pre-emptive right lodged a minute within the thirty days, agreeing to purchase the lands. But before the Court remitted to a surveyor to value the lands, he changed his mind and applied to the Court for permission to withdraw the minute.

LAWRIE, for the minister, argued that, on the analogy of the Lands Clauses Act and the interpretation put upon it, the lodging of a minute by Mr Caldwell was just an acceptance of the offer made to him in the interlocutor authorising the glebe to be feued.

J. M. LEES, for Caldwell, replied, that lodging the minute was a mere intimation of willingness, and did not complete the contract, for if it did, then the conterminous proprietor who applied first would be entitled to the lands; and this the Court had negatived in the *Rattray* case. (*Ante*, v. 659.)

The Court held that at this stage there was a power to withdraw.

Agents for Minister—A. G. R. & W. Ellis, W.S.
Agents for Heritor—Ronald & Ritchie, S.S.C.

Thursday, November 12.

SECOND DIVISION.

THOMAS *v.* TENNENT'S TRUSTEES AND OTHERS.

Trust—Failure of Trust Purposes—Revocation—Heir—Liferent. Circumstances in which *held* (1) that a trust-disposition and settlement was inoperative in regard to the fee of an estate, that having been conditioned by a previous will cancelled during the lifetime of the truster, and not being otherwise disposed of in a manner sanctioned by the law of Scotland; but (2) was available to establish a right of liferent in the truster's widow, the creation of that right being the primary object of the deed, which conveyed the right in a habile manner, and there being no evidence of any subsequent intention to annul it.

This was an action of reduction and declarator brought by Mrs Ann Armstrong Tovey or Thomas, heir-at-law of the deceased Colonel Tennent of Pynacles in the county of Middlesex, and of Annfield in the county of Stirling, against the trustees and executors, and also against the widow, of the deceased; and the object of the action was in substance to set aside—(1) A trust-disposition and settlement in the Scotch form executed by the deceased on 2d July 1864, whereby a liferent of the estate of Annfield was conferred upon the testator's widow, and a trust erected *quoad ultra* for purposes specified in an English will, which was afterwards destroyed; and (2) a last will and testament executed by the deceased in the English form on 2d February 1866, within sixty days of his death, whereby the deceased professed to dispose of his whole estate, and expressly revoked "all prior wills." This second deed was sought to be set aside only in so far as it operated as a conveyance or direction to convey, and not so far as it revoked prior wills.

The pursuer maintained (1) that the deed of 1866 was inoperative as a conveyance or direction to convey, in respect it was executed on deathbed; (2) that the deed of 1864 was also inoperative as a conveyance or direction to convey, in respect it was revoked by the deed of 1866, which was effectual as a deed of revocation.

The defenders, Tennent's Trustees, pleaded (1) that the deed of 1864, containing a disposition to trustees for trust purposes not now extant, and containing further a direction to sell, was truly a trust for behoof of the deceased's executors; (2) that the said deed of 1864 was not revoked or intended to be revoked by the English deed of 1866.

The defender (Mrs Tennent) pleaded that the deed of 1864, was, in any view, effectual to secure her liferent of Annfield, and she concurred with the trustees in maintaining that that deed was not revoked, or intended to be revoked, by the English deed of 1866.

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the closed record, productions, and whole process—Finds that the disposition and settlement in the Scotch form executed by the late Hamilton Tennent on 2d July 1864, founded upon by the defenders, is now altogether inoperative, and incapable of receiving effect in so far as regards the disposal of the fee of the property of Annfield, thereby conveyed in trust to the defender, Augustus Mason, in consequence of the prior will, dated 5th May 1864, to which said disposition and settlement bore reference, having been destroyed and revoked: Finds, *separatim*, that by clause of revocation contained in the last will and testament in the English form, executed by the said Hamilton Tennent on 2d February 1866, the said disposition and settlement in the Scotch form was effectually and totally revoked, both as to the fee of said property of Annfield and the liferent thereof thereby conveyed to the defender Mrs Howarth Graham or Tennent: Finds that the pursuer Mrs Anne Armstrong Tovey or Thomas, as heir-at-law of the said Hamilton Tennent, has good legal title and interest to challenge the said last will and testament, and generally to sue and insist in this action: Repels the defences; sustains the reasons of reduction; reduces, decerns, and declares in terms of the reductive conclusions of the libel: Finds, decerns, and declares in terms of the declaratory conclusions; decerns in terms of the conclusion for removing; and appoints the cause to be enrolled for further procedure in reference to the remaining conclusions: Finds the defenders liable in expenses to this date; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

"*Note.*—The pursuer Mrs Thomas, as heir-at-law of Colonel Tennent, seeks to reduce—(1) A last will executed by him in the English form in 1866; and (2) a *mortis causa* conveyance of the lands of Annfield in Stirlingshire, executed by him in the Scotch form in 1864, with the infeftment which has followed on it—reduction as to both deeds being sought only in so far as they prejudice the pursuer's right to Annfield, or any other Scotch heritage belonging to Colonel Tennent. In so far as appears, Annfield is the only heritable property in Scotland of which he died possessed. It is admitted that at the time of his death he was domiciled in England, and possessed both real and personal property there. The defenders maintain that the deeds sought to be reduced are effectual totally to exclude the pursuer's claim as heir-at-law to Annfield, and that, at all events, if they are not effectual totally to exclude her right to that property, it is at least excluded to the extent of the liferent conferred upon Colonel Tennent's widow by the Scotch deed of 1864. This alternative form

of the contention between the parties leads to some complexity in the pleas maintained by them respectively.

"The Scotch deed, executed on 2d July 1864, proceeds on the recital that Colonel Tennent had already executed a settlement according to the English form, of his whole means and estate, on 5th May 1864, but which might not, according to the law of Scotland, be held to regulate the disposal of his property of Annfield in Scotland, and that he had resolved to settle the destination of the same during his life so as to prevent all disputes after his death. After this recital, the deed proceeds to dispone Annfield to the granter's wife in liferent, and to the defender Mr Mason, and such other person as his wife might name, in trust. No nomination was made by Mrs Tennent, and Mr Mason has been all along the sole trustee. The deed expressly directs the trustees or trustee, immediately after the death of the widow, if she is the survivor, or of the truster in the event of her predeceasing him, or as soon after as they may deem most expedient, to sell the property; declaring that the proceeds of the sale shall form a part of the truster's residuary estate, to be appropriated as set forth in the previous settlement of May 1864; and the trustee or trustees were taken bound to pay over the same to the persons therein named.

"If the settlement of the testator's estate had been left to depend upon this conveyance and the prior English will, these deeds would have constituted an effectual settlement of the liferent of Annfield upon the widow, and of the price of the property when sold after her death upon the beneficiaries named in the will. But that will is not forthcoming, and the Lord Ordinary does not understand it is disputed that it may be held to have been intentionally destroyed by the testator. If the only testamentary deed by Colonel Tennent now in existence were the Scotch conveyance, the Lord Ordinary does not think there would be any question of difficulty as to the disposal of Annfield. As the deed contained a direct and independent conveyance of that property in liferent to Mrs Tennent, the Lord Ordinary does not think that the intentional destruction or revocation of the prior will could affect her right. It was not conferred upon her as a right which she was to take in any respect through the trust or the trustee. Whatever inoperative settlement of the liferent in her favour may have been contained in the previous English will, as to which no information can now be got, her right to it had not been left to depend to any extent on that instrument, but had been made the subject of a disposition valid by the law of Scotland, just because the testator had become aware that the prior deed was ineffectual for that purpose. The Lord Ordinary therefore thinks that the revocation of the prior will can only be held as intended to recal the bequest of the price in favour of the parties there named.

"As to the fee, the defenders maintain that if the Scotch conveyance were the only testamentary deed of Colonel Tennent now in existence, the trust-disposition to Mr Mason, with the absolute direction to sell, would have the effect of making it moveable property, to which his executors would be entitled to succeed. Although this is not the actual state of the case, the contention of the defenders in regard to it enters deeply into the questions as to the validity and effect of the subsequent English will of 1866, which is challenged by the pursuer as heir-at-law, on the ground of deathbed. If the fee of Annfield was moveable in the succession of Colonel Tennent in consequence of the trust-conveyance and direction to sell in the Scotch deed, the pursuer, as heir-at-law, can have no title to challenge the English will, in so far as it may be held to dispose of that fee, unless she can show that the conveyance to Mason has been revoked. And further, the objection of deathbed could not apply to the settlement of the fee of Annfield by the English will, if that is not to be dealt with as Scotch heritage in the testator's succession. The Lord Ordinary has no hesitation in rejecting the contention of the defenders on this point, which is contained in their fourth plea in law. He knows of no authority for holding that an absolute direction to trustees to sell, where the beneficial purpose for which the sale was to be made has failed or been revoked, changes the character of the estate from heritable to moveable in the succession of the truster, or is an implied and operative direction to pay the price to his executors. On the contrary, he is of opinion that, on all the analogies to be drawn from the established rules of law in regard to succession and settlements, the maker of the deed must be held to have died intestate in regard to property in that position, and that the nature of his succession cannot be affected by his inchoate or abandoned purpose to settle it in favour of strangers. It is indeed a well established rule of law that an absolute direction to sell makes the property moveable in the succession of the beneficiaries, although the sale may not have taken place, or the time for it arrived, at their death. The obvious ground of that rule is, that the beneficiaries could never get the subject of the bequest except as moveable property; and it has no application to the totally different question as to the effect of such a direction on the intestate succession of the truster himself. Although he has expressed an intention, now frustrated or abandoned, to benefit certain parties by directing his land to be sold and divided among them, he has never indicated a preference for his executors over his heir, or an intention that his property, if it is to go to his legal successors, should not do so in the state in which it shall exist at the time of his death. Reference was made to the case of *Gardner* v. *Ogilvie*, 20 D. 105, in which the direction was only to sell if necessary. The Lord Ordinary has not found anything in the views which were there incidentally expressed on the present point, which was not before the Court for decision, that he thinks would warrant him in coming to a different conclusion from that which he has expressed. He is of opinion that no assistance on this point is to be got from Exchequer cases, as to liability for legacy-duty of property directed to be sold under a trust-settlement.

"Such being, in the opinion of the Lord Ordinary, the effect of the Scotch deed of 1866, if it had stood as the latest settlement of Annfield—the prior will being destroyed—the remaining contention between the parties is as to the effect of the subsequent English will of 1866, and the challenge of that deed on deathbed.

"The defenders do not plead that the deed of 1866 carries the fee of Annfield to the residuary legatees in that deed, as being an effectual conveyance of Scotch heritage. Neither have they any express plea to the effect that it is so carried as having been by the Scotch deed rendered moveable, or made disposable by a subsequent will or informal deed of direction. But in reply to the pursuers' pleas, they found upon the latter view, as

giving them right to the estate, and entitling them to absolvitor in this action. The Lord Ordinary has already stated the reasons for which he cannot hold that the fee of Annfield is to be dealt with as moveable. He is also of opinion that it cannot be dealt with as estate held by the trustee to be disposed of by any direction of the truster in a subsequent deed. That is not the nature of the trust-settlement made by the truster when *in liege poustie.* He only gave the fee of the property to Mr Mason in trust for sale, that the proceeds might be appropriated as set forth in his previous will, and for no other purpose. The Lord Ordinary is of opinion that a trust-settlement thus limited cannot by implication be converted into a settlement in trust for that purpose, or any other purpose to be declared by a subsequent deed. Except for the existence of the previous trust, the fee of Annfield could not be disposed of by a deed on deathbed; and the deathbed deed can have no support from the prior trust, if, when it was executed *in liege poustie,* the truster expressed no intention that the property should be disposed of according to any direction he might subsequently leave. The Lord Ordinary is therefore of opinion that, as regards the fee of Annfield, the English will of 1866 is liable to the objection of deathbed, although it should not be held to have revoked the Scotch deed of 1864.

"But he is also of opinion that, both as to the liferent and fee, the deathbed will of 1866 must be held to have expressly revoked the Scotch deed, though he does not think this part of the case to be free from difficulty. It would be of no consequence that the will of 1866 should have merely revoked the prior deed by implication, such implied revocation being held, by a well-established rule of law, to be conditional on the validity of the deathbed deed. But it is important to consider what property the testator intended to dispose of by his last will, in order to ascertain his meaning in the clause of express revocation which the deed contains. He gives to his executors in the most ample terms all the residue and remainder of his "personal estate and effects of whatever nature and kind soever;" and he farther gives and devises to them "all and every my freehold, copyhold, and leasehold estates of which I shall be possessed or entitled to at my decease, whether situate in England, Scotland, or elsewhere." The defenders maintain that these words must be read with reference to English forms of tenure, and cannot be held to include landed property in Scotland. The Lord Ordinary thinks that freehold estates, taken in contradistinction to copyhold and leasehold, and described as in England, Scotland, or elsewhere, may properly, in the construction of such a deed, be held to include all lands not held by either of the two latter tenures. This construction is aided in the present case by the circumstance that the villa of Pynacles, which is to be liferented by the widow, is directed, after her death, to be held on the like trusts as the truster's 'other real estates' —that, is, the estates elsewhere described as freehold, copyhold, and leasehold. The Lord Ordinary thinks that, as in a question of intention, the testator must be held to have intended to dispose of his whole landed estate of every kind, and wherever situated. If this view is well founded, it follows that the will was intended to operate as a revocation of all prior settlements of heritage, whether in England or Scotland. As already noticed, that is not in itself of any importance in the present question of deathbed. But as the testator did not leave the matter of revocation to rest upon implication, but inserted an express clause of revocation, it seems to the Lord Ordinary to be a legitimate and material element in the construction of that clause—that it was introduced in order to make room for the operation of a will intended to dispose of the testator's whole landed estates, whether in England or Scotland. The clause is in these terms:—And lastly, I revoke all former wills, and declare this only to be my last will and testament. The testator must be held to have applied his mind to the matter of revocation, and expressed his intention that none of his previous deeds indicated by the terms of the revoking clause should receive effect. The question is—How are these terms to be construed in the present case with reference to the entire context? The Lord Ordinary has felt this to be a question of some difficulty in coming to a conclusion on that point. The words do not, in their strict or ordinary sense, apply to such a deed as the Scotch disposition, and the will in which they occur is different from that deed in its nature and effect according to the law of Scotland. But the Lord Ordinary thinks it is obvious that that distinction was not present to the mind of the testator. He also thinks that the terms used by him are subject to construction, in order to ascertain and give effect to his intentions; and that, when read in the light of the context, they must be held to include all testamentary deeds disposing of any part of his estate, heritable or moveable, whether by bequest, disposition, or otherwise. Taking this view of the clause of revocation, he is of opinion that the Scotch deed was expressly and totally revoked, and that, in consequence, the right of the pursuer, as heir-at-law, revived, so as to entitle her to challenge the will, in so far as it is to her prejudice in regard to the fee or the liferent of Annfield.

"The defenders maintain that the will of 1866, being executed in the English form, is ineffectual by the law of Scotland to revoke a previous settlement of Scotch heritage. But the Lord Ordinary does not think that this is now an open point, having been otherwise settled by the case of *Leith* v. *Leith,* 10 D. 1137.

"On the whole, the Lord Ordinary thinks that the Scotch deed of 1864 cannot be founded on by the defenders, and that the English will of 1866 is not a deed capable of conveying Scotch heritage, and is liable to the objection of deathbed, in so far as it is founded on for that purpose."

The defenders reclaimed.

Lord Advocate and Hutchison for Mrs Tenant.

Rutherfurd for trustees.

D.-F. Moncreiff and Gifford in answer.

At advising—

Lord Justice-Clerk—This action is brought by the heir-at-law of the late Mr Hamilton Tennant, in order to vindicate his claim as such heir to the lands of Annfield near Stirling.

Mr Tennant, in May 1864, appears to have executed a will in the English form, embracing in words his heritable property both in England and Scotland. This will was invalid to convey his property in Scotland, not containing words expressive of present disposition, which at that time was necessary to an effectual conveyance of heritage.

This will was subsequently cancelled by the testator, at least it is not furthcoming, and may be assumed to have been cancelled.

While this will subsisted Mr Tennent executed a deed in the Scotch form as to the property of Annfield. The narrative bears that the settlement of 1864 may not according to the law of Scotland be held to regulate the disposal of that property. It narrates his resolution "to settle the destination of the same so as to prevent all disputes after his death; and farther, his love and favour to the persons named." The deed then conveys a direct liferent right to his widow, the defender, in case of her survivance, and after her death, in favour of the defender Mr Mason and such other parties as might be named by her as additional trustees in fee.

On the 2d February 1866, the testator executed a deed in the English form. After all special bequests he bequeathed all the residue of his personal estate to Mr Mason and Colonel Graham, the defenders. As trustees, they are directed to invest and pay over the income arising from the investment to his widow, the invested fund being directed to be applied and appropriated to specified uses; and then, as to the real estate, he gives and devises "all and every, my freehold, copyhold, and leasehold estates, of which I shall be possessed or entitled to at my decease, whether situate in England or Scotland, or elsewhere, unto the use of the said Augustus Mason and James John Graham;" the uses being, that his widow shall have possession of his dwelling-house of Pynacles in England; that she should have the "net residue of the income" of his "freehold, copyhold, and leasehold estates." The income so secured is declared to be in satisfaction of any claims of the wife under marriage-contract or otherwise. The property is to be sold on her death and the residue to be paid to Lieutenant Hamilton Tovey. Further, the deed contains a clause to the following effect—"Lastly, I revoke all former wills and declare this only to be my last will and testament." The granter died within sixty days of the execution of this last will.

So far as relates to the fee of the Scotch property, the case is that of trust constituted in favour of trustees with a direction in favour of parties whose names it is impossible to conjecture. The reference to the prior cancelled deed failing, and there being no purposes pointed out except to carry out a distribution in the deed, the result in law is, that the trust-purposes are undeclared—a case in which trustees must be held to hold for heirs-at-law of the granter. It was maintained that there was a direction to convert the subject into moveable property by a sale, which would let in the representatives of the trustee *in mobilibus*, but the direction was given as part of an intended appropriation, which is not and cannot be carried out. It is impossible to say that any such conversion was directed under the circumstances which actually happened, or that the granter's succession can be allowed in this character, and therefore I can see no ground for resisting the claim of the heir as to that fee. The trust, it was said, may stand, the purposes being declared by the last will which, though ineffectual as a conveyance of heritage, may stand as a direction to trustees duly named and invested with the estate. There is no trust for purposes to be declared, but for purposes as declared in a specific instrument which is not extant. There is no operative divesting deed by which the interest of the heir can be effected. The deed of February 1866, under which he is sought to be divested, is bad, as containing no words of conveyance, and would be open to objection on the head of deathbed, and there is no operative deed left.

So far I agree with the Lord Ordinary in the result to which he has come to, but I hesitate to adopt his view as to the liferent.

The liferent of Annfield was conveyed to Mrs Tennent directly upon a narrative of a desire thereby to regulate his succession; it was so conveyed as to vest the right in her irrespective of the trust, and wholly independent of the trustees. She was a disponee in liferent by a special conveyance in her favour, and by the infeftment following upon the conveyance, became feudally vested to the effect of a liferent right unless the liferent right was revoked.

Deeds of conveyance may be impliedly revoked by a new conveyance to a different party, but there is no implied revocation, unless the new deed is effectual, where the deed is only intended to operate as a conveyance, but is abortive. This doctrine is well established. It is founded on the civil law; it has been given effect to in many cases. The case of *Henderson* v. *Wilson and Melville*, in the House of Lords, March 29, 1802, is an express authority upon that point. The deed of 2d February 1866 might be viewed as an implied revocation of the former deed of 1864 had it been valid and effectual. It is invalid, and therefore the implied revocation does not arise.

The provisions of the deed of July 1864 and those of the 2d February 1866 are, in reference to this property of Annfield, in some respects inconsistent. There is, no doubt, a substitute liferent, intended in each case to be conferred on the widow; but the trustees, according to the later will, are to hold and pay over the rents, subject to deductions under the one, while Mrs Tennent is to possess and enjoy the actual subjects in the other. But the deed of 1866 has no operative effect in so far as regards this property, for the property is "bequeathed," not "conveyed." The deed is not duly authentic; and the deed, if it were otherwise available, would be open to reduction *ex capite lecti*, so that the trustees cannot act under it, so far as this estate is concerned, and consequently implied revocation will not do. If the deed of 1864 is revoked, it must be by the efficacy of the clause of revocation alone. The question is, whether the settlement of the estate in liferent in 1864 was a formerwill?—a question attended with difficulty, especially if the word can be read with a view to the general purpose of the deed.

The expression "will" is inapplicable, according to a strict construction of a deed of direct disposition of an heritable subject. It would seem to import only an expression of testamentary volition, not the actual exercise of a *de presenti* power of conveyance. Technically, the expression does not reach the deed. Further, the revocation is accompanied by a declaration that "this was to be the only last will and testament," former wills being revoked. I think it may be said that the wills revoked were of the nature of the actual will, which was to form the last and only will and testament of the truster. Former wills are to be recalled, and to be replaced by a new will; but is an instrument of present conveyance of a specific heritable subject one of a series of wills, or does it differ in its nature? It is not necessary to read the words as necessarily embracing that deed, as the words have full significance and effect if read in connection with the first or general will or testament of 1864. Though that will is to be held as having been cancelled, it was

quite to be expected that that will should be revoked, though the testator may have taken means otherwise to set it aside. A revocation of former wills, with a view to substitute a new will, may very well be read as pointed to a former will of the like kind.

I think, therefore, that there are difficulties in the way of holding the deed revoked; one, that it is not a will but a disposition; another, that it is unlike in character to the instrument substituted for the recalled will; and a third reason may be found in the consideration that a specific revocation of a special deed may be looked for where that deed is really in view, and not the use of a mere general expression of what is, at best, of an ambiguous character.

I think that an examination of authorities supports this view, and I am inclined to hold, upon an examination of the very important case of *Dundas* v. *Dundas*, in the House of Lords, as explained in Mr Ross' first volume, that it is directly in point.

Sir Laurence Dundas, in 1765, bound himself in his son's marriage-contract to execute a conveyance of certain lands for his son's liferent use, and in fee to the heirs-male of the marriage. He reserved power to subject these lands to the fetters of an entail.

In 1768 Sir Laurence executed a deed of entail of his whole estates in Scotland—including valuable estates not embraced in the marriage-contract—on his son and the heirs-male of his body, reserving a power to revoke, so far as consistent with the marriage-contract.

In 1779 Sir Laurence bequeathed and devised to his son all the real estates in England, Ireland, Scotland, and the West Indies, not included in the settlement contained in the settlement made on his marriage, and added, "I do hereby revoke all former and other wills by me heretofore made." There was an inscription on the deed, initialed by the testator, which described it "as the last will and testament of me, L. D."

It was contended by the son Thomas Dundas that the revocation in the last will recalled the entail of all the lands not embraced within the marriage-articles, and the Court of Session found that the clause of revocation did operate a recal of the entailed destination; but the House of Lords altered the judgment, and they did so on the express ground that the clause of revocation was ineffectual to alter the settlement of the real estates.

Here the difference is between the nature of the liferent use only, so that if no good argument arose in the case of *Dundas* to lead to such a construction of a revocation of will, where there was a most material variance between the deeds, a lesser variance here cannot possibly lead to a different construction of the words. The Lord Ordinary argues as the unsuccessful party in the case of *Dundas* argued, upon the footing that the distinction between wills and deeds of conveyance was not before the testator, and that to give effect to his intentions the word "will" must receive a construction different from its ordinary meaning. Lord Thurlow held that this would be raising conjectures out of the deed, and that other wills meant instruments of a like nature with the will itself in which the clause occurs, and that such general words could not reach to special settlements of estate. Here as there, there is the absence of a revocation of the special deed. On this point I have entertained difficulty, removed only by an examination of this case of *Dundas*.

There are other cases where a trust-deed conveying Scotch heritage was not held to be revoked by a general revocation of former wills, or even of wills and testamentary disposition. Among them are the cases of *Fordyce* v. *Dick's Trustees*, and of *Brack* v. *Hogg;* but they may be said to stand in a different position from the present, inasmuch as the trust-deed supplied the necessary machinery for working out the purpose as expressed in the last wills of the granters, so that the construction led to this, that the very object of the testator would be defeated by the testator's object. I may state, however, that in the case of *Fordyce* the then Lord Justice-Clerk, without the expression of any difference of opinion on the Bench—speaking of a revocation in a last will of "all wills and testamentary dispositions by me at any time heretofore made,"—said, "though he altered the will of 1813, I do not think the revocation of all wills and testamentary dispositions can possibly include deeds relative to heritable property in Scotland."

There is thus, as it appears to me, no implied revocation and no express revocation, and consequently the deed must, I think, stand as a subsisting regulation of the specific heritable estate.

It is said that the deed cannot subsist apart from the will to which it is a mere accessory, and the same argument may be used to interpret the expression. The deed, no doubt, was executed to make effectual the attempted conveyance in a separate deed, but the deeds were independent. A direct liferent right was conferred, and the destruction of one with a preservation of the other does not lead to the conclusion that the one, in so far as it confers a special right, is to depend upon the other.

I have assumed that the English deed, if effectual according to the law of England, the place of execution, might have operated as a valid revocation. The majority of the Court expressed their view on that point in the case of *Leith*, and I concur with the majority in holding that the point was settled by former decisions, and that sound principles of international law require us to give effect to revocations of undelivered instruments as to land if the intention is expressed in an instrument executed according to the form prevailing in the place of execution.

Lord Cowan—The interlocutor under review appears to me well founded as regards the several questions involved in this case, with one exception. I cannot concur with the Lord Ordinary in holding that the disposition of the heritable property of Annfield in liferent to his widow, the defender Mrs Tennent, has been effectually revoked.

On the death of the testator two deeds of settlement were, as I understand, found in his repositories. One of these was the trust-disposition and settlement, dated 2d July 1864, in the Scottish form. The other was an English will, of date 2d February 1866, and which makes no specific reference to the prior deed.

The Scotch deed of July 1864 has regard entirely to the settlement of the property of Annfield in Scotland. It dispones to his widow the liferent of that property in the event of her survivance, and after her death conveys the fee in trust, for the purposes therein mentioned, to Augustus Mason, his heirs and assignees, and another trustee to be named by his widow. The purposes are declared to be, after the elapse of the liferent, to sell the subjects, and to appropriate the proceeds as a part of his residuary estate, "as set forth in my said

last will and settlement,"—the trustees being taken bound "to hold and pay over the same to the persons therein named and entitled to receive the same." The deed provides for no other application of the proceeds of this property when sold. The last will and settlement referred to is mentioned in narrating the cause of the testator having executed the Scotch deed in these terms—"having already executed a settlement according to the English form of my whole means and estate, which is dated the 5th of May 1864," but which, it is narrated, might not be held to regulate the disposal of Annfield by the law of Scotland; and on this account this Scotch deed of July 1864 is stated to have been executed. Thus, as regards the fee of the property, its disposal was to be regulated entirely by the English deed of May 1864. But the liferent right was given to his widow altogether irrespective of the English will. Its validity could not be affected whether that will subsisted or not. Its cancellation might destroy the destination of the fee and open the succession to the heir-at-law, but it could not touch the widow's independent liferent right. And the parties are at one in the record as regards the fact that the will is no longer in existence, having been cancelled or destroyed during the testator's lifetime.

Thus standing the fact as to the Scotch deed of July 1864, the English will of February 1866, executed by the testator when on deathbed, purports to convey his whole property, heritable and moveable, wheresoever situated, to his executors, for the purposes therein contained—viz., to pay legacies to various parties, and to pay the liferent of the whole residue to his widow for her absolute use, the residue itself being disposed of to and for behoof of the persons therein mentioned; and in the deed there is this clause—"I revoke all former wills, and declare this only to be my last will and testament."

As to the effect of this English will upon the Scotch deed of 1864, to which it does not once refer, and upon the succession to the property of Annfield, I observe—

(1) That in so far as it may be alleged to carry to the English executors the fee of that property, it can be of no avail in this question with the heir-at-law, whose right to succeed cannot be affected by a deed not executed according to the law of Scotland, and containing no disponing words sufficient for the purpose.

(2) That the deed in this respect can receive no support from the execution of the Scotch trust-disposition in 1864, supposing that deed still to subsist, for the trustees therein named are directed to hold the property for the purposes of a settlement no longer in existence, and for no other purpose whatever,—this case being thus essentially different from those instances, which have occurred where a Scotch trust-deed has declared that the trustees should hold the property conveyed to them for purposes to be declared in a will or deed of instructions to be executed at any time of the granter's life.

(3) That the heir-at-law's right to the fee of this Scotch property does not require the aid of the clause revoking former wills—there being no effectual destination of that property executed by the testator in *liege poustie*, either by the trust-deed of 1864 or by any other deed; and as little, in this view of his right, does the heir require the aid of he law of deathbed, for although the English will of February 1866 had been executed *in liege poustie*, it would not have affected his right.

On this simple view of the legal principles applicable to the case as it stands upon the two deeds, I hold the Lord Ordinary to have arrived at a right conclusion in so far as regards the pursuer's right to have the fee of this heritable property of Annfield. The position of the liferentrix, however, is quite different. The liferent right conferred upon her was given by the Scotch deed in apt and formal terms, and in all respects according to the forms required by the law of Scotland, to herself, and not through the trust created by the disposal of the fee of the property and its proceeds when sold. And when, by the act of the testator, the English will of May 1864, by which the disposal of the fee was to be regulated, was cancelled and destroyed, the Scotch deed—as the constitution of a liferent of heritable property—remained as entire and complete as if it had been from the first a separate conveyance in her favour. Such deeds of constitution of a liferent right are well known in the law and practice of the country, and will receive effect although, from there being no conveyance of the fee of the liferented property, the heir-at-law will succeed to it in virtue of his legal right. This, in truth, and no other, is the light in which the subsistence of the liferent conferred on the widow must be viewed. The deed of July 1864, preserved uncancelled by the testator along with the English will, is the constitution of her right; and the only objection that can be stated against its subsistence is, that the revoking clause contained in the English will includes and destroys the Scotch deed in favour of the widow. The question then is, whether the Scotch deed was intended by the testator to be revoked, or whether it was not left by him entire for the very purpose of taking effect after his death in her favour?

On one point maintained in the course of the debate by the defender's counsel I entertain a clear opinion—viz., that a Scotch deed settling heritage may be effectually revoked by a deed executed according to the law of the place of execution, although not formal according to the requisites of the law of Scotland; and had the English will of 1866 in clear and unambiguous terms declared it to be the intention of the testator to revoke *in toto* his Scotch deed of 1864, I do not think it doubtful that such revocation must have received effect. The decisions that have been pronounced appear to me to make this no longer a doubtful question in the law of Scotland. I allude to its decision in *Leith* v. *Leith*, referred to by the Lord Ordinary, and to the opinions of the great majority of the whole Judges in the case of *Purves*, 1861, 23 D. 812. It is not on this ground, therefore, that I differ from the Lord Ordinary's view as regards the liferentrix's right. It is because I cannot hold the words employed in the English will revoking all former wills, to be apt and sufficient indication, in the circumstances of this case, of an intention by the testator to revoke the liferent right conferred by the Scotch deed upon his widow.

The counsel for the pursuer failed to refer to any decision of the Court where such words as those which occur in this English deed have been held effectual to revoke any regularly executed Scotch deed disponing heritage. I do not say that there may not be indications so clear and manifest of an intention, by the use of the words employed, to revoke such a deed, as to make them legally effectual for that purpose. But I consider that when words of so general import are employed, the intention thereby to set aside and revoke the prior Scotch

deed must be clear and unambiguous. I find no such indication of intention on the part of this testator, either in the English will or in any other writing, or in any act of his regarding his succession. Indeed, I cannot account for his confirmation of the Scotch deed on 9th June 1865, and his careful preservation of it along with the English will, on any other footing than that his intention was that both deeds should receive effect in the regulation of his succession. And this conclusion appears to be well founded even if it be held that the fee of Annfield was intended to be carried to the English executors under the general words of conveyance. The liferent by which the fee was burdened nevertheless remains well bestowed upon the widow by a formal deed which has not been revoked.

The decisions of this Court, and of the House of Lords in the important and authoritative cases of *Dundas*, 2 Paton 613; *Fordyce*, 5 Sh. 897; *Black*, 1831, 5 W. & S. 61; and *Cameron*, 7 W. & S. 106, afford the strongest support to this view of the limited effect of general words of revocation contained in this English deed of 1866. The words of revocation which occurred in the English deeds that were founded on in those decisions were almost the same as occur in this English will, but they were not held effectual to revoke the prior well-executed deeds, according to the forms required by the law of Scotland for conveying heritage. In illustration of this observation, I would refer to the case of *Cameron*, not because it is singular, but because it affords an example of the principle of construction that has been acted on in such questions. A disposition of his whole means and estate, including heritable property in Scotland, had been executed by the testator in favour of trustees, in all respects formal by the law of Scotland, for the purpose of realising the proceeds, and for the uses, purposes, and under the declarations contained in the testator's will "in the English form already executed or to be specified and contained in any will, codicil, or other writing which may yet be executed or signed by me." The will referred to as executed was afterwards either cancelled or destroyed, but another will was executed by the testator, by which he revoked all former wills, and made a new distribution, and gave new directions as regards his property. The heir-at-law contended that the general revocation of former wills had the effect of revoking the trust-disposition formally executed according to the law of Scotland, and that, as the English will could not legally convey heritable property in Scotland, his right to succeed had not been effectually barred. The Court here, however, and the House of Lords, refused so to construe the general words of revocation in the English deed, and held that the trustees had been well vested with the testator's heritable property in Scotland for the purposes declared by the English will. Now, on this principle, I apprehend that had the testator's trust-deed of July 1864 contained an ulterior direction to the trustees that they should hold the property conveyed to them, not merely for the purposes of the English deed of May 1864 afterwards cancelled, but for the purposes of any other deed to be afterwards executed by the testator at any time of his life, the English deed of February 1866 must have received effect through the trustees,—seeing that the general words of revocation would not have been held to affect its subsistence, and the directions in the English deed behoved, therefore, to have been acted on by the trustees in the distribution of the testator's estate. The fact of the deed of July 1864 having been deprived, by the testator's own act of cancelling the English will of May 1864, of all operation as a trust as regards the fee of the property, and of its having been left entire by him as a formal deed of constitution of a direct liferent right to the widow, confirms the application to this case of the principle acted on in the decisions referred to. In the construction of such mere general revoking words as are contained in this English will of 1866, only such effect will be given to them as is plainly consistent with the declared object and clear intention of the testator in the regulation of his succession.

On these grounds, I think the interlocutor of the Lord Ordinary should be so far altered as to give effect to the defence stated to this action on the part of the liferentrix.

The other Judges concurred.

Agent for Pursuer—J. A. Forman, W.S.

Agent for Mrs Tennent—J. H. Ferrier, W.S.

Agents for Trustees—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, November 13.

WELWOOD'S TRUSTEES *v.* JOHNSTON.

Trust—Residue—Period of Vesting—A morte testatoris. Circumstances in which *held* (1) that a certain part of the fee of residue vested in children as a class *a morte testatoris* and in each individual child existing at that date, and at birth in the case of children born subsequently; (2) that the widow of a predeceasing child was entitled by his settlement to the shares of brothers and sisters accruing to him by succession.

This multiplepoinding was brought for the distribution of the moveable estate of the late Mr Robert Welwood of Garvock. Mr Welwood died in 1820, leaving two daughters, Isabella (Mrs Clark of Comrie) and Mary (Mrs Johnston of Sands). By his trust-settlement, executed in 1811, Mr Welwood bestowed one-half of his residuary estate on his eldest daughter, Mrs Clark, and the other half he directed his trustees to bestow upon his daughter Mrs Johnston in liferent, if she should survive him; and upon her decease, in case she should not survive him, "to pay over" the said half to and among her children, in proportions to be fixed by her, failing which, share and share alike. Mr Welwood declared that, while there were younger children, the heir succeeding to Sands, or any other estate of £500 a-year, should not be entitled to any share of the residue. In case of Mrs Johnston predeceasing him, the trustees were "to pay over," upon the testator's decease, the half of the residue to her children not entitled to succeed to Sands, &c., whom failing, to her child or children succeeding to Sands, or other estate of £500 a-year, whom failing, to the younger children of Mrs Clark, his other daughter, whom failing, to any child of Mrs Clark succeeding to the estate of Comrie, whom all failing, to Mrs Johnston, her heirs and assignees whomsoever. Mrs Mary Johnston survived her father, and died on 24th March 1867. She was survived by five, and predeceased by seven, of her children. Mr James Johnston of Sands, her eldest son, predeceased her on 12th August 1866. The competition in this case arose