whether, *pari ratione*, moveables on the ground in question belonging to one of the said two partners, occupying as such partner, may be competently poinded. I think that the question should be answered in the affirmative. While the firm has a separate *persona* in law, and is conceived as the direct and sole beneficiary under the bare trust, the truth and substance of the matter is that Mr Braidwood and the bankrupt, being the only partners of the firm, have the *jus disponendi* and the complete control of the subjects, and, subject to the obligations, if any, of the firm, they have the radical beneficial interest therein. This being so, it appears to me to be in accordance with the authorities that such control of and radical beneficial interest in the subjects is sufficient to sustain the poinding of the moveables on the ground belonging to the bankrupt.

LORD MACKENZIE was absent.

The Court recalled the interlocutors of the Sheriffs, found the articles of furniture in question fell within the poinding of the ground at the instance of the pursuer, and remitted the cause to the Sheriff-Substitute to proceed as accords.

Counsel for the Pursuer (Appellant) — Fraser, K.C.—R. Macgregor Mitchell. Agents —Cumming & Duff, W.S.

Counsel for the Minuter (Respondent) — Brown, K.C.—Maconochie. Agents—Guild & Shepherd, W.S.

Friday, March 19.

SECOND DIVISION.

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

Succession—Trust—Testament—Construction—Direction to Trustees to "Allow" Wife "to Possess" House "Rent Free"—Right of Wife to Let House—Incidence of Proprietor's Burdens.

A testator directed his trustees in the event of his wife's surviving him "to allow my said wife to possess, rent free, during the whole period of her survivance of me," the family dwelling-house along with the whole furniture and furnishings therein, and after the payment of certain legacies to realise and divide the remainder of his estate between his children.

Held that the wife was (1) entitled to let the house furnished or unfurnished during her lifetime, and (2) liable for payment of the feu-duty, proprietor's rates and taxes, repairs, and insurance.

James Milne (*secundus*), the testamentary trustee of his father James Milne (*primus*), who resided at Broomhead, Ballater Road, Aboyne, *first party;* Mrs Mary Jane Walker or Milne, widow of James Milne (*primus*), *second party;* and James Milne (*secundus*) and others, the children of James Milne (*primus*), *third parties*, brought a Special Case for the opinion and judgment of the Court as to the second party's right under the settlement to let the family dwelling-house, and her liability for the feu-duty, proprietor's rates and taxes, repairs, and insurance.

The Case set forth—"(1) James Milne, who resided at Broomwood, Ballater Road, Aboyne, in the county of Aberdeen (hereinafter referred to as 'the testator'), died on 20th April 1919. He left a deed of settlement dated 23rd December 1918, and registered in the Books of Council and Session on 25th April 1919. . . . (4) In the third purpose of his said *deed of settlement* the testator declared—'That my trustees shall, in the event of my said wife surviving me, allow my said wife to possess, rent free, during the whole period of her survivance of me, the heritable property known as Broomwood, Aboyne, along with the whole furniture and furnishings therein.' The testator's said wife did survive him and is the second party. (5) By the fourth purpose of the said deed of settlement the testator provided that on the death of his said wife his trustees should dispone and convey his said heritable property known as Broomwood with the furniture therein to his son George Milne and his heirs. The said George Milne is one of the third parties. (6) After providing in the fifth purpose for delivery as soon as convenient after his death of certain small specific legacies, the testator by the sixth purpose of the said deed of settlement directed that his trustees should realise the whole of the rest and remainder of his said estates including certain heritable properties, and pay and divide the whole free proceeds thereof equally, share and share alike, to his six children, whom he appointed to be his sole residuary legatees, 'declaring, however, that the furniture in Broomwood shall not be sold but be given to my son George Milne with the property.' The testator was survived by his said six children. . . . (8) Approximately the moveable estate left by the testator amounted to £6632. His heritable estate consisted of—1. Business premises in Aboyne valued at £550; 2. Two cottages in Aboyne valued at £770; and 3. Broomwood aforesaid valued at £855. The said estate (except Broomwood aforesaid and the furniture therein) has now been almost entirely realised for division in terms of the provisions of the said deed of settlement. (9) The second party has elected to accept the said testamentary provisions in her favour in lieu of her rights at common law in the testator's estate. Since his death she has enjoyed possession of Broomwood aforesaid and the furniture therein. The assessed annual rental of Broomwood is £40, but it can be readily let furnished in summer at rents varying from £25 to £30 monthly. Aboyne, in which Broomwood is situated, has for a number of years been a favourite holiday and health resort, and there has been and still is a great demand for houses during the months from June to the end of September. Broomwood is in the most popular part of the village, and is well suited for letting to summer visitors. As

there is a scarcity of houses in Aboyne at present, it is believed that the house could also be readily let unfurnished by the year at a good rent. The annual burdens affecting Broomwood consist of—1. Feu-duty amounting to £6, 10s.; 2. Rates and taxes, the proprietor's proportion of which amounts at present to, say, £10; 3. Cost of repairs, say, £6, 10s.; and 4. Premium of insurance, 9s."

The *questions of law* were—"1. Does the right of possession of Broomwood, conferred upon the second party by the third purpose of the said deed of settlement, entitle her to let the said house (*a*) furnished, or (*b*) unfurnished, during her lifetime? 2. Does the right conferred as aforesaid render the second party liable for payment of the feu-duty, proprietor's rates and taxes, repairs, and insurance?"

Argued for the second party—(1) The widow was entitled to let the house. The word "possess" was used in contradistinction to the word "liferent. It implied *prima facie* a higher right than that of mere occupancy. It implied the right to draw the fruits of the subjects. Moreover, the words "rent free" were inappropriate to a liferent, and there was nothing to suggest a mere right of occupancy. The words "rent free" suggested a tenant sitting under a lease with the rent wiped out, and that idea fitted in with the right of the tenant to any use of the possession. Although the widow had only the right for her own life, yet there was nothing to prevent her letting the house for that or a less period. A liferent lease was not unknown to Scots law and might be assigned—Ersk. Inst. ii, 6, 32. It was sometimes granted for two lives. The right to assign included the right to sub-let—*Anderson* v. *Alexander and Millar*, F.C. 10th July 1811. The language of the bequest had never been the subject of judicial decision. The cases only decided the question of the meaning of the word "occupancy" as opposed to the word "liferent"—*Johnstone* v. *Mackenzie's Trustees*, 1912 S.C. (H.L.) 106, 49 S.L.R. 986, *per* Lord Shaw at 1912 S.C. (H.L.) 109, 49 S.L.R. 986; *Smart's Trustees* v. *Smart's Trustees*, 1912 S.C. 87, 49 S.L.R. 42. If the intention of the testator had been to give a right of occupancy only, there was no provision for what was to happen if the widow failed to occupy the house. In the present case there was nothing to show that the trustees must divide forthwith the whole of the residue—*Smart's Trustees* v. *Smart's Trustees*, *cit.*, at 1912 S.C. 91, 49 S.L.R. 44. If the words used in the present case were inconsistent with the idea of a liferent, there was no rule of law which forced them to be interpreted as meaning a mere right of occupancy if it could be shown that the testator's intention was something else—*Rabbeth* v. *Squire*, 1859, 4 De G. and J. 406. (2) The widow was not liable for the proprietor's burdens on the house. It was unknown that a tenant should be liable for feu-duties and repairs, which were paid by the owner unless the obligation was expressly put upon the tenant. The testator in the present case had not referred to them, because, as he intended the property to be dealt with, it was unnecessary for him to do so.

Argued for the third parties—Both questions should be answered in the affirmative, or alternatively both questions should be answered in the negative. If the substance of the bequest was given, then it was a liferent which was given. There was no *vox signata*. In many cases the use of the word "liferent" had been held not to confer a liferent. In the present case the testator contemplated the disposal of his whole estate except the house, and that favoured the view that a liferent was given, because otherwise there would be no fund out of which to pay the burdens—*Johnstone* v. *Mackenzie's Trustees*, *cit.*, *per* Lord Shaw at 1912 S.C. (H.L.) 110, 49 S.L.R. 987; *Rodger's Trustees* v. *Rodger*, 1875, 2 R. 294, 12 S.L.R. 204. In the present case the widow was given possession for life, which was equivalent to giving her a liferent—*Montgomerie-Fleming's Trustees* v. *Carre*, 1913 S.C. 1018, 50 S.L.R. 798, *per* Lord Guthrie at 1913 S.C. 1024, 50 S.L.R. 802—and therefore she was liable for the burdens—*Glover's Trustees* v. *Glover*, 1913 S.C. 115, 50 S.L.R. 71. The expression "use and enjoy" was not equivalent to a liferent—*Boyer's Settled Estates, in re*, [1916] 2 Ch. 404. If the testator's intention had been to relieve his widow of the burdens it was to be expected that he would have expressly said that she was to be not only free of rent but free of the burdens also. *Rabbeth* v. *Squire* (*cit.*) appeared to have been a case of possession and occupancy. *Anderson, in re Halligey* v. *Kirkley*, [1920] 1 Ch. 175, was also referred to.

LORD SALVESEN—This case is not made easier of decision by any of the numerous authorities that have been cited to us, for none of them affords very much aid in the construction of words which for the first time apparently fall to be construed by a court of law.

The words are—"That my trustees shall in the event of my said wife surviving me allow my said wife to possess, rent free, during the whole period of her survivance of me the heritable property known as Broomwood, Aboyne, along with the whole furniture and furnishings therein."

Now it is said that the word "liferent" is not used, and that therefore this cannot be a proper liferent as that term is understood in our legal phraseology. I am not of that opinion. Even when the word "liferent" has been used, the use of other words conjoined with it has enabled the Court to reach the conclusion that liferent in the legal sense was not intended. I think equally that though the word "liferent" has not been used here the words used may be equivalent in their meaning and effect to the legal conception of a liferent.

The wife is to have possession of the house during her life. That is the cardinal provision, and she is to have it without payment of rent. If it had been intended that she was to have it without payment of owner's burdens, such as feu-duties, I think it natural to suppose that he would also have mentioned these expressly. But the

leading ground upon which I base my opinion is that the testator certainly contemplated that there would be an immediate division of his whole estate with the exception of this one heritable property and the furniture therein, which he specially destined on his wife's death to one of his children, and that such division could not take place if the trustees required to retain a capital sum the interest of which would cover not merely existing burdens but any possible increment in rates.

That has been described by Lord Shaw in what is now the most authoritative decision on this subject as a cogent consideration, and it has led me to the conclusion that the testator intended that his wife should just occupy the house as he had occupied it and subject to the same burdens that he himself had been in use to pay. In other words, that you have here—although not expressed in words that would have been the most appropriate from a lawyer's point of view—the constitution of a liferent proper, which carries with it the obligation to pay the owner's burdens.

For these reasons I am of opinion that we should answer the first question in the affirmative in both branches, and that we should answer the second question in the affirmative also.

LORD GUTHRIE—Hitherto in cases of this kind there have been two categories, and two categories only, put forward, namely, either of liferenter or occupier. In the one case the liferenter can sublet, but he must pay the burdens; in the other case the occupant cannot sublet, but he is free from landlord's taxes, feu-duty, repairs, and insurance. Mr Chree proposed to bring this case under a third category, which hitherto has been unknown to the law in cases of this kind, namely, that of a tenant for life who can sublet and is subject to no burdens except those appropriate to a tenant.

One would not have been disposed to introduce the third category unless the words made it necessary, but it appears to me that the words are quite sufficient—although the word "possess" is new in cases of this kind—to enable the Court to say that this clause, read as a whole along with the deed as a whole, brings the case within the category in which your Lordships propose to place it, namely, that of a liferenter who can sublet, but who in return for that benefit must bear the burdens which the testator himself bore and must pay the different items mentioned in the case, to wit, the feu-duty, the proprietor's rates and taxes, repairs, and insurance.

LORD DUNDAS—This is a very peculiar case, and I confess that I have had much more doubt and difficulty about it than seems to have been the case with either of your Lordships.

I agree so far that I think none of the authorities form any guide or assistance to us in the matter, and we must decide solely upon the construction of this odd clause: and so the case appears to be of more importance to the parties than to the law. Owing perhaps to the alternative form in which the argument for the third parties was advanced, I came near to doubting whether either alternative would do, and was almost tempted to decide that the right here conferred must be regarded as *tertium quid*, belonging to a new category intermediate between an ordinary liferent on the one hand and mere personal right of occupation on the other. It seemed to me that it is not unlike a tenancy for life; and the phrases, especially "rent free" and the word "possess," would aptly fit in with that view. But as both your Lordships are clear in your view to another effect I have no intention to dissent, though I confess that my mind is not clear in the matter. We answer the questions as Lord Salvesen proposes.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question in the affirmative as regards both branches, and answered the second question also in the affirmative.

Counsel for the First and Third Parties—Macmillan, K.C.—Scott. Agents—Ronald & Ritchie, W.S.

Counsel for the Second Party—Chree, K.C.—Dykes. Agents—Martin, Milligan, & Macdonald, W.S.

Wednesday, March 31.

FIRST DIVISION.

[Lord Hunter, Ordinary.

GLEBE SUGAR REFINING COMPANY, LIMITED, AND ANOTHER *v.* TRUSTEES OF PORT AND HARBOURS OF GREENOCK AND OTHERS.

Statute—Construction—Trust—Harbour—Ultra vires—Lease of Graving Dock to Ship Repairers.

The management of a port and harbours was vested under statute in trustees, who under their statutes might "from time to time, and at any time appropriate or grant the exclusive right to use any . . . of their . . . works and conveniences to any corporation, company, or person, on such terms and conditions as the trustees think fit." Further, with regard to lands vested in them they might from "from time to time appropriate . . . such parts as they think fit, of any such lands for the purpose of shipbuilding yards . . . and generally for manufacturing, trading, or commercial purposes and lease such lands or any parts thereof for such periods or upon such terms and for such rent or other consideration as they think fit, or sell, feu, or dispose of such lands or any part thereof." The trustees leased a graving dock which formed part of their statutory undertaking, said to be the only graving dock which they had suitable for