I think that if that question had occurred before the action was instituted it is impossible to suppose that the County Council would not have been ready to hear the defenders. As the question was not raised till after this action had been brought they might have been quite entitled to insist on obtaining a judgment or admission at that stage if they had given due notice before raising their proceedings. But as the defenders had been deprived of their statutory opportunity for objecting they were still entitled to be heard as to the methods they were using for rendering the discharge harmless at the time when the pursuers refused to hear them.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the cause, find that the pursuers have failed to give the defenders written notice of their intention to proceed in terms of the statute: Find in law that the defenders are entitled in respect of want of notice to object to the competency of the proceedings; of consent of the defenders sist process *in hoc statu*, to allow the pursuers, if so advised, *de novo* to give the defenders written notice of the pursuers' intention to take proceedings against them under the said statute, reserving to the defenders their whole rights and pleas under the said statute and at common law: Find the defenders entitled to the expenses of the debate in the Summar Roll, and remit the account thereof to the Auditor to tax and to report, and *quoad ultra* reserve the question of expenses."

Counsel for the Pursuers—Clyde, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.—James A. B. Horn, S.S.C.

Counsel for the Defenders the Oakbank Oil Company, Limited—Ure, K.C.—A. Moncrieff. Agents—Drummond & Reid, W.S.

Counsel for the Defenders the Pumpherston Oil Company, Limited—Ure, K.C.—Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Defenders the United Collieries, Limited—Ure, K.C.—M'Lennan. Agents—Drummond & Reid, W.S.

Friday, March 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CORRANCE'S TRUSTEES *v.* GLEN AND OTHERS.

Succession—Mutual Settlement by Spouses—Revocability by Survivor—Pactional or Gratuitous—Husband and Wife—Donation inter virum et uxorem.

A husband and wife by mutual settlement bequeathed the estate of the predeceaser to the survivor, and on the death of the survivor mutually assigned and disponed the whole estate of the survivor to trustees, directing them to pay and apportion one-half of the residue to certain relations of the husband and the other half to certain relations of the wife. Power was reserved to revoke or alter during their joint lives with mutual consent, and power was reserved to the husband and wife respectively, each by himself or herself alone, to alter or revoke the bequest of the one-half of residue bequeathed to his or her respective relations, and to dispose of the same as he or she respectively might think fit. The wife having predeceased and the husband having married again, the husband made a trust-disposition and settlement by which he gave a liferent of the residue to his second wife if she survived and postponed the division of the half of residue bequeathed to the first wife's relatives until the death of the second wife. He revoked all testamentary writings by himself or his first wife, and also all donations to her. The husband having predeceased the second wife, *held* that the clauses of the mutual settlement settling the extent to which the spouses, together or each separately, should have a power of revocation were pactional; that the husband could not by his trust-disposition and settlement effectually alter the provision in favour of the first wife's relatives; and that they were entitled to half of the residue upon the death of the husband.

On 23rd February 1891 Andrew Corrance, Blairgrove, Coatbridge, and his wife Mrs Janet Glen or Corrance, executed a mutual general trust-disposition and settlement. Thereafter, his wife having predeceased him, Andrew Corrance executed a trust-disposition and settlement, and the question in the present case was whether a certain provision in the latter deed which affected the provisions contained in the former was valid and effectual.

The mutual settlement executed by Mr and Mrs Corrance was, *inter alia*, in the following terms:—"We, Andrew Corrance and Mrs Janet Glen or Corrance, spouses, both residing at Blairgrove, Coatbridge, for the settlement of the succession to our means and estate after our respective deaths, do hereby mutually assign, dispone,

and bequeath to the survivor of us the whole heritable and moveable estate which shall belong to the predeceaser . . . : Further, upon the death of the survivor of us we do hereby mutually assign and dispone to and in favour of John Noble [and others], as trustees and trustee for the purposes after mentioned, All and sundry the whole means and estate, heritable and moveable, real and personal, which shall belong to the survivor of us at the time of his or her decease [the trustees being nominated executors] . . . But . . . in trust for the following purposes:— . . . (*Lastly*) On the death of the survivor of us, or as soon thereafter as our trustees, having regard to the interest of our estate, may consider expedient, they shall realise and convert into money the residue of the means and estate belonging to the survivor of us, and shall divide the proceeds into two equal parts or shares: One of said parts or shares they shall apportion and pay equally to and among Daniel Corrance [and others nominatim] all brothers and sisters of me the said Andrew Corrance, [together with the children of two deceased brothers]: Declaring that should any of the said [brothers and sisters of Andrew Corrance] predecease the survivor of us leaving issue, such issue shall be entitled to the share to which their parent would have succeeded . . . The other of the said parts or shares the said trustees shall apportion and pay equally to and among Edward Glen, Thomas Glen, and Agnes Glen or Pettigrew, all brothers and sisters of me the said Janet Glen or Corrance, declaring that should any of the said Edward Glen, Thomas Glen, and Agnes Glen or Pettigrew predecease the survivor of us leaving issue, such issue shall be entitled to the share to which their parent would have succeeded . . . : And we reserve power during our joint lives, and with mutual consent, to revoke or alter these presents; and also power to the survivor of us to increase, diminish, or revoke (a provision in favour of a certain beneficiary, who was not one of the beneficiaries mentioned in the purpose quoted *supra*), and to appoint additional trustees, executors, tutors, and curators, or to recall the appointment of those hereby appointed or to be appointed in any codicil hereto, and also to increase or restrict the powers of administration and immunities hereby conferred, or which may hereafter be conferred, on them: And we also reserve power to me the said Andrew Corrance, by myself alone, at any time to alter or revoke the bequest of the one-half of the residue bequeathed to my brothers and sisters and their issue, and to dispose of the same or any part thereof in such other way as I may think fit: And in like manner we reserve power to me the said Janet Glen or Corrance, by myself alone, at any time to alter or revoke the bequest of the one-half of the residue bequeathed to my brothers and sister and their issue, and to dispose of the same or any part thereof in such other way as I may think fit: And we dispense with delivery."

Mrs Corrance died on 10th June 1895, and on 17th June 1896 Andrew Corrance entered into a second marriage with Janet Russell Whitelaw.

On 3rd March 1897 Andrew Corrance executed a trust-disposition and settlement whereby he assigned to the same trustees as were appointed in the mutual settlement "All and sundry the whole means and estate, heritable and moveable, real and personal, which shall belong to me, or which I shall have power to dispose of at the time of my decease . . . in trust always for the purposes following, viz. — . . . (*Second*) In the event of my decease survived by my wife Mrs Janet Russell Whitelaw or Corrance, my trustees shall . . . hold the residue of my means and estate, and shall pay the annual income arising therefrom to my said wife for her liferent alimentary use allenarly during all the days and years of her life so long as she remains my widow." Upon the death of the survivor of his wife and himself he directed his trustees to divide the residue of his estate into two equal parts, and out of one part to pay certain provisions which he made to his own brothers and the children of his then deceased sisters, and with regard to the other part he provided as follows:—"My trustees shall divide the same equally to and among Edward Glen and Thomas Glen, the brothers of my late wife Janet Glen or Corrance, or the survivor of them, jointly with the children then in life *per stirpes* of the late Agnes Glen or Pettigrew, sister of my late wife (the said children, and failing them their issue, being entitled equally among them to one share along with the said Edward Glen and Thomas Glen, or the survivor of them, and failing them their issue): Declaring that should either of the said Edward Glen or Thomas Glen predecease leaving issue, such issue shall be entitled equally among them to the share which their parent would have taken had he or she survived." The trust-disposition and settlement further contained the following clause:—"And I do hereby expressly revoke not only all testamentary writings executed by me or by my late wife Janet Glen or Corrance and me, but also all donations granted by me in favour of my late wife Janet Glen or Corrance."

Andrew Corrance died on 15th September 1901 survived by his second wife, and the present action of multiplepoinding was thereafter raised by the trustees under his trust-disposition and settlement against themselves as such trustees, and against William Glen and others, the children of Mrs Janet Glen or Corrance's then deceased brother Edward Glen, and her brother Thomas Glen, and others, her relatives who were beneficiaries under the mutual settlement above referred to.

Claims were lodged (1) for the trustees under Andrew Corrance's trust-disposition and settlement; and (2) for Thomas Glen and the children of the deceased Edward Glen.

The fund *in medio* was the whole estate left by Andrew Corrance.

The claimants Andrew Corrance's trustees averred that when the mutual settle-

ment was executed neither party was possessed of any estate, and they contended (1) That the testator was entitled to revoke the provisions contained in the mutual trust-disposition and settlement granted by him and his wife the said Janet Glen or Corrance, in respect the latter had at no time any separate estate, and that the said mutual trust-disposition and settlement was therefore purely gratuitous and testamentary on his part, and was a donation; and (2) that in any view the testator was entitled to alter the provisions of the said mutual trust-disposition and settlement to the extent of conferring a liferent of the residue of his estate on his second wife the said Mrs Janet Russell Whitelaw or Corrance, as being no more than a reasonable provision which he was entitled to make for her. These claimants claimed to retain the whole fund *in medio* to be held and administered by them in trust for the purposes mentioned in the trust-disposition and settlement granted by the testator dated 3rd March 1897.

The claimants William Glen and others averred that Mrs Janet Glen or Corrance had a considerable sum of money before her marriage; that after Andrew Corrance had been incapacitated by an accident for working as a miner he and his first wife with her savings started a restaurant, which was managed by her, and that owing to her previous experience and skill it was carried on successfully.

They maintained that after the death of his wife Janet Glen or Corrance the said Andrew Corrance had no power to dispose of or to affect the one-half of the residue of the estate disponed by the mutual trust-disposition, and therein bequeathed to the brothers and sister of the said Janet Glen or Corrance, and that the said trust-disposition executed after Mrs Corrance's death did not do so. They maintained that the provisions in the said mutual trust-disposition in favour of Mrs Corrance and her relatives were not gratuitous on the part of the husband, but that consideration had been granted by her therefor; and that the said provisions were therefore onerous, and could not be revoked by the said Andrew Corrance after the death of his wife. These claimants claimed their respective shares of one-half of the residue of the estate disponed by the mutual trust-disposition and settlement.

On 30th December 1902 the Lord Ordinary (KYLLACHY) repelled the claim for the trustees under Andrew Corrance's trust-disposition and settlement, and sustained the claim of the other claimants.

Opinion.—"This case raises a question of some difficulty. It belongs to a class as to which there have been numerous decisions, some of them perhaps difficult to reconcile except on the principle that the question in each case depends on the terms of the particular instrument. There are, however, some points which may perhaps be taken as settled.

"In the first place, it may perhaps be affirmed that where two persons, not being husband and wife, make a mutual settlement which gives the whole estate of the predeceaser to the survivor, and then proceeds to make a settlement for the survivor with a nomination of executors, and bequests or other dispositions, to take effect on the survivor's death, the presumption is very strong that the survivor (who by survivance is absolute fiar) has power to revoke just as if the ultimate dispositions had been his own. It may also be assumed that this presumption will not be excluded by the expression of a limited power to revoke, as for instance a power to revoke during the joint lives by mutual consent—the presumption being, unless the contrary is made quite clear, that this limited power applies only to the primary dispositions by each party to the survivor.

"On the other hand, it is however, I think, equally 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.

"This being so, if the present deed had been made between parties who were not husband and wife, as for instance between a brother and sister or a mother and daughter, I should not, I think, have had much difficulty in coming to the conclusion that there was here enough to exclude revocation by the surviving spouse. For there is here not only a reserved power to alter during the joint lives by mutual consent but an express definition of the power of revocation which shall be possessed by the surviving spouse, a definition which limits that power to the one-half of the residue going under a settlement to the survivor's relatives. It appears to me that this is, as matter of fair construction, tantamount to the exclusion of revocation except as regards that half, or in other words, the constitution of a protected succession as to the other half, which goes to the relatives of the predeceaser. Accordingly, if the parties here had not been spouses I should not have had much difficulty in deciding for the defenders.

"But the parties here were in fact spouses, and the question really is whether that makes a difference, in respect that the bequest of one-half of the residue to the wife's relatives must be considered as truly a donation *inter virum et uxorem*. It was argued for the pursuers that this was so, and it was pointed out as distinguishing this case from some similar cases cited in argument—(1) that the wife here had no

separate estate, and (2) that the bequest to her relatives was to take effect not at all during the lifetime of the survivor but only after his death.

"I cannot say that I regard the position of the authorities on the subject of donation *inter virum et uxorem* as altogether satisfactory. In particular, it is not, I think, quite clear (with respect, I mean, to cases like the present, which are outside the operation of the Married Women's Property Acts) to what extent the fact that the estate conveyed has fallen to the wife by succession, or has been earned solely or partly by her own industry, is to be held as constituting onerosity.

"On consideration, however, I am of opinion that giving no greater effect to those last-named considerations than is, I think, plainly just, there is enough in the present case to support the irrevocability of the provisions which are here in controversy, provisions which are undoubtedly, if I am right in my construction of the deed, not testamentary merely but pactional. 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 relatives, and I see no sufficient grounds, nor do I think there is any authority, for extending the doctrine of the irrevocability 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. It may be true that in the former case the Judges note as a circumstance that the provisions to the children were in one event, namely, the second marriage of the surviving husband, to take effect during his lifetime, but when it is once conceded that the provision here is pactional and not testamentary it does not appear to me that that circumstance is essential.

"Neither does it appear to me to be an essential difference that in the case of *Kidd* the trust came into operation on the death of the first deceaser. That difference might have been important if the question here was as to the husband's right to revoke by deed *inter vivos*. But the question here is as to his right to displace *mortis causa* a succession protected by contract, and such a succession stipulated in favour of third parties seems to me to be no more revocable as between husband and wife than as between contracting parties who do not stand to each other in that relation.

"On the whole, therefore, I am of opinion that the claimants, the wife's relatives, are entitled to be ranked and preferred in terms of their claim."

Andrew Corrance's trustees reclaimed, and argued—The mutual settlement was revocable by the husband in so far as it disposed of his own estate; there was no *jus quæsitum* in the relations of the wife—*Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800, 14 S.L.R. 515; *Gibson's Trustees* v. *Gibson*, June 8, 1877, 4 R. 867. In so far as the deed conferred a power to test upon the wife as regards half of the residue it was a *donatio inter virum et uxorem*, and therefore revocable, the deed having been gratuitous in so far as it was in favour of the wife—*Melville* v. *Melville's Trustees*, July 15, 1879, 6 R. 1286, 16 S.L.R. 742; *Beattie's Trustees*, May 23, 1884, 11 R. 846, 21 S.L.R. 566. Neither of the cases relied on by the Lord Ordinary supported his judgment.

Argued for the respondents—The intention of the makers of the mutual settlement had to be ascertained apart from authorities, which threw no light upon the present question. The mutual settlement was clearly executed by way of compact, that each party's share of residue should be protected from the other's; such benefit as was conferred on the wife was not a donation. She had given up her rights in her husband's estate in exchange for a liferent of the whole estate and a gift of one-half. The settlement was a delivered deed, and interests having been conferred upon third parties, even though it were a donation on the part of the husband, it was irrevocable—Ersk. i. 6, 29; Bell's Prin. 1616. The wife's relations were entitled to be ranked and preferred in terms of their claim—*Wood* v. *Fairley*, December 3, 1823, 2 S. 549 (new ed., 477); *Craich's Trustees* v. *Mackie*, June 24, 1870, 8 Macph. 898.

At advising—

LORD TRAYNER—I think the question raised under the reclaiming-note is not unattended with difficulty, but on consideration I have come to be of opinion that the Lord Ordinary is right. The mutual settlement executed by Mr and Mrs Corrance is plainly to a large extent testamentary, and in so far would be revocable, as all testaments are during the lifetime of the maker. But I think also that the clauses contained in the mutual settlement settling the extent to which the spouses together, or each separately, should have a power of revocation were pactional, and that Mr Corrance could not effectually do anything in violation of the paction there expressed. Accordingly I think this reclaiming-note should be refused.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Reclaimers—Wilson, K.C.—Wallace. Agents—Gray & Handyside, S.S.C.

Counsel for the Respondents—Salvesen, K.C.—Orr. Agents—Simpson & Marwick, W.S.