The Act which applies in the present case is the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892. By section 5 of the schedule to that Act the services for which the company may charge embrace, *inter alia* (iv) "the detention of trucks beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof or the consignor or consignee to give or take delivery thereof." What the company may charge for these services is "a reasonable sum by way of addition to the tonnage rate."

The Minister has therefore, it seems to me, power to give directions after consulting with the advisory committee as to the special service in question and to fix a sum to be charged, and what he so fixes shall be deemed to be reasonable and may be charged. But the power to give directions, it appears to me, must embrace not only the fixing a rate but also the definition of the free period. It is essential to have the free period defined before the date from which the demurrage rate falls to be exacted can be ascertained, and there is nothing in the Act to suggest that this is not to be determined by the same person as he who fixes the rate. To my mind the Act implies the contrary. To arrive at a "reasonable sum" necessitates a calculation which involves as one of its factors the computation of a free period, and it is for the Minister to say what is a reasonable sum.

I agree that the pursuers are entitled to decree.

LORD SALVESEN was absent.

The Court recalled the interlocutor of the Lord Ordinary and decerned againt the defenders for the sum sued for.

Counsel for Reclaimers (Pursuers)—Macmillan, K.C.—Graham Robertson. Agent—James Watson, S.S.C.

Counsel for Respondents (Defenders)—Dean of Faculty (Constable, K.C.)—Aitchison. Agents—Drummond & Reid, W.S.

Saturday, January 8.

FIRST DIVISION.

PHILLIPP'S TRUSTEES *v.* PHILLIPP'S EXECUTOR.

Succession—Marriage Contract—Provisions Contractual or Testamentary—Destination to Heirs in mobilibus—Revocation—Implied Revocation by Subsequent General Settlement.

A lady prior to her marriage had inherited from her father a legacy of £3000, and also a share of his residuary estate, and had placed each of these funds in separate trusts. Thereafter by an antenuptial contract of marriage she directed the trustees holding each of the funds to pay the capital of the said estate on the death of the survivor of the spouses, or on the re-marriage of her husband in the event of there being no child of the marriage, to her heirs *in mobilibus*, ascertained as at the date of division according to the law of Scotland. The marriage was dissolved without issue by the death of the wife. She left a last will and testament, dated subsequently to the marriage contract, whereby, after certain bequests of trinkets, she bequeathed all her real estate and the rest of her personal estate whatsoever and wheresoever to her husband. The will, which was in English form, contained no express revocation of prior dispositions of a testamentary character.

Held that the provisions in the marriage contract in favour of heirs *in mobilibus* had been impliedly revoked by the will.

Mr Thomas Duff, merchant, Dundee, who died on 12th October 1896, left a trust-disposition and last will and testament and relative codicil dated respectively 12th October 1895 and 5th August 1896, by which he, *inter alia*, left to his daughter Miss Gertrude Duff a legacy of £3000. By the ninth purpose Mr Duff directed his trustees in certain events, which happened, to divide the residue of his trust estate equally among his children. He further provided—"And notwithstanding the period before expressed for the payment of the shares of residue, I provide that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone the payment of the provisions foresaid to all or any of my said eight children beyond the said term of payment, and to apply the interest or other annual produce of the same during such interval to and for behoof of such of my said eight children, or by a deed under their hands to retain the said provisions or any of them vested in their own persons, or to vest the same in the persons of other trustees whom they are hereby authorised to appoint with all or any of the powers, privileges, and exemptions conferred on themselves, so that my said eight children or any of them, as the case may be, may draw and receive only the interest or annual proceeds of their respective provisions during their lives or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such of my said eight children and their lawful issue on such conditions and under such restrictions and limitations and for such uses as my trustees may deem most expedient, of which expediency and the time and manner of exercising the powers hereby given they shall be the sole and final judges." Mr Duff's trustees, considering that it would be to the advantage of the said Gertrude Duff that in exercise of the option and powers conferred upon them they should vest the provisions for her behoof in trustees to be appointed by them, it was arranged, with the consent and concurrence of the said Gertrude Duff, that trustees should be appointed under separate trust deeds to hold (*a*) the legacy of £3000, and (*b*) the share of residue falling to the said Gertrude Duff. An assignation and deed of trust dated 28th

June and 8th July 1898 dealing with the investments forming the said legacy of £3000 was accordingly executed by her and by Mr Duff's trustees, by which certain specified shares were assigned and transferred to Gertrude Duff and Walter William Duff and David Stewart as trustees for the purposes set forth therein, and, *inter alia*, (*a*) for payment of the income to the said Gertrude Duff so long as she remained unmarried; (*b*) for payment of a capital sum to her for marriage outfit and furniture, &c., in the event of her marriage, and (*c*) to convey the balance to trustees under such marriage settlement as might be entered into by the said Gertrude Duff, to be held by such trustees for payment of the income to the said Gertrude Duff during her lifetime, and for disposal of the fee as might be arranged in the said marriage settlement. The said assignation and deed of trust is hereinafter referred to as the Legacy-trust-deed. The share of residue falling to the said Gertrude Duff was settled by a deed of trust and assignation, also dated 28th June and 8th July 1898, granted by Mr Duff's trustees and hereinafter referred to as the Residue-trust-deed. By this deed certain specified securities and cash amounting in all to £5912, 10s. 1d. were assigned and transferred to the said Gertrude Duff, Walter William Duff, and David Stewart, as trustees for the purposes therein set forth, and in particular for (*a*) payment of the income to the said Gertrude Duff, and (*b*) payment of the capital equally among her children, and failing children to her *mortis causa* disponees or assignees, whom failing to her heirs *in mobilibus*.

On 28th September 1914 an ante-nuptial contract of marriage and indenture was entered into between (1) Edward Fotherley Phillipps; (2) the said Gertrude Duff; (3) the said Gertrude Duff, Walter William Duff and David Stewart, as trustees under the Legacy-trust-deed; and (4) the said Gertrude Duff and others, the second parties, as trustees appointed under this contract of marriage. By this contract of marriage the said Edward Fotherley Phillipps and Gertrude Duff agreed to accept each other as spouses, and in contemplation of the marriage, and in consideration of the provisions in favour of the said Gertrude Duff and the children of the marriage granted and undertaken by the said Edward Fotherley Phillipps under a separate marriage settlement in English form, and after narrating the purpose in the Legacy-trust-deed, which provided for the capital of the legacy trust estate being made over to trustees under any marriage settlement that might be entered into by the said Gertrude Duff, the trustees under the said Legacy-trust-deed, with the consent of the said Gertrude Duff, made over in favour of themselves, as trustees under the contract of marriage then entered into, the legacy trust estate in trust for the purposes following – (*First*) payment of expenses of the trust; (*Second*) payment of the revenue to the said Gertrude Duff during her lifetime; (*Third*) in the event of the said Gertrude Duff predeceasing her husband, for payment of the free revenue to him during his lifetime, so long as he did not re-marry, which provision was declared to be purely alimentary to and not assignable by him; (*Fourth*) on the death of the survivor of the spouses, or on the re-marriage of the said Edward Fotherley Phillipps, to pay the capital of the estate to the children of the marriage in such shares and proportions as the said Gertrude Duff might appoint, and failing appointment then equally; (*Fifth*) on the death of the survivor of the spouses, or the re-marriage of the said Edward Fotherley Phillipps, and in the event of there being no child or children of the marriage or issue surviving, the trustees were directed to "pay and convey the capital of the estate to the heirs *in mobilibus* of the said Gertrude Duff ascertained as at the date of division according to the law of Scotland." The marriage contract further narrated the provision of the Residue-trust-deed which directed the residue trustees on the death of the said Gertrude Duff, in the event of her not being survived by children or their issue, to realise the trust estate and pay over the proceeds to her *mortis causa* disponees or assignees, whom failing her heirs *in mobilibus*, and that the said Gertrude Duff, being desirous of exercising this power of appointment, failing children or their issue "directs and appoints the trustees acting under the said deed of trust and assignation to pay the free revenue and return, or interests, profits and produce of the trust estate held under the said deed of trust and assignation to the said Edward Fotherley Phillipps during all the days and years of his lifetime after her death, so long as he does not re-marry, and that half-yearly, or at other convenient periods, which provisions in favour of the said Edward Fotherley Phillipps are hereby declared to be purely alimentary to, and not assignable by him, nor shall the same be affectable by his debts, acts or deeds, or the diligence of his creditors, and on the death or re-marriage of the said Edward Fotherley Phillipps, the said Gertrude Duff hereby further directs and appoints the said trustees last mentioned to pay and convey the capital of the said estate to the heirs *in mobilibus* of the said Gertrude Duff ascertained as at the date of division according to the law of Scotland."

Mrs Gertrude Duff or Phillipps died on 10th March 1919 leaving a last will and testament dated 8th March 1915 by which she appointed her husband executor of her will, and after providing for certain bequests of jewellery she gave, devised, and bequeathed to him all her real estate, and the rest of her personal estate whatsoever and wheresoever. Mrs Gertrude Duff or Phillipps left no issue, but was survived by her husband and by a brother and five sisters, and by the son of one brother, Thomas Herbert Knowles Duff, and the son of one sister Mrs Mary Margaret Duff or Still, who predeceased her.

Questions having arisen as to the meaning and effect of the Legacy-trust-deed, the Residue-trust-deed, the antenuptial contract of marriage, and the last will and testament,

a Special Case was presented to which the trustees acting under the said Residue-trust-deed were the *first parties*; the trustees acting under the said antenuptial contract of marriage were the *second parties*; the brother and sisters of Mrs Gertrude Duff or Phillipps were the *third parties*; and Edward Fotherley Phillipps, as executor of the said Gertrude Duff or Phillipps and as her residuary legatee was the *fourth party*. The estate held by the first parties was of the value of £10,250 or thereby, and that held by the second parties amounted to about £8500. Apart from the trust estate above referred to, Mrs Gertrude Duff or Phillipps left personal estate of the value of £2050 or thereby.

The *questions of law* were as follows:—"1. Was Mrs Phillipps entitled under the destination in the Residue-trust-deed to her *mortis causa* disponees or assignees in the event of her death without issue surviving to confer a liferent of the residue trust estate upon the fourth party for his lifetime after her death so long as he did not re-marry? 2. Was such a liferent effectively conferred by the marriage contract? 3. Did the Residue-trust-deed and the marriage contract operate as an irrevocable destination or appointment of the fee of the residue trust estate in favour of the heirs *in mobilibus* of Mrs Phillipps? 4. If not, was such destination or appointment revoked in fact by the last will and testament of Mrs Phillipps, and has the capital of the residue trust estate now vested in the fourth party thereunder? 5. If the preceding question is answered in the affirmative, are the residue trustees bound to pay over the residue of the trust estate (*a*) to the fourth party now, or (*b*) to the fourth party upon and in the event of his re-marriage, or (*c*) upon his death to his disponees or heirs *in mobilibus*? 6. Does the direction in the marriage contract to make payment of the capital of the marriage trust estate upon the death of the fourth party without issue of the marriage to the heirs *in mobilibus* of Mrs Phillipps ascertained at the date of division according to the law of Scotland operate as an irrevocable disposal of the fee of the said trust estate? 7. In the event of question 6 being answered in the negative, Does the last will and testament of Mrs Phillipps operate as a revocation of the said direction in the marriage contract and vest this estate in the fourth party? If the preceding question is answered in the affirmative, are the second parties bound to pay over the marriage trust estate (*a*) to the fourth party now, or (*b*) to the fourth party upon and in the event of his re-marriage, or (*c*) upon his death to his disponees or heirs *in mobilibus*?"

Argued for the first, second, and third parties—The destinations in the trust deeds and in the marriage contract had not been revoked by the later general disposition. Assuming they were revocable revocation had not taken place and was not to be presumed. It was possible to read the testamentary writings together and they should be so read. The destinations to heirs *in mobilibus* was of the nature of a special destination of particular assets which was not evacuated by the general conveyance in the will. The following authorities were referred to:—*Stoddart* v. *Grant*, 11 D. 860, *rev.* (1852) 1 Macq. 163; *Campbell* v. *Campbell*, July 8, 1880, 7 R. (H.L.) 100, 17 S.L.R. 807; *Mackie* v. *Gloag's Trustees*, March 6, 1884, 11 R. (H.L.) 10, 21 S.L.R. 465; *Bertram's Trustees* v. *Matheson's Trustees*, March 10, 1888, 15 R. 572, 25 S.L.R. 385; *Sheddon* v. *Sheddon's Trustees*, 1895, 23 R. 228, 33 S.L.R. 154; *Brydon's Curator Bonis* v. *Brydon's Trustees*, March 8, 1898, 25 R. 708, 35 S.L.R. 545; *Currie* v. *M'Lennan*, March 3, 1899, 1 F. 684, 36 S.L.R. 494: *Main's Trustees* v. *Main*, 1917 S.C. 660, 54 S.L.R. 532.

Argued for the fourth party—The destination in favour of heirs *in mobilibus* was purely testamentary. The case fell under the rule that destinations to persons not within the consideration of the marriage might be revoked. *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, *per* Lord Watson at p. 94, 31 S.L.R. 279; *Barclay's Trustees* v. *Watson*, June 9, 1903, 5 F. 926, 40 S.L.R. 673; *Main's Trustees* v. *Main*, 1917 S.C. 660, 54 S.L.R. 532. The destination to "heirs *in mobilibus*" was not truly a special destination. It was "the negation of all destination."—*Macleod* v. *Cunningham*, July 20, 1841, 3 D. 1288, *per* Lord Jeffrey at 1297. The doctrine of *Campbell* v. *Campbell* (*cit.*) had always been accepted reluctantly, and ought not to be extended—*Turnbull's Trustees* v. *Robertson*, July 17, 1911 S.C. 1288, *per* Lord Kinnear at 1293.

LORD PRESIDENT—The fourth party married in 1914 a daughter of the late Mr Thomas Duff. The marriage was dissolved without issue by her death in 1919. Prior to her marriage she had inherited from her father a legacy of £3000 and also a share of his residuary estate (her interest in which was liable in the discretion of her father's trustees to restriction), and had in conjunction with her father's trustees placed each of these bequests in separate trusts. By the trust relative to the £3000 legacy she was to have an alimentary liferent of the annual proceeds both while she remained single and during all the days and years of her lifetime after her marriage, and in the event of her marriage she obliged herself to enter into a marriage settlement the trustees of which should be her father's trustees, and by which the balance of the capital remaining after providing her with a marriage outfit was to be held in such manner as might be arranged for in the marriage settlement. By the trust relative to the share of residue she was likewise to have an alimentary liferent of the annual proceeds during her lifetime, and on her death, in the event of her having married, the capital was to go equally to her children, or failing children "to her *mortis causa* disponees or assignees," whom failing to "her heirs *in mobilibus*." These trusts were created in 1898, long before, and without in any way having in contemplation, her marriage with the fourth party.

On her marriage to the fourth party she

executed a marriage contract in Scottish form by which she made certain provisions with regard to each of the £3000 legacy and the share of residue. The former she settled on herself in alimentary liferent, and in the event of her predeceasing the fourth party conferred on him an alimentary liferent of the annual proceeds so long as he remained unmarried. As regards the capital, she directed it to be applied, paid, and conveyed on the death of the survivor of herself and the fourth party, or on the latter's re-marriage, to the children of the marriage, or failing children to her heirs *in mobilibus* "ascertained as at the date of division according to the law of Scotland." The latter she dealt with only in the event of her death without children. In so dealing with it she professed to exercise the power of appointment implied in the provision contained in the trust relative to the share of residue in favour of her *mortis causa* disponees or assignees. She conferred on the fourth party in the event named an alimentary liferent of the annual proceeds so long as he remained unmarried, and on his death or re-marriage she directed the capital to be paid and conveyed to her heirs *in mobilibus* "ascertained as at the date of division according to the law of Scotland." Apart from the benefits conferred on the fourth party in the event of his survivance and on her children should she have any, none of these provisions was covered by the consideration of marriage. They therefore remained defeasible by her.

The questions in the case depend for their answer on whether or not she has effectually defeated these provisions in favour of her heirs *in mobilibus* as at the date of the fourth party's death or re-marriage by a will which she executed in English form in 1915. By that will she bequeathed certain trinkets to her sisters and nieces, and gave, devised, and bequeathed "all my real estate and the rest of my personal estate whatsoever and wheresoever unto my said husband," the fourth party. She had no real estate, and the expression "the rest of my personal estate whatsoever and wheresoever" is wide enough in its terms to comprehend the whole moveable estate (other than the trinkets specially bequeathed) which belonged to her or over which she had the power of testamentary disposal. But it contains no express revocation of prior dispositions of a testamentary character, and in particular it is silent with regard to the provisions of the marriage contract in the event of failure of children. If it is effectual to revoke or evacuate those provisions it is so solely in virtue of its character as a general disposition.

It was attempted in argument to give a contractual character to the destinations (in the marriage contract) of the £3000 legacy and the share of residue in favour of persons other than the spouses and the children of the marriage by linking those destinations up with the provisions of the trust deeds. As regards the £3000 legacy, the argument was based on the obligation in the trust deed relative to it by which Mr Duff's daughter bound herself to enter into a marriage contract when she did marry, for the purposes of which contract the trustees under the trust deed were to continue to hold the £3000. But the daughter was all along the beneficial owner of the legacy itself, and the trust was really no more than an administrative one. To attribute any irrevocable character to the destination of the £3000 legacy is not possible. As regards the share of residue, the argument was that the trustees of Mr Thomas Duff having a discretionary power to restrict the daughter's interest to a liferent, and (failing her having children) to divert the capital to the benefit of other members of Mr Duff's family, the power of appointment conferred on her in the relative trust deed was truly subject to the control of the trustees, and that, the trustees of Mr Thomas Duff being parties to the marriage contract, the provisions in the latter deed must be regarded as having been made subject to their consent and approval, and were therefore irrevocable by the daughter alone. This argument is fanciful, and involves the notion that Mr Duff's trustees used their power of restriction over the daughter's interest in the share of residue to make something like a bargain with her as to its disposal. They had, no doubt, a wide discretion, but I see no sufficient reason to think that they attempted to abuse it by making any bargain. On the contrary, they gave the daughter a power to test on her share of residue by the terms of the relative trust deed, and it was in virtue of that power that she made the provisions with reference to the share of residue in the marriage contract. The question remains, whether those provisions were evacuated or revoked by the generality of the will of 1915.

It was contended on behalf of the, as yet, unascertained beneficiaries under those provisions that the latter constituted special destinations of particular estates or assets which, in accordance with a well-known group of authorities, could not be evacuated by a general disposition unless such be clearly shown to be the intention of the testator. But in all the cases in which the rule thus appealed to applies the special destination is attached to the particular estates or assets in question by being incorporated in the documents of title by which they are held. There is nothing in the nature of the funds with which we are here concerned or in the character of the marriage-contract provisions to distinguish the present case from that of prior bequests and a subsequent general will. The £3000 legacy was made the subject of a defeasible, or as it is usually called a testamentary, provision in the marriage contract by the legatee, and the share of residue was similarly dealt with by the daughter in respect of her right to test on it. The idea of treating the marriage contract provisions as special destinations within the meaning of the rule referred to must therefore be rejected.

If this be sound, the question resolves itself into a comparatively simple problem of the construction of testamentary writings. By the marriage contract two bequests of two funds respectively were made in favour of

the same set of beneficiaries. By the will the whole moveable estate (other than the trinkets specially devised) was bequeathed to the fourth party. Is there any reason why the rule *posteriora derogant prioribus* should not be applied? None certainly can be derived from the terms of the will, which appear to leave no doubt as to the intention of the testatrix. That intention was that after distribution of the specified trinkets among the persons named all the rest of the daughter's moveable estate, whether belonging to her or subject to her right of testamentary disposal, should go to the fourth party. To read the marriage-contract provisions as co-existing with this bequest in favour of the fourth party—universal except as to the specified trinkets—is impossible, and I therefore reach the conclusion that the will impliedly revoked the marriage-contract provisions.

I propose accordingly that the questions should be answered as suggested in Lord Skerrington's opinion, which I have had an opportunity of seeing.

LORD MACKENZIE—The question in this case is whether the late Mrs Phillipps intended by the will she made on 8th March 1915 to leave to her husband the whole moveable property over which she had testamentary power of disposal, amounting to £20,000, or whether she meant only to leave him moveable property amounting to £2000.

By her will, which was made in England, she appointed her husband her executor and made special bequests of articles of jewellery. The only other clause in the will is in these terms—"I give, devise, and bequeath all my real estate and the rest of my personal estate whatsoever and wheresoever unto my said husband Edward Fotherley Phillipps." The words in this clause in my opinion cover all the estate of the testatrix except the articles of jewellery specially bequeathed.

It was maintained that there ought to be excepted from the bequest in the will two funds now worth £18,000, which represent a legacy and a share of residue which came to Mrs Phillipps from her father. For the purposes of the present case it is unnecessary to draw a distinction between these two funds, or to consider the trusts upon which they were settled other than that contained in the marriage contract. By the marriage contract, entered into on 28th September 1914, Mrs Phillipps, after liferents in favour of herself and her husband, settled the capital of both these funds on the death of the survivor of the spouses, or on the re-marriage of her husband, in the event of there being no child of the marriage, by directing the trustees holding each of the funds to "pay and convey the capital of the said estate to the heirs *in mobilibus* of the said Gertrude Duff ascertained as at the date of division according to the law of Scotland." The argument founded upon these clauses in the marriage contract was that they were of the nature of a special destination which was not evacuated by the general conveyance in the will. The cases founded on were *Stoddart* v. *Grant*, 11 D. 860, rev. (1852) 1 Macq. 163, and *Campbell* v. *Campbell*, 7 R. (H.L.) 100.

I reject this argument upon two grounds. The law contained in such cases, though no doubt applicable when a question of conveyancing is concerned, does not lay down any imperative direction for the proper construction of a later will when its terms are considered along with an earlier one. In such a case what was said in *Stoddart* v. *Grant* by Lord Truro (1 Macq. 170) still applies—"The general rule applicable to cases of this description is perfectly clear, and not subject, so far as I am aware, to any exception. It is this, that questions relating to wills should be decided by looking to the whole contents of the documents with a view to discover what is fairly to be inferred as the intention of the testator."

Further, the initial bequests in the marriage contract are not, properly speaking, special destinations. They appear to have been inserted in order to make sure that the destination of the wife's funds unless otherwise directed by her should be to those of her own family. It may be that this was not necessary in view of the exclusion of her husband's rights. But she was entering into an English marriage, and the clause may have been inserted *ob majorem cautelam*.

It is not now disputed that the result of the provisions in the marriage contract was to leave Mrs Phillipps with full testamentary power over both funds. This she exercised by the will she made the year after she was married in favour of her husband. The questions ought to be answered accordingly as your Lordship proposes.

LORD SKERRINGTON—The question which we have to decide is whether a bequest of her whole estate to her husband, made by a married woman who died without issue, ought to be construed and to receive effect according to its natural and primary meaning so as to include the whole estate which she had power to dispose of at the time of her death, or whether it must be restricted to a small fraction of that estate by excluding in the first place a fund held by the trustees of her marriage contract, and, in the second place, a fund held by trustees appointed by the testamentary trustees of her father for the purpose of holding and administering her share of the residue of his estate. It is now admitted that she had full right and power to bequeath both these trust funds to anyone whom she desired to favour, subject, of course, to certain preferable and indefeasible trusts created by her marriage contract in favour of herself, her husband, and her children (if any). It was argued, however, by counsel for both sets of trustees, as representing the interest of a class of persons at present unascertainable, viz., the lady's "heirs *in mobilibus* according to the law of Scotland ascertained as at the date of" the death or re-marriage of the husband, that in her last will and testament, which was prepared by an English solicitor, the testatrix had failed to revoke with sufficient clearness and with due formality the directions which she had given

in her Scottish marriage contract to the effect that failing children the capital of both trust funds should be paid to these heirs on the death or re-marriage of her husband. If this contention is sustained the bequest to the surviving husband will give him about £2000 out of a total disposable estate of about £20,000. By the marriage contract he enjoys the alimentary liferent of the two trust funds, terminable on his re-marriage. It is impossible in my opinion to draw any distinction, so far as regards the present dispute, between the two trust funds. The testatrix was the beneficial owner of the marriage-contract fund, whereas she had only a general testamentary power of appointment over the fund held by the residue trustees. The special case proceeds upon the assumption that it is a question of Scots law whether a power created by a Scottish deed has or has not been effectually exercised. Accordingly we must apply the familar rule of Scots law that a general testamentary power of disposal may be, and *prima facie* is, validly exercised by a general disposition or a general bequest.

If the controversy falls to be decided (as I think that it does) according to the ordinary rules applicable to the interpretation and revocation of wills and legacies, it resolves itself into a competition between two legacies—an earlier legacy of two special parts of her estate bequeathed by the testatrix in her marriage contract, and a later legacy of the whole of her estate (except some jewellery) bequeathed by her last will. If these two bequests are inconsistent the earlier of the two is necessarily revoked. It is, in my opinion, impossible to read the will without being satisfied that the testatrix intended to bequeath to her husband her whole estate except only the articles mentioned in the will itself. If that be so, the will must prevail, and the earlier bequest of the trust funds in favour of the heirs *in mobilibus* must be held to have been revoked by necessary implication. This view seems consistent with good sense and it is also consistent with the authorities. I need refer only to the leading case of *Sibbald's Trustees* v. *Greig*, (1871) 9 Macph. 399, where it was held that a will which effectually disposed of a testator's whole estate but contained no express clause of revocation operated as a revocation of all previous testamentary writings. No doubt a bequest of the residue of the testator's estate contained in a last will may in special circumstances be shown to mean the residue remaining over after satisfying the bequests contained in earlier testamentary writings which dealt with only a part of the estate. In the present case, however, the testatrix has left no room for doubt as to what she meant by the phrase "the rest of my personal estate," and it cannot reasonably be suggested that she intended to except from her bequest anything except the articles mentioned in her will. I should have come to the same conclusion if the testatrix had contented herself with bequeathing "all" her estate to her husband without adding the words "whatsoever and whereso-ever." Whether by accident or by design, it may however be noted that these three words rebut by anticipation the very argument which was urged on behalf of the lady's relations, viz., that a part of her estate was so peculiarly situated both legally and locally that presumably she did not intend to include it in her bequest to her husband. I do not need to consider seriously the suggestion that the testatrix could not have intended to bequeath the trust funds to her husband because by so doing she might tempt him to re-marry with the object of obtaining possession and control of the capital which during his viduity would have to remain in the hands of the trustees.

Counsel for the trustees cited authorities relating to special destinations, a phrase which in this connection is often used in a loose sense so as to include not merely a destination or other part of an operative title which, unless "evacuated," will carry the property to a certain person or class of heirs on the death of the owner, but also a special and formal disposition or assignation or obligation *mortis causa* which, unless revoked, will confer a legacy on the death of the granter. The doctrine of special destinations, considered as a chapter in the law of wills and legacies, derives its origin from at any rate three sources, viz., (1) the technical rules of Scottish heritable conveyancing, as described by Lord Selborne in *Campbell* v. *Campbell*, 7 R. (H.L.) 100; (2) the *mortis causa* assignation or disposition of moveable property, which at one time performed a useful function and was indeed a favourite of the law (1690, cap. 26, 4 Geo. IV, cap. 98, section 3; Erskine, III. ix. 30) and (3) the notion described by Lord Kames as "commodius" (*Hill* v. *Hill* (1755) M. 11,580), that an undelivered and therefore ineffectual gift *inter vivos* may receive legal effect as a legacy. As the authorities at present stand, a subsequent general *mortis causa* disposition, even when containing an express but general revocation of prior testamentary settlements, may not always avail to revoke a legacy given by way of special destination. In short, contrary to the general law of wills and legacies, there is a certain presumption that a subsequent general disposition does not revoke a prior special destination made or taken by the same person. The explanation (I do not say the justification) of the doctrine seems to be that a person who chooses to invoke the methods of conveyancing for the purpose of bequeathing a legacy is regarded as having prescribed for himself certain formalities without which a revocation of his bequest shall be deemed to be ineffectual. If he wishes to revoke the bequest he ought to do so in the same formal manner in which he made it, or alternatively he must make it clear by express language or by necessary implication that the terms of the existing title or of his special conveyance are to be disregarded. No authority was cited, however, in favour of the proposition that money or property in a similar position to that of the marriage-contract fund, or of the residue fund in the present case,

must be regarded as having been settled by a special destination which will remain effectual unless and until it has been shown to have been evacuated. Nothing short of a direct and binding authority would induce me to extend the application of a technical rule which experience has, I think, proved to be in violation of the wishes of the ordinary testator. So far as regards the marriage-contract fund there are, I think, sufficient reasons why the ultimate trust purpose in favour of the bride's heirs *in mobilibus*, ascertained as at the date of division according to the law of Scotland, should be regarded as an ordinary legacy and not as a special destination made by her in their favour. She did not resort to the form of an *inter vivos* trust with the object of making this bequest, but finding it necessary for other reasons to place a fund in the hands of trustees she incidentally bequeathed the reversion of it by informing her trustees of her wishes in regard to it. Nor can a testamentary and revocable direction given by the beneficial owner of a reversion to her own trustees whose duty it was to ascertain and give effect to her final wishes, be assimilated to a loan made to a stranger, as to which the lender has stipulated that it shall be repaid to a particular person or to a particular class of heirs. The residue fund is in much the same position. By a transaction between the lady and her father's testamentary trustees (which I must in this process assume to be valid) a part of her fortune was vested in the residue trustees, and was settled so as to give her the alimentary liferent thereof and the fee to her issue. Failing issue the deed of trust and assignation directed the residue trustees to pay the fund to her "*mortis causa* disponees or assignees, whom failing her heirs *in mobilibus*." By her marriage contract she afterwards exercised this power of appointment by directing the residue trustees to pay the income to her husband for his aliment during his lifetime after her death so long as he did not re-marry, and on his death or re-marriage to pay the capital to her heirs *in mobilibus*, ascertained as at the date of division according to the law of Scotland. This latter direction was a revocable exercise of a general testamentary power of appointment. It was not a special destination in any sense of the expression but an ordinary bequest.

As regards the questions of law, the first and second were not argued, and may by consent be answered in the affirmative. The third question should be answered in the negative, the fourth in the affirmative. Branch (*a*) of question 5 should be answered in the negative, and as regards branches (*b*) and (*c*) it should be declared that the residue will fall to be paid to the fourth party upon and in the event of his re-marriage, or to his legal representatives if he does not re-marry. The sixth question should be answered in the negative and the seventh in the affirmative. Branch (*a*) of the eighth question should be answered in the negative, and as regards branches (*b*) and (*c*) it should be declared that the marriage trust estate will fall to be paid to the fourth party upon and in the event of his re-marriage, or to his legal representatives if he does not re-marry.

LORD CULLEN was absent.

The Court pronounced this interlocutor—

"Answer question 3, branch (*a*) of question 5, question 6, and branch (*a*) of question 8, all in the negative, questions 4 and 7 in the affirmative: In answer to branches (*b*) and (*c*) of question 5 and branches (*b*) and (*c*) of question 8 it is declared that the marriage trust estate will fall to be paid to the fourth party upon and in the event of his re-marriage, or to his legal representatives at his death if he does not re-marry, and, of consent of parties, answer questions 1 and 2 in the affirmative: Find and declare accordingly and decern."

Counsel for First, Second, and Third Parties—Dean of Faculty (Constable, K.C.) —Duffes. Agents—Cowan & Stewart, W.S.

Counsel for Fourth Party — Sandeman, K.C.—Cooper. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, October 16.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

WILLIAM C. GRAY & SONS *v.* WILLIAM M'COARD & SONS.

Process—Reclaiming Note—Competency—Whether Timeously Presented—Interlocutor Pronounced in Vacation—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 94—*C.A.S.* 1913, *D* (*i*) 4.

Held that a reclaiming note against a final interlocutor pronounced in vacation more than twenty-one days before the second box-day was competently presented on the first ensuing sederunt day.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100) enacts—Section 94—"It shall be lawful for the Lords Ordinary at any time in vacation or recess to sign interlocutors pronounced in causes heard in time of session, or at any extended sittings, or at the trial of causes by jury or by proof before such Lord Ordinary; provided that where any such interlocutor is dated at or prior to the first box-day in vacation the same may be reclaimed against on the second box-day; and where the interlocutor is dated after the first box-day, then on the first sederunt day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming note against such interlocutor dated and signed during session. . . ."

The Codifying Act of Sederunt 1913, D (i) 4, provides—"In all cases where the days allowed for presenting a reclaiming note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjourn-