the later legacies were substitutional. Mrs Anderson, then, was entitled to £500 under each of the writings, or at least under one or other of them, in addition to the legacy of that amount in the trust-deed. Though the document first in date was prior in date to the trust-disposition and settlement, yet the fact that it was contained in an envelope dated posterior to the trust-settlement showed that it was Mrs Brander's intention to increase the bequest in her trust-settlement.

Authorities—*Horsbrugh and Others* v. *Horsbrugh*, May 4, 1865, 9 D. 324; *Tennent, &c.*, v. *Dunsmure, &c.*, Nov. 8, 1878, 6 R. 150; *Arres' Trustees* v. *Mather, &c.*, Nov. 10, 1881, 9 R. 107; *Royal Infirmary of Edinburgh, &c.* v. *Muir's Trustees*, Dec. 16, 1881, 9 R. 352; *Tuckey* v. *Henderson*, July 22, 1863, 33 Beaven's Rep. 174; *Wilson* v. *O'Leary*, Feb. 26, 1872, L.R., 7 Ch. App. 448.

At advising—

LORD YOUNG—The question is whether Mrs Anderson is entitled to a legacy of £500 under each or under either of the documents of 24th October and 24th November 1880—it being thus that anything she may be entitled to under both or either is in addition to the legacy given to her by the will of February 1881. Now this will of February 1881 being a universal settlement of the estate of the testatrix, leaving nothing whatever to pass under any prior settlement, impliedly revokes all prior settlements. The testatrix was of course at liberty to revoke or alter it to any extent, but its terms signify clearly that when she made it she meant it to regulate her whole succession. For it in fact disposes of her whole succession, leaving nothing for anyone to take by any other instrument. It would therefore be extravagant to contend that when the testator made her universal will she meant it as an addition to the documents of October and November 1880—which obviously could not have effect without displacing the distribution by the latter and universal will to the prejudice of the beneficiaries under it. I do not refer to the division of "the remainder of my jewellery along with my body-clothes," for which the universal will refers to "any memorandum to be left by me."

The condition therefore of Mrs Anderson taking a legacy of £500 under the document of October 1880 is that we shall be satisfied that the testatrix has sufficiently signified an intention to alter her will of February 1881 to that extent—for of course Mrs Anderson can only have it by displacing to that extent the distribution by that will. The two facts relied on to satisfy us of this are, first, the preservation of the document, and second, the writing on the envelope in which it was enclosed, dated 7th March 1881. The first or mere preservation of the document is, I think, clearly insufficient, for it was revoked by the subsequent universal will. Nor is the unsigned writing on the envelope, together with the date, sufficient in my opinion to alter the will to the extent of changing the distribution of residue by introducing another legatee with a legacy of £500, or to any extent. The testatrix's conduct in the matter is, I think, sufficiently explained by taking the document as a memorandum about the division of her jewellery such as her will contemplates—signifies her intention to leave for the guidance of her executors. I cannot hold that a revoked testamentary document is restored to testamentary sufficiency by an unsigned memorandum on the envelope such as that which occurs here. I think it was not so intended. With respect to the document of November 1880, it is in my opinion sufficient to say that it was revoked by the subsequent will, and that nothing whatever was done to restore it and render it operative as an alteration of the will.

I do not regard the question as one of cumulative or substitutional legacies, but of prior and partial testamentary writings revoked by a subsequent universal will.

LORD RUTHERFURD CLARK—I have entertained a good deal of doubt as to whether Mrs Anderson is not entitled to two legacies—one under the general settlement of 1881, and the other under the codicil of October 1880 as set up by the later writing; but though I entertain these doubts, I do not desire to differ from your Lordship.

The LORD JUSTICE-CLERK concurred with LORD YOUNG.

LORD CRAIGHILL was absent.

The Court answered the two first questions in the negative, and found it unnecessary to answer the third.

Counsel for First and Third Parties—Guthrie—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Second Parties—Mackintosh—Pearson. Agents—Carment, Wedderburn, & Watson, W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

FARQUHARSON *v.* FARQUHARSON.

Succession—Words importing a Bequest of Heritage—Mutual Settlement—Special Destinations of Subjects acquired subsequent to Date of Settlement.

A husband and wife, neither of whom was at the time possessed of heritage, conveyed in each other's favour by mutual settlement "all and sundry goods, gear, debts, effects, sums of money, heritable and moveable, household plenishing and furniture, and others whatsoever," that should pertain to either at death. The husband afterwards acquired heritage, taking the title to part of it to himself and his wife in conjunct fee and liferent, for her liferent use allenarly, and to his heirs and assignees whomsoever, and the title to the remainder to himself and his heirs and assignees whomsoever. The husband having predeceased the wife, she claimed to be entitled, in virtue of the mutual settlement, to the whole heritable property left by him. *Held* (1) (*aff.* judgment of Lord Kinnear—*dub.* Lord Young) that the terms of the mutual settlement were not habile to carry heritage; (2) (by Lord Justice-Clerk and Lord Young) that assuming that the mutual settlement was habile to carry heritage, it was evacuated by the terms in which the husband had taken the titles to the heritage acquired by him.

Charles Henry Farquharson and Janet Farquharson, his wife, executed on 9th September 1840 a mutual disposition in the following terms:—"We, Charles Henry Farquharson, jeweller in Edinburgh, and Janet Wilkinson Romanes or Farquharson, spouses, for the love, favour, and affection which we have and bear to each other, have mutually agreed to grant these presents in manner after mentioned. Therefore I, the said Charles Henry Farquharson, do hereby assign and dispone to and in favour of the said Janet Wilkinson Romanes or Farquharson, my spouse (in case she survive me), her heirs, executors, and assignees, all and sundry goods, gear, debts, effects, sums of money, heritable and moveable, household plenishing and furniture, and others whatsoever, resting, pertaining, and belonging to me at the time of my death, by bond, bill, ticket, account, or any other manner of way whatever; and in like manner I, the said Janet Wilkinson Romanes or Farquharson, do by these presents assign and dispone to and in favour of the said Charles Henry Farquharson, my husband (in case he survive me), his heirs, executors, or assignees, all and sundry goods, gear, debts, effects, sums of money, heritable and moveable, household plenishing and furniture, and others whatsoever that shall be resting, pertaining, and belonging to me at the time of my death, by bond, bill, account, or in any other manner of way whatever; and, moreover, we do hereby nominate and appoint the survivor of us to be the sole executor, universal legator and intromittor with the whole goods, gear, debts, sums, and effects that shall happen to be resting and belonging to the person predeceasing in any manner of way, with power to the survivor of us to intromit with and dispose of the same at pleasure and if need be to pursue for and give up inventories thereof and confirm the same as accords; reserving always to each of us our liferent right of the sums and subjects before disponed during all the days of our lifetime, and full power and liberty at any time of our life to alter these presents in whole or in part as either of us shall think fit."

Neither spouse was at the time of the execution of this settlement possessed of heritage. After it was executed Mr Farquharson purchased heritable subjects at Newington and at Summerhall Place, Edinburgh, taking the dispositions to himself and his wife in conjunct fee and liferent, for her liferent use allenarly, and to his heirs and assignees whomsoever, heritably and irredeemably, but always with and under the power and faculty in his favour of full power and liberty at any time of his life, and without the consent of his wife, to sell, burden, wadset, or affect with debt, or even gratuitously dispone, the subjects in whole or in part as he might think proper, and generally to do everything thereanent as if he were absolute fiar of the same. He also purchased a shop in Leith Street, Edinburgh, taking the disposition to himself and his heirs and assignees whomsoever.

On 30th October 1882 Mr Farquharson died leaving no children. Mrs Farquharson survived him. This action was raised by her against her husband's nephew and heir-at-law, and also against his next-of-kin. The purpose of the action was to have it declared that the succession to the whole means and estate, heritable and moveable, left by or belonging at the time of his death to Mr Farquharson fell to be, and was, regulated and determined by the provisions of the above-quoted mutual disposition, and that the pursuer was entitled, under and in terms of these provisions, to succeed to the whole means and estate, heritable and moveable, left by him, and to which he was entitled at the date of his death.

Frank Farquharson, the heir-at-law, defended the action, pleading (1) that the mutual settlement did not convey heritage, because it was not at its date (1840) a deed habile to convey heritage, because at its date neither spouse possessed heritage, and because its terms did not import a conveyance of heritage. He also pleaded, that assuming the deed to be capable of conveying heritage, it was revocable, and was revoked by the manner in which the titles to the heritable property purchased by Mr Farquharson were taken.

The Lord Ordinary (KINNEAR) assoilzied the defenders.

"*Opinion.*—The only question in dispute between the parties is, Whether the heritable properties specified in the answer to the second article of the condescendence are carried to the pursuer by the mutual disposition of 1840? There can be no question that that disposition is effectual to carry lands if it expresses an intention to that effect. But the defender maintains, and I think correctly, that the words in which the testators have specified the kind of estate they mean to convey are applicable only to moveable estate, and cannot embrace any kind of heritage, excepting moveable estate which may have become heritable *destinatione*, and debts and sums of money heritably secured. The question involved has been repeatedly the subject of decision; and I am unable to distinguish the present case from the cases of *Brown* v. *Brown*, and *Cockburn* (Hume 131), in which the same words as here employed, although in a settlement containing words of disposition, were held insufficient to carry lands or leases of land. The later case of *Pitcairn* v. *Pitcairn* is also in point. It is true that the word 'effects' was not in that case combined with the words 'heritable or moveable;' but the reasoning of the learned Judges, particularly the Lord President and Lord Mure, is directly applicable. This construction is strengthened by the words descriptive of the kind of title or security under which the property intended to be conveyed might be held—all of which are applicable to moveable estates alone, and altogether inapplicable to lands held by charter and sasine.

"It was argued that the word 'subjects' in the clause of reservation is sufficiently comprehensive to embrace heritable estate; and it may be that a conveyance of heritable subjects belonging to the testator might be held to include lands; but the word as used in the clause of reservation cannot be held to import an additional term into the dispositive clause. It is a word of reference, and cannot have a wider signification than the antecedent words to which it refers."

The pursuer reclaimed, and argued—On a sound construction of the mutual disposition it was effectual to carry lands. Heritage had been carried by the use of the word (1) "effects" in the following cases—*Hogan* v. *Jackson*, June 20, 1775, 1 Couper's Rep. 299; *Titchfield* v. *Prescott*, July 18, 1808, 15 Vesey, 500; *Campbell* v. *Prescott*, July 18, 1808, 15 Vesey's Chan. Rep. 500. (2) By the use of the word "goods" in *Ross* v.

Ross, March 2, 1770, M. 5019; *Glover* v. *Glover*, December 7, 1810, 16 F.C.; *Welsh* v. *Cairnie*, June 28, 1809, 15 F.C.; *Wright* v. *Shelton*, December 16, 1853, 18 Eng. (Writ) 445; Williams on Executors, ii. 1184. "Gear" meant all the property a man has gathered round him. The cases relied on by the defenders were inapplicable. The case of *Brown* v. *Brown* was a very old one, and in it at the date of granting the deed the granter had heritable property of various kinds, and this was an element considered by the Court in construing the deed in question. In *Pitcairn* v. *Pitcairn* the word "effects" was not combined with the words "heritable or moveable."

The defenders replied—The disposition was inhabile to carry heritage—*Brown* v. *Brown*, January 26, 1770, M. 5440; *Cockburn* v. *Cockburn*, November 18, 1803, Hume's Decisions, 131; *Pitcairn* v. *Pitcairn*, February 25, 1870, 8 Macph. 604; *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026. Even if capable of conveying heritage, it was revoked *quoad* all the heritage Mr Farquharson left by the terms of the dispositions taken by him.

At advising—

Lord Justice-Clerk—[*After stating the facts*]—In these circumstances the question has arisen, whether the heritable subjects specified in the defender's answer are carried by the mutual settlement to the widow, or follow the destination contained in the conveyances?

The Lord Ordinary has found that the words used in the mutual settlement are not habile to include heritable property, and that the instrument must be read as confined to moveables, unless such as became heritable *destinatione* and debts heritably secured, and he founds on the case of *Brown*, M. 3440, and of *Cockburn*, Hume 131. These cases are much in point. Yet had the deceased left no other settlement of his heritable property the case might have been more doubtful than I take it to be.

This mutual settlement is essentially testamentary. The parties to it possessed no heritage. It only conveyed property which might belong to them at the death of the first deceaser, and it contained ample power to either of the spouses to alter it. There is the strongest reason to presume, both from the terms of the conveying words and from the general position of the spouses, that they had no intention of conveying heritage which might be afterwards acquired. But I am further of opinion, *first*, that this view of their intention derives great support from the special destination contained in the conveyance taken by Mr Farquharson to the properties afterwards acquired; and *secondly*, that these destinations effectually altered and evacuated the mutual disposition in so far as these subjects are concerned, even if they had been validly conveyed by that deed.

It is well fixed—and indeed was not questioned at the debate—that when a purchaser takes a title to heritable property containing a special destination, he is held by acceptance of the deed to make the destination his own. These conveyances, therefore, are equivalent to a settlement of the property by Mr Farquharson himself, and in my opinion effectually regulated the descent of these subjects at his death, and indicated very clearly his intention that they should not fall under the general settlement. The first of these conveyances being taken to himself and the pursuer in conjunct fee and liferent, for her liferent use allenarly, is of course inconsistent with the mutual disposition. In regard to the second, the title is taken to the purchaser's heirs and assignees, by which I understand future assignees or disponees of the special subjects. And as both spouses remained entirely free to alter the mutual disposition as they thought fit, this indication of intention should be, I think, conclusive. In regard to the question whether a special disposition will derogate from a prior general settlement, I think it enough to refer to the case of *Don* v. *Webster*, decided in this Division in 1876 (4 R. 101), and particularly to the very clear and lucid exposition of the law on that subject by Lord Gifford, which in all its points is very applicable to the present case. There a testator had executed a general disposition and settlement in favour of certain disponees. Several years afterwards he acquired some special heritable subjects, and took the titles to himself and his assignees and disponees, whom failing to A. B. The question arose whether this derogated from the general settlement, and the Court held that it did. Lord Gifford held, *first*, that the terms of the titles were equivalent to a settlement by the purchaser; *secondly*, after a review of the authorities, that the special title derogated from the general settlement; and *thirdly*, that the expression "assignees and disponees" did not necessarily carry the property to the persons named in the general settlement, but to any person to whom the purchaser might thereafter assign or convey the property.

The principles on which that case was decided are so clearly applicable to the present that I need not enlarge on them. In every aspect of it I think that the present claim by the widow has been effectually excluded.

Lord Young—I am doubtful on the first question—that which has been decided by the Lord Ordinary—namely, whether the words in the mutual disposition are habile to carry heritage, but on the second question I agree with your Lordship, and probably it is sufficient for the decision of the case. It was undoubtedly in the husband's power to deal with the moveable estate as he pleased, and with respect to all his heritable estate, except I think one house, he did deal with it in a manner which leaves no room for doubt as to what he intended, for when he bought it he took the title to himself and his wife in conjunct fee and liferent, for her liferent use allenarly, and to his heirs and assignees whomsoever, heritably and irredeemably, in fee. Now, there can be no doubt whether that having the power to take the title in this manner he did it, and that the effect was to limit his wife's interest to a liferent, giving the fee otherwise. The only doubt I have had on this part of the case—I confess it is a considerable doubt—relates to the house, the title to which he took to himself and his heirs whomsoever, and the doubt which I have on that is as to whether the wife is not to be regarded as his heir or assignee in respect of the general settlement. I think that point doubtful, and I am rather inclined to think, not that he did not intend her to

be assignee, but that he meant the provision in favour of his wife to be confined to the moveable estate and to the liferent use allenarly which he had specially given her in all his houses except one, and that it was not according to his intention to confer upon her the fee of the house, the title to which he took in the usual terms of style to himself and his heirs.

Therefore on the whole matter I agree with your Lordship.

LORD RUTHERFURD CLARK—I am also of opinion that the interlocutor of the Lord Ordinary should be affirmed, but my opinion is based entirely on the reasons which his Lordship gives in his note, to which I have nothing to add.

LORD CRAIGHILL, who was absent at the debate, delivered no opinion.

The Court adhered.

Counsel for Pursuer—Gloag—J. A. Reid. Agents—J. & R. A. Robertson, S.S.C.
Counsel for Defender — Campbell Smith — Rhind. Agent—J. B. W. Lee, S.S.C.

Thursday, July 19.

SECOND DIVISION.

[Dean of Guild, Glasgow.

COLVILLE *v.* CARRICK AND OTHERS.

Property—Feu-Contract — Building Restrictions —"Offices"— School.

The titles of the houses in a street in a town contained a condition, which duly entered the record, that the proprietors of the houses should have power to erect on the back-ground "such offices as they might consider necessary for additional convenience," not exceeding a certain height. One of the proprietors desired to erect on the back-ground a hall, not exceeding the stipulated height, for the purposes of the school kept by him. *Held* that the proposed building was an "office" within the meaning of the condition.

A similar hall having been in existence at the back of the next house (which had also come into the petitioner's possession) for more than twenty years—*opinions* that, in any view, the other proprietors were barred by acquiescence from challenging the proposed alterations.

Dean of Guild—Jurisdiction.

The question whether the proposed use of a building is legal under the titles—the building itself being not prohibited by them—is outwith the jurisdiction of the Dean of Guild.

The steadings in the street consisting of self-contained dwelling-houses, and known as Newton Place, in the burgh of Glasgow, were all derived from a common author. The various titles contained similar conditions and restrictions intended to secure the uniformity and amenity of the street, and, *inter alia*, it was provided that "the walls enclosing the back-ground of the steading should not exceed in height 16 feet, but the said disponees and their foresaids should have full power to erect on said back-ground such offices as they might consider necessary for additional convenience, on this express condition, that walls of such out-buildings are in no case or on any account to rise higher than 16 feet, and their extreme height should not exceed 22 feet . . . . and as they (the houses) are intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading-places of any description, nor should common stairs be erected, nor the house be divided into flats upon any pretext whatever."

In 1860 Miss Barbara Nicolson acquired the house No. 14 Newton Place, having previously occupied the same for many years as tenant. From the beginning of her occupancy to the date of this action the premises had been occupied by Miss Nicolson as a boarding-school and day-school for the education of young ladies. In 1862 Miss Nicolson, finding her business increasing, applied to the Dean of Guild Court for a lining, craving to be allowed to erect additional buildings on the back-ground, to be used for the purposes of her school, which was granted. The adjoining proprietors were called in that proceeding. These buildings still remained at the date of this application. In 1867, the business of the school still increasing, Miss Nicolson found it necessary to extend her premises, and acquired the house No. 15 Newton Place. The whole premises had, at the date of this action, been for many years occupied for the purposes of a school without any objections on the part of the adjoining proprietors.

In 1882 Nos. 14 and 15 were acquired by James Colville, who presented this petition to the Dean of Guild craving leave to take down the existing wall at the back of the house No. 14 Newton Place, and to erect a large hall at the back of the houses Nos. 14 and 15, and also to make other slight alterations on the houses. The proprietors of several of the adjoining houses opposed the petition, on the ground that "the buildings proposed to be erected on the back-ground are objectionable, in so far as they do not consist of offices for the accommodation of a dwelling-house, but of a large hall covering the entire area of the back-ground, and intended to be used, not as offices for or as part of the accommodation of the dwelling-house, but for the purposes of a school, or other purposes of business."

The petitioner pleaded—"(1) As the proposed operations will not be injurious to the public, nor to the conterminous proprietors, the petitioner is entitled to decree as craved. (2) The proposed alterations as restricted not being in contravention of the title-deeds, the lining ought to be granted. (3) Respondents are barred *personali exceptione*, having acquiesced for many years in the occupation of the petitioner's premises as a school."

The respondents pleaded—"(1) The proposed alterations upon the dwelling-house claimed by the petitioner being in contravention of the stipulations of the titles, and the respondents having a material interest to object to said alterations, the petitioner is not entitled to obtain warrant to execute the same. (2) The buildings proposed to be erected upon the back-ground of the lodging claimed by the petitioner being in contravention of the titles, and injurious to the respondents, the petitioner is not entitled to warrant as craved."