contractual. It is also presumed that provisions in favour of the issue of the marriage between the parties are contractual. On the other hand, it is presumed that where the objects of the testator's bounty are other than the parties to the deed or the children of the marriage between these parties the provisions are testamentary. It is also presumed that persons wish freedom with regard to the disposal of their own property, whatever may happen with regard to the property got from the other party. All these presumptions, however, must yield to indications in the deed that something else was intended. As is said by Lord M'Laren in his book on Wills (vol. i. p. 423), and as I said in the case of the *United Free Church of Scotland* v. *Black* (1909 S.C. 25, at p. 30), everything turns on the instrument itself. Lord Kyllachy in the case of *Corrance's Trustees* v. *Glen*, 1903, 5 F. 777, at p. 780, gave an instance of the class of clause from which it might be inferred that provisions in a mutual settlement—and not merely provisions in favour of the parties themselves, but also provisions as to the ultimate disposal of the estate—were contractual. It might be inferred, he said, "*inter alia*, from clauses restrictive of revocation which are so expressed as to be unequivocally referable to the ultimate dispositions under the mutual deed." He was there no doubt dealing with the case of a person disposing of his own property who had received nothing from the other party, but I think the statement applies equally in the case of a survivor to whom property has come from the predecessor.

I am bound to say that I think that the particular clause in this deed leads necessarily to the conclusion that the provisions as to the ultimate destination of the property in the deed are contractual and not testamentary. I put no stress on the reservation of full power to alter or revoke these presents "in our joint lifetimes and of mutual assent and consent but not otherwise," which is indeed phonastic and must be so unless you can go the length of holding that the deed created a *jus quæsitum tertio;* and no stress upon the phrase that "if not altered of joint consent the same shall be final and conclusive on both of us," which goes without saying. But the last clause seems to me to be conclusive, "reserving to the last survivor of us to dispone all his or her own means and estate to be made and acquired after the decease of the first of us and power of disposal thereof as he or she think fit." Now this power can only have been reserved because the parties were under the impression that without the reservation a disposition by the survivor of his own property acquired after the death of the other would have been struck at by the settlement. Accordingly I think it is clear that in the view of these two people the provisions in this settlement were contractual and would have applied to everything but for this clause reserving power to dispose of what was to be acquired after the dissolution of the marriage. In these circumstances I think that the second parties are entitled to the property, and the first question should be answered in the negative and the second in the affirmative.

LORD KINNEAR—I am of the same opinion.

LORD MACKENZIE—I am of the same opinion. The question whether the provisions in favour of ultimate beneficiaries made by the spouses in this settlement are contractual is one which must be judged upon the terms of the deed itself, and to my mind there is an inference, from the clause of reservation, to the effect that the spouses intended to contract that the disposition of their means and estate to the ultimate beneficiaries should stand, except to the extent that there was the reservation that the last survivor was to have "power to dispone all his or her own means and estate to be made and acquired after the decease of the first of us and power of disposal thereof as he or she think fit." Now that can only refer to dispositions to the ultimate beneficiaries, and excludes the idea that the spouses had power to deal with the property which fell under the terms of settlement.

LORD JOHNSTON was not present.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the First Party—Chree, K.C. —Wark. Agents—Mackay & Young, W.S.

Counsel for the Second and Third Parties —Constable, K.C.—Lippe. Agents—Henry Bower, S.S.C.—Steedman & Richardson, S.S.C.

Thursday, July 17.

FIRST DIVISION.

WATSON'S TRUSTEES *v.* WATSON.

Succession—Trust—Construction of Testamentary Writings — Fee or Liferent — Direction to Divide Residue, and a Share thereof Declared Alimentary—Discretionary Power of Trustees to Retain—Repugnancy.

A testator directed his trustees "to realise . . . my whole estates . . ., and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) divide the whole free proceeds thereof equally, share and share alike, amongst my whole children." By the same clause of the will he conferred upon his trustees "the most absolute discretionary power to retain the share or shares falling to any of my children instead of paying the same over to them, and my said trustees may in their discretion only pay over the annual income derived from the share so retained." The clause further contained a declaration "that the whole provisions hereunder in favour of (J. W., the testator's youngest

child) are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of (the said J. W.) or attachable by the diligence of his creditors." There was no destination of J. W.'s share in favour of any other person, and the trustees stated that if they had the power to do so they were prepared to hand over J. W.'s share to him.

Held (*diss.* Lord Johnston) that the trustees were entitled to pay the said share to J. W. in respect that his right therein was a right of fee in regard to which a declaration that the provision should be alimentary was ineffectual in law.

William Watson, pawnbroker, Hilltown, Dundee, and others, the testamentary trustees of the late William Stewart Watson, pawnbroker, Hilltown, Dundee, who died on 8th September 1904, *first parties*, and James Watson, the testator's youngest child, who attained majority in March 1911, *second party*, brought a Special Case to determine the construction of a certain provision in favour of the second party.

The trust-disposition and settlement, dated 24th November 1897, and recorded 13th September 1904, *inter alia*, provided—"*Tenth*, I direct and appoint my said trustees from and after the date of my decease to retain the tenement erected by me called 'Maitland Place' . . ., and after deduction of cost of upkeep of that tenement, including one-third of the feu-duty and rates and taxes appertaining thereto, my said trustees shall pay and apply the free income therefrom for and on behalf of James Watson, son of my present marriage, and that during all the days of his life, as a special bequest to him. In the event of the said James Watson marrying and dying leaving lawful issue, then my trustees shall hold the said tenement and apply the free income therefrom in clothing, maintaining, and educating the lawful issue of the said James Watson in such way and manner as my said trustees think right, and that until the youngest of such issue attains majority, when my said trustees shall sell said tenement and divide the free proceeds thereof equally betwixt the lawful issue of the said James Watson. In the event of said James Watson predeceasing me or surviving me and dying without leaving lawful issue, then said tenement shall be sold and the free proceeds divided equally, share and share alike, amongst the whole children of my former marriages, and the children of my present marriage, declaring that in the event of any of my children predeceasing leaving lawful issue, such issue shall succeed equally, share and share alike, to the share which their deceasing parent would have got if alive. *Eleventh*, Upon the youngest of my children of my present marriage attaining twenty-one years complete, I direct and appoint my said trustees to realise and convert into money my whole estates (so far as that may not have been already done by them) and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) divide the whole free proceeds thereof equally, share and share alike, amongst my whole children of my former marriages and the children procreated to me of my present marriage: Declaring that in the event of any of my children predeceasing leaving lawful issue, such issue shall succeed equally, share and share alike, to the share which their deceasing parent would have got if alive: But notwithstanding the power of division above mentioned, I hereby confer upon my said trustees the most absolute discretionary power to retain the share or shares falling to any of my children instead of paying the same over to them, and my said trustees may in their discretion only pay over the annual income derived from the share so retained, or may from time to time pay the capital of such share or shares by such instalments, and at such times as they may determine. Further, I hereby specially provide and declare that the whole provisions hereunder in favour of the said James Watson are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said James Watson, nor attachable by the diligence of his creditors. And any shares or share which may be retained by my trustees in terms of powers above conferred shall be subject to the same declaration in every respect."

The Case stated—"5. When the second party attained majority, in March 1911, the first parties proceeded, in terms of the direction in the settlement, to make an interim division of the residue of the estate. The second party's share in this division amounted to £1557, which the first parties still retain, and the income from which they have regularly paid over to him. The second party has now called upon the first parties to make over to him his share absolutely. The first parties have passed no resolution to retain the share of the second party, or of any of the other beneficiaries, in terms of the discretionary powers conferred upon them by the eleventh clause of the settlement, nor do they see any occasion to do so, and if they have the power they are prepared to hand over the second party's share to him."

The following *questions of law* were submitted — "1. Are the first parties entitled to pay over to the second party his share of the residue of his father's estate, if they are of opinion that it is advisable to do so? or 2. Are the first parties bound to retain said share of residue for behoof of the second party in liferent for his alimentary use? 3. In the event of the first question being answered in the negative, has the second party power to dispose of the fee of the said share of residue by *mortis causa* settlement?"

Argued for the second party—The direction to divide the residue among the testator's children constituted a gift of fee. The declaration that the provisions in favour of James were to be alimentary referred to the liferent of the subjects in Maitland Place. The clause making the same declaration applicable to shares re-

tained by the trustees could only be operative in the event of the trustees resolving to retain. A declaration that a gift of fee was to be alimentary was ineffectual in law—*Allan's Trustees* v. *Allan and Others*, December 12, 1872, 11 Macph. 216, 10 S.L.R. 141; *Auld* v. *Anderson*, &c., December 8, 1876, 4 R. 211, 14 S.L.R. 144; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199, 31 S.L.R. 135; *Young's Trustees* v. *M'Nab*, &c., July 13, 1883, 10 R. 1165, 20 S.L.R. 789. Assuming that a direction to retain could be read into the will, the fee of his share being vested in James and there being no ulterior interests to protect, an attempt to restrict his right as fiar fell to be disregarded—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106; *Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668; *Macculloch* v. *M'Culloch's Trustees*, November 24, 1903, 6 F. (H.L.) 3, *per* Lord Davey at p. 6, 41 S.L.R. 88, at p. 90; *Tweedale's Trustees* v. *Tweedale*, December 16, 1905, 8 F. 264, 43 S.L.R. 193; *Wilkie's Trustees* v. *Wight's Trustees* (*cit. sup.*).

Argued for the first party—The language used by the testator showed that his intention was to treat James differently from the other children, and to make the whole of the provisions in his favour alimentary, and he had done this effectually.

At advising—

Lord Dundas—[*Opinion read by Lord Kinnear*] — The principal question in this case depends for its solution upon the proper construction to be put upon the language of the eleventh purpose of the testator's settlement. The clause is unfortunately expressed. But it seems to me that its provisions fall under three separate heads—first, a substantive direction that the residue shall, at a prescribed date, be equally divided among all the children then alive; second, a discretionary power conferred on the trustees to withhold payment of any share so long as they think proper; and third, an express declaration that James' provisions shall be alimentary and incapable of attachment by his creditors—a condition which is also declared to be applicable to any shares which may be retained by the trustees in virtue of their discretionary power. Now under the first of these heads the words of bequest give to the children alive at the prescribed date an absolute vested right of fee in their respective shares; and James undoubtedly has that right unless it has been taken from him by the subsequent provisions of the settlement. No question arises under the second head; for the trustees inform us in the case that they do not see any occasion to exercise their discretionary power to withhold payment of any of the shares, and that "if they have the power, they are prepared to hand over the second party's share to him." The whole question then comes to turn upon the construction and the legal effect of the third head. The testator's complete intention with regard to James' share is not made very clear by the words he has used. But it is at least quite plain that he did intend that share to stand in a different position from the shares of the other children. He declared it to be purely and strictly alimentary, and evidently intended to protect it in some way against the diligence of James' creditors. The question remains, whether he has effectually done so. I think he has not. It was, of course, quite open to him to have given James a mere alimentary liferent interest in his share of residue, with or without the power to dispose of the capital by will. Or he could if he so pleased, in addition to the alimentary liferent, and subject thereto, have given James a vested right in the fee, which would then have been at the son's own disposal *inter viros* or *mortis causa*, subject always to the alimentary liferent. But the testator has not done any of these things. He has begun by using words which give to James a right of fee like the other children; and he has nowhere declared that that right shall be limited to a mere liferent, or to anything less than a right of fee; nor has he made any destination of the fee itself except in the words of the discretion to divide among his children. It is not open to us to speculate as to what he thought he had done, or what he would have wished to have done, in order to limit James' rights and to exclude his creditors. We cannot construct machinery for carrying into effect wishes or intentions which are at best only matter of conjecture. We can but look at what the truster has done; and that is to direct the division of the residue among his children; to confer upon the trustees a discretionary power (which they see no occasion to exercise) of withholding or delaying payment; and to declare that the whole provisions in James' favour are to be alimentary and incapable of attachment by his creditors. But such a declaration as this last does not, in my judgment, reduce the right of the second party to anything less than one of fee, and a right of fee cannot be limited, as a right of annuity or of liferent can, by a declaration, however emphatic, that it is to be alimentary. Such a declaration is a mere attempt to restrain the fiar in the use of his own property, and is by our law ineffectual to do so.

If the construction of this settlement which I have indicated is the correct one, it becomes easy to answer the questions put to us, and I do not know that one need go for direct assistance to any of the decided cases; but I should like to add a few words in regard to one or two of these. The second party's counsel founded strongly upon the series of decisions in this Court of which the *Manderston* case, *Miller's Trustees*, 1890, 18 R. 301, and the whole Court case of *Yuill's Trustees*, 1902, 4 F. 815, are prominent examples, and argued that if, as contended, the fee of the capital of James' share was vested in him and no ulterior interests or purposes were involved, any attempt to hamper or restrict his right as fiar must be disregarded. In *M'Culloch's*

Trustees (1903, 6 F. (H.L.) 3) Lord Davey expressed his opinion that the cases of *Miller's Trustees* and *Yuill's Trustees* were decided upon a sound principle, and "that principle is this, that where a man gives an estate in fee he cannot fetter or restrict the fiar's enjoyment of it by any provision which is repugnant to the idea of an estate in fee." In neither of these cases, however, was there any room for the suggestion here made, that the effect of the trust deed was to create and protect an alimentary liferent in the person of the beneficiary. The present case is much more like that of *Wilkie's Trustees*, 1893, 21 R. 199. A right of fee was there given by the testator's settlement to his daughters, but there was an attempt by a subsequent codicil to limit them in the use of it. The codicil directed the trustees to hold the residue in their own hands for the benefit and alimentary use of the daughters equally, and apply the same for their behoof respectively in such manner as the trustees might consider proper, and to pay them the capital and interest, or only the interest, at such times and in such sums as the trustees might deem proper and expedient, the said provisions being purely alimentary, and not to be arrestable or attachable by the debts and deeds of the daughters or the legal diligence of their creditors. But there was no express declaration that the daughters' right should be limited to a liferent, nor any destination of the fee to some other person. It was held that the share of one of the daughters, who was a party to the case, vested in her in fee, and that she was entitled to immediate payment of it. Lord Rutherfurd Clark said—"I hold her to be a fiar, and I do not think that the rights of a fiar can be restricted by the limitations contained in this deed. These limitations do not reduce the right of the legatees to anything less than a fee. They are mere attempts to restrain the rights of the fiar in the use of her own property. It cannot I think, be doubted that creditors would not be excluded, and though a liferent may be declared alimentary, such a declaration has no effect on a right of fee. Following the case of *Miller*, 18 R. 301, I think that there is a repugnancy between these limitations and the right of fee, and that the rights of the fiar must prevail." These words seem to me to be applicable to the present case if the construction I have put upon the testator's settlement is sound.

For the reasons thus summarised, I think we should answer the first question in the affirmative and the second in the negative. The third question is, in my view, superseded; for its postulate is that the first question be answered in the negative.

Lord Kinnear—I agree in the opinion which I have just read, and I only add a few words for the purpose of expressing my own reasons. I think it clear upon the construction of the eleventh clause of the settlement that the testator gives, as Lord Dundas has pointed out, a right of fee to all his children on the arrival of the date which he has fixed for distribution, for he appoints his trustees to realise and convert into money his whole assets, and thereafter, subject to a discretionary power, to divide the whole proceeds, share and share alike, amongst the whole children. There is no destination in favour of any other person. There is a direct and absolute right of fee given by these words to the testator's whole children, each to his own share; and so far as I can find on any reasonable construction of the subsequent part of the clause there is absolutely nothing to limit the right of fee so given or to give any of the children less than a right of fee.

I assent to the doctrine, which Lord Dundas' opinion also assumes, that a testator having given a right of fee to certain beneficiaries may nevertheless go on to divest them of that right if he does so in clear and sufficiently effectual terms. An extremely good illustration is the well-known case of *Smith* v. *Chambers' Trustees*, where the testator undoubtedly began by giving a fee to his children, but went on to authorise his trustees to make certain restrictions upon the deeds which they were to execute for the purpose of giving effect to that right so as in effect to reduce the children's interest to a liferent. The principle is very clearly explained by Lord President Inglis, and although the judgment of this Court was reversed in the House of Lords, there is nothing said by any of the noble Lords that at all affects the soundness of the Lord President's exposition. Indeed, I think the passage to which I mainly refer is cited in the House of Lords as the best exposition of the doctrine. And what he says is this: Having explained that the effect of the clause then under discussion was to give an absolute vested right at the testator's death, he says, in reference to the clauses which followed—"It would be strange if the effect of that modification were that in certain events the shares should not vest at death. That would simply undo what has immediately preceded. . . . But it is quite possible that a provision may vest and yet in certain events be subject to defeasance." And then he goes on to say that if the clauses that follow the vesting clause are resolutive and not suspensive, vesting takes place as fully as if there had been no condition, subject always to the provisions operating the divestiture. And accordingly the ground of judgment was that the trustees were entitled to divest the children to a certain extent by giving them an alimentary liferent instead of the fee. But a condition of that being done is that the trustees should be entitled to do something which would take away the fee previously, according to the form of the language of the deed, vested in the beneficiaries; and there is nothing in this clause which enables the trustees to do anything of that kind. There is no power in them to reduce the interest of any of the children to a liferent and to give the fee to anybody else; but whatever they do in the exercise of their power it must be consistent with the gift of the fee and

in no way modified by what follows. But there is undoubtedly discretion given to the trustees to retain the shares falling to any of the children instead of paying them over, and to pay over only the annual income derived from the shares or "from time to time pay the capital of such share or shares by such instalments and at such times as they may determine."

That now raises the question which Lord Dundas has considered, whether a discretionary power of that description is or is not repugnant to the right of fee, and so objectionable under the principle established in *Miller's Trustees*. I do not repeat what Lord Dundas has said upon that point, but I do not think it necessary that that question should be decided in this case, for this reason—all that the testator does is to give to his trustees a discretion either to pay over the whole of the income or a part of the share to each of his children, and that discretion applies to the share of the only child with whom we are concerned, James, exactly in the same way as to any of the others. Now the trustees have exercised that discretion. They tell us that they have considered the question and that they are prepared, so far as their judgment goes, to pay over James' share to him. He has under his father's will the gift of a certain share subject to a discretionary power in the trustees to withhold it if they think fit. But that power must be determined sometime, and it is to my mind completely determined when the trustees say "We have considered the matter and do not think it necessary to withhold any part of his share and we are ready to pay it over."

Well then, that leaves only one question, which is that which the trustees themselves say they have brought this case for the purpose of raising. It is argued that the position of James' share is totally different from that of the other children, and that although they might be entitled to pay over the shares to the others, a question has been raised as to whether they are entitled to pay over James' share, because his interest is restricted to an alimentary right. Upon that I think the distinction between James' share and the other shares is not very material, but it is quite clearly expressed. After explaining the discretion which he gives to his trustees as to all the children, he goes on to say—"I hereby specially provide and declare that the whole provisions hereunder in favour of the said James Watson are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said James Watson, nor attachable by the diligence of his creditors; and any shares or share which may be retained by my trustees in terms of the powers above conferred shall be subject to the same declaration in every respect."

Now the only distinction which that seems to me to make between James' share and that of the other children is plain enough. He says, if the trustees resolve to retain any part of the shares of the other children the part so retained shall be strictly alimentary; but the provisions in favour of James shall be strictly alimentary and not attachable by the debts or deeds of his creditors—that is to say, whether you retain a part of James' share or not it is to remain subject to a restriction that it is for his alimentary use and subject to the exclusion of his creditors. I think that the question which arises there is whether that plainly expressed purpose is good or bad in law.

I cannot quite agree with one observation of Lord Dundas, in which he seems to put it as if it was for the Court to make machinery for the working out of a provision which was not clearly expressed. I do not see that there is need to provide any machinery at all. I think the testator meant to give his son the fee, and, notwithstanding he had given his son the fee, to declare that it should be alimentary only, and that his creditors should not have power to reach it. I think that is totally ineffectual in law. The law is quite clearly settled that although you may make a liferent or an annuity alimentary you cannot make a fee alimentary so as to exclude creditors. It is open to the donor to provide that his donee shall only have the proceeds of the estate settled upon him so that these proceeds shall be secured for his alimentary use, and therefore to put the estate into the hands of trustees with such directions that they should be entitled only to apply the annual proceeds directly to his aliment and to meet the claims of such creditors only as are alimentary creditors. But, subject to that qualification, the law is that no man can have a right of fee in money or property and at the same time exempt his property from the diligence of his creditors. You cannot give a fee to a man and say to his creditors "Do not attach it." That is what I think the testator here intended to do and he has done it ineffectually. That is a condition of the gift which the Court cannot sustain.

I agree that the question should be answered in the way proposed by Lord Dundas.

LORD JOHNSTON—The question in this case concerns the provision out of residue so far as made for the testator's youngest son James Watson, whether it is absolute or effectively restricted. Mr Watson was married three times and left six children, two by each marriage. James Watson his youngest child was born in 1890, was seven years old when his father executed his settlement, and fourteen when his father died. He attained majority in 1911. He was singled out by his father—evidently it could only be by reason of his comparative youth—for somewhat special treatment under his settlement. Mr Watson carried on business as a pawnbroker in two different localities in Dundee. He gave two of his elder children the option of each taking over at valuation one of these businesses. Then, fifth, he directed his trustees to convey absolutely to his son William Watson junior, "as a special bequest" to him, a shop, store, and two

dwelling-houses in the Hilltown of Dundee. He, sixth, directed his trustees as soon as convenient to convert into money the whole of his other heritable estate and invest the free proceeds in good heritable securities. The seventh, eighth, and ninth purposes contain provisions for maintaining his children during minority and for his widow, the latter of a liferent nature. The tenth purpose contains a provision "as a special bequest to him" for James Watson, the youngest son, out of the rents of a particular heritable property. The ultimate destination of this subject was for sale after James' death and division among his issue, whom failing among the testator's whole children and the issue of predecessors. The eleventh purpose is the residue clause, the structure of which is involved and awkward.

By it the testator, on the youngest child of his last marriage attaining majority, directed his trustees to convert, so far as not already done, his whole estates into money "and thereafter (subject always to the discretionary powers vested in my trustees hereinafter mentioned) divide the whole free proceeds thereof equally, share and share alike," among his whole children, with a destination over "in the event of any of my children predeceasing leaving lawful issue" to such issue of their parents' share.

So far the provision presents no difficulty. The difficulty is created by the discretionary powers above referred to. The clause in a confused way deals specially with the case of James Watson the youngest child, and generally with the case of the rest of the children more or less by reference only to what was provided in the case of James. But it creates further confusion by the impression it gives—at present I do not say more—that as regards James its directions were intended to be imperative, as regards the rest of the children discretionary. To quote the clause *verbatim* would be to waste time. It is necessary to marshall its details in such a way as to present the testator's ideas in less involved, and I hope more intelligible, sequence.

I exclude in the first place any direct reference to James the youngest son. What then the testator does is to confer upon his trustees the most absolute discretionary powers to retain the share or shares of any of his children instead of paying the same over to them. I pause to notice that up to this point there is only expressed a direction to convert and divide, and the direction to divide is immediately, and not remotely or by reference, subjected to the discretionary powers vested in the trustees thereafter mentioned. Nothing is said about payment. The testator then adds—"And my trustees may, in their discretion, only pay over the annual income derived from the share so retained, or may from time to time pay the capital of such share or shares by such instalments and at such times as they may determine." Accordingly the direction to the trustees is in effect to convert and divide and to pay or retain, in their discretion. Had the provision ended there, I think that there can be no doubt that the case would fall under the rule of *Miller's Trustees*, 18 R. 301, and that there would have been no good answer to the demand of any child for immediate payment of his or her share. But there must be held to be annexed, though only by reference, to this direction the declaration following—"And I hereby specially provide and declare that the shares or share provided to any of my children, or such part thereof as may be retained by my trustees in terms of the powers above conferred, are purely and strictly alimentary, and the same shall not be attachable by debts or deeds of such children nor attachable by diligence of their or his creditors."

It is necessary here, and before proceeding to the special case of James Watson, to determine the effect of these provisions in the event of the trustees resolving, which as it happens they declare in the special case that they see no reason to do, to retain the share of any of the other children. Two things are clear—first, that it is in law impossible to attach an alimentary condition to a capital provision; and, second, that without the interposition of a trust even a life-interest cannot be made alimentary. Now we have here the interposition of a trust. We have also a discretionary power to the trustees to reduce the immediate beneficial interest to a liferent, although there is none the less a vested fee, coupled with a declaration that the provision so far as retained shall be alimentary. That the alimentary condition cannot attach to the fee or capital sum is clear. But the question remains, can a liferent of a capital sum be rendered alimentary, a trust being interposed, where the fee is in the liferenter and not carried past him to his issue or other institutes. I see no good reason why a clearly-expressed intention, the machinery being provided, should not be given effect to so far as is possible merely because the intention was to carry the protection to a further point than is possible at law. I think that it is recognised that a gift of capital to be retained in trust in liferent alimentary, with a power of disposal of the fee, is good to protect the liferent—*Adam & Forsyth* v. *Forsyth Trustees*, 6 Macph. 31; *Elliot* v. *Bowhill*, 11 Macph. 735—though the power of disposal of the fee may be made available for behoof of creditors. And I do not find that the situation which would be created here, were the trustees to exercise their discretion, is in any different situation. Hence I conclude that so long as the trustees retain the share of any child, that share, as regards the income, is protected and that, as in *Chambers' Case*, 5 R. (H.L.) 151, no interposition of creditors can prevent them freely exercising their discretion. That in the last-mentioned case the trustees had also a power not merely to reduce the beneficiary to a liferent but to give the fee over to his issue, does not, in my opinion, affect the question. In fact, if Dr Chambers' trustees had chosen they might have retained for an alimentary liferent without affecting the fee by any

further exercise of their discretionary powers.

But we are concerned specially with James Watson's share of residue. It is with regard to this share, but in words which cover the whole provisions in his favour under the settlement, that the declaration which is imported by reference into the general clause distributing residue occurs, "Further, I hereby specially provide and declare that the whole provisions hereunder in favour of the said James Watson are purely and strictly alimentary." The word 'are' I read as equivalent to 'shall be,' and as indicating the fixed intention of the testator that in all events the provision in favour of James Watson should be alimentary. His intention is clearly effectual as regards the special bequest of the Hilltown property, which is a proper life interest, with a fee to others, the property being retained in trust. Is it ineffectual as regards residue? I think not. For the intention is clearly manifested, and the means are in the trustees' hands to render it effectual. What is discretionary in the case of the remaining children becomes I think by necessary implication imperative in the case of the share of James.

Your Lordships take a different view, and consider that the judgment I would propose here runs counter to the case of *Wilkie's Trustees*, 21 R. 199. It is not therefore without grave hesitation that I adhere to the opinion which I had independently formed. But I do not think that the circumstances of *Wilkie's* case, however weighty the authority, are so far the same as those of the present as to compel to the same conclusion. I am particularly impressed by the close collocation between the direction to divide and its rider the discretionary power to retain. I think the wish of the testator manifest, and that "the rights of the beneficiary must be subordinated to the will of the testators" so far as the law can give effect to that will.

Accordingly I am for answering the first query in the negative, the second in the affirmative, and the third in the affirmative, with the rider "so as not to disappoint his creditors."

The LORD PRESIDENT and LORD MACKENZIE were not present.

The Court answered the first question in the affirmative and the second question in the negative, the third question being superseded.

Counsel for the First Parties—W. L. Mitchell. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Parties—Fenton. Agents—Wallace & Begg, W.S.

Tuesday, July 15.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

JOHNSTONE *v.* LOCHGELLY MAGISTRATES.

Reparation—Negligence—Safety of Public — Unfenced Coup — Injury to Child — Liability of Party Using but not Owning Coup—Averments—Relevancy.

A child between two and three years of age was fatally injured by her clothes catching fire when playing near a rubbish heap on which the refuse of a burgh was deposited and on which a fire had been lit. The field in which the rubbish heap was situated was not the property of the magistrates, who, however, were allowed by the owner to deposit rubbish upon it, but was treated by the inhabitants of the burgh as a public park, it being easily accessible to all. In an action of damages by the child's father against the magistrates the pursuer averred that the defenders were in fault in allowing the rubbish heap to remain unfenced; that they were well aware that children were in the habit of playing about the coup and of resorting thereto in search of playthings; that their (the defenders') servants were in the habit of lighting fires there in order to get rid of paper and other inflammable materials; that they (the defenders) were also aware that fires were frequently lit there by ragpickers who frequented the coup; that they were bound to see that fires which had been lit there were properly extinguished; and that owing to their neglect of that duty the pursuer's child was burnt. It was not, however, averred that the fire in question had been lit by anyone for whom they (the defenders) were responsible or that they were aware of its existence.

Held that the pursuer's averments were irrelevant.

Adam Johnstone, miner, Launcherhead, Lochgelly, *pursuer*, brought an action against the Magistrates of Lochgelly, *defenders*, for £500 damages in respect of the death of his child, which he alleged was due to the fault or negligence of the defenders in allowing a rubbish heap in which the refuse of the burgh was deposited to remain unfenced and unprotected, and in causing or permitting waste paper to be burnt there.

The pursuer averred—"(Cond. 2) Behind the house where the pursuer resides at Launcherhead aforesaid is a large grass park which slopes gradually downwards towards the railway. The railway is distant about 150 yards from the pursuer's house, which is part of a row of four houses at the west end of Launcherhead. At the lower end of said field, and about 75 yards distant from pursuer's dwelling-house, there