LORD ADAM—[*After narrating the facts as above, his Lordship proceeded*]—With reference to that part of the fund brought into settlement by Mrs Cuming, the trustees are directed to pay the income of it to the spouses and to the survivor, and after the death of the survivor to pay over the trust-estate to the child or children of the marriage in such shares or proportions, if more than one child, as may be appointed by the spouses or the survivor of them by any writing under their hand, and failing such writing to pay the same to such children equally, and to the issue of such children as may have predeceased, such issue having only the share to which their parents would have been entitled had they been in life, and there is a gift-over, failing children, to Mrs Cuming, her heirs and assignees.

It appears to me that the objects of the power of appointment here specified are the children alive at the period of payment, that is, the death of the longest liver of the spouses, and the issue of such of the children as may have predeceased that period. Until that period shall arrive it is impossible to say who will be entitled to take, or among whom the appointment would have to be made. For example, neither of the daughters, the appointees under the present deed of appointment, may be alive and entitled to share at that period, and the deed can confer no present right upon them. I therefore agree with the Lord Ordinary that this portion of the fund must remain under the administration of the trustee.

With reference to the remaining portion of the fund *in medio*, viz., the proceeds of the policy on Mr Cuming's life, Mr Cuming bound himself by the contract to effect a policy on his life for the sum of £500, which, and all sums of money derived therefrom, he assigned to the trustees in security, and for payment *pro tanto* to Mrs Cuming, in the first place, of the provisions in her favour, which were an annuity of £40 per annum, and certain other provisions; and in the second place, in security and for payment of the provisions in favour of the child or children of the marriage, and he declared that the sums when received by the trustees should be managed by them, under the like declarations as regarded the sums conveyed to them by Mrs Cuming, and then he provides that the foresaid sum of £500 and the surplus, if any, to be received in virtue of the foresaid policy, in so far as the same may not be applied in payment of the provisions to Mrs Cuming, were to be divided among the children in such proportions as the spouses or the survivor might appoint, and failing such appointment, equally among the children and the issue of such of them as may have predeceased.

We are not informed whether the whole of the proceeds of the policy will be required to satisfy the provisions in favour of Mrs Cuming, or whether there will be any surplus over for division as directed by Mr Cuming. But however that may be, it seems sufficiently clear that this part of the fund must in the meantime remain under the management of the trustee, and I agree with the Lord Ordinary that his claim to this effect must be sustained.

I think it right to notice that the Lord Ordinary has expressed an opinion that a right to the proceeds of the policy or the surplus, if any, will not vest till the death of Mrs Cuming. It does not appear to me to be necessary to decide that question at present, as, for anything we know, there may never be any surplus for division, but I am not to be held as concurring in his Lordship's opinion on this point.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer, Real Raiser and Claimant (The Trustee)—W. Campbell—A. Grainger Stewart. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Claimant George Olden—Dundas—W. E. Mackintosh. Agent—P. Morison, S.S.C.

Counsel for the Claimants Mrs Cuming and Daughters—H. Johnston—T. B. Morison. Agent—P. Morison, S.S.C.

Saturday, November 14.

FIRST DIVISION.

FAIRGRIEVE AND OTHERS (STIRLING'S TRUSTEES) *v.* STIRLING AND OTHERS.

Succession—Clause of Survivorship—Conditional Institution—Period to which Condition of Survivorship Referable.

A testator, after providing an annuity to his widow, directed his trustees to divide his estate as follows:—"My son William and my daughter Annie, and any children that may be born of my present marriage, to have the rest of my means and estates equally amongst them, their respective shares thereof being payable on their respectively attaining majority, but subject always to the said annuity of my said wife, in regard to which I give my trustees full powers to make all necessary arrangements in the event of her surviving all or any of the periods of majority of my said children, born or to be born; and I direct that on the death of my said wife . . . my trustees shall divide the capital yielding the said annuity equally amongst my said children." There followed a declaration that in case of any child dying without leaving lawful issue before his share became "payable," his share was to accresce to the survivors of the family of children; and that if the child so dying should have left lawful issue, such issue should be entitled to the parent's share.

The testator was survived by his wife, and by William and Annie, of whom both attained majority, but William predeceased the annuitant, leaving a widow and two children.

In a question between William's children and parties to whom he had assigned for value his share under his father's settlement, *held* that the conditional institution of survivors lapsed on William's attaining majority, and that his share was consequently carried by the assignation.

By trust-disposition and settlement and relative codicil John Stirling conveyed his whole estate to trustees, directing them to pay to his wife, if she survived him, an annuity of £160, to be forfeited in the event of her re-marriage.

By the third purpose he directed his trustees to divide his whole means and estate as follows:—"My son John to have the liferent of one-fourth thereof for his liferent use allenarly, and my son William, and my said daughter Annie, and any children that may be born of my present marriage, to have the rest of my means and estates equally amongst them, their respective shares thereof being payable on their respectively attaining majority, but subject always to the said annuity of my said wife, in regard to which I give my trustees full power to make all necessary arrangements in the event of her surviving all or any of the periods of majority of my said children, born or to be born; and I direct that on the death of my said wife, or on her forfeiture of the said annuity as above expressed, my trustees shall divide the capital yielding the said annuity equally amongst my said children, William and Annie, and any children that may be born of my present marriage: And further, I direct that on the death of my said son John the share of my means and estate liferented by him shall in like manner belong to and be equally divided amongst my said whole children born or to be born: Declaring hereby that in case any of my said children shall die without leaving lawful issue before his, her, or their shares respectively become payable, then such share or shares shall accresce to the survivor or survivors and be equally divided amongst them if more than one, in the same manner as his, her, or their original share or shares are hereby directed to become payable: Providing, nevertheless, that in case the child or children so dying shall have left lawful issue, such issue shall be entitled to the share or shares, both original and accrescing, which their deceased parent would have been entitled to if alive."

The testator died in 1878, survived by his wife, by his son John (who died in 1892), by his son William, and by his daughter Annie. William attained majority in 1882, Annie in 1887. William, who had received payment of no part of his share from the trustees, died intestate in 1895, survived by a wife and two pupil children.

In 1888, in consideration of a loan of £300, William assigned to the testator's widow his whole interest under the settlement, and at subsequent dates he granted further assignations of his said interest in favour of the same person and of another lender.

The trust-estate consisted mainly of heritage yielding a net revenue of £127 a-year.

This special case was presented to determine the respective rights of William's children and of William's assignees in his share of his father's estate.

The children maintained that no part of William's share vested in him, or, that if any vesting took place, it was subject to defeasance in the event, which had happened, of children coming into existence, and that the share had vested in them.

The assignees maintained that the share vested in William *a morte testatoris* absolutely, or subject to defeasance only on the contingency, which did not arise, of his dying before attaining majority leaving issue. Alternatively they maintained that vesting must be held to have taken place on William's attaining majority.

The following questions of law were stated for the opinion of the Court:—"(1) Did the share of residue destined to the said William Stirling vest in him *a morte testatoris?* or (2) Did it vest in him on attaining his majority? or (3) Was vesting postponed till the death of the widow Mrs Margaret Matthewson or Stirling? or (4) Is the said share vested in the children of the said William Stirling?"

Argued for the children of William Stirling—There had been no vesting in William. The testator's intention plainly was that vesting should not take place until payment was actually made. That the word "payable" must be taken in this sense was plain from the direction to make all necessary arrangements for the annuity, and upon its termination to divide the capital. Vesting, in short, was postponed till the death of the annuitant, and to that period the clause of survivorship must be referred—*Howat's Trustees* v. *Howat*, December 17, 1869, 8 Macph. 337; *Macdougall* v. *Macfarlane's Trustees*, May 16, 1890, 17 R. 761.

Argued for the assignees—Vesting took place in the children of the testator either at his death or at latest on their attaining majority. It was a well-settled principle that the mere burdening of a fee with a liferent would not postpone the vesting of the fee—*Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709; M'Laren on Wills, 652.

At advising—

LORD M'LAREN—This special case raises a question as to the right of succession of children to their father John Stirling under his will.

The testator provided for his wife (who survived him) by giving her an annuity of £50, increased by a codicil to £100, and directed the trustees of his will to give to his son John a liferent of one-fourth of the residue of his estate. The residue was to be divided amongst the other children of his present marriage equally amongst them, "their respective shares thereof being payable on their respectively attain-

ing majority, but subject always to the said annuity to my wife, in regard to which (he continues) I give my trustees full power to make all necessary arrangements in the event of her surviving all or any of the periods of majority of my said children, born or to be born." One of the sons, William, died intestate on 1st August 1895 survived by his mother, his wife, and two children, having meantime assigned his interest in the trust-estate for value. The question is, whether William's interest in his father's trust-estate was vested so as to pass to his assignees. If the destination in the will had stopped at the end of the passage which I have read, its construction would not, as I conceive, present any difficulty. The shares of children are declared to be "payable" at majority, subject to their mother's annuity, which I take to mean that the children were to have all the right which their father could give them to their shares of succession consistently with the retention of a capital sum sufficient to secure their mother's annuity. This implies that the surplus estate was to be paid over to each child at the age of majority. Now, it is a perfectly settled point in the construction of wills that the existence of a charge affecting residue does not suspend the vesting of the beneficiary interest in right; and to hold that the children should only take vested interests in so much of the estate as admitted of immediate division would, I think, be contrary to the rule of construction which I have stated. But the will contains further directions as to the disposal of residue, which in substance amount to this—1st, In case of any child dying without leaving lawful issue before his share becomes "payable," his share is to accresce to the survivors of the family of children; and 2nd, that if the child so dying shall have left lawful issue, such issue shall be entitled to the parent's share.

Now, the condition upon which this double destination takes effect is the death of a child before his share becomes "payable," and I do not think that the use of the word "payable" in this collocation is ambiguous, because I think it is a referential word, and that we are entitled to look to the original gift in order to ascertain the sense in which the testator has used the word. This being done, we find that the testator has marked the shares as being payable at majority, and therefore, as I conceive, the true meaning of the conditional institution of survivors or grandchildren, as the case may be, is that it is to come into operation in the event of the death of a child before attaining majority. I think it would not be good construction to hold that the testator uses the word "payable" in different senses in two parts or members of the same residuary destination, and I can find nothing in the context which would necessitate the putting a forced construction on the word.

When William Stirling attained majority the conditional institution fell, so far as it applied to his share, and it is unnecessary to consider whether the testator used the word "payable" in a sense precisely equivalent to "vested." William at his death had right to a share of residue burdened only with a fixed charge, and with no subsisting ulterior destination affecting it. It follows, in my opinion, that the claim of his assignees is preferable to that of his widow and children, and that the second question ought to be answered in the affirmative.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court answered the second question in the affirmative.

Counsel for Stirling's Trustees (First Parties) and for William Stirling's Children (Second Parties)—Dundas. Agents—Wishart & Sanderson, W.S.

Counsel for William Stirling's Assignees (Third Parties)—A. J. Young—R. Scott Brown. Agent—J. Knox Crawford, S.S.C.

Tuesday, November 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON *v.* WALKER.

Right in Security—Security over Moveables—Sale Intended to Operate as Security—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 61, *sub-sec.* 4.

A, who had acquired by purchase an engineer's business and plant at a price of £2112, to be paid by instalments, entered into negotiations with B for an advance of £400 to meet the first instalment. B, on the advice of his law-agent, agreed to advance this sum, provided the subjects were conveyed to him by a contract of sale. The parties accordingly executed the following deeds:—(1) A disposition by which A, in consideration of the sum of £400, sold the subjects as per inventory to B, with power to B "to take possession thereof at any time he may think proper," and also with power to sell the subjects in such portions and at such prices as he (B) could procure, and subject to the admission that the subjects disponed "are the property of B, and that they are in my possession only on loan;" (2) a back-letter containing the following clauses:—(1st) an obligation on the part of B to re-sell the subjects to A at the price of £400, to be paid by instalments of £60 every six months; (2nd) a proviso that until repurchased, A was to pay "by way of hire therefor" interest on the balance of the sum of £400 unpaid at the rate of 20 per cent.; (3rd) a further proviso that failure to make these payments should entitle B to enforce the disposition and forfeit the instalments already paid; (4th) a proviso that further advances should be covered by the disposition and should be repaid under