school is to be continued for a period of at least ten years. Everything therefore turns on the terms of the enacting part of sub-section (3). By it the transferred school is to be "held, maintained, and managed as a public school" by the defenders. They are also given the sole power (subject to the provisos) of regulating the curriculum and appointing teachers. It is plain that the phrase "as a public school" qualifies each of these three verbs. The term "held" is satisfied by the defenders having the title to the school and being its occupiers. "Managed" is satisfied by the exercise of a general power of supervision over the teaching staff and the organisation generally of the school. "Maintained" is the debatable term. It was not contended by the defenders that this term applied only to the physical structure of the school. It was conceded that the school had to be maintained as an educational institution. I have already indicated the main argument of the defenders. They contend that as managers and administrators of the school they are entitled to administer it as any other school within their jurisdiction supported by public money, so long as they do not make it something which cannot reasonably be described as a public school. The defenders point out that the terms of the three provisos are being observed in the transferred school, and that although it is now merely an infant school it is still being maintained as a public school. The pursuers on the other hand contend that the statutory duty of the defenders is to maintain the school in substantially the same condition educationally as it existed when transferred. They aver that the character and status of the school have been changed by what the defenders have done and its identity entirely destroyed. I have ultimately formed the opinion that the pursuers' contentions are well founded. I do not regard the phrase "as a public school" as being exegetical of the term "maintained." That phrase was in my opinion inserted for two reasons — (1) to make it plain that the transferred school was to be open to all children in the area, (2) to indicate that the school was to be supported by public funds. It was suggested that if it had been meant to preserve the *status quo* of the transferred school this would have been specifically stated. But this is just what seems to have been done by the use of the term "maintained," as this term necessarily means "continued in its existing condition"—see *Attorney-General* v. *West Riding of Yorkshire County Council*, [1907] A.C. 29; *Wilford* v. *West Riding of Yorkshire County Council*, [1908] 1 K.B. 685. If the sub-section is paraphrased and made applicable to this particular school it might, as I think, be expressed thus—"The defenders shall maintain as a public school St John's School." St John's School when transferred was a mixed school, having a full primary and supplementary course of instruction and containing, I assume, an infant, a junior, and a senior department. The junior and senior departments have been transported to another building. Departmentally the school has suffered amputation to the extent of two-thirds. No one who knew the school in its former condition would say that the present school is the same, or that it even resembles in character and status the school that was transferred. The defenders' statutory obligation, as I read it, is to maintain a school substantially the same in character and status as St John's School was before the transfer. They are not doing so, and the pursuers must therefore have the decree which they seek.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the pursuers, and found and declared in terms of the first three declaratory conclusions of the summons, and in terms of the alternative of the fourth declaratory conclusion added on amendment.

Counsel for the Reclaimers (Pursuers)—Brown, K.C.—Burnet. Agents—Wood & Mackenzie, W.S.

Counsel for the Respondents (Defenders) — Wark, K.C. — Scott. Agents — Alex. Morison & Company, W.S.

Thursday, March 20.

SECOND DIVISION.

CUNNINGHAM'S TRUSTEES *v.* CUNNINGHAM.

Succession — Testament — Revocation — Special Destination — Destinations in Stock Certificates — Government Stock Administered in England Purchased by Scottish Testator in Names of Himself and Wife—Law Regulating Succession thereto — Law of England or Law of Testator's Domicile.

A Scottish testator by trust-disposition and settlement conveyed to his trustees his whole estate for behoof of his widow in liferent and his children in fee. He subsequently effected three investments in War Stock, the certificates of which were taken in the names of himself and his wife. Upon his decease his widow maintained that the purchase of the War Stock constituted a contract with the Bank of England, that the succession to the War Stock fell to be regulated by the law of England, and that accordingly she was entitled in terms of the certificates, interpreted by English law, to succeed to the entire amount thereof. *Held* (1) that the special destinations in these investments had not been evacuated by the trust-disposition and settlement, and (2) that the destinations in the certificates fell to be interpreted according to the law of Scotland.

John Cunningham, Glasgow, who died on 12th July 1919, left a trust-disposition and settlement dated 4th February 1898, with a codicil thereto dated 4th March 1912, both registered 20th August 1919, wherein he appointed certain trustees to carry out his testamentary directions.

James Stirling, Glasgow, and others, the accepting, surviving, and assumed trustees acting under the said trust-disposition and settlement, *first parties;* Mrs Margaret Fraser or Cunningham, widow of the said John Cunningham, *second party;* and Mrs Jeanie Cunningham or Brown and Mrs Jane Nisbet or Cunningham, as tutrix of the pupil children of her marriage with the deceased John Cunningham, a predeceasing son of the testator, *third parties,* presented a Special Case for the opinion and judgment of the Court upon questions as to the application of the testator's testamentary writings to certain of his investments.

The Case set forth, *inter alia*—"2. By his said trust-disposition and settlement the testator gave, granted, assigned, and disponed to his trustees 'the whole means and estate, heritable and moveable, real and personal, and wherever situated, now belonging to me, or which shall belong to me at the time of my death,' for the trust purposes, *inter alia*, after payment of debts, &c., as follows:—In the second place to hold the residue of said estate for behoof of the second party in the event of her surviving him in liferent for her liferent use of the free annual proceeds thereof only, but subject to the express condition that this provision should be strictly alimentary and not assignable by her nor subject to the diligence of her creditors; and lastly, subject to the foregoing provisions, to hold the residue for behoof of his children John Cunningham junior, William Norris Cunningham (both of whom predeceased the testator, the said William Norris Cunningham having died without leaving issue), and Jeanie Cunningham and any other children who might thereafter be born to him equally among them and the survivors of them in fee, the issue of any child predeceasing the testator to take their parents' share. By the said codicil the testator authorised and empowered his trustees to advance to the second party such portions of the capital of his estate as in their opinion were necessary for her comfort and maintainance. 3. After the testator's death there were, *inter alia*, found in his repositories the following certificates and vouchers of investments, viz.—A (1) Certificate for £300 5 per cent. War Stock 1929-47 inscribed, taken in name of the testator and the second party. The testator made this investment in or about February 1917. (2) Certificate for £300 registered 5 per cent. National War Bonds 1928, taken in the same terms. The testator made this investment on or about 2nd September 1918. (3) Certificate for £200 4½ per cent. War Stock 1925-45 inscribed, taken in the same terms. The testator made this investment on or about 28th August 1915. It was converted into £210, 10s. 6d. 5 per cent. War Stock 1929-47 on 2nd July 1917. The destination remained unchanged. B Certificate for 15 8 per cent. first preference shares in Cranston's Tea Rooms, Limited, taken in names of the testator and the second party, dated 17th April 1917. C (1) Bond of the Clyde Navigation Trust for £300, in names of the testator and the second party and survivor, dated 16th May 1906. (2) Bond for £300 of the Clyde Navigation Trust, in names of the testator and the second party and survivor, dated 28th February 1901. (3) Certificate for 30 preference shares in Cranston's Tea Rooms, Limited, in names of the testator and the second party or the survivor, dated 26th February 1906. . . . The registers of the said War Stock and National War Bonds are kept by the Bank of England in London. All transfers of said stock and bonds are registered there. The said bank issues from London the dividends on the said stock and bonds and all notices of redemption and offers of conversion. The said stock and bonds are payable in London. Cranston's Tea Rooms, Limited, is incorporated under the Companies Acts, and its registered office is situated in Scotland. The Clyde Navigation Trust is a Scottish statutory incorporation. 4. The total value of the testator's estate conform to the confirmation in favour of the first parties is £3831, and the total value of the abovementioned investments is £1392. The money invested was the testator's own, and was partly savings acquired in his business of dairyman and partly inherited from his father. The second party, however, took an active part in the conduct of said business without remuneration. The investment of the funds was made by the testator personally without advice from his law agents, but the second party was at the time aware of the fact that these investments were made and of the terms thereof. The income from all the investments was drawn from time to time by the testator himself. For the purposes of this case the parties agree that there is no evidence of the testator's intention in so taking the investments titles other than what is contained in the documents printed in the appendix or stated in this Case. 5. With reference to the investments mentioned in group (*a*), *supra*, the parties hereto agree that by English law destinations in the terms of those in group (*a*), *supra*, contained in certificates in the terms of those in group (*a*), *supra*, whether issued in virtue of a transfer or an original application for stock, would confer on the survivor a right to the whole of the investments in question. The primary question raised in this Case is whether the law of Scotland or of England is to be applied in determining the effect of such destinations taken by a testator domiciled in Scotland in certificates of Imperial Government loans which happen to be administered by the Bank of England."

The *questions of law* were—"A (1) Do the destinations contained in the certificates relative to the investments in group A (*supra*) fall to be interpreted according to the law of (*a*) Scotland or (*b*) England? (2) Assuming that said destinations fall to be interpreted by the law of Scotland, (*a*) Do said investments belong to the second party as survivor? or (*b*) Do they belong half to the second party and half to the first parties as trustees? or (*c*) Do they pass wholly under said trust-disposition and settlement? B Does the investment in group B (*supra*) (1) belong half to the second party and half to the first parties as

trustees? or (2) Pass wholly under said trust-disposition and settlement? C Do the investments in group C (1) belong to the second party as survivor? or (2) Pass wholly under the said trust-disposition and settlement?"

Argued for the second party — The testator in acquiring the War Stock, which was registered in England and payable in London, contracted with the Bank of England. England was thus both the *locus contractus* and the *locus solutionis*. The destinations in these certificates therefore fell to be determined by the law of England, and the testator's widow was accordingly entitled to succeed to the proceeds. The following authorities were cited:—Dicey's Conflict of Laws (3rd ed.), pp. 609 and 614; *Thomson's Trustees*, 1851, 14 D. 217, *per* Lord Fullerton at p. 225; *Connell's Trustees*, 1886, 13 R. 1175, at p. 1184, 23 S.L.R. 857; *Webster's Trustees*, 1877, 4 R. 101, 14 S.L.R. 51; *Perrett's Trustees*, 1909 S.C. 527, 46 S.L.R. 453. Under the destination in the certificate in group B the testator and his widow were joint proprietors thereof—*Connell's Trustees*. The testator had acquired the securities in group C subsequent to the date of his will, and had demonstrated his intention that these were to go wholly to his widow—*Dennis' Trustees*, 1923 S.C. 819, *per* Lord President (Clyde) at p. 825, 60 S.L.R. 563; *Campbell* v. *Campbell*, 1880, 7 R. (H.L.) 100, 17 S.L.R. 807; *Scott's Trustees*, 1916 S.C. 732, 53 S.L.R. 551; *Farmer's Trustees*, 1917 S.C. 366, 54 S.L.R. 323.

Argued for the third parties—An investment in Government Stock did not compel the Court to construe the destinations therein according to the law of England. The terms of certificates for War Stock, which was an imperial or British stock, did not interfere with the succession to a deceased holder thereof, and the *lex domicilii* applied in such cases. The Bank of England here acted merely as the cashier or bookkeeper of the British Government, which was the true debtor in the obligation. The presumption was in favour of the testator's own law being applied in a case regarding his own succession, and that had not been satisfactorily displaced. The onus lay upon the second party to show that any foreign law should be applied, and that the testator had done something to demonstrate his desire that foreign law should regulate his succession. The second party had failed to discharge that onus. Counsel referred to the following authorities:—*Hamlin* v. *Talisker*, 21 R. (H.L.) 21, 31 S.L.R. 143; *Drysdale's Trustees*, 1922 S.C. 741, 59 S.L.R. 558; Grant's Law of Banking (7th ed.), pp. 470 and 471; *Connell's Trustees* (*cit.*); Sloman, 1845, 14 Sim. 486; *Turnbull's Trustees*, 1911 S.C. 1288, 48 S.L.R. 1033.

At advising—

LORD ORMIDALE—Two questions fall to be determined in this case. The first has reference to the investments in all the groups A, B, and C, and is whether the special destinations or any of them contained in these investments have been evacuated by the testator's general trust-disposition and settlement and codicil. The second is concerned only with the certificates relative to the investments in group A, and is whether the destinations in these certificates fall to be interpreted according to the law of Scotland or of England.

In considering the question whether the special destinations or any of them are affected by the general trust-disposition and settlement, certain rules require to be kept in view. One is that a disposition and settlement which recalls all other testamentary writings, and is a general conveyance, will not operate as a revocation of a special destination made by the testator himself; another is that wherever a person makes a special destination after his trust-disposition and settlement then the destination must be held to be the last expression of his will—*Perret's Trustees*, 1909 S.C. 522; *Turnbull's Trustees*, 1911 S.C. 1288; *Dennis*, 1923 S.C. 819. But these rules, or at any rate the first of them, is a rule only of presumption, and may be redargued by evidence of intention or any other relevant circumstance. The only clause in the trust-disposition, which is dated in 1898, on which the third parties could rely was the general conveyance to the trustees of all the testator's means and estate then belonging to him or which should belong to him at the time of his death. The codicil adds nothing that has any bearing on this matter. It is dated in 1912, and subject to a power being given to his trustees to make advances from capital to his wife, the testator in all other respects confirms his general disposition and settlement. There is no ground at all it seems to me for holding that the general conveyance standing by itself is relevant to infer recall. The investments in groups A and B, which are all dated subsequent to 1912, must therefore stand on their own special destinations. The same result must follow in the case of the investments in group C. They too are all dated subsequent to the trust-disposition though prior to the codicil. I cannot accept the argument that the effect of the codicil was, so to speak, to post-date the trust-disposition to 1912 and thus render it necessary to treat the special destinations in group C as having been made before the trust-disposition—*Scott's Trustees*, 1916 S.C. 732. Even if the codicil had that effect the same result would follow under the first of the rules I referred to. The rule may have become very threadbare, as Mr Mackay put it, but its vitality does not appear, in any case cited to us, to have been affected except where there was some context clearly evincing the intention of the testator that it should not operate. Now there is not even an express revocation of prior testamentary writings, and there is absolutely nothing either in the circumstances of the trust estate as in *Perret's Trustees*, or in any of the provisions of the settlement as in *Dennis* and *Drysdale's Trustees* (1922 S.C. 741), which can be said to infer or even suggest a revocation of the special destinations. Accordingly the investments in

group C must also stand on their own special destinations. The meaning and effect of the destinations in groups B and C are not in dispute.

The second question to be determined is whether the destinations in the certificates in group A are to be interpreted according to Scots or English law. I am disposed to think that we should follow the decision in *Drysdale's Trustees.* Among the investments dealt with in that case were two in War Stock taken, like the certificates in group A, in name of the testator and his wife, and a question was put to the Court as in this case, whether these investments belonged (*a*) to the wife of the testator or (*b*) half to the trust estate and half to the wife. The Court, following *Connell's Trustees,* 13 R. 1175, at 1184, answered (*a*) in the negative and (*b*) in the affirmative. The effect of the destinations was thus determined by Scots law. It is true that the parties interested did not maintain that their meaning should be determined by English law. No contention to that effect was stated in the case and no argument to support it was offered, I understand, at the bar. I take it that the reason was that the parties interested were satisfied that such a contention would meet with no success. Whether that was so or not, it would be very inexpedient for this Court in the present case to reach a result differing from that reached by the First Division in a case in which the special destinations were in precisely the same terms and in identical titles.

I may add, however, that if the question were to be regarded as open I should not be prepared as at present advised to give effect to the very excellent argument addressed to us by Mr Morison. In the case the question is referred to as follows:—"The primary question raised in this case is whether the law of Scotland or of England is to be applied in determining the effect of such destinations, taken by a testator domiciled in Scotland in certificates of Imperial Government loans which happen to be administered by the Bank of England." Now Imperial Government loans are obviously not of the same character or affected by the same considerations as investments in the shares of English trading companies, and the reasons given by Lord Adam for the conclusion he arrived at in the case of such shares in *Connell's Trustees* do not therefore appear to me to be applicable. What his Lordship said (at p. 1185) was—"It appears to me that when Mr Connell in taking these shares took them with this title he must be taken to have known that the title would carry the shares to the survivor and to have taken the title with that intention." His judgment is based on presumed intention and that, speaking generally, is in such a case conclusive I think. But National War Bonds and War Stock are not, in the strict sense of the term, English as distinct from Scots. They are Imperial or British, and a Scotsman is not, in transacting with the British Government, an alien or foreigner. What is said about such stocks in the case does no more than inform us that the registers, transfers, issue of cheques, and so on are regulated to suit the requirements of the Bank of England. While I think that we have here to deal with a matter of administration and succession rather than with a matter of contract, taking it that it is to be regarded from the point of view of contract the Bank of England was clearly no party to the contract. It acted merely as the cashier or bookkeeper of the British Government, the true debtor in the obligation. Accordingly in my opinion the testator, himself a domiciled Scotsman, and the rest of whose testamentary writings—I mean other than those in group A—fall admittedly to be construed in accordance with the law of Scotland, was entitled to regard War Stock and War Bonds as Scots and not English, and in taking the titles in the terms he did must be taken to have known and intended that the titles would and should be interpreted according to the law of his domicile, with the result that half only and not the whole would on his death pass to his wife. It was admitted that while the certificates in groups A and B are not literally in identical terms with those in group C, in legal effect they are, and I cannot think that Mr Cunningham entertained any doubt that on his death his wife would take the same beneficial interest under them all.

Accordingly the questions put to us in the case should, in my opinion, be answered as follows:—A (1) sub-head (*a*) in the affirmative and sub-head (*b*) in the negative; (2) sub-head (*a*) in the negative, sub-head (*b*) in the affirmative, and sub-head (*c*) in the negative. B (1) in the affirmative and (2) in the negative. C (1) in the affirmative and (2) in the negative.

LORD HUNTER—It is, I think, well settled that in the absence of evidence showing a contrary intention special destinations contained in bonds or certificates of shares belonging to the truster are not revoked or evacuated by a general conveyance to trustees contained in a testamentary settlement. Of course, where the special destination is contained in a deed of later date than the settlement it must receive effect. I agree with Lord Ormidale that in the present case there is no specialty to take the case outwith the application of the general rule.

The only difficulty in the case appears to me to arise from the terms in which certain investments in Government Stock were taken. These investments were taken in the name of the testator and the second party, who is his widow. It is made matter of admission that, according to English law, stock taken in such terms gives the survivor a right to the whole of the investment. According to Scots law, however, the survivor would only take a right to half the investment, the other half passing to the testator's representatives. The first question submitted to us is whether the destinations fall to be interpreted according to English or Scots law. For the next-of-kin it was argued that, although English law might determine the person entitled to

uplift the proceeds of the investments, the right of succession being to a Scotsman would have to be determined by Scots law. This is probably a difficult question that may have to be considered in some other case. In view, however, of the decision of the First Division in *Connell's Trustees* v. *Connell's Trustees* (13 R. 1175), I do not think that we could, without remitting the case to a larger Court, give effect to the contention of the next-of-kin. I agree, however, that Government Stock is in a special position and that it ought not to be treated in any different way from the Scots investments of the testator. This is what was done in *Drysdale's Trustees* v. *Drysdale* (1922 S.C. 741). Although no argument founded upon English law was advanced in that case, I have no doubt that the reason for this was, that the eminent counsel whose interest it was to plead the difference between English and Scots law, were satisfied that no argument based upon such distinction could be usefully presented to the Court. In my opinion the questions should be answered as proposed by Lord Ormidale.

LORD ANDERSON and the LORD JUSTICE-CLERK concurred.

The Court answered the questions of law as follows:—"A (1) sub-head (*a*) in the affirmative and sub-head (*b*) in the negative; (2) sub-head (*a*) in the negative, sub-head (*b*) in the affirmative, and sub-head (*c*) in the negative. B (1) in the affirmative and (2) in the negative. C (1) in the affirmative and (2) in the negative."

Counsel for the First Parties — G. R. Thomson. Agents — Bonar, Hunter, & Johnstone, W.S.

Counsel for the Second Party — Chree, K.C.—Morison. Agents—Scott & Glover, W.S.

Counsel for the Third Parties—Mackay, K.C.—Cooper. Agents — Dove, Lockhart, & Smart, S.S.C.

HOUSE OF LORDS.

Friday, February 8.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

G. *v.* G.

(In the Court of Session, December 7, 1922, 1923 S.C. 175, 60 S.L.R. 125.)

Husband and Wife—Nullity of Marriage—Refusal of Connection by Wife—Inference—Incapacity.

A woman, as a condition of her marriage, stipulated that for the first year after the marriage there should be no sexual intercourse, and her intended husband consented to the condition. The parties were married on 5th November 1913, the husband being then 29 years old and the wife 34. On the 16th November they went to India where they lived together till April 1914. During this period no intercourse was attempted, the bargain of abstention being kept by the husband. In April 1914 the wife returned to Scotland with her husband's consent. She rejoined her husband in India on 16th December 1914, and the parties again lived together in India till September 1915. During this period the wife, in spite of the fact that the period during which there was to be no sexual intercourse had expired, refused to consummate the marriage though the husband made repeated efforts to do so. In September 1915 the wife returned home to undergo an operation for appendicitis. The husband thereafter was called up for military service, and during the next five years the spouses were never together. In September 1920 the husband was released from military duties and rejoined his wife in Scotland on 13th November of that year when they came together at the house of the husband's father in Perth, sharing the same bed from the 15th to the 20th. During the period from the 15th to the 20th the husband again attempted to have intercourse, but his efforts were repulsed. On 20th November the wife left for Glasgow and thereafter the parties did not meet again. On 14th April 1921, after the marriage had subsisted for upwards of eight years, during which however, owing to war conditions and other reasons, there were only the three periods referred to of five months, nine months, and one week, during which the spouses lived together, the husband raised an action of nullity of marriage against the wife on the ground that she was incapable of consummating the marriage. Alternatively he asked for divorce on the ground of desertion, the desertion being qualified as a wilful and malicious refusal of carnal intercourse. There was no structural incapacity on the part of the wife, and it was not disputed that the husband was *vir potens*.

Held (*reversing* the judgment of the Second Division, Lord Anderson *dissenting*) that the inference from the facts was that the wife's refusal of sexual intercourse was due, not to wilfulness, but to incapacity on her part to consummate the marriage, arising from her invincible repugnance to the sexual act, and that accordingly decree of nullity fell to be granted.

A B *v.* C B, March 13, 1906, 8 F. 603, 43 S.L.R. 411 *approved*.

The case is reported *ante ut supra*.

The pursuer appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN — The pursuer in this case, Mr Graham, sues his wife Mrs Graham, asking for a declaration of nullity of the marriage on the ground of impotency, and alternatively for divorce upon the