had rested or fallen thereon. . . . (Cond. 7) The defender is responsible for the death of the said deceased, in so far as he failed in his duty to the public, and to the pursuer and his household in particular, in having in his possession and in selling the said tinned salmon, which was not, as before stated, in a fit condition for consumption. It was the duty of the defender to examine all tins containing foods which he was selling to the public in order to satisfy himself that these were air-tight and in order. He should have taken reasonable and proper precautions to prevent such an occurrence as that before condescended on. He did not make any such examination of the foresaid tin, nor did he take any such precautions, and in these respects he failed in his duty, and caused the death of the said Adam Gordon junior."

The defender pleaded—"(1) The action is irrelevant."

On 3rd July 1903 the Sheriff-Substitute (CAMPBELL SMITH) allowed a proof.

The pursuer appealed for jury trial.

Argued for the respondent—The action was irrelevant; it was not averred that the defender knew that the salmon was unwholesome, or that the tin was not air-tight. No action lay against the defender —*Cramb* v. *Caledonian Railway Co.*, July 19, 1892, 19 R. 1054, 29 S.L.R. 869; *Emmerton* v. *Matthews* (1862), 31 L.J. Exch. 139; *Smith* v. *Baker, Son, & Death* (1878), 40 L.T. (N.S.) 261.

Argued for the appellant — The case should be sent to a jury. A tin in the condition of that supplied ought not to have been accepted by the defender from the manufacturers, and if damaged after delivery to the defender ought not to have been sold by him. There being no name on the tin, the defender should be held to be in the position of the manufacturer, and therefore liable as for negligence in preparing the article sold—*George* v. *Skivington* (1869), L.R., 5 Exch. 1.

LORD JUSTICE-CLERK — In this case I think that there is no relevant case stated. I do not see how the defender could have examined the tin of salmon which he sold without destroying the very condition which the manufacturer had established in order to preserve the contents, the tin not being intended to be opened until immediately before use.

It is plain that a grocer who gets a quantity of tins of preserved food and sells them to the public cannot be liable for the condition of the contents of the tins if he buys from a dealer of repute. It is said that the tin which was sold to the pursuer was dented, but it is not averred that the dent had cut through the metal and allowed the air to get in, or had otherwise caused such an injury to the contents that the defender should have noticed it. Such an averment as that might have afforded ground for an action against a tradesman, but there is no such case here.

LORD YOUNG—This is an important case, but I am of the same opinion as your Lordship. We know that there is a large consumption of tinned salmon, although many people believe it to be dangerous. It is stated by the pursuer that for the price paid in this case—8½d.—it should have been possible to secure 1 lb. of the best salmon steak, but nothing definite is averred against the article supplied, except that the tin in which the salmon was contained was dented. It is not stated that there was any duty incumbent upon the grocer who sold it except of satisfying himself that the tin was air-tight, and it is not said how this was to be done. I am therefore of opinion—without referring to the authorities quoted —that no relevant case has been stated against the defender.

LORD TRAYNER—I agree. I think there is no relevant averment of fault or neglect of duty on the part of the defender sufficient to afford ground for an action of damages.

LORD MONCREIFF—Had there been any averment that the defender was asked to disclose the name of the manufacturer of the tin of salmon and refused, I should have been disposed to consider that the pursuer had stated a case for inquiry. But there is no such averment. I do not think that the defender was bound to do more than he did, and I am therefore of opinion that the action should be dismissed.

The Court dismissed the action.

Counsel for the Pursuer and Appellant—D. Anderson. Agent — William Cowan, W.S.

Counsel for the Defender and Respondent—Salvesen, K.C.—Craigie. Agent—J. Pearson Walker, S.S.C.

Tuesday, December 15.

SECOND DIVISION.

[Lord Low, Ordinary.

MACLEOD *v.* WILSON.

Succession—Testament—Conditional Institution—Destination to Daughter "and her heirs and assignees"—Legacy or Bond of Provision—Gift Held not Conditional on Surviving or Leaving Issue.

M. died leaving whereby "for the settlement of the succession to my means and estate after my decease" she disponed her whole estate "to my daughter J., and her heirs and assignees whomsoever absolutely," and she nominated J. to be her executrix. The disposition concluded with declarations for the protection of J. in the enjoyment of "the provision hereby made" in her favour, and M. reserved her own "liferent of the premises." M. was predeceased by J., who was her only child, and who left no issue. In an action at the instance of M.'s heirs *ab intestata* against the

heirs of J., in which the pursuers sought declarator that the disposition and settlement referred to was of no force and effect, and that M.'s estate had fallen into intestacy, in respect that the settlement was only to take effect if J. survived her mother or predeceased her leaving issue—*held* (*aff.* judgment of Lord Low, *dub.* Lord Moncreiff) that the deed referred to was testamentary, and that under the destination to J. "and her heirs" J.'s heirs were entitled to take as conditional institutes.

Mrs Margaret Mackie or Isbister, 705 Shields Road, Glasgow, widow of John Isbister of Pittsburg, U.S.A., died on 15th January 1903, having executed in January 1870 a disposition and settlement in the following terms:—"I, Mrs Margaret Mackie or Isbister, for the settlement of the succession to my means and estate after my decease, do hereby assign and dispone to my daughter Jessie Sarah Isbister and her heirs and assignees whomsoever absolutely all and sundry the whole means and estate presently belonging or which shall belong to me at my decease, and I nominate the said Jessie Sarah Isbister to be my sole executrix, but these presents are granted under burden of all my just and lawful debts and sick-bed and funeral charges; declaring also that the provision hereby made in favour of the said Jessie Sarah Isbister shall be exclusive always of the *jus mariti*, courtesy, curatory, and right of administration of any husband she may marry, and not affectable by the debts or deeds of such husband, nor by any action, diligence, or execution competent to follow thereupon; and I reserve my own liferent of the premises; and I dispense with the delivery hereof; and I consent to the registration hereof for preservation." The greater part of the estate left by Mrs Isbister was heritable property in Glasgow.

Mrs Isbister's daughter Jessie Sarah Isbister, afterwards Mrs Brown, who was her only child, died on 14th March 1902, and so predeceased her mother. Mrs Brown left no issue.

In June 1903 the present action was raised by Mrs Elizabeth Mackie or Macleod, Myrton, Prestatyn, Flintshire, and another, two of Mrs Isbister's heirs *ab intestata*, against Mrs Sarah Agnes Isbister or Wilson, Millburn House, Claremont, near Cape Town, South Africa, and others, the heirs of Mrs Jessie Sarah Isbister or Brown. The pursuers sought to have it declared that the disposition and settlement referred to was of no force and effect, and that Mrs Isbister's estate had fallen into intestacy.

The defenders maintained that the disposition and settlement was effectual to carry Mrs Isbister's whole estate to them as conditional institutes.

The pursuers averred, *inter alia*, that before Mrs Brown's death Mrs Isbister had been certified as incapable of managing her affairs or of giving directions for the management of them, and that if she ever realised the fact of her daughter's death, she never was capable of comprehending the effect of the disposition which she had executed in 1870 or of giving instructions for the preparation of a new will.

The pursuers pleaded—"(1) The pursuers are entitled to decree of declarator as concluded for, in respect (1st) that the said settlement was only to take effect in the event (*a*) of Mrs Brown's surviving her mother, or (*b*) of her predeceasing her mother leaving issue. (2) That Mrs Isbister being her daughter's heir *quoad* one-third of her daughter's moveable estate cannot be presumed to have intended to institute herself as heir to her own succession. (3) that it having been Mrs Isbister's desire to benefit only her daughter or daughter's issue, she was mentally incapable after her daughter's death of destroying the said settlement or of making a new one."

The defenders pleaded—"(1) The action as laid is incompetent. (2) No relevant case. (3) The disposition and settlement being the valid deed of Mrs Isbister, and entitled to receive full force and effect, the defenders should be assoilzied. (4) The destination to Mrs Brown's heirs in said disposition and settlement being a proper conditional institution of her heirs in the event of her predeceasing Mrs Isbister, the defenders should be assoilzied. (5) The material averments of the pursuers being unfounded in fact, the defenders should be assoilzied."

By interlocutor of 19th July 1903 the Lord Ordinary (Low) sustained the second plea-in-law for the defenders and dismissed the action.

"*Opinion.*—This case has been argued very ably by Mr Macfarlane and Mr Graham Stewart. They have said everything that can be said for the pursuers, and therefore I have the more confidence in expressing the opinion which I have formed.

"The question is whether the writing which the late Mrs Isbister left purporting to regulate the disposal of her estate at her death was a will or a bond of provision. The document bears to be a settlement, because the cause of granting is stated to be for 'the settlement of the succession of my means and estate after my death.' That is clearly a testamentary purpose. Then the terms used are unambiguous. Mrs Isbister dispones her whole means and estate to her daughter 'and her heirs and assignees whomsoever.' The meaning of such a destination is very well settled. The case of *Bowman's Trustees* is an authority for saying that a destination-over to heirs is just as much a conditional institutional as if it were to a third party nominatim, and there is nothing in this instrument to justify the words being read in any other sense. Now, what grounds are there for treating this instrument, which bears to be a testamentary settlement, as being merely a bond of provision in favour of the daughter? I think there are only two grounds, in so far as the answer to this question depends, upon the terms of the instrument. The one is that the daughter is nominated as sole executor, and the other is that the disposition in her favour is spoken of as a 'provision.'

"In regard to the *nomination* of the daughter as the executor it was argued

that if Mrs Isbister had intended that the disposition should take effect, even if her daughter predeceased her, she would have nominated an executor to act in that event. Very likely Mrs Isbister did not think of her daughter predeceasing her, but however that may be, if an executor, failing the daughter, had been nominated, it would have required to be a person who had no interest in the succession, because those to whom the estate was destined, failing the daughter, could not be known, and, indeed, did not exist, at the date of the settlement. I think that that sufficiently explains the nomination of the daughter only.

"In regard to the use of the word 'provision' it occurs in this way. It is declared that 'the provision hereby made shall be exclusive of the *jus mariti*, courtesy, and right of administration of any husband she may marry.' Now, the word 'provision' just refers back to what had been given to the daughter in the preceding part of the deed, that is, an absolute conveyance of the whole estate. I think that the use of the word 'provision' is very naturally explained by the relationship which existed between the parties — the relationship of mother and daughter — because I think it is a matter of everyday experience to find that legacies or gifts by a parent to a child are spoken of as provisions. It therefore seems to me that the mere use of the word 'provision' in the clause which I have quoted is altogether insufficient to reduce what bears to be, and in form is, a testamentary settlement to a bond of provision.

"It was further argued that as Mrs Isbister was in fact one of her daughter's heirs it could not be supposed that she intended to make a will in her own favour as conditional institute. But the fact that, as the event turned out, Mrs Isbister happened to be one of her daughter's heirs was a mere accident. If the daughter had survived her mother, or if she had left children, the mother would not have been one of her heirs. It seems to me that the unforeseen, and, I imagine, unlikely event of the daughter predeceasing her mother without issue cannot prevent the writing being construed according to the ordinary significance of the language used. The result of Mrs Isbister turning out to be one of her daughter's heirs seems to me simply to be that to the extent of one-third of the estate the settlement has proved to be ineffectual.

"Mr Macfarlane further argued that the word 'heirs' should be read as meaning heirs of the body. In some cases the word has been so read, but that was where the context showed that the testator in speaking of heirs in one part of the deed really referred to heirs of the body. In this deed, however, there is nothing to suggest that the word is used otherwise than in the ordinary sense.

"I shall therefore dismiss the action."

The pursuers reclaimed, and argued—Mrs Isbister did not intend to benefit anyone except her daughter, and the benefit conferred upon her daughter was expressly described as a "provision." The deed was intended to take effect only in the event of the granter's daughter surviving her or leaving issue if she predeceased her—*Findlay* v. *Mackenzie*, July 9, 1875, 2 R. 909, 12 S.L.R. 597; *Baillie's Executor* v. *Baillie*, June 16, 1899, 1 F. 974, 36 S.L.R. 739. Mrs Isbister was herself one of her daughter's heirs; therefore even if the deed was a *mortis causa* settlement it was ineffectual — *Birnie* v. *Simpson's Trustees*, November 29, 1892, 20 R. 481, 30 S.L.R. 259. The words "heirs and assignees whomsoever absolutely" merely marked Mrs Isbister's indifference as to what became of her estate if her daughter did not survive her or leave issue; "heirs" meant "heirs of the body"—*Craw's Trustees* v. *Craw*, February 15, 1899, 1 F. 572, 36 S.L.R. 414. The word "assignees" would be meaningless except in the view that the deed was only to take effect if Mrs Brown survived, because unless she survived there could be no assignation of her rights—*Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346.

Argued for the respondents—Mrs Brown's heirs were conditional institutes, and they were to be sought for as at the date of Mrs Isbister's death—*Maxwell* v. *Maxwell*, December 24, 1864, 3 Macph. 318; *Halliburton, &c*, June 26, 1884, 11 R. 979, 21 S.L.R. 686; *Cleland* v. *Allan*, January 13, 1891, 18 R. 377, 28 S.L.R. 264. The language of the deed was testamentary, and it was a will.

LORD JUSTICE-CLERK — The late Mrs Isbister left behind her a document which was stated to be for "the settlement of the succession to my means and estate after my death." The destination was to her "daughter Jessie Sarah Isbister, and her heirs and assignees whomsoever." Jessie was an only child, and was married. The settlement was executed in 1870. Jessie died in 1902 and Mrs Isbister died in 1903, there being nine months' interval between the two deaths. The question is, whether the deed was a bond of provision which fell by the death of the daughter, so that Mrs Isbister's estate goes to her next-of-kin by intestacy, or whether it was a testamentary bequest and is effectual in favour of Jessie's heirs as conditional institutes.

I agree with the Lord Ordinary in holding that there is no ground for treating this deed as being other than it bears to be—a death settlement. I attach no importance to the nomination of Jessie as executrix. It was quite natural that if she survived her mother she should be her executrix, and the fact that those who might take failing the daughter could not be ascertained at the time of granting seems reasonably to account for no one being nominated failing the daughter. I am also satisfied that the use of the word "provision" in the description of the deed in the clause excluding the *jus mariti*, &c., cannot be held to override the testamentary words in the disposing part of the settlement. I think it would be quite unreasonable to do so. The word "provision" is frequently

used as descriptive of what is really a bequest by testamentary legacy made to a child and its heirs, and cannot reduce the effect of what is on the face of it of the latter class.

I do not think that the other arguments of the pursuers require notice, viz., that, as it has happened, Mrs Isbister, by the predecease of her daughter, was herself an heir, and that "heirs" should be read as "heirs of the body." I agree in what the Lord Ordinary says on them, and am in favour of adhering to his interlocutor.

LORD YOUNG—The question in this case is a simple one—whether the defender's fourth plea-in-law is sound and should be sustained. Now, I think it clear that the deed in question is a will, a testamentary disposition of the estate of the testatrix—nothing else. It has been decided, and is beyond doubt, that a destination in a will to the heirs of a nominate legatee makes the heirs of the legatee conditional institutes. This will was prepared by a man of business, and we have to consider the meaning of the words which he used as though they had been used by the testatrix in the meaning which he attached to them, and that is a technical meaning. It would be a serious thing to give a different meaning to technical words to that given to them by the decisions and the text writers; but no doubt a different meaning would have to be given to the technical words employed here if there was anything in the will to show that the testatrix did not intend them to bear their technical meaning. I agree, however, with the Lord Ordinary, that there is nothing in this deed to show that the testatrix did not intend the heirs of the nominate legatee, her daughter, to take as conditional institutes in accordance with the technical meaning of the words employed.

LORD TRAYNER—I agree with the Lord Ordinary. I cannot regard the writ before us as being anything but a testamentary writing. It presents all the characteristics of a will, and none of the characteristics of a bond or deed of provision. The fact that the bequest to Mrs Brown is called a "provision" does not affect the question. It is quite common in testamentary writings to find proper bequests or legacies in favour of beneficiaries described as provisions made in their favour. Dealing with the writ as a testamentary writing, the one question in the case is, whether the bequest there made to Mrs Brown was dependent on her surviving the testatrix. I have no hesitation in answering that question in the negative. A legacy or bequest to A B lapses if the legatee predeceases the testator, but a legacy to A B "and his heirs and executors" does not. The recognised effect of such an addition is to prevent lapsing, and when I find these words in the deed before us I conclude that they were put there to prevent lapsing, and thus in themselves exclude the idea that the legacy or bequest was only to be effectual in the event of the survivance of the legatee. There is provision made for the event of the legatee's predecease by these words. The result in this case of applying the well-established rule is no doubt anomalous, for it happens that the testatrix herself is one of the heirs of her daughter. That, I believe, was not expected. But that it turns out so is merely accidental, and does not alter the legal effect of the language used.

LORD MONCREIFF—The deed under consideration is a combination of a will and a bond of provision, although the characteristics of a will undoubtedly predominate. Such were the deeds in the cases of *Findlay* v. *Mackenzie*, 2 R. 909, and *Baillie's Executor*, 1 F. 974, relied on by the pursuers, and also in the defenders' authority—*Halliburton*, 11 R. 979. The question turns upon the meaning to be ascribed to the words "her heirs and assignees whomsoever," and that again depends on whether, on consideration of the whole of the deed, we hold that it was the intention of the testatrix that the provision or bequest should or should not be dependent on her daughter Jessie Sarah Isbister surviving her.

The words "heirs and assignees whomsoever," when adjected to a conveyance or bequest, admit, according to circumstances, of different constructions. They may import a conditional institution of the disponee's or legatee's heirs, but, on the other hand, they may be inserted merely for the purpose of expressing emphatically that the conveyance or gift is absolute. Of this there are numerous examples. We have to decide which meaning is to be given to the words as used in this deed.

None of the cases which were cited are precisely an all fours with the present. In the case of *Findlay* it was expressly declared that the bequest was made to the testator's wife in the event of her surviving him; and in the case of *Baillie's Executor* the gift was also made to the wife "in case she shall survive me." In that respect the deeds in these cases afforded stronger indications of intention that the bequest should be conditional on survivance than the deed in the present case. On the other hand in the case of *Halliburton* the bequest of residue to the testator's youngest daughter, "her heirs and assignees," was not made dependent on her surviving her father, and there was nothing else in the deed to indicate that the gift was conditional on survivance. The same may be said of the case of *Cleland* v. *Allan*, 18 R. 377.

But while the deed in the present case lacks some of the indications of intention which are to be found in *Findlay's Trustees* and *Baillie's Executor*, it contains one indication of intention (which occurred in *Findlay's Trustees*, and to which the Lord President attached importance, as appears from his opinion in *Halliburton*), but which is not to be found in the cases of *Halliburton* and *Cleland* v. *Allan*, viz., that the testatrix nominates her daughter to be sole executrix. On this the pursuers rely as showing that the testatrix did not contem-

plate her daughter predeceasing her, and from that they argue that the expression "heirs and assignees whomsoever" could not have been inserted for the purpose of conditionally instituting her daughter's heirs. Another consideration is that it is improbable that the testatrix intended that her whole estate made by her own exertions, or at least two-thirds of it, should go to her husband's relatives if her daughter predeceased her without issue, the daughter, be it observed, having *ex hypothesi* no power to assign it. I think that there is considerable force in these contentions, and my impression is that the pursuers are right as to the intention of the testatrix. But the question is narrow, and as your Lordships all agree with the Lord Ordinary, I do not feel justified in dissenting.

The Court recalled the interlocutor reclaimed against and sustained the fourth plea-in-law for the defenders.

Counsel for the Pursuers and Reclaimers — Macfarlane, K.C. — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents — Solicitor-General (Dundas, K.C.)— Hunter. Agents—Steedman & Ramage, W.S.

Saturday, May 23.

OUTER HOUSE.

[Lord Low.

DAVIDSON *v.* CAMPBELL RENTON.

Game—Ground Game—Ground Game Act 1880 (43 *and* 44 *Vict. c.* 47)*—Interference with Agricultural Tenant's Exercise of his Concurrent Right to Take Ground Game—Interdict.*

The agricultural tenants of a farm, in the exercise of their concurrent right to take ground game, employed a rabbit catcher to snare rabbits. The landlord's gamekeeper selected the same fields for setting snares, with the object of obstructing the rabbit-catcher, knocked over some of the rabbit-catcher's snares, and set his own in positions to render others ineffectual, and on one occasion put paraffin on the runs on which the rabbit-catcher's snares were set. *Held* that the agricultural tenants were entitled to interdict against the gamekeeper, prohibiting him from designedly obstructing the agricultural tenants in the lawful exercise of their right to kill and take ground game upon their farm under the Ground Game Act 1880.

Master and Servant — Scope of Employment—Gamekeeper—Interdict.

Held, where a gamekeeper had designedly interfered with the agricultural tenants in the exercise of their right to kill and take ground game upon their farm, and the agricultural tenants had been found entitled to interdict against him from doing so, that the agricultural tenants were not also entitled to interdict against the landlord as the gamekeeper's master and responsible for the gamekeeper's acts within the scope of his employment.

George Davidson, George Davidson junior, and William Gladstone Davidson, tenants of the farm of Lamberton, in Berwickshire, raised an action against their landlord Robert Charles Campbell Renton, Esquire of Mordington, and Joseph Tait, his gamekeeper, craving the Court "to interdict, prohibit, and discharge the said respondent Robert Charles Campbell Renton Esquire, and the respondent Joseph Tait, and all others acting by the said Robert Charles Campbell Renton's authority, from trampling down or destroying snares or traps set by the complainers or any person duly authorised by them for the purpose of killing and taking ground game on the said farm of Lamberton, and from sprinkling paraffin or other noxious substance, or setting other snares or traps, or stopping up rabbit runs in such immediate proximity to snares or traps lawfully set by the complainers or any person authorised by them, as to prevent ground game being so killed and taken, and from otherwise preventing the complainers or any person authorised by them from killing and taking ground game on the said farm, and from unlawfully obstructing or interfering with the complainers in the exercise of their right to kill and take ground game on the said farm." . . .

The complainers' averments of fact, so far as held to have been substantially proved, were as follows:— "(Stat. 2) As occupiers of the farm the complainers are entitled, in terms of the Ground Game Act 1880, by themselves or any person duly authorised by them, to kill and take ground game thereon. The farm is a large one, and is a good deal exposed to depredations from ground game, which the complainers have found it necessary to keep in check. A considerable part of the farm consists of unenclosed moorland, upon which the complainers have no right to kill game except from 11th December to 31st March, and from which rabbits make their way in large numbers into the arable land through runs in the enclosing fences. For the purpose of keeping down the ground game the complainers have employed a rabbit-trapper named George Johnston. (Stat. 4) On 9th July 1902 Johnston by the instructions of the complainers set some snares in the Camps Field. Shortly thereafter the respondent Joseph Tait, who is employed as a gamekeeper by Mr Campbell Renton, went over the ground and set snares within one yard of those set by Johnston. The result of this was to prevent any rabbits from being caught, and Tait informed Johnston that that was his object in setting the snares. Again, on 14th July 1902, Johnston set snares in the Cove Field and Seabraes, when Tait proceeded to set others within one foot of those set by Johnston, with the same result. On 15th July the same thing was repeated in the Heathery House Field.