Tuesday, March 8.

FIRST DIVISION.

BRYDON'S CURATOR *v.* BRYDON'S TRUSTEES.

Succession — Revocation — Revocation of Special Destination by General Disposition — Gift of Income — Discretion of Trustees to Restrict.

A bond and disposition in security was granted to three sisters, J, E, and M, in respect of a sum of money advanced by them in equal shares, which the debtor undertook to repay "to the said J, E, and M, and the survivors or last survivor of them, and to their or her executors or assignees." Two other bonds were granted to them in similar terms.

J died in 1892 leaving a will dated after the execution of the last bond. She stated that she revoked and cancelled all former dispositions and settlements and bequeathed to her sister E "her whole estate, heritable and moveable . . . now owing and belonging to me, and which shall be owing and belonging to me at the time of my death." E died in 1896 leaving a will dated 1892 by which she conveyed to trustees her whole estate "now belonging or which shall belong to me at the time of my decease." The trustees were directed to hold the whole residue "and to apply the income thereof" for the support of her sister M, with power to apply the income "for my said sister's behoof, as they in their sole discretion shall deem best." The surplus of the income was to form part of the residue. The truster made certain bequests to be paid at the death of M, and the residue was to be paid over to her niece. There was no express clause of revocation of former wills.

E's estate was not nearly sufficient to meet the legacies bequeathed by her if there were not included in it the shares in the heritable bonds appertaining to herself and her sister J, and even including these sums there was a small deficiency. The *curator bonis* who had been appointed to M claimed that in virtue of the clause of survivorship in the bonds she was entitled to the whole sums contained therein; he also claimed that she was entitled to the whole income of the residue of E's estate.

Held (1) that the destination contained in the bonds was revoked by the general settlement of both J and E, and that accordingly E's trustees were entitled to two-thirds of the sums contained therein. (2) that M was entitled only to such amount of the income of E's estate as the trustees might think necessary for her comfortable maintenance.

Campbell v. *Campbell*, July 8, 1880, 7 R. (H.L.) 100, *followed.*

Miss Elizabeth Brydon, Innerleithen, died on 12th August 1896, leaving a trust-disposition and settlement dated 1892, with relative codicils. She had two sisters Jessie and Mary. Of these Miss Jessie Brydon died on 28th September 1892, leaving a disposition and settlement dated June 1892, whereby she bequeathed her whole estate to her sister Elizabeth and appointed her to be her sole executrix. The disposition commenced with the narrative that "I, Jessie Brydon, residing in Innerleithen, hereby revoke and cancel all former dispositions and settlements made by me, and for the love and favour which I have and bear to my sister Elizabeth Brydon . . . do hereby give, grant, resign, dispone, convey, and make over to and in favour of the said Elizabeth Brydon all and sundry lands, tenements, heritage, goods, gear, debts, and sums of money, and in general the whole estate, heritable and moveable, real and personal, now owing and belonging to me, and which shall be owing and belonging to me at the time of my decease."

Miss Mary Brydon was for many years of unsound mind and incapable of managing her affairs. From about September 1877 her affairs were managed by her sisters, and on 19th July 1879 she became an inmate of the Royal Edinburgh Asylum. She left it on probation in April 1880, re-entered it after a month and resided there and in the Rosslynlee Asylum ever since. Her sisters after her removal to the asylum applied to her maintenance the revenue received from her estate, and made up the deficiency themselves, the sum required for her maintenance not exceeding £50 per year. In January 1876 a sum of £500 was borrowed from the three sisters by Mr Russell, draper, Peebles, and he granted a disposition in security by which he granted him "to have instantly borrowed and received from Jessie, Elizabeth, and Mary Brydon, Leithenside, Innerleithen, the sum of £500," which sum he bound himself and his representatives "to repay to the said Jessie, Elizabeth, and Mary Brydon, and the survivors or last survivor of them, and to their or her executors or assignees whomsoever, at the term of Whitsunday 1876," with interest and penalties as therein mentioned. The disposition in security was "to and in favour of the said Jessie, Elizabeth, and Mary Brydon, and the survivors or last survivor of them, and to their or her executors or assignees whomsoever." The warrant of registration is "on behalf of Misses Jessie, Elizabeth, and Mary Brydon, Leithenside, Innerleithen," and the deed was recorded on 18th January 1876 in the Register of Sasines, Reversions, &c., for the burgh of Peebles.

In October 1877 a sum of £400 was lent by the sisters to the trustees of the Third Peeblesshire Rifle Volunteers, and a bond and disposition in security was granted by them by which the trustees bound themselves to repay to the sisters or to the survivor of them in terms practically identical with those in the first bond.

In April 1880 a third bond was granted to the sisters by Mr James Smith, auctioneer, Peebles, for a sum of £350. The terms of this bond were, *mutatis mutandis*, practically identical with those of the first two.

No part of the sums contained in these bonds was paid up with the exception of the sum of £150, which was repaid by Mr Smith in 1888.

Miss Elizabeth Brydon by her trust-disposition above mentioned conveyed her whole estate, "heritable and moveable . . . now belonging or which shall belong to me at the time of my death, . . ." to trustees, whom she directed—"*Second*, I direct my trustees to hold the whole residue of my means and estate, and to apply the income thereof, for the benefit, support, and comfort of my sister Mary should she survive me; declaring that my trustees shall have full power to apply the said income for my said sister's behoof as they in their sole discretion shall deem best, and may from time to time change her place of residence, it being my express desire that my trustees should occasionally, either by one of their own number or by some other suitable person duly authorised by them, visit my said sister, and that the expenses of such visit should be paid from the said income; declaring further, that any surplus of the said income in the hands of my trustees at my said sister's death shall form part of the residue of my estate, and be dealt with accordingly; it being specially provided, however, that a statement under the hands of my trustees, or their agent or factor for the time being, of the amount of such surplus shall be sufficient and conclusive evidence thereof without any further accounting or production of vouchers in regard to the application of the said income during the lifetime of my said sister." She made certain bequests of legacies, and directed her trustees after the death of the survivor of herself and her sister Mary to pay over the residue of her estate to her niece. The amount of her estate, excluding the sums contained in the bonds, was, after deduction of duty, &c., £1544. A special bequest and the preferable legacies amounted to £2016, leaving a deficiency of £472, to which fell to be added general legacies amounting to £500. If the trustees were entitled to two-thirds of the sums in the bonds, the deficit in the residue for paying both general and special legacies would amount only to £238.

A special case was presented by (1) Mr Wallace, C.A., who had been *curator bonis* to Miss Mary Brydon, and (2) Miss Elizabeth Brydon's trustees.

The contentions of the parties as set out in the case were—"The first party maintains that he, as *curator bonis* foresaid, is entitled, in virtue of the clause of survivorship contained in said bonds and dispositions in security, to the whole sums therein contained, with interest thereon from the date of Elizabeth Brydon's death, and he also maintains that he is entitled to receive from the second parties payment of the whole income of the residue of the estate conveyed under said trust-disposition and settlement, under deduction of the necessary expenses of management of the trust.

"The second parties on the other hand maintain that, in virtue of the terms of the destinations contained in the said bonds and dispositions in security, and of the terms of the disposition and settlement of Miss Jessie Brydon, and the trust-disposition and settlement and codicils of Elizabeth Brydon, they are entitled as trustees foresaid to the sums contained in said bonds and dispositions in security to the extent of two-thirds, or otherwise one-half, or otherwise one-third thereof. They also maintain that they are not bound to pay over the whole income of the residue of Elizabeth Brydon's trust-estate to or for behoof of Mary Brydon, or to pay any part of it to the first party. They maintain that they are themselves bound to see to the application of the income; that they are entitled to have regard to the amount of the estate belonging to Mary Brydon and the income derived therefrom; and that they are only bound to apply for her behoof such portion of the income of the residue as will, along with her private income, suffice for her comfortable support and maintenance."

The questions submitted for the judgment of the Court were — "(1) Is Mary Brydon now in right of the whole sums contained in said bonds and dispositions in security, or any of them? or (2) Do the sums contained in said bonds and dispositions in security, or any of them, now form to any extent part of the trust estate of Elizabeth Brydon? (3) If they do, are the second parties now in right thereof to the extent of (*a*) two-thirds, (*b*) one-half, or (*c*) one-third? (4) Is the first party entitled to demand from the second parties the whole or any part of the income of the residue of Elizabeth Brydon's trust estate? or (5) Have the second parties a discretion as to the amount to be applied for her benefit, support, and comfort, and in the exercise of that discretion are they entitled to have regard to the income derived from Mary Brydon's separate estate?"

Argued for the second party — These bonds were simply investments, and not in the nature of settlements, the so-called destinations being merely for the guidance of the debtors, that they might know whom to pay. Admittedly there was a presumption against the revocation by a general settlement of special destinations, but this presumption did not apply where there was anything to indicate a contrary intention, and looking to the nature of these documents it did not apply here—*Campbell* v. *Campbell*, July 8, 1880, 7 R. (H. L.) 100; *Walker* v. *Galbraith*, December 21, 1895, 23 R. 346; *Gray* v. *Gray's Trustees*, May 24, 1878, 5 R. 820. In the cases quoted by the second parties the judgments were all subject to the reservation that there was nothing to indicate an intention to revoke. If the Court held there had been no revocation, there would be a great deficiency in Miss Elizabeth's estate towards paying her legacies, and this had always been held important evidence of

intention — *Trustees of Free Church of Scotland* v. *Maitland*, January 14, 1887, 14 R. 333.

Argued for first parties—It would have been possible to evacuate the destinations by calling up the bonds during the lifetime of the sisters, but they were left subsisting as regulating their rights *inter se*, and accordingly they were equivalent to a special destination, which would, according to a well-known rule of law, not be revoked by any general disposition. The case could not be distinguished from *Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175. There being two deeds of the same person, unless there was something to show that it was not intended to make a special bequest in the bonds, or that it was intended to revoke such bequest, there was no evacuation by the later settlement—*Paterson's Judicial Factor* v. *Paterson's Trustees*, February 4, 1897, 24 R. 499; *Walker's Executors* v. *Walker*, June 19, 1878, 5 R. 965. There was here no such indication of intention, but, on the contrary, the element of mutuality contained in the bonds was against the view that the destinations were revoked. A mutual will of this kind was equivalent to three wills which it was competent to treat separately, and accordingly the insanity of Miss Mary at the date of the bonds need not be taken into account in dealing with the settlements of her sisters, even assuming her to have been incapable of making a settlement herself. There would in any case be a shortage of Miss Elizabeth's estate, so that argument did not apply.

LORD M'LAREN—This case raises in a new form the question which has been the subject of much learned debate of the efficacy of general testamentary words to revoke or evacuate a previous destination of specific subjects.

In January 1876 three sisters, Misses Jessie, Elizabeth, and Mary Brydon, invested a sum of £500, contributed by them in equal shares, on heritable security, and in the bond and disposition in security the debtor undertook to repay this sum "to the said Jessie, Elizabeth, and Mary Brydon and the survivors or last survivor of them, and to their or her executors or assignees." In October 1877 and April 1880 other sums of money, also contributed by the three sisters in equal shares, were invested on heritable security, and in each case the obligation of repayment was expressed in terms similar to those of the destination in the first bond. It is common ground that such a destination, inserted in a heritable bond on which infeftment is taken by the creditor, is in law the act of the creditor, and that its effect if not recalled is the same as if the creditor had made a deed or will disposing of the money and right in security in identical terms. In the case of the three bonds under consideration, the creditors' right was vested in the three sisters in such terms that on the death of one of them her share of the fee would pass by accretion to the surviving sisters without service or confirmation. At the same time there is nothing in the form of the destination which would limit or control the right of each sister to dispose of her share of the invested money. If one of the bonds were to be paid off, the money would be received by the creditors in equal shares, and it follows that each was free to dispose of her share of the money by will or deed while it remained in the debtor's hands.

Jessie Brydon died in the year 1892, leaving a will dated 13th June 1882 (two years later in date than the last of the bonds) in favour of her sister Elizabeth. This will begins with the words "I revoke and cancel all former dispositions and settlements made by me," and in this will the testator gives, grants, and dispones to her sister Elizabeth all her lands and heritages, debts and sums of money, and in general "the whole estate, heritable and moveable, real and personal, now owing and belonging to me, and which shall be owing and belonging to me at the time of my decease." No particular estates or securities are named, but the descriptive words are as comprehensive as general words of conveyance can be, and are, I may say, very appropriate to express the testator's right in invested money, the securities of which may be changed from time to time, but which is correctly and sufficiently described as estate heritable and moveable owing and belonging to the testator at the time of her decease. The first question is, whether Miss Jessie Brydon's will carries her share of the money lent by the sisters on heritable security.

Elizabeth Brydon died in 1896, leaving a will in the form of a trust-disposition and settlement, which is dated 30th December 1892. By this instrument the trustees are directed, after payment of debts, to apply the interest of the trust-estate, or so much as may be found necessary, for the support of her sister Mary. The estate, including surplus income, is first disposed of by providing pecuniary legacies to various persons and objects, and then the residue is given absolutely to Bessie Brydon or her heirs.

The same question arises with respect to Elizabeth Brydon's will, viz., whether it takes effect upon her share of the money invested on heritable security—a share which may or may not include the whole or the half of Jessie Brydon's share of the invested money according as the question first proposed be answered in the affirmative or in the negative. The question as to Jessie Brydon's will naturally falls to be first considered.

The case, I think, presents a form of the question as to the operation of a general settlement on a special destination somewhat different from those which have been considered and decided.

The whole law on the subject is summed up in the judgment of the House of Lords in *Campbell* v. *Campbell*, 7 R. (H.L.) 100. The general rule as there laid down is, that a general conveyance not controlled by limiting words within the deed will take effect upon estate subject to a subsisting destination, the case of a special

destination and a general conveyance by the same settlor being treated as exceptional. Lord Chancellor Selborne founds his opinion on general reasoning which is independent of authority, and he then proceeds to prove, by an examination of the authorities, that they are in the main consistent with the conclusions to which general reasoning would lead. "It is difficult," he says, "on any principle to understand why words in a testamentary instrument descriptive of a man's whole estate, present and future . . . should, in the absence of a controlling context, be held to pass less than what they properly describe. There can be no question as to the meaning of such words—no possible extrinsic evidence can make them equivocal. Their use, *prima facie*, excludes the supposition that the disposition was intended to be limited to some particular subjects. No reason can be suggested why a testator should be presumed generally to have more regard for heirs-substitute under a destination not of his own making than for his own heir-at-law." Passing to the case where the testator has himself made a prior settlement containing a special destination, which is not evacuated by general words of disposition in a subsequent *mortis causa* deed, his Lordship observes—"This may be explained upon an intelligible principle. In such a case both the instruments express the mind and will of the same person—the one as to a particular part, the other as to the generality of his estate;" and then he adds that the effect of this is to make the general words residuary in their operation, as they would be if the particular disposition had been found in the same instrument. Lord Hatherley and Lord Blackburn delivered opinions which are entirely consistent in principle with the opinion of the Lord Chancellor, and I think it must be held that general words disposing of a testator's whole estate are presumed to take effect upon every subject which the testator has the power to dispose of by will, and which he has not already disposed of by a will or other instrument expressing his mind and will. My opinion is (confining the question in the meantime to Miss Jessie Brydon's will) that the case does not fall within the exception, but is governed by the general rule, because the destination contained in the three heritable bonds is not the equivalent of a special legacy by Miss Jessie Brydon of her individual share, but is in substance a destination to which she was only a party, one amongst three, and because the motive of such a destination is primarily the convenience of the creditors in the bond. I think that the possible testamentary effect of such destinations is rather a consequence of the arrangement made for other reasons, than the result of the deliberate expression of the mind and will of one of the parties in relation to her share of the estate.

I cannot help thinking that the extension of the principle or conception of a destination in the case of money obligations containing clauses of survivorship is a very artificial creation of the law, and that if we were now to make a new exception to the rule as to the universal effect of general conveyances, the exception would in almost every case have the effect of defeating the true intention of the testator. Lord Selborne assimilates the case of a special destination made by the author of a general settlement to a special legacy contained in the settlement, but this cannot be predicated of a destination to which other individuals are parties. I think that the present case is undistinguishable in principle from the case of a standing destination which will regulate the succession if left undisturbed, but which the owner of the money or estate knows she has the power to alter, and which she must be presumed to mean to alter when she makes an inconsistent destination. The case for revocation is, I think, very much strengthened by the fact that Miss Jessie Brydon's will contains an express revocation of all former dispositions and settlements made by her, because if the destination in these bonds is to receive effect as her will, then her later will is to revoke it. I do not think it is open to doubt that a revocation of all former dispositions and settlements would operate as a revocation of a special legacy, and giving all possible weight to the destination in the bond it cannot give a right higher than a special legacy. For these reasons my opinion is, that under the operation of Jessie Brydon's will her sister Elizabeth, as her testamentary heir, became entitled to her one-third share of the sums contained in the heritable bonds.

If the views I have expressed be well founded, they apply also to the trust-settlement made by Elizabeth Brydon. I think that Elizabeth must be held to have revoked the destination of her share of the heritably secured money. There is, however, a shade of difference between the two cases, because Elizabeth Brydon's will does not contain a clause of revocation. But, in my view, such a clause is not necessary, because the general disposition is in itself a revocation of prior settlements. But there is also a specialty in this case, because it was pointed out in the course of the argument that if Elizabeth had not in fact disposed of her share of the secured money as well as the share derived from her sister, the estate disposed of would be exhausted, or very nearly so, by the payment of the special legacies. This circumstance makes it in the highest degree improbable that Elizabeth meant to leave the destinations in the bonds undisturbed. Now, all the Lords who took part in the decision of *Campbell's* case recognise that the law of Scotland admits evidence as to the acts of a testator in relation to his estate to clear up an ambiguity. We are therefore entitled to consider the state of the investments to see whether there is estate sufficient to meet the legacies and residuary trust purposes. And when we find that the necessary agreement between the amount of the sum disposed of and the

amount of the estate subject to Miss Elizabeth's disposition can only be brought about by including the heritable bonds, this is a strong reason for inferring that Elizabeth Brydon meant that these should be included.

The state of Miss Mary Brydon's health being such as to render seclusion and the appointment of a factor necessary, is an additional fact strengthening the presumption that the destination in her favour was not intended to have a testamentary operation after the execution of the trust settlement.

The answer to the first three questions ought, in my view, to be that the second parties are entitled to two-thirds of the money in dispute, and that the first party as *curator bonis* is entitled only to one-third.

As regards the income of the trust, I think that Miss Elizabeth Brydon makes it perfectly clear that her trustees are to be the judges of the extent to which it is necessary to apply the trust-income for Miss Mary's benefit. They are directed to add the surplus income to the residue, and this direction implies that the income of the trust is to be administered by the trustees. It would, in my view, be a proper fulfilment of their trust for the trustees to pay over annually or in half-yearly instalments so much of the income of the trust as in their judgment is necessary to supplement the income of Mary's private estate so as to provide her with a comfortable maintenance suited to her station in life.

The LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR was absent.

The Court answered the first question in the negative, the second in the affirmative, the first alternative of the third in the affirmative, the fourth in the negative, and the fifth in the affirmative.

Counsel for the First Party—Sol.-Gen. Dickson, Q.C. — Ralston. Agent — T. S. Paterson, W.S.

Counsel for the Second Parties—Balfour, Q.C.—Cook. Agents—Romanes & Simson, W.S.

Wednesday, March 9.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

STEEL *v.* STEEL.

Property—March Fence—Act 1661, *cap.* 41—*Remit to Man of Skill—Whether Final—Competency of Proof after Remit.*

A march fence having fallen into disrepair, a petition was presented to the Sheriff-Substitute under the Act 1661, cap. 41, craving for a remit to a man of skill, and for a warrant to execute the necessary works for putting the fence into a proper condition at the sight of the reporter. The Sheriff-Substitute remitted to a man of skill, who reported that the wall required to be rebuilt. No objection was taken by either party to the remit being made. The Sheriff-Substitute having pronounced a judgment in accordance with the report, the defender appealed to the Sheriff, who, in respect that all the questions of fact between the parties had not been determined, recalled the interlocutor and allowed a proof. No appeal was taken against this judgment, and a proof having been taken, the Sheriff decided upon the evidence that the wall was capable of being repaired without being altogether rebuilt, and granted warrant accordingly. The Court *held* that the remit was not necessarily final, and that it was not incompetent for the Sheriff to order the proof, and agreed with the view taken by him of the result of the evidence.

By Act 1661, cap. 41, it is, *inter alia*, ordained "That where enclosures fall to lie upon the borders of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dyke which parteth their inheritance, and recommends to all lords, sheriffs, and bailies of regalities, stewards of stewartries, and justices of peace, bailies of burghs, and other judges whatsoever, to see this Act put in execution, and to grant process at the instance of the parties damnified and prejudged, and to see them repaired after the form and tenor of this Act above written in all points."

Mr John Steel, of Skellyhill, in the parish of Lesmahagow, presented a petition in the Sheriff Court of Lanarkshire against Mr William Steel, of Reddochbraes, an adjoining proprietor, craving the Court "to remit to Robert M'Lellan, stone-dyker, Hope Street, Lanark, or such other person of skill as the Court shall think proper, to examine the march fence or dyke between the pursuer's lands of Skellyhill and the defender's lands of Reddochbraes, both in the parish of Lesmahagow, and to report to the Court what the present state and condition thereof is, and what works and repairs, if any, are needed to put the same into a proper and sufficient condition as a march fence or dyke, and the probable expense of such works or repairs; to grant warrant to the pursuer to execute such works and repairs as are reported to be necessary, and as the Court shall approve of at the sight of such reporter, and on the same being completed and the cost thereof ascertained, to ordain the defender to pay to the pursuer one-half of such cost and of the cost of the remit and other procedure, and with expenses."

The pursuer averred that the wall had been for a number of years in a state of disrepair and incapable of preventing cattle and sheep from straying and that it required to be rebuilt. He averred that it