Tuesday, October 27.

FIRST DIVISION.

[Lord Dundas, Ordinary.

CRAWFORD'S TRUSTEES *v.* CRAWFORD'S TRUSTEES & OTHERS.

Succession—Mutual Settlement—Power to Revoke.

A husband and wife executed a mutual settlement by which they conveyed their whole means and estate to the survivor, and on the death of the survivor to trustees for behoof of the grand-nieces of the female spouse. The deed contained this clause—"And we reserve our respective liferents of the means and estate above conveyed, with power to alter, innovate, or revoke these presents at pleasure." After his wife's death the husband executed a trust-disposition and settlement, by which he expressly revoked all previous settlements made by him, including the said mutual settlement, and disposed of the estate in a different manner.

Held that the provisions of the mutual settlement were not contractual, that the husband was therefore entitled to revoke, and that the ultimate destination in the mutual settlement in favour of the grand-nieces had been effectually defeated by his settlement.

On 8th June 1907 David H. Jack, accountant, Glasgow, and others, the trustees acting under (1) a trust-disposition and settlement executed by the late Rev. Matthew Crawford, 18 Carrick Park, Ayr, dated 9th December 1902, and codicil thereto dated 25th May 1904, and (2) a mutual trust-disposition and settlement executed by the said Matthew Crawford and Mrs Janet Drife or Crawford, his wife, dated 22nd August 1894, and codicil thereto dated 15th October 1896, raised an action of multiplepoinding and exoneration against (1) the said David H. Jack and others, as the trustees acting under the mutual settlement; (2), (3), and (4) Mrs Annie Pearson or Black or Pearson, wife of J. H. Pearson, warehouseman, London, and her daughter Miss Janet Crawford Black, and Miss Elizabeth Bennett Black, the ultimate beneficiaries under the mutual settlement; and (5) the Rev. Dr M'Crie and others, representing the United Free Church of Scotland, beneficiaries under Mr Crawford's settlement of 1902.

The following narrative is taken from the opinion, *infra*, of the Lord Ordinary (DUNDAS)—"The question raised in this multiplepoinding is whether or not the now deceased Rev. Matthew Crawford had power to revoke in whole or in part a trust-disposition and settlement executed by him and his wife, who predeceased him, dated 22nd August 1894, and with relative codicil, dated 15th October 1896, recorded in the Sheriff Court Books of Lanarkshire 20th January 1897. Mrs Crawford died on 4th December 1896. Mr Crawford died on 17th February 1905. He left a trust-disposition and settlement, dated 9th December 1902, and relative codicil, dated 25th May 1904. By the said settlement Mr Crawford professed to 'revoke and recall all previous settlements made by me, including the mutual settlement made by me and my late wife Janet Drife or Crawford.'

"By the said mutual settlement the spouses, 'for the purpose of settling our affairs and providing for the disposal of our means and estate after our decease,' assigned, disponed, and conveyed to and in favour of the survivor of them all and sundry the whole means and estate, heritable and moveable, real and personal, of whatever nature and denomination or wheresoever situated, which should belong and be owing and indebted to them respectively at the time of their death; 'and on the death of the longest liver of us, we dispone, convey, and make over all and sundry the whole means and estate of which we may die possessed to' trustees named. The trust purposes, after provision for payment of debts and expenses, were (*second*) that the trustees should hold and apply the whole free residue and remainder of the said estate, and should pay the free income and revenue therefrom to Mrs Black, therein designed, to be expended by her towards the education and upbringing of her daughters Janet and Elizabeth until they respectively attained the age of twenty-one years; (*third*) on the youngest of said children attaining majority, Mr and Mrs Crawford directed their trustees to divide the fee or capital of their said means and estate equally among the said children of Mrs Black, share and share alike, the lawful issue of a predeceasing child being entitled to take their parent's share; (*fourth*) in the event of the death of said children before the period of division, the trustees were directed to pay the free income and produce of said means and estate to Mrs Black, and upon her death to pay the residue of the trusters' said means and estate to the treasurer for the time being of the United Presbyterian Church of Scotland for behoof of objects specifically described. The following clause occurs later — 'And we reserve our respective liferents of the means and estate above conveyed, with power to alter, innovate, or revoke these presents at pleasure.' By the said codicil, dated 15th October 1896, the said spouses, 'in terms of the powers reserved to us in the foregoing settlement,' cancelled the appointment of one of their trustees, and named another in his stead, and made certain specific bequests of moveables.

"By his said trust-disposition and settlement, dated in 1902, Mr Crawford assigned and disponed to trustees (who are the same gentlemen as the trustees surviving and acting under the settlement of 1894) the whole means and estate, of whatever kind, which should belong and be indebted and owing to him at the time of his death, for the purposes therein set forth. By the third purpose the trustees were directed to hold for behoof of the said Janet and Elizabeth Black the sum of £800, which should be paid to them in equal portions, on the

youngest of them attaining majority, and by the fourth purpose the trustees were directed to pay over the whole residue and remainder of the testator's estate to the treasurer for the time being of the United Free Church of Scotland, to be devoted to objects described in the settlement. As already stated, the testator further revoked and recalled all previous settlements made by him, including the said mutual settlement. By the said codicil, dated 25th May 1904, Mr Crawford revoked and recalled the provisions in his settlement of 1902 in favour of Janet and Elizabeth Black, and in lieu thereof directed his trustees to hold for behoof of these ladies the sum of £150 each."

Claims were lodged by (1) the Misses Black, who maintained that Mr Crawford had no right to revoke the mutual trust-disposition and settlement, and claimed, *inter alia*, to be ranked and preferred to the whole fund *in medio*; and (2) the Rev. Dr M'Crie and others, official representatives of the United Free Church, who maintained that Mr Crawford's settlement effectually revoked the mutual settlement, and claimed, *inter alia*, (1) "to be ranked and preferred to the whole fund *in medio* after deduction of the debts, expenses, and legacies for which provision is made in his settlement and relative codicil."

On 21st December 1907 the Lord Ordinary pronounced an interlocutor, *inter alia*, finding that Mr Crawford had no power after his wife's death gratuitously to revoke or alter the provisions in the mutual trust-disposition and settlement.

Opinion.—" . . . [*After the narrative ut supra*] . . . The question in the present competition arises between the Misses Black, on the one hand, and the official representatives of the United Free Church, on the other hand. It appears that Mrs Black, the mother of Janet and Elizabeth Black, is the only niece of Mrs Crawford, and her sole next-of-kin and heir in heritage. The nett estate as at Mr Crawford's death is said to amount to over £2100. The claimants are not at one as to how much of this sum represents the estate of Mrs Crawford at her death. For the Misses Black it is maintained that Mrs Crawford's estate amounted to £1196, 12s. 3d., and this sum appears in the confirmation of her executors. The United Free Church, on the other hand, maintain that only £200 or thereby of the said sum truly belonged to Mrs Crawford; that the greater part of the items entered in the said confirmation 'was money which belonged to her husband, and was invested by him in her name,' and that 'this money, in any view, constituted a *donatio inter virum et uxorem*, and was impliedly revoked by Mr Crawford's said settlement.' I am not satisfied that these averments are sufficiently specific to be remitted to probation; but, for reasons which I shall presently state, I do not think that I require to determine that question.

"The cardinal matter, in a case of this kind, is to arrive at the intention of the parties, as it may be ascertained upon a just construction of the language of the instrument under consideration. Where there is a mutual settlement, under which each party gives and receives onerous consideration, the deed usually becomes irrevocable after the death of the predeceaser. And though the survivor may be fiar, and in a position to dispose of the estate *inter vivos*, it may yet be the result of the settlement that what he leaves at his death goes, as matter of contract, to the beneficiaries, mutually named therein. One must always have regard to the language and presumed intention of the deed as a whole; and it is important to notice, *inter alia*, what the parties say as to the matter of revocation. Upon consideration of the trust-disposition executed by Mr and Mrs Crawford, I am of opinion that the surviving husband had no power to revoke or alter its provisions, as by his own later settlement he professed to do. The terms of the instrument of 1894 are, to my mind, clearly pactional and contractual. The estates of the spouses are massed and given to the survivor of them, and, on his or her death, to trustees for purposes designed by them both. The parties reserve 'power to alter, innovate, or revoke these presents at pleasure.' I read these words, in conjunction with the language of the deed as a whole, as importing a power of joint revocation. It was argued that the words just quoted are immediately preceded by a reservation of 'our respective liferents of the means and estate hereby conveyed'; and that the word 'respective' must be held to import a power to the survivor to revoke the settlement. I cannot accept the suggested construction. The reservation of the liferents appears to be a not uncommon clause of style, and I suppose was introduced as such; but the introduction of the word 'respective' is not, in my opinion, strong enough *per se* to overcome the presumption that a provision stipulated in the settlement by the predeceasing spouse on behalf of her relatives is not revocable after her death by the husband, who had the use and enjoyment of the massed estate during his survivorship. Nor do I think that, even assuming (as was argued to me on behalf of the Church) that the wife's estate amounted only to £200 or thereby, the character of the settlement as a mutual and onerous one would be impaired or destroyed. I observe that in the case of *Wood*, 1823, 2 S. 549, the wife's separate estate was only £100, while the joint estate at the date of her death (predeceasing her husband) amounted to £1650, more than sixteen times the value of her original estate. Yet her husband, having survived her and remarried, was not permitted by the Court to defeat (by a postnuptial marriage-contract) the rights of his first wife's executors under the mutual settlement. In *Corrance's Trustees*, 1903, 5 F. 777, a husband was held not entitled to revoke, by *mortis causa* deed, provisions made in a prior mutual settlement between him and his wife, who had predeceased him, although it appears from the report that she had no separate estate

of her own. In the present case there is no need to push the doctrine of mutual consideration so far; for Mrs Crawford's estate amounted, even at the lowest estimate, to the not unsubstantial sum of £200. The position of Mr Crawford, after his wife's death, was, I take it, that he could use and consume during his lifetime the capital of the joint estate, but that, in so far as extant at his death, it was subject to the trust purposes of the mutual settlement, which were not (at all events so far as conceived in favour of his wife's relatives) liable to defeat by any *mortis causa* disposition on his part.

"I was favoured at the discussion in the Procedure Roll with a copious reference to authorities. Some of these require, I think, a certain amount of notice. The case of *Davidson's Trustees*, 1870, 8 Macph. 807, was strongly relied upon by counsel for the Church; but it does not in my judgment support his argument. There was there a mutual settlement by spouses conferring upon the survivor right to possess and inherit all the property that might belong to them at the death of the predeceaser; and providing that on the death of the survivor the residue of all that was left should go to the daughter of the wife by a former marriage and her daughter. These ladies survived the husband but predeceased the wife. The rubric bears that it was held that the provision in their favour was a mere substitution which was effectually defeated by a testament executed by the widow, and it was questioned by the Court whether their death in his lifetime did not of itself evacuate the substitution. It may be noted that there was in that case no machinery by way of a trust as there is in the present case. But it is, I think, enough to observe that the true *ratio decidendi* (or at all events a sufficient one) seems to be that particularly expressed by Lord Deas (p. 810) where he says—'If it appears that the burden or condition sought to be enforced against the survivor was stipulated for by the predeceaser himself, either absolutely or in the event of survivance, that will generally be a case for giving effect to the burden or condition. But here there is no such mutuality. The only burden or condition stipulated for is one which must be presumed to have been stipulated for by the wife in favour of certain of her own relations, and which it would be unreasonable to suppose she meant to be compulsory on herself if she was the survivor, so that she could bequeath nothing even to her own relations with the exception of the two named in the mutual will. The question is really one of intention, and I cannot hold that such was the intention of the parties. I give no opinion as to what might have been the result had the husband been the survivor.' I think the case of *Craich's Trustees*, 1870, 8 Macph. 898, more nearly resembles the present than that of *Davidson*. *Wood's* case (already referred to, which was quoted with approval but distinguished in *Davidson's* case) and *Corrance's Trustees* (above cited) are also cases where the joint estates were given to the survivor as here. In *Corrance's Trustees* I observe that the Lord Ordinary (Kyllachy) said in his judgment, which was adhered to by the Second Division—'The important consideration I think is that these provisions conferred benefits (benefits defeasible no doubt by *inter vivos* deed, but yet otherwise, if I am right, indefeasible) not upon the wife herself but upon third parties who are her relations, and I see no sufficient grounds nor do I think there is any authority for extending the doctrine of the revocability of donations between spouses to provisions of that description. The cases of *Kidd* v. *Kidd*, 2 Macph. 227, and *Kerr*, 11 Macph. 780, seem to me to be sufficient to support this conclusion.' I may also notice *Gentles*, 1826, 4 S. 749, a case of postnuptial marriage contract referred to by Lord Deas in *Davidson* (*sup. cit.*) as useful and instructive. It may be proper to subjoin a note of other cases cited during the discussion, though I do not think it necessary to refer specially to any of them—*Hogg*, 1863, 1 Macph. 647; *Lang*, 1867, 5 Macph. 789; *Melville*, 1879, 6 R. 1286; *Beattie's Trustee*, 1884, 11 R. 846; *Nicoll's Executor*, 1887, 14 R. 384; *Kyd* (*Kay's Trustee*), 1892, 19 R. 1071; *Robertson*, 1900, 2 F. 1097; *Denholm's Trustees*, 1907 S.C. 61, and later November 29, 1907, 15 S.L.T. 589; *Denyssen*, 1872, L.P. 4 Priv. Co. 236; *Dufaur*, 1769, 1 Dickens 219.

"For the reasons which I have now stated I think that Mr Crawford had no power after his wife's death to revoke the mutual settlement, and that the claim for the United Free Church is ill-founded and ought to be repelled. . . . . .

"I propose at this stage to pronounce findings embodying the opinion which I have expressed, and to grant leave to reclaim."

The claimants, Dr M'Crie and others, reclaimed, and argued—The Lord Ordinary was in error in thinking that mutual settlements were presumably irrevocable; the presumption was the other way. They were testamentary deeds, and therefore presumably revocable—M'Laren on Wills, i, 421-2. There was nothing in this mutual settlement to suggest that it was contractual *quoad* the ultimate destination. The mutuality ceased with the disposal of the fee to the survivor. The ultimate beneficiaries were not near relatives of the spouses; they were the grand-nieces of Mrs Crawford. There was no *jus quæsitum* in their favour. A limited power to revoke did not exclude the common law presumption that the survivor had power to revoke—*Corrance's Trustees* v. *Glen*, March 20, 1903, 5 F. 777, *per* Lord Kyllachy (Ordinary) at p. 780, 40 S.L.R. 526. The clause of reservation was wide enough to include revocation by the survivor—in any event, it was not so clear as to exclude it—*Davidson and Others* v. *Mossman*, May 27, 1870, 8 Macph. 807, 7 S.L.R. 498. Power to revoke would not be excluded save by clear and distinct words of exclusion—*Nicoll's Executors* v. *Hill*, January 25, 1887, 14 R. 384, *per* Lord Craighill at p. 393, 24 S.L.R. 271. There was no such evidence of contract here as

there was in *Robertson's Trustees* v. *Bond's Trustees*, June 28, 1900, 2 F. 1097, 37 S.L.R. 833. In any event Mr Crawford was entitled to revoke *quoad* his own share.

Argued for respondents (the Misses Black, claimants)—The Lord Ordinary was right. The mutual settlement was a joint deed, and such deeds were presumably irrevocable after the death of one of the parties—*Hogg and Others* v. *Campbell and Others*, 1863, 1 Macph. 647, at pp. 658-9. The spouses had dealt with their estates as one whole, as in fact a joint estate. That was apparent from the expressions used, *e.g.*, "our estate." That implied irrevocability—*Craich's Trustees* v. *Mackie and Others*, June 24, 1870, 8 Macph. 898, 7 S.L.R. 571. So did the existence of a trust. The reservation of power to revoke meant a joint power, and that could not be exercised. Reference was also made to *Wood* v. *Fairley*, December 3, 1823, 2 S. 549 (N.E. 477).

LORD PRESIDENT—The sole question here is whether the Rev. Matthew Crawford had power to revoke a mutual settlement executed by him and his wife. The scope of the matter is contained in the settlement by which he and his wife disponed to the survivor their whole means and estate, "and on the death of the longest liver of us," to certain trustees for behoof of the beneficiaries therein mentioned who were the grand-nieces of the female spouse. The only other clause of importance is as follows:—"And we reserve our respective liferents of the means and estate above conveyed, with power to alter, innovate, or revoke these presents at pleasure."

There have been a vast number of cases on the subject and the general rules of the matter are well settled. As a rule a mutual will is just two wills written in one, and wills are by nature revocable. But a mutual will may be so expressed as to show that its provisions were meant to be matter of contract between the spouses, and if there is contract then it must be respected. There is, however, a distinction arising, *ex natura rei*, between provisions in favour of the spouses and their children, and provisions in favour of third parties. It is much easier to suppose that stipulations in favour of the spouses themselves are of the nature of contract than stipulations in favour of third parties. The reason of that is based on a fact of human nature, namely that a person is supposed more readily to look after his own interests than after those of another. But this consideration does not carry one very far, for it is quite open to testators to make provisions in favour of third parties. I do not think the matter can be advanced further than is stated by Lord M'Laren in his work on wills, where he says (i, p. 423)—"With respect to settlements in which the rights given to heirs of the destination are contractual, the best illustration is the case of one of the spouses making a provision for the heirs of the other. The contract in each case must be found in the words of the instrument, and no general rules can be given." I entirely assent to what is there laid down, and think the whole matter turns on the instrument itself.

Now I do not find anything in this will which suggests contract *quoad* the eventual interests of the grand-nieces, for in the first place it is not so expressed, and in the second place there is no trust until the death of the surviving spouse. In other words, if you wanted to make provision for the grand-nieces after the death of the spouses, the proper way would have been to create a trust at the death of the first spouse. Further, the will proceeds to give the surviving spouse the fee of the whole estate. That is not a good start, so to speak, for the view that the settlement was intended to be contractual. It is also material to notice that the ultimate beneficiaries are not children of the marriage but the grand-nieces of the lady. Now if the will is contractual *quoad* the one spouse, it is also contractual as regards the other, and if the lady had been the survivor she would have found in that case that her estate was tied up in favour of her own relatives. I confess I am unable to find in the language of this deed anything pointing to contract, and accordingly I think the only clause of materiality is the clause reserving power to revoke, the words of which I have already quoted. Not because the clause is in itself evidence of revocability, but because from its phraseology one may, or may not, infer that the rights given were contractual.

I think the sentence which was read to us from the opinion of Lord Kyllachy in the case of *Corrance's Trustees*, 5 F. 777, at p. 780, is a correct statement of the law, viz., "that it is well settled that without words expressly contractual a mutual settlement may be read as upon its just construction wholly or partly contractual; and that that character may extend not only to the provisions in favour of the parties themselves, but also to the provisions which they make as to the ultimate disposal of the estate—in other words, although the survivor may be fiar and in a position to dispose of the estate *inter vivos*, it may yet be the result of the deed that what he leaves at his death goes as matter of contract to the beneficiaries named by the mutual settlement. And this may be inferred, *inter alia*, from clauses restrictive of revocation which are so expressed as to be unequivocally referable to the ultimate dispositions under the mutual deed." Accordingly I ask myself this—Is the clause in question so framed as to be unequivocally referable to the ultimate destination in the mutual deed? The clause itself is difficult to understand. I do not say that it is a bungled clause, but it contains words which are merely words of style, and words of style are often inappropriate to the matter in hand. It begins—"And we reserve our respective liferents of the means and estate above conveyed." That on the face of it is nonsense, for nothing was conveyed save on the death of the spouses, and you cannot reserve a liferent of what you have not conveyed. Then it goes on, "with power to alter, innovate, or revoke these presents at pleasure,"

—if that means that the spouses may revoke during their joint lives, it is futile, for they already had power to do so. Accordingly it seems to me that however this clause is regarded, it is impossible to hold that it is unequivocally referable to the ultimate disposition in the mutual deed. A proper illustration of that class of thing is to be found in the case of *Corrance* (*cit. sup.*), where there was a clause providing that the survivor might revoke *quoad* the one-half destined to his or her relatives respectively. All that is absent here. I think therefore there was a power in the survivor of the spouses to revoke the provisions which had been made in favour of the ultimate beneficiaries, and that Mr Crawford was within his right in doing so. I am therefore for sustaining the claim of the United Free Church.

LORD KINNEAR—I am of the same opinion.

LORD MACKENZIE—I agree.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court recalled the Lord Ordinary's interlocutor and sustained the first alternative claim for the reclaimers.

Counsel for the Pursuers and Real Raisers—W. Thomson. Agents—Balfour & Manson, S.S.C.

Counsel for the Claimants the Rev. Dr M'Crie and Others (Reclaimers)—Macphail—Dunbar. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Claimants the Misses Black (Respondents)—W. Thomson—Candlish Henderson. Agents—Balfour & Manson, S.S.C.

HOUSE OF LORDS.

Thursday, December 3.

(Before the Lord Chancellor (Loreburn), Lord Robertson, and Lord Collins.)

INLAND REVENUE *v.* EARL OF BUCHAN.

(In the Court of Session, March 20, 1907, 44 S.L.R. 572, and 1907 S.C. 849.)

Revenue—Succession Duty—Entail—Propulsion, with Subsequent Disentail—Succession Duty Act 1853 (16 *and* 17 *Vict. cap.* 51), *sec.* 15.

The Succession Duty Act 1851, sec. 15, enacts—"Where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

An heir of entail in possession of an entailed estate under an entail dated prior to 1848, in 1872 transferred his interest to his son, the next heir, born subsequent to 1848 and not yet twenty-five, for the purpose of certain family arrangements with a view to borrowing money. In 1875, on the son's attaining twenty-five, the father and son applied for power to disentail, and disentailed. The son continued to possess the estate, and in 1905 the Crown claimed Succession Duty in respect of the succession on the father's death, which had occurred in 1898.

Held that, under section 15 of the Succession Duty Act 1853, succession duty was exigible.

This case is reported *ante ut supra.*

The Earl of Buchan, defender (respondent in the Court of Session), appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This is one of those cases in which a conclusion seems clear as soon as the real significance of the facts is appreciated. We have to consider whether or not duty is payable on a succession under the Act of 1853, an Act which is so framed as to cover the system of disposition both of England and Scotland. The language of the Act is framed for that purpose, and must be construed, as has been pointed out by authority, so as to meet the substance of each case that arises.

Looking at the substance, and avoiding technical terms, what happened was as follows—Lord Buchan was entitled to enjoy these properties during his life. Whether he held in fee, though under fetters, or for an estate for life as understood in England, seems to me to signify nothing. His eldest son, Lord Cardross, was entitled to enjoy them after his death, and others also were, or would be, entitled to succeed Lord Cardross in due course, according to the entail. In these circumstances, Lord Buchan, during his lifetime, in 1872, transferred, by a process admittedly valid under Scottish law, his interest to Lord Cardross, for the purpose of making provision by the raising of money to meet debts and incumbrances. Part of the family arrangement was that when Lord Cardross reached the age of twenty-five he should disentail these properties. This he did in 1875, with the concurrence of Lord Buchan. Thenceforth Lord Cardross enjoyed the properties. If he did not alter the destination, then they would descend under the original entail to the persons destined by the entail. He did not alienate them, if that matters. In 1898 Lord Buchan died and the Crown claimed that Succession Duty was payable on that death. In my opinion the Crown is right in that contention.

Had there been no transfer in 1872, beyond question there would have been duty payable on a succession when Lord Buchan died. And it seems to me that section 15 of the Act of 1853 provides in unmistakable terms that the duty shall be paid notwithstanding the transfer. The title of Lord Cardross was accelerated by the surrender