of a selected class, who are to be sought for when the period of distribution arrives, and that until that time no vesting takes place. The question therefore comes to be, who are the next-of-kin of Dr Gregory at the period of distribution? and upon that matter I think the decision of the majority in the case of *Wannop's Trustees* is directly applicable. Upon these grounds I concur.

The Court found the parties of the fifth part entitled to the whole funds held by the parties of the first part.

Counsel for First and Second Parties—Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Third and Fourth Parties—Guthrie. Agents—J. S. & J. W. Fraser Tytler, W.S.

Counsel for Fifth Parties—D.-F. Mackintosh, Q.C.—Low. Agents—J. S. & J. W. Fraser Tytler, W.S.

Tuesday, January 25.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

NICOLL'S EXECUTORS *v.* HILL AND OTHERS.

Succession—Husband and Wife—Mutual Settlement—Jus quæsitum—*Protected Succession.*

A husband and wife executed a mutual testament by which each conveyed to the survivor the whole moveable estate which should be his or hers at death, and appointed the survivor to be executor and universal legatory of the predeceaser. Moreover, in order to settle the succession to their means at the death of the survivor, they bequeathed to certain relatives of the husband the whole goods and gear which should belong to the survivor at his or her death (subject to certain exceptions), and reserved power of revocation to them jointly, and to the husband if he should be the survivor. The wife, who had no estate of her own, was the survivor, and no revocation ever took place. *Held* (1) that so far as conferring a gift on the husband's relatives as at the death of the survivor, the deed was purely testamentary, there being no onerosity as far as they were concerned, and therefore (2) that the husband's relatives had no right conferred on them by the deed which entitled them on the widow's death to claim savings made by her out of the estate of her husband, but which she had given away by *mortis causa* donations in order to defeat their claims, such savings, assuming them to have been made out of her husband's estate, being her own property, which she was not under any obligation to leave to be carried by the mutual will.

Opinions that she was entitled to revoke her will as expressed in the mutual testament, and that with respect to her whole moveable estate without distinction.

In 1863 David Nicoll, residing in Dundee, and Isabella Key or Nicoll, his wife, executed "from our affection to each other and for other good causes" a "mutual testament" whereby the husband bequeathed to the wife, in case she survived him, all his goods, gear, and debts which should pertain to him at the time of his death, and in like manner the wife bequeathed to the husband all the goods, gear, debts, and sums of money which should pertain to her at her death, and they constituted the survivor to be sole executor and universal legatory of the predeceaser.

The deed then proceeded thus—"Moreover, we the said David Nicoll and Isabella Key or Nicoll being desirous to settle the succession to our moveable and personal estate in the event of the death of the longest liver of us, Therefore we do hereby, jointly and severally and each of us, whichever of us may be the survivor, leave, legate, assign, and bequeath in that event to and in favour of James Nicoll, basket and toy merchant in Dundee, Charles Nicoll, engineer, Victoria Docks, London, Robert Nicoll, seaman in Dundee, William Marshall Nicoll, mill overseer there, and Helen Nicoll or Cooper widow of the deceased William Cooper, seaman in Dundee, and the survivors or survivor of them, equally among them, share and share alike, declaring that the lawful issue of any predeceaser or predeceasers leaving lawful issue shall nevertheless be entitled to such share as their deceased parent or parents would have been entitled to if alive, all and sundry the whole goods, gear, debts, sums of money, household furniture and plenishing, books, bed and table linen, paraphernalia, and all other moveables whatsoever, including heirship moveables, that may pertain and belong or be resting-owing to the longest liver of us at the time of his or her decease, with the whole vouchers and instructions thereof, and all that has followed or may be competent to follow thereon: And further, we do hereby severally nominate, constitute, and appoint the said William Marshall Nicoll, whom failing, the said James Nicoll, and whom failing William Nicoll, son of the said James Nicoll, to be the executor of the longest liver of us respectively, with all the powers of the office. But these presents are granted always with and under the burden of all the just and lawful debts, sickbed and funeral charges, of the longest liver of us, and the legacy hereinafter appointed to be paid and delivered: And we ordain our said executor to pay and deliver the following legacy to the person after named and designed, viz., to Ann Nicoll Callender, presently residing with us, the sum of thirty pounds sterling," and also certain household furniture and plenishings.

They revoked all former wills executed by either. "And we do hereby further reserve to us at any time during our joint lives, and to me the said David Nicoll if I shall be the survivor, to alter, innovate, and revoke these presents in whole or in part as may be thought proper; but declaring always that these presents in so far as not altered, innovated, or revoked as aforesaid shall be effectual though undelivered, wherever found, the delivery thereof being hereby dispensed with."

James Nicoll and others, named in this portion of the will as beneficiaries, were relatives of the husband.

David Nicoll, the husband, died in September 1863 survived by his wife. He never exercised

his power of revocation, nor was there any joint-revocation by the spouses.

At the time of his death he was possessed of heritable property in Dundee, the annual rental of which was about £70. By a disposition and settlement dated 7th April 1862 he had conveyed this heritable property to his widow in liferent, and to his brother William Marshall Nicoll in fee.

The amount of the inventory of his personal estate was £80 sterling, and the pursuers of this action alleged that shortly after his death his widow received payment, in addition to this, of the sum of £150, which was the amount of a debt paid to her by her brother-in-law. Being of very thrifty and parsimonious habits, she, though living on the rents of the heritage and on the sum, of whatever amount, of her husband's moveable property, saved a considerable sum of money between his death in 1863 and her own in 1886. She was anxious that her husband's relatives should not benefit, by reason of the mutual testament, by any means she might leave, and determined to dispose of her property as she liked during her lifetime. In accordance with this she from time to time deposited sums of money in the British Linen Company Bank at Dundee on deposit-receipts in name of certain persons; one of these, which may be taken as a sample, was for £300, the deposit-receipt being dated 16th July 1879, and being taken in the names of a Mrs Meldrum and her children Isabella and Mary Anne Meldrum, and the receipt was delivered by Mrs Nicoll to Mrs Meldrum, who deposited it with the bank agent at Dundee. With the object of making a further donation to Mrs Meldrum she opened three accounts with the Dundee Savings Bank, two in the joint-names of herself and Mrs Meldrum, and one in name of Mrs Meldrum alone. In so doing she acted to some extent on the advice of a neighbour, James Hill, whose name was placed in more than one of the various receipts.

Mrs Nicoll died, as above stated, in 1886, twenty-three years after her husband's death. The persons named in the mutual testament as executors of the longest liver having all predeceased her, Robert Nicoll and the other children of William Marshall Nicoll got themselves decerned executors-dative to her *qua* general legatees under the mutual testament.

After the death of Mrs Nicoll the various deposit-receipts had been uplifted by the persons in whose names they were taken, and Hill by her desire paid out of one of the receipts in his name certain sums to two other persons whom she had told him she wished to give money to in consequence of their kindness during her illness.

This action was raised by the sons of William Marshall Nicoll as executors-dative *qua* general legatees under the mutual settlement, against James Hill, as trustee or mandatory of Mrs Nicoll, or otherwise as vitious intromitter with the estate of Mr and Mrs Nicoll, and as an individual, and also against the persons named in or who had received part of the money contained in the various deposit-receipts and the Savings Bank accounts, as vitious intromitters with the estate of Mr and Mrs Nicoll. The action concluded for count and reckoning of the defenders' intromissions with the estate of Mr and Mrs Nicoll, and payment of the balance due thereon, which they estimated at £1000.

The pursuers stated that the accumulations made by Mrs Nicoll were, owing to her saving habits, very considerable, and amounted to at least £1000, but all the visible estate at her death was the furniture and the proportion of the rents of heritage between Martinmas 1885 and her death; that what she had done was to attempt in concert with Mr Hill to dispose of her estate by *mortis causa* donations and otherwise, "so as to defeat the provisions of the mutual testament and the rights of the legatees under the same."

The defenders stated that Mrs Nicoll had been advised that she could dispose of her property as she pleased during her life, though a question might be raised as to her power to make a new will, and that in accordance with this advice she deposited the sums in bank with the object of constituting in favour of the parties named in the receipts a donation *inter vivos*, or alternatively, *mortis causa*, these sums being her savings out of her alimentary liferent. They also averred that the mutual settlement, so far at least as concerned provisions in favour of persons other than the spouses themselves, was purely gratuitous, testamentary, and revocable.

They pleaded that the pursuers had no title to sue, and further—"(3) Upon a sound construction of the said mutual testament, the provisions with reference to the succession to the survivor of the spouses were testamentary, gratuitous, and revocable, and were *pro tanto* revoked by the donations libelled on. (4) *Separatim*, Mrs Nicoll had full power notwithstanding the said mutual testament to dispose of the savings from her alimentary liferent by gift *inter vivos* or *mortis causa*. (5) The said sums having been received by the defenders from Mrs Nicoll as gifts *inter vivos* or alternatively *mortis causa*, they are not bound to account therefor to the pursuers."

The Lord Ordinary (M'Laren) pronounced this interlocutor—"Finds that by their mutual testament David and Isabella Nicoll conveyed to trustees the estate of the survivor for the purposes there mentioned: Finds that Isabella Nicoll, the surviving spouse, was barred by implied contract from revoking, altering, or defeating the provisions of this trust, in so far as these dispose of her predeceasing husband's estate, but finds that the said Isabella Nicoll was entitled to dispose of her separate estate or savings effected from her income after her husband's death, and that either by will or donation, the mutual will being to that extent defeasible by her acts: Further, allows a proof, on a day to be afterwards fixed, on the question whether the deposits libelled were or were not the husband's estate, and grants leave to reclaim.

"*Opinion.*—I am of opinion in this case that as regards the reciprocal destination by the one spouse to the other the settlement was onerous, and as regards the provision made for the succession of the survivor, that must be taken to be a testamentary destination by each spouse, revocable by each spouse as regards the particular estate which he or she conveyed. As regards the wife's money, I have really no doubt that she was perfectly entitled, being the survivor, to make a new will, or a *mortis causa* gift of any part of it. The mere circumstance that no power is reserved will not prevent her from doing so. But then as regards the hus-

band's estate I think the case is different, because while undoubtedly he gives his wife the fee, so that she might have spent the whole of the money, yet in so far as the money remained unexpended at her death, I think we must look to the words of reserved power of alteration. We find that the power of alteration is only given to the husband in the event of his being the survivor, and not to his wife. He has the power of alteration in regard to his own estate. It would follow from my opinion that there must be a separation of the estates, and on the question whether the husband's money was all spent in paying his debts and funeral expenses, or whether any part of it remains, I think that may be dealt with more satisfactorily by both parties putting in all documents in their possession than by a parole proof."

The pursuers reclaimed, and argued—There was here no good ground of defence, because it was admitted that the wife had nothing but the moveable estate of her husband, which she took in fee, and the liferent of his heritage. There was a destination-over to relatives of his, of all that the survivor should be possessed of. The Lord Ordinary had held that this did not prevent the wife disposing of her savings either by will or donation. But savings were part of the estate she died possessed of; it was matter of contract on the part of the husband that all such estate should go at her death in a particular way, the wife was not entitled to defeat his intention by any gratuitous act. She might spend, but she could not test, and if not, neither could she donate *mortis causa* or *inter vivos*, for all there were equally gratuitous. This principle was recognised in *Craich's Trustees* v. *Mackie and Others*, June 24, 1870, 8 Macph. 898; *Gentles* v. *Aitken*, June 23, 1826, 4 S. 749; *Wood*, December 4, 1823, Fac. Col.; *Hepburn* v. *Brown*, June 6, 1814, 2 Dow 342; *Kidd* v. *Boase*, December 10, 1863, 2 Macph. 227; *Arthur* v. *Seymour and Lamb, &c.*, June 30, 1870, 8 Macph. 928. The wife's power to revoke was excluded by the words of the deed, but yet it was admitted that what she did was an attempt to revoke *per ambages*.

The defenders replied—In the mutual testament the only two contracting parties were the spouses, and so far as they were concerned the deed was onerous, but its onerosity ended at the husband's death. She was after that quite entitled to do what she liked with the savings made by her own thrift out of what she received from her husband.

Authorities—*Laing* v. *Brown*, May 24, 1867, 5 Macph. 797; *Melville* v. *Melville's Trustees*, July 15, 1879, 6 R. 1286 *Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800.

At advising—

Lord Justice-Clerk—The pursuers in this action found their demand against the defenders on the alleged terms of a mutual settlement executed by a husband and wife in 1863. The pursuers are the nephews and a niece of the husband. The defenders are the trustees under the mutual settlement, and certain persons who are said to have received sundry payments from the wife, who survived her husband. It is maintained that these payments were in fraud of the mutual settlement, which it was out of the power of the widow to disappoint, and the pursuers call for an accounting.

The Lord Ordinary has sustained the pursuers' demand for an accounting, while holding that the wife was not precluded by the terms of the mutual settlement from testing on property which belonged to her apart from the settlement, and while she was uncontrolled fiar of any personal funds left by her husband, and was entitled to spend them as she pleased, her executors are yet bound to account to the pursuers for that portion of these funds which remained in her hands at the date of her death, or which had been gratuitously transferred to third parties.

I differ from the Lord Ordinary on the last point. It appears to me very doubtful if this settlement contains anything of the nature of what is now called a protected succession in favour of the pursuers. I think, further, that even if it did, it would not support the demand now made.

The settlement here consists of two parts. By the first the spouses mutually convey to the survivor all the personal property of which the predeceaser may die possessed, and nominate each other the executor of each. To this extent the instrument constituted an onerous contract. The second part commences with the word "Moreover," and proceeds as follows—"we, the said David Nicoll and Isabella Key or Nicoll, being desirous to settle the succession to our moveable and personal estate in the event of the death of the longest liver of us, Therefore we do hereby, jointly and severally and each of us, whichever of us may be the survivor, leave, &c., in that event to and in favour of" certain persons named, "and the survivors or survivor of them equally, share and share alike, the goods and gear of the longest liver at his or her decease, appointing one of the persons named to be the executor of the longest liver." The clause of revocation is as follows—"And we do hereby further reserve full power to us at any time during our joint lives, and to me the said David Nicoll if I shall be the survivor, to alter, innovate, or revoke these presents in whole or in part as may be thought proper, but declaring always that these presents, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual, though undelivered, wherever found, the delivery thereof being hereby dispensed with."

I am of opinion that the second part of this deed was purely testamentary, and conferred, and could confer, no right on the pursuers which can sustain the present action. There is no reason for assuming that the *mortis causa* conveyance contained in the first part of the settlement was the consideration for or conditional on the testamentary provisions contained in the second. These last possess no element of onerosity, as there was no blood relationship between the wife and her husband's nephews, and as the husband reserved a right to revoke; whatever other effect this might imply, it shows there was no intention of creating a *jus crediti* in the pursuers, and perhaps of itself indicates an absence of mutuality or reciprocity in these testamentary provisions.

This doctrine of protected succession in moveables rests on a series of decisions not altogether consistent, and I sympathise with the remarks on this head which I find in the last edition of Fraser on Husband & Wife, ii. 1507. But the

present case is not a difficult example of the category. My view of it is well and shortly expressed in two passages, one from an opinion of Lord Benholme and one from Lord Neaves in the case of *Lang* v. *Brown*, 5 Macph. 789. The settlement in that case was conceived in terms nearly identical with the present. It was between husband and wife, and professed to provide not only for the event of survivance, but also for the decease of both, in which case the property was conveyed to the daughter of the wife by a previous marriage. The wife survived, and left the property to her sister. In an action by the daughter Lord Benholme said—"It is important to observe that the only contracting parties were Mr and Mrs Marshall. So far as they were concerned the deed was an onerous one. It was intended to provide for the survivor of the two spouses, but it was never intended to do anything against the survivor. The whole onerosity of the deed ended, in my opinion, with Mr Marshall's death." Lord Neaves said—"The deed before us seems to have two objects. The first is to make provision for the survivor of the spouses, and this provision, which is material, is clearly onerous. The second object seems to be thus indicated—'Considering the propriety of making arrangements to prevent disputes as to our respective successions at the death of either or both of us.' Such arrangements are naturally introduced into the deed, but they are incidental only to its chief purpose, and I see no mutuality or onerosity in them." So I think here.

But if I thought otherwise on the general construction of the settlement I could not have applied the doctrine of protected succession to such a case. There was in truth no succession to protect. The husband died in 1863; the wife in 1886. He had in 1862 conveyed the only heritage he possessed to his wife in liferent for her alimentary use, and to his brother in fee. At his death he left her no other means of subsistence but this liferent, which yielded some £70 a-year, a sum of £150, a debt which was paid to her by her brother-in-law, and the value of the household furniture. It does seem, however, that by dint of much pinching and privation this old woman contrived, during the twenty-three years which elapsed since her husband's death, to amass some hundreds, which she gave as a gift to sundry friends, as explained in the record. I think she fairly earned these savings by her thrift and self-denial, and that they do not fall under any obligation in the mutual settlement. The £150 is not said to be extant in any specific form, and I think we must assume it to have been spent.

Lord Young—By the mutual will the whole moveable estate of the predeceasing husband passed to the surviving wife, and became her absolute property in fee-simple, and although the language of the instrument shows that he contemplated that at her death her moveable estate (not his) would pass to the legatees therein named, yet this could not possibly be by his will or by any other will than hers. His will was completely executed on his death in 1863 by the passing of his whole estate to his widow in fee-simple. But the mutual testament expresses her will also, and we need not consider whether she was at liberty to revoke it, for she did not revoke it, and it may be taken, so far as my opinion is concerned, that it will carry to the persons named the whole moveable estate belonging to her at her death in 1886, which, however, seems to have consisted only of furniture and the proportion of the rents of some liferented heritage from Martinmas 1885 till her death in January 1886.

This action, which is a count and reckoning, regards mainly certain sums of money which she had gifted to various persons and at various times during a period of seven years prior to her death, by depositing it in bank on deposit-receipts taken in their name, and in such manner that without any further act on her part, and without any aid from the Court, they have received payment of the money, and have it now in actual possession. To take the case of the earliest of these deposit-receipts—that dated 16th July 1879 (seven years before the widow's death), for £300, in name of Mrs Meldrum and of her daughters Isabella and Mary Ann Meldrum, and while they have in fact uplifted on no other right and title than the terms of the receipt gave them—I must hold that this was a complete gift of the money, and so irrevocable by the donor as every complete gift is. There may indeed have been facts as between the donor and the donees which implied a trust in the latter, but none such are averred, and the pursuers, so far from alleging a trust in the donees or a right to revoke in the donor, aver distinctly that the donor's intention was that the donees should have the money so that the pursuers might not get it under the will. But this was a lawful intention with respect to money which was her property to spend or gift as she pleased, and all that can be said is that it has been accomplished. Had she changed her mind it is clear that she could not have revoked the gift without the consent and aid of the donees, who had the written obligation of the bank in their favour, or without appealing to the Court and invoking its aid on an averment and proof of facts entitling her to leave it. The same remarks apply to all the deposit-receipts, which, one and all of them, import complete gifts, the parties named in them receiving the money on the right and title which these receipts conferred on them from their respective dates.

I am therefore unable to hold that these donees or any of them are liable to account for the money which they have so drawn as money pertaining and belonging or resting-owing to Mrs Nicoll at the time of her death.

For substantially the same reasons I am of opinion that there is no obligation to account for the money deposited by the deceased in the Dundee Savings Bank in name of persons whom she intended to draw it and keep it as their own, and which they have drawn accordingly on the right and title which the deceased gave them, and, as the pursuers aver, intended to give them, by the terms of the deposits. It is an undoubtedly lawful and effectual way of gifting money to put it into the donee's bank account, or into an account opened with a bank in his name, and with the intention of gifting it. Any attempt to take a fraudulent benefit from an account opened or money lodged for another purpose than gift would of course be frustrated on proper averments and evidence, but no case of that kind is here presented, and, indeed, it is the pursuers' case, as I have already remarked,

that gift was intended by the acts which *ex facie* import it, although they contend that it ought to be held unavailing to the donees because of the motive for it, viz., to defeat the mutual will. To this objection I could not assent, even on the assumption, which I have been making, that the surviving widow was not at liberty to revoke that part of that will. I have, however, to say, though I think it unnecessary to the decision of the actual case, that in my opinion Mrs Nicoll was entitled to revoke her will as expressed in the mutual settlement, and that with respect to her whole moveable estate without distinction, for if the estate was hers I can see no good ground for distinguishing between that part of it which came to her from her husband, and the rest which came from any other source. If there were ground for such distinction, which I think there is not, the part that came from the husband would require to be traced and identified as extant at the period of her death, for otherwise it would be impossible to act on the distinction. It is stated that the inventory of his estate, including furniture, amounted to £80. The furniture may no doubt be identified so far as extant. But with respect to money I do not see how identification is possible. The pursuers aver that the widow received payment of a debt for borrowed money to the amount of £150 due to her deceased husband. But assuming this to be so, how is the money so paid twenty years ago to be identified, and shown to have been extant at the widow's death? It was her own absolute property, so that she might spend it on her maintenance or otherwise as she saw fit, and to allow a proof in order to trace money—the currency of the realm—in the hands of the absolute owner during a period approaching a quarter of a century seems rather extravagant. The furniture which the widow died possessed of is left to pass by the will. The Lord Ordinary has allowed a proof "whether the deposits libelled were or were not the husband's estate?" I do not understand this to mean that there shall be a proof of the mere amount of money which came to the widow under her husband's will, which I should hardly have thought a fitting subject for a proof at large. I rather understand it to mean the tracing of the actual bank-notes or coin which came to her from him, and showing that these were deposited in bank on the receipts libelled, and to the propriety or practicability of such a proof I could not assent. That to the extent of the value of the estate left by the husband the beneficiaries named in the mutual will shall not be prejudiced by any act of the surviving wife, or at least not by her directions, is a simple (although I think an erroneous) idea, but beyond this I must own my inability to follow the Lord Ordinary's views. To trace money as having come from him and been left intact by his widow, the owner, during her survivance of twenty-three years, is, I think, impossible. I should at least before allowing a proof for such a purpose require some distinct special averments regarding the tracing of the money, and the identification of it as unspent and extant.

Lord Craighill—The late David Nicoll and his wife Isabella Key or Nicoll on 17th July 1863 executed a mutual settlement, whereby he legated and bequeathed in favour of his wife, in case she should survive him, the whole moveable estate which belonged to him at the time of his death, and in like manner she thereby legated and bequeathed to him, in case he should survive her, all and sundry the whole moveable property which should pertain, belong, or be resting-owing to her at the time of her decease, and they thereby severally nominated and appointed the survivor of them to be sole executor and universal legatory of the predeceaser. Moreover, on the narrative that they were desirous to settle the succession to their moveable and personal estate in the event of the death of the longest liver of them, they did jointly and severally and each of them, whichever of them might be the survivor, legate and bequeath to and in favour of James Nicoll and the other legatees, who are or who are represented by the pursuers of the present action, the whole goods and gear belonging to the longest liver at his or her death, but always with and under the burden of the just and lawful debts, sick-bed, and funeral charges of the longest liver of them, and of the legacy of £30 which they appointed their said executor to pay to Anne Nicoll Callender or Meldrum who is one of the defenders, and also to deliver to her the articles of household plenishing and other articles specified. There was reserved full power to themselves at any time during their joint-lives, and to the said David Nicoll if he should be the survivor, to alter and revoke the said mutual settlement in whole or in part as might be thought proper. They also dispensed with delivery.

Mr Nicoll died in September 1863 survived by his wife, who died in 1886. The testators did not during their joint-lives exercise the reserved power of revocation. Mrs Nicoll, however, it is said, gave *mortis causa* donations in order to defeat the legacies in the joint-settlement by her and her husband. And the purpose of the present action is to counteract those donations on the ground that they were *ultra vires*, and bring back to the legatees under the joint-settlement the money which in the way mentioned she attempted to put away.

That Mrs Nicoll was vested with the full right of the property which was the subject of mutual settlement between her and her husband is not in controversy. That she was entitled to spend it to the last farthing, if she thought fit, is also a matter on which parties are agreed, but what is said is, that what she might leave, however acquired, was beyond her power of disposal, because though in the form of a will it was in reality a contract betwixt the spouses that what she left should pass to the legatees, who are represented by the pursuers, subject of course to the legacy that was bequeathed to Mrs Ann Nicoll Callender or Meldrum. My opinion is that the contention of the pursuers cannot be maintained. The settlement, according to my reading of it, is a will, and nothing but a will, so far as regards the property that was the subject of bequest to the legatees by whom her succession is now claimed. The bequest by the one spouse to the other spouse, for anything appearing in the will, was not the cause for which the legacy in question was granted, but simply their desire to settle the succession to their moveable and personal estate in the event of the death of the longest liver of them. This is set forth in the narrative to that part of the settlement by which the bequest in question is

prefaced. There is no presumption in favour of the view that this part of the settlement was a contract. The contrary is the natural conclusion. Mrs Nicoll could spend it. She could gift it in her lifetime. What was bequeathed to her by her husband, and what moveable property she had inherited from her husband—what of her own she had before his death, and what she acquired afterwards—were all absolutely at her own disposal so long as she lived. This being the case, the reasonable inference is, that as the legacy could be defeated in this way it might also be revoked. The exercise of such a power would, I think, require to be expressly, or at anyrate unambiguously, excluded. But there is no such exclusion. On the contrary, the legacy stands upon what is merely the will of the survivor, and as Mrs Nicoll was the survivor, she might by revocation, as well as by spending or by gifting the money in her lifetime, put an end to the bequest, the benefit of which is claimed by the pursuers of the present action.

The Lord Ordinary so far shares these views, but he thinks the revocation could not take effect upon that portion of the moveable property belonging to the wife which she had acquired from her husband by the joint settlement. I think no reason for this limitation is supplied by the settlement. The words upon which this depends are, "All and sundry, the whole goods and gear . . . that may pertain or belong, or be resting-owing, to the longest liver of the said David Nicoll or the said Mrs Isabella Kay or Nicoll at the time of his or her decease." Whatever therefore the survivor left was included in this bequest, and my opinion is that the widow was entitled to revoke as well the portion of her moveable property which she acquired from her husband as that which was her own previous to the making of the joint-settlement or which she acquired during her viduity.

For these reasons I think that the interlocutor should be recalled.

Lord Rutherfurd Clark concurred in the opinion of the Lord Justice-Clerk.

The Court recalled the Lord Ordinary's interlocutor, sustained the defences, and assoilzied the defenders from the conclusions of the action.

Counsel for Pursuers — Darling — Dunsmore. Agent—David Milne, S.S.C.

Counsel for Defenders — Balfour, Q.C.—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Tuesday, January 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

THE DUKE OF MONTROSE *v.* PROVAN AND ANOTHER (PROVAN'S TRUSTEES).

Superior and Vassal—Casualty—Singular Successor—Taxed Composition on Entry.

By a feu-contract dated in 1631 there were given out to each of certain persons who had previously been "kindly tenants" of certain lands, and their heirs whatsoever or assignees who should not exceed three chalders victual in yearly rent, the portions of these lands previously occupied by them, the superior binding himself and his heirs and successors to receive the heirs of the vassals for a certain relief-duty, and to receive purchasers from the said vassals, or any of them, or their foresaids (such purchasers not exceeding the rank of three chalders victual rent), for payment of a taxed composition of £10 Scots for their entry. *Held* (1) that this obligation to receive for a taxed composition of £10 Scots extended not only to purchasers from these persons or their heirs, but to purchasers from such purchasers; (2) that persons who held a heritable property in a street in Glasgow, the agricultural rental of which would not be so much as three chalders victual, were within the class of singular successors who were entitled under the feu-contract to be so received; and *therefore* that on tendering payment of the taxed composition of £10 Scots they should be *assoilzied* in an action under the Conveyancing Act 1874 of declarator and for payment of a casualty of one year's rent as singular successor.

This was an action under the Conveyancing Act of 1874 by the Duke of Montrose, superior of certain lands described in the summons, against the trustees of the late Moses Provan, concluding for declarator that in consequence of the death of James Provan, the vassal last vest and seized in certain of these lands as described in the summons, a casualty, being one year's rent of the lands, became due to the pursuer, and for payment thereof, and that in consequence of the death of Anne Caldwell Holmes, the vassal last vest and seized in certain other lands described in the second place in the summons, a casualty of one year's rent of these lands became due to the pursuer, and for payment thereof.

Both pieces of land formed parts of the twenty shilling lands of Auchengillan, and were originally disponed in a feu-contract dated 25th August 1631 between James, Earl of Montrose, with consent of his curators, and John Wair, Archibald Buchanan, and George M'Indoe. They were there described as part of the twenty-shilling land of Auchingilzean, lying in the "Barronie of Mugdock parrochine of Strathblane and sherreffdome of Stirling." They were disponed to the said three persons above named, who were described as "possessors and kyndlie tenants" of the said twenty shilling lands of Auchengillan. The contract narrated that the Earl, in consideration of "certain