Cupar case—*Cochrane* v. *Smith*, 22 D. 352. I refer particularly to the judgment of Lord Wood in that case, which is the latest judicial utterance on the subject.

"The result is that the pursuer fails in his first and succeeds in his second conclusion, while the defender on the other hand gets absolvitor from the first conclusion and has to submit to decree under the second.

"Altogether, I propose to give the pursuer decree in terms of his alternative conclusion, and to assoilzie the defender from the first or leading conclusion of the summons. Success being thus divided I allow no expenses to either party."

The Lord Ordinary declared and interdicted the defender in terms of the alternative or second declaratory conclusion of the summons, and conclusion for interdict following thereon; *quoad ultra* assoilzied the defender from the conclusions of the summons, found no expenses due to or by either party, and decerned.

Counsel for the Pursuer—Guthrie, K.C. —Chree. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Defender — Sir John Cheyne, K.C.—C. N. Johnston. Agents—Menzies, Black, & Menzies, W.S.

Wednesday, December 12.

OUTER HOUSE.

[Lord Kincairney.

FLETT'S TRUSTEES *v.* ELPHINSTON.

Succession—Construction of Testamentary Writings—Casus improvisus—Accretion.

A testator, who died leaving no known heir or next-of-kin, by trust-disposition and settlement directed his trustees to divide his estate into three equal shares, and to hold one of these shares for A in liferent, and her children and the survivors of them in fee; another share for B in liferent, and his children and the survivors of them in fee; and the third share for C in liferent, and his children and the survivors of them in fee. The trustees were directed, on the death of the respective liferenters to pay over to their children in equal shares the fee of the respective shares set apart for them, payable to them on their respectively attaining twenty-one years of age, until which time the income was to be applied for their behoof. In the event of a fiar dying before the period of payment, his lawful issue were to take their parent's share, and if he left no issue the share of the deceaser was to be divided equally among his surviving brothers and sisters, the issue of a predeceasing brother or sister taking their parent's share; "and in the event of the whole fiars to any one share or portion dying without leaving issue before the said period of payment, such share or portion shall revert and fall to be administered as part of the residue of my estate." A and B died leaving issue. C died without ever having had issue. The children of A and C were, and if he had had any the children of B would have been, nephews and nieces of the testator's wife. On the death of C, *held* (1) that although apart from the direction at the close of the residuary clause the original bequests of residue were so framed that there could have been no accretion as between the three sets of fiars, and although the testator had not expressly provided for the event which had happened, it sufficiently appeared that his intention as expressed in the deed was that the direction at the close of the residuary clause should apply if there were no issue of a liferenter of a share to take such share, whether that resulted through the death of children who had been born or because no children had ever been born, and that therefore the one-third share of the estate liferented by C did not fall to the Crown as intestate estate; and (2) that said share, in virtue of the direction referred to, fell to be divided equally *per stirpes* among the issue of A and B.

This was a multiplepoinding in which the pursuers and real raisers were John Russell Thomson and another, the assumed and sole acting trustees of the deceased William Flett, merchant, Leith, under the trust-disposition and settlement executed by him on August 2, and recorded in the Books of Council and Session on August 17, 1877. The said William Flett died on August 12, 1877, without leaving issue, and predeceased by his wife. The pursuers stated that they were not aware of the existence of any relatives of the deceased who would be entitled to any estate as to which he might be held to have died intestate, and that they did not know who were his next-of-kin.

The said trust-disposition and settlement after instructing the payment of the testator's debts and funeral expenses, and certain legacies, provided as follows:—"And lastly, I direct and appoint my said trustees to divide the whole rest, residue, and remainder of my means and estate before conveyed into three equal shares or portions, and to hold and apply, pay, and convey the same in manner following, viz.—They shall hold one share or portion for behoof of Mrs Janet Bannatyne or Elphinston, sister of my late wife, in liferent, and her children and the survivors and survivor of them in fee, one share or portion for behoof of the said Reverend Alexander Mackinlay Bannatyne in liferent, and his children and the survivors and survivor of them in fee, and one share or portion for behoof of Doctor William Finlay, Newhaven, in liferent, and his children and the survivors and survivor of them in fee: And they shall pay over to the said liferenters during all the days and years of their respective lives the nett income or annual produce of the said respective shares or portions set apart for them: And on the respective deaths of the said liferenters

they shall pay over to their children, in equal shares if more than one, the fee of the said respective shares or portions set apart for them, payable to them on their respectively attaining twenty-one years of age, until which time the income shall be applied for their behoof: And in the event of any of said fiars dying before the said period of payment leaving lawful issue, such issue shall be entitled equally among them to the share to which their parent would have been entitled if in life, and in the event of any of said fiars dying before the said period of payment without leaving lawful issue, the share of such deceaser shall fall to and be divided equally among the survivors and survivor of his brothers and sisters jointly with the lawful issue of any of them who may have deceased leaving issue, such issue succeeding equally among them to the share to which their parent would have been entitled if in life, and in the event of the whole fiars to any one share or portion dying without leaving issue before the said period of payment, such share or portion shall revert and fall to be administered as part of the residue of my estate."

On the testator's death his trustees entered on the management of his estate, and paid over to the respective liferenters the income of the said respective shares. The said Mrs Janet Bannatyne or Elphinston, who liferented a one-third share of the estate, died on November 6th 1885, and in accordance with the testator's directions her share was thereafter divided among her three children—William Elphinston and two others. Another liferenter, the said Dr William Finlay, died on June 8th 1886 survived by eight children, among whom the fee of said share was thereafter divided. The remaining one-third share continued to be held by the pursuers, and the revenue thereof was paid to the liferenter, the said Rev. Alexander Mackinlay Bannatyne, until his death on December 4th 1899. He was married, and was survived by his widow, but never had any children. With regard to this one-third share a state of matters arose not verbally provided for in the trust-disposition and settlement, and the fund *in medio* consisted of this said one-third share of the testator's estate.

It appeared that the children of Mrs Elphinston and Dr Finlay were, and the children of Mr Bannatyne, if he had had any, would have been, nephews and nieces of the testator's wife.

Claims were lodged for (1) the three children of the said Mrs Janet Bannatyne or Elphinston and the eight children of the said Dr William Finlay, who pleaded that upon a sound construction of the trust-disposition and settlement they were entitled to be ranked and preferred in equal shares *per stirpes* to the fund *in medio*, and claimed to be so ranked and preferred; and (2) the Lord Advocate as representing the Crown as *ultimus hæres*, who claimed to be ranked and preferred to the whole fund *in medio*, and pleaded that the said share of the deceased William Flett's estate having fallen into intestacy, and there being no known heir or next-of-kin, he was entitled to be ranked and preferred in terms of his claim.

The arguments of the claimants sufficiently appear from the opinion of the Lord Ordinary.

LORD KINCAIRNEY—"In this multiplepoinding questions of interest and difficulty are raised as to the construction and effect of the trust-deed of William Flett, merchant, Leith, who died on 12th August 1877, having executed his trust-deed on 2nd August preceding. He was predeceased by his wife, and he left no issue. Parties are agreed on the statement that he left no known heir or next-of-kin. It is not explained how this has happened, seeing that the averments imply that relatives of his may possibly exist although they have not been discovered. My judgment, of course, proceeds on the assumption that he had no representatives. The fund *in medio* is one-third of the residue of the estate, and it is claimed (1) by the other residuary legatees, and (2) by the Crown, on the plea that that part of the estate has fallen into intestacy.

"The trust-deed is very short, and contains nothing but three special legacies and the residuary clause, which is quoted on record. The trustees are thereby directed to divide the estate into "three equal shares," and to hold one of these shares for Mrs Elphinston in liferent, and her children and the survivors of them in fee, one share for the Rev. A. M. Bannatyne in liferent, and his children and the survivors in fee, and one share for Dr William Finlay and his children and the survivors in fee. The trustees are directed to pay to these liferenters the income of "the said respective shares" "set apart for them," and on their respective deaths to pay to their children equally "the fee of their respective shares or portions set apart for them, payable to them on their respectively attaining twenty-one years of age." The truster then provides for the death of any of these children before that period of payment by directing that the share of such deceaser shall pass to his or her issue equally, or if there were no issue, then equally to the surviving brothers and sisters of such deceaser, and the children of any predeceasing brother or sister. The clause closes with a provision for the event of "the whole fiars to any one share or portion dying without leaving issue before the said period of payment," in which case the truster directs that "such share or portion shall revert and fall to be administered as part of the residue of my estate." That means undoubtedly shall revert to the trustees and be administered by them. The question depends mainly on the last provision. The trust-deed goes no further. It was, of course, possible that none of the fiars should survive their parent and reach the age of twenty-one, but the truster did not concern himself with that event and makes no provision for it; he leaves it to the law, and if that had happened there

would no doubt have been intestacy.

"The fiars in whose favour the deed has been made are the issue of the three liferenters. They are not relatives of the truster, who, as it is stated, had no relatives, but they are all of one class, and are (or would be if existing) nephews or nieces of the truster's wife,

"What has happened is, that the liferenters are all dead, one-third of the residue has been paid to the children of Mrs Elphinston, and one-third to the children of Dr Finlay. The third liferenter, the Rev. A. M. Bannatyne, died on 4th December 1899, never having had any issue; and the third part of the residue which was liferented by him is the subject of this action.

"The issue of Mrs Elphinston and of Dr Finlay claim that it is payable to them 'equally *per stirpes*' under the residuary clause, and the Crown claims it as intestate estate.

"I am disposed to think that the claim for the Crown could not be resisted were it not for the words at the close of the residuary clause to which I have specially referred. If there had been no such words the residuary clause would have consisted of three separate bequests of one-third of the residue to each of three separate sets of legatees unconnected in expression. I do not see how in that case it would have been possible to avoid holding that the three bequests were given separately and disjunctively and not jointly, and that there could not be accretion of one to another. I think that must have been held on the authority of the very authoritative case of *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, and of the cases which preceded it, among which may be specially mentioned as closely bearing on this case—*Torrie* v. *Munsie*, May 31, 1832, 10 S. 597; *Fulton's Trustee* v. *Fulton*, February 6, 1880, 7 R. 566; and *Buchanan's Trustees*, June 15, 1883, 20 S.L.R. 666. These cases are, it is true, no more than judgments on the construction of the deeds then before the Court, and cannot be absolute authorities about the construction and effect of a different deed. Still their application is so close that it would have been impossible to disregard them. It is important, however, to notice that, although the Judges in *Paxton's Trustees* profess to follow a settled rule of construction, they do not lay down the proposition that bequests separately and disjunctively expressed are not capable of being construed as joint bequests. On the contrary, it is expressly recognised that the application of the rule applied might be controlled or avoided by expressions of the truster importing an intention that there should be accretion, which implies that a joint bequest is a possible although not the natural meaning of words which *prima facie* express separate bequests. In the same way a bequest expressed as a liferent has been construed as a bequest of a fee where that was clearly intended—*Frockmorton* v. *Holyday*, 1765, 3 Bur. 618.

"In this case I think it legitimate to surmise that the truster regarded his wife's near relations as his, he having none of his own, and it is impossible to avoid the impression that his intention was to leave the whole of his residue among the nephews and nieces of his wife. Nevertheless, but for the closing words of the clause, I should not have been able to give effect to this conjectured intention.

"The case therefore depends on the meaning and effect of this clause. That raises two distinct questions — firstly, whether the final direction to the trustees that the portion of the estate shall revert and fall to be administered by them as part of the residue applies in the circumstances which have happened; and secondly, if it does, what is the meaning of that direction?

"Now, the event specified in the deed is the whole fiars of one share dying without leaving issue. The fiars are the children of the liferenters, and it is said that event has not occurred and could not occur, because the persons specified have not died and could not have died, because they were never born. Reading the words quite strictly, that is true, but the legatees contend that the words should not be read so judaically, and that to do so would be to prefer the words to the sense; they maintain that what the truster had in contemplation was the non-existence of children of a liferenter, and that his intention was that the destination-over should have effect if there were no children of the liferenter to take, and that it did not signify in the least whether the failure of children happened through the death of children who had been born or because no children had ever been born. I think that this contention of the legatees is manifestly right, and I have no idea that I am bound to construe the words of the deed so strictly as to defeat the intention which they were obviously meant to express, although imperfectly, but yet unmistakeably. The case is one of implied will, and is referred by Lord M'Laren to the category of *casus improvisus*—M'Laren on Wills, i. 324.

"Only one Scotch case was quoted which seems precisely in point—*Wedderburn* v. *Scrymgeour*, 1666, M. 6587. It is reported twice by Dirleton and Newbyth. The reports are not exactly the same, but from the latter report it appears that a testator believing his wife to be with child made a will, by which he gave a legacy of 5000 merks to a stranger if the child should be a daughter. The testator died, and it turned out that his wife was not enceinte, and no child was born. It was held that the legacy to the stranger was good, on the reasoning that if the testator was willing that the legacy should be paid if a female child was born, *multo magis* should he desire it to be paid if there was no child at all.

"Similar points have arisen more frequently in the English Courts. In *Jones* v. *Western*, 1738, 1 Eq. Cas. 245, the point was the same, or nearly so, as in *Wedderburn* v. *Scrymgeour*. In *Murray* v. *Jones*, 1813, 2 Ves. & B. 313, a legacy was sustained which was bequeathed if the testator should have only one child, or if they should all die but one when the testator

died without any issue. So a bequest to a testator's sister was sustained which was given in the event of his widow dying within twelve months after him, although the testator's wife predeceased him. The legatees quoted besides *Davis* v. *Davis*, 1882, 30 Weekly Rep. 918; *Aveline* v. *Ward*, 1749, 1 Ves. Junr. 420; *M'Kinnon* v. *Sewell*, 2 Milne and Keen, 202, *aff.* 5 Sim. 78; *Warren*, 1858, 4 K. & J. 603, *aff.* 9 H.L. 420, which are all cases to the same effect, where bequests were sustained although the exact event provided for had not occurred, but where what had occurred fell clearly within the meaning of the provision —Jarmyn on Wills, 5th ed., vol. ii., 622; Theobald on Wills, 4th ed. 526. The same point was decided in Rome in what appears to have been a *cause célèbre*, *Curius* v. *Coponius*, referred to by Lord Mansfield in *Frockmorton*, *supra*, and frequently mentioned by Cicero. See Smith's Dictionary of Greek and Roman Biography, *voce* M. Curius. A testator directed that Curius should succeed to his property if his wife should have a son who should die before maturity. The testator's wife did not give birth to a son, and Coponius, the testator's next-of-kin, claimed the estate, but Curius was preferred in respect of the manifest intention of the testator.

"I have therefore no difficulty in holding that the death of the Rev. A. M. Bannatyne without issue was equivalent to his death survived by children who predeceased the age of twenty-one, and that therefore the ultimate destination applies to the case which has occurred.

"The next question is, what is the effect and meaning of the provision that the share of the residue should revert to the trust and fall to be administered by the trustees as part of the residue?

"This appears to be a more difficult question, and no cases were quoted bearing on it except the class of cases of which *Paxton* v. *Cowie*, *supra*, is the last and most important. It is contended for the Crown that although the closing direction of the residuary clause should be held to apply in the circumstances, and although the share might revert to the trust, yet as the truster had left no direction in regard to it except the direction which had failed, it necessarily became intestate succession.

"I am disposed to think, however, that that contention should not prevail. The question is, what was the intention of the testator? It is true that we are only concerned with the testator's expressed intention, and that if a testator wholly fails to express his intention it cannot receive effect unless it can be brought under the category of implied will. But if his intention be reasonably clear, any possible interpretation of his words which will carry it out will be accepted.

"There is a strong presumption against intestacy when a testament or trust deed has a residuary clause, especially when the testator is without relations. The sole object of a residuary clause is very often to prevent intestacy, although it must be admitted in this case that in one possible event there would certainly have been intestacy. But if the testator had intended or contemplated intestacy in the event of all the fiars of one share dying, he would have given no further directions. He would of course have left it to the law, just as he does not provide for the failure of all the fiars. Then, no doubt, there would be intestacy, and in that case the testator did not interfere. It would have been mere nonsense if he had said that if all the fiars should die his estate would revert to the trust and be administered as part of the residue; such a provision would have been meaningless, and indeed the idea of a testator making such a provision is hardly conceivable. What, then, did he mean when he said that a share should revert to the trust on failure of the fiars called to that share, and should be administered by the trustees? I think that provision negatives the idea that intestacy was in the testator's mind. Whatever these words express positively they express negatively that there shall not be intestacy. To say the share shall fall into intestacy and shall revert to the trust and be managed as part of the trust estate would be a contradiction in terms.

"It is true, however, that a man may die intestate however decided his intention not to do so, and however clearly he expresses that intention, unless he leaves his estate to some legatee.

"It is said that that is the state of this case, and that the testator has expressed no affirmative testamentary intention about this part of the estate. It must be admitted that he has not done so expressly, but he has done so so as to leave no doubt of his intention.

"The argument for the legatees and against the Crown may be put in more ways than one. The simplest way of stating it seems to be to affirm that the threefold bequest must be construed as a joint bequest. If the words used justify the opinion that they negative intestacy, or express the desire of the testator against intestacy, the question is, What was it that the testator desired? He gives positive directions that the share should be administered as residue. What could he have intended except that it should be divided among the remaining recipients, the only possible recipients of the residue? And if he meant that, it follows that he intended from the first to make a joint bequest. It follows, notwithstanding *Paxton's* case, that the bequests should be construed as joint, or at least as admitting of accretion, and we have the exceptional case expressly recognised in the judgment of the Court in *Paxton's* case.

"Secondly, it may be urged that the clause imports a direction that there shall be accretion, or, what is the same thing, they import a destination-over in favour of the other legatees. That appears to be a possible meaning of the direction to the trustees to administer it as part of the estate, and the only possible meaning.

"Thirdly, it is clear that the truster here gives his trustees a positive direction—they

are to administer this portion of the estate as part of the residue. That gave them a right, and imposed on them a duty to do something with this fund. That was certainly not to pay it to the Crown. It was to be administered as they were directed to administer the whole residue. If they endeavoured to comply with that direction literally, they would divide it into three equal parts, and pay one part to the one set of legatees remaining, and another part to the other set, and they would have a third part over, which again they would subject to the same process, and so on—a mode of administration which would result in the division of the whole share among the remaining fiars, and that by a process of division in literal compliance with the truster's directions. That consideration shows clearly that it was the intention of the truster that the whole residue should go to the legatees named, and it does not signify in what precise manner that result which I have no doubt the truster endeavoured to secure should be brought about.

"On these grounds I am of opinion that the claim of the Crown should be refused, and that the claim of the other claimants should be sustained."

The Lord Ordinary sustained the claim of the claimants William Elphinston and others, and ranked and preferred them accordingly, and repelled the plea and claim for the Lord Advocate.

Counsel for the Pursuers and Real Raisers—C. J. L. Boyd. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Claimants William Elphinston and Others—C. K. Mackenzie, Q.C.—Pitman. Agent—Ninian J. Finlay, W.S.

Counsel for the Lord Advocate—Sol.-Gen. (Dickson, Q.C.)—Guy. Agent—W. G. L. Winchester, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

LYON *v.* LYON'S TRUSTEES.

Trust—Unilateral Trust-Deed Executed by Woman before her Marriage for Behoof of Spouses in Liferent and Children in Fee—Revocation—Birth of Child—Contemporaneous Bond of Annuity Granted by Intended Husband.

By a deed executed immediately before her marriage, a woman, "in prospect of" her marriage, disponed the whole property which should accrue and pertain and belong to her during the subsistence of the intended marriage to trustees for certain purposes, and, *inter alia*, that they should during her life and the subsistence of the trust pay the annual proceeds to herself, and in the event of her predeceasing her husband leaving issue, to him in liferent, and that in the event of children or a child being born of the marriage, and such children or child or their issue surviving the dissolution of the marriage, the capital of the estate in the hands of the trustees should, on the death of the longest liver of the spouses, be paid over to such children or child or issue in such proportions as the spouses or the survivor of them might direct, and failing direction equally. The deed was declared to be irrevocable. The husband a few days previously had executed a bond of annuity in favour of his intended wife. The deed executed by the intended wife was delivered and registered in the Books of Council and Session for preservation, and the estate falling under the trust was handed over to the trustees, and was still held by them. A child was born of the marriage, who still survived. The wife, eleven years after the date of the marriage, and also after the birth of the child and the delivery and registration of the deed, with consent of her husband, executed a revocation of the deed.

Held, in an action at the instance of the wife with consent of the husband against the trustees, that the deed was irrevocable.

Watt v. *Watson*, January 16, 1897, 24 R. 330, *distinguished*.

Question—Whether the bond of annuity executed by the intended husband, and the deed executed by the intended wife, did not in effect together constitute an antenuptial marriage-contract.

Opinion (*per* the Lord President) that a marriage-contract might be constituted by two deeds as well as by one.

Trust—Unilateral Trust-Deed Executed by Woman before her Marriage for Behoof of Spouses in Liferent and Children in Fee—Essential Error—Reduction.

Circumstances in which *held* that a woman, who immediately before her marriage had executed a trust-deed for behoof of herself and her intended husband in liferent and the children of the marriage in fee, was not entitled to have it reduced upon the ground of essential error as to its tenor and effect.

Husband and Wife—Trust-Deed Granted by Woman before Marriage in fraudem of Rights of Husband—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 21).

A woman immediately before her marriage executed a unilateral trust-deed, to which her intended husband was not a party, whereby she disponed and made over to trustees the whole property which should accrue and pertain and belong to her during the subsistence of the marriage for behoof of herself in liferent, and after her decease, if there were issue, of her husband in liferent and the issue of the marriage in fee, and if she predeceased