amount of the thing or amount duplicated. I do not think that there is any distinction between a duplication and a duplicate. One thing is said to be a duplicate of another if it is similar thereto in all respects, and one amount is a duplicate of another similar amount. It appears to me to be an unnatural use of language to employ the words a duplication of a ground rent as referring to and including twice the amount of the ground annual. In the case of *Governors of George Heriot's Trust* Lord Johnston, though not dissenting from the judgment of the Court, said—'I must say that the impression which the words used have made upon me is that "a double of," in the collocation in which the words occur, naturally means "a replica of"—that is (as the "double" is something to be calculated in money), that these words mean a sum which is the same as, and not twice as much as, the feu-duty.' I think that what is there said is directly applicable to a stipulation in a contract of ground annual for payment of a grassum amounting to 'a duplication of the ground rent.' In my opinion the defender's contention ought to prevail."

The pursuer reclaimed, and argued—The word "duplication" meant the act of making two duplicates and was used to mean the duplicates so produced taken together, not one or other of them. Similarly a triplication did not mean one of the three similar things produced by that act but the product. In exactly similar circumstances a double of the feu-duty was held to mean two feu-duties—*Governors of George Heriot's Trust* v. *Lawrie's Trustees*, 1912 S.C. 875, 49 S.L.R. 561—and a "duplicand" had been similarly interpreted—*Finlay* v. *Adam*, 1917, 54 S.L.R. 388—and "duplication" had been regarded as equivalent to a duplicand—*Magistrates of Dundee* v. *Duncan*, 1883, 11 R. 145, 21 S.L.R. 107—and the two terms had been regarded as interchangeable—*Commercial Union Assurance Company* v. *Waddell*, 1917, *ante*, p. 497. The pursuer was therefore entitled to twice the annual rent as grassum.

Counsel for the defender were not called on.

LORD PRESIDENT—The success of the Lord Ordinary in distinguishing between this case and the cases of the *Earl of Zetland* v. *The Carron Company*, 3 D. 1124, and *Heriot's Trust* v. *Lawrie's Trustees*, 1912 S.C. 875, is, I think, complete. We can with equal success distinguish this case from *Adam* v. *Finlay*, 1917, 54 S.L.R. 388, and *Commercial Union Assurance Company* v. *Waddell*, 1917, 54 S.L.R. 497, both of which were decided on appeal after the date of his Lordship's interlocutor. In the contract of ground annual before us I think the expression duplication signifies a duplicate copy or version—a counterpart. My opinion can therefore be expressed in the language of the Lord Ordinary where he says—"I do not think that there is any distinction between a duplication and a duplicate." Accordingly I am for adhering to his interlocutor.

LORD JOHNSTON—I am glad that your Lordships have found it possible to distinguish between the present case and that of *Adam* v. *Finlay*, 1917, 54 S.L.R. 388, recently before a Court of Seven Judges. But I do not think that it is possible to do so without indirectly condemning, though not directly overruling, the case of the *Heriot's Trust*, 1912 S.C. 875.

LORD MACKENZIE concurred.

LORD SKERRINGTON—I was of the majority in *Adam* v. *Finlay*, 1917, 54 S.L.R. 388, solely because I agreed with the view of the Lord Justice-Clerk in that part of his judgment where he said—"In the *Earl of Zetland's* case, 3 D. 1124, the Court interpreted the term 'duplicand' as meaning two years' feu-duties. That interpretation, I assume, has been acted on by the profession since then." I thought that it would not be right for the Court to alter a rule of conveyancing laid down in 1841 and presumably acted upon ever since. In the case of *Heriot's Trust*, 1912 S.C. 875, the Court interpreted the expression "a double" as equivalent to "a duplicand" in the technical sense. That is a very recent judgment, and it therefore stands in an entirely different position from that of *Zetland*. In the present case the word to be construed is "duplication," a word of ambiguous meaning, which may signify either the result of the process of doubling, *i.e.*, a "duplicand" on the one hand, or a single duplicate or replica on the other hand. It is for the pursuer to show that in the deed under construction the word "duplication" was used in the larger and more onerous sense of "duplicand," and in my opinion he has failed to do so.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Forbes—A. M. Mackay. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defender (Respondent)—The Lord Advocate (Clyde, K.C.)—C. H. Brown. Agent—S. F. Sutherland, S.S.C.

Saturday, July 7.

FIRST DIVISION.

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

Succession—Faculties and Powers—Exercise of Powers—Marriage Contract Giving Wife Power to Appoint amongst Children—Exercise of Power by Will.

By an antenuptial marriage contract the wife, in the circumstances which occurred, was given over funds provided by the husband, and had reserved to her over funds provided by herself, a power to appoint amongst the children of the marriage. She died leaving a trust-disposition and settlement which conveyed to trustees her whole means and estate, "including therein all means and estate over which I have power of disposal by will or otherwise." The trust-disposition and settlement contained no other refer-

ence to the wife's powers of appointment, and bequeathed a share of the residue of her estate in liferent to one of her daughters and gave the fee to her children, and a codicil provided that in the event of that daughter having only one child the share of residue should be held in liferent for that child with a destination-over of the fee. The testatrix had no other funds over which she had powers of appointment. *Held* that the testatrix had intended in her trust-disposition and settlement to exercise the powers of appointment conferred by the marriage contract.

Opinions reserved as to whether limited powers of appointment might be exercised generally and without any specific reference to the powers.

John Richardson Craig and others, the marriage-contract trustees of James Walter Alexander and Mrs Alexander, *first parties;* Mrs Ann Brown Alexander or Wilson, a child of the marriage, and others, Mrs Alexander's testamentary trustees, *second parties;* Margaret Richardson Alexander and Lieutenant Walter Alexander, the other two children of the marriage, *third parties;* Walter Francis Wilson, as tutor and guardian-at-law, and the said Mrs Ann Brown Alexander or Wilson his wife, and others as tutors appointed by Mrs Alexander's trust-disposition and settlement, of Walter Elliot Francis Wilson, the only child of Mr and Mrs Wilson, *fourth parties;* and the said Mrs Ann Brown Alexander or Wilson, with the consent and concurrence of her husband, *fifth party*, brought a Special Case to determine questions relating to the exercise by Mrs Alexander in her trust-disposition and settlement of powers of appointment conferred upon her in her marriage contract.

James Walter Alexander and Mrs Margaret Ann Craig or Fyfe were married on 26th April 1877, after entering into an *antenuptial contract of marriage* dated 24th April 1877, which after binding James Walter Alexander (1) to pay his wife on her survivance a liferent annuity of £250 and a sum for interim aliment and mournings, in security of which provisions he assigned two policies of insurance to the marriage-contract trustees, and (2) on the death of his stepmother to pay to the marriage-contract trustees the sum of £5000 to be held in trust for various purposes, of which the fourth purpose was as follows:—"(Fourth) The said trustees shall hold the capital of the said sum in trust for behoof of the child or children of the said intended marriage and any future marriage into which the said James Walter Alexander may enter and the survivors or survivor of them and the issue of the bodies of such of them as may decease leaving such issue *per stirpes* in such proportions and under such restrictions (including a restriction to a liferent) as the said James Walter Alexander may appoint by any writing under his hand and in the event of the said James Walter Alexander failing to exercise the power of division hereby conferred then in such proportions and under such restrictions and on such terms and conditions as the said Margaret Ann Craig or Fyfe may appoint by any writing under her hand executed after the decease of the said James Walter Alexander and failing such division equally to and for behoof of the said child or children or the survivors or survivor of them jointly with the lawful issue of such of them as may have predeceased leaving issue which provisions shall be payable at the first term of Whitsunday or Martinmas occurring six months after the decease of the survivor of the said intended spouses and after the said child or children shall respectively reach the years of majority or be married whichever of these two events shall first happen Declaring that the shares of the children in the said sums shall not vest in them until the events last above mentioned. . . . ." Mrs Alexander made over to the marriage-contract trustees (1) the sum of £633, 6s. 8d., (2) her share of the residue of the estate of her deceased father under his trust-disposition and settlement, and (3) the whole property belonging to her at the date of the marriage, or which should pertain and belong to her during the subsistence of the marriage, for various purposes, of which the fourth was—"In the fourth place the said trustees shall on the death of the survivor of said spouses hold and apply the said share of residue and estate conveyed by the said Mrs Margaret Ann Craig or Fyfe in the second and third places for behoof of . . . . the child or children of the said intended or any future marriage into which the said Mrs Margaret Ann Craig or Fyfe may enter in such proportions in case of there being more than one child as the said Mrs Margaret Ann Craig or Fyfe or failing her the said James Walter Alexander may by any writing appoint; And failing such writing equally and share and share alike and that until the sons shall attain if they have not then done so the age of twenty-one years and until the daughters shall attain if they have not then done so the said age or be married whichever shall first happen when the said Margaret Ann Craig or Fyfe hereby appoints the share of each child (which shall vest at the death of the survivor of the said spouses) to be paid conveyed and made over and until the said share shall become payable the said trustees shall apply the rents, interests and profits thereof or as much of the same as may be necessary for the maintenance and education of the child entitled thereto: . . . Declaring . . . . that if . . . . any child of the said intended marriage shall die without leaving lawful issue before receiving his or her share of the share of residue and estate in the second and third places conveyed by the said Margaret Ann Craig or Fyfe the share of the deceaser shall belong to the surviving child or children . . . equally and share and share alike in case of more than one and shall be payable in the same way as the original shares hereby destined to . . . the child or children of the said intended marriage, but if the deceaser shall leave lawful issue such issue shall be entitled to the deceased parent's share."

Mrs Alexander survived her husband and died on 28th May 1915, leaving a trust-disposition and settlement and codicils.

The *trust-disposition and settlement* conveyed to the second parties "all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description and wheresoever situate, that shall belong to me at the time of my decease, including therein all means and estate over which I have power of disposal by will or otherwise, together with the writs and vouchers of the same," and provided, *inter alia*—"(Fourth) And with regard to the residue of my means and estate I direct my trustees to pay and make over the same equally amongst my . . . children, but subject always to the provisions hereinafter contained; and in the event of any of my said children predeceasing me leaving lawful issue such issue shall be entitled equally among them to the share which their parent would have taken on survivance and in the event of any of said children so dying without leaving lawful issue the share of such deceaser shall fall to and be divided equally among the survivors and survivor of the said children jointly with the lawful issue *per stirpes* of any of them who may have predeceased me leaving issue: With reference to the share of residue falling to the said Ann Brown Alexander or Wilson I direct my trustees to set aside and invest such share (whether original or as augmented by accretion) in their own names and to pay the income thereof to the said Ann Brown Alexander or Wilson in liferent for her liferent alimentary use allenarly not capable of anticipation nor subject to her debts or deeds nor liable to the diligence of her creditors: . . . And on the death of the said Ann Brown Alexander or Wilson or on my own death in the event of her predeceasing me I direct my trustees to hold and apply pay and convey said share to and for behoof of the whole children of the said Ann Brown Alexander or Wilson born and to be born in equal proportions share and share alike payable on their respectively attaining the age of twenty-five years complete if sons or if daughters on attaining that age or being married whichever event shall first happen and in the event of any of said children dying before the arrival of said period of payment leaving lawful issue such issue shall be entitled equally among them to the share which their parent would have taken on survivance and in the event of any of said children so dying without leaving lawful issue the share of such deceaser shall fall to and be divided equally among the survivors and survivor of the said children jointly with the lawful issue *per stirpes* of any of them who may have predeceased leaving issue. . . ."

A *codicil* of 24th April 1912 provided, *inter alia*—"With reference to the share of residue of my means and estate (whether original or as augmented by accretion) directed by the said trust disposition and settlement to be paid and conveyed to and for behoof of the whole children of the said Ann Brown Alexander or Wilson, I direct my trustees, in the event of the said share falling to one child only, to hold the said share of residue of my said means and estate for the liferent alimentary use of such child, the fee falling to his or her issue, and in the event of such child dying without issue, the said share of residue shall be paid and conveyed absolutely to my children Margaret Richardson Alexander and Walter Alexander and their respective issue equally between them."

The Case set forth—"1. . . . The said James Walter Alexander died on 1st August 1885. . . . At the date of the said Mrs Alexander's death all the children of her marriage with the said James Walter Alexander, viz., the said Mrs Ann Brown Alexander or Wilson, Miss Margaret Richardson Alexander, and Walter Alexander were alive and had attained twenty-five years of age. The said Mrs Ann Brown Alexander or Wilson has one child Walter Elliott Francis Wilson, who is in pupillarity. . . . 7. The said James Walter Alexander by his disposition and settlement . . . made over his whole estate, 'exclusive of the portion of my estate conveyed by and subject to the provisions contained in' the marriage contract, to Mrs Alexander as executrix and universal legatory, and revoked all former settlements made by him, but did not exercise the power of appointment over the said sum of £5000 reserved to him in the marriage contract. . . . Mrs Alexander received payment of the income of the said £5000 settled in the marriage contract. . . . 12. The funds and estate settled by the spouses in the said marriage contract (including the said sum of £633, 6s. 8d.) amount approximately to £9700 or thereby, or, if the sums paid under the policies of assurance on Mr Alexander's life be included, to £12,500 or thereby, of which £5000 was settled by Mr Alexander and £4700 by Mrs Alexander. The whole funds and estate belonging to Mrs Alexander, and not so settled, amount approximately to £16,000 or thereby."

The first parties *contended* "that the said Mrs Alexander's testamentary writings do not operate as an exercise of the power of appointment reserved by or conferred on her in the said marriage contract, and that the said funds and estate settled in the said marriage contract fall to be dealt with by them in terms of the directions therein contained with reference to the case of the said powers not being exercised."

The second, third, and fourth parties contended, *inter alia*, "that the said testamentary writings operate as an exercise of the powers of appointment conferred on and reserved by Mrs Alexander in the said marriage contract."

The fifth party contended, *inter alia*, "that the said Mrs Alexander's testamentary writings were not intended to operate, and do not operate, as an exercise of the powers, or any of the powers, conferred upon or reserved by her in the said marriage contract."

The *questions of law* included the following—"Did the said Mrs Alexander by her testamentary writings or any of them, exercise the powers of appointment con-

ferred on or reserved by her in her said marriage contract?"

Argued for the first and fifth parties—The will of the testatrix contained nothing to indicate that she intended to exercise her powers of appointment under the marriage contract. The will was expressly for the settlement of "my" estate—a term which did not aptly describe estate conveyed by herself and her husband to the marriage-contract trustees; neither was the word "my" used to refer to the radical right under the marriage contract, for the will dealt with the case where the radical right could not exist, *i.e.*, when there were children of the marriage at the testatrix's death. The words "including therein all means and estate over which I have power of disposal by will or otherwise" were not a conscious and deliberate reference to the marriage-contract funds over which the testatrix had powers of appointment; they were really words of style and referred to funds over which she had unfettered powers. In the marriage contract her power was one of mere division; that could not properly be called a power of disposal. Further, the will could not be supposed to be an exercise of the powers of appointment, for it went beyond the very powers which on that assumption it was exercising, for it cut down the fifth party's right to a liferent. There being no express exercise of the powers of appointment in the will, such limited powers as were given in the marriage contract could not be exercised generally and without any specific reference to the power—*Paterson's Trustees* v. *Joy*, 1910 S.C. 1029, *per* Lord Johnston at p. 1034, 47 S.L.R. 844. Such limited powers were distinguished from general powers where the donee could appoint as he chose—*Bannerman's Trustees* v. *Bannerman*, 1915 S.C. 398, *per* Lord Johnston at p. 406, and Lord Skerrington at p. 408, 52 S.L.R. 315. A general power could be exercised generally and without any specific reference to the power, *e.g.*, by a general settlement or the residuary clause of a will—*Bray* v. *Bruce's Executors*, 1906, 8 F. 1078, 43 S.L.R. 746. Limited powers had been held not to be exercised by a general provision in a will—*Whyte* v. *Murray*, 1888, 16 R. 95, 26 S.L.R. 67; *Bowie's Trustees* v. *Paterson*, 1889, 16 R. 983, 26 S.L.R. 676. The question was raised but not decided in *Dick's Trustees* v. *Cameron*, 1907 S.C. 1018, 44 S.L.R. 753. *Whyte's* case (*cit.*) and *Bowie's* case (*cit.*) were not cited in *Tarratt's Trustees* v. *Hastings*, 1904, 6 F. 968, 41 S.L.R. 738, which was therefore not an authority on the point. *Dalziel* v. *Dalziel's Trustees*, 1905, 7 F. 545, 42 S.L.R. 404, was not in point, for it merely decided which of two sets of trustees was to administer the fund in question. *Cameron* v. *Mackie*, 1831, 9 S. 601, 1833, 7 W. & S. 106, *per* Lord Chancellor Brougham at p. 141, was distinguished, for there the power was general and was not *in re aliena*. *Smith* v. *Milne*, 1826, 4 S. 679 (685), was very special; the testatrix had no estate other than that over which she had the powers, and no third party could question her actings. When a testator had powers of a general character, there was little difficulty in assuming that he meant to exercise those powers when he disposed of his estate in general terms. In England the fund over which such wide powers existed became when the powers were exercised liable to the debts of the donee exercising the powers, but that created no difficulty, as there was no need to separate from the rest of the estate of the donee of the powers estate over which he had such general powers. But if limited powers were held to be exercised by general directions in a will, anomalous results would follow, for the fund over which the testator had powers would become liable under the direction to pay debts and general legacies. The first question should be answered in the negative. *Turnbull* v. *Hayes*, [1901] 2 Ch. 529, and Farwell on Powers (3rd ed.), at p. 255, were referred to.

Argued for the second, third, and fourth parties—The general question of the exercise of limited powers did not arise. The testatrix in her will expressly included in the estate upon which the will was to operate the funds over which she had powers of appointment under the marriage contract. The reference to "estate over which I have power of disposal by will or otherwise" was a deliberate reference to the funds under the marriage contract; the testatrix had no other funds over which she had powers of disposal. No difficulty arose from the fact that the will would result in the transference of the marriage-contract funds from the marriage contract to the testamentary trustees—*Mackie* v. *Mackie's Trustees*, 1885, 12 R. 1230, 22 S.L.R. 814; *Dalziel* v. *Dalziel's Trustees* (*cit.*). Further "power of disposal" included power of appointment, that being a particular form of disposal, and in popular language the two terms were used as synonyms. No inference resulted from the fact that the exercise of the powers might be *ultra vires;* a testator might deliberately exceed his powers believing that those affected would raise no objections. Assuming, however, the general question of the exercise of limited powers arose, limited powers might be exercised in the same way as general powers—*Mackie* v. *Cameron* (*cit.*); Lord Brougham's dicta went that length, and he was founding on cases in which the powers were limited. The rule which applied to general powers had been applied in the case of limited powers—*Tarratt's* case (*cit.*), *Dalziel's* case (*cit.*), *Smith's* case (*cit.*). *Bannerman's* case (*cit.*) did not touch that point, neither did *Whyte's* case (*cit.*). Lord Johnston's dictum in *Paterson's* case (*cit.*) was not approved of by Lord President Dunedin (at p. 1035). The balance of authority was to the effect that limited powers might be exercised in the same way as general powers. The first question should be answered in the affirmative.

At advising—

LORD SKERRINGTON—The first question of law might have been more clearly expressed, but I understand that what we have to decide is whether the testatrix

Mrs Alexander by her trust-disposition and settlement intended and purported to exercise the power of appointment conferred on her by her deceased husband, and also the power of appointment reserved by her over the funds which they respectively settled by their marriage contract.

In the course of the argument various points of importance and interest in the law of powers were canvassed and many authorities were cited. In particular, the question was discussed whether a testator who executes a general testamentary trust-disposition and settlement, in which he makes no reference to any power, ought to be presumed, in the absence of evidence of a contrary intention, to have intended to exercise every power of appointment, not merely general but also limited or special, of which he may stand possessed at the time of his death. So far as regards general powers of appointment, this question was answered affirmatively by the Seven Judges who decided the case of *Bray* v. *Bruce's Executors*, 1906, 8 F. 1078, 43 S.L.R. 746. This decision is none the less binding upon us, although, as was pointed out in the course of the debate, the well-known dictum of Lord Brougham in *Cameron* v. *Mackie*, 1833, 7 W. & S. 106, at p. 141, which was followed and approved by the Seven Judges, was pronounced in a case where a testator had not exercised a power *in re aliena*, but had merely disposed of his own property *mortis causa*. It seems, however, to be still an open question whether the presumption given effect to in *Bray's* case (*cit.*) (which related to a general power), can reasonably be invoked in the case of a power to appoint to one or more members of a limited class. Upon this question the opinions delivered in the case of *Paterson's Trustees* v. *Joy*, 1910 S.C. 1029, 47 S.L.R. 844, indicate a difference between the Lord President (Dunedin) and Lord Johnston. I do not think it desirable to express any opinion in regard to this question, because it does not really arise in the present case, seeing that the testatrix in the dispositive clause of her trust-disposition and settlement expressly included "all means and estate over which I have power of disposal by will or otherwise." These words are wide enough to include, and taken in their natural sense do include, all property over which the testatrix had any power of disposal, whether general or limited.

It was suggested by the counsel for the first parties that the expression "power of disposal" pointed to a general power, and that a special power would more properly have been described as a "power of appointment." So far as I know this contention is not supported either by the popular meaning of these expressions or by the use which is generally made of them by lawyers either in Scotland or in England. At the commencement of his treatise on Powers (3rd ed., p. 1) Sir George Farwell states that "The donee of a power has a right of disposition over the property subject to the power, which may be either limited or unlimited, according to the terms upon which it is granted." Again, sections 2008 and 2036 of Lord M'Laren's book on Wills and Successions, 3rd edition, show that the learned author and also Lord St Leonards considered it no solecism to write of a "general power of appointment." The only question therefore to be decided in the present case is whether, when the will is read as a whole, it becomes reasonably certain that the property which the testatrix had in view in the dispositive clause was limited to property of which she was the owner, if not in form at least in substance. I cannot reach this conclusion. The only provision in the will which was relied upon as indicating that the testatrix did not intend to exercise the powers vested in her by the marriage contract was the clause by which she limited the interest in the residue to be taken by Mrs Wilson, one of her three children, to a mere liferent and gave the fee to Mrs Wilson's children. In a codicil she went a step further, and in one contingency gave the fee to Mrs Wilson's grandchildren. Counsel pointed out that as regards the funds put in settlement by Mrs Alexander it was quite clear that an appointment in favour of Mrs Wilson's children or grandchildren was *ultra vires*. Assuming that to be so, it does not follow as a matter of necessary implication that the testatrix must have intended to confine the operation of her will to property of which she had an unlimited right to dispose as she chose. Nothing is more common than for the donee of a power to exercise it in a manner which is *ultra vires* in whole or in part. This may happen either through inadvertence or through ignorance, or because of the testator's belief that the beneficiaries will give effect to his wishes In construing ambiguous language one would of course prefer an interpretation which does not involve a finding that a testator has exceeded his powers, but I do not think that general words, as to the meaning of which there is no doubt, ought to be limited in their effect because of any supposed presumption that the donee of a power will not attempt to exercise it except in strict conformity with his legal rights. For these reasons I think that the first question of law ought to be answered in the affirmative. Undoubtedly it seems anomalous that a limited power of disposal should be exercised by the form of a conveyance or bequest in favour of the testamentary trustees or executors of the donee of the power, but it was conceded that according to the authorities such a power may competently be exercised in this way. [*His Lordship then proceeded to deal with certain other questions which had been argued at the hearing.*]

The LORD PRESIDENT and LORD MACKENZIE concurred.

LORD JOHNSTON was absent.

The Court answered the first question in the affirmative.

Counsel for the First and Fifth Parties—Chree, K.C.—R. C. Henderson. Agents—Laing & Motherwell, W.S.

Counsel for the Second, Third, and Fourth Parties — Blackburn, K.C. — Hamilton. Agent—W. Croft Gray, S.S.C.