty is payable.

*Process—Revenue—Summons—Estate-Duty—Property Passing on Death—Donations inter virum et uxorem—Summons Calling on Executors to Lodge Account of All Unrevoked Donations.*

*Opinion* (*per* Lord President) that a summons on behalf of the Inland Revenue calling upon the executors of a deceased spouse to lodge an account, for the purpose of calculating estate-duty, of all donations unrevoked at death made by the deceased to the other spouse where the executors denied all knowledge of the alleged donations, would fall to be dismissed.

*Statute—Taxing Statute—Interpretation—Application of Imperial Statute to Scotland—Finance Act* 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (1) (*a*).

Donations *inter virum et uxorem* are by the law of Scotland revocable, and by the law of England irrevocable. A claim having been made for estate-duty on donations by a deceased spouse to the other spouse, unrevoked at death, the executors resisted on the ground that such a construction of the statute would result in an unequal incidence of taxation, and was contrary to the rule established by *Lord Saltoun* v. *Advocate-General*, April 30, 1860, 3 Macq. 659, and *Lord Advocate* v. *Earl of Moray's Trustees*, August 4, 1905, 7 F. (H.L.) 116, 42 S.L.R. 839.

*Held* that the rule did not apply.

The Finance Act 1894 (37 and 38 Vict. cap. 30) enacts, sec. 1—"In the case of every person dying after the commencement of this part of this Act there shall . . . be levied and paid upon the principal value . . . of all property . . . which passes on the death of such person a duty called estate-duty. . . ."

Sec. 2 (1)—"Property passing on the death of the deceased shall be deemed to include the property following—that is to say, (*a*) Property of which the deceased was at the time of his death competent to dispose. . . ."

Sec. 22 (2) (*a*)—"A person shall be deemed competent to dispose of property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit. . . ."

On 25th July 1906 the Lord Advocate on behalf of the Commissioners of Inland Revenue raised an action against Dame Mary Agnes Winwood Hughes, of Shelsley Grange, Worcestershire, and others, the executors acting under the joint last will and testament of the deceased Dr Robert Halliday Gunning, who died on 22nd March 1900, and his widow the said Dame Mary Hughes, dated 5th November 1896, and recorded in the Court Books of the Commissariot of Edinburgh on 3rd May 1900. The summons concluded for an account of "all donations" made by Dr Gunning to his wife after their marriage and remaining unrevoked at his death, for purposes of ascertaining the estate-duty due on the personal property passing on his death, and for a sum of £1000 in name of such duty.

The pursuer averred—"(Cond. 3) It is believed and averred that Dr Gunning gifted or made over certain of his funds or portions of his estate to his wife. The total value is not known, nor to what extent the property given consisted of personalty or heritage. By a trust settlement dated 19th July 1900, and recorded in the Books of Council and Session 21st March 1901, Dr Gunning's widow, the said Dame Mary Agnes Winwood Hughes, made provision for his niece Miss Elizabeth Gunning and his grandniece Miss Jane Gunning Carruthers. This deed proceeds on the narrative that Dr Gunning had made over to his said wife certain funds as her absolute property, but on the understanding that she should apply or bequeath them in terms of his wishes as expressed to her verbally, and that she should ultimately bequeath any unused surplus to his testamentary trustees for the purposes of his testamentary settlement. The amount of the funds which Dr Gunning handed over to his wife has not been disclosed, but by the said deed she expressed her resolve forthwith to place the sum of £10,000 in the hands of the parties therein named as trustees for the purposes therein declared." [An extract of the said trust settlement by Dame Mary Hughes was produced.]

The defenders in answer stated that they believed certain gifts had been made by Dr Gunning some years before his death to his wife, the nature and amount of which was unknown to them. They, *inter alia*, pleaded—"(2) Estate duty not being due on gifts of funds or property which had been made by the late Dr Gunning to his wife some years before his death, and which he had not revoked, the defenders should be assoilzied from the conclusions of the summons. (3) The defenders, as executors of the late Dr Gunning, not being bound to—*et separatim* not having the information necessary to enable them—to deliver the accounts sued for, they should be assoilzied from the conclusions of the summons."

On 16th November 1906 the Lord Ordinary (JOHNSTON) assoilzied the defenders with expenses.

*Opinion.*—"Dr Gunning died in 1900 leaving estate which was returned at £107,800, on which estate duty has been paid. But Dr Gunning had during their marriage made certain donations to his wife Dame Mary Agnes Winwood Hughes, the history and amount of which are not ascertained. It is, however, sufficient for the present purpose that it is asserted by the Crown, and admitted by Dr Gunning's trustees, that donations were made by Dr Gunning to his wife, and that they remained unrevoked at his death. The Crown now call for an account of them in order that the additional estate duty leviable in respect of them, as personal property passing at the death of Dr Gunning, may be ascertained.

"The contention of the Crown is that donations by Dr Gunning to his wife could have been revoked at any time during the subsistence of the marriage and disposed of by him, and that they therefore fell under the category of property of which he was competent to dispose at the time of his death, which by the Finance Act 1894, section 2 (1) (*a*), is to be deemed to be included in the property passing at Dr Gunning's death, and therefore to be liable to estate duty.

"Dr Gunning's trustees dispute this contention, and maintain that any donations which might have been made by Dr Gunning to his wife and which remained unrevoked by him were no part of the estate, actually or constructively, which passed at his death, and they therefore refuse to lodge the account demanded, and, in fact, they say that they have no information to enable them to do so.

"The question is a novel and an important one, the more so as the law as to the revocability of donations *inter virum et uxorem* is different in Scotland and in England. In Scotland they are revocable, in England admittedly they are not. Hence, if the contention of the Crown is sound, the incidence of the statutory provision of estate duty would not be equal in the two countries. That would be assessed to duty in Scotland which would go free in England. The present is a very exemplary case of the uncertain and uneven effect of the Crown's claim. Dr Gunning resided originally in Edinburgh. I do not know where he was born, though I assume in Scotland. But he made his fortune, it is pretty clear, in Brazil, and latterly lived in London, where he died. It appears, however, to have been agreed that he died, notwithstanding, domiciled in Scotland, and hence the claim in this Court, which would probably have been avoided had he lived a little longer in London.

"Such a haphazard incidence of the duty it cannot be reasonably presumed was intended, and one would have to be well satisfied that it was a necessary consequence of the language of the statute before sustaining the claim.

"In the case of *Saltoun* v. *The Lord Advocate* (1860), 3 Macq. 659, Lord Chancellor Campbell said—'In construing the statute on which this case depends' (the Succession Duty Act 1853), 'we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the Legislature must be understood to be that the like interests in property taken by succession should be subjected to like duties wheresoever the property may be situated. The technicalities of the law of England and of Scotland where they differ must be neglected and the language of the Legislature must be taken in its popular sense.'

"The question in that case was, who was to be deemed the 'predecessor' of a substitute heir of entail in the sense of the Succession Duty Act 1853; and in its determination the principle enunciated by Lord Chancellor Campbell was applied. So, too, I think it was by the majority of the House of Lords in *Pensel's* case, L.R. (1891), A.C. 531, see Lord Herschell, pages 570-3, in construing the expression 'trust for charitable purposes' of the Income Tax Act.

"This matter was also extensively discussed in the case of *Lord Advocate* v. *Earl of Moray's Trustees*, 7 Fr. (H.L.) 116, where it was necessary to apply in Scotland section 9, sub-section 6, of the Finance Act 1894, entitling a person having a limited interest in property to a charge for the amount of estate duty paid by him in respect of the property, the expressions used in the sub-section being inappropriate to Scotland. In that case Lord Macnaghten said—'It must be presumed to have been the intention of Parliament to make the incidence of the taxation the same in Scotland as in England and in Ireland, and to extend the same measure of relief, such as it is, to limited owners called upon to discharge a burden on the inheritance wherever the property burdened may be situated.' And his Lordship then quoted with approval the words of Lord Cranworth in *Saltoun's* case, *supra*—'This decision, though it would do violence to some of the best-established doctrines of Scotch law if the present question were one of conveyancing, may yet be well admitted in the construction of an Act intended to impose corresponding duties on successions happening under two different systems of law.' And in the same case Lord Davey added—'I think that the same principle applies as was laid down in this House with regard to

the Succession Duty Act—*Lord Braybrooke* v. *Attorney-General* (1860), 9 H.L.C. 150—that the Act is not to be construed according to the technicalities of the law of England or of Scotland, but according to the popular use of the language employed.'

"In *Saltoun's* and *Moray's* cases technicalities of conveyancing were alone concerned, and it was held that a common sense must be given to the expressions of the enactments in question irrespective of such technicalities, in order to effectuate an equal incidence of assessment. In *Pensel's* case the point of difference was not of conveyancing, but more nearly akin to the point here. It was one of construction adopted and stereotyped by judicial decision. In the present case the difference goes deeper, being in the common law of the two countries.

"If I found that the expressions used in the statute were incapable of application in Scotland without either producing an unequal incidence of taxation or requiring me judicially to assimilate *pro hac vice* the law of Scotland on a particular point to the law of England, I should hesitate, notwithstanding the generality of some of the opinions to which I have referred, to do the latter in order to avoid the former. But I think that I am fully justified in regarding the intention of equal taxation as a clue to the meaning of the expressions of the statute, where these can reasonably be made to bear an interpretation which will produce such equal incidence.

"The expression to be interpreted is (Finance Act 1894, section 2 (1) (*a*)) 'property of which the deceased was at the time of his death competent to dispose.' It can hardly be disputed that, broadly speaking or in a popular sense, by his settlement the deceased was competent to dispose of any subject donated to his wife during marriage. He had nothing to do but make a testamentary disposition of it, and the act of disposition would imply the necessary revocation (*Henderson* v. *Tulloch*, 1833, 12 S. 133). But to imply the revocation the disposition must be express. Still I think that it is open to me to regard such a testamentary disposition as a composite act, one of revocation and one of disposal. Without revocation he could not dispose. So long as there was no revocation, therefore, he was not competent to dispose. The act of revocation and the act of disposal might be inseparable, as where by testamentary instrument. But, if so, then where there was no testamentary disposal there was no revocation, and therefore no present competency to dispose.

"It may be that in so applying the statutory provision I am attaining uniformity of taxation not by taking the broad popular view but a narrower and more recondite one. But if inequality of the incidence of taxation can be so avoided I think I am justified in so doing.

"I do not think any aid is obtained from the interpretation clause, section 22 (2) (*a*), for to reason from it would be reasoning in a circle.

"On the other hand, the difficulties in which the executors would find themselves under section 6 (2) and section 8 (3), and the insufficiency of sections 9 and 14 for their relief, favour the exclusion of a donation *inter virum et uxorem* unrevoked at the death of the donor from the effect of section 2 (1) (*a*).

"It may not be inappropriate to refer to the analogy of entail expenditure, *cf. Maxwell*, 1877, 4 R. 1112, which appears to me to be much in the same position as a donation *inter virum et uxorem* unrevoked. Both are, *quoad* succession, of the nature of a *res meræ facultatis*, capable of being brought within the purview of the sub-section, but requiring an act of the deceased to place them in that position which he may die without performing.

"I think also that a general power of appointment unexercised may be in the same position, *cf.* the Legacy Duty Act 1796, section 18 (the latter half, 'such property *upon the execution* of such power shall be charged,' &c.).

"I shall therefore assoilzie the defenders with expenses."

The pursuer reclaimed, and argued—The gifts by Dr Gunning to his wife were capable of being revoked by the donor up to the time of his death, and therefore were property of which he was "competent to dispose." They therefore "passed" at his death and must be included in calculating estate duty—Finance Act 1894, sections 1 and 2 (1) (*a*), 22 (2) (*a*). Competency to dispose depended on the possession of power to dispose, not on whether that power had or had not been exercised. No preliminary act of the husband was necessary to render him capable of disposing of the gifts in question. A bequest by will to anyone other than his wife would have been effectual as against the wife. The fact that under English law a gift by a husband to his wife ceased to be the property of the donor at the date of the gift and was an irrevocable gift so that he was not competent to dispose of it at his death, was no reason for construing the words of the statute, as applied to Scotland, so as to exclude from its compass property which a Scottish husband was under Scots law competent to dispose of. The interlocutor of the Lord Ordinary should be recalled.

Argued for the defenders and respondents—The Lord Ordinary was right in holding that if a meaning could be found for the words "competent to dispose" which would make the incidence of the duty equal in England and Scotland that meaning should be adopted—*Lord Saltoun* v. *The Advocate-General*, April 30, 1860, 3 Macq. 659; *Commissioners for Special Purposes of Income-Tax* v. *Pensel*, [1891] A.C. 531; *Lord Advocate* v. *Earl of Moray's Trustees*, August 4, 1905, 7 F. (H.L.) 116, 42 S.L.R. 839. The result of the pursuer's contention would be that the donations of a husband to his wife would be subject to estate duty in Scotland but not in England. In order to put Dr Gunning in a position to be competent to dispose of the property gifted to his wife, some act of revocation was necessary and he had not

performed any such. A general settlement would not revoke a donation—Fraser on Husband and Wife at p. 953; Erskine's Institutes, i. 6, 31. The property gifted to a wife passed absolutely to her at the date of the gift, subject only to a resolutive condition that the donor might resume the property to himself—*Thomson* v. *Thomson's Trustees*, July 9, 1879, 6 R. 1227, the Lord Justice-Clerk (Moncreiff) at p. 1229, 16 S.L.R. 727. Thus vesting in the wife operated on a donation being made, accompanied by a complete divestiture of the husband, unless Dr Gunning exercised his power of again becoming *dominus* of the property, which he had not. The Finance Act 1894, sec. 2, sub-secs. 1 (*a*) and (*c*), were also referred to.

The pursuers on January 25, 1907, in consequence of some remarks from the Bench at the hearing which took place on January 8, 1907, lodged a minute restricting "the conclusions of accounting and payment to the estate-duty claimable in respect of the funds made over by the said Robert Halliday Gunning to the said Dame Mary Agnes Winwood Hughes during marriage, as set forth in her trust settlement dated 19th July 1900 and recorded 21st March 1901," reserving any further claim.

At advising—

LORD PRESIDENT—This is a case brought by the Lord Advocate on behalf of the Inland Revenue against the trustees of the late Dr Gunning. Dr Gunning had, it seems, during his lifetime made certain donations to his wife Lady Hughes, although it is not certain what these donations amounted to. The present action is brought by the Crown, and asks the trustees to state an account of these donations in order that they may pay duty upon them under the Finance Act. Dr Gunning's trustees have joined issue upon the matter. They have admitted that there was one certain donation which was given to Lady Hughes, which she still has, and which she is to apply to certain purposes which were told her by her husband. *Quoad ultra* they do not make any admission upon the subject, but they have joined issue with the Crown upon the question whether, upon the assumption of there being donations, there is any duty due at all. That matter depends, as was conceded on both sides of the bar, on whether this was property of which, in the words of the 2nd section, sub-section 1 (*a*), of the Finance Act, "the deceased was at the time of his death competent to dispose." The Crown has not been able to contend that this was property which purely and simply passed under the 1st section, unless it was brought in as passing under the terms of the 2nd section and the sub-section which I have just read.

Now the Lord Ordinary has held that it was not, and the ground upon which his Lordship has held that seems to be this. He first of all, in considering the well-known cases of *Lord Saltoun* (1860, 3 Macq. 659) and the *Earl of Moray's Trustees* (1905, 7 F. (H.L.) 116), lays down the general proposition that the interpretation of a taxing statute must so far as possible be such as to make the burden thereby created the same under the laws of England and the laws of Scotland; and having made that observation he makes the remark that as donations *inter virum et uxorem* are not revocable by the law of England a determination in favour of the Crown would, as he terms it, create an inequality between England and Scotland. But he rests his actual judgment upon this. He says that the act of revocation must be an act. To quote his own words:—"Without revocation he (Dr Gunning) could not dispose. So long as there was no revocation therefore he was not competent to dispose."

I have been unable to come to the same conclusion. I of course accede to the general proposition which the Lord Ordinary deduces from the cases of *Lord Saltoun* and the *Earl of Moray*, but then I do not think that the doctrine laid down in these cases really has any application in this matter. We are not here construing the Finance Act in any different sense for England than for Scotland. It is merely that in England and in Scotland in certain circumstances the Act will have a different application. But that is so to speak a mere accident. The true analogy there would seem to be this—Supposing, for instance, there is a duty put upon, let us say, heritable property, and not upon moveable property, it would make no difference in construing an Act of that sort to say, if it were the fact, that more people in Scotland put their savings into heritable property than did in England. That is a mere accident of the situation, and of course it has the result that more people will be taxed under the statute or will have to pay more money under the statute in the one kingdom than in the other, but that is not a construing of the statute itself in a different sense. And therefore it does not seem to me that the fact that owing to the law of husband and wife a man in Scotland has money under his control by means of revocation which in England he would not have if he were a husband in England really creates any difficulty in a question of interpreting what is the true meaning of "competent to dispose."

I therefore come straight to the consideration of what the phrase itself is. Now, the Lord Ordinary has said that the interpretation clause gives no help because it is only arguing in a circle. To a certain extent that is true, but at the same time I think the interpretation clause is in this matter worth looking at. The interpretation clause is section 22, subsection 2 (*a*). It runs thus—. . . [*quotes, supra*] . . I take these words by themselves, and it seems to me that they point pretty clearly at this class of power—I leave out the words which are not here needed—"that a person shall be competent to dispose of property if he has such a general power as would enable him to dispose, and that such general power includes every power or authority enabling the holder to appoint or dispose of the pro-

perty as he thinks fit." Do not these words suit this matter? The Lord Ordinary's view when pressed seems to come to this, that in the matter of dealing with a revoked donation there are two steps—first, you have got to revoke, and then when you have revoked you reduce it into your own power again, and then you are competent to dispose. If such an expression is allowable in a judicial opinion, that is what is popularly called making two bites of a cherry. But it seems to me the whole matter is done at once, and I think it is really settled by decision. It is quite well settled that the revocation of donations *inter virum et uxorem* may be either express or implied. It need not even be done by the man or woman himself or herself. For instance, in the case of *Blaikie* v. *Mill*, 1838, 1 Dunlop 18, it was done by the *curator bonis* of an insane wife, and again in *Kemp* v. *Napier*, 1841, 4 Dunlop 558, you have this still further step that the revocation is effected *ipso facto* by the act of sequestration—by the condition of sequestration where of course the man has not exercised any *voluntas* at all, and probably if he were asked would very much object to do so. I think that is the right way of looking at it. That also comes out very clearly from the opinion of my brother Lord M'Laren in the case of *The Inland Revenue* v. *Earl of Moray's Trustees*, reported in 6 Fraser, p. 347. There were two questions there. First of all, whether the particular property that was there spoken of—namely, the right to charge the duty which he paid against the entailed estate—whether it was *in bonis* of the Earl of Moray, and secondly, whether if it were not, it was dutiable because it was something of which he was competent to dispose. The Court of Session held adversely to the Crown on both these views. The House of Lords came to a different conclusion on the first point. They held that the property was directly taxable, and consequently they did not have to consider the second question—whether the Earl of Moray was competent to dispose or not—because they held that the sum was taxable without the words "competent to dispose." But the view of the Court of Session upon the second question was really not touched one way or the other by the House of Lords. With regard to what Lord M'Laren says upon that, I beg to point out that it really does not matter whether the result that his Lordship came to, in view of what was afterwards said in the House of Lords, was sound or not. The point is how he puts the question. Upon page 358 he goes through the section as I have gone through it, about the definition of general powers and so on; and then he says—"From it I infer first that the point of time at which the existence of a power of disposal is considered is the death of the person to whom the power is attributed—in this case the Earl of Moray—and secondly, to render the estate affected by the power liable to estate duty the deceased person must have been able to dispose effectively of the money or property in question, because to be able to dispose ineffectively of property is just the same as not being able to dispose of it at all. Was the Earl of Moray at the time of his death able to give a title to his executors to uplift this money or to raise it out of the entailed estate? If he had proposed to convey it to his trustees would the will have enabled the trustees to obtain possession of it?"

Let me translate that question into the circumstances of this case, and there can be but one answer. Nobody supposed but that Dr Gunning at the time of his death could have given a title to his executors to uplift this money, because all he need to have done was to have left them the money. That would have operated as a revocation of the donation. Accordingly, I think, the way in which Lord M'Laren states the question in Lord Moray's case becomes apposite authority in this. Upon the whole matter therefore I come to a different conclusion, opposite from that of the Lord Ordinary, and hold that this was money of which Dr Gunning was competent to dispose.

In the summons as originally laid there was a difficulty which I confess but for what has happened would to me have been insuperable. The action as raised by the Crown called upon the defenders, that is to say Dr Gunning's trustees, to deliver an account of all donations. Now I do not see any warrant for that whatsoever, because Dr Gunning's trustees are not in possession of any of the donations and never would be; and if the defence here had been simply a statement that the trustees knew nothing about these donations at all, and could not tell anything about them, then I think the action must have fallen to be dismissed. Of course I am not leaving out of view that the estate in the trustees' hands, like every other bit of the deceased's estate, is liable to the duty, and if the Crown can establish that the duty is due they would of course be entitled to bring a declarator against these people to say that they must pay. But they are not entitled to order them to give an account of moneys which never were in their hands, and never could be in their hands. But that particular difficulty in this case has been removed, because the Crown has put in a minute limiting their conclusion to an accounting of this one specific donation which I have already referred to, and the defenders have not taken up the position of saying that they know nothing about it, but have come here saying that they do know about that donation, and have come here anxious to fight the Crown upon the merits. Accordingly there is no hardship in asking these defenders, who include Lady Hughes herself, to render an account in order that duty may be paid upon that sum. Upon the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that decree ought to be pronounced in terms of the restricted conclusion calling upon the defenders to give in an account.

LORD KINNEAR—I am of the same opinion. As the action was originally laid I

should have had, to say the least, very great difficulty in sustaining it, but as now restricted I think it raises a much simpler question, as to which I entirely agree with your Lordship's judgment. There seem to be only two points to be considered with reference to the question that now remains in the action—in the first place, whether the Lord Ordinary is right in holding the question to be governed by the rule laid down in the cases of *Lord Saltoun, Lord Zetland* (February 12, 1878, 5 R. (H.L.) 51, 15 S.L.R. 373) and *Lord Moray*. Now I understand that rule to be perfectly well settled, and to come to this that the taxing statute which is intended to be equally applicable to England and Scotland must be construed with respect to English and Scottish entails so as to produce substantially corresponding effects in each of these two different technical systems. I do not think that rule of construction applies to the question we are deciding, because there is no technical language to construe. The Crown is not appealing on the one hand, nor the defenders on the other, to technical rules of conveyancing which are recognised in Scotland but which do not prevail in England. The statute taxes property purely on death, and the question is whether certain pecuniary interests did or did not belong to the deceased in the sense of the statute. If they did, then it does not matter that somebody in a position analogous to his who had died in England would not have possessed these pecuniary interests. The main question is whether the right of the deceased man was or was not part of his estate in the sense of the statute. Now if that be the question, it depends, as the Lord Ordinary held, upon whether the deceased was or was not competent to dispose of the gifts which he had made in favour of his wife during his lifetime. The Lord Ordinary held that he was not, because in order to bring about that competency his Lordship seems to think it was necessary that before disposing of the donation to his wife the husband must by some operative act revoke the donation so as to bring it within his own power; and having done that, according to his Lordship's view, he may then proceed to dispose of it, but till he does that he cannot. I am unable to assent to that proposition, because it seems to me to be perfectly clear that a contrary disposition by a husband of personal estate which he has given to his wife is in itself a revocation. It is not disputed that the husband might at his pleasure have revoked the gift, and I am unable to doubt that the thing which a man may do or abstain from doing at his pleasure is a thing within his competency, and that is the whole question we have to consider.

I think the authorities to which your Lordship has referred all tend in the same direction; and perhaps I may add that there is another striking illustration of the same rule in the case of *Dunlop* v. *Johnston*, March 24, 1865, 3 Macph. 758, where the gift by the husband to the wife was set aside after his bankruptcy by no act or operation of the husband himself at all, but by an action of reduction raised by the trustee in his sequestration in his own right and title as trustee for creditors. I therefore agree with your Lordship.

LORD PEARSON—In this action as it now stands since the minute of restriction, we have to do with a gift *inter sponsas*, of definite amount and still extant, in the hands of trustees, and the question is whether the donor (the husband) was competent to dispose of it at the time of his death, it being admittedly a revocable donation. Now, the gift having according to our law been revocable during the life of the donor, the Lord Ordinary approached the question of whether it is chargeable with estate duty from the point of view that such gifts are revocable in Scotland but not in England. He deduces from this the proposition that if the duty be held to attach in Scotland on the ground of the revocability of the gift, this would produce an unequal incidence of taxation as between the two countries, and that this result is to be avoided if the statute can be construed so as to avoid it. Now, there is here no question as to the construction of technical expressions; and the Lord Ordinary does not dispute that "broadly speaking and in a popular sense the deceased was competent to dispose" of the fund in question. But in order to attain uniformity of taxation he construes the words in "a narrower and more recondite sense," and founds his judgment upon the consideration that the donor died without revoking the gift, and that so long as there was no revocation he was not "competent to dispose" within the meaning of section 2. I regard that as a strained interpretation, and I confess I do not feel the necessity of construing the words otherwise than in their ordinary and natural meaning. In my opinion this is not a case of unequal incidence of taxation as between Scotland and England. To say that such a donation is liable in estate duty in the one country and not in the other does not infer inequality any more than does the proposition that such a donation is revocable in the one country and not in the other. The maxim that inequality of the taxation is to be avoided applies to matters in which the laws of the two countries are fundamentally the same, though differing in form or expression, and not to matters in which the laws themselves are fundamentally different.

When once the rule of construction is settled I think the case is really free from difficulty. I cannot assent to the proposition that a man who has made a revocable gift is not competent to dispose of the subject of the gift unless and until he has revoked it. The revocation and the disposal are truly parts of one and the same intention. He is competent to dispose just because he is competent to revoke; and the revocation does not require to be established by any separate act, but is inferred from the fact of disposal. This is so not merely where the subject of the gift is specially assigned to another, but also where there is a general disposition if that

infers revocation on a sound construction of its terms. The rules in bankruptcy law which your Lordships have referred to proceed entirely on the same lines; and on the whole matter I agree with your Lordship.

LORD PRESIDENT—LORD M'LAREN, who was present at the hearing, authorises me to say that he concurs in this judgment.

The Court recalled the interlocutor of the Lord Ordinary and ordained the defenders to lodge an account in terms of the conclusions of the summons as restricted.

Counsel for the Pursuer (Reclaimer)—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton Grierson).

Counsel for the Defenders (Respondents)—Scott Dickson, K.C.—Grainger Stewart. Agents—Auld & Macdonald, W.S.

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*Tuesday, March* 12.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## PAISLEY PARISH COUNCIL *v.* GLASGOW AND ROW PARISH COUNCILS.

*Process—Appeal—Sheriff—Value of Cause—Continuing Liability—Competency—Sheriff Court Act* 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 22.

The Sheriff Court Act 1853 enacts, section 22—"It shall not be competent . . . to remove from a Sheriff Court or to bring under review of the Court of Session . . . any cause not exceeding the value of £25 sterling."

*Held* that a cause in which only £11, 2s. and interest was sued for, but the decision in which would govern the chargeability for the future until another settlement were established of a pauper, a wife deserted by her husband, was open to appeal to the Court of Session.

On October 28, 1905, Paisley Parish Council brought an action in the Sheriff Court at Glasgow against the Parish Councils of Glasgow and of Row, praying the Court "to ordain the defenders to free and relieve the pursuers of the advances made and to be made by the pursuers to or on account of Elizabeth Craig Logan or Wright, a pauper, sometime residing at 16 New Stock Street, Paisley, and now at 7 Park Avenue there, and that by paying to the pursuers (*first*) the sum of £11, 2s. sterling, with the legal interest thereon from the 24th day of January 1905 till payment, or at least the legal interest on the various advances which go to make up said sum from the respective dates of disbursement thereof, commencing as from said date till payment, and (*second*) all further sums which the pursuers may have to pay subsequent to the 31st day of October 1905 to or on account of the said Elizabeth Craig Logan or Wright, with the legal interest thereon from the dates of their respective payments till repaid; and to find the defenders liable in expenses."

On 23rd November the Sheriff-Substitute (FYFE) allowed a minute of restriction by the pursuers whereby they intimated that they did not press their claim under the second conclusion, reserving their right to claim in the future; and at the same time he closed the record.

The pursuers averred "(Cond. 7) By agreement among the parties this action has been brought in this Court of consent for the purpose of having the question of law at issue decided really as between the two defenders, and for the purpose of the pursuers obtaining relief from such of the defenders as may be found liable. It is admitted by all parties (*first*) . . .; and (*sixth*) that liability is upon one or other of the defenders, and that pursuers are entitled to relief as concluded for against one or other of them accordingly."

The answer to this by both defenders was "Admitted."

The Sheriff-Substitute having given decree against the parish of Row, and the Sheriff (GUTHRIE) having adhered, that parish appealed to the Court of Session.

Glasgow Parish objected to the competency of the appeal, and argued—The appeal was incompetent as the amount sued for was below £25—Sheriff Court Act 1853, sec. 22. It did not matter that as the petition was originally drawn it was of greater value, for it must be judged of at litis-contestation, *i.e.*, the closing of the record, all restriction prior to that time taking effect as at the raising of the action—*Cairns* v. *Murray*, November 21, 1884, 12 R. 167, 22 S.L.R. 116, *distinguishing Buie* v. *Stiven*, December 5, 1863, 2 Macph. 208. But as matter of fact the conclusion which was dropped was of no avail as it must have been refused — *Den* v. *Lumsden*, November 10, 1891, 19 R. 77, 29 S.L.R. 76. There was not necessarily involved an element of continuing liability so as to bring up the amount at stake above £25, the question being of actual, not possible, liability. That being so, the appeal could not be defended as being competent—*Macfarlane* v. *Friendly Society of Stornoway*, January 27, 1870, 8 Macph. 438, 7 S.L.R. 259; *Standard Shipowners Mutual Association* v. *Taylor*, June 24, 1896, 23 R. 870, 33 S.L.R. 647; *Parish Council of Stirling* v. *Parish Council of Perth*, June 10, 1898, 25 R. 964, 35 S.L.R. 735. The alleged breach of agreement with regard to the action (Cond. 7) did not exist since the agreement had nothing to do with the form of the action.

Argued for the appellants Row Parish Council—This action had been brought, as mentioned in Cond. 7, by agreement, and the form therefore must not be too strictly examined. It was really an action of declarator as to the chargeability of the pauper for so long as she remained chargeable. That was the question originally raised. Litiscontestation was when de-