

the trustee to hold and administer the entire fund *in medio* was upheld. This view seems to have been recognised as early as the case of *Carter v. Mackintosh*, 24 D. 931, in which trustees holding assignments in security, like the present claimants, withdrew their claims in the multiplepointing, reserving right to insist in them in the sequestration.

In the case of *Littlejohn v. Black*, 18 D. 207, the same view as to the effect of the vesting in the trustee under section 102 of the Act of 1856, and the duties of the trustee in the sequestration, was taken, it having been there held that the vesting in the trustee did not affect the rights of the various classes of creditors, *inter se*, and that these rights should receive effect in the ranking of the various creditors and classes of creditors in the sequestration. The opinions of the judges in that case, to which the Lord Ordinary refers, appear to me to lend strong support to the view which his Lordship has taken in the present case.

For these reasons I am of opinion that the judgment of the Lord Ordinary, sustaining the claim of the trustee, should be adhered to.

LORD ADAM—There is no doubt at all that the fund *in medio* in this case was the personal or moveable estate of the bankrupt at the date of his bankruptcy, and that being so I entertain no doubt that under the 102nd section of the Bankruptcy Act of 1856 that moveable estate vested in the trustee, subject to all preferences that may have been acquired. Now, the claimants here claim no security, preferable or otherwise, over this estate, and it therefore appears to me to fall strictly under the 102nd section of the Act. I cannot entertain any doubt about that. The trustee will administer the estate looking to the various claims on the bankrupt estate according to their preferences, and the claims in question will receive due attention just as any others.

I concur with the Lord Ordinary, and have nothing to add to what your Lordship and the Lord Ordinary have said.

LORD M'LAREN — I am of the same opinion. The effect of sequestration is to displace all existing trust management with regard to such property as the bankrupt possesses by an unqualified title. Where the title is qualified either by being limited to a life interest or being declared alimentary, there may be room for question, and all such cases must be determined with reference to their own special circumstances. There is nothing in this case, I think, to displace the rule that a trustee in virtue of his statutory power has a claim preferable to but not necessarily inconsistent with the claims of secured creditors.

LORD KINNEAR—I also think that this case is perfectly clear. If a creditor had a real right which he could make good by his own action against either the debtor or anybody else it might very well be that it would not be necessary for him to come

into the sequestration, but that he might proceed to dispose of the subject of the security and make good his own claim. But the reclaimer here has nothing but a personal right—as indeed the bankrupt when he derived it had nothing himself but a personal right—to claim on the trustees, and it is impossible to make that right effectual except by taking some action either by claiming in the sequestration or otherwise. Therefore it appears to me to be quite clear that although the security which the reclaimer has obtained may be perfectly good and preferable to the claims of ordinary creditors, it is a security which can only be made effectual in the sequestration, because the whole estate is vested in the trustee in the sequestration, and creditors in the position of this reclaimer must go to the trustee and present their claims to him.

The Court adhered.

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Thursday, December 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MACFARLANE'S TRUSTEE *v.*

MACFARLANE.

Succession—Vesting—Discretion of Trustees—Exercise of Power of Apportionment by Trustees—Protected Succession.

A testator by trust-disposition and settlement conveyed his whole estate to trustees, directing them to divide the proceeds among, *inter alios*, the children of his deceased brother. By a subsequent codicil he directed that the trustees should hold the share of residue falling to these children, and should give and make over to and apply it for behoof of such of these children, or the issue of any of them predeceased, as the trustees might think proper, in such way and manner as to the trustees should seem proper, with special power

in making such payments to exclude any one or more of such children, and also, "if they see cause, in place of paying over to any one or more of the said children the share or shares which the trustees may apportion to them . . . to retain the same under this trust for behoof of such child or children either during their lifetime or during such period as they may consider necessary, my intention . . . being to give my trustees the same powers in apportioning, withholding, or dealing with the same . . . as I could have myself were I in life." Then followed a declaration that the children should have no vested interest in the provisions in their favour.

After the death of the testator, the trustees, by minute in the sederunt book, ordered that a certain share of the funds held by them for these children should be apportioned to and set apart for one of them, X., and that the share thus set apart for X. should be invested for his behoof and the annual interest paid over to him, which interest should be strictly alimentary and not assignable nor affectable by his debts or deeds nor liable to the diligence of his creditors.

Held that the minute of the trustees was *modo et forma* an exercise by the trustees of the power to give or make over a share to X.; that the restrictions in the minute on the right of X. for his protection were consistent with the vesting in X. of the share apportioned to him in the minute from the date of the minute; and, accordingly, that X. could after that date effectually test on the share in question.

This was an action of multiplepointing and exoneration at the instance of Patrick Blair, W.S., Edinburgh, surviving trustee under the trust-disposition and settlement and codicil thereto, executed by the deceased Dr John Macfarlane, Professor of Medicine in the University of Glasgow (the nominal raiser), against Mrs Christina Ogilvie or Macfarlane, widow of the deceased Alexander Goodsir Macfarlane (the real raiser), and other defenders.

By his trust-disposition and settlement dated June 7, 1866, Dr Macfarlane conveyed his whole estate, heritable and moveable, to certain trustees, directing them, by the fifth purpose, to realise the residue and remainder of his estate, and to divide the proceeds equally among his brothers and sisters *nominatim* and the issue of his deceased brother Dr James Macfarlane, *per stirpes et non per capita*, share and share alike.

The said fifth purpose also provided, in regard to the shares of residue falling to the family of the deceased Dr James Macfarlane that the trustees should hold and invest the same in their own names for behoof of said family, until the youngest should attain the age of twenty-one years complete, applying the free interest and income of the said shares for the benefit of the said children, or such of them as they

thought might require the same, in such way as the trustees might consider most advisable; and on the youngest child attaining majority the trustees were directed to divide the said share equally among the children surviving at the time, and the issue of predeceasing children, *per stirpes*, share and share alike.

By a codicil dated December 3, 1869, Dr Macfarlane made the following provision with reference to the fifth purpose of his trust-disposition and settlement:—"I hereby declare that whenever the words 'family of my said deceased brother Dr James Macfarlane' are used in said purpose, or reference made to his 'family,' it is understood by me that it is the 'children' of my said brother who are referred to; and I hereby cancel and revoke the whole directions given in said purpose with regard to the manner in which the share of the residue of my means and estate falling to the children of my said brother Dr James Macfarlane is to be held for their behoof; and in room and place thereof I provide and declare as follows, viz.—My trustees shall hold the said share of residue falling to the said children under their trust, investing the same, or such part thereof as may be necessary, as provided in said settlement, and shall give and make over to or hold and apply for behoof of such of the children of my said brother, or the issue of any of them predeceased, *per stirpes*, as the trustees may think proper, the said share of residue, interest, and capital alike, and that in such shares and proportions, at such times, and in such way and manner as to the said trustees shall seem proper, as to all which they shall be the sole judges; with special power to my trustees in making said payments to exclude therefrom any one or more of the children of my said brother as they may consider proper, and also, if they see cause, in place of paying over to any one or more of the said children the share or shares which the trustees may apportion to them, with power to my trustees to retain the same under their trust for behoof of such child or children either during their lifetime or during such period as they consider necessary, my intention with regard to the said share of residue falling to the children of my said brother, and interest thereof, being to give my trustees the same powers in apportioning, withholding, or dealing with the same, or interest thereof, as I could have myself were I in life; and the children of my said brother, nor their issue, shall have no vested interest in the provisions in their favour contained in my said settlement and this codicil, but shall be in the matter of the said provisions entirely under the control of my trustees; and I hereby exclude any of said children, or their issue, and all other persons, from interfering with or calling in question the actings of my trustees with regard to the said provisions, and declare that no such interference shall be competent to any one, as the fullest power and authority is committed to my trustees in the matter."

Dr John Macfarlane died in 1869, survived by two brothers and two sisters, and also by the children of his deceased brother Dr James Macfarlane, of whom one was Alexander Goodsir Macfarlane. The youngest of the children of Dr James Macfarlane attained majority on 31st May 1881.

The original trustees nominated by the testator having died or resigned, the pursuer and another were appointed trustees by the Court of Session in 1882. At the date of the action the pursuer was sole trustee.

By minute dated July 7, 1885, the trustees resolved that there should be apportioned to and set apart for, *inter alios*, Alexander Goodsir Macfarlane a certain share of the funds held by them for the children of Dr James Macfarlane, and resolved and directed that the share thus set apart for Alexander Goodsir Macfarlane should be invested for his behoof and the annual income or interest paid over to him. By the said minute the trustees, in consequence of the said apportionment of part of the trust funds to Alexander Goodsir Macfarlane, resolved that a quarterly allowance to him should cease, and that in lieu thereof he should be paid the interest on the sum apportioned to him in quarterly payments, which interest should be a strictly alimentary allowance and should not be assignable nor affectable by his debts or deeds nor liable to the diligence of his creditors. This minute was communicated to Alexander Goodsir Macfarlane, and in accordance therewith the share apportioned and set apart for Alexander Goodsir Macfarlane was retained by the trustees and invested by them in their own names, and the income derived therefrom paid to him.

Alexander Goodsir Macfarlane died on March 6th 1898 survived by his widow Mrs Christina Ogilvie or Macfarlane, leaving a settlement dated January 26th 1891, by which he directed and appointed the trustees for the time acting under the trust-disposition and codicil of his uncle Dr Macfarlane to hold and stand possessed of the said share, and pay the income thereof to his widow, or to expend or apply the same for her behoof.

The fund *in medio* consisted of the share of the trust funds of Dr Macfarlane which had been apportioned to and set apart for Alexander Goodsir Macfarlane by the minute of the trustees dated July 7th 1885, and which the pursuer as trustee continued to hold, accumulating the income thereof from the date of the death of Alexander Goodsir Macfarlane.

Claims were lodged by (1) the trustees of the late Dr Macfarlane, who claimed to be ranked and preferred to the whole fund *in medio* to be administered in terms of Dr John Macfarlane's codicil of 3rd December 1869, or otherwise to be ranked and preferred to the fund *in medio* so far as it consisted of capital as at 6th March 1898, to be administered in terms of Alexander Goodsir Macfarlane's settlement; and (2) Mrs Christina Ogilvie or Macfarlane, the widow of Alexander Goodsir Macfarlane,

who claimed (1) the fund *in medio*, except in so far as consisting of capital as at 6th March 1898, and (2) that the trustees should hold the balance of the fund *in medio*, and pay over to her the free annual income or interest thereof, or otherwise expend or apply the same for her behoof in terms of the said Alexander Goodsir Macfarlane's settlement and deed of directions dated 26th January 1891.

The claimant the trustee of the late Dr Macfarlane pleaded—“(1) On a sound construction of the testamentary writings of the late Dr John Macfarlane and relative minute of apportionment, the late Alexander Goodsir Macfarlane was not fiar of the fund *in medio*, and the claimant is entitled to be ranked and preferred in terms of the first alternative of his claim. (2) *Esto* that a right of fee did vest in Alexander Goodsir Macfarlane, the claimant is entitled under Mr Macfarlane's settlement to be ranked and preferred in terms of the second alternative of his claim.”

The claimant Mrs Christina Ogilvie or Macfarlane pleaded—“(1) On a sound construction of the trust-disposition and codicil of the truster the fee of the fund *in medio* vested in the said Alexander Goodsir Macfarlane, and the claimant is entitled to the liferent thereof in virtue of his settlement and deed of directions. (2) *Esto* that the trustees appointed by the Court were entitled to exercise the powers conferred by said codicil, they, on a sound construction of the minute of 7th July 1885, appointed to the said Alexander Goodsir Macfarlane the fee, or in any event the power of testamentary disposal of the fund *in medio*, and the claimant is entitled to the liferent thereof in virtue of his settlement and deed of directions.”

On June 25th 1903 the Lord Ordinary (KYLACHY) pronounced the following interlocutor:—“Finds that on a sound construction of the trust-disposition and settlement and codicil of Dr John Macfarlane the truster, and of the trustees' minute dated 7th July 1885, the fee of the share of the truster's estate by said minute apportioned and set apart for Alexander Goodsir Macfarlane vested in him, and now falls to be held and applied in terms of his settlement and deed of directions: Therefore ranks and prefers the claimant Mrs Christina Ogilvie or Macfarlane on the fund *in medio* in terms of the first branch of her claim: *Quoad ultra* finds it unnecessary to dispose of her claim: Repels the first branch of the claim for Patrick Blair, trustee of the late Dr John Macfarlane, and sustains the second branch thereof: Ranks and prefers the said claimant in terms of said second branch of his claim; and decerns,” &c.

Opinion.—“The question in this case turns upon the construction of the will and particularly of a codicil which forms part of the will of the late Dr John Macfarlane. The claimants are—(1) The now sole trustee under the will, who as it happens was not named in the deed, or assumed by the trustees named, but was (along with another gentleman now dead) appointed by

the Court under a petition presented by some of the beneficiaries; and (2) the widow of the late Alexander Goodsir Macfarlane, who was one of the children of the late Dr James Macfarlane, to which children one-fifth of the residue was bequeathed. The widow now claims under her husband's settlement a life interest of the share apportioned to him under a minute of the trustees dated in 1885, which, it is not disputed, fixed the amount of his share. The trustee, on the other hand, claims in effect that Alexander Goodsir Macfarlane's share, although thus appointed to him, lapsed by his death, and that he (the trustee) is entitled to hold and apply the same at his discretion for the benefit of the other members of Dr James Macfarlane's family.

"In the view which I take it is not necessary to decide a point which was the subject of argument, viz., whether the power of apportionment and the other powers contained in the codicil—the powers on which the trustee founds—could or can now be effectually exercised by trustees who were only appointed by the Court. With respect to that point I am bound to say that having considered the question and referred to the authorities I should have great difficulty in holding that on the just construction of the will and codicil the powers in question did not transmit to appointed trustees in the same manner as if they had been named in the will or assumed under its provisions. But I do not propose so to decide, because, assuming that point in the truster's favour, I am of opinion that whatever might have been done to exclude Alexander Goodsir Macfarlane's right, or to create a lapse after his death, nothing of the kind was in fact done while he lived, or can be done now when he is dead.

I do not think it is at all difficult to follow the scheme of the will and codicil. By the will the children of Dr James Macfarlane surviving the majority of the youngest child took on that event an equal share of one-fifth of the residue, and became entitled to immediate payment. Until that event the trustees were to hold for their behoof, and to apply the income for their benefit. But each child took a vested interest, and was entitled to immediate payment on the youngest of the family reaching majority. That was the scheme of the will.

"By the codicil, however, the truster, *inter alia*, revoked and cancelled the whole directions given by him with regard 'to the manner' in which the share of residue falling to this particular family should 'be held for their behoof,' and the codicil then proceeded to confer powers on the trustees—powers, as they are described, of 'control'—whereby the rights of the individual children were made subject to what I think I may properly describe as various resolute conditions—conditions depending on the action of the trustees with respect to certain options which the truster conferred on them.

"Now the options so conferred, as I read the codicil, were these—In the first place

the trustees had power to fix the share of each child. They could give each child an equal share as bequeathed, or a larger or smaller share as they might think right, or they could make if they pleased what is called an exclusive apportionment, and exclude a particular child altogether. That was in substance their first option. And then the second option was this—They might, with respect to the share of any child not excluded, resolve either (1) to pay over the share at once, or (2) to retain the share under the trust for behoof of the child either during his life or during such (shorter) period as they might think necessary.

"These are the options—options which applied both to capital and income; and with respect to their exercise it was, I think, implied if not expressed in the codicil—(1) that they might be exercised revocably or irrevocably, absolutely or conditionally, as the trustees choose; but (2) that if exercised absolutely and irrevocably, that is to say, without reservation, and by a deed delivered or intimated, the trustees could not afterwards go back upon what they had done. In other words, if the trustees resolved, for instance, to fix and set apart a certain sum as a child's share, they could not afterwards exclude such child, or diminish his share, any more than, having resolved to pay over the child's share, they could afterwards resolve to retain it for his behoof during his life. They might resolve to exclude or to pay or to retain for the child's behoof, but whichever course they adopted, that course when once intimated became final.

"Now, these being the trustees' powers, what did they in fact do? I mean with respect to Alexander Goodsir Macfarlane's share. By a carefully expressed minute drawn up in 1885, recorded in the Sederunt Book, and intimated to Alexander Goodsir Macfarlane and the other beneficiaries, they exercised their powers thus—(1) They resolved not to exclude Alexander Goodsir Macfarlane, but on the contrary to apportion and set apart a certain sum as his share; (2) they resolved at the same time not to pay the share over to him at once, but to invest the capital for his behoof, and to pay over to him the annual income or interest in quarterly payments as a strictly alimentary allowance. In short, the trustees exercised their discretion exactly as the will and codicil contemplated. They settled and intimated the extent to which they thought it necessary that Alexander Goodsir Macfarlane's rights should be restricted, and they did so without reservation or qualification, and so matters stood until Alexander Goodsir Macfarlane's death in 1898. The question is whether, in respect that Alexander Goodsir Macfarlane died without having obtained actual payment of his capital, the surviving trustee is now bound or entitled to treat that capital as a lapsed interest, and (I presume) to divide it just as if Alexander Goodsir Macfarlane's right had been excluded or confined to a life interest.

"Now, I think it follows from what I have

already said, that in my opinion this question does not admit of doubt. It was not, and I think could not, be suggested that the retention of capital which the codicil permitted, and on which the trustees resolved, constituted Alexander Goodsir Macfarlane a mere liferenter. On the contrary, the capital was to be held, and was held, for his behoof. The trustees might, if they had seen cause, have paid it over to him at any time. It was simply held for him in trust so as to secure the income for his alimentary use. Neither was it suggested that the trustees could not divest themselves of the power of revocation. There is nothing better settled than that such powers as those here in question may be exercised either revocably or irrevocably. Nor, again, is there any difficulty about vesting. The original vesting was postponed, but postponed only to the effect of securing the trustees' powers under the codicil, and if the trustees' minute of 1885 was a final exercise of the trustees' powers, there was absolute vesting from the date of that minute. At all events, there was absolute vesting, subject only to this, that neither the beneficiary nor his creditors could have enforced payment during his life. Again, with regard to the case of *Smith v. Chambers*, which was referred to at the discussion, I do not, I confess, see how that case raises any difficulty. For the trustees there had undoubtedly the widest powers of restriction and exclusion, and had done nothing to bar their exercise of those powers at the date of the arrestment and furthcoming.

"I am therefore of opinion that the claim of the trustee should be repelled, and that of the other claimant sustained."

The claimant, the trustee of the late Dr Macfarlane, reclaimed.

It was stated on behalf of the reclaimer that he had brought the reclaiming-note owing to the fact that Lord Kincairney, in a question with creditors arising out of the will and codicil of the deceased Dr John Macfarlane, had held that there was no vesting in the children of James Macfarlane.

Argued for the reclaimer—Under Dr Macfarlane's trust-disposition and settlement and relative codicil no right of fee in the fund *in medio* vested in the late Alexander Goodsir Macfarlane. The powers given to the trustees by the testator to exclude any of the children of his deceased brother James were absolute, and in view of these absolute powers, and the express declaration that these children should have no vested interests, no right of fee could vest in any of the children except by the act of the trustees. The terms of the minute, dated 7th July 1885, conferring on Alexander Goodsir Macfarlane a restricted right to the income of a portion of the fund, did not infer vesting of the fee of that portion of the fund in him—*Chambers' Trustees v. Smiths*, April 15, 1878, 5 R. 97, and (H.L.) 151, 15 S.L.R. 58 and 541; *Yuill's Trustees v. Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668; *Ross' Trustees v. Ross*, May 29, 1902, 4 F. 840,

39 S.L.R. 678; *Newall's Trustees v. Inglis' Trustee*, July 15, 1898, 25 R. 1176, 35 S.L.R. 908; *Kinmond's Trustees v. Mess*, November 18, 1898, 25 R. 819, 35 S.L.R. 631.

Counsel for the respondent were not called upon.

LORD PRESIDENT—The question in this case relates to the construction and effect of the trust-disposition and settlement and codicil of Dr John Macfarlane, and of the minute of the trustees of 7th July 1885. The claimants are the sole trustee of Dr John Macfarlane and the widow of the late Alexander Goodsir Macfarlane, who was one of the children of Dr James Macfarlane, and as such entitled to a share of one-fifth of the residue of Dr Macfarlane's estate. The widow claims in right of her husband his share of one-fifth of the residue under a minute of the trustees to which reference has been made. It is maintained by the trustee that the right to this share of the one-fifth lapsed on the death of Alexander Goodsir Macfarlane, because, as he maintains, under the minute of the trustees in the exercise of their powers conferred by the will, Alexander Goodsir Macfarlane had only a right of liferent and not of fee.

I agree with the Lord Ordinary in thinking that it is not necessary to decide whether the power of apportionment conferred by the codicil could be effectually exercised by the trustee appointed by the Court. But what we have to consider is, if the point is assumed in favour of the trustee, whether the Lord Ordinary is right in holding that, whatever the power to exclude Alexander Goodsir Macfarlane may have been, nothing was in fact done to bring about that exclusion, and now that he is dead nothing can be done now with that object or effect.

Under the codicil two alternate powers or options were conferred on the trustees. They had in the first place the power to fix the share of each child—it might be larger or smaller—as they thought fit. And they had in the second place the power with respect to the various shares either to pay over the share at once or to retain the share in trust for each child during his life, or for a shorter period as they might think right. As the Lord Ordinary explains, these powers might be exercised either revocably or irrevocably, but if they were exercised irrevocably the trustees could not afterwards go back on what they had done. This being the general nature of the powers conferred on the trustees, the next question is, what did they do with respect to Alexander Goodsir Macfarlane's share. They framed a minute on 7th July 1885, which was duly recorded in the Sederunt Book and intimated to Alexander Goodsir Macfarlane and the other beneficiaries, and by that minute they did not exclude him but made an affirmative declaration that they resolved not to do so but to apportion and set apart a specified sum as his share. They decided, however, that they would not pay the share to him at once but invested the

capital for his behoof and paid the interest to him as an alimentary allowance. Now, this seems to me to have been an exercise *modo et forma* of one of the powers which were conferred on them by the testamentary writing. They did so far restrict the right of Alexander Goodsir Macfarlane, but so far as they did not restrict his right it remained in him, and the ground of the reclaiming-note against the Lord Ordinary's interlocutor is that as Mr Macfarlane did not obtain actual payment of his share it in fact lapsed and was to be so treated by the surviving trustee.

Now, I agree, however, with the Lord Ordinary in thinking that this is not the true view of the case. The fund was protected no doubt, but Alexander Goodsir Macfarlane was the real beneficiary subject to a protective provision.

Without going through in detail the writings on which the matter depends it is sufficient to say that the view taken by the Lord Ordinary appears to me to be the correct one, and that accordingly he was right in ranking and preferring the widow to the fund *in medio* in terms of the first branch of her claim. I am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM—I am of the same opinion. It appears that the late Dr John Macfarlane directed the residue of his estate to be divided equally among his brothers and sisters and the issue of his deceased brother, and there was a destination-over declaring that in the event of any of the brothers and sisters predeceasing without leaving lawful issue the share of such predeceasing should be divided among the surviving brothers and sisters of his deceased wife. Then there was a further destination-over in the case of any of the brothers and sisters leaving lawful issue that such should be entitled to the parent's share; and then there is this further, that as regarded the share falling to the family of his deceased brother Dr James Macfarlane, he directed his trustees to invest the same in their own names for behoof of the family of the deceased brother until the youngest of the family attained the age of twenty-one years complete, and to apply the free interest and income of the shares "for the benefit of said children or such of them as they may think require the same in such way as the said trustees may consider most advisable." And then there is this clause—"And on the said youngest child attaining majority the said trustees shall divide the said share equally among the children of my said deceased brother surviving at the time, and the issue of predeceasing children *per stirpes*, share and share alike." These were the additional provisions in regard to the shares of the children of his deceased brother James. Now, it is quite obvious to me that the children of James had the share vested in them, though it was not payable till the youngest should attain twenty-one years of age.

But that was all swept away, as we are

told, by a codicil dated 5th December 1869. By the third clause of that codicil he says, "With reference to the fifth purpose of my said settlement, I hereby declare that whenever the words 'family of my said deceased brother Dr James Macfarlane' are used in said purpose or reference made to his 'family,' it is understood by me that it is the 'children' of my said brother who are referred to;" and then he says, "I hereby cancel and revoke the whole directions given in said last-mentioned purpose with regard to the manner in which the share of the residue of my means and estate falling to the children of my said brother James Macfarlane is to be held for their behoof." Then he arranges that his trustees shall "hold the said share of residue falling to the said children under their trust, investing the same or such part thereof as may be necessary as provided in said settlement, and shall give and make over to, or hold and apply for behoof of, such of the children of my said brother or the issue of any of them predeceasing *per stirpes* as the trustees may think proper, the said share of residue, interest and capital alike," and so on. Well, it appears to me quite obvious that this gentleman refers to an existing share of the children of James Macfarlane. He says, "With regard to the manner in which the share of the residue of my means and estate falling to the children of my said brother is to be held for their behoof." That is the way he speaks of it. And he says that he alters the manner in which the shares were to be held. And then he says that he does not take away the right of the children of James to the shares—he only regulates the mode and manner in which they are to be held by the trustees.

Now, no doubt the trustees have very extensive powers. They have power to exclude any one or more of the said children from the share which the trustees may apportion to them. But surely if you are to exclude a person from a share, that implies that that person has the share which is to be taken away from him. And the same thing applies to the next provision. They have power to retain any share which they may apportion to the children, but a power to retain is to keep something in their hands which otherwise would belong to the person from whom they were retaining it. That would be the literal meaning of retaining. Then power is given them to apportion the shares in any way they think fit.

Now, what they did was to come to a formal minute of 7th July 1885, in which they proceed to carry out the powers of apportionment conferred upon them. Now, section 3 of that minute is quite clear—"That there shall now be apportioned to and set apart for Alexander and William Macfarlane a share of capital equal to that apportioned by minutes of July 1880 and July 1881, viz., £1400, 14s. 10d." That minute, as I understand—it is not disputed—was communicated to Alexander and to William Macfarlane, and I think after that

there was an apportionment of the share of the residue which the trustees had power to make, and which they did thereby conclusively make, so far as the capital of that sum was concerned. But they did not choose or did not think it right that the beneficiaries should have control of more than the interest of it, and they provided for that. "The trustees further resolve and direct that with regard to the shares thus to be set apart for each of the sons of Dr James Macfarlane, that the same shall be invested for their behoof, and the annual income or interest shall be paid over to each of them half-yearly or at such other period as the trustees may fix from time to time." That is the only limitation upon the right to the share to go to the sons of James Macfarlane. They are only to get payment of the interest at such times as the trustees may think proper. Whether they thought that in that way they would retain right as to the disposal of the interest during the life of the child may very well be questioned, but I see nothing in that to interfere with the capital which they had apportioned to him. Accordingly I think that their right to the share of the children of James did not depend on any future minute or on what others would get. The trustees had power of exclusion, but if they were not excluded then I think that as soon as their share of the estate was apportioned it fixed the amount of the fee to which each child was entitled, and that thereafter the trustees could not intervene, and that it had passed under the settlement. And therefore I agree with your Lordship.

LORD M'LAREN—The trustees under Dr Macfarlane's will and codicil, in the exercise of the powers conferred on them, assigned a share of the trust estate to Alexander Goodsir Macfarlane, and resolved to retain that share in their own hands and to pay over to him, as an alimentary allowance, the income of his share. Alexander Goodsir Macfarlane has died, the alimentary allowance has come to an end, and the Lord Ordinary has held—concurring with your Lordships, I think rightly held—that notwithstanding the exercise of the protective powers which devolved on the trustees, the fee of the apportioned share remained in Alexander and passes under his will. The trustee has very naturally brought the Lord Ordinary's decision under review, because it was explained to us that another judge, in a question with creditors arising out of the same will, had taken a different view of the rights of the beneficiary arising under the will and the power of appointment. The judgment was that of Lord Kincairney, who states the question in a way in which I should concur, with the alteration of a single word. His Lordship says—"Was the share set apart for the beneficiary vested in him because the trust deed had conferred it and the trustee had not expressly 'excluded' his right?" ("limited" is the word used, but I prefer "excluded," because it is the word used by the testator)—"or was it not vested be-

cause the trustee had not declared or affirmed his right?" Now, his Lordship in answering that question begins by saying that he has not had any light from the authorities. This I quite understand, because it is not so much a question of law as a question of the meaning of Dr Macfarlane's will. His Lordship says that, with some hesitation and having regard to the extremely wide powers conferred by the codicil, he had come to think that the answer should be in the negative, and I think mainly on the ground that the codicil contains an express declaration that the children should have no vested interests. Now, I do not attach very much importance to such declarations, and there is authority for saying that a declaration as to vesting is not decisive, because the word "vesting" is itself ambiguous. It may be used by the testator in the sense, and I think in this case it was used in the sense, that no child should have such a specific vested interest as would interfere with the power given to the trustees to limit or exclude his share. It was evidently for this purpose that the declaration was made, but that declaration is quite consistent with there being a vested general right to such shares as the trustees may think suitable, or, failing that, to equal shares. Now I agree with Lord Kyllachy in his construction of the power, and I think with regard to the share given to any individual beneficiary the trustees might do one of three things. They might, first, leave the beneficiary's share to stand under his right in the codicil. In that case he would take only a rateable part or share of any part of the fund which might be unapportioned. Secondly, they might exclude him altogether; but the very fact that the power is given to exclude is to my mind equivalent to saying that unless the child is excluded he shall have his share. Then, thirdly, they might apportion a definite share to each beneficiary, and it is only in that case that the further power arises of managing the share. I think that under that power the trustees may give such protection to the income of the share as the law will permit consistently with the beneficiary retaining the capital, because they certainly have no power to give the capital to any other person than the child to whom it has been appointed. The trustees appear to me in regard to this gentleman to have quite understood their powers when they resolved to retain the share in their hands, and to pay over the income as an alimentary allowance, but I think the trustee is not well founded in the contention which he now puts forward that this capital has lapsed into the general residue. I agree with your Lordship in affirming the judgment of the Lord Ordinary.

LORD KINNEAR—I am entirely satisfied by the Lord Ordinary's reasoning with the soundness of his Lordship's interlocutor, and I agree in adhering to it on the ground explained by him.

The Court adhered.

Counsel for the Claimant and Reclaimer—Constable. Agents—Blair & Cadell, W.S.

Counsel for the Claimant and Respondent—Macfarlane, K.C.—Chree. Agents—Scott Moncrieff & Trail, W.S.

REGISTRATION APPEAL COURT.

Friday, December 11.

(Before Lord Kinnear, Lord Trayner, and Lord Kincairney.)

DAVIDSON v. JOHNSTON.

Election Law—Burgh Franchise—Ownership—Length of Possession—Statute—Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV. c. 65), sec. 11—Representation of the People Act 1884 (48 Vict. c. 3), secs. 5, 7 (7), 12, Schedule 2 (2).

Held that the owner of property within a burgh was entitled to be enrolled as a voter in respect of such ownership although he had not been owner of said property for the period of twelve months prior to the 31st July of the year in which he claimed to be registered.

Davidson v. Gray, 1868, 7 Macph. 293, 6 S.L.R. 45, overruled.

The Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV., c. 65), sec. 11, conferred a franchise upon the occupant within a burgh for twelve months of any house, warehouse, counting-house, shop, or other building, of the yearly value of £10: "Provided always that the claimant shall have paid on or before . . . the 20th day of July . . . all assessed taxes which shall have become payable by him in respect of such premises previously to the 6th day of April then next proceeding: Provided also that no such person shall be entitled to be registered or to vote . . . unless he shall have resided for six calendar months next previous to . . . the last day of July . . . within such . . . burgh . . . or within seven miles of some part thereof: Provided also that persons so resident shall be entitled to be so registered and to vote if they are the true owners of such premises as are hereinbefore mentioned within such . . . burgh . . . of the yearly value of £10 or upwards, although they should not occupy any premises within its limits, or although the premises actually occupied by them should be of less yearly value than £10." . . .

The Representation of the People Act 1884 (48 Vict. c. 3), sec. 5, enacts—"Every man occupying any land or tenement in . . . a borough in the United Kingdom of a clear yearly value of not less than £10 shall be entitled to be registered as a voter, and when registered to vote at an election for such . . . borough in respect of such occupation, subject to the like conditions . . . as a man is at the passing of this Act entitled to be registered as a voter and to

vote at an election for . . . such borough in respect of the borough occupation franchise."

Section 7 (7)—"The expression 'borough occupation franchise' means . . . as respects Scotland the franchise enacted by the 11th section of the Act of the session of the second and third years of the reign of King William the Fourth, chapter sixty-five."

Section 12—"Whereas the franchises conferred by this Act are in substitution for the franchises conferred by the enactments mentioned in the . . . second part of the second schedule hereto, be it enacted that . . . the Acts mentioned in the second part of the second schedule shall be repealed to the extent in the third column of that part of the said schedule mentioned except in so far as relates to the rights of persons saved by this Act, and except in so far as the enactments so repealed contain conditions made applicable by this Act to any franchise enacted by the Act."

Part 2 of Schedule 2 includes the Representation of the People (Scotland) Act 1832, and the extent of the repeal is "section 11, from the beginning of the section to the words 'sixth day of April then next preceding' inclusive."

At a Registration Court for the burgh of Annan, held on 9th October 1903, Wilson Davidson, residing at Beechgrove, in the parish of Annan, claimed to have his name entered in the register of voters for the said burgh as proprietor of the dwelling-house and garden known as "Solway Place" in said burgh.

William Joseph Johnston, solicitor, Annan, a voter on the roll of voters for said burgh, objected to the name of the said Wilson Davidson being added to or entered in the register of voters for said burgh.

It was admitted that the said Wilson Davidson had acquired the said subjects, as owner, with entry as at 25th November 1902, by assignation dated the 23rd and 24th, and recorded in the Register of Sasines for said burgh the 27th, all days of January 1903, and that the valuation of said subjects according to the valuation roll was £30 per annum. It was further admitted that Beechgrove, the residence of the said Wilson Davidson, was not within the Parliamentary burgh of Annan, but was about two miles distant from the said burgh, and that the said Wilson Davidson had resided there for many years.

It was objected by the said William Joseph Johnston that the said William Davidson was not entitled to be enrolled, in respect that he had not been the owner of the said subjects for twelve months prior to the 31st day of July last.

The Sheriff sustained the objection and rejected the claim. Davidson took a special case in which the above facts were narrated, and the following question of law was submitted:—"Is a person entitled to be entered in the register of voters for a burgh as owner of property therein who has not been owner of the said property for the full period of twelve months previous to