Thursday, June 6.

SECOND DIVISION.

DICK'S TRUSTEES *v.* CAMERON AND OTHERS.

Succession—Faculties and Powers—Apportionment—Exercise of Power not bona fide—Option Given between a Liferent, being outwith the Power, and a Sum Relatively much Smaller, in order to Compel Acceptance of the Former.

A husband and wife by their antenuptial marriage-contract directed that the marriage-contract funds should, after the death of the survivor of them, be divided among the children of the marriage in such proportions as the contributing spouse, whom failing the other spouse, might direct. The wife, who predeceased her husband, left a holograph settlement, which, even assuming it intended to deal with these funds, did not effectually exercise the power of apportionment, as it left mere liferents of £7000 and £20,000 to two of the daughters with a fee to their children and an annuity of £50 to a third daughter. The husband left a deed of apportionment in which he directed the marriage-contract trustees to pay to each of the three daughters £500, and the residue to his son. The deed then, on the narrative that it was his desire that his daughters should benefit as far as possible as their mother had desired, proceeded to give them the option of taking the said £500 each, or instead, of taking liferents of £7000, £20,000, and £3500 respectively.

Held that not only was the option to take the liferents an invalid and ineffectual apportionment, being outwith the power conferred, but that the apportionment of £500 to each daughter was also invalid and ineffectual, being merely a threat for the purpose of concussing them into accepting the liferents, and not a *bona fide* exercise of the power.

By antenuptial contract of marriage Henry Knox Dick conveyed to John Urquhart and others, as trustees, certain moveable estate, and directed them to hold and apply it, in the event of there being a child or children of the marriage surviving the survivor of the spouses, for the liferent use of the child or children until they should severally attain majority, when the trustees should pay and make over to each of them an equal share of the fee thereof, under the declaration "that the spouses or the survivor shall by any writing under their, his, or her hand be entitled to divide and apportion the fee among the children of the marriage, should there be more than one, in such shares as they or the survivor may think proper, and to impose such conditions and restrictions upon the enjoyment thereof as they or the survivor may deem expedient."

By the said contract of marriage Cecilia Isabella Mackenzie or Knox Dick, the wife, conveyed to the said trustees her whole estate and certain *acquirenda* (first) for the conjunct liferent and use of the spouses during the subsistence of the marriage, and (second) "After the death of such survivor, and there being issue of the marriage surviving, the said trustees shall hold, pay over, or assign the whole of the said means and estate hereby conveyed to them by the said Cecilia Isabella Mackenzie to or for behoof of the child or children of the marriage, and that in such proportions and subject to such conditions as the said Cecilia Isabella Mackenzie, and whom failing the said Henry Knox Dick, may direct by any writing under her or his hand, and failing such direction, then equally, share and share alike, the issue of any child or children of the marriage always coming in room of the parent deceasing, the shares of sons to be payable on their attaining majority, and of the daughters on their respectively attaining such age or being married: Declaring that the portion or shares of such child or children shall vest only upon and after the decease of the longest liver of the said spouses, and thereupon be payable on attainment of majority or marriage as aforesaid." This estate proved to be of the value of about £57,500.

Mrs Knox Dick died on 30th August 1902. Mr Knox Dick died on 19th April 1905. They were survived by four children—Mrs Cecilia Cameron, Mrs Agnes Higinbotham, Henry Cecil Knox Dick, and Alice Helen Knox Dick.

Mrs Knox Dick executed a holograph settlement, dated 24th February 1901, by which she appointed certain trustees and directed them to hold the sum of £7000, the interest of which should be paid to her said daughter Cecilia Isabella Dick or Cameron half-yearly, and in the event of her decease to her child or children, if any, on attaining the age of twenty-five. Failing the survival of Mrs Cameron and her child or children the sum of £7000 was to be divided equally between Henry and Alice. She further directed her trustees to hold for her daughter Alice the sum of £20,000, and to pay her until she attained the age of eighteen the sum of £100 yearly, and thereafter, until she attained the age of twenty-five years, the sum of £300 yearly, and thereafter the whole income derived from said sum of £20,000. In the event of her death, being married and having children, the whole of said £20,000 was directed to be equally divided among such children when the youngest attained twenty-five years, but no child or children was to have any vested interest until he or she should have attained the said age of twenty-five years, and failing there being any children at the decease of her daughter Alice Helen, the said sum of £20,000 was to revert to the truster's general estate. The residue of her estate the testatrix bequeathed to her son Henry. She further requested the trustees to pay to her daughter Agnes Higinbotham half-yearly the sum of £50 during her lifetime.

Mr Knox Dick left a deed of appor-

tionment, dated 20th July 1904, in the following terms—"I, Henry Knox Dick of Torbrex, 61 Grange Loan, Edinburgh, considering that by my marriage contract with my late wife I have power to apportion the funds thereunder among my family, and in terms of such power I hereby direct the trustees under the said contract to pay each of my daughters the sum of £500, and to my only son Henry the whole residue of the estate. It being my desire, however, so far as consistent with my own private estate, that my said daughters should benefit as far as possible and to such an extent as their mother under her holograph deed of settlement, dated 24th February 1901, desired they should, I hereby declare that my said daughters shall have the option of either accepting the foresaid £500 each or they shall have the right to claim the following increased amounts, but that only on the conditions stipulated for in the said holograph deed of settlement of my said wife,—That is to say, in the case of my daughter Mrs Cecilia Isabel Dick or Cameron the liferent of £7000, and in the case of my daughter Mrs Agnes Mackenzie Dick or Higinbotham the liferent of £3500, and in the case of my daughter Alice Helen the liferent of £20,000, which sums to meet said liferents shall be deducted from the residue of the said estate, and they or each of them shall grant such deed or deeds necessary in favour of the trustees under the marriage contract to carry out the purposes contained in the said holograph deed of settlement, which shall form the basis upon which the liferent and disposal of the fee are to be settled. In regard, however, to my daughter Agnes, who under the will was only entitled to a half-yearly payment of £50 in the event of her electing to take the £3500, it shall be on the same conditions as are specially provided for in the said holograph deed as regards her sister Isabel. The right of election shall be declared within three months of my death, but in regard to my youngest daughter Alice Helen, who is presently a minor, the right of election shall not take effect till three months after she attains the age of twenty-one years, but during such minority she shall receive the interest on the said £20,000 as stipulated in said holograph deed, and any surplus interest shall be annually invested for her benefit, and in regard to the capital sum, should she die before reaching majority, it shall be divided in terms of the said holograph deed, and until she attains twenty-one years the capital shall be set aside till it is ascertained what course she may elect. . . ."

Questions having arisen as to the validity and effect of Mrs Dick's holograph settlement as an exercise of the power of apportionment conferred on her by the marriage contract, and as to the validity and effect of Mr Dick's deed of apportionment, a special case was presented.

The parties to the case were (1) John Urquhart and others, the marriage contract trustees of Mr and Mrs Dick, first parties; (2) Mrs Cameron and Mrs Higinbotham, second parties; (3) Henry Cecil Knox Dick, third party; (4) Alice Helen Knox Dick, fourth party; and (5) John Baird, the executor under the holograph settlement of Mrs Dick, fifth party.

The second parties maintained that the holograph settlement of Mrs Dick was not intended by her to be an exercise of the power of apportionment contained in the marriage contract, and, *separatim*, that if it was so intended it was not a valid exercise of the said power. They further maintained that Mr Dick's deed of 20th July 1904 was not a valid exercise of such power, and was invalid. The third party maintained that the settlement of Mrs Dick was not intended to be an exercise, and in any event was not a valid exercise, of the power of apportionment of the wife's estate conveyed under the marriage contract (which alone it could affect), in respect, *inter alia*, that it favoured persons who were not objects of the power, and imposed restrictions and limitations which were *ultra vires* of the donee of the power; that the deed of apportionment of 20th July 1904 by Mr Dick was valid in so far as it apportioned the trust funds, £500 to each of the daughters of the marriage and the residue to the third party, but that the rest of the said deed was invalid and ineffectual as an apportionment of said funds and fell to be held *pro non scripto*, and that accordingly he was entitled to take said residue free of any conditions. The fourth party maintained that by her holograph settlement Mrs Dick intended to and did validly exercise the power of apportionment conferred on her by the marriage contract, and that under it she, the fourth party, was entitled to have paid over to her the sum of £20,000 free of all conditions, or that in any event she was entitled to said sum on the conditions set forth therein. Alternatively, in the event of it being held that the said holograph settlement did not to any effect form a valid exercise of said power, she maintained that the deed of apportionment executed by Mr Dick on 20th July 1904 was a valid exercise of the power of apportionment conferred upon him, and that under the option granted to her by said deed she was entitled to the sum of £20,000 free of all conditions, or at least on the conditions set forth in Mrs Dick's holograph deed of settlement. The fifth party maintained that if the holograph settlement of Mrs Dick was effectual as a valid exercise of the power of apportionment conferred on her by the marriage contract, then he as sole accepting trustee under that settlement was entitled and bound to hold and administer the funds which under said holograph settlement are directed to be held by Mrs Dick's trustees. The first parties maintained that in the event aforesaid the funds fell to be held and administered by them and not by the fifth party. They further maintained that the sums apportioned by either of the deeds in question must be taken by the beneficiaries subject to the conditions annexed to the gifts in the deeds of apportionment which received effect.

The following questions of law were, *inter alia*, submitted for the opinion and judgment of the Court—"(1) Does the holograph settlement of Mrs Knox Dick of 24th February 1901 operate as an effectual exercise of the power of apportionment among her children of the means and estate conveyed by her to the trustees under the antenuptial marriage contract entered into between her and her husband Mr Knox Dick? . . . (3) As regards the marriage contract funds conveyed severally by (*A*) Mr Knox Dick, and, in the event of the first question being answered in the negative, (*B*) Mrs Knox Dick—(*a*) Is the deed of apportionment by Mr Knox Dick, dated 20th July 1904, valid *in toto?* or (*b*) Is it valid only in so far as it apportions £500 to each of the daughters and the residue of the estate to his son? or (*c*), Is it also valid in granting the option to the beneficiaries? or (*d*), Is it entirely ineffectual?"

Argued for the second parties—Mrs Dick did not intend to exercise the power of apportionment. She thought she had to dispose of £57,000 which she had received from an uncle, but subsequent to her death the English Courts had held that this formed part of the marriage-contract estate. That that was her view, and consequently that she was not intending to deal with the funds under the power of apportionment, was seen in that (*a*) she had appointed other trustees; (*b*) the provision as to the reversion of the £20,000 in certain events to her general estate; (*c*) the provisions of her settlement were inconsistent with the marriage-contract. Where there was a general power of appointment, a general settlement exercised that power—*Bray* v. *Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746, which followed the dictum of Lord Brougham in *Cameron* v. *Mackie*, 7 W. & S. 106, at p. 141; English Wills Act 1837 (1 Vict. cap. 26), section 27. The English Wills Act 1837, sec. 27, was intended to be and was declaratory of the Scotch law. It established the presumption in favour of the exercise of a general power of appointment, but, on the other hand, it seemed to follow from section 27 that where there was only a power of distribution among a class the presumption was that a settlement not referring to the power did not exercise it. Almost all the reported cases related to general powers. Thus in *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 Sh. 413, there was a general power of disposal. The only two cases which might be said to refer to a mere power of distribution were—*Smith* v. *Milne*, June 6, 1826, 4 Sh. 679—but that was a very special case, as the power of apportionment was to be exercised by a liferenter and executor among her children—and *Tarratt's Trustees* v. *Hastings*, July 7, 1904, 6 F. 968, 41 S.L.R. 738, in which there was no reference to *Whyte* v. *Murray*, November 16, 1888, 16 R. 95, 26 S.L.R. 67, or to *Bowie's Trustees* v. *Paterson*, July 16, 1889, 16 R. 983, 26 S.L.R. 676, both of which indicated that a special power of apportionment among a class was not to be presumed to be exercised by a general settlement. In any case the exercise here, even if intended, was bad, because it brought in persons not objects of the gift, and cut down to liferents the rights of persons who were objects of the gift—*Gillon's Trustee* v. *Gillon*, February 8, 1890, 17 R. 435, 27 S.L.R. 338; *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; and if the apportionment was bad in part it was bad altogether—*Baikie's Trustees* v. *Oxley & Cowan*, February 14, 1862, 24 D. 589; *Gillon's Trustees*, *cit. sup.* (2) Mr Dick's deed was also invalid as an exercise of the power. It attempted to give an option between two alternatives; that was no more permissible than to offer a hundred alternatives. In either case there was an attempt to delegate the power of apportionment to the objects of the gift. Moreover, if Alice Helen did not attain twenty-one, she would never be in the position of being able to exercise the option, and accordingly the apportionment as regarded her, and consequently as regarded also the others, would fall. In any case the option was bad, as not offering a fair choice between two equivalents, but being for the purpose of compelling acceptance of liferents which were outside the power.

Argued for the third party—(1) As regarded the holograph deed of Mrs Dick, he adopted the argument of the second party. (2) As to Mr Dick's deed, it was valid in so far as it appointed £500 to each of the daughters, and the residue to the third party, and otherwise it was invalid, *i.e.*, it was valid down to the word "estate," that being an initial gift complete in itself, and the remainder fell to be regarded *pro non scripto* — *Middleton's Trustees* v. *Middleton*, July 7, 1906, 8 F. 1037, esp. Lord Kyllachy at 1042-3, 43 S.L.R. 718; *Dalziel* v. *Dalziel's Trustees*, March 9, 1905, 7 F. 545, Lord President Dunedin at 553, 42 S.L.R. 404.

Argued for the fourth party—(1) Mrs Dick's holograph deed being a general settlement was a good exercise of the power—*Tarratt's Trustees* (*cit. sup.*). The effect was to give the £20,000 free from restrictions, *i.e.*, to give it in fee. There was an initial gift of £20,000, and what followed was merely a burden on the initial gift — *Matthews Duncan's Trustees* v. *Matthews Duncan*, February 20, 1901, 3 F. 533, 38 S.L.R. 401. The inclusion of grandchildren did not invalidate it; that portion was simply to be read out. (2) As to Mr Dick's deed, it was wholly good, the same argument applying to it as to Mrs Dick's deed. Alternatively it was wholly bad. It was not a case here as in *M'Donald* v. *M'Donald Trustees*, June 17, 1875, 2 R. (H.L.) 125, 12 S.L.R. 635, of attaching to a gift a condition or burden inconsistent with it, but of altering the gift itself to an option, an attempted delegation of the power of apportionment.

At advising, the opinion of the Court (The Lord Justice-Clerk, Lord Stormonth Darling, Lord Low, and Lord Ardwall) was delivered by

Lord Low—The first question which was argued in this case was whether the power

given to Mrs Dick by her marriage contract to apportion among the children of the marriage the marriage contract funds contributed by her was validly and effectually exercised by a holograph testamentary settlement which she left. It was contended (1) that a testamentary settlement was not a habile mode of exercising such a power, especially if, as here, it contained no reference to the power; and (2) that even if such a power could be exercised by a testamentary settlement the terms of that left by Mrs Dick when read in the light of the circumstances in which it was executed showed internal evidence that it was not her intention thereby to exercise the power.

That argument appears to me to raise questions of some nicety, upon which I do not think that it is necessary to express any opinion, because assuming that the power might be exercised by a testamentary settlement, and that Mrs Dick intended to exercise the power, the apportionment which she made was, in my judgment, altogether invalid and ineffectual.

Only one of the children, Miss Alice Dick, supports the settlement as a valid exercise of the power. She is given a life interest in a sum of £20,000, with fee to her issue, and failing issue the fund is to return to the estate of the testatrix. Now grandchildren are not objects of the power, but it was contended that there was first of all a gift of the £20,000 to Miss Alice, and that the subsequent attempted restriction of her right to a life-interest with fee to her children was merely a condition as to the mode of enjoyment of the gift which, in accordance with the rule laid down in the House of Lords in *M'Donald's Trustees* (2 R (H.L.) 132) fell to be disregarded and held *pro non scripto*. In my opinion that contention fails because there is no initial gift of the £20,000 to the daughter which can be separated from the limitation of her right to a liferent and the gift of the fee to her children.

The provision in question commences thus—"My trustees shall hold for my daughter Alice Helen the sum of twenty thousand pounds." It was argued that these words imported an absolute gift of the £20,000, and that all that followed might be disregarded. I am unable to assent to that argument. To direct trustees to hold a fund for a person does not imply that that person is to have an absolute and unrestricted right of fee. On the contrary, the fact that the trustees are directed to hold and not to pay, implies, or at all events suggests, that the right of the donee is subject to some restriction or limitation, and therefore in order to see what precisely is the right which is given to the donee it is necessary to ascertain the purpose for which the trustees are directed to hold. In this case the purposes are to pay to the lady a certain annual sum until she attains twenty-five years of age, thereafter to pay her the income of the fund during her life, and upon her death to pay the capital to her children. It therefore seems to me to be impossible to separate the direction to the trustees to hold the fund from the purposes for which they were to hold it, and as these purposes were to give a fee to persons who were not objects of the power and to restrict the right of the person who was an object of the power to a liferent, the appointment is in my opinion ineffectual and invalid.

The next question is whether the deed of apportionment executed by Mr Dick was a valid exercise of the power? That deed is in a very peculiar form, because it gives the daughters the option of taking very small sums absolutely, or large sums in liferent only, with fee to their children if they have any, and failing children to fall into residue, which is destined to the only son of the marriage.

The deed commences with a narrative of the power conferred by the marriage contract, and proceeds—"In terms of such power I hereby direct the trustees under the said contract to pay to each of my daughters the sum of £500 and to my only son Henry the whole residue of the estate."

If the deed had stopped there I take it that the appointment could not have been challenged, although it would, considering the large amount at Mr Dick's disposal, have left the daughters (of whom there were three) very slenderly provided for. The trust funds amounted to some £60,000, and Mr Dick's means which did not fall under the marriage contract to over £54,000, and by his testamentary settlement he had left to each of two of his daughters—Mrs Cameron and Mrs Higinbotham—the liferent only of £5000, and to his daughter Alice only a legacy of £250.

Mr Dick recognised that to appoint to each of his daughters so small a share of the marriage-contract funds as £500 would leave them inadequately provided for, and accordingly he proceeds to give them the option to which I have referred, and he explains his reasons for adopting that course in the following words—"It being my desire however, so far as consistent with my own private estate, that my daughters should benefit as far as possible, and to such an extent as their mother under her holograph deed of settlement desired they should."

Evidently some words have been omitted from that sentence, but I think it is plain enough that what Mr Dick meant by the words "so far as consistent with my own private estate" was so far as consistent with *the testamentary settlement which he had made of his own private estate*. If that be a sound construction of the language used, then Mr Dick's reasons for giving his daughters an option were (1) that he did not wish to give them anything more from his own estate than what he had provided to them in the settlement which he had executed; and (2) that he desired that the wishes of his wife as expressed in her holograph settlement should be given effect to in the division of the marriage-contract funds.

The deed accordingly proceeds—"I hereby declare that my said daughters shall have the option of either accepting the foresaid

£500 each, or they shall have right to claim the following increased amounts, but that only on the conditions stipulated for in the said holograph settlement of my said wife." He then gave to his daughters Mrs Cameron and Miss Alice Dick liferents of the same sums as those provided for them in Mrs Dick's settlement—namely, £7000 in the former case, and £20,000 in the latter. To the third daughter Mrs Higinbotham he gave a liferent of £3500, whereas in Mrs Dick's settlement she was restricted to an annuity of £50. All these gifts were declared to be subject to the conditions specified in Mrs Dick's settlement to which effect was directed to be given. The result was that the daughters were restricted to a liferent, that the capital sums were given to their children if they had any, and failing children were to fall into residue, which by Mrs Dick's settlement was destined under certain limitations to the only son of the marriage.

Now it is plain that if Mrs Dick's settlement was invalid as an exercise of the power of appointment, the alternative which Mr Dick offered to his daughters was equally so, but it was argued that if they did not accept the alternative they must content themselves with £500 each, because Mr Dick had undoubtedly power to restrict them to that amount.

I think that the best answer to that argument is that Mr Dick's deed of apportionment was not a *bona fide* exercise of the power. I take it that the power was conferred because circumstances might arise which would render it expedient and just that there should not be an equal division of the marriage contract funds among the children, and that some of them should get more and others less. Mr Dick, however, was not actuated by consideration of that kind in appointing £500 to each of his daughters, because it seems to me to be plain that he never intended that his daughters' interest in the marriage contract funds should in fact be restricted to that sum. In particular, it is absurd to suggest that he ever contemplated that the sole provision for his daughter Alice out of parental estates, amounting to nearly £120,000, should be a capital sum of £750, that is, a legacy of £250 under Mr Dick's settlement, and of £500 under his deed of appointment. The appointment of £500 to each of the daughters was therefore merely a threat, a weapon which he used for the purpose of concussing the daughters to agree to a disposition of the marriage contract funds which was contrary to the provisions of the contract, and which he had no power to make. I think that that was an illegitimate use—indeed an abuse—of the power which the Court cannot sanction. Accordingly Mr Dick's deed of apportionment was in my judgment altogether bad and cannot receive effect.

I am therefore of opinion that the first question of law should be answered in the negative, and head (*d*) of the third question in the affirmative. If that be done all the other questions seem to be superseded.

The Court answered the first question of law in the negative, and answered head (*d*) of the third question in the affirmative.

Counsel for the First Parties—Grainger Stewart. Agents—Carmichael & Miller, W.S.

Counsel for the Second Parties—Clyde, K.C. — Graham Stewart, K.C. — Chree. Agents—J. Knox Crawford & Son, S.S.C.

Counsel for the Third Party—Cullen, K.C. —Hon. W. Watson. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for the Fourth Party—Hunter, K.C. — Horne. Agents — Carmichael & Millar, W.S.

Counsel for the Fifth Party — Kippen. Agents—Carmichael & Millar, W.S.

Tuesday, June 18.

SECOND DIVISION.

[Sheriff Court at Airdrie.

RUTHERGLEN PARISH COUNCIL *v.* NEW MONKLAND PARISH COUNCIL.

Poor—Settlement—Pupil whose Widowed Mother had at Death Residential Settlement Different from Father's Takes Settlement of Father.

A legitimate pupil child on the death of his father takes a derivative settlement in the parish in which his father had a settlement at the date of his death; where, however, the mother survives the father and acquires a settlement in a parish other than that of the father's settlement, the pupil, becoming chargeable, is entitled to relief from the parish of his mother's settlement during her life, but on her death the suspended liability of the father's parish revives.

The Parish Council of the Parish of Rutherglen brought the present action against the Parish Council of the Parish of New Monkland in the Sheriff Court of Lanarkshire at Airdrie.

The following statement of the *facts* and *contentions* of parties is taken from the opinion of Lord Ardwall—"In this action the parish of Rutherglen claims relief from the parish of New Monkland for the aliment of a pauper named Samuel Brown, who became chargeable on 30th November 1905, and was relieved by Rutherglen.

"The pauper was born in the parish of New Monkland on the 26th of January 1894; he is therefore still in pupillarity.

"The father of the pauper died on the 18th of June 1899, having at the time of his death a residential settlement in New Monkland. The pauper's father had, however two years before his death, removed to Rutherglen, where he died. After his death the pauper's mother and the pauper resided in family in Rutherglen till the 30th of July 1904, when she died without having re-