would have arisen, as it would have been impossible to hold that there was vesting in a conditional institute, where there were objects in existence answering to the prior destination.

If I have correctly stated the result of the case of *Steel's Trustees*, it is difficult to see why different principles should be applied to the cases of a legacy to a daughter and to any other favoured person in liferent. At all events, where the person to whom the liferent is given is a person to whom the testator stood *in loco parentis*, I think there can be no doubt that the same principle is applicable.

Another distinction is suggested between this case and *Steel's Trustees*. It is pointed out that here there are two liferents, and that they are so closely connected that on the death of one liferentrix the survivor takes the liferent enjoyed by the predeceaser, but I think it is quite clear that if the principle of vesting subject to defeasance is applicable to the case of two gifts, each of one-half of a particular fund in liferent, with the destination, which I need not repeat, in fee, the mere circumstance that the survivor is to take the life interest previously enjoyed by the predeceaser can have no bearing on the presumed intention of the testator with regard to the fee.

With these explanations I think that we have here the very case in which the doctrine of vesting subject to defeasance has always been applied, and that we should therefore answer the first question in the affirmative.

The second question is really consequential on the first, because, if there was vesting in Robert Cumming, subject to defeasance in the event of the liferenters having issue, then on the death of one of the liferenters without issue, when the possibility of there being issue ceased, Robert Cumming's right to the fee of the sum liferented by the deceased became absolute.

I may remark on the third question, viz., whether the second party is entitled to payment of one-half of the £1300 absolutely, the circumstances which raise the question are, that the second party takes the liferent previously enjoyed by her deceased sister by immediate gift under the will, and also takes the fee of the same share or sum as representative of Robert Cumming. I think that the lesser right of liferent is absorbed in the more comprehensive right of fee. Questions are sometimes raised in relation to such rights, which depend on the consideration that the liferent rights are alimentary. Nothing was said in argument on this point, and I do not find that the liferent in question was declared to be alimentary.

LORD KINNEAR—I am of the same opinion. The truster directs that the annual interest of £1300 is to be divided equally between his two nieces, and that if either leaves legitimate issue the fee of the parent's share is to go to such issue; but failing legitimate issue to either lady, on the death of the survivor the fee of the whole is to go to Mr Robert Cumming.

Now, the gift to Robert Cumming is to take place on the occurrence of a certain event, namely, the death of the surviving liferentrix, subject to one contingency only, the birth and survivance of issue to the liferenters. Accordingly, the legacy to him was liable to be defeated only by the occurrence of that event.

That is a normal instance of the sort of case to which the decision in *Steel's Trustees* directly applies, and no reasonable ground has been stated for our refusing to follow that decision.

The LORD PRESIDENT concurred.

The Court answered the first, second, and third questions in the affirmative.

Counsel for the Second Party—MacWatt. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Third Party—Macphail. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Fourth Parties—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Saturday, November 16.

FIRST DIVISION.

[Junior Lord Ordinary.

HOWDEN (SIMSON'S JUDICIAL FACTOR), PETITIONER.

Trust—Discretionary Powers of Trustees—Judicial Factor—Special Powers.

A testator directed his trustees to hold the sum of £4000 for behoof of his son D in liferent, for his liferent use allenarly, and of his lawful issue in fee, and upon D's death, failing his issue, to pay the capital to the three other sons of the testator. The trustees were further granted full power to pay over to the said D, as his own absolute property, the whole or any part of the principal sum of £4000, if in the exercise of their own judgment and discretion they should think it prudent and advisable to do so. A petition was presented by the judicial factor on the trust-estate, appointed in room of the trustees, for special power to invest a portion of the capital fund in the purchase of an annuity for the lives of D and his wife, and the survivor of them, in order to enable D to make a provision for his wife, which he was otherwise unable to do. The petition was opposed by all others in existence having an interest in the fund.

On the statement by the judicial factor that he considered the proposed application of a portion of the fund prudent and advisable, the Court (*rev.* judgment of Lord Low) granted the special power craved.

Observations (by Lord M'Laren) as to the exercise by a judicial factor,

who comes in the place of trustees, of discretionary powers vested in them.

By trust-disposition and settlement executed by the late David Simson senior, tenant of Oxnam Row, in the parish of Oxnam and county of Roxburgh, and Mrs Elizabeth Rutherford or Simson, his wife, dated 15th and 18th September 1863, the said David Simson conveyed to trustees his whole real and personal estate with the exception of the tack of the farm of Oxnam Row and Bloodylaws.

By the sixth purpose of the said trust-disposition and settlement it was provided —"That my trustees shall, at the first term of Whitsunday or Martinmas after my death, set apart the sum of £4000, and retain and invest the same in their own names as trustees foresaid on such securities, heritable or personal, or in railway debentures, or the Government funds, as they shall think proper, for behoof of David Simson junior, my son, in liferent, for his liferent use allenarly, and of his lawful issue in fee; but with power, nevertheless, to the said David Simson junior to distribute and apportion the principal of the said sum of £4000 among such issue, if more than one, in such shares and proportions as he may think proper and expedient: Declaring that the interest or annual produce of the said sum of £4000 is intended by me, and shall be held to be a purely alimentary provision to the said David Simson junior, and shall not be assignable by him in any way, nor for any purpose, nor be subject to the diligence of his creditors: And it is hereby further provided and declared that upon the death of the said David Simson junior without issue then alive, then and in that case I appoint the said sum of £4000 to be divided and paid to my other sons, George Simson, James Simson, and John Simson, equally among them, share and share alike, and their respective heirs and assignees: But it is hereby specially provided and declared, that the foregoing provisions in favour of my said son David Simson junior in liferent and of his issue, whom failing in favour of the said George Simson, James Simson, and John Simson and their foresaids in fee, are made by me subject to this condition and provision, that in case at any time my trustees may, in the exercise of their own judgment and discretion, think it prudent and advisable to pay over to the said David Simson junior the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted full power, authority, and liberty to do so; and they shall be completely exonered thereof by the discharge of the said David Simson junior alone, and shall not thereafter be subject to any claim thereto, or to the part so paid at the instance of his issue, or of my said sons George, James, and John, or any one of them, or on the part of their respective foresaids, it being my intention to give to my trustees the same full powers and discretion in giving the said principal sum to the said David Simson junior, or withholding the same from him, which I myself now possess, and the said David Simson junior shall have no right or power to claim or demand payment of said principal sum, or any part thereof, from my trustees in case they may not deem it proper to give the same to him of their own free will and motive, they being hereby declared to be the sole and uncontrolled judges in the matter."

The testator died on 12th April 1865, and the whole purposes of his said trust were fulfilled in July 1865, with the exception of the provisions of the 6th purpose above set forth in favour of the said David Simson junior, which were to subsist during his lifetime.

All the trustees having resigned, the Court in 1875 granted an application made in terms of the Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), sec. 10, and appointed a judicial factor upon the trust-estate. In 1882, upon his resignation, the Court appointed Mr James Howden, C.A., Edinburgh, to be judicial factor in his place. In 1883 Mr Howden received authority from the Court to invest out of the trust-estate the sum of £1000 in the purchase of an annuity on behalf of the said David Simson, and an annuity of £80 was accordingly purchased for him from the Edinburgh Life Assurance Company (see *Simson, &c.*, January 12, 1883, 10 R. 540).

The said David Simson was born in 1830, and in 1893 he married Miss Annie Jane M'Lean, who was born in 1844. There were no children of the marriage.

On 31st November 1894 the said Mr James Howden, as judicial factor on the trust-estate, presented a petition to the Court, in which he explained that the remainder of the estate in his hands consisted of a deposit-receipt with the Union Bank for £2200, and a sum of £35, 17s. 8d. in current account with that bank, and stated that "the income of the estate falling to the liferenter, the said David Simson, is insufficient to meet his wants, and the petitioner has accordingly, at his request, agreed to ask your Lordships for authority to pay over to the said David Simson absolutely the sum of £200 in order that he may suitably provide and furnish a house for himself and his wife, and also for authority to invest a further sum of £1000 out of the trust-estate in the purchase of an annuity in favour of the said David Simson and his wife, and the survivor of them. It is believed that the sum of £1000 will purchase an annuity of about £60."

The petitioner accordingly craved the Court to authorise him to make this payment, and to purchase the annuity.

Answers were lodged by James Simson and John Simson, surviving brothers, and by the five sons and four daughters of George Simson, a deceased brother of the said David Simson, all of whom, on David Simson's death, would be entitled under the trust-disposition and settlement to a share of the fee of the trust-estate. In their answers the respondents stated that when in 1883 the petitioner received authority to purchase an annuity for David

Simson, his three brothers, John, James, and George Simson, expressly consented thereto, and were parties to the petition on which the said power was granted. They also stated that "the understanding and agreement between the whole parties at the time of presentation of said petition was, that if the powers therein prayed for should be granted, that should be treated as a final settlement, and that the balance of capital should thereafter be retained intact." The respondents further stated, —"Looking to the age of the said David Simson junior, which, as stated in the petition, is sixty-four, and to the age of his wife, which, as also stated in the petition, is fifty, it is very unlikely that he will leave issue, in which event the respondents are the sole persons interested after the said liferenter in the said trust-fund. They deny that the annuity at present enjoyed by the said liferenter, which amounts to £80, together with the revenue of the balance of the said trust-fund, amounting to £2235, 17s. 8d., is insufficient for the said liferenter's needs. If the balance of the trust-fund under the petitioner's care were invested in suitable securities, instead of lying in bank on deposit-receipt as at present, the income of the said David Simson junior would amount to at least £150 per annum;" and they accordingly craved the Court to dismiss or refuse the petition with expenses.

The respondents having at the bar withdrawn their opposition to the first branch of the petition, on 18th October 1895, the Lord Ordinary, after a report by the Accountant of Court, pronounced the following interlocutor:—"Of consent, authorises and empowers the petitioner to pay and hand over to David Simson, designed in the petition, for his own absolute use and control, the sum of £180 out of the trust-estate mentioned in the petition: *Quoad ultra* refuses the prayer of the petition; and decerns," &c.

Note.—. . . "The trust-deed authorises the trustees to pay over to David Simson the whole or any part of the sum of £4000 as his own absolute property. Now, in the former petition, the Court authorised the trustees to invest a sum of money in the purchase of an annuity for David Simson, on the ground that that was practically giving £1000 of the capital to David Simson himself, as he desired that the £1000 should be invested in that way. The factor approved of that being done, all the beneficiaries consented, and the Court said this—that to say that this is not within the terms of the power is really a play upon words, because to expend £1000 in the purchase of an annuity, at the desire of David Simson, is practically the same thing as paying £1000 directly to himself for his own absolute use and behoof. But then upon the same course of reasoning to expend £1000, or any part of that sum, in purchasing an annuity, not for David Simson, but for his wife, is not in any sense giving the money to him. It is applying the capital of the money for behoof of a person other than David Simson, for which I can find no warrant whatever in the trust-deed.

"Now, that is the only thing which is asked in this part of the prayer of the petition. It is asked that the authority of the Court should be given to the factor to invest £1000 in the purchase of an annuity for David Simson and his wife. If the application had been one for the advance of £1000 to David Simson, upon the ground that he desired that money to make provision for his wife, that would have been a totally different matter, and would have been a totally different application, raising another and different set of considerations than those we are considering here, and as to which I of course indicate no opinion. But I am clear that to apply a part of this capital sum in the purchase of an annuity, not for David Simson but for his wife, would be to go beyond the powers given in the trust-deed." . . .

The petitioner reclaimed, and at the suggestion of the Court lodged a minute, in which he stated that David Simson had undertaken, in the event of his obtaining from the trust-estate a capital sum of £1000, to invest the same in the purchase of an annuity in favour of himself and his wife and the survivor of them. The minuter further stated—"The judicial factor is of opinion that in the whole circumstances of the case, such an application of the said money would be prudent and advisable. He accordingly considers that the investment by him of the said sum of £1000 in an annuity as craved in the prayer of the petition would be a prudent and advisable act of the administration. Further, looking to the undertaking by Mr Simson above mentioned, in which the judicial factor reposes confidence, he is of opinion that it would be safe, prudent, and advisable to hand over a sum of £1000 out of the trust funds to Mr Simson absolutely."

The arguments of parties sufficiently appear from the judgments.

At advising—

LORD KINNEAR—I am of opinion that the application ought to be granted. The testator directed that £4000 should be held in trust by his trustees for behoof of his son David Simson, for his liferent use allenarly, and for his issue in fee; and then he went on to provide that the interest or annual produce of that sum should be held to be a purely alimentary provision for the said David Simson, and should not be assignable by him in any way or for any purpose, or be subject to the diligence of his creditors. If that provision had stood alone, there could have been no possibility of the Court or the judicial factor allowing the alimentary liferenter to have, directly or indirectly, any portion of the fee of the estate. But the testator goes on to say—"It is hereby specially provided and declared that the foregoing provisions . . . are made by me, subject to this condition and provision, that in case at any time my trustees may, in the exercise of their own judgment and discretion, think it prudent and advisable to pay over to the said David

Simson junior the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted, full power, authority, and liberty to do so." He further goes on to express his intention of giving his trustees the same discretion in the matter as he himself possesses, and therefore there was a power given to the trustees to discharge the limitations which the truster had put upon the original gift for the protection of his son, and if they found it safe and prudent to do so, to make over to the son any part, or the whole, of the capital as they in their discretion might think fit. Now, it appears to me that all of these provisions are made for the benefit of the son. It is for his benefit that the provisions are in the first place restricted so as to exclude the diligence of his creditors; and in the second place, that the trustees are authorised to withdraw that restriction and put him in full possession of his own property if they think fit. I do not think that the trustees, or the judicial factor in their place, would be entitled to exercise their power to give any portion of the sum in question to David Simson, unless, in the exercise of their judgment and discretion, they thought that it was no longer necessary that he should be protected, either with regard to the whole or a part of the sum, as the case might be, by the exclusion of the diligence of his creditors. Therefore I think that the first step which the trustees, in the discharge of the duty laid upon them by the truster, are bound to take, in considering whether they were to give or to withhold any part of the money which David Simson might require, is to consider whether in his interest it is prudent and advisable to grant that request. Now, if the judicial factor had said nothing more than that he "proposed to sink a thousand pounds in an annuity for David Simson and his wife," I should have thought that that was not a sufficient statement to warrant the power to do so being given. The mere fact that he so proposed would not in itself establish, at all events to my satisfaction, that he had, in the exercise of his judgment and discretion, come to the conclusion that it was prudent and advisable to make over such a sum of money as the absolute property of the legatee, because he no longer required the protection which the testator had provided against the diligence of creditors. But he does not confine himself to such a statement at all; he tells us explicitly that he does consider that the investment on the annuity would be a prudent and advisable act of administration, and further, that he is of opinion that it would be safe and prudent and advisable to hand over a sum of £1000 out of the trust funds to Mr Simson absolutely. Now, if we have the judicial factor's report to that effect, I do not think we should have any hesitation in allowing him to do what he thinks it advisable to do. The only ground on which the Lord Ordinary refused the application appears to be that the petitioner desires the money to make provision for his wife, and his Lordship says that "to apply a portion of this capital sum in the purchase of an annuity, not for David Simson, but for his wife, would be to go beyond the powers given in the trust-deed." That would have been perfectly sound, if the powers in the trust-deed had been confined to the administration of the income of this property during David Simson's life, but the power is to give the whole or part to Simson as his absolute property, and if he is entitled to obtain a thousand pounds for himself, it is surely within that power that he should be entitled to say—"I want a thousand pounds, because I wish to purchase an annuity for my wife with it." The purpose to which the money is to be applied is only material in so far as it is an element which the judicial factor very properly took into consideration in determining whether it was a prudent and advisable thing to put the money under this gentleman's control. The logical result of that view would be this, that we should authorise the judicial factor to pay over the £1000 to Mr Simson, and allow him to do with it what he pleases. But I think it is very much more convenient to adopt the course which the judicial factor himself proposes, and that we should authorise him to apply the money for which he is asked. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and that we should grant the prayer of the petition.

LORD M'LAREN—I agree with all that has been said by Lord Kinnear, and will only add a sentence on two points. The exercise of the powers here granted by the testator is a somewhat delicate branch of our jurisdiction, and has often been the subject of discussion. In a case that came before us not very long ago—*Robbie's Judicial Factor*, 20 R. 358—we had occasion to consider the limits of the power of a judicial factor who came in the place of trustees vested with discretionary powers, and your Lordships held that a judicial factor could not exercise an unqualified power of selection of the objects of the trust; but it appeared on a review of the cases, including that of *Simson*, that where a truster had clearly pointed out the objects of a trust, and had given his trustees discretion only as to the mode in which the benefit should be enjoyed, that was a power which could be exercised by a factor, and it would be extremely unfortunate if such powers could not be exercised after the death of the original trustees. But then I agree with the observation made in the respondents' argument, that where the trust is one involving a large exercise of discretion in disposing of a capital fund, the Court has a certain controlling power. The factor has not merely to come to the Court that we may see that the proposed application of the money is within his power, but he must also set forth his reasons for the proposed exercise of the power that we may see that there is a fair exercise of the discretion which has devolved upon him in succession to the trustees. The only other point which I desire to note is as to the purpose for which this

money is to be applied. Of course the most ordinary case of the exercise of such a power would be where there had been some loss of interest to the beneficiary, and it was necessary that a portion of the capital should be so invested that he might spend the remainder of his days in the same degree of comfort that he had hitherto enjoyed. But the power is not limited to questions of this sort. It is a power to give the beneficiary liferenting the fund the absolute control of a portion of the capital, provided the trustees shall think it a reasonable application of the money. It appears to me to be quite proper for the factor to inquire of the beneficiary what he means to do with the money, for the very purpose of the trust is to protect him against the improvident expenditure of his capital. Now, in this case, where it is explained that he proposes to sink the money in an annuity, I cannot doubt that, upon this explanation being made, the judicial factor has a case before him entitled to very favourable consideration, and as he comes to us stating that he approves of the proposed advance, I am of opinion with Lord Kinnear that the power should be granted.

The LORD PRESIDENT and LORD ADAM concurred.

The Court recalled the interlocutor of the Lord Ordinary, granted the prayer of the petition, and found the petitioner entitled to the expenses of the petition out of the capital of the trust-estate.

Counsel for the Petitioner and Reclaimer — Dundas — Howden. Agents — Shiell & Smith, S.S.C.

Counsel for the Respondents — Guy. Agents—Sibbald & Mackenzie, W.S.

Friday, November 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

FLEMING AND ANOTHER *v.* DISTRICT COMMITTEE OF MIDDLE WARD OF COUNTY OF LANARK.

Arbitration—Lands Compulsorily Acquired—Compensation—Agricultural Tenant—Break in Lease.

A tenant occupied certain agricultural subjects on a nineteen years' lease, which empowered either him or his landlord to put an end to it at the termination of six, eleven, or sixteen years from the term of entry. Soon after the term of entry, the local authority of the district under the Public Health (Scotland) Acts, in virtue of powers conferred upon it by a private Act of Parliament, served a notice upon the tenant of its intention to take a portion of the lands occupied by him for the purpose of constructing certain water-works. In a question between the local authority and the tenant as to the compensation payable to the latter, *held* that the proper method of valuation was to take the tenant's interest on the footing that his lease was for nineteen years, subject to deduction in respect of the contingencies affecting its duration for that period, and that the amount of this deduction was a matter for the determination of the arbiters appointed in terms of the Lands Clauses Consolidation Act 1845.

On 6th November 1894 John Fleming and James Murray, tenants of the farm of Low Plewland belonging to the Duke of Hamilton, in the parish of Avondale and county of Lanark, raised an action against the District Committee of the Middle Ward of Lanarkshire for declarator that upon a just construction of their lease they were entitled to receive full compensation from the defenders for all loss, injury, and damage sustained and to be sustained by them to the term of Whitsunday 1911, being the natural termination of the said lease, in consequence of the defenders taking land and way-leave on the said farm under their private Water Act 1892, and for payment (1) of the sum of £6307, 14s. 1d., and (2) of the sum of £50.

The pursuers possess the said farm under a lease dated 15th and 20th February 1892, granted in their favour by the commissioner of the Duke of Hamilton. The duration of the lease is for nineteen years, but with power "to either of the parties hereto to put an end to this lease at the termination of six, eleven or sixteen years from the respective terms of the tenants' entry under the same, upon the party resolving to exercise such power giving to the other party notice in writing at least six months previous of his intention to do so."

In 1892 the defenders obtained a private Act of Parliament (55 and 56 Vict. cap. 169), whereby they were authorised and empowered to construct certain water-works to supply water within the district. The main reservoir for storing the water is situated in part upon the pursuer's farm. In 1893 the defenders served on the pursuers a notice stating their intention of taking certain portions of their farm, extending to 66 acres, for the purposes of the said works, and a further notice was served with regard to a way-leave over an additional portion of the farm. The pursuers lodged a claim for compensation in respect of the taking of the said lands and way-leave.

By deed of nomination and submission dated 10th October 1893, the defenders, in terms of the Lands Clauses Consolidation (Scotland) Act 1845, nominated an arbiter on their part to determine the purchase money to be paid for the said lands and the said way-leave, and for all injury or damage occasioned to the pursuers by the defenders' actings, the said arbiter to fix and determine alternatively the amount of purchase money and compensation to be paid to the pursuers as aforesaid, in the first place, on