think that creates any difficulty. The meaning is perfectly clear. It means that the husband and wife together are not to defeat this contract. But if the instrument contains a purely testamentary provision which is not matter of contract at all, it makes no difference in the legal character of such a provision that the testator says he means it to be irrevocable. There is no *jus quæsitum* in anybody to prevent its being revoked, and the testator may alter his intention not to revoke, just as he might alter his intention to bequeath if nothing had been said about revocation.

The Court answered the first question in the affirmative.

Counsel for the First, Second, and Eighth Parties—Younger—Neish. Agents—W. & J. Burness, W.S.

Counsel for the Third and Seventh Parties — Craigie. Agents — Alexander Campbell & Son, S.S.C.

Counsel for the Fourth Party—Hunter. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Fifth Parties—Pitman. Agent—J. W. D. Kirkland, S.S.C.

Counsel for the Sixth Parties—Gunn. Agents—Mackay & Young, W.S.

Thursday, June 11.

SECOND DIVISION.

NEILSON'S TRUSTEES *v.* NEILSON.

Succession — Testament — Construction — Bequest of Share in Estate "Left by" Parents — Estate Falling under inter vivos Disposition by Parent to Children in Fee on Expiry of Parent's Liferent.

A testator by his last will and testament bequeathed "all my right, title, and interest, claim, and estate as one of the children and heirs of my deceased father and mother in and to the estate left by them and situated in the city of Glasgow." He did not dispose by his will of any other estate to which he was entitled.

Held (1) that the testator's will carried a share of certain heritable property to which he was entitled under an *inter vivos* disposition by his father in favour of the disponer and his wife in liferent and his children in fee, and that this share passed to the beneficiaries under the will as being property "left" by the testator's father; but that (2) the will did not dispose of a share of the same property to which the testator was entitled under the will of his brother; and that this latter share fell into intestacy and passed to the testator's heir-at-law.

William Neilson of Claddens, contractor in Glasgow, executed an *inter vivos* disposition in 1858 whereby he conveyed certain heritable subjects in Calton, Glasgow, to his wife and himself in liferent, and to trustees for behoof of his children (of whom there were eight) in fee. The principal question in the present case was whether the share of that property falling to one of William Neilson's sons fell under that son's will, which dealt solely with estate "left by" his father.

William Neilson died in 1865 possessed, *inter alia*, of heritable property in Glasgow, in addition to that which he had liferented under his *inter vivos* deed. He left a trust-disposition and settlement whereby he directed his whole estate, heritable and moveable, so far as not covered by the *inter vivos* deed, to be realised, and the residue to be divided among his whole children. He was survived by all his children, and by his widow, who died in 1881, leaving moveable estate, the residue of which by trust-disposition and settlement she directed to be divided among her whole children.

One of William Neilson's sons, Hugh Mackenzie Neilson, died in 1886, leaving a settlement under which he directed the residue of his estate, after the division of his father's and mother's estates, to be divided among his whole brothers and sisters.

Another of William Neilson's sons, John Neilson, who was resident in Galveston, Texas, U.S.A., died in 1898, leaving a will in the following terms—"After payment of all my just and lawful debts, I give, bequeath, and devise all my right, title, interest, claim, and estate as one of the children and heirs of my deceased father and mother, William Neilson and Helen Neilson, in and to the estate left by them, and situated in the city of Glasgow, Scotland, as follows, to wit—To my sister Jennett Neilson, an undivided one-eighth part thereof; to my brother James Rankin Neilson an undivided one-eighth part thereof; and the remaining three-fourths part thereof to Henrietta Magdalena Tolex and Lillie Johanna Augusta Tolex, the daughters of John Tolex of said city of Galveston, Texas, share and share alike."

All William Neilson's children survived the period of division under his *inter vivos* deed and his trust-disposition and settlement, and under his widow's settlement.

At the date of the present case the estate falling under William Neilson's *inter vivos* deed remained in the hands of the trustees thereunder in accordance with an agreement among his children. The estate falling under his trust-disposition and settlement had been divided with the exception of the share falling to his son John Neilson. The estate falling under his widow's settlement had been finally divided. Hugh Mackenzie Neilson's estate had been divided with the exception, *inter alia*, of the share to which he was entitled of the property in Glasgow falling under his father's *inter vivos* deed.

In these circumstances a special case was presented for the opinion and judgment of the Court by (1) the trustees under William Neilson's *inter vivos* disposition; (2) the trustee under Hugh Mackenzie Neilson's settlement; (3) John Neilson's immediate

younger brother as his heir-at-law; (4) the beneficiaries under John Neilson's will; and (5) John Neilson's executor.

The third party maintained that while the estate carried by John Neilson's will to the fifth party included the share falling to the said deceased John Neilson in the final division of the estate falling under the said deceased William Neilson's trust-disposition and settlement, the property in Calton, Glasgow, on the other hand, did not fall under the last will and testament, not having been "left" by the truster, but having, on the contrary, been disposed of by him during his lifetime, and that he, the third party, was entitled, as the said deceased John Neilson's heir-at-law, to the share of the said property in Calton, Glasgow, to which the said deceased John Neilson was entitled under the foresaid *inter vivos* disposition, and also to the share of the said property to which the said deceased John Neilson was entitled under the said deed of settlement by the said deceased Hugh M'Kenzie Neilson, his brother.

The fourth and fifth parties on the other hand maintained that on a sound construction of his last will and testament the said John Neilson intended it to cover the whole estate coming to him through his father or mother, whether directly or indirectly, in so far as the said estate was situated in Glasgow. They accordingly maintained that the said last will and testament carried the whole estate in Glasgow which came to the said John Neilson from his father or mother, as one of their children and heirs, including therein his share of the property in Calton, Glasgow, conveyed by the said *inter vivos* disposition, and also the further share to which he became entitled through his deceased brother Hugh M'Kenzie Neilson, and that the said property was in terms of the said last will and testament validly bequeathed to the fourth parties.

The following were the questions of law:—"(1) Does the share of the said property in Calton, Glasgow, to which the said deceased John Neilson was entitled under the said *inter vivos* disposition by the said deceased William Neilson, his father, fall into intestacy of the said deceased John Neilson, and descend to the third party hereto as his heir-at-law? or (2) Does it fall under the said last will and testament of the said deceased John Neilson, and is it thereby carried to the fourth parties? (3) Does the share of said property to which the said John Neilson was entitled under his brother, the said deceased Hugh M'Kenzie Neilson's deed of settlement, fall into intestacy of the said deceased John Neilson, and descend to the said William Neilson, the third party hereto, as his heir-at-law? or (4) Does it fall under the said last will and testament of the said deceased John Neilson, and is it thereby carried to the fourth parties?"

Argued for the first, second, and third parties—It was clear from the language employed in the will that it had been prepared by a professional man; it therefore could not be liberally interpreted as in the case of a holograph testamentary writing—*Dunsmure* v. *Dunsmure*, November 22, 1879, 7 R. 261, 17 S.L.R. 134. The *inter vivos* disposition completely divested the granter—*Robertson* v. *Robertson's Trustees*, June 7, 1892, 19 R. 849, 29 S.L.R. 752; *Smitton* v. *Tod*, December 12, 1839, 2 D. 225; there were no circumstances in the present case that could qualify that divestiture—*Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237, 12 S.L.R. 169; the property in question could not therefore be held to be within what was "left" by William Neilson. In particular, the share of that property which John Neilson was entitled to under his brother Hugh's settlement was left by that brother and not by his father.

Argued for the fourth and fifth parties—The will in question should receive a liberal interpretation. "Left" did not apply exclusively to testamentary disposition; what John Neilson intended to dispose of under his will was what he was entitled to as his father's son, whether as disponee or as heir.

LORD JUSTICE-CLERK—We are asked in this case to decide the meaning of a clause in John Neilson's will. I think that a liberal interpretation should be given to the terms of this clause, and that there is no room here for the extremely technical construction which we are asked by the first, second, and third parties to place upon it. By bequeathing as he did all his interest in the estate left by his father and mother in Glasgow, it must be held that his intention was to deal with all the estate in Glasgow which came to him in consequence of their death, including what came to him under the *inter vivos* disposition by his father. The fact of the previous *inter vivos* disposition as distinguished from *mortis causa* deeds never probably came into his mind, and in any case there is nothing to indicate that he intended to draw any distinction between what he acquired under that disposition and what he acquired under his father's and mother's wills; on the contrary, the presumption is that he intended it all to pass to the beneficiaries named in his will. I am accordingly in favour of answering the first question in the negative and the second in the affirmative.

The case is different with regard to the share of the property disponed by the *inter vivos* disposition to which John became entitled under the deed of settlement executed by his brother Hugh. His title to this share is derived solely from Hugh and not in any sense from his father, and it does not fall under the category of "estate left by his father" to which John has a right as "one of his children and heirs." I am accordingly of opinion that this estate does not fall under John's will, and therefore that the third question should be answered in the affirmative and the fourth in the negative.

LORD YOUNG—I am of the same opinion. It so happened that John Neilson's share of the property in Calton, Glasgow, came to

him under the *inter vivos* disposition executed by his father. Had there been no such disposition and had the property fallen to be dealt with according to the rules of intestate succession, he would still have been entitled to it as his father's heir-at-law. In that case it could not have been denied that, as one of his father's heirs, he had acquired estate "left" by his father, and that accordingly such estate was included in the terms of the will before us. I can see no distinction between such a case and the case now submitted to us, and I agree with the view as to the construction of the will expressed by your Lordship.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court answered the first and fourth questions in the negative, and the second and third questions in the affirmative.

Counsel for the First and Second Parties—Skinner. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Third Party—Campbell, K.C.—M'Clure. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Fourth and Fifth Parties—Salvesen, K.C.—D. Anderson. Agent—William Fraser, S.S.C.

Friday, June 12.

FIRST DIVISION.

[Lord Pearson, Ordinary.

TURNBULL *v.* NORTH BRITISH RAILWAY COMPANY.

Expenses — Jury Trial—Fees to Medical Witnesses.

An action of damages for personal injuries was settled during the trial after certain evidence had been led by the pursuer but before any of the medical witnesses had been examined. In terms of the settlement the pursuer was found entitled to expenses, and the account thereof was remitted to the Auditor to tax and report.

On a consideration of objections to the Auditor's report, in respect that, of the sums charged for four medical witnesses, he had disallowed *in toto* the sums charged as fees for two medical witnesses, and also the sums charged for drawing precognitions of two medical witnesses, and had reduced the sums charged as fees for two medical witnesses to £4, 4s. each, *held* that the Auditor in his report had correctly followed the rule in *Watson* v. *The Caledonian Railway Company*, June 22, 1901, 3 F. 999, 38 S.L.R. 717, as to the fees to be allowed to medical witnesses, and note of objections *refused*.

James Turnbull, sometime warehouseman, 60 West End Park Street, Glasgow, raised an action against the North British Railway Company to recover £5000 damages for personal injuries sustained by him in an accident on the defenders' railway on August 30th 1902.

An issue was adjusted, and the case went to trial before a jury on March 26th 1903.

At the trial certain evidence was led for the pursuer, but before any of the medical witnesses had been examined the action was settled on condition of the defenders paying £1150 and expenses, and the jury of consent returned a verdict in favour of the pursuer for £1150.

On May 19th 1903 the Court applied the verdict, and found the pursuer entitled to expenses, and remitted the account thereof to the Auditor to tax and to report.

After the accident the pursuer had been attended in the hospital throughout his illness by Dr Knox and Dr Boyd, who were both in attendance as witnesses at the trial. He had also been examined and reported upon by Dr Beaton. Some time before the trial the pursuer had been examined by Professor Annandale and Dr Murray, who were also in attendance at the trial to give evidence for the pursuer.

The Auditor having made his report on the pursuer's account of expenses, the pursuer objected thereto in so far as the Auditor had disallowed partially or in whole the following items in the pursuer's account of expenses:—

"1903

Jan. 27.	Framing following precognitions—	Taxed off.	
	Dr Boyd - - - - -	£1 4 0	£1 4 0
	Dr Knox - - - - -	2 16 0	2 16 0
	Making three copies of precognitions -	1 16 0	1 16 0
March 26.	Paid witnesses per Schedule—		
	Dr Knox, Prof. of Surgery, Glasgow, 1 day - - - - -	10 17 6	10 17 6
	Dr Boyd, Glasgow, 1 day - - - -	7 14 6	7 14 6
	Dr Murray, Surgeon, Alexandra Hospital, Glasgow - - -	10 17 6	6 6 0
	Professor Annandale, Edinburgh, 1 day	15 15 0	11 11 0
		£51 0 6	£42 5 0"

The Auditor allowed fees to Dr Knox and Dr Beaton for reports of examination of pursuer prior to the raising of the action, and the agent's charge relating thereto, and also a fee to Dr Boyd for attending an examination of the pursuer along with the defenders' doctors, and the agent's charges relating thereto, as well as the agent's charges in connection with the examination of the pursuer and the reports thereon by Dr Murray and Professor Annandale.

Argued for the pursuer and objector—The medical fees charged were in the circumstances fair and reasonable and should be allowed. The Auditor had allowed only fees to two medical men, viz., four guineas each, and had disallowed *in toto* the fees to the other medical men who were properly in attendance as witnesses at the trial. This allowance was entirely inadequate, having