the 32d section of the statute provides that "no petition for recall of the sequestration, excepting as hereinafter provided" (that is, with the consent of nine-tenths in number and value of the creditors), "shall be competent after the expiry of the said forty days." That seems to me to be conclusive. We have no alternative but to adhere to the Lord Ordinary's interlocutor—not on the grounds stated by his Lordship, but on grounds which could not have been before his Lordship, as the circumstances on which they are based had not emerged at the date of his interlocutor.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Petitioner and Reclaimer—Campbell Smith—Strachan. Agent—R. H. Miller, L.A.
Counsel for Respondent—Mackay—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, November 10.

SECOND DIVISION.

SPECIAL CASE—ARRES & OTHERS AND MATHER & OTHERS.

Succession — Will — Legacy — Double Legacies to same Legatee.

When a testator by one or several instruments gives two or more legacies to the same legatee, it is presumed that he intended the legatee to take both in the absence of competent evidence that the second legacy was intended to be substitutional for the first.

A testator by a deed of settlement left £4000 to be held in trust for his natural son until he should reach twenty-five years, and then to be paid to him. If he died before attaining twenty-five, the sum was to go to certain cousins of the testator. By another deed dated six months after the first, on the narrative that he thought it his duty to dispose of his whole worldly affairs, he made a bequest of £6000 for behoof of the natural son, to be payable to him when he reached twenty-four years of age, and until that time to be held for him by a different trust from that created by the previous writing. This was the only provision in the deed other than a legacy to the trustees appointed under it. If the son died before reaching twenty-four, the same persons who were conditionally instituted under the previous writing, with one addition, were to take the sum. *Held* that the provisions of the second writing must have been intended to be substitutional for that in the first, and that the natural son was not entitled to take both provisions.

James Mather Arres, farmer, died unmarried on February 13, 1881, possessed of one-half share of certain landed property in Ireland of the annual value of £670, also of certain farm leases in Scotland held by him jointly with a brother, and of moveable property of the value of £12,000, consisting to the extent of £10,000 of his share of a farming stock.

There was found in his repositories after his death the following holograph deed of settlement, dated November 25, 1872:—"I, James Mather Arres, presently residing at the Mains of Ardersier, in the parish of Ardersier and county of Inverness, consider it my duty while in health to settle my worldly affairs. I hereby leave and bequeath and dispose off to my natural son James Mather the sum of four thousand pounds stg., to be free of legacy duty; and I hereby appoint Charles Clunas, accountant, National Bank of Scotland, Inverness, to be trustee in the event of my death before my son is twenty-five years of age; and the above sum of four thousand pounds is to be paid over to my trustee in equal instalments, the one at six months and the other at twelve months after my death, and to be invested in trust-funds or good railway debentures, and the interest thereoff payable by my trustee to my before-mentioned son in half-yearly instalments till he is twenty-five years of age, and then to receive the above sum of four thousand pounds stg.; and I hereby leave to Charles Clunas, for acting as trustee, the sum of one hundred pounds stg., but in the event of my son's death before reaching the age of twenty-five years, the above sum of four thousand pounds to be divided equally among my unmarried female cousins at the date of his death (my son). Written in my own handwriting, and one word deleated before singning, dated and signed thus the twenty-fifth day of November one thousand eight hundred and seventy-two, at Ardersier, as witness my signature thus

"JAMES M. ARRES."

He also left another document, dated April 26, 1873. This was to the following effect:—"I, James Mather Arres, presently residing at the Mains of Ardersier, in the parish of Ardersier and county of Inverness, think it my duty while in health to settle my worldly affairs. I hereby leave and beaquath and dispose of my whole worldly affairs in the following manner, viz., 1st, To my natural son James Mather, presently living with Robert Scott, 44 Pitt Street, Bonnington, near Edinburgh, the sum of six thousand pounds stg. (£6000), to be paid to my trustees for his behoof, the one-half at Whitsunday after my death, the other at the following Martinmas, to be paid to the affordsaid son of my body when he reaches twenty-four years of age, free of legacy-duty. I hereby appoint Chas. Clunas, accountant, National Bank, Inverness, and Roderick Scott, solicitor, Inverness, and Alick Mather, Druid Temple, by Inverness; and I leave to each of my trustees, if they act, the sum of one hundred pounds stg.—in the event of my son's death before reaching the age of twenty-four years, to be divided equally among my unmarried femal cousins, with the following exception, to my cousin Mary Mather, presently the wife of Robert Smith, banker, Lossiemouth, the sum of one thousand pounds stg. Written in my own hand writting, this the twenty-sixth day of April 1873, as witness my hand this.

"JAMES M. ARRES."

A question having arisen as to whether this second writing was intended to supersede the first, or whether the legacy of £6000 provided by it to James Mather Arres, and failing him to the deceased's female cousins as therein mentioned, and the legacy also left by it to Charles Clunas,

were additional to the legacies of £4000 and £100 respectively provided by the first writing, this Special Case was settled for the opinion and judgment of the Second Division. The first parties were James Mather Arres, the natural son of the deceased, and Charles Clunas, as trustee under the first writing; the said Charles Clunas, Roderick Scott, and Alexander Mather as trustees under the second writing; and the said Charles Clunas as an individual. They maintained that the legacies were cumulative, as did also the second parties, who were the whole unmarried female cousins of the deceased, and also Mrs Mary Mather or Smith mentioned in the second writing, and her husband for his interest. James Arres Mather, the executor-dative, *qua* only brother and next-of-kin of the deceased (with consent of deceased's father for his interest), was the third party. He maintained that the legacies in the second writing were substitutional for those in the first.

The question on which the opinion of the Court was asked was—"Are the legacy of £6000 bequeathed by the second of the said writings to the said James Mather Arres, and the legacy of £100 also bequeathed thereby to the said Charles Clunas, additional to or substitutional for the legacies bequeathed by the first of the said writings?"

Argued for the first and second parties—Where there are several legacies contained in the same or in different writings which may be read as a whole, the legacies are all due unless the intention of the testator to the contrary is apparent from the deeds—*Horsburgh* v. *Horsburgh*, January 12, 1847, 9 D. 329; *Stoddart* v. *Grant*, February 27, 1849, 11 D. 860 (Lord Moncreiff's opinion), *rev.* June 28, 1852, 1 Macq. 163. It is true that one total settlement is inconsistent with another, but here the documents are not both total settlements. The deceased left in all about £10,000 of moveable property, and it must be presumed that he intended by the second writing, having already left £4000 to his son, to leave him the remaining £6000. The "whole worldly affairs" in the preamble of the second writing meant "my affairs still undisposed of."—*Sibbald's Trustees* v. *Greig*, January 13, 1871, 9 Macph. 399. The documents were therefore not inconsistent, and ought to stand together—*Alves* v. *Alves*, March 8, 1861, 23 D. 712. There were also several *indicia* (any one of which might be sufficient) that the second writing was meant to give additional legacies. The sums were different. The direction as to the period of payment was different (see Lord President in *Horsburgh's* case). The destination-over to the female cousins was altered by the addition of the name of a married cousin. The trusts created were different. Further, it might be held that the second writing was a general conveyance to the son of the testator's means subject to a legacy to Mr Clunas. No doubt the testator erred in saying that the estate was £6000, but *falsa demonstratio non nocet.*

Argued for third party—In order to the application of the doctrine last founded on by the first and second parties, an entire subject must be given, and the words following must not, as was the case here, divide it. The legacy to Mr Clunas was not a mere burden on the general conveyance to the son. It was a case of particular bequests which did not exhaust the estate. The true doctrine was stated by Lord Westbury in *West* v. *Lawday*, March 14, 1865, 11 Clark's Cases (H. of L.) 375. On the question whether the legacies in the second writing were additional or substitutional, the words of the preamble to it are very plain. The testator meant to make "hereby" a settlement of his "whole worldly affairs." That did not mean a disposal of residue with reference to a previous will. It was not a natural thing to give two sums to separate trustees to hold for the same person. The second writing was clearly a substitution of a more liberal provision than had before been given to one for whom the testator wished to provide. The change in the ulterior destination was of no importance to the question in the case.

Authority—Note to p. 102 of 1 Russell and Mylne.

At advising—

Lord Young—[Who delivered the judgment of the Court]—There are two instruments, and the question is whether the second, which is about six months later in date than the first, is additional or substitutional—for I lay aside the point which I myself suggested, that the second might possibly be regarded as a universal settlement of the testator's whole estate. That point is not presented in the case, was not taken up by the party interested to maintain it, and is, I am on consideration satisfied, not well founded. On the question of additional or substitutional, whatever difficulty there may be is not in the law, which is clear, and may be stated in a sentence. When a testator by one or several instruments gives two or more legacies or other benefits to the same individual, he presumably intends that they shall all have effect, and in the absence of any expression or other indication of intention to the contrary, the law takes this to be his intention accordingly. Nor will a mere speculative conjecture or plausible doubt be allowed to affect the legal presumption for cumulation, which is generally in accord with the real intention, and is the *prima facie* legal presumption precisely because it is so, for the aim and object of the law is to ascertain and carry into effect the testator's intention. The presumption may, however, be overcome, not only by distinct expression that the later bequest was intended to be substitutional, but by everything which satisfies the Court that it was so intended. I mean, of course, anything which may legitimately be taken account of, for extrinsic evidence is generally inadmissible, although there may be exceptions not necessary to be here considered. Whether or not the Court has sufficient ground to be so satisfied here is the question to be determined—the legal result being clear according as we shall determine it affirmatively or negatively. There is no criterion of what ought or ought not to satisfy the judicial mind on any such matter, and the infinite variety of circumstances which occur in real cases, and our experience that what satisfies one judicial mind often fails to satisfy another, and sometimes even leads it to an opposite conclusion, are exclusive of exact demonstration. The law does, however, aid us so far that we must follow the presumption of additional or cumulative, unless we are judicially satisfied that such was not the testator's intention

—it being insufficient that we are not satisfied that it was, and even shrewdly doubt it.

Had the two instruments here been in the same terms—the second being an exact copy of the first—though signed and of a later date, it would not, I think, have been doubtful that the latter was intended to supersede the former. I should have thought so whether both were found in the testator's drawers, or the one there and the other with the mother of the boy. The thing in question is not a common legacy, but a provision by a father for his natural son, and that he wrote and signed the selfsame provision twice over, retaining the one and handing the other to the child's mother, would not only not have suggested to my mind the idea that he meant a double provision, but would have satisfied me that he did not. But the second is not an exact copy of the first. It is for a larger sum—£6000, instead of £4000—names two additional trustees, and appoints the last moiety to be paid when the boy reaches twenty-four, whereas the first appointed it to be paid when he reached twenty-five. These changes—and there are no others—rather tend to confirm my judicial conviction that the second instrument was intended to be substitutional. I say judicial conviction, for with the view of the law which I have expressed mere conjecture or impression would be insufficient.

I have the same opinion with respect to the second legacy given to Mr Clunas, and for reasons so plainly arising from the views I have already expressed, that it would be superfluous to state them.

My opinion is strengthened by comparing the provisions of the two instruments in favour of the testator's unmarried female cousins.

The Court answered the question by finding the legacies in the second writing substitutional for those in the first.

Counsel for First and Second Parties—Mackintosh—A. G. Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Third Party—D.-F Kinnear, Q.C. —Rankine. Agents—Romanes & Simson, W.S.

Saturday, November 12.

FIRST DIVISION.

GUNN *v.* SMITH AND ANOTHER (LIQUIDATORS OF THE BENHAR COAL COMPANY, LIMITED).

Public Company—Secured Creditor—Agreement to Pay certain Creditors before Liquidation commenced.

A debenture-holder in a limited company, when her debenture fell due, instead of withdrawing her money, agreed, at the request of the company, to accept a bond and disposition in security for the amount over certain heritable subjects belonging to the company, which on realisation fell short of the sum secured. The company was at the time in difficulties, and afterwards went into liquidation under the supervision of the Court. Before the liquidation began, the directors, with the view of, if possible, carrying on the business, intimated that they were "enabled to make a payment of 3s. 4d. per £ on the unsecured debt" out of the proceeds of the sale of certain oil-works. The creditor above mentioned claimed a share of this payment proportionate to her debt, and intimated that she would hold the directors personally responsible if they failed to make due provision for her. Thereupon a sum equal to her claim was consigned in bank, in the joint names of the company and her agents, "to await the determination of her claim to the said dividend, which in the meantime the company dispute." *Held*, in a petition at her instance, that being a secured creditor, she was not entitled to payment of that sum in the liquidation.

The Benhar Coal Company (Limited) was in liquidation, subject to supervision, in terms of an order pronounced by the Court on 18th Jan. 1881. The liquidators were J. T. Smith, C.A., and A. W. Turnbull. The company was embarrassed, and petitions for winding it up were presented in the end of 1878, which after sundry proceedings in Court were withdrawn. An endeavour was then made to resume business. The petitioner was at that date the holder of two debentures for £1000 each, which fell due at Whitsunday 1879, and which she declined to renew; but ultimately she agreed to allow her debentures to be cancelled, and to accept in their place a bond and disposition in security for £2000, dated 23d July and recorded 13th August 1879, over 1st, the dwelling-house 14 Maitland Street, Edinburgh, already burdened with a debt of £2750, and 2d, the lands of Easter Hassockrigg, in the parish of Shotts, already burdened with £1200.

In 1880 the Benhar Company realised various heritable assets appropriated to secured creditors, and also certain oil-works at Benhar and Broxburn, the latter for the sum of £40,000, out of which the directors ordered a payment to be made of 3s. 4d. per £ to all the creditors of the company not secured. In the circular making this intimation, which was dated 18th August 1880, and was addressed to all the creditors of the company, the directors stated that they were anxious "to bring under your notice what has been and is being done towards paying off the company's debts, and to ask your concurrence in the arrangements they propose for the future. Since the present board took office they have disposed of feu-duties to the value of about £30,000, the brick-work at the price of £7500, the oil-works at Benhar and Broxburn for £40,000, and one or two minor portions of heritable property. With the exception of the proceeds of the oil-works, however, these realisations have been applied in reduction of heritable debt, in terms of the agreement at present in force. Out of the proceeds of the oil-works the directors, having regard to the requirements of the collieries, are enabled to make a payment of Three shillings and fourpence per pound on the unsecured debt, which will be remitted to you in the course of a few days; or in the case of debts on debentures or otherwise which are not yet exigible, will be deposited in bank in name of Messrs Dove and Gair, the creditors' advising committee, to be paid when due."