

period of these decisions. Mr Erskine (b. ii, t. 10, § 53) considers these decisions as fixing the law in a competition betwixt tithes belonging to the Crown, as coming in place of the bishops, and tithes held by the heritors in virtue of an heritable right.—“Where part of the tithes of a parish belong to the bishop, and part to the landholders by virtue of heritable rights from lay titulars, the tithes belonging to the landholders must be exhausted before any part of the stipend can be localled upon the bishops’ tithes; because bishops are considered a superior order of ministers; *Minister of Arngask v. The Heritors*, 13 July 1715; *Officers of State v. Campbell of Lochnell*, 7 March.” It is very plain, therefore, that the decision in this locality is not *res judicata* in the present case.

The last special defence is a plea of positive prescription. The possession of the teinds alleged by the Crown is by certain tacks granted in 1797 to Lindsay of Balcarras and Cheape of Strathtyrum of their respective teinds. Which teinds above mentioned the tacks declare “pertained of before to the late Archbishops of the diocese of St Andrews, and are now fallen, and come into our hands, and at our gift and disposal, as come in place of the said Archbishop of the said diocese, by virtue of several Acts of Parliament abolishing Episcopacy.”

This narrative, at the time it was framed, was plausible, and might remain so whilst the Archbishop’s deed of mortification was withheld. But in the late litigation at the instance of Lindsay of Balcarras, that disposition was produced and laid before the Court. Now, in reference to the Crown’s plea of positive prescription, that disposition is absolutely exclusive of the teinds which the Crown seeks to prescribe.

In positive prescription a habile title is absolutely necessary—a title which not only quadrates with the nature and evidence of the possession, but is, in its own terms, capable of comprehending the subject possessed. A bounding charter has frequently been held to be no title for prescription beyond the bounds set forth. But this is, perhaps, the first case in which a party has attempted to plead prescription upon a title which absolutely and specially excludes him from the very subjects sought to be acquired.

At the last debate the advisers of the Crown seemed willing to abandon the title of the Crown as derived from the Archbishop; and the suggestion was made that perhaps the Crown might fall back upon the *jus coronæ* as a title of prescription.

This certainly appeared at the time to be, in regard to teinds, a novel idea, countenanced, so far as I know, by no authority.

The theory of our feudal constitution, no doubt, ascribes to the Sovereign a primary property in all lands within the kingdom, and in many rights connected with lands, the right of every subject being in these, secondary and derived.

Hence the *jus coronæ* vests in the Crown an unwritten and universal title to these subjects. The Crown is the supreme superior of all lands in Scotland; and, as the overlord or *dominus directus*, the Sovereign is enabled to plead on this unwritten title in questions of positive prescription. But no author, so far as I know, has said that the *jus coronæ*—the Sovereign’s unwritten and universal title—applies to teinds; and, in my opinion, all principle, as well as theory, is against the idea.

“The King’s right, *jure coronæ*,” says Lord Stair, “is a sufficient title to lands either in supe-

riority or property without seizin.” The same author observes—“Teinds are acknowledged with us to be the patrimony of the kirk;” and his Lordship refers to the Act 1567, c. 10, as containing an authoritative statement of this doctrine. The *jus coronæ* probably applies to all the temporalities of the Church, but these his Lordship distinguishes from “the teinds, the spirituality as flowing from a spiritual ground of Divine right.” The Church did not derive the teinds, their spiritual patrimony, from the Sovereign. That patrimony was founded, if not on Divine right, as some authors contend, at least upon the acknowledged constitutional law of most Christian countries.

Whatever teinds are possessed by the Crown are held by singular and secondary title—a title derived mediately or immediately from the Church.

The Crown acquires teinds by contract or demission, by the annihilation of ecclesiastical establishments under the maxim *Quod nullis est, fit domini regis*, or by the attainder of individual titulars, in which case the law of escheat operates in favour of the Sovereign. But in every case the Crown’s right is limited, circumscribed, and qualified by the titles of its author.

It is perhaps unnecessary to pursue this speculation any farther, for, after all, even although such universal and unwritten title in the teinds could be ascribed to the Sovereign, it is difficult to see how that could be of any avail in the present case. It is difficult to understand how such title could be conjoined so as to form a prescriptive right with the possession constituted by tacks, which *in gremio* profess to be granted by virtue of another—a special—and, as it now appears, an insufficient and inhabile title.

Upon the best consideration, therefore, which I have been able to give to this part of the case, I am unable to sustain the Crown’s defence of positive prescription.

I have therefore to propose to your Lordships that the Lord Ordinary’s interlocutor should be altered, the defences repelled, and judgment pronounced in favour of the pursuer.

Agents for Pursuer—Mackenzie & Kermack, W.S.

Agent for Defender—Donald Beith, W.S.

Friday, January 13.

(Before seven Judges.)

SIBBALD’S TRUSTEES *v.* GREIG AND OTHERS.

*Trust—Testament—Residue Clause—Revocation—Necessary Implication.* Terms of a deed which held (before seven Judges, dissenting Lord Cowan) to operate a revocation by necessary implication of nineteen testamentary bequests of a previous date, found in the repositories of the trusteer.

*Expenses.* A number of claimants who appeared and successfully maintained the same case, held entitled among them to the expense which would have been incurred had only one of them argued the case.

This was an action of multiplepounding and exoneration at the instance of the trustees and executors of the late Dr John Robertson Sibbald, against the several beneficiaries under Dr Sibbald’s testamentary bequests. Twenty-one writings of a testamentary nature were found in Dr Sibbald’s

repositories, varying between the years 1863 and 1868, and all of them, with the exception of a trust-deed executed in 1863, were holograph of the deceased. The twentieth of these writings was a holograph will, dated 15th June 1868. It conveyed his whole property, heritable and moveable, to trustees, and after the enumeration of a number of legacies, annuities, and bequests, contains the following residue clause: "And I wish the residue of my estate, other than disposed of by any codicil I may execute for behoof of various friends, such as trinkets, jewels, plate, or household furniture, which I wish to have effect same as this deed written on a separate paper, all not so disposed of being the entire residue of my estate, to be applied for benefit of persons labouring under incurable disease, either by pensions or of any infirmity or hospital having distinct wards for such cases my trustees may appoint." Subsequent to this will the testator executed a list of gifts, dated 24th July 1868, which is annexed to the 21st or last of his testamentary writings. Claims were put in to the multiplepounding on behalf of all the claimants included in the several writings, many of them maintaining their right to cumulative legacies. After closing the record and hearing parties, the Lord Ordinary (MURE) pronounced the following interlocutor:—

"13th April 1870.—The Lord Ordinary having heard counsel for the claimants, the trustees of the late Dr Sibbald, and for the Royal Infirmary of Edinburgh, and The Shipwrecked Fishermen's and Mariners' Society, and for Mrs Eleanor Ferguson or Macguire and her husband, and other claimants, and considered the Closed Record and productions, Finds that the writings Nos. 9, 12, and 17 of the print appended to the record are not testamentary writings of the late Dr Sibbald: Finds that the deeds and writings Nos. 1, 3, 5, 7, 8, 10, 11, 13, 14, 15, 16, 18, 19, and 20 of the said print, and also that portion of the writing No. 21 of the print, commencing with the date 5th June 1868, and ending with the initials J. R. S., are probative testamentary writings of Dr Sibbald: Finds that the writing No. 2 of said print is probative and testamentary, with the exception of the part of it at the bottom of page 81 and top of page 82, headed 'written on other side': Finds that the writing No. 4 of said print is probative and testamentary, with the exception of the portion on pages 84 and 85, headed '*Vidimus* of testamentary arrangements': Finds that the writing No. 6 of the said print is probative and testamentary, with the exception of the part on page 89, headed 'Mrs Sibbald's jewels, &c.': Finds that the said deeds and writings which are testamentary have not been revoked by the trust-deed executed by Dr Sibbald on the 15th of June 1868; Therefore reple the first plea in law for Dr Sibbald's trustees, and before further answer appoints the case to be enrolled, that parties may be heard upon the effect of the above findings on their respective rights and claims in this process; and reserves in the meantime all questions of expenses."

"Note.—As there is no clause in any of the various trust-deeds left by the late Dr Sibbald which declares that any legacies or bequests made by separate informal writings or memoranda shall be held to be part of his settlement, as there was in the cases of *Gillespie*, December 20, 1831, and *Baird Preston*, July 15, 1856, the Lord Ordinary has dealt with each of the various writings founded on in this case upon the footing that unless in it-

self probative and of a testamentary character, it cannot be held to be a part of the settlement in question. But applying this rule in the present case, it appears to him that the greater portion of the writings left by Dr Sibbald, and which are stated in the minute lodged for his trustees to have been all found together in the same box in his dwelling-house in Edinburgh, must be held to be probative and of a testamentary character."

"The Lord Ordinary has however refused effect to Nos. 9 and 17 of the writings in the print appended to the record, because the first of them appears to be a mere note of instructions and memorandum of things to be done; while the other, though bearing to be in some respects of a more formal character, is described by Dr Sibbald himself, by an indorsation on the back of it, as 'Jottings for settlement by me,' and cannot therefore, it is thought, be held to be a completed act of the will. The question as to the validity of No. 12 is, in the opinion of the Lord Ordinary, attended with more difficulty; and it is apparently a *vidimus* or memorandum of things done or intended to be done, and does not seem to contain any words of direct bequest, the Lord Ordinary does not think it would be safe to deal with it as an operative part of the settlements."

"With reference again to the deeds and writings which have been found to be probative and testamentary, he has had considerable hesitation in regard to Nos. 8 and 10 of those writings. But, upon examining No. 8 in connection with the *notandum* dated the 12th of July 1866, at the end of the will dated 2d July 1866, and which is connected with the writing No. 8 by the jotting holograph and initialed by Dr Sibbald at the end of that writing, the Lord Ordinary has come to the conclusion that he would not be warranted in rejecting No. 8 as part of the settlement of Dr Sibbald. And he has come to the same conclusion in regard to the writing No. 10, because it is headed as 'Directions and Will' of Dr Sibbald in his own handwriting, and although it bears to be initialed only on the first page, it is signed in full at the end, of the same date as the heading at the commencement of the direction, and bears to be initialed as on the 16th of January 1867, as then approved of.

"As regards Nos. 2, 4, and 6 of the print, the parties seemed to be agreed that the portions of those writings which the Lord Ordinary has refused to give effect to could not be maintained as probative and testamentary; while, as regards the writings which have been found to be probative and of a testamentary character, it was, as the Lord Ordinary understood, not disputed on the part of the trustees at the debate that, with the exceptions of Nos. 8 and 10 of them, these writings were not open to objection.

"But it was contended on the part of the trustees that the earlier writings of every description had been revoked by the trust-deed of 15th June 1868; and that that trust-deed, together with the writing dated 24th July 1868, alone constituted the settlement of the deceased. The Lord Ordinary, however, having regard to the rules laid down in the case of *Stoddart & Grant*, 28th June 1852 (1 M'Queen, p. 163), can see no ground sufficient to warrant him in giving effect to this plea. There is no express clause of revocation in the deed of 15th June 1868; and the mere fact of a person making a subsequent settlement cannot, it is thought, have the effect of operating a total revocation of his former settlement, unless the

two are so inconsistent as to be incapable of standing together.

"There is, however, in the opinion of the Lord Ordinary] no such inconsistency in the present case, whatever difficulty there may be in deciding which, and whether any, of the various legacies are cumulative or not. And, apart from this fact—viz., the execution of the deed of 15th June 1868—the Lord Ordinary has been unable to find anything which can be said to indicate, even assuming that deed to be so worded as to operate a conveyance of heritage, which is doubtful, that Dr Sibbald had then any intention of revoking the deeds and writings of an earlier date. Dr Sibbald appears to have been quite aware that there was a power of revocation reserved to him in the mutual settlement of 1863; and that, in such circumstances, it was usual for the party who intended to exercise such a power to do so expressly. He does this in the disposition and settlement of the 4th of March 1867, by which he in so far alters and recalls the deed of 1863. He refers to this power again in the will executed by him on the 1st of August 1867, by which he expressly confirms the will of 1863, excepting in so far as altered by that deed, or by any other direction he might leave. And as he makes no reference to this reserved power in the deed of 15th June 1868, and that deed contains no directions importing any express revocation or alteration of the earlier writings, the Lord Ordinary does not think it can be inferred that when he executed the deed of 15th June 1868 Dr Sibbald intended to recall all the earlier deeds, and relative writings and codicils, which he had so carefully preserved, and to make that trust-deed his only operative settlement."

The trustees reclaimed.

WATSON (with him SOLICITOR-GENERAL) said there were two points before the Court—(1) What writings were to be considered as of a testamentary character? (2) What should receive effect? The Lord Ordinary had dealt with both, and the trustees did not intend to raise any question as to the manner in which he had disposed of the first of these. In regard to the second, he argued that the will of 15th June 1868, by the necessary implication of its terms, operated a revocation of the previous testamentary writings. He specially founded on the terms of the residue clause, maintaining that the words "other than disposed of by any codicil" must be taken to mean any codicil subsequent to the date of the will.

PATTISON and ADAM, as representing the beneficiaries, argued—That all the wills should receive effect, there being no repugnancy in taking them as whole, and that being the rule of construction where no repugnancy occurred. It was specially pleaded on behalf of the Royal Infirmary in addition to the general argument that a bequest to a charity contained in one deed could not be taken away by a later deed except under words importing a direct revocation.

At the close of the argument, the Court appointed the case to be heard before seven judges.

SOLICITOR-GENERAL and WATSON for trustees.

LORD ADVOCATE and ADAM for beneficiaries.

At advising—

LORD JUSTICE-CLERK—The question as it is presented to us for the purpose of the present advising, is, whether the general settlement of 15th June 1868 revoked all the previous testamentary writings executed by Dr Sibbald?

The deed contains no clause of revocation and

no revoking words. The intention to revoke must be deduced from the substance of the deed itself, if it be there at all.

All the numerous testamentary writings which Dr Sibbald left remained uncanceled in his repositories. They must all be held to be of the date of his death, and to express his last will, unless by clear implication he has expressed an intention to the contrary. If the settlements can be read together, and receive just effect, that effect I think they must receive. Thus the real question comes to be whether the deed of 1868 is, or is not, inconsistent with the previous settlements.

Now I do not think it conclusive—indeed hardly material—that the deed of 1868 contains a fresh conveyance of the *universitas* of the estate. The mere conveyance is only machinery for administration, and whoever the administrators are to be, their administration may be consistent with testamentary purposes previously expressed. Unless these are revoked otherwise, the obligation of giving effect to them is one which the law would impose on the trustees, or on any one representing the testator.

I have no idea, therefore, that a change in the persons appointed to act as trustees, and a new conveyance in order to carry out that change, have, of themselves, any legal effect in implying an intention to revoke previous testamentary bequests. Although the *universitas* of the estate be conveyed, still, if that *universitas* be not disposed, there can be no inconsistency, or may be none, between the settlement containing the conveyance, and those which preceded it. And although there be a new conveyance to new trustees, and purposes entirely new, there is nothing in a settlement so expressed exclusive of former bequests, unless the *universitas* of the estate is not merely conveyed but disposed of.

I should have thought, therefore, that this deed of 1868 contained nothing in it which could be held to imply revocation, had there been no disposal of the residue; it being certain that a large proportion of the estate remained undisposed of by the special purposes of that deed. This leads to the consideration of the residue clause, on which, in my opinion, the case entirely depends.

Now I am chiefly anxious in the opinion I am now giving, which is adverse to the conclusion to which the Lord Ordinary has come, to be understood to rest that opinion entirely on the special terms of that clause. The expression "residue" is a very flexible one. If the previous provisions were not inconsistent with prior bequests, these bequests, as they remained unrevoked, still subsisted as burdens on the trust, and thus the term "residue" might be applicable to the sum left over after all subsisting testamentary purposes were provided for; and such a reading would give full effect to the words.

Thus the existence of a residue clause is only important in this question of revocation so far as its terms necessarily imply a disposal of the whole estate. There could be no clearer illustration of this than is to be found in the undoubted effect of the settlements of July 1866 and March 1867. The first contained a residue clause. The second contained a residue clause, and also a clause revoking all prior settlements in so far as inconsistent with it. And yet the one clear element which runs throughout these testamentary writings is the testator's intention that, notwithstanding

these settlements, the deed of 1863 should subsist. Of course, as the term residue is wide enough to comprehend the *universitas* of the estate, it is a material element in this question. But it is far from conclusive.

This reduces the question to a construction of, and criticism on, the precise terms of the clause of residue of the deed of 1868; and although any conclusion as to the testator's intention, drawn from inartistic and confused expressions used by an unskilled man, is necessarily unsatisfactory, I am unable, on any reasonable interpretation, to read this special clause in any sense but that of a disposal of the entire estate.

The clause is not left on the general construction of the term residue. It contains within itself a construction of the term. The residue of the estate is there defined to be that which remains "*undisposed of* by any codicil I may execute for behoof of various friends, such as trinkets," &c., and then the remainder is again described as the *entire* residue of the estate. If therefore the bequests left by the prior settlements stand, they must be brought under the special exception of estate so settled by codicil.

I do not think they can, by any reasonable reading, be brought under that category. The clause is limited to bequests of a certain class, and extends to no other. This limitation, which is not ambiguous, is really of great moment. For it is on that view an exclusion of all other previous bequests in previous settlements, and is therefore to that extent inconsistent with these settlements, and operates as a revocation of them.

LORD BENHOLME—I do not consider that any general principle of law is in danger of being impugned by the decision of this case. But there may be difference of opinion as to the application of the law. It is impossible to doubt that a later testament puts an end to a former with which it is inconsistent, and that without express revocation. "*Rumpitur testamentum mutatione; id est si postea aliud testamentum jure factum sit.*"—Ulpian Fragments, tit. 23, § 2. "*Hinc autem testamentum rumpitur quum posterius rite factum est.*"—2 Ulpian, Lib. 2, ad Sabin. But in order to produce this effect the later deed must be perfectly complete, and exclusive of the other testament. Erskine says (3,9,5) a will "*is ineffectual till the death of the testator, and consequently he retains a power of revoking it at pleasure, and substituting another in its place, by which the first becomes of no force.* In the case therefore of several testaments of different dates the last only is effectual." What we have, therefore, to enquire into is, whether the deed of June 1868 is inconsistent with all the former deeds; and I think that depends upon the effect to be given to the clause of residue. One view of that clause will make it not exclusive of bequests given under prior deeds; while another view will make it to exclude all bequests extrinsic of the deed excepting codicils to be made after its date, and relative to gifts of jewellery and such like to friends. Between these two views there is no doubt a question, perhaps a doubtful one; but that question involves no legal principle, but depends merely upon the interpretation to be given to the clause and the presumed intention of the testator. The question has been discussed with reference to the peculiarities of the testator's mind, and in the argument we were referred to former deeds of the testator, in which clauses of residue were not in-

tended to have such an effect as is ascribed by the trustees to the residue clause in this deed. Looking to the special terms of the clause of residue in this deed, I am of opinion that the testator intended that the whole of the residue of his estate, after executing the special purposes of the deed, should be employed for the purposes contained in that clause. Every clause of residue which may occur in any future case will be construed according to its own terms and circumstances. Should a similar clause occur, probably the judges who have to decide upon it will hold themselves bound by the decision of this case as a precedent, but no principle of law is involved in that decision.

I am not moved by the view of Lord Cowan as to the law of deathbed, so that I cannot see how our decision can interfere with or collide with the law of deathbed.

On the second question, I agree with your Lordship, and I think that a careful consideration of the last document, endorsed "1868, July 24," supports the view which I take of the other deed, and of the parenthesis in the clause of residue. If there had been a codicil actually written of later date than that deed, there could have been no doubt but that was what the testator meant. Virtually, he did the same thing as if he had written out a later codicil. He found a list of gifts which he had formerly made, and he authenticated it, and gave it effect by adding a date subsequent to his deed of settlement.

THE LORD PRESIDENT, LORDS NEAVES, ARDMILLAN, and KINLOCH concurred.

LORD COWAN—The leading question in this case is, whether the deed of 15th June 1868 can be held by implication to have the effect of revoking all the previous writings of a testamentary nature executed by the deceased, and to be by itself the sole deed expressive of his intentions in regard to his succession.

The Lord Ordinary has found that the various deeds and writings of a testamentary nature found in the repositories of Dr Sibbald, amounting to seventeen in number, have not been revoked by the deed of June 1868, and that the whole deeds must be taken into view in order to ascertain the testator's intentions; "whatever difficulty there may be in deciding which, and whether any, of the previous legacies are cumulative or merely substitutional," I am of opinion that the findings in the interlocutor to that effect were well founded. I have formed this opinion on these grounds:—

1. There is no revocation of prior deeds or writings by any express clauses in the deed of June 1868

2. The deed is holograph of the testator, and is not therefore to be so strictly construed as regards its form or the particular manner in which it is expressed, as if it had been written by a man of business.

3. The apparent settlement of his whole property, including the residue of his estate, for the purposes declared by the deed, is not inconsistent with effect being given to special legacies and bequests contained in prior writings, and not specially enumerated in this deed itself, the effect of such prior legacies and bequests, if held to be effectual, being merely to diminish the residue vested by this, and all the prior deeds, executed by the testator for the benevolent purposes of providing for incurables.

4. All the deeds of settlement in question were found together in the same box, carefully preserved as his settlement, in his dwelling-house, after his death by his trustees; and the series of deeds, when examined, afford evidence that, however frequently he repeated the same bequests, and specially the bequest of his residue for the benefit of incurables, he desired and intended that these several writings should stand together and be interpreted, in so far as not inconsistent, as the settlement of his succession.

The first trust-deed was executed by him and his spouse, dated 23d February 1863, by which, after providing for his spouse, should she survive him, to whom he gave the liferent of his property, he bequeathed certain annuities and legacies, and specially a legacy of £50 for behoof of each of the twelve charitable societies or institutions therein mentioned, and the residue of his means and estate was appointed to be applied, in the first place, in founding certain scholarships and bursaries; and, in the second place, for behoof of persons labouring under incurable disease. The deed was declared revocable during the joint lives of the granters; and, in the event of his wife's predecease, Dr Sibbald was declared to have power of revocation at any time, in whole or in part,—all prior deeds of settlement being recalled “in so far as inconsistent with these presents.”

To this deed several codicils were annexed both before and after the death of Mrs Sibbald.

The next deed was executed 2d and 12th July 1866, by which, after stating that, since the deed of 1863, circumstances had been altered by Mrs Sibbald's death, he gave over his whole estate to the individuals therein mentioned in trust to pay debts and the legacies and annuities therein mentioned—*inter alia*, legacies of £50 each to five charitable institutions, and £20 each to six other charities, and the whole residue was appointed to be applied in the same manner as provided by the previous deed, but which was not revoked by any express clause, nor was any of the codicils thereto. To this deed, as to the former, several codicils were made.

After this, on 4th March 1867, a new trust-deed was executed, conveying his whole estate, heritable and moveable, to the same trustees for the purposes therein stated, and which are very much to the same effect as the previous deed, and in particular it confers legacies of £19, 19s. each, amounting to £319, 4s., as initialed by himself on the margin, to charitable and religious institutions, the whole remainder of his means and estate being destined as before to found a scholarship and bursary, and for behoof of persons labouring under incurable disease. And this deed contains this important clause, which is thought to throw light upon the testator's whole intentions with regard to his several testamentary writings, “And I hereby revoke and recall all former settlements in so far as inconsistent with these presents.” To this deed some jottings and memoranda are attached, and in particular one setting forth the bequests to Edinburgh charities, amounting to £325.

Another will was executed by him on 1st August 1867, in which, on the declaration that he confirmed the deed of 1863 except in so far as altered by this will, and of new conveyed to his trustees his whole property for payment of the legacies and annuities therein mentioned, but without any mention of the bequests to charities. And at the close of the deed he adds that he had written out

a list of gifts to friends, which he wished to have “the force of a codicil to my will of 1863, which I confirm, excepting in so far as altered by this or any other direction in writing I may leave”—words, the meaning of which I cannot confine to writings subsequently executed, all deeds left by him being, as I think, embraced within their purview.

The next deed is that of June 1868; but before adverting to its terms, the condition in which the testator's settlements stood at the time may be shortly noticed. The principle applicable to deeds of the kind now before the Court, containing declarations as to the will of the deceased regarding his estate, is to give effect to the intention so declared in whatever deed it occurs, provided the last declaration of intention is not inconsistent with that previously declared. The last two deeds to which reference has been made give effect to this principle in so many words. The *enixa voluntas* of the testator is clearly stated to be that his prior deeds of a testamentary kind are to receive effect, unless inconsistent with the later declaration of intention. Where no such inconsistency is found to exist, the prior testamentary deeds, as regards the bequests contained in them, are in truth confirmed instead of being revoked; and to get at the testator's real intention all the writings he has left behind him must be read together and construed. In no other way can we be sure that his intention is truly followed out when there is no express revocation in the last of his testamentary writings.

The deed of June 1868 refers to the original deed of 1863, as certain of the previous deeds had done, which the testator says was, from various circumstances, now “unsuitable,” but which, he it observed, he does not revoke; and he gives over the whole of his property to the same trustees, and two others, for the purposes specified in the deed, and in particular for payment of certain legacies and annuities, generally to the same persons as in previous deeds, but not altogether the same; and legacies of £19, 19s. sterling each to twelve charitable societies which are named, a legacy of £50 to the Infirmary, and other similar bequests, being left out, and then the residue is left to endow bursaries and one scholarship as before; and finally it is provided: “And I wish the residue of my estate other than disposed of by any codicil I may execute for behoof of various friends, such as trinkets, jewels, plate, or household furniture, which I wish to have effect same as this deed written on a separate paper, all not so disposed of being the entire residue of my estate, to be applied for benefit of persons labouring under incurable disease,” and so forth.

This is alleged to be an exclusive settlement of the testator's whole estate, and it cannot be denied that there are expressions which appear to point in that direction. But, in the *first* place, those expressions are not stronger than the words which occur in some of his other deeds, in which he has declared expressly that in so far as not inconsistent with the renewed declaration of his intention, his prior deeds should have effect. In the *second* place, as regards the disposal of the residue, it is no otherwise provided than it was in the prior deeds, and will receive full effect, although the amount may be diminished, should there be any bequests to them entitled to effect other than those in this deed itself. And, in the *third* place, I cannot so strictly construe the words, “all not so disposed of being the entire residue,” as, in the

absence of express revocation, to imply the recall of all those previous writings which the testator had so carefully preserved in his repositories along with this very deed. By the adoption of the opposite view, I think violence may be done to his plainly enough declared intention in regard to several matters. Those charities which he had desired so much to benefit, which are not enumerated in the deed of 1868, in particular, the Infirmary, and certain others of special legacies which the prior deed alone declared, must be held inept. No writing but such as that subsequently executed would, according to this construction, receive effect; and as no deed of the kind in reference to his trinkets and jewels, and others so anxiously provided for in all his writings, are contained in any deed of subsequent date, and this notwithstanding the anxious reference to these very bequests in the passage above quoted. The more reasonable view, I cannot but think, is to hold that the codicil referred to, of whatever date executed, is any writing of the kind which might be found amongst his testamentary writings. And finally there a memorandum of date 24th July 1868, which, with the Lord Ordinary, I cannot but hold a testamentary writing, and which provides thus: "All the gifts to be over and above those named in any will I may have made. Initialed—J. R. S." Whether this has reference exclusively to the charities, as the heading of it may be held to confine it, or to other gifts as well, this is a declaration under the hand of the testator after execution of the deed of June 1868, that any will he may have made, and not this deed alone, should be read so far as his settlement.

The case of *Stodart v. Grant* in the House of Lords is referred to in the interlocutor, and although it is true that the deed did not contain a bequest of residue, this does not, in my apprehension, materially detract from the application to this case of the principle to which their Lordships gave effect.

That decision, I observe, was recently founded on by the Judge in Probate (Law Reps. vol. i, Probate, 62), in *Lunage v. Goodban*, whose observations are, I think, very important:—"The will of a man (he says) is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them than similar defects if appearing on the face of a single document." And afterwards: "This Court has been in the habit of admitting to probate such and as many papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering, not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers the testator designed to revoke or to retain."

No authority was referred to in support of the contention of the trustees, and I am not aware of any decision to the effect that the last dated deed of settlement, though exhausting the succession by disposing of the residue, must be held by implication to have revoked all prior settlements. Suppose that the deed of June 1868 had been executed on deathbed, is it to be held that the heir-at-law could have maintained that the settlement

of the heritage in the prior deeds had by implication been revoked, leaving the last deed, so far as regards the heritage, open to reduction at his instance? The case of *Anderson v. Fleming*, 17th May 1833, related to the effect of a deathbed deed in recalling a prior deed in all substantial respects the same, but it was only because of the deathbed deed containing an express revocation of former settlements that the heir-at-law prevailed. Here there is no clause of revocation. This being so, I cannot think that by implication prior settlements could be held to be superseded and recalled so as in a case of deathbed to operate the same result as an express clause of revocation. Yet this seems to be but the legitimate result of the plea maintained by the trustees.

On the whole, I am of opinion that the reclaiming note against the Lord Ordinary's interlocutor ought to be refused.

The case came up for final adjustment on the question of expenses before the Second Division. On the question of expenses the Court found—(1) That the four claimants who had been entirely unsuccessful should be allowed between them from the fund the whole expense of one claim; (2) that all the other claimants were entitled to their expenses in the Outer House; (3) that those claimants who had been successful in getting the interlocutor of the Lord Ordinary altered, so far as it decided that the deed of gift, dated 24th July 1868, was not of a testamentary nature, were further entitled to one fee for watching the case in the Inner House, and to an additional fee for the discussion of the question of expenses. The Court strongly expressed an opinion that the question of expenses was decided on the specialties of the case.

Agents for Pursuers—Mackenzie, Innes, & Logan, W.S.

Agents for Defenders—Hope & Mackay, W.S.

Saturday, January 14.

DUFF, ROSS & CO. v. KIPPEN.

*Proprietor and Agent—Representation—Bona fides—Improvements.* A was induced by the representations of C to enter into a partnership with B, believing him to be the proprietor of certain works. D, for whom C was general agent, was in reality the proprietor of these subjects. Held that A, who had in *bona fide* expended certain sums upon the property, was entitled to recover these from D to the extent to which he was *lucratus* thereby.

This was an action at the instance of Mr Ross, sole partner of the firm of Duff, Ross & Co., against Richard Kippen, brought in the following circumstances:—"In the month of August 1863, the pursuer, John Ross, who was then residing in Stirling, and was desirous of entering into business on his own account in Glasgow, noticed an advertisement in the *Glasgow Herald*, of 5th August 1863, in the following terms:—Partner wanted by a practical engineer who has had long experience in the construction of land and marine engines. He is proprietor of a work and tools capable of doing a large business. The capital required is £3000, and a knowledge of the business is not essential. Apply to Kerr, Anderson & Brodie, 32 St Vincent Street, Glasgow." Mr Anderson was then and had been for several years