Tuesday, January 22.

SECOND DIVISION.

WARRAND'S TRUSTEES *v.* WARRAND.

Succession—Faculties and Powers—Power of Appointment—Power to Appoint under "Conditions and Restrictions"—Exercise of Power Partially ultra vires—Appointment to Share of Residue—Restriction of Share to Liferent with Limited Right of Testing—Fee to Descendants not Object of Power.

A testatrix by trust-disposition and settlement directed her trustees, on the death of herself and her brother, to convey the residue of her estate to the children of her brother, in such proportions, at such times, on such conditions, and under such restrictions as he might direct, and failing such direction, equally among them. She further declared that the children's shares should vest on the death of their father and their attaining majority, or in the case of the females, on their majority or marriage. The testatrix was survived by her brother, who executed two deeds of appointment, whereby he appointed "that the said residue" should on his death "belong to" his "children (on the conditions and under the restrictions" thereinafter "written, so far as" he might "lawfully impose such conditions and restrictions)" in certain proportions, but provided further that the shares appointed to certain of his children should belong to them in liferent only, and for their alimentary use allenarly, and should be held by the trustees during these children's lifetime, and that the fee of their respective shares should belong to their issue, and in the event of the death of any of these children without issue, that his share should be disposed of as he might by will or other deed direct, and failing direction should belong to his next-of-kin.

In a question raised after the death of the appointer between the trustees and A and B, two of the appointer's children whose shares had been restricted to a liferent, *held* that the appointment, in so far as it appointed that the residue should belong to the appointer's children in certain proportions, was a valid exercise of the power, but that the gift of fee to the issue of certain of the children, and the restriction of these children's rights to a liferent, with power of disposal in the event of their dying without issue, were *ultra vires* and ineffectual, and that A and B were entitled to payment of the capital of the shares appointed to them.

Lennock's Trustees v. *Lennock*, October 16, 1880, 8 R. 14; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921; and *Wright's Trustees* v. *Wright*, February 20, 1893, 21 R. 568, *distinguished* and *commented on*.

Mrs Catherine Munro Warrand of Bught died on 24th March 1891 leaving a trust-disposition and settlement dated 3rd October 1883, whereby she conveyed her whole estate, heritable and moveable, to certain trustees for the purposes therein specified.

The fourth purpose was as follows—"I direct the said trustees and their foresaids, on the death of the said Alexander John Cruickshank Warrand (the truster's brother), or on my own death should I survive him, to hold and apply, pay, divide, and convey the said residue and remainder of said means and estate to and for behoof of the lawful child or children of the said Alexander John Cruickshank Warrand (including the heirs succeeding to the said estates of Bught and Piltochie), and that in such proportions, at such times, on such conditions, and under such restrictions as he may direct by any writing under his hand executed after my death, and failing any such writing, then to hold the same for behoof of the children of the said Alexander John Cruickshank Warrand (including as aforesaid) equally among them, payable in the case of sons of my said brother on their respectively attaining majority, and in the case of daughters on their respectively attaining majority or being married, whichever of these events shall first happen: And I declare that the interests of my said brother's children in said residue shall vest in them respectively upon the occurrence of the two events of the death of my said brother and their majority, or in the case of daughters on their majority or marriage, it being my intention that their said interests should not vest prior to the periods of payment herein appointed, and that the share of any child of my said brother who may predecease the term of payment of such share, leaving lawful issue, shall be paid to such surviving issue or their legal guardians, and failing issue the share of any such predeceasing child shall belong to the survivors of the said children of my brother and the issue of predeceasers, if any, equally among them *per stirpes*: But it is hereby declared that any of the children of my said brother, upon attaining majority, and during the lifetime of their father, shall have power to divide and apportion his or her prospective interest among his or her children and their issue, in such proportions and subject to such conditions as he or she may think proper; and I direct the said trustees to hold and apply the rents, dividends, and other annual produce and income of the share of said residue prospectively falling to each of the children of the said Alexander John Cruickshank Warrand (in the event of his decease), or such part thereof as the said trustees may deem necessary and proper for the maintenance, clothing, education, upbringing, and advantage of such children, until actual payment of his or her share, and to accumulate as part of

said share such part of the income thereof as the said trustees may not apply for these purposes, if such accumulation may lawfully be made, otherwise the right to such surplus income shall immediately vest in the child or children prospectively entitled to the share of capital producing such income; and notwithstanding the period of payment of the shares of residue before expressed, I provide that it shall be lawful to and in the power and option of the said trustees, if they shall see fit, to advance and pay, after my death and before the arrival of the term of payment foresaid, to and for behoof of the said children of the said Alexander John Cruickshank Warrand, or any of them, with consent of my said brother during his life and at the discretion of the said trustees after his death, such part as they may see fit of their respective shares of the fee or capital of the said residue for the support of such child or children, or for establishing a son in business or fitting out or making provision for a daughter on marriage, or otherwise for behoof of such child or children."

The truster was survived by her brother Alexander J. C. Warrand, who on 4th April 1893 executed a deed of appointment, which, upon the narrative of the powers conferred on him by the truster, and on the further narrative that the granter had then eight surviving children, *videlicet*: Alexander Redmond Bewley Warrand, Emily Catherine Fanny Warrand, Louisa Laura Forbes Warrand or Caton, Constance Georgina Warrand, Hugh Munro Warrand, George Arthur Stuart Warrand, Myra Kathleen Grant Warrand, and Duncan Grant Warrand, proceeded as follows—"Therefore in virtue of the powers conferred upon me by the said trust-disposition and settlement and deed of directions and codicils, and of all other powers enabling me herein, I do hereby appoint that the said residue shall on my death belong to the said children (on the conditions and under the restrictions hereinafter written, so far as I may lawfully impose such conditions and restrictions) in the proportions following, that is to say, to the said Alexander Redmond Bewley Warrand, eighteen one-hundredth parts; to the said Emily Catherine Fannie Warrand, eighteen one-hundredth parts; to the said Louisa Laura Forbes Warrand or Caton, twelve one-hundredth parts: to the said Constance Georgina Warrand, twelve one-hundredth parts; to the said Hugh Munro Warrand ten one-hundredth parts; to the said George Arthur Stuart Warrand, eight one-hundredth parts; to the said Myra Kathleen Grant Warrand, twelve one-hundredth parts; and to the said Duncan Grant Warrand. ten one-hundredth parts; and I provide that the share hereby appointed to the said Alexander Redmond Bewley Warrand and Louisa Laura Forbes Warrand or Caton shall vest in and be payable to them on my death; and with regard to the shares of my other children, I provide, direct, and appoint that the said shares shall belong to them in liferent only, and for their alimentary use allenarly, and shall be held by the trustees acting under said trust-disposition and settlement and deed of directions and codicils during the lifetimes of the said children respectively, and the free income of the respective shares shall be paid to such children, and that the fee or capital of the respective shares shall belong to the lawful issue of such children, and in the event of any of such children dying without issue, the share of such child shall on his or her death be disposed of as he or she by will or other deed shall direct, and failing direction, shall belong to the next-of-kin of such child, and the shares of the said children, other than the said Alexander Redmond Bewley Warrand and Louisa Laura Forbes Warrand or Caton, shall vest in liferent as aforesaid on my death, and on their respectively attaining majority in the case of sons, or in the case of daughters on their respectively attaining majority or being married: And I further provide, direct, and appoint that notwithstanding the restriction of the children above named to a liferent, it shall be in the power of the trustees acting under the said trust-disposition and settlement and deed of directions and codicils to advance and pay to any of such children, or to apply for his or her behoof from time to time, or in one sum, a part of the capital of the share of such child not exceeding one-third of the total capital of such share, and the interest of the issue of such child shall be restricted accordingly."

By deed executed on 10th December 1894 Alexander J. C. Warrand directed and appointed that "the shares of the residue above referred to which shall on my death belong to my sons Hugh Munro Warrand and George Arthur Stuart Warrand, shall be nine one-hundredth parts to each, instead of ten one-hundredth parts to the said Hugh Munro Warrand and eight one-hundredth parts to the said George Arthur Stuart Warrand," under the same conditions and restrictions as were contained in the deed of 4th April 1893.

Alexander J. C. Warrand died on 2nd November 1899 survived by the above-named eight children, all of whom had then attained majority.

Questions having arisen as to the effect of the said trust-disposition and deed of appointment, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Mrs Catherine Warrand's trustees, (2) Hugh Munro Warrand, and (3) George Arthur Stuart Warrand.

The first parties maintained that the restriction of the shares of the second and third parties to a liferent was effectual.

The second and third parties maintained that, on a sound construction of Mrs Warrand's trust-disposition and settlement, Alexander J. C. Warrand was not entitled to restrict them to a liferent of their shares and to appoint the fee to their children; that said appointment of the fee to their children was invalid, and that they were entitled to payment of the capital of the sums appointed.

The first question of law for the opinion and judgment of the Court was as follows:—"(1) Is the provision in the deed of appointment of 4th April 1893, whereby the second and third parties are restricted to a liferent of the shares apportioned to them, with a power of disposal in the event of their dying without issue, a valid exercise of the power of appointment conferred on Alexander John Cruickshank Warrand, and ought it to receive effect? or Are the second and third parties entitled to payment of the capital of the sums appointed to them respectively?"

Certain other questions were stated by the parties, which the Court found it unnecessary to consider.

Argued for the first parties—Alexander Warrand had validly exercised the power of appointment conferred on him by the truster, in so far at least as he had restricted the rights of the second and third parties to a liferent with power of disposal. Admitting that the gift of fee to the issue of the appointer's children was invalid, they not being objects of the power, that part of the appointment might be disregarded, leaving the other restrictions unaffected. A restriction to a liferent with power of disposal had been held a valid exercise of such a power of appointment as was given here—*Crompe* v. *Barrow* (1799), 4 Vesey jr. 681; *Carver* v. *Bowles* (1831), 2 Russ & Myl. 301; *Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921; *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568. The case last cited was directly in point.

Argued for the second and third parties—The appointment made by Alexander Warrand was valid in so far as it distributed the trust estate among the beneficiaries in certain proportions, but the restrictions which he had attempted to impose were *ultra vires*, and must be disregarded. The truster had expressly declared that the children's shares should vest on the occurrence of their father's death and their own majority, and the appointer could not defeat that right. The appointment was bad, first, because it purported to give the fee to the issue of the children, such issue not being objects of the power; second, because it restricted the children's rights to a liferent. That restriction would have been invalid even if the power of disposal had been unqualified. *A fortiori* it was invalid where the power of disposal was limited to the event of the children dying without issue. The case of *Wright's Trustees*, relied on by the first parties, went further than any previous decision, and was ill-decided. It was impossible to separate the liferent restriction from the admittedly invalid gift of fee, and therefore they both fell to be disregarded—*Baikie's Trustees* v. *Oxley and Cowan*, February 25, 1862, 24 D. 589; *Macdonald* v. *Macdonald's Trustees*, June 17, 1875, 2 R. (H.L.) 125; *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230; *Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435; *Churchill* v. *Churchill* (1867), L.R., 5 Eq. 44.

At advising—

LORD TRAYNER—The late Mrs Catherine Warrand by her trust-disposition and settlement directed her trustees in an event which has happened to pay and divide the residue and remainder of her estate to the children of her brother Alexander, "in such proportions, at such times, on such conditions, and under such restrictions as he (Alexander) may direct by any writing under his hand." Alexander, by deeds executed by him of date 4th April 1893 and 10th December 1894, on the narrative of the foresaid power conferred on him by his sister, appointed with regard to the second and third parties to this case (with whose interests we are here only concerned) that their shares of said residue should be 9/100th parts to each; but he also provided that said shares should belong to them in liferent only and for their alimentary use allenarly, and that the fee or capital of their respective shares should belong to their lawful issue, and failing such issue should be disposed of as they (the second and third parties) should direct, and failing such direction should belong to their next of kin. We are asked to determine whether such an appointment by Alexander was a valid exercise of the power conferred on him. There is authority for the proposition that an appointment within the power is valid, and may be sustained although burdened with conditions *ultra vires* of the appointer. In such a case the appointment is sustained, and the conditions annexed to it are disregarded. Whatever, therefore, may be thought of the conditions and restrictions imposed here on the shares appointed to the second and third parties, I think there can be no doubt that there was a valid appointment made in favour of each of them of a 9/100th part of the residue.

But, as I have pointed out, Alexander Warrand by his deed of appointment directed that the shares appointed to the second and third parties should belong to them in liferent only, and the fee to their issue, or, failing issue, as the second and third parties should direct, or to their next-of-kin. Was it competent to the appointer to make these restrictions and conditions? I think not. In the first place, I think it clear that the direction to give the fee of the shares in question to the children of the second and third parties was *ultra vires* of the appointer, because he was thereby conferring part of the estate to be divided on persons who were not objects of the power. In the second place, to confer a mere liferent of the shares appointed was not within the power of the appointer. What he was authorised by the power to do was to apportion the residue of his sister's means and estate—that is, the fee of such residue—the residue itself—among his children. To give them a mere liferent of a portion of that estate was not giving them that to which by the truster's settlement they were entitled, and which by the same settlement the appointer was directed to give them. There is no authority, so far as I know, for the proposition that

under a direction and power to appoint to a share of an estate the appointer may validly appoint to a mere liferent of a share. On the contrary, I take the law on that matter to be well stated by the Lord Justice-Clerk in the case of *Lennock's Trustees*, when he says—"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 maintained by the first parties that it was competent to Alexander Warrand to restrict the right of the second and third parties to a liferent if he gave them also a power of disposal of the fee. For this proposition there is some appearance of authority in the cases to which we were referred, namely, the cases of *Lennock's Trustees*, *Wallace*, and *Wright's Trustees*. But when these cases are carefully considered I think it appears that they do not support the proposition, to the full extent at all events, for which the first parties contend. In these cases the right conferred on the beneficiary was regarded as in some measure a right of fee the enjoyment or use of which was restricted. I do not myself see how a right of fee can be conferred, and at the same time a restriction placed on its use and enjoyment. It was decided in *Miller's* case (18 R. 301) that this could not be done. But assuming for the moment that it can—that there can be a fee restricted to a liferent enjoyment of it by the fiar (as by declaring that he shall not be entitled to alienate it gratuitously during his lifetime, although that would not exclude the diligence of creditors against the fee)—the case we are here dealing with could not be brought within such a category. The right which the appointer declared to be the right of the second and third parties was not a restricted fee but an alimentary liferent allenarly. No doubt there is added a power of disposal, but it is not absolute but conditional—conditional on the second and third parties having no issue; so that even if it were within the power of an appointer directed to divide the money or estate among certain persons, to appoint to a certain share in liferent with an absolute power of disposal of the fee (a view which I am not to be regarded as holding), that would not avail the first parties in the present case.

I am therefore of opinion, that while the appointment in the present case is valid in so far as it appoints a 9/100th share of the truster's residue to each of the second and third parties, it is invalid and ineffectual in so far as regards the conditions annexed to the appointment.

The LORD JUSTICE-CLERK—I concur in the opinion of Lord Trayner.

LORD MONCREIFF—It is clear from the terms of the power of appointment that the primary objects of the power among whom the residue was to be divided were such of the immediate children of Alexander Warrand as survived what is called in the deed the "term of payment"—that is, such as survived their father and attained majority, or being females married. Alexander Warrand was given power to divide the fund among his children "in such proportions, at such times, on such conditions, and under such restrictions" as he might direct by any writing under his hand. The issue of the children are to take in the event of their respective parents' predeceasing the "term of payment," which is expressly said to be the time of vesting. To this limited extent they also are objects of the power, but not in competition with their parents.

The first parties, who are the testamentary trustees of Mrs Catherine Warrand, do not maintain that the appointment made by Alexander Warrand is in all respects valid; but they do maintain that he validly executed the power of appointment conferred upon him in so far as he restricted the shares of the second and third parties to a liferent. While I think that the first parties were well entitled to present the question for the determination of the Court, and while their argument at first sight receives support from the cases to which we were referred by Mr Mackintosh, I do not think that their contention is sound. The appointment made by Alexander Warrand, while good as a division and apportionment of the capital, is *ultra vires* and invalid in so far as it restricts the rights of the second and third parties to a liferent.

Turning to the deed of appointment the appointment by Alexander Warrand commences thus—"In virtue of the powers conferred on me by the said trust-disposition and settlement and deed of directions and codicils, and of all other powers enabling me herein, I do hereby appoint that the residue shall on my death belong to the said children (on the conditions and under the restrictions hereinafter written, so far as I may lawfully impose such conditions and restrictions) in the proportions following—that is to say." He then proceeds to divide the fund into one hundred parts, and these he apportions in certain proportions among his eight children. The second party is given 10 100th parts, and the third party 8 100th parts, subsequently altered to 9 100th parts to each. So far that is a valid and unobjectionable exercise of the power of appointment. The deed then proceeds to declare that the shares appointed to two of the children, viz., Alexander and Louisa, shall vest at and be payable to them on their father's death. This also is unobjectionable, because Louisa (Mrs Caton) had married, and Alexander, the eldest son presumably, had attained majority.

But then the appointer proceeds to cut down and restrict the interests which he had already given to the remaining children (three of whom, be it observed, were sons) to an alimentary liferent. The deed leaves no doubt of the limited nature of the interest which he intends his children to have. It is not even a restricted fee; it is a life-

rent. The direction is, that "the free income of the respective shares shall be paid to such children, and that the fee or capital of the respective shares shall belong to the lawful issue of such children." And again, the said shares "shall vest in liferent as aforesaid," &c.; and again in a clause by which he empowers the trustees to make advances of capital to the said children he says—"I further provide, direct, and appoint that notwithstanding the restriction of the children above named to a liferent, it shall be in the power of the trustees . . . to advance and pay to any of such children, or to apply for his or her behoof from time to time or in one sum a part of the capital of the share of such child, not exceeding one-third of the total capital of such share, and the interest of the issue of such child shall be restricted accordingly."

Pausing there, that is undoubtedly a bad exercise of the power of appointment, or rather a bad restriction of the apportionment which the appointer has already made, in this respect, that it restricts the interest of the immediate children to a liferent, and bestows the fee of their shares upon their children, who in competition with them were not objects of the power.

But it is argued, that granting that the gift of the fee to grandchildren was *ultra vires*, the result is, not that the whole limitation falls, but that the destination to grandchildren being struck out there remains a restriction to a liferent coupled with a power of disposing of the shares by will, and that this is sufficient.

The decisions have gone far in the direction of sustaining a deed of appointment in so far as it can possibly be held to be within the power after striking out these parts of the deed which are invalid, although in doing so some violence is done to the intentions of the appointer. There is no stronger example of this than the case of *Macdonald* v. *Macdonald*, 1 R. 794, and 2 R. (H. of L.) 125, which must now be held to regulate the law of Scotland.

But this is only done where it is possible to separate the good from the bad, and if the objectionable portions are so mixed up with the remainder of the appointment as not to admit of separation, the whole deed, or at least such part of it as is inextricable, falls.

In the present case there is no difficulty in separating the appointment of the fund from the limitations which follow. In that respect the case resembles and is more than covered by the case of *Macdonald* v. *Macdonald*. In that case the appointers began by declaring that it was their will that a sum of £25,000 secured over certain entailed estates should "be settled on and belong to our eldest son and other members of our family in possession of the entailed estate—the sum of £25,000 being the share which we have allotted and apportioned, and do hereby allot and apportion, as the share of our eldest son, or failing him of the heir of entail succeeding to the entailed estate." But the way and the only way in which the appointers intended and directed that the eldest son should obtain the benefit of this apportionment was that their marriage-contract trustees should after their death discharge the said heritable bond for £25,000 over the entailed estates, the result of which would have been that Colonel Macdonald, the eldest son, would only have had an interest during his life in the sum apportioned, and that the benefit of the apportionment might ultimately accrue to persons who were not objects of the power. It was contended for the younger children, and with success, in this Court, that the conditions being invalid (and both the majority and the minority of the Court agreed that they were) the whole apportionment failed, and that there must be an equal division. So formidable did this objection appear to Colonel Macdonald that in the appeal case his first alternative contention was that the whole appointment was good. Alternatively he pleaded that the appointment of the £25,000 was good, and that the conditions attached to the gift being invalid should be disregarded. The House of Lords sustained the latter contention, and held that the appellant was entitled to the £25,000 absolutely, although undoubtedly this was not according to the intention of the appointer.

In the present case the appointer, after making what if it stood alone would be a good absolute appointment to the second and third parties, has attempted to restrict their interests under the erroneous belief that he had power to give the fee of their shares to their children. The whole of the restrictions hinge on this. He has restricted the second and third parties to a liferent, and although he has superadded provisions which might raise the interest given to somewhat more than a liferent, these provisions are conditional and might never come into operation. I do not admit that an unqualified power to test would cure the defect, but not even that is given. He gives them a power to test, but only in the event of their dying without having had issue. Again, the trustees are given power to make advances of capital, but these advances are limited to one-third of the respective shares, and this restriction is made in the interests of the grandchildren to whom the fee is destined. In my opinion the whole of these restrictions are due to and dependent on the invalid gift of fee to the grandchildren, and stand or fall according to the validity of that gift. Even if they could stand alone the interest given does not amount in any view to one of fee.

It is necessary to say a word on the cases which were pressed on us in argument. Assuming them to be well decided, none of them when examined seems to me to touch this case. The principal Scottish authority relied on was *Lennock's Trustees*, 8 R. 14. The judgment in that case was framed, or intended to be framed, upon the judgment in the old English case of *Carver* v. *Bowles*, 1831, 2 Russell and Mylne, 301. The latter case is chiefly known and cited

as an authority for the proposition that an appointment otherwise good does not necessarily fail because the appointer has adjected invalid conditions; but it is true that another point was decided which must be noticed. The direction in the appointment was to "pay the interest to the daughter during her life for her separate use and without power of anticipation or alienation"; and then followed the limitations in favour of issue, followed by a conditional power of disposal on the failure of issue, which were held to be in excess of the power. The Master of the Rolls held that the words of appointment were sufficient to vest the shares *absolutely in the daughter*; but that it was competent for the donee of the power to limit the interest which he appointed to his daughters to their separate use and to restrain them from anticipation or alienation. Accordingly in the judgment (p. 309) it was declared that the daughters' shares are limited to their separate respective use for life, and are to be held and enjoyed by them without power to make any assignment or appointment by way of alienation." Subject to this they had an absolute right of disposal. The decision may or may not be sound, but two things are apparent, that it is not an authority to the effect that a liferent coupled with a qualified power to test would have been good; and secondly, it was not necessary to remodel the deed of appointment further than to draw a pen through the objectionable clauses.

Coming now to *Lennock's Trustees*, 8 R. 14, there are peculiarities about that case which somewhat detract from its value. The terms of the deed were substantially the same as those in the case of *Carver* v. *Bowles*, it being directed that the trustees should pay the interest and annual proceeds to the appointer's daughters during their respective lives "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."

Then follows a power to the daughters to divide the fee among their children; and in case there should be no children who attained a vested interest in the funds, "in trust for such person or persons in such shares, and in such way and manner as my said daughters respectively shall in manner aforesaid appoint." It is to be observed that both parties to the special case maintained that the restrictions on the daughters' interests were wholly invalid; but the Lord Justice-Clerk held that the case was ruled by *Carver* v. *Bowles*. He did not, however, regard the interest given to the daughters as one of liferent. He expressly says that an attempt to restrict the right to a liferent would have been bad; but he says: "It may be quite true, as it was in that case (*Carver* v. *Bowles*), 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 again, as I gather from the conclusion of his opinion, did not even decide that the grandchildren had not a right of fee. He contented himself with holding that there was a good appointment of the fund in liferent to the daughters, leaving the question as to their power to dispose of the fee to arise subsequently.

The interlocutor, again, goes beyond the declaration in the case of *Carver* v. *Bowles*, which contained no reference to disposal by will; because after declaring that the shares of the daughters are limited to their separate use for life, it proceeds: "are to be held by them subject to the power of appointment conferred by the said settlement." Now, the power of appointment in the settlement was limited, if there were issue, to appointing among the issue who were not objects of the power. Perhaps the interlocutor means simply that the daughters should have power to test. If so, there is nothing to suggest that the power was conditional on there being no issue. I think that this was the Lord Justice-Clerk's intention, but not Lord Gifford's, who was not prepared to decide as to the interests of the children.

The decision in *Wallace's Trustees* simply followed the other decisions, the language of the deed of appointment being practically the same, with this exception, that there was no destination to the issue of the daughters. The daughters had an absolute right of disposal by will of the capital of their shares—not, as here, a limited and conditional power.

In the last case, *Wright's Trustees*, 21 R. 658, the power of appointment was contained in Mr John Wright's antenuptial marriage-contract. Under it the survivor of the spouses had power to appoint among the child or children of the intended marriage in such proportions, at such times, and under such conditions as he or she might direct. Mr John Wright survived his wife, and died leaving a settlement by which he directed a third part of the trust funds to be held for behoof of his daughter Florence in liferent, and the parties after named in fee. The parties after named were her lawful children if she had any, and failing children such parties and in such manner as she should direct by any writing under her hand, and failing such writing to her nearest of kin equally. I observe in passing, that under that deed, differing from the one which we have to construe, the appointment did not commence with an absolute appointment of a certain sum to Florence. The only appointment made to her is in liferent; and this of itself is sufficient to distinguish it from the present case. It is also, I think, sufficient to distinguish it from the cases of *Carver* v. *Bowles* and *Lennock's Trustees*, because in both these cases, although there was a prohibition of anticipation, there was what was held to be otherwise an absolute appointment.

But then Lord Adam deals with the peculiarity of the case, that the power to test which is superadded to the liferent is not an absolute power to test, in which respect the deed resembles that in the

present case. He holds, and rightly, that the abortive appointment to children who were not objects of the power could not of itself render invalid a gift to an object of the power. But then he had to meet the difficulty that the power to test was not an absolute right, but was conditional upon Miss Wright dying without issue. He held, however, that the power to test, though qualified, was sufficient, coupled with the liferent, to constitute a good exercise of the power in favour of Florence. If it were good law that a liferent, plus a qualified power of testing, is equivalent to a right of fee, I should agree that the effect of an abortive attempt to interject persons who were not objects of the power would not affect the right to test conferred. But I know of no authority to the effect that a liferent with a power to test so qualified is equivalent to a right of fee.

In regard to the case of *Crompe* v. *Barrow*, which Lord Adam refers to, I fail to see its application to the case of *Wright*. In *Crompe* v. *Barrow* the contention on behalf of Charles Barrow was that the fee of the moiety, of which he had the liferent, having been given to his issue, persons not objects of the power, in the first instance, and in the event of his dying without issue to his sister Frances, the whole of the appointment fell, and the fund fell to be disposed of as unappointed. It is true that the judgment of the Master of the Rolls implies that Frances would only take in the event of Charles dying without leaving issue, and that if he left issue, although they could not take, the fund would go as unappointed. But Frances seems to have been content with this qualified right, and the real dispute was whether the gift to her was not wholly bad in consequence of the invalid appointment to the children of Charles. The Master of the Rolls held that it was not, and sustained the claim of Frances to that extent. The question does not seem to me to be the same. There the question was whether a gift in remainder of a full though conditional right of fee to an object of the power wholly failed because an ineffectual attempt had been made to give the fee to persons who were not objects of the power. In *Wright's* case, as here, the question was whether an object of the power who was entitled to a fee was bound to accept something less than a right of fee. If *Crompe* v. *Barrow* applied at all to the present case, the second and third parties would have no power to test on their shares if they had issue. That is exactly what they complain of.

None of these cases, assuming them to be well decided, seems to rule this case, or necessarily to conflict with the view which I take of it. In none of them was there such a distinct and separable appointment as here. Again, *Carver* v. *Bowles*, on which the decisions in *Lennock's Trustees* and *Wallace's Trustees* were intended to be based, merely decided that it was within the power to restrain the object of the power (a female) from anticipation, leaving her otherwise absolute owner, and free to dispose of her share by will or deed to take effect after her death.

In *Wright's Trustees* the only appointment was in liferent, which is sufficient to distinguish the case, but I do not agree in the judgment, which goes far beyond the other decisions. This case really depends on the well-settled law that "if the first appointment gives the absolute interest to the appointee, and the subsequent superadded modification of it is void, the original appointment stands exactly as if the attempted modification were struck out of the will"—*per* Master of the Rolls Lord Romilly, in *Churchill* v. *Churchill*, L.R., 5 Eq. 48.

I therefore would answer the second alternative of the first question in the affirmative.

LORD YOUNG concurred.

The Court answered the first alternative of the first question in the negative, and the second alternative in the affirmative.

Counsel for the First Parties—W. E. Mackintosh. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Second and Third Parties—Chree. Agent—W. K. Aikman, W.S.

Tuesday, January 22.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON'S TRUSTEE *v.* ROBERTSON.

Husband and Wife—Donatio inter virum et uxorem — Provision — Revocation — Bankruptcy.

A husband who had executed no antenuptial marriage-contract, granted an assignation, whereby "in order in so far to supply that defect, and make provision" for his wife, he conveyed to her certain leasehold subjects (occupied by him as a residence) with immediate entry thereto, a policy of life insurance for £100, and his household furniture. These subjects, together with a sum of £459, which he subsequently uplifted from bank and delivered to his wife, constituted his whole means. At the date of the assignation the husband's private estate was solvent, but he was liable for the debts of a mercantile business belonging to a trust-estate on which he was a trustee. This business was in financial difficulties. The trust estate and the estate of the husband were subsequently sequestrated.

Held (*rev.* Lord Kincairney, Ordinary, *diss.* Lord Young) that the assignation was a *donatio inter virum et uxorem*, revocable by the husband, and therefore reducible at the instance of the trustee in his sequestration.