But the third question appears to me to raise a sufficiently clear issue, and in the view I take of it the answer to that question will be sufficient to dispose of the special case.

The point raised by the third question is whether the mutual disposition, assignation, and settlement of 17th April 1879 was validly revoked by a settlement which Mrs Johnstone subsequently made.

Looking to the circumstances under which the mutual settlement was executed, to the facts that no antenuptial marriage contract had been entered into between the spouses, and that the whole funds possessed by them were in a position which might well have given rise to questions after their death, it was very natural that they should have come to an agreement as to the disposal of their joint estate. That in my opinion is what they actually did. Each spouse agreed to give the liferent of his or her estate to the other in the event of survivance. It is not disputed that that was a remuneratory arrangement which amounted to a contract. Then the spouses agreed and declared that on the death of the survivor the whole residue of their estates should be divided equally among their ten children. It was argued that that provision was purely testamentary and could be revoked by either spouse *quoad* his or her estate. If the gift of the residue had been to strangers it might very well have been regarded as being only testamentary, but it is different when the object of the gift was to provide for the children of the marriage. That is a matter upon which it is natural and customary that spouses should come to an agreement, and I regard the whole settlement as being a family arrangement which neither of the spouses could revoke without the consent of the other. It is, further, not without significance that the words of the settlement are that the parties "agree and declare" that the residue shall be divided among the whole children. Accordingly, I think that we should answer the third question in the negative.

LORD ARDWALL—I agree. The point raised by the third question is whether the mutual settlement executed by Mr and Mrs Johnstone on 17th April 1879 was contractual or merely testamentary. I have no doubt that it was contractual and could not be revoked except by the joint act of the spouses during their lifetime. No such joint revocation was made. The position of the heritable and moveable estates in question at the said date was that the heritable subjects were held under a 999 years' lease, and, though I do not wish to express an opinion on the matter, would appear to have been vested in the husband, while the sum to which the wife succeeded as the share of the estate of her father fell under her husband's *jus mariti*, subject to his making reasonable provision for her maintenance if a claim therefor were made on her behalf, as provided for by the Conjugal Rights Amendment Act 1861, section 16. Now reasonable provision was made by the mutual settlement, by which in short the spouses settled their whole affairs *inter se*, each conferring some benefit on the other, and both departing from their strict legal rights. That being so, it is, I think, vain to contend that the settlement could be revoked by the survivor. I therefore agree that the third question should be answered in the negative, but I think the words "*quoad* her property" at the end of the question should be omitted. In this view of the case it becomes unnecessary to answer the first and second questions.

The LORD JUSTICE-CLERK concurred.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

. . . "Answer the third question of law as amended in the negative, and find it unnecessary to answer the first and second questions." . . .

Counsel for the First Parties—Chree—W. T. Watson. Agents—Cameron & Orr, S.S.C.

Counsel for the Second Parties—J. A. T. Robertson. Agent—Gilbert Tweedie, W.S.

Tuesday, October 15.

FIRST DIVISION.

[Sheriff Court at Glasgow.

KIRKWOOD & SONS *v.* THE CLYDESDALE BANK, LIMITED, AND ANOTHER.

Bank—Bill of Exchange—Cheque—Cheque Presented after Death of Drawer—Intimated Assignation—Right of Bank to Strike a General Balance over All Drawer's Accounts in Computing Funds Available—Bills of Exchange Act (45 *and* 46 *Vict. cap.* 61), *secs.* 53 (2), 73, *and* 75.

A customer of a bank, having a current account, and also several loan and cash accounts which were in various ways secured, drew for value a cheque, and died before it was presented for payment. On its being presented the bank refused payment on the ground of the customer's death, and subsequently in defence to an action maintained that they had no funds available. At his death the customer had in his current account a sufficient credit balance to meet the cheque, but at the other accounts large debit balances, and a debit balance on a general accounting.

Held that while the cheque on being presented operated under the Bills of Exchange Act 1882, sec. 53 (2), as an assignation of any funds available in the hands of the bank, the bank was entitled, in calculating whether there were any funds available, to take a balance of the customer's whole ac-

counts, and that without having regard to whether any of the accounts were secured.

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61) enacts—section 53 (2)—"In Scotland when the drawee of a bill has in his hands funds available for the payment thereof the bill operates as an assignment of the sum for which it is drawn in favour of the holder from the time when the bill is presented to the drawee." Section 73—"A cheque is a bill of exchange drawn on a banker payable on demand." Section 75—"The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) Countermand of payment; (2) Notice of the customer's death."

On September 22, 1905, in the Sheriff Court at Glasgow, James Kirkwood & Sons, stockbrokers, 62 Buchanan Street, Glasgow, raised an action against the Clydesdale Bank, Limited, concluding for payment of the sum of £1588, 8s. 7d., with interest from December 15, 1904. The sum sued for was the amount of a cheque, dated 15th December 1904, drawn by J. & G. Moffatt, stockbrokers, Glasgow, on the Clydesdale Bank, Limited, the defenders, and handed to the pursuers for value. The pursuers had handed this cheque for collection to their own bankers, who had presented it on December 16 to the defenders. The defenders had refused payment on the ground that Mr George Moffatt, the sole partner of J. & G. Moffatt, had died that morning. At the time there was at J. & G. Moffatt's credit on current account a sum of £2948, 15s. 6d., but the firm also had with the defenders a number of separate loan and cash accounts, secured in different ways, at which there were debit balances, the total debit balance on these accounts amounting to £29,100.

On January 4, 1906, the Sheriff-Substitute (BALFOUR) assoilzied the defenders.

The pursuers appealed to the First Division of the Court of Session. The Court having had the dependence of the action intimated to Robert Paterson, C.A., judicial factor on Moffatt's estate, and having subsequently sisted him as a party, of new closed the record and allowed a proof, the import of which is given *supra*.

The defenders, the Clydesdale Bank, *inter alia*, pleaded—"(3) In respect that when said cheque was presented to these defenders they held no funds of Messrs Moffatt which could be assigned to the pursuers, these defenders should be assoilzied with expenses. . . . (5) *Separatim*—Notice of the death of the said George Moffatt having been given to these defenders before the presentation of said cheque, these defenders were, in terms of sub-section 2 of section 75 of the Bills of Exchange Act 1882, warranted in refusing payment of same, and they are accordingly entitled to absolvitor with expenses. . . . (7) These defenders being entitled at any time without notice to treat all the accounts between Messrs Moffat and the bank as one account, and to apply the credit balance on any account towards meeting the debit balances on the other accounts, absolvitor should be pronounced with expenses."

The judicial factor, Paterson, had similar pleas.

Argued for the pursuers (appellants)—The bank was bound to pay the cheque drawn on Messrs Moffatt's working account from the funds in that account, and these funds were sufficient. A bank was bound to honour a customer's cheque on a current or working account on which he had been in the habit of operating. That constituted a custom of dealing between banker and customer, and must be observed, whatever might be the condition of any other accounts, until the customer had had notice of the bank's contrary intention—*Cumming* v. *Shand*, 1860, 5 Hurl. and Nor. 95, Pollock (C.B.) at p. 98; *Buckingham & Company* v. *The London and Midland Bank, Limited*, 1895, 12 T.L.R. 70. This was not a matter of contract but a rule of law on which persons taking the customer's cheque were entitled to rely. But even if it were a matter of contract, the contract was one in which the pursuers had a *jus quæsitum tertio*. Further, the cheque here in question being for value was an intimated assignation of the drawer's funds with the bank—Bills of Exchange Act 1882, section 53 (2), and section 73; *British Linen Company Bank* v. *Carruthers & Fergusson*, June 6, 1883, 10 R. 923, Lord President Inglis at p. 926, 20 S.L.R. 619; *Bryce* v. *Young's Executors*, January 20, 1866, 4 Macph. 312, 1 S.L.R. 114. Even if the bank were entitled to set off the debit balance on other accounts against that at credit of the current account, it was not entitled to do so without realising the securities held against them and discussing their guarantors.

Argued for the defender, the judicial factor—The cheque till presented was an unintimated assignation giving no *nexus*. When presented it placed a *nexus* on any funds available, but there were no such funds. The English cases cited dealt with the course of conduct towards a living client and with the contract in these circumstances. That contract dealt with the cheque *qua* cheque, not with the assignation. The customer knew that the accounts would be set off against one another on his death, and the course of dealing ended. The bank was entitled to strike a general balance over all the various accounts in spite of the fact that they held securities against some of them—*Thomas* v. *Howell*, 1874, L.R., 18 Eq. 198, Malins (V.C.) at p. 202.

Counsel for the bank adopted the argument for the judicial factor.

LORD PRESIDENT—The pursuers in this action are stockbrokers in Glasgow. In order to oblige a certain Mr Moffatt, now deceased, who wished a sum of money in London, and who had not himself got a bank account there, they gave Mr Moffatt a cheque upon a bank in London, and by that means put in Mr Moffatt's hands a document by which he could get the money in London. They were paid for that by

taking from Mr Moffatt a cheque upon his Scottish bank, the Clydesdale Bank, with its office in Glasgow.

The pursuers unfortunately did not present that cheque at the moment, and before they did present the cheque Mr Moffatt had died, his death being sudden. The result of that was that naturally enough the Clydesdale Bank refused to pay the cheque when presented; and the present action is directed by the Messrs Kirkwood against the Clydesdale Bank for payment of the cheque. Now, the pursuers cannot deny that, so far as the ordinary operation of the cheque was concerned, the Clydesdale Bank were perfectly within their rights, and it was according to their duty to refuse payment of the cheque, because section 75 of the Bills of Exchange Act 1882 says perfectly clearly that "the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment, and (2) notice of the customer's death." It is not denied that at the time the cheque was presented the Clydesdale Bank had notice of the customer's death.

But the pursuers rely upon the second sub-section of the 53rd section, which says— . . . [*quotes supra*] . . . The pursuers say that the Clydesdale Bank had funds in their hands belonging to Mr Moffat, and that accordingly this cheque being an intimated assignation of these funds they are bound to make the same forthcoming. This statement of having funds in their hands belonging to Mr Moffatt the Clydesdale Bank deny; but the state of the facts as elucidated by the proof is this—Mr Moffatt, in accordance with a common practice, kept several accounts, and, using the nomenclature that is common in Scottish banking, these accounts may be described as Current Account, Loan Account, and various Cash Accounts. Now, the Current Account is, as its name indicates, an account on which the ordinary transactions from day to day are made, and there is no question that this cheque was intended to be drawn upon that Current Account. In point of fact it was drawn, not by Mr Moffatt himself, but by a gentleman connected with his firm who had right to draw upon this account and upon no other. The state of affairs as at the death of Mr Moffatt was that in the bank's books there was on that Current Account a credit balance in favour of the customer. But there were other accounts, namely, the Loan Account and various Cash Accounts, and in all of these, as was natural, there was a debit balance against the customer. There is no question whatever that the sum of these debit balances against the customer amounted to a sum much greater than the credit balance upon the Current Account.

It is quite true that against these debit balances upon the Loan and Cash Accounts the bank held various securities, partly consisting of stock and shares belonging to the debtor himself, and partly consisting of guarantees by various third parties, which guarantees for the purposes of the argument may be assumed to be good guarantees,—that is to say, guarantees given by persons who if called upon are equal to meet the amounts. Now the argument therefore really has come to this—In the circumstances is the bank's answer that it has no funds of Mr Moffatt a true one or not?

I am of opinion that it is a true one. It seems to me that the state of affairs between a banker and his customer as at any given time must be taken to be the state of affairs upon all accounts, and the state of affairs on all accounts shows perfectly clearly that the bank did not owe the customer, but the customer owed the bank, money. I do not think that fact is disturbed by either of the two considerations which have been pressed upon us by the counsel for the pursuers. One consideration is the question of what security the bank holds. That is a matter of very great moment for the bank, but none the less it does not seem to me to alter the relation of debtor and creditor as between the bank and its customer. That becomes very clear if you look at the security such as is given by an outsider—by a cautioner or by a guarantor. What is caution? It is not to pay money that you owe yourself, but it is to pay money that is owed by somebody else. In other words, the very hypotheses of a cautioner being called upon is that the customer is truly in the relation to the bank of a debtor and not a creditor. As little I think is the fact I have mentioned affected by the rule in support of which reference was made to the English cases of *Buckingham* and of *Cumming* v. *Shand*. That is the rule which lays down that a banker who is in the habit of honouring his customer's cheques to the extent to which he has funds at that customer's credit upon a current account is not entitled, without notice, at any moment, to turn round and refuse to honour these cheques because as a matter of fact there are other loan and cash accounts, and because, as a matter of fact, if all the accounts were massed the customer would be found to be a debtor and not a creditor. That seems to be common sense; and really it is a rule without which the ordinary banking practice with customers would be impossible. Cash accounts generally, and loan accounts always, have from their birth a debit balance against the customer, and a customer who happened to have a loan account or a cash account as well as a current account would never be in security to work on a current account at all, because he might never know at any moment when a cheque might be dishonoured upon presentment. But that does not affect this question. The question here as upon a question of honouring a cheque is gone, because the cheque as a cheque was countermanded by death; and the whole question is, what is the right which is given by the section of the statute which says that a cheque shall operate as an assignation. It seems to me quite clear that the expression "where the drawee of a bill has in his hands funds available for the payment thereof" must mean funds as

upon a true state of the accounts between the two parties concerned. As I have already pointed out, upon a true accounting between the parties concerned there were no funds in the hands of the Clydesdale Bank belonging to this gentleman at this time; and I am accordingly of opinion that the result which the Sheriff has come to is right, and his judgment ought to be affirmed.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellants—Hunter, K.C. —Sandeman. Agent—J. Mullo Weir, S.S.C.

Counsel for the Respondents (The Clydesdale Bank, Limited)—The Solicitor-General (Ure, K.C.)—W. J. King. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondent (The Judicial Factor)—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Campbell & Smith, S.S.C.

Wednesday, October 16.

FIRST DIVISION.

MILLAR AND ANOTHER *v.* MILLAR'S TRUSTEES.

Succession — Liferent and Fee — Trust — Direction to Divide into Shares Followed by Subsequent Direction to Hold and Manage Certain Shares for the Liferent Alimentary Use of Certain of the Beneficiaries—Right of Beneficiary to Demand Payment of Share—Repugnancy.

A testator directed his trustees "to divide the whole residue and remainder of my means and estate into nine equal shares, being one share for each of my following children" who were then named; and subsequently he directed them to invest the shares of two of the sons and to pay to or expend for them the produce thereof for their "liferent alimentary use" as the trustees should think fit, with a power of paying capital up to a sum named. He subsequently spoke of these shares as being "liferented" by the two sons, and directed that any sums accruing should be held "for their liferent use only as above provided with reference to their original shares." He, however, made no provision as to the fee of these shares, although he did so with regard to the fee of the shares of the other sons and of the daughters. *Held* that, there being no direct gift of fee, the two sons were not entitled to immediate conveyance of their shares, but that their shares fell to be administered by the trustees as prescribed by the testator, there being no repugnancy between the first direction and the subsequent direction.

Miller's Trustees v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 237, *distinguished* by Lord M'Laren.

John Millar, confectioner, Seagrove House, Leith, died on March 31, 1895, survived by his widow, Mrs Helen Winton or Millar, four daughters and five sons, and leaving a trust-disposition and settlement dated February 28, 1891, and recorded in the Books of Council and Session, April 8, 1895, whereby he conveyed to James Pirret Ferrier, merchant, Edinburgh, and others as trustees his whole means and estate.

By his trust disposition and settlement the testator, *inter alia*, gave the following direction—"(*Fourth*) On the death of the survivor of me and my said wife, I direct my trustees to divide the whole residue and remainder of my means and estate into nine equal shares, being one share for each of my following children, *videlicet*, Helen Millar or Somerville, wife of David Somerville, Scotland Street, Edinburgh, Jessie Millar, Jane Millar, Marion Winton Millar, John Millar, George Millar, William Millar, Thomson Millar, and Thomas Millar; and my trustees shall invest in their own names the shares of my said daughters, and shall pay to them during their respective lives the free annual interest or produce thereof for their liferent alimentary use, and the fee of said shares shall, on the death of my said daughters, respectively be paid or made over to their respective children, equally among them if more than one, and that on each child attaining twenty-one years of age or in the case of daughters on being married, whichever event shall first happen. . . . With regard to the shares of my sons, the said John Millar and George Millar, my trustees shall invest the same in their own names, and shall pay to my said two sons, or expend for their behoof, in such way, by such instalments, and at such times as my trustees in their discretion shall think best, the free annual interest or produce thereof for their liferent alimentary use respectively. But notwithstanding the foresaid provisions for the shares of my said daughters, and of my said sons John and George, being liferented by them, my trustees shall have power in their discretion to pay to each of them out of the capital of their shares a sum not exceeding £400, if my trustees consider that such payment may be for the benefit and advancement in life (my trustees being the sole judges on this point) of my said daughters and my said two sons or any of them; and with regard to the shares of my sons William, Thomson, and Thomas my trustees shall . . . apply said shares, including the part of any other share which may have accrued to them under the provisions hereinafter mentioned, or so much thereof as may be necessary, in extinction of the loan of £7000 made by me to them as partners of the firm of John Millar & Sons, or of any part thereof which may then be unpaid, and shall pay or make over to them at the first term of Whit-