son's Trustees v. *University of Edinburgh*, November 9, 1888, 16 R. 73; *Petticrew's Trustees* v. *Petticrew*, December 6, 1884, 12 R. 249; *Brown* v. *Maxwell's Trustees*, May 21, 1884, 11 R. 821. The pencil additions must be held to be deliberative only—*Lamont* v. *Magistrates of Glasgow*, March 10, 1887, 14 R. 603. The law in England was to the same effect—Williamson on Executors (8th ed.), 211. The *conditio si testator sine liberis decesserit* did not apply here. The general presumption that this *conditio* was to be read into a will giving a stranger an estate, if the testator should afterwards marry and have children, could be rebutted by the facts, viz.—(1) The will did not deal with the whole estate of the deceased but only part of it; (2) it was also plain that the testator had not forgotten the existence of the will, because he had actually made alterations on it which, although they could not affect the validity of the will, showed that he had remembered the existence of his wife and children; (3) the testator had survived the birth of his children for some time, but had not destroyed the will. All these circumstances showed that the *conditio* did not apply—Bankton, i. 227; Ersk. Inst. iii., 8, 46; *Colquhoun* v. *Campbell*, June 5, 1829. 7 S. 709.

The third party argued—The will was valid and effectual as altered for her benefit. The pencil alterations made by the testator were good, as the Court always endeavoured to arrive at the true meaning of a will, and effect had often been given to wills in a much rougher state than this. The will did not fall under the *conditio si sine liberis* for the reasons already given in the second parties' argument.

The tutors of the children argued—The pencil alterations destroyed the deed as a testamentary document, but were ineffectual as a will in the third party's favour. At most they were only deliberative, and the will in the altered circumstances was a mere draft. Apart from the question of the pencil alterations the will was destroyed by the operation of the *conditio si sine liberis*. The course of the decisions in later times had been that the birth of a child absolutely destroyed a will made when there were no children of the testator—*Dobie's Tr.* v. *Pritchard*, Oct. 19, 1887, 15 R. 2. Unless the testator did anything very decided to show that he intended that the birth of a child should make no difference, the *conditio* applied, and here the testator had done nothing. The result was that the estate fell into intestacy—*A's Executors v. B. and Others*, Feb. 1874, 11 S.L.R. 259.

At advising—

LORD JUSTICE-CLERK—The late Mr Munro, banker in Dunoon, wrote a holograph will, dated 5th February 1884. At that time Mr Munro was a bachelor, and by this will he made over his whole means and estate, heritable and moveable, to his parents should they survive him, and failing them to his nephew, under the burden of certain payments and legacies. Mr Munro afterwards married, and he took this will and with a pencil scored out the word "parents" and substituted "wife," and the word "nephew" and substituted "daughter." At the time he did this it is obvious that only one child was born of the marriage. The question is, whether this will is to stand as it now is, or whether it is to stand as it was originally drawn, or whether it falls altogether?

It is quite clear that the will came to an end as it was originally drawn upon Munro marrying and leaving a widow and children. Well, the next question is, whether the old will having come to an end, the changes made in pencil by Munro upon it constituted the document as a new will? and I am of opinion that it did not. I do not think that it is necessary for us to enter into the question whether in every circumstance the insertion of pencil alterations must be held to vitiate the whole deed, but taking the whole circumstances of this case into account, my impression is that Mr Munro took this old will, which he must have known to be valueless, and used it as a draft for a new will to be executed afterwards. Mr Munro was a solicitor and notary-public, and I do not think that he intended to set up this will, which he must have known to be useless, as the real settlement of his affairs. In my opinion, therefore, Mr Munro did not leave any will to govern the division of his property, and therefore it will go according to the rules of the law of the land. The last section of the fourth question for the consideration of the Court will be answered in the affirmative.

LORDS YOUNG, RUTHERFURD CLARK, and TRAYNER concurred.

Counsel for the First, Second, and Fourth Parties—MacWatt. Agents—Cumming & Duff, S.S.C.

Counsel for the Third Party—Sym. Agents—Cumming & Duff, S.S.C.

Counsel for the Fifth Party—Younger. Agents—Cumming & Duff, S.S.C.

Tuesday, November 18.

SECOND DIVISION.

[Lord Trayner, Ordinary.

THE EARL OF WEMYSS AND MARCH AND OTHERS *v.* THE EARL OF ZETLAND AND OTHERS.

Salmon Fishing—Fixed Engine—Net.

A net of about 120 or 300 yards long and from 12 to 15 feet deep was used for taking salmon in the estuary of a river. The net was paid out from a boat rowed across the stream, and was afterwards kept upright by floats on the top and a heavy rope at the bottom. The net was stretched straight across the channel where the fish ran, at slack water, shortly before the tide began to ebb or flow, and was left to float entirely un-

connected with the boat except at night, when it was attached to the stern of the boat to prevent it being lost. It remained in the water from a quarter to three-quarters of an hour, during which time it drifted about 100 yards. At slack water it maintained its original position, but this was gradually altered by the currents, which shaped it into varying curves, and finally compelled its removal from the water. The fish were entangled in the meshes, and were either gaffed from the boat as the net floated or were hauled on board along with the net. At the places where these nets were used fishing with net and coble was practised.

Held, following the case of *Allan's Mortification* v. *Thomson*, November 14, 1879, 7 R. 221, that the net was not a fixed engine as used, and that this mode of fishing was not illegal.

The Right Honourable the Earl of Wemyss and March and others, proprietors of fishings on the upper waters of the rivers Tay and Earn, brought this action against the Right Honourable the Earl of Zetland, proprietor, and George Dunn and John Macvean, lessees, of fishings at Newburgh near the mouth of the Tay, to have it declared that the defenders were not entitled to fish in the river Tay for salmon or fish of the salmon kind with hang or drift nets, and for interdict.

The pursuers averred—"The said nets are used both at high and low water, when they are run out of a boat over the stern in a straight line across the river, and they maintain that position as they drift up and down the tide. During the time they are in the water they are nearly stationary, and the salmon caught in them are either hung or caught by their gills, and become entangled in the net according to the size of the fish. The length of time the nets are in the water is generally about three-quarters of an hour, and during that time they drift from 150 to 300 yards, remaining stretched across the current of the stream, and they are used for the double purpose of taking fish as aforesaid, and of keeping back the fish not so taken that they may be taken by the draught-nets that are used as soon as the turn of the tide makes such fishing available. . . . The portions of the river where the said nets have been used by the defenders are perfectly suited for net and coble fishing in the ordinary way. Such net and coble fishing is not the only legal mode of fishing for salmon in the Tay, but is that which has been universally practised by the pursuers, and to which they have strictly confined themselves. It is, besides, the only mode by which the coterminous and opposite proprietors of salmon fishings can exercise their respective rights without injury to each other."

The defenders averred—"The defender the Earl of Zetland has not expressly sanctioned such nets, but in view of the judgment of the Court in the case of *Masters of Allan's Mortification* v. *Thomson*, 7 R. 221, affirming the legality of using precisely similar nets in the river Forth, he declined to interfere with the use of drift-nets by his tenants."

The pursuers pleaded—"(1) The said nets used or permitted to be used by the defenders as aforesaid being substantially fixed engines adapted for the capture and obstruction of salmon and fish of the salmon kind are illegal both at common law and under the statutes above libelled. (2) The said nets used by the defenders as aforesaid being illegal, and in violation of the rights of the pursuers as upper proprietors on the said river, the pursuers are entitled to declarator and interdict as libelled."

The defenders pleaded—"(1) The defenders should be assoilzied in respect that the said nets are neither fixed engines nor illegal obstructions to the passage of salmon. (2) The method of fishing complained of being merely a form of fishing by net and coble adapted to the character of the part of the river in question, the defenders should be assoilzied with expenses."

Upon 28th June 1889 the Lord Ordinary (TRAYNER) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—The defenders maintain that the mode of fishing complained of in this action has already been determined to be a legal mode, and that therefore they should be assoilzied. They refer to the decision in the case of *Masters of Allan's Mortification*, 7 R. 221. The pursuers say that that case can be distinguished from the present in two particulars. First, they aver in this case that the net 'remains stretched across the stream,' while in *Allan's* case it was admitted that the free or river end of the net was swept down by the action of the tide until it became parallel with the shore, which was just a slow sweep of the net. And second, that in *Allan's* case it was admitted that net and coble was not a suitable mode of fishing the water there in question, while in the present case net and coble is not only suitable but is practised. I do not think this case is distinguishable from *Allan's* case. It is obvious that the free end of the net complained of, unless fixed, which it is not said to be, must fall off towards the shore under the action of the tide, and cannot remain stretched across the river. The character of the net and mode of fishing in each case is the same. The net is never fixed or stationary while being used; it is always moving or drifting more or less.

"With regard to the second point, I agree with the opinion of Lord Shand in *Allan's* case. The legality or illegality of a certain mode of fishing is not to be determined by the consideration whether another mode of fishing is suitable or not."

The pursuers reclaimed, and upon 21st January 1890 the Second Division recalled that interlocutor, and remitted the case to the Lord Ordinary for proof of the parties' averments, with expenses to the pursuers.

Proof was led, and the following facts were established thereby—The hang-nets or drift-nets used in the Tay vary from 120 to 300 yards in length, and from 12 to fifteen feet in depth, with a mesh of 3

inches between each knot, or from 11 to 13 inches all round. They are made of very fine cord, and are fitted either with a thick rope or with sinkers at the bottom and with floats at the top, the result being that they assume in the water a perpendicular position. The nets are used at each turn of the tide, both ebb or flow, when the water is slack, and are paid out from the stern of a coble which is rowed straight across the stream, the object of the fishermen being to stretch the net straight across the channel where the fish run. When the nets are fully paid out they are allowed to remain in the water unconnected with the boat except at night, when they are attached to the stern by a small cord to prevent them being lost in the dark. After the nets are paid out they depend for their position entirely on the action of the water. At dead water they maintain their original position, but as the currents from above or below begin to affect them they drift up or down the river. They remain in the water from twenty minutes to half or three-quarters of an hour, during which time they drift with the current about 100 yards. If the currents are even the nets maintain fairly their position; if the currents vary, the nets assume corresponding variations of curve. Being of fine material, they are easily affected by currents, and when these begin to increase in force the nets are hauled on board to prevent the risk of their being rolled together. The fish are entangled in the meshes, and they are either gaffed from the boat while the net drifts, or, if they appear to be fast, they are not secured till the nets are finally hauled on board.

It also appeared that at some of the places near Newburgh, where the nets in question were used, net and coble fishing was practised.

The pursuers sought to prove that while these nets were in use they formed a complete barrier to the passage of fish. The defenders, on the other hand, brought evidence to show that fish sometimes went under, or round, or over the top of these nets, as they were being used.

Upon 23d May 1890 the Lord Ordinary assoilzied the defenders from the conclusions of the action.

"*Opinion.*—I am unable to find any material distinction whatever between the nets complained of in this action, and the manner in which they are used, and the nets, the use of which was held in the case of *Allan's Mortification* to be legal. I think that case is decisive of the present, and I therefore, following that decision, assoilzie the defenders, with expenses. I concur in the opinion delivered by Lord Shand in the case I have referred to."

The pursuers reclaimed, and argued—This case was different from *Masters of Allan's Mortification* v. *Thomson*, Nov. 14, 1878, 7 R. 221, because it was proved that these nets formed an obstruction to the passage of fish up the river, even if they could not be said to be fixed engines. If there was obstruction the pursuers should prevail—*Dunn and Others* v. *Littles*, 25th February 1797, M. 14,282. But these hang-nets really constituted a fixed engine. In the case of *Hay* v. *Magistrates of Perth*, May 12, 1863, 1 Macph. (H. of L.) 41, it was laid down that the only proper mode of fishing for salmon was by net and coble, and that was really the principle upon which the case of *Allan's Mortification* was decided; there was a marked difference between that case and the present. There the result was a succession of sweeps, the ordinary result of net and coble fishing, and secondly, as the boat was being constantly moved by rowing, it kept the net in motion; but here the net was paid out in slack water when there was no current, or at least very little, and the net remained immoveable. The meaning of a fixed engine was an engine fixed relatively to the water. This was true of the nets here. Net and coble fishing was practised at the points in question.

The respondents argued—This case was indistinguishable from *Allan's Mortification*. The net was the same, the mode of paying it out the same, and the mode of fishing by entangling the fish was the same. There was no obstruction except to the fish caught. Fish could get under or round the net. A fixed engine must be fixed to the shore in some way so as to be kept taut. This net was put into the river and moved alone by the action of the water. There was even more of the fixed engine in the mode of fishing used in *Allan's* case, because there the net was attached to the boat which was rowed along with the intention of straightening the net.

At advising—

LORD JUSTICE-CLERK—This is an action to have it found and declared that the defenders are not entitled to fish in any part of the river Tay for salmon or fish of the salmon kind with nets of the description known as "hang-nets' or "drift-nets," and for interdict against the use of such nets.

Now, the Lord Ordinary, having considered the case on the record, decided that there was no distinction between this case and the case of *Allan's Mortification*, and therefore he assoilzied the defenders from the conclusions of the action. In this Court we thought, on reviewing that interlocutor, that it would be advisable to have the matter in dispute cleared up by a proof, and that proof is before us.

Now, the conclusions of the present action are practically to the same effect as the conclusions in the case of *Allan's Mortification*. They are directed against placing drift-nets in the water. Is there any difference in the facts as now ascertained which still make it necessary to hold that the use of such nets in this particular case is illegal?

In *Allan's* case the drift-nets were used, so far as I can see, practically in exactly the same manner as they are used in this case, and this remark applies both to the nets themselves and to the mode in which the fish were captured. If there is any distinction, it is one which

does not arise from the mode of fishing or the way in which the appliance is used, but from the fact that the stream is in this case somewhat different in strength and action from the stream in *Allan's* case It seems to me, however, that if we take the opinion delivered by Lord Westbury in *Hay* v. *Magistrates of Perth* and apply it to this case, we shall find that what was done here was in no way in contradiction to what was laid down by his Lordship as being the essential elements of fair river fishing, of which the symbols are net and coble. His Lordship says (4 Macq. App. 546)—"The proper conclusion is that the 'net and coble' is merely symbolical of the proper legal form of fishing, that legal form of fishing being by a net which is not to be fixed or stented, or in any manner settled or made permanent in the river, but is to be used by the hand, and is not to quit the hand, but is to be kept in motion during the operation of fishing."

Now, in *Allan's* case it is certain that the way in which the net was kept in motion was by the action of the tide, or of the stream on the net. In this case, also, there is no doubt that the motion imparted to the net is imparted by water, and by water alone. I suppose that a net of this kind stretched in absolutely still water would be ineffectual, and though the stream and tide may cause the net not to swing round in exactly the same way as it did in *Allan's* case, still the effect of the tide and stream is to keep the net moving always, and to prevent its remaining in one fixed place across the river.

These then being the facts, I am unable to see any distinction between this case and *Allan's* case. If the question were still open it might be a difficult one to decide, and I cannot say that my opinion would not lean in the direction of the decision in that case, because I think it was consistent with the deliverance of Lord Westbury which I have quoted. But I think it is sufficient for us in the decision of this case to find that there is no substantial difference of any kind between the facts of the two cases, and on that ground to hold that we must adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—I concur in adhering to the Lord Ordinary's interlocutor. I only wish to say this, that I do so solely because of the judgment in the case of *Allan's Mortification*. I am not prepared to say with the Lord Ordinary that I agree with the opinion delivered by Lord Shand in that case. I think the decision is not free from doubt, and I should have been very glad if your Lordships had seen fit to reconsider the subject of it in this case very carefully. I only therefore wish to guard myself against our decision being thought —should this or any other case go elsewhere — against it being thought that we are adding by our present judgment to the authority and weight of the case of *Allan*. I think we proceed—at least I do—on it entirely because it would not seem to your Lordships on the whole to be fitting for us to review that decision in the present case. I should like to say that I do not approve of any judgment of any Division as conclusive of Scottish law. If it should happen to be thought wrong on further consideration either by the same Division or another Division, I am not of opinion that it is necessary to summon the whole Court, or that nothing but an Act of Parliament will correct an error that has been fallen into. The series *rerum judicatorum* would cease to be valuable if as soon as a judgment was pronounced the matter was to be considered as conclusively settled; and it is a matter of discretion in the circumstances whether, in considering a point which has been a subject of decision either by ourselves or by the other Court, we should call in a larger number of Judges to consider it or not. But here, clearly guarding against being supposed to add anything to the weight of that decision by our formal adherence, or that we are doing more than simply adhering, I concur in the Lord Ordinary's judgment being affirmed.

LORD RUTHERFURD CLARK—I am of the same opinion, and think that we should adhere to the Lord Ordinary's interlocutor. I only wish to say further that I proceed solely upon the case of *Allan's Mortification*, and that like Lord Young I do not think that case is entirely free from doubt.

The Court adhered.

Counsel for the Reclaimers—Sir C. Pearson—Ure. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Respondents—Jameson—Guthrie. Agents—H. G. & S. Dickson, W.S.

Tuesday, November 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

STURROCK *v.* WELSH & FORBES.

Reparation—Wrongous Use of Diligence.

A party who had been charged to make payment of the sums contained in a decree for expenses obtained against him in an action of maills and duties, brought an action of damages against the chargers, averring that before they moved for said decree against him they had entered into an agreement under which, in consideration of certain trust-deeds granted by him for behoof of his creditors, they discharged all "personal claims" against him, and, *inter alia*, the claim for expenses in the action of maills and duties. The defenders founded upon the fact, that although they had given the pursuer due notice of their intention to move for said decree, he had not appeared to oppose their application, and pleaded that the action was irrelevant. It appeared