Counsel for Pursuer (Reclaimer)—Wallace. Agents—Welsh & Forbes, S.S.C.

Counsel for Defenders (Respondents)—Guthrie. Agents—Boyd, Macdonald, & Co., S.S.C.

Saturday, October 23.

SECOND DIVISION.

SPECIAL CASE—LENNOCK'S TRUSTEES AND OTHERS.

Trust—Power of Appointment among Children—Partial Exercise of Power—Appointment to a Life Interest where Power given to Appoint to Capital.

A father by *mortis causa* deed placed a sum of money in the hands of trustees for behoof of his son in liferent and his grandchildren in fee, giving his son a power of appointment among his children. The son by last will and testament conveyed the sum to other trustees, and gave each of his sons an absolute right to a certain provision on attaining majority, but limited his daughters' interest in the sums provided for them to their separate use for life with power to divide among their children. *Held* that this was a good exercise of the power of appointment.

Admiral George Gustavus Lennock of Broomrigg, Dumfriesshire, died on 12th May 1866 leaving a deed of appointment and trust-disposition and settlement dated in October 1856, and along with five codicils annexed to it recorded in May 1866. He left a son George James, and a daughter, the wife of Colonel Walker of Crawfordton, Dumfriesshire. His wife had predeceased him. By his deed of apportionment and trust-settlement Admiral Lennock, on the narrative of certain provisions in his marriage-contract, appointed that of the sum of £20,000 which he had power under his marriage-contract to apportion among the children of his marriage, his marriage-contract trustees should pay to his son George James Lennock a sum of £5000 as his share, and that the balance of £15,000 should be paid to Mrs Walker. The deed went on to convey to trustees—who were the first parties to this case—the whole estate, heritable and moveable, of which he should die possessed, and directed them to pay the proceeds to the testator's son George James Lennock as an alimentary provision, upon his own receipt alone, and at such times as the trustees should consider expedient, declaring that the interests or profits should not be assignable by him, and should not be subject to the diligence of his creditors. George James Lennock was then unmarried. Referring to the contingency of his being married, the deed provided as follows:—"And in the event of the said George James Lennock contracting a marriage, I hereby authorise and empower him to settle and secure to his wife, by marriage-contract or other deed, an annuity out of the said interest, dividends, or other annual produce, payable to her quarterly or half-yearly after his death, as he may direct; the balance, if any, of the said interest, dividends, or other annual produce, being paid to or applied for the maintenance and education of the children of the marriage, if any, in such manner as my said trustees or trustee may direct; declaring as it is hereby expressly provided and declared, that upon the death of the said George James Lennock, or in the event of his marriage upon the death of the surviving spouse, the said free residue of my estate so liferented by him shall belong and be paid to the child or children of the marriage, at such periods and in such proportions and under such limitations, conditions, and restrictions as he the said George James Lennock may have directed by any deed or writing under his hand, failing which, equally amongst them, share and share alike, upon their severally attaining majority; failing all which, to my daughter, the said Anne Murray Lennock otherwise Walker, or her heirs or assignees." Shortly after the date of his father's deed of apportionment and trust-disposition and settlement, George James Lennock married Miss Elizabeth Leigh Bloxam, the third party to this case.

In February 1862, after his son's marriage, Admiral Lennock added a codicil to the deed above mentioned, by which he authorised his "trustees to pay over the said interest, dividends, or other annual produce as an alimentary allowance, and in such sums as they shall think proper, either to my said son or to his wife, as they, my trustees, shall consider expedient; or in the event of my trustees considering it more expedient, I hereby authorise and empower them to apply the same for their behoof, or for behoof of their children; and in the event of my said son George James Lennock predeceasing his wife without having secured her an annuity after his death out of the said interest, dividends, or other annual produce, I hereby authorise and empower my trustees to pay to his wife during her widowhood such portion, or even the whole, of the said interest, dividends, or other annual produce, as they shall from time to time consider necessary or proper." This deed was ratified by George James Lennock in November 1866. After the death of Admiral Lennock the trustees paid to George James Lennock the sum of £5000 apportioned to him, and continued to hold the free residue for the purposes above specified. That residue amounted to about £14,000. George James Lennock died in 1871 survived by his wife, the third party to this case, and by five children—three sons and two daughters. He left two deeds—(1) a deed of apportionment dated 9th July 1870, whereby, on the narrative of the powers conferred upon him in his father's deed of apportionment and settlement and codicils thereto annexed, he directed his father's trustees after his death to pay to his wife (the third party) should she survive him, so long as she should continue unmarried, an annuity of £200 as an alimentary allowance, and to pay the balance to his wife for the maintenance of the children. He directed that the income after the decease or marriage of his widow should be applied by his father's trustees for behoof of his children, and as to the capital he directed that it should be divided equally among the children who should attain twenty-three years of age. (2) In October 1871 Mr Lennock executed in English form, he being at the time resident in England, a last will and settlement, whereby, on the narrative of his powers of apportionment under his father's deed to a sum amounting in all to £14,200 among

his wife and children, he conveyed the whole sum to trustees, who were the second parties to this case, on trust to pay the annual proceeds to his wife (the third party) so long as she should continue his widow, for her own use and to bring up and educate the children of the marriage. With regard to the capital he provided as follows:—"I direct and declare that when and as each of my sons George Richard, Charles Frederick, and James Gustavus shall attain the age of twenty-one years (if my said wife shall be then living and unmarried) my trustees shall realise and pay to each and every of them the sum of £1700, part of the said trust-funds, for his and their own use and benefit respectively: And after the decease or marrying again of my said wife, which shall first happen, I direct my trustees to pay unto each and every of my said sons the further sum of £1700, for his and their absolute use and benefit, it being my will and desire that each of my said sons shall have and receive the sum of £3400 as his part and share of the moneys hereby appointed and bequeathed; and I appoint and bequeath the same to them accordingly: And I declare that each of them, my said sons, shall have and take a vested interest in the said sum of £3400 at the said age of twenty-one years, subject as aforesaid: And after the decease or marriage of my said wife, as aforesaid, I direct and appoint that my said trustees shall hold the sum of £4000, the residue of the said trust-funds, upon trust, to pay the interest and annual proceeds thereof unto my two daughters Elizabeth and Ann Eleanor, during their respective lives, in equal shares and proportions (subject nevertheless as hereinafter mentioned), for their and each of their own separate and absolute use and benefit notwithstanding coverture, and so that my said daughters respectively shall not have power to dispose thereof by way of anticipation: And from and after the decease of each or either of my said daughters respectively, I direct and appoint that one moiety or equal half part of the said trust-monies, funds, and securities shall go and be held in trust for the children or child of each of my said daughters respectively, in such shares and in such way and manner as my said daughters respectively, by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil, and whether they shall be under coverture or not, shall appoint; and in default of such appointment, and so far as any such appointment shall not extend in trust for the children of each such daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, in equal shares; and if there shall be only one such child, the whole to be in trust for that one child; and in case there shall be no such child or children of my said daughters respectively who shall attain a vested interest in the said trust-funds, then in trust for such person and persons, in such shares and in such way and manner as my said daughters respectively shall in manner aforesaid appoint."

This Special Case was adjusted by Admiral Lennock's trustees of the first part, Mr Lennock's trustees of the second part, and Mr Lennock's widow of the third part, to settle the rights of parties under these deeds. The first parties maintained that it was *ultra vires* of Mr Lennock to convey to his trustees funds belonging to his father's trust-estate which were vested in them, and which he had power only to apportion. They also maintained that it was *ultra vires* of Mr Lennock to restrict any of his children to a mere liferent of their share of the residue of Admiral Lennock's trust-estate. The second parties (Mr Lennock's trustees) maintained that the first parties were bound to pay over to them the residue of Admiral Lennock's trust-estate, to be administered by them in accordance with Mr Lennock's last will and testament. The third party maintained that the first or second parties, whichever of them should be found entitled to administer the estate, were bound to pay to her so long as she remained a widow, in terms of her husband's last will and testament, the annual income of the estate, subject to the declaration that when and as each of her sons reached the age of twenty-one years he should be entitled, under his father's last will and testament, to payment of the sum of £1700. Alternatively, she contended that should the Court be of opinion that the last will and testament was not a valid exercise of Mr Lennock's powers, she was entitled to the provisions made for her in his deed of 1870, or at least to those made for her in Admiral Lennock's trust-disposition and settlement and relative codicils.

In these circumstances the parties presented this Special Case. The questions on which they craved the opinion of the Court were—"1st, Does the deed of appointment or settlement of 9th July 1870 amount to or contain a valid exercise by George James Lennock of the powers conferred on or reserved to him by his father Admiral Lennock under his (the Admiral's) deed of apportionment and trust-settlement of 8th October 1856 and relative codicils? 2d, Are the provisions contained in or constituted by the said deed of appointment or settlement of 9th July 1870, in favour of the wife and children respectively of George James Lennock, the provisions to which they are now entitled? or, 3d, Are the provisions contained in or constituted by George James Lennock's last will and testament of 24th October 1871, in favour of his widow and children respectively, the provisions to which they are now entitled? and 4th, In view of the several writs mentioned in the preceding queries, what are the provisions to which the widow and children of Mr George James Lennock are entitled respectively?"

The Second Division on 30th January 1874 pronounced this interlocutor:—"The Lords having heard counsel on the Special Case, are of opinion and find, that the parties of the first part are entitled and bound to hold the fund in question until the capital, in whole or in part, becomes payable: And further, find that under the last will of George J. Lennock, dated 24th October 1871, the parties of the first part are bound to pay over the whole annual income of the said fund to the party of the third part, as long as she remains unmarried, until one of the sons attains the age of twenty-one, reserving all questions which may arise in that event as to the nature and effect of the settlement in question: Find the parties to this case entitled to their expenses out of the trust-estate, &c."

One of Mr Lennock's sons and one of his daughters having attained majority, the Court resumed consideration of the case, and it was now argued for the first parties:—Mr Lennock had

no power to convey the residue of his father's estate away from the first parties to his own trustees. The appointment he made by his last will, whereby he only gave a life interest to his daughters, was bad. The giving of a mere interest where the donee of the power is appointed to distribute capital is a bad exercise of the power —*Carver* v. *Bowles*, 2 Russell and Milne; *Duke of Northumberland* v. *Macgregor*, 5 Bell's Ap. 407. If the whole appointment was not bad, it was at least bad as regarded the daughters, and the £4000 apportioned to them must be divided equally between them for themselves as absolute fiars.

Argued for second and third parties—The donee of such a power may in a marriage-contract give a liferent to a daughter and a fee to her children. At all events, this gift by Mr Lennock to his daughters came under the words "in such proportions and under such limitations, conditions, and restrictions as he, the said George James Lennock, may have directed." Even if bad as to the daughters the appointment was good as to the sons.

At advising—

Lord Justice-Clerk—When a sum of money is left to certain persons, and a power is conferred on another to divide or apportion the amount among them, it has been settled that it is beyond the power to restrict the share of one of the beneficiaries or legatees to a mere right of liferent, and an attempt so to exercise the power will be of no avail. But it has been settled by the English case of *Carver* v. *Bowles*, and is good sense, that if an appointment embraces the whole fund to be distributed, it will not necessarily be vitiated by the introduction of conditions and restrictions tending to limit the enjoyment of any particular share. I should have been disposed to follow the authority of that leading case as conclusive of the general doctrine. But it so happens that both the power of appointment and the terms of the appointment itself are in the present case as nearly as possible identical with those which occur in *Carver* v. *Bowles*. In both the power authorised the appointer to appoint under such conditions and restrictions as might be thought fit; and the actual restrictions imposed in this case are as nearly as may be expressed in the same words. I propose, therefore, that we should pronounce a judgment in terms of that pronounced by the Master of the Rolls in the case I have referred to. It may be quite true, as it was in that case, that some of these restrictions reduce the actual enjoyment to little more than a life interest, but they do not appear to me to exceed the limits which were contemplated by the testator.

Lord Gifford—I have come to the same conclusion. Admiral Lennock left the residue of his estate to trustees for his son, directing them to hold and stand possessed of the same for payment to him during all the days of his life of the interest, dividends, or other annual produce accruing thereon, declaring that the same should be alimentary. Then he goes on to authorise his son to settle on any wife he might marry an annuity "out of the said interest, dividends, or other annual produce, payable to her quarterly or half-yearly after his death as he may direct; the balance, if any, of the said interest, dividends, or other annual produce being paid to or applied for the maintenance and education of the children of the marriage, if any, in such manner as my said trustees or trustee may direct;" with a declaration that "on the death of George James Lennock, or in the event of his marriage on the death of the surviving spouse, the said free residue of my estate so liferented by him shall belong and be paid to the child or children of the marriage, at such periods and in such proportions and under such limitations, conditions, and restrictions as he, the said George James Lennock, may have directed by any deed or writing under his hand." It is this residue that the son has dealt with. He dealt with it by two deeds—first a deed of apportionment; but that was superseded by a will. The will is dated in 1871. Having power to apportion and to impose limitations and restrictions, he has, as I think, done it well. He provides that his trustees shall invest his funds in certain securities, and pay the dividends, interest, and annual produce to his widow for her own use, and to enable her to bring up, educate, and maintain their children of the marriage. So far there is no dispute, and the wife is entitled to the whole interest for herself and the children. But that is subject to the provision that "when and as each of my sons shall attain the age of twenty-one years (if my said wife shall be then living and unmarried), my trustees shall realise and pay to each and every of them the sum of £1700." The first question is, whether he had power to do that? I cannot doubt that he had power to appoint. He is here doing so among his sons as they attain twenty-one. Why should that not take effect? He does not indeed exhaust his power. He might have stopped there. The sons might demand these provisions, and the widow could not object. It is a long step to our decision to find that these provisions of £1700 to each son are good. Then, after the decease or marriage of the widow the trustees are to pay to each of the sons other £1700—"it being my will and desire that each of my said sons shall have and receive the sum of £3400 as his part and share of the moneys hereby appointed and bequeathed." I think that that is good too, to this effect, that he has said that the sons should have so much and the daughters the rest after the death of his wife. Then he says that after the decease or marriage of his wife his trustees "shall hold the sum of £4000, the residue of the said trust-funds, upon trust, to pay the interest and annual proceeds thereof unto my two daughters Elizabeth and Ann Eleanor during their respective lives, in equal shares and proportions (subject nevertheless as hereinafter mentioned), for their and each of their own separate and absolute use and benefit notwithstanding coverture, and so that my said daughters shall not have power to dispose thereof by way of anticipation." That is a good appointment to £2000 to each of the daughters, the interest of which is to be paid to them during their own lives and during coverture. Then we come to the only question which creates a difficulty. The next clause is—"And from and after the decease of each or either of my said daughters respectively, I direct and appoint that one moiety or equal half part of the said trust-monies, funds, and securities shall go and be held in trust for the children or child of each of my said daughters respectively, in such shares and in such way and manner as

my said daughters respectively, by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil, and whether they shall be under coverture or not, shall appoint; and in default of such appointment, and so far as any such appointment shall not extend in trust for the children of each such daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, in equal shares; and if there shall be only one such child, the whole to be in trust for that one child: And in case there shall be no such child or children of my said daughters respectively who shall attain a vested interest in the said trust-funds, then in trust for such person and persons, in such shares and in such way and manner as my said daughters respectively shall in manner aforesaid appoint." Now, it does not seem to me to be necessary to decide as between the daughters and their possible children what their respective rights are. The question whether the daughters have power to disinherit them or not may never arise, and I doubt if anyone now at the bar is entitled to appear and plead for these possible children. The question is, whether George James Lennock has made a good appointment? I think he has; and that the trustees must, as directed, pay to the sons and hold for the two daughters. If they object to the trust and demand an absolute payment, a question will arise. But they may not do so, and I decline to decide a question which has not arisen. I think Mr Lennock had power to put this money in trust for his daughters. Whether or not they can cut out their children it would be premature to decide.

LORD YOUNG concurred.

The Court pronounced this interlocutor:—

"Sist Miss Elizabeth Leigh Lennock and George Richard Lennock, both now or lately residing in Edinburgh, as parties to the Special Case, and having resumed consideration of the case and heard counsel, are of opinion and find, that the deed of settlement (last will and testament) dated 24th October 1871 constituted a valid deed of appointment in favour of the widow and children of the granter, to the effect of vesting in the granter's sons the provisions therein mentioned absolutely in fee, and vesting in the daughters the capital of the sums therein mentioned, but that the respective shares of the daughters are limited to their separate use for life, independent of any present or future husband, and are to be held by them subject to the power of appointment conferred by the said settlement, but without power to make any other assignment or appointment by way of alienation: Find all the parties to the Special Case entitled to their expenses out of the trust-estate," &c.

Counsel for First Parties — Dean of Faculty (Fraser, Q.C.)—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Second and Third Parties—Gloag—Muirhead. Agents—Ronald & Ritchie, S.S.C.

Tuesday, November 2.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KNOX *v.* SLIGO.

Process—Appeal—Expenses.

A Sheriff Court appeal was sent to the Short Roll on 15th October 1880. On 2d November counsel for the appellant moved that the appeal be dismissed with modified expenses. The respondent's counsel asked for his full expenses, on the ground that he had been put to considerable expense in printing documents for the consideration of the case omitted by the appellant in his print. The Court *dismissed* the appeal, and allowed the respondent his full expenses as taxed.

Counsel for Appellant — Lorimer. Agents — Macbrair & Keith, S.S.C.

Counsel for Respondent—Dickson. Agents—J. L. Hill & Co., W.S.

Wednesday, November 3.

FIRST DIVISION.

[Sheriff of Midlothian.

SUTHERLAND *v.* GREIG.

Process—Appeal—Expenses—A. S., 10th March 1870—Reponing.

A Sheriff Court appeal being enrolled in the Single Bills, the respondent's counsel objected to its being sent to the roll, in respect that the appellant had failed timeously to comply with the terms of the Act of Sederunt, and had indicated by his procedure throughout a desire for delay. The interlocutor appealed against was dated 15th June 1880; the defender did not appeal till 12th October; and the proceedings were received by the Clerk of Court 14th October. By sub-sec. 1 of sec. 3 of the Act of Sederunt the appellant was bound to print and box the papers within 14 days thereafter, failing which to be held to have abandoned his action, and to be reponed only on payment of such expenses as should seem just. The print was not boxed till 1st November, though due on 29th October, the 28th being the Fast Day and a Court holiday. The appellant pleaded, as an excuse for the delay, absence from town of junior counsel, and consequent inability of the agent to get access to the papers. He did not present a note to be reponed. The Court *allowed* the case to go to the roll on payment of ten guineas by the appellant to the respondent.

Counsel for Appellant—J. C. Smith. Agent—Andrew Clark, S.S.C.

Counsel for Respondent—Salvesen. Agents—Boyd, Macdonald, & Co., S.S.C.