Tuesday, June 29.

FIRST DIVISION.

DALGLEISH'S TRUSTEES *v.* DALGLEISH AND OTHERS.

Succession—Power of Appointment—Exercise.

A testator directed his trustees to pay his daughter the interest of a sum of £3500 during her life, and at her death to pay the capital to her children, in such proportions as she might direct by any writing under her hand, and in the event of there being no children, to such person as she might direct by any writing under her hand, and failing such direction to the heir of entail in possession of a particular estate. The daughter died unmarried, leaving a trust-disposition and settlement, wherein she conveyed to trustees, for the purposes therein mentioned, her whole estate, heritable and moveable, of what kind and nature soever, presently belonging and addebted, or which should belong and be addebted, to her at the time of her decease. She bequeathed legacies amounting to £18,000. Her whole estate exclusive of the said sum of £3500 amounted only to £15,200.

In a special case presented after the daughter's death it was stated that she was fully aware of the amount of her funds, and of her power with regard to the sum of £3500. *Held* that she had validly exercised her power of appointment with regard thereto.

James Dalgleish, W.S., of Westgrange and Ardnamurchan, died in September 1870. By a codicil to his trust-disposition and settlement dated 16th March 1870, he directed his trustees to pay his daughter Mary Wellwood Dalgleish a sum of £7500, "and to lend out on proper security a further sum of £3500, and pay over to her during her life the interest to accrue thereon, which interest it is hereby declared shall not fall under the *jus mariti* or right of administration of any husband she may marry, nor shall it be assignable by her or her husband or arrestable for her or his debts, and at her death to pay over the capital to her child or children or their issue in such proportions as she may direct by any writing under her hand, and failing such direction, equally among them, and in the event of there being no such child or children or issue alive at her death, then to pay over the said capital sum to such person as she shall direct by any writing under her hand, and failing such direction, to the heir of entail in possession of the estate of Ardnamurchan for the time, or failing him, to her nearest of kin." By his settlement Mr Dalgleish directed the estate of Ardnamurchan to be entailed upon his son John James Dalgleish and certain other heirs.

In implement of the direction in the codicil, Mr Dalgleish's trustees granted a bond and disposition in security for the sum of £3500 over a heritable property belonging to the trust-estate in favour of themselves as trustees foresaid, for the purposes specified in the said codicil, and paid the interest to Miss Dalgleish during her life.

Miss Dalgleish died unmarried on 3rd April 1892, leaving a trust-disposition and settlement whereby she conveyed and made over to certain trustees, for the purposes therein specified, "All and sundry lands and heritages, and in general the whole estate, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging and addebted, or which shall belong and be addebted, to me at the time of my decease, with the whole vouchers and instructions, writs, titles, and securities of and concerning my said estate." The settlement contained no express allusion to the power of disposal given to Miss Dalgleish by her father.

After Miss Dalgleish's death a special case was presented by (1) the trustees under her settlement, (2) the trustees under her father's settlement, (3) John James Dalgleish, as the institute in the entail of Ardnamurchan which his father directed to be executed, and (4) John James Dalgleish and Laurence Dalgleish, as next-of-kin of Miss Dalgleish, in order to obtain the opinion of the Court upon the following questions:—"(1) Has the said Miss Mary Wellwood Dalgleish, by her said trust-disposition and settlement, validly and effectually exercised the power of disposal of the said sum of £3500 conferred upon her by said codicil, to the effect of entitling her trustees, the first parties, to claim the said sum as part of her trust-estate? And in the event of the first question being answered in the negative, (2) Is the said sum now payable to the third party as the person who would have been heir of entail in possession of the estate of Ardnamurchan, had it been entailed in terms of the said James Dalgleish's settlement, or to the fourth parties as next-of-kin of Miss Dalgleish?"

The following statements were made in the case—"The said Mary Wellwood Dalgleish was fully aware of the amount of her funds, and collected her income herself, including the interest of the said £3500. She was also fully aware of the terms of her father's settlement as to the said £3500, and of her power with regard thereto. At the date of her settlement her estate, exclusive of the sum of £3500 in question, consisted, as nearly as may be, of . . . £15,200. She bequeathed legacies to the amount of £18,000."

Argued for the first parties—Looking to the terms in which the power of appointment was given, to the terms of the conveyance in Miss Dalgleish's settlement, and to the admissions in the case, there was clear evidence that Miss Dalgleish intended to exercise her power of appointment. The case fell under the rule established in *Smith* v. *Milne*, June 6, 1826, 4 S. 679; *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413; *Grierson* v. *Miller*, July 3, 1852, 14 D. 939.

Argued for the second, third, and fourth parties—There was no clear indication that

Miss Dalgleish meant to exercise the power of disposal. Her settlement contained no words appropriate for that purpose. In *Smith's* case the testatrix had reasonable ground for considering the estate over which she had a power of disposal her own, and as she had no estate of her own, it was clear that she must have had that interest in view when she made her will. In the cases of *Hyslop* and *Grierson* the granter of the power of disposal contemplated that it might be exercised by will, and in both these cases there was no destination-over, and the donees of the power might reasonably hold the funds over which they had a power of disposal their own. These considerations did not apply here, and accordingly the present case was distinguished from those on which the first parties relied —*Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050; *Boustead* v. *Gardner*, November 4, 1879, 7 R. 139; *Bowie's Trustees* v. *Paterson*, July 16, 1889, 16 R. 983; *Whyte* v. *Murray*, November 16, 1888, 16 R. 89; *Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. 106 (*per* Lord Brougham, 141).

At advising—

LORD ADAM — [*After referring to the terms of the deeds*]—In order to arrive at a conclusion on the questions put to us, it is only necessary further to refer to the fifth statement in the case, where it is said that Miss Dalgleish "was fully aware of the amount of her funds, and collected her income herself, including the interest of the said £3500. She was also fully aware of the terms of her father's settlement as to said £3500, and of her power with regard thereto." Then it is said that at the date of her settlement the amount of Miss Dalgleish's estate, exclusive of the £3500, was about £15,200, and that she has left legacies to the amount of £18,000. From the above statement it is clear that if the sum of £3500 is not carried by Miss Dalgleish's settlement there will be a deficit of about £2800 in the funds left by the settlement. We are told in the case that she was fully aware of the amount of her funds, and she must have known the amount of the legacies she was leaving. The only inference seems to be that the sum of £3500 was meant to be carried by her settlement.

These being the facts, the question is, whether Miss Dalgleish has effectually exercised the power of disposal of this sum of £3500? I think that question is settled by authority.

The first case we were referred to was that of *Smith* v. *Milne*, 4 S. 679. The facts in that case were different from those in this, and need not be particularly referred to. In that case, however, the Court held that the power of disposal of the residue of his estate, given by a husband to his wife, was effectually exercised by her by her last will and settlement, although the power was not therein referred to.

The case, however, of *Hyslop* v. *Maxwell's Trustees*, 12 S. 413, appears to me to be directly in point. In that case Mr Maxwell left to his niece Miss Hyslop an annuity of £100 sterling, with power to her "by will or other deed under her hand" to dispose of as she might think proper, after her decease, of the capital sum of £2000, which was to be set apart by his trustees for ensuring the annuity, and which they were directed to pay in the way she might order and appoint. Miss Hyslop, before Mr Maxwell's death, had executed a settlement of her whole estate, heritable and moveable, in favour of her three sisters. After her death her sisters claimed this sum of £2000. Mr Maxwell's trustees objected to the claim, on the ground that the testatrix had no property in the sum, but a mere power or faculty to dispose of it, and that her settlement was not an effectual exercise of the power, so that the sum of £2000 fell to the residuary legatee of Mr Maxwell. The Lord Ordinary, Lord Corehouse, than whom I need hardly say there can be no higher authority, preferred the Misses Hyslop's claim. "The only question therefore," he said, "is, whether the general conveyance in favour of her sisters is an execution of the power, and comprehends that sum. According to a very strict and rigorous construction of the instrument, it may perhaps be admitted that the words used do not comprehend it, for neither was the fee vested in her person, nor could the trustees have been called to denude of it during her life. But testamentary deeds are not so construed; on the contrary, it is an invariable rule that they shall receive the most liberal interpretation, and that which carries the presumed intention of the testator into effect. The sum in dispute, though not technically Miss Hyslop's property, was virtually so. She had the interest of it during her life, and the unlimited power of disposal at her death. So much was it considered her property, that one time she submitted to a reduction of her annuity when the rate of interest fell. Indirectly, she might have disposed of it even in her lifetime, for onerous causes, by a deed to take effect at her death. When she made a settlement, therefore, leaving everything she had, or might afterwards have, to her sisters, no reasonable doubt can be entertained that she meant to include a sum which in effect was as much hers as any part of her property." The Lord Ordinary goes on to point out that the law of Scotland has never recognised the English rule, that a general devise, however unlimited in terms, will not comprehend the subject of the power unless it refers to the subject or the power itself. Now, that judgment of Lord Corehouse was adhered to in the Inner House for the reasons stated by the Lord Ordinary, and the same principles were given effect to in the case of *Grierson* v. *Miller*, 14 D. 939. I cannot distinguish these cases from the present, and I therefore think the present case is settled by authority.

We were referred to the case of *Mackenzie* v. *Gillanders*, 1 R. 1050, as a decision to an opposite effect. It is true that in that case the Court, on the construction of Miss Gillanders' last will and settlement, came to the conclusion that she had not

thereby exercised a power of disposal of a sum of money conferred on her by the trust-disposition and settlement of her father. But in that case the Court recognised the authority of the cases of *Smith*, *Hyslop*, and *Grierson*, to which I have referred. Lord Deas said—"It is quite settled in our law and practice that where a testator leaves his whole means and estate to a person or persons named in his will, that may be a sufficient exercise of a power to dispose of funds not the property of the testator, but which the testator has been empowered by somebody else to dispose of. So much at least is settled, and we are not now to go back upon it."

In that case the Court thought it had not been the testator's intention to deal with the particular fund. In this case, for the reasons I have stated, I think it clearly was the intention of the testatrix to deal with the particular fund, because otherwise her funds would have been insufficient to meet the special legacies.

I think therefore the first question should be answered in the affirmative.

LORD M'LAREN—The most general principle that can be extracted from all the cases, where the question which had to be considered was the exercise of a power of appointment by a general deed, amounts to no more than this—that such a general deed may receive effect as an exercise of the power, provided it appears from the deed itself and the surrounding circumstances that it was the intention of the granter of the deed that it should be an exercise of the power. It does not appear that any absolute rule has been recognised, that in all circumstances a general settlement is sufficient to carry property over which the granter has a power of disposal; and where the donee of a power has no interest in the proprerty, and there is no evidence that he was aware of his power, then it would be difficult, or rather wrong, to assume that his general deed was an exercise of the power. One might instance the case of a trustee having no personal interest in the trust estate, but with a power to divide it among the truster's children. In such a case it would be obviously inadmissible that his general disposition should receive effect as an exercise of the power. But that is a very unusual case. On the other hand, it is a case—and very familiar to conveyancers—that a limited interest is given to a member of a family, with the fee to his children, and a power of disposal to others outside his family in the event of the failure of issue. The cases referred to by Lord Adam are of that description. Now, where a power of disposal is given to the taker of a limited interest, such as a liferenter, if there are also present these additional elements, that there is a destination of the fee to the liferenter's family in the first instance, and that the donee is cognisant of the power, it would be difficult to resist the conclusion that his general disposition was intended to carry the estate which is subject to the power. There is the further element in this case that Miss Dalgleish has made testamentary provisions to an amount which her individual estate is inadequate to satisfy, but which there is enough to satisfy if the property over which she had a power of disposal is taken into account. Here, then, we have a concurrence of all the elements which in former cases have been held to be *indicia* of intention to exercise a power of disposal although the power is not mentioned in express terms.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Jameson—C. S. Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Second, Third, and Fourth Parties—H. Johnston—Ferguson. Agents—Dalgleish & Bell, W.S.

Thursday, March 2.

OUTER HOUSE.

[Lord Low.

AIKMAN (SMITH'S TRUSTEE), PETITIONER.

Parent and Child—Legitim—Bankruptcy—Right of Trustee in Legitim Fund—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 103.

Held than an undischarged bankrupt was not entitled to reject his legitim, and take instead testamentary provisions from which his creditors were purposely excluded.

Observations on *Stevenson* v. *Hamilton*, 1 D. 181.

The estates of David Smith, wine broker, 95 Bath Street, Glasgow, were sequestrated on 13th October 1891, and Patrick Hamilton Aikman, C.A., 107 St Vincent Street, Glasgow, was elected trustee in the sequestration. On a realisation of the assets a dividend of 1s. 3½d. in the £1 was paid to the creditors.

The bankrupt's father, Mr Andrew Smith, S.S.C., Edinburgh, died on 24th July 1892, possessed of considerable means. He left a trust-disposition and settlement dated 20th February 1891, in which he nominated trustees and directed them, *inter alia*, to hold the residue of his estate and to pay over the free annual income to his daughter, Agnes Jane Smith so long as she lived and remained unmarried, and on her death or marriage, to divide the whole of his means and estate amongst his children in equal shares. By a codicil dated 7th December 1891, on the narrative that the estates of his son David Smith had been sequestrated, he declared that in the event of his decease before his said son had obtained his discharge, the latter should have no right or interest in his estate, and the trustees