his property which is accessible to children from the road, it may be anticipated that they will amuse themselves with it, and climb on it, and swing it, unless it is made childproof by one means or another. But to deduce from this that the owner is bound to anticipate that children will fall from it or get knocked down by it or get squeezed in it, and therefore to make special provision against anything of that kind, is a proposition which I do not think the authorities require me to accept, and which I feel sure cannot be accepted, as a general proposition without grave injustice.

In my view the Lord Ordinary took a proper course in refusing an issue in this case.

The result of the majority opinion will be that the issue will be approved.

LORD CULLEN did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary, approved of the issue, and remitted to Lord Morison to proceed.

Counsel for the Pursuer and Reclaimer—Fraser, K.C.—Cooper. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for Defenders and Respondents—MacRobert, K.C.—Marshall. Agents—W. B. Rankin & Nimmo, W.S.

Thursday, July 20.

FIRST DIVISION.

DRYSDALE'S TRUSTEES *v.* DRYSDALE AND OTHERS.

Succession—Special Destination—Revocation—Effect of General Disposition—Special Destinations Prior to and Subsequent to General Disposition—Jus quæsitum tertio—Donation—War Stock Taken by Testator in Names of Wife and Children.

A testator, who was survived by his wife and three children, by trust-disposition and settlement conveyed to his trustees "the whole means and estate . . . which shall belong to me at the time of my death, including all means and estate held by me at my death, under special destination, and all means and estate of which I may at my death have the power of disposal or appointment"—and revoked all former testamentary writings made by him. His estate consisted partly of three groups of investments, the first (Group A) being National War Bonds purchased prior to the date of the trust-disposition and settlement and taken in the names of his wife and children, the second (Group B) Registered War Stock purchased after the date of the trust-disposition and settlement and taken in the names of the children, and the third (Group C) Registered War Stock purchased after the date of the trust-disposition and settlement and taken in names of his wife and himself. The money in these investments belonged solely to the testator and he drew the interest during his life, the documents being kept by banks on his behalf. The testator's estate exclusive of these investments was not sufficient to carry out the purposes of the trust-disposition and settlement. *Held* (1) (*a*) that the fact that the investments under Group A had been taken in name of the wife and children did not create an irrevocable right thereto in their favour, and (*b*) that the destinations in these investments having been revoked by the clause of revocation in the trust-disposition and settlement, the investments fell to be disposed of in terms thereof; (2) that the destinations of the investments in Groups B and C were not affected by the trust-disposition and settlement, and that the investments in Group B belonged to the children in whose names they were taken, and those in Group C to the extent of one half to the trust estate and of the other half to the widow.

Mrs Mary Anne Westwood or Drysdale, widow of the late William Drysdale, Dunfermline, and others, the accepting trustees acting under his trust-disposition and settlement, *first parties*, the said Mrs Mary Anne Westwood or Drysdale, *second party*, Charlotte Wilhelmina Drysdale, Campbell Westwood Drysdale, and William Douglas Drysdale, children of the said William Drysdale and Mrs Drysdale, *third parties*, and Miss Amalia Brichta and others, the directors of the First Church of Christ Scientist, Edinburgh, *fourth parties*, brought a Special Case for the opinion and judgment of the Court upon questions as to the application of the said trust-disposition and settlement to certain investments of the testator.

By his trust-disposition and settlement dated 10th August 1918 the testator, who died on 20th April 1921, conveyed to trustees for certain purposes "the whole means and estate, heritable and moveable, real and personal, of what kind soever and wheresoever situated, which shall belong to me at the time of my death, including all means and estate held by me at my death, under special destinations, and all means and estate of which I may at my death have the power of disposal or appointment." The fifth purpose directed the trustees, after the death of his wife, to pay the income of the estate, to the extent of £750 to the third parties, and to divide any balance after said payment between the fund for disabled soldiers and sailors and the fourth parties until the youngest of the children attain the age of thirty-five, when the estate was to be realised and divided equally amongst them. The testator expressly revoked in the trust-disposition and settlement all former testamentary writings made by him.

The Case set forth (the words in italics having been added by amendment), *inter alia*—"7. . . . Throughout the period from 1906 until February 1920 the testator was ordinarily resident in Java. During that period he had from time to time lodged sums on current account with (*a*) the London branch of the said corporation (The Hong-

kong and Shanghai Banking Corporation) in name of himself and the second party; and (*b*) the Royal Bank of Scotland (Dunfermline branch) in name of the second party, to meet household expenses of the second and third parties. The second and third parties had no private means, and all the sums lodged as aforesaid were the property of the testator. . . . 8. On 1st February 1912 the testator deposited on what is known as fixed deposit-receipt with the said corporation the sum of £5000 belonging to him in name of the second and third parties. Said sum belonged absolutely to the testator. The interest on the said sum was periodically paid to credit of said joint current account with said corporation, and the deposit-receipt itself was held by the said corporation on behalf of the testator, conform to testator's instructions, until 1st February 1918. On or about 21st January 1918 (while on holiday in Scotland) the testator, with concurrence of the second party, instructed the said corporation to invest the principal sum (viz., £5000) contained in the said deposit-receipt, together with £100 from the said joint account, with the said corporation, in 5 per cent. National War Bonds 1927, registered as transferable by deed and repayable on 1st October 1927, in favour of the third parties to the extent of £1700 each, and to place the interest paid under the said bonds to the credit of the joint account last mentioned, and to hold the bonds themselves for safe custody. The testator's instructions to the said corporation are contained in the following letter—viz. (the terms of the letter, signed by William Drysdale and Mary Drysdale, were then set forth). Owing to the requirements of the Bank of England the said bonds could not be registered in the sole names of the third parties, they being minors at the date of registration. Accordingly the testator (with concurrence foresaid) in order to satisfy the said requirements instructed the said corporation to register the said bonds in names of the second party and each one of the third parties respectively. The application forms for the allotments of said holdings are dated 25th January 1918, and are signed by the second party. The said forms were in the following terms—(the terms of the form signed by the second party, with endorsement for registration in the names of the second party and Miss Charlotte Wilhelmina Drysdale, were here set forth). The other two applications were in precisely similar terms except that the names of the other two minor children were inserted, one in each. These instructions were complied with, and in compliance with the mandates annexed to these applications the interest on these investments was paid into the said current account. Certificates relating to the said bonds were issued on or about 18th March 1918 *and on the testator's instructions were thereafter held by the said corporation in safe custody on his behalf.* Particulars thereof are set forth under the heading Group A in the schedule appended to and forming part of this Case. 9. . . . On or about 8th September 1920 he (the petitioner) instructed the said corporation to purchase £12,900 Registered 5 per cent. War Stock 1929-47 in name of the third parties to the extent of £4300 each. The testator's letter of instruction, dated 8th September 1920, and addressed to the manager of the London branch of said corporation, is as follows—(The terms of the letter in which the testator, *inter alia*, stated— . . . 'The above mentioned are my three children for whom I act, so please arrange that the half-yearly interest on the above stock is paid direct to your bank and credited to my current account with you'—were here set forth). . . . These instructions were carried out and the necessary transfers and the *mandates for payment of the dividends were signed and delivered by the third parties.* The sums required for these investments were provided wholly by the testator. Upon 12th October 1920, the said corporation advised the testator that they had received from the Bank of England the 'securities' for the said investments to be held in safe custody on his account. Particulars of the said investments appear under the heading Group B of the said schedule. 10. On or about 2nd October 1920 the testator instructed the said corporation to purchase £10,400 5 per cent. Registered War Stock, 1929-47. The testator's letter of instruction is as follows:—'It appears to me that the 5 per cent. War Loan Stock at the *present* price will give a better return—*in the long run*—than National War Bonds at about 95 per cent. Unless I am entirely wrong in that view, will you please purchase £10,400—of British Government 5 per cent. *War Loan* registered or inscribed Stock 1929-47 at best market price in the name of William Drysdale and/or his wife Mrs Mary Ann Drysdale, repayable to either or survivor, and arrange that the half-yearly interest is always paid to the Hongkong & Shanghai Banking Corporation for our credit in current (joint) account beginning with the interest due on 1st December. Please debit our current a/c for the cost of above stock.' Further, on or about 12th February 1921 the testator instructed the corporation to purchase for account of himself and the second party £4000 of the said stock. Said letter of instruction is as follows:—'Will you please purchase for our account £4000 (say four thousand pounds) of the 5 per cent. War Loan Registered Stock 1929/47 at the lowest price obtainable. This stock is to be registered in the names of William Drysdale &/or his wife Mrs Mary Ann Drysdale and the cost of same to be debited to our joint current a/c with you. Please fill up and send us an interest or dividend mandate form giving instructions that the full amount of interest on above stock shall be regularly paid to your bank for the credit of our joint current a/c address c/o H. & S. B. C., London. Kindly see that there is no delay this time in obtaining the certificates for this stock and send us your safe custody receipt for same as soon as possible.' Transfers relating to the said stock—in both of which the names of the transferees are given as William Drysdale and Mary Ann Drysdale, and in

neither of which do the words 'or' 'and/or' and 'either or survivor' appear—were duly executed by the testator and the second party along with mandates in the form requested by the testator. Upon 8th November 1920 the said corporation wrote to the testator that they had received from their brokers the certificate for £10,400 5 per cent. War Loan Stock. Upon 12th March 1921 the said corporation advised the testator that they had received the certificate for the £4000 stock last mentioned, to be held in safe custody on his account. It is admitted by the parties hereto that the testator provided the funds for purchasing the said stock, particulars of which are furnished under the heading Group C of the said schedule. The parties admit that according to the practice of the Bank of England stock registered in the names of two or more persons is held at the disposal of the survivors or survivor of them, and that it is not the bank's practice to enter these or similar words in certificates relating to such holdings, or to record them in their books. Parties are agreed that there is no evidence bearing on the questions submitted except the terms of the certificates, the facts set forth in this Special Case, the letters and application forms herein quoted, and the terms of the testator's said settlement. 11. Under the heading Group D in the said schedule are comprised the whole investments (other than those before mentioned) made by the testator and the other assets left by him. The total value of the items under Group D is estimated at £4807, 7s. 11d. It is admitted by the parties to this case that all the said items belonged absolutely to the testator. The testator's debts amounted to £248, 9s. 1d. and the Government duties payable are estimated at £2300. Apart from the writings before mentioned, the testator left no writing affecting or which may affect the succession to his estate. In the event of the investments to which this Case relates being excluded from the trust estate of the testator the income of said estate will not amount to the sum of £750 which the first parties are directed in the fifth purpose to divide among the third parties after the death of the second party."

The certificates for the War Stock included under Group C were in the names of "William Drysdale, gentleman, and Mary Ann Drysdale, married woman, both care of Hongkong and Shanghai Banking Corporation, 9 Gracechurch Street," without the words "or," "and/or," or any words of survivorship.

The *questions of law* were—"1. Whether the investments enumerated in Group A of the schedule appended hereto form part of the trust estate of the testator or belong to the third parties whose names appear in the respective destinations thereof, or jointly to the second party and to the said third parties respectively, or alternatively to the first and second parties jointly? 2. Whether the investments enumerated in Group B of the said schedule form part of the said trust estate or belong to the third parties whose names they respectively bear? 3. Whether the investments enumerated in Group C of the said schedule form part of the said trust estate, or belong (*a*) to the second party, or (*b*) to the extent of one-half to the said trust estate and of the other half to the second party?"

Argued for the third parties—The third parties were entitled to the investments included in Groups A and B. The trust-disposition and settlement did not convey these investments or revoke the destinations in which they were taken. The dispositive clause was in mere words of style—Burns, Conveyancing Practice, p. 821—and did not apply to investments which were not in the testator's name and possession. All the testator had here was the custody of the writs. The presumption was against a general clause of revocation affecting special destinations created prior to the will by the testator himself, and such a clause could not affect a special destination created at a date later than that of the will—*Perrett's Trustees* v. *Perrett*, 1909 S.C. 522, *per* Lord President Dunedin at p. 527, 46 S.L.R. 453; *Webster's Trustees* v. *Webster*, 1876, 4 R. 101, *per* Lord Justice-Clerk Moncreiff at p. 102, and Lord Gifford at p. 104, 14 S.L.R. 51; *Connell's Trustees* v. *Connell's Trustees*, 1886, 13 R. 1175, at p. 1183, 23 S.L.R. 857; *Turnbull's Trustees* v. *Robertson*, 1911 S.C. 1288, *per* Lord Kinnear at p. 1294, 48 S.L.R. 1033. There was nothing here to redargue the presumption as to Group A, and the principle in *Perrett's Trustees* admittedly applied to Group B. Alternatively a *jus quæsitum tertio* had been created in the third parties as regards Group A through Mrs Drysdale as their agent, and as regards Group B by their being themselves made parties to the contract with the bank. As regards Group A there was sufficient intimation, Mrs Drysdale's knowledge being the knowledge of the third parties—*Carmichael's Executrix* v. *Carmichael*, 1920 S.C. (H.L.) 195, *per* Lord Dunedin at pp. 201 and 202, 55 S.L.R. 547; *Cameron's Trustees* v. *Cameron*, 1907 S.C. 407, *per* Lord Kyllachy at p. 416, 44 S.L.R. 354.

Argued for the second parties—The second party was according to the law of Scotland entitled to one-half of the investment in Group C—*Connell's Trustees* v. *Connell's Trustees*. The special destination in the certificates could not be revoked by the settlement of prior date—*Perrett's Trustees* v. *Perrett*; *Turnbull's Trustees* v. *Robertson*—nor was the investment carried by the dispositive clause as estate at the disposal of the testator or held by him under special destination. Special destinations in the dispositive clause meant those created by a third party, and estate "held by" the testator meant such as was held by him alone, and not, as in the case of Group C, by the testator and his wife. As regards Group A this party supported the contention of the third parties. As regards Group B this party had no contention. (The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sec. 48, was referred to.)

Argued for the fourth parties—The investments in Groups A, B, and C all fell to be included in the trust estate. It was admitted

that the funds in these investments belonged to the testator, and that if they were excluded the purposes of his settlement could not be carried out. This with the clause of revocation was sufficient reason for including Group A—*Perrett's Trustees* v. *Perrett; Turnbull's Trustees* v. *Robertson*. But without either Group B or C the estate would still be insufficient, and if Group B fell to be included so also did Group C. The dispositive clause of the settlement was quite wide enough to cover these groups. They were estate held by the testator at his death under special destinations. Further, the documents were not of a proper testamentary character, as were those in *Perrett's Trustees* v. *Perrett*, and merely created tentative destinations, which were ineffective as against a proper testamentary settlement. The argument that a *jus quæsitum tertio* had been created was not supported by the decision in *Carmichael's Executrix* v. *Carmichael* (*cit.*), *per* Lord Dunedin at p. 199. There was nothing here to indicate an intention of donation. The taking of certificates with destinations in favour of children was not sufficient. The certificates had been kept under the control of the testator, and the children could not have dealt with the investments during his life—*Hill* v. *Hill*, 1755, M. 11,580. There had been no proper intimation here, and in any event it was not said in *Carmichael's Executrix* v. *Carmichael* that intimation alone could create a *jus quæsitum tertio*.

At advising—

LORD MACKENZIE—It was not denied on behalf of the third parties that the revocation of "all former testamentary writings" by the settlement is wide enough to apply to the National War Bonds in Group A, the investment in which was made before the date of the settlement. It is therefore unnecessary in this case to consider any general question. The result is that these investments are carried by the dispositive clause in the settlement, unless the argument submitted by the Solicitor-General is well founded that the terms in which the investments were taken constitute an irrevocable gift. The authority founded on for this was the case of *Carmichael*, 1920 S.C. (H.L.) 195. There, however, there was a variety of circumstances which warranted an inference in fact which it is not possible to draw in the present case. There were the peculiar terms of the document; the fact that the son had come to know of it, and that he had acted upon it. Here there was merely an instruction to take out the investments in names of the children. The wife's name was put in merely as machinery. There is not sufficient to warrant the inference there was a *jus quæsitum*.

The first question ought therefore to be answered to the effect that these investments form part of the trust estate of the truster and fall to be disposed of in terms of his trust-disposition and settlement.

As regards the investments falling under Group B there is a presumption according to the law laid down in the case of *Perrett's Trustees*, 1909 S.C. 522, that these constituted valid testamentary bequests in favour of the third parties. They must be held to be of the nature of special destinations, and they were later in date than the settlement. The presumption has not been redargued.

The second question ought therefore to be answered by saying the investments in Group B belong to the third parties.

As regards Group C, the legal effect of the testator having taken the investments in these terms is that he must be held to have willed that on his death one-half was to go to his wife and one-half to his own trustees. Question 3 should be answered to that effect.

LORD SKERRINGTON—This Special Case relates to three groups of investments which were made by the testator William Drysdale with money which was his own absolute property, the question in each case being whether the succession thereto is regulated by his will (which was in the form of a trust-disposition and settlement) or by the terms in which he had directed the titles of the investments to be taken. The former proposition is maintained by the fourth parties, who represent a church to which the testator bequeathed in certain events a part of the income of the trust estate. The contrary is maintained by the testator's three children (the third parties).

Group A—These investments consist of three blocks of £1700 registered 5 per cent. National War Bonds—each block being in the names of the testator's wife and of one of his three children. The date of these investments was 18th March 1918, about five months before he made his will on 10th August of the same year. The testator instructed his London bankers to have the bonds made out in the names of his three children respectively, but the Bank of England required that as the children were in minority the name of some person of full age should appear in the case of each investment along with that of the minor. The testator's wife (who is the second party to the Special Case) accordingly signed the three application forms, and also a mandate in each case requesting that the interest should be paid into a current account with the testator's bankers, kept in the joint names of the testator and his wife. All the sums lodged in the account belonged to the testator. It was operated on for the purpose of meeting household expenses, and the interest on the said investments was paid into it in terms of the mandate. The bonds remained in the possession of the bankers, who gave the testator an acknowledgment that they held the same for safe custody on his account. Counsel for the second party explained that his client did not claim to be beneficial owner of any part of these investments. He stated that she had agreed to allow her name to be used in order to comply with the requirements of the Bank of England, but he added that he did not maintain that she was a trustee for her children. The Special Case does not state that any trust was constituted by the testator on

behalf of his children. Nor is it stated that the third parties knew during their father's lifetime that these investments had been made in their names.

I have set forth these facts in some detail because in the course of the debate counsel for the third parties developed an argument of which no hint is to be found in the Special Case. They maintained that whatever may have been the intention of the testator at the time when he made his will, he had no power to interfere with the *jus quæsitum* which he had conferred upon his children when he made the investments five months previously. They founded on the decision of the House of Lords in the case of *Carmichael* v. *Carmichael's Executrix* (1920 S.C. (H.L.) 195). I do not find in the Special Case a single fact stated which indicates that the testator intended to confer upon his children an irrevocable right to the money secured by the three blocks of National War Bonds. The fact that he drew the interest during his lifetime is in itself almost fatal to any such contention. The mere circumstance that the title was taken in the names of persons other than the owner of the money goes a very short way towards proving that he intended to confer upon these persons an irrevocable right to the investments. There is a long series of decisions, from *Hill* v. *Hill* (1755, M. 11,580) onwards, which establishes that proposition. I have no difficulty in rejecting the theory of a *jus quæsitum* and in holding that the testator had full power to dispose of the investments in Group A by his will if he actually intended to do so.

As regards this question of intention, the learned Solicitor-General, who was the senior counsel for the third parties, stated he could not maintain that the revocation clause of the will did not sufficiently evidence an intention on the part of the testator that the investments in Group A should be disposed of in terms of the directions in the will, and should not upon his death become the property of the persons named in the bonds. Accordingly the first question of law must be answered in this sense by affirming the first alternative and negativing the second, third, and fourth alternatives.

As we heard an interesting argument upon the effect of a general clause of revocation in a will upon a special destination or title previously taken by the testator, I venture to refer briefly to the authorities. Though the decisions are probably reconcilable, the dicta of the judges seem to me to leave the law in a state of painful uncertainty. Speaking only for myself as to a matter on which your Lordships may possibly hold a different opinion, I think that the revocation clause in Mr Drysdale's will was sufficient to revoke the destination in the titles. The clause was as follows:—"I revoke all former testamentary writings made by me." I cannot read this clause as limited to writings signed by the testator and in the form of a proper will or testament. There are many writings other than wills or testaments which the law of Scotland (unfortunately as I think) allows to have a testamentary effect, *e.g.*, the revocable and testamentary clauses which conveyancers insist upon introducing into marriage contracts, and the large class of cases in which it has been thought "commodious," as Lord Kames phrased it in *Hill's* case, that a writing signed by a third party and not by the owner should regulate the succession to a portion of his estate although it did not create a special destination in the proper and accepted sense of that term. I am satisfied that owing to the laxity of our law property often passes from the dead to persons whom the owner did not intend to favour at the time of his death. The evil would be aggravated if anomalous wills in the form of personal bonds, stock certificates, &c., were held to be exempted from a clause revoking previous testamentary writings upon the technical ground that a title is something different from a will, and that it is not under the hand of the owner of the property. I respectfully adopt what was said on the subject by Lord M'Laren in *Brydon's Curator Bonis* v. *Brydon's Trustees* (1898, 25 R. 708, at pp. 713, 714) and Lord Kinnear in *Turnbull's Trustees* v. *Robertson*, 1911 S.C. 1288, at p. 1294. The decisions in *Connell's Trustees* v. *Connell's Trustees* (1886, 13 R. 1175) and *Paterson's Judicial Factor* v. *Paterson's Trustees* (1897, 24 R. 499, *per* Lord Kyllachy at p. 504) may, I think, be explained by the restricted terms of the revocation clauses which the Court had to construe. Lord Adam's observations in *Connell's* case (*sup. cit.* at pp. 1182, 1183) were cited for the purpose of showing that he did not regard a stock certificate as a testamentary writing. It would, I think, have been difficult to bring a stock certificate within either of the clauses which he had to interpret. If, however, he intended to lay it down as a general rule that where an owner of property has taken the title in name of a third party the title must regulate the succession to the property notwithstanding that the owner has subsequently made a will revoking earlier testamentary writings, his opinion was *obiter*, and I respectfully disagree with it. I confess also that I have difficulty in reconciling a dictum by Lord Dunedin in *Perrett's Trustees* v. *Perrett* (1909 S.C. 522, at p. 527) with the opinion of Lord Kinnear in the later case of *Turnbull's Trustees*.

Group B—These three investments of Registered 5 per cent. War Stock were taken in the names of the testator's three children respectively, and they were made in October 1920. The children have two presumptions in their favour—the titles were later in date than the will and they referred to a special part of the estate—*specialia derogant generalibus*. I attach no weight to the argument that by the peculiar terms of the dispositive clause the testator intended to declare that no effect should be attributed to any titles which he might afterwards take in the names of persons other than himself. The words founded on by the fourth parties are as follows—"Including all means and estate held by me at my death under special

destinations. I cannot apply these words to an asset which belonged to the testator in spite of the fact that he had taken the title in favour of a third party. The second question should be answered negatively as to the first and affirmatively as to the second alternative.

Group C—These two investments of 5 per cent. Registered War Stock were taken in the names of the testator and his wife without any clause of survivorship, and they were made in October 1920 and March 1921 respectively. What has been said about the investments in Group B equally applies to Group C. The Special Case contains a statement in regard to the practice of the Bank of England in regard to stock registered in the names of two or more persons. The attention of the parties was called to the irrelevancy of this statement and they were allowed an opportunity to add a statement in regard to the law of England applicable to such cases. They did not avail themselves of this opportunity but requested that the third question should be answered as if the effect of the titles fell to be determined according to the law of Scotland alone. Upon that assumption one-half of these investments belongs to the second party Mrs Drysdale, and the other half to the first parties Mr Drysdale's trustees (*Connell's Trustees* v. *Connell's Trustees, supra cit.* at p. 1184). It follows that alternative (*b*) of question 3 should be affirmed and the other alternatives should be negatived.

LORD PRESIDENT—I desire to reserve my opinion upon the question of the effect of a clause of revocation in a settlement such as there is in this case upon a special destination of prior date. It is not necessary to come to any conclusion upon it here, because the parties in whose interest the question might have been raised do not raise it, but, on the contrary, concede that the revocation in the present case was effective.

With regard to all the other questions in the case, I concur in the opinion which Lord Skerrington has delivered, and have nothing to add.

LORD CULLEN having been absent during part of the hearing gave no opinion.

The Court found, in answer to the first question in the case, that the investments referred to formed part of the testator's trust estate and fell to be disposed of in terms of his trust-disposition and settlement; in answer to the second question, that the investments therein referred to belonged to the third parties; and answered questions 3 (*a*) in the negative and (*b*) in the affirmative.

Counsel for the First Parties—Wallace. Agent—Henry Bower, S.S.C.

Counsel for the Second Party — Macmillan, K.C.—Scott. Agent—Henry Bower, S.S.C.

Counsel for the Third Parties—Solicitor-General (Watson, K.C.)—W. H. Stevenson. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for the Fourth Parties—Wark, K.C.—Douglas Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Thursday, July 20.

FIRST DIVISION.

GILMOUR'S TRUSTEES *v.* GILMOUR AND OTHERS.

Succession — Legitim — Collation inter hæredes—Heir not Collating—Effect upon Legitim Fund and Residuary Estate.

A testator was survived by three children, including the heir, entitled, if they so wished, to claim legitim. The heir, who took the heritage under the will and was also residuary legatee, refused to collate. In a question between the heir and the testamentary trustees on the one hand and the remaining children on the other, *held* that the heir was not to be counted as a *caput* in the division of the legitim fund to the effect of carrying a portion thereof to the residuary estate, and that the legitim fund fell to be divided among the remaining children subject to their respective rights of collation *inter se*. *Authorities examined.*

Parent and Child—Legitim—Collation inter liberos—Advances to Children—Collation or Set-off—Interest on Sums Advanced.

A testator during his life had made advances of considerable amount to two of his children. One of the advances, for which no receipt had been received, was referred to in his will as a "gift" and also as a "provision." The other advances were made on the footing that they were to be "imputed" towards legitim, and were acknowledged to be so by one child in receipts, and by the other in a marriage contract. There was no discharge *pro tanto* by the children of their rights as legitim creditors. *Held* (1) that the sum for which no receipt had been given fell to be collated in the event of the child claiming legitim; (2) (*diss.* Lord Mackenzie) that the other advances did not fall to be deducted from each child's share by way of set-off, so as to benefit the executry estate, but fell to be dealt with by way of collation *inter liberos;* (3) that interest on the advances did not fall to be collated.

Observed (*per* Lord Cullen) that when it is intended that the general rule of the common law making advances subject to collation should be superseded by a bargain for a set-off on behalf of the "estate general" of the father, the document setting forth the transaction must be clear and unambiguous.

Young v. *Young's Trustees*, 1910 S.C. 275, 47 S.L.R. 296, *distinguished*,

Henrietta, Lady Gilmour, Denbrae, Cupar, Fife, and others, the trustees acting under the trust-disposition and deed of settlement of the late Sir John Gilmour, Baronet, of Lundin and Montrave, in the county of Fife, and of South Walton, in the county of Renfrew, *first parties;* Lieutenant-Colonel Sir John Gilmour, Baronet, of Lundin and Montrave, *second party;* Captain Harry Gilmour, Denbrae, aforesaid,