ever. His character appears now to be unimpeachable, and I cannot think that we ought to impose upon him a burden which would inevitably involve him in ruin. I therefore concur in the opinions that have been delivered.

Agents for Pursuers—A. Duncan & G. V. Mann, S.S.C.

Agents for Respondents—Keegan & Welsh, S.S.C.

Saturday, June 15.

FIRST DIVISION.

BILDSTEIN *v.* BOCK & CO.

Arrestment—Ship—Register—Jurisdiction.

Arrestments on a foreign ship used *ad fundandam jurisdictionem* and on the dependence of an action against a person who had been the owner, recalled at the instance of a party who, *ex facie* of the foreign register, was now the owner.

This was a petition by Alexander Bildstein, Odessa, praying for recall of certain arrestments at the instance of E. Bock & Co., Glasgow, on the Russian ship 'D. Jex,' of which the petitioner was, *ex facie*, the registered owner.

The petitioner set forth that he had purchased the vessel from her former owner, Carl Adolphus Busch, merchant, Odessa, in September 1870, and produced the necessary documents to instruct the transference. On 3d October 1871 the vessel sailed from Odessa for Glasgow, with a cargo for which she had been chartered by Busch. On her arrival at Glasgow Bock & Co. procured letters of arrestment *ad fundandam jurisdictionem* against Busch, in virtue of which they arrested the ship, on the allegation that Busch was the sole or part owner thereof. Thereafter, on 7th February 1872, Bock & Co. raised an action against Busch in the Court of Session for certain sums, and, in virtue of the warrant contained in the summons, arrested the vessel in security.

Messrs Bock & Co. lodged answers, in which they denied that the petitioner was the true owner of the vessel, and averred that Busch had all along continued to be the owner, and acted as such. They averred that the petitioner was a clerk at Odessa, and that the registration of the ship in his name was a mere device on the part of Busch for preventing the ship from being made answerable for their just claims. In support of these averments the respondents produced a letter from Busch after the date of the alleged sale, which showed that he still acted as owner.

Solicitor-General and Strachan, for the petitioner, argued that a creditor could not use arrestments on a ship which did not, *ex facie* of the register, belong to his debtor; *Duffus*, Feb. 13, 1857, 19 D. 430; *Schulz*, Dec. 5, 1861, 24 D. 120; *Grant*, Dec. 14, 1867, 6 Macph. 155.

Watson and Maclean for the respondents.

At advising—

Lord President—It seems to be taken for granted that if a creditor cannot use arrestments on a foreign ship his remedy is gone. The proper course for the respondents is to sue Busch at the port of Odessa, his domicile. It happens to be convenient to the respondents, being resident in Glasgow, to sue him in the Courts of this country, and they may be able to do so if they can find means to found jurisdiction. But we must not strain our rules to enable parties to found jurisdiction. The rule laid down in the case of *Duffus*, and followed in the subsequent cases, is a most salutary and proper rule.

The other Judges concurred, observing that the respondents had not made out so strong a case of fraud as was done in the case of *Grant*, in which, nevertheless, the arrestments were recalled.

The Court recalled the arrestments.

Agent for Petitioner—William Duncan, S.S.C.

Agents for Respondents—J. & R. D. Ross, W.S.

Saturday, June 15.

SECOND DIVISION.

SPECIAL CASE—GRANT, AND MURRAY AND COUTTS.

Succession—Liferent and Fee—Vesting.

A testator bequeathed £500 to his daughter, "in liferent only, and not affectable by her debts or deeds," and to her children in fee, and also a share of the residue of his estate to his daughter, in "liferent, and not affectable by her debts or deeds," and to her children in fee. He likewise declared that no legacy should be payable till the majority of the party entitled thereto, and that the share of any son or daughter who should predecease ("without leaving issue") before the term of payment should revert to the estate. The daughter and her children having perished at sea in the same vessel—*held* that the £500 had vested in the children immediately on their birth; that the share of the residue had likewise thus vested in them, notwithstanding the omission of the restrictive word "only" in the provision of the liferent of that share to their mother; and that neither of these sums reverted to the estate.

This was a Special Case for the opinion and judgment of the Court, between William Grant, Twin Cottage, Chapel Street, Aberdeen, executor-dative of the deceased Rev. George Grant, sometime of Aberdeen, and executor of the deceased children of the said Mr Grant, of the first part; and Mrs Elspet Ogilvie or Murray, widow of Alexander Murray, Whitehills, parish of Boyndie, county of Banff, and William Coutts, solicitor, Banff, a majority and quorum of the trustees of the said deceased Alexander Murray, of the second part. By a trust-disposition and settlement, dated 17th May 1860, and with codicil annexed, dated 1st October 1860, Alexander Murray, residing in Whitehills, in the parish of Boyndie and county of Banff, conveyed to trustees for the purposes therein specified, his whole estate, heritable and moveable, and he nominated his trustees his sole executors. Among the purposes of the trust-deed were the two following:—"(12th) I bequeath to each of my daughters Elspet Murray, Ann Murray, Barbara Murray, Margaret Jane Murray, and Helen Murray, the sum of £600 sterling, and in case of any of them predeceasing leaving issue, such issue shall succeed to the parent's share, but specially providing and declaring that there shall be paid to each of my said daughters, within six months after my death, the sum of £100 sterling, being part of the beforementioned £600, which provision of the balance of £500 to each, in favour of my said daughters

shall be secured upon them in liferent, for their liferent use only, and the fee upon their children, and the interest accruing to them shall be purely alimentary, and shall not be affectable by their debts or deeds (farther than a right to divide among their said children, if any), or subject to the diligence of their creditors, nor shall the same be subject to the *jus mariti* of any husbands of my said daughters, or the right of administration of such husbands. (14th) . . . It is declared no legacy shall be payable till the party entitled thereto shall attain majority, but in the case of such as are in minority, it shall be lawful to my trustees and executors to apply the interest arising thereon to and towards their maintenance, and the share of any son or daughter who shall predecease (without leaving issue) before the term of payment arrives, shall revert to the estate; and it is also declared, that if my means and estate fall short of realising the foresaid provisions, then the sums so left to my five sons and five daughters shall suffer a proportional abatement. But, on the other hand, and if my means and estate should yield more than sufficient to meet the foregoing bequests, I direct my said trustees and executors to pay the residue equally to and among my said five sons and five daughters, to whom accordingly I bequeath the same, naming and hereby appointing them my residuary legatees: But such residue shall not be paid over to my said sons till they have all attained majority; and the shares falling to my said daughters shall be secured on them in liferent, and on their children in fee, and the interest accruing to the mothers shall be purely alimentary, and not affectable by their debts or deeds (farther than a right of apportionment among their children), or subject to the diligence of their creditors, nor shall the same be subject to the *jus mariti* of any husband of my said daughters." The truster died on 6th Dec. 1860. The trustees accepted of the trust, and gave up an inventory of his personal estate, the amount of which was stated at £13,305, 0s. 7d. The second parties in the case were a majority and quorum of the accepting and acting trustees. On 27th May 1862, Ann Ruddiman Murray, one of the daughters of Alexander Murray, was married to the Reverend George Grant, sometime of Aberdeen, afterwards clergyman in New Zealand, and went to New Zealand with her husband in the same year. Mrs Grant had attained majority prior to her marriage. In May 1869 Mr Grant, having given up his charge in New Zealand, embarked with his wife and their whole family, viz., three sons and a daughter, on board the sailing vessel "Matoaka," at Lyttleton, New Zealand, bound for London, intending to return to Scotland. At this time Mr Grant was of the age of thirty-eight years, Mrs Grant was of the age of thirty-four years, and the four children were all in pupilarity, the eldest having been born on 1st February 1864. The ship "Matoaka" having never been spoken with or heard of after her departure from New Zealand, the parties were satisfied that Mr Grant and his wife and children were dead, and were agreed in stating as matter of fact that they had perished at sea. William Grant, the first party, brother of the said Mr Grant, was on 28th January 1870 decerned executor-dative *qua* one of the next of kin to his brother; and on 29th December 1871 he was decerned executor-dative *qua* one of the next of kin to the children of Mr Grant, conform to decrees of executry by the commissary of Aberdeenshire in his favour. The Rev. Mr Grant was survived by his father and by one brother and two sisters, besides his brother the said William Grant. The widow of Alexander Murray, the truster, was at this time still alive, and in the capacity of trustee was a party to this case. Three of the residuary legatees were paid by the second parties, prior to May 1870, £300 each to account of their shares of residue, and the second parties, in accounting with Mrs Grant, credited her with the interest of £300 of residue from 26th May 1866, in addition to the sum of £100, and interest on the sum of £500, referred to in the 12th purpose of the trust-deed. The following members of Alexander Murray's family, who survived the testator, predeceased Mrs Grant, viz., Alexander Murray, who died on 10th May 1862, James Murray, who died on 14th May 1862, and Elspet Murray, who died on 16th January 1863. These all died unmarried. In consequence of the presumed death of Mr and Mrs Grant and their children, questions arose between the parties as to the rights of the first party, as executor of Mr Grant and of his children, under the trust-disposition and settlement of the said Alexander Murray. Mr Grant himself had not contributed in any way to the funds claimed by his executor. The first party maintained that he was entitled to the amount of the provision by Alexander Murray under the 12th purpose, and to a share of the residue under the 14th purpose of his trust-disposition in favour of Mrs Grant and her children, in so far as not already paid, with the interest due thereon. The second parties maintained that the first party was neither entitled to the said provision, nor to a share of the residue under Mr Murray's settlement; first, because as they conceived the right of Mrs Grant's children was contingent on their survivance of their mother, it being provided in the said 14th trust-purpose that the share of any son or daughter of the testator who should predecease without leaving issue before the term of payment arrived, should revert to the estate, and that it was therefore incumbent on the first party to show as matter of fact or legal presumption that Mrs Grant was survived by one or more of her children. They further maintained that, even assuming that the said provision and share of residue vested in Mrs Grant's lifetime, it was necessary that the claimant should establish his right to the succession in one or other of the two characters in which he claims. No evidence existed as to the order of survivance of the different members of the family who perished. It was accordingly left to the Court to determine whether any and what conclusions could be deduced regarding the survivance of any of the said family from the circumstances of age, sex, and relationship above set forth, it being agreed that all matters of legal presumption, raised by the questions of law, should be disposed of by the Court in the same manner as if the first party had brought an action to constitute his claim against the trust-estate.

The following questions were accordingly submitted for the opinion and judgment of the Court:—

"1. Whether the provision and share of residue, liferented by the deceased Mrs Grant, under the 12th and 14th purposes of her father's trust-disposition and settlement, vested in her children in the lifetime of their mother?

"2. If the said provision and share of residue vested as aforesaid, was the first party entitled to have it judicially declared, either (1) that he, the

first party, along with his brothers and sisters, was the next of kin and heir *in mobilibus* of the said children; or (2) that the said Rev. Mr Grant survived his children, and was their next of kin and heir *in mobilibus*, and that the first party, along with his father, brother, and sisters, represented the said Mr Grant; and was it necessary, in order to entitle the first party to payment of said provision and share of residue, that one or other of these alternatives should be substantively affirmed by the Court?

"3. If the said provision and share of residue did not vest in Mrs Grant's lifetime, was the first party entitled to have it judicially declared that the said children survived their mother, and thus acquired a vested interest in said succession?

"4. Whether the first party was entitled to the amount of the provision under the 12th purpose, and of the share of residue under the 14th purpose, bequeathed to Mrs Grant and her children, in so far as not already paid, or to any part thereof, with the interest due thereon."

SOLICITOR-GENERAL and KEIR, for William Grant, argued that the provision under the 12th purpose had vested in the children immediately on their birth, and that it now fell to be paid to their client as the executor of these children; but, if it should be held that there was a presumption that the father had survived the children, then the said provision fell to be paid to him as executor of the father. With regard to the share of the residue under the 14th purpose, they maintained that it was clearly the intention of the testator that it should go to the mother in liferent, and her children in fee, precisely in the same manner as the provision under the 12th purpose; for, although the restrictive word "only" was not used in this clause, the interest of the mother was declared to be "alimentary," and "not affectable by her debts or deeds." The share of the residue would therefore also fall to be paid to William Grant.

WATSON and M'LAREN, for the trustees, contended that, although under the 12th and 14th purposes the fee was provided to grandchildren, it did not vest in them until they severally attained majority; for it was expressly declared that no legacy should be paid until the majority of the party entitled thereto; the trustees were, in the case of such as were in minority, to apply the interest towards their maintenance; and the share of any son or daughter (which as they argued, meant "son or daughter of the daughter") predeceasing without leaving issue before the term of payment should revert to the estate. If there was any presumption that Mrs Grant had survived her children, then the fee had vested in her, and would go to her heirs *ab intestato*.

The Court held unanimously that the provisions, under the 12th and 14th purposes of the deed, vested in the children immediately on their birth, and that the omission of the restrictive word "only" in the 14th purpose was not to be held as importing that the mother was truly fiar of the share of the residue. They accordingly answered the first question in the affirmative, and held it unnecessary to answer the others, but continued the case in order that the parties might have time to consider their position.

Agents for William Grant—Andrew & Wilson, W.S.

Agent for Alexander Murray's Trustees—Alexander Morison, S.S.C.

Saturday, June 15.

JOHN GRANT (MACPHERSON'S TRUSTEE) *v.* ROBERTSON & OTHERS (MACPHERSON'S MARRIAGE-CONTRACT TRUSTEES.)

Marriage-Contract—Bankruptcy—Succession—Liferent and Fee.

Clause in an antenuptial contract of marriage—by which the fee of a sum of money coming from the husband was ostensibly given to him, with a right of joint administration in the spouses, a declaration that "at his death such part thereof as shall remain shall form part of his estate hereinafter assigned and conveyed," and followed by a conveyance of the fee of the husband's estate, failing children, to the wife—*Held* to convey the fee of the sum of money to the husband.

The question here was the construction of a clause in the marriage-contract, dated 21st July 1864, between Donald Macpherson and Mrs Mary Fraser or Macpherson, affecting a sum of £1000. The estates of the said Donald Macpherson were sequestrated on 20th September 1870, and John Grant was confirmed trustee upon the estate. He raised a summons against the trustees under the said marriage-contract, concluding that it should be found and declared that the sum of £1000 held by the said trustees, being the balance remaining of the sum of £1200 mentioned in said contract of marriage, was at the date of the sequestration of the estates of the said Donald Macpherson the property of the said Donald Macpherson, and fell under the said sequestration, and now belongs to the estate of the said Donald Macpherson, and that the defenders should be decerned and ordained to make payment of said sum to the pursuer, with interest, or otherwise that certain bonds should be adjudged in implement to the pursuer.

By the marriage-contract, Donald Macpherson bound and obliged himself to make payment to his marriage-contract trustees of the sums of £1000 and £1200. With regard to the former sum, the contract provided, "*Fifth*, that the said sum of £1000 shall, as soon as convenient, be lent out or invested by them on good and sufficient security, either heritable or moveable, or be otherwise invested as the said trustees may think safe and proper for the purposes of the trust, the investment to be made in their names as trustees, for the purposes of the trust hereby created; *sixth*, that the interest, dividends, or yearly profits of the said sum of £1000, after deducting all necessary charges, shall be paid by the said trustees to the said Mary Fraser personally, for her own absolute behoof, exclusive of the *jus mariti* of the said Donald Macpherson, her intended husband; and in the event of her predeceasing the said Donald Macpherson, the said interest shall be paid to him during all the days of his life after her decease; *seventh*, upon the death of the survivor of the said Donald Macpherson and Mary Fraser, the said principal sum of £1000 shall be paid to the child or children of the said intended marriage, in such proportions as shall be appointed by their father and mother; and failing such joint apportionment, then to the children, if more than one, equally, share and share alike; the payment to be made at the first term of Whitsunday or Martinmas after the child or children shall have attained majority or have been married; declaring, that in case of the death of any child or