LORD MACKENZIE—If the verdict is one which cannot from any reasonable point of view be reconciled with the weight of the evidence, it cannot stand. The question put to the jury was whether the pursuer was injured through the fault of the defenders, and this they have answered in the affirmative.

I regret to say that in my opinion the jury were not entitled to come to this conclusion. On her own evidence it clearly appears that the pursuer never looked before she attempted to cross the rails on which the tramcar that struck her was travelling; from the evidence of the passenger who followed her she just walked behind the car she had left and struck the front corner of the south-going car. It is therefore clear that the pace at which that car was going is not of moment in this case. I say so because I am of opinion that when the foot-passenger has a clear view he is entitled to rely upon the fact that the car is not going at an excessive speed. There is evidence that the driver of the south-going car failed to take the necessary precaution when passing the other car of sounding his bell. Though evidence upon a point of this kind is open to criticism, the jury were entitled to believe it. Under certain circumstances this might raise a question which would properly be left to the jury, viz., whether the failure to sound the bell or the want of reasonable care on the part of the foot passenger was the *causa causans* of the accident. Such a case is put by Lord Cairns, L.C., in *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*, 3 A.C. at p. 1167. But in that case the accident happened not in the daytime but at night. Here it was daylight, and had the pursuer looked she would have seen the oncoming car. It was her unfortunate omission to do so that was the cause of the accident. The verdict therefore, in my opinion, cannot stand.

LORD HUNTER—I concur. The inference I drew from the evidence was that this unfortunate accident would not have happened had the pursuer exercised that precaution for her own safety which is expected of pedestrians crossing a street.

LORD KINNEAR was absent.

The Court set aside the verdict and assoilzied the defenders.

Counsel for Pursuer—Sandeman, K.C.—MacRobert. Agents—M'Leod & Rose, S.S.C.

Counsel for Defenders—Watt, K.C.—Macmillan, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Wednesday, January 29.

SECOND DIVISION.

COLLINS' TRUSTEES *v.* COLLINS.

Succession—Faculties and Powers—Power of Appointment—Validity of Exercise—Power to Appoint under "Terms and Conditions"—Appointment Partly among Objects and Partly outwith Objects of Powers.

A testator directed his trustees to hold part of his estate for behoof of a son "for his liferent alimentary use allenarly and his children in fee, in such proportions and under such terms and conditions" as his son might appoint, "which failing, equally among such children, share and share alike, the division being *per stirpes*." By his deed of appointment the son, who was survived by three sons and one daughter, directed that part of the fund should be held by trustees for the alimentary liferent of his youngest son, with power on the son attaining twenty-five to pay him the whole or part of the capital thereof, and in the event of his death the appointer directed any balance to be paid to the son's widow in liferent and his children or their issue *per stirpes* in fee, whom failing to his other two sons and his daughter equally, the issue of predeceasers taking their parent's share, and the shares of predeceasers who left no issue accrescing to the survivors *per capita* and the issue of predeceasers *per stirpes*. The appointer further apportioned to his two elder sons such sums as should amount to debts due by him to them, these payments being accepted by them in full satisfaction of such claims. He made a similar apportionment in favour of his daughter, and directed further that the residue should be divided among his two elder sons and his daughter equally, with a similar clause of substitution and accretion. He further directed that the shares of the daughter should be held by trustees for her liferent allenarly and her children equally in fee, the issue of predeceasers taking their parent's share, whom failing to his two elder sons with a similar clause of substitution and accretion. There was further a clause of forfeiture in the event of any child impugning the apportionment thus made. *Held* that the children and issue of children of the appointer's children and the widow of the youngest son were strangers to the power, that the gift to the two elder sons in satisfaction of debts due to them by the appointer was invalid, and that as it was impossible to sever the gifts to objects of the power from the invalid provisions the appointment was wholly invalid.

Opinion per curiam that the statement of contentions in a Special Case

did not bring the parties stating them within the terms of the forfeiture clause so as to forfeit all right to take benefit under the deed of appointment.

William Clark, thread manufacturer, Glasgow, and others, the trustees acting under the trust-disposition and settlement of the deceased Sir William Collins, publisher and stationer in Glasgow, *first parties;* Mrs Cornelia Thompson Pattison or Collins, residing at Annette Lodge, Skelmorlie, and others, the trustees under a deed of direction and apportionment granted by the deceased Alexander Glen Collins, wholesale stationer and publisher in Glasgow, a son of Sir William Collins, *second parties;* William Alexander Collins and Godfrey Pattison Collins, both of 144 Cathedral Street, Glasgow, sons of Alexander Glen Collins, *third parties;* Miss Cornelia Pattison Collins, 68 Gloucester Place, Portman Square, London, the only daughter of Alexander Glen Collins, *fourth party;* the Official Receiver in Bankruptcy, Carey Street, London, W.C., as trustee in bankruptcy on the estate of Charles Glen Collins, a son of Alexander Glen Collins, *fifth party;* and John Walter Collins, residing at Annette Lodge, Skelmorlie, a son of Alexander Glen Collins, with consent and concurrence of his curators, *sixth party*, presented a Special Case for the opinion and judgment of the Court as to the validity of the exercise of a power of appointment by Alexander Glen Collins under his father's, Sir William Collins, trust-disposition and settlement.

The following *narrative* of the *facts* of the case is taken from the opinion of Lord Dundas—"The late Sir William Collins ("the testator") died in 1895 leaving a trust settlement dated in 1892. The first parties to this case are the trustees under that settlement. The testator directed his trustees to hold and divide the residue of his estates, heritable and moveable, as follows—(first) one-tenth for distribution among charitable societies to be selected by his trustees; (second) seven-tenths for and among certain of his children, whom he named; and "(third) the remaining two-tenths shall be held by my said trustees for behoof of my son the said Alexander Glen Collins, in liferent, for his liferent alimentary use allenarly, and his children in fee, in such proportions and under such terms and conditions as the said Alexander Glen Collins may appoint by a writing under his hand, which failing, equally among such children, share and share alike, the division being *per stirpes.*" The trustees, after the testator's death, set apart two-tenths of the residue, amounting to about £7800, and administered the same for the liferent use of Alexander until his death on 19th March 1911. He was survived by his widow and by his children, William, Godfrey, Charles, Cornelia, and John. He left a deed of direction and apportionment. Questions have been raised as to the validity, or the reverse, of that deed. The trustees appointed under it are the second parties to the case. The third parties are the sons William and Godfrey. The fourth party is the daughter Miss Cornelia. The official receiver in bankruptcy appointed on the estate of the son Charles is the fifth party. The son John, aged fifteen, with consent and concurrence of his curators-nominate, is the sixth party."

The *deed* of *direction* and *apportionment* dated 30th June 1910, after narrating the power, *inter alia*, provided—"Therefore I do hereby, *in the first place*, appoint and apportion to my son John Walter Collins (who was born subsequent to the date on which by an *inter vivos* trust settlement I made provision for my four elder children and did not accordingly participate therein) out of said two-tenth shares of residue a sum of four thousand eight hundred pounds sterling, or in his option one hundred and fifty ordinary shares in William Collins, Sons, & Company, Limited, provided that the investments held by the said Sir William Collins' trustees and the circumstances of the trust constituted by the said trust-disposition and deed of settlement at the time permit of this, but declaring that said sum, or the said shares in William Collins, Sons, & Company, Limited, as the case may be, shall be paid over and transferred to and held by my wife Mrs Cornelia Thompson Pattison or Collins, and my sons William Alexander Collins and Godfrey Pattison Collins, both wholesale stationers and publishers in Glasgow, and the survivors or survivor of them, hereafter referred to as 'the said trustees,' whom failing my testamentary trustees at the time in trust for the liferent alimentary use allenarly of my son the said John Walter Collins, they paying to the said Mrs Cornelia Thompson Pattison or Collins for his behoof the whole income derived therefrom, and that until he reaches the age of twenty-five years complete, and on my said son reaching said age, or on the death of my said wife, should that event first happen, they shall thereupon and thereafter pay the said income to him or apply same for his behoof in such manner as they may deem proper: With power to the said trustees or the survivors or survivor of them, whom failing to my testamentary trustees at the time (the approval of my said wife, so long as she survives, being a *sine quo non*), notwithstanding the foregoing limitation of my said son's interest in the share of said residue to that of a liferent alimentary provision to make over absolutely to him on his reaching the age of twenty-five years complete, or at any time thereafter, the whole or such portion of the capital sum of four thousand eight hundred pounds sterling, or of the said shares as the case may be, or of the equivalent investments thereof respectively, as they in their sole discretion may deem right: And in regard to the fee or capital of the said sum of four thousand eight hundred pounds, or the said shares, as the case may be, apportioned to my said son, I hereby declare that in the event of his decease the same or the balance thereof, as the case may be, shall in so far as in the hands of the said trustees or the survivors or survivor of

them, or in those of my testamentary trustees at the time, be paid and made over to his widow in liferent and his children or their issue *per stirpes* in fee should he be survived by such, whom failing to my sons William Alexander Collins and Godfrey Pattison Collins, and my daughter Cornelia Pattison Collins, equally, share and share alike, the issue of predeceasers taking always their parent's share, the shares of any of them predeceasing without leaving lawful issue falling and accrescing in equal proportions to the survivors *per capita* and the lawful issue of predeceasers *per stirpes: In the second place,* I hereby apportion to my sons William Alexander Collins and Godfrey Pattison Collins respectively, and to their respective heirs, assignees, and successors, out of said two-tenth shares of residue, such a sum to each as shall amount to and meet the sum in which I am indebted to them respectively, these payments being made to and accepted by them in full satisfaction of their respective claims for said amounts, and declaring that in no event shall the amount hereby apportioned to each of them respectively exceed a sum of seven hundred and fifty pounds sterling: *In the third place,* I hereby in like manner apportion to my daughter Cornelia Pattison Collins out of said two-tenth shares of residue such a sum as shall meet the amount in which I am indebted to her or the trustees under a deed of trust granted by her of date the nineteenth day of December Nineteen hundred and three, and recorded in the Books of Council and Session the eighth day of January Nineteen hundred and four, and which sum shall be paid and handed over on behalf of my said daughter to the trustees under said deed of trust, and applied by them for the purposes therein set forth: Declaring always that the foregoing apportionment and payment shall be accepted in full satisfaction of the claims of my said daughter or her trustees for said debt, and that in no event shall the amount hereby apportioned to her exceed a sum of seven hundred and fifty pounds sterling: *In the fourth place,* I appoint and apportion to my said daughter Cornelia Pattison Collins out of said two-tenth shares of residue a sum of one thousand six hundred pounds sterling, or in her option fifty ordinary shares in William Collins, Sons, & Company, Limited, provided that the investment held by the said Sir William Collins' trustees, and the circumstances of the trust constituted by the said Sir William Collins' trust-disposition and deed of settlement at the time permit of this: *Lastly,* with regard to the whole rest and remainder of the said two-tenth shares of the residue of the estate of my said father, I hereby appoint and apportion same to and among my sons the said William Alexander Collins and Godfrey Pattison Collins, and my daughter the said Cornelia Pattison Collins, equally among them, share and share alike, the lawful issue of predeceasers taking always their parent's share, and the share of any of them predeceasing without leaving lawful issue falling and accrescing in equal proportions to the survivors *per capita* and the lawful issue of predeceasers *per stirpes:* And with regard to the whole funds and estate hereby apportioned to my daughter the said Cornelia Pattison Collins, I hereby specially provide, appoint, and declare that the same shall, except as before provided, be paid over to and held by the said trustees, whom failing my testamentary trustees at the time, for her liferent alimentary use allenarly, not assignable by her nor affectable by her debts or deeds, nor subject to the diligence of her creditors, the said trustees or the survivors or survivor of them, or my testamentary trustees at the time, paying to her or applying for her behoof the income or revenue derived therefrom, and that during all the days and years of her life: And on the death of my said daughter I hereby direct that the capital or fee of the share of said residue apportioned to her shall be paid and made over equally share and share alike to and among her lawful children should she be survived by such, the lawful issue of predeceasers taking always their parent's share, whom failing to my sons the said William Alexander Collins and Godfrey Pattison Collins equally between them share and share alike, the lawful issue of both taking always their parent's share and the share of either of them predeceasing my said daughter without leaving lawful issue falling and accrescing to the other or his lawful issue *per stirpes:* . . . And I do hereby specially provide and declare that should any one of my said sons or my daughter in any manner of way quarrel or impugn the apportionment hereby made or the conditions attached by me to same, or should any person or persons in right of or as representing any of my said sons or my daughter in any manner of way interfere or seek to interfere in the arrangements hereby made by me, then and in that event the son or daughter so quarrelling or impugning the same, or in regard to whose share any interference takes place, shall forfeit all share and interest in the apportionments hereby made, and that to the same effect as if I had entirely excluded him or her from any share in the succession to the said two-tenth shares of the residue of my said father's estate: Declaring further, that the share or shares so forfeited or lapsing shall fall and accresce in equal proportions, share and share alike, to and among my remaining children before named and their respective foresaids, exactly as if the same had been directly given to them along with the sums originally apportioned as aforesaid, and subject to all the conditions applicable to same."

The *questions of law* for the opinion of the Court were — "1. Is the appointment of the said two-tenths of residue contained in the said deed of direction and apportionment (*a*) wholly valid or (*b*) only partly valid or (*c*) wholly invalid? 2. (*a*) Is the fourth party entitled to the fee of the said sum of £1600, or equivalent shares, and of one-third of the whole rest and remainder

of the said two-tenths of residue free in each case of all restrictions? or (*b*) Do the said sum of £1600 or equivalent shares and the said one-third of the said whole rest and remainder of the said two-tenths of residue fall to be held by the second parties for the liferent alimentary use of the fourth party, and on her death to be paid and made over by them in fee, in conformity with the directions contained in the last place in said deed of direction and apportionment? 3. (*a*) Is the sixth party entitled to the fee of the said sum of £4800 or equivalent shares free of all restrictions? or (*b*) Has there been a valid restriction of the interest of the sixth party in the said sum to an alimentary liferent? 4. (*a*) Are the third parties entitled each to the fee of such sum not exceeding £750 as the said Alexander Glen Collins was due to each of them at his death, and of one-third of the whole rest and remainder of the said two-tenths of residue? (*b*) In the event of the appointments in favour of the fourth and sixth parties contained in the first and fourth clauses of the said deed of direction and apportionment being held to be entirely invalid, do the sums so appointed to them fall into the rest and remainder of the fund, and are the third parties each entitled to one-half or otherwise to one-third thereof? 5. If the third alternative of the first question be answered in the affirmative, Does the fee of the said two-tenths share of residue now fall to be divided equally among the five children of the said Alexander Glen Collins? 6. Have the fourth and sixth parties, by reason of their contentions in this case, quarrelled or impugned the apportionment made by the said Alexander Glen Collins by the said deed of direction and apportionment or the conditions attached by him to the same to the effect of forfeiting all right on the part of the said parties to take any benefit under the apportionment contained in the said deed?"

Argued for the second and third parties—The appointment was valid except the provision of a liferent to the widow of the sixth party, who was outside the favoured class. Otherwise the power was so wide that it extended to children's issue and liferent, and, with the exception of the widow, all the persons appointed were objects of the power. "Children" was an elastic term, and the testator evidently contemplated that his own children might fail leaving issue—*Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, 31 S.L.R. 279; *in re Smith*, 1887, 35 Ch. D. 558. If, however, the appointment was not valid in all respects, then at least the gift of a liferent to Cornelia and to John Walter, and the gift over to the other sons, were good, they being also objects of the power. The restriction to an alimentary liferent in the case of one object of the power was good if the gift of the fee were to another object of the power — *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; *Pringle's Trustees* v. *Pringle*, 1913 S.C. 172, 50 S.L.R. 74; *Dalziel* v. *Dalziel's Trustees*, March 9, 1905, 7 F. 545, 42 S.L.R. 404. Where a liferent was interposed in favour of someone who was not an object of the power, the gift might still be good so far as it favoured objects of the power, the invalid gift being simply treated as *pro non scripto*—*Matthews Duncan's Trustees* v. *Matthews Duncan*, February 20, 1901, 3 F. 533, *per* Lord Adam at p. 539, 38 S.L.R. 401; *Warrand's Trustees* v. *Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R. 273. If the invalid gift of a liferent to the widow were omitted, the deed still remained workable—*Middleton's Trustees* v. *Middleton*, July 7, 1906, 8 F. 1037, *per* Lord Stormonth Darling at p. 1043, 43 S.L.R. 718. The gifts of the "sums in which I am indebted" to the third parties were valid if accepted by them—Sugden on Powers, p. 526. The forfeiture clause was valid, and therefore the fourth and sixth parties who were impugning the limitations imposed on them and claiming the fee could take nothing—*Webb* v. *Sadler*, 1873, L.R., 8 Ch. 419.

Argued for the fourth party—There was no authority for giving effect to the forfeiture clause, and it would be contrary to public policy to enforce it. It was impossible to say that the will was impugned by bringing a special case to find what it meant. The restriction of the fourth party's share to a liferent was an invalid condition which should be treated as *pro non scripto* leaving her to take the fee unfettered—*M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, 12 S.L.R. 409; *Middleton's Trustees* v. *Middleton* (*cit. sup.*); Farwell on Powers, p. 292. Grandchildren were not objects of the power, and even the use of the words *per stirpes* would not bring them in—*Dalziel* v. *Dalziel's Trustees* (*cit. sup.*) *per* Lord President at p. 553, *approving Neill's Trustees* v. *Neill* (*cit. sup.*). The only power given was to apportion among children on such terms as the appointer thought best. If grandchildren were brought in, it must be under very special powers and wide enabling words such as "restrictions" or "limitations." It had been held that "restrictions" included the power to reduce to a liferent with a power of disposal, and in that respect it differed from "conditions," which could not alter the gift—*Ewing's Trustees* v. *Ewing*, 1909 S.C. 409, 46 S.L.R. 316; *Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14, 18 S.L.R. 36; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921, 28 S.L.R. 709; *MacGillivray's Trustees* v. *Watson's Trustees*, 1911 S.C. 1103, 48 S.L.R. 887.

Argued for the sixth party—The liferent to the widow and the fee to the children of the sixth party were both invalid, since these parties were not objects of the power —*Neill's Trustees* v. *Neill* (*cit. sup.*). But these restrictions were easily separable, and therefore they could and should be ignored, leaving the sixth party to take the fee of the whole provision—*Middleton's Trustees* v. *Middleton* (*cit. sup.*); *M'Donald* v. *M'Donald's Trustees* (*cit. sup.*); *Carver* v. *Bowles*, 1831, 2 Russ. & My. 304. In the

case of *Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, 27 S.L.R. 338, founded on by the fifth party, no such severance was possible. The invalidly appointed fund simply fell into residue—*Best's Trustees* v. *Reid*, November 3, 1885, 13 R. 121, 23 S.L.R. 82. Alternatively the sixth party maintained that the deed should be held good with its restrictions, rather than that it should be held bad altogether.

Argued for the fifth party—The exercise of the power was totally invalid. The invalid conditions were so bound up with the initial gift as to make their efficacy a condition of the gift—*MacGillivray's Trustees* v. *Watson's Trustees*, 1911 S.C. 1103, *per* Lord Dundas at p. 1108, 48 S.L.R. 887; *Gillon's Trustees* v. *Gillon*, *cit. sup.*; *Baikie's Trustees* v. *Oxley & Cowan*, February 14, 1862, 24 D. 589. *M'Donald* v. *M'Donald's Trustees*, *cit. sup.*, and *Middleton's Trustees* v. *Middleton*, *cit. sup.*, only apparently infringed this rule, but these were not cases in which a part of the fee had been given to non-objects of the power. The distinction was that if a part of the fee was given to non-objects of the power the appointment was wholly bad, but if the whole fee was given to objects and invalid conditions adjected, these would be held *pro non scriptis* and the appointment good—*Lord Inverclyde's Trustees* v. *Lord Inverclyde*, 1910 S.C. 420. The present case belonged to the former category, and this interpretation was confirmed by the terms of the forfeiture clause.

At advising—

LORD DUNDAS—[*After a narrative of the facts*]—The first and principal question put to us is whether the appointment of the said two-tenths of residue contained in the said deed is (*a*) wholly valid, or (*b*) only partly valid, or (*c*) wholly invalid.

No argument was seriously maintained to us in favour of (*a*); it scarcely could be, because the introduction of the granter's widow as a contingent liferentrix was plainly *ultra potestatem*. But a dispute under (*b*) was maintained, whether or not children of the children of Alexander Collins (the donee of the power) were proper objects of it. I am of opinion that they are not. The testator's trustees are expressly directed to hold and divide the two-tenths of the residue for behoof of Alexander for his liferent alimentary use allenarly, "and his children in fee," subject to his appointment. It was only failing such appointment that the truster's destination "among such children, share and share alike, the division being *per stirpes*," could become operative. Further, even if the provision had been to Alexander in liferent alimentary and to "his children *per stirpes* in fee"—a phrase, strictly speaking, meaningless—there is authority for holding that children of his children would be strangers to the power—*Neill's Trustees*, 1902, 4 F. 636. If this view is correct, it seems plain that the deed of appointment is to a very large extent *ultra potestatem*. It begins by appointing and apportioning to the granter's son John a sum of £4800, but goes on immediately to declare that that sum is to be held in trust for him for his liferent alimentary use allenarly, and to destine the fee of the £4800 to his widow in liferent and his children or their issue *per stirpes*, whom failing to William and Godfrey and Miss Cornelia equally, the issue of predeceasers taking always their parent's share, the shares of any of them predeceasing without leaving issue falling and accruing to the survivors equally *per capita* and the issue of the predeceasers *per stirpes*. The widow and the children and issue of children of John, William, Godfrey, and Cornelia are all, as I hold, strangers to the power. Nor is it of any avail to argue that William, Godfrey, and Cornelia, who are proper objects of it, might, in possible circumstances, take the fee; for the whole of the complex declarations must be read together, and must stand or fall as a whole (see, *e.g.*, Lord Kyllachy's opinion in *Middleton's Trustees*, 1906, 8 F. at p. 1042). In the same way, though a sum of £1600 is by the deed appointed to Miss Cornelia, it is declared that it shall be held in trust for her for her liferent alimentary use allenarly, and the fee is destined in a manner similar to that just described and open to the same objections. Again, the apportionment to William and Godfrey respectively of "such a sum to each as shall amount to and meet the sums in which I am indebted to them respectively, these payments being made to and accepted by them in full satisfaction of their respective claims for said amounts, and declaring that in no event shall the amount hereby apportioned to each of them respectively exceed a sum of £750 sterling," seems to come in effect to no gift or appointment at all.

But it was urged that, assuming parts of the deed of appointment to be *ultra vires* of the granter, these could, and ought to be, severed from the rest and treated *pro non scriptis*. Counsel founded upon the latter branch of the "plain rule" laid down by the Lord Chancellor (Cairns) in *M'Donald* (1875, 2 R. (H.L.) 125, *reg.* 1874, 1 R. 794), "that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions." The rule thus laid down is authoritative; and the latter branch of it was expressed even more succinctly by Lord Kyllachy in *Middleton's Trustees* (*supra cit.*) at p. 1043. But it seems to me that the present case falls under the first rather than under the second part of Lord Cairns' rule. It is manifest that if

one attempts to sever the invalid portions of this deed from the rest, a relatively small part of it would be left standing. This was demonstrated when Mr Moncrieff in his clear and able argument indicated precisely through what parts of the instrument it would, on his own showing, be necessary to draw one's pen. But what appears to me to afford an unassailable basis for the view that this deed of appointment must be regarded as wholly invalid is the remarkable clause by which the granter specially provides and declares that should any of his said sons or his daughter in any manner of way quarrel or impugn his apportionment or the conditions he attached to it, or should any person representing any of his said children seek to interfere in the arrangements made by him, the child or person so quarrelling and impugning or seeking to interfere should forfeit all share or interest in the apportionments. The clause is, as far as I know, or as counsel could inform us, unique in an instrument of this kind. Its effect is, to my mind, to remove any doubts one might otherwise have entertained as to the possibility of severing, in the construction of this deed, gifts to objects of the power from invalid provisions, conditions, and declarations with which they are intermingled. The appointer himself has welded the mass of his instrument into an indissoluble whole. I think the provisions and declarations are so coupled and bound up with the gifts, such as they are, as to make their efficacy a condition of the gifts; and the result must be that the whole apportionment is invalid. I am therefore for answering head (*c*) of the first question in the affirmative.

I should here notice a separate argument which it was sought to base upon the forfeiture clause, but which is, in my opinion, quite untenable. It was suggested that the fourth and sixth parties, by reason of their contentions in this case, have quarrelled or impugned the deed of appointment and thus forfeited all right to take benefit under it. I think the argument is futile. It is obvious that the fifth party, at all events, who takes no benefit under the instrument, and is outside the scope of the clause, could with impunity raise in Court any questions he thought fit as to the construction and meaning of the deed. The trustees also are manifestly entitled to obtain any necessary directions from the Court for their own safety in the matter. I cannot conceive that if the trustees had raised a multiplepoinding — and a special case of this kind is in substance the same — the fourth and sixth parties could have been held to imperil (indeed, *eo ipso*, to forfeit) their right to benefit under the deed in question by stating their views as to its proper meaning and construction, and claiming shares of the fund upon the footing that their contentions were well founded. The argument on this head was not very vigorously pressed, and I shall say no more about it.

It would serve no good end to review the numerous authorities referred to at the discussion. Each case of this kind must be decided upon a construction of the particular document or documents involved. Nor, if the view I take of this case is well founded, need we now attempt to define precisely how far the old Scots doctrine has been abrogated, about which Lord Deas (*Baikie's Trustees*, 1862, 24 D. at p. 598), after observing that it was plain that the law of England differed in some respects from that of Scotland on this matter, said—"For instance, I agree with your Lordships that if the deed of appointment is to be set aside at all, it must, according to our law and practice, be set aside *in toto*, and the whole fund be equally divided. It would not be easy for any Scotch lawyer to doubt that"—the reason being, as Lord Curriehill in the same case explained (p. 596), "that you cannot tell what appointment the party entrusted with the power would have made had he known that what he attempted to do was to some extent at least inept." (See also *Watson* v. *Marjoribanks*, 1837, 15 S. 586, *per* Lord Mackenzie at p. 591.) The old rule—clear and simple, though liable perhaps to lead in some cases to unfortunate results—was certainly modified by Lord Cairns' "plain rule," already quoted, derived from *Carver* v. *Bowles* (1831, 2 Russ. & My. 301), and other English cases. Lord Cairns (2 R. (H.L.) at p. 131, foot) stated this rule to be "beyond all doubt," and that it was not in any way disputed at their Lordships' bar; and Lord Selborne observed that the English cases were determined "on principles which if sound in England must be equally so in Scotland" (*ib.* at p. 135); but it is perhaps worth noticing that no Scots counsel seem to have been present. The precise extent to which the old rule was abridged or modified is not so plain. In *Gillon's Trustees* (1890, 17 R. 435) the case of *Baikie's Trustees* and Lord Curriehill's opinion in it were cited by Lord Rutherfurd Clark as conclusive authority. But the observations of that very learned Judge must, of course, be read *secundum subjectam materiem*; and the facts of *Gillon's* case certainly did not admit of the application of the rule of *Carver* v. *Bowles*, for no part of the fee of the fund there to be "divided" was given to any object of the power. It may be that, as was argued by one of the counsel in the present case, the old Scots rule has never been gone back upon where the whole fee is not apportioned to proper objects of the power, but part of it is given to a stranger. However this may be, we are not now called upon, if the view I take of this case is right, to solve a problem which may sooner or later come up for definite determination.

On the whole matter I think we ought to answer head (*c*) of the first question, and also the fifth question, in the affirmative, and all the other questions in the negative.

LORD SALVESEN, LORD GUTHRIE, and the LORD JUSTICE-CLERK concurred.

The Court answered head (*c*) of the first question of law and question 5 in the

affirmative, and answered all the other questions of law in the negative.

Counsel for the First Parties—Clyde, K.C.—D. P. Fleming. Agents—Drummond & Reid, W.S.

Counsel for the Second and Third Parties—Macmillan, K.C.—Strain. Agents—Watt & Williamson, S.S.C.

Counsel for the Fourth Party—Ingram—Mitchell. Agents—Mackenzie & Fortune, S.S.C.

Counsel for the Fifth Party—Sandeman, K.C.—J. A. T. Robertson. Agents—J. & R. A. Robertson, W.S.

Counsel for the Sixth Party—Moncrieff, K.C.—Hon. W. Watson. Agents—J. & A. F. Adam, W.S.

Friday, January 31.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

DARNGAVIL COAL COMPANY, LIMITED *v.* FRANCIS (SURVEYOR OF TAXES).

Revenue—Income Tax—Sale on Hire—Profits—Deductions—Hiring Agreement for Waggons with Option to Purchase.

A coal company made an agreement with a waggon company under which the coal company agreed to pay for ten years a certain yearly sum for a certain number of waggons. The coal company bound themselves to keep the waggons, which were to be at their risk, in good repair. At the end of the ten years the coal company were to have the option of purchasing the waggons at the nominal price of one shilling per waggon.

Held that in striking the profits of the coal company for purposes of income tax, there must be allowed as deductions that portion of the yearly payments which represented the consideration paid by the coal company for the use of the waggons, but not that which represented the consideration paid for the option to purchase.

The Darngavil Coal Company, Limited, *appellants*, appealed to the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to Inhabited House Duties for the Middle Ward of Lanark, against assessments under Schedule D of the Income Tax Acts for each of the years ending the 5th April 1910, 1911, and 1912, in respect of the profits of their business as coalmasters carried on in the parish of New Monkland, in the county of Lanark, and claimed deductions from the respective assessments in respect of payments made under certain agreements in the circumstances set forth below.

The Commissioners, after hearing parties, were of opinion that the transaction in question was a purchase by instalments and dismissed the appeal.

The Darngavil Coal Company were dissatisfied with this determination, and required the Commissioners to state a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Case stated, *inter alia*—"The following *facts* were admitted or proved:—(1) The appellant company carry on the business of coalmasters, and in the course of such business they have to convey the coal from the collieries to their customers in railway waggons. (2) In order to obtain waggons for this purpose the appellant company has from time to time entered into agreements in the form of the agreement between them and the Scottish Waggon Company, Limited, of which a copy is annexed hereto. [See *infra.*]

"In particular they have entered into the following agreements with the Scottish Waggon Company, Limited, viz.:—

No. of agreement.	Date.	No. of Waggons.	Period of Years.	Annual Payments.
1	19th Feb. 1902	50	7	£550. This agreement was duly carried through and the waggons in due course became the property of the company.
2	30th Aug. 1906	25	10	£223, 4s. 7d. This agreement is still running.
3	30th March 1909	100	10	£801, 5s. This agreement is still running.

These agreements were in existence during the years on the profits of which the assessments under appeal fall to be computed. . . . (4) The waggons comprised in the three agreements referred to above were all new at the date of the respective agreements, and they have not been the subject of any prior or subsequent agreement. (5) At the termination of the respective agreements the various waggons, the subject thereof, having regard to the average life and rate of depreciation applicable to such waggons, had or will have a substantial value in excess of the one shilling referred to in clause vii of the agreements. (6) In the appellant company's own accounts the whole of the annual payments paid under the agreements have been treated as an expense of carrying on the business and have been debited to the waggon revenue account. . . . (7) In the returns for income tax assessment, however, the appellant company have divided the said payments between revenue and capital, and have deducted as a trading expense that portion only of the annual payments which the Scottish Waggon Company, Limited, certified had been treated by them as revenue and had entered into the computation of their profits for income tax assessment. . . . (9) Prior to 29th May 1909, at which date the Secretary of Inland Revenue, Somerset House, London, issued to H. M. Surveyors of Taxes the circular of which a copy was produced to the Commissioners, . . . it was the practice of H. M. Surveyors