in question, the county general assessment, is levied under a statute which hitherto had authorised its imposition within parliamentary burghs in the position of Oban. In my opinion it would be "inconsistent with the context," meaning thereby with the terms of this very sub-section read in the light of the clauses which I have quoted, to construe the word "county" in such a way as to operate a virtual abolition of the power to levy county general assessment within a parliamentary burgh without making any provision for a contribution by the burgh.

On these grounds I respectfully differ from the consulted Judges, and hold that the suspension should be refused.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause with the opinions of the consulted Judges, in conformity with the opinions of the majority of the whole Judges of the Court, Adhere to the interlocutor of Lord Kyllachy dated 10th March 1897 reclaimed against by the respondents, with the omission of the words 'in respect the cause is ruled by the recent judgment of the First Division in the case of the *Burgh of Galashiels* v. *The County Council of Selkirk* (23 R. 818),' and decern: Find the complainer entitled to additional expenses," &c.

Counsel for the Respondents and Reclaimers—Shaw, Q.C.—Graham Stewart. Agents—M'Neill & Sime, W.S.

Counsel for the Complainer and Respondent—Salvesen—Abel. Agents—Gill & Pringle, W.S.

Friday, March 18.

FIRST DIVISION.

KINMOND'S TRUSTEES *v.* MESS.

Succession—Power of Appointment—Discretionary Power of Trustees to Invest for Behoof of Fiars—Repugnancy.

A truster bequeathed a legacy to his niece, with the proviso that "This legacy may be paid to" her husband, "or invested for behoof of their children, and under such conditions as shall to my trustees appear most for their benefit." He further provided that the legacies "shall become payable to the legatees" only after his own death and that of his widow, and that the issue of any of the legatees predeceasing the longest liver of himself and his wife, "shall succeed to their parents' share in equal portions," while the share of any predeceasing without issue was to fall into residue.

The truster's niece survived him but predeceased his widow, leaving two sons, one of whom was of unsound mind, while the estates of the other were sequestrated. After the death of the truster's widow, the trustees, in exercise of the discretion given by the truster, executed a minute by which they restricted the right of the sons to an alimentary liferent of their shares of the legacy, with power of testamentary disposal.

Held that the sons took a right which was independent of their mother's contingent interest, and was not affected by the trustee's discretionary power, and that accordingly the trustees were bound to pay over the legacy to the sons' representatives.

Opinion (*per* Lord M'Laren) that even if the right were subject to this power, it was impossible, seeing that a full right of fee was conferred upon the sons, without ulterior destination, to protect it against creditors, or against their own voluntary acts.

Mr Alexander Kinmond died on 5th January 1872, leaving a trust-disposition and settlement dated 30th August 1867, whereby he disponed his whole estate to trustees.

The trust-disposition, after making provision for the truster's widow and appointing various special legacies, contained the following clause—"*In the fifth place*, I hereby make the following legacies:—To the foresaid Thomas Kidd Kinmond, my nephew, I legate and bequeath the sum of four thousand pounds: *Item*—To Mrs Ann Kinmond or Cairncross, daughter of the late Andrew Kinmond, merchant in Dundee, the sum of fifteen hundred pounds; this legacy may be paid to Henry Cairncross, husband of the said Ann Kinmond, or invested for behoof of their children, and under such conditions as shall to my trustees appear most for their benefit." Various legacies to other nephews and nieces of the truster were bequeathed under this head of the deed, and the clause proceeded as follows—"Declaring that the legacies contained in this clause shall become payable to the legatees only after my death and after the death of the said Mrs Jane Wedderburn Jolly or Kinmond as my widow; also declaring that the lawful issue of any of said legatees predeceasing the longest liver of me and my said wife shall succeed to their parents' share in equal portions; and also that the share of any of them who may predecease me and my said wife without lawful issue shall fall into the residue of my trust-estate: Declaring further that all the legacies herein conceived in favour of females shall not be subject to the *jus mariti* of any husband or husbands to whom they may be married, and that their own personal receipts shall be a sufficient discharge to my trustees therefor, minors always excepted." By the sixth clause the truster provided for the event of the estate proving insufficient to meet the debts, legacies, &c., and proceeded—"And in the event of my said estate being more than sufficient for all the purposes herein specified, then and in that case the legacies to my nephews and nieces and their lawful issue shall be increased proportionally to their respective amounts so as to exhaust the estate, with power to my said trustees

to defer for a time the payment of such increase or surplus if they shall see cause so to do."

The truster was survived by his widow, who died on 18th July 1895. Mrs Cairncross, the truster's niece, described in the fifth article of his disposition, survived him but predeceased his widow, having died intestate in 1892 predeceased by her husband. She left two sons, Francis and Andrew, of whom the former was of unsound mind, while the estates of the latter were sequestrated in 1889. Mrs Cairncross was herself of unsound mind at the date when Mr Kinmond's trust-disposition was executed. The trust-estate was more than sufficient to meet the legacies and provisions, and there was a surplus to be applied towards increasing proportionally the legacies to the truster's nephews and nieces.

The representatives of Francis and Andrew Cairncross having demanded payment from Mr Kinmond's trustees of the legacy to Mrs Cairncross, the trustees, by minute dated October 1896, resolved to set aside and hold and invest the funds in trust for Francis and Andrew Cairncross, and by a minute dated March 1897, "having resumed consideration of the provisions of the settlement under which the legacy to Mrs Cairncross may be 'invested for behoof of her children and under such conditions as shall to my trustees appear most for their benefit' declare that in their (the trustees') opinion it is most for the benefit of both sons of Mrs Cairncross that they should be restricted to an alimentary liferent of their shares of said legacy, and that their powers of assignment and the diligence of their creditors should be excluded, leaving them always power of testamentary disposal of the fee, and they therefore resolve to retain the said respective shares of Francis and Andrew Cairncross during the lives of the said children, and to invest the same in their (the trustees') hands, excluding the power of the said children to assign and the diligence of their creditors, and that the income and proceeds thereof shall be paid or applied half-yearly to or for behoof of the children during their respective lives as a provision purely alimentary and for their maintenance alone."

A special case was presented by (1) Mr Kinmond's trustees, (2) Mrs Cairncross' executor *ad omissa*, (3) Francis Cairncross' *curator bonis*, and (4) the trustee on the sequestrated estate of Andrew Cairncross.

The contentions of the parties as set forth in the case were—"The first parties maintain that according to the terms of the trust-disposition and the intention of the truster, the legacy in question and proportional share of residue did not vest in Mrs Cairncross, or otherwise, even though vested, was defeasible in her person on the first parties before payment exercising the discretionary power conferred upon them, and, in any view, that the first parties in the exercise of said power are entitled to retain it and the proportionate share of residue, and invest them for behoof of the children of Mrs Cairncross under the conditions above specified, which they are of opinion are for the benefit of said children. On the other hand, the said John Mess, Mrs Cairncross' executor, the second party, contends that the legacy and proportional share of residue vested *a morte testatoris* in Mrs Cairncross, and on her death passed to him as her executor, and that he is entitled to payment thereof, together with the said share of residue. In the event of its being held that the legacy did not vest in Mrs Cairncross, then the said John Mess, as *curator bonis* to Francis Cairncross, the third party, and the said John Mess, as trustee on the sequestrated estates of Andrew Cairncross, the fourth party, maintains that the legacy and proportional share of residue vested in the children absolutely on the death of their mother, or at latest, of Mrs Kinmond, the truster's widow; and that in respect thereof he, as curator for Francis Cairncross, is entitled to payment of one-half of the legacy and of the said share of residue, and to payment of the other half as trustee on the sequestrated estates of Andrew Cairncross, on which estates the said John Mess, as *curator bonis* of the said Francis Cairncross, is a large creditor. Further, the said second, third, and fourth parties maintain that in any view the said share of residue is not subject to the same discretionary power as the legacy, but only to a power to postpone payment for a time."

The questions for the judgment of the Court were—"(1) Did the legacy to Mrs Cairncross vest in her *a morte testatoris*, and is it now payable to the second party as her executor? (2) Are the first parties entitled to retain the said legacy and invest it for behoof of the said Francis and Andrew Cairncross equally in such manner as to exclude their creditors and secure to each of them an alimentary liferent of their respective shares and a power of testamentary disposal of the fee? or Are the third and fourth parties, as representing the said Francis and Andrew Cairncross, entitled to immediate and unconditional payment of said legacy equally between them, share and share alike? (3) Does the share of residue proportionate to the said legacy fall to be disposed of in the same manner and subject to the same conditions as the said legacy?"

The arguments of the parties sufficiently appear from their contentions as set out above.

The following cases were quoted by them in support of their arguments:—*By the first party—Chambers' Trustees* v. *Smiths*, April 5, 1878, 5 R. (H. of L.) 151; *Bryce's Trustee*, March 2, 1878, 5 R. 722; *Lennock's Trustees*, v. *Lennock*, October 16, 1880, 8 R. 14; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921. *By the second, third, and fourth parties—Mackinnon's Trustees* v. *Official Receiver in Bankruptcy in England*, July 19, 1892, 19 R. 1051.

At advising—

LORD M'LAREN—The testator, Alexander Kinmond, who died on 5th January 1872, left a will disposing of his estate by providing pecuniary legacies to his nephews and

nieces, and with respect to the residue of his estate he directed that in the event of his estate being more than sufficient for the purposes specified, then "the legacies to my nephews and nieces and their lawful issue shall be increased proportionally to their respective amounts so as to exhaust the estate."

One of the legacies, the only one with which we are concerned in this case, is thus expressed:—"*Item.*—To Mrs Ann Kinmond or Cairncross, daughter of the late Andrew Kinmond, merchant in Dundee, the sum of Fifteen hundred pounds. This legacy may be paid to Henry Cairncross, husband of the said Ann Kinmond, or invested for behoof of their children, and under such conditions as shall to my trustees appear most for their benefit."

The clause then proceeds as follows:—"Declaring that the legacies contained in this clause shall become payable to the legatees only after my death, and after the death of the said Mrs Jane Wedderburn Jolly or Kinmond as my widow. Also declaring that the lawful issue of any of said legatees predeceasing the longest liver of me and my said wife shall succeed to their parents' share in equal portions, and also that the share of any of them who may predecease me and my said wife without lawful issue shall fall into the residue of my trust-estate."

The legatee, Mrs Ann Kinmond or Cairncross, who was of unsound mind, died intestate on 13th January 1892, predeceased by her husband and survived by two sons, Francis and Andrew. The testator's widow died 18th July 1895. The trustees of the will did not exercise the power or direction relative to Mrs Cairncross's legacy until 23rd March 1897, when they made the minute which is quoted at length in the sixth paragraph of the special case.

The substance of this declaration is that the right of the two sons of Mrs Cairncross "should be restricted to an alimentary liferent of their shares of said legacy, and that their powers of assignment and the diligence of their creditors should be excluded, leaving them always power of testamentary disposal of the fee." If the trustees had the power to make such a disposition of the legacy it is not disputed that their minute is in proper form. The question is whether the trustees had the power which they attempted to exercise, the negative being maintained by the second and fourth parties, who represent the interest of Andrew's creditors, and by the third party who is *curator bonis* to Francis. If Mrs Cairncross had survived the testator's widow, so that the legacy should have vested in her, the trustees would have been in a position to exercise the power. Bearing in mind that Mrs Cairncross at the date of the execution of her uncle's will was of unsound mind, I think that the fair construction of the power would be that the legacy and share of residue might be invested so as to provide for the maintenance of Mrs Cairncross out of the first of the fund, the balance of income, if any, and the fee, or what remained of it at the mother's death, being payable to the sons. But Mrs Cairncross did not survive Mrs Kinmond, and under the terms of the clause of conditional institution which I have already read, the lawful issue of a legatee predeceasing the longest liver of the testator and his wife, are to succeed to the parent's share in equal portions. My opinion is that under this clause, the sons, Francis and Andrew, take a right which is independent of their mother's contingent interest, and that their right is not affected by the power.

I wish to add that even if it were held that the right of the sons was subject to the power, the decision of the case would not in my opinion be different. Under a power to invest for behoof of legatees, and under conditions that are to be for their benefit, it is plainly incompetent to give any right whatsoever to persons other than the objects of the power, and the trustees have not attempted to do so. What they have done is to make an appointment of the income of the fund with a power of testamentary disposal in favour of Francis and Andrew Cairncross. But this appointment leaves the fee of the legacy and the corresponding share of residue untransferred in the persons of Francis and Andrew, the circumstance that it is held for them by trustees being of no materiality in this question. Now, whoever has the income of a fund and also the control of the capital, has the entire estate; and in my view, which is supported by a strong and clear expression of opinion by Lord President Inglis in *Gibson's Trustees* v. *Ross*, 4 R. 1038, it is legally impossible to protect the life interest of a person to whom a fee is also given against creditors, or against his own voluntary acts.

The cases of *Lennock* and *Wallace*, which were quoted in the argument, were cases where a trust of this kind was part of a marriage settlement intended to protect the wife's estate in a question with the husband. They do not support the contention that a settlement of this nature would be effectual against creditors, or against a party like a *curator bonis*, who claims by a universal title. In the case of *Chambers' Trustees*, 5 R. (H. of L.) 151, the power given to the trustees was a power to restrict the right of the legatee to an alimentary liferent, and to settle the fee in favour of issue. It was there held that the creditors of the legatee could only take the right of the legatee *tantum et tale*, and therefore that the deed in exercise of the power was effectual to exclude creditors.

If your Lordships agree with me, we may answer the first question in the negative, answer the second question in favour of the third and fourth parties, and answer the third question in the affirmative.

The LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR was absent.

The Court answered the first question in the negative, and the second question in favour of the third and fourth parties, and the third question in the affirmative.

Counsel for the First Parties — Cooper. Agents—Henry & Scott, W.S.

Counsel for the Second, Third, and Fourth Parties—Macfarlane—Fleming. Agents—Morton, Smart, & Macdonald, W.S.

Saturday, March 19.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

MACDONALD *v.* FORSYTH.

Process — Appeal from Sheriff Court — Amendment of Record.

In an appeal for jury trial from the Sheriff Court, a pursuer *allowed* to amend his record upon payment of one guinea of expenses.

This was an action of damages raised by Robert Macdonald against Charles Forsyth for injuries sustained by the pursuer while driving from Elgin to Lossiemouth in a dog-cart hired by him from the defender.

The Sheriff-Substitute (RAMPINI) having allowed a proof, the pursuer appealed for jury trial to the Court of Session, and on 10th March 1898 obtained an order for issues.

The pursuer lodged an issue, and at the same time put in a minute setting forth certain amendments which he desired to make on the record, and he craved the Court to open up the record and allow the same to be amended in terms of the minute, and thereafter of new to close the record.

The nature of the proposed amendments will be seen from the following extracts from the record, where the amendments are indicated by brackets:—"(Cond. 4) When about two miles from Elgin, at a point on the road leading to Lossiemouth, nearly opposite Myreside Farm, the left-hand wheels of the dog-cart, which was at the time being driven by the defender's servant, left the road and went up a bank on the left-hand side of the road, with the result that the dog-cart tilted over on its right side, and the occupants were thrown, or fell, violently to the ground. [The said dog-cart had, owing to the fault of the defender as after mentioned, not been provided with lights, and it was therefore the duty of the said Robert Cameron to exercise particular care and caution in driving the said dog-cart. This he failed to do, and drove the horse in such a careless and negligent manner that the dog-cart was partially drawn off the road and was upset in manner set forth.]" "(Cond. 7) The said accident was caused by the defender's failure in duty, or negligence in not providing proper lights for the said dog-cart, or in not providing a careful, competent driver [or by the fault of the defender's servant the said Robert Cameron, or by one or more of these causes.]"

The defender submitted that, as a condition of the amendment being allowed, the pursuer should be found liable in expenses since the closing of the record.

LORD PRESIDENT—The Court will not be averse to a careful scrutiny of the record being made at this stage of the case. So in giving a guinea of expenses we do so rather as an indication that no harm is done by a close look being given to the record, and that in such circumstances we will only give such a sum as will enable the opposing party to consider the amendment.

LORD ADAM concurred.

LORD M'LAREN—I am of your Lordship's opinion. We have frequently had occasion to notice that the discussion of Sheriff Court cases is very much embarrassed by want of consideration of the record before the debate. I was glad, therefore, to see that care had been taken in this case to put the record in proper form before it was brought up for discussion.

LORD KINNEAR was absent.

The Court opened up the record, allowed the pursuer to amend the same in terms of his minute on condition of his making payment to the defender of the sum of £1, 1s., and the said amendments having been made and the defender having answered the amendments at the bar, of new closed the record and approved of the issue proposed by the pursuer as adjusted.

Counsel for the Pursuer—Jameson, Q.C. —C. D. Murray. Agent—Alex. Mustard, S.S.C.

Counsel for the Defender — Salvesen. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, November 2, 1897.

OUTER HOUSE.

[Lord Kincairney.

HODGE *v.* SCHOOL BOARD OF BALLINGRY.

Election Law — Reduction of Election — Elections (Scotland) (Corrupt and Illegal Practices) Act 1890 (53 *and* 54 *Vict. c.* 55), *sec.* 30.

Section 30 of the Elections (Scotland) (Corrupt and Illegal Practices) Act 1890, after declaring that an election may be questioned by an election petition on certain specified grounds, provides (sub-section 2)—"An election shall not be questioned on any of these grounds by way of reduction or suspension, or by any form of proceeding except by an election petition." *Held* (*per* Lord Kincairney) that the grounds specified did not include all possible sources of challenge, and that it was competent to question an election to a school board by an action of reduction in the Court of Session on grounds other than those specified in section 30.