appointment, nor anything but the application of the Act itself. She may be entitled to renounce her office. She may be placed in circumstances which make it not desirable that she should act as guardian, but by statute she is the guardian of her pupil children.

A minute has been lodged by Mrs Willison in the present application in which she says that she does not desire the office of guardian to her pupil children conferred on her by the Act of 1886. If by that minute she means to renounce the office of guardian, then it may be open to the Court to appoint a factor *loco tutoris* in her place, but as to appointing a person who is by law entitled to be the guardian of her children to the office of factor *loco tutoris*—that is, factor in the place of the guardian—the law cannot do that. The office is already hers, and if she desires to act, let her proceed to act; if she does not desire to act, she can apply to have some one else appointed in her place. There is no other alternative open.

I think, as regards the part of the petition which prays for the appointment of Mrs Willison as *curator bonis* to her minor children, that that is not reported to us by the Lord Ordinary.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court remitted to the Lord Ordinary to refuse the petition in so far as it prayed for the appointment of Mrs Willison as factor *loco tutoris* to her pupil children: *Quoad ultra* remitted to his Lordship to proceed.

Counsel for the Petitioner — Kemp. Agents—Macpherson & Mackay, W.S.

Friday, December 12.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

FORBES AND OTHERS *v.* MITCHELL AND ANOTHER (M'CONDACH'S TRUSTEES).

Succession—Vesting—Conveyance to Trustees—Interposed Liferent—Destination-Over.

A testator directed his trustees to invest a share of his estate, and pay the interest to his daughter in liferent and the principal to her major children as soon after her death as they could conveniently uplift and divide the same. The issue of children dying before receiving payment of their shares were to represent their parents, and the shares of children dying without issue were made divisible among their brothers and sisters.

The liferentrix renounced her liferent, and her major children required the trustees to denude of the trust in their favour. *Held* that their shares did not vest until after their mother's death.

The late Harry M'Condach, by last will and testament, dated 23rd April 1859, left his whole estate to trustees, whom he directed to divide the residue of his estate into three equal parts, to invest one of these in their names, and to pay the interest thereof to his daughter Mrs Forbes, "for her aliment and support." The will then proceeded—"Declaring that if all my said daughter's said children shall have attained majority before my said daughter's death, then that the said principal of said third part, or the balance thereof, shall be uplifted and divided among the said children as aforesaid as soon after my said daughter's death as my trustees or their aforesaids can conveniently uplift and divide the same: Declaring further that if any of my daughter's said children shall die before receiving payment of his or her share respectively, leaving lawful children, then that such children equally between them shall be entitled to their deceased parent's share. . . . But declaring that if any of my said sister's children shall die before receiving his or her share, leaving no lawful children, then that the share of such child or children so dying shall be equally divisible among such child's or children's surviving brothers and sisters and the lawful children as aforesaid of any of them that may have predeceased." The balance of the third part amounted to about £148, and the interest had been regularly paid to Mrs Forbes. In 1890 all the five children of Mrs Forbes, and who were all major and *sui juris*, with the consent and concurrence of their mother brought an action of declarator in the Sheriff Court at Aberdeen against the trustees, David Mitchell and Stodart James Mitchell, advocates in Aberdeen, to have it declared that the pursuers had full right and title to the sum of £148, and to have them ordained to pay it over to the pursuers.

The pursuers averred—"The pursuers' said father and mother are, from old age and infirmity, quite incapable of earning their own livelihood. Their said mother is in ill-health, confined to bed, and requiring medical attendance, and being in straitened circumstances, the income derivable from the balance of residue in defenders' hands is quite inadequate for her support, and the pursuers have been for years back contributing towards her maintenance. The said Mrs Isabella M'Condach or Forbes is anxious to accelerate or anticipate the period of the division of the said balance of residue liferented by her, and with this view has executed in favour of the pursuers a discharge of her right of liferent."

The pursuers pleaded—"(1) The fee of the sum sued for having vested in the pursuers, and their mother having renounced and discharged her right of liferent in the same, the defenders are bound to denude themselves of the trust, and to make payment as prayed for, with costs."

The defenders pleaded—"(1) The right to the said share of said residue liferented by

the said Mrs Forbes as aforesaid does not vest under the said settlement till the date of her death. (3) The pursuers having acquired no vested right to said share have no title to discharge the defenders of the same. Or alternatively, vesting is suspended altogether until actual payment to each beneficiary, at least so far as concerns Mrs Forbes' own children. (4) The provisions in said settlement in favour of the said Mrs Forbes being alimentary, she cannot legally execute a discharge thereof in favour of the pursuers, or renounce her right under said settlement to the same."

Upon 24th July 1890 the Sheriff-Substitute (GRIERSON) sustained the defenders' first plea-in-law, and assoilzied the defenders.

"*Note.*— . . . Mrs Forbes is seventy-three years of age, and bedridden. Her husband is seventy-five. Her children were all born before the testator's death in 1859, and it is argued that as the fee has vested in the pursuers, and as their mother has renounced her right of liferent, the defenders are bound to denude themselves of the trust. I am not of that opinion, for until the period of payment (*i.e.*, the death of Mrs Forbes) arrives it is impossible to say who are the parties entitled to share in the fund. Accordingly, in my view the shares do not vest until after Mrs Forbes' death. See *Young* v. *Robertson*, February 14, 1862, 4 Macph. 314; *M'Alpine, &c.*, March 20, 1883, 10 R. 837; *Marshall* v. *King*, October 30, 1888, 16 R. 40. I think this point is so clear that it is unnecessary to consider whether the provision to Mrs Forbes is alimentary, and if so, whether it is in her power to discharge it."

The pursuers appealed, and argued—They had a vested right, and could give a valid discharge to the trustees. The period of vesting was not postponed merely because the period of payment was deferred. If vesting did not take place *a morte testatoris*, then it did take place when the youngest of the grandchildren attained the age of twenty-one—*M'Alpine, &c.*, March 20, 1883, 10 R. 837. The survivorship clause did not prevent vesting until the period of payment arrived—*Marshall* v. *King*, October 30, 1888, 16 R. 40; *Hay's Trustee* v. *Hay*, June 19, 1890, 17 R. 961. The trust appointed by the deed was plainly meant only to pay the liferent, but as the liferentrix was willing to renounce her liferent, and all the parties interested were agreed that the trust-estate should be handed over now, the trust could not be an obstacle. With regard to the question of the renunciation of the liferent, and the case of *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786, it was enough that in this settlement there was no words stating that the provision was to be alimentary. There was one special interest to be kept up, and that interest could be effectually provided for in some other way. All the parties interested agreed.

Argued for the respondents—There was only a limited power given to the trustees, and the testator intended to protect his daughter from her own acts; that was enough to make the provision alimentary—M'Laren on Wills, &c., 55. It was quite decided that an alimentary provision could not be renounced — *White, &c., supra.* Vesting was postponed until the death of the liferenter — *Muirhead* v. *Muirhead*, May 12, 1890, 27 S.L.R. 917; *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. Those entitled to succeed upon the death of the liferentrix could not be determined, because the destination was different in the event of any of her children predeceasing her with or without issue.

At advising—

LORD TRAYNER—This action is brought by the pursuers for the purpose of recovering from the trustees of the late Mr Harry M'Condach a sum of money which he had directed by his will should be liferented by his daughter Mrs Forbes, and after her death should be divided among the pursuers, who are Mrs Forbes' children. The only practical difficulty in the way of handing this sum over to the pursuers was the liferent of Mrs Forbes, but she has agreed to renounce her liferent, so that that difficulty is removed. The trustees, however, object to handing over the sum in their hands to the pursuers, on the ground that they are not entitled to do so, and it is further pleaded for them that the pursuers have no vested right in the trust-estate, and that therefore they cannot give a valid discharge.

I confess my sympathy is with the pursuers, and I should have been glad to accede to their demand if we could legally do so, but I am of opinion that they could not give a valid discharge of the debt to the trustees, and that therefore they are not entitled to have this sum under the trustees' care handed over to them.

The pursuers' title depends entirely upon the late Mr M'Condach's will, and if we turn to that deed we find that he declares as to one-third of his estate at least it shall be invested and held by the trustees named in the deed. These trustees were to pay to Mrs Forbes the interest during her lifetime of that third part of his estate. Then the will provides that after Mrs Forbes' death the trustees shall uplift and divide the said estate among Mrs Forbes' children if they have all attained majority at the time of her death.

On the part of the trustees there were two objections stated why they should not hand over the principal of the sum in their hands to the pursuers. In the first place, it was said that this was an alimentary provision, and that therefore Mrs Forbes cannot legally renounce her right to the same; and the second objection is, that the pursuers could acquire no vested right in the fee of the estate until after Mrs Forbes' death. I am not concerned to deal with the first question whether this provision is alimentary or not, because I am distinctly of opinion that no right to the fee of this estate can vest in the pursuers until the death of Mrs Forbes. The terms of the will are conclusive upon that point when

we apply the principles stated in the case *Bryson's Trustees* v. *Clark*, 8 R. 142, to the circumstances of this case. The only right which is given to the pursuers under this will is a right to an equal division of the third part of the trust-estate after the death of Mrs Forbes. I think we must hold, after what was said by the Lord President in that case, that no right can vest in the pursuers until the condition has been fulfilled. I am therefore of opinion that we should refuse this appeal, and adhere to the Sheriff-Substitute's interlocutor.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

The Court adhered to the Sheriff-Substitute's interlocutor.

Counsel for the Appellants — Salvesen. Agent—John Rhind, S.S.C.

Counsel for the Respondents—M'Lennan. Agents—Auld & Macdonald, W.S.

Saturday, December 13.

FIRST DIVISION.

HUTCHISON *v.* HUTCHISON.

Parent and Child—Custody.

Terms of order pronounced by the Court on the petition of a father from whose custody a child had been abducted by the mother, who was living separate from him.

A woman who was living separate from her husband abducted a child from his custody. The father then presented a petition praying the Court to find him entitled to the custody of the child, and to ordain the mother to restore the child to him. The mother lodged answers, in which she asked the Court to give her the custody of the child, or at anyrate to give her full and complete access to it. The child having been restored to its father, the Court *held* that the sole object of the petition had been fulfilled, and declined to consider the questions of custody or access.

This was a petition at the instance of John Paterson Hutchison, photographer in Penicuik.

The petitioner stated that he married Mrs Agnes Stevenson or Hutchison in 1883; that two children—a daughter and a son—had been born of the marriage, the daughter being six and the son about three years of age at the date of the petition; that his wife left him in January 1888, and had since lived separate from him; that she left her two children at the same time, and that they had since then resided with and been in the custody of the petitioner; that on 12th November the daughter, while on her way to school, which was at a little distance from her father's house, was abducted by a man and two women, and that from inquiries made the petitioner had reason to believe that the child had been abducted by or on the instructions of his wife, and had been taken to Glasgow, and that his wife intended to take her outwith the jurisdiction of the Court.

He therefore prayed the Court to appoint the petition to be intimated on the walls and in the minute-books, and to be served upon his wife Mrs Agnes Hutchison, her sister Mrs Gow, and her brothers William and James Stevenson, and to ordain them to lodge answers, if so advised, within four days; "and upon resuming consideration hereof, with or without answers, to find that the petitioner is entitled to the custody of his child, the said Margaret Forrest Hutchison, and to decern and ordain the said Agnes Forrest Stevenson or Hutchison, or Anne Stevenson or Gow, or William Stevenson or James Stevenson, or whatsoever person shall be found to be withholding said child from the custody of the petitioner, forthwith, and at such time and place as may be fixed by your Lordships, to deliver up the said child to the petitioner, or any other person having his authority; and meanwhile to grant warrant to messengers-at-arms and other officers of the law to take into their custody the person of the child, the said Margaret Forrest Hutchison, in the petition mentioned, wherever she may be found, and deliver her into the custody of the petitioner, and to authorise and require all judges ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of such warrant, and to recommend to all magistrates elsewhere to give their aid and concurrence in carrying such warrant into effect; and further, to prohibit and interdict the said Agnes Forrest Stevenson or Hutchison, or anyone acting on her behalf, and all others, from withdrawing or attempting to withdraw the said child Margaret Forrest Hutchison from Scotland or from the jurisdiction of your Lordships' Court; and to do further or otherwise in the premises as to your Lordships shall seem proper."

The Court on 15th November ordered intimation and service as craved, and answers in eight days, and granted warrant "to messengers-at-arms and other officers of the law to take into their custody the person of the child Margaret Forrest Hutchison, daughter of the said John Paterson Hutchison, and of the said Agnes Forrest Stevenson or Hutchison, wherever she may be found, and deliver her into the custody of the said John Paterson Hutchison; and authorise and require all judges ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of this warrant, and recommend to all magistrates elsewhere to give their aid and concurrence in carrying the same into effect: Further, prohibit and interdict the said Agnes Forrest Stevenson or Hutchison, or anyone acting on her behalf, and all others, from withdrawing or attempting to withdraw the said Margaret Forrest Hutchison from Scotland."