the Magistrates and the Town Council having been called as parties to the action and having taken no steps in it, and having acquiesced therefore in the action going on, and above all having, as I have already said, refused to proceed under the 5th section of the 1903 Act, I think it would practically amount to a denial of justice to these private persons who are interested in this matter to delay indefinitely deciding the question between them. The Town Council have refused to take any action under the statute, and the position accordingly is practically the same so far as the decision of the ownership of this piece of land is concerned as if the statute had never been passed. I am therefore of opinion that the Sheriff is entitled to deal with this action in ordinary form, and that we should remit to him to do so.

LORD SKERRINGTON—I concur. If every question as to the breadth of a public street in a burgh must necessarily be determined by the new statutory method, and cannot under any circumstances be determined in any other manner, then the action ought to have been sisted until the width of the street had been determined by the only competent procedure. That would have left it to one or other of the parties to take proceedings under the Court of Session Act to compel the Town Council to do its duty. But I cannot agree that such was the intention of Parliament. If the Town Council had fixed the width of the street its decision would have been final and conclusive, subject to appeal or reduction. Again, if, while this litigation depended, proceedings had been initiated by the Town Council for fixing the width of all the streets in Loanhead under the Act of 1903, it might have been proper to sist this action. But as the width of the streets has not been determined by the statutory procedure, and as there is no present intention on the part of the Town Council to perform its statutory duty, the question must as a matter of justice be determined in the present action. I am not embarrassed by the suggestion that there may some day be a conflict between the decision in the present case as to the width of the street and the decision in the course of the statutory procedure. The difficulty would have been the same if the question had arisen before the Act of 1903 came into force. A decision in an action between two private persons cannot hamper the Town Council when they come to perform their statutory duty, although I have no doubt that in considering the evidence before them they will keep in view what was previously decided upon difficult evidence.

LORD JUSTICE-CLERK—Where a party has property abutting on a public street in a burgh, and when a dispute arises as to the ground in front of his property between himself and the proprietor of adjoining subjects, there is plainly jurisdiction in the Court to decide the question. I am unable to see how such a party can be deprived of his right to have that question decided by the Court through the fact that an Act of Parliament has been passed under which a duty is laid upon the public authority of the burgh to lay off the boundaries of the streets, or why he should be precluded from proceeding with his case until they do so. If they do not do so, then I take it that parties are, while that state of matters subsists, in the same position as if the Act of Parliament had never been passed.

LORD DUNDAS was absent.

The Court sustained the appeal, and remitted to the Sheriff to proceed with the case.

Counsel for Appellant—M'Lennan, K.C. —Kemp. Agent—George Jack, S.S.C.

Counsel for Respondent—Mercer. Agents —Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, February 4.

ECOND DIVISION.

[Sheriff Court at Cupar.

HENDERSON'S TRUSTEES, PETITIONERS.

Succession — Special Destination — Subsequent General Settlement—Revocation.

By disposition dated May 1878 Mrs L. and spouse disponed certain heritable subjects in Cupar to H. and spouse in conjunct fee and liferent, and to the longest liver of them in fee and their assignees, whom failing to the children of their marriage equally. Haymount, the dwelling-house of H. at Cupar, was built on part of the subjects thereby disponed. H. died in 1907 predeceased by his wife and survived by one son and three daughters. He left a trust-disposition and settlement dated 10th July 1907, whereby he left his whole estate to trustees for division among his family in certain specified proportions. The settlement contained no express clause of revocation of the special destination in the disposition. It, however, *inter alia*, made the following provision:—"I wish my family and their aunt Miss J. H. to reside together at Haymount; and I direct my trustees to apply the whole or any part of the revenue of my estate, including profits of business, for the maintenance of my daughters and their said aunt while residing together, . . . and that until my youngest daughter is twenty-one years of age, and as long thereafter as may be considered suitable."

Held that the settlement, in respect of the provision therein contained with regard to residence at Haymount, revoked the special destination in the disposition of 1878.

Samuel Wallace Johnston and William Duncan Patrick, both of Cupar, trustees

of the late William Henderson, of Haymount, corn merchant there, brought a petition in the Sheriff Court at Cupar under sec. 10 of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) for authority to make up title to certain subjects in Cupar.

By a disposition dated 10th and recorded 15th May 1878, Mrs Landale and spouse had disponed certain heritable subjects in Cupar to the foresaid William Henderson and Mrs Margaret Hill Hume or Henderson, his wife, in conjunct fee and liferent, and to the longest liver of them in fee and their assignees, whom failing to the children of their marriage equally. Mrs Henderson died in February 1886 and William Henderson in September 1907. He was survived by one son, John William Henderson, and three daughters. He left a trust-disposition and settlement dated 10th July 1907, whereby he left his whole estate, heritable and moveable, to trustees for the following purposes, *inter alia*—"(*Thirdly*) I wish my family and their aunt, Miss Jemima Thoms Hume, to reside together at Haymount, and I direct my trustees to apply the whole or any part of the revenue of my estate, including profits of business, for the maintenance of my daughters and their said aunt while residing together, including allowance of £20 per annum to said Miss Jemima Thoms Hume so long as she resides with my daughters, and that until my youngest daughter is twenty-one years of age, and as long thereafter as may be considered suitable: (*Fourthly*) I direct my trustees when they find it convenient after my youngest daughter is twenty-one years of age to realise my estate and divide it, the division to be as follows, viz.—£500 sterling to be set aside and invested, and the revenue thereof paid over to the said Miss Jemima Thoms Hume as the same is received during all the years of her life from the date of her ceasing to reside with my daughters, said £500 to be divided equally among my family on the death of the said Miss Jemima Thoms Hume; (2) £1000 sterling to be paid to my said son or his heirs; (3) £1500 to each of my daughters and their respective heirs; and (4) the residue or remainder of my estate, if any, to be divided equally among my daughters or their heirs, declaring that said sum of £1000 sterling shall be paid to my said son only in the event of his having carried on said business for behoof of my family during the whole period of my youngest daughter being under twenty-one years of age, and that if my estate shall not be sufficient to provide in full £6000 sterling (including said £500 sterling to be set aside for the said Miss Jemima Thoms Hume), said sum of £1000 sterling for my son, £1500 sterling for each of my daughters, and £500 sterling for behoof of the said Miss Jemima Thoms Hume, shall be proportionately diminished or reduced."

The trustees, in respect of certain debts due to the estate by John William Henderson, obtained decree of adjudication on 2nd June 1910 of the one-fourth *pro indiviso* share of the subjects contained in the disposition by Mrs Landale and spouse to which he might establish a right in his person were he served as an heir of provision to his father under the destination therein contained, together with the dwelling-house now known as Haymount, Cupar, built on part of the said land.

Thereafter the trustees brought this petition. They proceeded upon the averment "that John William Henderson was one of the four heirs of provision in special of the William Henderson under the foresaid disposition, and as such in right of one-fourth *pro indiviso* part or share of the lands and others therein described, but had only a personal right thereto," and they founded on the decree of adjudication. They craved the Court to find that they were entitled to procure themselves infeft in the said one-fourth *pro indiviso* share.

On 5th December 1910 the Sheriff-Substitute (ARMOUR HANNAY) refused the prayer of the petition.

Note.— ". . . William Henderson died in 1897 predeceased by his wife. He left a trust settlement dated 10th July 1897 under which he disponed his whole estate to trustees with directions to realise it and divide it amongst his children in such a way that his three daughters were to receive the greater part of the estate.

"The question raised by this application is whether the settlement evacuates the destination under which the testator Henderson acquired right to the subjects—if so, this application must be refused. It appears to me that it does. Admittedly it is a question of intention. What did the testator Henderson intend with regard to the distribution of his estate? I think there can be no possible doubt that he wished it divided according to the settlement.

"I have examined the authorities quoted very carefully and have read the settlement more than once, and the only conclusion I can come to is that the latter was intended to revoke, and did in point of fact revoke, and evacuate the destination in the former disposition.

"The following authorities were referred to and have been considered:—*Don and Others* (*Webster's Trustees*) v. *Webster*, 1876, 4 R. 101, 14 S.L.R. 51; *Currie* v. *M'Laren*, 1899, 1 F. 684, 36 S.L.R. 494; *Campbell* v. *Campbell's Trustees*, 1903, 11 S.L.T. 441; *Perrett's Trustees* v. *Perrett*, 1909, 1 S.L.T. 302; *Low and Others* (*Mrs Agnes Garvie or Wilson's Trustees*) v. *Wilson*, decided by the Second Division 6th March 1903, but not reported."

The petitioners appealed to the Court of Session, and argued — Two deeds — the special destination and the general disposition—were in existence. They must both be given effect to if possible. Admittedly it was a question of intention. When the testator — as here — was a party to the special destination, it was practically his disposition *quoad* the property affected. The rule was that a special destination was not evacuated by a general settlement subsequently executed by the maker of the destination. A deed in which a party con-

curred was his own deed. The case was different where the destination was made by a stranger — *Campbell* v. *Campbell*, December 11, 1878, 6 R. 310, 16 S.L.R. 280, and July 8, 1880, 7 R. (H.L.) 100 (Lord Chancellor at 101, and Lord Hatherley at 104), 17 S.L.R. 807. There must be unequivocal indication of intention to revoke the destination—*Campbell* v. *Campbell's Trustees*, November 21, 1903, 11 S.L.T. 441 (Lord Kyllachy at 442). Here there was no such indication, but merely a general conveyance of the testator's estate. Also it was important to observe (1) that there was no clause of revocation, and (2) that there was a declaration that the bequests should suffer proportional diminution in event of the estate proving insufficient. The special destination would be held to be evacuated where the purposes of the settlement could not receive effect if it stood—*Campbell* v. *Campbell's Trustees* (*sup. cit.*); *Perrett's Trustees* v. *Perrett*, 1909 S.C. 522 (Lord President at 527), 46 S.L.R. 453. Where there was practically nothing left if the destination stood, then it was held to be revoked. But in the present case there would only be a shortage of £127 in carrying out the settlement if Haymount were excluded therefrom.

LORD ARDWALL—I am of opinion that the judgment of the Sheriff-Substitute ought to be affirmed.

I regret for some reasons to come to that conclusion, because there has been considerable expense already caused in pursuance of an opinion to the effect that the special destination here must be given effect to, notwithstanding the general settlement, and that expense will be thrown away should we now hold that the general settlement must rule and have the effect of evacuating the destination in the disposition of this particular property. However, we must decide the case on its legal grounds apart from considerations of mere convenience or expense; and certainly it is matter so far of congratulation that the expense of making up a title should not be very great.

We have had several cases quoted to us, but I do not know that I need go into them in detail. I wish to point out, however, that the Court is not in a very favourable position for giving an exhaustive opinion on all the points which suggest themselves in a case such as the present. For one thing, there is no contradictor here, and the decision we are giving lacks the authority it would have had had there been a contradictor, and had we had the case argued to us on both sides. Not only is there no contradictor to put the various views before us that might have been put by a person holding that character, but we have not a record or special case or statement of surrounding facts and circumstances of any kind; though I am ready to accept Mr Christie's assurance that there would be only a shortage of £127 in carrying out the purposes of the disposition were the property of Haymount to be excluded from the operation of the trust. We are not told anything about the rest of the estate, and we are not told the value of Haymount, and, in short, we have few of the surrounding facts before us which might serve to throw light on the question at issue by showing the circumstances under which the deeds were executed. But apart from that deficit of £127 which would be caused were the special destination to be given effect to, we have what I cannot help viewing as a very important clause in this deed showing that the testator contemplated in his trust-disposition and settlement that Haymount would fall under it, and that he made such provisions therein as necessarily implied a revocation of the special destination contained in the disposition of that property. Where the terms of a destination have been made by a third party it is not in as strong a position as where it has been made by the party himself, but I do not think we need to draw any distinction of that kind here, for I think the third purpose of the trust deed plainly shows that the testator intended that this property of Haymount should be carried by the general dispositive clause of his whole heritable and moveable estate to his trustees, and should be administered by them in terms of the trust purposes. Now that provision is this—"I wish my family and their aunt, Miss Jemima Thoms Hume, to reside together at Haymount, and I direct my trustees to apply the whole or any part of the revenue of my estate, including profits of business, for the maintenance of my daughters and their said aunt while residing together;" and then there is a special allowance to Miss Thoms Hume. Now this imports a direction to the trustees to make over the use of Haymount to his family and Miss Hume so long as they should live together after the testator's death, and also to give them an allowance to enable them to live at Haymount, which has been described to us as a large and commodious residence. Now that being expressed, the trustees upon whom it lay to give this use of Haymount to his family and their aunt would not be in a position to do so unless it be held that Haymount was carried by the trust-disposition and settlement, because if it fell under the special destination in the disposition of 1878 it might, for example, have happened as matter of legal right that as soon as Mr Henderson was dead the fiars under that disposition might have sold by consent or under an action of division and sale the property of Haymount, and thus defeated this third purpose which I have read. Accordingly I think that leads us to this conclusion, that the two deeds cannot stand together, and if that be so, it necessarily follows that the later deed must be held impliedly to revoke the former, and the general disposition must accordingly be held impliedly to revoke the special destination. I think that in the said third purpose we find what Lord Kyllachy in one of the cases quoted to us described as an unequivocal indication of intention to revoke on the part of the testator, and apart from what may be said

about the general provisions in the trust deed which we are not in a favourable position to consider, I think the clause that I have adverted to compels us to hold that the trust-disposition and settlement impliedly revoked the destination in the disposition of 1878.

On these grounds, I am of opinion that the decision of the Sheriff-Substitute should be affirmed.

LORD JUSTICE-CLERK—I am of the same opinion. I think the clause to which Lord Ardwall has referred is quite sufficient for the decision of the case. The expression there "I wish" is plainly the expression of a direction which the testator had desired should be put into his disposition and deed of settlement by those who drew it up for him, and it is plainly also an expression which cannot be left out of view in deciding how a title should be made up to the subjects in question. I have no doubt that, assuming a case in which there was a clause such as is expressed here—I wish that my daughters shall have the use of Haymount and reside there till the youngest daughter is twenty-one, and their aunt to reside with them—trustees, whatever their powers otherwise under the deed might be, would be interfered with by the Court if they did not carry out that wish, but tried to put his estate in such circumstances as the daughters could not live at the place where their father desired them to live. I therefore think that it is very clearly implied that the testator intended that Haymount should be carried by his general disposition of his estate, and that accordingly we should affirm the judgment of the Sheriff-Substitute.

LORD ORMIDALE—I am entirely of the same opinion. I only wish to add that while it is not necessary, in view of the grounds on which your Lordships propose to decide the case, specially to consider the terms of the destination, I am not prepared as at present advised to assent to the view of Mr Christie that the words "and their assignees" make no difference on the construction of the clause.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court dismissed the appeal.

Counsel for Petitioners—J. A. Christie. Agent—William Black, S.S.C.

Tuesday, February 7.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LIMITED *v.* BROWN AND OTHERS.

Process—Multiplepoinding—Competency—Double Distress.

A creditor arrested in the hands of an insurance company a sum under a policy which had become payable to his debtor, and for which the debtor had granted a discharge. The insurance company having raised a multiplepoinding, the arrester objected to the competency thereof on the ground that there was no double distress. *Held* that the multiplepoinding was competent.

On 3rd May 1910 the Colonial Mutual Life Assurance Society, Limited, having their registered office at Melbourne and their head office for the United Kingdom at 33 Poultry, London, *pursuers* and *real raisers*, brought an action of multiplepoinding against (1) John Brown, formerly residing in Edinburgh and then residing in Jersey City, near New York, U.S.A., who was described as *common debtor*, and (2) Poole & Company, accountants, Edinburgh, and Alexander Wilson Poole, accountant there, the sole partner thereof, who were described as "creditors or pretended creditors of the said John Brown," all *defenders*, to have it found that they were only liable in once and single payment of the principal sum of £105, 10s., including cash profits, due under a policy in name of the common debtor effected with the pursuers. In terms of the policy this sum became payable within one calendar month after proof to the pursuers that John Brown had survived 21st March 1910, the date of the maturity of the policy. On or about 26th March 1910 the defenders Poole & Company used arrestments to the extent of £400 in the hands of the pursuers to found jurisdiction against John Brown and also on the dependence of an action in the Court at Edinburgh against him. In this action Poole & Company obtained decree for £272, 10s. with expenses. Following on this action they raised on 20th April 1910 an action of furthcoming in the Sheriff Court. The pursuers thereupon, on 3rd May 1910, raised the present action of multiplepoinding in which they stated that the sum due under the policy was claimed by John Brown, and that the arrestments used by Poole & Company to found jurisdiction were irregular in form. At the discussion in the Inner House it was stated at the bar that John Brown had sent to the pursuers from the United States a discharge dated 24th March 1910, on receipt of which they were entitled, if not interpelled, to pay the fund. It was also stated that the Sheriff-Substitute had, on 28th June 1910, dismissed