rant for any such assumption in the facts of this case as stated.

Nor can it be maintained that, provided the Railway Company are satisfied, it is *jus tertii* of anyone else to object. I do not know, and there is nothing before us to show, that the Railway Company are satisfied. But, in any case, this is a matter of public right depending on statute, and it is just because the case stated does not enable us to say that the statutory requirements are really and truly fulfilled that I hold the claim must be disallowed.

It was further argued, in support of the wife's position as a tenant, that if she had been a man she would have been entitled to the service franchise under sec. 3 of the Act of 1884, being "deemed" for the purposes of the Act to be an inhabitant-occupier of the dwelling-house "as a tenant." That, however, distinctly suggests that but for that enactment a person in that position is not, and could not have been regarded as, a tenant, and in any view that section, which is really only a proviso to section 2, cannot be supposed to have any effect whatever upon the legal position of persons who do not fall within its scope.

On these grounds I am for answering the first question of law in the negative.

LORD JOHNSTON—I agree with your Lordships in substantially giving a negative answer to the first query.

The Sheriff tells us that the house which is the subject of the alleged qualification, situated at a crossing, presumably level, on the North British Railway line between Peebles and Innerleithen, belongs to the company, and that in return for her services as gatekeeper it is "let" to the claimant's wife Mrs Murray. I cannot take this as a pure statement of fact. By such we should be bound. I am obliged to read the Sheriff's statement along with the documents appended to the case, which he says were produced by the claimant, who is Mrs Murray's husband, in support of his claim. I can only thus read the Sheriff-Substitute's statement as meaning that the house is "let" in the sense of the documents produced and founded on, or in so far as these import a "letting." Reading then his statement in conjunction with these documents, I cannot accept the Sheriff-Substitute's statement as importing that the house is let in its full legal meaning. It is plain that the house is not let. All that has passed between the assumed lessor and the assumed lessee is a letter in general terms addressed by Mr Jackson, who I believe is the general manager of the North British Railway Company, to a Mr P. Gardiner Gillespie, an S.S.C., and understood to be a party electioneering agent, in which Mr Jackson states that, "with the view of enabling the men in question (that is, I assume, the husbands of female gatekeepers) to exercise the franchise, there would be no objection to let the houses occupied by them to their wives, with power to them to sublet the houses to their husbands, subject to the conditions contained in the missive, one of which would be a condition that, should they cease at any time to be servants of the company they and their sub-tenants would immediately vacate the houses."

This is a somewhat extraordinary document on which to found as a lease by the company to Mrs Murray. And as I do not know the conditions contained in the missive, or even that any missive exists, I am unable to read the Sheriff-Substitute's statement as meaning that the house which is the subject of qualification was ever really let to Mrs Murray. Consequently I am unable to accept the missive (No. 2) as a sub-lease of anything which Mrs Murray was entitled to sublet.

This is, in my opinion, sufficient for the disposal of the case, and requires me to conclude that as Mrs Murray, the claimant's wife, had herself no title as lessor of the premises in question, the claimant can have no title thereto as sub-lessee, and therefore does not occupy the qualifying subjects as the sub-tenant of his wife.

There is underlying the present case a much more difficult question, which was argued to us from both sides of the Bar. On that question, as argued, I have formed a very definite opinion, but, on reconsideration of the case as stated, I find that the argument proceeded on an insufficient disclosure of facts, and that my opinion was based on inferences which, though they may be correct, I was not justified in drawing. Had it been necessary to determine that question I should have been of opinion that the case must be remitted to the Sheriff for further information. As things stand, however, I agree that that is obviated.

The Court answered the first question in the negative, found that this answer superseded the necessity of answering the second question, and remitted to the Sheriff to expunge the name from the roll.

Counsel for the Appellant—C. N. Johnston, K.C.—M. P. Fraser. Agents—Russell & Dunlop, W.S.

Counsel for the Respondents — A. M. Anderson—A. Maitland. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

COURT OF SESSION.

Tuesday, January 8.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

[Lord Johnston, Ordinary.

H. M. ADVOCATE *v.* ROUTLEDGE'S TRUSTEES.

Revenue—Legacy Duty—Power of Appointment—Whether Power Exercised or Not—Intention.

A testator directed his trustees to hold one-half of the residue of his estate for payment of the income to his sister while she remained unmarried, and on her death unmarried "to pay the

capital to the person or persons to whom she may bequeath the same by any will or any other deed under her hand, and failing any direction by her, to the legatees after mentioned."

The sister died unmarried, leaving a settlement which, after reciting *totidem verbis* the said provision and power of appointment in her favour, continued—"I now hereby declare that it is my wish and desire that the capital of the said half of the said deceased's whole estate shall be divided among the legatees appointed by him under his said trust-disposition and settlement."

The testatrix thereafter, on the narrative that she was desirous of settling "her own proper means and estate," disponed her whole property to trustees for certain purposes.

Held (*rev.* Lord Johnston) that the sister had made no appointment of the half of her brother's estate, and that consequently no legacy duty was payable upon it in respect of her death.

Attorney-General v. *Brackenbury*, 1 H. & C. 782, 32 L.J. (N.S.) Exch. 108, *distinguished.*

On June 25, 1906, the Lord Advocate, on behalf of the Commissioners of Inland Revenue, raised an action against Mr Justice Robert M'Killiam Routledge, Port of Spain, Trinidad, and others, trustees of the late William Jamieson Routledge, manufacturer, Aberdeen, under his trust-disposition and settlement dated May 2, 1894, and with two codicils thereto dated respectively May 29 and October 29, 1895, recorded in the Books of Council and Session September 16, 1897.

The conclusions of the summons were for an accounting in respect of half of the residue of the testator's trust estate liferented by his late sister Miss Mary Routledge, sometime of Aberdeen, over which she had a power of appointment, and for £350 in name of legacy-duty on the same.

The circumstances were as follows:—William Jamieson Routledge, manufacturer in Aberdeen, died on August 20, 1897, leaving a trust-disposition and deed of settlement and two codicils. By his settlement he conveyed to the defenders his whole means and estate for the purposes therein set forth. *Inter alia*, by the third purpose of his trust deed the said William Jamieson Routledge directed his trustees to realise his whole estate, heritable and moveable, and to hold one-half of the free balance or residue thereof for payment of the free revenue to his mother during her life, and after her death for the payment of the said free revenue to his sister Mary Routledge in the event of her surviving and being unmarried. If his said sister married her right to the revenue was to cease at the expiration of one year from the date of her marriage. On her death unmarried the trustees were directed "to pay the capital of the said half of my estate to the person or persons to whom she may bequeath the same by any will or other deed under her hand, and failing any direction by her, to the legatees after mentioned." Lastly, the trustees were directed to divide and pay the other half of the residue, as well as the half to be liferented by his mother and sister, in the event of its being set free by his sister's marriage, or by her death without disposing of the same, equally between his brothers and sisters (including the said Mary Routledge, if then alive), and the survivors of them, and the lawful issue of such of them as might have died, equally among them *per stirpes*.

The testator's mother predeceased him. Mary Routledge died unmarried on 2nd July 1905, leaving a will dated 5th February 1904. After narrating the directions given by her brother to his trustees, and referring particularly to the power of appointment conferred upon her, and to the effect of her failure to exercise that power, she made the following declaration of her will with regard to the disposal of the one-half of the residue—"I now hereby declare that it is my wish and desire that the capital of the said half of the said deceased's whole estate shall be divided among the legatees appointed by him under his said trust-disposition and deed of settlement." Her will then further proceeded to dispose of her own means and estate.

The pursuer's claim was founded on the Legacy Duty Acts 36 Geo. III, c. 52, and 55 Geo. III, c. 184, schedule part iii, and also upon section 4 of 8 and 9 Vict. c. 76.

He pleaded—"(1) The said Mary Routledge having exercised the general power of appointment conferred upon her, the fund in question is chargeable with legacy duty as a bequest by her to the appointees. (2) The duty claimed being due by the defenders as trustees in respect of residue under their administration, they are bound to deliver an account as required, and the pursuer is entitled to decree as concluded for, with expenses."

The defenders pleaded—"(1) The said Mary Routledge not having exercised the power of appointment conferred on her by her said brother's trust-disposition with reference to the estate in question, no legacy duty is payable thereon at her death. (2) The estate in question having passed under the will of the said William Jamieson Routledge, and legacy duty having been paid on his death, no further duty is payable."

On November 15th, 1906, the Lord Ordinary (JOHNSTON) ordained the defenders to deliver the account called for in the summons, and decerned.

Opinion.—"The late William Jamieson Routledge, who died in 1897, by his settlement directed his trustees to hold one-half of the residue of his estate for payment of the income to his sister Mary Routledge so long as she remained unmarried, and on her death unmarried 'to pay the capital to the person or persons to whom she may bequeath the same by any will or other deed under her hand, and failing any direction by her, to the legatees after mentioned.' The other half of the residue, and the half destined as above mentioned for the liferent use of his sister, in the event of its being set free by her marriage

or by her death, without disposing of the same, he directed his trustees to divide equally between his whole brothers and sisters, including Mary Routledge, should she be then alive.

"Mary Routledge survived the testator, did not marry, and died in 1905. She left a will in which, after narrating the provision in her favour contained in her brother William's settlement, she thereby declared 'that it is my wish and desire that the capital of the said half of the said deceased's whole estate,' *i.e.*, the half over which she had a power of appointment, 'shall be divided among the legatees appointed by him under his said trust-disposition and deed of settlement.'

"Mary Routledge thus received from her brother a limited interest in the half of his residue, short of a liferent, for it was determinable by her marriage, and she received a general power of appointment contingent on her remaining unmarried.

"It is said that legacy duty, as on a legacy from William J. Routledge, has been paid upon the half of the residue in which Miss Routledge was interested, but the record does not disclose what duty was paid or on what principle the payment was made, and at present I am not called on to inquire. Mary Routledge had not during her life either an unconditional liferent or an unconditional power. But, as the event happened, the condition which would have determined the liferent did not occur, and the contingency affecting the power was purified, so that the power became absolute.

"The Crown now claim legacy duty on half of the residue of William J. Routledge's estate, as passing under Mary Routledge's will, in respect that she exercised the power, though in favour of the legatees named in her brother's settlement, who would equally have taken had she not exercised it, and that therefore they took as her legatees and not as his.

"I think that the claim must be sustained. Mary Routledge might have remained passive. She might have confined her will to her own proper estate by so expressing herself as to show that she did not wish to exercise the power conferred upon her, and her brother's contingent legatees would then have taken under his will only. But she has chosen to express her wish and desire—that is her will—that the subject of the power should go to the persons named by her brother, and they therefore take immediately by her bounty, and only mediately by her brother's. She possibly wished her surviving brothers and sisters to know that they took by her goodwill as well as by her brother William's. In fact I cannot understand her course of action if this was not the case. But she having acted as she did, they cannot escape from the result of her exercise of testamentary volition.

"The sections of the Legacy Duty Act 1796 (36 Geo. III, cap. 52) referred to were:—Section 12, the marginal note of which is, 'How duty on legacies enjoyed by persons in succession or having partial interest therein charged.' This section appears to me to deal entirely with the duties said to have already been settled on the bequest by William J. Routledge, the testator, which conferred the power. Section 18, 'How duties on legacies subject to power of appointment charged,' provides—'Where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property upon the execution of such power shall be charged with the same duty and in the same manner as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof.' This section also appears to me to bear entirely upon the duties said to have been already settled on the bequest by William J. Routledge, the testator, which comprised the power.

"I do not think that these sections aid in the solution of the question before me. But they are preceded by section 7 (now replaced by 8 and 9 Vict. cap. 76, sec. 4), which enacts that 'Every gift by any will or testamentary instrument, which by virtue of any such will or testamentary instrument, is or shall be payable, or shall have effect or be satisfied . . . out of any personal or moveable estate or effects which such person hath, had, or shall have power to dispose of . . . shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly.'

"This provision is the operative one in the present circumstances. It would have been more natural had it succeeded sections 12 and 18. But it leaves it quite clear that, whatever duties are exigible from prior limited interests, and from the donee of the power as taking from the original donor of the power, further duties are exigible, independently, from those taking from or through the donee of the power. That I hold to be the position of the legatees named as destinees-over in default of appointment by Mary Routledge, because they take, not in default of appointment, but by her appointment, not by virtue of William J. Routledge's will but by virtue of Mary Routledge's will in conjunction with it. The case is ruled by *Attorney-General* v. *Brackenbury*, 1 H. & C. 782, if it is not indeed *a fortiori* of it."

The defenders reclaimed, and argued—The deceased Miss Routledge had not exercised the power. All she had done, or meant to do, was to approve of what had already been done by her brother. The case of the *Attorney-General* v. *Brackenbury*, 1 H. & C. 782, 32 L.J. (N.S.) Exch. 108, was distinguishable (the defenders' argument on this case is stated by the Lord President *infra*). A conveyance of "my means and estate" included estate over which a testator had a power of appointment, unless the intention not to include it

was otherwise indicated—*Bray* v. *Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746, *sub nom. Bray and Others* v. *Peterkin (Bruce's Trustee) and Others*. Here, therefore, the express recital of and reference to the power was necessary in order to indicate that the estate to which it applied was not included in the subsequent disposition of her whole means and estate.

Argued for the pursuer and respondent—The power of appointment had been effectually exercised as evidenced by the words, "it is my wish." The testatrix and her advisers must be held to have known that a general settlement of her estate was an exercise of the power of appointment, and the obvious course if she did not intend to exercise the power was to exclude, in the dispositive clause, estate over which she had that power. The case was ruled by the *Attorney-General* v. *Brackenbury*, *cit. sup.*

LORD PRESIDENT—Mr William Jamieson Routledge, who died in 1897, by his settlement directed his trustees to hold half of the residue for payment of the income to his sister Mary Routledge, and then his settlement continued—"And on the death of my said sister unmarried"—I ought to have mentioned that her right was to be forfeited upon marriage—"to pay the capital of said half of my estate to the person or persons to whom she may bequeath the same by any will or other deed under her hand, and failing any direction by her to the legatees after mentioned;" and in a subsequent portion of the settlement he specifies the said legatees. Miss Mary Routledge survived her brother, and did not marry, and accordingly was paid during her lifetime the interest of this half of the residue of her brother's estate. She died in 1905, and she left behind her a testamentary document. That testamentary document is in this form. It begins—"I, Miss Mary Routledge," and it then proceeds to recite *totidem verbis* the provisions of her brother's settlement by which she had a right to appoint the capital of this half share of her brother's residue, which had been liferented by her, and continues to the end of the direction as to the destination of the fund in the event of her having made no such appointment. Having made that recital it goes on—"I now hereby declare that it is my wish and desire that the capital of the said half of the said deceased's whole estate shall be divided among the legatees appointed by him under his said trust-disposition and deed of settlement;" and then it proceeds thus, "and now seeing that I am desirous of settling my own proper means and estate after my decease," she goes on to dispone her whole property to trustees, and to make certain provisions in favour of other people than the legatees under her brother's settlement, although those legatees also take certain shares of these provisions and destinations under her own will. Now the question which has arisen between the representatives of Miss Mary Routledge and the Crown is as to whether there is legacy duty to be paid—legacy duty, that is to say, upon a legacy by Miss Mary Routledge of this capital sum, half of the residue of her brother's estate. The point comes to be an absolutely narrow one. It all really turns upon this, whether the words "I now hereby declare that it is my wish and desire" are to be paraphrased in one of two ways. If they are to be paraphrased "I hereby appoint in favour of the persons who are named as legatees in my brother's settlement," it is clear that legacy duty must be payable. If, on the other hand, they are to be properly paraphrased "In respect that I am perfectly satisfied with the persons who will take under my brother's settlement in default of appointment therefore I do not propose to appoint," it is equally clear that no duty will be payable. I have come to be clearly of opinion that the true construction is the latter one, and that what this lady meant to say and did say was, "I am perfectly content to let the half of my brother's residue go according as he said it should go in default of the power of appointment being exercised, and therefore I shall not appoint." I think that that is the true view of what the phrase means, and I put that upon the general idea which the phrase conveys. I am not, I mean, inclined to put my judgment upon any minute criticism of what was said. If I were inclined to go upon minute verbal criticism, then one might put stress upon the fact that what she says is that the capital shall be divided among the legatees appointed by him "under his said trust-disposition and deed of settlement." Now observe, if "under his trust-disposition and settlement" is referable to "shall be divided amongst" and not referable to "appointed by him," the point would be "I do not wish this to go according to appointment, but I wish it to go under his trust-disposition and settlement." But although I think that point is worth noting, I do not base my judgment upon it. I base my judgment upon the wider view that you start with the consideration that she has first of all, before settling her own means and estate, brought in this recital of the powers she had over her brother's estate, and of where that brother's estate would go if she did not exercise her power of bequeathing in virtue of a certain appointment, and having considered that she used those general words that she desires the estate shall be divided among the legatees appointed by him under the settlement. It really would be construing the matter quite too strictly to hold that this was an appointment by her in favour of those persons. I think it is a much juster view to hold that she is really saying "I am quite content that this should go according to my brother's settlement, and therefore I do not find it necessary to make any appointment."

The Lord Ordinary in reaching the opposite view seems to have been to a certain extent swayed by the case of the *Attorney-General* v. *Brackenbury*, which he says is *a fortiori* of it. I cannot think that the case

of the *Attorney-General* v. *Brackenbury* is any authority against the view I am now recommending to your Lordships. In that case a person, who had a general power of appointment in her will charged the fund over which she had that general power of appointment with certain legacies and bequests, and having charged it with certain legacies and bequests, proceeded to make a gift of the residue of that sum in favour of the same people who would have taken in default of the exercise of the power. It is clear of course that those persons could not say that they took in default of the exercise of the power, but must say they took in virtue of the will, and the whole point of the judgment, as said by every one of the learned Judges who gave judgment in the case, was that the testatrix there had really made the fund her own by charging it with her own debts and legacies. In other words, she did not appoint the fund to those beneficiaries; she appointed it to her own executor, and the point would have come out, if you had supposed that in that case the lady had died practically insolvent as regards her own funds. In the actual case, obviously from the report, she did not, and therefore there was a sum of money left intact which was equal to the sum of money over which she had the power of appointment. But supposing she had died insolvent, it is clear that in that case the sum of money over which she would have had the power of appointment would have been good to meet the legacies which she left to other legatees. I think it is clear that the *Attorney-General* v. *Brackenbury* has really nothing to do with this case.

LORD M'LAREN—My opinion is the same as that which has been delivered by your Lordship in the chair. I think it is plain that Miss Routledge did not exercise any independent judgment in regard to the disposal of the half of her brother's estate which had been put under her power of disposition. She wished the property to pass as he intended it to pass, and again there is no devolution or transfer of estate in virtue of her will. The estate went exactly as it would have gone if Miss Routledge had died intestate. She did not die intestate, but left what may be called an ambiguous direction or provision in regard to the half of her brother's estate—a provision which might either mean that she did not desire to exercise the power of appointment that had been given to her, or that she meant to exercise it but to exercise it by giving it to the same persons to whom her brother had appointed it. Now, it is plain enough that whichever way you interpret or explain this ambiguous direction, the effect of it, so far as regards beneficial interests, is exactly the same. The first view, that she does not mean to exercise the power, is to my mind the simple and the more direct interpretation of the lady's settlement, and I do not think that we ought to displace that interpretation for no purpose connected with the administration of the estate, but merely for the purpose of enabling the Crown to maintain a claim of legacy duty which would not otherwise be due, which would not have been due if this provision had been drawn by a lawyer who had had his attention directed to the point.

LORD KINNEAR—I also agree. I do not think that this case ought to be decided by any minute analysis of the language of Miss Routledge's will, and certainly not by a rigorous construction of particular words and phrases which she uses in the course of it, but that, reading the instrument as a whole, we should see what is its true effect and meaning, and reading it in that way, it appears to me that, in the first place, she begins by reciting the power of appointment which had been given to her by her brother, for the purpose of separating the fund over which that power extended from the estate which she intended to settle by her own will. First of all she recites the power, and then, as I read the will in the same way as your Lordship reads it, she goes on to say in effect—"Having this power it is my wish and desire, so far as regards that fund, that my brother's trust-disposition and settlement should have effect, and that it should not be carried by my own trust-disposition and settlement which I am now about to set forth in detail, and that my trustees shall have nothing whatever to do with it." I think the true meaning is to leave the brother's trust-disposition and settlement operative with regard to this fund, and therefore it is upon that, and that alone, that the legatees are entitled to take the money.

LORD PEARSON concurred.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Defenders and Reclaimers—Cooper, K.C.—Kemp. Agents—Henry & Scott, W.S.

Counsel for the Pursuers and Respondents—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Tuesday, January 15.

FIRST DIVISION.

[Single Bills.

GORMAN *v.* HUGHES.

Expenses—Modification—Jury Trial in Court of Session—Verdict for £10 *where* £250 *Claimed—Pursuer Aware that Damages could not Amount to* £25.

A pursuer raised an action in the Court of Session for £250 in name of damages sustained by his being run over by the defender's motor car. The jury awarded him £10.

The Court, on the defender's motion, modified the pursuer's expenses to one-half of their taxed amount, *holding* (1) that the pursuer was bound to have