

the only thing he can say in moving for postponement is that one witness who is very material is in Switzerland and that another material witness is a roving gentleman whose present address is unknown to the pursuer. I therefore think this motion should be refused.

LORD KINNEAR—I concur.

LORD MACKENZIE—I also concur.

LORD JOHNSTON was not present.

The Court refused the motion.

Counsel for the Pursuer—Macquisten.
Agents—Purves & Simpson, S.S.C.

Counsel for the Defenders—Moncrieff,
K.C.—J. M. Hunter. Agents—Simpson &
Marwick, W.S.

Friday, July 19.

SECOND DIVISION.

SOUTER v. WATT.

Succession—Faculties and Powers—Power of Appointment—Exercise by General Bequest of Residue—Exercise by Gift of a Liferent.

By his trust-disposition and settlement a testator left a share of the residue of his estate to his trustees to hold for his three daughters equally in liferent and their children, if any, in fee, and in case of any of the daughters dying without leaving issue "to pay over her portion to such person or persons, and, if more than one, in such proportions as she shall by any writing under her hand direct or appoint." One of the daughters, who died without issue, left a holograph will, which commenced with the words—"I, Eliza Watt or Ferguson, do hereby state and record my wishes as to the disposal of my property and belongings after my death"; and by the will, after using the expression "As regards my own estate I do hereby leave and bequeath . . ." she thereupon bequeathed a number of special legacies, and made a bequest of residue in the following terms—"I desire that the residue of estate shall be divided between my sisters . . . in liferent," and thereafter destined the fee to her nieces. In a special case brought to determine whether the daughter by her will had or had not validly exercised the power of appointment conferred on her by her father's settlement, held that a power of appointment, as distinguished from a power of apportionment, was validly exercised by an appointment to a liferent—*Baillie's Trustees v. Oxley*, February 14, 1862, 24 D. 589, distinguished—and, following *Bray v. Bruce's Executors*, July 17, 1906, 8 F. 1073, 43 S.L.R. 746. that the daughter had exercised the power of appointment by the residuary bequest in her will.

James Francis Souter, bank agent, Inverness, and another, the trustees of the deceased Alexander Watt, shipowner, Macduff (*first parties*); Major Donald Munro Watt and others, the trustees of the deceased Alexander Watt, solicitor, Banff (*second parties*); James Watt, San Francisco, and others, some of the next-of-kin of the deceased Mrs Eliza Watt or Ferguson, widow of Dr John Ferguson, Mooltan, Punjab, India (*third parties*); Mrs Helen Watt or Jamieson, wife of the Rev. John Jamieson, United Free Church Manse, Canonbie, and others, the other next-of-kin of the said Mrs Eliza Watt or Ferguson (*fourth parties*); and George Watt, K.C., Edinburgh, as executor-nominate of the said Mrs Eliza Watt or Ferguson and others, the residuary legatees of the fee of her estate (*fifth parties*), brought a Special Case to determine whether the said Mrs Ferguson had or had not validly exercised a power of appointment conferred upon her by the will of her father the said Alexander Watt, Macduff.

The following narrative is taken from the opinion of Lord Dundas, *infra*—The sole question raised in this case is whether or not a power to dispose of certain funds by way of appointment has been validly exercised by the late Mrs Ferguson. The power was conferred upon her by the trust settlement of her father Mr Alexander Watt, who died in 1874. By that settlement, dated in 1873, Mr Watt, *inter alia*, directed in regard to a certain share of the residue of his estate that his trustees should hold it in trust "for the use and behoof of my daughters Helen Watt, Eliza Watt" (Mrs Ferguson), "and Jane Watt, equally between them in liferent for their liferent use alienably, paying to each during her life the annual income or produce of" one-third of the said share, "and on the death of each of my said daughters my trustees shall pay over the capital or fee to her children, if any, in such proportions as she by any writing under her hand shall appoint, or failing any such writing, to and among her children equally between them, share and share alike; and"—here comes the part of the clause which raises the question in this case—"in the case of any of my daughters dying without leaving issue, my trustees shall pay over her portion to such person or persons, and if more than one, in such proportions, as she shall by any writing under her hand direct or appoint; and failing such direction and appointment, my trustees shall pay and divide the portion of any daughter or daughters dying without leaving issue to and among her surviving brothers and sisters and the issue *per stirpes* of any predeceasing brothers or sisters equally among them, share and share alike." Mr Watt's daughter Eliza became the wife of Dr John Ferguson. She died on 14th July 1911, predeceased by her husband, and without issue. The question whether or not Mrs Ferguson validly exercised the power thus conferred upon her depends upon the terms of her holograph

last will and testament, dated 2nd April 1910. It is a universal settlement, and begins with the wide and general statement—"I, Eliza Watt or Ferguson, do hereby state and record my wishes as to the disposal of my property and belongings after my death." Mrs Ferguson dealt, in the first place, with the estate she had received as executrix of her deceased husband; she then proceeded to dispose of what she calls her "own estate"; and concluded with a "desire that the residue of estate shall be divided between my sisters Helen Jamieson and Jane or Jeannie Gardner in liferent. At Helen Jamieson's death her share to be divided into three parts, one part to go to Nora Jamieson and two parts to Lena Gardner. If Nora Jamieson is married or engaged to be married at her mother's death, I desire all the three parts to go to Lena Gardner. At Jeannie Gardner's death I desire her share to be divided between Lena Gardner and Leila Gardner. If Leila is married or engaged to be married, then two-thirds will go to Lena and one-third to Leila."

The question of law was—"Has the power of appointment conferred upon the said Mrs Eliza Watt or Ferguson under her father's testamentary writings been validly exercised by her in her said testament and codicils?"

Argued for the third parties—(1) Mrs Ferguson had not exercised the power of appointment because she had not intended to exercise it. All that she professed to deal with was "my property and belongings" and "my own estate," and the manner in which she disposed of that estate indicated that she believed she was dealing only with estate over which she had absolute control. The presumption that a general disposition of property was an exercise of a power of appointment was a very slight one, liable to be displaced by the facts and circumstances of each particular case—*Mackenzie v. Gilanders*, June 19, 1874, 1 R. 1050, per Lord Deas at p. 1054, 11 S.L.R. 612, per Lord Deas at p. 615. The following cases were also referred to—*Bray v. Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746; *Ramsay's Trustees v. Ramsay*, 1909 S.C. 623, 46 S.L.R. 468; *Bowie's Trustees v. Paterson*, July 16, 1889, 16 R. 983, 26 S.L.R. 676. (2) In any event the power of appointment was merely a power to distribute capital, not a power to give a liferent—*Lennox's Trustees v. Lennox, &c.*, October 16, 1880, 8 R. 14, 18 S.L.R. 36; *in re Cotton*, *Wood v. Cotton*, 1888, L.R., 40 Ch. Div. 41; *in re Porter's Settlement*, *Porter v. de Quitteville*, 1890, L.R., 45 Ch. Div. 179. [LORD SALVESEN referred to *Gillon's Trustees v. Gillon, et al.*, February 8, 1890, 17 R. 435, 27 S.L.R. 338.] Moreover, the direction which Mr Watt gave to his trustees to "pay over" the capital to the appointees excluded the interposition of a liferent by Mrs Ferguson.

Argued for the fifth parties—(1) Mrs Ferguson had exercised the power of appointment. No inference could be

drawn from the fact that she commenced her will by dealing with her husband's estate. The presumption that a general disposition was an exercise of a power of appointment was a very strong one. The cases of *in re Porter's Settlement*, *Porter v. de Quitteville (cit.)*, and *Gillon's Trustees v. Gillon et al. (cit.)* merely concerned powers of appointment, the exercise of which was not so readily presumed—*Paterson's Trustees v. Joy*, 1910 S.C. 1029, per Lord Johnston at p. 1034, 47 S.L.R. 844, per Lord Johnston at p. 847. (2) The power of appointment was so wide that a gift of a liferent was a valid exercise of it—*Lennox's Trustees v. Lennox, &c. (cit.)*, per Lord Justice-Clerk at p. 16 (8 R.), p. 38 (18 S.L.R.); *Bray v. Bruce's Executors (cit.)*, per Lord Low at p. 1089 (8 F.), p. 752 (43 S.L.R.); *Paterson's Trustees v. Joy*, per Lord Johnston (*cit.*)

At advising—

LORD DUNDAS—[After the narrative *supra*]—I have no doubt that upon the terms of Mrs Ferguson's will her residuary bequest is so conceived as to operate as an exercise of the power conferred upon her by her father's settlement, unless a contrary intention can be justly inferred from the language of her will. A very recent and highly authoritative decision on this branch of the law is *Bray v. Bruce's Executors* (July 19, 1906, 8 F. 1078, 43 S.L.R. 746). The rubric bears that "a bequest of the moveable estate of a testator is to be construed as including any personal estate which he may have power to appoint in any manner he may think proper, and operates as an execution of such power unless a contrary intention appears by the will." The strength of the presumption is illustrated by the facts of the case and expressed in the opinions of the learned Judges. Mrs Bruce had, under the settlement of her deceased husband, three separate powers by way of appointment. By her will she expressly exercised two out of the three powers; but the will was silent as to her intention in regard to the third. A Court of Seven Judges (Lord Stormonth Darling doubting but not dissenting) held, adhering to an interlocutor pronounced by me as Lord Ordinary, that the residuary clause of Mrs Bruce's will was a valid exercise of the power with which she had not expressly dealt. In the case before us I can find no ground for an argument to rebut the legal presumption nearly so strong as was available in *Bray's* case; and I am accordingly of opinion that the power conferred upon Mrs Ferguson by her father's settlement was validly exercised by her in terms of her will.

The contention urged by Mr Valentine as against the presumption came, as I understood it, to this—that Mr Watt's direction to his trustees, in the event of Mrs Ferguson's decease without leaving issue, to "pay over her portion to such person or persons, and, if more than one, in such proportions as she shall by any writing under her hand direct or appoint,"

was not duly echoed in or carried out by Mrs Ferguson's "desire" that the residue of her estate should be divided between her two sisters in liferent, with destination of the fee to her nieces as above set forth. It was argued, with ingenuity and some plausibility, that Mrs Ferguson's power under her father's settlement was in truth to apportion and divide the fund, and that, in respect she disposed of her residue in favour of the beneficiaries in liferent and fee respectively, it could not be held, looking to the legal decisions on this subject, that she intended or professed to exercise that power, or otherwise, that, if she did so intend, the bequest is illegal and invalid as an apportionment.

When one looks fairly and carefully into the thing, I think this contention is fallacious. There is a complete and radical distinction between a power to apportion or divide a fund among the members of a prescribed class and an unfettered gift of a fund to such person or persons in such manner and in such proportions as the donee of the power may direct or appoint. We are here, I think, clearly in the second of these categories and not in the first. It is true that the word "appoint" is often used as equivalent to "apportion"; but the distinction I have indicated is a real one, and we must look to the substance as well as to the words in any given case. It has no doubt been decided that, in proper cases of apportionment or division among members of a class, the person who exercises the power must neither on the one hand give any portion of the fund to a stranger to the power, nor on the other hand restrict to a bare liferent the right of any member of the class who is admitted to the benefit, because (I apprehend) that does not in the eye of the law amount to an apportionment of a share of the fund to be divided. But the latter of these rules, which has, to my thinking, been pressed to an unfortunate extent in some of the cases, cannot, in my judgment, have any place at all where the donee of the power is not fettered by any reference to a prescribed class, but is free to direct or appoint the fund to or among any person or persons he pleases. In such case I see no reason why the donee of the power should not direct or appoint his gift in liferent and fee just as well as in fee merely. So far as I am aware the Court has never applied the somewhat artificial rule above indicated to a case where no class of beneficiaries is prescribed amongst whom the fund is to be apportioned or divided, and I do not suppose it is likely to do so. In the case before us it appears to me that Mrs Ferguson's power under her father's settlement was quite unfettered; no class of beneficiaries was prescribed or suggested; she had right to dispose of the fund in such manner as she pleased to any person or persons by writing under her hand, whether *inter vivos* or *mortis causa*, though of course the writing could only take effect in the event of her death without leaving issue. If I am right in this view, there seems to be no substantial force in a subordinate argument presented

by Mr Valentine, to the effect that Mr Watt's direction to his trustees to "pay over" the fund must be read as meaning to pay it over once and for all, and so excluding the idea of any interposed liferent rights. I think this would involve an unnecessarily restricted reading of the words "pay over," and I see no reason why the language of Mr Watt's settlement should not be wide enough to include the payment over of the fund in liferent and fee as Mrs Ferguson desired it should be made.

For the reasons stated, I am of opinion that no contrary intention can in this case be shown to rebut the presumption that Mrs Ferguson intended to exercise her power and that she did validly exercise it by her last will and testament. I am therefore for answering the question put to us in the affirmative.

LORD SALVESEN—In this case I have had more difficulty than Lord Dundas in holding that we should answer the question of law in the affirmative. My difficulty arises from the decision in the case of *Baikie's Trustees v. Oxley*, February 14, 1862 (24 D. 589). In that case a power was given by a father to his daughter, then a widow, with reference to a sum of £2000, of which she had the liferent, to divide the fee "among such children by such proportions as she shall direct." She appointed to one child £5 and the liferent of £1000, and to the other £995 and the fee of the £1000 so to be liferented. It was held by a majority of the First Division (*diss.* Lord Deas) that the above was in part a bad appointment, and that the whole deed was thereby vitiated. On a careful perusal of this case I think, however, it must be regarded as special, and not to lay down a rule that a party having a power of division of a fund among a class may not allot a liferent of the fund to one person and the fee to another, where there is no indication of the intention of the donor of the power to the contrary. This was expressly so stated in Lord Curriehill's opinion at the commencement. I do not, therefore, think that it really presents any obstacle to the judgment proposed, more especially as there is in the present case no difficulty as to the objects of the power. I cannot at present see any good reason why, if a power is conferred to appoint in such proportions as the donee of the power may direct, that power might not be validly exercised by giving a liferent of the whole or part of the fund to one and the fee to others. In any event I think there is ground for saying that later decisions have modified and in part overruled the decision in *Baikie's* case; and we were not referred to any direct authority where, in the case of a power to appoint without limitation as to the objects of the power, an appointment could not be good because it postponed the division of the fee in whole or in part, in order to provide for a liferent.

On the other question I think we are bound by the case of *Bray*, and that there is no sufficient indication of a contrary intention to overcome the strong presump-

tion that a general disposition and settlement is to be construed as including all estate over which the testator had a power of appointment. I concur, therefore, in Lord Dundas's opinion, and very much for the reasons he has assigned.

THE LORD JUSTICE-CLERK and LORD GUTHRIE concurred with LORD DUNDAS.

The Court answered the question of law in the affirmative.

Counsel for the First, Second, and Third Parties—Valentine. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Fourth and Fifth Parties—T. G. Robertson. Agent—A. Stuart Watt, W.S.

HOUSE OF LORDS.

Friday, July 26.

(Before Lord Macnaghten, Lord Atkinson, and Lord Shaw.)

JOHNSTONE v. MACKENZIE'S TRUSTEES.

(In the Court of Session, December 23, 1910, 48 S.L.R. 256, 1911 S.C. 321.)

Succession — Testament — Construction — “Liferent Use and Enjoyment” of House — Liferent or Occupancy — Public Burdens.

A testator conveyed his whole estate to trustees for the following purposes — (a) payment of debts and “the expenses of executing this trust”; (b) giving the widow “the liferent use and enjoyment of my dwelling-house . . . together with the whole household furniture and plenishing therein at the time of my death . . . without, however, any obligation upon her to replace articles broken or perishing with the using . . . and in the event of the said dwelling-house . . . being sold by my trustees, as they are hereby with the consent of my said wife empowered to do, they shall pay to her the annual income of the price . . . obtained therefor during all the days of her life, declaring that the said liferent provisions shall be for the alimentary use of my said wife, and shall not be assignable by her or affectable by the diligence of her creditors”; (c) payment to the widow, in name of aliment allenerly, of an annuity at the rate of £500 per annum; (d) payment of two legacies to two brothers; (e) payment, after setting aside the sum of £20,000 to provide for the foresaid annuity, of one-half of the residue to the widow, and the other half in certain proportions to the two brothers, and, on the death of the widow, of the dwelling-house and the sum set aside to provide the annuity and “any surplus revenue accrued thereon” in the same proportions to the two brothers.

Held (rev. decision of the Second Division) that the widow's interest in the house was a liferent, not a right of occupancy, and consequently that she was liable for feu-duty, proprietor's taxes, and landlord's repairs.

This case is reported *ante ut supra*.

The defenders, Mackenzie's Trustees, appealed to the House of Lords.

At delivering judgment—

LORD SHAW—By the trust settlement of the late James Whitelaw Mackenzie he provided “that my trustees shall give to my said wife in the event of her surviving me during all the days of her life the liferent use and enjoyment of my dwelling-house No. 9 Glencairn Crescent, Edinburgh, or of such other house as shall at the time of my death be my residence in Edinburgh and belong to me, together with the whole household furniture and plenishing therein at the time of my death, including books, pictures, linen, china, plate, plated articles, and others, without, however, any obligation on her to replace articles broken or perishing with the using, and in the event of the said dwelling-house and the whole or any part of the said household furniture or plenishing being sold by my trustees, as they are hereby, with the consent of my said wife, empowered to do, they shall pay to her the annual income of the price or prices obtained therefor during all the days of her life.”

The question which arises in this case is whether Mr Mackenzie's widow (now Mrs Johnstone) is liable for payment of feu-duty, proprietor's taxes, and landlord's repairs on this house 9 Glencairn Crescent, Edinburgh.

The expression “my trustees shall give to my said wife in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of my dwelling-house,” is, as was admitted at your Lordships' Bar, a direction in terms which are perfectly apt to give a liferent in the ordinary sense. Even if the question were one of feudal conveyancing, the expression “the liferent use and enjoyment” would appear to be language suitable to express the constitution of a liferent. But, occurring as they do in the course of an ordinary trust settlement, these words are adopted as language familiar for generations in Scotland and used in setting up a liferent right. As we were informed at the Bar, they so occur in the “Juridical Styles” from its earliest edition.

The consequences which attach to such a liferent are also familiar. The subject must be enjoyed *salva rei substantia*. Upon the subject of annual charges (on the hypothesis that what is really a liferent has been given) there is little ground for dispute. In the language of Erskine (ii, 9, 61), “Liferenters, as they are entitled to the profits, must also bear the burdens attending the subject liferented, as taxations, duties payable to the superior, ministers' stipends, and the other yearly payments chargeable on the lands which may fall due during the liferent.” Mr