be that only one witness can give really direct evidence. But it is always essential that the vital testimony given by a single witness against the person accused should be corroborated either by the testimony of other witnesses or by facts and circumstances.

In the present case it is admitted that there was illegal trawling by some vessel on 11th October 1922. Whether the vessel that committed that offence was the "Alida" or not depends entirely upon the testimony of Duncan Macpherson junior. Two or three other witnesses were beside him, and they speak to having seen the trawler in the illegal operation. But not one of them said anything which suggests that that trawler was the "Alida." Nor does the circumstance that Macpherson said to his father at the time that he saw that name on the bow of the boat afford any corroboration of his testimony. As your Lordship has said, it would be different if in addition to the positive testimony of Duncan Macpherson there had been some independent evidence that this trawler was in the neighbourhood, or had been seen going to the place or coming away. But there is an entire absence of any such evidence. And it is not to be left out of account that when Macpherson first made a complaint as to this vessel having been engaged in illegal trawling a substantial period of something like two months had elapsed.

LORD ANDERSON — I concur. The only incriminating evidence in this case is that of Duncan Macpherson junior, and I agree with your Lordships that that evidence is insufficient. There are two other features which are unsatisfactory from the point of view of the prosecution. One is that the date libelled is 20th October, while the date spoken to by Macpherson is 11th October. Another is the allegation, supported by the evidence of the master and two members of the ship's company, that the ship was at Tobermory on the day in question. It is true that the Procurator-Fiscal had no opportunity of testing the accuracy of that evidence, but, notwithstanding that, three witnesses, whose credibility is not impeached by the Sheriff-Substitute, depone that the vessel on 11th October was at Tobermory, and she may very well have been there.

The Court answered the first question in the negative, found it unnecessary to answer the second question, sustained the appeal, and quashed the conviction.

Counsel for the Appellant — Normand. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Respondent—Lord Advocate (Hon. W. Watson, K.C.)—Lord Kinross, A.-D. Agent — John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Saturday, June 23.

FIRST DIVISION.

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

Succession — Special Destination — Revocation — Effect of General Disposition — Special Destinations Prior to General Disposition—Clause in General Disposition Irreconcilable with Special Destinations — Shares — Bond and Disposition in Security.

A testator left moveable estate which included stocks and shares, some of which stood in the joint names of himself and his wife, and others in the joint names of himself and his wife and the survivor, and a bond and disposition in security in favour of the testator and his wife and the survivor and the heirs of the survivor and their, his, or her assignees whomsoever. All these investments had been made out of the testator's own means, and the titles to them were found in his repositories after his death, there having been no gift or delivery of them to his wife during his lifetime. The testamentary writings, which consisted of a trust-disposition and several codicils, did not contain any express revocation of prior special destinations. The last codicil, however, which was subsequent in date to all the investments in question except one block of shares, was practically a new settlement, and contained a general conveyance of the testator's whole estate and a clause which gave the testator's niece an option to purchase after the death of his wife any shares held by him at the time of his death, or held by his wife at the time of her death, at a valuation not greater than the cost price, and specified as shares which she might so acquire certain shares among which were included some of the shares standing in the names of himself and his wife, and of himself and his wife and the survivor. *Held* (1) that the right of purchase conferred on the niece by the last codicil was irreconcilable with the special destinations of the stocks and shares, and that therefore the special destinations of the stocks and shares acquired prior to the date of the codicil were revoked by the general conveyance, but (2) that the special destination of the shares acquired subsequent to the date of the last codicil remained unaffected, and (3) (*diss.* Lord Skerrington) that the special destination in the bond and disposition in security remained unaffected.

George Robert Toynbee and others, the trustees acting under the trust-disposition and settlement and relative codicils of the late John Dennis, Dalkeith, *first parties*, Mrs Rebecca Fieldsend or Dennis, widow of the late John Dennis, *second party*, Miss

Martha Jane Elliot, a niece of the late John Dennis, *third party*, and the beneficiaries or representatives of beneficiaries interested in the residue of the trust estate of the late John Dennis, *fourth parties*, brought a Special Case for the opinion and judgment of the Court upon questions regarding the right to certain stocks and shares and a bond and disposition in security which formed part of the trust estate.

The testator died on 29th February 1912 survived by his wife but leaving no children. He left a trust-disposition and settlement dated 3rd and 14th May 1886 and five codicils. The trust-disposition and settlement contained a conveyance of the testator's whole estate to trustees for the trust purposes and a clause in the following terms—"And I revoke all prior settlements or other testamentary deeds made by me." The last codicil, dated 30th October 1911, which was practically a new settlement by which the testator again conveyed his whole estate to trustees, contained a clause in the following terms—"Declaring that my niece Martha Jane Elliot, Brixwold, Bonnyrigg, shall at the time or shortly after the death of my wife have the option of purchasing any article or articles forming part of my estate and which she may specially desire at a valuation, and she may also acquire any shares, should she desire to buy such, held by me at the time of my death or held by my wife at the time of her death, all at valuation not exceeding cost price, such as ordinary shares in John Dennis & Company, Limited, or others such as Craig & Company, Paisley, Dalkeith Gas Light Company, International Gas Light Company, Penicuik Gas Company, Scottish Waggon Company, Queensland National, Lasswade Gas Company, L. Rose & Company, Port of London Debentures, Nobel's Dynamite Preference, Nobel's Dynamite Ordinary, Calico Printers, North British Railway 3 per cent., Babcock & Wilcox, Arniston Coal Company Preference, United Alkali Company Debentures, or others if preferable."

The Case stated—"7. After the truster's death there were found in his repositories share certificates and other writs or vouchers respectively for the following investments made by him:—(1) *In shares of companies registered in England*—(*a*) 140 6 per cent. preference shares of £5 each, fully paid, in L. Rose & Company, Limited, registered in name of John Dennis, the truster, and Rebecca Dennis, the second party. Certificates dated 29th October and 26th November 1908 and 15th April 1909. (*b*) 500 fully paid 5 per cent. cumulative preference shares of £1 each of the Calico Printers' Association, Limited, registered in name of John Dennis and Rebecca Dennis. Certificate dated 19th August 1908. (*c*) 200 ordinary shares of £1 each, fully paid, of Babcock & Wilcox, Limited, registered in name of John Dennis and Rebecca Dennis. Certificate dated 8th April 1909. (2) *In shares or stock of Scottish companies*—(*a*) 20 ordinary shares of £10 each (£8 paid) of the Arniston Coal Company, Limited, registered in name of Mr John Dennis and Mrs Rebecca Fieldsend or Dennis, his wife. Certificate dated 5th November 1908. (*b*) 129 shares of £1 each, fully paid, of Bruce Peebles & Company, Limited, registered in name of John Dennis, Esq., and Mrs Rebecca Fieldsend or Dennis. Certificate dated 20th March 1909. (*c*) 20 ordinary shares of £5 each, fully paid, of Aberlady and Gullane Gas Company, Limited, registered in name of John Dennis, Rebecca Dennis, his wife, or the survivor. Certificate dated 18th January 1912. (*d*) 20 five per cent. preference (or A) shares of £10 each, fully paid, of James Brown & Company, Limited, in name of John Dennis and Rebecca Fieldsend or Dennis, his wife, and the survivor of them. Certificate dated 16th October 1908. (*e*) 210 shares of £2 each (£1, 15s. paid) of the Craigmillar Steam Laundry Company, Limited, in name of John Dennis and Rebecca Fieldsend or Dennis, and the survivor. Certificates dated 30th January, 13th and 20th February, and 12th November 1908. (*f*) 3000 ordinary shares of £1 each, fully paid, of John Dennis & Company, Limited, in name of Mr John Dennis and Mrs Rebecca Dennis (either or survivor). Certificate dated 7th September 1911. (*g*) £1000 three per cent. preferred ordinary stock of the North British Railway Company in name of John Dennis and Mrs Rebecca Dennis, and survivor. Certificate dated 3rd October 1908. (3) *In other securities* — (*a*) Bond and disposition in security for £1000 by the Glenburn Hydropathic Company and others in favour of John Dennis and Rebecca Dennis, and the survivor, and the heirs of the survivor, and their, his, or her assignees whomsoever, dated 14th and recorded 19th February 1908... 8. The whole sums invested in the securities enumerated in article 7, of which the value at the date of the truster's death was £9028, 11s. 6d. or thereby, were provided by the truster out of his own estate, and were placed in these investments by him. . . . 10. Apart from the said investments the truster died possessed of the following moveable estate—[*There followed a list of moveable estate including other stocks and shares (some of which were in the same companies as the stocks and shares taken with special destinations as stated in article 7) and securities in England and Scotland, and amounting in value to £17,414, 5s. 4d.*] 13. Questions have been raised between the parties to this case as to the rights of the second party in connection with the investments enumerated in article 7. All the parties admit that no other evidence exists of the truster's intention in regard to these investments beyond what is shown by the terms of his testamentary writings and in the certificates or other documents instructing such investments. Upon the assumption that the claims of the second party are wholly sustained, the whole provisions of the truster's testamentary writings with regard to legacies or annuities in favour of parties other than the second party can be satisfied out of the estate left by him and as to which no question is raised. 14. The first parties, the trustees of the truster, maintain no contentions. The second party, the trus-

ter's widow, and the third party, her niece Miss Martha Jane Elliot, maintain that the terms of the investments enumerated in article 7 of this case operated as special provisions in favour of the truster's widow by the truster, that in law such investments effected special destinations of such investments to the second party according to their respective terms, express or implied, of the whole or of one-half thereof as the case may be, that such special destinations are entitled to receive testamentary effect, that none of the said special destinations was revoked by his testamentary writings, that in accordance with English law the second party as survivor is entitled to the whole of the shares therein specified under branch (1) as invested in English companies, that of the investments specified under branch (2) the second party as joint owner is entitled to one-half of the shares (*a*) and (*b*), and as survivor to the whole of the remainder of such shares, and that the second party as survivor is entitled to the whole of the investments specified under branch (3). The fourth parties are among the residuary legatees of the truster. They maintain that the documents vouching the investments enumerated in article 7 (or some of them) are not testamentary writings, that in any event the testamentary writings of the truster were intended to revoke and did revoke all previous provisions or destinations in favour of his wife, and that the said investments are part of the trust estate of the truster."

The *questions of law* were—"1. Do the shares represented by the investments enumerated (*a*) to (*c*) inclusive in branch 1 of article 7 of this Case belong to the second party wholly or to the extent of one-half only? or, Do such shares belong in whole or to the extent of one-half to the trust estate of the truster? 2. Does one-half of the shares represented by the investments specified as (*a*) and (*b*) in branch (2) of the said article 7 belong to the second party? or, Does the whole of such shares belong to the trust estate? 3. Do the shares represented by the investments enumerated as (*c*) to (*g*) inclusive in branch (2) of the said article 7 belong to the second party wholly or to the extent of one-half only? or, Do such shares belong wholly to the trust estate? 4. Does the sum contained in the bond and disposition in security specified under head (*a*) of branch (3) of the said article 7 belong wholly to the second party? or, Does it belong to the trust estate? 5. Do the sums enumerated as (*b*) in branch (3) of the said article 7 on deposit with the Edinburgh Corporation belong wholly to the second party? or, Do such sums belong wholly to the trust estate?"

Argued for the second and third parties—There was a presumption that the special destinations in the stock and share certificates and in the bond were not evacuated by the general conveyance in the codicil. This presumption could only be rebutted by evidence that it was the testator's intention to evacuate the destinations—*Glendonwyn* v. *Gordon*, (1873) 11 Macph. (H.L.) 33, *per* Lord Colonsay at p. 39, Lord Chancellor (Selborne) at p. 43, 10 S.L.R. 451; *Walker's Executor* v. *Walker*, (1878) 5 R. 965, *per* Lord President at p. 969, 15 S.L.R. 636; *Connell's Trustees* v. *Connell's Trustees, &c.*, (1886) 13 R. 1175, *per* Lord Adam at pp. 1182 and 1183, 23 S.L.R. 857. Nor without evidence of such intention on the part of the testator could the clause of revocation of prior settlements contained in the trust-disposition and settlement affect the special destinations—*Paterson's Judicial Factor* v. *Paterson's Trustees*, (1897) 24 R. 499, 34 S.L.R. 377; *Perret's Trustees* v. *Perret*, 1909 S.C. 522, *per* Lord President at p. 527, 46 S.L.R. 453; *Turnbull's Trustees* v. *Robertson*, 1911 S.C. 1288, 48 S.L.R. 1033; *Stewart* v. *M'Laren*, 1920 S.C. (H.L.) 148, 57 S.L.R. 531; *Duff's Trustees* v. *Phillipp*, 1921 S.C. 287, *per* Lord Skerrington at p. 296 *et seq.*, 58 S.L.R. 212. There was no evidence of intention of the testator sufficient to rebut the presumption. The fact that certain of the specially destined shares were mentioned in the codicil in connection with the power to acquire conferred upon the niece was not to be taken as such evidence. If effect were given to the special destinations there would still be sufficient estate to carry out the trust purposes. In *Perret's Trustees* the trust purposes would have been defeated if effect had been given to the special destinations. In any event there was no revocation of the destination in the bond.

Argued for the fourth parties—The codicil of 30th October 1911 was intended to apply to the stocks and shares taken with special destinations and to the bond and disposition in security. The right conferred on the niece to purchase shares "held by me at the time of my death or held by my wife at the time of her death," together with the inclusion amongst the shares which the niece might acquire of some of the shares taken with special destinations, was irreconcilable with an intention that effect should be given to the special destinations, and clearly showed that the testator meant to convey his whole estate, including the shares and bond in question, to the trustees. The special destinations must therefore be considered to have been revoked by the general conveyance in the codicil—*Henderson's Trustees*, 1911 S.C. 525, 48 S.L.R. 424; *Minto's Trustees* v. *Minto*, (1898) 1 F. 12, 36 S.L.R. 50. *Drysdale's Trustees* v. *Drysdale*, 1922 S.C. 741, 59 S.L.R. 558, was also referred to.

At advising—

LORD PRESIDENT—The testator, who died in 1912, left moveable estate, chiefly in the form of stocks and shares, amounting to nearly £26,500, and heritable property of the value of rather more than £11,500. The questions in the case are as to the rights of parties in certain blocks of stocks and shares and in a bond and disposition in security for £1000. Some of these stocks and shares stood at the date of the testator's death in the joint names of the testator and his wife (who survives him), and others stood in the joint names of the testator and his wife and the survivor, while the bond and disposition in security bore to be in

favour of the testator and his wife, and the survivor and the heirs of the survivor, and their, his, or her assignees whomsoever. All these investments were made out of the testator's own means prior to the codicil of 1911, with the exception of one block of shares acquired in 1912. Many years earlier, namely, in 1886, he had executed a trust-disposition and settlement disposing of his whole estate. He was a prolific author of testamentary writings, however, and his fifth (and last) codicil of 1911 is practically a new settlement complete (except for the nomination of trustees and a few occasional references to older provisions) in itself. The stocks and shares and the bond and disposition in security were found in his repositories after his death, there having been no gift and no delivery of any of them to his wife during his lifetime. It is agreed that there is no evidence of the testator's intention with regard to these investments beyond what is provided by the terms in which the titles to them stood and the testator's settlement and codicils. [*His Lordship then referred to a question, which was withdrawn, as to certain deposit-receipts.*]

Apart from any specialty which may be found to attach to the shares in English companies, it will be seen that none of the documentary titles in question gave the testator's wife any rights during his lifetime. But it is now well settled by a long train of authority, in which *Connell's Trustees* (13 R. 1175) occupies a prominent place, that such documentary titles may have testamentary effect. Some stress was put during the debate on that part of the rubric in *Connell's* case which dealt with share certificates in the joint names of husband and wife (without mention of survivorship). It reads as if the effect of certificates in that form was to make the shares joint property of the spouses in the husband's lifetime, and Lord Adam's language (13 R. 1184, near the foot) lends itself to that interpretation. But I do not for one moment imagine that such was his Lordship's meaning. There was no evidence in *Connell's* case any more than there is here either of a *donatio inter virum et uxorem* or of anything amounting or equivalent to delivery. It was only after the husband's decease that his widow got a joint right of property in the shares along with his general representatives, and this she got by virtue of the testamentary effect attributed to the certificate as a special destination. The doctrine of special destination is that if (1) anyone takes the documentary title to property or securities (including shares) which he has acquired in his own right or out of his own means in favour of some other person (either solely or jointly with himself, and in the latter case either with or without a clause of survivorship), and (2) if such title remains in the possession of the acquirer undelivered to such other person during the acquirer's lifetime, then such title is held to constitute a valid nomination of such other person as successor of the acquirer in such property or securities—to the extent of the whole if the title is in favour of such other person solely or as survivor; to the extent of one-half if the title is a joint one in favour of the acquirer and such other person without a clause of survivorship. In short, the documentary title, so far as the same is in favour of the other person (whether wholly or as regards only a-half), is a special destination of the property or securities to him to that extent. Perhaps the old but oft-quoted cases of *Hill* v. *Hill* ((1755) M. 11,580) and *Balvaird* v. *Latimer* (December 5, 1816, F.C.) still remain the most instructive illustrations of the doctrine amid a host of later decisions. [*His Lordship then stated his reasons for holding that no specialty attached to the shares in English companies.*]

Unless, then, there is something in the testamentary writings of the testator to revoke or evacuate the prior special destinations in the share and stock certificates and in the bond and disposition in security, those destinations must receive effect in the widow's favour. The special destination in the share certificate of 1912 being later in date than any of the testamentary writings cannot be revoked or evacuated by them—*Perret's Trustees* v. *Perret*, 1909 S.C. 522—and no dispute as to the shares included in this certificate arose at the debate. In none of those testamentary writings does the testator make any express revocation of prior special destinations. But while it is trite law that a general conveyance such as is contained in the codicil of 1911 will not of itself avail to revoke or evacuate prior special destinations—*Glendonwyn* v. *Garden*, 11 Macph. (H.L.) 33; *Walker's Executor* v. *Walker*, 5 R. 965—this rule is one of presumption only and may be redargued by evidence of intention; and it is held to be strong evidence of such intention that the directions for the administration of the testator's estate contained in his general settlement cannot stand together with the prior special destinations. I refer to such cases as *Minto's Trustees* v. *Minto*, 1 F. 62; *Perret's Trustees* v. *Perret*, 1909 S.C. 522; *Henderson's Trustees*, 1911 S.C. 525; and *Turnbull's Trustees* v. *Robertson*, 1911 S.C. 1288. Now in the codicil of 1911 there is a clause designed in favour of a niece of the testator, who benefits largely under it, which seems to me on consideration to afford unequivocal evidence that the testator intended all the stocks and shares which he had then acquired, including those standing in the joint names of himself and his wife, to pass under the administrative directions of that codicil. By the clause in question the testator's niece is given a right to buy from the trustees any of the testator's stocks and shares at a valuation not exceeding the price the testator had paid for them. The clause enumerates certain of his stocks and shares evidently as being among those which the testator thought it might be worth his niece's while to purchase on these terms. But the right thus given to the niece is not limited to those named, for the enumeration closes with the words "or others if preferable." Among those enumerated are two of the blocks of shares in English companies standing in name of the testator and his wife, and two of the blocks of the shares in Scottish com-

panies standing in name of the testator and his wife and the survivor. The right thus given to the niece is irreconcilable with the prior special destinations of the stocks and shares in favour of the widow, and is in my opinion sufficient to establish that the whole of the stocks and shares referred to in article 7 of the Special Case (other than the shares included in the certificate of 1912), notwithstanding the form of the title in which they stood at the testator's death, passed to his trustees under the general conveyance in their favour contained in the codicil of 1911, and fall to be administered and dealt with according to the provisions of the testator's settlement and codicils. At first sight the description of the shares as being shares "held by me at the time of my death or held by my wife at the time of her death" is puzzling, but I think the latter part of the description is sufficiently explained by the contingency of the wife's death occurring after that of the testator but before the trustees had got the shares registered in their own names.

I can find nothing in the codicil of 1911, or in the prior testamentary writings so far as these have to be read along with it, to infer any evacuation or revocation of the special destination in the bond and disposition in security for £1000, and I think that special destination must prevail.

LORD SKERRINGTON—The parties to this Special Case are agreed upon the following facts, viz., that all the investments enumerated in article 7 were made or purchased by the truster with money which belonged to himself; that the titles to these investments were found in his repositories after his death; and that apart from the terms of the titles and of his testamentary writings there is no evidence as to the purpose which he had in view when he directed the titles to be expressed as we find them. From these facts it follows, according to Scots law, that the truster continued to be the beneficial owner of these investments until his death seeing that there is no evidence that he ever delivered the titles to his wife or to someone for her behoof, or otherwise parted with the power and the right to dispose of the investments as he might wish either *inter vivos* or *mortis causa*. [*His Lordship then referred to the English investments and stated his opinion that any specialty was immaterial for the purpose of the present case.*]

Such being the position of matters the sole question argued to us was whether the latest of the testator's testamentary writings, which he described as his "deed of settlement or codicil" and which is dated 30th October 1911, contains materials sufficient to rebut a purely artificial legal presumption to the effect that a testamentary writing which in express language disposes of the whole estate "of whatever kind or denomination whatever and wheresoever situated" belonging to a testator at the time of his death was not intended by him to refer to and dispose of a part of his estate falling within that description, viz., investments of which he was the absolute and indisputable beneficial owner at the date of the writing, but which for some unknown reason he had invested in his own name and in that of a third party, or which he had invested in the name of himself and another and the survivor of them, or in terms which implied that the investment was destined to such survivor. I have come to the conclusion that the codicil of 30th October 1911 may consistently with the authorities be construed as meaning what it says. It contains a clause which seems to me to indicate unmistakably that the testator intended that his shares in some four companies which he named should at his death fall under the disposition and control of his testamentary trustees for the purposes of his will and codicil notwithstanding the fact that the legal title to these shares would vest in his widow if she should survive him. If I am right as to this it follows in my opinion that the depositive clause of the codicil must be read in its natural sense, and therefore as including the whole property belonging to the testator at the time of his death in whatever way that property might happen to be invested or held. It is impossible in my opinion to draw any distinction between the shares in the four named companies and the similar investments in the shares in other companies of which the testator was the beneficial owner. Differing from your Lordships I apply the same reasoning to the bond and disposition in security for £1000, which according to the form of the title was destined to the survivor of the spouses. I think that the testator has sufficiently vindicated his right to have his testamentary wishes construed according to the natural and proper meaning of the language which he uses. Considerations of a different kind apply to the investment which is later in date than the codicil, as in that case the question would be whether the terms of the investment have the effect *pro tanto* of revoking that testamentary writing.

LORD CULLEN—As regards the deposit-receipts mentioned in the case the second party does not now insist in her contention.

As regards the shares and the bond and disposition in security to which the case otherwise relates, it is clear on the authorities that while these remained the sole property of the deceased down to his death the terms of the scrip and of the bond are habile to constitute special destinations *mortis causa* in favour of the second party to which effect must be given unless they have been revoked. Accordingly the contention of the fourth parties is that they have been revoked. This contention is not founded on the general conveyance to the trustees under the settlement taken by itself. In conjunction with it, however, the fourth parties appeal to the terms of the clause in the last and holograph testamentary writing of the deceased giving rights to the third party to acquire shares on certain terms to which your Lordships have already referred and which I need not quote. Counsel for the second party offered

certain comments upon the obscurity of this clause. It is a difficult clause and I do not profess to have arrived at a complete analysis of all the conceptions which were in the mind of the testator when he wrote it. But this, I think, is sufficiently clear that the testator was professing to exercise a testamentary power of disposal over the shares to which it relates, whether standing in his own name at his death or in the name of the second party at her death. And the generality of his reference to the shares to which the clause is to apply does not seem to me to warrant a distinction being made between one set of the shares now in question and another. The proper inference, in my opinion, is that the testator was exercising a testamentary power of disposal over all these shares as being included within his general conveyance in trust for the purposes thereof. I accordingly think that as regards the shares the contention of the fourth parties should be sustained.

The bond and disposition in security, however, is in a different position. Neither in the said clause of the last holograph writing nor elsewhere in his testamentary writings does the deceased refer to it. The special destination in the bond stands, accordingly, unaffected. I am unable to see how the said clause, dealing as it does solely with shares, can be said to evince any intention on the part of the deceased to revoke that destination. I accordingly think that *quoad* the bond the contention of the second party should be sustained.

LORD SANDS—In this case it appears that on the death of the testator certain funds, which admittedly formed part of his own estate, were invested in name of himself and his wife—1. Certain shares in companies registered in England were registered in name of the testator and his wife. Under the articles of these companies, under such a destination, the shares were recognised as the shares of the survivor. 2. Certain shares in Scottish companies registered in name of the testator and his wife. 3. Certain shares in Scottish companies registered in name of the testator and his wife and/or the survivor. 4. A bond for £1000 in favour of the testator and his wife and the survivor and the heirs of the survivor and their, his, or her assignees whomsoever.

The legal effect of all these forms of destination, apart from any later indication of testamentary intention, is well settled by authority. In the case of the shares in the Scottish companies with no survivorship clause, one-half would be held as destined to the wife on the decease of the husband. In all the other cases the shares or funds would be held to be destined to the wife if she survived her husband. But the funds being those of the husband on investment, the right of property in them remains exclusively in him during his survivance, and on his death his widow takes as a testamentary disponee. Accordingly it has been held that when from a subsequent testamentary writing it can be gathered that the husband intended to dispose of the property otherwise than according to the destination in the title, such indication of intention is sufficient to operate as an evacuation of the legal destination otherwise attributed to the form of title. The law in regard to this matter is somewhat peculiar in its operation. One could quite understand the view that when a person voluntarily places his property in such a position that he cannot deal with it without the consent of another, he confers a right upon that other party. But the law does not accept this view. The property so placed remains absolutely the property of the person investing it in another's name, however great difficulty such person may find in dealing with it. But on his death he is held to have bequeathed it to the other party. This seems to be an exception to the rule against nuncupative legacies. By verbal instructions to an agent a person may bequeath £100,000. In one way a bequest of this kind is better protected than a special bequest by will. The latter is held to be revoked by a disposition for other testamentary purposes of a testator's whole means and estate, but not so the former. In the present case there is such a disposition. But whilst this does not by itself evacuate the special destination, it may do so if from the terms of the general settlement it can be gathered that the testator intended to include the funds under the special destination in the general conveyance to his executors for other testamentary purposes.

In the final settlement of the testator there is a curious provision, according to his niece a right of pre-emption as regards certain of his shares. In the particular enumeration of shares there are four blocks of shares which stood in the names of both spouses. I am unable, in view of the fact that these blocks are cited merely as samples, to entertain the suggestion that in a question of indication of intention the particularly mentioned shares are to be considered as being on a different footing from other shares held in the same way.

In the view that the testator contemplated that the destination should become operative not merely as a matter of formal title but also of proprietary right on his death the shares destined to his wife would have become her absolute property. She might sell or deal with them as she pleased. On her death, in so far as undisposed of, they would have passed not to the husband's executors but to the wife's. But the direction in the settlement was and could be a direction to the husband's trustees and executors alone. The suggestion appears to me to be so far-fetched as to be unreasonable, that the testator contemplated that on the death of his wife his testamentary trustees were to endeavour to buy shares from her executors in order that they might be in a position to offer them to his niece at "cost price," whatever in such circumstances "cost price" might be held to import.

I am accordingly of opinion that the testator has indicated an intention to include the shares in question in this case in the

general disposition to his testamentary trustees, so that on his death, whatever might be the formal state of title, the whole of the shares belonging to him at his decease should fall to be distributed by his testamentary trustees according to the directions of his settlement.

In regard to the heritable bond I have some difficulty. If the testator had expressly directed that shares held in his wife's name or in joint names were to be treated as part of the estate conveyed to his testamentary trustees there would have been no difficulty. The bond not being referred to the destination therein would not have been affected. The difficulty I feel arises from the consideration that the construction I propose to put upon the testament as regards the shares imports these two things—that the testator meant them to be part of his testamentary estate, and that he *assumed* that this would be so without any special direction on his part. It would be quite unreasonable to suggest that he introduced this curious clause about pre-emption for the purpose of indicating this intention. The *assumption* underlies the clause. It is not sufficient, however, that a testator should intend. He must show the intention by words in the settlement. Heritable bonds are not mentioned in the settlement, and accordingly I concur with your Lordship in the chair in differentiating the bond from the shares.

I am of opinion that the several questions should be answered in the manner proposed by your Lordship.

The Court answered the second alternative of the first question in the case, as regards the whole of the shares, in the affirmative, and the second alternative of the second question, the second alternative of the third question, and the first alternative of the fourth question all in the affirmative, subject of consent to the qualification that the answer to the second alternative of the second question did not apply to the investment which was later in date than the date of the last codicil (30th October 1911), which fell to be dealt with in terms of the special destination contained in the share certificate thereof.

Counsel for the First and Fourth Parties —Wark, K.C. — Dykes. Agents — Gray, Muirhead, & Carmichael, S.S.C.

Counsel for the Second and Third Parties —Wilton, K.C.—King Murray. Agents— Sim & Whyte, S.S.C.

Saturday, July 14.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

JAMES BROWNLIE & SON *v.* MAGISTRATES OF BARRHEAD.

Reparation—Limitation of Action—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*a*)—"*Continuance of Injury or Damage*"—*Progressive Damage—Injurious Effects Caused by Flooding.*

By the Public Authorities Protection Act 1893, section 1 (*a*), an action against any person in respect of any alleged default in the execution of any Act of Parliament or of any public duty or authority must be commenced within six months next after the act, neglect, or default complained of, "or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

An action was raised against a public authority in respect of floodings, some of which had occurred more than six months previously. The pursuers averred that as a result of these floodings their premises had been seriously damaged, and were still being seriously damaged, owing to the progressive injurious effects of the water on the buildings. *Held* that the action was excluded in so far as it related to damage done by the floodings which had occurred more than six months before the date of the summons, there being no case of a "continuance of injury or damage" in the sense of the statute.

Burgh—Drainage—Dual System of Drainage — Duty of Drainage Authority to Effectually Drain the Burgh — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 219.

The Burgh Police (Scotland) Act 1892, sec. 219, enacts—"The Commissioners shall . . . cause to be made . . . such . . . sewers as shall be necessary to the effectual draining of the burgh. . . ."

An action was raised against the drainage authority of a burgh for damages for injury to property due to the inadequacy of the sewers to carry off surface water as well as sewerage. The burgh had adopted a dual system of drainage whereby sewerage proper and roof water were carried by sewers to purification works, and surface water was taken by separate pipes to convenient points for discharge. In the case of the pursuers' property the surface water was discharged partly into a burn and partly, with the acquiescence of the drainage authority, into the sewer. The sewers proved insufficient to carry off all the surface water naturally delivered to them from the pursuers' premises and flooding ensued. *Held* that the drainage authority was not excused by the adoption of the dual system from its statutory duty of effec-