

diligence after the decree had been obtained. Now diligence does not always or necessarily follow upon the execution of a summons, and the officer could not know whether diligence would or would not be used against the pursuer in this case. But after the execution was returned a decree was taken, and that decree contains the ordinary warrant for diligence, arrestment, and poinding. There was nothing on the face of the decree to show that there was anything wrong with it, and there was not necessarily anything wrong. It may be that it was, as we are now told, invalid, but it was not necessarily so, even although the service as executed was bad. For all that appeared in the decree it was possible that the defender had compared at the Small Debt Court, and that decree had then been pronounced against him. There was nothing upon the face of the decree to show that that was not so, for there is no difference in point of form between a Small Debt decree obtained against a comparing defender and a decree in absence. That being the case, it seems to me the case falls directly within the authority of the old case of *Scot* (M. 6016), and that as there is not any averment that the messenger knew that the diligence was wrong, and in spite of that went on with it, there is no relevant case against the messenger. Accordingly, I think the messenger—and with him, of course, his cautioners—must be assoilzied.

LORD KINNEAR—I agree with your Lordship.

LORD JOHNSTON—I agree, and have nothing to add.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court recalled the interlocutor of the Sheriff-Substitute dated 18th March 1908, assoilzied Thomas Nisbet and his cautioners from the conclusions of the action, and decerned; and remitted the cause so far as directed against the defender and respondent Andrew Beattie to the Sheriff to proceed as accords.

Counsel for the Pursuer (Appellant)—Hamilton. Agents—Sharpe & Young, W.S.

Counsel for the Defender (Respondent)—Findlay. Agent—J. Dunbar Pollock, Solicitor.

Friday, December 4.

#### FIRST DIVISION.

MACKENZIE'S TRUSTEES v.  
KILMARNOCK'S TRUSTEES AND  
OTHERS.

*Succession—Liferent and Fee—Liferent with Testamentary Power of Disposal.*

Where the same person is given a liferent and a power of disposal over the capital, "the Court will not declare a

fee unless there is both an unlimited liferent and an absolute power of disposal, as opposed to a mere testamentary power of disposal."

#### *Succession—Faculties and Powers—Power of Appointment—Exercise of Power—Division of Unappointed Portion of Fund.*

In the marriage-contract of A M his father bound himself to pay £25,000 to the marriage-contract trustees, to be held by them after A M's death "for the liferent use and behoof of the child or children of the said intended marriage, but for their respective liferent uses allenarly, and in such shares or proportions as their said father may by any writing under his hand direct and appoint, and failing such direction and appointment, then equally among them, share and share alike, and during the minority of said child or children the said trustees shall apply the annual income or produce of said sum of £25,000 towards their maintenance and education, and on their respectively attaining majority their respective shares of said income or produce shall be paid over to themselves during their several lifetimes; declaring nevertheless that any of the daughters shall be entitled to settle their shares of said sum in any contracts of marriage into which they may enter with consent of their father during his life, and that in so far as not so settled the whole of said children shall be entitled to dispose of their respective shares of said capital sum, by will or other testamentary writing under their hands." A M survived his father and was survived by one daughter and three sons. In the marriage-contract of his daughter A M appointed to her a one-fourth share both of income and capital which she with his consent settled in her marriage-contract and conveyed to trustees. A M by deed of appointment also directed "that on the expiry of my own liferent one-fourth of the annual income of said sum of £25,000 be paid to my eldest surviving son," V "if then surviving, and for the remainder of his life, subject always to the conditions and provisions of said marriage-contract, and I declare this appointment to be irrevocable."

Held (1) that the power of appointment had been validly exercised in the case of the daughter, because the power to her "to settle" her share in her marriage-contract imported the setting aside of capital, and also in the case of the son V because the appointment to him though in form an appointment of income carried incidentally with it a power of disposal by will; and (2) that the unappointed capital fell to be divided equally among the four children of A M.

A Special Case was presented to the Court by (1) the trustees acting under the ante-nuptial contract of marriage entered into

between Sir Allan Russell Mackenzie (then Allan Russell Mackenzie, Esquire), and Miss Lucy Eleanora Davidson (afterwards Lady Mackenzie), *first parties*; (2) the trustees acting under the antenuptial contract of marriage entered into between Lord Kilmarnock and Miss Mary Lucy Mackenzie (afterwards Lady Kilmarnock), *second parties*; (3) Lady Kilmarnock, *third party*; (4) Sir Victor Mackenzie, *fourth party*; (5) Allan Keith Mackenzie and Eric Dighton Mackenzie, *fifth parties*; (6) the trustees acting under the trust-disposition and settlement of Sir James Thompson Mackenzie, *sixth parties*. The subject-matter of the case was the rights of parties in a sum of £25,000 conveyed by the testamentary trustees of the late Sir James Thompson Mackenzie of Glenmuick to the marriage contract trustees of his son Sir Allan Russell Mackenzie. Sir Allan had died on 19th August 1906 survived by his wife Lady Mackenzie, one daughter, Lady Kilmarnock, and three sons, Sir Victor, Allan Keith, and Eric Dighton.

By the antenuptial contract of marriage entered into between Sir Allan (then Allan Russell Mackenzie, Esquire), and Miss Lucy Eleanora Davidson (afterwards Lady Mackenzie), the late Sir James, his father, *inter alia*, bound and obliged himself, his heirs, executors, and successors, to make payment to the trustees acting under the said contract of marriage within six months after his (the said Sir James's) death, of the sum of £25,000, to be held for the uses, ends, and purposes mentioned in said contract of marriage. By the fourth purpose of the contract of marriage it was provided—"Upon the death of the said Allan Russell Mackenzie the said trustees shall then and thereafter hold the said sum of £25,000 for the life interest use and behoof of the child or children of the said intended marriage, but for their respective life interests uses alienably, and in such shares or proportions as their said father may, by any writing under his hand, direct and appoint, and, failing such direction and appointment, then equally among them, share and share alike; and during the minority of said child or children the said trustees shall apply the annual income or produce of said sum of £25,000 towards their maintenance and education, and on their respectively attaining majority their respective shares of said income or produce shall be paid over to themselves during their several lifetimes; declaring, nevertheless, that any of the daughters shall be entitled to settle their shares of said sum in any contracts of marriage into which they may enter with consent of their father during his life, and that, in so far as not so settled, the whole of said children shall be entitled to dispose of their respective shares of said capital sum by will or other testamentary writing under their hands."

By the antenuptial contract of marriage entered into between Lord Kilmarnock and Miss Mackenzie, afterwards Lady Kilmarnock, dated 16th, 17th, and 21st May, and recorded in the Books of Council and Session 16th June 1900, Sir Allan irre-

vocably appointed a one-fourth share of said sum of £25,000, both of the income and capital, to his daughter Lady Kilmarnock, who, with consent of her father and of her intended husband Lord Kilmarnock, and with the concurrence of the trustees of her grandfather, the said Sir James, settled and conveyed and made over to the trustees under her contract of marriage, *inter alia*, her right and interest as one of the children of Sir Allan, and, in virtue of the foregoing appointment, to a one-fourth share of said sum of £25,000, both income and capital.

Sir Allan, by deed of appointment dated 4th April 1904, after narrating the power of appointment given him, directed as follows:—"I do hereby direct and appoint that on the expiry of my own life interest, one-fourth of the annual income of said sum of £25,000 be paid to my eldest surviving son Victor Audley Falconer Mackenzie, if then surviving, and for the remainder of his life, subject always to the conditions and provisions of said marriage-contract."

Sir Allan died intestate without having made any appointment of the income or capital of said sum of £25,000 other than said appointments in favour of Lady Kilmarnock and his son Victor.

The second parties maintained that they were entitled to receive immediate payment from the first parties of the one-fourth share of said sum of £25,000 appointed by Sir Allan to his daughter Lady Kilmarnock under her contract of marriage, to be held and applied by them in terms thereof.

The third parties maintained that Lady Kilmarnock was entitled in her own right, and in addition to the one-fourth share of said sum of £25,000 appointed to her as aforesaid, to the fee of an equal share, along with her three brothers, of the unappointed part of said sum of £25,000, and that she was further entitled to immediate payment thereof. In any event, they maintained that she was entitled to the life interest of said share, and to settle the fee thereof by marriage-contract or dispose thereof by will or other testamentary writing in terms of Sir Allan's marriage-contract.

The fourth party maintained that the deed of appointment dated 4th April 1904 was a valid and effectual appointment in his favour of one-fourth part of the capital of the said sum of £25,000, or otherwise of the income thereof, for his life. He accordingly claimed that he was entitled to immediate payment of one-fourth of the said sum of £25,000, or alternatively, that he was entitled to the income for his life of the said one-fourth part of the said sum of £25,000. Further, as regards any unappointed part of the capital of said sum of £25,000, the fourth party claimed an equal share thereof, along with the fifth parties, or otherwise, in any event, he claimed an equal share thereof, along with the third and fifth parties. He also claimed immediate payment of such part thereof as he might be found entitled to, except in so far as the same was life interest by him and required to be held by the first parties.

The fifth parties maintained that the deed of appointment dated 4th April 1904 in favour of the fourth party was invalid, and that they were, along with the fourth party, entitled to share equally between them the whole of the unappointed part of said sum of £25,000, and to receive payment of their respective shares thereof on their respectively attaining majority.

The sixth party maintained that the children of the marriage had no right of fee in the capital of their shares of the £25,000, and that the first parties were bound to retain the capital of the respective shares of Sir Allan Mackenzie's four children during their lives respectively, and that on the death of each child the capital of such child's share fell to be repaid to the sixth party, except in so far as the same had been disposed of by the will or other testamentary deed of such child, or else, in the case of the daughter, should have been settled in any contract of marriage entered into by her.

The questions of law for the opinion and judgment of the Court were—“(1) Are the first parties bound (a) to make immediate payment to the second parties of the one-fourth share of the said sum of £25,000 appointed by Sir Allan Russell Mackenzie to Lady Kilmarnock in her marriage-contract, or (b) to hold the said one-fourth share during Lady Kilmarnock's life for her liferent use allanarly? (2) Is the deed of 4th April 1904 a valid deed of appointment in favour of the fourth party apportioning (a) one-fourth of the income, or (b) one-fourth of the capital of the said sum of £25,000 to him? (3) In the event of question 2, branch (a), being answered in the affirmative—(A) Does the income of the said sum of £25,000 fall, in so far as unappointed, to be divided equally (a) between Lady Kilmarnock and the fourth and fifth parties, or (b) between the fifth parties? (B) Does the capital of the said sum of £25,000, in so far as unappointed, fall to be equally divided between (a) Lady Kilmarnock and the fourth and fifth parties, or (b) between the fourth and fifth parties, or (c) between the fifth parties? (4) In the event of question 2 (b) being answered in the affirmative, does the capital of the said sum of £25,000, in so far as unappointed, fall (a) to be divided equally between Lady Kilmarnock and the fourth and fifth parties, or (b) between the fifth parties? (5) In the event of both branches of question 2 being answered in the negative, does the said sum of £25,000, in so far as unappointed, fall to be equally divided between (a) Lady Kilmarnock and the fourth and fifth parties, or (b) the fourth and fifth parties? (6) (a) Are the parties other than Lady Kilmarnock entitled on majority to immediate payment of any share of the capital of the said sum of £25,000 to which they may be found entitled in virtue of the preceding questions, or (b) are the first parties bound to retain the said shares for the liferent use allanarly of the said parties, with power to them to dispose of the said shares by will or other testamentary writing? (7) In the

event of Lady Kilmarnock being found entitled to a share of the capital of the said sum of £25,000 in addition to the one-fourth share settled by her in her marriage-contract, is she entitled to (a) immediate payment of the said additional share, or (b) are the first parties bound to retain the said additional share for her liferent use allanarly, with power to her to settle the same in any marriage-contract into which she may hereafter enter, or to dispose thereof by will or other testamentary writing?”

Argued for the fifth parties—The appointment to Sir Victor was not a valid exercise of the power. The attempted appointment attached the condition of Sir Victor's survivance to the gift, and was an appointment not to the liferent of one-fourth (or any other specific share) of the £25,000, but to one-fourth of the annual income of £25,000. Had there been no appointment Sir Victor would have taken from Sir James, the granter of the power, not merely a right to income or liferent, but a fee, or at any rate a testamentary power of disposal in addition to the liferent. To allow the appointer to cut down the gift to a liferent would be contrary to the principle of the cases of *Warrand's Trustees v. Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R. 273; *Neill v. Neill's Trustees*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; *Dick's Trustees v. Cameron*, 1907 S.C. 1018, 44 S.L.R. 753; *Middleton's Trustees v. Middleton*, July 7, 1906, 8 F. 1037, 43 S.L.R. 718; *Matthews Duncan's Trustees v. Matthews Duncan*, February 20, 1901, 3 F. 533, Lord Adam at 538, 38 S.L.R. 401. There was no case where a mere appointment of income had been held good.

Argued for the fourth party—The appointment to Sir Victor was a valid exercise of the power. It did not transgress the power given, and was in fact an echo of it in practically its very words. It was a good exercise of a power to give a liferent to one object of the power and the fee to another object—*Wilson v. Wilson*, 1855, 21 Beav. 25, per Romilly, M.R., at p. 28; *Alloway v. Alloway*, 1843, 4 Dr. and Wav. 380, Sugden, L. Ch., at 386; Farwell on Powers, p. 322—and it was equally good to give a liferent to an object of the power, and to allow the fee to follow the directions of the granter of the power. [The LORD PRESIDENT referred to the distinction that in England a liferent was a separate estate.] In any case here the appointment to a share of income necessarily carried with it the power to dispose by will of that share, given by Sir James, and hence the survivorship restriction not merely was not, but could not, have been operative. An appointment to a liferent with a power of testamentary disposal had been held good in *Lennock's Trustees v. Lennock*, October 16, 1880, 8 R. 14, 18 S.L.R. 36; *Wright's Trustees v. Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450. The ground of decision in *Dick's Trustees* (cit. sup.) was not that a mere liferent had been given, but that the fee had been given to persons not objects

of the power. The gift of liferent of a share, and the power to dispose of it by will, was equivalent to a fee, and entitled the fourth party to immediate payment. On this matter they adopted the argument for the second and third parties.

Argued for the first parties—They admitted they must denude in favour of the second parties in virtue of the power to daughters to settle their shares. *Quoad ultra* they were bound to hold the fund, and were not entitled to make payment of any capital sum to any of the children. The provisions in the children's favour, even in the case of daughters, did not confer a fee, because a liferent with a mere testamentary power of disposal was not equivalent to a fee—*Alves v. Alves*, March 8, 1861, 23 D. 712; *Reid v. Reid's Trustees*, June 13, 1899, 1 F. 969, 36 S.L.R. 722; *Douglas' Trustees*, November 6, 1902, 5 F. 69, 40 S.L.R. 103; *Tait's Trustees v. Neil*, November 25, 1903, 6 F. 138, 41 S.L.R. 92; *Peden's Trustees v. Peden*, June 27, 1903, 5 F. 1014, 40 S.L.R. 741; *Forrest's Trustees v. Reid*, November 25, 1904, 7 F. 142, 42 S.L.R. 133; *Anderson's Trustees v. Anderson*, December 7, 1904, 7 F. 224, 42 S.L.R. 167; *Millar and Another v. Millar's Trustees*, October 16, 1907, 45 S.L.R. 6—even where there was no destination-over—*Reid v. Reid's Trustees*, *Peden's Trustees*, *Millar v. Millar's Trustees* (*omnes cit. sup.*). In *Greenlees' Trustees* and in *Wilkie's Trustees* (*cit. infra*) there was an initial gift of fee, here there was not.

Argued for the second and third parties—The second parties were entitled to payment of the share appointed to Lady Kilmarnock. Further, the children of Sir Allan were entitled to demand payment of their shares of the unappointed portion of the £25,000. A fee had been given them. It seemed certain that Sir James had intended to divest himself of the £25,000, and never contemplated that it might return to his estate. If only a liferent had been intended, the word “and” in the sentence “for their respective liferent use allenary, and in such shares” would have been omitted. There was here no destination-over, but in all the cases cited by the first parties except *Reid* (*cit. sup.*) and *Peden's Trustees* (*cit. sup.*), there was a gift-over. In *Reid's Trustees* the question here was not argued, while the decision in *Peden's Trustees* turned upon the special terms of the destination. Where a person was given a liferent of a sum with testamentary power of disposal, and no other interest was given to another—no ulterior interest by destination-over—and the liferent was not declared to be alimentary, then that person had a right of fee—*Greenlees' Trustees v. Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106; *Rattray's Trustees v. Rattray*, February 1, 1899, 1 F. 510, 36 S.L.R. 388; *Wilkie's Trustees v. Wight's Trustees*, November 30, 1893, 21 R. 199, 31 S.L.R. 135. The liferents not being alimentary might have been assigned by the children, and contracts made binding them to test in favour of the assignee—*Paterson v. Paterson*, February 3, 1893, 20 R. 484, 30 S.L.R. 646.

The sixth parties concurred in the argument of the first parties.

At advising—

LORD M'LAREN—In this case, while there are many questions, there are, I think, only two that require careful consideration; there is the question whether a good appointment has been made in favour of Sir Victor Mackenzie, and the question which relates to Lady Kilmarnock's share as well as Sir Victor's share of their father's marriage provision—whether the appointment of these shares carries with it a right of fee in the appointed sum of money, or whether the right of the appointees amounts only to a life interest with a testamentary power of disposal of the capital.

The fund which is the subject of consideration is a sum of £25,000 which Sir James Mackenzie (Sir Allan's father) undertook to pay to his son's marriage trustees six months after his own death, to be applied by the trustees as directed in the son's contract of marriage.

The income which should be derived from the investment of the £25,000 was to be paid to Sir Allan as an alimentary provision, and then it is provided that on the death of Sir Allan the trustees “shall then and thereafter hold the said sum of £25,000 for the liferent use and behoof of the child or children of the said intended marriage, but for their respective liferent uses allenary, and in such shares or proportions as their said father may by any writing under his hand direct and appoint, and failing such direction and appointment, then equally among them, share and share alike.”

The words which I have read contain all the power which Sir Allan was to exercise directly over the distribution of the £25,000 amongst the children of the marriage; it is a power to apportion the income amongst his children by a writing under his hand, neither more nor less. But indirectly the exercise of this power had very important consequences affecting the capital sum, because, *first*, it was further provided that Sir Allan's daughters should be entitled to settle their shares by contract of marriage with consent of their father; and, *secondly*, with respect to what was not so settled, the whole of the children should be entitled to dispose “of their respective shares of said capital sum” by will or testamentary writing.

Now as to the share of the £25,000 which a daughter was empowered to settle by contract of marriage, it is perfectly clear that this must either be the sum, if any, which her father had apportioned to her in liferent, or, if there were no appointment in her favour, then her equal share of the whole or the unapportioned part of the fund of £25,000. There is nothing in the context of Sir Allan Mackenzie's contract of marriage which would even suggest the notion of two different and inconsistent divisions of the £25,000, one to regulate the life interest, and the other applicable to the capital or fee. On the contrary, the word “settle,” which is a word of ordinary language, plainly imports that a definite share of

this trust money is to be set apart so as to secure to the daughter an income for life—which is the primary purpose of the special trust—and that the capital of this definite share is to be impressed with the usual trusts of a marriage settlement, in such terms as the daughter, with her father's consent, should approve.

It follows, in my opinion, that Sir Allan Mackenzie rightly interpreted his power with regard to daughters' shares when in the contract of marriage of his daughter Lady Kilmarnock he irrevocably directed and appointed a one-fourth share both of the income and capital to his daughter in virtue of the power of appointment; and then I think that Lady Kilmarnock was also within her rights when she proceeded in the same deed to convey her right to a one-fourth share of the fund to trustees on trusts which provided for the respective interests of herself, her intended husband, and the children of the marriage in the usual form.

The appointment in favour of Sir Victor Mackenzie is different in form, and keeping in view that Sir Allan's power of appointment in favour of sons is more limited than his power in relation to daughters' shares, I think that in this case also Sir Allan correctly apprehended and carried out the prescriptions of the contract of marriage. By the deed of appointment, which is dated 4th April 1904, Sir Allan, on the narrative of his contract of marriage and the power of appointment therein contained, did thereby direct and appoint "that on the expiry of my own life-ent, one-fourth of the annual income of said sum of £25,000 be paid to my eldest surviving son Victor A. F. Mackenzie, if then surviving, and for the remainder of his life, subject always to the conditions and provisions of said marriage contract, and I declare this appointment to be irrevocable."

This appointment is an exact echo of the power, except for the words introduced, "if then surviving," to which our attention was called by the Dean of Faculty. But Sir Victor did survive his father, and nothing is better settled in the law of powers, or on more conclusive grounds, than that the introduction of a condition which does not take effect in no way invalidates a deed in the execution of a power. This passing criticism, which only illustrates the careful and microscopic examination to which the deed has been subjected by counsel, leaves the deed of April 1904 intact, because under no conceivable circumstances could it be held that a deed which uses the words of the power was not a good execution of the power in point of form.

But then, as I have had occasion to point out, although the form of the power is that of an appointment of a share of income, it is in substance an appointment of a share of the capital, because Sir Allan's contract provides that any child who takes a share of the income may dispose by will of the capital share from which his income is derived. I do not go so far as to say that if Sir Allan had gone on to express that his son was empowered to dispose of the capital, the appointment would have been in excess

of the power, because in such cases we look to the substance of the act rather than the form; but I think that is of as much force as Mr Hunter's observation that the testamentary power of Sir Victor was given by Sir James himself, and was not within the scope of the power given to Sir Allan. In either view it must be taken that Sir Victor, under the deed of appointment, has all the right that his grandfather intended he should have, viz., a protected life-interest and a power of disposal by will.

I pass now to the more difficult question, the extent of the interest of Sir Victor in the appointed share—I mean whether his interest in the fund amounts to what the law regards as a right of fee.

This question does not present any difficulty in relation to Lady Kilmarnock's share, because according to the judgment of the House of Lords in *Pursell v. Elder*, 3 Macph. (H.L.) 68, a protected life-interest in a married woman can never be expanded into a fee, even where a plenary power of disposal is given along with it.

But in the case of a person who is *sui juris* it was argued that the concurrent or simultaneous acquisition of the usufruct and the *jus disponendi* would amount to an estate in fee.

According to my understanding of the law, this expression, if I may so call it, of the life-ent right will only take effect when the two rights, the *jus habendi* and the *jus disponendi*, are unlimited. In this case Sir Victor's life estate is unlimited; it is not restricted to alimentary uses or otherwise qualified. But the power of disposal is only to be exercised "by will or other testamentary writing under his hand," and having regard to Lord Westbury's opinion in the case just mentioned, and that of Lord St Leonard's in *Morris v. Tennant*, I think it must be taken that where a qualified power of disposal only is given, the right of the appointee is only such as the deed of gift prescribes, and does not amount to absolute property. In the cases I have cited the qualification of the right was a destination-over in default of appointment, but in the case of *Forrest's Trustees*, decided in this Division, we held the right did not amount to a fee, because the power of disposal was to be exercised by a revocable deed. This case may be contrasted with *Rattray's Trustees* (1 F. 510), where the power of disposal was unqualified, and the appointees were held entitled to immediate payment. It was argued for Sir Victor that he might sell his interest in the £25,000, and that a grantee or beneficiary who can realise his expectations by indirect means is entitled to payment directly.

I am not sure that Sir Victor's interest is a saleable interest. The purchaser would certainly require that he should be put in a position to claim payment by means of an irrevocable deed, and if that were done a court of construction might hold that this was not a testamentary writing of the character described in the marriage-contract, and was therefore not a good exercise of the power. In my opinion it is not

so clear that Sir Victor could give a good title to a purchaser that we ought to ordain the trustees to make immediate payment of his share.

I have only further to add that the one-half of the fund which is unappointed is divisible equally among the four children.

The result of my opinion is that question 1 (a) and question 2 (a) and (b) fall to be answered in the affirmative; the answer to the third and fourth questions is that the unappointed capital and income is divisible equally between the four children of Sir Allan; 6 (a) and 7 (a) will be answered in the negative.

LORD KINNEAR — I agree with Lord M'Laren.

LORD PEARSON — I also agree.

LORD PRESIDENT—I also agree, and have nothing to add upon the first matter, namely, whether this was a good execution of the power.

As regards the second question, I confess I have had considerable difficulty, and I confess also that I do not think that the law is in a very satisfactory state, because I should have thought that the effect of the case of *Paterson* in 20 R. 484, is to make it fairly clear that Sir Victor here could bind himself by a contract to execute a testamentary power in favour of a named individual. It is quite clear also that Sir Victor could assign his life-ent, because the life-ent is not alimentary, and accordingly it seems to me that if he executed this contract, which I have suggested, and an assignment of his life-ent, in favour of one individual, that one individual would have everything. And it is almost a travesty of trust law to think that a trust has to be kept up merely to postpone that other individual entering into possession of the money. That seems to me entirely inconsistent with the general law which has been laid down in the case of *Sir William Miller's Trustees—Miller's Trustees v. Miller*, December 12, 1890, 18 R. 301.

But I have come to be satisfied that as the law stands at present upon authority, it is as Lord M'Laren has put it—that is to say, that the Court will not declare a fee unless there is both an unlimited life-ent and an absolute power of disposal, as opposed to a mere testamentary power of disposal. The remedy for what I think is an anomalous state of circumstances caused by two currents of decisions must be given elsewhere, and not in this Court. Accordingly I agree in the opinion that Lord M'Laren has delivered.

The Court answered questions 1 (a), 2 (a), and 2 (b) in the affirmative; to questions 3 and 4 the answer was returned that the unappointed capital was divisible equally among the four children of Sir Allan; questions 6 (a) and 7 (a) were answered in the negative.

Counsel for the First Parties—Graham Stewart, K.C.—J. H. Millar. Agents—W. & J. Cook, W.S.

Counsel for the Second and Third Parties—Blackburn, K.C.—Chree. Agent—Alex. Ross, S.S.C.

Counsel for the Fourth Party—Hunter, K.C.—David Anderson. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for the Fifth Parties—Dean of Faculty (Dickson, K.C.)—Cowan. Agents—Mackenzie & Black, W.S.

Counsel for the Sixth Party—Fleming, K.C.—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 5.

## SECOND DIVISION.

[Sheriff Court at Glasgow.

MANCHESTER AND COUNTY BANK,  
LIMITED v. MOORE.

*Process—Appeal—Appeal from Sheriff-Substitute to Sheriff not Insisted in—Competency of Appeal to Court of Session.*

*Held* incompetent to appeal to the Court of Session against an interlocutor of a Sheriff whereby he dismisses an appeal from the Sheriff-Substitute “in respect the appeal was not insisted in at the Bar.”

In an action raised in the Sheriff Court at Glasgow by the Manchester and County Bank, Limited, against Edmund Cranston Moore, the Sheriff-Substitute (GLEGG) sustained a plea that the defences were irrelevant, and granted decree as craved.

The defender appealed to the Sheriff (GARDNER MILLAR), who on 9th November 1908 pronounced this interlocutor:—“The Sheriff, in respect the appeal was not insisted in at the Bar, dismisses the appeal . . .”

The defender appealed to the Court of Session.

In the Single Bills the respondents objected to the competency of the appeal, and argued—it was incompetent to appeal against an interlocutor proceeding on a consent express or implied—*Sutherland v. Thomson*, December 4, 1905, 8 F. (H.L.) 1, 43 S.L.R. 115; *Aird v. School Board of Tarbet*, 1907 S.C. 22, 44 S.L.R. 26; *Watson v. Russell*, January 30, 1894, 21 R. 433, 31 S.L.R. 352. The appellant by his failure to insist in his appeal before the Sheriff had consented to the interlocutor against which he now presented this appeal.

Argued for the appellant—The mere fact that the appellant had not chosen to present an argument to the Sheriff was not equivalent to consent to the dismissal, or to statutory abandonment, of the appeal. As the interlocutor of the Sheriff was a final one, the appeal was competent, and the failure to argue his case before the Sheriff, though it might affect the question of expenses, could not bar the appeal.

LORD JUSTICE-CLERK—It seems to me quite clear that this appeal is incompetent.