bank are provisions which under the terms of the deed can only come into operation on the death of the widow, who is given a liferent interest. Therefore any question in regard to these properties appears to be premature. As regards the property of Lounsdale there is no liferent interest interposed, and therefore I am of opinion that the directions to the trustees in regard to it fall to be carried out now.

I would therefore propose that the sixth question be answered affirmatively as regards its first alternative.

LORD YOUNG concurred.

LORD TRAYNER—The questions here presented for determination do not appear to me to be attended with any difficulty. I have no doubt that the capital of the trust estate vested in the second and third parties *a morte*. There is nothing in the testator's will to indicate an intention to postpone vesting. If that is so, then, subject to the securing of the widow's rights the persons in whom the capital is vested are entitled, according to recent decisions, to immediate payment of that which is vested in them. With regard to the estate of Staneley and Lilybank I think the option conferred by the testator on his children respectively and in order cannot be exercised until the widow's death. Until that event happens it cannot be ascertained which of the testator's children will be alive and entitled to exercise the option. Nor can it be ascertained whether any child will be disposed to give the testator's price for the estate "as it then stands." Its value at that date will be a material element in deciding any of the children whether the option should be exercised or not. Besides the express words of the will are that "at the death of my wife" the children should have the option. They have no right to any option at an earlier period. The estate of Lounsdale stands in a different position. There is no restriction in regard to it as to the time at which the option to purchase may be exercised. The will appears to me to contemplate an immediate exercise of the option, and failing any of the children desiring to purchase the property at the price fixed the estate should be immediately sold and the price realised added to the general estate for distribution as directed. I would answer the question accordingly.

LORD MONCREIFF—In regard to the first six heads of Mr Coats' settlement I think there is no doubt that as regards intention he intended that the provisions in favour of his four children should vest *a morte testatoris*, but that their shares of capital should not be paid until the death of his wife. The result, however, of the recent authorities is that, as regards division of capital, the intention of the testator cannot be fully carried out. The only trust purpose to be secured by retention of capital being the payment of an annuity of £4300 a-year to the widow, while the trustees are undoubtedly entitled and bound to set aside a sum amply sufficient for that purpose, they will be bound, having done so, to accelerate the term of payment and divide the balance of the capital among the children.

The seventh and eighth purposes stand in a somewhat different position. Looking to their terms they cannot, I think, be properly carried out until the death of the widow, who is liferented in Staneley and part of Lilybank.

The ninth purpose, which relates to the sale and purchase of the estate of Lounsdale, in which the widow has no interest, can be carried into effect now.

The Court answered the first alternative of the first question, and the third question, the second alternative of the fourth question, and the first alternative of the sixth question in the affirmative.

Counsel for the First Parties—Jameson, K.C.—A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Second Party——Campbell, K.C.—M'Lennan. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Third Parties—A. Moncrieff. Agents—R. R. Simpson & Lawson, W.S.

Thursday, January 29.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BALFOUR MELVILLE *v.* DALZIEL.

Parent and Child—Right of Administration—Minor—Right of Father—Petition for Recal of Curator Appointed to Minor's Estate.

Circumstances in which the Court *refused* a petition presented by a minor and by his father for the recal of the appointment of a *curator bonis* appointed to the minor's estate.

This was a petition presented by Evan Whyte Melville Balfour Melville, son of and residing with James Heriot Balfour Melville, W.S., Edinburgh, with consent and concurrence of the said J. H. Balfour Melville, and by the said J. H. Balfour Melville, praying for the recal of the appointment of Mr John Dalziel, C.A., who in May 1899 and May 1900 was appointed factor *loco tutoris* to the said Evan Balfour Melville, *quoad* his interest in an entailed estate known as Strathkinness, which his father, the heir of entail in possession, was proposing to disentail, and also *quoad* a small property called the Den, which belonged to the ward in fee-simple. As there had been separate appointments in reference to each estate, separate petitions for recal were presented.

Answers were lodged for Mr Dalziel, submitting that in the circumstances the prayer of the petition should not be granted.

A remit was made to Mr Charles Young, W.S., who made a report to the Lord Ordinary.

The circumstances under which the petition was presented are fully stated in the opinion of the Lord Ordinary, *infra*.

On 22nd November 1902 the Lord Ordinary (PEARSON) pronounced an interlocutor whereby he refused the prayer of the petition.

Opinion.—"The appointment which the ward, with the concurrence of his father, now seeks to have recalled was made on 19th October 1899 under somewhat unusual circumstances. The father was proposing to disentail his entailed estate of Strathkinness, and the ward, his only child, being in pupillarity, it was necessary to appoint a guardian to protect his interest under the entail. But further, the pecuniary affairs of the father were embarrassed, and accordingly in May 1899 he petitioned for the appointment of a factor *loco tutoris* to his son, so far as regards the son's interest in the estate and any sum that might be payable in respect of that interest. In the petition it was proposed to appoint a cousin to that office, but owing to a strongly worded minute by the ward's uncle, who was also next in succession under the entail, Mr John Dalziel, C.A., was appointed factor. The ward's interest in the entailed estate was valued at £17,600, and this sum was duly paid over to the factor, who still holds it.

"A year later, in May 1900, it became necessary to extend the factory so as to include a small property called The Den, belonging to the ward in fee simple. There was a provisional arrangement for the sale of Strathkinness, in order to clear the father from his embarrassments, and as The Den lay in to Strathkinness, and could only be advantageously sold in conjunction with it, the factory was enlarged so as to include The Den, and the price of it when sold, which proved to be £325.*

"The ward attained minority on 15th November 1901, and the factor *loco tutoris* thereupon *ipso facto* became *curator bonis* to the minor by virtue of section 11 of the Judicial Factors Act 1889.

"On 21st February 1902 the ward, with the consent and concurrence of his father, presented the two petitions now before me for the recal of the factory or curatory. The ground of recal is that circumstances have altered since the appointment was made. In the first place, the conflicting interests which emerged in the disentail proceedings are now ended. Further, it is said that when the father originally petitioned for the appointment of a guardian he was moved to do so chiefly owing to the embarrassment of his own affairs, that the sale of Strathkinness has relieved his embarrassment, and that he is now discharged of the pecuniary obligations for which he was then liable. The *curator bonis* has lodged answers to the petitions, stating that he has no knowledge or means of ascertaining the present financial position of the father, or whether it is better or otherwise than when he was first appointed. He has now, however, lodged a minute, in which he says that he has been reasonably satisfied of the accuracy of the statement in the petition to the effect that with his share of the proceeds of the heritable estates the father 'has discharged himself of the pecuniary obligations for which he was liable under the arrangements for terminating his sequestration, and that he is now free from any liabilities, so far as regards debts due prior to his sequestration, or obligations with reference to the arrangement for terminating that sequestration.'

"Now, upon the authorities, I think it is clear enough that in these circumstances the Court would not intervene to supersede the father in his office of administrator-in-law, and to appoint a guardian (see *Wardrop*, 1869, 7 Macph. 532, and cases there cited). That is not quite the question which arises here, for it is now a question of recal. It appears to me, however, that substantially the same considerations must apply, with this in addition, that the ward has meanwhile attained the status of a *minor pubes*, and is the principal petitioner, and that the father, who was only superseded as regards the two items already mentioned, is at the present moment his administrator-in-law to all other effects. On this ground, if there were no specialty in the case, I should recal the appointment.

"There is, however, this great peculiarity, that in each of the petitions for recal the petitioners state that 'on the prayer of this petition being granted, your petitioners will forthwith execute and deliver the deed of trust in favour of Mr Thomas Bennet Clark, C.A., Edinburgh, a draft of which is herewith produced, and to which reference is respectfully made.' It is therefore to be a recal upon a condition; and when the proposed trust-deed is examined it is found to provide for the continued supersession of the father as administrator of the capital during the whole period of the son's minority. If the trust-deed should prove to be irrevocable, which it bears to be, the plea now urged, that the father should be restored to his administration, does not fit the facts, while if the deed is revocable and is revoked, the condition of the recal would fail. I do not like a conditional recal, and I can see grave objections to it. Still less do I like the trust-deed itself as submitted by the petitioners. I do not see my way to interpone authority to it either in its original form as lodged or in its improved form as revised by the reporter, with whose remarks I agree. It is urged that it is better than nothing, but I am not quite sure of that. If the curatory were recalled *simpliciter* the father would be vested with the ordinary powers as administrator, but he would also resume his duties as such, and I have nothing before me to suggest that these duties would not be honestly performed, unless it be the trust-deed itself, which seems to proceed on the assumption that they might not. In other words, if the trust-deed is necessary, as seems to be assumed, it furnishes a strong reason for leaving things as they are. This is the

*The Den was sold by the factor under authority from the Court to that effect.

conclusion to which the reporter has come, and I confess I have a strong impression that this would be for the best interests of the ward. The difficulty lies in the authorities to which I have referred, acknowledging as they do the pre-eminent right of a father, notwithstanding his poverty, to retain or resume his position as administrator. But I dismiss the petitions on this special ground, that the resumption of the administration by the father is not one of the alternatives laid before me, and is not contemplated."

The petitioner reclaimed, and argued—A father was entitled to act as administrator-in-law to his minor son, and might resume that office whenever he pleased—*Wardrop* v. *Gossling*, February 6, 1864, 7 Macph. 532. The fact that the petitioners, desiring to act with entire candour, had stated the proposal to have a trust deed granted, did not make the petition a request for a conditional recal. The object of the application was to obtain a larger income than could be obtained from the securities which a judicial factor would invest in.

Counsel for the respondent supported the Lord Ordinary's opinion.

LORD PRESIDENT—On 19th October 1899 Lord Pearson, under a petition presented by Mr J. H. Balfour Melville, for the appointment of a factor *loco tutoris* to his son Evan Whyte Melville Balfour Melville, appointed Mr John Dalziel, C.A., to be factor *loco tutoris* to the son in connection with and so far as related to his interests in the entailed estate of Strathkinness, of which Mr J. H. Balfour Melville was heir of entail in possession, and which he was about to disentail. Mr Dalziel's appointment was afterwards extended so as to apply to a small property called The Den, belonging to the ward in fee-simple. That appointment still remains in force, and Mr Dalziel has been doing his duty in administering the estate belonging to his ward, which amounted to £17,600. The son has become a *minor pubes*, and he now, with the consent and concurrence of his father, petitions for the recal of the curatory. If there had been no other material facts in the case there might have been good ground for recalling the factory, now in effect become a curatory, but the father in effect admits in the petition that he could not with propriety ask for the recal of the factory or curatory without some provision being made for the protection of his son's interest in the money already mentioned, and the recal of Mr Dalziel's appointment is only asked upon the footing that coincidently with it a trust deed shall be executed by the father and son for the protection of the interests of the latter in the money already mentioned, and by which it is proposed that after providing for the expense of the son's education the whole free balance of income shall be handed over to the father, who will out of it maintain the son when he is not absent at school. This discloses a somewhat singular state of things, because although the father is entitled to a reasonable allowance for the maintenance of the son while he resides in family with him, some regard should be paid to the interest of the son by saving such part of the income as may not be required for his maintenance at school or at home. The proposal that there should be a trust deed implies an admission that some sort of fiduciary administration is required in the interest of the son, and the present administration by Mr Dalziel is adequate and satisfactory. Why then should matters not be left as they are at present? To this question no adequate answer has been given, and it seems to me better that the present administration should be continued than that a new administration should be set up under the proposed trust deed.

For these reasons I think the prayer of the petition should be refused.

LORD ADAM concurred.

LORD M'LAREN—I concur in the judgment proposed by your Lordship, and have very little to add. An important consideration in this case is that the appointment of Mr Dalziel as factor *loco tutoris* was made on the application of Mr Balfour Melville, the father of the ward. That was a very honourable and just act on his part. When he found that his circumstances were embarrassed he desired to give his son's fortune the utmost degree of protection afforded by the law.

This was a serious step, because the father, or his advisers, knew that the son's money would remain under the administration of the judicial factor until the son came of age, or until the factor's administration was displaced by the Court on reasonable cause shown. In the argument addressed to us it seemed to be assumed that because Mr Balfour Melville had voluntarily placed his son's money under the administration of the Court it could be withdrawn again at any time at his pleasure. I cannot assent to that view of the rights of a father. The question is not before us now under the same conditions at all.

We have no power to inquire into the administration of minors' estates by their fathers unless some application is made to us. But when the estate of the ward has been placed in the hands of the Court, and an application is made to withdraw it, a public duty is cast on the Court to see that the fund is not withdrawn except under a proper and effective scheme of administration. In this case I do not feel greatly concerned as to what might happen to the income of the estate, because the amount of it is not very large, and I have some sympathy with the wish of the son that the income should be applied towards the maintenance of the family as well as for his own individual benefit. But I share the difficulty expressed by your Lordships and by the Lord Ordinary as to the safety of the capital. I cannot overlook the possibility that under pressure from creditors the trust which is to be constituted

might be revoked. I am not suggesting that that would happen in this case, but still there is a possibility. Meantime the estate is perfectly safe, and is being managed with due regard to economy. I think with your Lordship that it is better to leave the estate under its existing administration.

LORD KINNEAR—I also agree with the Lord Ordinary. The petition, as I understand, is maintained on the ground that a father has a legal right to put an end to the judicial administration of the estate of his minor son and to secure his position as administrator-in-law, and therefore that the Court has no concern with any conditions which he may propose to adject to his own administration, but must at once proceed to recal the curatory. I do not think that is the legal position of the petitioner at all. This is not an application to supersede the father in the office of administrator-in-law by the appointment of a judicial factor on the son's estate. Even if it had been, I should not assent to the proposition that the Court has no power to make such an appointment. The case of *Wardrop*, 7 Macph. 532, to which the Lord Ordinary refers, only decided that very strong grounds must be shown for such an application, and that it was not enough merely to say that the father was in embarrassed circumstances. But it assumes that on such on application it is the duty of the Court to consider, when the matter is brought before them by a person who has a title to do so, whether, looking to the interests of the minor, such an appointment should or should not be made. But, as I have said, the father here is not in the position of a father objecting to the appointment of a curator. The question here is, whether an appointment made at his own instance should be recalled. The argument was pressed by Mr Pitman that conclusions should not be drawn too strongly from statements made in the petition which he was not bound to make, but which were inserted in a spirit of candour, and in order that the Court might be put in possession of the whole facts. I quite assent to that, but as the statement has been made we must read it to ascertain its bearing upon the application before us. It amounts to this, that the petitioner or his advisers do not think that he is in a position to undertake the uncontrolled guidance of his son's affairs as his administrator-in-law, and that in view of certain circumstances he thinks he ought not to administer the capital of the estate, and therefore proposes that a trustee should be appointed in whom that capital should be vested. But then he says that although he is not prepared to administer the capital he ought to have the control of the income. I am not prepared to enter into such a distinction. A father ought either to have the uncontrolled management of his son's estate, or else, if it is admitted that he is not in a position to claim the uncontrolled administration, it is better for the interests of the son that the administration both of capital and income should remain in the hands of an officer of the Court. I am therefore disposed to refuse the prayer of the petition on the grounds on which the Lord Ordinary has proceeded, without any consideration of the terms of the trust-deed which it is proposed to grant. It is enough that we are assured that the father does not feel entitled to claim the uncontrolled administration of the son's estate, but desires to be restrained by a trust, because I think that if the father is not to be the absolute and uncontrolled guardian the present method of administration is better and simpler than a new trust. But when we look at the trust-deed, I agree with your Lordships that its provisions are such as we ought not to sanction, and form an additional ground for thinking that the prayer of the petition ought to be refused.

The Court adhered.

Counsel for the Petitioners — Jameson, K.C. — Pitman. Agents — Clark & Macdonald, S.S.C.

Counsel for the Respondent — W. L. Mackenzie. Agents — Dundas & Wilson, C.S.

Friday, January 30.

FIRST DIVISION.

CAMPBELL'S TRUSTEES.

Marriage-Contract—Succession—Power of Appointment—Prescribed Formalities—Power Exercised without Formalities Prescribed—Contract.

Where a marriage-contract confers a power of appointment to be exercised by the survivor of the spouses by any writing executed with certain prescribed formalities, the power cannot be validly exercised by any writing which is not executed with the formalities specified.

Question (*per* Lord M'Laren) whether, apart from the law of wills, it was competent for parties to a contract to stipulate that any writing, however informal, should be binding upon them in reference to that contract.

Process—Special Case—Facts Admitted in Case — Question of English Law — Construction of English Statute.

Opinions (*per* Lord Adam and Lord Kinnear) that the Court will not consider, in a special case, an argument founded on the construction of an English statute, unless the meaning of that statute is set forth as one of the admitted facts in the case.

This was a special case raising the question of the validity of the exercise of a power of appointment conferred in the marriage-contract between John Archibald Campbell and Miss Emma Legh or Campbell. The *first parties* to the case were the trustees acting under the marriage-contract; the *second parties* were the trustees under the trust-disposition and settlement of the Rev. John Archibald Legh Campbell, son of the