

Argued for the respondent—An appeal at the present stage would merely cause delay, and that might be most prejudicial to the respondent. There might in that case be several appeals as there were various matters still to be decided, about which disputes might arise between the parties.

At advising—

LORD PRESIDENT—The case in which this application has been presented was an action for enforcement of a contract of sale contained in missive letters—the subject being the estate of Murtly—and the pursuer concluded for specific implement, and alternatively for damages. The defender resisted the action upon two grounds—the first resting upon a construction of the personal contract of sale, and the second being that it was not a case in which specific implement was the appropriate remedy. We repelled both pleas and appointed the pursuer to lodge in process, within 14 days, the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer, in fulfilment of the contract of sale constituted by the missives of sale, dated 19th and 20th September 1888, founded on by the pursuer.

The disposition so appointed to be prepared has been lodged and accordingly the case is now in such a position that the draft disposition may be adjusted. But there is a great deal to follow upon that, because when the deed has been granted and executed, it will be necessary to apply to the Court to have the sale confirmed under the Entail Amendment Act of 1853. There may then arise questions of very great importance, particularly as regards the manner in which the compensation to the next heir will fall to be adjusted, and its amount. There is therefore a good deal to be done before specific implement can be carried into effect.

In a question of this kind the Court is bound to consider the interests of both parties, and in the exercise of their discretion to say where the balance lies. It has been suggested that the whole merits of the case are substantially exhausted, but I can hardly assent to that. No doubt the case has been finally decided up to this point that the defender is bound by the missives to give specific implement of the contract therein contained. But there may be an appeal hereafter to the House of Lords in regard to other questions, and accordingly we must take into consideration the disadvantage to both parties if there should be more than one appeal. Mr Asher says that there is no ground for an appeal at a later stage. I cannot agree to that. There may be a very fair ground for appeal in the future, and, besides, the pursuer is quite entitled to suggest in a case like this that an appeal may be taken with the object of delay. There is therefore no protection or assurance against the prospect of there being three appeals. That is a very serious consideration.

The alternative of granting or refusing leave to appeal generally depends on a variety of considerations affecting the case in point. It has been a common thing to present an application for leave to appeal against a judgment sustaining a plea of relevancy—the object being to avoid the expense which would have attended an inquiry by proof or by jury trial if it should

be held by the House of Lords that there was no relevant case. We have not seen many of these cases lately, but I can recall two of them in which petitions for leave to appeal to the House of Lords was refused, and in both there was ultimately a verdict for the defeuder. That seems to be a very good practical justification of the refusal of the application. I do not say that they are precisely applicable, but I cannot help thinking that the likelihood of there being more than one appeal is a sufficient reason for refusing this petition.

LORD ADAM—There is a good deal of contentious matter still to be disposed of in this case. Your Lordship has said that there may quite well be a *bona fide* appeal at a future stage, and there was the case of General Macdonald in the Dunalastair disentail—*M'Donalds v. M'Donald*, March 12, 1880, 7 R. (H. of L.) 41—which was appealed to the House of Lords on the very question of the amount of compensation to be paid to the next heir. I do not think it is at all desirable that there should be a possibility of two appeals—and I think the respondent has a legitimate interest that the case should be disposed of here before an appeal is taken. I accordingly concur with your Lordship.

LORD LEE concurred.

LORD MURE and LORD SHAND were absent.

The Court refused the petition.

Counsel for the Petitioner—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent—D.F. Mackintosh—C. S. Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, February 26.

## SECOND DIVISION.

CHEYNE AND STUART v. IRVING SMITH  
AND OTHERS.

*Succession—Vesting Subject to Defeasance.*

A testator left his whole personal means and estate to trustees to be held in trust for the equal use and behoof of all his children, and the respective heirs of their bodies, and failing any of his said children without lawful issue to the survivors and survivor of them and their lawful issue, share and share alike, "subject always to the uses, control, and disposal hereinafter directed, and declaring that the said shares shall not become vested interests in my children respectively until their respective majorities or marriages." The children upon reaching 25 were to become trustees, and upon the youngest child reaching 21 the trustees other than his children were to cease to act. There was power given to the trustees in certain cases, none of which occurred, to restrict the rights of daughters to a life interest, and to settle the fee of their shares of capital upon their children. At the close of the deed it was

provided that "failing all my children and their lawful issue after the decease of my said beloved wife, my said trustees shall pay and deliver over the whole of my said estate . . . to my nearest heirs, executors, or assignees." The testator died predeceased by his wife and all his sons, and survived by his daughters, all of whom were over 25 at his death. One was then married but had no children; the others all died unmarried. The daughters dealt with the estate as having vested in them equally, and left settlements.

*Held* that the estate vested in each daughter as she respectively married or attained majority, subject to defeasance in certain cases; that the provision in favour of "nearest heirs" applied only to the case of children "failing" before vesting; and that the settlements of the daughters must receive effect.

Alexander Falconar of Falconhall died on 10th December 1847, predeceased by his wife and all his sons unmarried, and survived by his five daughters, who were all then above 25 years of age. Of these Mrs Jessy Pigou Falconar or Craige had married before her father's death, and never had children, and the other four were never married. He executed a trust-disposition and settlement, dated 15th May 1820, by which he left his whole estate to trustees. These trustees were four persons named and his children, who were to become trustees as they respectively reached 25 years of age, but upon the youngest of his children attaining the age of 21 the five trustees, who were not of his family, were to cease to act unless unanimously requested by his family to continue in office.

The purposes of the trust were, *first*, payment of the trustor's debts, funeral expenses, legacies, and expenses of trust management; *secondly*, payment of certain specific legacies; *thirdly*, delivery of certain ornaments to his wife, and that she should have the use for her life of the "household furniture, silver plate, goods and plenishing, together with such parts of my wines and liquors, carriages, horses and cattle as she may wish to have for the use of herself and our children living in family with her . . . and after her death (my trustees) shall deliver over the same to those of my children who shall continue to live in family together, to be possessed and enjoyed by them so long as any two or more of them shall continue so to live after majority, but no longer." The *fourth* purpose provided for his heritable estate, including Falconhall, going to his sons according to seniority, but in case of the failure of all his sons and their lawful issue, the trustees were to "convert the same and whole proceeds thereof into part of my moveable and personal means and estate, to be invested and divided among my daughters and others in manner hereinafter directed."

The *fifth* purpose gave the classes of investments preferred by the trustor, and provided that the "investments shall form an accumulating fund or capital to be added to my means and estate, and to be disposed of as hereinafter directed."

The *sixth* purpose was in these terms—"The whole free amount and residue of my said personal means, estate, and effects, and debts, real as well as personal, together with the free annual

proceeds and income of my real estate, until the majority of my eldest son or other person entitled to succeed thereto, but always after deduction as above specified, and also all increase and accumulation of my said means and estate, to be made as above directed, shall be held by my said trustees in trust for the equal use and behoof of all of my sons above named, and of all my daughters, Margaret Jane, Caroline, Louisa Maria, Jesse Pigou, and Charlotte Octavia, and of any other child or children, whether sons or daughters, to be born to me in my lifetime or in due time afterwards, who shall survive me, and the respective heirs of their bodies, and, failing any of my said children without lawful issue, of the survivors and survivor of them and their lawful issue respectively; to whom I hereby give and bequeath the same in equal portions, and share and share alike, the lawful issue of each child respectively having collectively right to their parent's share; but subject always to the uses, control, and disposal hereinafter directed, and declaring that the said shares shall not become vested interests in my children respectively until their respective majorities or marriages."

In the *seventh* purpose the trustor expressed his earnest wish that his wife and his children should continue to live together in family as long as possible, until the marriage of his daughters or the prospects of his sons made that impossible, and he directed his trustees to pay £1500 a-year for the maintenance of the family, with power to make temporary additions if found necessary.

By the *eighth* purpose power was given to pay to any of the sons separately his share of the fore-said annual revenue of £1500, or if thought advisable, to advance and pay to him, if 21, "one-half of his share of the capital of my means and estate," or even, "the whole of his said share" upon his reaching the age of 25.

By the *ninth* purpose it was provided that "in like manner, in the event of the marriage of any of my daughters, with the approbation and sanction of their relations, and of my trustees and executors (without which I hope they will never enter into the conjugal state), I hereby direct and appoint that my trustees shall make payment to her separately, by the equal moieties and at the terms above written, of her equal share of the said yearly revenue during all the years and days of her natural life after her marriage, for her sole and exclusive use and benefit, excluding the *jus mariti* and all the other rights, legal and conventional, of her husband. . . . Should, therefore, my said trustees be either unanimously of opinion one year after her marriage or then decide by the aforesaid majority of voices or votes that it would be suitable, proper, and advisable to remove the above restriction in regard to the *jus mariti*; and further that it would be proper to advance to her or her husband in her name and behalf, any part as far as a moiety of her share of the capital of my said means and estate, they are hereby empowered and directed to make such advance accordingly, the lawful interest of any such partial advance being ever after deducted from her share of the fore-said yearly revenue: And I further authorise and empower my said trustees, with the concurrence and approbation of my said daughter, to enable her by their consent, or after the expiration of

the fifth year of her marriage, to settle and destine her full share of the said capital upon herself and her husband, and the issue of the marriage, in such manner and in such terms as my said trustees or the aforesaid majority shall approve."

By the *tenth* purpose, if any daughter married without the consent and approbation of the trustees no payment of capital was to be made to her, but the trustees were to retain it in trust for her issue; "and failing such daughter and her lawful issue, then her share of said capital shall belong and be payable to my surviving children and the respective heirs of their bodies in manner above provided."

The *eleventh* purpose provided for the case (which did not occur) of the truster dying leaving minor children.

The *twelfth* and last purpose and certain general provisions were expressed in these words—*"Twelfthly*, Whatever part of their shares of the capital of my means and estate shall not have been advanced and paid in their lifetime or for the use and behoof of any of my children who shall die leaving lawful issue, the same shall be disposed of and paid to and for the use and behoof of such issue equally, and share and share alike their respective proportions of the free yearly interest or income being applied towards their maintenance, education, and support during their respective minorities, and their proportions of the capital being payable to them respectively at the first term of Whitsunday or Martinmas after their respective majorities or marriages, with lawful interest thereafter until paid, and in the event of the failure of all my children and their lawful issue during the life of my said beloved wife, Eliza, my said trustees shall pay and deliver over to her in absolute property one equal moiety of my whole means and estate, debts and effects, real and personal, and whole interest and proceeds thereof, and pay and deliver over the other half to my own nearest heirs, executors, or assignees whomsoever; and failing of all my children and their lawful issue after the decease of my said beloved wife, my said trustees shall pay and deliver over the whole of my said estate, means, debts, and effects, real and personal, and whole interest and proceeds to my said nearest heirs, executors, or assignees."

The five daughters who survived the truster being all above twenty-five years of age, and therefore the only parties entitled absolutely to the office of trustees under the destination in the trust-disposition and settlement, and as being also the sole parties beneficiaries entitled to receive the residue of the estate after paying off all debts and legacies forming claims against the estate, dealt with the estate as having vested in them equally. They made up their title as heirs-portioners *pro indiviso* to Falconhall, being of opinion that their father would in the circumstances have desired them to keep that as their family home. They also executed various family settlements that no difficulties might occur in the future.

By the predecease of their sisters, Miss Margaret Jane Falconar and Mrs Craigie became vested with and in possession of the whole means and estate left by their father, in so far as not expended by them or their sisters, and upon 19th November 1873 they executed separate general

dispositions of their respective whole means and estate in similar terms in favour of Harry Cheyne, W.S., Edinburgh, and others, as trustees, and a mutual deed of directions for the disposal of said estates.

Codicils were added at different dates, and Mrs Craigie died on 12th March 1875.

By a codicil of Miss Falconar dated 16th May 1876, Mr R. L. Stuart, W.S., was appointed a trustee and executor under her settlement along with Mr Cheyne, the other trustees having died, and Mr Cheyne was requested to assume Mr Stuart as a trustee under Mrs Craigie's trust.

Miss Falconar died upon 1st September 1887.

Mrs Irving Smith, widow of Charles Irving Smith, presently residing at Stourbridge, Worcester, and others, claimed to succeed to Alexander Falconar's estates as "nearest heirs" under the destination contained in the *twelfth* purpose of the trust-deed, on the ground that his estates had never vested in his daughters, and they had consequently no power to test upon them.

Messrs Cheyne and Stuart as trustees in the estate of Miss M. J. Falconar, and Mr Cheyne as trustee in the estate of Mrs Craigie, raised an action of multiplepounding to have the right of all parties determined, and they with the approval of, and by arrangement with the beneficiaries under the various deeds forming the settlements of Mrs Craigie and Miss Falconar, claimed "to be ranked and preferred to the whole fund *in medio*, in order that they may administer the same as the estate of the said Mrs Jessy Figou Falconar or Craigie, and Miss Margaret Jane Falconar under the settlements of these ladies and the various codicils thereto."

Mrs Irving Smith and others claimed the whole fund *in medio* as above, and alternatively as beneficiaries under said settlements.

It was admitted that the important question which should be first decided was that of vesting or no vesting, and that the question as to who were the "nearest heirs" should be left over.

The Lord Ordinary (KINNEAR) pronounced the following interlocutor:—"Finds that under the settlement of the late Alexander Falconar, the interests of his children who survived him vested in them by survivance of the testator, and therefore sustains the claim for the real raisers in its first alternative, and repels the claims of the other claimants with the exception of the alternative claim of Mrs Irving Smith, Mrs Wilkie, and Mrs Sutherland: Ranks and prefers the real raisers accordingly to the whole fund *in medio* and decerns: Finds the whole parties entitled to their expenses out of the fund *in medio*, and remits the accounts thereof when lodged to the Auditor to tax and report: Grants leave to reclaim.

*Opinion*.—The question in this case is whether the children of the late Mr Falconar had a vested right in the entire estate bequeathed to them by his will, or whether in the events which have happened, their interest was restricted to the income enjoyed by them during their lives, and to such parts of the capital as might have been actually paid over to any of them by the trustees in conformity with the directions of the truster.

"The leading provision is contained in the sixth purpose of the trust, by which the testator

directs that the residue of the whole estate, real or personal, 'shall be held by my said trustees in trust for the equal use and behoof of all my sons above named, and of all my daughters Margaret Jane, Caroline, Louisa Maria, Jesse Pigou, and Charlotte Octavia, and of any other child or children whether sons or daughters to be born to me in my lifetime or in due time afterwards, who shall survive me, and the respective heirs of their bodies, and failing any of my said children without lawful issue respectively, to whom I hereby give and bequeath the same in equal portions and share and share alike, the lawful issue of each child respectively having collectively right to their parent's share, but subject always to the uses, control, and disposal hereinafter directed, and declaring that the said shares shall not become vested interests in my children respectively until their respective majorities or marriages.'

"The meaning of this provision does not appear to me to be doubtful. The estate is bequeathed to the children who shall survive the testator and their issue subject only to certain directions, for which the trust refers to the subsequent clauses of the deed as to the use, control, and disposal of their respective shares, and with a declaration as to vesting, which *prima facie* would appear to imply that the interest of each child is to vest at majority or marriage.

"The question therefore comes to be, whether there is anything in the subsequent directions to modify or displace the construction which must otherwise have been put upon the words of this leading provision. In reading these directions I think it is very material to observe that the main object and design which the testator appears to have had in view in framing them is that which he expresses in the seventh clause of the deed as his 'earnest wish and desire,' viz., that his wife and family after his death, and all his children after their mother's death, should 'continue to live together in family and in unity, and never separate except in the event of the fortunate marriage of any of the children, the eventful advancement of the sons' in life, or 'any other contingency in the lot of any of his children which might render his or her continuing to live in family impossible or inexpedient.' The whole scheme of the trust appears to be framed with reference to this desire of the trustor, that his children should live in family together as long as possible; and accordingly the specific directions which are contained in the eight and following clauses are intended to provide first for the joint maintenance of the entire family, and secondly for the settlement and disposal of the shares of those children who may have occasion to separate from the rest. But these directions are by no means exhaustive, and the material point to observe is that none of them are applicable to the events which have happened. The trustor contemplates and provides for certain cases in which he thinks it may be expedient to 'advance and pay' their shares of capital to his sons, or to settle the shares of the daughters who may marry upon them or their issue. But the event which has happened is that all the sons died before the testator, and that the only daughter who ever married was married during his lifetime. And

there is no direction for the disposal or settlement of the shares of unmarried daughters, or of daughters who may have married before the trust came into operation. The consequence would appear to be that in their case there is nothing to qualify or control the bequest contained in the sixth clause. The testator bequeaths his estate to the children who shall survive him, in equal portions, subject to certain directions, for the use, control, and disposal of the estate so bequeathed. But none of these directions have taken effect, because the events which might have brought them into operation have not occurred. It would seem to follow that the bequest in favour of the testator's daughters who survived him must be held to be absolute and unqualified. It may be true that so long as the daughters lived it could not be certainly known that the directions for the settlement of their shares would not come into force. But that is a contingency which will not affect vesting. The effect of the directions is, that in certain cases the trustees would have power to settle the capital of a daughter's share, or a portion of it, upon her issue. But if the capital is bequeathed to her, subject only to such a power of settlement, that will not, according to the more recent decisions, preclude vesting, although subject to a possible defeasance of the right in a certain contingency. The effect in law of a bequest in the terms used by the testator would appear to me to be in accordance with the plain meaning of the words. He gives his estate to his daughters to vest at majority or marriage, subject to being divested in certain events; but he indicates no intention that the right shall be contingent upon the occurrence of these events.

"It is said that there is no direction to make any payment to the children, except of certain specified advances; and that there is a destination-over in favour partly of the trustor's wife, and partly of his nearest heirs and assignees. But the ultimate destination to the trustor's heirs and assignees cannot affect the question of vesting; and the conditional institution of the widow, on the failure of children and their issue, appears to me to be consistent with the vesting of the children's interest at majority or marriage. It is true that the clause as expressed appears to refer to the failure of issue, as a distinct and separate condition from the failure of the children of the trustor himself; and therefore to suggest that the children may have married, and yet may have failed to take a vested interest. But the leading provision is in favour of children and their issue, which gives a direct and immediate interest to the issue of children who may have died before the trustor leaving issue who should survive him. The case contemplated therefore in the conditional gift to the widow would appear to be the failure of all the children and their issue, without any of them having survived to take a vested interest in terms of the leading provision; and the question of vesting will depend upon the fair construction of that provision. If this be so, the absence of an express direction for payment is not material. If an estate is bequeathed in equal shares to children, with a declaration that the shares shall not vest until majority or marriage, and there is no express direction for payment, no interposed

interest, and no destination-over, there is nothing to exclude or to postpone vesting, except the declaration that it shall not take place till majority or marriage. And it makes no difference that the gift is subject to restrictions or qualifications, if these are to take effect only on events which may or may not occur, and if these events may be sufficiently provided for by a partial defeasance of a right already vested without keeping the entire right open and contingent."

The claimants Mrs Irving Smith and others reclaimed, and argued—The Lord Ordinary had only looked at clause 6 because the events contemplated by the succeeding clauses had not happened, but the whole deed must be read to see what was the intention of the testator. His great desire was that his children should continue to live in family together as long as possible and be supported by the liferent of his estate. Clause 6 did not govern the succession. It was only a direction to the trustees to hold for certain persons' equal use and behoof, and "subject always to the uses, controls, and disposal herein-after directed." It did not dispose of the fee. That was done by clause 12. The declaration as to vesting in clause 6 was negative merely and the other side had no right to construe it into a positive declaration. The directions to the trustees about advances, and especially the directions in clause 10 not to advance her share of the capital to any daughter who married without their consent and approbation, were meaningless if each child upon attaining majority or marrying obtained a vested interest in a share of the capital. It was clause 12 which must be looked to as regulating the succession. The clause must be held as extending down to the second word "assignees." It exhaustively dealt with all the three cases that might arise, viz.—(1) Death of children leaving issue (which had not occurred); (2) death of children without leaving issue (a) during the lifetime of the mother (which had not occurred) and (b) after the death of the mother (which had occurred). In the case which had occurred it was expressly provided that "my said trustees shall pay and deliver over the whole of my said estate . . . to my said nearest heirs, executors, or assignees." The other side and the Lord Ordinary only got over this provision by arbitrarily reading into the clause in two places after the words "failure [and failing] of all my children and their lawful issue" the words "before majority or marriage." The daughters had only a liferent. There had been no vesting of anything, for no advances had been made. Such advances could only have been made in case of marriages and the only married daughter had been married before her father's death. The ulterior destination to the "nearest heirs" as a class must therefore receive effect. That class was to be ascertained at the death of the last liferentrix—*Haldane's Trustees v. Murphy, &c.*, December 15, 1881, 9 R. 269; *Murray, &c. v. Gregory's Trustees*, January 21, 1887, 14 R. 368. Even if clause 6 conferred the fee there was divestiture by the terms of clause 12. *Lindsay's* case relied upon by the other side was not in point, but was in marked contrast. There the Court were anxious not to decide so as to infer repugnancy in the deed in question. Here there was no such danger.

Argued for respondents—The Lord Ordinary's interlocutor was right. Clause 6 was the ruling clause of the deed, and as all the daughters had attained majority and had died without leaving issue, it was the only clause that needed to be considered. All the subsequent clauses were framed to meet contingencies which had not arisen. Clause 12 dealt with the possibility of the trustees having made partial advances to children who had died leaving issue. It concluded at the words "until paid." The words which followed were general instructions to meet the possibility of there having been no vesting by reason of all the children having died before majority or marriage, and that in the two cases of having predeceased and of having survived their mother. This was a simple case of protected succession in the interests of grandchildren. Clause 6 plainly conferred a fee upon the children on their attaining majority or marrying subject to defeasance in certain circumstances. Controlling words such as those here did not reduce a fee to a liferent. Unless she had a vested interest the provisions in clause 10 restricting the rights of a daughter marrying with the trustee's consent to a liferent were unnecessary—*Gibson's Trustees v. Ross*, July 12, 1877, 4 R. 1038; *Smith v. Chambers' Trustees*, November 9, 1877, 5 R. 97, and April 15, 1878, 5 R. (H. of L.) 151; *Lindsay's Trustees v. Lindsay, &c.*, December 14, 1880, 8 R. 281; *Popham's Trustees v. Parker's Executors*, May 24, 1883, 10 R. 888; *Bradford v. Young*, July 19, 1884, 11 R. 1135; *Peacock's Trustees v. Peacock*, March 20, 1885, 12 R. 878.

At advising—

LORD JUSTICE-CLERK—The late Mr Alexander Falconar of Falconhall executed a trust-disposition and settlement in 1820, by which he left his whole estate to trustees. The trustees were to be four persons named in the deed, and his children who might survive him when each of them should attain the age of twenty-five years.

It was directed that on his youngest surviving child attaining twenty-one years of age the four named trustees were to cease to hold office unless the family should unanimously request them to continue to act. His estate of Falconhall was directed to be conveyed to his eldest son or his heirs, whom failing to his next son or his heirs, and so on, but he directed that if they all failed the whole heritable property was to be sold, and the proceeds to be "invested and divided among my daughters and others in manner hereinafter directed."

By the fifth purpose, after giving directions as to the class of investments in which his means should be placed, he directed that the investments should "form an accumulating fund or capital."

By the sixth purpose he directed that "the whole free amount and residue," and "all increase and accumulation," be held "for the equal use and behoof of" all his sons and daughters and the respective heirs of their bodies, and of the survivors of those dying without issue. The lawful issue of each child was to have collective right to its "parent's share," and it was declared that the shares "shall not become vested interests in my children respectively until their respective majorities or marriage."

By the seventh purpose the testator expressed

his strong desire that his children should live in family, unless in the case of marriage or the advancement of his sons in life, and provision was made for his widow maintaining herself and children in family.

By the eighth purpose power was given to the trustees to advance to any son one-half or the whole of "his share of the capital."

By the ninth purpose the trustees were to pay to any daughter who married with the approval of the family and the trustees, her equal share of the revenue during her life, excluding the husband's *ius mariti* and other rights, and her "share of the capital" was declared not to be "assignable either by law or by her act and deed in favour of her husband," but the trustees were empowered to remove the restriction as to the *ius mariti* one year after marriage, and to advance "any part as far as a moiety" of "her share of the capital" to her or her husband, and further to "enable" the daughter after five years of married life" to settle and destine her full share of the capital" upon herself and her husband, and the issue of the marriage. On the other hand, if the trustees do not approve of some such destination, her share was to be provided and secured to the issue of the marriage.

By the tenth purpose if any daughter married without the consent and approbation of the trustees, no payment of capital was to be made to her, but the trustees were to retain it in trust for her issue.

By the eleventh purpose the trustees were empowered to make special payments for minor children for their education and setting out in life, but these payments it was declared "shall not be imputed against them as any part of their shares of my means and estate."

Lastly, by the twelfth purpose, the lawful issue of children dying were to have share and share alike, "whatever part of their share of the capital" as shall "not have been advanced and paid" before their decease.

There follows a provision for the event, which did not occur, of the failure of all his children and their issue. Mr Falconar died survived by one married daughter, Mrs Craigie, who had no issue, and four unmarried daughters, Margaret, Caroline, Louisa, and Charlotte. None of these four ladies afterwards married. The five sisters and Mr Craigie mutually arranged what should be done with the estate of the father during their joint lives, and various deeds were granted which it is unnecessary to particularise. Mr Craigie, Caroline, Louisa, and Charlotte all died before 1873, and on 19th November 1873 Mrs Craigie and Margaret executed a trust-disposition and settlement by which the real raisers were appointed their trustees, and received a general conveyance of their means and estate for certain trust purposes. Certain codicils were afterwards added. The whole means and estate of these ladies were derived from the estate of their father Alexander Falconar.

The real raisers maintain that under the trust-disposition and settlement of Alexander Falconar Mrs Craigie and Margaret had a vested interest in the estate of their father, and were entitled to test upon it. The claimants, Mrs Irving Smith and others, maintain that as nearest of kin of Alexander Falconar they are entitled to the estate, his lawful children and their issue having failed.

The Lord Ordinary has found that the interests of children surviving Alexander Falconar vested in them by survivorship, and has ranked and preferred the real raisers to the fund *in medio*. I am of opinion that the interlocutor is right. The provisions of Alexander's deed, the material parts of which I have quoted, are, speaking generally, all framed with one object, to secure to his children and their issue shares of his means and estate, which is to be "divided" among them. What is provided for each is spoken of throughout as his or her "share of the capital of my means and estate," words in themselves exclusive of the idea of an intention to limit to a life tenant, and to exclude the power of disposal by *mortis causa* deed, which would be the effect of the contention of the claimants Mrs Irving Smith and others. The great object which the testator had before him throughout was that the members of his family should as far as possible in their future life act together, and by mutual advice and family concord contribute to the happiness and success of each member. And all the provisions which can be called restrictive are plainly not for the purpose of restricting the right of any child, but rather to protect it in certain events from evil consequences which might follow from others coming into the family by marriage, and obtaining powers over the child's share which might be detrimental to the best interests of the child or its issue. Now, the deed is framed upon the footing that it gives a vested interest to children in their shares, and the only restriction which is put upon vesting is that "the said share shall not become vested interests in my children until their respective majorities or marriages," that is, whichever event should first occur.

It is no doubt true that the trustees under the deed are to have power, in certain events, to settle a daughter's share on her children. But the existence of such a power does not deprive her of what has vested in her. Its virtue depends upon the event, in which alone defeasance of her right in what has vested in her is possible. The occurrence of that event may take away her right, but the contingency that the event may occur cannot effect it. There is no direction in the deed for the disposal of unmarried daughters' shares, or shares of daughters who may be married before the testator's death. In their case nothing can be found in the deed qualifying in any way those words in it, which are to the effect that their shares become vested interests in them at their marriage or majority. To them the directions of the deed to meet cases which may arise have no application. Their right is without any restriction.

This would appear to be the true reading of the will of the testator, and I see nothing in such a reading inconsistent with the principles of our law in regard to vesting, and should have been prepared so to decide upon the case itself. But I do not think that the question is an open one. There have been numerous cases which seem to bear out the view of the Lord Ordinary, and the decision in that of *Lindsay v. Lindsay's Trustees* in particular seems to be so directly in point as to constitute a binding authority.

It only remains to notice the contention of the claimants Mrs Irving Smith and others, based upon the last direction as to destination in the

deed. These claimants desire to read this last clause as forming part of the 12th clause, and to be read along with it. I cannot so read it. I hold that the 12th clause ends at the words "until paid," and that what follows is a new and separate clause altogether, framed to meet the case of the whole other and minor purposes of the deed having failed by there being no children or issue of children in whom the estate of the testator could vest after his death. In that event he gifts one-half of his whole property to his widow absolutely, and after her death all that he has is to go to his nearest heirs, executors, or assignees. But the failure which is the condition of this provision is the failure of "all my lawful children and their issue." What is failure in that connection? I take it to be failure before the time for the vesting in them of shares, and that is expressly declared to be the occurrence of majority or marriage. There has not been such failure here, and therefore the event on the occurrence of which alone this last clause was to operate not having happened, the clause itself does not come into operation.

On these grounds I would move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

Counsel for the Real Raisers (Respondents)—Cheyne—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for the Claimants (Reclaimers)—Balfour, Q.C.—Ure. Agents—Melville & Lindsay, W.S.

Wednesday, February 27.

## FIRST DIVISION.

[Sheriff of Inverness, Nairn, and Elgin.]

LORD MACDONALD *v.* CAMPBELL.

*Landlord and Tenant—Condition in Landlord's Favour—Tenant not to Sell or Retail Spirits upon the Premises without Consent—Revocation of Consent.*

A building lease contained a clause prohibiting the tenant, *inter alia*, from selling or retailing "spirits upon the premises without the express consent of the proprietor, or his factor for the time being," the proprietor, "or the factor for the time, being the sole judges of all such matters." The tenant erected buildings and carried on business as a general merchant. Thereafter, with the factor's consent, he obtained a grocer's licence to sell malt liquors on the premises. For the purposes of his whisky trade he erected at the end of his house a store-shed of the value of about £50, and he was allowed, without opposition on the part of the landlord, to obtain for seven years a renewal of his licence. In consequence of irregularities in the conduct of the spirit business the landlord sought to put in force the prohibition in the lease.

Held that the consent which had been

given was limited in its nature; that nothing had followed thereon which gave to that consent a permanent character; that it was revocable on cause shown; and that the evidence showed sufficient justification of its withdrawal.

*Opinion (per the Lord President and Lord Lee)* that the consent could not have been withdrawn capriciously, or from enmity, or within the year in which it was granted.

*Opinion (per Lord Adam)* that as, by the terms of his lease, the landlord, or his factor, was the sole judge, it was not essential, in withdrawing a consent, to assign a reason therefor.

The Right Honourable Ronald Archibald Lord Macdonald, Armadale, Isle of Skye, raised an action in the Sheriff Court of Inverness against Samuel Campbell, merchant, Broadford, Invernesshire, to have the defender interdicted from selling or retailing spirits in the shop, store, or other premises occupied by him at Broadford.

In the proof allowed by the Sheriff-Substitute the following facts were established—By building lease, dated 2nd October 1875 and 2nd March 1876, entered into between the pursuer and defender, the pursuer let to the defender, and his heirs and assignees, for ninety-nine years from and after Whitsunday 1875, a piece of ground at Broadford measuring 2436 square yards or thereby, with the dwelling-house erected or to be erected thereon. By the lease it was expressly provided and declared that the defender or his foresaids "shall not sell or retail spirits upon the premises without the express consent of the proprietor, or his factor for the time being, the said Lord Macdonald, or the heirs of entail in possession of the said lands and estate, or the factor for the time, being the sole judge of all such matters." In the premises erected on the ground the defender carried on business as a fish-curer, meal merchant, and general dealer. In September 1876 he applied for a grocer's licence, after receiving the consent of the then factor, Mr Macdonald of Tormore, who, at the request of the defender, addressed the following circular letter to the licensing Justices in support of the application:—"My dear Sir,—As it is likely you will be one of the acting J.P.'s the day the Court is held at Portree for considering the applications for licences, I will be obliged if you will support the application of Mr Samuel Campbell, merchant, Broadford, for a grocer's licence to sell malt liquors, the same being approved by the proprietor." The factor deponed that he had no doubt that the consent of Lord Macdonald had been obtained before he wrote this letter. The defender succeeded in obtaining a grocer's licence. For the purposes of his whisky business he erected at the end of his house a shed of stone and lime of the value of about £50. In January 1883 the pursuer's factor wrote to the defender in the following terms:—"Sir,—I beg leave to bring under your notice that you are at present infringing upon the terms of your lease by selling whisky in direct contravention thereof, on the premises occupied by you at Broadford. It will be for Lord Macdonald to consider whether your selling whisky in this way is or is not for the benefit of his tenants and the people of the district generally. In the meantime I have to inform you that in my opinion, as