Kilmarnock, and St Andrews *quoad sacra*, Kilmarnock, jointly, and that to the extent of the other half the fund is to be administered by the minister of the parish of Riccarton: Find and declare accordingly: Find the whole parties to the Case entitled to expenses out of the trust funds: Remit," &c.

Counsel for the First, Second, Third, and Fourth Parties—Sol.-Gen. Robertson, Q.C.—H. Johnston. Agents—Gibson & Strathearn, W.S.

Counsel for Fifth and Sixth Parties—D.-F. Mackintosh, Q.C.—Johnston. Agent—George J. Wood, W.S.

Tuesday, January 4, 1887.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

M'CAIG AND OTHERS.

Process—Res judicata—*Identity of Interest.*

In a multiplepoinding brought to distribute a deceased's lady's residuary estate which was burdened with a number of annuities, the heir in possession of her family estates claimed the whole residue under burden of annuities thereon. A counter claim was lodged by a party claiming the fund *in medio* at the death of the last surviving annuitant, if he should then be in possession of the family estates. The Court *sustained* the claim of the heir in possession to payment of the residue, so far as not necessary to be retained by the executor to meet the annuities still remaining charged against it, reserving to him and all others concerned his or their claims on the remaining part of the residue retained by the executor. Seventeen years thereafter one of the annuities fell in by the death of the annuitant. In a second multiplepoinding brought for distribution of the capital retained to meet it, the person who happened then to be heir in possession of the family estates, and who was son and heir of the party who was unsuccessful in the former process, claimed it as against the executrix of the successful claimant. *Held* that the former process was *res judicata* against him, in respect he was *de facto* in the position of the unsuccessful claimant in it.

Miss Mary Turner Maitland, only daughter of the Hon. Patrick Maitland of Freugh, died at Portobello on 23d January 1861 leaving certain testamentary writings, which were all, except one, in the form of letters to the deceased Alexander Smith, W.S. By the fifth of these she directed the capital of her estate "to revert to the possessor" [of her family estates]—"first, to my nephew Patrick Maitland of Freugh and his children, failing them my nephew John Maitland, Esq.," &c. The residue was burdened with a number of legacies and annuities, which included one of £50 to her nephew Colonel (afterwards Lieutenant-General) John Maitland. Patrick Maitland of Freugh predeceased her, and was succeeded in Freugh by his eldest son and heir-at-law John Maitland.

On 27th October 1861 Mr Smith, her executor, raised an action of multiplepoinding and exoneration in the Court of Session for the purpose of having the executry estate divided There was, *inter alia*, a competition between the eldest son of Patrick Maitland, John Maitland of Freugh, and the younger children of Patrick Maitland. This competition related both to the amount of the residue and the time of division.

The younger children of Patrick Maitland of Freugh claimed to be entitled to three-fourths of the fund *in medio* as it should exist at the death of the last surviving annuitant if Freugh and Balgreggan should remain unsold, and they made an alternative claim if the estates should not then be unsold.

Colonel John Maitland, afterwards General John Maitland, was one of the annuitants. His annuity was one of £50. He claimed his annuity of £50, and further, failing all the children of his brother, the said Patrick Maitland, "that at the death of the last surviving annuitant other than himself he shall be ranked and preferred to the fund *in medio* as it shall exist at that time if the estates of Freugh and Balgreggan shall then remain unsold."

On 10th February 1863 the Lord Ordinary (Ormidale) pronounced this interlocutor, in which he found, *inter alia*, as follows:—"Finds that according to the sound legal contention of the said testamentary writings, the claimant John Maitland, as the heir-at-law of the late Patrick Maitland of Freugh, and as such now in possession as proprietor of the estates of Freugh and Balgreggan, is entitled to the residue remaining of the testatrix Miss Maitland's means and estate after payment of all the specific legacies and annuities left by her. . . . Therefore, and in respect of those findings, sustains the claim (in its first branch) [*i.e.*, for his annuity] for Colonel John Maitland; . . . and also sustains the claim of John Maitland of Freugh . . . for immediate payment of the residue of the testatrix's executry estate so far as not necessary to be retained by the raiser Mr Smith as executor of Miss Maitland to meet the annuities still remaining charged against it, reserving to the said John Maitland and all others whom it may concern, his or their claims on the remaining portion of said residue, which in the meantime is to be retained by the pursuer as Miss Maitland's executor: Repels the claims for all the parties, so far as not now sustained, subject always to said reservation, and decerns." To this interlocutor, on a reclaiming-note, their Lordships of the First Division, of date January 15th 1864, adhered—*Maitland* v. *Maitland*, January 15, 1864, 2 Macph. 417.

John Maitland of Freugh died intestate on 5th July 1869, and his mother was confirmed as executrix-dative to him. His younger brother William succeeded him in the family estates, and dying on 2d January 1881, left a general settlement in favour of his mother, under which she became liferenter of the estates and executrix to him also. He was succeeded in the fee of the estates by his uncle General John Maitland, who died on 16th March 1881, and was succeeded in the fee of the estates, under certain deeds which need not here be detailed, by his son Elphinstone Vans Agnew Maitland, under burden of Mrs Maitland's liferent.

Mr Smith died on 8th August 1868, and Thomas M'Caig was appointed judicial factor on Miss Maitland's estate.

By the death of General Maitland his annuity fell in, and a portion of the residue in Mr M'Caig's hands to the extent of £2000 was set free, and became available for payment to the person or persons having right thereto. The only remaining annuitant, Miss Catherine Maitland, who had an annuity of £200, agreed to take a bond of annuity therefor, so that it was now possible to wind up the estate.

This action of multiplepoinding and exoneration was raised in name of M'Caig as nominal raiser by Mrs Maitland, widow of Patrick Maitland of Freugh, and mother of John and of William Maitland of Freugh, whose executrix she was. She claimed the whole sum available for payment. Elphinstone Vans Agnew Maitland, now of Freugh, also claimed the fund *in medio*. He contended that the residue of Miss Maitland's estate did not vest till the period of distribution, and that as possessor of Freugh and Balgreggan he was entitled thereto, it being, he contended, the intention of the testatrix to benefit her father's family, of whom he was one, by bequeathing the capital of the residue to the possessor of the family estates at the time the annuities fell in.

Mrs Maitland pleaded—"(1) The claimant is entitled to be ranked and preferred in terms of her claim in respect of the findings contained in the judgment of the Lord Ordinary of 10th February 1863, to which the First Division of the Court subsequently, on 15th January 1864, adhered."

The Lord Ordinary (M'Laren) ranked and preferred the claimant Mrs Maitland to the whole fund *in medio* in terms of her claim.

"*Opinion.*—In this action, which relates to the distribution of a part of the personal estate of Miss Mary Turner Maitland, I am of opinion that the plea of *res judicata* stated for Mrs Maitland (John Maitland's executrix) ought to be sustained.

"The question which was raised in the former action appears to me to be identical with the subject of dispute in the present case. It is, whether the residue of Miss Mary Turner Maitland's personal estate vested *a morte testatoris*, or at what date. The Lord Ordinary (Ormidale) found in express terms that Mr John Maitland (here represented by his mother and executrix) 'is entitled to the residue remaining of the testatrix Miss Maitland's means and estate after payment of all the specific legacies and annuities left by her.' This interlocutor being brought under review was affirmed by the Court without variation. The case is reported in 2 Macpherson 417. On referring to the printed papers of the case, I find that the summons of multiplepoinding embraced the whole moveable estate of Miss Mary Turner Maitland, and therefore it cannot be said that the Lord Ordinary or the Court, in adjudicating in the terms quoted, were going beyond the requirements of the case, or deciding anything in excess of the claims and conclusions submitted to their decision.

"The argument for the competing claimant in the present case (Mr Elphinstone Vans Agnew Maitland) rests upon this distinction, that the interlocutor after a series of findings proceeds to sustain the claim for Mr John Maitland 'for immediate payment of the residue of the testatrix's executry estate, so far as not necessary to be retained by the raiser Mr Smith as executor of Miss Maitland, to meet the annuities still remaining charged against it.' This decerniture, it is argued, leaves open for future consideration the question, who is entitled to the fee of the sum of money retained to provide for the annuities?

"Now, it is undoubted that under this decerniture Mr John Maitland could only demand immediate payment of a part of the residue. But why? Not because he had not the property in it (the contrary having been previously found), but because it was held to be the duty of the executor to retain a part of the residue as an income-yielding fund to provide for the payment of annuities. It does not appear to me that the decree for immediate payment of a part of the residue is a limitation of the previous finding with respect to the vesting of the whole.

"The interlocutor proceeds to reserve 'to the said John Maitland, and all others whom it may concern, his or their claims on the remaining portion of the residue, which in the meantime is to be retained by the pursuer as Miss Maitland's executor.' I think that the meaning of the reservation is that the conclusions for payment are not exhausted, and that Mr Maitland may enrol the case for further payments as annuities fall in. It was pointed out that the reservation is not merely to Mr John Maitland, but also to 'all concerned.' I think that this was a reasonable, though perhaps a superfluous addition, because the future claim might have to be made, not by Mr John Maitland himself, but by some one claiming in his right, as has in fact occurred. But the 'all concerned' would not, as I imagine, include competing claimants, because their claims are repelled, subject no doubt to this reservation.

"Entertaining the view to which I have given expression, I do not give an opinion on the merits of the case. I have an opinion on the question whether the gift of the residue is vested or contingent. But if the matter is decided I ought not to say anything either for or against the decision."

Elphinstone Maitland reclaimed, and argued—The former case could not be truly said to be *res judicata*. (1) In it the question in the present case could not possibly have arisen, because it could only arise when one of the annuities fell in. The Lord Ordinary in it had only meant to deal with so much of the residue as was then divisible. He reserved the residue in so far as necessary for payment of the annuities, making thus a distinction between the sum immediately divisible and the sum which might be set free ultimately by the annuities falling in. The latter contingency was in fact carefully guarded against, the period of vesting being held to be the period of distribution. Now that one of the annuities had fallen in, it fell to be paid to the person who for the time being was the owner of the family estates. (2) There was a new party entirely claiming here. No one could by any possibility have told at the date of the former process who would be the representative of the family estates when the annuities fell in.

Miss Maitland replied—The former process was *res judicata* in respect (1) of identity of the sub-

ject-matter in litigation, for there the claimant was found entitled to the whole residue after payment of the annuities. This was an accurate description of the fund *in medio* in the present process. The reservation was no reservation of the successful claimant's right of property, but merely one as to who should be in the position to claim the annuities when they should come to be set free. Hypothetically the claimant in the former process had taken up the position adopted by Elphinstone Maitland. (2) There was also identity of person—Elphinstone (Maitland) was *de facto* in the same legal position as a claimant maintaining the very same interest in the previous process.

Authority—*Earl of Leven and Melville* v. *Cartwright*, June 12, 1861, 22 D. 1038.

At advising—

Lord Justice-Clerk—I agree in the view which the Lord Ordinary has taken, and I do not see much difficulty in the case. The question arises thus—The bequest of the testatrix carried her property to the representatives of the family of Maitland of Freugh. When the previous multiplepoinding was brought to divide the estate a claim was made by John Maitland, who was then representative of the family, for the residue in terms of the settlement. Counter claims were lodged by other parties, who were also her representatives, which were not successful. John Maitland's claim in the technical language of the multiplepoinding was for payment of the residue. The residue was, however, under the settlement, burdened in the person of the executor with certain annuities. It is manifest that though John Maitland's right might be declared, it was impossible in the process to give decree for payment till the annuities fell in. That was the whole question which came to be decided by the Lord Ordinary, so far as his claim was concerned. The Lord Ordinary sustained his claim as the then existing head of the family to the whole residue. He did so in express terms, and I see nothing which in any degree can be said to limit this. He goes on to make qualifications with respect to payment, and with respect to payment of so much as was not required to meet the annuities he gives decree for the part retained. He reserves the question, when the money is set free, who will then be in the position which John Maitland had in regard to the amount then free. That is a qualification entirely subject to the finding that John Maitland was entitled to be preferred to the whole estate. I think it is impossible that this party who simply represents the position which Colonel John Maitland held in the former process should again raise the question of John Maitland's right to the whole residue.

Lords Craighill and Rutherfurd Clark concurred.

Lord Young was absent.

The Court adhered.

Counsel for Elphinstone Maitland—Sol.-Gen. Robertson, Q.C.—Rankine. Agents—J. & A. Forman & Thomson, W.S.

Counsel for Mrs Maitland—Graham Murray—Gillespie. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, January 6.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE PROPERTY INVESTMENT COMPANY OF SCOTLAND (LIMITED) *v.* DUNCAN.

Public Company — Transfer — Rectification of Register — Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 35—"*Unnecessary Delay.*"

"Unnecessary delay" by a company in dealing with a transfer of shares will not of itself give a person concerned in the transfer a right to have the register altered. He must, in order to have such a right, have been prejudiced by the delay to deal with the transfer.

Where a shareholder had it intimated to him that the directors declined to sanction his transfer, and remained on the register for a considerable time, after which, being sued for calls, he sought to have his name removed from the register, *held* that there had been "unnecessary delay" by the company in not dealing with his transfer at the first meeting after it had been intimated, but that having suffered no prejudice thereby, and having also acquiesced for a long time in the declinature to recognise the transfer, he was not entitled to have the register altered by deletion of his name.

The Property Investment Company of Scotland (Limited) was incorporated under the Companies Acts 1862 and 1867, and had its registered office in Edinburgh. The capital of the company was £240,000 divided into 24,000 shares of £10 each.

In April 1879 Alexander Duncan, Solicitor before the Supreme Courts, Leith, became proprietor by purchase of 50 shares of the said company, upon which £1 per share had been paid up.

In December 1883 Duncan tendered through his broker to the manager of the company a transfer of his shares to and in favour of his wife. By sec. 32 of the articles of association the directors of the company had power to decline to register any transfer in favour of any person whom they might consider it against the interests of the company to admit as a shareholder, and that without any cause expressed or assigned. The directors of the company refused to register the transfer by Duncan in favour of his wife. They did not intimate this refusal till 14th April 1884. Mr Duncan's name continued to stand on the register.

In March 1885 the company made a call of £1 per share, and again in September of the same year a further call of £1 per share. To the first demand Mr Duncan answered that he had sold his shares in December 1883, and had no concern with them. The second he did not notice at all.

Mrs Duncan died in September 1885.

In March 1886 the company raised the present action against Duncan, concluding for payment of £100, being the amount of the two calls. They averred that they duly intimated to him their refusal to register his transfer, and that he never objected to his name remaining on the register until application was made to him