Mackintosh for petitioner.

M'Lennan for respondent.

Lord President—This petition is, so far, for the benefit of the pupil's estate, for it not only prays for removal of this factor, but for a new appointment. Supposing this factor had resigned voluntarily, a petition would have been necessary for appointing a new factor. The expense of the petition itself, therefore, will form a proper charge in the accounts of the new factor, and, so far, we do not require to find it. But I am against giving expenses to the parties, and I am not disposed to throw out of view that these two parties made it matter of bargain that they were both to get their expenses out of the estate.

Agent for Petitioner—Robert Hill, W.S.

Agent for Respondent—Colin Mackenzie, W.S.

Saturday, December 21.

SINCLAIR *v.* SINCLAIR'S TRUSTEES AND OTHERS.

Trust—Vesting. Circumstances in which *held* that vesting had taken place.

This was an action of multiplepoinding raised by Godfrey Sinclair, judicial factor appointed for the purpose of fulfilling the purposes specified in certain articles of agreement entered into between Henry Bertie Tollemache and other parties. The following statement of the facts of the case is taken from the opinion of Lord Curriehill:—"The fund *in medio* in this process of multiplepoinding consists of £1000, being part of a sum of £3000 which, in 1841, was entrusted by Lady Catherine Camilla Sinclair, spouse of Sir George Sinclair, to certain trustees for purposes which are set forth in a minute by these parties, executed in June of that year. The parties to that minute were Lady Catherine Camilla Sinclair; her husband, Sir George Sinclair; her daughter, Mrs Amelia M. L. Sinclair or Tollemache; and Henry Bertie Tollemache. The purposes of that trust are set forth in these articles of agreement. It was constituted in contemplation of a divorce being immediately obtained between Lady Sinclair's daughter and her husband. The issue of the marriage consisted of only one son, Wilbraham Archibald Tollemache, who, at the date of this agreement in 1841, must, I think, have been about three years of age. The trust which was the subject of that arrangement included not only that sum of £3000, but also two other sums amounting to £2000, contributed by Sir George Sinclair; but the present action is not concerned with that fund. Two trustees were appointed to administer the trust, but, they having declined, the trust was put under judicial management, and the judicial factor is now the raiser of this multiplepoinding. The purposes of the trust are numerous and somewhat complicated, but it is not necessary to trouble your Lordships with any statement as to more than one of them regarding the £1000 which alone constitutes the fund *in medio*. The first set of provisions applies to this sum of £3000, and provides that the revenue therefrom, to the extent at all events of £75 per annum, was to belong to the daughter, Mrs Amelia Sinclair; and ultimately, in certain events, she was to get the whole of the revenue, but not any part of the capital. That income was to be enjoyed by her during her life. As to the capital, one-third was disposed of by the fifth article of this agreement, and that is the article with which we are concerned in the present case. That article provides 'that after the death of the said Mrs Amelia Madeline Louisa Sinclair the said monies above-mentioned (consisting of the said sum of £3000 from Lady Catherine Camilla Sinclair's funds, and of two sums of £1500 and £500 from the funds of the deceased Sir John Sinclair of Ulbster and Sir George Sinclair, payable after the death of the latter), shall be held by the said trustees for the purposes after-mentioned, all as stated in the several following articles, that is to say, the sum of £1000, part of the said sum of £3000 (part of Lady Catherine Camilla Sinclair's funds), shall be held for behoof of Wilbraham Archibald Tollemache, the only child of the said Henry Bertie Tollemache and of Mrs Amelie Madeline Louisa Sinclair or Tollemache, and be payable to him on his attaining the age of twenty-four years; the interest, under the restriction in article tenth, to be applied for his use until he shall attain that age." Now, Wilbraham Tollemache attained the age of twenty-four years in July 1862, and died on 27th June 1863. His mother, Mrs Amelia Sinclair, survived till January 1864. Lady Catherine Sinclair predeceased both her daughter and her grandson, having died on 17th March 1863."

Lady Sinclair's trustees claimed the whole fund *in medio*, pleading (1) that Wilbraham having predeceased his mother, after whose death only the said sum of £1000 was to be held by the trustees of the settlement for his behoof, he had at his death no vested interest in that sum; and (2) that the said sum had reverted to Lady Sinclair's estate on the death of Wilbraham and his mother.

Henry Bertie Tollemache, father of Wilbraham, claimed one-half of the fund *in medio*, pleading that, according to the sound construction of the articles of agreement above set forth, the sum of £1000, forming the fund *in medio*, was vested in the deceased Wilbraham Archibald Tollemache from and after his attaining the age of twenty-four, or at least from and after the death of the said Lady Catherine Camilla Sinclair.

The Lord Ordinary (Jerviswoode) held that the £1000 was vested in Wilbraham Archibald Tollemache at the time of his death, and sustained the claim of Henry B. Tollemache.

Lady Sinclair's trustees reclaimed.

Adam for reclaimers.

John Marshall for respondent.

At advising.

Lord Curriehill (after narrating the facts of the case *ut supra*)—This being the state of facts, the difficulty is, how to apply to them the direction in the fifth article; for, on the one hand, the capital is to be paid to Wilbraham Archibald Tollemache, but then, as the commencement of that statement bears, it is after the death of his mother, Mrs Amelia Sinclair, that the money is to be held for his behoof, payable to him on his attaining the age of twenty-four. How is the direction to pay to him to be reconciled with the direction to hold for him from a date posterior to his death? And accordingly the competition here is between the representatives of Lady Catherine Camilla Sinclair and the representatives of Wilbraham Archibald Tollemache, the representatives of the former claiming, apparently, on the ground that there is a part of these funds the purpose as to which has become inoperative. The claim of Wilbraham's representatives, on the other hand, is

that the right to the fund had vested in Wilbraham on his attaining the age of twenty-four, or, at all events, on the death of his grandmother, Lady Catherine Camilla, and therefore is now payable to his representatives. Now, it is impracticable that both of these directions in the fifth article shall be read according to their strict meaning. They are inconsistent, and as an inconsistent intention cannot be imputed to a testator, one direction must be bent so as to be consistent with the other. We must fix which is to receive effect as the most probable intention of the truster. This requires us to examine the whole deed, the circumstances of granting it, and the general intention thereby indicated. After doing so, the conclusion I come to is that which the Lord Ordinary has arrived at, that the right must be held to have vested in Wilbraham Archibald Tollemache during his life. The grounds on which I come to this conclusion may be shortly stated. The claim of Lady Catherine Sinclair's representatives is that the funds should be returned to her estate, there being no other purpose to serve. Now, I find that, in the subsequent articles of this agreement, there are various express provisions, and I examine these in order to see if they express or fairly imply that, on the occurrence of a contingency such as has here happened, the £1000 was to be returned to Lady Catherine's estate. Now, I find no such intention expressed. I think the tendency of these provisions is rather the other way. I may refer to the tenth and eighth articles of the agreement. By the tenth article it is provided "that if the said Wilbraham Archibald Tollemache shall die before attaining twenty-four years of age, without leaving lawful issue, then the said Lady Catherine Camilla Sinclair, Sir George Sinclair, and Henry Bertie Tollemache, shall get back the sums they have paid or contracted for herein in regard to him." The only contingency in which the contracts for any thing provided to Wilbraham ever being brought back is that of his dying before attaining the age of twenty-four. And my inference is, that if he survived the age of twenty-four, the sum provided to him was not to be brought back. The eighth article is so plain as to afford an inference to the same effect. By that article it was provided "that if no children should be thereafter born of the body of the said Mrs Amelia Madeline Louisa Sinclair, or if such should die without issue, and without attaining twenty-four years of age, then the said £2000, the balance of the said £3000, part of the said Lady Catherine Camilla Sinclair's funds, should be at the absolute disposal of the said Lady Catherine Camilla Sinclair." This is a provision that, in the event of the failure of such children, the £2000 was to be returned, but this is the only other clause in the contract in which there is any provision of return to Lady Catherine Sinclair, and it does not include the £1000, but the other £2000. So that there seems only one contingency in which Lady Catherine contemplated the return of the £1000. Secondly, with regard to the words of the fifth article, that "after the death of Mrs Amelia Sinclair," the monies are to be held by the trustees. They, at first sight, appear to mean that the trust is only then to be constituted. And if that were the case, it would create great difficulty. But that is not the case, for on looking at the first article we find that the trust was constituted from the very outset, in 1841, and the funds provided by Lady Sinclair were put at that date out of her control, and into the hands of the trustees, so that the fifth article did not constitute the trust, but merely directed what the trustees were to do in certain contingencies with a trust constituted long before. And that takes off the meaning intruding itself at first sight, and creating a difficulty from the terms of the fifth article. I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

The other Judges concurred.

Agents for Reclaimers—Hope & Mackay, W.S.

Agents for Respondent—J. A. Campbell & Lamond, C.S.

Saturday, December 21.

SECOND DIVISION.

FOWLIE *v.* BARNETT & CO.

Bill of Exchange—Blank Bill—Sequestration—Indorsation without Recourse—Fraud—Writ or Oath—Suspension. A party charged on a bill of exchange by parties who had acquired it by indorsation without recourse, alleged that if his subscription as acceptor of the bill was genuine it was originally adhibited to one of a number of blank bills which he had granted to the indorsers, and as, since his sequestration, he had had no dealings with the indorsers, that the filling up of the bill was fraudulent. *Held* that proof of these allegations of fraud was not restricted to writ or oath, the words on the bill "without recourse" presuming that the indorsees had made all proper inquiry as to the acceptor.

Observed by Lord Benholme, that the indorsation "without recourse" showed that the indorsees were conjunct and confident persons with the indorsers.

The suspender of this charge on a bill for a £100 is a spirit merchant in Edinburgh, and the chargers are watchmakers in Glasgow. The bill is dated 14th February 1867. It bears the signature of the suspender as acceptor, of Macnab & Co. as drawers, and the chargers, the present holders, are indorsees of Macnab & Co., the back of the bill bearing the words "Indorsed without recourse on Macnab & Co." It was averred by the suspender that if the signature to the bill was genuine it had been fraudulently obtained, or turned to a fraudulent use. He stated that he had been sequestrated and discharged in 1866; that, prior to his sequestration, he had given to his brother-in-law, Pater Macnab, of the firm of Macnab & Ritchie, ironmongers, Edinburgh, some blank bill stamps; that he had had no dealings with his said brother-in-law or his firm since his sequestration; and that, on the assumption that the signature was genuine, the document in question must have been written upon one of these blank bill stamps which were given before his sequestration. He further averred that John Barnett & Co., the indorsees, well knew that the bill had been turned to a fraudulent use when they accepted of the indorsation without recourse upon Macnab & Co.

Lord Jerviswoode allowed a proof of the allegations of fraud, remarking that the matter was one of some difficulty.

Barnett & Co. reclaimed, and craved that it it should be held that the proof of suspender's allegations should be limited to writ or oath.

Counsel were heard, and the bill was produced