winch was placed as inferring liability upon the defenders at common law." This is most unfortunately put. It reads as if it meant that if a manager having to place a winch in a particular position did not place it exactly where it should be placed, the limited company, his masters, would be responsible at common law for his mistake. That is plainly not sound law as stated.

It seems to me that the case having gone to the jury on such directions as these, it is impossible to do otherwise than to sustain the exceptions to the directions 1, 2, 4, 5, and 7, and to order a new trial.

Had it been necessary to consider the case on the question of the verdict being contrary to evidence, I will only say that it would have been very difficult to hold that the verdict was not open to exception as being contrary to evidence.

I will only add that I think it lamentable that in a simple case like this there should be placed before us notes of evidence filling 163 pages of print, the case having occupied three long days. Such a case would certainly have been tried in this Court in one day, and the print of notes if required would certainly not have been one-third of the size of that in this case.

If such cases are conducted in the Sheriff Court as this one has been, instead of jury trial in that Court being a blessing to litigants, it will prove something very different to the unfortunate litigants who either come into Court as pursuers or are hailed to Court as defenders.

LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the . . . interlocutor appealed against, as also the whole interlocutors since the closing of the record on 20th August last: . . . Allow the bill of exceptions, set aside the verdict, grant a new trial, and remit the cause to the Sheriff to proceed therein."

The defenders moved for expenses, and argued that the rule in *Canavan* v. *John Green & Company*, December 16, 1905, 8 F. 275, 43 S.L.R. 200, did not apply to jury trials in the Sheriff Court.

LORD JUSTICE-CLERK—This has been an unfortunate case, and it is a case in which both parties are more or less to blame. I think the proper course is to find neither party entitled to the expenses of the trial and of the appeal.

LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court found neither party entitled to expenses from the date of closing the record.

Counsel for the Pursuer (Respondent)—Crabb Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Appellants)—Watt, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Tuesday, February 23.

SECOND DIVISION.

RAMSAY'S TRUSTEES *v.* RAMSAY.

Succession—Faculties and Powers—Power of Appointment—Exercise of Power—General Settlement—Appointment quoad "Residue"—Power Expressly Exercised with regard to Two out of Three Sums—Expressio Unius Exclusio Alterius—Presumption.

By his antenuptial contract of marriage, dated in 1851, A bound himself to pay a sum of £4000 at the first term after his or his wife's death, to the children of the marriage, equally among them, declaring that the spouses or the survivor should have power to appoint it among the children in such proportions as they or the survivor might think fit. By the same deed A and his future father-in-law each bound themselves to pay a sum of £3000 to the marriage-contract trustees for behoof of the children of the marriage, in such proportions as the spouses or the survivor might appoint. An additional sum of £1518, 18s. 11d. was subsequently conveyed to the marriage-contract trustees by directions of the wife's father, for the purposes of the trust.

In 1887 the spouses executed a mutual settlement and deed of appointment, in which, after providing for payment of debts and legacies, they disposed of the residue of their estate, which they apportioned among their children in certain shares. Clauses reserving the liferents of the spouses and dispensing with delivery followed. The deed then proceeded to narrate the marriage contract and the trust purposes relating to the sums of £6000 and £1518, 18s. 11d. and apportioned these sums among the children. No reference was made in this part of the deed to the sum of £4000.

Held that, looking to the construction of the mutual settlement as a whole, and to the terms of the residue clause in particular, the sum of £4000 had not been validly appointed.

Bray v. *Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746, *distinguished.*

By his antenuptial contract of marriage, dated in 1851, James Ramsay junior, merchant, Dundee, bound himself to make payment of the sum of £4000 at the first term of Whitsunday or Martinmas after the death of the longest liver of himself and his wife to the child or children of the marriage then alive, equally among them, share and share alike—"Declaring that if there be two or more children of the said contracted marriage, then the said James Ramsay junior and Euphemia Wilson Baxter (Mrs Ramsay) shall have full power during their joint lives to divide and apportion the said sum of Four thousand pounds between and among the said chil-

dren, in such manner and in such proportions as the said James Ramsay junior and Euphemia Wilson Baxter shall think fit to appoint by a joint deed or other writing under their hands; and in case no such division shall be made during their joint lives, then and upon the death of either the survivor shall have full power and liberty in like manner to divide and apportion the whole of the said sum between and among the said children, in such manner and in such proportions as the said survivor shall think fit to appoint by writing under his or her hand."

By the same deed the said James Ramsay and Edward Baxter, Esq., merchant, Dundee (Mrs Ramsay's father), each bound themselves to pay to the marriage-contract trustees the sum of £3000 for, *inter alia*, the following purposes, viz.—"After the death of the longest liver of the said James Ramsay junior and Euphemia Wilson Baxter, the said trustees . . . shall pay and assign the said sum of £6000, or such part thereof as shall have been advanced and paid over to them, to and in favour of the child or children of the said intended marriage, and the lawful issue of any of them who may have died, in such shares or proportions as the said James Ramsay junior and Euphemia Wilson Baxter shall jointly appoint and direct by a writing under their hands, or failing such joint appointment and direction, as the survivor of them shall appoint and direct by any writing under his or her hand, or failing such appointment and direction by the said James Ramsay junior and Euphemia Wilson Baxter or by the survivor of them as aforesaid, then to and in favour of all and every the child or children of the said intended marriage equally between or among them, share and share alike."

By his trust-disposition and settlement Mr Baxter conveyed to the said trustees a sum of £1518, 18s. 11d. to be held by them for the purposes of the trust.

On 14th December 1887 Mr and Mrs Ramsay executed a mutual trust-disposition and settlement and deed of appointment, whereby they disponed to trustees the whole estate then "belonging and indebted" to them, or that should "belong and be indebted" to them at their death, and, *inter alia*, provided—"And in the last place, with reference to the residue or remainder of the trust estate, we direct our trustees (First) To pay to our son James the sum of Two hundred pounds; to pay to our son Edward Baxter the sum of Two hundred pounds; and to pay to our son Alexander the sum of Two hundred pounds; and (Second) To divide and apportion the balance of the residue or remainder of the trust estate equally amongst our daughters, share and share alike, and to hold, retain, and invest their respective shares in trust for behoof of our daughters respectively for their respective liferent use allenarly and their lawful issue respectively in fee."

[Then followed clauses providing for the nomination of the trustees as executors of the spouses, a reservation of their own liferents, and a declaration that so far as the will was not altered or modified it should be effectual although found undelivered at their death.] The deed then proceeded as follows:—"And further, whereas by the antenuptial contract of marriage entered into between me the said James Ramsay, . . . and me the said Euphemia Wilson Baxter or Ramsay, . . . I, the said James Ramsay, agreed and thereby bound and obliged myself . . . to advance and pay the sum of three thousand pounds sterling . . . for the purposes therein and hereinafter mentioned, and the said deceased Edward Baxter bound and obliged himself and his heirs and successors also to advance and pay a like sum of three thousand pounds . . . . but that always in trust for the ends, uses, and purposes therein and hereinafter mentioned . . . . [*then followed a narrative of the trust purposes*] . . . . and whereas the said Edward Baxter by his said trust-disposition and settlement, *inter alia*, directed his trustees to set apart for behoof of me" the sum of £1518, 18s. 11d., and directed his trustees to pay it to our marriage contract trustees, "to be held by them upon the same trusts, and to be paid and applied by them in the same way and manner for behoof of us and our children respectively, as the said marriage-contract trustees hold and are bound to pay and apply the other monies falling under the trust created by the said contract of marriage: And whereas the several sums above specified have been paid over to the said marriage-contract trustees, and that the fund under their charge amounts *in cumulo* to seven thousand five hundred and eighteen pounds, eighteen shillings and elevenpence: And now seeing that we have resolved to exercise the power of appointment and direction conferred upon us by the said contract of marriage: Therefore we do hereby appoint and allocate to our said son, the said James Ramsay, or his lawful issue as aforesaid, the sum of ten pounds; to our said son Edward Baxter Ramsay, or his lawful issue as aforesaid, the sum of ten pounds; to our said son, the said Alexander Ramsay, or his lawful issue as aforesaid, the sum of ten pounds, and the remainder of the sum of seven thousand five hundred and eighteen pounds, eighteen shillings and elevenpence, we hereby appoint and allocate equally amongst our daughters, the said Euphemia Eleanor, Gertrude Jane, now Mrs Cook, Jane Elizabeth, Eleanor Baxter, Edith Agnes, and Constance Maud, or their lawful issue respectively as aforesaid, share and share alike, which several sums apportioned as aforesaid to our said sons or daughters, or their lawful issue as aforesaid, shall be payable to them at the times and subject to the conditions and declarations specified in our said contract of marriage."

Mrs Ramsay died on the 18th October 1897, survived by her husband, who enjoyed the liferent of the funds held in trust under the marriage-contract until his death in April 1907. Mr Ramsay left personal estate

sufficient to implement the provision for payment of the £4000 under his marriage-contract to the extent only of about £1200.

Mr Ramsay was survived by three sons and five daughters of the marriage, and by a grand-daughter, the only child of a predeceasing daughter. The question having arisen whether the mutual settlement operated as a valid exercise of the power of appointment conferred on the spouses by the marriage-contract with reference to the said sum of £4000, which Mr Ramsay had bound himself to pay to the children of the marriage, a Special Case was presented, the parties to which were—(1) the trustees under the marriage contract; (2) the trustees under the mutual settlement; (3) Miss E. E. Ramsay and others, the surviving daughters of the marriage, along with the child of the predeceasing daughter; and (4) James Ramsay and others, the sons of the marriage.

The parties of the third part maintained that, on a sound construction of the said mutual settlement and marriage contract, the former deed operated as an effectual exercise of the power of apportionment of the said sum of £4000 conferred by the latter deed upon the spouses or the survivor of them, and that the said sum accordingly formed part of the estate held in trust by the parties of the second part for behoof of the third parties in liferent and their issue in fee.

The parties of the fourth part maintained that, on a sound construction of the said mutual settlement and antenuptial contract of marriage, the former deed did not operate as a valid exercise of the power of apportionment of the said sum of £4000 conferred by the latter deed upon the spouses or the survivor of them, and that the said sum of £1200 or thereby, being the amount to which the said obligation undertaken by Mr Ramsay to pay £4000 was implemented, accordingly fell to be divided equally among Mr and Mrs Ramsay's children, and the issue of predeceasing children, in terms of the contract of marriage.

The *question of law* was—"Does the mutual settlement of Mr and Mrs Ramsay operate as a valid exercise of the power of appointment to the sum of £4000 created by their contract of marriage?"

Argued for the fourth parties—There was no valid appointment of the £4000. *Esto* that the *onus* of proof lay upon the party maintaining that a general bequest was not an exercise of a power of appointment, —*Bray* v. *Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746,—the *onus* was discharged. There were three funds over which the spouses had power of apportionment. They apportioned two of them in specific terms, but not the third. They could not have intended that the general bequest of residue in the mutual trust-disposition and settlement should operate as a power of appointment, for that would render the subsequent particular appointment altogether superfluous. Further, the composite nature of the deed, which was divided into two parts and was both a mutual will and a deed of appointment, differentiated this case from *Bray* v. *Bruce's Executors* (*sup. cit.*), and from *Tarratt's Trustees* v. *Hastings*, July 7, 1904, 6 F. 968, 41 S.L.R. 738. Moreover, there was a direct destination to children in the marriage contract, so that if it were held that no appointment of the £4000 had been made, the fund would not be thrown into intestacy. The estate dealt with in the mutual settlement was Mr and Mrs Ramsay's estate, and not the estate settled under the marriage contract. The estate dealt with by the marriage contract and that dealt with by the mutual settlement were meant to be kept apart. The £4000 was payable after the death of Mr Ramsay, so that it could not be described as a sum belonging or addebted to him at his death.

Argued for the third parties—The power of apportioning the £4000 had been exercised by the mutual will. There was a heavy *onus* on those contending that general words in a testamentary disposition did not operate as an exercise of a power of apportionment—*Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. (*per* Lord Brougham, p. 141); *Milne* v. *Milne*, June 6, 1826, 4 S. 685; *Bray* v. *Bruce's Executors* (*sup. cit.*); *Tarratt's Trustees* v. *Hastings* (*sup. cit.*) This case was *a fortiori* of *Tarratt's Trustees*. The argument *expressio unius est exclusio alterius* was rejected in *Bray's* case. The circumstance that no intestacy resulted from a failure to exercise the power of appointment was immaterial. *Esto* that the £4000 in question was not payable until the death of Mr Ramsay, it was none the less part of his estate at his death, and therefore fell under the mutual settlement.

LORD ARDWALL—I am of opinion that in this case we should answer the question of law in the negative. The deed, which is called the mutual settlement, does not operate as a valid exercise of the power of appointment to this sum of £4000. The mutual settlement is in some ways a very distinctly expressed deed, and there is a direct cleavage of it into two parts. The first part is in the ordinary form of a trust-disposition and settlement, and then after dealing with the joint estate of the spouses we come to the second part of the deed which commences with these words—"And further, whereas by the antenuptial contract of marriage entered into between me the said James Ramsay," and so on. It describes the provisions of the marriage contract, and then it proceeds carefully to recite the sums settled in the marriage contract which the spouses are going to deal with. These are a sum of £3000 provided by Mr Ramsay, another sum of £3000 provided by Mrs Ramsay's father, and then a sum of £1518 which came to Mrs Ramsay in some other way. Then they go on to recite that these sums have been paid over to the marriage-contract trustees, and they state the *cumulo* amount of them. Then they proceed to say—"And now seeing that we have resolved to exercise the power of appointment and direc-

tion conferred upon us by the said contract of marriage:" therefore they go on with their allocation.

Now that is a most distinct exercise of the power to which it refers, and it appears most clearly that the parties intended to appoint and apportion these sums held under the marriage contract and no others. The rule *enumeratio unius est exclusio alterius* applies here most directly. We must assume that when this deed was drawn, the parties had before them the antenuptial contract of marriage which they refer to in the opening clause of this part of the deed. Under the contract of marriage which was open before them they must have seen that certain sums of money were settled subject to their appointment. They proceed to appoint three of these sums, and they leave the other out altogether. I do not think clearer proof of an intention to exclude altogether from the ambit of this deed the sum of £4000 in question could be afforded.

In this state of matters the parties of the first, second, and third parts say—"Oh! that is all very well. That deals with the sums placed in trust by the contract of marriage, but we are going to bring the sum of £4000 under the general disposition and settlement which precedes this deed of appointment." Accordingly they maintain, and maintain strongly, that this sum of £4000, which turns out after all to have been only £1200—for that is all that the gentleman could pay—was intended to be dealt with, and must be held to have been dealt with, in the clause disposing of the residue and remainder of the trust estate of these two spouses. Now, in the first place, I think that is too far-fetched an argument, because, as I pointed out, the deed is divided into two parts, one of which plainly deals with what is settled under the contract of marriage, and the other I think as plainly deals with what is not settled under that contract. Putting that aside for the moment, let us see whether this sum of £4000 can by any means be brought under the residue clause which it is said is an exercise of the power of appointment. It will be noticed that the clause under which it is said the power of appointment to this £4000 was exercised begins thus—"And in the last place, with reference to the residue or remainder of the trust estate, we direct our trustees," and then follows the appointment of £200 to each of the sons, and the residue and remainder of the estates of the spouses to the daughters.

Now let us see what was the estate of which this residue and remainder formed part. The estate is described in the usual way as—"All and sundry lands, heritages, goods, gear, debts, and sums of money, and in general the whole means and estate, heritable and movable, of what kind or nature soever or wheresoever situated, presently belonging and addebted to us, or that shall belong and be addebted to us at the time of our deaths." Can this sum of £4000 possibly be held to come within that description or be intended to be brought within it? I do not think this description is habile to include it. This £4000, so far from belonging to and being addebted to them, is thus described in the contract of marriage—"Mr Ramsay binds and obliges himself and his foresaids to make payment of the sum of £4000 at the first term of Whitsunday or Martinmas after the death of the longest liver of himself and his wife to the child or children of the marriage who shall be alive at the said term equally amongst them, share and share alike." Then follows the power reserved to the spouses jointly, or to the survivor of them, to divide and apportion that sum. Taking the sum itself, it is payable to these children (in certain proportions it may be) at the first term of Whitsunday or Martinmas after the death of the longest liver of these two parties. It seems to me plain that a sum that is to be paid by Mr Ramsay in the future cannot possibly be a sum belonging to him or addebted to him at the time of his death. On the contrary, it represents an obligation on him and his executors to pay a sum of that amount within six months after the death of the survivor of the spouses. Therefore it seems to me it would be a very great stretch of interpretation to hold that that sum was intended to be disposed of in the mutual disposition and settlement, settling property belonging and addebted to him at the time of his death. In other words, I think that the description of subjects which the testators were disposing of, shows their intention to exclude from that disposal this sum of £4000.

I therefore think this clause taken by itself is not habile to dispose of this sum, and is not a valid appointment of it. I think that would have followed from a consideration of the first part of the mutual settlement taken by itself, but when we have, as I have already said, a division of the deed into two parts, one part dealing with the sums to be appointed under the marriage contract, and the other part dealing with the general estate and property of the spouses, no doubt remains in my mind that it was not the intention of parties to appoint this sum of £4000. On the contrary, we have in the deed itself the clearest indication that it was not their intention to do so. Therefore the *onus* which undoubtedly, according to the case of *Bray*, rests upon the party questioning the validity of a general clause in a disposition as an exercise of a power of appointment, has been fully discharged in this case.

There are two or three points which I think strengthen the fourth party's contention, but I need only refer to one of them, and that is, that there is a provision that the parents may in regard to the £4000 create a special trust in the person of the marriage-contract trustees, whereas under the mutual trust-disposition and settlement the £4000 would be carried away to the administration of totally different trustees. That is not an insuperable objection, but it is an indication that the two sets of estates—the estate dealt with by the marriage contract and the estate dealt with by the mutual settlement—were intended to

be kept strictly apart. On these grounds I have no hesitation in holding that this question ought to be answered in the negative.

LORD PEARSON—I concur in the opinion which has been delivered. The sum of £4000 was provided by the antenuptial contract of marriage of Mr and Mrs Ramsay. There having been children born of the marriage, the spouses some years afterwards executed a mutual settlement affecting the estates of both, and bearing on the face of it to exercise certain powers of appointment vested in these spouses. The question is whether, in addition, it exercised the power of appointment which is here in question. That depends on the intention of parties to be gathered from the deed as a whole, qualified only by this, that the *onus* of proof lies upon the party who maintains that general words in a testamentary disposition are not enough to make an effectual appointment.

The mutual will which is founded on as containing the exercise of the power is entitled a mutual trust-disposition and settlement and deed of appointment by Mr and Mrs Ramsay. I do not know that one can draw any inference from the printed title, but the deed itself read as a whole demonstrates that there was no intention on the part of the spouses to exercise this particular power of appointment regarding the £4000. As has been pointed out, this deed is a composite deed. It is a mutual will operating upon the combined estates of the two parties to it, and it is also a deed of appointment. It is, I think, noticeable that the two parts of the deed are unusually sharply separated. The part which constitutes the mutual will between the spouses closes with the nomination of trustees to be executors of the two parties, a reservation of their own liferent, and a declaration that so far as the will is not altered or modified it should be effectual although found undelivered at their death. Then follows a reference to the antenuptial contract of marriage entered into by the spouses, and a narrative of the clauses of the contract having reference to two provisions for £3000, and an additional provision for a sum which turned out to be £1518, 18s. 11d. It seems to me that the fact that in exercising their power of apportionment special reference is made in the deed to these sums, excludes the idea that the parties had any intention of making an apportionment of any other sum. I assent to the opinion of Lord Ardwall as to the difficulty which lies in our way in holding that this clause of the mutual deed, as to the residue and remainder of the trust estate of the spouses, can be construed as including the provision here in question. I think it would only be by an undue stretch of language that that provision, which the husband was not bound to satisfy until after his wife's death, could be held to be part of the residue which is directed to be paid under the residuary clause of the settlement. I therefore concur in the proposed judgment.

LORD JUSTICE-CLERK—I am of the same opinion. It is a settled matter that a general disposition, such as we have here in the first part of the deed, may in certain circumstances be a sufficient and valid exercise of a power of apportionment. But I must say that I cannot see how this can apply to a case in which the parties themselves have expressed their intention of exercising the power of appointment, and have exercised it as regards certain funds. It is most unlikely that a deed making a certain allocation should apply inferentially to a sum not included in the allocation. I agree in all that your Lordships have said, and have no doubt or difficulty in holding that we must answer the question as suggested.

LORD LOW and LORD DUNDAS were sitting in the Valuation Appeal Court.

The Court answered the question in the negative.

Counsel for the First, Second, and Third Parties—Constable, K.C.—Dunbar. Agent—Thomas Henderson, W.S.

Counsel for the Fourth Parties—Munro—Maitland. Agent—John N. Rae, S.S.C.

Thursday, March 4.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THE ELLERMAN LINES, LIMITED *v.* THE CLYDE NAVIGATION TRUSTEES AND OTHERS.

GLASGOW AND NEWPORT NEWS STEAMSHIP COMPANY, LIMITED *v.* THE CLYDE NAVIGATION TRUSTEES AND OTHERS.

Process — Summons — Joint and Several Liability — Defenders Sued Jointly and Severally, or Severally, for Lump Sum—Joint Delinquents—Competency.

A shipowner brought an action of damages against different defenders for an injury to his vessel which he alleged was due to the combined result of their negligent actings. The action concluded against the defenders "jointly and severally or severally" for £1500.

Held that as the pursuer did not ask the Court to apportion liability between the different defenders, but sought decree against each or all, as the case might be, for the whole sum sued for, the action was competent, and proof allowed.

Process—Appeal—Sheriff—Appeal for Jury Trial — Appeal not Taken within Six Days of Interlocutor Allowing Proof — Competency — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30—*A.S.*, 5*th January* 1909, *sec.* 4 (5).

When an interlocutor allowing proof has been pronounced in the Sheriff