to accord any such right. At anyrate I see no ground for implying it, and in my opinion it is a circumstance very adverse to the defender that though the lease was extended by two separate agreements there is no reference in either to any right on his part to remove the buildings. If the knowledge was subsequent to the lease it cannot be material. The parties were then left to their legal rights.

Again, it is urged that the buildings were unsuitable to the subject, and an injury to it rather than a benefit. It may be so. The only conclusion that I can draw from that circumstance is, that the landlord might have a right to compel the defender to remove the buildings. But an obligation to remove, if required by the landlord, does not in my opinion carry with it the implication that the tenant has a right to remove.

LORD JUSTICE-CLERK—This is a narrow case in any aspect, but the strong inclination of my opinion is with the Lord Ordinary and with Lord Craighill, and I agree in everything that Lord Craighill has said. There is no doubt as to the law of the case. The question is, whether the case is ruled by specific or implied agreement. I come to the conclusion that it is so ruled both on the terms of the lease and by the actings of parties. The first thing which strikes one is that these buildings were not erected for the benefit of the subjects of the lease. This tenant had a mania for hothouse flowers. Horticulture was his ordinary recreation, and these houses were put up with a view to give effect to his passion for flowers. It is true that the lease makes little regulation as to the use to be made of the ground. But it contains a clause which is very significant. By this clause the tenant may cut down trees on condition of supplying their place with others of equal value. The object of cutting down the trees was to build the houses, and the insertion of this clause shows that the houses should be removed.

I cannot say that I have much sympathy with this claim. It is said that the tenant had spent £700, and I am glad that we have been able to come to the conclusion at which we have arrived.

LORD YOUNG was absent.

The Court adhered.

Counsel for Reclaimers — Mackintosh—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Counsel for Respondent—Comrie Thomson—Macfarlane. Agent—William Finlay, S.S.C.

Saturday, July 4.

SECOND DIVISION.

[Lord Fraser, Ordinary.

MACKIE *v.* GLOAG'S TRUSTEES.

Marriage-Contract — Exercise of Power of Appointment—General Settlement.

A widow with a family executed on the occasion of her second marriage a marriage-contract by which she conveyed to trustees her heritable and moveable estate to be held for behoof of herself in liferent and for her children procreated and to be procreated, "in such proportions and on such conditions as she might appoint by any writing under her hand." She subsequently executed a trust-disposition and settlement in which she stated her intention to exercise this power of appointment, but in which she massed the marriage-contract funds with her general estate without making any special distribution of those funds. *Held* that she had validly exercised the power of appointment.

Power of Appointment in Marriage-Contract—Appointment to Persons not Objects of Power—Consent of Objects of Power.

A widow who had a power of appointment over her marriage-contract estate, the objects of the power being her own children, exercised it in a trust-disposition and settlement in which she left one-fourth of the residue of her estate to her son's son, and the rest of it to her daughter in liferent and her daughter's children in fee. *Held* that the appointment was valid as regards the latter, inasmuch as it was made with the consent of their mother, who was an object of the power, but that it was invalid as regards the former, in respect his father, who was also an object of the power, had withheld his consent, and that therefore the fourth share of the residue remained unappointed, and fell to be equally divided between the appointer's son and daughter—the two objects of the power.

Apportionment Act (37 *and* 38 *Vict. c.* 37)—*Appointment under Powers Act* 1874.

Held that this Act applies to Scotland.

Power of Appointment—Omission in Deed of Appointment of Representatives of One of Objects of Power who Died without Issue.

A widow who had a power of appointment over her marriage-contract estate, the objects of the power being her children, exercised the power in a deed which omitted from the appointment the representatives of one of the children of her first marriage who had survived the execution of the contract, and had had a vested interest in the marriage-contract funds, but who had predeceased his mother without issue. *Held* that having regard to the provisions of the Apportionment Act (37 and 38 Vict. c. 37), the omission was not fatal to the validity of the deed of appointment.

Deed of Appointment—Illusory—11 *Geo.* IV. *and* 1 *Will.* IV., *cap.* 46.

Opinion reserved by Lord Fraser whether this Act applies to Scotland, but *observed* that in Scotland no such statute is necessary.

The first stage of this case was disposed of in the Court of Session on 9th March 1883, and was reversed on appeal by the House of Lords on 6th March 1884, and reference is made to the report of these proceedings, *ante* vol. xx., p. 486, 10 R. 746, and vol. xxi., p. 465, 11 R. (H. of L.) 10.

In the present stage of the case the following pleas-in-law for the pursuer fell to be disposed of — "(1) The pursuer's mother Mrs Mackie or Gloag did not validly execute the power of appointment under the said antenuptial contract of marriage by the foresaid trust-settlements

or otherwise. More particularly, there has been no valid execution of the power, in respect that (1st) no provision has been appointed to the pursuer, or at least it is illusory; (2d) no provision has been appointed to the heirs and executors of the pursuer's deceased brother Alexander; and (3d) beneficiaries under the truster's settlements, not being objects of the power, are made to share in the estate, the subject of the power."

The defender pleaded—"(3) The power of apportionment under the antenuptial contract of marriage libelled having been validly exercised by Mrs Mackie or Gloag in the trust-settlement and codicils executed by her, the pursuer is not entitled to have the said deeds set aside or to have the property falling under the said contract of marriage dealt with as if no apportionment had been made. (4) The said exercise of the said powers is not invalid in respect of the particular objections stated thereto by the pursuer, because (1st) the pursuer takes a substantial interest under the said deeds of Mrs Gloag; (2d) it is not necessary to a valid exercise of a power of apportionment to include a deceased child in the scheme of apportionment; (3d) that it is a lawful and valid exercise of the said power to apportion the funds to children in liferent and grandchildren in fee; and (4th) the apportionment is valid in respect of the provisions of 37 and 38 Vict. cap. 37."

The Lord Ordinary (Fraser) on 2d December 1884 pronounced the following interlocutor and opinion, which render unnecessary a repetition of the facts of the case:— . . . "Finds that Mrs Gloag so far validly executed the power of appointment reserved to her by the marriage-contract by providing that the residue of her estate should be liferented by her daughter Mrs M'Cutcheon, and her children in fee, and in so far as she directed her trustees to convey over to Mrs M'Cutcheon the Clydesdale Bank stock: Finds that she validly exercised the said power by directing her trustees to pay £300 to the pursuer, and an annuity of £25; but finds that the conditions attached by her to the said provision of £300 and annuity of £25 were *ultra vires* and incompetent, and that the pursuer is entitled to the said sum of £300 and the said annuity absolutely and unconditionally: Finds that in so far as Mrs Gloag directed a share of the residue to be paid to the pursuer's son Alexander Campbell Mackie, this direction was *ultra vires* and incompetent so far as regards the property conveyed under the marriage-contract, but that the same is a valid bequest to the said Alexander Campbell Mackie in reference to the other property belonging to the testatrix not carried by the marriage-contract: Finds that the share of the residue so far as composed of marriage-contract funds directed to be paid to the said Alexander Campbell Mackie remains unappointed by Mrs Gloag, and that it falls to be divided equally between Mrs M'Cutcheon and the pursuer, the only children of the marriage: Finds that the pursuer is not entitled to have any share of the estate allocated to him on the ground that he is heir-at-law and one of the next-of-kin of his brother Alexander Mackie: Finds that the provisions in favour of the pursuer are not invalid as being illusory: Appoints the defenders, the marriage-contract trustees, to lodge in process a state showing what is the amount of property in their hands which was conveyed to them by the marriage-contract, with any increase thereon since Mrs Gloag's death, &c.

"*Opinion.*—The question in this case is, whether or not a power of appointment or distribution, reserved by a parent in her marriage-contract, has been validly executed?

"The pursuer's mother, Mrs Helen Campbell or Mackie, on the occasion of her marriage with her second husband, John Gloag, entered into an antenuptial contract of marriage. By this deed Mrs Gloag conveyed over to trustees properties, heritable and moveable, therein specified, the purposes of the trust, so far as regards the property, being that the trustees should hold it for behoof of Mrs Gloag in liferent alimentary, exclusive of the *jus mariti* and right of administration of her husband, and for behoof of the children procreated or to be procreated of the body of Mrs Mackie, 'in such proportions and on such terms and conditions as the said Mrs Helen Campbell or Mackie might appoint by a writing under her hand, which failing equally among them, share and share alike, and their respective heirs and executors whomsoever in fee.'

"The pursuer is a son of Mrs Mackie or Gloag by her first marriage. The Court of Session decided that he not being a child of the marriage with Gloag had no title to object to his mother conveying away the marriage-contract fund to any person that she pleased. But the House of Lords reversed this judgment, and held that although the pursuer was not a child of the marriage he had a vested interest under that deed, which entitled him to challenge the mode in which his mother executed the power of appointment which she had reserved.

"No question arises here, as in many other cases, as to whether Mrs Gloag did intend to execute the power of appointment. That intention is expressly stated. The only question is, whether the mode in which she carried it out was within her power?

"Here it must be observed, at the outset, that the present is not a case of a party who has no further connection with the fund than having a power of appointment over it given to him by the owner of it. Mrs Mackie or Gloag was the owner of the marriage-contract fund before it was settled by the marriage-contract. This is of great moment, because it has always been held that such reserved powers are to be construed in the most favourable and ample way in reference to their execution by the owner of the fund. In *Moir's Trustees, &c.*, June 17, 1871, 9 Macph. 850, Lord Justice-Clerk Moncreiff thus expressed himself—'A distinction must be taken between a power of distribution in its proper and technical sense and such a provision as we have in this contract of marriage. In the first the sole right to deal with the property is derived from the power, the terms of it are liable to be construed as the constitution of a special trust, and to be limited accordingly. But when a father in his antenuptial marriage-contract settles the general estate which he may leave on the children *nascituri*, as a class, and reserves power to distribute, and failing distribution directs the division to be equal, his right to distribute does not arise from the reservation, but from his right of property in the fund to be distributed and his position as the father of the family.'

"The pursuer and Mrs M'Cutcheon are the only surviving children (by her first marriage) of Mrs Helen Mackie or Gloag. She had another child, Alexander Mackie, who died unmarried and intestate before his mother.

"Mrs Mackie executed two trust-dispositions and settlements, and several codicils thereto; but the material deeds so be considered are the second trust-disposition and settlement and the last codicil, which contain the final directions as to the distribution of her estate. By the trust-disposition and settlement which she executed on 31st January 1881 she conveyed over to her trustees therein named her whole means and estate, heritable and moveable; and further, upon the narrative of the contract of marriage between her and John Gloag, and of the power thereby given to her to divide the property dealt with by the marriage-contract, among her children, 'in such proportions and on such terms and conditions as I may appoint by a writing under my hand, and it is my intention by this present trust-disposition and deed of settlement to exercise said power, I do therefore hereby request and desire the trustees under the said contract of marriage, on the determination of my said liferent, to transfer the property vested in them to the trustees under these presents; and in so far as I can do so, I assign and dispone the same to them accordingly, it being my desire and intention that the property conveyed by the said contract of marriage, and now vested in the trustees under the same, and whether so transferred or not, shall be dealt with and divided as part of my general estate: With the rents, interests, profits, and produce, and writings, titles, and vouchers of my whole means and estate conveyed or about to be conveyed to the trustees (all hereinafter called my estate).' The trustees under the marriage-contract have not yet conveyed over to the trustees under the trust-disposition and settlement the property settled by the marriage-contract, and that fund still remains intact.

"By the trust-deed Mrs Mackie or Gloag directed her trustees to make payment of—(*First*) Certain legacies to charities, amounting in all to £400. (*Secondly*) Two legacies of £100 each to two women. (*Thirdly*) To pay to the pursuer, William Cross Mackie, a legacy of £300, under deduction of any sums advanced by the testatrix to him for passage money, outfit, law expenses, or repayment to his cautioner under any bail-bond for moneys which his cautioner had been obliged to pay. (*Fourthly*) To pay to William Cross Mackie an annuity, which was reduced to a smaller sum by a codicil, the amount of which will be stated immediately. (*Fifthly*) To pay to Alexander Campbell Mackie, the pursuer's son, in the event of his being placed under the control of the testatrix's trustees, a sum for his education, maintenance, and upbringing, which was subsequently reduced by a codicil. As to the residue of her means and estate, the trustees were directed to hold it for behoof of Mrs M'Cutcheon in liferent, and of her grandchildren, viz., (1) Alexander Campbell Mackie, son of the pursuer; and (2) The children of Mrs M'Cutcheon, equally among them in fee. These provisions were made under the condition that the testatrix's children and their issue should accept them as in full of all their claims under the contract of marriage, and as in full of all right under two assignations of leases, one of which was conveyed to the pursuer in liferent, and to the pursuer's son in fee.

"By a codicil to this trust-disposition and settlement, of same date as that deed, the testatrix conveyed over to Mrs M'Cutcheon certain stock or shares which she had in the Clydesdale Bank in Glasgow, and which had been specially conveyed to the trustees under the marriage-contract for the purposes of that deed.

"By a second codicil to the trust-disposition and settlement, dated 16th February 1881, she declared that the legacy of £300 and the annuity to the pursuer, were conditional upon his renouncing his right and interest to the leasehold subjects at Largs which had been conveyed to him, and also his right and interest under the marriage-contract. Further, she conveyed by this codicil all the furniture in her house in Glasgow to Mrs M'Cutcheon.

"The third and last codicil executed by her contained her final disposition of her property so far as regards the pursuer. She, on the narrative of the pursuer misconducting himself in a very improper way, restricted the annuity to be paid to him to £25 a-year. She also fixed the annuity to be paid to pursuer's son Alexander Campbell Mackie at £40, to be payable till he should attain the age of eighteen years, and from the age of eighteen to twenty-five this annuity was fixed at £20 a-year.

"The annuity to the pursuer was clogged with conditions. It was declared that it was to be strictly alimentary, not affectable by his debts or deeds, and he was not to be entitled to anticipate the annuity, or to assign, burden, or affect it in any way. As regards the legacy of £300, it was declared that the trustees should be entitled, if they should deem it a prudent and judicious measure, to restrict the pursuer's interest in it to an alimentary liferent, and to hold the capital for such purposes as the pursuer might by any writing direct or appoint, or they might themselves by their own motion apply the capital for his behoof or benefit in such manner as they thought best.

"Was there then here an execution of the power given to Mrs Mackie or Gloag which the Court can uphold? The two objects of the power (Mrs M'Cutcheon and the pursuer) are made the recipients of provisions or legacies—certainly in very unequal proportions, and under very different conditions. The legacies to strangers, including the annuities of £40 and £20 to the pursuer's son, may, it is said, be paid (in part at least) from Mrs Gloag's general estate without encroaching upon the funds settled by the marriage-contract.

"The testatrix united the marriage-contract fund with her general estate, and did not make any special distribution of the marriage-contract fund. Her mode of disposing of it was by making certain provisions for Mrs M'Cutcheon and for the pursuer, and then disposing of the residue, which included, in the way in which she massed it, the marriage-contract fund with any general estate which she possessed. To this course there is no valid ground of objection. If there be sufficient funds to satisfy the bequests made to persons other than the objects of the power arising from the general estate, no difficulty need arise. The general estate will be

applied to the effectuating of these purposes of the will. If, on the other hand, that general estate be insufficient to do so, the result will simply be that the legacies must suffer abatement, and no encroachment will be allowed upon the marriage-contract fund.

"That a person having power to divide a fund among children may mass it with any estate belonging to herself, and may effectually execute the power by a will which does not refer to the power, but merely speaks as if the testatrix was dealing with her own particular estate, was decided in the case of *Milne or Smith* v. *Milne, &c.*, June 6, 1826, 4 S. 679. The testatrix had been appointed by her husband (the author of the power) executor, and the power that he gave to her was that 'she is to be entitled to dispose of the residue of my fortune amongst our children after her death, in such proportions as she thinks proper.' All that the testatrix—the donee of the power—did, was to bequeath the free residue of her subjects and effects to her children in certain unequal proportions, and the contention of one of the children was that the power had not been effectually exercised, there being no reference to the power in the will of the testatrix, which it was said merely disposed of her own property. But the Court held the contrary, and, in the words of the Lord Ordinary, said 'that it is impossible to impute her conduct to any other motive than that of exercising every power committed to her.'

"It is settled in England that where a party has a power of appointment among a limited class, the power is well executed though the fund be appointed as a part of a residue for the purpose of paying debts and legacies, and then in trust for the objects of the power. Thus a person having a special power to appoint property to be divided amongst a class of persons specified, it was held that this power was well executed by a will by which the testatrix gave all her real and personal estate whatsoever and wheresoever, and of which she had any power to appoint or dispose of, to trustees, in the first place to pay her debts, funeral, and testamentary expenses, and then to divide the residue between the objects of the power. Vice-Chancellor Malins held that the testatrix, when she directed her debts to be paid, intended that the payment should come out of that portion of the property not included under the special power—'Upon the well-known rule of *reddendo singulâ singulis*, it may well be supposed that she meant her debts to come out of that property which was in effect her own, and the rest to pass to those who were the objects of the special power'—*Ferrier* v. *Jay*, L.R., 10 Eq. 550. Vice-Chancellor Page Wood came to the same conclusion in *Cowx* v. *Forster*, 1 J. and H. 30; and Lord Selborne as Lord Chancellor did the same *in re Teape's Trusts*, L.R., 16 Eq. 442. The rubric of this last case is as follows—'A testator having a limited power to appoint the income of £5000 consols to his wife for her life, and having no other power, by his will, which contained no reference to the power, after first directing payment of his debts and funeral expenses, devised and bequeathed the residue of his estate belonging to him at the time of his decease, or over which she might have any power of disposition or control, to his wife, her heirs, assigns, and legal representatives for ever in full property:—Held that the power was well exercised.' The Lord Chancellor while adopting the reason for the judgment in *Ferrier* v. *Jay*, noticed a peculiarity in the case of *Teape's Trustees* as follows:—'The only difficulty is that the testator's only power was to appoint a life interest, whereas the words he used, to my wife, her heirs, and assigns and legal representatives, in full property for ever, seem at first sight applicable only to the entire interest. But, after all, the reasonable view to take of the words is, that he meant to give his wife the largest interest he could give in everything he had to dispose of, and if that was a terminable interest she will take it to the full extent of his disposing power, which in this case was for her own life.'

"Where an appointment is made to persons as a class, some of whom are and some are not objects of the power, and it is impossible to define how much of the appointment falls within the power, and how much without it, the whole appointment is bad—*Brown's Trust*, L.R., 1 Eq. 74. The point was thus stated by Vice-Chancellor Kindersley in *Harvey* v. *Stracey*, 1 Drew 117.—'Now, when an appointment is to a class, some of whom are within and others are not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A, who is within the limits, and say so much is to go to him, though the others are not within the limits, yet the appointment to A shall take effect; but if the appointment is to a class, some of whom may and others may not be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails.'

"Now, keeping these rules in view, what are the circumstances with which we have here to deal? The fee or the residue of the estate is given to the testatrix's grandchildren—persons who are not themselves objects of the power. The son of the pursuer and the children of Mrs M'Cutcheon are to have the fee in equal shares. It is therefore maintained that so far as that fee has been so given, there has been an invalid execution of the power. This cannot be maintained in regard to the fee given to the children of Mrs M'Cutcheon, because Mrs M'Cutcheon, herself an object of the power, is willing that it should be so settled upon her children, of whom there are three alive. In reference to such a case Sir Edward Sugden in his Treatise on Powers (8th ed. pp. 670 and 671, ch. 16, sec. 1, sub-secs. 18 and 19) has thus expressed himself—'It is settled that in equity a valid appointment may be made to persons not objects of the power with the approbation of the real object of the power. Therefore if, upon the marriage of a child, the parent, by the marriage settlement under a power to appoint to children, appoint to the issue of the marriage, the appointment would be supported in equity, not as a good appointment to the issue of the marriage, but as an appointment to the child himself, and a settlement of it by him; nor is it essential that such a settlement should be made upon marriage. The principle is that the Act operates first as an appointment, and secondly as a settlement by the appointee. Therefore an appointment of personalty to the children of a married daughter,

who is herself the object of the power, is valid if made with the concurrence of the husband, for a husband can dispose of such property of his wife in expectancy against everyone but the wife surviving (see *Hanbury* v. *Tyrell*, 21 Beav. 322, where, after a settlement by a child on herself and her children of a portion appointed to her, a further inaccurate appointment was made to her and her children, and the latter words were rejected). So an appointment after the marriage of a daughter, the sole surviving object of the power, at the request and with the concurrence of the daughter and her husband, to the separate use of the daughter for life, and after her decease for her children, was held to be valid. An appointment by the same instrument with the like convenant of a part of the fund to a stranger, was also supported, as the deed, it was said, could not be good in part and bad in part; but this point seems to have called for further inquiry and consideration.'

"Lord Chelmsford, in a Scotch case on appeal, adopted this law in the following terms:—'An objection was made to the execution of the power, that the appointment of the £5000 to the daughters respectively was not confined to them, but made to others who were not objects of the power. This was answered by the case of *White* v. *St Barbe* (1 Ves. and B. 339), in which it was decided that under a power to appoint among children, interest may be given to grandchildren by way of settlement, with the concurrence of their mother (an object of the power) and her husband.' (*Smith Cunninghame* v. *Anstruther's Trustees; Mercer* v. *Anstruther's Trustees*, 25th April 1872, 10 Macph. H. of L. 52). Therefore, so far as regards the appointment of the fee to the children of Mrs M'Cutcheon there can be no objection, seeing that she consents to it.

"It is in regard to the fourth share of the residue conveyed to the pursuer's son Alexander Campbell Mackie that a difficulty arises. The pursuer—an object of the power—has challenged this conveyance of the fee to his son. If Mrs Gloag had left to the pursuer the liferent of that share of the residue which she gave to his son in fee, then there would be room for the application of the rule which is exemplified in the case of *M'Donald* v. *M'Donald's Trustees* (17th June 1875, 2 R., H. L., 125), where it was decided that an object of the power took an absolute interest to the sum allotted to him by the appointer, freed from limitations which the appointer had no right to attach to the provision. The English decisions on the subject are collected in the case of *Churchill* v. *Churchill* (L.R., 5 Eq. 44), where it was found that the appointer having power to divide among the children of a marriage a certain fund, he could not limit the right to a liferent, giving the fee to the children of the objects of the power. The power was not held to be invalidly executed,—only the children were found entitled to an absolute right to their shares instead of to a liferent.

"There was, however, no liferent given to the pursuer with the fee to his son, and the case therefore is not within the rule sanctioned by these decisions. It must, in these circumstances, be held that the fourth share of the residue given to the pursuer's son must be treated as unappointed, and therefore that it must be divided equally between the two objects of the power, viz., the pursuer and Mrs M'Cutcheon. This mode of division must be adopted, notwithstanding that Mrs M'Cutcheon and (through her) her family receive a far larger share of the fund than the pursuer. (*See Smith Cunninghame* v. *Anstruther's Trustees*, 10 Macph., H. L., 39).

"It is with some hesitation that the Lord Ordinary has come to this conclusion. Can the rule be applied here, that when a liferent is granted to an object of the power, with remainder over (without his consent) to children, this is held to be an absolute gift to the object of the power, and the destination to the children be not regarded? Can this rule be applied in the present case so as to give to Mrs M'Cutcheon, who has the liferent, an absolute right to the share of the residue given to Alexander Campbell Mackie? This is a conclusion which cannot be come to. Alexander Campbell Mackie is not Mrs M'Cutcheon's son. Whether it would be a good conveyance to the son, if the pursuer consented to his receiving it, is a question that need not be considered, because the pursuer challenges the provision, and insists that it is sufficient to set aside the whole appointment. Upon the whole matter, therefore, the Lord Ordinary thinks that the correct view to take is to hold that the fourth share of the residue remains unappointed, and must be divided equally between the two objects of the power.

"It is further said that Alexander Mackie, a brother of the pursuer, one of the children of Mrs Gloag's first marriage, who survived the execution of the contract, was an object of the power and had a vested interest in the fund. He left no children and died intestate, his representatives being the pursuer and Mrs M'Cutcheon. To these representatives there ought, it is said, to have been a portion of the marriage-contract fund left, and this not having been done the whole appointment is bad. The answer to this is the Act of Parliament 37 and 38 Vict. c. 37, sec. 1, which enacts 'that no appointment, which from and after the passing of this Act shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power.' It is contended on behalf of the pursuer that this Act does not apply to Scotland. Whenever it has been referred to the contrary has been assumed, as by the Lord President Inglis and Lord Deas in *Campbell* v. *Campbell and Others*, June 19, 1878, 5 R. 961, and by the Lord Justice-Clerk—(Lord Moncreiff) in *Hamilton's Trs.* v. *Hamilton and Others*, July 9, 1879, 6 R. 1221. The statute itself contains no words limiting it expressly to England, and it is couched in language which is as applicable to legal rights according to the law of Scotland as to those of England. The evil to be redressed existed in this country equally as in the south, and it was frequently made the subject of regret that it should be allowed to exist. The remedy is a remedy that the Scottish Courts can apply as well as the English Courts. Even in a case where the language of a statute was such as at first sight

to confine its operations to England, the Lord Justice-Clerk (Lord Moncreiff) thus expressed himself—*Perth Water Commissioners* v. *M'Donald, &c.*, June 17, 1879, 6 R. 1055. "Now, there are no words excluding Scotland from its provisions. Ireland is specially excluded, and the statute deals with interests which are the same on either side of the border. The only reason for supposing that it was not meant to extend to Scotland is that it is drawn with such exclusive reference to English legislation and English institutions and procedure, that although it would be easy enough to find equivalents in our own usages for these English requisites, it would be difficult, if not impossible, to follow out in Scotland the precise injunctions of the Act . . . I incline to the opinion that the statute applies to Scotland, because its object is general, and there are no words to exclude, and no reason for excluding, Scotland from its operation, although I see great difficulties in the way of its practical application." These reasons apply *a fortiori* to the present case. There is no difficulty whatever in the practical application of the Act 37 and 38 Vict. c. 37, to Scottish deeds.

"In the next place, it is contended that the appointment is bad, because the share allotted to the pursuer is illusory. In England this objection is met by the statute 11 Geo. IV. and 1 Will. IV. c. 46, and if that statute applied to Scotland it would be a good answer now. Whether it does apply to Scotland is a question which has not been decided, and the Lord Ordinary gives no opinion upon the matter, because there is enough in the case to enable the objection to be got rid off without deciding the point as to the application of the statute. In the case of *Smith's Trs.* v. *Graham, &c.*, May 29, 1873, 11 Macq. 636, Lord Benholme rightly said—"The decided cases show that 'illusory' may be 'pleaded, but there is no case in which it has been successfully pleaded.' And he defined 'illusory' to 'consist in a fraud against the trust, making an appointment which is altogether a mockery.' The Scottish Courts have never taken it upon them to control the discretion of a parent in dividing a settled fund among his children, merely because he gave to one child more than to another. The purpose of giving a discretion to a father would necessarily be defeated if such a control existed. No one could be better acquainted with the capabilities and necessities of his different children than the father, and fortunately (if the statute of 11 Geo. IV. and 1 Will. IV. c. 46, does not apply to Scotland) we may console ourselves with the fact that no legislation is necessary, because no rule requiring alteration was established by our Courts. It is, however, altogether out of the question to maintain that in point of fact the annuity given to the pursuer was illusory. The reasons assigned by the pursuer's mother for the gradual diminution of the sum of the annuity given to him explain the cause of her action in this matter if a defence of it be necessary, which it is not.

"But, on the other hand, the pursuer is entitled to the £300 bequeathed to him, and to his annuity of £25 absolutely, and freed from all the conditions and restrictions which his mother attached to her gift."

The pursuer reclaimed, and argued — The widow's power of appointment was invalidly executed, in respect that (1) she had massed the fund over which she had the power of appointment under the marriage-contract with her general estate without making any special distribution of the fund. The case of *Milne or Smith* v. *Milne*, June 6, 1826, 4 S. 679, was not exactly in point. (2) She had apportioned the fee to Mrs M'Cutcheon's children, who were not themselves objects of the power. Granted that Mrs M'Cutcheon's consent could validate this, it was necessary that that consent should be given in writing. She must in fact join in the deed in which the appointment was made—Sugden's Treatise on Powers (8th ed.), p. 670, section 17, and cases referred to in note. There was no case to be found where consent by writing had been dispensed with. Mrs M'Cutcheon had given no consent in writing. (3) No appointment was made to the representatives of Alexander Mackie, the pursuer's brother, who was one of the children of the first marriage, who survived the execution of the contract, and was an object of the power, and had a vested interest in the fund. This was fatal to the deed of appointment—*Watson* v. *Marjoribanks*, February 17, 1837, 15 S. 586; *Crawcour* v. *Graham*, February 3, 1844, 6 D. 589; *Campbell* v. *Campbell, &c.*, June 19, 1878, 5 R. 961. The Act 37 and 38 Vict. cap. 37, sec. 1, would be a good answer to this objection in England, but it did not apply to Scotland. Its phraseology was distinctly English, and it was intended to remedy evils existing exclusively in England. (4) The share allotted to the pursuer was illusory. The Statute 11 Geo. IV. and 1 Will. IV. cap. 46, which would meet this objection in England had no application in Scotland. It was in these terms—"No appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, among several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to devolve upon any one or more of the objects of such power, but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power."—Lord Moncreiff's opinion in *Crawcour* v. *Graham, supra.*

The defender replied—(1) It was quite settled by *Milne or Smith* v. *Milne, supra*, that a person having the power may deal with a fund of this kind in a settlement professedly dealing with his or her general estate—*Brok* v. *Aldam*, November 3, 1874, 19 L.R., Equity Cases, 16. (2) As regards the appointment of the fee to Mrs M'Cutcheon's children, who were not themselves objects of the powers, it was quite true that in almost all the cases there was a deed of consent executed by the object of the power, but there was no reason or necessity for it. Consent might be given in any way, and there was no authority to the effect that concurrence by deed was necessary—*Crawcour* v. *Graham, supra*; *M'Donald's Trustees* v. *M'Donald*, March 10, 1874, 1 R. 794 (opinion of Lord Justice-Clerk, p. 809); Farwell on Powers, p. 134; *in re Brown and Sibley's Contract*, May 20, 1876, L.R., 3 Ch. Div. 156; *in re Cunynghame's Settlement*, January 27, 1871, 11

L.R., Equity Cases, 324. (3) The Act 37 and 38 Vict. cap. 37, section 1, remedied the objection that no portion of the fund was appointed to the representatives of Alexander Mackie. It was an Act applicable to Scotland, although drawn in the first instance with reference to English procedure —*Campbell* v. *Campbell, &c.* (opinion of the Lord President and Lord Deas), *supra; Hamilton* v. *Hamilton's Trustees*, July 9, 1879, 6 R. 1221. (4) It was vain to plead that the annuity given to the pursuer was illusory. Even if it were, this objection could be cured by the Act 11 Geo. IV. and Will. IV. cap. 46, which applied to Scotland. But apart from the statute, the pursuer's mother had amply explained her reasons for gradually diminishing his annuity.

At advising—

The Lord Justice-Clerk delivered the opinion of the Court in the following terms:—

The Lord Ordinary has explained his views so clearly, and with such full citation of authority, as greatly to assist us in giving our decision on the points which still remain for judgment. I agree entirely with the Lord Ordinary in all respects.

The first question which arises in the present position of the case is, whether Mrs Gloag competently exercised her power of apportionment of the marriage-contract funds by introducing the apportionment into a general settlement of her means and estate. I see no reason for doubting that this may be competently done, provided it be clear that the appointer intended thereby to exercise the power. In the present case no question can be raised on this head, for the settlement expressly refers to the power, in her trust-disposition and settlement of the 31st January 1881, and states her intention, by this present trust-disposition and settlement, to exercise said power. It is true that the directions which she gives are applicable as well to her general estate as to the fund provided in the marriage-contract which was the subject of the power; but if these directions would have been valid, which I see no reason to doubt, if applied exclusively to the marriage-contract fund, they are not rendered invalid because they are also operative in the settlement of her general estate. The authorities quoted by the Lord Ordinary, both from our own law, and that of England, are I think conclusive. The second question raised by the pursuer relates to the provision by Mrs Gloag, to her daughter in liferent, and her children in fee. But for the consent of the daughter, this would not have been a valid exercise of the power. But it seems to have been settled in England that such a provision made with the consent of the beneficiary or appointee will be supported; and I quite agree with the Lord Ordinary in his view of the authorities on this head.

The Lord Ordinary adopts a different view in regard to the third question raised—whether the provision of one-fourth of the residue to the son of the pursuer in fee was in due fulfilment of the power. He holds that it was not, as the pursuer did not consent to it; and he holds that the case of *Macdonald*, as decided by the House of Lords, necessarily leads to that conclusion. He therefore holds that this fourth share is not appointed to and falls to be divided between the pursuer and his sister. The case of *Macdonald* decided that where, without the consent of the beneficiary, his right in an appointed share is limited to a liferent, and the fee going to one not an object of the power, the limitation flies off, and the share devolves without restriction on the appointee. But here there is no room for the application of that rule, for no liferent was provided to the pursuer, and thus the share remains unappointed. The last question raised relates to the interest of a brother of the pursuer, who survived the execution of the contract of marriage, but died without issue. It is contended that his representatives were objects of the power, and that as no share was apportioned to them, the whole apportionment was invalid—The recent statute, 37 and 38 Vict. c. 37, seems to remove all difficulty on this head. It was said that the statute does not extend to Scotland, but I find no ground for that contention in the provisions or in the phraseology of the statute itself. In the case of *Hamilton*, 6 R. 122, referred to by the Lord Ordinary, we assumed that the statute applied to Scotland, and in the case of *Campbell*, 5 R. 561, the very pointed remarks of the Lord President and Lord Deas proceed on the same assumption.

I am further of opinion that the share apportioned to the pursuer was not illusory.

In these remarks I have done but little more than summarise the Lord Ordinary's very able and instructive note. I entirely agree with him, and I propose that we should adhere to his judgment.

The Court adhered.

Counsel for Reclaimer — Nevay. Agent—William Officer, S.S.C.

Counsel for Respondents—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, July 8.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SINCLAIR *v.* THE MERCANTILE BUILDING INVESTMENT SOCIETY.

Friendly Society—Building Society—Alteration in Laws—Ultra vires—*Acquiescence—Arbitration—Building Societies Act* 1874 (37 *and* 38 *Vict. cap.* 42), *sec.* 35.

Circumstances in which *held* (1) that a member of a building society was barred by acquiescence from challenging, on the ground of *ultra vires*, the legality of a new rule, passed at a special meeting of the society, which provided that a certain deduction should be made in making repayment to withdrawing members; and (2) that the society had not forfeited their right to have a dispute between a member and themselves determined by arbitration because there had been no "application" by the member in the sense of section 35 of the Building Societies Act of 1874, with which they had failed to comply.

The Mercantile Building Investment Society,