Tuesday, November 19.

FIRST DIVISION.

PRINGLE'S TRUSTEES, PETITIONERS.

Succession—Faculties and Powers—Power to Appoint among Issue—Validity of Exercise of Power—Gift of a Liferent.

A power to divide among children of a marriage in such shares and proportions as the spouses, or the survivor of them, may appoint, is well exercised by giving a liferent of a share to one child—the capital of the share being given to the other child of the marriage.

A marriage settlement provided that the trustees should hold the capital of the trust funds for behoof of the children of the marriage in such shares and proportions as the spouses might during their joint lives appoint, and failing such joint appointment, then in such shares and proportions as the survivor might appoint, and failing any such appointment then equally among them share and share alike. No appointment was made during the joint lives of the spouses. After the husband's death the widow, in consideration of her daughter's marriage, became a party to an agreement by which she provided that on her death part of the trust funds should be paid over to her daughter, and that the trustees should hold the remainder for the use of her son in liferent, the capital to be paid over on his death to her daughter or her heirs.

Held, in a case remitted from the High Court of Justice in England, after the widow's death, that the power had been validly exercised.

On 21st October 1912 Robert Henry Elliot and another, Mr and Mrs Chetwode Drummond Pringle's marriage-contract trustees, presented a petition to the First Division for the opinion of the Court on a case remitted from the Chancery Division of the High Court of Justice in England.

The *facts* were as follows. Mr and Mrs C. D. Pringle were married at Cheltenham on 29th March 1871. After the marriage two post-nuptial settlements were entered into by the spouses, viz.—(1) a settlement in English form dated 23rd December 1871 between Chetwode Pringle of the first part, Mrs Pringle of the second part, and certain trustees of the third part; and (2) a post-nuptial contract of marriage in Scottish form, dated 23rd December 1871 and 2nd January 1872, between Chetwode Pringle of the first part, Mrs Pringle of the second part, and Robert Kerr Elliot (Mrs Pringle's father) of the third part. By the Scottish settlement the late Robert Kerr Elliot bound himself during his life to pay to his daughter Mrs Pringle an alimentary annuity of £100 sterling during the joint lives of himself and Mrs Pringle, and he further bound and obliged himself and his heirs, executors, and successors to pay to the marriage-contract trustees (who were the same as those nominated in the English settlement), for the purposes thereinafter mentioned, the sum of £3000 at the first term of Whitsunday or Martinmas after his death.

By the Scottish settlement it was declared that the said sum of £3000, and the estate, means, and effects thereby conveyed, should be held by the trustees thereof for the following purposes, viz.—. . . (Third) that the trustees should hold the capital of the trust funds as a provision for behoof of the child or children to be procreated of the said marriage, divisible, if there should be more than one child, in such shares and proportions, and to vest at such age or time, ages or times, within the limits allowed by law, as Chetwode Pringle and Mrs Pringle might during their joint lives appoint by any joint writing under their hands, and failing such joint appointment then in such shares and proportions as the survivor of them might appoint by a writing under such survivor's hand, and failing such appointment then equally among them share and share alike, declaring that the said child or children should not under the above gift in default of appointment have a vested right in his, her, or their provision, until the decease of the longest liver of Chetwode Pringle and Mrs Pringle, but in case any such child should die before having obtained a vested right in his or her provision leaving lawful issue, such issue should be entitled to the share which would have fallen to the parent had he or she survived.

Chetwode Pringle died on 30th December 1878, survived by Mrs Pringle and two children, Claude Mark Elliot Pringle and Adelaide Eleanor Violet Pringle. On 2nd December 1897 Miss A. E. V. Pringle was married at Rome to Count Carlo Basta, a domiciled Italian, and died there on 10th March 1910 survived by her husband and three pupil children. On 26th October 1911 the Official Solicitor of the High Court of Justice in England was appointed guardian *ad litem* of Claude Pringle (who was incapable of managing his affairs) and also of Count Basta's pupil children. No joint appointment was made by the spouses under either of the settlements during Mr Pringle's life, but on 25th October 1897, in consideration of Miss Pringle's marriage, an agreement was entered into between Mrs Pringle, Miss Pringle, and Count Basta, which, *inter alia*, provided as follows:—"VII. Mrs Ellen Elliot Pringle in consideration of this marriage . . . . gives to her daughter irrevocably the following goods. This donation is at the same time the constitution of the following goods as dowry to the said daughter Miss Violet Chetwode Pringle. The sum of £7666, 13s. 4d. This amount is represented by £4666, 13s. 4d. in bonds over the estate of Clifton belonging to Mr Robert Henry Elliot, of which are trustees Messrs Robert Henry Elliot, James Moffat, Thomas Elliot Boag, Charles Stuart Pringle, Patrick John James Grant Ord, as by the marriage contract made by her father the late Mr Robert Kerr Elliot on the 20th January

1872 at Edinburgh, and by £3000 as portion left to her by her husband the late Mr Chetwode Drummond Pringle as by post-nuptial contract 23rd December 1871. Said sums or any greater sum that may appear due will be kept in trust during the life of said Mrs Ellen Elliot Pringle, who will use the income. At her death the sum of £4300 will remain in trust or in any other way bound in favour of her son Mr Claude Chetwode Pringle to whom the income will be unconditionally paid during his life. The other sum that will result from this deduction of £4300 will be paid at once to the daughter Miss Violet or her heirs. On the death of Mr Claude C. Pringle also the principal of the £4300 shall be paid to Miss Violet, then Countess Basta, or her heirs as by paragraph III of this contract. Having thus provided for the existence of her son Mrs Ellen Chetwode Pringle intends that this disposal of the whole capital of these £7666, 13s. 4d. be respected by her son and confirms her will by giving irrevocably to her daughter all that capital. Should Mr Claude C. Pringle raise objections to these dispositions Mrs Ellen C. Pringle will deprive him of the income of the £4300 as above said and will give him only one shilling."

In these circumstances an action was raised in the Chancery Division of the High Court of Justice in England by Robert Henry Elliot and another, the trustees then acting under the marriage settlements of Mr and Mrs Pringle, in the course of which a question arose as to whether the agreement of 25th October 1897 constituted a proper and effectual exercise by Mrs Pringle of the power of appointment conferred on her by the Scottish settlement, and if so as to what extent. The present case was accordingly remitted by Justice Joyce for the opinion of the First Division of the Court of Session.

The defendant William Charles Rowcliffe as the administrator of the Countess Basta, and the defendant Count Basta, contended that the agreement of the 25th October 1897 operated as a good and valid appointment in favour of Countess Basta of £366, 13s. 4d., part of the said £4666, 13s. 4d. heritable bonds to take effect in possession immediately upon her mother's death, and was a good and valid appointment in favour of the Countess Basta of the residue of the said heritable bonds to take effect in possession forthwith on the death of her brother Claude Pringle, and alternatively if the said agreement of the 25th October 1897 were held not to be a good and valid appointment as aforesaid, then that the said heritable bonds were wholly unappointed and vested absolutely in Countess Basta and her brother Claude Pringle in equal shares. The defendant Claude Mark Elliot Pringle contended that the agreement of the 25th October 1897 operated as a good and valid appointment in his favour of a life interest in £4300, part of the said £4666, 13s. 4d. heritable bonds to take effect in possession immediately on his mother's death, and that subject thereto the said heritable bonds were wholly unappointed and that he was entitled to one moiety thereof, and alternatively if the said agreement of the 25th October 1897 were held not to be a good and valid appointment as aforesaid then that the said heritable bonds were wholly unappointed and vested absolutely as to one moiety thereof in him; and the defendants Florenza Elena Adelaide Basta, Tecla Violetta Amalia Basta, and Dimitrio Leonardo Carmine Basta (Count Basta's pupil children) contended that the agreement of the 25th October 1897 did not operate as a good or valid appointment in any respect, and that the said heritable bonds were wholly unappointed and vested absolutely as to one moiety thereof in them in equal shares.

The *questions of law* included the following:—"1. Is the agreement of 25th October 1897 a proper exercise by Mrs Pringle to any extent of the power of appointment conferred on her by the Scottish settlement? 2. If the foregoing question is answered in the affirmative—(*a*) Is the appointment of a life interest in £4300 to Claude Pringle good and valid? and (*b*) Is the appointment of the principal of the £4300 (subject to the life interest of Claude Pringle) to Countess Basta good and valid? and (*c*) Is the appointment of the residue of the funds in excess of the £4300 to Countess Basta good and valid?"

Argued for Claude Pringle's curator *ad litem*—The agreement in question constituted a valid exercise by Mrs Pringle of the power of appointment, for a power of appointment among a class was well executed by an appointment to one object for life with remainder to the other objects—*Dalziel* v. *Dalziel's Trustees*, March 9, 1905, 7 F. 545, 42 S.L.R. 404. The rule in England was to the same effect — *Alexander* v. *Alexander* (1755), 2 Vesey Senior 640; *Crompe* v. *Barrow* (1799), 4 Vesey Junior 681; *Alloway* v. *Alloway* (1843), 4 Drury and Warren's Rep. 380, *per* L.C. Lord St Leonards at 387; *Wilson* v. *Wilson* (1855), 21 Beav. 25, *per* Romilly, M.R., at p. 28. A power to divide among objects in such proportions and under such conditions as the donee of the power might appoint was well exercised by giving to one of the objects a liferent with a power of disposal—*Baikie's Trustees* v. *Oxley and Cowan*, February 14, 1862, 24 D. 589; *Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921, 28 S.L.R. 709; *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450; *Ewing's Trustees* v. *Ewing*, 1909 S.C. 409, 46 S.L.R. 316; *Souter* v. *Watt*, July 19, 1912, 49 S.L.R., 983 at p. 985. That being so, there was no reason why the bestowal of a liferent alone should not be a good exercise of such a power, provided the fee was not given to objects outwith the scope of that power. The cases of *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; and *Darling's Trustees* v. *Darling's Trustees*, 1909, S.C. 445, 46 S.L.R. 394, were distinguishable, for there the fee was not conferred with

restrictions on objects within the power, but was conferred on persons outwith its ambit. *Esto*, however, that the bestowal of the liferent was not a valid exercise of the power, it did not vitiate the whole appointment, for where, as here, the bequest was separable, the invalid conditions fell to be held *pro non scriptis*—*Carver* v. *Bowles* (1831), 2 R. and M. 301; *M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, *per* Cairns (L.C.) at p. 132, and Lord Selborne at p. 135, 12 S.L.R. 635; *Middleton's Trustees* v. *Middleton*, July 7, 1906, 8 F. 1037, *per* Lord Kyllachy at p. 1042, 43 S.L.R. 718.

Argued for the pupil children of Count Basta—The power to appoint had not been validly exercised, for such a power must be exercised according to the terms of the deed by which it was conveyed, and must not alter the quality of the estate given, as, for instance, by, as here, limiting it to a liferent—Bell's Prin. sec. 1988; *Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, 27 S.L.R. 338; *Warrand's Trustees* v. *Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R. 273; *Matthews Duncan's Trustees* v. *Matthews Duncan*, February 20, 1901, 3 F. 533, 38 S.L.R. 401; *Bristow* v. *Warde* (1794), 2 Vesey Junior, 336; *Caulfield* v. *Maguire* (1845), 2 Jones and La Touche, 141; *Porter* v. *De Quetteville* (1890), L.R., 45 C.D. 179; *in re Crawshay* (1890), L.R., 43 C.D. 615. The words "hold for behoof of the children" pointed to a division of the funds in fee. Moreover, there were no words permitting the imposition of restrictions or limitations as there were in the cases cited by the guardian *ad litem* of Claude Pringle. Further, the appointments to Miss Violet Pringle "or her heirs" constituted a gift to objects outside the power. The gift of a liferent also postponed the termination of the trust which the power had contemplated as ceasing on the death of the survivor of them. The cases relied on by the guardian *ad litem* of Claude Pringle were distinguishable either on the doctrine of *Carver* v. *Bowles* (*cit.*) or because the deed containing the power conferred on the donee wide powers of limitation or restriction.

Argued for the administrator of Countess Basta — Counsel for the administrator adopted the argument of the guardian *ad litem* of Claude Pringle in so far as the latter contended that the power had been well exercised. He also cited the following authorities—M'Laren on Wills, sec. 2044; Farwell on Powers (2nd ed.), 322; and Sugden on Powers (8th ed.), 681, foot.

The Court (the LORD PRESIDENT and LORDS KINNEAR, JOHNSTON, and MACKENZIE), without delivering opinions, answered the first and second questions—the latter in all its branches—in the affirmative.

Counsel for Petitioners — Hon W. Watson — Hendry. Agents — J. & J. Turnbull. W.S.

Counsel for the Guardian *ad litem* of Claude Pringle—R. C. Henderson. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Guardian *ad litem* of the Infant Defenders—A. M. Mackay. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Administrator of Countess Basta — Chree, K.C. — W. H. Stevenson. Agents — John C. Brodie & Sons, W.S.

Friday, November 22.

SECOND DIVISION.

[Sheriff Court at Wick.

BRYDEN AND OTHERS *v.* CORMACK.

Succession — Testament — Construction — Subject of Gift — Words Importing Gift of Heritage—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 20.

A testatrix, by holograph will, on the narrative that she had resolved to provide for the settlement of her "affairs" in the event of her death, after bequeathing a number of pecuniary legacies and appointing her nephew to be her "sole trustee and executor," proceeded—"I further declare that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to my three nieces A, B and C. I reserve my own life use of the whole estate and effects hereby conveyed." The testatrix left moveable property, and had also a personal right to the extent of one-half share *pro indiviso* in the fee of certain heritable property. *Held* that the heritable property was not carried by the will.

Mrs Amelia Sutherland or Bryden, residing at Bruan, in the county of Caithness, and others, *petitioners*, presented a petition in the Sheriff Court at Wick in which they craved the Sheriff to find, *inter alia*, that by her trust-disposition and settlement, dated 17th July 1909, and registered 16th July 1910, Mrs Catherine Adamson or Cormack, who died on 22nd June 1910, a sister of the petitioners' mother, conveyed the residue of her estate, which comprised her *pro indiviso* right to one-half of certain heritable subjects in Wick, to the petitioners, and that the petitioners were entitled to procure themselves infeft in the subjects to the extent of one-half *pro indiviso* share thereof, in terms of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94).

The *trust-disposition and settlement* of Mrs Cormack was in the following terms —"I, Catherine Adamson or Cormack (widow), Newton Swiney, Lybster, parish of Latheron, Caithness, having resolved to provide for the settlement of my affairs in the event of my death, and to prevent all disputes regarding same, Do hereby legate and bequeath to my grandson John