reach the age of twenty-one years complete, or be married, whichever of these events shall first happen, and on the arrival of these events, or either of them, immediately on being required by my said daughter so to do, to denude themselves of this trust, and dispone, assign, convey, and make over to the said Catherine Margaret Kenmore, or to any trustees to be named by her and her husband, the whole of the said residue of my said heritable and moveable estate, but exclusive always of the *jus mariti* and right of administration of any husband my said daughter may marry; declaring that the said residue and the revenue derivable therefrom shall belong to herself only, and shall not be subject to the debts or deeds or diligence of the creditors of the husbands she may marry any manner of way, and in case of the death of my said daughter before the said conveyance by my said trustees, leaving lawful issue of her body, I direct my said trustees to hold the said estate and apply the annual return therefrom for behoof of such issue, until the youngest of said issue shall attain majority, or in the case of a daughter she be married, and thereupon to divide and convey the said residue amongst said issue, share and share alike; and failing my said daughter without lawful issue of her body, and failing further lawful children of my own body, I direct my said trustees to dispone, assign, convey, and make over the said residue of my said estate, heritable and moveable, to one of his trustees." The trust-disposition and settlement contained no express clause of revocation of previous settlements or bequests, nor did it contain any express direction to the trustees to pay legacies which he had bequeathed or might bequeath by separate writings. Mr Kenmore died on 17th August 1868. He was survived by Mrs Kenmore and by their only child the said Catherine Margaret Kenmore. His personal estate amounted, conform to Inventory given up by his trustees, to £3,715, 3s. 5¾d. sterling, which includes 12 shares (or £1200 of the stock) of the Commercial Bank of Scotland, valued in said Inventory at £3,144. His heritable estate consisted of house property and investments on heritable security, yielding a yearly income of about £280.

These questions were argued before the Court:—

"1. Whether both or either of the holograph writings of 23d July 1862 and 7th June 1865 constitute valid and effectual bequests in favour of Mrs Kenmore, and what is their legal effect? or Whether both or either of them were revoked by the trust-disposition and settlement of 23d June 1868.

"2. Whether, in the event of the holograph writing of 23d July 1862 being found to have been revoked, the said Mrs Catherine Russell Hill or Kenmore is entitled to payment of the said balance of £140 with interest at the rate of 5 per cent. per annum from 12th April 1861 till payment, or any part thereof."

CLARK and JOHNSTONE for Mrs Kenmore.

GIFFORD and MAIR for trustees.

At advising—

LORD PRESIDENT—I entertain no doubt that our judgment must be in favour of Mrs Kenmore, on the ground suggested in the first question appended to the Special Case.

It is not disputed by the trustees that the writings of 23d July 1862 and 7th June 1865 are holograph of the deceased Mr Kenmore, and that they are in their true construction and effect—supposing them to be unrevoked,—testamentary writings. By one of these writings Mrs Kenmore is entitled to three shares of the stock of the Commercial Bank, and that in payment of money lent him by her. The value of the stock is in excess of the money advanced, but that of course does not derogate from the effect of that as a legacy. By the second writing Mrs Kenmore is entitled to £500 bank stock. It must be conceded that there is no express revocation of these legacies, and it is not immaterial to observe in connection with that, that these papers were delivered to the legatee. If after that the testator intended to revoke such special legacies, it strikes me that he must either expressly revoke them or make his intention very clear by implication, almost equivalent to express revocation, for if he gives these papers to the legatee, to be founded on, and leaves them with the legatee till his death, that appears to be an indication in their favour. But on examining the general deed of settlement of 1868,—so far as I know, the first general settlement made by Mr Kenmore—it is very difficult to spell out of it anything like an implied revocation of these special legacies. It conveys his entire estate, no doubt under burden of various payments, and creates one special legacy in favour of his sister-in-law, and then gives the residue to his daughter. If the testamentary writings founded on by Mrs Kenmore had settled his whole estate, it might have been said that this later deed revoked the prior general settlement. But there is nothing inconsistent between this and the other deeds. They may receive effect together as constituting the will of the deceased. There is no legal principle on which the validity of these writings can be impugned.

I am therefore of opinion that we must give judgment in favour of Mrs Kenmore in terms of the first alternative stated in the Special Case.

The other Judges concurred.

Agents for Mrs Kenmore—Hope & Mackay, W.S.

Agent for Trustees—James Finlay, S.S.C.

Tuesday, May 18.

SECOND DIVISION.

SPECIAL CASE—WILSON AND OTHERS.

Special Case — Antenuptial Contract — Erasure — Clerical Error. A clerk, after engrossing and recording a deed, detected an error, the word "lives" being written "leaves." At his own hand he erased the words in the deed, and made the necessary correction. There was no notice of this erasure in the testing clause, and to the extent mentioned there was a discrepancy between the deed and the record. *Held* that the deed was in no way vitiated, and afforded a sufficient security for the lending of money.

This was a Special Case for the opinion and judgment of the Right Honourable the Lords of the Second Division of the Court of Session, submitted by John Wilson and Others. The following are the facts upon which the parties are agreed:—

"The said John Wilson and Christiana Johnston or Wilson agreed, in contemplation of their marriage, that by their contract of marriage provision should be made for the contingency of their having occasion to sell or burden with debt the heritable subjects intended to be thereby settled and conveyed; and also to divide and apportion the fee

of the subjects falling under the conveyances and obligations therein contemplated to and among the children of their marriage; or, in the event of there being no children, to dispone and convey the same by deed to take effect upon the death of the survivor of the spouses.

"The draft of their antenuptial contract of marriage accordingly, as prepared for execution and submitted to and approved of by the parties, contained a clause in the following terms:—'And the said John Wilson and Christiana Johnston, intended spouses as aforesaid, reserve to themselves jointly full power and liberty at any time during their joint lives, by a writing under both their hands, but not otherwise, to sell or burden with debt the heritable subjects above mentioned hereby conveyed, and also to divide and apportion the fee of the subjects and others hereby conveyed, or falling under the conveyances and obligations herein contained, to and among the children of the said intended marriage, or, in the event of there being no children thereof, to dispone and convey the same by deed, to take effect upon the death of the survivor of the said spouses, in such way and manner as they may think proper.'

"The contract of marriage, after being engrossed, was duly executed by the parties upon the 6th day of August 1866: and, on the 23d day of August 1866, it was recorded in the Register of Sasines. They were married shortly after the date of the contract.

"After the deed had been so recorded, the clerk who had engrossed the same was informed by some one of the officials in the Record Office that an error appeared to have been made in engrossing the deed. It was pointed out to him that in the contract as executed the above clause was thus expressed, viz.:—'Reserve to themselves jointly full power and liberty at any time during their joint *leaves*, by a writing under both their hands, but not otherwise, to sell,' &c:—the word '*leaves*' having been written in place of the word '*lives*,'—and the deed had been so entered in the Record of Sasines. Upon this being discovered, the clerk to whom it was made known, who was the same person by whom the deed had been engrossed, did, at his own hand, and without instructions from the agent of the spouses who had prepared the contract, erase the letters '*lea*' of the said word '*leaves*,' and, by writing the letters '*li*' upon the erasure, rendered the word '*lives*,'—thus making the deed disconform to the record. No mention of this erasure was made in the testing clause; and no addition could or can be made to it as it had been entered in the record.

"Neither the spouses, nor Mr Somerville, their agent, were aware until the present question arose of the circumstances before-stated as to the error in the deed, and the mode taken to obviate it.

"The said spouses having recently occasion to borrow a sum of £900, entered into an arrangement with Messrs Taylor and Son for a loan of that amount, to be advanced as at the term of Whitsunday 1869, on the security of heritable property, settled and conveyed by the said marriage-contract, and Mr Wilson and his spouse were to grant a bond and disposition in security over certain subjects situated in Oxford Street, Edinburgh, contained in the said antenuptial contract of marriage.

"The lenders have taken exception to the title offered by Mr Wilson and his spouse, on the ground, *first*, that the testing clause does not contain any mention that the said word '*lives*' is partly written on an erasure; and *secondly*, that the deed in this particular is disconform to the record, where the word is 'leaves,' and not 'lives.' They contend that in these circumstances the clause above quoted does not effectually reserve to the said spouses power to sell and burden and divide, and that any bond and disposition in security, or conveyance or writing, executed by the said spouses jointly would be invalid and inept.

"In these circumstances, the parties desire the opinion of the Court upon the following question of law:—

"Whether the partial erasure on the said word 'lives,' not mentioned in the testing clause of the deed—and the discrepancy thereby created between the deed and the record,—render the clause above quoted inoperative and ineffectual?

"Or, Whether the clause is not sufficient without the words 'during their joint lives,' and is not effectual though these words were held *pro non scriptis*.

"If the Court shall be of opinion that the erasure in the deed in the particular above explained vitiates the clause, and renders it inoperative, they are requested to pronounce a decree to that effect. If they are of opinion that the clause is effectual notwithstanding of the erasure, they are requested to pronounce judgment to that effect.

"And both parties consent that the opinion and judgment to be pronounced by your Lordships shall not be subject to review of the House of Lords."

PATTISON for spouses.

HALL for lenders.

The Court held that the word might either be taken as "leaves," which would be a mere clerical error not vitiating the deed, or as "lives;" but the erasure could not have the effect of annulling it.

Agent for Spouses—J. Somerville, S.S.C.

Agent for Lenders—W. H. Cornillon, S.S.C.

Thursday, May 20.

FIRST DIVISION.

TOSH AND OTHERS *v.* HOOD AND ANOTHER.

Trust—Revocation—Lapse—Cumulative Bequests. A testator conveyed his whole property, heritable and moveable, to two parties whom he named his executors, for the purpose *inter alia* of paying, at the first term of Martinmas or Whitsunday after his death, certain legacies, including a legacy of £100 to W. H. He subsequently executed another deed, appointing one of the persons named as executors in the previous deed, and another, to be his executors for the administration of his moveable estate, including payment to the same W. H. of a legacy of £300. *Held* (1) that the second deed revoked the first *quoad* the moveable estate, and that the legatees named in the first deed were not entitled to payment out of the *universitas* of the estate, but only out of the heritage; (2) that the legacy of £100 to W. H. did not lapse although he died before the term of payment, he having survived the testator;