order alone. It appears to me that the suspension did not disincorporate the society. It was still a friendly society, and was still entitled to do certain acts. It was an affiliated society—the affiliation of which was for a time suspended. But it did not kill the child, and put an end to its life altogether. Still less—that is where my difficulty became stronger—did it deprive it of this property, and put the whole funds, which may be very large, into the hands of the Greenock District Court, or of the Ancient Order, or whatever else its head may be termed. It was a suspended friendly society—suspended from connection with the general body, but still existing. I do not think the High Court were ever intended to be vested with the power to take the property of any individual Court and to hold it for any new body under the same name. In short, the power of issuing a dispensation is not a power of incorporation. That is a power which the Legislature alone can give. The difficulty about having two friendly societies bearing the same name is just an anomaly which we must deal with in coming to a decision affecting the substantial question between the parties. Accordingly, as I read the law, pro vision is actually made for a district society seceding from the general body and still continuing to be a society.

Counsel for Pursuers and Reclaimers—Scott. Agents—M'Caul & Armstrong, S.S.C.

Counsel for Defenders and Respondents—Guthrie Smith and M'Kechnie. Agent—William Archibald, S.S.C.

Tuesday, November 24.

SECOND DIVISION.

SPECIAL CASE FOR W. R. SANDBACH AND OTHERS.

Marriage-Contract—Construction—Vesting.

Terms of antenuptial contract of marriage under which a sum of money constituting the trust-fund *held* not to have vested in the issue of the marriage during the survivance of either of the spouses.

The parties of the first part to this case were the Trustees under the marriage-settlement of the late G. Parker of Fairlie House, Ayrshire; the parties of the second part were the Trustees and Executors under the will of Mrs Parker.

The facts were as follows:—George Parker died in 1860, survived by his spouse, by a son, and a married daughter. The son, who was imbecile, lived until the age of twenty-two, and died unmarried in 1864. The daughter married in 1860, and died in 1863 without leaving issue. Mrs Parker died in 1873.

No deed of appointment was executed by either of the spouses. George Parker by will bequeathed the whole of his property to his wife. Mrs Parker by will left the sum of £6000, mentioned in the marriage-contract, to certain parties named. This was the sum in dispute, and the questions submitted for the opinion of the Court were:—"(1) Whether under the terms of the said marriage settlement, the said Charles Edward Parker and Ada Parker or Corbett, or either of them, had a vested interest in or became absolutely entitled to the said sum of £6000, or any part thereof? (2) Whether, under the terms of the said marriage settlement and the will of the said George Parker, the said Mrs Anne Traill or Parker had the absolute right to the said sum of £6000?"

The antenuptial contract of marriage between Mr and Mrs Parker was in the English form, and provided, *inter alia*, that the sum of £6000 paid to the trustees by Mr Parker was to be held "from and after the decease of either of them, the said George Parker and Anne Traill, upon trust, to pay the interest and annual produce of the said trust monies and securities unto, or authorise the same to be received by the survivor of them, the said George Parker and Anne Traill, or his or her assigns, during his or her life, for his, her, and their own benefit, and from and after the death of the survivor of them, the said George Parker and Anne Traill, upon trust, if there shall be any child or children of the said intended marriage, to pay, assign, and transfer the said trust monies and securities to, between, and among such child or children, or the issue of any of the same child or children, such issue being born in the lifetime of the said George Parker and Anne Traill, or the survivor of them, in manner following (that is to say),—the same to become and be vested in such child or children, or other issue respectively, and to be paid, transferred, or assigned to him, her, or them respectively at such age or respective ages, in such manner, and if more than one, in such shares and proportions as the said George Parker and Anne Traill shall by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by them in the presence of one or more witness or witnesses jointly direct and appoint; and in default of such joint direction or appointment, or so far as the same, if incomplete, shall not extend, then as the survivor of them, the said George Parker and Anne Traill, shall, after the decease of the other of them, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by him or her, or by his or her last will and testament in writing, to be by him or her signed and published in the presence of one or more witness or witnesses, direct and appoint: and for want of any such direction or appointment as aforesaid, or so far as the same, if incomplete, shall not extend, to, between, or among such child or children of the said George Parker and Anne Traill, in manner following (that is to say),—if there shall be but one such child, the said trust monies and securities to vest in such only child, being a son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years, or on the day of her marriage, which shall first happen, and be paid, transferred, or assigned to him or her on or at the same age, day, or time, if the same shall happen after the decease of the survivor of them the said George Parker and Anne Traill; but if the same shall happen in the lifetime of them, or of the survivor of them, then immediately after the decease of such survivor; and if there shall be two or more such children, then the said trust monies and securities to vest in and be paid to, between, or among such two or more children in equal shares and proportions, the share or shares of such of them as shall be a son or sons to vest in him or them respectively at his or their age or respective ages of twenty-one years, and the share or shares of such of them as

shall be a daughter or daughters to vest in her or them respectively at her or their age or respective ages of twenty-one years, or on the day or respective days of her or their marriage or respective marriages, which shall first happen, and to be paid, transferred, or assigned to him, her, or them respectively, on or at the same ages, days, or times repectively if the same respectively shall happen after the decease of the survivor of them the said George Parker and Anne Traill, but if the same shall happen in the lifetime of them or of the survivor of them, then immediately after the decease of such survivor: Provided always, and it is hereby agreed and declared between and by the parties hereto, that no child or children who or whose issue shall take any part or share of the said trust monies and securities, under or by virtue of any direction or appointment to be made by the said George Parker and Anne Traill, or the survivor of them, in pursuance of the powers or authorities herein-before given for that purpose, or either of them, shall have or be entitled to any share of the unappointed part of the said trust monies and securities, without bringing his or her appointed share into hotchpot, and accounting for the same accordingly, unless the person or persons making such last-mentioned direction or appointment shall otherwise direct: Provided always, and it is hereby further agreed and declared, that if there shall be more than one child for whom portions are intended to be hereby provided, and any one or more shall die before he, she, or they shall acquire a vested interest in the said trust monies and securities, or any of them, or any part thereof, under or by virtue of the powers or trusts herein-before contained, or any of them, then, as well the original share intended to be hereby provided for as the share or shares by virtue of the present clause surviving or accruing to each and every such child so dying, or so much thereof as shall not have been applied for his or her preferment in the world in pursuance of the power hereinafter for that purpose contained, shall vest in or accrue and belong to the survivor or survivors, or other or others of such children, in equal shares, if more than one, at and in such and the same time or times and manner as are herein-before declared of and concerning his, her, or their original share or shares of and in the said trust monies and securities: Provided also, and it is hereby agreed and declared, that it shall be lawful for the said trustees, or the trustees or trustee for the time being, at any time or times after the decease of the survivor of them, the said George Parker and Anne Traill, or in the lifetime of them, or the survivor of them, with their, his, or her consent in writing, and as to the said Anne Traill notwithstanding her coverture, to levy and raise any part or parts of the portion or portions intended to be hereby provided for such child and children or other issue as aforesaid, not exceeding in the whole, for any one such child or other issue, one moiety or equal half part of his or her then expectant portion of or in the said trust monies and securities, notwithstanding the same shall not then have become vested or payable, and to apply the money so to be raised for the preferment, advancement, or benefit of such child or children or other issue in such manner as the said trustees or trustee shall in their or his discretion, or with such consent as aforesaid, as the case may be, think fit: Provided also, and it is hereby further agreed, that the said trustees or trustee for the time being do and shall, from and after the decease of the survivor of them the said George Parker and Anne Traill, and for want of any disposition by them or the survivor of them to the contrary, by and out of the interest, dividends, and annual produce of the said trust monies and securities, pay and apply for the maintenance and education of the child or children or other issue for the time being of the said intended marriage, who shall be presumptively entitled to a provision under the trusts or powers aforesaid in the meantime, and until his, her, or their eventual portion or portions of the said trust monies and securities shall become vested, such yearly sum or sums of money, not exceeding the amount of the interest, dividends, and annual produce of the same portion or portions as the said trustees or trustee shall think fit, and do and shall accumulate and improve the residue or suplus, if any, of the said interest, dividends, and annual produce after answering the last-mentioned purposes, by investment thereof and of the produce thereof, in their or his names or name, in some of such securities or investments as herein-after are mentioned, for the benefit of such child or children, or other person or persons, as under the trusts of these presents shall become absolutely entitled to the principal trust monies, stocks, funds, or securities, or such part or parts thereof whence such accumulations shall have proceeded: And upon this further trust, that if there shall be no child or other issue of the said intended marriage who shall become absolutely entitled under any of the trusts or powers aforesaid to the said trust monies and securities, then the said trustees or trustee for the time being shall, after the decease of the said Anne Traill, and such want or failure of issue as aforesaid, pay, transfer, or assign the same trust monies and securities, or so much thereof as shall not have been disposed of under any of the powers aforesaid, and the dividends, interest, and annual produce thereof, and accumulations thereupon (if any), unto the said George Parker, his executors, administrators, or assigns, as part of his personal estate."

Cases cited—*Romaines*, 3 Macph. 348; *Rogerson*, 3 Macph. 648.

At advising—

Lord Justice-Clerk—The question here is, whether this sum of £6000 did or did not vest in the children, or whether the purposes of the marriage contract have failed, and the resulting clause comes in. This being a question of construction of an obscure deed, the presumption of vesting in favour of the children of the marriage does not carry us far toward a solution. This case is different from those of *Romaines* and *Hunter*, which were quoted. A power of apportionment rather implies vesting, but where, as here, the power is not to apportion but to decide when vesting shall take place, it is different. In the ordinary case, if there is a specific power given to fix the period of vesting, the presumption is that vesting will not take place so long as it has not been exercised, or may still be exercised. On the best consideration I can give to the clause on page 8 of the record, beginning "If there shall be but one such child," I think it provides—

First, That both vesting and payment are to be made at the same time.

Second, Both are to take place when majority or marriage occurs if either occurs after the death of the survivor of the spouses.

Third, Both are to take place if, when the sur-

vivor of the spouses died, majority or marriage had occurred.

On the first reading of the clause it seems to provide that the shares are to vest absolutely in the son at his majority, and in the daughter at her majority or marriage, and to be paid at the same period if either occurred after the death of the survivor; but if during the lifetime of the survivor either event occurred, then payment is to be made on the death of the survivor. But this is not the necessary meaning of the clause, and looking to the clause on page 10 of the record, making provision for the want of any disposition by the survivor, and giving the trustees power to make advances to the child or children or other issue for the time being who may presumptively be entitled to a provision under the trust, I think it is not the meaning intended. That clause implies that it is consistent with the rest of the deed that there may be other issue presumptively entitled to the fund, and that is not consistent with vesting on the marriage of the daughter. It is a direct provision that if the daughter marry and die before the survivor of the spouses, leaving issue, her share is to be held to vest in the child, but not during the lifetime of the survivor. And then comes the last clause, which I read as meaning, that if on the death of the survivor there shall be no child in life who shall become absolutely vested in the fund, or any descendent who may be absolutely entitled to take—then the resulting clause is to come in, and the fund is to go to the executor of George Parker. So that I propose to answer the first question in the negative and the second in the affirmative.

Lord Neaves—I concur. The deed is obscure, and the question is, which of the conflicting clauses should predominate. The general scope of the deed is to form a series of trusts, first, for the spouses together, then for the survivor, and then only for the children. There is nothing in the deed corresponding to our idea of fee and liferent —of co-existing rights in a fiar while the right as liferenter exists. It is a point against vesting that it is not known whether the fund has vested or not, the condition precedent succeeds vesting. Suppose the daughter marries, leaves issue, and dies before the survivor of the spouses, and leaves a will gifting the fund to strangers, is it valid? Does not the existence of issue continue the power of division in the spouses. Looking in particular to the clause winding up the deed, which anticipates a state of matters in which there may be a hope of vesting, but where the fund has not vested until the condition is purified by the running out of the whole period, I think there has been no vesting.

Lord Ormidale—I abstain from needlessly occupying time by repeating details which have been already gone into. I consider it sufficient to say that, looking to the whole terms and scope of the marriage-contract founded on, the vesting of the £6000 in dispute must, in my opinion, be held to be the period of payment; and that as it could not be paid to the child or children of Mr and Mrs Parker or their issue, supposing there had been such, until the death of the surviving sponse, and their attaining majority in the case of sons, and majority or marriage in the case of daughters, so neither can it be held sooner to vest in them. At the same time, it is impossible not to feel that this matter is attended with considerable difficulty arising from the peculiar, not to say confused, manner in which the deed in question is expressed, especially as regards the directions intended to regulate the disposal of the fund after the death of the survivor of the two spouses. But, keeping in view that these directions are chiefly contained in one clause, which commences, and, as it appears to me, proceeds throughout, in the assumption that the survivor of the two spouses has died, and that payment to the child or children or their issue is then, and only then, to be made, the conclusion I have come to is,—that vesting cannot be held to take place till the period of payment—I think well founded. And as confirmatory of this view, the clause towards the close of the deed, specially alluded to by your Lordship, to the effect that even after the death of both spouses the trustees may apply the annual income of the fund to the maintenance and education of the children till the time they attain majority in the case of sons, or of majority or marriage in the case of daughters, when their respective portions "shall become vested," is very important. I cannot indeed, see how it is possible to reconcile that clause with the assumption that the fund could have vested in the child or children during the survivance of the spouses, or either of them.

For these reasons, briefly stated, I concur with your Lordships in opinion that the first of the two questions submitted to the Court in this case ought to be answered in the negative, and that the second ought to be answered in the affirmative.

Lord Gifford—I agree with your Lordships as to the difficulty of the question, and that it is a question which clause is to predominate. Vesting is a question of intention—any time might have been fixed by the spouses for vesting, and if a time was fixed by an express clause, I think that clause must be given effect to if there is no impossibility in doing so. Now I find such a clause in the deed—the clause on page 8, to which reference has been made—which gives the spouses the power of fixing the vesting, and goes on to make provision for the want of any direction or appointment, and where the words "vesting" and "be paid" are not always united, but different periods for the one and the other are clearly contemplated. If this clause stood alone I would have little difficulty in holding that the fund had vested, and where there are conflicting clauses I must give the greatest effect to the clause specially fixing vesting, and not to others having a remote connection with vesting. So that I cannot get over that clause, and would answer the first question in the affirmative, and the second in the negative.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the Special Case, are of opinion and find that under the terms of the said marriage-settlement and the will of George Parker, Mrs Anne Traill or Parker had the absolute right to the sum of £6000, and allow the expenses of both parties to the Special Case to be paid out of the fund, and remit to the Auditor to tax the same and to report, and decern.

Counsel for First Parties—Dean of Faculty (Clark) and Pearson. Agents—J. M. & J. Balfour, W.S.

Counsel for Second Parties—Solicitor-General (Watson) and Blair. Agents—Hunter, Blair, & Cowan, W.S.