Saturday, July 22.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

CORBIDGE (MAY SOMERVILLE'S TRUSTEE) *v.* FRASER AND OTHERS (MAY SOMERVILLE'S TRUSTEES) AND OTHERS.

Husband and Wife—Divorce—Bankruptcy—Postnuptial Contract between Husband and Husband's Father in Favour of Trustees for Wife and Children—Donatio inter virum et uxorem—Revocation.

A, while solvent, by a deed of settlement to which his father was a party, made shortly after his marriage, assigned to trustees his interest in the marriage-contract of his parents amounting to £15,000, for payment of the income to himself during his life, and after his death to his wife should she survive him, this provision to be alimentary and in full of terce or *jus relictæ*, and subject to forfeiture of one-half in the event of her re-marriage. On the death of the survivor of the spouses, or on the death of any second wife on whom A might confer a life-rent, the trustees were directed to hold the fee for the children of the existing or any future marriage, and failing issue for A's heirs *in mobilibus*. A's father consented to £1000 being raised out of the estate to pay A's debts, and bound himself to make an annual allowance for the maintenance of A's wife and children. Ten years after executing the deed A became bankrupt, and shortly after was divorced by his wife. In an action at the instance of the trustee in A's bankruptcy, to recover part of the income, or alternatively part of the fee, for the creditors—*held* (1), *qua* the income, that the deed was contractual as between A and his father and was not reducible, and (2), *qua* the fee (*per* Lord Skerrington, Ordinary) that the gift to the children, not being testamentary, was irrevocable, and (*per* the First Division) that till the death of the wife it was premature to decide whether it was revocable or not.

Cooper Corbidge, C.A., London, trustee in the bankruptcy of Samuel W. May Somerville, Bishops Waltham, Southampton, *pursuer*, brought an action against (*a*) William Stuart Fraser, W.S., Edinburgh, and others, trustees under a deed of settlement executed by the bankrupt about ten years prior to his bankruptcy and by John May Somerville, his father; (*b*) Mrs Caroline Smith or May Somerville, formerly the bankrupt's wife, who had obtained a divorce from him; (*c*) Dolores May Somerville, the pupil child of the marriage; and (*d*) the bankrupt himself for any interest he might have, *defenders*. In the action the pursuer sought declarator that the provisions in the above-mentioned deed of settlement in favour of the bankrupt's wife in the event of her surviving him, and in favour of the child or children of that or any future marriage, were "in excess of reasonable and moderate provisions made *stante matrimonio* by a husband and father for the benefit of his wife and children," "having regard to the amount of the trust funds falling under the trust" and "the position and circumstances" of the bankrupt and the beneficiaries under the trust, and that the trust funds *quoad excessum* were available to the pursuer as trustee in the bankruptcy for the purpose of satisfying the claims of creditors and the expenses of the bankruptcy. There were further conclusions that the provisions in question were in excess by a certain capital sum, or alternatively by a certain proportion of the income, and for payment as to these sums, and for the reduction of the deed of settlement *quoad excessum*. There were also conclusions for count and reckoning, and by amendment in the Inner House a declaratory conclusion to the effect that the deed of settlement, so far as regarded the provisions for the disposal of the fee or capital, was testamentary and revocable and had been revoked by the bankruptcy, and that the right to the fee or capital had been transferred to and become vested in the pursuer as trustee for the creditors without prejudice to and under reservation of the income in favour of the defender Mrs Caroline Smith or May Somerville.

The defenders pleaded—"(2) The said provisions in favour of the defender Mrs Caroline Stuart Smith or May Somerville, and the child or children of the defender S. W. May Somerville, not being unreasonable or excessive in amount, are not reducible at the instance of the pursuer, and these defenders are entitled to be assoilzied from the declaratory and reductive conclusions of the summons. (3) The said provisions having been granted with the consent of the said John May Somerville, and his consent having been necessary to enable them to be granted, and the said John May Somerville having given valuable consideration for the same, they are not reducible. (4) The said provisions not being reducible to any extent, the defenders, the trustees nominated under the said deed of settlement, should be assoilzied. . . (5) The said provisions being declared to be alimentary, and not alienable or affectable by the diligence of the creditors of the defender S. W. May Somerville, and having been granted with the consent of Mr John May Somerville, such consent being necessary to enable them to be granted, and the said John Somerville having given valuable consideration for the same, the pursuer is not entitled to payment of the income of the trust funds between the date of the bankruptcy of the defender S. W. May Somerville and the date of the decree of divorce obtained against him." And added by amendment—"(6) The deed of settlement in so far as regards the provisions for the

disposal of the fee or capital of the trust funds contained in the third purpose thereof, not being testamentary or revocable, and not having been revoked by the bankruptcy of the defender Samuel Wallace May Somerville, or otherwise, the pursuer is not entitled to decree of declarator and reduction as concluded for in the third conclusion of the summons."

W. A. Fleming, Esq., Advocate, was appointed *curator ad litem* to Dolores May Somerville, the pupil child of the marriage, and lodged a minute craving to be sisted as a defender, adopting the defences for the other defenders and reserving his right to be separately represented and heard should the pursuer's contention as to the liability of the trust funds be upheld, and in that event to maintain that the income was primarily liable.

The *facts* of the case appear from the opinion of the Lord Ordinary (SKERRINGTON), who on 15th December 1910 appointed the trustees to lodge an account of the estate and their intromissions therewith.

Opinion.—"The pursuer is the trustee in the bankruptcy of Samuel Wallace May Somerville, who was adjudged bankrupt in the County Court of Hampshire at Southampton on 3rd January 1910. Although Mr Somerville was made bankrupt in England, his domicile of succession was in Scotland, as he was divorced for adultery on 18th June 1910 by decree of the Court of Session, the attention of the Lord Ordinary having been specially directed to the question of domicile. The pursuer alleges that the estates of the bankrupt fall short of the sum required to meet his debts and the expenses of the bankruptcy by £3000. He accordingly endeavours in this action to make available for the purpose of the bankruptcy certain funds which the bankrupt placed in trust in the year 1900 as a provision for his wife if she should survive him, and for his children if they should survive their parents. In the ordinary case the income of the trust estate would have been available for payment of the bankrupt's debts notwithstanding that he settled it upon himself as an alimentary provision. Owing to the divorce, however, his liferent has come to an end. In these circumstances the pursuer maintains that the provisions by Mr Somerville in favour of his wife and children were and are excessive and unreasonable, and that, if these provisions are restricted to a reasonable amount, a sufficient sum of capital or of income will be set free for the purposes of the bankruptcy. The compearing defenders are the trustees under the deed of settlement, Mr Somerville's former wife, and the only child of the marriage, to whom a curator *ad litem* has been appointed.

"The deed of settlement was executed by Mr Somerville of the first part, and by his father John May Somerville of the second part, on 28th December 1900. It recites the antenuptial contract of marriage entered into between Mr Somerville's parents, the death of his mother, and the fact that he was the only child of the marriage. After narrating Mr Somerville's marriage on 20th July 1899, and the fact that no provision had been made by him, by antenuptial contract or otherwise, for his wife or children, it proceeds—'And whereas it is right and proper that he should now make such reasonable provision for her and them as his circumstances will permit: And whereas the second party is desirous that such provisions should now be made by the first party, and has therefore agreed, in consideration of and as a condition of the first party's doing so, to grant the undertaking by him, also after written, for the more immediate benefit of the first party, his wife, and children; and now seeing that the parties hereto, acting on independent legal advice, have for the purpose of carrying this arrangement into effect, agreed to grant these presents as after written.' Upon this narrative Mr Somerville assigned to trustees his interests under the provisions of the marriage-contract of his parents, and directed the trustees to pay the whole free income to himself during his life, and after his death to his wife if she should survive him during her life, as a purely alimentary provision, provided always that she should be bound to maintain and educate his issue in a manner suitable to their station in life, and that in the event of her entering into a second marriage the liferent provision in her favour should be restricted to one-half. On the death of the survivor of Mr Somerville and his wife, or in the case of his second marriage, on the death of any other wife on whom he might confer a liferent of the trust funds, the trustees were directed to hold the fee or capital for behoof of Mr Somerville's child or children by his existing or any future marriage. Failing issue of Mr Somerville becoming entitled to the trust funds, the trustees were directed to hold the same for his heirs *in mobilibus*. After the usual clauses appropriate to a trust conveyance the deed proceeds—'And in respect that the second party has assented to a sum being raised out of the trust estate held under the said contract of marriage to pay certain debts, expenses of travelling, and other liabilities of the first party incurred and that may hereafter be incurred, and to reimburse the second party in certain outlays made by him for or on behalf of the first party, the first party hereto authorises the trustees under said contract of marriage to raise and pay to the second party, out of such part of the trust funds under their charge as the second party may point out, a sum or sums of money not exceeding £1000 in all. . . . In the second place, the second party, in consideration of the foregoing settlement by the first party, hereby binds himself during his, the second party's, life or until such time during the second party's life as the means of the first party shall be sufficient to maintain himself and his wife and family, to provide an allowance of £200 per annum, and to pay the same by monthly or quarterly instalments to the said Mrs Caroline Stuart Smith or May

Somerville during her life, and after her death to the first party or to or for behoof of the first party's children, as the second party may think best.' These provisions were declared to be in full of terce, half or third of moveables, legitim, and other claims competent to Mr Somerville's wife and children. The parties further agreed that their rights and obligations and those of the beneficiaries, and generally the construction of the deed, should be regulated by the law of Scotland. Mrs Somerville did not sign the deed either on her own behalf or as representing the children of the marriage. Accordingly she and they remained free to claim their legal provisions if these should prove to be larger than the conventional ones. As already stated there is one child of the marriage. The trust funds amount to about £15,000 over and above the £1000 raised in 1900. They came into the possession of the trustees on the death of Mr Somerville senior in 1908.

"The first question which was debated was whether the deed of settlement expressed a contract between Mr Somerville and his father. Although it is not in the usual form of a contract, I am of opinion that both in form and in substance it is a contract. The provisions by Mr Somerville in favour of his wife and children were granted not merely because he considered it 'right and proper' to make them, but also because his father had stipulated that he should do so, and had agreed to give something to his son in return. The defenders' counsel did not maintain that the consideration given by Mr Somerville senior was equivalent in value to the provisions by Mr Somerville in favour of his wife and children. If the consideration had been equivalent, Mr Somerville senior might have been regarded as the settler according to the decision in *Ruthven* v. *Drummond*, 1908 S.C. 1154. In that view the restriction of Mr Somerville's liferent to an alimentary interest might have been valid, and it might have been immaterial whether the latter was or was not solvent at the date of the deed. As matters stand, however, Mr Somerville was the settler, and the contractual character of the deed does not exclude inquiry as to whether the provisions were reasonable in amount, any more than if some consideration, though an inadequate one, had been given by Mrs Somerville herself, and not by his father—See Fraser on Husband and Wife, ii, p. 942. But the fact that Mr Somerville received some consideration from his father has a bearing on the question whether the provisions were in the whole circumstances reasonable. The pursuer's counsel pointed out that by the marriage contract of Mr Somerville's parents Mr Somerville senior had bound himself to maintain and educate the child or children of the intended marriage suitably to their rank and station in life until the term of payment of their provisions, or until they should be otherwise provided for, or until they should be in a position to maintain themselves. This obligation simply expresses the ordinary obligation of a father, and it would not support a ranking in bankruptcy (Fraser, ii, 1364 and 1382). It does not, in my opinion, seriously detract from the value of the obligation undertaken by Mr Somerville senior in the deed of settlement to pay a definite annuity to his daughter-in-law. Further, Mr Somerville senior gave up his right to enjoy as liferenter the interest of £1000.

"The next legal question which was debated was whether a provision by a father to a child is revocable by the granter or is challengeable by his creditors so far as excessive, provided (1) that the granter was solvent at the time when he made the provision and that he did not thereby make himself insolvent, and (2) that the provision was constituted by a conveyance duly completed in favour either of the child or of trustees for his behoof. From this latter category I exclude cases where provisions intended to be testamentary and revocable are constituted by an *inter vivos* trust deed. It was not maintained that the provisions of the deed of settlement were of this character. I am unable to discover any legal principle for holding that a duly completed provision or gift made by a solvent father in favour of his child is revocable by the donor in whole or in part. Equally I can discover no legal ground for holding that such a provision or gift can be challenged by the father's creditors in whole or in part. It has been repeatedly decided in cases under the Act 1621, cap. 18, that a gratuitous alienation in favour of a conjunct and confident person is not challengeable provided the granter was solvent at the time when he made the alienation. There is nothing in the institutional writers which supports the pursuer's contention on this point. See Stair, i, 9, 15 (*Thirdly*), and Ersk. iv, 1, 32-34. The pursuer's counsel referred to dicta of eminent judges as showing that provisions to children were in the same position as provisions to wives, and were revocable so far as excessive, but he quoted no decision to that effect. These dicta may be explained in part by the fact that in the cases referred to it was not necessary to distinguish between the provision to the wife and the provision to the children, both being held to be reasonable; and in part by the fact that where a provision to a child is constituted merely by an obligation in his favour entitling him to rank with ordinary creditors, it may not be effective except in so far as rational and moderate—see Fraser on Husband and Wife, ii, p. 1503. Although there is all the difference in the world between a gift which is complete and one which is incomplete, it must be remembered (as Lord Watson pointed out in *Mackie* v. *Gloag's Trustees*, 11 R. (H.L.) 16) that after the device of a trust had been generally adopted in marriage contracts, there was a tendency to extend to such trusts legal rules which were properly applicable to marriage contracts in the earlier form. Whatever may be the reason, judicial opinions have differed upon the question whether a post-nuptial

trust by a solvent person in favour of children is or is not challengeable by creditors—see *Morrice* v. *Sprott*, 1846, 8 D. 918. In the absence of clear authority to the contrary, I hold that a gift either to a child or to a stranger is irrevocable and unchallengeable if the granter was solvent and the gift was duly completed. Accordingly if this were the only question in the case I should dismiss the action. If, however, there is to be an inquiry as to whether the provision in favour of Mrs Somerville is reasonable, or as to Mr Somerville's solvency in 1900, it would probably be in the interest of both parties, and would not add to the expense, if the inquiry were extended so as to include the question of the children's provisions.

"As regards the provision in favour of Mrs Somerville, there is no doubt about the law. A provision to a wife is just a gift in so far as it exceeds what is reasonable in the circumstances, and to that extent it can be revoked by the husband and is *ipso jure* revoked by sequestration. Whatever may be the effect of an English bankruptcy I assume that any power of revocation which was vested in the bankrupt may now be exercised and has been duly exercised by the pursuer. Whether a provision is or is not reasonable is a question of fact, and I certainly cannot decide it in favour of the pursuer without a proof. Further, I do not think that it would be safe to decide it against him by holding that his averments are irrelevant. As the question was carefully argued, and as both parties wished to avoid the expense of a proof, I may say that my impression is that the provision to Mrs Somerville, though liberal, was not and is not unreasonable or excessive. Of course it is unreasonable that she should enjoy the whole of her husband's income while nothing is left for him or his creditors, but the question must be considered as if he were actually dead. Looking to the position in life of the parties both in 1900 and in 1910 I do not regard an income of about £500 a-year as excessive for the widow of an officer who is burdened with the support of one child and who will forfeit one-half of her annuity if she marries again. At the date of the deed Mr Somerville was entitled to about £16,000 under his parents' marriage contract provided he survived his father. The defenders say, and it seems probable, that the greater part of this money having been settled by his deceased mother was vested in him, and they also allege that he had an indefeasible right, subject to his father's life interest, to a further sum of £5000 under another trust. It would seem, therefore, that Mr Somerville had in 1900 a vested right to about £17,000, of which one-third or one-half, as the case might be, would be available as *jus relictæ* to his widow. Further, if he survived his father (as he did) he would become absolutely entitled to about £15,000 under the marriage contract (over and above the £1000 raised in 1900) and to £5000 under the other trust, making £20,000 in all. Looking to the fact that as an only child Mr Somerville might fairly expect to succeed to something more under his father's will, it would not, I think, have been excessive on his part if he had settled upon his widow a capital sum of £10,000, being the maximum *jus relictæ* to which she would become entitled if he survived his father and died immediately thereafter. If, as happened, a child survived him, the *jus relictæ* would only be one-third, but in fixing a conventional provision it would be reasonable to give the widow one-half under burden of maintaining the child or children of the marriage. Instead of a capital sum of £10,000 Mrs Somerville has received only an annuity of about £500 terminable on her marriage. Accordingly if her provision is excessive, the excess consists not so much in the amount as in the fact that the provision was absolutely secured to Mrs Somerville against all contingencies, while she was left free to claim *jus relictæ* if at the end of the day it should suit her to do so. This criticism, however, may be made in every case where a post-nuptial provision to a wife is made by a unilateral deed. So far I have not taken into account the fact that Mr Somerville received some consideration from his father—a fact which makes it still more difficult to hold that the provision was excessive.

"At this stage I shall dispose only of the fifth conclusion and appoint the defenders, the trustees of the deed of settlement, to lodge an account. The pursuer is clearly entitled to an account and also to payment of any income which vested in the bankrupt before the divorce. I shall continue the case in order that the parties may consider as to further procedure, and in particular as to the question of Mr Somerville's alleged insolvency in the year 1900. The discussion before me proceeded on the assumption that he was then solvent."

On 6th April 1911 the Lord Ordinary assoilzied the compearing defenders from the above narrated declaratory and petitory conclusions of the summons.

Opinion.—"The parties have now settled by one joint minute the accounting question under the fifth conclusion, and by another joint minute they have agreed upon certain facts and have renounced further probation. The most important of these facts is that Mr Somerville was solvent in 1900, at the date when he executed the deed of settlement. It follows from the opinion which I have already expressed, and to which I adhere, that the provisions thereby made by Mr Somerville for his children cannot be challenged as excessive, and that the whole capital of the trust estate must remain in the hands of the trustees of the deed of settlement, at any rate so long as it is possible that the only child of the marriage may survive to take a vested interest in the fee. The pursuer's counsel invited me to consider what would be the result if Mr Somerville entered into a second marriage and had further children who might claim a share of the fee in terms of the deed. He argued that the pursuer as representing Mr Somerville's creditors would have a right which was preferable

to that of children who were not in existence at the date of the bankruptcy. It is impossible for me, in the absence of the proper contradictors, to decide any such hypothetical questions, but I think it right to point out that any decision which I may pronounce under the conclusions of the present action will not prejudice the right of the pursuer in the event of a change of circumstances, such as the death of Mrs Somerville or of her child, to maintain that the income or the capital of the trust estate has not been effectually disposed of by the deed and therefore falls under the bankruptcy.

"As regards the question whether the provision of income in favour of Mrs Somerville can be cut down as being excessive, I adhere in substance to my former opinion. It seems to me to be very difficult to separate the two provisions and to hold that the one is valid and the other excessive and therefore partially invalid. By divesting himself of the fee of the greater part of his prospective fortune in favour of trustees for his children, Mr Somerville to that extent depleted any possible *jus relictæ* fund so long as any child lived who might acquire a vested right to the fee of the trust estate. It is the existence of the deed of settlement rather than Mr Somerville's comparatively trifling debts which excludes Mrs Somerville from any right to *jus relictæ*, though technically her legal rights as a widow are still open to her. Accordingly I do not think that it is legitimate to compare Mrs Somerville's conventional provision with her legal provision, which latter is of no value as events have turned out. Of course, Mr Somerville retained out of the settlement a sum of £5000 which would have been liable to *jus relictæ* if it had existed at the date of the divorce. The probability that he would spend any money under his control was one of the reasons which made it proper that he should make an irrevocable provision for his widow and children. The purpose of the deed of settlement was to confer upon Mr Somerville's widow and children irrevocable and secured provisions out of a fund amounting to £22,000, which would come into his possession if he survived his father. It consisted of £5000 from a family trust, and of £18,000 under his parents' marriage contract, less £1000 which was raised in order to pay Mr Somerville's debts and provide an outfit. As in fact he survived his father I think in considering what is a reasonable provision for Mrs Somerville that one is entitled to assume that one-third of this fund, or a capital sum of £7300, would not have been excessive or unreasonable in the circumstances. As events have turned out, Mr Somerville's conventional provision consists of a liferent of just double that sum or £14,500, which yields a free income of about £550; but the liferent is burdened with the maintenance and education of one child—a daughter, ten years of age, and it is also restrictable to one-half in the event of Mrs Somerville remarrying. As I read the deed, she will, in this latter event be freed from the burden of maintaining her child, which will fall to be paid out of the other half of the income of the trust. Even so, Mrs Somerville's conventional provision will in that event compare unfavourably with a provision of a capital sum of £7300. On the other hand, after making allowance for the maintenance and education of her child, Mrs Somerville's income, so long as she remains unmarried, is decidedly larger than if she had received a capital sum of £7300 and spent it in buying a life annuity. There is also the chance that her daughter may marry in a few years, and so relieve Mrs Somerville of the obligation of maintenance. I put aside the contingency of the child's predeceasing her mother, as in that event the capital of the trust estate would probably fall to the pursuer under burden of Mrs Somerville's liferent. Although I think that, as events have turned out, Mrs Somerville's provision is a very liberal one, there is one consideration which, in my opinion, makes it impossible to hold that it is so unreasonably large that it can be cut down upon the principle that the excess was a gratuitous gift from a husband to a wife. The provision to Mrs Somerville was to some extent at least purchased by Mrs Somerville's father and paid for in hard cash. While the provision to Mr Somerville's wife and children was to some extent conditional on his surviving his father and so succeeding to the whole £22,000, the pecuniary considerations given by Mr Somerville senior were immediate and unconditional, and were of very great value to Mr Somerville at the time, as they enabled him to make a new start in life. Though it so happened that Mr Somerville senior survived only until 1908, he might have lived considerably longer, as he was born in 1840, in which case the consideration given by him to his son would have been proportionately greater. In coming to the conclusion above expressed I have tried to give due weight to the legal view contended for by the pursuer's counsel to the effect that one must in cases of this kind have regard to the date of the dissolution of the marriage rather than to that of the deed of provision. See per Lord Gifford in *Mitchell* v. *Mitchell's Trustees*, 4 R. 806."

The pursuer reclaimed, and argued — Post-nuptial provisions to a wife and children had always been subject to be cut down at the instance of creditors *quoad excessum*. There was no difference in the position of the wife and of the children. This was really a unilateral deed granted by the husband in favour of the wife—Stair, i, 9, 15; *Morrice* v. *Sprot*, June 27, 1846, 8 D. 918; *Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800, 14 S.L.R. 515; *Low* v. *Low's Trustees*, November 20, 1877, 5 R. 185, 15 S.L.R. 111. At the time he executed the deeds the husband had no means of his own. The father's provision of £200 a-year was an indication that he, at any rate, thought that sufficient to keep the wife and family respectably alimented. The effect of the deed was that the whole fee was tied up for the children and the whole income for the wife, and there was

nothing left for creditors, though the effect of the deed was to make the wife and family better off than they were before. Such an allowance to the wife could not, however, receive effect on divorce in a question with creditors—*Johnstone Beattie* v. *Johnstone*, February 5, 1867, 5 Macph. 340, 3 S.L.R. 203, *per* Lord Curriehill; *Dawson* v. *Smart*, July 20, 1903, 5 F. (H.L.) 24, 40 S.L.R. 879. That it was true was a case of divorce for desertion, but divorce for adultery was in the same position—*per* Lord Robertson *ibid.*; *Somervell's Trustee* v. *Dawes*, July 10, 1903, 5 F. 1065, 40 S.L.R. 802. The husband by the divorce made over his liferent to his wife, and he could be interpelled from doing so by his creditors. At the time the bankruptcy took place there was vested in the husband his life interest in these funds, and that passed to his creditors. It was undecided whether the doctrine of civil death applied to a post-nuptial deed of this kind, which was neither a legal nor a conventional provision. While it might be that there was forfeiture as between the spouses, this did not apply to creditors. If the deed were to be treated as a contract between father and son, it must be construed according to the intention of the parties. The intention here clearly was that the son should have the liferent till his actual death, and not that he should forfeit it by dissolution of the marriage by divorce. There were good grounds for maintaining that this was really a testamentary deed, and therefore revocable—*Byres' Trustees* v. *Gemmell*, December 20, 1895, 23 R. 332, 33 S.L.R. 236. In the present deed there was nothing vested in the granter which he was entitled to convey. He had rights under his parents' marriage contract which were contingent on his survivance. [Lord Kinnear referred to *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, 9 S.L.R. 29.] Here the first trust purpose was for the liferent of the granter himself, whereas in none of the cases cited *contra* was there anything making the granter the sole beneficiary by giving him the whole liferent during his life—*Forrest* v. *Robertson's Trustees*, October 27, 1876, 4 R. 22, 14 S.L.R. 82. A deed which appeared on the face of it to create a direct interest might be testamentary. There was further in the deed an option as to election of legitim or the provisions of the deed, and this favoured the presumption of its testamentary character—*Peddie* v. *Peddie's Trustees*, February 6, 1891, 18 R. 491, 28 S.L.R. 336.

Argued for the respondents—The present deed made a reasonable provision for the wife and was not reducible. *Mitchell* v. *Mitchell's Trustees* (*cit. sup.*) had nothing to do with the present case and was a case of adequacy of consideration. The proper test was not the time of the bankruptcy, but the time the provision was made. This was a reasonable provision looking to the social position of the parties, and was only a portion of what the husband might become entitled to. Divorce did not give the creditors any better right than the bankrupt. The guilty spouse was personally barred from setting up his own rights as against the innocent spouse, because he had by his fault deprived the other spouse of the *communio bonorum*, and his creditors could not come forward and present a higher claim than he had—*Johnstone Beattie* v. *Johnstone* (*cit. sup.*), *per* the Lord President and Lord Deas. The trustee in bankruptcy could only take *tantum et tale*. It was, further, not a unilateral deed but a bargain between father and son. The purposes of the deed were not testamentary. There was no reservation of power to revoke or to deal with the funds and the deed was a delivered deed. It had none of the *indicia* of a testament given in the decided cases—*Smitton* v. *Tod*, December 12, 1839, 2 D. 225; *Sommerville*, May 18, 1819, F.C.; *Turnbulls* v. *Tawse*, April 15, 1825, 1 W. & S. 80; *Allan* v. *Kerr*, October 21, 1869, 8 Macph. 34, 7 S.L.R. 9. But if the deed were irrevocable by the husband, the trustee could do nothing. The provision was further not testamentary and was not revocable—*Morrice* v. *Sprot* (*cit. sup.*) It was an assignation of a definite estate which had come to the bankrupt during his life and in which trustees had become vested and completed a title—*Robertson* v. *Robertson's Trustees*, June 7, 1892, 19 R. 849, *per* Lord Kyllachy, p. 851, 29 S.L.R. 752.

At advising—

Lord President—The Lord Ordinary, in his first opinion in this case has given a very clear and succinct account of the facts, and I do not think it necessary to repeat them. I simply adopt his words. Upon the whole matter I am of opinion that the Lord Ordinary is right, and I have only a very few words to add to what he has said in his two opinions. I shall put very shortly the ground upon which I agree with him.

The trustee for the bankrupt here wishes to have a payment of the income which is settled upon the wife in the event of the husband's death. The husband is not dead, but he has been divorced, and it is not denied that in cases of all marriage settlements divorce operates temporarily as death. Now the trustee seeks to have admission to the benefit of this income upon the ground that the provision made to the wife is extravagant. I do not think, under the circumstances of the case, that it is really necessary to go into that, although if I had to do so I should agree with the Lord Ordinary, who thinks that it is not extravagant. But the ground upon which I am prepared to decide the case without that is this—that I do not think that the doctrine as to donation *inter virum et uxorem* truly applies to this case at all. I look upon the provisions to the wife under these circumstances, not as a donation from the husband, but as pactional between the father and the husband, and accordingly, as is admitted, there being no question of insolvency on the husband's part at the time of the constitution of the contract, I

do not think that the doctrine of donation *inter virum et uxorem* ever can have effect here because I do not look upon it as a donation. I think that what the husband gave to the wife was a consideration not merely with the opposing consideration of the marriage but with the opposing consideration of what the father proposed to do in the way of making an allowance.

As regards the question of the capital of the children, I do not think it necessary to go into that at all at this present moment. The Lord Ordinary has held that the provision is perfectly good, and I am far from saying that I am of a different opinion. I do not see why a man who is solvent may not put out of his power part of his funds by putting them into the hands of trustees for behoof of his children. Of course everything depends upon whether what is done is done as an *inter vivos* conveyance or merely with the view of securing testamentary provisions. If they are merely testamentary, they would be revoked by bankruptcy. But I do not think it is necessary to decide which character those particular arrangements hold, because the time has not yet come for that. The whole of the income is quite properly paid to the wife, and it may be that the question will never arise, because we do not know yet whether there will be a child to inherit the money or not.

Accordingly upon the whole matter I think that the Lord Ordinary's interlocutor should be adhered to.

LORD JOHNSTON—I concur with your Lordship, and I would only add that I doubt much whether the case has been properly presented to us. On the face of the papers I can see no grounds for the assumption which has been made that the bankrupt was really domiciled in Scotland, and if he is not, our doctrine of donation *inter virum et uxorem* cannot be appealed to.

With regard to the children, the case takes a totally different complexion from that which it had before the Lord Ordinary, because a new statement has been made and a new plea has been added raising a question which was not before him, namely, whether *quoad* the children the provision in the post-nuptial settlement was not testamentary. That question I agree with your Lordship should in the circumstances be reserved.

LORD MACKENZIE—I agree with your Lordship in the chair. As regards the liferent, I understood there was an attempt to argue that in construing this settlement—what was called a settlement, what is in reality a contract—the divorce was not to be taken as an equivalent to death. That contention, I think, is quite untenable in view of what was decided in the case of *Beattie* v. *Johnstone*, 5 Macph. 340.

As regards the fee, the trustees who were appointed are vested in the trust funds. They must hold them in the meantime in order to see whether the child, Dolores May Somerville, who is in pupillarity and who is represented in this case by a curator *ad litem*, survives to take a vested interest or not. As the Lord Ordinary points out, there may be certain questions in the future, but these do not arise just now, and the reasons assigned by your Lordships are quite sufficient to prevent the pursuer getting any decree at present.

LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuer and Reclaimer—M'Lennan, K.C.—Dallas. Agents—Forbes, Dallas, & Company, W.S.

Counsel for Defenders and Respondents—Fleming, K.C. — Howden. Agents—Fraser, Stodart, & Ballingall, W.S.

Monday, July 17.

FIRST DIVISION.

TURNBULL'S TRUSTEES *v.* TURNBULL'S TRUSTEES.

Succession—Special Destination—Revocation—Effect on Special Destination of General Disposition.

By his settlement a testator revoked "all and every previous will or settlement" made by him, and conveyed to his daughter his whole property, means, and estate, heritable and moveable, real and personal, wherever situated or by whom held. At different periods during his life he had settled particular properties and certain policies of insurance upon his daughter, partly for her own behoof and partly in trust for her children. At the time of his death the deeds of settlement relating thereto were in the hands of his agents—all of them being testamentary and revocable. In addition to the property so destined the testator left considerable estate, none of which, however, was in other hands than his own.

In a special case, *held* that the special destinations had been effectually revoked by the terms of the settlement.

On 27th October 1910 Mrs Elizabeth Cochran Turnbull or Robertson, wife of and residing with Hugh Robertson, 16 Portland Road, Kilmarnock, and others, trustees acting under the holograph settlement of the late Andrew Turnbull, Kilmarnock, dated 16th February 1907, and with relative codicils registered in the Books of Council and Session, 2nd February 1910, *first parties;* James Dunbar Mackintosh, solicitor, Kilmarnock, and others, trustees appointed by a holograph letter written by the said Andrew Turnbull to his daughter the said Mrs Elizabeth Cochran Turnbull or Robertson, dated 13th November 1900, and her reply thereto dated 14th November 1900, *second parties;* and the said Mrs Elizabeth Cochran Turnbull or Robertson, and the said Hugh Robertson as her curator and administrator-in-law, *third parties*, presented a Special Case, in which