subject to defeasance in the event of the testator's daughter leaving issue: Further, find that the one-half share of residue destined to the family of William Brown falls to the claimant Albert John Allbuary as executor of the late Mrs Elizabeth Carpenter or Allbuary: Further, find with reference to the division of the one-half share of residue falling to be divided among the family of the late John Searcy, that the said share falls to be divided among his three children who survived the testator, viz., the claimants Arthur John Searcy, Mrs Maud Ann Searcy or Physick, and Mrs Edith Rebecca Searcy or Dickson, and the trustees of the deceased William Frederick Searcy, a predeceasing son of the said John Searcy: Therefore sustain the claims lodged on behalf of the said claimants, and rank and prefer the said claimants accordingly."

Counsel for Claimant and Reclaimer A. J. Allbuary—Dean of Faculty (Campbell, K.C.)—A. M. Anderson. Agents—Mackenzie & Fortune, S.S.C.

Counsel for Pursuers and Real Raisers, and for Claimants Mrs Murray's Trustees—Hunter, K.C.—W. J. Robertson. Agents—Laing & Motherwell, W.S.

Counsel for Claimants A. J. Searcy, Mrs Physick, and Mrs Dickson—Scott Dickson, K.C.—W. T. Watson. Agent—Wm. B. Rainnie, S.S.C.

Counsel for Claimants W. F. Searcy's Trustees—Craigie, K.C.—Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for Claimants J. W. Searcy and his Guardian—Ballingall. Agent—W. B. Rainnie, S.S.C.

Thursday, March 14.

FIRST DIVISION.

MILLER'S TRUSTEES *v.* MILLER.

Succession—Trust—Construction of Testamentary Writings—Subjects Included in Bequest—"Furniture, Pictures, Books, Linen, and Others"—"Household Furniture and Plenishing of Every Description, including Pictures, Books, Linen, and Others"—"Furniture and other Effects therein"—Wines and Liquors—Interest in Wines and Liquors of Party having Use for Life—Liferent as distinguished from Use for Life through Trust.

A testator directed his trustees "to deliver to my said wife as her own absolute property out of the furniture and plenishing of said H.— House, . . . such furniture, pictures, books, linen, and others that she may select for her personal use."

He also directed his trustees "to convey and make over to my said wife as her own absolute property the house No. 45 G.— S.— . . . . together with the whole household furniture and plenishing of every description, including pictures, books, linen, and others (but excepting silver plate) in said house. . . ."

And he also directed them "to allow my said wife to occupy and possess during her lifetime . . . . the said mansion-house of M.—and offices, and furniture, and other effects therein. . . ."

Held (1) that in all three bequests wines and liquors were included; and (2) further, that under the third bequest, while the beneficiary was entitled to consume as much of the wines and liquors as was required while she resided at M., the trustees were not bound, or entitled at their discretion, to sell the wines and liquors and pay the beneficiary the interest on the price.

Observations on the more extensive inclusion of "a right of possessing and enjoying subjects under a trust" than of "a liferent."

Sir James Miller, Bart., of Manderston, Berwickshire, died, without issue, but survived by his wife the Hon. Eveline Mary Curzon or Miller, on 22nd January 1906. He left a trust-disposition and settlement dated 4th December 1901 and recorded 26th January 1906, whereby he conveyed his whole estate to Sir George Houston Boswall, Bart., of Blackadder, and others as trustees.

Difficulties having arisen as to the construction of certain clauses of the trust-disposition, as to whether wines and liquors were included in the bequests, a special case was presented, to which the trustees were the *first* parties and the widow the *second* party.

The *trust-disposition* gave the uses, ends, and purposes of the trust, *inter alia*, as follows, the particular clauses in question being third place (*third*) and sixth place (*third* and *seventh*):—"In the first place, for payment of all my just and lawful debts, deathbed and funeral expenses, and the expenses of executing this trust: In the second place, for payment to my trustees acting for the time equally among them of an annuity of £150 . . . : In the third place, for payment and delivery of the following legacies and bequests, and implement of the following directions, namely—(*First*) To my wife the Honourable Eveline Mary Curzon or Miller, the sum of £25,000 . . . . : (*Second*) To lease to my said wife during her life, should she desire it, Hamilton House, Newmarket, should the same belong to me at my decease, or any other house at Newmarket that may then belong to me, at a rental of £150 per annum, but in the event of my said wife not being desirous of occupying said house the same shall form part of my general estate: (*Third*) To deliver to my said wife as her own absolute property out of the furniture and plenishing of said Hamilton House, Newmarket, or any other house at Newmarket which may belong to me at my decease, such furniture, pictures, books, linen, and others that she may select for her own personal use: (*Fourth*) To deliver to my said wife as her own absolute pro-

perty three carriages and six carriage horses . . . .: (*Fifth*) To my sister Mrs Amy Elizabeth Miller or Bailie . . . .: (*Sixth*) To my sister Mrs Evelyn Mary Miller or Hunter . . . .: (*Seventh*) To my overseer at Manderston, to my secretary and to each of my servants . . . .: In the fourth place, in the event of my death survived by a son, I direct my trustees . . . .: In the fifth place, in the event of my death survived by a daughter, I direct my trustees . . . .: In the sixth place, in the event of my death without leaving issue, or in the event of such issue, if a son, dying before attaining the age of twenty-five years without leaving lawful issue, or if a daughter, in the event of her death without leaving lawful issue, I direct my trustees—(*First*) In the event of my death without leaving a son, or upon the death of such son before attaining the age of twenty-five years and without leaving lawful issue, to make payment to my said wife of an annuity or jointure of £15,000 per annum, that is, the annuity or jointure of £10,000 which I have directed my trustees to pay to my said wife in the event of a son surviving me shall immediately on the death of such son without lawful issue, and if leaving lawful issue upon the failure of such issue, be increased to £15,000: (*Second*) To deliver to my said wife as her own absolute property . . . . [*certain jewels*] . . . .: (*Third*) To convey and make over to my said wife as her own absolute property the house No. 45 Grosvenor Square, London, presently belonging to and occupied by me, if the same shall belong to me at my death, and any other house or houses in London . . . which may pertain and belong to me at the time of my death, together with the whole household furniture and plenishing of every description, including pictures, books, linen and others (but excepting silver plate) in said house 45 Grosvenor Square, and said other house or houses, and also to convey and make over to my said wife as her absolute property any stable or stables, coach-house or coach-houses in London . . . and the pertinents thereof, and the whole fittings therein, whether fixed or moveable, as the same may belong to me at my death: (*Fourth*) To deliver to my said wife for her liferent use allenarly the silver plate belonging to me wherever the same may be at the time of my death: (*Fifth*) Upon the death of my said wife, to deliver to my brother John Alexander Miller, Esquire, of Barneyhill, for his liferent use allenarly, the said silver plate of which I have by the preceding purpose given the liferent to my said wife: (*Sixth*) To hold and retain my said lands and estate of Manderston and others, and out of the income of my estate generally (including the said lands and estate of Manderston and others) to make the various payments before provided for in the event of my death, leaving a son—[*These payments were feu-duties and burdens, maintenance of mansion-house at Manderston, and maintenance of that estate*]: (*Seventh*) To allow my said wife to occupy and possess during her lifetime, free of rent or taxes (both landlord's and tenant's), the said mansion-house of Manderston and offices and furniture and other effects therein, and the game on my said lands of Manderston and others, and the other subjects of which I have directed my said wife to have the liferent in the event of my death survived by a daughter: And I direct my trustees during the liferent of my said wife to pay the wages of the foresters employed in connection with the said establishment, the wages of the gamekeepers and gardeners to be paid by my said wife . . . .: (*Eleventh*) To accumulate the whole surplus income of my estate, heritable and moveable, for the period of twenty-one years after my death, or until the death of the survivor of my said wife and the said John Alexander Miller should they predecease the said period, and in the event of the said John Alexander Miller being alive at the expiry of said period of twenty-one years I direct my trustees to pay over the whole income of the residue of my means and estate accruing after the expiry of the said period of twenty-one years to him during his life, whom failing, to the heir for the time prospectively entitled to succeed to the said lands and estate of Manderston and others under the said deed of entail: . . . (*Thirteenth*) I direct and appoint my trustees upon the death of the survivor of my said wife and the said John Alexander Miller to deliver to the heir in possession for the time of the said lands and estate of Manderston and others, under the foresaid disposition and deed of entail to be executed by my trustees, for his or her liferent use and enjoyment allenarly, the said silver plate and the whole household furniture and others in the said mansion-house of Manderston: And I hereby provide and declare that no right of property in the said silver plate, household furniture, and others shall vest in my said wife or the said John Alexander Miller or the said heirs of entail, but such shall remain in my trustees, my wish and intention being that the said silver plate and the said household furniture and others in the said mansion-house of Manderston shall, after the death of the survivor of my said wife and the said John Alexander Miller, always be enjoyed by the successive heirs who shall from time to time succeed to my said lands and estate of Manderston and others under the said deed of entail. . . ."

The case stated — "The first parties *maintain* — (1) That the bequest to the second party of the house No. 45 Grosvenor Square, London, together with the whole household furniture and plenishing of every description in said house, does not carry the wines and other liquors in the said house at the time of the testator's death; (2) that the bequest to the second party out of the furniture and plenishing of Hamilton House, Newmarket, of such furniture, pictures, books, linen, and others as she may select for her own personal use, does not include the wines and other liquors in the said house at the time of the testator's death; and (3) that the gift to

the second party of the right to occupy and possess during her lifetime the mansion-house of Manderston and offices and furniture and other effects therein, does not include the wines and other liquors in the said mansion-house at the time of the testator's death: Alternatively, and in the event of the third question of law hereinafter set forth being answered in the affirmative, the first parties maintain that they are bound, or at all events entitled at their discretion, to sell the wines and other liquors in the said mansion-house of Manderston, and to pay to the second party the interest of the price.

"The second party maintains—(1) That the bequest of 45 Grosvenor Square and the household furniture carries everything in said house, including wines and other liquors, with the exception of the silver plate; (2) that the bequest to her of such furniture and others as she might select for her own personal use out of Hamilton House includes the wines and other liquors therein; and (3) that the liferent of Manderston House and pertinents, with furniture and other effects therein, includes the wines and other liquors, and that she has right to use as much thereof as she may require for herself and friends while residing there, or otherwise that the first parties are bound to sell the same and pay to her the interest of the price received."

The following questions were submitted—"(1) Does the bequest in favour of the second party of the house No. 45 Grosvenor Square, London, together with the whole household furniture and plenishing of every description, including pictures, books, linen, and others (but excepting silver plate), include a bequest of the wines and other liquors in said house? (2) Does the right of the second party to obtain delivery as her own absolute property of such furniture, pictures, books, linen, and others as she may select for her own personal use out of Hamilton House, include a right to obtain delivery of the wines and other liquors in said house? (3) Does the liferent in favour of the second party of Manderston House and offices and furniture and other effects therein include the wines and other liquors in said house? (4) In the event of the preceding question being answered in the affirmative, is the second party entitled to use as much of said wines and liquors as she may require for herself and her friends when she is residing in Manderston House, or otherwise are the first parties bound or entitled at their discretion to sell the same and pay to the second party the interest on the price received?"

Argued for the First Parties—Wines and liquors were not included in the bequests. The terms used were similar in all three bequests. Taking Manderston, wines and liquors could not be included, for there could be no liferent of fungibles, which perished in their use—Erskine's Institutes, ii. 9, 40. Wine was not furniture—Bell's Principles, 10th ed. 1872; M'Laren on Wills, 3rd ed. 344. It differed in the essential that it was consumed by use. It was for the same reason not covered by "other effects," which meant effects *ejusdem generis*—Bell's Principles, *cit. sup.* If wine was not included in the case of Manderston, it was not included in the case of Grosvenor Square or of Hamilton House. "Plenishing" did not enlarge the bequest, for it was the equivalent of "furniture"—Jamieson's Dictionary *v.* "plenishing"—but if it could have that effect it was to be observed that it was followed by a list of articles, all essentially different from wine, not being fungibles. No inference was to be drawn from the exception made of silver plate. Silver plate was not a fungible. Besides, the exception put into the clause was unnecessary and surplusage; the silver plate was dealt with in the succeeding clause. As to decisions, it had been held in England that beer and ale were not "household goods"—*Slanning* v. *Style*, 1734, 3 Peere Williams, 344, *cf. Porter* v. *Tournay*, especially Lord Alvanley approving *Kelly* v. *Powlett*, Amb. 605. The decision in *Cole* v. *Fitzgerald*, 1823, 1 Sim. and St. 189, that wine was included in "household furniture and other household effects," was doubted on appeal—3 Russ. 301, Lord Eldon, 303.

Argued for the Second Party—Wines and liquors were included. The testator's intention was the ruling consideration, and clearly he meant to deal liberally with his wife, and the words used should therefore have a liberal construction. There was no difficulty in the case of Manderston, for here it was not a liferent in a legal sense which was given, but a right of use and possession through an interposed trust. It was open to the Court to give effect to the testator's intention. The words "other effects," being general, would have carried the wine as a direct gift, and there was nothing against such a construction being now given to them as to confer on the second party the use of the wine in the course of her occupation of the mansion-house—*Phillips* v. *Beal*, 1862, 32 Beav. 25; *Groves* v. *Wright*, 1856, 2 K. & J. 347, Page Wood (V.C.) at 351. As regards the Grosvenor Square house, the words of bequest were wide enough to cover the whole contents of the house, with the exception of silver plate which was expressly reserved. That exception showed that the testator's view was that the general words he used would have carried silver plate but for the insertion of the exception. Such a construction had been given to general words with an exception in *Hotham* v. *Sutton*, 1808, 15 Ves. Jun. 319, Lord Eldon at p. 326, and *Cole* v. *Fitzgerald*, 1827, 3 Russ. 301. If wines were included in the bequests relating to the other houses, it might easily be held that the bequest to the second party of such furniture and others as she might select for her own personal use out of Hamilton House also included wine—*Hutchinson* v. *Smith*, 1863, 11 W.R. 417. *Porter* v. *Tournay, ut supra*, was distinguished by the absence of general words of bequest, dealing with furniture only. *Rogers, &c.* v. *Scott, &c.*, July 19, 1867, 5 Macph. 1078, 4 S.L.R. 198, was also referred to.

Lord President—The questions to be determined in this case relate solely to what is the meaning of the trust deed, and I do not intend to lay down any general rules as to the meaning of certain words. Taking this deed as a whole, I have come without any difficulty to the conclusion that the questions ought to be answered in favour of the widow.

As regards the house in Grosvenor Square, there is a direction to "convey . . . (*quotes, supra*) . . . No. 45 Grosvenor Square." I cannot doubt that the truster intended his widow to have the house and everything that was in it, and I do not find any difficulty in bringing in "wine" which is not expressly mentioned under the words "and others," because of the clause excepting silver plate. If it was thought necessary to except silver plate, it must have been because silver plate, according to his view of generality, would pass under the words "furniture and plenishing." Now, no doubt wine would not pass under the word "furniture," but I think it does pass under the general words "plenishing of every description, including pictures, books, linen, and others."

The other question is a little more difficult—the question as to Manderston House. I cannot doubt that the authority of Erskine is absolutely sound, that the technical term "liferent" as used in Scots law will not be held to extend to fungibles. But the term "liferent" is not used here. We are not engaged in the determination of what passes under a conveyance of liferent. Everything is here conveyed to trustees, and the point is, what is to be done with the thing so conveyed? The words used are "to allow my said wife during her life to occupy and possess, free of rent and taxes, the said mansion-house of Manderston and furniture and other effects therein." Now I think the words "effects therein" is of such general application as to cover the wine, and therefore she is entitled to possess the wine, no doubt only during her lifetime. Now the only way she can possess wine during her lifetime is to drink it as occasion occurs. I do not think that under this clause she would have been entitled to send away the wine to an auctioneer any more than furniture, but I think she was entitled to drink it in the ordinary occupation of the house.

In regard to Hamilton House, the terms are that the trustees are to deliver to Lady Miller as her own absolute property "such furniture, pictures, books, linen, and others that she may select for her own personal use." That, when viewed in the light which is thrown on it by the other clause I have read, would go to show that in this settlement at least he wished his wife to take anything of the contents of the house she wished. I am therefore, without laying down any general principle, of opinion that we ought to answer these questions in favour of the widow.

Lord M'Laren—I have come to the same conclusion. The words used by the testator to describe what he is leaving to his wife, viz., "furniture, furnishings, effects," and so on, are all general words, and they seem to me to include the whole equipment of the different houses. But with regard to Manderston, what is given to the lady is that she shall have a right to occupy and possess, and that free of rent or taxes, "the mansion-house of Manderston and furniture and other effects therein," and so on. Now there is certainly authority for holding that a right of possessing and enjoying subjects under a trust may be more extensive in what it embraces than a proper right of liferent. It is a more elastic expression, and the interposition of the trust removes some difficulties that arise from the conception of a legal liferent as excluding things consumed or diminished by use.

In the case of coal, for example, or minerals, it has always been held that a right to derive a revenue from minerals is larger than a right of proper liferent. Under a legal right of liferent one can only use such mines as were opened by the proprietor; but if it is a right to draw the revenue under a trust the question is what in a reasonable sense was contemplated under that direction.

In regard to the house at Newmarket, again, I do not see that there need be any difficulty, because the right there is a right of selection, and when the articles are selected it is intended that they should not be sold but used in any way Lady Miller may think proper. I agree with your Lordship that we should answer these questions in favour of the second party, and from such explanation as Mr Pitman gave at the end of his speech it would rather seem that in regard to part of them Lady Miller would by arrangement get interest on the price of the wines, while as to another part she would be entitled to the capital or to the proceeds of sale.

Lord Kinnear—I am of the same opinion.

Lord Pearson—I also agree.

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

Counsel for the First Parties—Macfarlane, K.C.—J. H. Millar. Agents—Mackenzie & Kermack, W.S.

Counsel for the Second Party—Fleming, K.C.—Pitman. Agents—J. & F. Anderson, W.S.