posed to go further than the cases have already gone.

It will be no public loss if the result of this decision is to lead those responsible for framing and adjusting statutes, if power to prosecute is desired, to see that it is expressly given.

LORD JUSTICE-GENERAL—As your Lordships are aware, I have only a vote in the case of a division among your Lordships, and your Lordships are unanimous. But it is expedient that I should express an opinion upon the matters which have been argued before us, all the more because, having had the opportunity of maturely considering all the cases upon this point, I wish to say that I am satisfied that some of the views I expressed in the *Caledonian Railway Company* v. *M'Gregor* (1909 S.C. 1010) are unsound. I refer to that part of the opinion which draws a distinction between common-law crimes and statutory crimes in the matter of interest. I am satisfied that the law is exactly as expressed by my brother Lord Dundas in his review of the cases upon that matter.

With that correction, the other remarks in that case by myself and, I think, the decision, were right. And I apprehend that upon the general principles there is no difference in opinion between myself and your Lordships. Put absolutely shortly, it comes to this, that there are four ways in which a title to prosecute exists. There is the title of the Lord Advocate, and there is the title of the private individual with the concurrence of the Lord Advocate where that private individual can show that he has been personally wronged by the crime or offence complained of.

Neither of these cases apply to this case. It is not a prosecution by the Lord Advocate; and I am entirely with your Lordships in holding that it is quite impossible for the Commissioners to qualify a private interest in the sense in which a private interest was declared to be in the decided cases.

Then, thirdly, there is a title conveyed expressly. Parliament in this matter is omnipotent; and if Parliament gives a title, there the title is. And then, lastly—and here also I understand that your Lordships agree with me—there is no impossibility in holding that there may be a title to someone, not the Lord Advocate, conferred by implication.

The only question, therefore, that remains is—Is there such an implication in this statute as will give the Commissioners a title to prosecute this prosecution; I say "this prosecution," because I do not think it necessarily follows that if they had a good title for this prosecution they would have a good title to prosecute all the offences in the statute. Here I confess I personally have a different opinion from your Lordships. If I had had to decide this case by myself I should have found myself able to take what your Lordships may consider the leap of holding that there was an implied title conferred under the terms of section 69, and that for the simple reason that the right of the Commissioners to get back the arrears in what I agree may be practically a civil process is only given them under a condition-precedent, namely, that there has been a conviction under a prosecution; and I think that the two are so narrowly linked together that I myself should have held that that was sufficient implication to give them a title to institute the criminal prosecution which is the condition-precedent to the recovery of arrears.

But although that is my opinion, and your Lordships are of a different opinion, I wish most emphatically to say this, that I do not think this matter ought to have been left thus. This statute contains, among other things, a Scottish application clause, and it is surely not too much to expect that the Scottish law officers should be able to tell what was necessary in Scotland by putting in a simple addition to the application clause which by dealing with the right to recover the unpaid instalments would make the matter *luce clarius*.

The Court answered the question in the negative, sustained the appeal, and quashed the conviction, sentence, and finding.

Counsel for the Appellants—Macmillan, K.C. — Maconochie. Agent — J. Dunbar Pollock, Solicitor.

Counsel for the Respondents—Solicitor-General (Anderson, K.C.)—T. G. Robertson. Agent—James Watt, W.S.

COURT OF SESSION.

Thursday, July 17.

FIRST DIVISION.

BRODIE (LAWRIE'S EXECUTOR) *v.* HAIG AND OTHERS.

Succession—Mutual Settlement by Spouses—Revocability by Survivor—Pactional or Testamentary.

A husband and wife executed a *mortis causa* mutual disposition and settlement. The husband conveyed, subject to certain burdens, his whole estate to his wife in the event of her survivance. The wife conveyed to the husband in the same terms her whole estate with the exception of certain heritable subjects belonging to her, which she conveyed to her husband, if he survived her, in liferent, and to A and B in fee. The deed contained a clause reserving power of revocation during the joint lifetimes of the spouses, with a declaration that if not altered it should be final, "but reserving to the last survivor of us to dispone all his or her own means and estate to be made and acquired after the decease of the first of us, and power of disposal thereof as he or she think fit."

Held that the reservation of power of disposal of estate acquired after the death of the predeceaser of the spouses showed that the provisions of the settlement were contractual *quoad* all other estate, and that the wife was not entitled after the death of her husband to alter the destination of the said heritable subjects.

Charles Robert Brodie, executor of the deceased Mrs Margaret Eeles or Sandilands or Lawrie, under her holograph settlement dated 10th March and recorded 14th October 1911, *first party;* Sarah Weatherhead Haig and her two sisters, executrices and universal legatees of their mother Mrs Mary Eeles or Haig, *second parties;* and Mrs Elizabeth Eeles or Brodie, *third party,* presented a Special Case dealing with difficulties arising out of the testamentary writings of the deceased Mrs Margaret Eeles or Sandilands or Lawrie, the first party being entitled to certain heritable property under her holograph settlement, and the deceased Mrs Mary Eeles or Haig and the third party being entitled to the fee of the same property under a destination in a mutual disposition and settlement by her and her husband Alexander Sandilands, butcher, North Berwick, dated 6th June 1874 and recorded 20th September 1876.

The Case stated—"1. The late Alexander Sandilands, butcher, North Berwick, and his wife, the late Mrs Margaret Eeles or Sandilands, afterwards Lawrie, executed a *mortis causa* mutual disposition and settlement of their respective estates and effects, dated 6th June 1874. . . . By the said mutual disposition and settlement each of the spouses conveyed to the other, in the event of his or her survivance (with the exception of certain heritable subjects belonging to the wife which had been purchased for £400, and which were specially dealt with as hereinafter mentioned), his or her whole estate, heritable and moveable, under burden of payment of the whole capital value thereof, to the beneficiaries and in the proportions therein named upon the death of the last survivor. It was provided . . . that the surviving spouse should have the full liferent use and enjoyment of the whole estate and effects, heritable and moveable, of the predeceasing spouse."

The *mutual disposition and settlement,* which, *mutatis mutandis,* was in the same terms of the wife as of the husband excepting the said heritable property, which consisted of 45 and 47 High Street, North Berwick, contained these clauses—"I, the said Margaret Eeles or Sandilands, do hereby, give, grant, dispone, assign, and convey to and in favour of the said Alexander Sandilands, my husband, in case he survive me, in liferent, but for his liferent use only, and of the said Mary Eeles or Haig, and Elizabeth Eeles [*two of the three residuary legatees of the husband as also of the wife*] daughters of the said late George Eeles, butcher, North Berwick, and their respective heirs and assignees whomsoever in fee," the said heritable subjects; and "We, the said Alexander Sandilands and Margaret Eeles or Sandilands, reserve full power in our joint lifetimes, and of mutual assent and consent, but not otherwise, to alter or revoke these presents, but we severally and jointly expressly declare that, if not altered of joint consent, the same shall be final and conclusive on both of us, but reserving to the last survivor of us to dispone all his or her own means and estate to be made and acquired after the decease of the first of us, and power of disposal thereof as he or she think fit."

The Case further stated—"2. The said Alexander Sandilands died at North Berwick on 12th September 1876, survived by his said wife. He was not possessed of any heritable property at the time of his death, but he left moveable estate valued, for confirmation, at the sum of £433, 9s. 6d., which estate his widow confirmed to and ingathered. She thereafter, in terms of the said mutual disposition and settlement, enjoyed for the rest of her life (a period of thirty-five years) the full liferent use and enjoyment of the said estate left by her husband the said Alexander Sandilands. At the date of her death it was found that the whole moveable estate left by her (including the moveable estate of her said deceased husband) did not exceed £55 stg., and that the only heritable property left by her was the above-mentioned heritable subjects, which, along with a sum of money not exceeding £400 stg., was the whole estate which belonged to the said Mrs Sandilands at the death of her husband the said Alexander Sandilands. The said Mrs Margaret Eeles or Sandilands afterwards married James Lawrie, butcher, North Berwick. She survived her husband, the said James Lawrie, and died at North Berwick on 6th October 1911. . . .

"4. The said Mrs Margaret Eeles or Sandilands was the natural daughter of the said George Eeles, and the fiars called in the destination above quoted were his daughters. The said fiars were not related to the said Alexander Sandilands, but were on terms of personal friendship with him and his wife throughout his lifetime. The first named of the fiars called in the said destination, viz., Mrs Mary Eeles or Haig, died on 25th September 1908. She was predeceased by her husband, but is survived by her three daughters, Sarah Weatherhead Haig, Mary Eeles Haig, and Elizabeth Eeles Haig, the parties of the second part, who are her executors and universal legatees and disponees. The second named of the said fiars is now the widow of James Brodie, baker in North Berwick, and is the party of the third part.

"5. By a *holograph settlement,* dated 10th March 1911, and registered in the Books of Council and Session 14th October 1911, the said Mrs Margaret Eeles or Sandilands or Lawrie provided as follows, viz.—'(*Second*) I give and bequeath my heritable property (which is absolutely mine), No. 45 and 47 High Street, North Berwick, to Charles Robert Brodie, 24 Bruntsfield Gardens, Edinburgh, for the love I have for him.

I hereby revoke all writings of a testamentary nature made by me prior to the date hereof.'"

The following *questions of law* were submitted—"1. Was Mrs Margaret Eeles or Sandilands entitled after the death of her husband, the said Alexander Sandilands, to alter or revoke the destination of the heritable subjects, Nos. 45 and 47 High Street, North Berwick, contained in the mutual disposition and settlement executed by her and her said husband on 6th June 1874; and was the alteration and revocation thereof contained in her holograph settlement of 10th March 1911 effectual? or, 2. Does the destination of the said heritable subjects still fall to be regulated by the provisions of the said mutual disposition and settlement?"

Argued for the first party—Apart from specialties, the general rule was that mutual wills were just two wills contained in one document. Even in the case of a mutual will made by a husband and wife provisions in favour of persons other than the spouses and the children of the marriage were, just as in marriage contracts, presumed to be testamentary—*United Free Church of Scotland* v. *Black*, 1909 S.C. 25, 46 S.L.R. 87 (*sub voce Crawford's Trustees*). No doubt a clause of revocation might be expressed in such terms as to show clearly that the provisions of the will were intended to be binding on the survivor even *quoad* his own estate, but the language used would need to be so plain that no other interpretation was possible—*Robertson's Trustees* v. *Bond's Trustees*, June 28, 1900, 2 F. 1097, 37 S.L.R. 833. The expression of a limited power to revoke, however, did not exclude the presumption of revocability—*Corrance's Trustees* v. *Glen*, March 20, 1903, 5 F. 777, 40 S.L.R. 526. The concluding words of the clause of revocation in the present case, reserving to the last survivor power to dispone of property acquired after the death of the predeceaser were merely words of style.

Argued for the second and third parties—Although the presumption was that provisions in mutual wills in favour of strangers were merely testamentary, that presumption was rebutted by the terms of this will. *Corrance's Trustees* (*cit. sup.*) was an example of provisions in favour of collateral relatives which were held to be contractual. In the present case the ultimate beneficiaries were blood relations of the wife and also close friends of both spouses. Power to revoke was expressly limited by language of striking stringency, and there was no case where a clause so clear in its terms had been held compatible with revocability. There was here fair equality between the provisions made by either spouses in favour of the other. The contract was therefore remuneratory, and the wife having taken benefit under it was not entitled to will away her property in breach of its terms—*Robertson's Trustee* v. *Bond's Trustees* (*cit. sup.*).

LORD PRESIDENT—Mr Sandilands, a butcher in North Berwick, entered into a mutual settlement with his wife by which he conveyed to her all the estate which should belong to him at the time of his death and nominated her his executrix, but declared that the conveyance was to be under certain burdens which his wife was to be bound to implement and fulfil. These burdens were that she should herself only have the liferent use and enjoyment of the estate, that she should pay certain specific legacies, and that she should at her death pay the entire residue of the estate to certain named persons. On the other hand, the wife conveyed her general estate to the husband in the same terms, imposing upon it the same burdens, textually repeated, as had been imposed by her husband upon his estate. But the conveyance by the wife differed from the conveyance by the husband in this particular, that there was in addition to the general conveyance a special conveyance of a special subject, which was a tenement of land in North Berwick, and was conveyed in the following manner, viz.—"In favour of . . . my husband, in case he survive me, in liferent, but for his liferent use only, and of the said Mary Eeles or Haig and Elizabeth Eeles, daughters of the said late George Eeles, butcher, North Berwick, and their respective heirs and assignees whomsoever in fee"—the persons preferred to the fee being near relatives in blood of the lady herself. The settlement ended with this clause—"And we reserve full power in our joint lifetimes, and of mutual assent and consent, but not otherwise, to alter or revoke these presents, but we severally and jointly expressly declare that if not altered of joint consent the same shall be final and conclusive on both of us, but reserving to the last survivor of us to dispone all his or her own means and estate to be made and acquired after the decease of the first of us and power of disposal thereof as he or she think fit."

Mrs Sandilands survived her husband and lived for a period of thirty-five years after his death. She succeeded to a certain amount of property which her husband left behind him. On her death she left a holograph settlement in which she disposed of her heritable property, which she described as "absolutely mine," Nos. 45 and 47 High Street, North Berwick, to a person other than the parties named in the mutual settlement. This Special Case is brought to determine whether that property belongs to this disponee or whether it is ruled by the terms of the mutual settlement. There is no question as to the identity of Nos. 45 and 47 High Street as the parcel of ground described in the mutual settlement.

The general rules in regard to mutual settlements have been again and again laid down and are well settled. The main point is to discover whether a particular provision is contractual or is merely testamentary. There are certain general presumptions that can always be appealed to in determining this point. For example, it is presumed that provisions in favour of the other party to the settlement are

contractual. It is also presumed that provisions in favour of the issue of the marriage between the parties are contractual. On the other hand, it is presumed that where the objects of the testator's bounty are other than the parties to the deed or the children of the marriage between these parties the provisions are testamentary. It is also presumed that persons wish freedom with regard to the disposal of their own property, whatever may happen with regard to the property got from the other party. All these presumptions, however, must yield to indications in the deed that something else was intended. As is said by Lord M'Laren in his book on Wills (vol. i. p. 423), and as I said in the case of the *United Free Church of Scotland* v. *Black* (1909 S.C. 25, at p. 30), everything turns on the instrument itself. Lord Kyllachy in the case of *Corrance's Trustees* v. *Glen*, 1903, 5 F. 777, at p. 780, gave an instance of the class of clause from which it might be inferred that provisions in a mutual settlement—and not merely provisions in favour of the parties themselves, but also provisions as to the ultimate disposal of the estate—were contractual. It might be inferred, he said, "*inter alia*, from clauses restrictive of revocation which are so expressed as to be unequivocally referable to the ultimate dispositions under the mutual deed." He was there no doubt dealing with the case of a person disposing of his own property who had received nothing from the other party, but I think the statement applies equally in the case of a survivor to whom property has come from the predecessor.

I am bound to say that I think that the particular clause in this deed leads necessarily to the conclusion that the provisions as to the ultimate destination of the property in the deed are contractual and not testamentary. I put no stress on the reservation of full power to alter or revoke these presents "in our joint lifetimes and of mutual assent and consent but not otherwise," which is indeed phonastic and must be so unless you can go the length of holding that the deed created a *jus quæsitum tertio;* and no stress upon the phrase that "if not altered of joint consent the same shall be final and conclusive on both of us," which goes without saying. But the last clause seems to me to be conclusive, "reserving to the last survivor of us to dispone all his or her own means and estate to be made and acquired after the decease of the first of us and power of disposal thereof as he or she think fit." Now this power can only have been reserved because the parties were under the impression that without the reservation a disposition by the survivor of his own property acquired after the death of the other would have been struck at by the settlement. Accordingly I think it is clear that in the view of these two people the provisions in this settlement were contractual and would have applied to everything but for this clause reserving power to dispose of what was to be acquired after the dissolution of the marriage. In these circumstances I think that the second parties are entitled to the property, and the first question should be answered in the negative and the second in the affirmative.

LORD KINNEAR—I am of the same opinion.

LORD MACKENZIE—I am of the same opinion. The question whether the provisions in favour of ultimate beneficiaries made by the spouses in this settlement are contractual is one which must be judged upon the terms of the deed itself, and to my mind there is an inference, from the clause of reservation, to the effect that the spouses intended to contract that the disposition of their means and estate to the ultimate beneficiaries should stand, except to the extent that there was the reservation that the last survivor was to have "power to dispone all his or her own means and estate to be made and acquired after the decease of the first of us and power of disposal thereof as he or she think fit." Now that can only refer to dispositions to the ultimate beneficiaries, and excludes the idea that the spouses had power to deal with the property which fell under the terms of settlement.

LORD JOHNSTON was not present.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the First Party—Chree, K.C. —Wark. Agents—Mackay & Young, W.S.

Counsel for the Second and Third Parties —Constable, K.C.—Lippe. Agents—Henry Bower, S.S.C.—Steedman & Richardson, S.S.C.

Thursday, July 17.

FIRST DIVISION.

WATSON'S TRUSTEES *v.* WATSON.

Succession—Trust—Construction of Testamentary Writings — Fee or Liferent — Direction to Divide Residue, and a Share thereof Declared Alimentary—Discretionary Power of Trustees to Retain—Repugnancy.

A testator directed his trustees "to realise . . . my whole estates . . ., and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) divide the whole free proceeds thereof equally, share and share alike, amongst my whole children." By the same clause of the will he conferred upon his trustees "the most absolute discretionary power to retain the share or shares falling to any of my children instead of paying the same over to them, and my said trustees may in their discretion only pay over the annual income derived from the share so retained." The clause further contained a declaration "that the whole provisions hereunder in favour of (J. W., the testator's youngest