to the contrary. I am therefore of opinion that the defenders have proved their case, and that the claim of the Crown for legacy duty has failed. This opinion leads to an affirmance of the Lord Ordinary's interlocutor on the merits. The defender's counsel raised no question as to expenses in the Outer House, and I express no opinion as to whether there are sufficient reasons for departing in this case from the usual rule that expenses follow the decision.

LORD PEARSON—In many of the cases—I think in most of the cases—on this branch of the law there has been either a conflict of evidence or else a proof of facts, some tending to show an intention to preserve the domicile of origin, and others tending to show its abandonment and the acquisition of a new domicile. In these cases the judgment has been arrived at on a balance of considerations, some pointing one way and some another. Of that class of cases the recent decision in the *Cunliffe Brooks* case is a notable example. The peculiarity of the present case is that the evidence is all one way, and the case for the retention of Mr Brown's domicile of origin stands, not upon a balance of considerations arising on the evidence, but solely on the strength of the presumption in favour of the domicile of origin as against the alleged domicile of choice. The question here is not whether the facts tending to show that Mr Brown acquired a domicile in the colony outweigh the facts which tend in a contrary direction. Speaking broadly, there are here no facts tending in a contrary direction. The question rather is, whether the uncontradicted fact of this gentleman's career and intentions are sufficient to displace the presumption that his domicile of origin persisted. That question I think must be answered in the affirmative, for the reasons fully set forth in Lord M'Laren's opinion, which I have had an opportunity of reading, and in which I agree.

LORD KINNEAR concurred.

The LORD PRESIDENT was not present at the hearing.

The Court adhered.

Counsel for the Pursuer and Reclaimer—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Defenders and Respondents—Guthrie, K.C.—C. D. Murray. Agents—M. J. Brown, Son, & Company, S.S.C.

Friday, January 11.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

GORDON'S EXECUTOR *v.* MACQUEEN AND OTHERS.

Succession—Will—Revocation—Terms of a Holograph Will which was Held not to Revoke an Earlier Trust-Disposition and Settlement.

A testator, who died in 1904 aged eighty-three, and possessed of about £8000, left a formally executed trust-disposition and settlement dated 1852, by which she disposed of her whole means and estate in a rational way, and also a holograph writing dated 1865, with alterations dated 1879, which as altered read as follows:—"Having made two wills when suffering from decay of memory, both of which are registered in the Books of Session in Edinburgh, I do hereby cancel them, and in place of which I make the following statement of my wishes:—I retain in my own name the money such as I require and wheresoever invested. I wish to rember my friends but have little to do it with. I commend myself to the care of the Almighty. My deathbed, sickbed, household, and church debts are to be liquidated, and my affairs are to be wound up and brought to a conclusion by my legal adviser at the period of my decease." No will was registered in the Books of Session, but the settlement of 1852 contained a clause authorising registration. There was nothing in the settlement to suggest decay of memory, and there was no evidence that the testator, of whom little was known, had ever suffered from it.

Held (*reversing* a judgment of Lord Salvesen) that the writing of 1865 or 1879 had not the effect of revoking the disposition of 1852.

Stoddart v. *Grant and Others*, February 27, 1849, 11 D. 860, and June 28, 1852, 1 Macq. 163, *followed*.

This was an action of multiplepoinding raised by William Rose Gordon, Durban, Natal, South Africa, executor-dative *qua* next-of-kin of Georgina Gordon, to determine the manner in which her estate fell to be divided, the parties entitled to share therein, and the meaning and effect of two testamentary writings left by her. The defenders called were Mrs Mary Jane Gordon Macqueen and others, being so far as could be ascertained the whole persons interested or who might claim to be interested in the succession of the testator.

Miss Georgina Gordon died in 1904 at the age of eighty-three, leaving personal estate in the United Kingdom to the amount of £7977 8s. 5d., the bulk of which was invested in heritable securities in Scotland and in Belgian Government 3 per cent. bonds in England. She was prede-

ceased by all her brothers and sisters.

She left a testamentary disposition, dated 4th March 1852, by which she conveyed to her trustees her whole estate for the purposes, *inter alia*, that payment should be made of her debts, &c., and of an annuity to a sister, Madelina M'Gusty, of thirty pounds a year: "(*Fourthly*) that the said trustees or trustee shall hold and retain in their or his hands, and lay out in security, real or personal, . . . the sum of five hundred pounds sterling for behoof of my sister Alicia Bridges in liferent . . . and for behoof of the issue of her body, whom failing my brother Alexander Gordon and his heirs and assignees in fee; . . . and (*lastly*) that the said trustees or trustee shall account for, pay over, assign, and convey the whole residue and remainder of my property, including all lapsed legacies, to my brother Alexander Gordon, presently residing at Port Natal, and him I appoint my general disponee and residuary legatee to all my property not otherwise disposed of; . . . and I consent to the registration hereof in the Books of Council and Session in Scotland or others competent, therein to remain for preservation. . . ."

There was no mention in the settlement of "Belgian Funds."

Both of the trustees and executors named in the above testamentary disposition having predeceased Miss Gordon, the pursuer, the said William Rose Gordon, was ordained executor-dative *qua* one of the next-of-kin of the late Miss Gordon.

Alexander Sutherland, W.S., Edinburgh (who was named as a trustee in the above testamentary disposition, and by whom the deed was prepared), acted as Miss Gordon's law-agent. Mr Harry Cheyne, W.S., Edinburgh, acted in that capacity after Mr Sutherland's death in 1869. When Mr Cheyne took over from Mr Sutherland's executor the securities and papers held for Miss Gordon he received the above-mentioned testamentary disposition, and this deed remained in his possession up to the time of Miss Gordon's death. The only writing of a testamentary nature found among her papers was a document apparently holograph and evidently written at two different dates, the ink of parts being of different shades. It was in the following terms [what here appears in small type being in the original merely in a different shade of black ink], viz.—"Having made two wills when suffering from decay of memory, both of which are registered in the Books of Session in Edinburgh,—I do hereby cancel them, and in place of which I make the following statement of my wishes—I retain in my own the *invested wheresoever* such as I name my money *in the Belgian Funds*, and I require and wheresoever invested— I wish *request the Bankers in Brussels and* to rember my friends but have little to do it *London who now have it to continue to* with I commend myself to the care of the *take the charge of it for me.* My Death Bed, Almighty.

Sick Bed, Household and Church Debts, are to be liquidated, and my affairs are to be wound up and brought to a conclusion by my legal Adviser at the period of my decease.

"GEORGINA GORDON,
"Logie Cottage,
"3rd April 1879." "29th March 1865."

[*The words in italics were scored through.*]

Though in the holograph writing above quoted reference is made to two "wills" stated to be "registered in the Books of Session in Edinburgh," so far as was known the only settlement or will executed by Miss Gordon previous to the said holograph writing was the testamentary disposition of 1852, and neither that nor any other will or settlement of the testator had been registered in the Books of Council and Session.

Claims were lodged on behalf of (1) Mrs Mary Jane Gordon or Macqueen and others, the five children of Alexander Gordon (who predeceased the testator), and (2) Mrs Mary Bridges or Sherlock and William Francis Bridges, two of the four children of Mrs Alicia Gordon or Bridges (who predeceased the testator), and (3) Harry Lyons Dümler, guardian of Georgina Bridges and John Gordon Bridges, being the other two children of Mrs Alicia Gordon or Bridges.

The claim of the first mentioned claimants was "to be ranked and preferred to the whole of the fund *in medio* under deduction of the legacy of £500 payable to the issue of the deceased Mrs Alicia Gordon or Bridges."

They, *inter alia*, pleaded—"(1) In virtue of the provisions of the said testamentary disposition of the deceased Miss Georgina Gordon the claimants are entitled to be ranked and preferred in terms of their claim. (2) The said testamentary disposition was not revoked by the alleged holograph document referred to; *et separatim*, the said document is of no effect in respect that it is vitiated *in essentialibus*."

The claim of the second mentioned claimants was "to be ranked and preferred on the fund *in medio*, each to the extent of one-ninth thereof; or, alternatively, each to the extent of one-fourth of the said sum of £500."

They pleaded—"(1) On a sound construction of the testamentary writings condescended on the said Georgina Gordon died intestate *quoad* the fee of her estate. (2) These claimants being (first) two of the next-of-kin of the said Georgina Gordon, and (second) two of the four children of the said Mrs Alicia Macdonald Gordon or Bridges, are entitled to be ranked and preferred in one or other of the alternatives of their claim."

The claim and pleadings of the third mentioned claimants was similar to that of those second mentioned.

On 1st March 1906 the Lord Ordinary (SALVESEN) pronounced this interlocutor—"Finds that on a sound construction of the testamentary writings condescended on the deceased Georgina Gordon died intestate *quoad* the fee of her estate, and, with this finding, appoints the cause to be enrolled for further procedure: Finds all parties

interested entitled to their expenses out of the trust estate, and grants leave to reclaim."

Opinion.—"This action relates to the distribution of the estate of Miss Georgina Gordon, who died in December 1904 at the advanced age of 83. In the possession of her law-agents, Messrs Mackenzie & Kermack, there was at the time of her death a testamentary disposition which had been executed so far back as the year 1852. Under this deed she gave, *inter alia*, a legacy of £500 to her sister Alicia Bridges in liferent and her issue in fee, and conveyed the whole residue of her estate to her brother Alexander Gordon and his issue, if he should predecease leaving issue. The claimants Mrs Macqueen and others are the whole children of Alexander Gordon, who predeceased the testatrix, and who accordingly claim the estate, subject only to the payment of the legacy of £500. Their claim is contested by four of the issue of Miss Alicia Bridges, who maintain that the disposition of 1852 was revoked by a subsequent holograph document which was found in the lady's own repositories.

"That document is quoted at length in art. 2 of the condescendence annexed to the summons. In its original form it appears to have been signed on 29th March 1865, but it was altered in the handwriting of the testatrix herself apparently on 3rd April 1879. If it stood alone it would undoubtedly have the effect of leaving the estate to be distributed according to law, because beyond a direction for payment of debts it contains no provisions with regard to the disposal of the testator's means. So far there is nothing inconsistent with the provisions contained in the earlier disposition, and accordingly it was argued on behalf of the issue of Alexander Gordon that the disposition by which they are made residuary legatees must receive effect. The Bridges family, on the other hand, maintain that the prior disposition was either expressly or impliedly revoked by the subsequent testamentary writing.

"This holograph writing starts with the following clause—'Having made two wills, when suffering from decay of memory, both of which are registered in the Books of Session in Edinburgh, I do hereby cancel them.' The effect of this clause might have been more easily determined if anything had been known of the history of the lady herself prior to 1865, or of any testamentary dispositions which she had executed. Neither set of claimants, however, makes any averments on the subject, and it was frankly stated at the bar that parties despaired of obtaining any information which would tend to elucidate the meaning of the document. Only one will (that of 1852) is known to have been executed prior to 1865, and it was, of course, not registered in the Books of Session, although it contained a consent to registration for preservation. It is therefore not impossible that two wills may have been executed subsequent to 1852 which answered the description of having been made when the testatrix was suffering from decay of memory, although all trace of them has been lost. The onus of showing that a particular will is revoked by a clause of this kind lies, I think, upon those who maintain the revocation, and accordingly if the clause above quoted had stood alone I do not think that I could have held that the will of 1852 was sufficiently identified as one of the two wills expressly revoked.

"The holograph document, however, proceeds (I read only from the later edition) 'and in place of which I make the following statement of my wishes—I retain in my own name the money such as I require and wheresoever invested; I wish to rember my friends, but have little to do it with. I commend myself to the care of the Almighty. My deathbed, sick-bed, household, and church debts are to be liquidated, and my affairs are to be wound up and brought to a conclusion by my legal adviser at the period of my decease.' It is not easy to understand why the testatrix took the trouble to express these wishes, seeing that no former wills could have affected her right to her own money during her lifetime and that her personal estate, if what she ultimately left at her death is any indication of what she possessed in 1879, was far from inconsiderable. It is, however, difficult to resist the inference that she executed the holograph will under the impression that there was no previous settlement of her testamentary wishes which still remained operative, and I think it impossible to hold that she had in view the prior disposition of 1852, and believed that it would regulate the succession to her estate. By the 1852 disposition provision was already made for payment of her debts and for the distribution of her estate, and at the time that the last clause of the holograph writing—as we now find it—was framed, her legal adviser, Mr Alexander Sutherland, who had drawn the disposition of 1852, was still alive. In my opinion, therefore, it must be held either that the disposition of 1852 was one of the two wills which she expressly revoked, or that she had forgotten its existence and made a new will, in which she deliberately stated her intention of making no provision for the disposal of her free estate after her death, because rightly or wrongly she considered that it was of such small amount as not to require to be specially bequeathed. In construing a document of this peculiar kind without any extraneous aid one is of course in the region of pure conjecture, but I think it probable that the testatrix had before her at the time a copy of the 1852 disposition, and imagined that the conveyance to trustees operated in some way to take her money out of her own name, just as she seems to have assumed that the consent to registration had been acted on, and that the will itself was already registered in the Books of Council and Session.

"If I am right the result is that Miss Gordon's estate falls to be disposed of according to law. It is satisfactory to

know that my decision does not involve that the children of Alexander Gordon, whom she nominated as her residuary legatees in the 1852 will, will be entirely disappointed, but that the estate will be substantially divided between them and the issue of Alicia Bridges—the only other legatees of those mentioned in that will who have survived her."

The claimants, the children of Alexander Gordon, reclaimed, and argued—The disposition of 1852 was not expressly revoked, there being nothing to show that it was one of the two wills expressly cancelled by the holograph writing. On the contrary, everything tended to show that it was not. It was formal, rational, and evinced no sign of decay of memory, and was moreover, made at an age, viz., thirty-one, when such a disease was improbable. Nor was there any implied revocation, for, in fact, the holograph writing contained no testamentary disposition whatsoever. The onus of proving the revocation of a prior by a subsequent testamentary instrument was on those who asserted the revocation—*Stoddart* v. *Grant and Others*, February 27, 1849, 11 D. 860, and June 28, 1852, 1 Macq. 163. That onus had not been discharged.

Argued for the claimants, the children of Alicia Gordon or Bridges—A revocation was perfectly good although what followed the revocation might not be capable of bearing a rational construction. "In place thereof" indicated the testator's belief that there was nothing to prevent a new will—an entirely new arrangement of her affairs—being made, and that the two wills recalled were all the existing wills. The fact that the will had not actually been registered was immaterial, because the testator evidently imagined that the power to register in the Books of Council and Session had been exercised, and in any case *falsa demonstratio non nocet—Bankes* v. *Bankes' Trustees*, July 6, 1882, 9 R. 1046, 19 S.L.R. 785. The latter part of the holograph writing was an appointment of an executor, for the words "at the period of my death" referred to the time of winding up of her estate, and not to the time of ascertainment of "my legal adviser." There was in the 1852 disposition a liferent requiring the protection of trustees, and this showed that the intention was not merely to substitute an executor for trustees, but to cancel the deed of 1852.

LORD STORMONTH DARLING—The Lord Ordinary has disposed of this case on the footing that the document in question operates a revocation of the only previous will which was found in the repositories of the deceased. That was a particularly reasonable will—written, no doubt, a long time before the will which was begun in 1865, and finished in 1879—but reasonable in the sense that it was prepared by her legal adviser at the time, that it was properly witnessed by responsible people, and that it disposed of her whole estate in a rational way. So far as is known the testatrix was not at the time it was made, when she was only thirty-one years of age, suffering from any decay of memory, and there is nothing in the deed itself to suggest that she was then suffering either bodily or mentally. This will, therefore, on the face of it is entitled to all respect and attention. The testatrix survived till 1904, and then she died possessed of nearly £8000. The only later document which she left is one which is not easy to decipher. It is holograph, and begins thus—"Having made two wills when suffering from decay of memory, both of which are registered in the Books of Session in Edinburgh, I do hereby cancel them, and in place of which I make the following statement of my wishes." Therefore we begin with this—that she intended to cancel two wills which she had made when suffering from decay of memory, but she omits entirely to make any new disposition of her property, except that she wishes her affairs to be wound up by her legal adviser at the period of her decease. She also says that both wills are registered in the Books of Session at Edinburgh. Is there any will corresponding to that description? There are no such wills to be found. Therefore we cannot say what are the wills which she made when she was suffering from decay of memory or which are registered in the Books of Council and Session. The only will of which we know is that of 1852, which is not registered, and bears no trace on its face of having been made when she was suffering from decay of memory. That being so, there is nothing to warrant the conclusion that either of these wills is the one of 1852. The case seems to fall under the rule laid down in the well-known case of *Stoddart* v. *Grant* (1849, 11 D. 860; 1852, 1 Macq. 163), that "the onus of proving the revocation of a prior by subsequent testamentary instruments is on those who assert the revocation." It is not to be inferred by mere conjecture, but by a comparison of the documents, clause by clause; and if the will said to be revoked is not named or clearly identified, it must be taken as wholly or partially regulating the succession, so far as not inconsistent with subsequent instruments.

LORD LOW—I am of the same opinion. I take it there is no dispute as to the rule of law which is applicable. It is this—that a subsequent will does not operate to revoke a prior will unless it does so expressly, or the two are incapable of standing together either in whole or in part. It is said that the holograph will in this case contains an express revocation of the will of 1852. If that is so, there is, of course, an end of the question, although the testatrix has not disposed of her estate at all, but has died intestate. The words of revocation in the holograph will are these—"Having made two wills when suffering from decay of memory, both of which are registered in the Books of Session in Edinburgh, I do hereby cancel them, and in place of which I make the following statement of my wishes." Now the two wills which are thereby cancelled are specially described as having been made when the testatrix was suffering from decay of memory, which, I

think, may be read as meaning that her mind was at the time in such a state that she was not truly capable of making a will. It was laid down in *Stoddart* v. *Grant* that the onus is on the party who maintains that a will is revoked to prove that it is so, and therefore the onus is here on the party who maintains that one of the wills revoked by the holograph writing was the will of 1852. There is no evidence that when the will of 1852 was made the testatrix was suffering from decay of memory, or was incapable of making a will. One might even go further and say that the inference is the other way, because the terms of the will appear to be entirely fair and rational; it was drawn up by a member of the legal profession, and the witnesses appear to have been the doctor of the testatrix and the minister of her church. There is a strong presumption, therefore, that the testatrix was not at that time suffering from any mental incapacity. There, is accordingly, no evidence in my opinion that the will of 1852 was one of those which was expressly cancelled.

That leaves the question whether the two wills are incapable of standing together? The Lord Ordinary answers that question in the affirmative. He reads the holograph will as one "in which the testatrix deliberately stated her intention of making no provision for the disposal of her free estate after her death." I agree that if that is a correct description of what the holograph will does, it would revoke the will of 1852. If the testatrix had said, "I prefer not to dispose of my estate but to leave my succession to the operation of law," such a declaration would receive effect; but, with very great deference to the Lord Ordinary, whose opinions are always entitled to great respect, I am unable to construe the holograph will in any such way.

Apparently the testatrix intended to make a testamentary disposition of her means, because she says that "in place of" the cancelled wills she makes "the following statement of my wishes." In the statement which follows, however, she makes no testamentary disposition. She does not even—as I read the will—invoke the law of intestate succession. She merely says that she retains in her own name such money as she requires; that she wishes to remember her friends but has little to do it with; and then she commends herself to the care of the Almighty. Perhaps if the cancelled wills had been in existence they might have thrown some light upon what the testatrix had in her mind, but reading what purports to be a statement of her wishes alone, I cannot spell out of it any testamentary intention at all. The Lord Ordinary founds chiefly upon the words, "I wish to rember my friends but have little to do it with," which, he says, show that the testatrix considered her estate to be of such small amount as not to require to be specially bequeathed. That may have been what she meant, but it may not have been so. It seems to me to be impossible to say what she had in her mind when she said she wished to remember her friends, or to read what she said as amounting to a declaration that she did not intend to dispose of her estate at her death, but desired to leave it to the operation of the law of intestacy.

In regard to the last clause in the will it may perhaps be read as the nomination of an executor, but even in that case, although the executor so nominated might supersede the trustees appointed in the will of 1852, that will otherwise would not be thereby revoked. I doubt, however, whether the clause was intended to do more than provide that the gentleman who was her legal adviser at her death should be the law agent employed in winding up her affairs.

LORD JUSTICE-CLERK—I am of the same opinion. It is for those who maintain that the later writing of the testator cancels the earlier will of 1852 to show that it does so. I think they have failed to do so. The will of 1852 in all its aspects is inconsistent with the idea that it was made when suffering from decay of memory, or was one of the two wills revoked, and there is no revocation of all wills. The latter part of the document under construction is not testamentary, but merely expresses a desire that her agent at her death should have the winding up of her affairs.

The Court recalled the interlocutor reclaimed against, held that the writing of 1865 or 1879 had not the effect of revoking the testamentary disposition of 1852, and remitted to the Lord Ordinary to rank and prefer the claimants accordingly.

Counsel for Claimants, Mrs Macqueen and Others (Reclaimers)—Macfarlane, K.C. —Jameson. Agents—Mackenzie & Kermack, W.S.

Counsel for Claimants, Mrs Sherlock and William Francis Bridges (Respondents)—Macphail — Macmillan. Agents — Finlay, Rutherford, & Paterson, W.S.

Counsel for Claimants, Georgina Bridges' Guardian and John Gordon Bridges (Respondents)—Macphail—Macmillan. Agents —Ronald & Ritchie, S.S.C.

Saturday, January 12.

SECOND DIVISION.

[Sheriff Court of Renfrew and Bute at Paisley.

THORNTON *v.* BOYD & FORREST.

Expenses—Amendment of Record in Appeal from Sheriff Court.

Observed by the Lord Justice-Clerk, that in appeals from the Sheriff Courts, "in which counsel cannot go on without asking leave to amend, it is not a good thing to postpone dealing with the question of expenses till the end of the case. This state of things occurs much too often."