recalled, and the case remitted to him to proceed.

LORD KYLLACHY—I concur. The case being decided on the grounds stated by your Lordship we are relieved of the necessity of considering whether the failure of the appellant to appear at the meeting was wilful failure in the sense of the statute.

LORD KINCAIRNEY—I am of the same opinion. I should always be reluctant to recal the judgment of a Sheriff on a point of form, especially in a process of cessio, but I do not think it is possible to allow this interlocutor to stand. The decree pronounced was practically a decree in absence. That is quite right if there is a pursuer in the action, but it can never be right if there is no pursuer, and in this case there was neither a pursuer nor a defender, nor any creditor who had made himself a party to the action. On that ground I agree with your Lordships that the judgment should be recalled.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of Dumfries and Galloway dated 3rd February 1905, and remit to him to proceed of new, and decern."

Counsel for the Appellant—Macmillan. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—F. J. Jameson. Agents—Scott & Glover, W.S.

Thursday, March 9.

FIRST DIVISION.

DALZIEL *v.* DALZIEL'S TRUSTEES.

DALZIEL *v.* HENDERSON'S TRUSTEES.

Succession—Power of Appointment—Validity of Exercise of Powers—Exercise by General Conveyance to Testamentary Trustees—Objects of Power—"Issue"—Issue including Grandchildren—Appointment to Child in Liferent and Her Children in Fee—Exercise of Powers Partly ultra vires—Competition for Administration between Two Sets of Trustees.

A, a married woman possessed of separate estate, executed a deed of settlement conveying a portion of her estate to trustees, who were directed to pay the interest thereof to herself during her life, and after her death to hold it in trust for all or any one or more of her "issue, . . . at such ages and times . . . in such shares, if more than one, and in such manner" as she should by deed or will appoint, and, in default of such appointment, for all her children, it being further provided that "no child who, or any of whose issue," should take any part of the trust funds under any such appointment, should be entitled to any share of the unappointed trust funds without bringing the share or shares "appointed to him or to her, or to his or her issue," into hotchpot.

A had also a power of appointment over certain funds held by trustees under her father's trust-disposition "in trust for all or such one or more exclusively of the others or other of the issue of" A "born or to be born during the life of" A "or within twenty-one years after her death if more than one, in such shares and with such future and other trusts for the benefit of such issue or some or one of them, with such provision for their respective maintenance . . . and upon such conditions, with such restrictions, and in such manner, as" A . . . "shall appoint, and in default of such appointment . . . in trust for all or any of the children or child living at" the truster's "death or born afterwards of" A; " . . . provided always that no child . . . who or whose issue shall take any part of the same trust estate under any appointment . . . shall, in default of any appointment to the contrary, have or be entitled to any share of the unappointed part of the same trust premises without collating the share or shares appointed to him or her or to his or her issue." . . .

A died, survived by a son and daughter, and left a will by which she bequeathed to trustees all the residue of her estate, "of whatever nature or kind soever, and including all property over which I have any power of appointment," to hold in trust for her son and daughter, with directions restricting her daughter's right to a liferent, and giving the fee of her daughter's share to her daughter's children as her daughter might appoint, and conferring a power on her daughter to provide a liferent of a certain amount to a surviving husband.

Held (1) that the powers of appointment possessed by A under the deed of settlement as well as under her father's trust-disposition and settlement were validly exercised by the general conveyance of the residue of her whole estate to her testamentary trustees, such conveyance being a formal mode of conveying the beneficial interest; (2) that the directions in A's will restricting her daughter's right to a liferent, and giving the fee of her daughter's share to her daughter's children as her daughter might appoint were *intra vires* of A's powers of appointment under both deeds, inasmuch as in both these deeds the term "issue" included grandchildren; (3) that the direction in A's will giving her daughter a power to provide a liferent for a husband was an invalid exercise of these powers, in respect that such husband was not an object of the powers; (4) that the invalid exercise of her powers in this particular, being separable, did not affect the validity of the exercise of the powers in other respects, but merely fell to be disregarded; and (5) that the funds

under the deed of settlement fell to be administered by A's testamentary trustees.

Mrs Ethel Henderson or Dalziel, wife of Andrew Dalziel, chemical manufacturer, Irvine, by deed of settlement in the form of an indenture between her on the one part and Stonhewer Parker Freeman of 13 Queen Street, London, and James Pipe of Irvine, as trustees on the other part, of date 4th December 1890, provided that the said trustees should invest and retain upon trust as therein directed the sum of £14,105, 12s. 7d., her separate estate, which she had paid over to them.

After providing for the payment of the income of the trust funds to Mrs Dalziel during her life, and on her death to her husband while he remained unmarried, the said deed of settlement directed that the trustees should thereafter hold the trust funds "in trust for all or any one or more of the issue of the said Ethel Dalziel, as well by the said Andrew Dalziel as by any future husband, at such ages or times, age or time (not being earlier as to any object of this power than his or her age of twenty-one years or day of marriage), in such shares, if more than one, and in such manner as the said Esther Dalziel shall by deed or will appoint, and in default of such appointment, and so far as any such appointment shall not extend, in trust for all the children of the said Esther Dalziel, as well by the said Andrew Dalziel as by any future husband, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares, and if there be only one such child the whole to go to that one child, but so, nevertheless, that no child who, or any of whose issue, shall take any part of the trust funds under any such appointment as aforesaid shall be entitled to any share of the unappointed trust funds without bringing the share or shares appointed to him or to her or to his or her issue into hotchpot and accounting for the same accordingly, unless the person or persons making such appointment shall thereby direct to the contrary; and if there be no such child, then in trust for the said Esther Dalziel absolutely."

Mrs Dalziel was predeceased by her husband, and died on 17th May 1896 survived by two children, Esther Blanche Dalziel, who attained her twenty-fourth year on 16th February 1904, and Ralph Cannan Dalziel, who at the date of these cases was a minor and a ward of the Court of Chancery.

Mrs Dalziel left a last will and testament, whereby, *inter alia*, she bequeathed to the trustees therein named, viz., the said James Pipe and Stonhewer Parker Freeman, and William Cunningham Macnaughtan of Glasgow, "all the residue of my estate and effects, real and personal, of what nature and kind soever, and including all property over which I have any power of appointment, upon trust that my trustees shall sell the said real estate, including chattels real, and call in, sell, and convert into money such part of my personal estate as shall not consist of money, with power to postpone such sale and conversion;" and further directed her trustees, "out of the money to arise from the sale and conversion of my said real and personal estate, and out of my ready money, to pay my funeral and testamentary expenses and debts, and any legacies bequeathed by this my will or by any codicil hereto, and to hold the residue of the said money upon trust, to invest the same in . . .; and I declare that my trustees shall hold the said investments hereby directed to be made or authorised to be retained (hereinafter called the trust fund) upon trust for my said two children Esther Blanche Dalziel and Ralph Cannan Dalziel, or such one of them as shall attain twenty-four years of age, or die under that age leaving lawful issue, and if more than one in equal moieties, and so that the share of my said daughter shall be retained and held on such trusts hereinafter declared concerning the same as shall be subsisting and capable of taking effect."

The sixth paragraph of said last will and testament provided—"My trustees shall retain the share of my said daughter in the trust fund, upon trust to pay the income thereof to her for her life without power of anticipation during any coverture, and after her death the capital and income of her share and so much thereof respectively as shall not have been paid or applied under any trust or power affecting the same shall be held in trust for all or any one or more exclusively of the others or other of the issue of my said daughter, whether children or remoter descendants, at such time, and if more than one, in such shares and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as my said daughter shall, whether covert or sole, by deed revocable or irrevocable or by will or codicil appoint; and in default of and until and subject to any such appointment, in trust for all or any of the children or child of my said daughter, . . . and if more than one, in equal shares; and I declare that any child of my said daughter who or whose issue shall take any part of the trust fund under any appointment by such daughter shall not, in the absence of any direction by my said daughter to the contrary, take any share in the unappointed part without bringing the share or shares appointed to him or her or his or her issue into hotchpot, and accounting for the same accordingly; and I empower my trustees at any time and from time to time after the death of my said daughter or during her life, with her consent in writing, to raise any part or parts not exceeding together one-half of the presumptive or vested share of any child or other issue of such daughter, under the trusts hereinbefore declared, and to pay or apply the same for the advancement or benefit of such issue as my trustees think proper; and I declare that if there should not be any child of my said daughter who under the trusts in default of appointment hereinbefore contained attains a vested interest in her share, then, subject to the trust and powers declared in favour of my

said daughter and her husband and issue, her share shall be held in trust for such person or persons as my said daughter shall by will or codicil appoint: Provided always, and I hereby declare, that notwithstanding anything hereinbefore contained, my said daughter may, notwithstanding coverture from time to time, or at any time after she shall have attained twenty-one years of age, by deed revocable or irrevocable or by will or codicil, appoint to or in favour of any husband of hers, in case he should survive her during his life or any less period, one moiety or any less part of the annual income of my said daughter's share of the trust fund, and upon any such appointment the powers and trusts herein limited to take effect after the death of such daughter so appointing shall take effect only after the determination of and in the meantime subject to the interest limited by any such appointment: Provided further, and I hereby declare, that notwithstanding anything hereinbefore contained my said daughter may, whether covert or sole, by any deed or deeds, revocable or irrevocable or by will or codicil, appoint any part or parts of my daughter's share in the trust fund not exceeding in the whole the sum of £5000 either to herself or to any other person or persons."

Mrs Dalziel left no other writing purporting to be an exercise of her powers of appointment which she had. The residue of her own estate, exclusive of estate held by trustees over which she had power of appointment, was £6516, 0s. 3d.

Mrs Dalziel had also a power of appointment under the trust-disposition and settlement of her father William Henderson of Williamfield, Irvine, chemical manufacturer there. He died on the 31st December 1880 survived by six children. By his trust-disposition and settlement, which was dated 30th April 1877, he conveyed all his estates and effects, heritable and moveable, for the purposes therein stated, to Arthur Henderson, Fairmile Court, Cobham, Surrey, and others as trustees.

Mr Henderson directed that his trustees should stand possessed of the residue of his estate in trust for all his children, the eldest son taking a double share, and as to the shares of daughters, of whom Mrs Dalziel was one, he provided that the daughters should receive the income during their lives, and that his trustees, "after the death of each such daughter, shall stand possessed of the share hereinbefore given to her in the residuary moneys aforesaid and of the stock, funds, shares, and securities in or upon or into which the same may be invested or varied, and the interest, dividends, and income thereof in trust for all or such one or more exclusively of the others or other of the issue of such daughter born or to be born during the life of such daughter or within twenty-one years after her death, if more than one, in such shares and with such future or other trusts for the benefit of the said issue or some or one of them, with such provisions for their respective maintenance and education or advancement at the discretion of the trustees or trustee for the time being of this my will, or of any other person or persons, and upon such conditions, with such restrictions and in such manner as such daughter shall by deed or writing under her hand, with or without power of revocation and new appointment, or by will or codicil appoint; and in default of such appointment, and so far as any such appointment shall not extend, in trust for all or any the children or child living at my death or born afterwards of such daughter who, being a son or sons, attain the age of twenty-one years, or being a daughter or daughters attain that age or marry under that age, with the consent of her or their guardians or guardian for the time being, and if more than one in equal shares: Provided always that the child of such daughter who or whose issue shall take any part of the same trust estate under any appointment made by such daughter in pursuance of the power in that behalf hereinbefore contained shall, in default of appointment to the contrary, have or be entitled to any share of the unappointed part of the same trust premises without collating the share or shares appointed to him or her or to his or her issue, and accounting for the same accordingly." . . .

Doubts having arisen as to the effect of these deeds two special cases were presented for the opinion of the Court, the first dealing with the fund held by the trustees under Mrs Dalziel's own deed of settlement, the second with that held by the trustees under Mr Henderson's trust-disposition.

To these cases Miss Esther Blanche Dalziel, residing at Overstone Lodge, Withybrook, Warwickshire, Mrs Dalziel's daughter, was the first party, and Ralph Cannan Dalziel, residing at Exbury Rectory, in the county of Southampton, Mrs Dalziel's son, was the second party. In the first case the trustees acting under Mrs Dalziel's deed of settlement, and in the second the trustees acting under Mr Henderson's trust-disposition, were the third parties. In the first case the trustees acting under Mrs Dalziel's last will and testament were fourth parties, and in the second case there were no fourth parties, it having been decided by the Second Division by interlocutor of 5th February 1898 that Mr Henderson's trustees were the proper persons to administer the fund in question held under his trust-disposition.

In the first case the contentions of parties were as follows:—

The first party contended that Mrs Dalziel's will did not import an exercise by her of her power of appointment under the deed of settlement of 4th December 1890, and, alternatively, that the said last will was not a valid exercise by Mrs Dalziel of her said power of appointment so far as regarded the directions for retaining her share in trust and the trust purposes directed concerning the same, in respect, *inter alia*, of the limitations imposed, and that it purported to delegate the power of appointment to more remote issue, and further, that it introduced as beneficiaries parties who were strangers to the power. Alternatively, the first party contended that Mrs Dalziel's last will and testament

was not to any extent a valid exercise by her of said power of appointment.

The second party contended that the will of the late Mrs Dalziel did not constitute a valid exercise by her of the power of appointment over the funds conveyed in her said deed of settlement, and that no appointment having been made in terms of said deed he was entitled to payment of one-half of the said funds upon attaining the age of twenty-one years.

The third parties contended that the power of appointment competent to Mrs Dalziel under the said deed of settlement was intended to be exercised, and was validly exercised, by her said last will and testament, the first party's interest in the estate settled by the said deed of settlement being by said last will and testament restricted to a liferent with power of appointment, and that the estate settled by said deed of settlement fell to be held and administered by them (the third parties) in terms of the directions contained in the said last will and testament.

The fourth parties maintained that the power of appointment competent to Mrs Dalziel under the said deed of settlement was intended to be exercised, and was validly exercised, by her said last will and testament, and that the estate settled by the said deed of settlement fell to be paid over to them by the third parties, to be held and administered for Mrs Dalziel's children in terms of the direction contained in said last will and testament.

The following questions were, *inter alia*, submitted for the opinion and judgment of the Court—"(1) Do the directions in Mrs Dalziel's last will and testament for the disposal of the residue of the estate referred to therein constitute a valid appointment in exercise of her power under the deed of settlement of 4th December 1890 only in so far as they direct her trustees to hold the funds in trust for her son and daughter, or such one of them as shall attain twenty-four years of age or die under that age leaving issue, and if more than one in equal moieties? or (2) Are the trusts imposed by said last will and testament upon the share therein appointed to the first party also valid as in exercise of said power of appointment? or (3) Does the said last will and testament not constitute to any extent a valid exercise by Mrs Dalziel of her said power of appointment? (4) In the event of the first or second question being answered in the affirmative, are the fourth parties entitled to have the fund settled by said deed of settlement, or any and what part thereof, paid over to them by the third parties, to be held and administered for Mrs Dalziel's children in terms of the directions contained in said last will and testament?"

In the second case the contentions of the parties were similar, and the following question was, *inter alia*, submitted to the Court—"(1) Was the power of appointment conferred on Mrs Dalziel by Mr Henderson's last will validly exercised by her last will and testament, and if so to what extent?"

Argued for the first and second parties—The powers were not exercised, for the testatrix did not intend to do so. If the intention were present, what had been done was not to exercise the powers but to try to transfer them to others, which could not be done—*In re Cotton*, L.R., 1889, 40 Ch. Div. 41. If, however, that contention were wrong, then the exercise made of the powers was *ultra vires*, for it was attempted to favour objects outside the powers, viz., children's issue and daughters' husbands, and to subject the interests given to the proper objects to conditions which were *ultra vires*. The powers validly exercised and those invalidly exercised were so interwoven as to render the whole exercise bad—*Baikie's Trustees* v. *Oxley*, February 14, 1862, 24 D. 589; *Gillon's Trustees* v. *Gillon*, February 18, 1890, 17 R. 435, 27 S.L.R. 338; *Cattanach's Trustees* v. *Cattanach*, November 28, 1901, 4 F. 205, 39 S.L.R. 154. In any event, the restrictions and conditions fell to be disregarded—*M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, 12 S.L.R. 635.

Argued for the third and fourth parties—There was no doubt of the intention, but even had there been, a general disposition to testamentary trustees was sufficient to carry property over which the testator had a power of appointment—*Mackie's Trustees* v. *Mackie*, July 4, 1885, 12 R. 1230, 22 S.L.R. 814; *Dykes' Trustees* v. *Dykes*, November 20, 1903, 6 F. 133, 41 S.L.R. 84. The exercise made was within the power. The Act of 1874 (37 and 38 Vict. c. 37) allowed the exclusion altogether of one of the favoured class; it must be lawful therefore to make an interest merely a liferent—*Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, at p. 640, 39 S.L.R. 426—and a liferent had in many cases, in circumstances less favourable than the present, been upheld—*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; *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450. The testatrix had not favoured objects outside the power, for "issue" in the general case meant descendants—*Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, 31 S.L.R. 279; *Turner's Trustees* v. *Turner*, March 4, 1897, 24 R. 619, 34 S.L.R. 468—and in the deeds in question here it clearly covered grandchildren. As to the conditions, the testator had express power to impose conditions, and if any of the restrictions exceeded the power conferred it fell merely to be disregarded and did not involve the invalidity of the whole—*M'Donald* v. *M'Donald's Trustees, cit. sup.; in re Finch & Chew's Contract*, L.R. [1903], 2 Ch. 486.

The third parties also argued that they were the proper set of trustees to administer the funds, as the Court could not without special reason transfer the administration—*Bush* v. *Aldan*, L.R., 1874, 10 Eq. 16. The fourth parties argued *contra*—*Mackie* v. *Mackie's Trustees, cit. sup.; Cowx* v. *Foster*, 1886, 1 J. & H. 30; *Ferrier* v. *Jay*, L.R., 1870, 10 Eq. 550; *in re Swinburne*, L.R., 1884, 27 Ch. Div. 696.

At advising—

LORD PRESIDENT—Mrs Esther Dalziel, a married lady possessed of separate estate, executed on the 4th December 1890 a deed of settlement in English form (which I shall refer to as the settlement), by which she conveyed a sum of £14,000 odd of her separate estate in trust to three persons. These trustees, who are the third parties to the special case, were to hold the funds for payment of the interest thereof to Mrs Dalziel during her life and to her husband if he survived her. After the death of Mrs Dalziel and the death or second marriage of her husband the trustees were to hold the trust funds — [*His Lordship read the direction in the deed of settlement*].

Mrs Dalziel was predeceased by her husband, and died on 17th May 1896 survived by two children, Ralph Cannan Dalziel, the second party to this case, and still a minor, and Elizabeth Blanche Dalziel, the first party, who is now twenty-four years of age and unmarried. She left a last will and testament dated 17th December 1894 (which I shall refer to as the will), by which she left to trustees, who are the fourth parties to this case, "all the residue of my estate and effects, real and personal, and of what nature or kind soever, and including all property over which I have any power of appointment."

We are informed that Mrs Dalziel was possessed of estate other than that held by the third parties to the extent of £6000 odd.

The trust purposes need not be read at length. The trustees are to realise, converting real or personal estate into cash. They are to pay debts and invest, and then they are to hold upon trust—[*His Lordship read the direction in Mrs Dalziel's will*].

The succeeding trust purposes may be sufficiently described by saying that they restrict the daughter's right to a mere liferent, giving the fee to her children or remoter descendants as she may appoint, and with power to her to provide a liferent of a certain amount to a surviving husband.

The first and second parties unite in contending that there has been no valid exercise of the power of appointment. The interest of the second party, the son, is limited to the point that if he can take under the settlement in default of an appointment he will get his moiety when he attains twenty-one, whereas if he takes under the will he has to wait until he is twenty-four. The interest of the daughter, the first party, is more considerable, as it involves the difference between a fee and a liferent.

The first party further contends that even if the will operates as a valid exercise of the power of appointment, yet it is only effectual in so far as it conveys a moiety to the first and second parties, and that the succeeding declarations as to the trusts upon which the first parties' moiety are to be held are *ultra vires* so far as affecting the settled funds, and fall to be disregarded. The practical result of this to her is the same as that sought to be reached by the first contention.

The third and fourth parties unite in resisting the contention of the first and second parties, maintaining that the power of appointment in the settlement was well exercised by the will, and that the trusts of the will fall to be administered. They contend as against each other as to which of them are the proper body of trustees to administer the trusts of the settled funds.

It would be unavailing even if it were possible to attempt to set forth a complete analysis of the cases which have been decided on the branch of law involved in these questions, a considerable number of which had been cited to your Lordships. But there are at least two principles which stand clearly out from the decisions, which will I think be sufficient to try the contentions of parties in the present case.

The first is that no exercise of a power of appointment can be good in favour of persons who are not objects of the power. This is one of those propositions, the mere statement of which would seem to dispense with the need of authority. But there are many cases which are examples of its application, and a good and recent instance of a case to which the party would wish to assimilate the present may be found in the case of *Neill's Trustees* v. *Neill*, 4 F. 636, where, under a power given to a liferentrix to appoint the fee to her children *per stirpes* in such proportions, and subject to such conditions and restrictions as she chose, it was held that an appointment by which she cut down the interest of certain of her children to a liferent and gave the fee to grandchildren was bad, as it made no appointment of the fee except to persons who were outside the power.

The second proposition is that when an appointment is duly exercised in favour of objects of the power, any further restrictions or stipulations which are sought to be imposed, but which are upon a just consideration of the terms of the power *ultra vires* of the person who exercises the power, fall to be disregarded, and held *pro non scripto*, but do not invalidate the exercise of the power in favour of the objects thereof. An example of this proposition may be found in the leading case of *M'Donald* v. *M'Donald Trustees*, 2 R. (H.L.) 125, where the gist of the matter is set forth in an oft quoted sentence of Lord Chancellor Cairns, which for convenience of reference may be here quoted again—"From all these cases the plain rule is to be derived, 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 the 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."

Turning now to the contentions of parties in the present case, the argument of the

first and second parties that there is here no valid exercise of the power of appointment possessed by the late Mrs Dalziel is based on two separate grounds. They say that as a matter of construction the will does not seem to exercise it, because it does not in terms say that it is exercising this power, and further, because it begins with a general conveyance to trustees of all things belonging to the granter, whereas the power did not contemplate a conveyance to other trustees than those who held under the settlement. As regards the point that the will does not in terms say that it is exercising the power, that has been settled as immaterial by a long series of decisions, beginning so far as our Courts are concerned with the case of *Milne* in 4 S. 685, and when we come to the conveyance to trustees, viewed as a question of construction, in this case it is very hard to say that there was no intention, inasmuch as there are the words "including all property over which I have any power of appointment." The counsel for the first party were driven to contend that by power of appointment here was not meant power of absolute disposal. The sufficient answer seems to be that it is a safe rule to begin with believing persons to mean what they say, and that in this case that *prima facie* view is not displaced when we find that the testatrix had under two instruments power of appointment over other property, and had not so far as brought to our notice any absolute power of disposal.

The second ground of argument is that, apart from construction, a conveyance to trustees must be a bad exercise of the power. That must be on the ground that the trustees are not objects of the power. In one sense that is true. But then the conveyance to them is merely formal; the beneficial interest is given to others. Accordingly, one is not surprised to find that there is a long series of English decisions in which it has been held that when the person in right of a power makes a general conveyance to trustees and imposes on those trustees some duties which obviously cannot be satisfied out of the funds which are the subject of the power, such as, *e.g.*, the payment of the testator's own debts, yet this form of conveyance will not vitiate a proper exercise of the power. An example of the partial application of the same doctrine will be found in our Courts in the case of *Mackie* v. *Mackie's Trustees* (12 R. 1230). I am therefore of opinion that Mrs Dalziel did intend to and did validly exercise by her will her power of appointment under the settlement. This disposes of the contentions of the second party, the son.

There remains the further contention of the first party, the daughter, that the limitations sought to be imposed on her moiety are invalid and ought to be disregarded. To succeed in this she must show that in so far as the will gives rights to the grandchildren, it gives to objects outside the power. Now, the power says that the funds may be held for "issue" of Mrs Dalziel in such "manner" as she may direct. It is now well settled that the primary meaning of issue includes all descendants—*M'Donald* v. *Hall* (20 R. (H.L.) 88). It is true that the context may show that it is intended in a more limited sense, as was held in *Cattanach's Trustees* (4 F. 205), where it was clearly synonymous with immediate children only. But here, so far from showing a limited sense, the context seems to me to show clearly the other way; because in the concluding proviso as to hotchpot we find the expression "no child who or any of whose issue," an expression which cannot be satisfied without holding that the original term "issue" includes at least grandchildren.

In so far, then, as the will gives in the "manner" that it confers a liferent on Esther Blanche and a fee on her issue, it seems to me not to go beyond the objects of the power.

There remains a power proposed to be given to Esther Blanche to provide a liferent to a possible husband. Such a person would be an object outside the power. But this part of the case comes, I think, clearly within the second general proposition which I ventured to lay down; and accordingly it may be disregarded without affecting the validity of the exercise of the power in other respects.

There remains the question as between the two sets of trustees brought forward in the special case to which allusion is made in the other case. At the time that special case was presented the beneficiaries were not in the field, and consequently it could not be decided whether there was a proper exercise of the power or not, and accordingly *eo statu* it was better for the first trustees to hold. I think Mrs Dalziel sufficiently indicated by the massing of her funds that she wished her whole moneys to be managed by one set of trustees. I am therefore for giving the testamentary trustees the management of the funds. I do not lay down any general rule. Each case must be judged on its own circumstances. Nor do I think that is at variance with the judgment of the other Division of the Court.

On the whole matter I advise your Lordships to answer the questions submitted as follows:—The first in the negative, the second in the affirmative, the third in the negative, the fourth in the affirmative, and to find it unnecessary to answer the fifth question.

Second Case.—In this case the first and second parties are the same as in the case just disposed of. The third parties are the testamentary trustees of the late William Henderson, who was the father of Mrs Dalziel, and under whose will there was a fund held for Mrs Dalziel in liferent, over which she had a power of appointment.

The contentions of the parties are really identical with those in the last case, with the exception that here there is no competition of administration between the trustees who presently hold the appointable fund and the testamentary trustees of Mrs Dalziel, because these persons have already had a special case before the other Division of the Court on the subject, in which it was

held, and the matter is thereby *res judicata* that Mr Henderson's trustees, *i.e.*, the trustees holding the appointable funds, must continue to hold.

The observations which I made to your Lordships in the previous case, so far as general, and so far as relating to the form of expression used in the will, are clearly applicable to the present. The only question which demands separate treatment will therefore be the argument of the first party seeking to show that the conveyance effected by the trusts of Mrs Dalziel's will is a conveyance to objects outside the power; and for that purpose it is necessary to look at what the power of appointment was in Mr Henderson's deed. By Mr Henderson's deed his trustees were to divide his property into shares and to hold the shares for behoof of each of his children. The proviso as to daughters provided that they were to have a liferent and—[*his Lordship read the provision in Mr Henderson's deed*].

This proviso seems to me to be, if possible, even clearer than the proviso in the last case, as showing that "issue" is not confined to immediate issue, because you have the expression "issue of such daughter born or to be born during the life of such daughter or within twenty-one years after her death." There is further the proviso for the making of "future" trusts for the benefit of such issue. It is said that by the trusts of Mrs Dalziel's will it is possible that Esther Blanche may confer a right on issue who will be born more than twenty-one years after the death of Mrs Dalziel. The answer is that there is no reason that she should do so, and that if she does, so far it will be an *ultra vires* act; but on the principles already commented on these considerations will never invalidate Mrs Dalziel's appointment. I am of opinion that this case is therefore substantially identical with the last case, and that the questions fall formally to be dealt with as follows:—To answer the first question by saying that the power of appointment conferred on Mrs Dalziel by Mr Henderson's will was validly exercised by her in her last will and testament, and that the funds held by Mr Henderson's trustees, and subject to such power of appointment, fall now to be held under the trusts declared by Mrs Dalziel's will; and to find it unnecessary to answer the other questions.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court answered the questions in the two cases as advised by the Lord President.

Counsel for the First Party—Macphail. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Second Party—Scott Brown. Agents—Calder, Marshall, & Walker, W.S. (in First Case), and Mylne & Campbell, W.S. (in Second Case).

Counsel for the Third Parties—Malcolm (in First Case), and Hunter (in Second Case). Agents—Bruce & Black, W.S. (in First Case), and Webster, Will, & Company, S.S.C. (in Second Case),

Counsel for the Fourth Parties—Chree. Agents—Mylne & Campbell, W.S.

Friday, March 10.

SECOND DIVISION.

WILLIAM SOMMERVILLE & SON, LIMITED *v.* THE EDINBURGH AND DISTRICT WATER TRUSTEES.

Waterworks—Pollution—Construction of Private Act of Parliament—Negligent Use of Statutory Powers—Quality of Compensation Water.

A water company had statutory powers conferred on it to take water for the use of the city of Edinburgh from the Glencorse Burn, and to form a reservoir. As a condition of the grant of these powers the statutes provided that the company should give a certain quantity of compensation water from the reservoir to the lower heritors on the burn, among whom were certain millowners. The statutes were silent as to the quality of the compensation water to be given. The Edinburgh and District Water Trustees, who were the successors of the water company, having drawn off the water in the reservoir to such a low level that the silt which had collected on the bottom rendered the water unfit for the purposes of the millowners—*held* (*dissenting* Lord Young) (1) that, on a just construction of the provisions of the statutes as to compensation water, the Water Trustees, while not bound to send down the compensation water of any particular standard of purity, were bound to send it down free from such pollution as was preventable under a reasonable system of management; and (2) that the Water Trustees in managing the reservoir were bound to have reasonable regard not only to the interests of the city of Edinburgh, but also, if not primarily at least co-ordinately, to the interests of the lower heritors on the stream; and (3) that the Water Trustees having failed to perform these obligations were liable in damages to the millowners for the loss caused to them by such failure.

This was an action raised by William Sommerville & Son, Limited, carrying on business as papermakers at Dalmore Mills, Milton Bridge, Midlothian, against the Edinburgh and District Water Trustees, (1) to have it declared, *inter alia*, that the pursuers were entitled to have the compensation water provided to the pursuers by the defenders' Acts of Parliament sent down the Glencorse Burn, on which the pursuers' mills were situated, in a fit state for all primary purposes, or otherwise in a state not inferior in quality and purity