survived, although there was no necessity for the trustees, in the interest of the widow, holding more than would yield her the income to which her right was restricted.

I am accordingly of opinion that the trustees will carry out the intentions of the testator by, in the first place, setting aside a sufficient sum to meet the widow's liferent, and that they are bound to deal with the capital of what is not necessary for that purpose by paying such portion of it to the testator's son as they are directed to distribute by the last purpose of the will as modified by the codicil. I propose, therefore, that we answer the first question in the affirmative, the second in the negative, and the third, in the amended shape in which it is now put, in the affirmative.

LORD KINNEAR—I concur in the result of the opinions delivered. I only wish to add that while I agree in answering the first question in the terms proposed, I do not wish to express any opinion upon the various points which have been raised on the third question, and which are said to be of difficulty, because they do not appear to me to be properly before the Court. The only question put to us under that head is whether the vesting of one-half of the son's share takes place at twenty-one notwithstanding the postponement of the term of payment of the other half till twenty-six. I think it does vest under the will, and there is nothing in the codicil to affect the right so created.

The LORD PRESIDENT, who was absent at the hearing, delivered no opinion.

The Court answered the first and third questions of law, as amended, in the affirmative, and the second question in the negative.

Counsel for the First and Second Parties—Hon. Wm. Watson. Agents—Deas & Co., W.S.

Counsel for the Third and Fourth Parties—Moncrieff. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Friday, July 15.

FIRST DIVISION.

PATERSON'S TRUSTEES *v.* JOY AND OTHERS.

Succession—Faculties and Powers—Power of Apportionment — Separate Funds under Power—Exercise by Will—Power not Expressly Referred to — Funds not Separately Apportioned—Intention.

A, the liferentrix of three several sums under three different Scottish settlements, died domiciled in England. The fee of the sums was destined to A's children, but A had power "to divide and apportion" it among them. A left a document styled her last will and testament, invalid as a will by the law of England, the place of execution, by which, after appointing executors, she bequeathed various sums to her children, and divided "the residue" equally among them. She made no reference to the different settlements nor to the various powers of apportionment. The sums bequeathed, however, practically amounted to the sum of the funds which she had power to apportion exclusive of her own private estate.

Held that, even assuming the document to be valid as a holograph will, it was invalid as an exercise of the power of apportionment, in respect that no distinction was made between the several funds held by the different sets of trustees.

Kennion v. *Buchan's Trustees*, February 7, 1880, 7 R. 570, 17 S.L.R. 380, *distinguished.*

Henry E. Richardson, W.S., Edinburgh, and others, trustees acting under the trust-disposition and settlement of the late Adam Paterson of Whitelee, W.S., Edinburgh (*first parties*); Mrs Ada G. Duckworth or Joy and others, the children of the late Mrs Elizabeth Paterson or Duckworth, wife of the late W. N. Duckworth, Copford Place, Colchester (*second parties*); and Ralph Richardson, W.S., Edinburgh, and others, trustees acting under the contract of marriage between Adam Black Richardson of New Park and Alice Maud Duckworth or Richardson, daughter of the said Mrs Elizabeth Paterson or Duckworth, and others (*third parties*), brought a Special Case to determine whether Mrs Duckworth had or had not effectually exercised a power of apportionment conferred upon her by the trust-disposition and settlement of her father the late Mr Adam Paterson of Whitelee.

By his settlement the late Mr Paterson directed his trustees to hold his estate for behoof of his four daughters in liferent and their children in fee. He further declared—"Each of my said four daughters respectively shall have power to divide and apportion the income and capital of the respective provisions hereby made for them among their respective children, subject to such conditions and payable at such times as they may appoint, and failing issue of any of my said daughters the fee or capital of their provisions shall belong to their nearest heirs and assignees whomsoever."

Mr Paterson died in 1875 survived by his four daughters, one of whom was the late Mrs Elizabeth Campbell or Duckworth.

Mrs Duckworth was also liferentrix of a share of the estate of her uncle the late Mr Paterson of Ettrickhall, and of the estate held by her own marriage-contract trustees. Over both she had powers of apportionment similar to those which she possessed with regard to her share of her father's estate. The whole net funds over which she had powers of apportionment amounted to about £26,220. Mrs Duckworth was aware of the powers of apportionment conferred upon her with

regard to these various funds, as appeared from a document in her handwriting found in her repositories after her death, consisting of (1) a copy of a letter by the agents of the first parties giving detailed information regarding her powers, and (2) a statement dated 1907 showing the gross values thereof to be £28,323, 1s. 5d.

Mrs Duckworth's domicile of origin was Scottish. Her husband was an Englishman, and from the date of her marriage she resided in England and was domiciled there. She died on 3rd May 1908, leaving a document consisting of a single sheet of paper, the first and second pages of which were partly printed and partly written. Both pages were signed by Mrs Duckworth, but while the signature at the foot of the first page was attested by two witnesses, that at the foot of the second page was not attested in any way. The writing was refused admission to probate in England as a will in respect that it had not been regularly attested.

The document was in the following terms (the words in italics being in the handwriting of Mrs Duckworth):—

"THIS IS THE LAST WILL AND TESTAMENT of me *Elizabeth Duckworth* of *The Hurst, Ch. Crookham, Fleet, Hants.* in the County of *Hampshire* made this *thirtieth* day *of December* in the year of our Lord one thousand nine hundred and *seven*

I hereby revoke all Wills made by me at any time heretofore. I appoint *Herbert William Duckworth & Cecil Samuel Joy* to be my Executors, and direct that all my Debts and Funeral Expenses shall be paid as soon as conveniently may be after my decease.

I GIVE AND BEQUEATH unto *my children*
Alice Maud Richardson £3860.
Ada Gertrude Joy £5720.
Louise Beatrice £5720.
Edith Marion £3860.
Herbert William £6161.
Lionel Geoffrey £3000.

(I give less to Alice & Mai, because they were supposed to have married rich men) & to be well provided for.

The residue to be equally divided—all my furniture, plate, pictures, china & effects to be sold, & proceeds to be shared equally.
(except my star)
My jewels / to be equally divided amongst my four daughters, except my gold seal with crest which

Signed by the said Testator in the presence of us, present at the same time, who at *her* request, in *her* presence, and in the presence of each other have subscribed our names as witnesses.
(*Sgd.*) *Elizabeth Duckworth.*
(*sgd.*) *Isabel Court, Householder, Fleet.*
(*sgd.*) *Annie Seaber, Domestic, The Hurst, Fleet.*

(If necessary to use next page strike this out.)

is for Herbert William & one ring (for his wife) with five diamonds
(which he may choose
My lace and wardrobe to be equally divided.
Louise Beatrice if unmarried at my death is to have all the money at the Bank at my credit—also the shares and stock of which I die possessed—& in my name, also my Diamond Star.

I appoint my son Herbert William Duckworth & Cecil Samuel Joy
to be my executors.

Signed by the said Testator in the presence of us, present at the same time, who at *her* request, in *her* presence, and in the presence of each other, have subscribed our names as witnesses.
(Sgd.) *Elizabeth Duckworth.*

The *contentions* of parties as stated in the case were as follows:—"The second parties maintain that the said document left by Mrs Duckworth is validly executed, and that its terms are such as to constitute a valid and effectual exercise by her of the power of appointment conferred by the trust deed under which the first parties act.

"The third parties maintain that the said document is not effectual as an exercise by Mrs Duckworth of her said power of appointment (1) in respect that it is neither holograph nor duly attested, and (2) in respect that its terms do not purport to exercise the said power, and are not effectual to do so. They accordingly maintain that the document is not entitled to receive effect as an exercise by Mrs Duckworth of her said power of appointment, and that she must be held to have died without exercising the same."

The *question of law* was—"Does the said document left by Mrs Elizabeth Paterson or Duckworth constitute a valid and effectual exercise of the power of appointment conferred on her by the trust-disposition and settlement of her father the late Mr Adam Paterson?"

Argued for first and second parties—The power of appointment had been effectually exercised, for a will valid by the law of Scotland, though not by that of England, executed in England by a person domiciled there, was an effectual exercise of a power of appointment under a Scotch trust deed—*Kennion* v. *Buchan's Trustees*, February 7, 1880, 7 R. 570, 17 S.L.R. 380. *Esto* that the document was not properly tested, it was a valid holograph will — *Carmichael's Executors* v. *Carmichael*, 1909 S.C. 1387, 46 S.L.R. 807 —and therefore *a fortiori* a good exercise of the power of appointment. The fact that all the funds subject to the power had been disposed of showed that the testatrix intended to exercise the power —*Dalgleish's Trustees* v. *Young*, June 29, 1893, 20 R. 904, 30 S.L.R. 802; *Clark's Trustees* v. *Clark's Executors*, February 16, 1894, 21 R. 546, 31 S.L.R. 430; Farwell on Powers (2nd ed.), 180, and *Lownds* v. *Lownds*, there cited.

Argued for the third parties—By the law of England the document was invalid either as a will or as an exercise of the

power of appointment. It was equally invalid by the law of Scotland, for (*a*) it was not duly tested, and (*b*) it could not be valid as a holograph will, for if the printed words were omitted it would consist of names and figures and that was not enough—*Macdonald* v. *Cuthbertson*, November 14, 1890, 18 R. 101, 28 S.L.R. 92. That being so, it was not effectual as an exercise of the power of appointment. Assuming, however, that the document were valid as a will, the power of appointment had not been effectually exercised—*Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050, 11 S.L.R. 612. The case of *Bray* v. *Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746, was distinguishable, for there the power was referred to.

At advising—

LORD JOHNSTON—Mrs Duckworth was domiciled in England at the date of her death. She had originally been a Scotswoman, but had married in England, where she continued to reside during her married life and also as a widow, and where she died.

She was liferentrix of three several sums under three separate settlements, viz., that of Mr Adam Paterson of Whitelee, who was Mrs Duckworth's father, this fund being about £5400; that of Mr William Paterson of Ettrick Hall, this fund being about £17,800; and that of her own marriage trust, this fund being about £3000; the total of the three funds thus amounting to about £26,200, taken at the current values at the time of Mrs Duckworth's death. Under each of these settlements the fee of the sums liferented by Mrs Duckworth went to her children, but with a "power to divide and apportion" among her children, subject to such conditions and payable at such times as she might appoint, conferred upon Mrs Duckworth in substantially identical terms. Failing issue of Mrs Duckworth, the funds were destined over.

Mrs Duckworth left a document styled her last will and testament, bearing the date 30th December 1907, which was a printed form filled up in her own handwriting. This document was invalid as a will by the law of England, which was both the place of the domicile and of the execution. I assume for the purposes of this case that it would have been a good testament had it been executed in Scotland or had the lady been domiciled in Scotland, though, having regard to the actual place of domicile and execution it is not a good will even in Scotland. When examined in detail the document can, at best, be regarded as an intended testament appointing executors, making bequests of various amounts to Mrs Duckworth's six children, and dividing her residue equally between them. It made no reference whatever to any of the three settlements under which Mrs Duckworth had a power of division and apportionment, and it did not expressly import to be executed in whole or in part in the exercise of any such power. But there is this fact deducible from extrinsic evidence, viz., that the six bequests to Mrs Duckworth's children taken *in cumulo*, amount, to within a couple of pounds, to the *cumulo* of the three funds liferented by her, and which she had power to divide and appoint, if the values are taken not at her death but at December 1906, when she received from the agents for the trustees who held the various funds a state of these funds. It was accordingly endeavoured to be inferred that, regarding the document as a deed of division, and not as a testament, by her intended bequests Mrs Duckworth exercised the powers of division of the whole three funds in slump, her residuary bequest alone being ineffectual to carry, as it had been intended by her to do, her own independent estate. From the figures I think it very probable, nay almost certain, that Mrs Duckworth thought that by her particular bequests she was dividing the three funds, the subjects of her powers, and by her residuary bequest disposing of her own estate. But I do not think that that surmise, however probable, forms a ground for supporting this document as an exercise of the three several powers. Counsel referred the Court to the case of *Kennion*, 7 R. 570, in which it was held that a holograph will executed in England by a domiciled Englishwoman, which was invalid according to the law of England but would have been valid by the law of Scotland had it been executed or the testator domiciled there, was an effectual exercise of a somewhat similiar power of appointment under a Scots trust deed. At first sight the authority appeared conclusive of the present question. On closer examination, however, the two cases bear to be distinguished, with the result that not only can the present case not be decided on the direct authority of *Kennion's*, but that, as I think, the decision in *Kennion's* case can afford no assistance in the decision of the present.

In *Kennion's* case a power was conferred on the lady at any time during her life "to bequeath to or settle upon" her child or children surviving her, in such manner as she might think fit, a sum of £4000 sterling. Mrs Kennion, the donee of the power, left a holograph writing testamentary in character, by which in express exercise of the power and with express reference to the deed under which it was conferred upon her she made bequests exhausting the subject of the power and did nothing else. It was this deed which, though invalid as a testamentary writing in England, would have been valid in Scotland, and which though it would not have effect as a will in either country, was held effectual as the exercise of a power of appointment to take effect in Scotland under a Scots deed conferring the power. In the present case we have not a power of bequest but a power of division and apportionment, and that not single but threefold, and we have not an express exercise of the powers, or an express reference

to the deed conferring the powers, but a general and abortive testament put forward as an effectual exercise of the powers.

I think that the rule which has been established in Scotland by decision, and has now been adopted in England by statute, that a general power to test is to be held well executed by a general settlement or even testament unless there be evidence of a contrary intention, does not, and from the essential difference between the terms of the powers cannot, apply to the exercise of a mere power to divide and apportion. I concede that a power to divide and apportion may be perfectly well executed *in gremio* of a general settlement or even testament, but that assumes that it is expressly exercised or that some words are used connecting or identifying the exercise with the power. The donee of a mere power of division among particular objects has no right to test or bequeath, and therefore no justification for massing the subject of the power with his or her own estate, and without mention of the power, leaving it to be inferred that general bequests, even though *de facto* confined to the objects of the power, are to be assumed to be in exercise of the power and to be paid indiscrimately out of the subject of the power and the general estate. But I am not sure that it is necessary to decide the present case upon this more general ground, which it would be well to leave open. For I think that there are other grounds upon which it is necessary to reject this assumed exercise of the powers in Mrs Duckworth's case.

In the first place, a mere appointment by testament of executors who are to administer the estate and satisfy the bequests left does not seem to me to be an apt exercise of a power to divide and apportion a fund already vested in trustees under the settlement which confers the power, and which they cannot part with to the executors of the testament, but must themselves distribute among the objects of the power, according to the scheme of division and apportionment dictated by the donee of the power, and failing that, as directed by the donor of the power.

In the second place, we are dealing with three separate powers under three separate settlements, each applicable to a distinct and definite fund, and what I have just said with reference to the exercise of one power applies with still greater force to the exercise of three separate powers. I do not think that the three sets of settlement trustees could treat Mrs Duckworth's bequests by her intended testament as justifying them each in handing over the subject of their respective power to Mrs Duckworth's executors to dispose of in slump as if it were part of her estate, and I think that each set of trustees is entitled to ask what part of the fund under their administration is apportioned to Mrs Duckworth's daughter Alice, what to her daughter Ada, and so on. Any one set is entitled to say—Mrs Duckworth intended to bequeath £3860 to Miss Alice and £5720 to Miss Ada. Are we to pay Miss Alice and Miss Ada the whole of these sums, or if not, what part of them? And this question cannot be answered.

But, in the third place, a still more difficult question arises when it is considered that Mrs Duckworth had estate of her own amounting to at least £4000, and that the so-called deed of division intends to deal with that fund also, but as an invalid testament is ineffectual to do so. Each set of trustees under the settlements conferring the powers are entitled to ask—Of these bequests to Mrs Duckworth's children, how much did she intend to be paid out of the subjects of the powers, and how much out of her own private estate? Though as a testament affecting her own estate the document is ineffectual, in trying to press it into service as a deed of division no part of it can be read out. I do not think that that question can be answered by ignoring the separate estate, or by resting on extrinsic evidence drawn from a comparison of figures, but that the whole scheme of this assumed last will and testament is wholly inept as an exercise of a power of division and apportionment, and still more so as the exercise of three separate powers of division and apportionment, and that it cannot receive effect as such. That this should be so may be subject of regret, but for this Mrs Duckworth is herself alone responsible. I propose, therefore, that the question in the case be answered in the negative.

The case and question are confined to one of the powers only, that under Mr Adam Paterson's settlement, it being assumed that the decision on it would rule the other two. But it has been impossible to decide the case without reference to the fact that three separate powers are involved.

LORD PRESIDENT—I have come to the same conclusion, but on somewhat narrower grounds than those of my learned brother. I think these propositions are certain—first, that a holograph writing by the law of Scotland will be equally effective whether as a will or as the exercise of a power; second, that where, as here, there is a writing which is partly holograph and partly not, the effective portions must be contained in what is holograph, that is to say, you must take the writing, read out all words that are not holograph, and then see if what is left is sufficient. When I say "is sufficient," I mean that it is quite clear that it must be sufficient either to be the exercise of a power as such—and that means that the deed must in some way or other bear a reference to the power—or that it must be sufficient to operate as a will in order that the doctrine that a power can be well exercised by a will even although that will bears no specific reference to the power, may apply—that is to say, in other words, it must bear in itself evidence of being a testamentary writing, and not a mere *notandum* with a view

to making a testamentary writing. I am willing for the purposes of this case to hold all that in favour of those who wish this writing to be held to be a good exercise of the power. I think there is enough in the holograph portion of the writing to spell out of it a will, and that being so, the general doctrine comes in that it is quite possible to execute a power by will, and that where there is a general settlement it will be presumed if nothing points to the contrary that a power which the maker of the general settlement possessed has been thereby exercised. I am not inclined to draw the distinction which my learned brother has drawn between general powers and power to divide. Upon that matter I wish to reserve my opinion. I shall, however, for the moment assume that also in favour of the parties who contended that the power was well exercised. Where I think they fail is that, even assuming these things in their favour, they are asking the Court to do too much. We are asked, not to carry out the instructions which were left by the testatrix, but to make a will for her which, *tota re perspecta*, we may be fairly sure she would have made if the matter had been properly explained to her; and my difficulty arises from the fact, upon which Lord Johnston has chiefly based his judgment, that here there are three different trusts and none of them has anything to do with the others. The trustees in each trust are entitled to say, "Show us what we are to do; show us the authority of the deceased lady." Take the directions as they stand; they are misleadto the trustees of a single trust. If we were to hold the exercise of the power good a trustee of a single trust would then be told to pay away sums which are far in excess of what he can pay away, and he would be also told that there was a certain residue to be given equally to certain persons—a direction which would be really inappropriate. What one is really asked to do is to say to the body of trustees in Trust A, "You will allow me to introduce trusts B and C and add up all the figures together, and the result will show that it is more than likely that this lady meant you to divide the money which the three trusts together have in certain proportions which correspond to the figures which the deceased lady has put down, and then dispose of her private fortune by way of residue." In other words, you are asking the trustees to take these sums, not as direct directions at all, but as arithmetical factors in order to make a proportional sum, leaving out the residue. Now I think that is too great a feat for the Court to perform. I think probably the lady meant to do that, but I do not think she has done it. Accordingly I come to the same conclusion as Lord Johnston.

I am instructed to say that Lord Low concurs in the opinion which I have just delivered.

LORD KINNEAR and LORD SALVESEN gave no opinion, not having heard the case.

The Court answered the question of law in the case in the negative.

Counsel for First and Second Parties—Blackburn, K.C.—Lord Kinross. Agents—Gillespie & Paterson, W.S.

Counsel for Third Parties—Wilson, K.C.—Macmillan. Agents—Hope, Todd, & Kirk, W.S.

Friday, July 15.

FIRST DIVISION.

(RAILWAY AND CANAL COMMISSION.)

JOHN WATSON, LIMITED, AND OTHERS *v.* CALEDONIAN RAILWAY COMPANY AND OTHERS.

POLQUHAIRN COAL COMPANY, LIMITED *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Appeal — Bar — Railway — Railway and Canal Commissioners — Railway and Canal Traffic Act 1888 (51 *and* 52 *Vict. c.* 25), *sec.* 17—*Act of Sederunt*, 1*st June* 1889, *sec.* 2 — *Appeal against Order for Proof after Obtaining Diligence for Recovery of Documents—Competency.*

In an application by certain traders to the Railway and Canal Commissioners against several railway companies, the Commissioners intimated verbally that they would allow an inquiry into the facts. Shortly thereafter the respondents applied for and got a diligence in terms of a specification for the recovery of documents. The Railway and Canal Commissioners thereafter issued a written order allowing a proof before answer, and against that interlocutor the respondents appealed. The applicants having objected to the competency of the appeal on the ground that the respondents had barred themselves from insisting therein by taking the diligence for the recovery of documents, *held* that the appeal was competent.

Railway — Railway and Canal Commissioners—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *sec.* 2—*Regulation of Railways Act* 1873 (36 *and* 37 *Vict. cap.* 48), *sec.* 6—*Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *sec.* 8—*Jurisdiction—Reasonable Facilities.*

In an application to the Railway and Canal Commissioners at the instance of certain traders against certain railway companies for an order on the respondents to allow the applicants to tender their own waggons and to have their mineral conveyed over the railways in their own waggons, the Commissioners allowed a proof before answer. The respondents appealed and objected to proof being allowed, on the ground that what the applicants sought was a declarator of general legal right, which