the defenders a conjunct probation: Find the pursuers entitled to their expenses in the Outer House since the closing of the record: Allow an account thereof to be lodged, and remit the same to the Auditor to tax and to report to the Lord Ordinary, to whom remit to decern for amount due, and to proceed as accords: Reserve the Inner House expenses incurred to date."

Counsel for Pursuers — Trayner — Lang. Agents—W. & J. Burness, W.S.

Counsel for Defenders—J. P. B. Robertson—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, March 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

REYNOLDS *v.* MILLER'S TRUSTEES.

Succession — Testament — Revocation—Resulting Intestacy—Husband and Wife—Exclusion of Jus mariti.

A testator who had several children, directed by his settlement that certain legacies be paid them, and the residue of his estate be divided equally among them. In the case of a married daughter, M, to whom he had left a legacy exclusive of the *jus mariti*, he directed her share of residue to be for her sole use exclusive of the *jus mariti*. By a codicil he revoked and recalled that part of his settlement by which he provided for his children, and made new provisions in lieu thereof, giving to M a special legacy exclusive of the *jus mariti*, and appointing the trustees to hold the residue of his estate, after payment of that and other legacies to his children, for behoof of one son in liferent allenarly, and his children in fee, and in the event of this son predeceasing him without issue, he directed his trustees to divide the residue equally among the children who survived him, the share of M to be for her own sole and alimentary use exclusive of the *jus mariti*. Subject to these alterations and additions he ratified the trust-disposition and whole clauses thereof. The son survived him, but died without issue before M. *Held*, by a majority of five Judges (*affirming* judgment of Lord Kinnear), that the fee of the residue had, in the event which had happened of the son's death after surviving his father, but without issue, fallen into intestacy, and therefore that the share of M therein had fallen *jure mariti* to her husband.

The Lord Justice-Clerk and Lord Young *dissented, being of opinion* that the will and codicil when read together clearly showed the intention of the testator to dispose of his whole estate, and that the ratification clause in the codicil operated to revive the disposition of the residue in the trust-deed in the event which happened, to the effect of preventing its falling into intestacy.

Robert Nasmyth, surgeon-dentist in Edinburgh, died in 1870 survived by six children—four daughters and two sons. One of the daughters was unmarried, and one of the others was a widow. He left a trust-disposition and settlement dated in 1868, and a codicil dated in 1869. By his settlement he directed his trustees to realise his whole estate for certain purposes, of which the third direction of the fourth purpose was expressed as follows:—"For payment to my daughter, Mrs Mary Elizabeth Nasmyth or Miller, wife of John Robert Miller, Esquire, Surgeon in the Indian Army, of £3000 sterling, for her own sole and separate alimentary use, exclusive of the *jus mariti* and right of administration of her said husband, and payable to her on her own receipt or discharge without the consent or concurrence of her husband." Each of his other children had a similar special legacy varying in amount, one of them being to the truster's son David Jobson Nasmyth after mentioned. The seventh head of the fourth purpose disposed of the residue of his estate, and was as follows:—"*Seventh*, In the event of there being any free residue of my said estates above conveyed after answering the purposes above expressed, I direct my trustees to make payment thereof, in equal shares and proportions, amongst all my lawful children above named, the share of the said Mary Elizabeth Nasmyth or Miller being for her own sole and separate alimentary use, exclusive of the *jus mariti* and right of administration of her said husband."

By the codicil he revoked and recalled the first to the seventh directions inclusive of the fourth purpose of his settlement, made certain alterations on the special legacies to his children, in particular increasing that to Mrs Miller from £3000 to £3500, this legacy to be for "her own sole separate alimentary use, exclusive of the *jus mariti* and right of administration of her said husband, and payable to her on her own receipt and discharge without the consent and concurrence of her husband," and leaving no special legacy to David Jobson Nasmyth. By the sixth direction of the codicil he divided the residue as follows:—"My said trustees shall hold the whole free residue and remainder of my estates conveyed in the said trust-disposition and settlement, after answering the purposes therein and hereinbefore expressed, for behoof of my eldest surviving son, the said David Jobson Nasmyth, in liferent for his liferent use allenarly, and of his lawful child or children, if he should any have, in fee, ... and in the event of the said David Jobson Nasmyth predeceasing me without issue, I direct my said trustees to make payment of the said free residue and remainder of my said estates in equal shares and proportions amongst all those of my lawful children above named who shall survive me, and the issue of such as shall predecease me *per stirpes et non per capita*, the share of the said Mary Elizabeth Nasmyth or Miller being for her own sole and separate alimentary use exclusive of the *jus mariti* and right of administration of her said husband." The codicil also contained this clause:—"And subject to these alterations and additions, I do hereby ratify and confirm the said trust-disposition and settlement in the whole heads, articles, and clauses thereof."

Neither in the settlement or the codicil did the testator exclude the rights of husbands, present

or future of his daughters other than Mrs Miller from either their legacies or their shares of the residue.

David Jobson Nasmyth survived his father, and died unmarried in 1871.

From 1867—prior to the date of her father's settlement—till her death in 1872, Mrs Miller lived apart from her husband. She left a trust-disposition and settlement and a codicil, dated respectively in March and April 1871. For one son, on the explanation that he had been provided for during her life, she made no provision. She provided for the others as follows:—"And I provide that in the event of my daughters Caroline Grant Miller and Mary Miller, and my sons Charles David and George Francis, surviving me" (which event happened), "my trustees shall divide the residue of my estate into six equal shares, of which they shall hold two for the benefit of my daughter Caroline, and two for the benefit of my daughter Mary, in manner after set forth; and my said two sons shall be entitled to the remaining two shares equally between them." Her trustees having entered on the administration of her estate after her death, gave up an inventory of her moveable estate amounting to about £1800. She left no heritage.

Robert Nasmyth's trustees, in the course of the administration of his estate, had at various dates from 1st March 1873 to 10th May 1881, made payment of certain sums of money, amounting in all to £2171, to account of Mrs Miller's share of her father's residue, to her husband as in right of her share *jure mariti*.

In 1882 Mrs Miller's daughter Mary Miller, then Mrs Reynolds, and her husband, raised the present action against Mrs Miller's testamentary trustees, and also against her father John Robt. Miller, concluding for an accounting by the trustees, and for declarator that they were bound to apply for Mrs Reynolds' behoof two-sixths shares of the residue of her mother's estate, and pay her the annual income; further, for declarator that on a sound construction of Robert Nasmyth's will and codicil the share of the residue of his estate provided to his daughter Mrs Miller, the female pursuer's mother, was so provided to her "for her own sole and separate alimentary use, and exclusive of the *jus mariti* and right of administration of her husband," the defender John Robert Miller.

The pursuers maintained that the one-sixth share of the fee of the residue of Robert Nasmyth's estate liferented by David Jobson Nasmyth had, on his death without issue, devolved on his daughter Mrs Miller as a separate estate in her person, and free from the *jus mariti* of her husband, and was therefore carried to the pursuers as beneficiaries under his settlement, and that her trustees were bound to account to them for their share thereof as part of Mrs Miller's estate. They therefore maintained that the payments to Dr Miller ought not to have been made, because the money that was paid him was part of his wife's separate estate.

The defenders maintained that the provision in regard to the residue in Mr Nasmyth's trust-deed having been revoked by his codicil, which made no provision for the disposal of the fee of the residue in the event (which had happened) of David Jobson Nasmyth surviving the testator and dying without issue, the residue had fallen into intestacy, and Mrs Miller's share thereof had passed to her husband *jure mariti;* and further, that that being so, Mrs Miller's estate, out of which much debt had required to be paid, was insolvent, and showed no residue for which they could be bound to account.

The pursuers pleaded—"(2) On a sound construction of Mr Nasmyth's settlement and codicil, the share of the residue of his estate provided to Mrs Miller was for her separate alimentary use, and exclusive of her husband's *jus mariti* and right of administration, and now falls to be accounted for by the defenders as her trustees and executors."

The defenders (Mrs Miller's trustees) pleaded, *inter alia* — "(3) On a sound construction of Mr Nasmyth's settlement, and in respect that his son David Jobson Nasmyth survived him and died unmarried, he died intestate as to the fee of the residue of his estates, and said fee vested in the defender Dr Miller *jure mariti;* and, *separatim*, no part of said residue was provided by said settlement for Mrs Miller's separate use, free from the *jus mariti* of her husband."

The Lord Ordinary pronounced this interlocutor:—"Finds that on a sound construction of Mr Robert Nasmyth's settlements, the fee of the residue of his estate is undisposed of in the event (which happened) of his son David Jobson Nasmyth surviving him and dying unmarried, and that the defender John Robert Miller was entitled to his wife's share thereof *jure mariti;* allows Mrs Miller's trustees to lodge their accounts within eight days, and the pursuer to lodge objections thereto, if so advised, &c.

"*Note.*—If the question is to be regulated by the terms of the codicil alone, it was not disputed that in the event which happened the residue is undisposed of. But it is said that the revocation by the codicil of the seventh purpose of the settlement being only for the purpose of carrying out a disposition which has failed, the revocation ought not to receive effect. *Onyon* v. *Tyrer*, 1 P. Wms. 343; *Tupper* v. *Tupper*, 1 Kay and J., 665; Jarman on Wills, 3d ed., i., 156.

"The rule to which the pursuer appeals has been applied where the second instrument has been found to be invalid from defective execution or otherwise. But there is no invalidity in the codicil, and nothing has occurred to interfere with its effect. The codicil contains an absolute revocation of certain directions in the settlement, including the direction for disposal of the residue, gives certain other directions in lieu of those recalled, and, subject to these alterations, ratifies and confirms the settlement. The effect is to strike out of the will the directions which are revoked, and to substitute in their place the new directions of the codicil.

"By the revoked directions the testator had bequeathed special legacies to his various children, including his son David, and bequeathed the residue, if there should be any, in equal proportions amongst all his children, excluding the *jus mariti* of Mrs Miller's husband. By the codicil, after recalling these bequests, he gives special legacies to his other children, but none to his son David; and instead of giving the residue to be divided equally among all his children, he directs that it shall be held for behoof of his son David

in liferent allenarly, and for his children in fee, in such shares as he might appoint, or failing appointment, equally; and 'in the event of David predeceasing' him 'without issue,' that it shall be divided among his other children, subject to the same condition as before with regard to Mrs Miller's share.

"The original direction with regard to the residue is therefore revoked absolutely to enable the directions of the codicil to receive effect. But by the codicil no interest in the residue is given to the children other than David, except in the event of his dying before his father without leaving issue. In that event they are conditionally instituted as residuary legatees. But David survived his father, and the conditional institution therefore fails to take effect.

"It is true that Mr Nasmyth did not intend to die intestate, and a construction which should impute to him that intention ought not to be adopted. But it is more than construction to strike out of the bequest of residue to his other children the express condition that it should take effect 'in the event of his son David predeceasing' him. The words are explicit and must receive effect, nor is it legitimate to speculate upon what the testator would have done if he had foreseen the effect which, in the event which has happened, they must receive. He may possibly have contemplated that his son David's share in the event of his surviving him and having no issue should be divided among the other children, or he may have contemplated that David should have power to dispose of it by testament. But he has expressed no intention on the subject, and the Court cannot supply the defect by conjecture, but must leave the residue to pass to the children *ab intestato*. In this view it is not contended that Mrs Miller's share is free from the *ius mariti*."

The pursuers reclaimed.

The Court, after hearing counsel, appointed the cause to be debated by one counsel on each side before the Second Division and one Judge from the Outer House.

Argued for the pursuers—Under these deeds there was no room for intestacy, for both deeds showed a clear intention to dispose of the whole estate. The intention was to give effect by the codicil to a new idea, and if that should fail, to leave the previous provisions standing. If it were possible to get the testator's intention by reading the two together, the Court were bound to give effect to that intention, because both deeds taken together disposed of the whole estate—*Ogilvie's Trustees and Others*, January 25, 1870, 8 Macph. 427, *per* Lord Ardmillan, 430. The codicil could not be upheld as a revocation if it did not also effect a disposition of every part of the estate. This was not pure and simple revocation, but merely revocation in favour of a new disposition on which it was conditioned. This was an example of the doctrine known to English law as "dependent relative revocation"—*Earl of Ilchester*, 7 Vesey, 348, *per* Alvanley C.-G., 372, and *Grant*, M. 17,378; *Onyon* v. *Tyrer*, *supra*; *Quinn* v. *Butler*, L.R., 6 Eq. 225; Jarman on Wills, 4th ed., i., 168; Williams on Executors, 8th ed., 150, 155-6, 189. "Predeceasing" without issue should be read as "dying" without issue, for it was absurd to provide for his predeceasing only, since in that case the testator might have made a new provision. He could not have meant to provide a liferent to a son whom he contemplated when making his will only in the light of a predeceaser. Another part of the intention of the testator which was clear was the exclusion of her husband's rights from Mrs Miller's share. The opposite contention would defeat this. The analogy of death-bed deeds was misleading, for there disposition and revocation were good against all the world but the heir-at-law.

Replied for defenders—They were not bound to present a theory of the testator's mind when he made these deeds. He might have had no intention at all as to his residue in the event which happened. The deeds were to be read as they were expressed. It was not legitimate, when words could plainly be read in a particular intelligible way, to twist them to another meaning to suit a supposed intention of the testator. Had the codicil stood alone it must have been given effect to as defenders intended. It was legitimate to appeal to the other deed if there were dubiety in the reading of the codicil, but to appeal to it here assumed a dubiety in the codicil which did not exist, and was reasoning in a circle. The English doctrine of dependent relative revocation was not recognised in the law of Scotland. In Scotland, where there was an express revocation, it took effect entirely independent of the deed to which it was attached. This was illustrated in two departments of the law—in *Leith's Trustees* v. *Leith*, June 6, 1848, 10 D. 1137; and in cases of death-bed deeds, the law of which was summarised by the Lord President in *Kirkpatrick* v. *Kirkpatrick's Trustees*, March 19, 1873, 11 Macph. 564.

At advising—

Lord Craighill—I agree on all points with the Lord Ordinary, and have little to add to the reasons which he has given in the note to his interlocutor.

The question is, whether the late Mrs Miller succeeded on the death of her brother David to a share of the residue of which he was liferenter, by virtue of the directions contained in the settlement of their father the late Mr Nasmyth, who died in 1870? If she took such share under her father's will, it is not doubtful that from this testamentary succession the *jus mariti* and right of administration of her husband, the defender Dr Miller, was excluded, and that her daughter, the pursuer Mrs Reynolds, is entitled to decree of declarator to this effect, as concluded for in the summons. But if the share of Mr Nasmyth's succession liferented by his son David fell into intestacy at David's death, because he left no children to take the fee of what he had liferented, then Mrs Miller's share was unaffected by the condition which was attached to her succession to property to which she became entitled by virtue of her father's will. The interest accordingly centres in this condition, the pursuers contending that the rights of the defender Mrs Miller's husband were excluded from the share in question, and he, on the other hand, contending that it was an intestate succession, which, as such, passed to him, by virtue of the assignation implied in marriage, at the death of David

Nasmyth without children. The result of course depends upon the true reading of Mr Nasmyth's settlement. On this subject the pursuers say, first, that even under the codicil they are entitled to prevail, because the words "predeceasing me," in the clause which provides for the death of David Nasmyth without issue, ought to be read simply as equivalent in their meaning and effect to the word "deceasing." This suggestion is said to be justified by the consideration that if adopted, the intention of the testator, as that is to be gathered from the other parts of the settlement, will be fulfilled. But I cannot accede to what has so been proposed. We must take the will as it has been left. Were we to read out of it words which the testator has used, and to read into it in place of these another word which the testator has not used, in order to change the meaning, we should not be construing the will as executed, but would be making another will for the testator.

The pursuers' next contention is, that supposing the share liferented by David is not to be held as carried to his sisters on his death without issue, by virtue of the codicil, that result would be accomplished by the seventh article of the fourth purpose of the trust-deed. But that also appears to me to be an erroneous conclusion. The direction referred to, as were likewise the first, second, third, fourth, fifth, and sixth directions, was revoked and recalled, and consequently the seventh, which is relied on by the pursuers, is as inefficacious as if it had never formed part of the trust-deed.

The pursuers no doubt say that the revocation and recall were not absolute, but were conditional upon the efficacy of the new testamentary arrangements created by the codicil. On this subject I adopt what has been said by the Lord Ordinary as the true view of our law, and desire only to add that even if that insisted on by the pursuers were to be accepted, their case would not be made good. None of the provisions contained in the codicil have failed of effect. Every legatee has obtained that which was bequeathed to her or him. The daughters have got their special bequests. David got the liferent of the residue while he lived. Had he left children they would have got the fee, or had he predeceased the testator without children, the conditional institution in favour of the truster's surviving children would have come into operation. Thus there has been no failure of any purpose or provision expressed in the codicil, and consequently, even if the revocation and recall could have been held conditional in the codicil taking effect, it would have not been affected by anything that has occurred. The want of a clause by which the contingency, which did happen, would have been provided for, and not the failure of anything expressed, affords the explanation of the intestacy as regards the fee of the residue liferented by David Nasmyth, which has supervened. The pursuers' last contention was, that notwithstanding the revocation and recall of the seventh direction in the fourth purpose of the trust-deed, that direction must be held to be as good as restored to its place in the settlement, because, "subject to these alterations and additions," the testator "ratifies and confirms the said trust-disposition and settlement in the whole heads, articles, and clauses thereof." But this clause of ratification leaves the revocation and recall unaffected, as I think, because the revocation and recall was, according to my construction of the words, one of the alterations subject to which the trust-deed was confirmed.

This reclaiming-note ought therefore in my opinion to be refused.

Lord Young—The view of this case which Lord Craighill has just stated very distinctly, and which is stated with equal distinctness by the Lord Ordinary, is certainly quite intelligible, and as I understand it to be held by a majority of your Lordships, it is presumably the sound view. But I have the misfortune to differ from it. I have no knowledge of the will of this testator except what I can collect from his testamentary deeds, but that knowledge satisfies me that his will was such that we are most distinctly defeating it by the judgment which we are about to pronounce. I think that must be almost admitted—that is to say, if the view stated by the Lord Ordinary is right, we are defeating his will and not acting according to his intention. Now, as it is altogether a question of will, and the testamentary trustees are to act in pursuance of directions expressive of the testator's will, I feel entitled to take a large latitude of construction, if that be necessary, in order to give effect to that will, and avoid defeating it. This is not a deed of conveyance, except to the trustees; there is no conveyance to the beneficiaries. The testator conveys to the trustees to execute his will, and he expresses his intention in the shape of directions which they are to carry out.

Now, to begin with, the question really is whether with respect to the fee of the residue of his estate he died intestate—that is to say, whether he has not so expressed himself in the directions to his trustees as to indicate that he had any will as to the residue? The residue is conveyed to the trustees by his trust-deed, but it is said that his directions to the trustees are so expressed as not to show that he had any will or intention as to the disposal of it. It is contended, therefore, that there is intestacy. I entirely differ from that view. I think his directions indicate that he had a will and intention as to the disposal of the residue, and that that is precisely what we are defeating—under the compulsion of a supposed rule of construction, as to the operation of which I do not agree—by the judgment we are about to pronounce. It is not doubtful that by the trust-deed he expressed his intention with respect to the whole of his estate. There is no suggestion of any doubt about that, and none occurs to my mind. There is no reason for intestacy under it in my view. He tells the trustees what they are to do with the residue, if any exists. They are to divide it among his children, and Mrs Miller is to have her share, free of the *jus mariti* and control of her husband. I see here no room for intestacy—no possibility of saying that he died without expressing his will and intention as to the disposal of his whole estate. But the codicil is supposed to make intestacy by withdrawing any expression of his intention with respect to the residue of his estate. That, I must confess, is to my mind a very curious effect to attribute to a codicil which makes certain alterations more or less skilful, and concludes with these words—"And, subject to these alterations

and additions, I do hereby ratify and confirm the said trust-disposition and settlement in the whole heads, articles, and clauses thereof." That trust-disposition and settlement which, subject to certain alterations and additions, is expressive of his will, he confirms in the whole heads, articles, and clauses thereof, and which disposes of all he could possibly die possessed of, is supposed to make intestacy. I cannot agree to that. I think that is deliberately violating the will of the testator, according to which—and I have no other source of information—I am as satisfied as I can judicially be of anything, he intended to give directions with respect to the fee of the residue of his estate. He gives the liferent to his son, and he gives the fee in the manner which is expressed. I think there is a blunder in the expression of the codicil—a plain blunder—for there is no sense in it. I put the question over and over again to the defenders' counsel during the debate—"Can you suggest any view according to which it might have occurred to the testator to give Mrs Miller's husband the *jus mariti* of her share of the fee of the residue if his son David predeceased him, but not if he survived him?" And the answer was necessarily, No. The meaning which the defenders give could not have been that of the testator; there is no sense in it. Therefore there is an inaccuracy in the expression. And in order to reach the man's will I should overcome that blunder. But I do not think that that is even necessary, for I think that under the words of the original will intestacy is, I again say, an impossibility. That deed is confirmed in the whole heads, articles, and clauses thereof, and it is subject, not to intestacy in a certain case, but to certain alterations and additions.

My opinion, therefore, in deference to the mind and will of the testator, and, I think, in accordance with rules and views of law for which there is sufficient authority, is adverse to the judgment of the Court.

LORD RUTHERFURD CLARK—I think the Lord Ordinary's interlocutor is right, and ought to be affirmed. I have nothing to add.

LORD M'LAREN—I concur in the opinion of the Lord Ordinary and Lord Craighill. I may perhaps add, that as a matter of impression I should probably agree with what Lord Young has said as to the intention of this testator. But I arrive at that impression solely as a matter of probability, because I cannot deduce it from the words of the will; and I do not think there is any reason why one should be ingenious in the construction of a will to favour the legatee rather than the next-of-kin. The next-of-kin may be as deserving as the legatee; and if the heir-at-law were the Chancellor of the Exchequer I should think that the same kind of reasoning ought to be applied to the construction of a will, and to the determination of what has been omitted, as in the case where the parties were the children, and therefore the persons most favoured by the testator in the eye of the law.

LORD JUSTICE-CLERK—I entirely agree with Lord Young. Of course the judgment is fixed by the opinions which your Lordships have delivered; but it seems to me that our choice lies between holding that this codicil operates, and was intended to operate, intestacy as regards part of the residue, and adopting any reasonable construction by which effect could be given to the will. The result of intestacy of course is not to be presumed, and in my opinion there is no ground for arriving at the conclusion; and, indeed, I come to the opposite conclusion on the grounds which have been so clearly indicated and explained by Lord Young, but mainly on this ground—the Lord Ordinary holds the revocation in the codicil to be absolute, while I am of opinion with Lord Young that it is not absolute, but conditional and contingent—that the very words of the deed, and indeed the words of the revocation clause which follow, indicate that the revocation was to the intent and for the purpose of bringing the provisions of the will into operation. If these provisions failed, then I think the intention of the testator was that the clauses which are conditional should remain to regulate the succession, and when we arrive at the end of the deed we find that expressed in words which I think explicit.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Trayner—Lorimer. Agent—John K. Lindsay, S.S.C.

Counsel for Defenders Mrs Miller's Trustees (Respondents)—Mackintosh—Dickson. Agents—J. & J. Gardiner, S.S.C.

Counsel for Defender Dr Miller (Respondent)—Pearson. Agent—N. Briggs Constable, W.S.

Thursday, March 20.

FIRST DIVISION.

[Bill Chamber Cause.

KERR (TEENAN'S TRUSTEE) *v.* MAXWELL WITHAM.

Bankruptcy — Sequestration — Joint-Adventure — Accommodation Bills — Vote — Voucher — Conjunct and Confident — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79).

At the first meeting of creditors subsequent to the election of a trustee in a sequestration there was produced a claim founded on certain bills in which the bankrupt was an obligant, and which were long over-due. The claimant was a joint-tenant with the bankrupt in a farm, and had managed the farm for the joint-tenants. He had made no claim for the sums in the bills when the bankrupt's affairs had some time previously to the sequestration been in charge of a *curator bonis*, though claims had been advertised for, and he had been specially written to on the subject. *Held* that the claimant being a conjunct and confident person, and the claim being suspicious in its nature, it was not by the production of the bills sufficiently vouched to entitle the claimant to vote.

Conjunct and Confident — Cheque — Separate Writing.

In a sequestration, the bankrupt's son, and partner in business, claimed to vote,