certainly think, if one were dealing with a case of this kind for the first time and approached it with the view of giving effect to the intention of parties, that these parties intended that this should be a contract to take effect after the death of the survivor.

The position of matters was that the spouses first executed a simple will in favour of each other. Each must be assumed to have had property at the time or else there would have been no reason for a mutual will at all. We are told that the wife carried on a separate business and that in fact she left estate which passed to her husband, who was the survivor, and which amounted to considerably more than half of what he ultimately left. The parties were not satisfied with the original will and they made a codicil in which they directed that on the death of the survivor without leaving lawful issue the whole means belonging to the survivor should be divided between a relative of the husband and a relative of the wife, and trustees were appointed for carrying out the provisions of the settlement.

It is very difficult to understand why that codicil was ever executed except on the view that Mr Wilson put forward—that the parties thought that it was not right if there was anything left of the joint estate that it should go to the relative of one entirely or to his nominees, and they wished to provide for a more equitable distribution between the relatives of those from whom the estate was derived. Mr Forbes said that it was to prevent intestacy, but I doubt very much whether the parties would have thought it worth their while to execute a codicil which could be defeated if the survivor made a testamentary disposition to the opposite effect, which he argued was the effect of the codicil. Therefore I think these parties probably intended to make a contract with regard to the ultimate disposal of the estate.

But there is a good deal of authority upon that matter, and the presumption is very strong for freedom. As your Lordship in the chair has pointed out, freedom will be presumed unless from the terms of the instrument itself you can infer that the parties intended it to be contractual. I agree that there is nothing in either of these documents from which you can draw such an inference. The inference is drawn from purely external facts—the facts that the two parties each had property, and that the ultimate beneficiaries were drawn from the relatives of the wife and of the husband. Probably it would have made the whole difference if there had just been a simple clause in the codicil that this provision should be irrevocable except with the joint assent of the spouses during their lifetime. There is no such provision in the present case, and therefore we are taking the line of least resistance so far as the authorities are concerned if we decide as your Lordship proposes.

LORD GUTHRIE—I am of the same opinion. In dealing with a mutual settlement between spouses there may or may not be a presumption in favour of contract in relation to the rights of the spouses, but it is quite certain that there is no presumption in favour of contract so far as the rights of third parties are concerned. The element of contract may be found in the clause itself. That is not necessary however, because it may be found in other clauses; the cases of *Corrance's Trustees*, 5 F. 777, and *Robertson's Trustees*, 2 F. 1097, where there was a provision providing expressly for a complete or partial power of revocation in the survivor, were mere illustrations of such a case.

It is said that here in the element of a provision in favour of the relatives of both spouses is enough to constitute contract. That has been held to be an important element, but I do not find it has been held to be enough in itself to show contract in relation to third parties. It was also said that the fact that both spouses had estate was enough. It is clear that at the date of her death the wife had estate, but it is not said that in 1894, the date of the codicil, she had any estate. In the case of *Mitchell*, 4 R. 800, the question was discussed which date was to be looked at in the matter of a mutual will. It seems to me that the date that must be looked to here is the date when the contract was entered into, namely, in 1894, when it is not said the wife had any estate.

In any view surrounding circumstances have never by themselves been held enough if the contract cannot be spelled out of the deed itself. Here I think the deed is not one that, taken by itself or along with the surrounding circumstances, will support the case of contract made by Mr Wilson, and I think we must decide the case as your Lordship proposes.

LORD DUNDAS was not present.

The Court answered the first question in the affirmative.

Counsel for the First Parties—D. M. Wilson. Agents—Lyle & Wallace, Solicitors.

Counsel for the Second Parties—Forbes. Agents—Mackay & Young, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

SCHULZE, PETITIONER.

Succession—War—Alien Enemy—Executor-Dative — Right of Unnaturalised Alien Enemy to Apply to be Appointed Executor-Dative—Aliens Restriction Act 1914 (4 *and* 5 *Geo. V, cap.* 12)—*Aliens Restriction Order* 1914.

A non-naturalised alien enemy who has duly complied with the requirements of the Aliens Restriction Act 1914 and relative Order in Council, resident in this country, may be appointed to and hold the office of an executor-dative to a deceased British subject.

William Schulze, Brunswickhill, Galashiels, *petitioner*, a non-naturalised alien enemy,

brought a petition in the Sheriff Court at Edinburgh wherein he craved the Court to decern him executor-dative *qua* father to his deceased son William Rudolph Hugo Schulze.

The petitioner averred—"(Cond. 1) The late William Rudolph Hugo Schulze, sometime chocolate manufacturer, residing at 19 Abercorn Terrace, Portobello, thereafter a private in the Cameron Highlanders, was killed in action in France on 18th July 1916, conform to certificate of death from War Office produced, and at the time of his death had his ordinary or principal domicile in the county of Edinburgh. The said deceased William Rudolph Hugo Schulze died intestate, unmarried, and without issue, survived by brothers and sisters. (Cond. 2) The pursuer is the father of the said deceased William Rudolph Hugo Schulze, and has right to one-half of his moveable estate. *The pursuer was born in Germany, but he has resided and carried on business in this country for the past fifty-four years and owns heritable property in this country. He has not been naturalised, but he has duly complied with the provisions of the Aliens Restriction Act* 1914, *and relative Order in Council.*" [The words in *italics* were added by way of amendment in the Inner House.]

The petitioner pleaded — "The pursuer being entitled to one-half of the personal estate of the said William Rudolph Hugo Schulze, is entitled to be decerned his executor-dative."

The Sheriff-Substitute (GUY) refused the petition.

Note. — "This is an application at the instance of William Schulze, residing at Brunswickhill, Galashiels, to be decerned executor-dative *qua* father of the deceased William Rudolph Hugo Schulze, designed as sometime chocolate manufacturer, residing at 19 Abercorn Terrace, Portobello, and thereafter a private in the Cameron Highlanders. When the application came before me on a motion to grant the prayer thereof, the Depute Commissary Clerk called my attention to the fact that the applicant was an alien enemy, viz., a German. This statement was confirmed by the agent for the applicant. It was further stated to me that the deceased son of the applicant was British born, and at the date when he was killed in action was a private soldier in His Majesty's army. I have refused the application because in my opinion no alien enemy during the continuance of the present war should be entitled to hold the office of executor to any deceased British subject. The agent for the applicant argued that the matter for consideration was similar to the question whether the alien enemy might be entitled to sue an action in our Courts during the continuance of the war, but I think that the two things are essentially different. The executor to be appointed has the duty of ingathering estate, possibly from British subjects; he is also under a trust obligation to pay debts which may be debts due to British subjects. The agent for the applicant pointed out that the appointment of executor was one thing but that confirmation was another. That may be quite true, but the appointment would be followed executorially by confirmation without any further application to the Court provided the usual procedure is followed, and I could only prevent confirmation following as a matter of course upon the appointment by suspending the issue of confirmation until further orders of Court or making some such order. It is much more convenient that the matter should be determined at this stage. For these reasons I have refused the application. I may add that the application discloses that the deceased was survived by brothers and sisters as well as by his father, and I am informed that the brothers and sisters are, like the deceased himself, British born."

The pursuer appealed, and argued—The Sheriff-Substitute had no discretion in this matter. From the documents now produced it appeared that the deceased's sisters declined the office, and his brothers, one serving in France and the other in East Africa, were ineligible and made no opposition. The Sheriff-Substitute had mistaken the position of an alien enemy resident in this country. The test for civil rights was residence and not nationality. The fact that the pursuer was permitted to reside in this country bestowed on him the King's protection, and secured for him civil rights *quoad* property — *Princess Thurn and Taxis* v. *Moffitt*, [1915] 1 Ch. 58. There was no restriction imposed with regard to the property of alien enemies in this country. The restrictions were only directed against their freedom of personal movement — *Porter* v. *Freudenberg*, (1915) 1 K.B. 857, *per* Lord Reading, C.-J., at p. 867. Caution had to be and would be found for the full amount —Currie, Confirmation, p. 197. The pursuer was an alien under the protection of the Crown *quoad* his civil rights. An interned enemy alien could sue in the courts in this country. This was necessary to enable him to ingather sums due to him so as to meet his liabilities and prevent his creditors from suffering—*Schaffenius* v. *Goldberg*, (1916) 1 K.B. 284, *per* J. Younger at p. 291. There was no competition here, and therefore the pursuer was entitled to be decerned as executor-dative. The father's right to one-half of the estate was statutory—Intestate Moveable Succession (Scotland) Act 1855 (18 and 19 Vict. cap. 23), sec. 3. On the title of a father to be appointed an executor-dative to his deceased son counsel cited *Webster* v. *Shirress*, (1878) 6 R. 102, 16 S.L.R. 45.

At advising—

LORD SALVESEN—This is an application by a father to be decerned executor-dative as such to his deceased son. The Sheriff-Substitute has dismissed the petition on the ground that the appellant is an enemy alien, being of German nationality, and having never renounced his allegiance to his native country by taking out letters of naturalisation here. I confess that when I first read the Sheriff-Substitute's note I was disposed to think that he had reached a sound conclusion, but in view of the authorities which were cited to us, but were apparently not

brought under his notice, I have come to be of a different opinion. The appellant has been fifty-four years resident in Scotland. He has carried on business here. His family, including the young man who was killed in the war which is now going on, were born here, and were therefore British subjects. We have now evidence before us that he has been registered as an alien, and that it has not been thought necessary by the authorities that he should be interned. We have further evidence of the members of his family who would have right to be conjoined with him in the office of executor that they do not desire this office. The only person who is not in this position is a son who is at present serving in East Africa and cannot be communicated with.

In these circumstances I think, following the English decisions, that we must grant the prayer of the note. Although an enemy alien the applicant is residing here under the protection of the King. He is accordingly entitled to appeal to the King's courts. Nationality, it has now been clearly settled, is not the test, for a person of British nationality now residing in Germany would not be entitled to institute legal proceedings in our courts. I do not think that the fact that this is an administrative suit makes any difference. On the contrary, the very fact that the applicant is not entitled to leave the country without a licence ensures that the courts of this country will continue to exercise jurisdiction over him; and as he must find caution for his intromissions the estate is as safe in his hands as it would be in the hands of a British subject. The only persons interested in the succession are the applicant himself and the members of his family, and even if we had a discretion in the matter I see no reason why we should exercise it to his prejudice. I am therefore of opinion that we ought to recal the interlocutor appealed from and remit to the Sheriff-Substitute to grant the prayer of the petition.

LORD GUTHRIE—In view of the amendment made on the petition I am of the same opinion. As the petition came before the Sheriff-Substitute I think it was properly refused, because it did not contain the statement now added by amendment that the petitioner, although by birth a German subject who has not been naturalised in this country, is registered under the Aliens Restriction Act 1914 and Aliens Restriction Order 1914. In the case of *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284, Lord Cozens-Hardy, M.R., at page 298 thus states the effect of registration—"This operated as a licence to remain in the country, and carried with it the right to trade and enter into agreements with British subjects." In the same case Younger, J., dealt incidentally with the very case of an executor which is raised in the present petition. He said, referring to proclamations relating to trading with the enemy, that an alien enemy resident in a foreign country must of necessity have access to the courts of that country. "Indeed if that were not so the proclamation would be little better than a mockery to a person in the position of the plaintiff. It would leave him liable to fulfil all his permitted transactions but powerless to enforce any of them, and such a result would not only be ruinous to the plaintiff but speedily disastrous to all persons contracting with him, and it was on this very ground that an alien executor under the old law was permitted to sue, for it was said that if he were not it would be a prejudice to the King's subjects, who could not recover their debts from him if he were not able to get in the assets of his testator"—see Bacon's Abridgment, vol. i (1832 ed.), p. 181.

The whole matter was the subject of an elaborate judgment delivered by the Lord Chief-Justice (Lord Reading) in disposing of three cases in the Court of Appeal, the first named of which is *Porter* v. *Freudenberg*, [1915] 1 K.B. 857. The Lord Chief-Justice delivered the opinion of a Court consisting of himself, Lord Cozens-Hardy, M.R., Buckley, Kennedy, Swinfen Eady, Phillimore, and Pickford, L.JJ. It is sufficient to quote one passage from the Lord Chief-Justice's opinion on page 874—"The latest adjudication upon the alien enemy's right to sue is *Princess Thurn and Taxis* v. *Moffitt*, (1914) 31 T.L.R. 24, where Sargant, J., held that the subject of an enemy state who was registered under the Aliens Restriction Act 1914 as an alien and the subject of an enemy state is entitled to sue in the King's courts. This decision is in our opinion clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the executive of his presence in this country and has been allowed thereafter to remain here. He is *sub protectione domini regis*."

But it would not necessarily follow that the petitioner is entitled as matter of right to the office of executor-dative on his deceased son's estate. Had any of the deceased's brothers or sisters, who are all British subjects, desired the office it might well have been that the Court, in the exercise of its discretion, would have preferred one or more of them to the office. But it clearly appears that the deceased's brothers are not in a position to perform the duties of executors because they are abroad in His Majesty's Forces, and the deceased's sisters have formally stated that they do not desire the office.

The LORD JUSTICE-CLERK concurred.

The Court remitted to the Sheriff-Substitute to grant the prayer of the petition.

Counsel for the Petitioner—D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.