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

Harrold Cormack, Romford, the sum of two hundred pounds sterling; to my grandson Levi Carter Cormack, Nevada, two hundred and fifty pounds sterling; to my grandson William Peter Cormack, Nevada, U.S.A., two hundred and fifty pounds sterling; to my niece Amelia Sutherland or Bryden, Bruan, one hundred and fifty pounds sterling; to my niece Jessie Sutherland, Latheronwheel, the sum of one hundred and fifty pounds sterling; to my niece Elizabeth Sutherland, Lybster, the sum of one hundred and fifty pounds sterling; to my nephew Alexander Sutherland, draper, Lybster, the sum of two hundred pounds sterling; to my nephew Donald Sutherland, merchant, Latheronwheel, the sum of two hundred pounds sterling; to my daughter-in-law Mrs John Cormack, Romford, the sum of one hundred pounds sterling; to Jessie Paton, Latheronwheel, the sum of fifty pounds sterling; to Lizzie Paton, Holyoke, the sum of fifty pounds sterling; to each of the four children of my late nephew Rev. David Sutherland, Charlottetown, the sum of fifty pounds sterling; to each of the four children of my niece Mrs Amelia Sutherland or Bryden, Bruan, the sum of fifty pounds sterling; to my maid Barbara Waters the sum of fifty pounds sterling; to Catherine Adamson or Budge (address unknown), the sum of ten pounds sterling. I also leave and bequeath all valuations and compensations payable by landlord, or due to me for outlays on dwelling-house, croft, &c., occupied by me at Newton Swiney, with farm stock, implements, furniture, napery, and personal effects and clothing, with all farm produce to my three nieces (my late sister's daughters) Amelia, Jessie, and Elizabeth, each of them to share and share alike: they, before sharing same, to give my nephews Alexander and Donald Sutherlands anything out of the dwelling-house they would like to have. If any of my nieces have trouble in nursing me at my death, they must be paid first along with all just debts and funeral expenses. I leave and bequeath the sum of one hundred pounds sterling to Dr Barnardo's homes in London. Also I bequeath the sum of fifty pounds sterling to the National Bible Society of Scotland, the same to be paid free of legacy duty. I hereby nominate and appoint my nephew Alexander Sutherland, draper, Lybster (failing whom from any cause, Donald Sutherland, merchant, Latheronwheel) to be my sole trustee and excutor, to do all that is competent for an excutor to do by the laws of Scotland. Further declaring that in the event of any dispute arising about the succession to these bequest, said trustee and excutor shall interpret my wishes, determine the matter in dispute, and his decision shall be final. 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 Amelia, Jessie, and Elizabeth. I reserve my own life use of the whole estate and effects hereby conveyed, and power at any time to alter or revoke the presents in whole or in part as I think proper. In witness whereof I subscribe these presents written on these pages by mine own hand at Newton Swiney, Lybster, on the seventeenth day of July, Nineteen hundred and nine years.

"CATHERINE ADAMSON or CORMACK."

On 9th February 1912 the Sheriff-Substitute (TROTTER) found "that the trust-disposition and settlement of Mrs Catherine Adamson or Cormack, mentioned in the petition, dated 17th July 1909, and registered in the Sheriff Court books of Caithness 16th July 1910, imports a conveyance of the whole means and estate of the said Mrs Catherine Adamson or Cormack, including the subjects set forth and described in the petition, to Alexander Sutherland as trustee under and appointed by said trust-disposition and settlement: Therefore, and also in respect the petitioners do not found on and produce a disposition or conveyance by the said Alexander Sutherland, as trustee foresaid, in their favour of the subjects described in the petition, refuses the prayer of the petition, and dismisses the petition, and decerns."

The petitioners appealed to the Court of Session.

When the appeal came before the Second Division the Court ordered intimation to be made to the heir in heritage of the testator John Harold Cormack, who lodged answers in which he denied that the terms of bequest were habile to convey heritage, or that the one half *pro indiviso* share of the heritable property set forth and described in the petition formed part of the residue thereby conveyed.

Argued for the petitioners—The settlement was habile to convey heritage. The preamble could only be interpreted as a universal will, and if such was the testatrix's intention there was nothing to contradict it in the rest of the will. The testatrix appointed a trustee as well as executor, and this was more consistent with a desire to convey heritage. Further, the reservation of the liferent of the estate and effects must mean the whole estate, and the word residue must mean the residue of the whole estate. It was not probable that the distinction between heritage and moveables would be present to the lady's mind. The construction given by the Court to similar expressions supported this view—*M'Leod's Trustees* v. *M'Leod*, February 28, 1875, 2 R. 481, 12 S.L.R. 349, "the whole residue of my estate"; *M'Leod's Trustee* v. *M'Luckie*, June 28, 1883, 10 R. 1056, 20 S.L.R. 714, "the remainder of my property wherever situated"; *Forsyth* v. *Turnbull*, December 16, 1887, 15 R. 172, 25 S.L.R. 168, "means and effects"; *Wallace's Executors* v. *Wallace*, November 21, 1895, 23 R. 142, 33 S.L.R. 87, "residuary legatee"; *Copland's Executors* v. *Milnes*, 1908 S.C. 426, 45 S.L.R. 314, "whole estate"; *Jack's Executor* v. *Downie*, 1908 S.C. 718, 45 S.L.R. 545, "residue of my estate"; *Crowe* v. *Cook*, 1908 S.C. 1178, 45 S.L.R. 904, "remainder." The case of *Edmond* v. *Edmond*, January 30, 1873, 11 Macph. 348, 10 S.L.R. 210, founded on by the minuter, was not relevant because it was property in

money bonds and debts. The other cases founded on by the minuter were special.

Argued for the respondent—The will did not carry heritage. The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), while it did away with words of conveyance *de præsenti*, still required words referring to such lands—*Pitcairn* v. *Pitcairn*, February 25, 1870, 8 Macph. 604, 7 S.L.R. 328. In all the cases founded on by appellants there was to be found either a conveyance to executors or trustees or a direction to sell or realise, or words sufficiently general to cover heritage. In the present will the preamble was neutral and equivocal. The word "affairs" was primarily applicable to moveables, and the appointment made was simply the appointment of an executor. The word "residue" was relative, and referred back to what the testatrix was dealing with. The word "residue" was not appropriate to heritable property unless there was a direction to sell and realise; and lastly, the words "whole estate and effects," on which appellant founded, referred back to "residue"—*Edmond* v. *Edmond, cit. sup.*; *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026, 16 S.L.R. 602; *Grant* v. *Morren*, February 22, 1893, 20 R. 404, 30 S.L.R. 442. In a testament like the present the word "estate" was presumed to mean moveables only—M'Laren on Wills, i, 332. In *M'Leod's Trustees* v. *M'Leod, cit. sup.*, there was an express direction to realise all heritable and moveable property. In *M'Leod's Trustees* v. *M'Luckie, cit. sup.*, there was a direction to sell wherever situated. In *Forsyth* v. *Turnbull, cit. sup.*, there was a direct bequest. To carry heritage under "residue" there must be a direction to sell—*Bell and Others* v. *Bell and Others*, July 19, 1906, 14 S.L.T. 244.

Lord Dundas—The first question, and indeed in the view which I take of this case the only question, which we have to decide is whether the testamentary disposition of the late Mrs Cormack carried the heritable subjects which were vested in her at her death, or whether there was intestacy with regard to them. The disposition bears to be holograph of the testatrix, but its language suggests to one that it probably was not her own unassisted handiwork. We must consider whether the instrument is habile to convey heritage — whether Mrs Cormack's intention, as it may be gathered from the language used, was to do so or not. Our answer must, in my opinion, be in the negative; and I shall state as briefly as I can my reasons for this conclusion.

I turn at once to the disposition, and shall notice the clauses which seem to make for one or other of the two views. The preamble narrates a resolution "to provide for the settlement of my affairs in the event of my death, and to prevent all disputes regarding same." Mr Anderson seized on these words as importing a universal settlement of the whole estate, of whatever kind. I think that this is asking too much of the words, which are, after all, common words of style. They must, of course, be construed, but I do not think they necessarily imply a disposition of estate of every kind. To see whether or not they were intended to do so, we must read them in connection with the other clauses of the deed which follow. The testatrix goes on to leave a number of money legacies to various persons; then she bequeathes all valuations and compensations due to her in respect of the croft she occupied, and stock and personal effects; and then come more legacies of money. All her bequests are of a pecuniary nature, and of no other. Then she appoints her nephew "to be my sole trustee and executor, to do all that is competent for an executor to do by the laws of Scotland." In many of the cases on this branch of the law the use of the word "trustee" or "executor" figures in the discussion. The word "executor" points *prima facie* to a disposition of moveables, and the mere collocation of the word "trustee" has been held not to produce a different result. On the other hand, I do not suppose that the mere fact that an "executor" is nominated would be in itself conclusive. One need only say that the clause here seems rather to favour the view that this disposition is intended to convey moveables only. The testatrix goes on to declare that "if there be any residue after all expenses and legacies are paid, I bequeath the said residue to my three nieces." Mr Anderson founded on the word "residue," but I think "residue" is a flexible term, colourless in itself. It is really identical with "remainder"—what is left over—and may relate to moveable or heritable estate, according to the context and the facts of any particular case. The concluding portion of the instrument contains a reservation of the liferent use of "the whole estate and effects hereby conveyed." Now as to the words "estate and effects," I take it that "effects" is a word importing moveables, while the word "estate" is more flexible and may include heritage. But then the estate and effects are expressly designed as the "estate and effects hereby conveyed," and that necessarily takes one back to find from the language of the settlement as a whole what it was that was truly intended to be conveyed. These are all the clauses which need to be noted; and the points which Mr Anderson founded on were just the four already indicated, viz.—(1) The terms of the preamble; (2) the nomination of a "trustee and executor;" (3) the gift of residue; and (4) the words "estate and effects" in the reservation of liferent. On the other hand, I can find no words of general gift importing a conveyance of the whole estate of every kind, and no language sufficiently indicating an intention to deal with heritage.

I think it would be idle to review the authorities, which are very numerous. Every time they are cited, as they were to-day, it strikes one how fertile they are in judicial doubts, dissents, and reversals. This is not surprising, for it just shows how largely all these cases depend on im-

pressions. They are at best illustrations of the application of general rules which are well understood, and are explained in many of the cases. But each individual case has its own special features which were sufficient to bring down the balance on one side or the other. In the case now before us a consideration of the clauses of the particular deed in question leads me to the conclusion that it is not habile to carry heritable estate.

Mr Anderson admitted that if the Court held this view there was no other question to be decided. I think therefore that we ought to recal the Sheriff-Substitute's interlocutor, find that the heritable subjects in question were not carried by Mrs Cormack's disposition, and of new refuse the prayer of the petition and dismiss it.

LORD GUTHRIE—I concur. We have had an able argument in this case, and my opinion has varied in the course of the discussion. The deed might have contained by a slight alteration words which would have made the testator's meaning clear one way or the other. As an illustration I refer to the words "whole estate and effects," used in the clause of reservation of liferent, which if they had occurred in a clause of conveyance would have carried the heritage. The trouble is that that clause, by the addition of the words "hereby conveyed," merely throws you back to the clause of residue, which says—"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." That seems rather to indicate that what was in the testator's mind was moveable estate. Then there are the introductory words. But these are equivocal. We are then thrown on the other parts of the deed itself, and it is not possible to find in them any words of general gift, which in one form or other are to be found in all the cases to which we were referred. It is true that the tendency in recent decisions has been to endeavour, if the words of the deed make it possible, to hold that the testator intended to deal with his whole estate. It may be that the lady here had that intention, but I am not able to find words under which we can hold that she has carried it out.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Dundas. The features of the deed on which Mr Anderson relied were the testatrix's declaration that she was resolved to provide for the settlement of her "affairs," the bequest of "residue," and the reservation of her liferent of the "whole estate and effects hereby conveyed." But none of these features unequivocally indicate that the testatrix intended that the will should carry her heritage, and looking to the whole will and to the position of these expressions as used in it, I am satisfied that it does not have that effect.

LORD SALVESEN was absent.

The Court recalled the interlocutor appealed against, found that the trust-disposition and settlement of Mrs Cormack was not habile to convey the heritage which belonged to her, and therefore of new refused the petition.

Counsel for the Petitioners (Appellants)—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent — Riach. Agents—W. & J. H. Gunn, S.S.C.

Tuesday, November 26.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

MACKENZIE *v.* FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Reparation—Negligence—Precautions for Safety of Public—Sand-pit in Private Ground—Use of Sand-pit as Playground by Young Children—Injury to Child—Danger not Manifest to Child.

A shipbuilding company owned a sand-pit situated in a piece of ground which adjoined a public path and was separated from it by a hedge. While some children were playing in the sand-pit its wall fell and killed one of them, a girl aged seven years. In an action of damages for the death of the child, brought by her father against the company, the pursuer averred that the hedge was defective, that the sand-pit was in a dangerous condition, that children were in the habit of using it as a playground, and that the defenders allowed them to do so.

The Court (distinguishing *Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92, and *Cummings* v. *Darngavil Coal Company, Limited*, February 24, 1903, 5 F. 513, 40 S.L.R. 389), in respect that the dangerous condition of the sand-pit was not manifest to the child, *held* the action relevant and *allowed* an issue.

On 4th March 1912 John Mackenzie, blacksmith, Govan, *pursuer*, brought an action of damages for £300 for the death of his daughter against the Fairfield Shipbuilding and Engineering Company, Limited, Govan, *defenders*, in which he averred—"(Cond. 2) The defenders are owners and occupiers of a piece of ground situated immediately to the west of their shipbuilding yard on the south side of the river Clyde. The said piece of ground is bounded on the north by a hedge which separates it from a public path along the south bank of the Clyde. The said hedge was on 1st August 1911, and had been to the knowledge of the defenders for a considerable time prior thereto, in a defective condition, in respect that there were a number of gaps in it, some of these being 5 or 6 feet wide. The public were in the habit of going to the said piece of ground through the said gaps, and children were in the habit of playing constantly on said ground