William Henry died on the 17th September, 1918, leaving a will in which he set out the bequest of $4,000, the power of appointment and the fact that Christy had died intestate without having exercised the power, and then proceeded to exercise the power "to the extent to which I am entitled as such survivor," and distributed the corpus of the fund among certain relatives of the testator.

The Judge of first instance held that the attempt by William Henry alone to make the appointment and distribution was ineffective, and that the corpus of the fund fell into the residue of the estate of William and should be distributed as directed by his will.

William Henry and Christy never held this fund either as joint tenants or tenants in common; neither of them had any right or claim upon the corpus or estate therein; they were to receive the income during their respective lives and to appoint by will the person or persons to receive the corpus upon the death of the survivor; they were in no sense trustees; nor could it be said, although there was no resulting trust, that they should be treated as absolute owners of the fund.

Reference to Sugden on Powers, 3rd ed., p. 126; In re Bacon, [1907] 1 Ch. 475, 478, 479; Farwell on Powers, 3rd ed., p. 512; Halsbury's Laws of England, vol. 23, p. 15, para. 36; Cole v. Wade (1809), 16 Ves. 27, at p. 45; Townsend v. Wilson (1818), 1 B. & Ald. 608.

The correct rule was laid down by the Judge of first instance.

The appeal should be dismissed; the costs of all parties except the appellant should be paid out of the estate, those of the trustees between solicitor and client.

MEREDITH, C.J.O., read a judgment to the same effect; he referred particularly to Farwell on Powers, 3rd ed., p. 62. He agreed that the power was a joint power not exercisable by the survivor alone.

MAGEE, J.A., was of opinion, for reasons stated in writing, that William Henry Simonton had a power of appointment by will over one half of the fund, and had by his will expressly exercised that power, and so his appointment as to that half should take effect, and as to that the appeal should be allowed. As to the other half, the appeal should be dismissed.

FERGUSON, J.A., agreed with MACLAREN, J.A.

Appeal dismissed (MAGEE, J.A., *dissenting in part*).