as a ground for allowing the applicant to obtain the benefit of the poor's roll, that being a marine engineer in the habit of making long foreign voyages, he would be unable to earn his livelihood, and at the same time remain continuously at home; while, on the other hand, his personal superintendence of this litigation is said to be most desirable, if not essential, for the protection of his interests. With this view I have no sympathy, and were his claim based solely on the poverty caused by his remaining at home in pursuit of his litigation, I should be for refusing the application. But looking to what the reporters have found to be the amount of his earnings when he is at work, I think he may fairly be held to be within the category of persons entitled to the benefit of the poor's roll. I am therefore for admitting him.

LORD YOUNG and LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I have some doubts about this case, which I do not think is ruled by that of *Stevens*, for there is this essential difference, that the applicant here might have brought his action in the Sheriff Court, while in *Stevens'* case the action was one for the reduction of an award of aliment, which could only be brought in the Court of Session.

The Court granted the application.

Counsel for the Applicant—Penney. Agent—J. A. Trevelyan Sturrock, S.S.C.

Counsel for Respondents—Ure. Agents—Maconochie & Hare, W.S.

Friday, May 22.

FIRST DIVISION.

LINDSAY v. LINDSAY'S TRUSTEES.

Succession—Vesting—Conveyance to be on Death of Liferentrix—Clause of Survivorship.

A testator conveyed his heritable property to trustees, directing them to pay the annual proceeds thereof to his widow in liferent, and so soon as convenient after her death to convey to his two sons certain portions of the heritable property, equally, share and share alike—"Declaring that if either of my said sons shall predecease my said spouse without lawful issue, then my said trustees shall denude and convey the said several subjects first above described and disponed to my surviving son, but should such predeceasing son leave lawful issue, then such issue shall come in their father's room and stead." Both sons survived the testator. One died without issue in 1864, and the other also without issue in 1873. The widow died in 1877. *Held* that the object of the survivorship clause was served on the death of the first deceasing son, and that the fee of the heritage vested in the other son at that date.

By trust-disposition and settlement dated 26th April 1860, and relative codicil dated 4th June 1860, John Lindsay, plumber in Perth, conveyed to trustees his whole estate, heritable and moveable for, *inter alia*, the following purposes:—(*First*) for payment of his just and lawful debts; (*Second* and *Third*) for payment to his wife Mrs Mary Campbell or Lindsay, in the event of her surviving him, of the free annual proceeds of his heritable property, and for delivery to her of his household furniture and silver plate as her own absolute property, and also for payment to her of the sum of £500 contained in a policy of assurance on his life with the Standard Life Assurance Company, together with any sum that might be in bank at his death above what was necessary for the expenses of the trust. The truster further directed his trustees to pay over to Mary Anne Lindsay, his daughter, in the event of her surviving him, the whole amount of accumulated bonuses, dividends, or other profits which had accrued or might accrue on the said policy, under deduction of two legacies of £50 each, payable to his grandchildren, the son and daughter of his eldest son James Lindsay, plumber, Aberfeldy."

The fourth and fifth purposes of the settlement were as follows:—"In the *fourth* place, I direct and appoint my said trustees, so soon as convenient after the death of my said spouse, to denude, convey, and make over to my two sons, George and John, the whole heritable properties first before conveyed and disponed equally, and share and share alike, and that in due and legal form, so as that they may be duly and validly invested in the fee of the said several heritable subjects first before disponed and described; declaring that if either of my said sons shall predecease my said spouse without lawful issue, then my said trustees shall denude and convey the said several subjects first above described and disponed to my surviving son, but should such predeceasing son leave lawful issue, then such issue shall come in their father's room and stead, and my said trustees shall denude and convey the father's share to such issue, and if more than one child, then to all of my said predeceasing son's lawful children equally, and share and share alike. In the *fifth* place, in the event of my said daughter Mary Anne surviving my said spouse, whether married or unmarried, I hereby direct and appoint my said trustees to denude, convey, and make over to her the subjects second before disponed and described as her own sole and absolute property, and that so soon as my said trustees shall find it convenient; declaring always that in the event of my said daughter being married at the time of my said trustees so denuding in her favour, and having lawful issue, then my said trustees shall so denude, convey, and make over the said subjects to her in liferent, and to her children equally among them, share and share alike in fee."

The testator died on 31st July 1860, having been twice married. By his first wife he had one child, James Lindsay, plumber in Aberfeldy, who predeceased the testator, but was survived by two children, William Lindsay, who died after his grandfather, unmarried and intestate, and Mrs Mary Lindsay or Sinclair. By his second wife Mrs Mary Campbell or Lindsay (who survived him) he had two sons, George and John, who were mentioned in the fourth purpose above quoted, and one daughter, Mary Anne Lindsay (mentioned in the 5th purpose), who all survived him.

George Lindsay died on 21st April 1864, and John Lindsay (*secundus*) on 26th January 1873, both intestate and without issue. The testator's widow died in 1877.

This was a Special Case, in which the testator's trustees were the parties of the first part, Miss Mary Anne Lindsay was the party of the second part, and Mrs Mary Lindsay or Sinclair was the party of the third part. The party of the second part maintained that the right to the heritable subjects referred to in the fourth purpose or otherwise, and at least the right to the one-half thereof provisionally destined to George Lindsay, vested in her brother John Lindsay, and that she was entitled to a conveyance thereof as his heir. On the other hand, the party of the third part maintained that Mrs Mary Lindsay or Sinclair was entitled to the said subjects as heir of her grandfather, the testator, or at least that she was entitled to one-half thereof.

The following questions were submitted for the opinion of the Court:—"Whether, on a sound construction of the said trust-disposition and settlement, the heritable subjects referred to in the fourth purpose thereof, or otherwise one-half thereof *pro indiviso*, vested in the said John Lindsay (*secundus*), and now belong to the party of the second part? Whether the said subjects or otherwise one-half thereof *pro indiviso* fall and belong to the party of the third part?"

Argued for the first and second parties—(1) The clause of survivorship here applied to the death of one of the brothers, and therefore the same argument applied as in the case of *Macalpine, &c.*, March 20, 1883, 10 R. 837, Lord Pres. at p. 844; *Snell's Trs.* v. *Morrison*, March 20, 1877, 4 R. 709; *Ross' Trs.* Dec. 18, 1884, 12 R. 378. The case was distinguishable from *Bryson* v. *Clark*, cited *infra*. (2) It was impossible to hold that John could get his brother's share, although he could not get his own.

Argued for third party—(1) This case resembled that of *Bryson's Trs.* v. *Clark*, Nov. 26, 1880, 8 R. 142; *Boyle* v. *Lord Glasgow*, May 14, 1858, 20 D. 925; *Howat's Trs.* v. *Howat*, Dec. 17, 1869, 8 Macph. 337; *Stodart's Trs.*, *&c.*, March 5, 1870, 8 Macph. 667. (2) John Lindsay might be held to have succeeded to his brother's one-half.

At advising—

Lord President—The testator here conveyed to trustees his whole estate, heritable and moveable, for certain purposes which are specified. As regards the first, second, and third of these purposes there is nothing remarkable; there is the usual provision for payment of debts, and a provision for the payment to the wife of the free annual proceeds of the heritable property, for delivery to her of the household furniture, &c., and also for payment to her of the sum of £500 contained in a policy of insurance, and then follow other provisions which it is not necessary for me to mention in detail.

The contention between the parties arises on the fourth purpose of the trust, which is expressed thus—"In the fourth place, I direct and appoint my said trustees, so soon as convenient after the death of my said spouse, to denude, convey, and make over to my two sons, George and John, the whole heritable properties first before conveyed and disponed, equally, and share and share alike, and that in due and legal form, so as that they may be duly and validly invested in the fee of the said several heritable subjects first before disponed and described; declaring that if either of my said sons shall predecease my said spouse without lawful issue, then my said trustees shall denude and convey the said several subjects first above described and disponed to my surviving son; but should such predeceasing son leave lawful issue, then such issue shall come in their father's room and stead, and my said trustees shall denude and convey the father's share to such issue, and if more than one child, then to all of my said predeceasing son's lawful children equally, and share and share alike." Now, but for the survivorship clause the provision would be quite simply construed. Indeed it would just be the ordinary case of a gift of heritage in liferent, with a direction to the trustees to convey in fee to certain persons on the death of the liferentrix. If there was nothing more than the interposed liferent there would certainly be vesting in the fiars *a morte testatoris*, but there is a peculiarity here from the terms of the survivorship clause. The destination is to the two sons of the second marriage, equally between them, and to the issue of either of them predeceasing. But the event which has occurred completely satisfies the right arising on the clause of survivorship, because one of the sons has died without leaving issue, and as a necessary consequence of that the estate which is directed to be conveyed to him, belongs to the other son and to his issue if he has any. In this state of matters the survivorship clause has no longer any effect, and we must deal with the case as if there were no such clause.

The trustees were then, on the decease of the widow, to convey to the surviving son, or if he died before the widow, then to his lawful issue. Is there anything in that state of matters to prevent the fee from vesting? There is no destination-over; it is not made a condition that the son shall survive the widow; there is merely a direction to the trustees to convey when the liferent lapses, and that is not a reason for postponing the vesting. It appears to me that such is the plain construction of the clause as applicable to existing circumstances.

I think this construction receives very great support from the fifth purpose of the trust. That purpose contains a provision in favour of the testator's daughter, and stands in direct contrast to the fourth purpose, because it is made a condition of his daughter Mary Anne taking that she shall survive the widow. It is only "in the event of" her surviving that she can take, and that is sufficient to show—(1) That Mary Anne's right could not vest until the condition was purified by her survivance; and (2) that when the testator intended to make survivance a condition of vesting he knew quite well how to express himself. It is also very material to observe that the reason for the distinction is very plain. It depends upon circumstances whether Mary Anne is ever to get a fee or only a liferent. If, when the widow died, Mary Anne were married, then she was to get not a fee, but a liferent, and therefore it could not be ascertained what estate she is to take until her survivance of the widow.

I am therefore clearly of opinion that the second party is entitled to the heritable property as fiar, she being the heir-at-law of John Lindsay, her brother, in whom the whole came to be vested in fee.

Lord Mure concurred.

Lord Shand—I am of the same opinion as your Lordships.

It appears to me that the question between the parties is solved by the circumstance that the provision with regard to survivorship was brought to an end by the death of the first of the sons, who died on 21st April 1864. By the terms of the trust-deed the heritable property is given in liferent to the widow, and then practically in fee to the two sons of the truster, subject to the condition that if either of them should predecease the widow without leaving issue, then the other should take. It seems to me that the only object the truster had in view, in inserting the survivorship clause was completely served on the death of the first son, and that it cannot be said the vesting was to be postponed until the death of the widow.

The clause making provision for the sons does not contain the words "in the event of" which, as in the daughter's case, would have made the benefit conditional. Nor was the survivorship clause intended for the protection of a series of conditional institutes, who would have taken according to their survivance at the death of the liferentrix. It may no doubt be said that the vesting might not have been absolute so as to give the property to the surviving son if he left issue. The clause is so framed as to leave that question open, and it might have been that if the surviving son had left issue, there would have been defeasance, as there was in the cases of *Snell's Trustees*, 4 R. 709; and *Fraser's Trustees*, Nov. 27, 1883, 11 R. 196; but that does not affect the present question. On these grounds I agree in thinking that the second party should succeed.

Lord Adam concurred.

The Court pronounced this interlocutor—

"Find and declare that the heritable subject contained in the fourth purpose of the testator's settlement was vested in his son John Lindsay in fee after the decease of his brother George, and that the same now belongs to the second party as heir-at-law of her brother, the said John Lindsay, and decern."

Counsel for First and Second Parties—Pearson—Wallace. Agent—Alex. J. Napier, W.S.

Counsel for the Third Party—Rhind. Agent—Robert Menzies, S.S.C.

Friday, May 22.

SECOND DIVISION.

[Sheriff of the Lothians.

BELL *v.* ANDREWS.

Process—Appeal—Court of Session (Scotland) Act 1868 (31 *&* 32 *Vict. c.* 100), *sec.* 69—*Party "Appearing" in an Appeal.*

In a process of sequestration for rent by a landlord against an urban tenant in the Sheriff Court, a claim made by the tenant's minor daughter to have an article removed from the tenant's house by the landlord under the Sheriff's warrant excluded from the sequestration, and restored to her, was disallowed by the Sheriff, who also repelled the tenant's defences to the petition for sequestration. Against this interlocutor the tenant, as defender, noted an appeal to the Court of Session in the form given in section 66 of the Court of Session Act. No appeal was noted for the claimant. At the calling of the case on the Short Roll in the Court of Session, counsel (who also appeared for the defender) appeared and argued the case for the claimant, and she was represented by a separate agent. *Held* that the claimant had "appeared" in the sense of section 69 of the Court of Session Act, and was entitled to the benefit of the defender's appeal.

Landlord and Tenant—Hypothec—Invecta et illata—*Piano the Property of Tenant's Daughter.*

Held that a piano the property of the minor daughter of an urban tenant, and which was kept by her in her father's house, where she herself resided, was not subject to the landlord's hypothec for rent.

James Andrews was tenant of a flat which he used as a dwelling-house at No. 7 North St David Street, Edinburgh, and of which the proprietor was Henry Montgomerie Bell, residing at Oundle, from Whitsunday 1879 to Whitsunday 1884, at a yearly rent of £48. At the last mentioned term Andrews left the house, taking with him his household furniture and other effects to another house at 4 Marchmont Street. He left unpaid a balance of rent of £33.

Thereafter Henry Montgomerie Bell and his mandatory John Montgomerie Bell, Writer to the Signet, presented a petition to the Sheriff of the Lothians against Andrews for sequestration of the whole furniture, goods, gear, and other effects which were or might have been within the dwelling-house at No. 7 North St David Street, and for warrant to carry them back to said dwelling-house or other place of safe custody, and for warrant to sell so much of the sequestrated effects as would satisfy the unpaid balance of rent of £33.

Having obtained a warrant accordingly, the pursuer instructed a Sheriff-officer to proceed to the defender's house at 4 Marchmont Street for the purpose of removing his furniture, which was accordingly done by the officer. The furniture removed was placed in the premises of an auctioneer. Among the effects so sequestrated and removed was a pianoforte.

Andrews lodged answers to the petition for sequestration. In these he averred that John