observe the terms of the statute these licences—I think some fifty in number—are *per aversionem* to be granted. Nothing more contrary to the policy of the Act could be imagined. I have no knowledge of the circumstances of any of the cases, but it may be in the highest degree prejudicial to the interests of the community that licences A, B, C, and D should be granted, and yet that would be the effect of sustaining what the Lord Ordinary has done to the latter part of his judgment. Accordingly it appears to me that the cases ought to go back, and the applicants afforded an opportunity of being heard *de novo*. As to the other matters which are discussed by the Lord Ordinary in his opinion, they are obviously of the highest importance, and may at a later stage come to be vital in the disposal of the case. They do not come up for disposal now, and I accordingly reserve my opinion with regard to them.

LORD SKERRINGTON—I have no difficulty in holding that the members of the Licensing Court acted illegally and in violation of the statute, in respect that they did not first hear the applicants before refusing to renew a material part of their certificates. I have more difficulty in concurring with your Lordships as regards the consequences of that illegality. The language of section 11 is very special, and there is much to be said for the construction that as it was incompetent in the circumstances for the Court to refuse to renew the certificates, and as no competent objection to the renewals had been submitted to the Court in the manner pointed at by sections 19 and 20 of the statute, the Court had no discretion in the matter, but lay under a duty to grant the renewals. It is also unfortunate that we should be compelled to take a course which may result in the pursuers' applications having to be reconsidered by persons who have already illegally prejudged the question. My doubts, however, are not sufficiently clear to justify me in formally dissenting.

The Court pronounced this interlocutor—

"Recal *in hoc statu* the said interlocutor [18th July 1916]: Find and declare that in refusing the renewal of the pursuers' certificates without hearing the pursuers in support of their applications for renewal in open Court, the defenders first called acted contrary to their statutory duties: Therefore appoint the defender second called to summon a meeting of the Licensing Court of the Burgh of Motherwell, to be held on Friday, the 17th of November current, to entertain, hear, and dispose of the applications of the pursuers for renewal of their respective certificates condescended on, irrespective of the deliverances of the defenders first called, all in terms of the Licensing (Scotland) Acts 1903 to 1913, with power to the said Court to adjourn to a day or days, but not later than seven days from the 17th November foresaid: Further, appoint the defender fourth called to summon a meeting of the Licensing Court of Appeal for the Burgh of Motherwell, to be held on Friday, the 8th day of December next, to hear and dispose of any appeal or appeals which may be taken against any proceedings of the Licensing Court for the Burgh of Motherwell at the meeting above appointed: Appoint the defender second called to advertise this interlocutor in the *Glasgow Herald* and *Motherwell Times* newspapers *quam primum*: Dispense with further intimation or advertisement of such meetings of the Licensing Court and Court of Appeal: Further, appoint the defenders second and fourth called respectively to lodge a report of the proceedings at the said respective meeting or meetings within eight days after the latest of said meetings."

Counsel for the Pursuers (Respondents)—Horne, K.C. — A. M. Mackay. Agent—James Purves, S.S.C.

Counsel for the Defenders (the Licensing Court of Motherwell)—Macmillan, K.C.—D. M. Wilson. Agents—Burns & Waugh, W.S.

Counsel for the Defenders (the Licensing Appeal Court)—The Lord Advocate (Munro, K.C.)—Sandeman, K.C.—Gentles. Agents—Weir & Macgregor, S.S.C.

Tuesday, November 7.

FIRST DIVISION.

MACEWAN'S TRUSTEES *v.* MACEWAN.

Succession — Faculties and Powers — Appointment—Exercise of Power—Validity.

By antenuptial marriage contract a father conveyed the whole of his means and estate to and in favour of the child or children of the intended marriage, under burden of a liferent and annuity to his intended wife, and "also under such burdens and conditions and payable at such periods and in such shares or proportions amongst the said children respectively if more than one, and their lawful issue in case any of them" should predecease him "leaving lawful issue of their bodies as" he should "appoint by any writing under his hand, and failing such appointment then the said means and estate shall fall and belong to the said children if more than one equally, share and share alike, and shall be payable to them if sons upon their respectively attaining twenty-one years of age, and if daughters upon their respectively attaining majority or being married whichever of these events shall first happen, and in case any of the children shall die without leaving lawful issue of their own bodies before their shares shall respectively become due to them the share or shares of any of them so dying shall accrue to the survivors or survivor, but in case of their leaving lawful issue, such issue shall be entitled to the share or shares which would have

belonged to their parents had they been in life, equally amongst them also, if more than one child, share and share alike, unless otherwise appointed by" him in virtue of the power reserved to him.

By his trust-disposition and settlement he directed his trustees to hold and retain the whole residue of his means and estate, and appointed them on his daughters respectively attaining the age of twenty-four or being married, whichever happened first, to hold their shares for their liferent uses allenarly, and for their lawful issue respectively in fee, in such proportions and under such conditions and restrictions as the daughters should appoint by any writing under their hands, and failing such issue, or in the event of an appointee of a daughter dying before reaching majority, for behoof of such person or persons as such daughter should direct by any *mortis causa* or other writing under her hand.

A daughter having challenged this exercise of the power of appointment, *held*, in a Special Case, that she was entitled to her share of the residue as her absolute property unburdened by the restrictions, conditions, and provisions imposed thereon in the trust-disposition.

Andrew MacEwan and another, trustees of the deceased Andrew MacEwan, accountant, Glasgow, *first parties*, and Janet MacEwan, daughter of the deceased Andrew MacEwan, *second party*, brought a Special Case for the opinion of the Court, raising questions as to the exercise by the deceased Andrew MacEwan in his trust-disposition and settlement of a power of appointment conferred upon him by his antenuptial marriage contract.

The *marriage contract*, dated 21st November 1842, provided, after certain provisions in favour of Mrs MacEwan, as follows:—"Farther I the said Andrew MacEwan dispone convey and make over to and in favour of the child or children of the said intended marriage in fee my whole means and estate heritable and moveable real and personal wherever situated presently belonging or that shall belong to me at the time of my death or to which I may succeed or acquire right in any manner of way during the subsistence of the said intended marriage but always with and under the burden of the foresaid annuity and liferent use of the furniture and others before specified and hereinbefore provided in favour of the said Agnes Kerr and also under such burdens and conditions and payable at such periods and in such shares or proportions amongst the said children respectively if more than one and their lawful issue in case of any of them predeceasing me the said Andrew MacEwan leaving lawful issue of their bodies as I shall appoint by any writing under my hand and failing such appointment then the said means and estate shall fall and belong to the said children if more than one equally share and share alike and shall be payable to them if sons upon their respectively attaining twenty one years of age and if daughters upon their respectively attaining majority or being married whichever of these events shall first happen and in case any of the children shall die without leaving lawful issue of their own bodies before their shares shall respectively become due then the share or shares of any of them so dying shall accrue to the survivors or survivor but in case of their leaving lawful issue such issue shall be entitled to the share or shares which would have belonged to their parents had they been in life equally amongst them also if more than one child share and share alike unless otherwise appointed by me the said Andrew MacEwan in virtue of the power above reserved by me the said Andrew MacEwan."

The *trust-disposition and settlement*, dated 16th November 1855, and with two codicils registered 21st June 1866, after conveying the testator's whole estate to trustees for certain purposes, which included the payment of debts, legacies, &c., provided as follows:—"And in the fourth place I direct and appoint my trustees to hold and retain the whole residue and remainder of my said means and estate including the sums or subjects to be set apart to meet the foresaid annuity to my said wife when the same becomes available by her decease for behoof of my whole children who shall be alive at the period of my decease, if more than one equally among them share and share alike and to pay or apply the same as hereinafter mentioned, the shares of sons to the extent after mentioned becoming vested and payable as hereinafter mentioned, and the interest of daughters in their shares and also the interest of sons in their shares to the extent after mentioned being restricted and limited as hereinafter mentioned; And I direct and appoint my said trustees to pay to or expend for behoof of my children whether sons or daughters the annual proceeds of their shares respectively or as much of such annual proceeds as my trustees shall think necessary for their maintenance and education accumulating the remainder if any for their behoof respectively and adding the same to the capital of their shares until they shall attain the age of twenty four years complete if sons or attain that age or be married whichever of these events shall first happen if daughters. And as regards the shares or provisions of my sons I direct and appoint that the same (including any accumulations of income and all sums to which they may become entitled by the decease of other children as after provided for) to the extent of two third parts or portions of each share or provision shall be payable at the first term of Whitsunday or Martinmas which shall happen after they shall respectively attain the age of twenty four years complete and in the event of the whole of the said two thirds not being then available the remainder shall be paid over when it becomes available. And in regard to the remaining one third part of the shares or provisions of my sons respectively (including as aforesaid) I direct and appoint my trustees to retain the same in their hands, and when the same becomes avail-

able by the decease of my widow or otherwise to set aside and hold the said one third part of the shares of my sons (including as aforesaid) for behoof of my sons respectively in liferent for their liferent alimentary uses allenarly and for behoof of their issue respectively in fee and that in the same way and manner and subject to the same power of apportionment and failing issue subject to the same destination and to the like restrictions and conditions directions and others as are hereinafter written in regard to the shares of my daughters; Declaring always that such liferents in favour of such sons shall be purely alimentary to them and shall not be alienable or assignable by them or affectable by their debts and deeds or attachable or arrestable by the diligence of their creditors in any manner of way; But my trustees shall have full power to pay over to my sons on their attaining the said age of twenty four years complete the whole of the said two third portions of their shares or as much thereof as may be then available retaining under their control as much of the sums or funds of the trust set aside for providing the said annuity to my wife or otherwise as will in the estimation of my trustees secure the one third of the shares of my sons to be limited and restricted as aforesaid; And I declare that the shares of my sons including as aforesaid to the extent only of two thirds shall become vested in them on their attaining the said age of twenty four years respectively, and that the other one third shall not become vested in them. But notwithstanding the above declarations I empower my trustees at any time even before my sons attain majority to advance to them such portions of their shares as my trustees shall think proper for the education of my sons or for setting them up or fitting them out in a business or profession or otherwise advancing their prospects in life such advances to be imputed *pro tanto* of the two third parts of their shares to become payable and vested in them as aforesaid. And in regard to the shares of my daughters I direct and appoint my trustees on my daughters respectively attaining the said age of twenty-four years complete or being married whichever of these events shall first happen or as soon thereafter as possible to set aside and hold their shares (including therein all accumulations of income and all sums to which they may become entitled by the decease of other children as after provided for) or such part thereof as may be then available the remainder being set aside when it becomes available for behoof of my daughters respectively in liferent for their respective liferent uses allenarly and of their lawful issue respectively in fee in such proportions among such issue if more than one child and whether there be one or more children under such restrictions and conditions as my daughters may respectively appoint by any *mortis causa* deed or writing under their hands respectively and failing such apportionment equally among such issue if more than one child share and share alike; And failing such issue or in the event of such issue dying before attaining majority, for behoof of such person or persons as my daughters may respectively direct by any *mortis causa* deed or other writing under their hands: And failing my daughters without leaving any such deed or writing for behoof of my then surviving children and the issue of any of them who may have predeceased leaving issue such issue always receiving the shares or shares which would have fallen to their parents had they survived: And I do hereby specially provide and declare that the shares or provisions of my said estate and effects herein made and provided in favour of my daughters including as aforesaid both capital and annual proceeds shall be purely alimentary to them and shall not be alienable or assignable by them or affectable by their debts or deeds or attachable or arrestable by the diligence of their creditors and shall be exclusive of the *jus mariti* and right of administration of any husbands they may marry and not affectable by the debts or deeds of such husbands, or attachable or arrestable by the diligence of their creditors in any manner of way, all which are hereby expressly excluded and debarred. . . . But I specially empower my trustees if they shall find it practicable in order to carry out the foregoing directions and instructions at any time without the intervention of a trust to convey and make over to any of my sons or daughters and their issue their respective shares or parts of shares of my estate subject to the same destinations conditions and provisions as are hereinbefore provided in regard thereto. And my trustees shall be completely discharged of such shares or portions of shares on the same being handed over to such new trustees or conveyed direct to the parties interested as aforesaid. And I do hereby specially provide and declare that the provisions before written in favour of my children shall be in lieu and place of and in full satisfaction to them respectively of all legitim and bairns' part of gear portion natural executry and every other right or claim legal or conventional competent to them or any of them by and through my decease or through the decease of their mother or otherwise against my or her estate in any manner of way whatever and shall also be in full to them of all provisions conceived in their favour by the said contract of marriage between me and the said Mrs Agnes Kerr or MacEwan, my wife."

The Case stated—"1. Andrew MacEwan, accountant, Glasgow (hereinafter referred to as the truster), died on 11th June 1866, survived by his wife Mrs Agnes Kerr or MacEwan, and all the children of the marriage, namely, Jane Kerr MacEwan, who was born on 1st July 1845; Janet MacEwan, who was born on 13th April 1848; Andrew MacEwan, who was born on 8th September 1853; and Agnes Kerr MacEwan or Kidston, who was born on 25th September 1856. The truster's widow, Mrs Agnes Kerr or MacEwan, died on 10th July 1880. His daughter, Miss Jane Kerr MacEwan, died on 22nd January 1911. Of the surviving children, Andrew MacEwan is married and has issue;

Janet M'Ewan is unmarried; and Mrs Agnes Kerr MacEwan or Kidston is the widow of David Whitelaw Kidston, chartered accountant, Glasgow, who died without issue on 27th June 1909. . . .

"6. On the death of the truster the surviving trustees nominated in his said trust-disposition and settlement accepted office and entered on the management of the trust estate. They made over to his said widow the furniture and effects bequeathed to her and the sums provided for mourning and interim aliment, and until her death on 10th July 1880 paid to her her said annuity of £500 and allowed her the liferent use of his dwelling-house.

"7. The residue of the truster's estate at the date of his death amounted approximately to £40,542. Of the one-fourth share thereof bequeathed to the truster's son, Andrew MacEwan, two-thirds have been paid over to him, as directed in the said trust-disposition and settlement, and the remaining one-third portion is represented by heritage in Glasgow, the title to which has, in accordance with the said trust-disposition and settlement, been taken in the name of certain trustees for him in liferent for his liferent alimentary use allenarly and for behoof of his issue in fee, in such proportions among such issue as he may appoint by any *mortis causa* deed or writing under his hand, and failing such appointment, for behoof of such issue, equally share and share alike. As regards the remainder of the residue of the truster's estate, no allocation of the capital thereof was made when the daughters attained twenty-four, as they desired that it should be retained undivided by the trustees, and that the income should be divided equally among them. By letter of date 22nd March 1884, however, the said daughters requested the trustees to allocate and set aside the share of the residue falling to each of them. The trustees accordingly set aside and appropriated and thereafter retained and administered the said shares, and paid to each daughter the income accruing from her respective share. The truster's daughter Miss Jane Kerr MacEwan, on her death on 22nd January 1911, left a trust-disposition and settlement disposing of the share of the residue liferented by her, and the said share was made over by the trustees as directed by her in her said deed. The remaining two shares of the residue of the truster's estate are at present held and administered by the trustees in terms of the directions contained in his said trust-disposition and settlement.

"8. The truster's children (other than the said Miss Janet MacEwan) have acquiesced in the dispositions made by the truster in his said trust-disposition and settlement in regard to the shares of the trust estate falling to them. The said Miss Janet MacEwan, however, has now intimated that she challenges the exercise of the power of appointment by the truster in his said trust-disposition and settlement *quoad* the one-fourth share of the residue bequeathed to her, in so far as it restricts her interest in the same, on the ground that the said restriction is not warranted by the terms of the power of appointment reserved in the said marriage-contract, and has called upon the trustees to convey and make over the said share to her as absolute fiar and free from the said restrictions. Accordingly, in order that the validity of the said appointment in regard to the said share and the rights of the said Miss Janet MacEwan therein may be determined, the present case is presented for the opinion and judgment of the Court."

The *contentions* of the first parties were —"That the estate settled by the truster in his said marriage-contract being destined to the children of the marriage 'under such burdens and conditions and payable at such periods and in such shares or proportions amongst the said children' as the truster should appoint, the directions in his said trust-disposition and settlement as to the said one-fourth share constitute in all respects a valid exercise of the said power reserved in the said marriage-contract; or, otherwise, that the said trust-disposition and settlement, in so far as it directs the first parties to hold or make over the said share for or to the second party under the conditions, limitations, and declarations affecting her interest therein, as set forth in the said trust-disposition and settlement, and empowers the second party to direct as to the disposal of the said share in the event of failure of her issue, is a valid exercise of the said power of appointment. The first parties accordingly maintain that the said conditions, limitations, and declarations being valid and effectual, the second party is not entitled to require immediate payment or conveyance to her of the said share as her absolute and unqualified property."

The contentions of the second party were —"The said trust-disposition and settlement is a valid exercise by the truster of the power of appointment reserved in his marriage-contract in so far as it apportions one-fourth share of the residue of his estate to the second party, but that it is an invalid exercise of the said reserved power in respect that it seeks to restrict the interest of the second party in said share to an alimentary liferent, and further in so far as it bequeaths the fee of said one-fourth share to persons who are strangers to the power. In these circumstances, the second party maintains that she is entitled to immediate payment of said one-fourth share as her absolute property."

The *questions* for the opinion of the Court were—"(1) Is the appointment of the marriage-contract fund contained in the said trust-disposition and settlement, in so far as it relates to the said one-fourth share of the residue of the trust estate (*a*) valid *in toto*, or (*b*) only partially valid? (2) In the event of the second alternative of the preceding question being answered in the affirmative, (*a*) is the second party entitled to immediate payment or conveyance of the said share as her absolute property, unburdened by the restrictions, conditions, and provisions imposed thereon in the said trust-disposition and settlement; or (*b*) to

what interest in the said share is the second party entitled, and what restrictions, conditions, or provisions attach to that interest?"

Argued for the first parties—The proper objects of the power of appointment in the marriage-contract were children, the issue of children predeceasing the testator, and the issue of children dying before their shares respectively became due. In so far as the testator in his trust-disposition and settlement conferred a benefit upon those proper objects, the power of appointment was validly exercised. But in so far as the testator attempted to confer a benefit on others who were not proper objects, the exercise of the power of appointment was invalid. In so far as the exercise of the power of appointment went beyond the proper objects, as it did here, it was null and void, and that invalid portion of it being separable from the rest fell to be treated *pro non scripto*—*Carver* v. *Bowles*, 1831, 2 R. & M. 301; *MacDonald* v. *MacDonald's Trustees*, 1875, 2 R. (H.L.) 125 (*per* L.C. Cairns at p. 132), 12 S.L.R. 635, *following Carver's* case (*cit.*)—but *quoad ultra* the power of appointment was validly exercised. The fact that a liferent was given to the second party did not invalidate the exercise of the power—*Pringle's Trustees* v. *Basta*, 1913 S.C. 172, 50 S.L.R. 74. The present case was *a fortiori* of *Pringle's Trustees* (*cit.*), for here there was an express power to impose burdens and conditions in appointing, and was ruled by the decision in *Wright's Trustees* v. *Wright*, 1894, 21 R. 568, 31 S.L.R 450. The gift of the fee to the children was a gift to a class, and did not entitle a child to claim a share in fee. Alternatively, the second party's rights were not cut down to a liferent but were a fee clogged by certain conditions, and consequently there was no repugnancy between the gift of the fee to the children of the testator and the appointment by him, and on that view the case was ruled by *Lennock's Trustees* v. *Lennock*, 1880, 8 R. 14, 18 S.L.R. 36, *followed* in *Wallace's Trustees* v. *Wallace*, 1891, 18 R. 921, 28 S.L.R. 709. *Ewing's Trustees* v. *Ewing*, 1909 S.C. 409, 46 S.L.R. 316, showed that the testator could validly create a trust to give effect to the restrictions and burdens imposed by the deed of appointment. *Warrand's Trustees* v. *Warrand*, 1901, 3 F. 369, 38 S.L.R. 273, was no longer authoritative as a result of the decision in *Pringle's* case (*cit.*), Farwell on Powers, p. 350; Sugden on Powers, p. 681; and *Balderson* v. *Fulton*, 1857, 19 D. 293, were also referred to.

Argued for the second party—It was conceded that the appointment was not valid *in toto*, but it was not even valid in part. Here the deed gave a gift of fee to the children, and it was incompetent to restrict that, by exercise of the power of appointment, to a liferent. *Pringle's* case (*cit.*) was distinguished, for there there was no gift of fee to the children, but the fund was merely to be held for their behoof. The words "under such burdens and conditions" did not entitle the donee of the power to appoint to cut down the fee given to the children to a mere liferent—*Crum Ewing's Trustees* v. *Bayley's Trustees*, 1910 S.C. 484 (*per* L.P. Dunedin at p. 488), 47 S.L.R. 423; *Middleton's Trustees* v. *Middleton*, 1906, 8 F. 1037, 43 S.L.R. 718. *Lennock's* case (*cit.*) was very special, but in any event the donee of the powers was held to have given a gift of fee. *Wallace's* case (*cit.*) was distinguished, because in it there was no gift-over to persons who were not proper objects of the power. *Matthews Duncan's Trustees* v. *Matthews Duncan*, 1901, 3 F. 533, 38 S.L.R. 401; *Darling's Trustees* v. *Darling*, 1909 S.C. 445, 46 S.L.R. 394; *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, 1909 S.C. 472, 46 S.L.R. 217, were also referred to.

LORD PRESIDENT—I am of opinion that the second party is entitled to have immediate payment of one-fourth share of the residue of the trust estate left by her father. It appears to me that the case is covered by authority. *Warrand's Trustees* v. *Warrand*, 1901, 3 F. 369, 38 S.L.R. 273, and *Middleton's Trustees* v. *Middleton*, 1906, 8 F. 1037, 43 S.L.R. 718, seem to me to be authorities directly in point. I do not profess to be able to reconcile the mass of decisions which have been quoted to us. Nor shall I attempt to distinguish them, for that task has already been well achieved by Lord Moncreiff and Lord Trayner in *Warrand's Trustees* (*cit.*), and by Lord Kyllachy and Lord Stormonth-Darling in *Middleton's Trustees* (*cit.*).

The deeds before us seem to me to be expressed in singularly distinct terms. The power of appointment is conferred by the antenuptial contract of marriage, dated in the year 1842, thus—"I the said Andrew MacEwan" — subsequently the testator— "dispone convey and make over to and in favour of the child or children of the said intended marriage in fee my whole means and estate heritable and moveable real and personal wherever situated presently belonging or that shall belong to me at the time of my death or to which I may succeed or acquire right in any manner of way during the subsistence of the said intended marriage but always with and under the burden of the foresaid annuity and liferent use of the furniture and others . . . and also under such burdens and conditions and payable at such periods and in such shares or proportions amongst the said children respectively if more than one and their lawful issue in case of any of them predeceasing me the said Andrew MacEwan leaving lawful issue of their bodies as I shall appoint by any writing under my hand." That appears to me to be a power expressed in terms which are not susceptible of two interpretations. The fee is given directly to the whole children of the intended marriage, but the testator, as he subsequently was, reserved the power to impose conditions on the gift of fee and to direct the periods at which it should be payable and the shares into which it should be divided.

The deed by which the power so conferred purports to be exercised is the trust-disposition and settlement executed thirteen years later, by which, briefly stated, the

testator proceeded to destroy the right of fee which he had conferred on his daughters, to reduce that right of fee to a liferent allenarly, and to give the fee to certain persons who were altogether outside the objects of the power, namely, the daughters' issue.

Now I cannot profess to say what I think the testator would have done had he been told that the gift of fee to the issue of his living children was outwith the power he had reserved in the antenuptial contract of marriage. I cannot say whether he would have disposed of the shares bequeathed to his daughters as he has done or have disposed of them otherwise. But I am perfectly certain of this, that neither a restriction to a liferent allenarly nor the gift of the fee to objects outwith the power can possibly be sustained as a legal exercise of the reserved power, and, for that reason, it appears to me that the daughter is entitled to have her share of the fee of her father's estate now, in terms of what I call the leading clause in his trust-disposition and settlement, namely, that expressed in the fourth purpose thereof, but rid of all the conditions and restrictions and the destination-over which we find in the later portion of the deed.

I propose to your Lordships therefore that we should answer the second question (*a*) in the affirmative, and it does not appear to me to be necessary to answer any of the other questions put to us.

LORD JOHNSTON—I agree with the result at which your Lordship has arrived. I do not think in this case that it is necessary for us to canvass the authorities which have been quoted, because the matter is susceptible of easy determination on the terms of the deeds themselves. On consideration of these terms I have come to the conclusion that by his settlement Mr Andrew MacEwan has, in intended exercise of the power reserved to him by his marriage contract, conferred benefits on those who are not objects of the power and in such a manner that his exercise of the power cannot be sustained in part, but fails entirely, at least so far as his daughters are concerned, which is the sole question before us.

LORD MACKENZIE—I agree, on the special terms of the deeds before us, that the questions should be answered as your Lordship proposes.

LORD SKERRINGTON—I understand that nothing we are deciding to-day warrants the inference that it would have been incompetent for the appointer to give the whole fund to one of his children under burden of liferents in favour of the other children. What we do decide is that the scheme of appointment contained in his will is bad, because it attempts to restrict the children's right of fee for the benefit of grandchildren.

As has frequently happened in cases of this kind, a great deal of time has been taken up by the consideration of three cases, namely, *Lennock's Trustees*, 1880, 8 R. 14, 18 S.L.R. 36; *Wallace's Trustees*, 1891, 18 R. 921, 28 S.L.R. 709; and *Wright's Trustees*, 1894, 21 R. 568, 31 S.L.R. 450, which always occasion a great deal of difficulty. They are difficult cases to understand, and on a suitable occasion I hope that they will be reconsidered.

The Court answered question 2 (*a*) in the affirmative, and found it unnecessary to answer any of the other questions.

Counsel for the First Parties—R. C. Henderson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second Party—Dunbar. Agent—D. P. Maclagan, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, November 7.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.)

KELLY *v.* RAE.

Justiciary Cases — Procedure — Complaint — Service — Accused Apprehended and Complaint Read over to Him, but no Copy Served or Asked for.

An accused was apprehended and charged by summary complaint with an offence under the Street Betting Act 1906, section 1. He was thereafter kept in custody, and was brought before a police court on 14th August 1916, when the charge was made in his presence. Proof was ordered on 21st August, on which date the charge was read over to the accused, who had been out on bail since 14th August. He was never served with a copy of the complaint, and never asked for a copy. He was thereafter found guilty and sentenced. *Held* in a bill of suspension, that the want of service did not render the procedings null and void, and conviction *sustained.*

Justiciary Cases—Procedure—Oppression—Magistrate Stating he Considered Case not Proven, Clerk of Court thereafter Calling his Attention to Certain Items of Evidence, and the Magistrate thereafter Finding Accused Guilty.

In a proof upon a summary complaint, after the evidence and speeches, the magistrate said he thought the case had not been proved. Thereupon the clerk of court, as averred by the suspender, called the magistrate's attention to certain evidence, and suggested that the accused should be convicted. The magistrate convicted the accused. *Held* in a bill of suspension that the suspender's averments were not relevant, and conviction *sustained.*

Patrick Kelly, miner, Wishaw, *suspender*, brought a bill of suspension against Thomas Rae, Procurator-Fiscal of the Burgh of Wishaw, *respondent*, craving suspension of a pretended sentence, dated 21st August 1916, of the Magistrate at the Police Court at Wishaw.