Brown's death, although meetings were held, there was no regular service in the South Clerk Street church. After Mr Brown's death the trustees let the church and the house adjoining for what rent they could get, and that has been the position of affairs down to the present time. The defenders and respondents are some of the original trustees of the property, and since the congregation was dissolved in 1878 there have been still some thirteen or fourteen members adhering. How many have gone over to the other section we do not know. The church was burdened with some debt, and it is stated in defence that what the defenders have been trying to do is to pay off what remains of that debt, and that then they hope to get another congregation for this church. There are thus two parties who are applicants for the exercise of the powers which we undoubtedly have—on the one hand, the members of the congregation who on Mr Brown's death joined the Victoria Terrace Church, and on the other hand the Synod of the Original United Secession Church come forward saying that as the original purposes of the trust have now failed they have a sufficient interest and title to have the property handed over to them for the purpose of having it sold, and to invest the money in such manner as will be most nearly akin to the original purposes of the trust. No doubt we have the power to do this, but in my opinion as matters stand I think that the trust has not failed—that neither the machinery nor the purpose of the trust have failed. I think the parties had a right to call for the production of the accounts, but these have now been shown, and the pursuers admit that they are correct, and show that the trustees are paying off the debt. The title is in these trustees, and I think it is premature—I say nothing further—to ask us to set up a new trust. As to whether the Synod or the members who have gone to the Victoria Terrace Church may have the right to ask us to interfere at some future time and under other circumstances I say nothing. My general view is that there has not been such a failure of the trust as would lead us to interfere just now.

Lord Young—I am of the same opinion. The action that was first brought was an action of declarator and for an accounting, and it also contained a conclusion that the defenders should hand over the heritable subjects to the minister and elders forming the kirk-session of the Church of United Original Seceders in Victoria Terrace, Edinburgh, under the pastoral charge of the Rev. John Sturrock, in trust for behoof of that congregation. In that action the trustees under the original trust-deed under our direction exhibited their accounts, and the pursuers were quite satisfied that the trustees had done and were doing their best for the property. The property was subject to a small debt which the trustees were paying off by degrees, and their dealings in regard to that debt constituted the greater part of that very small accounting. So far, then, as the conclusion for accounting goes, that has been satisfied. With regard to the conclusion that the church and house adjoining, which are the subject of this litigation, are held in trust, that was quite unnecessary, as the trustees admit that they hold it only in trust. Is there, then, any ground for our interfering? In my opinion there is none. The church and house were acquired by the congregation worshipping under the pastoral care of the Rev. Mr Archibald Brown. He was not able to keep them together, and when he died the remnant of the congregation disappeared. The church was no longer used for the purpose for which it had been acquired, but then it was trust-property and there was a debt upon it, and the question arose what was to be done with it. The duty of the trustees was to make as much profit out of it as possible so as to meet the obligations upon it. Neither the church nor the house could be used for its original purpose, but they had to be used in some way, and the trustees very properly let both the church and the house. No doubt they did it in the exercise of their duty and their proper discretion as trustees. But that is not a case for our interference. A time may come when we might find it necessary to inquire if it was proper to sell the property, but there is no need to anticipate that time. Had there appeared to be any misapplication or misappropriation of the funds, then a very slight interest or title would justify anyone in applying to this Court so as to make the wrong-doer do right. But here there is no case of the trustees misapplying or misappropriating the funds.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court adhered to the Lord Ordinary's interlocutor in the action of declarator and dismissed the petition.

Counsel for Reclaimers and Petitioners — D.-F. Mackintosh—Walton. Agent—Thomas White, S.S.C.

Counsel for Respondents — Gloag — Low. Agents—Ronald & Ritchie, S.S.C.

Thursday, July 7.

OUTER HOUSE.

[Lord M'Laren.

BARRON *v.* DEWAR AND OTHERS (BARRON'S TRUSTEES).

Succession — Fee and Liferent — Liferent Alimentary — Unqualified Right to Fee.

By trust-disposition and settlement a testator directed his trustees to hold the residue of his estate for behoof of his daughter, "in liferent for her liferent alimentary use allenarly," and declared that the liferent should be purely alimentary and not affectable by debts, or subject to the *jus mariti* of any husband she might marry. In the event of her being married and leaving lawful issue he directed the residue to be made over to such issue after their mother's death, and in the event of her death without lawful issue the residue was to be made over to the truster's heirs, executors, and assignees whomsoever. The daughter being 58 and unmarried, and being also his heir-at-law

and sole next-of-kin, brought an action to have it declared that there had vested in her an absolute right to the fee of the said residue. *Held* that although there was in her an unqualified reversionary right to the residue of the estate, the right of liferent was qualified, and that the trustees must hold the income of the residue as an alimentary provision for her benefit, and could not pay over to her the capital.

Margaret Barron raised an action against H. B. Dewar, S.S.C., and others, trustees under the trust-disposition and settlement of her father, the late John Barron, to have it found and declared (1) that there was vested in her an absolute and unlimited right to the fee or capital of the residue or remainder of the whole estate and effects, heritable and moveable, real and personal, of her father, held by the defenders as his trustees; and (2) that she was entitled to sell, burden, or in any other way affect or dispose of the fee of said residue or any part thereof *inter vivos* or *mortis causa* at her pleasure. The action was brought in the following circumstances:—John Barron died on 1st November 1873, leaving a disposition and settlement dated 13th February 1868, and conveying his whole estate to trustees. It consisted of about £8000, besides a house in Edinburgh worth about £2200. He was married in 1826, and was predeceased by his wife. He had only one child, the pursuer, who was born on 6th August 1829, and had never been married, and who in this action averred that she did not intend to marry. The first purpose of the trust provided for payment of debts, &c. The second purpose provided for payment (1) of a legacy, which lapsed, (2) of a legacy of £200 sterling to the truster's sister Mrs Mitchell, and (3) of any other legacies he might leave. He left no other legacies. The third purpose provided for the joint alimentary liferent use allenarly of the house in Queen Street, and furniture therein, to the pursuer and her aunt Miss Christian Barron (who predeceased the testator), and to the longest liver of them. In the fourth place the truster directed that his trustees should, after implementing the first, second, and third purposes, set apart, hold, and retain the residue or remainder of the whole estate and effects, heritable and moveable, real and personal, thereby conveyed, for behoof of his daughter, the pursuer, in liferent, for her liferent alimentary use allenarly; declaring that the liferent of the residue thereby provided to the pursuer, as well as her liferent interest in the said dwelling-house, furniture, and others, should be purely alimentary, and not affectable by her debts or deeds, or attachable by the diligence of her creditors; declaring also that the same should be expressly exclusive of the *jus mariti*, right of administration and of courtesy, and all other right whatsoever of any husband whom she might marry, and should not be affectable by the debts or deeds of such husband, or any diligence or execution competent to follow thereon, and that the receipts or discharges of the pursuer alone, without the consent of such husband, should be at all times sufficient discharges to the trustees. In the fifth place the truster directed that, in the event of the marriage of the pursuer and of her leaving lawful issue surviving her, then the trustees should, as soon as convenient after her decease, pay or assign and dispone the said residue, and without prejudice to the said generality, the said subjects and others in Queen Street, Edinburgh, or the proceeds of the sale thereof, if sold, to and in favour of all the lawful children born of the marriage of the pursuer, equally among them, share and share alike, provided they should then have attained the age of twenty-one years complete, but if not, then on their respectively attaining that age; declaring that the shares of such lawful children should in no case vest until the death of the pursuer, nor until they should further have respectively attained the age of twenty-one years, in the event of their still being in minority at the time of the death of the pursuer. There was a clause of survivorship among the children, and other clauses relative to female children. Lastly, on the decease of the pursuer, and in the event of her dying unmarried and without leaving lawful issue, then the trustees were directed, as soon as convenient thereafter, to pay, assign, and dispone the said residue to and in favour of the truster's heirs, executors, and assignees whomsoever. The pursuer was at her father's death and at the date of this action his heir-at-law and sole next-of-kin.

On the 21st May 1881 she had raised an action of declarator to have it declared that she was entitled to sell, burden, or in any other way dispose of the fee of the residue of the trust-estate, or any part thereof, or otherwise that she was entitled to do so, subject to the right of the trustees to hold the estate for the purpose of securing her alimentary liferent; and (2) that she was entitled to dispone *mortis causa* or bequeath the fee or any part thereof at her pleasure; or otherwise, and at least that she was entitled to dispone *mortis causa* or bequeath the fee or any part thereof failing her own issue. The said action was raised, *inter alia*, against the trustees, who entered appearance and defended the same. That action came to depend before Lord Rutherfurd Clark (Ordinary), who on 12th November 1881 sustained this plea-in-law stated for the trustees—"The action is premature, and should be dismissed with expenses, (1) in respect that the pursuer may yet marry and leave lawful issue surviving her; or (2) even in the event of her not leaving lawful issue, the person or persons who at her death shall hold the characters of heir-at-law and next-of-kin of the testator may be different persons from those defenders who are called in this action as holding these characters at present."

The pursuer stated that she was now fifty-eight years of age, and therefore she considers that in present circumstances she was entitled to have the question reconsidered in the present action, and to have decree as concluded for.

The pursuer pleaded—"(1) There having been a failure of issue of the pursuer, she as heir-at-law and next-of-kin of the said John Barron, has right to the fee of the residue under the said trust-disposition and settlement. (2) The pursuer having right to the fee of the said residue as heir-at-law and next-of-kin foresaid, is entitled to decree as concluded for."

The defender pleaded—"(3) The action is premature and should be dismissed with expenses, in respect that the pursuer may yet marry and have issue. (4) On a sound construction of the

last purpose of the testator's settlement, the pursuer is excluded from taking benefit under it. (5) The provisions in the pursuer's favour under the third and fourth purposes of the testator's settlement being declared to be for her 'alimentary liferent use allenarly,' her rights in the residue of her father's estate, and in the house in Queen Street, and furniture therein, are rights of bare liferent only. (6) On a sound construction of Mr Barron's settlement, and having regard to the circumstances at the time when it was executed, his intention is disclosed to have been that the fee of his trust-estate in the event of the pursuer dying without lawful issue, is to be paid over or conveyed after his death by his trustees to the person or persons who shall at the death of the pursuer hold the characters respectively of his heir-at-law and next-of-kin. (7) In any view, the testamentary trustees being bound to hold the estate for the purpose of securing the pursuer's liferent, the action as laid should be dismissed."

The Lord Ordinary assoilzied the defenders from the first conclusion, and *quoad ultra* dismissed the action

"*Opinion.*—This action is instituted by Miss Barron against her father's trustees in order to have it found and declared that there is vested in the pursuer an absolute and unlimited right to the fee or capital of the residue of her father's estate. There is a second and consequential conclusion to the effect that the pursuer is entitled to dispose of such estate either *inter vivos* or *mortis causa*.

"*Ex facie* of Mr Barron's settlement the pursuer has only an alimentary liferent, the fee of the residue being destined to the issue of any marriage into which the pursuer may enter, and in the event of her death without leaving issue there is a destination to the truster's heirs, executors, and assignees whomsoever.

"The pursuer is unmarried and her age is fifty-eight. Her counsel therefore maintain that it is to be assumed there never will be any object of the destination other than the pursuer herself. She is her father's heir and is also, according to the suggested reading, his executor and assignee, being entitled to the reversionary fee in this character, and being entitled under the same deed to the liferent, the argument is that these two rights amount to an unqualified fee.

"Leaving out of view the circumstance that Miss Barron's liferent is declared to be an alimentary provision, I should be disposed to accept the pursuer's argument as sound. I must not omit to notice that in a previous case instituted by Miss Barron in terms similar to those of the present summons the action was dismissed as premature. The lady was then in her fifty-second year, and I do not understand that Lord Rutherfurd Clark in dismissing the action, decided anything except the question of fact or of probability depending on the age of the pursuer, because the defenders were not assoilzied, but were only found entitled to have the action dismissed as premature.

"As to the leading proposition maintained by the pursuer, it amounts to no more than this, that if a person has an unqualified life-interest under a trust, and has also an unqualified reversionary right expectant on the termination of his own life-interest, these two rights together constitute a fee, and entitle her to be put into possession of the estate. When so stated, I do not suppose that anyone will dispute the pursuer's argument, and I will even go further and say that I think that the possibility of issue being born to the party ought not to be an obstacle in the vesting of the *dominium plenum* in the case of a woman who is admittedly past the age of child-bearing. But I am now considering the case of two rights, the one of liferent and the other of fee, both unqualified. In the actual case the liferent is not unqualified, for it is declared to be an alimentary provision. It is not a case where the word 'alimentary' is used in conjunction with allenarly as a term in the destination to show that nothing more than a liferent is given. There is a carefully expressed direction to the trustees to treat the income of the residue as an alimentary provision for Miss Barron's benefit, with all the usual conditions applicable to alienation and attachment by creditors, and I am asked to find that these conditions which were binding on the trustees and on the pursuer herself, so long as the destination of the fee was in suspense, have lost their effect, by reason of the pursuer having become entitled to the fee. I do not see how this can be. If the question is looked at theoretically there are two rights, the one qualified and the other unqualified, and it is impossible to add the one to the other so as to make one homogeneous unqualified right of fee. If the question is looked at from the practical side, then I think that the truster must be supposed to have meant to make his daughter's income as secure as the law could make it, and in that view it would be a breach of trust if the trustees were to pay over the capital to Miss Barron, because the putting her in possession would destroy the alimentary trust. I agree that if Miss Barron were entitled to demand a conveyance and were put into the possession of the residue, the alimentary trust would not stand good in a question with creditors. But I approach the question from the other side. I think that the truster has here made a provision which is effectual to protect the pursuer's life-interest against non-alimentary creditors, and also to protect it against her own acts. That being so, it follows that the trust must be kept up as the only effectual way of accomplishing the truster's object. I shall assoilzie the defenders from the first conclusion, and *quoad ultra* dismiss the action."

Counsel for the Pursuer—M'Kechnie. Agent—W. H. Cornillon, S.S.C.

Counsel for the Defenders—Salvesen. Agents—H. B. & F. J. Dewar, W.S.