Thursday, July 19.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Dundas, Ordinary.

BRAY AND OTHERS *v.* PETERKIN (BRUCE'S TRUSTEE) AND OTHERS.

Succession—Faculties and Powers—Power of Appointment—Exercise by General Settlement—Intention—Onus—English Wills Act 1837 (1 *Vict. c.* 26), *sec.* 27, *a Correct Expression of Law of Scotland.*

Section 27 of the English Wills Act 1837, which provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have a power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will," *held* to be a correct expression of the law of Scotland. Lord Brougham's dictum as to the law of Scotland in *Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. p. 106, at p. 141, on which the above section is founded, *approved.*

Opinion per Lord Low that the presumption in favour of the exercise of the power can be rebutted only by evidence of intention amounting practically to a declaration that the power is not exercised.

A testator conveyed his whole means and estate, heritable and moveable (except the estate of X to be settled in the fourteenth place), to trustees for various purposes, including *fourth*, division of furniture among A, B, C, grandnieces of wife failing exercise by wife of power of appointment conferred on her; *eighth*, liferent of whole income to wife; *twelfth*, on death of wife if she survived him, payment of residue of moveable estate as appointed by her, or, failing appointment, equally among grandnieces A, B, C; *fourteenth*, as regarded estate of X, on death of wife sale of estate and payment of proceeds as she might appoint, or, failing appointment, division among certain relatives of wife from whom A, B, C, otherwise provided for, were excluded. By her will the wife, after expressly exercising the power of appointment as to furniture, provided, "as regards the remainder of my means and estate I provide" that the residue be divided between her grandnieces A and B (C had died) in the proportion of two-thirds to A and one-third to B. By subsequent codicil she expressly exercised the power of appointment over the residue of her husband's moveable estate in favour of A and B.

Held (*dub.* Lord Stormonth Darling) that the power of appointment conferred on the wife by purpose *fourteen* as regarded the proceeds of the sale of X, had been validly exercised by her will in favour of A and B.

Mackenzie v. *Gillanders*, June 19, 1874, 1 R. 1050, 11 S.L.R. 612, *commented on.*

On 27th January 1905 Mrs Charlotte Wheeler or Bray, widow, residing at Wimborne House, Albert Road, Bromley Common, Kent, and others, beneficiaries under the trust-disposition and settlement of the deceased James Bruce of Inverquhomerie, raised an action against, *inter alios*, Henry Peterkin, solicitor, Aberdeen, the sole surviving trustee of the said James Bruce, *inter alia*, to have it declared that Mrs Diana Wheeler or Bruce, widow of the said James Bruce, had not validly exercised a power of appointment over one moiety of the proceeds of the sale of certain property at Chislehurst, Kent, known as Blackmount, conferred upon her by her husband's trust-disposition and settlement.

They, *inter alia*, pleaded—"(1) On a sound construction of the fourteenth purpose of the said trust-disposition and settlement and codicils thereto of the said James Bruce, the legacy of the first moiety of the Blackmount property referred to in summons, or the proceeds of a sale thereof, vested (in default of any appointment in terms of such purpose of his wife) in the pursuers and the other parties mentioned in the said fourteenth purpose as at the death of his wife, according to their share as mentioned therein. . . . (2) The wife of the said James Bruce never having exercised the power of appointment conferred on her by the said fourteenth purpose of his settlement over the moiety in question, the pursuers are entitled to have decree to that effect pronounced in terms of the declaratory conclusions of the summons."

The facts are fully stated by the Lord Ordinary (DUNDAS) in his opinion *infra.*

The following is the text of the material portions of the deeds of which the Lord Ordinary states the general tenor:—I. Trust-disposition and settlement of James Bruce, dated 14th May 1897—"I, James Bruce, do . . . hereby . . . dispone [to certain trustees] all and whole the lands of Inverquhomery . . . as also my whole moveable means and estate of every kind and denomination, heirship moveables included, but excepting my freehold property in England consisting of a messuage or tenement and premises at Chislehurst, Kent, which are to be devised and settled by me in trust hereafter in the fourteenth place . . . But declaring always that these presents are granted in trust for the ends, uses, and purposes after mentioned, *videlicet* . . . (*Fourth*) that my trustees shall convey and make over to my said wife, subject to the declaration after written, all the furniture and effects which may at the time of my death be in the mansion-house of Inverquhomery. . . . But I declare and provide that although the furniture, effects, and others hereby in the fourth place directed to be conveyed and made over to my said wife are intended by me to be used and disposed of by her as

her own absolute property, yet in the event of her not having herself disposed of them during her lifetime, or by any testamentary writing to take effect after her death, my trustees shall divide and deliver such of the said furniture, effects, and others as may be undisposed of at the death of my said wife to and amongst her grandnieces, Kate Freeman, Emily Blanche Freeman, and Dora Sylvia Warwick, equally among them, or as nearly equally as my trustees shall find to be practicable and as they may consider just in their discretion, which no one shall be entitled to interfere with or question. . . . *Eighth*, that my trustees shall provide for the full and free liferent use and enjoyment by my said wife of the income of the whole of my said estates, means and effects . . . *Twelfth*, on the death of my said wife in case she survive me my trustees shall pay and convey and make over the residue of my said moveable and personal estate to such person or persons, or in such way or manner as my said wife may direct and appoint by any writing under her hand, and failing such direction and appointment by her my trustees on her death shall pay and convey and make over the said residue to the said Kate Freeman, Emily Blanche Freeman, and Dora Sylvia Warwick, and the survivors and survivor of them equally, but declaring that should any of them have predeceased the time appointed for such division leaving lawful issue the share of the said residue to which the party so predeceasing would have been entitled if alive shall be paid and divided to and amongst such lawful issue equally share and share alike. . . . *Fourteenth* . . . I devise my freehold house and premises at Chislehurst aforesaid, known as Blackmount, to my trustees upon trust to permit my said wife to occupy the same during her life, or so long as she shall think fit so to do . . ., and after her death or in her lifetime if she shall elect no longer to occupy . . . to sell . . . and I declare that my trustees shall stand possessed of the proceeds of my freehold house and premises known as Blackmount aforesaid, upon trust if my wife shall be living at the time of sale to invest the same . . . and to stand possessed of the investments hereinbefore directed to be made (hereinafter called 'the trust fund') and of the annual income thereof upon trust to pay the income thereof to my said wife during her life for her separate use without power of anticipation, and after her death shall stand possessed of the capital and income of the trust fund, or if she shall have died prior to such sale of my Blackmount estate then of the proceeds of sale of my said Blackmount estate, upon trust to divide the same into two equal moieties, and shall stand possessed of one moiety thereof upon and for such trusts, intents, and purposes as my said wife shall, whether covert or sole, by will or codicil appoint, and in default of such appointment or so far as no such appointment shall extend, then upon trust to divide the same equally (except as hereinafter mentioned) amongst the following persons, namely, my wife's surviving sister Mrs Charlotte Wheeler or Bray, her niece Mrs Mary Ann Hedges or Freeman, all the children then living of the said Mary Ann Hedges or Freeman (except Kate Freeman and Emily Blanche Freeman), all the children then living of the said Charlotte Wheeler or Bray (except William Bray), all the children then living of my wife's niece Mrs Rosa Bray or Warwick (except Dora Sylvia Warwick), my wife's half brother Edward Warwick, all the children then living of my wife's half brother William Warwick, and all the children then living of the said Edward Warwick (except his eldest daughter Ellen Matilda), so nevertheless that the said Mary Ann Hedges or Freeman and Rosa Warwick or Bray shall respectively take each a double share in the trust fund: And I direct that all such children and grandchildren shall take equally *per capita* with the other persons hereinbefore named, and shall stand possessed of the other moiety thereof upon trust to pay the sum of £200, which shall carry interest at the legal rate from the date of the death of my said wife, to Charles Warwick, who is now in my service at Blackmount aforesaid: And subject thereto shall stand possessed of such second moiety in trust for all or some one or more of my said wife's three grandnieces Kate Freeman, Emily Blanche Freeman, and Dora Sylvia Warwick, at such times, in such manner, and subject to such conditions as my said wife, whether covert or sole, shall by deed or will appoint, and in default of or subject to such appointment in trust for my wife's said three grandnieces or such of them as shall respectively attain the age of twenty-one years or be married, in equal shares as tenants in common."

II. Will of Mrs Diana Bruce, widow of James Bruce, dated 29th April 1903—"I, Mrs Diana Bruce, widow of the late James Bruce, and residing at Inverquhomerie, Longside, with the view of providing for the disposal of my means and estate after my death, hereby appoint Henry Peterkin, solicitor in Aberdeen, to be my executor with all the usual powers; and with reference to the furniture and effects referred to in my said husband's settlement in article fourth thereof, and there directed to be made over to me, as well as with reference to any other effects at Inverquhomerie belonging to me, I provide as follows:—My niece Kate Freeman shall be entitled as her absolute property to such articles of furniture as she may select and as my executor may consider suitable and sufficient to furnish a house for her, and which shall be delivered over to her out of said furniture at Inverquhomerie. With regard to silver my said niece Kate Freeman shall receive the larger tea service and large tray and tea urn, my niece Emily Blanche Freeman or Blackett shall receive the small tea set, and the remaining silver shall be divided by my executor between Kate Freeman above named and the above named Emily Blanche Freeman or Blackett in such way as shall in his opinion give Kate two-thirds of the value thereof and Emily one-third of the value

thereof. As regards linen, bedding, and blankets, these shall be divided amongst the said Kate Freeman, the said Emily Blanche Freeman or Blackett, and my niece Rose Warrack, but so that my executor may in his opinion give Kate the best share. The crockery and other things of that kind and the large pictures brought from Chislehurst shall be divided between Kate and Emily above referred to. The whole furniture and effects referred to in article fourth of my said husband's settlement, and any other furniture and effects belonging to me at Inverquhomerie, and not hereby specially disposed of, shall be sold, and the free proceeds after deducting all duties and expenses thereon shall be paid over to the said Kate Freeman and the said Emily Blanche Freeman or Blackett in the proportions of two-thirds thereof to Kate and one-third thereof to Emily. And my said executors shall have full discretion as to the divisions above directed and as to what is to be sold. And as regards the remainder of my means and estate I provide that after payment of all my debts and freeing my means and estate of all obligations thereon, the same shall be disposed of as follows: First, in payment of the following legacies, viz., to William Davidson, gardener, if in my service at the time of my death, the sum of fifty pounds, to my sister Mrs Charlotte Freeman the sum of five hundred pounds, to my niece Rose Warrack the sum of five hundred pounds, to my grandniece Mary Ann Freeman the sum of two hundred pounds; and I direct that the residue of my means and estate shall be divided between my said nieces Kate and Emily in the proportions of two-thirds thereof to my said niece Kate Freeman and one-third thereof to my said niece Emily Blanche Freeman or Blackett."

III. Codicil of Mrs Diana Bruce, dated 23rd November 1903. (This codicil altered the amounts of certain legacies and is immaterial.)

IV. Codicil of Mrs Diana Bruce, dated 22nd March 1904—"I, Mrs Diana Bruce, widow of the late James Bruce, and residing at Inverquhomerie, Longside, have reconsidered the terms of the will made by me the twenty-ninth day of April Nineteen hundred and three, and of the codicil made by me the twenty-third day of November Nineteen hundred and three, and desire to make the following legacies in addition to those mentioned therein: . . . and further considering that by the twelfth purpose of my late husband's settlement, which is dated the fourteenth day of May Eighteen hundred and ninety seven, and recorded along with two relative codicils in the Books of the Lords of Council and Session on the nineteenth day of February Nineteen hundred, the trustees acting under the said settlement were directed to pay and convey and make over the residue of my said husband's moveable and personal estate to such person or persons or in such way or manner as I might direct and appoint by any writing under my hand, I therefore hereby direct and appoint the said trustees to pay and convey and make over the said residue of my said husband's moveable and personal estate to my said grandnieces Kate Freeman and Emily Blanche Freeman or Blackett and the survivor of them, but declaring that should either of them have predeceased me leaving lawful issue the share of the said residue to which such predeceaser would have been entitled if alive shall be paid and divided among such lawful issue equally share and share alike, and in the event of females being entitled to receive any principal sums of money under this provision being in minority when such sum shall become payable, the said trustees shall during such minority of each such female invest the sum to which she shall be so entitled in such security as is authorised by law and apply the interest thereof for her benefit in such manner as the said trustees shall in their absolute discretion see fit; and subject to the foregoing amendments and additions I homologate and approve of said settlement and codicil. I provide that the said residue of my said husband's moveable and personal estate is to be paid equally to my said grandnieces equally if both survive, and direct and appoint the said trustees to pay the same accordingly . . ."

V. Codicil of Mrs Diana Bruce, dated 8th April 1904. (This codicil merely altered the amount of certain legacies and is immaterial.)

On 1st June 1905 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—". . . . Finds that the power of appointment in regard to the first moiety of the proceeds of the sale of Blackmount, conferred upon Mrs Bruce by the fourteenth purpose of the trust-disposition and settlement of her husband, was validly exercised by her will, dated 29th April 1903. . . . ."

Opinion.—"James Bruce of Inverquhomerie, in Aberdeenshire, died on 12th February 1900, leaving a trust-disposition and settlement, dated 14th May 1897, and two codicils. The main question in the case is whether or not his wife validly exercised a power of appointment conferred upon her by the fourteenth purpose of the said trust-disposition over one moiety of the proceeds of the sale of certain freehold premises at Chislehurst, known as Blackmount, which belonged to her husband. By the said fourteenth purpose Mr Bruce devised Blackmount to his trustees, upon trust to permit his wife to occupy it during her life upon certain conditions, and after her death, which occurred on 10th April 1904, to sell it by public auction at a reserved price to be signified in writing by him (and which was in fact signified by him as at £13,000), and he gave directions as to the means to be adopted for selling the property if not sold at such public auction. In point of fact, the trustees have found it impossible to sell Blackmount at the price signified by Mr Bruce, and I am informed that they have recently obtained the authority of the Court of Chancery in England to sell it for the best price which they can obtain. Mr Bruce further directed his trustees by the said fourteenth purpose, after the death

of his wife, or if she should have died (as happened) prior to the sale of Blackmount, to stand possessed of the proceeds of such sale upon trust to divide the same into two equal moieties, and that they should stand possessed of one moiety thereof upon and for such trusts, intents, and purposes as his said wife should by will or codicil appoint, and in default of such appointment, or so far as any such appointment should not extend, then upon trust to divide the same amongst the persons and in the manner therein specified. The second moiety of the proceeds of the sale of Blackmount is not here in question. Other powers of appointment, to which I shall refer later, were by the said trust-disposition and settlement conferred upon Mrs Bruce.

"The pursuers claim to be certain of the persons entitled to take this first moiety, upon the assumption that Mrs Bruce did not validly exercise her said power of appointment in regard to it. The conclusions of the summons are that the said power was not validly exercised by her to any extent; that the executors-nominate of Mrs Bruce and the residuary legatees under the will and codicils have no right or interest of any kind in the said moiety; that the legacy, bequest, or provision of the said moiety vested in the legatees or beneficiaries named in the said fourteenth purpose as at the death of Mrs Bruce, and that it falls accordingly to be divided among the pursuers and the other beneficiaries named in said purpose; and that the pursuers in right of shares of the said moiety are entitled to sell and dispose of their interests by way of sale or security or otherwise. The defenders called are (1) Mr Bruce's surviving and acting trustee, (2) the executors-nominate of Mrs Bruce under her will and codicils, and (3) her residuary legatees.

"The defender, Mr Bruce's trustee, states preliminary pleas to the effect that the pursuers have no title to sue, and that the action is premature and unnecessary. [*These were not argued in the Inner House.*] These were not very strenuously maintained, and I do not think that there is much substance in them. The theory is that the pursuers' right, if any, is to a share of the proceeds of the sale of Blackmount, whereas no sale has yet taken place, and there is no absolute duty upon the trustee to sell for some time to come. But I think that the material date is not that of actual sale but that of Mrs Bruce's death, and that if the power of appointment has not been validly exercised by her the pursuers would have a vested interest and would be entitled to sue this action of declarator. Similar pleas are stated on record by the other defenders, but were expressly abandoned at the debate. I see no reason why I should not decide in this action the real question at issue, viz., whether or not Mrs Bruce validly exercised her power of appointment as regards the first moiety of the proceeds of the sale of Blackmount.

"Mrs Bruce's will is dated 29th April 1903. She appoints an executor, and at once proceeds to expressly exercise one of the powers of appointment conferred upon her by her husband's settlement—(*fourth* purpose)—viz., to dispose of his furniture and effects. There was a good reason for the special exercise of this power, because one of the three ladies to whom, failing appointment, the furniture and effects were destined, in equal shares, by the settlement, viz., Miss Dora Sylvia Warwick, had died on 15th March 1901. Mrs Bruce exercises the power of appointment by a division between the other two ladies in the proportions, roughly speaking, of two-thirds and one-third. The will then proceeds, 'And as regards the remainder of my means and estate' (a phrase which the defenders point to as indicating that Mrs Bruce considered the subjects of the power which she had just exercised as part of 'her' means and estate), and after providing for payment of debts and certain legacies, directs 'that the residue of my means and estate shall be divided' between the two ladies above referred to in the proportions of two-thirds and one-third.

"If this will had to be considered by itself, apart from any codicil, I should say without much hesitation that the residue clause imported a valid exercise by Mrs Bruce of all her powers of appointment (including the one now in dispute) so far as not otherwise specifically exercised. I had the benefit of a full citation of the authorities, from *Smith* v. *Milne*, 1826, 4 S. 679, to *Tarratt's Trustees*, 1904, 6 F. 698. The result of these is, I think, correctly summarised in the last-named case by Lord Trayner, where he says that, 'it has been decided that words of general conveyance in a will . . . are a sufficient exercise of a power of appointment possessed by the testator. It is for those who contend that they are not to show reason for their contention.' Upon a consideration of the will by itself I should hold that the pursuers had clearly failed to rebut the general presumption. It remains to consider whether anything in the codicils can be said to rebut it. By her first codicil, dated 23rd November 1903, Mrs Bruce, on the narrative that she has 'reconsidered' her will and 'desires to make the following alterations thereon,' bequeaths certain legacies with which this case has no concern. The second codicil, dated 22nd March 1904, narrates that Mrs Bruce has 'reconsidered' her will and codicil, makes some additional legacies, and bequeaths a small piece of ground (part of Inverquhomerie) which she had obtained in feu from her husband's trustees, in accordance with a direction to them, contained in the *eighth* purpose of this settlement, to grant such feu to her if she should request it. Mrs Bruce then proceeds in said codicil, upon the narrative of the *twelfth* purpose of the said settlement, to exercise the power of appointment thereby conferred upon her over the residue of her husband's moveable and personal estate, and to appoint it to the same ladies who are her own residuary legatees, but not in the same proportions, 'and subject

to the foregoing amendments and additions I homologate and approve of said settlement and codicil.' A third codicil, dated 8th April 1904, need not be noticed. The pursuers say that Mrs Bruce, having thus expressly exercised the powers of appointment conferred upon her by her husband's settlement above set forth, must be presumed to have intended to abstain from exercising her power over the moiety of the proceeds of the sale of Blackmount, here in question, of which no express appointment is made by her. But the burden is upon the pursuers, and I do not consider that there is any sufficient ground for holding that they have rebutted the general presumption already indicated. They referred to the case of *Mackenzie* v. *Gillanders*, 1 R. 1050. But that was a very peculiar case, and decided upon special grounds, as was observed by the learned Judges in *Clark's Trustees*, 21 R. 546. A sufficient, if not the principal ground of judgment appears to be that stated by Lord Ardmillan thus (1 R., at p. 1055)—'The power was peculiar. It was not power to dispose of a specified sum, but of a sum of £2000, to the extent of £1000. She might dispose of £20, or £500, or £1000. She has not expressed her will on that subject, which I think she would have done if she had intended to exercise such a power.' Upon the whole matter, therefore, I hold that the power of appointment here in question was validly exercised by Mrs Bruce, and I shall sustain the pleas stated by the defenders to that effect."

The pursuers reclaimed.

The case was argued before the Judges of the Second Division in December 1904, and was thereafter sent for rehearing to a bench of Seven Judges. The arguments of the parties are sufficiently indicated in the opinions *infra*, particularly those of Lords Kyllachy, Stormonth Darling, and Low. The following authorities were cited—*Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. 106, Lord Brougham at p. 141; *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413; *Dalgleish's Trustees* v. *Young*, June 29, 1893, 20 R. 904, 30 S.L.R. 802: *Clark's Trustees* v. *Clark's Executors*, February 16, 1894, 21 R. 546. 31 S.L.R. 430; *M'Tavish's Trustees* v. *Ogston's Executors*, March 10, 1903, 5 F. 641, 40 S.L.R. 458; *Tarratt's Trustees* v. *Hastings*, July 7, 1904, 6 F. 968, 41 S.L.R. 738; *Cunninghame* v. *M'Leod*, August 13, 1846, 5 Bell's App. 210; *Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050, 11 S.L.R. 612; *Whyte* v. *Murray*, November 15, 1888, 16 R. 95, 26 S.L.R. 67.

At advising—

LORD PRESIDENT—If the question were an open one I think there would be much to be said in favour of the view that a disposition of "my" property and effects could not be the exercise of a power of disposition over property which never was and never could be mine. But it has long ago been settled by a series of cases that, so far as phraseology is concerned, the expression "my" is capable of being referred to a power over the property of another.

Further, I do not think that the Solicitor-General was at all successful in his attempt to show that the dictum of Lord Brougham in *Cameron* v. *Mackie* was incorrect. On the contrary, it was repeated in *Cunninghame* v. *M'Leod*, and its weight is certainly not lessened by the fact that a statute was passed altering the English law so as to be exactly in conformity with what the Scotch law, as Lord Brougham put it, was.

I therefore concur with the view of the Lord Ordinary that the words used are sufficient to exercise the power; that it is for those who say that it was not exercised to show special reasons for inferring it was not; and that they have failed to do so.

I have not thought it necessary in this opinion to critically examine the deed, because that has been done by Lord Kyllachy in the opinion which he is about to deliver, in which opinion I concur.

LORD JUSTICE-CLERK—I am of the same opinion. I have had the advantage of reading the opinions of your Lordship and of Lord Kyllachy, with which I entirely concur, and I do not think it necessary to add anything.

LORD KINNEAR—I also agree with your Lordship. Like the Lord Justice-Clerk I have had the advantage of reading the opinion of Lord Kyllachy, with which I entirely concur, and I do not consider it would be desirable that I should detain the Court by saying the same thing in other words.

LORD KYLLACHY—In this case I agree with the Lord Ordinary that the pursuer has failed to show cause why this moiety of the price of the estate of Blackmount should not pass by Mrs Bruce's will and be payable by her executors to her residuary legatees. She (Mrs Bruce) had, under her husband's settlement, right to the income of the moiety during her life, and she had also a power of appointment over the capital, to be exercised by will or codicil. I am unable to hold otherwise than that her will now before us contains a sufficient exercise of this power.

The law on the subject, long settled in Scotland, and now in England by the Wills Act of 1837, is what is expressed in the 27th section of that Act, which provides, *inter alia*, that "all bequests of personal estate of a testator shall be construed to include any personal estate . . . which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will." It is, I think, generally acknowledged that this enactment correctly expresses what is now the law of both countries on the subject.

The onus is therefore upon the pursuers to make good in the present case the "contrary intention"; and, as I understand them, they seek to do so by reference mainly to a single circumstance, viz., that, there being here two other powers of appointment conferred on Mrs Bruce by her husband's settlement, she exercised both of those powers specially, and with express

reference to her husband's deed. From this the pursuers propose to infer that if the third power (the power in question) had been intended to be exercised, it would also have been exercised specially and with express reference to the husband's deed.

Now, I am not myself partial to the invocation of the maxim *expressio unius est exclusio alterius* as a canon in the interpretation either of wills or of Acts of Parliament. It has been more than once observed that, speaking generally, it is by no means a safe canon of construction. At the same time it may perhaps be allowed that if Mrs Bruce, having powers of appointment over three separate subjects, which, if she had said nothing about them, would all simply have formed part of her Residue, had yet made by her will, with respect to two of the subjects, an express provision that they should form part of her Residue, while with respect to the third subject she made no provision at all—that circumstance might at least found an argument that her intention was to make a distinction, and to declare implicitly that as regards the third subject she had resolved to forego her power of appointment. That might perhaps be arguable. As it happens, however, the position in fact is entirely different. Mrs Bruce had power to dispose (1) of certain furniture, (2) of the residue of her husband's estate, and (3) of this moiety of the price of Blackmount. If she made no contrary provision, she knew, or must be held to have known, that all three subjects would form part of her own Residue, and pass to her own residuary legatees. But as regards two of them—viz., the furniture and the husband's residue—she apparently did not desire that that should be so. Accordingly, she dealt specially and expressly with those two subjects, in the one case by her will, and in the other by her second codicil—dividing the furniture among particular legatees, and as regards the husband's residue, providing in substance that it should go, not to her own residuary legatees, but to the residuary legatees of her husband. That is really the position, and I must say that I fail to see how in such circumstances any inference can be deduced as to the lady's intention with respect to the third subject (the subject here in question), except the inference that she desired that it should remain part of her own Residue.

It is true that in disposing of the furniture she makes reference to the clause in her husband's settlement which created the power. That was, indeed, necessary for purposes of identification. It is true also that the bequest expressed in her codicil of her husband's residue to her husband's residuary legatees is prefaced by a recital of the clause in the settlement which created the power. And that may have been, like many other recitals, superfluous. But that is really all that can be said on the subject. What is, I think, of more importance is this, that the codicil in question—that which deals with the husband's residue—would (as regards the part of it applicable) have been altogether unnecessary except on the footing that Mrs Bruce's will as it stood carried by its residuary clause everything falling under her powers and not specially appointed otherwise. Unless that was so, it is conceded that the residuary destination in her husband's settlement remained operative, and being so operative, there could have been no object in her making a provision by codicil, which simply—and indeed *totidem verbis*—repeated that destination. That it simply did so is quite certain—the only difference being that one of the husband's residuary legatees having died without issue the codicil carries the fund, as the husband's settlement carried it, to the two survivors and their issue. This, I confess, seems to me to be really conclusive as to the meaning which Mrs Bruce herself put upon the residuary clause in her will. And the gloss thus derived is accentuated by this, that the codicil proceeds to declare that, "subject to the foregoing amendments and additions," the testatrix homologates and approves of her existing will. The defenders contend that the word "amendments" is significant, and I think they are entitled to do so. For it is quite certain that the only "amendment" upon the lady's will which the codicil in any view of its terms makes, is that it restores her husband's destination of residue, as against that contained implicitly in the residuary clause of her own will. I need not, of course, point out that if Mrs Bruce's residuary clause (apart from the codicil) carried, and was intended to carry, the husband's residue, there can be no possible ground for concluding that the moiety of the price of Blackmount was in a different position.

It appears to me, therefore, that the codicil in question, construed upon ordinary principles, so far from displacing, supports the legal presumption, and indeed instructs affirmatively that the testatrix did in fact intend what the law presumes. The lady's assumption plainly was that by her will as it stood she had effectually exercised her whole powers of appointment. So assuming she proceeds to make a new disposition with respect to the subject of one of the powers, and having done so she goes on to declare in express terms that *quoad ultra* her will shall remain in force.

With regard to previous cases I do not, I confess, think that much help in questions of this class can be derived from decisions or dicta either Scotch or English. So far as they go, the Scotch cases from *Hyslop* v. *Maxwell* downwards, and the English cases since the passing of the Act of 1837, seem fairly uniform in supporting the legal presumption as against mere general inferences as to what was or was not likely to have been the testator's intention. Beyond that I do not find it necessary to examine the decisions, most of which were fully cited to us. All I need say is that I do not find myself either assisted or embarrassed by the decision in the case of *Gillanders* v. *Mackenzie*—a case as to which I agree with the observations of the Lord Ordinary. Rightly or wrongly

the determining element in that case plainly, I think, was the peculiar character of the power—a power which seemed to require for its exercise something very like the exercise of a discretion. I certainly cannot accept the suggestion that the decision proceeded upon the existence in the deed creating the power of a destination-over failing its exercise, or upon the further circumstance that the power was exercised by a will proper and not by a trust-disposition and settlement. The destination-over might have been important (as has been held in England) if the testatrix had herself created the power by some previous deed. And the other element might have been important if the will under construction had consisted simply of a nomination of executors without any expressed purposes or bequests. It seems enough for present purposes that there is no room for either argument here. The destination-over here is in no different position from that, for instance, in the case of *Tarrat's Trustees* referred to by the Lord Ordinary; and although Mrs Bruce's will is doubtless a proper "will," and begins with a nomination of executors, it contains also distinct words of bequest and conveyance— words of bequest and conveyance, first, of certain parts of her estate, and next of the whole residue of her estate to certain named beneficiaries.

I am therefore of opinion that the Lord Ordinary's judgment is right and should be affirmed.

LORD STORMONTH DARLING — I understand your Lordships to lay down in substance that section 27 of the English Wills Act of 1837 must be held to express the law of Scotland as it has existed from a period considerably earlier than 1837. I do not in the least dissent from that general rule. It is convenient that in a mere bye-path of the great highway of succession the two laws should be the same, and certainly we cannot complain when assimilation takes place by the rule of our neighbours' law being made to conform to our own.

The effect may be to strengthen the presumption which the Act introduces in favour of the power being exercised by the donee of the power, though by words of general gift which in terms would apply only to property belonging to himself. Such an instrument is to operate as an execution of the power "unless a contrary intention shall appear by the will." But the search for the contrary intention is still open; and I am afraid that no rule of law which establishes a mere presumption can ever save courts of law the necessity of examining the instrument to see whether the presumption can be rebutted. The really difficult question must always be, what is enough to show an intention to the contrary? Your Lordship in the chair has referred to the famous and rather mysterious dictum of Lord Brougham made so far back as 1833 in the case about the Dick bequest, with which it had very little connection. That dictum came supported originally by no Scottish authority—though probably a Lord Chancellor is exempt from the necessity of relying on authority—and for a long time it found no place in the development of the Scots law applicable to this question. Lord Corehouse did not found upon it in his well-known judgment in *Hyslop* v. *Maxwell* in 1834, though it was cited in argument, and it was not so much as cited in *Mackenzie* v. *Gillanders* in 1874, forty years later. It is only within comparatively recent years that it has come into prominence. I do not say this as at all attempting to detract from its authority. But even if it be treated as containing the doctrine which was afterwards embodied in the Wills Act, it does not alter the fact that the rule is at best a presumption, for Lord Brougham, after stating what he understood to be the law of Scotland with sundry variations not wholly consistent, ends at p. 143 of 7 Wilson & Shaw by saying that what you have to ascertain is the intention of the maker of the instrument alleged to be an execution of the power, and that you are to gather his intention "in every way you can from the instrument itself."

Now, what I have had difficulty in holding—and I confess my doubts have not been altogether removed, though of course they have been shaken by your Lordships' views—is that Mrs Bruce, the donee of the three powers with which her husband had invested her, did not manifest an intention contrary to the legal presumption as regards the third power. It would be tedious and useless to give in detail my reasons for so doubting. But I may say in a sentence that the considerations which have weighed with me more than with your Lordships were (1) that her husband had made in his own will a detailed destination-over of the property which was the subject of this third power in favour of relatives of the wife; and (2) that Mrs Bruce expressly recited in her testamentary writings two of her powers (thereby showing that to be her way of declaring her intention to exercise them) while omitting all mention of the third, which indicates to my mind that her intention with respect to that power was to leave her husband's destination untouched.

LORD LOW—It seems to me that this case raises sharply a question of general interest, namely, what precisely is the rule of law applicable to cases of this kind?

There is a series of decisions which I have been accustomed to regard as authoritative, in which, as I read them, the question whether the donee of a power of appointment has exercised the power by a general settlement of his own means and estate containing no reference to the power, has been regarded as a question of intention to be determined in the ordinary way upon a fair reading of the settlement, there being, however, a certain presumption—stronger or weaker according to circumstances—in favour of the exercise of the power.

I may refer in particular to the cases of

Smith v. *Milne* (4 S. 679); *Hyslop* v. *Maxwell's Trustees* (12 S. 413), a case frequently cited, and the opinion of Lord Corehouse in which has often been quoted with approval; and *Mackenzie* v. *Gillanders* (1 R. 1050), where, in circumstances very similar to those of the present case, it was held that the power had not been exercised.

In regard to the presumption in favour of the exercise of the power I imagine that it originated in a recognition that, generally speaking, it is just as natural that the donee of the power should exercise it as that he should dispose of his own estate, and accordingly I find in the class of cases to which I have referred that the question of the weight to be given to the presumption, or whether it applied at all in a particular case, seems to have been regarded as a question of circumstances.

Accordingly, when this case was first argued before the Second Division, the circumstances presented great difficulties to my mind, because the donee of the power, Mrs Bruce, was, in a more marked manner than in any other case which has arisen, put to her election whether she would allow a careful destination of the funds which had been made by her husband in favour of her relations to stand, or alter it and dispose of the funds in a different way. I had difficulty in seeing why in such a case it should be presumed that the wife would, as a matter of course, alter the destination made by her husband. It appeared to me that the more natural presumption was that her desire would rather be to respect her husband's wishes, and that she would not alter the destination made by him unless she had very good reason for doing so. That was a consideration which weighed strongly with the Court in *Mackenzie* v. *Gillanders*, although the option which in that case was given to the donee of the power, who was a daughter of the donor, was not nearly so pointed as it is in this case.

It further seemed to me that the circumstance to which I have referred having rendered the presumption in favour of the exercise of the powers a very weak one, there were other circumstances which went far to show that it was not Mrs Bruce's intention to exercise her powers except in the cases in which she did so expressly. In the first place, she used the form of will which, of all others, was the least suited for the exercise of the powers by implication. In the face of the decided opinion expressed by Lord President Inglis in *Mackenzie* v. *Gillanders* that a testament merely appointing an executor for the distribution of the testator's personal estate amongst legatees cannot be presumed to be an exercise of a power of appointment, I could not imagine that Mrs Bruce's law-agent would advise her that such a testament would without doubt be an exercise of all the powers conferred upon her. Again, assuming that she had received that advice, and believed that the residue clause in her will disposed of the three funds over which her husband had given her power, why, when she desired slightly to alter the appointment in regard to one of the funds, was it thought necessary to do so by a formal deed of appointment reciting the power conferred upon her by her husband? I should have expected that she would simply have said that she altered the residuary clause in her will, to the extent specified, so far as regarded the residue of her husband's estate. It is true that the result of the alteration was to give the residue of her husband's estate to the very persons whom he had selected, and, of course, there is great force in the argument that it would have been quite unnecessary to do so, unless by her will she had altered her husband's destination. One of three persons, however, to whom the husband had destined the residue of his estate had died, and it seemed to me that Mrs Bruce's formal appointment might reasonably be attributed to her desire to make it clear that although the condition of matters which her husband had contemplated had changed, she did not wish to interfere with the destination which he had made.

I should still regard these considerations as sufficient to justify the conclusion that Mrs Bruce did not exercise the powers except those to which she expressly referred, if it had not been that I have come to be satisfied that the sound view of the law is that the presumption in favour of the exercise of the power is very much stronger than I had understood it to be, so strong indeed that it can only be rebutted by evidence of intention amounting practically to a declaration that the power is not exercised.

I do not know why Lord Brougham's statement of the law in *Cameron* v. *Mackie* (7 W. & S. 106) has apparently been to a great extent disregarded in this Court. It would certainly have afforded a very easy solution of the case of *Hyslop* v. *Maxwell's Trustees*, which was decided in the following year, and indeed of most of the cases which have subsequently arisen. Lord Brougham's statement of the law, however, must be regarded as being of the highest authority, because although it was not necessary for the decision of the case in which it was made, it was relevant to the question at issue, and none of the other noble and learned Lords who took part in the judgment indicated any dissent.

Now, it seems to me that the substance of Lord Brougham's statement of the law (which was somewhat discursive) is succinctly embodied in the 27th section of the English Wills Act of 1837. That enactment, which appears to have materially altered the English law, and to have been intended to assimilate it to that of Scotland, as laid down by Lord Brougham four years before the passing of the Act, provides that "a bequest of the personal estate of the testator shall be construed to include any personal estate which he may have the power to appoint in any manner which he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will."

Now, this question relates to a branch of

the law in which, as a rule, there is no difference between the law of England and that of Scotland; and it is certainly desirable that the law of the two countries should be the same. Therefore if, as I understand to be the case, your Lordships' opinion is that the rule of the common law of Scotland is the same as the English statutory rule, I am ready to concur.

What, then, is the result of applying the rule to this case? The element of intention is not altogether excluded, but its scope is very much restricted, because the rule makes it imperative upon the Court to construe Mrs Bruce's will "to include" all the personal estate which under her husband's settlement she had power to appoint. I think that that practically means that Mrs Bruce's will must be read as if she had actually defined the residue of her estate as including all the funds which she had power to appoint, and, if so, I agree that she must be held to have exercised all the powers.

LORD PEARSON—I am of opinion in this case that the power of appointment has been effectually exercised; and I entirely concur in the reasons for that opinion which have been expressed by your Lordship in the chair and Lord Kyllachy.

The Court adhered.

Counsel for the Pursuers and Reclaimers—The Solicitor-General (Ure, K.C.)—Wilton. Agents—Henderson & Mackenzie, S.S.C.

Counsel for the Defenders and Respondents—Younger, K.C.—A. R. Brown. Agent—Arthur B. Paterson, W.S.

Tuesday, June 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BURGHEAD HARBOUR COMPANY, LIMITED *v.* GEORGE (COLLECTOR OF DUFFUS PARISH).

Valuation Acts—Valuation Roll—Conclusive Evidence of Annual Value from which Deductions to be Made—Poor-Rates—Assessment—Harbour.

Held that in assessing a harbour for poor-rates a parish council is bound to accept as conclusive the annual value as appearing in the valuation roll, and to make therefrom the deductions allowed by section 37 of the Poor Law Amendment (Scotland) Act 1845, whatever deductions may already have been made by the assessor in arriving at such annual value. *Edinburgh and Glasgow Railway Company* v. *Meek*, December 10, 1864, 3 Macph. 229, and *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, 24 S.L.R. 241, *followed.*

Poor—Poor-Rates—Harbour—Rights and Powers Below Low-Water Mark—Deductions from Annual Value—Expense of Dredging Harbour—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 37—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91).

A parish council refused to allow as a deduction from the annual value of a harbour, under section 37 of the Poor Law Amendment (Scotland) Act 1845, the average cost of dredging the harbour, on the ground that such expense was not incurred in maintaining the lands and heritages, the subjects of assessment, but was an expense of carrying on business incidental to an incorporeal right of harbour in the harbour company not included in the entry in the valuation roll, or alternatively was expenditure in operations on the *solum* of the sea below low-water mark which did not form part of the harbour as that subject fell to be and was entered in the valuation roll.

Held that the average cost of dredging was a proper deduction, inasmuch as (1) it was an expense necessary for maintaining in use the wharves, &c.; and (2) harbour was a complex heritable subject, duly entered in the valuation roll, which embraced any right such as was now sought to be distinguished, and required for its maintenance such expense. *Adamson* v. *Clyde Navigation Trustees*, June 26, 1863, 1 Macph. 974, June 22, 1865, 3 Macph. (H.L.) 100; *Mersey Dock and Harbour Board* v. *Jones*, June 22, 1865, 3 Macph. (H.L.) 102, note; and *Gardiner* v. *Leith Dock Commissioners*, June 17, 1864, 2 Macph. 1234, March 12, 1866, 4 Macph. (H.L.) 14, 1 S.L.R. 213, *commented on.*

Poor—Poor-Rates—Deductions—Insurance where no Premiums Paid—Rates and Taxes—Whether Actual or Average—Whether Owners Only or both Owners and Occupiers—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 37.

Held (*per* Lord Stormonth Darling, Ordinary, and acquiesced in) (1) that in calculating over an accepted number of years the "probable annual average cost of insurance" for deduction from the annual value, under section 37 of the Poor Law Amendment (Scotland) Act 1845, prior to assessing, no allowance fell to be made for insurance in years in which no premiums had been paid or money set aside in lieu thereof—*Glasgow Gas Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727, *distinguished;* (2) that the rates, taxes, and public charges which fell to be deducted under the section were those actually payable and not an average estimate thereof; and (3) that where the owner was also the occupier the proportion of taxes deductible was the owner's proportion only.

The Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83), section 37, enacts—"In estimating the annual value of lands and heritages the same shall be taken to be the rent at which, one year