conditio si sine liberis operated here to the effect of substituting Jessie Amelia Thomson in the place of her mother as a sharer along with her uncle and aunt, the surviving children of Henry Taylor (second) in the share of the testator's succession liferented by Mrs Miller—*Rougheads* v. *Rainnee*, 1794, M. 6403.

Argued for the parties of the third part—The clause of survivorship which closed the bequest excluded the application of the *conditio si sine liberis.*

At advising—

Lord Justice-Clerk—The question here is, whether a great-grandchild of the testator is a beneficiary under his settlement, and this depends on whether that great-grandchild is a "surviving residuary beneficiary" in the express terms of the deed—whether the use of these words makes any difference on her position. My opinion is that they make no difference at all—that it leaves her in the same position as the other beneficiaries who take a share of Mrs Miller's provision under the residuary clause.

Lord Young—That is my opinion also. Mr Guthrie, who said all he could for his case, practically admitted that the case was undistinguishable from that of *Rougheads*, and I think it rules the present case. If Mrs Miller, who had her provision in liferent and the fee to her children, died without issue, the grandchild of Henry, both on the authority of the case of *Rougheads* and on the general principles on which it proceeded, was entitled to take a share in virtue of the *conditio si sine liberis decesserit.*

Lord Craighill—I am of the same opinion, and would have come to it equally if there had been no case of *Rougheads.* I think Miss Thomson was a survivor in the sense of the clause in the settlement at the time of the death of the liferentrix, and under that authority I am fully warranted in coming to that conclusion.

Lord Rutherfurd Clark—I am very glad your Lordships have already decided the case, as I am not quite clear upon it.

The Court pronounced this interlocutor:—

> The Lords . . . are of opinion, and find and declare (1), in answer to the first question therein put, that the share of the residue liferented by Mrs Miller falls to be divided in three equal parts among William Taylor, Patrick Taylor, and the representatives of the testator's son Henry Taylor (second) under the eighth purpose of the trust-disposition and settlement; and (2), in answer to the second question, that Jessie Amelia Thomson is entitled to one-third of the portion of the said share falling to the representatives of the said Henry Taylor (second), and to immediate payment of the same, and decern."

Counsel for First and Fifth Parties—Mackintosh—Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for Second and Fourth Parties—Lord Adv. Balfour, Q.C.—Alison. Agent—John Gill, S.S.C.

Counsel for Third Parties—J. P. B. Robertson—Guthrie. Agents—Campbell & Smith, S.S.C.

Wednesday, January 23.

FIRST DIVISION.

[Lord Lee, Ordinary.

WATSON *v.* GIFFEN.

Succession—Husband and Wife—Destination—Conditional Institution or Substitution—Mutual Settlement—Revocation.

> Heritable property was purchased by a husband with his own funds, and the destination taken to himself and his wife "and the survivors of them, and to their or the survivor's heirs and assignees whomsoever." Subsequently the spouses executed a mutual settlement of their whole estate, heritable and moveable, in favour of each other, for their liferent use allenarly, and in fee to their son, the wife making also a special destination of her half of the heritage just mentioned in favour of her husband in liferent allenarly, and "my said son, whom failing to my own heirs and assignees and disponees whomsoever in fee." The son survived his mother, but died intestate before his father, who died leaving a will by which he revoked "all other wills and codicils heretofore made or purporting to have been made by me," and gave and bequeathed to his brother, *inter alia*, the said heritable property. *Held* (1) that this revocation did not affect the destination of half the subjects made by the wife in the mutual settlement; (2) that under that destination—the property being heritable—the son was a substitute, and not a conditional institute, and as he had died without evacuating the destination, the wife's half went to her heir whomsoever.

In November 1874 Alexander Baillie Watson, stationer, Glasgow, purchased from John Rowan, at the price of £4500, certain house property in Craignestock Place, Glasgow. The destination in the conveyance was "to Alexander Baillie Watson and Elizabeth Giffen or Watson (his wife), and the survivor of them, and to their or the survivor's heirs and assignees whomsoever." Mr Watson signed the disposition as a consenter "in token of his approval of the destination." Infeftment followed on this disposition.

On 12th November 1877 Mr and Mrs Watson executed a mutual settlement in the following terms:—"We, Alexander Baillie Watson, sometime stationer at No. 168 Great Hamilton Street, Glasgow, presently residing at No. 9 Binnie Place there, and Elizabeth Giffen or Watson, spouses, for the love, favour, and affection we bear to each other, and in consideration of the provisions herein contained, granted by each of us in favour of the other, have, with mutual advice and consent, agreed to grant these presents in manner afterwritten, That is to say, I, the said Alexander Baillie Watson, do hereby give, grant, dispone, and assign to and in favour of the said Elizabeth Giffen or Watson, for her liferent use allenarly, and to and in favour of my son Alexander Baillie Watson junior, whom failing to my own heirs, executors, and assignees and disponees whomsoever in fee, the whole means and estate, heritable and moveable, real and per-

sonal, of whatever nature and wherever situated, which shall be owing or belonging to me at my decease: . . . And in the like manner, I, the said Elizabeth Giffen or Watson, do hereby give, grant, dispone, and assign, to and in favour of the said Alexander Baillie Watson, for his liferent use allenarly, and to and in favour of my son the said Alexander Baillie Watson junior, whom failing to my own heirs, executors, and assignees and disponees whomsoever in fee, the whole means and estate, heritable and moveable, real and personal, of whatever nature and wherever situated, which shall be owing or belong to me at my decease, or of which I may have the power of disposal; . . . . and specially, and without prejudice to the foresaid generality, I, with consent of my said husband, dispone to him, for his liferent use allenarly, and to and in favour of my said son, whom failing to my own heirs and assignees and disponees whomsoever in fee, the just and equal half *pro indiviso* of All and Whole that steading of ground, part of the lands of Craignestock," &c., "being the subjects acquired by the said disposition from John Rowan." The settlement further declared "that though the interest granted by these presents in favour of each of us in the estate of the other is that of liferent only, it shall be at all times competent to the survivor of us to change, as he or she may think proper, the investments of the means and estate so liferented . . . also, that in every instance in which females take benefit under these presents the same shall be taken and held by them exclusive of the *jus mariti* and right of administration of their respective husbands." Power was reserved by the spouses to alter or revoke the settlement in so far as regarded the estate conveyed by them respectively.

Alexander Baillie Watson, the son mentioned in the mutual settlement, was the only child of Mr and Mrs Watson. Mrs Watson died on 23d October 1877, survived by her husband and son. After her death Mr Watson continued in the possession of the subjects, drawing and using the rents. Alexander Baillie Watson, the son, died on 10th December 1878, intestate and without issue.

On 30th October 1882 Mr Watson died, leaving a last will and testament, dated 19th August 1882, in these terms—"I hereby revoke all other wills and codicils heretofore made or purporting to have been made by me. I direct that all my just debts, and funeral and testamentary expenses, shall be paid in the first instance as soon as possible after my decease. I do hereby give and bequeath unto Mr James Baillie Watson, my brother, my whole moveable and heritable estate, consisting of heritable subjects situated at Nos. 2/1 Craignestock Place, and 168/160 Great Hamilton Street, and at 285 South Wellington Street, Glasgow, county of Lanark, household furniture, plenishing, jewellery, monies in bank and on hand, and everything else which may pertain to me after my decease." In addition to the heritable properties mentioned in the will, the testator left personal estate to the amount of about £200. The moveable estate left by Mrs Watson at her death was of small amount.

This was an action of declarator at the instance of James Baillie Watson, merchant, the brother mentioned in Mr Watson's settlement, against John Giffen, engineer, Port-Glasgow, brother and heir-at-law of Mrs Watson, the conclusions of which were—(*First*), That the pursuer had right under and in virtue of (1) the disposition by John Rowan in favour of Mr Watson, and Mrs Watson, his wife, dated 10th and 11th, and recorded in the Register of Sasines the 13th November 1874; and (2) last will and testament of the said Alexander Baillie Watson, dated 19th August, and registered in the Books of Council and Session 21st December 1882, to the subjects situated in Craignestock Place, Glasgow; or otherwise (*second*), that the pursuer had right, under and by virtue of the said two last-mentioned writs, to one half *pro indiviso* of the said subjects, and was entitled to make up a title thereto *habili modo;* and (*third*), that the pursuer had also right, under and by virtue of (1) the said disposition, (2) the mutual settlement, and (3) the said last will and testament, and in consequence of Alexander Baillie Watson junior, mentioned in the said mutual settlement, having survived his mother the said Elizabeth Giffen or Watson, and predeceased his father the said Alexander Baillie Watson, intestate and without issue, to the other half *pro indiviso* of the said subjects, videlicet, the half conveyed by the said Mrs Elizabeth Giffen or Watson in the said mutual settlement, and was entitled to make up a title thereto. The pursuer averred, and the defender denied, that Mr Watson had purchased the Craignestock Place subjects with his own funds.

The action was founded on these pleas-in-law, viz.:—"(1) The late Mrs Watson having during her life no right of fee under the disposition of 1874, transmitted none to her son by the mutual settlement; and upon the death of Mr Watson (predeceased by Mrs Watson and their son), the right to the whole subjects passed to the pursuer under Mr Watson's last will and testament. *Or otherwise*—(2) By Alexander Baillie Watson junior predeceasing his father, the fee of one half *pro indiviso* of the subjects passed to the pursuer under the last will and testament; and (3) By Alexander Baillie Watson junior surviving his mother, the fee of the other *pro indiviso* half of the said subjects vested in him under said mutual settlement, and on his death fell to his father as intestate succession, and on the father's death to the pursuer, under the said last will and testament."

The defender pleaded—"(1) Mrs Watson having been vested in one-half *pro indiviso* of the subjects in question under the disposition thereof by John Rowan, she had right to dispose of the said half in the mutual settlement of 12th October 1877. (4) Alexander Baillie Watson junior having died intestate, and without otherwise evacuating the destination in the said mutual settlement, the *pro indiviso* half of the subjects in question devolved on the defender under the said destination."

The Lord Ordinary (Lee) on 26th June 1883 pronounced this interlocutor:—"Finds that, under the deeds libelled, the pursuer has right only to that half of the subjects described in the summons which was conveyed by the deceased Alexander Baillie Watson, in terms of the mutual settlement executed by him and his wife to and in favour of Elizabeth Giffen or Watson, for her liferent use allenarly, and to and in favour of his son Alexander Baillie Watson junior, whom

failing to his own heirs, executors, assignees, and disponees whomsoever, in fee; to this extent finds, declares, and decerns in terms of the second branch of the conclusions of the summons: *Quoad ultra*, finds that Alexander Baillie Watson junior having died without issue, and without disposing of the subjects, the destination in the conveyance of said mutual settlement is, on a sound construction of said deed, effectual as a substitution in favour of her [*i.e.* Mrs Watson's] own heirs and assignees and disponees whomsoever; and therefore assoilzies the defender from the conclusions of the action excepting as to the foresaid half of the subjects, and decerns: Finds the defender entitled to expenses, &c.

"*Opinion.*—The question in this case relates to the right of succession to certain subjects in Glasgow which in 1874 were disponed 'to Alexander Baillie Watson and Elizabeth Giffen or Watson (his wife), and the survivor of them, and to their or the survivor's heirs and assignees whomsoever.'

"The disposition bears to have been granted in consideration of a price of £4500 paid by the spouses; and although it is alleged by the pursuer that this price was truly paid by the husband out of his own funds, no proof was at the debate offered on that subject. It was contended for the pursuer that such proof was unnecessary, and for the defender that it was incompetent.

"In 1877 the spouses executed the mutual settlement set out in the condescendence By that deed each of the spouses, in consideration of the provisions therein contained, granted by each in favour of the other, and of their having therefore 'agreed to grant these presents,' gave, granted, disponed, and assigned his or her whole means and estates, heritable and moveable, to the other in liferent allenarly, 'and to and in favour of my son Alexander Baillie Watson junior, whom failing to my own heirs, executors, and assignees and disponees whomsoever in fee.' And Mrs Watson specially, with consent of her husband, and without prejudice to the said generality, disponed to her husband, for his liferent use allenarly, 'and to and in favour of my said son, 'whom failing to my own heirs and assignees and disponees whomsoever, in fee,' her half of the subjects in Glasgow.

"This deed contains other clauses, conferring upon the survivor, though a liferenter only, power to alter the investments, and even to sell the estates; but it was not contended that either spouse had any power to revoke the settlement, excepting a qualified power as regards the estates conveyed by them respectively.

"Mrs Watson died on 23d October 1877, being survived both by her husband and by her son. The son died on 10th December 1878. The husband, Alex. Baillie Watson senior, survived till 30th October 1882, when he died, leaving a will dated 19th August 1882. By this will he revoked all other wills, and gave and bequeathed his whole estates, heritable and moveable, to his brother, the pursuer, who now claims the whole of the Glasgow subjects, as having been carried by his will.

"Two questions are raised—(*First*), Whether, under the title by which the subjects were acquired, the whole belonged in property to the husband? (*Second*), If one-half *pro indiviso* belonged to the wife, whether that half passed to the husband upon the death of his son Alexander Baillie Watson junior, and as his heir, or was governed failing him by a substitution in favour of the wife's 'own heirs and assignees and disponees whomsoever?' The latter question depends on whether Mrs Watson's own heirs and assignees whomsoever were only conditionally instituted in the event of the failure of her son before her, or were intended to be proper substitutes.

"My opinion upon the first question is, that the terms of the disposition did not make the husband sole proprietor, and that any claim he might have advanced to alter or revoke that deed, so far as in favour of his wife, was discharged by his entering into the mutual settlement, by which, as matter of contract, he consented to her dealing with one-half share of the subjects as her property. It is not alleged that any right conferred by him upon his wife by these deeds exceeded a reasonable provision, and I think that the pursuer's averments disclose no sufficient ground either for questioning the validity of the wife's conveyance by the mutual settlement or for regarding the will of 1882 as specially applicable to the subjects in question. There seems to be no reason to believe that Mr Watson intended by that will to deal with the subjects of the special conveyance by his wife, unless by the effect of that conveyance, and of the son's death, these subjects had become a part of his estate.

"The second question is, I think, attended with more difficulty. It is very well settled, that in regard to moveable estate there is a strong presumption against substitution (*Greig* v. *Johnston*, 6 W. & S. 421). But it is not less clear, and from the same authorities, that in regard to heritable estate the rule is different, and that even in moveable rights there may be a substitution, especially where the period of payment is postponed (*Ramsay* v. *Ramsay*, 1 D. 83). The question, I think, is one of intention, to be determined by the language used in the deed.

"There are some peculiarities in the terms of the present conveyance. In the first place, there is no destination to the heirs whomsoever of Alexander Baillie Watson, junior. The conveyance is 'to my said son, whom failing to my own heirs and assignees and disponees whomsoever.' This is a feature which distinguishes the case from *Baillie* v. *Tenant* (M. 14,941), and *Suttie* v. *Suttie* (January 19, 1809, F.C.), and *Richardson* v. *Stuart* (2 Sh. App. 149). And although it is true that a destination to A generally includes heirs (Bell's Pr. sec 1704), the effect of an immediate substitution in favour of the grantor's own heirs must be considered in the light of the fact that there is no destination to the heirs and assignees whomsoever of the institute, and therefore no difficulty from the use of such a technical expression in construing the clause as a proper substitution intended to take effect upon the failure at any time of the institute without heirs of his body, and without disposing of the subjects. Even in cases where the terms of the institution expressely included *heirs*, or *heirs and assignees whomsoever*, the terms of an ulterior destination have sometimes been held to explain and limit the meaning of these words. See *Hunter* v. *Nisbet* (2 D. 16), *Tinnoch* v. *M'Lennan* (26 Nov. 1817, F.C.), and *M'Ewan* v. *Pattison* (3 Macph. 779).

"A second peculiarity is, that the clause seems to contemplate the possibility of the granter predeceasing both her son and her husband. For it gives a liferent to the husband, and the fee, failing the son, not to the granter herself, but to her own heirs and assignees, &c.

"A third peculiarity is, that the clause occurs in a mutual settlement by husband and wife, and apparently has for its object the disposal by each of the spouses of the fee of his or her estates in such a way as to provide a contingent reversion of a share of the estates as at the period of distribution (viz. the death of the longest liver) to his or her 'own heirs.' The effect of reading the clause as a conditional institution of the granter's own heirs only, in the event of the son predeceasing her, is to give rise to an inequality in the operation of the deed as regards the wife's estate. For in the case of the wife's conveyance the result is, that unless she survived her son her own heirs could never come in; whereas the husband's heirs, being practically the same as his sons, would take in any event.

"In the view of these circumstances, and dealing with an heritable subject, I think that there is no presumption in favour of conditional institution, but the reverse. And a subsequent clause, declaring 'that in every instance in which females take benefit under these presents' the *jus mariti* is to be excluded, seems to me to point rather at substitution being intended.

"It was urged, on behalf of the pursuer, that as the moveable estate is dealt with in the same way, it was highly improbable that the words should mean a conditional institution in one part of the deed and a substitution in another. Perhaps that is so. The argument, however, may operate in either of two ways. In the present case I have only to deal with the heritable estate to which the pursuer has confined the conclusions of the action. In their application to that estate I am of opinion that substitution rather than an institution conditional upon Mrs Watson being predeceased by her son is the meaning of the clause.

"It is not without difficulty that I have formed this opinion. But in the absence of any destination to the heirs-general of the son, I think that the case is free from any technical difficulty in the way of construing the clause according to the natural meaning of the words. So construing it in this mutual settlement, my opinion is that the words are apt and sufficient to signify, and do signify, the testator's intention to make a proper substitution in favour of his own heirs in the event of the failure of the son at any time without issue, and without disposing of the subjects. I think that a child of the son would have taken under the *conditio si sine liberis*, but that there is no ground in fact or in law for holding that the heirs of the granter are only conditionally instituted in case the son should predecease her."

The pursuer reclaimed and argued—(1) It was always a question of intention whether the terms of a destination implied conditional institution or substitution—*Snell* v. *White and Others*, May 24, 1872, 10 Macph. 745; *Stiven* v. *Brown's Trustees*, January 10, 1873, 11 Macph. 262. This was a case of mixed succession, and therefore the presumption was in favour of conditional institution—M'Laren on Wills, i. 493; *Allan* v. *Fleming*, June 20, 1845, 7 D. 908; *Stewart* v. *Stewart*, April 8, 1824, 2 Sh. App. 149; *Greig and Others* v. *Johnston and Others*, July 1, 1833, 6 W. & S. 407, 421; *Paul* v. *Home*, July 5, 1872, 10 Macph. 957. Even if this was proper heritable estate, the evidence of intention was so clear as to override any presumption in favour of substitution. The liferenter had here power to convert the succession into cash. The words "whom failing" were not crucial—*Brown* v. *Coventry*, Bell's 8vo cases, 310, M. 14,863. (2) The form of the title in the disposition of 1874 left the fee of the Craignestock property in the husband—Ersk. Inst. iii. 8, 36. A proof may be allowed of where the purchase money came from if necessary—*Steedman* v. *City of Glasgow Bank*, October 31, 1879, 7 R. 111; Fraser on Husband and Wife, 925. Even if a gift was made to the wife by the form of the title, this could be redargued by proof of the source from which the money came—Ersk. i. 6, 30; *Jardine* v. *Currie*, June 17, 1830, 3 S. 937. At the date of the mutual settlement the husband was the fiar, the wife having a *spes successionis* in the event of survivance, or at anyrate the husband was the substantial fiar, for if there was anything in the wife the husband could have revoked it, and the wife could only dispose of her fee subject to the husband's right of revocation. This was a *donatio inter virum et uxorem* which was revoked. In questions of onerosity as to postnuptial settlements the state of the funds as at the dissolution of the marriage is to be regarded—*Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800; *Rae* v. *Nelson*, May 14, 1875, 2 R. 676—Bell's Prins., sec. 1618; *Hatton Hall* v. *Cranston*, M. 6151. Even if the distinction in the mutual settlement implied a substitution, that was evacuated by the will of the husband.

The defender argued—The destination implied a substitution—*Ramsay* v. *Ramsay*, November 23, 1838, 1 D. 83. A substitution to the disponer's "own heirs" was the same as the destination in *Tinnoch* v. *M'Lennan*, November 26, 1817, F.C. The destination in the disposition of 1874 did not make the husband fiar; it did not give a right of conjunct fee and liferent—Ersk. Inst., iii, 8, 36; *Wallace* v. *Henderson*, July 20, 1875, 2 R. 999. The husband had no power to revoke the wife's conveyance in the mutual settlement, because (1) a right of fee was vested in the son so as to make him absolute disponee, and (2) the mutual settlement was an onerous contract—*Rust* v. *Smith*, January 14, 1865, 3 Macph. 368; *Kidd* v. *Kidds*, December 10, 1863, 2 Macph. 227. The terms of the husband's will were not distinct enough to work the mutual settlement.

At advising—

Lord President — Alexander Baillie Watson purchased in 1874 from John Rowan house property in Craignestock Place, Glasgow, for £4500, and took the disposition to that estate to "Alexander Baillie Watson and Elizabeth Giffen or Watson (his wife), and the survivor of them, and to their or the survivor's heirs and assignees whomsoever." The allegation of the pursuer is that the price of these heritable subjects was paid out of Mr Watson's own proper funds. This the defender denies, but his denial is not accompanied by any averment as to the source whence the funds came, if not from Mr Watson. I must assume, therefore, in the present

judgment that the allegation of the pursuer is consistent with fact, and that the price was furnished by Mr Watson himself.

The next fact is, that on 12th October 1877 Mr and Mrs Watson executed a mutual settlement, and on the terms and effect of it, or part of it, the present question depends. This settlement sets out the desire of the spouses "for the love, favour, and affection we bear to each other, and in consideration of the provisions herein contained, granted by each of us in favour of the other," to settle their affairs. In it Mr Watson, the husband, in the first place, gives, grants, dispones, and assigns to and in favour of his wife, for her liferent use allenarly, and to and in favour of his son Alexander Baillie Watson junior, whom failing his own heirs, executors, and assignees and disponees whomsoever in fee, his whole means and estate. Mr Alexander Baillie Watson junior, here named, was the only son of Mr and Mrs Watson, and the object, therefore, of this, the husband's, part of the deed was to give a liferent to his wife, and the fee to his son, of his whole means and estate. On the other hand, Mrs Watson makes similar provisions in favour of her husband for his liferent use allenarly and their son in fee, but her part of the deed was different in its terms from Mr Watson's, for there is also a special conveyance by Mrs Watson of her share of the subjects purchased from Mr Rowan in Craignestock Place. She begins by disponing in favour of her husband, "for his liferent use allenarly, and to and in favour of my son, the said Alexander Baillie Watson junior, whom failing to my own heirs, executors, and assignees and disponees whomsoever in fee, the whole means and estate, heritable and moveable, real and personal, of whatever nature and wherever situated, which shall be owing or belonging to me at my decease, or of which I may have the power of disposal." That clause alone would have embraced not only her other estate, but also her one-half share in the Craignestock Place property. But this general conveyance is followed by a clause in these terms:—"Specially, and without prejudice to the foresaid generality, him, for his liferent use allenarly, and to and in I, with consent of my said husband, dispone to favour of my said son, whom failing to my own heirs and assignees and disponees whomsoever in fee, the just and equal half *pro indiviso* of all and whole that steading of ground, part of the lands of Craignestock," &c., being the subjects acquired by the disposition from John Rowan. The main question between the parties turns upon the effect of the last words of this conveyance, though the pursuer contends that whatever the effect of the mutual settlement may be, yet the revocation by Mr Watson after his wife's death has the effect of conveying the whole of the Craignestock Place property to him.

Mr Watson survived both his wife and his son. His wife died on 23d October 1877, and his son on 10th December 1878, intestate and without issue. In October 1882 Mr Watson himself died leaving a will, which is said to have the effect of revoking, if he had the power, that conveyance by Mrs Watson in favour of her son, and her own heirs, assignees, and disponees whomsoever. Apparently Mr Watson's will was not intended to revoke that conveyance, for the precise words are—"I hereby revoke all other wills and codicils heretofore made or purporting to have been made by me;" he then conveys to Mr James Baillie Watson, his brother, the pursuer here, his whole moveable and heritable estate, and the subjects in Craignestock Place are specially mentioned. I think that a revocation was not intended, and that this will has not the effect of recalling the mutual settlement, for I read it as a conveyance to the pursuer merely of the share which Mr Watson possessed notwithstanding the mutual settlement.

What is the effect of Mrs Watson's conveyance of her share in the Craignestock Place property? The words used are somewhat peculiar, for she gives the fee of the subjects "to my said son," but then there is no addition to his heirs and assignees, but what follows is "whom failing to my own heirs and assignees and disponees whomsoever in fee" Now, the question is, whether the conveyance "to my own heirs and assignees and disponees whomsoever in fee" operates a conditional institution or substitution. If it is a substitution, then Mr Baillie Watson junior would take as institute, and on his death, though after that of his mother, the destination would take effect in favour of the heirs and assignees of the granter. If it is a conditional institution, then the one-half share vested in Mr Baillie Watson junior, and transmitted to his heirs.

There is one distinction in conveyances of moveables and of heritage; in the case of moveables the presumption is always in favour of conditional institution, not of substitution; in the case of heritage the presumption is the other way, in favour of substitution. That being settled, it is always a question whether there is, in the terms of the settlement, anything to take off the presumption. I confess that in this case I do not see any considerations which can have the effect of displacing the presumption, and the various considerations which the Lord Ordinary has adverted to in his note all go to support it.

The conveyance is to the son, and there is no mention of his heirs. Now, although in ordinary circumstances this has the same effect, yet when there immediately follows upon that a destination, failing the sons, to the heirs and assignees of the granter, that seems to indicate that if the son failed without leaving issue, the heirs and assignees of the granter should be entitled to take. I mean that in the event of the son dying after taking the succession without having executed a disposition so as to evacuate the substitution, it will take effect.

I cannot find in this case any circumstances to militate against the ordinary legal presumption. It is said that some of the clauses throw light on this point—for instance, the clause providing that although each of the spouses only got a liferent of the estate, yet it should be competent to the survivor to change the investments of that estate. Upon that it is contended that it was matter of doubt whether when the succession opened, the subjects might remain heritable or have become moveable. But I do not think that affects the contract if when the deed was made the subjects were heritable. Though the subjects change their character afterwards, the intention of the maker at the time the deed was executed must be looked at.

It is also said that the power of revocation given to either spouse to revoke his or her part

of the settlement is against the ordinary presumption, but I do not see how that affects the question. The power was not exercised, and the conveyance stands as a conveyance to a *nominatim* disponee, whom failing to the heirs and assignees of the granter, and I therefore come to the conclusion without difficulty that the Lord Ordinary is clearly right.

Lord Deas concurred.

Lord Mure—I arrive at the same conclusion. There are various points of importance which have been raised on the terms of the deed as to the meaning of the disposition of 1874 and of the mutual settlement.

It was maintained that under the conveyance in 1874 there was a fee in Mr Watson, and that the terms of the deed were not sufficient to give a *pro indiviso* half to his wife. Assuming the statement to be correct, that the property was purchased with Mr Watson's own money, I am disposed to think that that contention is sound. But then by the mutual settlement which was subsequently made by the spouses one half of the subjects purchased in 1874 was settled by the wife on the husband in liferent, the fee being given to the son, whom failing to her own nearest heirs and assignees. In that clause of the mutual settlement of 1877 there is an express declaration that the settlement of the property on the husband is for his liferent use allenarly. It has accordingly been assumed by the parties that a *pro indiviso* half was in the wife. Under that mutual deed, however, although the husband had a mere liferent allenarly, he had also a right to revoke the disposition in so far as regarded his own estate. Then after the death of Mrs Watson and the son, Mr Watson made a will which contained a revocation of all previous wills made by him, and it is maintained that by that will he revoked the conveyance by Mrs Watson and her disposition of the property. On that there arises the important question whether he had power under the terms of the mutual deed to revoke it. I am disposed to think, following the opinion of Lord Eldon in the case of *Hepburn* v. *Brown and Others*, 2 Dow's App. 342, where the power to alter a mutual deed after the death of one of the parties was considered, that Mr Watson had not power to alter the mutual settlement with regard to the wife's property after her death. Even if he had that power he did not by his deed revoke the destination to heirs and assignees in the mutual settlement, for it is expressly said in his will that the revocation is to apply to all wills "made by me." I cannot look on Mrs Watson's special conveyance of her one-half as a will made by him, and not by Mrs Watson.

Then the question remains, whether under the destination to her own heirs and assignees, Mrs Watson intended that her own heirs should take on the death of her son, and I agree that that is a question of intention. No doubt there are presumptions in favour of conditional institution or substitution, but these may be displaced by the terms of the deed. Here there is a clearly expressed conveyance of a *pro indiviso* half, which, as I read it, indicates that the heirs and assignees of the granter should take after the death of her son.

Lord Shand—I am of the same opinion on both points.

The property here disponed is heritable, and the ordinary rule in the case of such a disposition of heritage is that a substitution was intended, as well as a conditional institution. I think that there are no circumstances here to displace that presumption. There is however an alleged revocation by Mr Watson, and the reserved power of revocation contained in the mutual settlement has been referred to. It is in these terms, "power and liberty to us, or either of us, to alter or revoke these presents at pleasure, so far as regards the estate conveyed by us respectively." But that is not a power to the husband to revoke the conveyance by his wife. It is said, however, that the husband in the mutual settlement made a donation to the wife, and that he subsequently made a will which operated a revocation of the conveyance which he had allowed the wife to make. But I think that would have required much more distinct words. Mr Watson in his will refers to the property in Craignestock Place, but I think the description used will be satisfied by referring it to the one-half share which he possessed. I agree that the opening words "I revoke all other wills . . . made by me" will not cover the conveyance by his wife.

The Court adhered.

Counsel for Pursuer.—Mackintosh—Lorimer. Agents—Macbrair & Keith, S.S.C.

Counsel for the Defender—Gloag—Jameson. Agents—F. J. Martin, W.S.

Wednesday, January 23.

FIRST DIVISION.

PAUL *v.* JACKSON.

Reparation—Slander—Veritas Convicii—*Issue in Justification*

The defender in an action of damages for slander said to be contained in two letters written and sent by him to the pursuer, took no issue in justification, but proposed to prove in mitigation of damages the truth of certain statements made by him on record. *Held* that these statements amounted to an averment of *veritas convicii*, and therefore could not be proved without a counter issue.

This was an action of damages for slander at the instance of Andrew Paul, tanner, Edinburgh, against Thomas Jackson, plumber, Edinburgh, founded on the following two letters addressed by Jackson to Paul:—

"21*st June* 1883.

"Sir,—As I am informed that you have been using violent language towards me, and threatening to waylay me for the purpose of inflicting serious personal injury, and as I believe that you are capable of doing that, I have now to inform you that I am communicating with the authorities for the purpose of having you duly restrained. I am quite aware of the animus you have against me—that I have been long aware of. I am also aware of how you and several other persons of a similar description have bandied together for the purpose of injuring me otherwise; but both you and they will find that the