tion that a general disposition and settlement is to be construed as including all estate over which the testator had a power of appointment. I concur, therefore, in Lord Dundas's opinion, and very much for the reasons he has assigned.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred with LORD DUNDAS.

The Court answered the question of law in the affirmative.

Counsel for the First, Second, and Third Parties—Valentine. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Fourth and Fifth Parties—T. G. Robertson. Agent—A. Stuart Watt, W.S.

HOUSE OF LORDS.

Friday, July 26.

(Before Lord Macnaghten, Lord Atkinson, and Lord Shaw.)

JOHNSTONE *v.* MACKENZIE'S TRUSTEES.

(In the Court of Session, December 23, 1910, 48 S.L.R. 256, 1911 S.C. 321.)

Succession — Testament — Construction — "Liferent Use and Enjoyment" of House —Liferent or Occupancy—Public Burdens.

A testator conveyed his whole estate to trustees for the following purposes — (*a*) payment of debts and "the expenses of executing this trust"; (*b*) giving the widow "the liferent use and enjoyment of my dwelling-house . . . together with the whole household furniture and plenishing therein at the time of my death . . . without, however, any obligation upon her to replace articles broken or perishing with the using . . . and in the event of the said dwelling-house . . . being sold by my trustees, as they are hereby with the consent of my said wife empowered to do, they shall pay to her the annual income of the price . . . obtained therefor during all the days of her life, declaring that the said liferent provisions shall be for the alimentary use of my said wife, and shall not be assignable by her or affectable by the diligence of her creditors"; (*c*) payment to the widow, in name of aliment allenarly, of an annuity at the rate of £500 per annum; (*d*) payment of two legacies to two brothers; (*e*) payment, after setting aside the sum of £20,000 to provide for the foresaid annuity, of one-half of the residue to the widow, and the other half in certain proportions to the two brothers, and, on the death of the widow, of the dwelling-house and the sum set aside to provide the annuity and "any surplus revenue accrued thereon" in the same proportions to the two brothers.

Held (*rev.* decision of the Second Division) that the widow's interest in the house was a liferent, not a right of occupancy, and consequently that she was liable for feu-duty, proprietor's taxes, and landlord's repairs.

This case is reported *ante ut supra.*

The defenders, Mackenzie's Trustees, appealed to the House of Lords.

At delivering judgment—

LORD SHAW—By the trust settlement of the late James Whitelaw Mackenzie he provided "that my trustees shall give to my said wife in the event of her surviving me during all the days of her life the liferent use and enjoyment of my dwelling-house No. 9 Glencairn Crescent, Edinburgh, or of such other house as shall at the time of my death be my residence in Edinburgh and belong to me, together with the whole household furniture and plenishing therein at the time of my death, including books, pictures, linen, china, plate, plated articles, and others, without, however, any obligation on her to replace articles broken or perishing with the using, and in the event of the said dwelling-house and the whole or any part of the said household furniture or plenishing being sold by my trustees, as they are hereby, with the consent of my said wife, empowered to do, they shall pay to her the annual income of the price or prices obtained therefor during all the days of her life."

The question which arises in this case is whether Mr Mackenzie's widow (now Mrs Johnstone) is liable for payment of feu-duty, proprietor's taxes, and landlord's repairs on this house 9 Glencairn Crescent, Edinburgh.

The expression "my trustees shall give to my said wife in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of my dwelling-house," is, as was admitted at your Lordships' Bar, a direction in terms which are perfectly apt to give a liferent in the ordinary sense. Even if the question were one of feudal conveyancing, the expression "the liferent use and enjoyment" would appear to be language suitable to express the constitution of a liferent. But, occurring as they do in the course of an ordinary trust settlement, these words are adopted as language familiar for generations in Scotland and used in setting up a liferent right. As we were informed at the Bar, they so occur in the "Juridical Styles" from its earliest edition.

The consequences which attach to such a liferent are also familiar. The subject must be enjoyed *salva rei substantia.* Upon the subject of annual charges (on the hypothesis that what is really a liferent has been given) there is little ground for dispute. In the language of Erskine (ii, 9, 61), "Liferenters, as they are entitled to the profits, must also bear the burdens attending the subject liferented, as taxations, duties payable to the superior, ministers' stipends, and the other yearly payments chargeable on the lands which may fall due during the liferent." Mr

More, in his Notes to Stair (ccxv), puts the proposition simply, "The liferenter is bound to pay all the annual and ordinary burdens which are exigible from the property liferented by him." And in Mr Guthrie's edition of Bell's Principles the language employed is "The right of the liferenter" (on which the learned editor Mr Guthrie interpolates the parenthesis "unless exempted by the terms of the grant") "is subject to the burden of the public taxes, feu-duties, ministers' stipend, &c., during the liferent." An old report of Fountainhall (3rd Supplement, p. 33) refers learnedly to the *corpus juris* upon the subject, and with some quaintness sums up, "and really it cannot be thought rational that the fiar shall bear the burdens imposed *intuitu* of land whereof he is not in possession but debarred by liferenters. Natural equity provides *ut eum sequantur incommoda qui habet commoda.* They who reap the emolument ought not to grudge *onus ei annexum.*" I have only cited these authorities because of a somewhat full argument presented to your Lordships' House, which appeared at times to suggest that there was doubt in the law of Scotland on the subject of the liferenter's liability. That doubt is without warrant.

Nor does it appear to me that there is any foundation for the proposition that the obligations of a liferenter are less or more according as the liferent is a gift direct or is a gift conveyed through the interposition of a trust. There is no decision which sanctions such a distinction. There seems nothing in the form in which the right is conveyed which should alter the obligations attached to the gift, and I do not see my way to hold that considerations as to the possibility, or otherwise, of the liferent being feudalised by infeftment have any bearing upon the topic under consideration. None of the Judges in the Courts below took such things into account.

The true and only question is whether a liferent right, to which the obligations that I have mentioned would undoubtedly attach, has been here created, or whether, on the contrary, what Mr Mackenzie conferred upon his wife was not a liferent but a mere right of occupancy of his house. The respondents maintain that it was the latter. In support of that view they appeal with much force to the series of cases enumerated in the opinion of the learned Lord Ordinary.

One of these cases may be at once put on one side. I refer to the case of *Rodger* (1875, 2 R. 294). In that case the truster in terms directed and appointed that his widow should "have the liferent use and enjoyment of the house in which I reside at the time of my death, free of rent, feu-duty, ground annual taxes, and all other deductions." The question, accordingly, of whether the liferenter stood free of these annual burdens was not left—as unfortunately conveyancers in Scotland have too frequently left it—to be determined by implication or inference, but was settled in express terms by the language of the trust deed.

In the case of *Clark* (1871, 9 Macph. 435) trustees were directed by a testator to give his widow "the use of my house No. 36 Drummond Place, with the whole furniture and effects contained therein," so long as she remained his widow. The words employed, namely, "the use of my house," were not those usual in the constitution of a liferent. The residue of the estate was not divisible until the widow's death. Lord President Inglis held that "there can be no doubt that the widow as a mere occupant of the house has nothing to do with the payment of the feu-duty, and as to the repairs of the house, I do not see what a mere occupant has to do with them either." The case was peculiar in this respect, that the main point of contention seemed to have been as to whether the widow was even liable for tenant's taxes, it being maintained that the true tenants were the trustees themselves. This contention was set aside, and the Court held that the widow was liable in tenant's taxes as occupant, but that upon a construction of the special terms of the trust deed her position stopped at occupancy and did not rise to the level of a liferent. As I say, the language of the deed, which was merely to give her the use of the house so long as she remained his widow, was no doubt taken in connection with the fact that the trustees were charged with keeping up the trust, the division of the residue being postponed until the widow's death.

I agree with the learned Lord Ordinary in attaching importance to this latter circumstance. It humbly appears to me that in regard to the question of the incidence and disbursement of charges as charges upon the estate of a trust, it is a consideration of weight that the annual administration is continued and the residue left in hand. On the other hand it is a cogent consideration in favour of the opposite view that the residue is in fact distributed and the fund available for disbursements of trust charges is gone. In this latter case it appears to be not an unfair or improper inference that the testator's meaning was that the annual charges referred to should fall to be borne by the person liferented in the property on which they fall.

In the later case of *Bayne* (1894, 22 R. 26) a testator directed his trustees "to make over to Miss Duckworth the house at present occupied by me at Craig View, together with the whole furniture, &c., therein, and that during all the days of her natural life, and so long as she shall not enter into any marriage after my decease." It will be observed that the word "liferent" is not used in this destination, nor is the expression employed "liferent use and enjoyment." Lord Young expressed doubts as to the decision and his leaning to the view "that as the widow gets the whole benefit of the house, not merely to occupy it but to let it if she pleases, the whole costs and charges con-

nected with it should fall on herself." This doubt seems entirely in line with the institutional and other authorities which I have cited. But the Second Division held that the case was ruled by *Clarke*. It is plain that there was considerable difference in the expressions used in the respective deeds. In this case also, as in the case of *Clarke*, the residue only became payable at the death of the liferenter.

Matters, however, advanced a distinct stage further in the case of *Cathcart* (1899, 2 F. 326), where by an antenuptial contract of marriage the husband conveyed to his wife "the liferent use of any one house he may die possessed of." He died, survived by his wife, and possessed of one house only, and this was burdened to the extent of over two-thirds of its value. It was held that the wife was not liable for the burdens and the landlord's taxes, &c., but that the meaning of the settlement was that the widow had obtained a free gift of the occupation of the house. Lord Young again expressed doubts. Lord Moncreiff held that the decision had to be governed by the preceding cases, and particularly that of *Clarke*. The Lord Justice-Clerk decided the case upon its merits in the sense indicated, but held that his view was confirmed by the preceding authorities.

With some regret, and fully admitting the difficulties which confronted the learned Judges of the Court of Session, I venture to doubt whether the previous authorities, and in particular the case of *Clarke*, were apt as precedents. In the case of *Cathcart* a liferent in terms was created. In *Clarke* it was not so. Nor did the other language in the deeds to be construed in the two cases equate. But if the case of *Cathcart* is treated as an independent authority amounting to a proposition that a person enjoying "the liferent use" of a particular house is not, *quoad* the obligation attached to such a position, to be treated as a liferenter, then I am humbly of opinion that such a proposition is unsound in law. No reason occurs to the mind for confining the beneficiary to the category of occupant as distinguished from that of liferenter, when the language employed in the settlement or marriage contract is plain and apt as constituting a liferent right. The doubt of Lord Young, expressed more than once, as to the decisions in which he took part seem to me to have been well warranted.

It is not necessary in this case to go further and to say whether the cases of *Clarke* and *Bayne* were in themselves properly decided, or whether the language and provisions of the deeds there construed were so special as to relieve the beneficiary as a mere occupant from the general obligations of a liferenter. Two propositions of general import may, however, be stated. First, the extent of the obligations attaching to a right of this character conferred by deed or settlement is a question to be determined by the intention of the maker, as that intention can be derived from the language which he has employed and from the provisions which he has made with regard to, *inter alia*, the administration and realisation of his estate. Secondly, when the language employed is entirely apt and appropriate for the creation of an ordinary liferent right, it rests upon those who contend that the ordinary obligations which attach to a liferenter should not apply to him in the particular case—it rests upon those putting forward such a proposition of exception to establish it. Applying these principles to the present case I now turn to the provisions of Mr Mackenzie's settlement. The scheme of that settlement was this. After the ordinary provision for payment of debts, he gave his widow an annuity of £500 and the liferent of the house. With regard to the liferent, a sum of £20,000 was set apart, and the language in which that was done, and in which the corpus of the estate was disposed of, is of great importance. It is as follows—"That my trustees shall, in the event of my said wife surviving me, after setting aside the sum of £20,000 to provide for the aforesaid annuity, pay and convey to her one-half of the whole residue and remainder of my means and estate, and shall pay and convey the remaining one-half to my said brother Walter Mackenzie to the extent of two-thirds thereof and to my said brother Robert Mackenzie to the extent of one-third thereof, and shall, on the death of my said wife, pay and convey to them in the same proportions the said dwelling-house and household furniture and plenishing, or, if the same shall have been sold, the prices thereof, and the sum set aside to provide the said annuity, and any surplus revenue accrued thereon."

It is accordingly clear that the bulk of the residue of the estate was to be paid and conveyed on the death of the testator to one set of beneficiaries, viz., the testator's widow and brothers, in certain proportions.

During the widow's life all that remained undistributed were the house and furniture (or their prices if sold), in which she was liferented, and a sum of £20,000 set aside to provide the widow's annuity. These were to be paid and conveyed at her death to another set of beneficiaries, viz., the testator's brothers alone. Not only, however, was the sum set aside to provide the annuity so to be conveyed to the brothers, but, as was also provided by the settlement, "any surplus revenue accrued thereon." This surplus revenue was surplus after payment of the annuity and nothing else, and the right to every portion of such surplus was and is in Messrs Walter and Robert Mackenzie. It appears accordingly to be in the highest degree unlikely, and indeed quite contrary to the intention of the testator, that any residue of his estate (thus directed to be paid over at his death) was to be in part reserved so as to provide a fund out of which the taxation upon the property liferented by his widow was to be defrayed. In the second place—and with much respect to the Judges of the Second Division—this appears to be particularly clear: The fund

of £20,000 was a fund which, along with the surplus of revenue which remained after defraying Mrs Mackenzie's annuity year by year, went to Messrs Walter Mackenzie and Robert Mackenzie, and to divert it or any part of the annual surplus to other purposes or to other people seems a plain breach of the duty resting upon the trustees and of the rights of Messrs Walter and Robert Mackenzie under their brother's settlement. I cannot see my way to hold that an encroachment upon this fund so specifically destined can be made for the purpose of payment of taxation by Mr Mackenzie's trustees upon the house liferented by his widow. The judgment of the Second Division, holding that it is legitimate to dedicate any portion of the £20,000 and surplus revenue thereon to the payment of such taxation, appears to me to be contrary to the provisions of the deed.

Accordingly the residue is, in terms of the settlement, distributed, and the £20,000, with the entire surplus revenue therefrom, is specially destined to particular beneficiaries. That being so, and the problem being, did Mr Mackenzie intend that his trustees should pay these annual charges or that his widow should pay them? I think the problem is plainly solved by these two considerations—first, that if he intended the former, he has left no fund which it would be reasonable to think he assumed could be dedicated to or utilised for that purpose; whereas, on the contrary, if his intention was that his widow should pay these charges, there was nothing out of the common in that; he was simply presuming what the law of Scotland would in ordinary circumstances lay down, namely, that she as liferenter should have the rights and perform the obligations attaching to such a position.

There is, however, another point which humbly appears to me to shed no inconsiderable light upon the testator's intentions—a point which does not appear to be adverted to in the Courts below. The trustees had power, with the consent of the widow, to sell the house. What, in the event of such a sale, was to happen? She was to be entitled to "the annual income of the price or prices obtained therefrom during all the days of her life." It is clear that the price obtained for the property was a price which would be realised on the footing that feu-duty, landlord's taxation, and all the charges now in question in this case were on the debit side of the property account as a revenue yielding subject. The widow accordingly, it is provided by the settlement, shall in the event of a sale be truly and in the result debited with this taxation. If, however, there be no sale she is not to be debited with that taxation, but it is to be disbursed, so is the contention, out of the general residue, or out of the revenue of £20,000 specifically destined to the testator's brothers. It would appear to be much more reasonable and in accord with the intention of the testator to make the incidence of the taxation where the general law would put it, viz., as a debit against the property and its fruits or their equivalent—a debit to be borne by the liferenter in either case, viz., whether the property was sold or remained unsold.

Although the result has been reached in some respects upon a broader ground than that taken by the Lord Ordinary I am of opinion that that learned Judge came to a correct conclusion in this case, and that whether upon the point of the possible dedication of the annuity funds and surplus to the payment of these charges, or upon the point of the effect of the authorities as governing a case of this kind, the decision of the learned Judges of the Second Division cannot be supported.

I am humbly of opinion that the appeal should be sustained.

LORD ATKINSON—I concur.

LORD MACNAGHTEN—I agree.

Their Lordships allowed the appeal with costs, also in the Court below, and restored the interlocutor of the Lord Ordinary.

Counsel for the Pursuer and Respondent—Dean of Faculty (Scott Dickson, K.C.)—Constable, K.C.—Lyon Mackenzie. Agents—Bonar, Hunter, & Johnstone, W.S., Edinburgh—Long & Gardiner, London.

Counsel for the Defenders and Appellants—M'Lennan, K.C.—Mercer. Agents—Cumming & Duff, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

HIGH COURT OF JUSTICIARY.

Saturday, July 13.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Johnston, Lord Salvesen, Lord Mackenzie, and Lord Guthrie.)

SCOTT *v.* JACK.

Justiciary Cases—Food and Drugs Acts—Milk—Sample below Standard of Quality Required by Statutory Regulations—Proof that Milk was as from the Cow—Sale of Food and Drugs Acts 1875 (38 *and* 39 *Vict. cap.* 63), *sec.* 6, *and* 1899 (62 *and* 63 *Vict. cap.* 51), *sec.* 4—*Sale of Milk Regulations* 1901.

A farmer was charged with selling milk which was not genuine, in respect that it did not contain the quantity of milk fat and solids required by the Sale of Milk Regulations 1901. It was proved to the satisfaction of the Sheriff-Substitute that the milk had not been tampered with after being taken from the cow, but that the deficiency in quality was due to a method of feeding the cows, purposely adopted by the farmer in order to produce quantity of milk irrespective of quality. The accused was acquitted.

Held that the decision of the Sheriff-