opinion and the decision of the Court of King's Bench the most careful consideration.

But I regret that I feel myself compelled to dissent from the result arrived at by your Lordships and by Phillimore and Bankes, JJ., as I am unable so to divide the original agreement as your Lordships and those learned Judges do. I think, therefore, that the Sheriff has come to a right conclusion, and that the appeal should be dismissed.

LORD MACKENZIE—I agree with your Lordship in the chair and with Lord Kinnear, and I agree with the reasoning of the learned Judges who decided the case of *Baker* v. *Ingall.*

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, repelled the first plea-in-law of the defender, and remitted the cause to the Sheriff-Substitute.

Counsel for Pursuers and Appellants—D.-F. Dickson, K.C.—T. B. Morison, K.C.—Paton. Agents — Gordon, Falconer, & Fairweather, W.S.

Counsel for Defender and Respondent—Crabb Watt, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Thursday, June 24, 1909.

FIRST DIVISION.

CRUM-EWING AND OTHERS (LORD AND LADY INVERCLYDE'S M.-C. TRUSTEES) *v.* LORD INVERCLYDE AND OTHERS.

Succession—Faculties and Powers—Power of Appointment—Invalid Exercise of Power—Restriction of Fiar's Interest to Liferent—Election—Approbate and Reprobate.

By his antenuptial marriage contract A assigned £18,000 to trustees for behoof of the children of the marriage in fee, in such shares and subject to such conditions and restrictions as he should appoint, with power to him to restrict the share of any of the children to a liferent and to settle the fee on their offspring.

By his trust-disposition and settlement A directed his testamentary trustees to hold the residue of his estate for behoof of his children in liferent and of their children *per stirpes* in fee, "in such proportions . . . and subject to such restrictions, limitations, and conditions" as the children might appoint. He further provided that the £18,000 was to be treated as falling under this purpose, and that the provisions of the settlement were to be in full of his children's right to legitim, and also in full of the provisions conceived in their favour in the marriage-contract.

One of A's children, B, having died without issue, a question arose as to his (B's) interest in his father's estate, and as to the validity of A's exercise of the power of appointment.

Held (1) that A had not validly exercised the power, in respect that while the marriage-contract allowed him to reduce a child's interest to a liferent for the purpose of giving the fee to his issue, he had in his settlement gone beyond that and empowered the child to restrict to a liferent the interest of his (the child's) issue and to confer a fee on the grandchildren; but (2) that B could not set aside the provisions of the settlement *quoad* the marriage-contract funds and at the same time avail himself of its provisions *quoad* the residue of the estate, but was bound to elect between them.

Alexander Crum-Ewing and others (the first Lord Inverclyde's marriage-contract trustees), *first parties;* the second Lord Inverclyde and others (the first Lord Inverclyde's testamentary trustees), *second parties;* the third Lord Inverclyde (the second son of the first Lord Inverclyde), his children, and his three sisters, *third parties;* Mary Baroness Inverclyde (widow of the second Lord Inverclyde) and others, *fourth parties;* Mary Baroness Inverclyde and the Merchants' House, Glasgow (the charity favoured under the will of the second Lord Inverclyde), *fifth parties;* and Mary Baroness Inverclyde, *sixth party,* presented a Special Case, in which they, *inter alia,* craved the Court to determine the interest of the second Lord Inverclyde and his representatives in his father's (the first Lord Inverclyde's) marriage-contract funds.

The following *narrative* is taken from the opinion (*infra*) of the Lord President—"The questions in this Special Case arise in respect of the marriage-contract and testamentary settlement of the first Lord Inverclyde, and upon a deed of directions executed by him and his deceased wife. The first Lord Inverclyde—at that time Mr John Burns—entered into an antenuptial marriage contract with Miss Emily Arbuthnot, afterwards Lady Inverclyde. By that marriage contract he bound himself to provide two sums of £13,000 and £5000 respectively, to be held by the trustees therein nominated 'in trust for the child or children to be born of the present marriage, who, if sons, shall attain the age of twenty-one years, and who, if daughters, shall attain that age or shall marry in minority with consent of their parents or surviving parent, if both or either of them shall be then living, or of a quorum of the said trustees if both parents shall then be dead, and that in such shares and proportions between or among the said children, if there shall be more than one, and subject to such conditions and restrictions as the said John Burns may appoint by any testamentary or other writing under his hand; it being hereby declared that he shall have power, if he see it proper or necessary, to restrict the share of any

of the said children to a liferent only, and to settle the fee on such child's offspring in equal portions among such offspring or otherwise; and failing any such writing by the said John Burns, then the said capital sum of £13,000 shall, on the death of the survivor of the spouses, and the said sum of £5000 shall, on the death of the said John Burns, be divided among the said children equally, share and share alike.'

"By the said marriage contract Miss Arbuthnot assigned to the trustees £10,000 and £3000, to be held 'for behoof of such child or children of the said intended marriage, . . . and that in such shares or proportions among the said children, if there shall be more than one, as may be appointed by their parents jointly while both survive, and failing of such appointment, then in such shares or proportions as the survivor of the said John Burns and Emily Arbuthnot may, by any writing under his or her hand, direct and appoint, and failing of such appointment, then equally among them, and subject to the same conditions and provisions as are hereinbefore expressed in regard to the said sum of £13,000 provided to the said children by their father.' The effect of that clause accordingly was simply to write into the portion of the contract dealing with the fortune of Miss Arbuthnot the same provision as had been made with regard to these sums of £13,000 and £5000 provided by Mr Burns.

"Five children were born of the marriage, two sons and three daughters. Certain other sums having been added to the funds under the marriage contract, Mr and Mrs Burns executed in 1877 a deed of directions in exercise of the power in the contract, by which they proceeded to appoint the £10,000 and the £3000, and the additional securities which had been added thereto, representing the fortune of Miss Arbuthnot, then Mrs Burns. This they did by declaring that the trustees should hold these sums 'for behoof of such children of our marriage as we may leave, equally among them in liferent for their respective alimentary liferent uses allenarly during all the days and years of their respective lifetimes, paying to them the annual income arising on their shares respectively during their respective lifetimes (but subject to the limitation and with the powers hereinafter mentioned), and for behoof of their issue respectively *per stirpes* in fee, in such proportions among the issue of such children respectively, if such issue consist of more than one child, and whether there be one or more children, subject to such restrictions, limitations, and conditions, but not inconsistent with the directions and conditions herein contained, as our children . . . shall by any *mortis causa* deed or writing under their hands respectively direct or appoint. . . . And in the event of any of our children dying without leaving lawful issue, or, leaving such issue, in case such issue shall all die before attaining majority without leaving issue, we direct and appoint our trustees to divide the shares or provisions which were liferented by such deceasing child or children, or held for behoof of their issue deceasing, as the case may be, equally among our then surviving children.'

"Mr Burns, who became the first Lord Inverclyde, died in February 1901, and left behind him a trust-disposition and settlement. Lord Inverclyde had by the time of his death become possessed of very large means, and he left his large fortune, after a very ample provision for his wife, among the whole of his children, but restricting their interests to life interests. Lady Inverclyde died within two days of her husband, so that the large provision in her favour never really came into effect. The general provisions of his settlement I need not trouble your Lordships with, because no question arises upon them. It is sufficient only to say that they do leave very large fortunes to each of the children, but of course fortunes only in liferent. Then, in the thirteenth place, he deals with the residue of his estate, the disposition of which is precisely in the same terms as the disposition contained in the deed of directions which I have read, and he makes it quite clear that in so doing he is exercising all the powers of appointment competent to him under the marriage contract. He further declared that these provisions in favour of his children and their issue should be in full of all legitim and also in full of the provisions in their favour contained in his antenuptial contract of marriage.

"Lord Inverclyde was succeeded by his son George, the second Lord Inverclyde. George accepted the provision which was made for him of the liferent interest of the whole sums left by his father, including in that massed fortune the sums of the £13,000 and the £5000, and he was regularly paid the income of his share as it arose. He died in 1905 survived by a widow, the second Lady Inverclyde, in favour of whom he left a will practically giving her all his fortune. The will is not written by a lawyer and not expressed in terms of art, and there might, I think, have been doubt as to whether it gave the wife the whole of the money in fee, or whether it was a trust on behalf of the charity to whom after her death he directed his fortune to go But all that has been set at rest by the action of the lady, because a provisional order has been obtained confirming the bequest and erecting a set of trustees, who are parties to this case, to hold the whole fortune of the second Lord Inverclyde on behalf of Lady Inverclyde in liferent, and afterwards for behoof of this charity which is to be founded."

In these circumstances the first, second, and third parties *maintained* that the first Lord Inverclyde effectually exercised in his trust-disposition and settlement the power reserved in his marriage contract of appointing the £13,000 and £5000; that the power reserved as to the £10,000 and £3000 was effectually exercised in the deed of directions in 1877; and that the interest of

the second Lord Inverclyde was effectually restricted to a liferent of one-fifth share of these sums. In any event they maintained that as a condition of enjoying his provision under the trust-disposition and settlement the second Lord Inverclyde was bound to renounce any right competent to him under the marriage-contract to a share of the fee of the £13,000 and £5000, and that by continuing to enjoy the testamentary provisions until his death he had renounced any such right.

The fourth, fifth, and sixth parties maintained that there was no valid exercise of his powers as to the £13,000 and £5000, or the £10,000 and £3000, and that therefore the second Lord Inverclyde took one-fifth share thereof; and, in any event, that as the second Lord Inverclyde died without issue he was not under the said trust-disposition or deed of direction deprived of his right to a one-fifth share of the fee of these sums. They further maintained that he was not put to his election, and had not elected between the provisions in his father's settlement and his rights under the marriage-contract, and that he was in no way barred by his actings from claiming the latter.

The *questions of law* included the following—"(1) With reference to the sums of £13,000 and £5000 provided by the said Right Honourable John first Baron Inverclyde under the said antenuptial contract of marriage, does his trust-disposition and settlement contain or operate a valid exercise of the powers of disposal reserved to him with regard to the said two sums under the said antenuptial contract of marriage, and does the said trust-disposition and settlement, in the event (which has happened) of his leaving no issue, effectually restrict the right and interest of the said Right Honourable George Arbuthnot second Baron Inverclyde in the said two sums to an alimentary liferent of one-fifth part thereof, and validly dispose of the fee of the said one-fifth as provided in the said trust-disposition? (2) In the event of the foregoing question being answered in the negative, was the second Baron Inverclyde bound to elect between his rights under the said antenuptial contract of marriage and the provisions conceived in his favour under the said trust-disposition and settlement, and did he by continuing until his death to enjoy his testamentary provisions while himself acting as trustee under the settlement elect in favour of the same; or are the fourth parties now entitled to receive payment for the purposes of their trust of one-fifth share of the said two sums? . . . (4) With reference to the sums of £10,000 and £3000 assigned by the said Right Honourable Emily Baroness Inverclyde under the said antenuptial contract of marriage, and the funds settled under the said supplementary deed of trust and directions, does the said deed of directions of 6th October 1877 contain or operate a valid exercise of the power of appointment reserved to the spouses with regard to the said two sums of £10,000 and £3000, and the said settled funds by the said antenuptial contract of marriage and supplementary deed of trust and directions respectively, and does the said deed of directions, in the event (which has happened) of his leaving no issue, effectually restrict the right and interest of the said Right Honourable George Arbuthnot second Baron Inverclyde in the said two sums of £10,000 and £3000, and the said settled funds, to an alimentary liferent of one-fifth part thereof, and validly dispose of the fee of the said one-fifth as provided in the said deed of directions? (5) In the event of the fourth question being answered in the negative, are the fourth parties now entitled to receive payment for the purposes of their trust of one-fifth share of the said two sums of £10,000 and £3000, and of the said settled funds?"

In the course of the argument the following cases were referred to—*Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, 27 S.L.R. 338; *Warrand's Trustees* v. *Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R. 273; *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; *Middleton's Trustees* v. *Middleton*, July 7, 1906, 8 F. 1037, 43 S.L.R. 718; *Darling's Trustees* v. *Darling's Trustees*, 1909 S.C. 445, 46 S.L.R. 394; *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, 1909 S.C. 472, 46 S.L.R. 217; *in re Meredith's Trusts* (1876), L.R., 3 Ch. Div. 757; *Alexander* v. *Alexander* (1755), 2 Vesey (senior) 640; *Alloway* v. *Alloway* (1843), 4 Drury and Warren 380; *Carver* v. *Bowles* (1831), 2 R. and M. 301, at p. 304; *Bonhotes* v. *Mitchell's Trustees*, May 27, 1885, 12 R. 984, 22 S.L.R. 648.

At advising—

LORD PRESIDENT — [*After the narrative quoted supra*] — The questions that have now arisen are as to these two sets of sums settled in the marriage contract, which I shall for shortness call the father's and the mother's provisions.

The first point, and the ruling point, that arises is whether it was a good exercise of the power to restrict George's interest to a liferent in both sets of provisions. From what I have said your Lordships will notice that undoubtedly the first Lord Inverclyde in the arrangements which he made proceeded beyond the actual words of the power. The power allowed of the cutting down of the fee in favour of the child to a liferent with the object of settling the fee upon his child, whom I shall call the grandchild. But Lady Inverclyde in her deed of directions and Lord Inverclyde in his trust-disposition and settlement, went beyond that, and affected to allow the child to restrict the interest of the grandchild, and to confer an eventual fee upon the great-grandchild, who I need scarcely say is a stranger to the power, although no doubt they went on to say that if a child died without issue then the child's share was to be divided among his surviving brothers and sisters, who, of course, were objects of the power. Now we were told that in this case we should have to decide that question so often

mooted and so often put off, viz., whether where there is a power to divide among a set of people it is possible to restrict the interest of one to an annuity or a life interest. Well, I do not think that we shall have to decide that even in this case, because cases of this kind depend not upon general principles but upon the terms of each particular deed, and general principles are only valuable, so to speak, as guide-posts to what one may do upon these particular deeds. Taking then this deed, I cannot say that, after attentive perusal of it, I have any doubt as to what it really means. It seems to me that the third purpose of the marriage contract provided clearly for a fee to each of the children of the marriage. No doubt it allows that fee to be cut down to a liferent, but I think it allows it to be so cut down for one purpose, and for one purpose only, and that is the settling of the fee upon the grandchild; and if that is not done—that is to say, if the deed does not effect both of these objects—then I think it is no deed at all. Accordingly I think that the provision "failing any such writing" takes effect, and that under the marriage contract—and this of course applies to both the father's and the mother's provision—there is an equal division among the children. It appears to me, therefore, that George second Lord Inverclyde was entitled to his share of the fee of both his father's and his mother's provisions.

That ends the question so far as the mother's provisions are concerned, but it does not end the question so far as the father's provision is concerned, because in the father's trust-disposition and settlement after, as I say, making very large provisions otherwise for his children, he provides and declares "that the provisions before written in favour of my said children and their issue are so conceived and granted in their favour upon the special condition and provision that the same shall be in full to my children and their issue respectively of all legitim and every other claim, legal or conventional, competent to them, or any of them, by or through the decease of their mother, or otherwise, against my estate in any manner of way, and also in full and in lieu and place of all provisions conceived by me in favour of my children and their issue in the said antenuptial contract between me and my said wife."

It seems to me that that clearly put the second Lord Inverclyde to his election, and that equally clearly he exercised his election. Indeed, it does not matter whether he exercised it or not, because those who have taken his right would have to exercise it now, and from the state of the figures there can, of course, be no doubt whatsoever that both he and his representatives do far better to take the general benefit under the will, and surrender the right which they would have under the marriage contract to insist on the fee of these provisions as against the liferent. The result of that opinion is that the first question must be answered in the negative; as to the second, I do not like the form of it, because the real point of the second question is the negative of the second branch; it really does not bring out the point. The first portion of the question comes under the doctrine of equitable compensation. It was not that Lord Inverclyde was bound to forfeit one of the provisions, but that he could not take both. Therefore I advise your Lordships to answer the second branch of the second question in the negative. The third question is superseded, the fourth will be answered in the negative, the fifth in the affirmative, and the sixth is superseded.

LORD KINNEAR — I agree with your Lordship.

LORD GUTHRIE—I concur.

LORD M'LAREN and LORD PEARSON were absent.

The Court answered the first question in the negative, the second alternative of the second question in the negative, the fourth in the negative, and the fifth in the affirmative.

Counsel for the First, Second, and Third Parties—D.-F. Scott Dickson, K.C.—Moncrieff. Agents—Webster, Will, & Company, W.S.

Counsel for the Fourth, Fifth, and Sixth Parties—Clyde, K.C.—Macmillan. Agents—Fraser, Stodart, & Ballingall, W.S.

RAILWAY & CANAL COMMISSION.

Monday, January 23, 1911.

(Before Lord Mackenzie, the Hon. A. E. Gathorne-Hardy, and Sir James Woodhouse.)

CALEDONIAN RAILWAY COMPANY AND OTHERS *v.* COLTNESS IRON COMPANY AND OTHERS.

JOHN WATSON, LIMITED, AND OTHERS *v.* CALEDONIAN RAILWAY COMPANY AND OTHERS.

(Reported *ante*, 47 S.L.R. 848.)

Railway—Railway and Canal Commissioners — Demurrage on Waggons — Siding Rent—Liability of Traders for Demurrage and Siding Rent.

In an application by traders against certain railway companies, brought in consequence of claims made by the railway companies against the traders for undue detention of the companies' waggons and sheets, and for undue occupation of their sidings by waggons belonging to traders, *held* that the railway companies were entitled to charge for such detention of their own waggons and sheets and occupation by traders' waggons, both before conveyance by the railway company and after such conveyance, on certain conditions as to free