class, subject to the contingency that the number of individuals in the class is not fixed; but this does not prevent the vesting in the already existing members of the class; and then as Mr Hamilton has very ample powers of apportionment by any writing under his hands, I think that he may apportion part of the capital to his existing children, and may make their shares instantly payable, reserving a sufficiency to meet all future contingencies. I think he has made this partial apportionment quite legally and effectually—and for aught that appears to me, quite reasonably—by the deed of apportionment and division of 17th January 1879. It is fixed that such a power of apportionment as we have here may be exercised partially and from time to time as the circumstances of the family may seem to require it. See among other cases *Smith Cuninghame* v. *Anstruther's Trs.*, as decided in the House of Lords April 25, 1872, 10 Macph. H.L. 39. I think the reference in the trust deed to the issue of children is merely an expression of what the law would itself do—that is, place the issue of predeceasing children in the place of their respective parents.

I am therefore of opinion, though not without difficulty, that Mr Hamilton's deed of apportionment and division of 17th January 1879 should receive effect, and that the trustees are entitled and bound to make the partial division therein directed.

The Court therefore answered both questions in the affirmative.

Counsel for First Parties—Trayner—Moncrieff. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Parties—Pearson. Agents—Dove & Lockhart, S.S.C.

Wednesday, July 9.

SECOND DIVISION.

SPECIAL CASE — THOMSON AND OTHERS (THOMSON'S TRUSTEES) *v.* THOMSON.

Husband and Wife—Communio bonorum—*Donation—Policy of Insurance effected on Life of Wife subsequent to Marriage, and taken payable to her Heirs.*

A policy of insurance was effected after marriage on the life of a wife, payable six months after her decease to "her heirs, executors, or assignees." The husband paid all the premiums, and on two occasions got advances of money on the security of the policy. By an antenuptial contract of marriage the wife had assigned her whole estate, *acquirenda* as well as *acquisita*, to her husband. The husband predeceased, leaving a trust-disposition and settlement by which his whole means and estate were disponed to trustees for various purposes. In a question between the wife and the husband's trustees regarding the right to the policy of insurance, *held* that it belonged to the wife, in respect that it was a donation to her by her husband which was not recalled by him, and therefore was not his property at the time of his death, nor carried by his general trust-disposition and settlement.

Observed (*per* Lord Gifford) that the rule of law to the effect that a particular destination of a specific subject is not derogated from by a general settlement of a testator's whole estate, unless the intention appeared to be otherwise, was applicable in such a case as the above.

Thomas Thomson and his wife Mrs Margaret Gray or Lumsden or Thomson were married on 3d October 1838. They had previously executed a marriage-contract, in which, *inter alia*, Mrs Thomson, in consideration of various provisions in her favour by her husband, which she accepted as in full of all her legal provisions, assigned to her husband, and his heirs and assignees, "all and sundry lands and heritages, goods, gear, debts, and sums of money, as well heritable as moveable, at present belonging or resting-owing to her, or that shall pertain or belong to her during the subsistence of the said marriage," &c.

Soon after the marriage there was effected on the life of Mrs Thomson a policy of insurance with the Scottish Widows' Fund for £200. The policy was dated 24th October 1838, and was taken entirely in favour of Mrs Thomson, "with consent of her said husband." The policy bore that the application was made by Mrs Thomson, that the first annual contribution and entry-money was paid by her, and that "her heirs, executors, or assignees" were to be entitled to payment of the sum insured. The premiums were regularly paid by the husband as they fell due until his death. In 1857 a loan of £80 was given by the insurance company on the security of the policy, which was repaid in 1863. In 1863 another loan of £125 was given in conformity with an agreement dated 18th November and 9th December 1863. This agreement was unilateral in name of Mrs Thomson, with the special advice and consent of her husband, and as taking burden on him for his wife, and was signed by both husband and wife. The advance was repaid on 22d July 1870. Both of these loans were given to and for behoof of Thomas Thomson, and were repaid by him. He died on 25th February 1879, having executed a trust-disposition and settlement dated 6th November 1871, by which, *inter alia*, he gave, granted, and assigned to his trustees, for the purposes mentioned in the deed, "all and whole lands and heritages, goods and gear, debts and sums of money, policies of insurance," &c., and generally the whole estate belonging or owing to him, or that should be belonging and owing to him at the time of his death. There was no special mention of the above policy of insurance on his wife's life.

It was admitted at the discussions before the Court that Mr Thomson at his death was the holder of at least two policies of insurance other than the one on his wife's life.

At Mr Thomson's death a question arose between his testamentary trustees, the first parties to this case, and his widow, the second party, as to who was in right of the policy in question, and this Special Case was agreed upon.

The following questions of law were submitted for the decision of the Court:—"(1) Does the said policy on the life of the second party

belong to the parties hereto of the first part, or to the party hereto of the second part? (2) Do the bonus additions belong to the parties hereto of the first part, or to the party hereto of the second part?"

Argued for first parties—The policy, on the best view for Mrs Thomson, was a donation to her, and her husband was entitled to revoke it whenever he pleased, and he did this by his trust-disposition and settlement. He intended to do so; for policies of insurance were specially referred to, and there was no exception of the one on his wife's life, which besides was nowhere alluded to as a donation to her. It was clear that if the wife had died first the first parties would have been entitled to the money. The mere fact of conversion into money made no difference in the ownership of the policy—the only difference being that payment would be made to the husband's executors instead of to himself. Where there was no question of intention, a general disposition following a special one evacuated it.—*Thoms* v. *Thoms*, 6 Macph. 704, Ersk. i. 6, 31.

Authorities—*Strachan* v. *M'Dougall*, June 19, 1838, 13 S. 954; *Pringle's Trs.* v. *Hamilton*, March 15, 1872, 10 Macph. 621; *Smith* v. *Kerr & Others*, June 5, 1869, 7 Macph. 863; *Campbell* v. *Campbell*, Feb. 17, 1743, 1 Paton 343; *Glendonwyn* v. *Gordon and Others*, May 19, 1873, 11 Macph. (H. of L.) 33.

Argued for second party—It was denied that a general conveyance following a special one evacuated it—*Glendonwyn* v. *Gordon*, May 19, 1873, 11 Macph. (H. of L.) 33. The insurance company entered into no contract with the husband, only with the wife; and he had no title to pass the policy, which all along belonged to the wife. If that was not so, the policy must be held to have been a donation to the wife, and it was absurd to say that the wife by assigning in her marriage-contract debarred herself from receiving donations. The husband chose to make this donation, which he never specially recalled, and which was therefore not his property at the time of his death, and therefore not carried by his trust-disposition.

Authorities—*Wight* v. *Brown and French*, Jan. 27, 1849, 11 D. 459; *Galloway* v. *Craig*, July 17, 1861, 4 Macq. 267; *Walker's Exrs.* v. *Walker*, June 19, 1878, 5 R. 965; *Muirhead* v. *Lindsay*, Dec. 6, 1867, 6 Macph. 95; and cases quoted *supra*.

At advising—

Lord Justice-Clerk—This question is one of a class which has often been the subject of decision in this Court. The question is, Does the insurance policy with the bonus and other additions belong to the wife or to the representatives of the husband as part of his moveable estate? The case is, in my opinion, substantially ruled by the case of *Smith* v. *Kerr and Others*, 7 Macph. 863, and the proceeds therefore belong to the wife. The whole doctrine applicable to this branch of law was considered in that case and in the case of *Wight* v. *Brown*, 11 D. 459, and it is quite unnecessary to recapitulate it. I may however state that it has been found that a policy of insurance on the life of a wife does not truly fall under the *communio bonorum* during the marriage. The policy in this case seems to me a strong example of the doctrine of *Smith* v. *Kerr*. The wife was the only party to the contract; the husband does not appear. The sum in the policy was taken payable to the wife's "heirs, executors, or assignees," and the obligation on the part of the company being thus in favour of the wife and her heirs only, the policy therefore *prima facie* belongs to her. It was said that the policy was kept up by the husband. I think this is wholly immaterial, and the same thing also occurred in *Smith* v. *Kerr*. It was also said that during his lifetime the proceeds of the policy belonged to the husband. I am of opinion that to the effect of his being entitled to deal with it in any way in which it might be used patrimonially during his wife's life, as, for example, to raise money upon it (as he did), it did belong to him, but to the extent to which he did not deal with it, it remained hers.

It was further said that under the antenuptial contract of marriage the wife assigned all the property she might acquire during the subsistence of the marriage to her husband. And this was undoubtedly the case, but this could not prevent the husband making a donation in his wife's favour. It was argued that this antenuptial assignation to the husband transferred by anticipation any donation made by him, but I do not think this proposition can be maintained. I think it is plain that the husband could not take advantage of this clause to the effect of defeating any express donation made by him to his wife.

It was also said that this was a donation and could be recalled, and so I think it was, and so it was in the case of *Smith* v. *Kerr;* but the next question is, has it been revoked? and I am clearly of opinion that it has not. The general settlement does not do it, for it only deals with the husband's own property, and the gift was not revoked during his life. The right to revoke was not transmissible, and the gift not being revoked at his death, was then no part of his estate, and was therefore not dealt with by his general disposition. I think therefore we should answer the first question in favour of Mrs Gray.

In regard to the second question, I think all accessories should follow the principal.

Lord Ormidale—The dispute in this case relates to a policy of insurance effected by a husband on the life of his wife who is still alive, and is the second party to the present case. The husband is dead, and his testamentary trustees are the first parties to the case.

The two questions submitted to the Court are respectively, whether the policy and the bonus additions thereto belong to the first parties, the husband's trustees, or to the second party, the surviving wife?

According to the terms of the policy, the sums covered by it would appear to belong to the wife, for it expressly bears that they are to be payable to her "heirs, executors, or assignees." But it was argued on the part of the husband's testamentary trustees, the first parties, that notwithstanding the terms of the policy it must be held that the contents belong to them in virtue of the antenuptial contract of marriage of the parties, which bears that the wife, in consideration of the provisions made for her by her husband, "assigns, dispones, conveys, and makes over to and in favour of the said Thomas Thomson" (the husband), "and his heirs and assignees whomso-

ever, all and sundry lands and heritages, goods, gear, debts, and sums of money, as well heritable as moveable, at present belonging or resting-owing to her, or that shall pertain and belong to her during the subsistence of the marriage." This clause is doubtless very comprehensive in its terms, but I cannot think that it covers or was intended to cover a *peculium*, so to speak, expressly given or created by the husband for the benefit of his wife, or rather "her heirs, executors, or assignees," as the policy in question appears to have been. There is no authority to support the first parties' argument, so far as I am aware, while the case of *Smith* v. *Kerr* (June 5, 1869, 7 Macph. 863) appears to me to be an authority to the opposite effect. In that case it is true that there was no such express assignation as we have here by the wife in favour of her husband, but the *jus mariti* of the husband was not excluded. The Judges, notwithstanding, held that a policy of insurance effected by a husband on the life of his wife, just as that in the present instance was effected, was not carried by the *jus mariti* or covered by the *communio bonorum*. Nor is there anything in what at the debate was called the virtual revocation by the husband in the present case through the medium of his trust-disposition and settlement, for although he there refers to policies—not a policy—of insurance, as conveyed and transferred by him to his trustees, it was admitted by the first parties that in point of fact there were two policies which he had to convey and transfer independently altogether of that in question.

Without therefore going into an examination of the other cases which were cited at the debate, I am satisfied, on the authority of the case of *Smith* v. *Kerr*, that the two queries submitted in the Special Case now before the Court must be answered favourably for the wife, the second party—a result which in my opinion will be conformable to justice and the intention of the deceased husband.

Lord Gifford—I am of opinion that the policy of life assurance effected with the Scottish Widows' Fund Society, dated 24th October 1838, with the whole sums therein, and the whole bonus additions thereto, belongs to Mrs Margaret Gray or Lumsden or Thomson, the second party to this Special Case.

The provision in the antenuptial contract of marriage between Mr and Mrs Thomson, whereby Mrs Thomson, in consideration of the provisions therein mentioned, assigned to her husband, the late Thomas Thomson, her whole estate, *acquirenda* as well as *acquisita*, and everything that should pertain or belong to her during the subsistence of the marriage, did not and could not prevent the husband from making additional provisions in favour of his wife in any way he might think proper, or from making over to her as her absolute property any special subject or fund of which he might be possessed, and that in addition to her marriage-contract provisions. No doubt, in so far as such provision or grant was in addition to the provisions stipulated for in the antenuptial contract of marriage, it would be held to be a donation by the husband to the wife, and so would be revocable by the husband at any time of his life; but if the husband died without revocation, such donation or additional provision would subsist and be available to the widow.

Now, I am of opinion that in substance and effect the policy in question, with the whole bonuses and profits arising therefrom, constituted a donation by the late Mr Thomson to his wife Mrs Thomson, who is the second party to the present case. The donation was made by the husband by the very act of taking out the policy in his wife's name by making it payable to the wife's "heirs, executors, or assignees," and by the husband's paying the whole annual premiums falling due on the policy during the subsistence of the marriage. I think this was quite a valid and competent mode in which Mr Thomson might make a donation to his wife, and it is impossible to hold that the donation became void and nugatory merely because the antenuptial contract conveyed to the husband the wife's *acquirenda* as well as her *acquisita*. To hold this would, I think, be to return to the old fallacy that a husband could not renounce his *jus mariti* over his wife's estate, because such renunciation itself fell under the *jus mariti*, and was resumed in the very act of granting it.

If, then, the husband might make and did make a donation of the policy to and in favour of his wife, the only question is, Did that donation subsist and remain effectual at the date of the husband's death, or was it revoked by the husband before he died? The donation was undoubtedly revocable during the husband's life, and in substance the husband seems partially to have exercised his right of revocation by more than once, and for temporary purposes, borrowing money on the security of the policy with his wife's consent. But these loans were repaid by the husband during the subsistence of the marriage, and such repayment restored the donation to his wife to its full effect, and disburdened it of the sums with which the husband had charged it.

But it is said that the husband's final trust-disposition and settlement of 1871 operated as a virtual revocation of the donation, and had the effect in law to convey this policy to the husband's testamentary trustees, who are the first parties to the present case. I am of opinion that the trust-disposition of 1871 had no such effect. No doubt the husband had power to revoke the donation, and he might have done so if he had so chosen in his trust-disposition and settlement, or in any instrument fairly expressive of his will and intention to revoke. Nay, if it could be shown on any reasonable construction of the trust-settlement that it was the will and intention of the husband to revoke the donation, and to give the policy and its proceeds not to his wife but to his general testamentary trustees for his general testamentary purposes, the Court would give effect to such intention.

But I cannot so read the general trust-disposition and settlement. No doubt he conveys to his testamentary trustees his whole estate, heritable and moveable, belonging and owing, or that shall belong and be owing, to him at the time of his death, and the words of conveyance are very wide and general. But the policy in question, if I am right in holding that it had been gifted to the wife, did not belong to the husband at the time of his death, and did not form a part of his estate, because the donation thereof had never been revoked, and was not re-

voked, by any expression in the trust-deed, or on any fair construction thereof. It was admitted at the bar, contrary to what rather appears on the statement, that at the time of his death Mr Thomson held at least two policies other than the one now in question, and this will quite explain the expression in the words of conveyance in the the trust-deed "policies of assurance" belonging to me. In order therefore to embrace the policy now in question in the testamentary conveyance it must be shown that Mr Thomson had in some form or other revoked the donation in favour of his wife, for only by such revocation could the policy now in question have become his property. But as this revocation has not been instructed, the policy stands excluded from the testamentary conveyance.

Even if in a loose sense the policy in question were held to be Mr Thomson's property, he having a certain power over it, and it being liable in certain circumstances for his debts had he been sequestrated or had he died bankrupt, I think the case would be governed by the principle that a special settlement of a particular subject is not derogated from by a general settlement of the testator's whole estate, unless this can be shown to have been the testator's real intention. This principle is fixed by a large class of cases, a recent example of which will be found in *Glendonwyn* v. *Gordon*, May 19, 1873, 11 Macph. H.L. 33, where there is a full citation of previous cases. The present case, however, is an *a fortiori* one to cases like that of *Glendonwyn*, for until the husband had in some competent way revoked the donation of the policy it could not be regarded as part of his general estate. There is no evidence whatever, either in the terms of Mr Thomson's general disposition and settlement or elsewhere, that he intended the policy in question not to go to his wife but to his general testamentary executors; and holding as I do that it had been validly gifted to the wife, I think she is entitled to be preferred thereto. There is no room for making any distinction between the sum in the policy itself and the bonus additions thereto.

The Court therefore made answer that the policy and bonus additions belonged to the party of the second part.

Counsel for First Parties—J. P. B. Robertson —Moody Stuart. Agents—Duncan & Black, W.S.

Counsel for Second Parties—Asher—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 11.

FIRST DIVISION.

[Lord Adam, Ordinary.

HENDRIE *v.* LINDSAY (C. & A. CHRISTIE'S TRUSTEE).

Process—Bankruptcy—Reponing a Creditor against Interlocutor granting Trustee's Discharge—Intimation to Creditors — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 152.

A trustee in bankruptcy applied with the concurrence of all the creditors except one for his discharge. The usual remit was made to the Accountant of Court, who in his report left it for the consideration of the Lord Ordinary whether there should not be special intimation to the dissenting creditor of the application for discharge. The matter was not brought under the notice of the Court, and an interlocutor was pronounced granting discharge. On this coming to the knowledge of the creditor he presented a reclaiming note, but after the expiry of the reclaiming days, asking to be reponed. *Held* (following the case of *Milne* v. *Maccallum*, Jan. 22, 1878, 5 R. 546) that notice not having been given to the dissenting creditor of the application for discharge, he was entitled to be reponed, and case remitted to the Lord Ordinary to inquire into the merits.

The estates of C. & A. Christie, coal and iron masters, Gladsmuir, were sequestrated on April 5, 1871, and Mr T. S. Lindsay was appointed trustee in the sequestration. The realisation of the estates were then proceeded with, and a final division of the funds made.

The trustee, in terms of section 152 of the Bankruptcy (Scotland) Act 1856, then duly called a meeting of the creditors, with a view to an application for discharge. Prior to this meeting, however, Mr Hendrie, a creditor, ranked on the estate for the sum of £49, 17s. 8d., had presented a complaint to the Accountant in Bankruptcy, proceeding on the grounds that the trustee's commission, as fixed by the commissioners, and the law expenses, were excessive. To this complaint the trustee lodged answers, and the matter was discussed before the Accountant in Bankruptcy. This note of complaint, the answers thereto, and the deliverance of the Accountant in Bankruptcy thereon, were, along with the sederunt book, accounts, &c., laid before the above-mentioned meeting of creditors which was held on February 20, 1879.

The meeting resolved that there were no grounds for the complaint in question, and authorised the trustee to proceed with an application for discharge—Mr Hendrie for himself, and as mandatory for Mr M'Culloch, their claim amounting *in cumulo* to £80, 12s. 8d., dissenting.

The trustee accordingly presented the usual petition for discharge, and the Lord Ordinary on the Bills on 1st May 1879 remitted to the Accountant in Bankruptcy to report. On 4th June 1879 the Accountant made his report, which, *inter alia*, contained the following observation with reference to Hendrie's dissent: — "The Accountant begs to refer to his acknowledgment of the sederunt book, in which he points out the objection which has been taken by Mr James Hendrie, a creditor, to the trustee's management. It may be for the Lord Ordinary's consideration whether any special intimation of the trustee's application for discharge should be made to Mr Hendrie before answer."

That observation was not brought under the notice of the Lord Ordinary (ADAM), and without any special intimation having been made to Mr Hendrie (who remained unaware that the trustee was obtaining his discharge) he on 11th June 1879 granted the prayer of the petition and discharged the trustee.

Mr Hendrie, when he was informed of what