do not think that the doctrine of donation *inter virum et uxorem* ever can have effect here because I do not look upon it as a donation. I think that what the husband gave to the wife was a consideration not merely with the opposing consideration of the marriage but with the opposing consideration of what the father proposed to do in the way of making an allowance.

As regards the question of the capital of the children, I do not think it necessary to go into that at all at this present moment. The Lord Ordinary has held that the provision is perfectly good, and I am far from saying that I am of a different opinion. I do not see why a man who is solvent may not put out of his power part of his funds by putting them into the hands of trustees for behoof of his children. Of course everything depends upon whether what is done is done as an *inter vivos* conveyance or merely with the view of securing testamentary provisions. If they are merely testamentary, they would be revoked by bankruptcy. But I do not think it is necessary to decide which character those particular arrangements hold, because the time has not yet come for that. The whole of the income is quite properly paid to the wife, and it may be that the question will never arise, because we do not know yet whether there will be a child to inherit the money or not.

Accordingly upon the whole matter I think that the Lord Ordinary's interlocutor should be adhered to.

LORD JOHNSTON—I concur with your Lordship, and I would only add that I doubt much whether the case has been properly presented to us. On the face of the papers I can see no grounds for the assumption which has been made that the bankrupt was really domiciled in Scotland, and if he is not, our doctrine of donation *inter virum et uxorem* cannot be appealed to.

With regard to the children, the case takes a totally different complexion from that which it had before the Lord Ordinary, because a new statement has been made and a new plea has been added raising a question which was not before him, namely, whether *quoad* the children the provision in the post-nuptial settlement was not testamentary. That question I agree with your Lordship should in the circumstances be reserved.

LORD MACKENZIE—I agree with your Lordship in the chair. As regards the liferent, I understood there was an attempt to argue that in construing this settlement—what was called a settlement, what is in reality a contract—the divorce was not to be taken as an equivalent to death. That contention, I think, is quite untenable in view of what was decided in the case of *Beattie* v. *Johnstone*, 5 Macph. 340.

As regards the fee, the trustees who were appointed are vested in the trust funds. They must hold them in the meantime in order to see whether the child, Dolores May Somerville, who is in pupillarity and who is represented in this case by a curator *ad litem*, survives to take a vested interest or not. As the Lord Ordinary points out, there may be certain questions in the future, but these do not arise just now, and the reasons assigned by your Lordships are quite sufficient to prevent the pursuer getting any decree at present.

LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuer and Reclaimer—M'Lennan, K.C.—Dallas. Agents—Forbes, Dallas, & Company, W.S.

Counsel for Defenders and Respondents—Fleming, K.C. — Howden. Agents—Fraser, Stodart, & Ballingall, W.S.

Monday, July 17.

FIRST DIVISION.

TURNBULL'S TRUSTEES *v.* TURNBULL'S TRUSTEES.

Succession—Special Destination—Revocation—Effect on Special Destination of General Disposition.

By his settlement a testator revoked "all and every previous will or settlement" made by him, and conveyed to his daughter his whole property, means, and estate, heritable and moveable, real and personal, wherever situated or by whom held. At different periods during his life he had settled particular properties and certain policies of insurance upon his daughter, partly for her own behoof and partly in trust for her children. At the time of his death the deeds of settlement relating thereto were in the hands of his agents—all of them being testamentary and revocable. In addition to the property so destined the testator left considerable estate, none of which, however, was in other hands than his own.

In a special case, *held* that the special destinations had been effectually revoked by the terms of the settlement.

On 27th October 1910 Mrs Elizabeth Cochran Turnbull or Robertson, wife of and residing with Hugh Robertson, 16 Portland Road, Kilmarnock, and others, trustees acting under the holograph settlement of the late Andrew Turnbull, Kilmarnock, dated 16th February 1907, and with relative codicils registered in the Books of Council and Session, 2nd February 1910, *first parties;* James Dunbar Mackintosh, solicitor, Kilmarnock, and others, trustees appointed by a holograph letter written by the said Andrew Turnbull to his daughter the said Mrs Elizabeth Cochran Turnbull or Robertson, dated 13th November 1900, and her reply thereto dated 14th November 1900, *second parties;* and the said Mrs Elizabeth Cochran Turnbull or Robertson, and the said Hugh Robertson as her curator and administrator-in-law, *third parties*, presented a Special Case, in which

they, *inter alia*, craved the Court to determine whether certain destinations made in favour of Mrs Robertson by her father the said Andrew Turnbull during his lifetime had or had not been revoked by his settlement.

The Case stated—"1. By the said holograph settlement, dated 16th February 1907, the late Andrew Turnbull, F.S.A.A., who died on 10th September 1909, left and bequeathed to his said daughter Mrs Elizabeth Cochran Turnbull or Robertson, his whole property, means, and estate, heritable and moveable, real and personal, wherever situated or by whom held, to be held and possessed by her exclusive of the *jus mariti*, right of administration, or any other right of her said husband or of any other husband she might subsequently marry. . . .

"3. Some years prior to his death the firm of Mackintosh & Bain, writers, Kilmarnock, acted as the law agents of the testator. At the time of the testator's death the following documents, *inter alia*, were in the hands of Mr Mackintosh, the senior partner of said firm:—(*a*) A policy of assurance, dated 23rd July 1890, of the North British and Mercantile Insurance Company, No. 77,223, on the life of the deceased for the sum of £100, in favour of his said daughter Mrs Robertson. The present value of the policy is £129, 4s. (*b*) A policy of assurance, dated 27th August 1896, with the same company, No. 82,535, on the life of the deceased for the sum of £400, also in name of the said Mrs Robertson, the present value of which is £478, 11s. (*c*) A disposition, dated 26th April 1898, of which the dispositive clause is as follows:—'I, Matthew Muir, builder, Kilmarnock, for sundry good causes and considerations, do hereby, at the request and with the consent of Andrew Turnbull, sometime Town Chamberlain, Kilmarnock, now accountant there, dispone and assign to and in favour of Elizabeth Cochrane Turnbull, daughter of and residing with the said Andrew Turnbull' (now the said Mrs Robertson), 'and her heirs and assignees whomsoever, heritably and irredeemably, All and Whole,' certain heritable subjects in Prestwick. The disposition is signed by Mr Muir and Mr Turnbull, and is attested. . . .

"6. On 13th November 1900 the testator wrote to his daughter Mrs Robertson a holograph letter, signed over a 6d. stamp, in the following terms:—

"'Kilmarnock, 13th Nov. 1900.

"'To Mrs Lizzie Cochran Turnbull or Robertson, 49 North Hamilton, Street, Kilmarnock.

"'Dear Lizzie,—I have placed in the hands of Mr James Dunbar Mackintosh, solicitor here, for your behoof, deeds and documents to the value of some £1200 stg., which I may add to or diminish as I think proper, but subject to your agreeing, by holograph letter, that on my death, or at my request during life, you will convey the same to the following trustees, viz., The said James Dunbar Mackintosh, Thomas M'Culloch, ironfounder here, James Blackwood Wilson, manufacturer here, and Andrew Aitken, draper here—to be held by them for your behoof in liferent, and your children in fee equally among them, or to any one or more of them nominated by any writing under your hand, exclusive of the "jus mariti," right of administration, and whole other rights of your present or any future husband you may have; and providing that in the event of your predeceasing me, or dying without leaving children, the whole property carried by said deeds and documents remains my sole property, or falls into the residue of my means and estate. Given under my hand this thirteenth day of November One thousand nine hundred years.

"'AND. TURNBULL.'

"The said trustees are the parties of the second part.

"On 14th November 1900 Mrs Robertson wrote to the testator a holograph letter in the following terms:—

'49 North Hamilton Street,
'Kilmarnock, 14th November 1900.
'To Mr Andrew Turnbull, F.S.A.A.,
Kilmarnock.

'Dear Father,—I have received your kind intimation dated 13th November 1900, and I hereby agree to accept the properties, policies of insurance, and shares you have handed to Mr J. D. Mackintosh, solicitor here, for my behoof, and I further bind and oblige myself to convey the same to the trustees, and on the conditions you name, and that on such terms as may be devised by the said James Dunbar Mackintosh, whom failing the Sheriff-Clerk-Depute for the time being at Kilmarnock, whose decision and judgment will be binding on me; and on my default in any manner of way whatever I agree to forfeit any right or interest I may have in said properties, policies of insurance, and shares. Given under my hand this fourteen day of November One thousand nine hundred years.

'LIZZIE COCHRANE TURNBULL or ROBERTSON.'

"These letters were among the documents in the hands of Mr Mackintosh at the testator's death. The parties are agreed that under the 'deeds and documents' referred to in the testator's letter to Mrs Robertson were included the following—(1) The policies of insurance and disposition set forth in article 3 hereof; (2) Certificates for (*a*) 25 shares in Thomas M'Culloch & Company, Limited, (*b*) 20 shares in Thomas Stewart & Sons, Limited; and further, that the heritable subjects contained and described in the said disposition, together with the said shares and the said policies of insurance, were included under the 'properties, policies of insurance, and shares' referred to in Mrs Robertson's letter to the testator. The testator sold the shares in Thomas Stewart & Sons, Limited, during his lifetime. The shares in Thomas M'Culloch & Company, Limited, are valueless.

"7. Subsequent to the date of the said letters passing between the testator and his daughter Mrs Robertson, the testator granted, *inter alia*, the following dispositions of heritable subjects, all of which

were in the hands of Mr Mackintosh at the date of the testator's death, the deeds in each case being completed but not recorded:—(1) A disposition dated 4th May 1903 by the deceased in favour of Mrs Robertson, of property in Morton Place and Park Street, Kilmarnock. (2) A disposition by the deceased in favour of Mrs Robertson bearing to be granted 'for the love, favour, and affection which I have and bear to my eldest daughter,' dated 22nd February 1904, conveying certain heritable subjects in Kilmarnock, therein described as Victoria Terrace, Plot No. 1. (3) A disposition dated 22nd February 1904, in terms exactly similar to the preceding disposition conveying certain heritable subjects in Kilmarnock, therein described as Victoria Terrace, Plot No. 2.

"8. On 7th March 1904 the testator wrote to Mr Mackintosh a holograph letter in the following terms:—

'I enclose disposition of one half *pro indiviso* of subjects in Morton Place and Park Street, dated 4th May 1903, disposition of subjects Victoria Terrace, Plot No. 1, also of Plot No. 2, dated 22nd February 1904, all in favour of my daughter Mrs Elizabeth Cochran Turnbull or Robertson, residing at Hamilton Place here, which please hold in her interest and for her behoof. Her entry is at my decease, and I reserve full right during my life to deal with them as I please in any manner of way whatever.—I am, very truly yours,

'AND. TURNBULL.'

"9. In the repositories of the testator after his death there was also found a holograph letter in the following terms addressed to him by his daughter Mrs Robertson:—

'16 Portland Road,

'22nd April 1903.

'Mr Andrew Turnbull, 4 Bank Place.

'Referring to your transfer to me of various shares and life insurance policies, I hereby bind myself to re-transfer the same to you at your expense when called on by you to do so, but in the event of your predeceasing me without having called for a re-transfer, then the shares and insurance policies are to remain my property.—Yours truly, ELIZABETH COCHRAN TURNBULL or ROBERTSON.'

"10. The testator has left considerable estate which will be carried by the said holograph settlement of 16th February 1907, even in the event of it being found that the policies of insurance and heritable subjects mentioned in article 3 and the heritable subjects mentioned in article 7 are not carried by the said settlement.

"11. In these circumstances questions have arisen among the parties as to whether a trust affecting all or any of the properties expressly disponed by the testator in favour of his daughter Mrs Robertson was validly constituted by the said letters dated 13th and 14th November 1900, and, if so, whether such trust applied to and affected the properties conveyed in favour of Mrs Robertson by deeds subsequent to the date of the said letters. In the event of any such trust having been validly constituted, the parties are farther at issue upon the question whether that trust was subsequently recalled by the truster by implication when he executed the general trust-disposition and settlement of 16th February 1907, or was in part discharged in respect of Mrs Robertson's undertaking to reconvey certain of the subjects of trust to the truster upon the terms set forth in the holograph letter dated 22nd April 1903."

The second parties *maintained* that by the letters of 13th and 14th November 1900 passing between Mr Turnbull and his daughter Mrs Robertson, an effectual trust was constituted affecting (1) the foresaid policies of insurance, (2) the heritable subjects contained and described in the disposition of 26th April 1898. They also maintained that the heritable subjects contained and described in the disposition dated 4th May 1903 and the two dispositions dated 22nd February 1904 had been brought under the trust. They further maintained that the said trust had never been recalled, and that in terms of it Mrs Robertson falls to pay, transfer, convey, and make over to the second parties in trust for the purposes set forth in the said letters the said policies of insurance and heritable subjects.

The third parties maintained that any operative trust was recalled by the testator when he executed the holograph settlement of 16th February 1907, and that the first parties were bound to pay and make over to them unconditionally the whole estate of the late Andrew Turnbull.

The *questions of law* included the following—"1. Was a trust validly constituted by the letters of 13th and 14th November 1900 with regard to the subjects of the disposition and the policies of assurance referred to in article 3 of this case? 3. Did the provisions of any such trust extend to and affect the properties conveyed by the said dispositions dated 4th May 1903 and 22nd February 1904? 4. In the event of the first question or the third question being answered in the affirmative, does the said general trust-disposition and settlement of 16th February 1907 operate the recall of any such trust?"

Argued for the third parties—*Esto* that a trust had been constituted by the letters of 13th and 14th November 1900, it was revoked by the holograph settlement of 1907. The latest expression of a testator's intention was the ruling one, and that being so all prior dispositions must be held to have been revoked. The cases of *Campbell* v. *Campbell*, July 8, 1880, 7 R. (H.L.) 100, 17 S.L.R. 807, and *Perrett's Trustees* v. *Perrett*, 1909 S.C. 522, 46 S.L.R. 453, were inapplicable, for these were feudal destinations in favour of heirs-substitute.

Argued for second parties—*Esto* that a general disposition and settlement which revoked all other testamentary writings would revoke a special destination made by a third party, it would not revoke a special destination made by the testator himself—*Perrett (cit. sup.), per* the Lord President, p. 527. That rule was not limited to feudal destinations, but applied also to

destinations of personal estate—*Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175, 23 S.L.R. 857. The provisions in favour of the third party were special destinations made by the testator himself, and were therefore outwith the scope of the general settlement, which dealt only with the residue of his estate. *Nasmyth* v. *Hare*, July 27, 1821, 1 Sh. App. 65, was also referred to.

At advising—

LORD KINNEAR—The question raised at the discussion in this Special Case is whether the testamentary settlement dated 16th February 1907, executed by the late Andrew Turnbull, who died on 10th September 1909, is effectual to carry to his daughter Mrs Elizabeth Cochran Turnbull or Robertson his "whole property, means and estate, heritable and moveable, real and personal, wherever situated, or by whom held," or whether certain particular properties which had been settled during his life upon her still remained settled in terms of the deeds of settlement.

It appears that for several years the testator had been in the habit of setting aside both heritable properties and policies of insurance by certain instruments for the benefit of this particular daughter, and it is said that with respect to all of these, and certainly with respect to some, his daughter should take the benefits conceived in her favour subject to a trust in favour of her children. The question is whether these particular settlements remain valid or whether they are recalled by the later trust-disposition and settlement. I do not examine in detail all the instruments to which I have referred, nor do I intend to consider a number of questions raised as to their mutual bearing on one another, upon the assumption that they were all still in force at the date of the testator's death. The material point about which the parties are agreed is that they were none of them donations out and out, but that they were all testamentary and revocable. The only question therefore is whether they are revoked.

I cannot understand that there should be any dispute raised about the terms of the testator's will, which are sufficiently comprehensive to carry everything without exception which belonged to him at the time of his death. But then it is said to be a settled doctrine of the law of Scotland which has been established by cases of great authority, and especially by the decision of the House of Lords in the case of *Glendonwyn* v. *Gordon*, 11 Macph. (H.L.) 33, that general words of disposition in a *mortis causa* deed, unless there is something to control the presumption, are to be understood as applicable only to property the succession to which is not already regulated by special destination to a particular class of heirs. That is the whole extent that the cases to which I have referred really go. But the rule established by these cases with reference to *mortis causa* dispositions of heritable property, read with reference to previous special destinations, has been extended so as to apply to questions of moveable rights settled by testamentary instruments. It has been observed more than once that it is difficult to reconcile that extension of the doctrine to the settled rules which govern the construction of wills, but the point is too well settled by decision to be disturbed by this Court. We must accept the decisions as they stand. But they do not establish, any more than do the cases as to heritable rights, an absolute rule that a general disposition will not operate as a revocation of a previous special grant or conveyance, but only that there is a presumption against its so operating which may be redargued. In certain of the cases the question has been whether facts extrinsic of the testamentary documents themselves would be sufficient to rebut the presumption, but it is equally clear that it may be excluded by the terms of the will itself. I have come to the conclusion that the special destinations in question have been effectually revoked by the terms of this will. The first point is that it begins by "cancelling and revoking all and every previous will or settlement" made by him. These words are wide enough to cover all instruments which have the effect of testamentary settlements whether they are technically wills or deeds, and they will therefore cover the instruments in whatever form they stood in favour of the daughter, because it is common ground that these were all testamentary and revocable. I confess that if the question were open I should be disposed to say that the rule against general words of gift or bequest being read as derogating from a special destination must be excluded by that revocation alone, because the only question of difficulty is whether the special destination can be evacuated by implication from the use of general terms of conveyance. In *Campbell* v. *Campbell*, in which the rule of *Glendonwyn's* case was held to be inapplicable, Lord Selborne explains the principle of the earlier judgment to be that as both instruments expressed the mind and will of the same person—the one as to a particular part, the other as to the generality of his estate—the two instruments might be construed together so as to make the general words residuary in their operation. But it is not intelligible that two testamentary instruments should be construed together if the later of the two revokes the earlier; and it appears to me that to construe a will which begins by revoking all and every previous will and settlement and thereafter bequeathes the whole means and estate of the testator in a different way, as meaning that certain previous settlements are to stand good as special bequests, and the operation of the new will to be confined to the residue after these special bequests have been satisfied, is to deny all meaning to plain words. But then there is some authority for holding that a general clause of revocation is not necessarily conclusive of the question of intention. I should therefore not be dis-

posed to rest my judgment on that ground alone. But it is still a material point that the settlement begins in the way I have stated, because we must go on to the context and see what it is that he puts in place of the instruments which he revokes. Now what he says is—"I cancel and revoke all and every previous will and settlement made by me: And I now and hereby leave and bequeath to my daughter Elizabeth Cochran Turnbull or Robertson, wife of Hugh Robertson, turner, both residing at 16 Portland Road here, my whole property, means and estate, heritable and moveable, real and personal, wherever situated or by whom held, to be held and possessed by her." It is clear enough that the words "by whom held" mean "by whomsoever held," and that shows that the testator has present to his mind the fact that a part of his estate is in other hands than his own and that he means to dispose of that part. The inference appears to me to be obvious that he intended the general words of bequest in the new will to carry the properties and policies of insurance which had been previously settled and were now in the hands of other persons and not in his own hands, because the Special Case shows that there was no other estate which could be so described. A special case is a contract by which the parties agree to state exhaustively all the determining facts upon which the question of law arises which is in controversy beween them, and therefore we must take it that every material fact to which the will relates has been brought before us. But if we are to assume that the material facts are fully stated, there is no estate to which the reference to the property held by others than himself can be made except that settled by the instruments in question. I hold therefore that upon a plain construction of the will itself when it is read, as every will must be read, with reference to the surrounding circumstances, this testator intended to recal these instruments and to render them all ineffectual, and to give to his daughter his whole means and estate for her own use. Taking that view, I should suggest that we ought not to answer the first three and the last two questions put to us, for they are all points which it is not necessary to consider if we answer the fourth question in the way I think it should be answered, namely, that by the trust-disposition and settlement of 16th February 1907 the previous settlements specified in the Special Case were revoked, and that the whole of the testator's property, real and personal, was effectually bequeathed to his daughter, and that we should find it unnecessary to answer the other questions.

LORD JOHNSTON—In the view which I take of this case it is unnecessary to determine whether there was a trust subsisting in Mrs Robertson of the policies and heritable property in Prestwick specified in the third article of the Special Case, or of these and certain other securities at the date when Mr Turnbull executed his holograph settlement to which he afterwards added a number of codicils, although I am disposed to think that such trust did subsist limited to the policies and the Prestwick subjects. Assuming that it did subsist, I think that it was superseded by the holograph settlement. In so deciding I do not think that it is necessary to consider the bearing of the authorities which were quoted to us bearing upon the conflict between a general settlement and prior special destinations either of heritage or moveables, because I am satisfied that the holograph settlement in question bears *in gremio* of it distinct indication that it was the testator's intention that it should supersede the documents which were clearly of a testamentary nature out of which such trust is, I assume, to be deduced. Not only does this holograph settlement expressly cancel and revoke "all and every previous settlement made by me" which in itself might require construction in relation to these documents, but it bequeathes to Mrs Robertson the testator's whole estate, heritable and moveable, in these very special terms, "wherever situated or by whom held." These words are particularly apt to include the policies and Prestwick subjects, the title to which is vested in Mrs Robertson, subject to the series of writings referred to in the Special Case, and the terms were, I think, not only apt to do so, but were selected for the purpose of bringing those subjects under the holograph settlement of 1907. I therefore agree with your Lordship in the manner in which you propose to answer the questions in the case.

LORD MACKENZIE concurred.

The LORD PRESIDENT did not hear the case.

The Court pronounced this interlocutor—

"Find in answer to the fourth question of law in the case that by the general trust-disposition and settlement of 16th November 1907 therein mentioned all previous settlements by the testator specified in the Special Case were revoked, and that the whole property, real and personal, was effectually conveyed to the testator's daughter: Find it unnecessary to answer the other questions of law in the case, and decern."

Counsel for the First and Third Parties—Moncrieff—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Second Parties—Cooper, K.C.—J. M. Hunter. Agents—Macpherson & Mackay, S.S.C.