The bill further stated—"On the conclusion of the evidence adduced for the pursuer in the cause, the Lord Advocate, as counsel for the defenders, stated that he did not propose to lead any evidence, that he proposed only to raise questions of law, and that in these circumstances he did not propose to address the jury but would confine his observations to the Court. He then moved the Court to give the following two rulings and to direct the jury to enter a formal verdict in accordance with these rulings and directions, viz., (1) . . . . and (2) That as the pursuer admits that she left her seat and stood on the platform while the car was in motion, this action on her part was a contributory cause of her injuries and the defenders were entitled to the verdict of the jury. Counsel for the pursuer having been heard preliminary upon the Lord Advocate's motion the presiding judge reserved his direction to the jury, and counsel for the pursuer then addressed the jury on the whole case. And whereas the presiding judge proceeded to charge the jury, and after reading to the jury the issue in the cause, directed them as follows, viz., 'Gentlemen, you are the masters of the situation in regard to the question of fault mentioned in the issue.' The presiding judge then reviewed the evidence, explaining, *inter alia*, that if the jury came to the conclusion on the evidence that the pursuer was guilty of contributory negligence, the verdict should be for the defenders. The defenders' counsel excepted to the direction above mentioned as inapplicable to the case. The presiding judge thereafter refused to give either of the rulings asked for by the Lord Advocate, who respectfully excepted to said refusal."

At the hearing on the bill counsel for the defenders, in support of the second ruling asked for, argued — The pursuer admitted that she knew that it was likely that men would jump on to the car while it was moving, and that it was her duty to remain seated until the car was stopped. In leaving her seat and going on to the platform while the car was moving the pursuer did so at her own risk. The practice of going on to the platform before the car stopped did not constitute an invitation—*M'Skerry* v. *Glasgow Corporation*, 1917 S.C. 156, 54 S.L.R. 178. The case of *Watt* v. *Corporation of Glasgow*, 1919 S.C. 300, 56 S.L.R. 225, was decided on different grounds, but the opinion of the Lord President in that case supported the defenders' contention.

Counsel for the pursuer were not called upon.

LORD PRESIDENT—[*After dealing with the first direction which was asked*]—With regard to the second of the two directions, which is that the action of the pursuer in leaving her seat and standing on the platform while the car was in motion was "a contributory cause of her injuries," I think it is enough to read and adopt a passage from Lord Mackenzie's opinion in the case of *Watt* v. *Glasgow Corporation* (1919 S.C. 300 at p. 310, 56 S.L.R. 225, at p. 236) with which I entirely concur—"It appears to me that contributory negligence can only be judged of with reference to the particular facts of each case, and that it cannot *ab ante* be laid down as a proposition of the common law of Scotland that a passenger who is upon the platform of a tramway car in motion is there at his or her peril."

Accordingly I do not think this bill of exceptions can be sustained with regard to either of the two directions asked. Nor do I think it is possible to attack the proceedings before the jury on the other and general ground suggested, namely, that the case was left for the jury's decision too broadly and without sufficiently specific directions.

LORDS MACKENZIE, SKERRINGTON, and CULLEN concurred.

LORD ASHMORE—I also agree. I would like to explain that at the conclusion of the pursuer's evidence there was no motion made to withdraw the case from the jury. I pointed that out at the time, having in view the case of *M'Caffery*, 1910 S.C. 797, 47 S.L.R. 691.

With regard to the rulings which I was asked to give, my opinion at the time, since confirmed, was that to have given these two rulings would have been to withdraw from the jury what it was really their function to dispose of. In short, the questions for determination were questions of fact. I fully explained to the jury the circumstances and in particular the bearing of the law of contributory negligence, and that is stated in the bill of exceptions.

The Court refused the bill.

Counsel for the Pursuer—Graham Robertson—Macgregor Mitchell. Agents—Paterson & Salmon, S.S.C.

Counsel for the Defenders — The Lord Advocate (Morison, K.C.)—Gentles. Agents —Simpson & Marwick, W.S.

Friday, May 13.

SECOND DIVISION.

[Sheriff Court at Dumfries.

REID *v.* DOBIE.

Succession—Fee or Liferent—Destination—"After him"—Executors (Scotland) Act 1900 (63 *and* 64 *Vict. cap.* 55), *sec.* 3.

A testatrix left a holograph will in the following terms, viz.—"All I possess I leave to my husband A, and after him to my sister B." In a competition between A and B for the office of executor, *held* that A was entitled to the appointment in respect that under the will he took a full fee, not limited to a liferent.

The Executors (Scotland) Act 1900 (63 and 64 Vict. cap. 55) enacts—Section 3—"Where a testator has not appointed any person to act as his executor, or failing any person so appointed . . . any general disponee or universal legatory or residuary legatee

appointed by such testator, shall be held to be his executor-nominate and entitled to confirmation in that character."

Mrs Mary Helen Bruce or Reid, widow of Charles William Reid, Lockerbie, *pursuer*, presented an application in the Sheriff Court at Dumfries for confirmation in her favour as executrix-nominate of her sister the deceased Jeanie Hosea Bruce or Dobie. A similar application was presented by Thomas Dobie, Lockerbie, *pursuer*, the husband of the deceased Mrs Dobie. These applications were presented in virtue of a holograph will, dated 12th June 1917, in the following terms:— "*Muirhead*,

"*Lockerbie*, 12/6/17.

"All I possess I leave to my husband Thomas Dobie, and after him to my sister Mary Helen Reid, King's Arms Hotel, Lockerbie, and her heirs.

"(Sgd.) JEANIE HOSEA DOBIE."

The pursuer Mrs Reid maintained that the will conferred a liferent on Thomas Dobie and constituted the pursuer residuary legatee of the deceased subject to the liferent of her husband.

The pursuer Thomas Dobie maintained that under the will he was entitled in fee to the whole of the deceased's estate, and as general disponee was accordingly executor-nominate in terms of the Executors (Scotland) Act 1900 (63 and 64 Vict. cap. 55), sec. 3.

The Sheriff-Substitute (CAMPION) conjoined the applications, and on 24th February 1921 repelled the plea-in-law for the pursuer Mrs Reid and refused the crave of her application; further authorised the Clerk of Court to issue confirmation in favour of the pursuer Thomas Dobie as executor-nominate *qua* general disponee of the late Mrs Dobie in virtue of her holograph will dated 12th June 1917.

Note.—"... I am of opinion that what was intended by the testator was that in the event of the institute her husband not being alive at the time of her death, to her sister as conditional-institute the succession should open. Anyway I am of opinion that is the effect of the will which was executed in June 1917. To sustain the case as contended for by the agent for the pursuer Mrs Reid would practically imply the setting up of a trust, which does not seem to have been contemplated by the testator. The law on this question is very fully considered in the case of *Bell's Executor*, 24 R. 1120, and the numerous cases there referred to."

The pursuer Mrs Reid appealed to the Court of Session, and argued—The words "after him" in the holograph will implied a succession of interests, and therefore inferred a liferent in Thomas Dobie. A substitution in moveables was not to be presumed without express words—*Crumpton's Judicial Factor* v. *Barnardo's Homes*, 1917 S.C. 713, and *per* Lord President Dunedin at p. 719, 54 S.L.R. 596; *Bell's Executor* v. *Borthwick*, 1897, 24 R. 1120, 34 S.L.R. 838.

Argued for the respondent—The words "after him" meant "on his death." To construe the words as a liferent was to invert the order of preference. The testatrix meant her husband to get the capital, and there was no reason why the words should not be construed as a substitution—M'Laren on Wills and Succession, vol. i, p. 575, sec. 1039; *O'Reilly* v. *Baroness Sempill*, 1855, 2 Macq. 288, *per* Lord St Leonards, p. 293; *Young's Trustees* v. *Young*, 1899, 7 S.L.T. 266, *per* Lord Kyllachy.

LORD JUSTICE-CLERK—I think there is very little doubt about this case. The testatrix used words which are apposite and habile to convey her property to her husband, and it seems to me that there is no condition limiting his interest to a liferent. I think the husband is full fiar, and that therefore, under the 3rd section of the Executors (Scotland) Act, as general disponee he is entitled to be appointed her executor. Accordingly this appeal fails.

LORD DUNDAS—I am of the same opinion. This competition between applications for the office of executor must be decided upon a construction of the odd and somewhat obscure words of the holograph will in question. Now the opening words of the will—"All I possess I leave to my husband Thomas Dobie"—by themselves would import a clear gift of fee to the husband, and I cannot read what follows, upon any reasonable construction, as cutting that right down to a mere liferent.

I think it is unnecessary to consider or decide whether Mrs Reid is introduced as a conditional institute, as the Sheriff-Substitute seems to have thought, or, as Mr Henderson argued, a substitute. The husband's application must plainly succeed, and the appeal be refused.

LORD SALVESEN—I also think that the Sheriff-Substitute has reached a right result, although as at present advised I am not prepared to concur in his view that this was a conditional institution. My impression is that it was one of substitution, and that the words "after him" are to be read as equivalent to "after his death." I am quite clear that there is no ground whatever for sustaining the argument upon which this appeal is based—that the husband is to be treated as a mere liferenter and that the fee of the estate passed under the holograph will to the sister who is competing for the office as executor. I find nothing in the two lines of which the will consists to limit to a liferent the fee initially given to the husband.

LORD ORMIDALE—I concur.

The Court refused the appeal.

Counsel for the Appellant—Guild. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Respondent — R. C. Henderson. Agents—Inglis, Orr, & Bruce, W.S.