altered would, I presume, have involved a statement that the alteration was by consent, which would, of course, have had no force as a decision.

The Court answered the first question of law in the affirmative.

Counsel for Pursuers (Appellants)—Sandeman, K.C.—Macgregor Mitchell. Agents—Wallace & Begg, W.S.

Counsel for Defender (Respondent)—Watt, K.C.—Wilton. Agents—Macbeth, MacBain, Currie, & Company, S.S.C.

Friday, January 11.

FIRST DIVISION.

POTTER'S TRUSTEES *v.* ALLAN AND OTHERS.

Succession—Trust—Construction—Revocation—Powers of Apportionment—Proper Objects — Payment — Authorisation of Donees of Powers to Delegate Execution of Powers to Persons Nominated by them.

By a codicil a testator gave a share of residue to one of his daughters, Mrs A. "declaring that the share of [my] daughter [Mrs A.] shall in the event of her and her daughter [M.] surviving me suffer deduction of the sum of [£500], which sum my trustees shall pay to [her daughter M.]." A later codicil provided "with reference to the share of the residue of my estate bequeathed to my daughter [Mrs A.] [I] do alter and vary the said bequest," and thereafter the testator directed his trustees to hold and apply or pay the share of residue and the income thereof to or for behoof of the "daughter and her children or any of them in such portions and at such times as my trustees may think most for the advantage of them or any of them, or otherwise in their option to pay and convey the said share or any portion thereof remaining unpaid to such person or persons as shall be named by my trustees," to be held and apportioned by him or them in the same way. The testator was survived by Mrs A. and her daughter M., who predeceased her mother. Mrs A. had two children at the date of the testator's death, 6th May 1890; thereafter other two were born to her. In September 1905 the testamentary trustees, who had made no apportionment of the share of residue in question, executed a deed of nomination in exercise of their option and assigned and conveyed to their nominees the share of residue. Their nominees continued thereafter to hold the share of residue without making any apportionment of the capital. *Held* in a special case, to which the trustees' nominees Mrs A. and her surviving children were parties, (1) that the bequest of £500 was not revoked by the second codicil, and that it vested *a morte* in the legatee; (2) that the children born to the testator's daughter after the testator's death were included with the other children among the proper objects of the power of apportionment; and (3) that those beneficiaries were not entitled to demand payment of the share of the residue.

Question whether the power given to the trustees to delegate to their nominees the exercise of the power of apportionment was valid.

William Smith Storie and another, as trustees acting under a deed of nomination and conveyance by the testamentary trustees of James Potter of Glenfuir, Falkirk, *first parties;* Mrs Janet Wilson Potter or Allan, widow of the deceased Andrew Allan, solicitor, Falkirk, and a daughter of James Potter, *second party;* and Robert Andrew Craig Allan, Elizabeth Craig Allan, and Janet Evelyn Allan, the surviving children of the second party, *third parties*, brought a Special Case to determine questions relating to the rights of the parties under the testamentary writings of James Potter, who died on 6th May 1890, leaving a trust-disposition and settlement and three codicils.

The *trust-disposition and settlement*, dated 1st November 1887, disponed and conveyed the testator's whole means and estate to William Snell Anderson, Andrew Allan, and the Rev. William Smith Storie as trustees for various purposes.

The *first codicil*, dated 5th April 1899, directed the trustees to pay to the testator's widow the profits of his shares in a certain coal company in order to increase her provision.

The *second codicil*, dated 4th November 1899, revoked the testator's directions in his trust-disposition and settlement as to the disposal of the residue of his estate, and in lieu thereof directed his trustees, in the first place, to pay at the first term after his death, to his son James Thomas Potter, whom failing his issue, the sum of £750, and further provided—"And in the second place I direct that my trustees shall hold, pay, or convey the residue of my said means and estate, including the funds employed in and free proceeds of any business or interest in any business continued as mentioned in the foregoing trust-disposition and settlement, together with the annual profits or income thereof, and any funds that may have been set apart to meet the annuity before mentioned as the said funds, proceeds, and profits are realised and set free, to or for behoof of my other lawful children, Mary Henderson Potter, Janet Wilson Potter or Allan, and Christina Isabella Potter or Storie, equally among them, the lawful issue of any of said children predeceasing me being entitled equally among them to the share which would have fallen to their parent if alive; declaring that the share of my daughter Janet Wilson Potter or Allan shall in the event of her and her daughter Mary Wordie Allan surviving me suffer deduction of the sum of Five hundred pounds sterling, which sum my trustees shall pay to the said Mary Wordie Allan; notwithstanding what is before written I empower my trustees to retain in their own

hands should they consider it desirable in the interests of any of the beneficiaries under these presents the whole or any portion of the share of the said beneficiaries other than the said James Thomas Potter as alimentary provisions, and to apply the annual income of such share for behoof of such beneficiary so long as they consider it expedient; with the foregoing alteration I hereby confirm the said trust-disposition and settlement and relative codicil."

The *third codicil*, dated 10th April 1890, provided—"I, James Potter of Glenfuir, having reconsidered the trust-disposition and settlement and codicils before written, with reference to the share of the residue of my estate bequeathed to my daughter Janet Wilson Potter or Allan, do hereby alter and vary the said bequest to the following extent and effect, viz., I direct my trustees to hold and apply or pay the said share of residue and income thereof to or for behoof of the said Janet Wilson Potter or Allan and her children or any of them in such portions and at such times as my trustees may think most for the advantage of them or any of them, or otherwise in their option to pay and convey the said share or any portion thereof remaining unpaid to such person or persons as shall be named by my trustees, to be held by him or them in trust and applied or paid to or for behoof of the said Janet Wilson Potter or Allan and her children or any of them in such portions and at such times as the said person or persons so named may consider most for the advantage of the said Janet Wilson Potter or Allan and her children; declaring that my trustees' discretion in the nomination of such person or persons to act as aforesaid shall be absolute, and the receipt or discharge of the person or persons so named shall be a sufficient exoneration to my trustees; and with these alterations I ratify and confirm the said trust-disposition and settlement and codicils."

The Case set forth—"1. James Potter" left "estate of the nett value of £13,000. The testator was survived by his widow Mrs Mary Bow Wordie or Potter, who died on 15th June 1905, and by four children, viz., James Thomas Potter, who died in 1896, and Mary Henderson Potter, Mrs Janet Wilson Potter or Allan, and Mrs Christina Isabella Potter or Storie, who all survive. 2. The testator's daughter Mrs Janet Wilson Potter or Allan is aged 57, and is the widow of the deceased Andrew Allan, solicitor, Falkirk, who died on 30th May 1899. At the date of the testator's death she had two children, Robert Andrew Craig Allan and Mary Wordie Allan. Since that date two other children have been born to her, viz., Elizabeth Craig Allan and Janet Evelyn Allan. The said Mary Wordie Allan died intestate and unmarried, at the age of twenty-one, on 20th May 1906. All the other children have attained majority. . . . 6. By a deed of nomination and conveyance dated 20th, 22nd, and 25th September 1905, and registered in the Books of Council and Session 26th September 1905, William Snell Anderson, William Smith Storie, and John Craig Allan, the surviving original and assumed trustees of the testator, on the narrative of the directions contained in the last-mentioned codicil, and on the further narrative that they had decided to exercise the said option, named and appointed themselves and Robert Andrew Craig Allan (these being the surviving trustees of Mrs Allan's husband Andrew Allan) 'to hold and apply the share of the estate of the said deceased James Potter bequeathed or falling to his daughter the said Janet Wilson Potter or Allan and the income or interest due, or which may hereafter become due, thereon, to or for behoof of the said Janet Wilson Potter or Allan and her children or any of them in such portions and at such times as the said John Craig Allan, William Snell Anderson, William Smith Storie, and Robert Andrew Craig Allan or their foresaids may consider most for the advantage of the said Janet Wilson Potter or Allan and her children.' The said deed also contains an assignation and conveyance by the testator's trustees to the said trustees therein nominated (who accepted office) of the said share of the residue of the testator's estate. 7. The trustees acting under the said deed of nomination and conveyance still hold the share of the residue thereby conveyed to them. No payment of the said sum of £500 or of interest in respect of the same was made to the said Mary Wordie Allan by the said trustees or by the trustees acting under the testator's testamentary writings. The whole income accruing from the said share of residue since the date of the testator's death has been paid to or for behoof of the said Mrs Allan and her children, but no payment has been made from the capital thereof, nor has any appointment as to the said share been executed, by the trustees acting under the said deed of nomination and conveyance."

The first parties *contended* that "on a sound construction of the testator's testamentary writings no right vested in the said Mary Wordie Allan; that no right in the share of residue dealt with in the third codicil or in any part of the said share which may from time to time remain in the hands of the first parties has vested or will vest in the second or third parties or any of them so long as it remains in the hands of the first parties; that in any event the second and third parties are not entitled to demand payment of the said share or any portion thereof, and that the same is payable only to such of the second party and her children and in such portions and at such times as the first parties in the exercise of their discretion may determine."

The second party contended that "the direction as to the payment of the said sum of £500 to Mary Wordie Allan has not been revoked but vested in her (Mary Wordie Allan), and is now distributable as her intestate estate; that the said share of residue (under deduction of the said sum if the said direction has not been revoked) vested on the death of the testator in the second party and her children who were alive at the testator's death in equal shares to the exclusion of any children born to her thereafter; that the directions in the third codicil

are not effectual to limit their rights in the said share, and that they are now entitled to payment thereof."

The third parties concurred in the contention of the first parties, and further contended that "the direction as to the payment of £500 to the said Mary Wordie Allan contained in the second codicil was revoked by the third codicil. They also maintain that if the said share of residue has vested it vested equally in the second and third parties and the said Mary Wordie Allan."

The *questions of law* were — "1. Is the direction contained in the codicil dated 4th November 1889 as to the deduction from the share of the second party, and payment to the said Mary Wordie Allan of the sum of £500, revoked by the terms of the codicil dated 10th April 1890? 2. In the event of the preceding question being answered in the negative, had the said Mary Wordie Allan a vested right in the said sum of £500? 3. (*a*) Did the share of residue referred to in the said codicil dated 10th April 1890 (or the said share subject to the deduction of £500) vest equally in the second party and her children who were alive at the date of the testator's death to the exclusion of any children born thereafter? or (*b*) Did it vest equally in the second and third parties and Mary Wordie Allan? or (*c*) Will it vest only in those of the second party and her children to whom it may be paid or made over by the first parties, and that at such times and in so far as it is paid and made over? 4. In the event of branches (*a*) or (*b*) of the third question being answered in the affirmative, (*a*) are the first parties bound to make payment of the shares of the said share of residue to the parties in whom the same have vested when required by them to do so? or (*b*) are the first parties entitled to continue to retain the shares of the said share of residue whether payment is or is not demanded by the parties in whom the same have vested?"

Argued for the first and third parties—(1) The second codicil contained a bequest of £500 to Mary Wordie Allan, but also earmarked the fund from which it was to be paid, viz., her mother's share. That was a demonstrative legacy, which would fail if the mother never took a share. In the third codicil the testator was expressly rearranging his testamentary bequests, and he therein treated the mother's share as a share equal to that given to each of her sisters, and ignored the deduction of the legacy to Mary Wordie Allan contained in the second codicil. That was a revocation by implication of that bequest, for if not the mother could not take an equal share with her sisters. (2) The proper objects of the power of appointment contained in the third codicil were Mrs Allan and her children or any of them. There was no hint of an intention to limit the proper objects to children born at any particular date. Any person *de facto* a child of Mrs Allan whenever born was a proper object. In such a case the class of proper objects was closed only when and in so far as the donees of the power exercised it — *Ross* v. *Dunlop*, 1878, 5 R. 833, *per* Lord President Inglis at p. 836, 15 S.L.R. 580. Thus if the donees of the power made a partial distribution children born thereafter could not challenge that distribution so far as it had operated on the funds, but they were entitled as proper objects to share in the funds remaining undistributed. If the donees of the power made no distribution all the children whenever born would take equal shares—*Hill's Trustees* v. *Thomson*, 1874, 2 R. 68, 12 S.L.R. 20. Everything depended on whether there was a direction to pay at a certain date. If there was, then the class of proper objects was closed at that date. Farwell, Powers (3rd ed.), pp. 534 and 536, was referred to. (3) As to the power of delegation conferred upon the trustees in the third codicil there were no authorities in point, but in any event the original trustees were still in the saddle and might still act themselves. Otherwise the nominees in the deed of nomination had a position very similar to that of assumed trustees, and it had been decided that assumed trustees could validly exercise such a power as that in question—*Shedden's Trustees* v. *Dykes*, 1914 S.C. 106, 51 S.L.R. 115. In a case where there was a delegation to trustees to distribute amongst relations it had been observed that if all the trustees died without distributing the Court would find a substitute to exercise the power — *M'Cormack* v. *Barber*, 1861, 22 D. 398, *per* Lord Deas at p. 407. *Hill* v. *Burns*, 1826, 2 W. & S. 80, was referred to.

Argued for the second party — (1) The terms of the third codicil were silent as to the legacy to Mary Wordie Allan, but when the testator meant to revoke a bequest he did so expressly. The "share of residue" referred to was the share of residue given to Mrs Allan subject to deduction of the bequest of £500. That legacy vested in Mary Wordie Allan at the testator's death, as there was nothing to suspend vesting. (2) The share of residue was gifted to Mrs Allan and her children or any of them subject to a power of apportionment. The result was that that share vested *a morte* in a composite class consisting of Mrs Allan and her children alive at the date of the testator's death, subject to the fixing of the shares of the bequest by the donees of the power of appointment. Such discretionary powers did not suspend vesting in the class. Vesting took place *a morte* subject to defeasance operated by an exercise of the discretionary powers — *Chambers' Trustees* v. *Smith*, 1878, 5 R. (H.L.) 151, *per* Lord Blackburn, at p. 161, 15 S.L.R. 541; *Hill's Trustees* v. *Thomson* (*cit.*), *per* Lord Justice-Clerk Moncreiff and Lord Neaves at 2 R. p. 70; *Macfarlane's Trustee* v. *Macfarlane*, 1903, 6 F. 201, *per* Lord President Kinross at p. 206, and Lord M'Laren at p. 210, 40 S.L.R. 64. There was no destination-over and no need to continue the trust. The trustees could have acted at once and paid away all the funds and the *post nati* could not have objected. Different periods of payment were not contemplated by the codicil. Further, under the second codicil vesting was undoubtedly *a morte* in the fund in question. The third codicil dealt with the same fund, and there was no indication of a different intention as regards

vesting. Consequently the *post nati* had no right to a share as proper objects of the power—*Wood* v. *Wood*, 1861, 23 D. 338; *Stopford Blair's Executors* v. *Heron Maxwell's Trustees*, 1872, 10 Macph. 760, 9 S.L.R. 490; *Weir* v. *Young*, 1898, 5 S.L.T. 233. (3) The power of delegation given to the trustees was invalid. There was no case in which such a power had been sustained. No doubt assumed trustees might be held entitled to exercise such discretionary powers, but in *Shedden's* case (*cit.*) the validity of conferring such powers on trustees to be assumed was not argued. Here, however, the nominees were not in the position of assumed trustees, but were trustees of the trustees, there being really a double trust. But in any event the powers belonged to those who were actually in the office of trustees under the testator's deed —*Eastick* v. *Smith*, [1904] 1 Ch. 139, *per* Farwell, J., at p. 142. *Crichton* v. *Grierson*, 1828, 3 W. & S. 329, was referred to.

At advising—

LORD PRESIDENT—In this case the testator by his trust-disposition and settlement bequeathed one-third of the free residue of his estate to his daughter Mrs Allan, but under deduction of a sum of £500 which he directed his trustees to pay to her daughter Mary Wordie Allan. The bequest was of course conditional on both ladies surviving the testator, which they did. By his second codicil he repeated this bequest, and by his third codicil he altered or varied but did not revoke it. The alteration in no way related to the amount of the bequest, but was confined exclusively to the objects of the bequest, times of payment, and the mode of distribution amongst those who were entitled to participate, and, subject to this alteration he confirmed and ratified his trust-disposition and settlement and the second codicil.

If I have correctly recited the effect of the third codicil, it necessarily follows that the bequest of the £500 vested in Mary Allan at the testator's death, and that her mother's bequest was one-third part of the free residue of the estate less the £500 which the trustees were directed to pay to Mary Allan.

If your Lordships agree, then we shall answer the first question put to us in the negative and the second question in the affirmative. And then if we answer question 4 (*b*) in the affirmative, I understand it was agreed that it was unnecessary to answer any other questions in the case—they might never arise.

I see no reason why we should refuse to answer question 4 (*b*) in the affirmative. If we do so we shall only, in my opinion, be affirming that the testator meant exactly what he said, and that his wishes are susceptible of being given effect to by the law of Scotland, for nothing in the argument addressed to us threw any doubt, in my opinion, on the efficacy of the direction to the trustees or to persons named by them to hold and apply and pay the share of residue and income thereof to or for behoof of a daughter and her children or any of them, of course including *post nati*, in such portions and at such times as the trustees might consider to be most for the advantage of the daughter and her children or any of them, including once more *post nati*. And to answer question 4 (*b*) in the affirmative appears to me to be simply affirming what the testator says, and that his wishes are susceptible of being given effect to.

If I were to answer a question which does not in my opinion arise in the event of our giving an affirmative answer to question 4 (*b*), then my views would coincide exactly with those which I understand are to be expressed by my brother Lord Skerrington in his opinion.

LORD JOHNSTON—[*After referring to the terms of the testator's codicils*]—The questions annexed to the case are not satisfactory, and we were promised a revised edition. This promise has not been fulfilled, and I find myself left to ascertain what the questions that arise in the circumstances are. The first question in dispute is, I think, whether the alteration and variation of the third codicil of the bequest of a share of residue to Mrs Allan by the second codicil revokes the riding bequest with which it was burdened, of £500 to Mary Wordie Allan. I do not think that it does. The bequest of residue to Mrs Allan was not of an equal third share of the residue along with her two sisters, but of an equal third share under burden of a preferable payment of £500 to her daughter. There is no revocation, but merely alteration and variation, and what is so dealt with is what was left to Mrs Allan, viz., the one-third share of residue less £500. The riding bequest on that of £500 to Mary Wordie Allan remains untouched.

The next question that arises is as to whether the benefit of the provision of the third codicil enures to Mrs Allan and her whole children, or only to her and those who were born before the testator's death, to the exclusion of *post nati*. She had two children, including Mary Wordie Allan, born before, and two after, the testator's death. I think that the testator clearly intended all to participate.

The only remaining question, so far as I can see, though I may be mistaken, is in regard to the rights of mother and children under the third codicil in the share of the residue bequeathed to Mrs Allan by the second codicil. The third codicil confers on the trustees a wide discretionary power of appointment among Mrs Allan and her children. So far there can be no doubt that the power conferred is valid and effectual, and that while the trustees are to hold for Mrs Allan and her children they are to apply and pay in terms of the power. Whether they have any vested right in the fund or not the children cannot defeat the power by requiring payment at once. The time of executing the power is left to the trustees. But they are bound to execute the power in *bona fide*, and cannot simply hold up the fund. Were they to let the power lapse by non-exercise, then as it is only a burden on the bequest as altered and varied, I am disposed to think the class favoured, includ-

ing Mary Wordie Allan, have taken equally the bequest *a morte*, subject to the powers, and that they ought to be, on failure to exercise the power, preferred accordingly. But it is premature to decide this question.

But then the testator is not content with giving this power to his trustees; he goes on to authorise them to transfer the share in question to other persons and to confer on these other persons the same powers as he had conferred on themselves. He gives them thus a power to delegate the power to others. I have very great doubt as to the validity of such a delegation and desire to reserve my opinion thereanent. No question on this point has been raised by the parties, and what the trustees have done is virtually to assume one other new trustee, which they might have done under the original deed of settlement, instead of by creating a new and separate trust. Had they done so the situation would have been covered by the decision in *Shedden's* case, 1914 S.C. 106, 51 S.L.R. 115, to which I was a party, though under reservations.

LORD MACKENZIE—I agree with your Lordship in the chair as to the way in which the questions should be answered.

LORD SKERRINGTON—The first and second questions relate to a legacy of £500 in favour of the testator's granddaughter Miss Mary Wordie Allan. I agree that this bequest cannot be held to be revoked, because nothing is better settled than that a legacy bequeathed in clear and unambiguous terms is not revoked by ambiguous language. It is also clear that the legacy vested *a morte*.

The third and fourth questions relate to the share of residue which the testator bequeathed to his daughter Mrs Allan and her family by his third codicil. The clause is peculiar in this respect, that while it confers upon the trustees a power of apportionment among Mrs Allan and her children or any of them, it does not go on, as is usual in such cases, to say what is to happen failing appointment. I agree with your Lordship that it is premature for us to decide whether any person will be found to have taken a vested right under the clause in the event of the power never being exercised. I may, however, express my concurrence with what I understand to be the opinion of your Lordship in the chair and also of Lord Johnston, to the effect that, failing appointment, there is here an implied gift to the persons who are the objects of the power, namely, Mrs Allan and her children—whatever that phrase may mean. It is necessary now to consider and decide what that phrase means in order that the trustees who are vested with the power of appointment may know among what persons they are entitled to divide. An authority was cited which seems to be entirely in point, the case of *Ross* v. *Dunlop*, 5 R. 833. That case indicates that this power may lawfully be exercised either in whole or in part in favour of Mrs Allan and any of her children who happen to be alive at the time when it is exercised. In other words, the objects of the power are not limited to the children alive at the death of the testator, but include children subsequently born. Of course the trustees in exercising the power might exclude any child, but on the other hand they would not be bound or entitled to exclude a child merely because he had been born after the will came into operation.

The question as to who are the objects of the power arises most directly with reference to question 4, which asks whether the trustees are entitled to retain the fund in their own hands or are bound to distribute it at once. I see no reason to doubt that question 4 (*b*) must be answered in the affirmative, namely, that the trustees are entitled to continue to retain the fund. Although the point is not put in the question, we ought, I think, to add that the objects of the power include children *post nati* as well as children in existence at the date when the will came into operation.

One of your Lordships indicated a doubt as to the legal validity of what the testator affected to do, namely, to give his testamentary trustees power to nominate a new body of trustees who should be entitled to exercise the power of apportionment. In point of fact they have exercised that power and are not themselves parties to this Special Case. In their absence it is impossible for us to decide whether the deed of nomination is valid or not. I may say, however, that I do not share the doubt in question.

The Court answered the first question of law in the negative, the second question in the affirmative, and branch (*b*) of the fourth question in the affirmative, with the addition that the first parties were entitled to include *post nati* as well as children in existence at the date of the testator's death in the exercise of their discretionary power.

Counsel for the First and Third Parties—R. C. Henderson. Agents—R. D. Ker & Ker, W.S.

Counsel for the Second Parties—W. J. Robertson. Agent—A. E. S. Thomson, LL.B., Solicitor.

Friday, January 25.

SECOND DIVISION.

[Lord Anderson, Ordinary.

CAMERON *v.* WOOLFSON.

Process — Proof — Expenses — Production of Evidence Taken on Commission—Discretion of Court—Expenses of Reclaiming Note.

In an action of damages the evidence of one of the witnesses for the pursuer was taken on commission, to lie *in retentis*. The report of the commission was opened prior to the proof, and both parties had an opportunity of being acquainted with its contents. The pursuer closed his case without having made the evidence taken on commission a part of his case. Counsel for the defen-