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SECOND DIVISION.

JOHNSTONE'S TRUSTEES *v.* JOHNSTONE'S TRUSTEES.

Succession—Will—Husband and Wife—Mutual Settlement—Gift by Each Spouse to Other of Liferent of Estate on Survivance and to their Children of Residue—Revocability by Survivor.

A husband and wife, who had married in 1846 without an antenuptial contract, made in 1879 a mutual settlement by which each spouse gave to the other, in the event of survivance, the liferent of his or her estate, and agreed and declared that on the death of the survivor the whole residue of their estates should be divided equally among their children. The settlement reserved power to the spouses to alter or revoke its terms during their joint lives. The wife survived the husband and left a settlement which bore to revoke all previous *mortis causa* deeds executed by her. Questions might have arisen as to which of the spouses the property belonged to.

Held in a special case that the mutual settlement was contractual and so not validly revoked by the wife's subsequent settlement.

George Johnstone, tailor in Dalbeattie, married Margaret Bell in the year 1846. No antenuptial contract of marriage was entered into between the parties, and Margaret Bell had no estate at the date of her marriage. By lease in the year 1868 Mrs Copland, factor and commissioner for William Copland, Esquire of Colliston, set and in tack and assedation let to the said George Johnstone and Margaret Bell or Johnstone, in conjunct fee and liferent, and their heirs and assignees, certain subjects consisting of a house and piece of ground in the village of Dalbeattie and Stewartry of Kirkcudbright for the space of 999 years from and after the term of Whitsunday 1868. The lease, *inter alia*, narrated that the original tack, feu, or other right of said subjects had been lost; that the various transmissions thereof were supposed to be informal and inept; that Samuel Hyslop at Blackford assigned and disponed the subjects to the said George Johnstone and Margaret Bell or Johnstone and their heirs and assignees; and that the said George Johnstone and Margaret Bell or Johnstone had accordingly applied to the said factor and commissioner to grant the said lease. One half of the purchase price of the subjects was contributed by Mrs Johnstone out of funds received from her father.

In 1876 Mrs Johnstone succeeded to a share of the estate of her father, who died intestate. Mr and Mrs Johnstone did not at any time execute a mutual deed in terms of section 4 of The Married Women's Property (Scotland) Act 1881. On 3rd June 1878 Mrs Johnstone placed on deposit-receipt with the Union Bank of Scotland, Limited, the sum of £348, being part of her share of her deceased father's estate. This sum was uplifted and redeposited frequently between 1878 and the date of her death in 1905. Generally the accrued interest was added to the sum deposited, but on a few occasions that and a small portion of the capital was withdrawn. The deposit-receipts were invariably taken in the name of Mrs Margaret Bell, and the operations were always carried out by Mrs Johnstone personally. Both at the date of George Johnstone's death in 1902 and at Mrs Johnstone's death in 1905 the amount on deposit was £500.

On 17th April 1879 Mr and Mrs Johnstone executed a mutual disposition, assignation, and settlement, the material clauses of

which were as follows:—"We, George Johnstone, tailor in Dalbeattie, and Mrs Margaret Bell or Johnstone, spouses, having resolved to make the following settlement of our affairs, in case of the death of us or either of us, therefore I, the said George Johnstone, do hereby give, grant, assign, and dispone to and in favour of my said wife Margaret Bell or Johnstone, in case she shall survive me, in liferent for her liferent use allenarly, all and sundry lands and heritages, long leasehold subjects, goods and gear, debts and sums of money, household furniture and others, and in general my whole estate, heritable and moveable, real and personal. . . . And in like manner, I, the said Margaret Bell or Johnstone, do hereby give, grant, assign, and dispone to and in favour of the said George Johnstone, in case he shall survive me, in liferent for his liferent use allenarly, all and sundry lands and heritages, and in general my whole estate, heritable and moveable, real and personal. . . . And on the death of the longest liver of us, the said George Johnstone and Margaret Bell or Johnstone, we hereby each agree and declare that the whole remainder of our estates, heritable and moveable, or such part thereof as may not have been sold and used by the survivor of us in virtue of the powers hereinbefore conferred upon us, shall be disposed of as follows:—We hereby bequeath . . . and the free residue shall be realised, and the free proceeds thereof shall be equally divided as soon as practicable among our children, viz. [*naming them, being ten in number*], and the survivors and survivor of them: Declaring always that the lawful issue of such of our said children who may predecease shall be entitled to their parent's share: And for the purpose of carrying these presents into full effect, we do hereby nominate, constitute, and appoint . . . to be our executors and the executors of such one of us as shall predecease. . . . And we revoke and recal all settlements and deeds *mortis causa* heretofore executed by us or either of us, and we declare the same null and void, and we hereby reserve to ourselves full power to alter or revoke these presents during our joint lives, . . . And finally we nominate and appoint said executors, and the acceptors or acceptor, survivors or survivor, of them to be trustees for carrying these presents into full effect, with all the usual powers competent to that office by the law of Scotland. . . ."

Mr Johnstone died on 31st December 1902.

Mrs Margaret Bell or Johnstone did not succeed to any estate after the death of her husband, and had no income other than that derived from the estate which existed at his death. She died on 24th August 1905.

By trust-disposition and settlement dated 11th June 1900 Mrs Johnstone conveyed to trustees her whole estate in trust for certain purposes, and, *inter alia*, for the payment of certain legacies and the division of the residue among five of the ten children.

Questions having arisen as to whether one-half of the said leasehold subjects and the sum in the said deposit-receipt, or either of them, formed part of the estate of Mrs Johnstone, and were carried by her said trust-disposition and settlement, a special case was presented.

The parties to the case were (1) John Prentice and others, the trustees under the mutual settlement of 1879, *first parties*; and (2) James Mackenzie and others, the trustees of Mrs Johnstone, *second parties*.

The first parties maintained (1) that in virtue of the destination in said lease the said George Johnstone was sole fiar of said leasehold subjects; (2) that the whole moveable estate of the said Mrs Margaret Bell or Johnstone was conveyed to the said George Johnstone *jure mariti;* and (3) that in any event the said Mrs Margaret Bell or Johnstone had no power to revoke the said mutual settlement in so far as it was intended to convey estate belonging to her, and that they were entitled to possession of any estate left by her to be administered under said mutual settlement.

The second parties maintained that one-half of the said leasehold subjects in Dalbeattie belonged to the said Mrs Margaret Bell or Johnstone, and fell to be administered by them under the said trust-disposition and settlement along with all the moveable estate to which they had confirmed, viz., the cash in the house, the household furniture and other effects belonging to the deceased, and the deposit-receipt with accrued interest.

The *questions of law* stated for the opinion and judgment of the Court were as follows:—"1. Was the said George Johnstone sole fiar of the said leasehold subjects? 2. Did the sum due in the said deposit-receipt at the date of the said George Johnstone's death form part of his estate? In the event of the first or second question being answered in the negative, 3. Was the said mutual disposition, assignation, and settlement validly revoked by the said Mrs Margaret Johnstone's trust-disposition and settlement *quoad* her property?"

On the suggestion of the Court during the hearing it was agreed to delete "*quoad* her property" at the end of question 3.

On the question of revocability the following authorities were cited for the first parties:—*Kidd* v. *Kidds*, December 10, 1863, 2 Macph. 227; *Mudie* v. *Clough*, July 17, 1896, 23 R. 1074, 33 S.L.R. 775; *Craich's Trustees* v. *Mackie*, June 24, 1870, 8 Macph. 898, 7 S.L.R. 571; *Croll's Trustees* v. *Alexander*, June 13, 1895, 22 R. 677, 32 S.L.R. 535; *Robertson's Trustees* v. *Bond's Trustees*, June 28, 1900, 2 F. 1097, 37 S.L.R. 833.

For the second parties *Traquair* v. *Martin*, November 1, 1872, 11 Macph. 22, 10 S.L.R. 36, was cited.

LORD LOW—The first and second questions which are put in this special case raise points of considerable difficulty on which I should not be prepared to express an opinion without further consideration.

But the third question appears to me to raise a sufficiently clear issue, and in the view I take of it the answer to that question will be sufficient to dispose of the special case.

The point raised by the third question is whether the mutual disposition, assignation, and settlement of 17th April 1879 was validly revoked by a settlement which Mrs Johnstone subsequently made.

Looking to the circumstances under which the mutual settlement was executed, to the facts that no antenuptial marriage contract had been entered into between the spouses, and that the whole funds possessed by them were in a position which might well have given rise to questions after their death, it was very natural that they should have come to an agreement as to the disposal of their joint estate. That in my opinion is what they actually did. Each spouse agreed to give the liferent of his or her estate to the other in the event of survivance. It is not disputed that that was a remuneratory arrangement which amounted to a contract. Then the spouses agreed and declared that on the death of the survivor the whole residue of their estates should be divided equally among their ten children. It was argued that that provision was purely testamentary and could be revoked by either spouse *quoad* his or her estate. If the gift of the residue had been to strangers it might very well have been regarded as being only testamentary, but it is different when the object of the gift was to provide for the children of the marriage. That is a matter upon which it is natural and customary that spouses should come to an agreement, and I regard the whole settlement as being a family arrangement which neither of the spouses could revoke without the consent of the other. It is, further, not without significance that the words of the settlement are that the parties "agree and declare" that the residue shall be divided among the whole children. Accordingly, I think that we should answer the third question in the negative.

LORD ARDWALL—I agree. The point raised by the third question is whether the mutual settlement executed by Mr and Mrs Johnstone on 17th April 1879 was contractual or merely testamentary. I have no doubt that it was contractual and could not be revoked except by the joint act of the spouses during their lifetime. No such joint revocation was made. The position of the heritable and moveable estates in question at the said date was that the heritable subjects were held under a 999 years' lease, and, though I do not wish to express an opinion on the matter, would appear to have been vested in the husband, while the sum to which the wife succeeded as the share of the estate of her father fell under her husband's *jus mariti*, subject to his making reasonable provision for her maintenance if a claim therefor were made on her behalf, as provided for by the Conjugal Rights Amendment Act 1861, section 16. Now reasonable provision was made by the mutual settlement, by which in short the spouses settled their whole affairs *inter se*, each conferring some benefit on the other, and both departing from their strict legal rights. That being so, it is, I think, vain to contend that the settlement could be revoked by the survivor. I therefore agree that the third question should be answered in the negative, but I think the words "*quoad* her property" at the end of the question should be omitted. In this view of the case it becomes unnecessary to answer the first and second questions.

The LORD JUSTICE-CLERK concurred.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

. . . "Answer the third question of law as amended in the negative, and find it unnecessary to answer the first and second questions." . . .

Counsel for the First Parties—Chree—W. T. Watson. Agents—Cameron & Orr, S.S.C.

Counsel for the Second Parties—J. A. T. Robertson. Agent—Gilbert Tweedie, W.S.

Tuesday, October 15.

FIRST DIVISION.

[Sheriff Court at Glasgow.

KIRKWOOD & SONS *v.* THE CLYDESDALE BANK, LIMITED, AND ANOTHER.

Bank—Bill of Exchange—Cheque—Cheque Presented after Death of Drawer—Intimated Assignation—Right of Bank to Strike a General Balance over All Drawer's Accounts in Computing Funds Available—Bills of Exchange Act (45 *and* 46 *Vict. cap.* 61), *secs.* 53 (2), 73, *and* 75.

A customer of a bank, having a current account, and also several loan and cash accounts which were in various ways secured, drew for value a cheque, and died before it was presented for payment. On its being presented the bank refused payment on the ground of the customer's death, and subsequently in defence to an action maintained that they had no funds available. At his death the customer had in his current account a sufficient credit balance to meet the cheque, but at the other accounts large debit balances, and a debit balance on a general accounting.

Held that while the cheque on being presented operated under the Bills of Exchange Act 1882, sec. 53 (2), as an assignation of any funds available in the hands of the bank, the bank was entitled, in calculating whether there were any funds available, to take a balance of the customer's whole ac-