It was not disputed that the failure to print in time had been an innocent omission on the appellant's part.

At advising—

Lord Young—The Act of Sederunt is merely a rule of Court, and it is in the power of the Court to relieve from the penalties it provides. If the Act of Sederunt implied an *ipso facto* forfeiture of the statutory right of appeal, without motion or interlocutor, so as to exclude the discretion of the Court in the matter, the Act of Sederunt is clearly *ultra vires* of the Court. In the present case there is no suggestion of delay for an improper purpose, or of the respondent being put to the slightest inconvenience. In *Park* v. *Weir* the First Division had no doubt exercised a reasonable discretion in refusing to allow the appellant to proceed, but the circumstances of that case are not fully reported. I am therefore for repelling the objection to the competency of the appeal.

Lord Gifford—I concur. In *Park* v. *Weir* the appeal process had been retransmitted to the Sheriff Court.

Lord Ormidale—I concur in the result at which your Lordships have arrived, but I cannot assent to the view expressed by Lord Young as to the binding effect of the Act of Sederunt. I do not think, however, that the present case is provided for in terms by any sub-section of the Act of Sederunt. The appeal in this case was received in due course in session time, and the period of printing expired in vacation. I do not think that case is provided for.

The Court reponed the appellant.

Counsel for Appellant — Mair. Agent—J. Wilson, L.A.

Counsel for Respondent — Lang. Agents — Macrae & Flett, W.S.

Saturday, May 26.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

BUCHANAN'S TRUSTEES *v.* BUCHANAN.

Succession—Vesting—Direction to pay to Children "procreated or to be procreated"—Distribution where Provision is made for Payment of an Annuity.

A testator directed a sum of £20,000 to be held in trust, the annual interest of it to be paid to his sister, and, on her death, to the extent of £300 to her husband, in the event of his surviving her. On her death it was further provided that the trustees were to hold and apply the said sum and its proceeds "for behoof of all the lawful children of my brother . . . procreated or to be procreated . . . equally among them, share and share alike, payable the several children's shares to the sons on their attaining twenty-five years of age, and to the daughters on their attaining that age, or being married, whichever of these events shall first happen." There was a clause of survivorship in the case of children dying without issue after the decease of the liferenter, and there was a power in certain circumstances to make advances to the children. The deed contained a bequest of residue.—*Held*, upon a construction of the deed in conformity with the testator's intention—(1) that the right of the children could not vest till the death of the liferenter, but that thereafter, notwithstanding the subsistence of the annuity, each of them took a vested interest upon his or her attaining twenty-five years, or further, if a daughter, on her being married, and that payment could not be suspended by the possibility of future children; (2) that the surplus of capital, after provision had been made for payment of the annuity, fell to be divided amongst the beneficiaries; and (3) that, even in the view of the contingency of the subsequent birth of other children who might make good their claims to participate, it was unnecessary to ordain the beneficiaries to find caution for rapayment.

Opinions that the class of beneficiaries was limited to the children in life at the date of the liferenter's death.

This was an action of multiplepoinding and exoneration raised by the trustees of the deceased Peter Buchanan, merchant, Glasgow, in the following circumstances:—

The truster, Peter Buchanan, died on 5th November 1860, unmarried, and survived by his brother Isaac and one sister Jane, the wife of Major George Douglas. She died on 9th May 1875 without issue.

Peter Buchanan left a trust-disposition and settlement, dated 24th May 1860, by which he conveyed his whole estates to the pursuers, in the first place, for payment of his debts, and, in the second and third places, for conveyance of certain subjects to his sister Mrs Douglas. By the fourth purpose of the trust the said Peter Buchanan directed his trustees to set apart and invest in their own names the sum of £20,000, and to pay the annual interest or proceeds thereof to the said Mrs Jane Buchanan or Douglas, his sister, in the event of her surviving him, at two terms in the year, Whitsunday and Martinmas, by equal portions, and so continuing all the days of her life, which provision was declared to be alimentary, exclusive of her husband's *jus mariti*, and not assignable or arrestable for her own or her husband's debts; and upon the death of the said Mrs Jane Buchanan or Douglas he directed his trustees "to pay over the said interest or annual proceeds, to the extent of £300 sterling per annum, to the said George Douglas in the event of his surviving his said wife, and that likewise at the terms of Whitsunday and Martinmas, in equal portions, beginning the first payment at the first of these terms which shall occur after his wife's death, for so much as shall then be due, reckoning from the day of her decease, and the next payment at the next of these terms thereafter for the half-year preceding, and so continuing during all the days of his life, which provision shall in like manner be alimentary, and not assignable, arrestable, or affectable for his debts and deeds:" . . . "Further, upon

the decease of the said Jane Buchanan or Douglas (but subject to the burden of the said annuity provided to her husband if he shall survive her), I direct that the trustees shall hold and apply the said principal sum of £20,000, and the income or annual proceeds thereof, to and for behoof of all the lawful children of my brother the said Isaac Buchanan, procreated or to be procreated (other than his eldest son Peter Toronto Buchanan, hereinafter provided for), equally among them, share and share alike; payable the several children's shares to the sons on their attaining twenty-five years of age, and to the daughters on their attaining that age or being married, whichever of these events shall first happen; with power to my trustees during the minority of the several children to expend their shares of the annual interest or income of the said principal sum for their behoof, and also to advance a part of the principal of the sons' shares in establishing them in a business or profession respectively, and a part of the principal of the daughters' shares in their outfit on the occasion of their being married; provided always my trustees approve of the business or profession in which the sons are to engage, and of the marriages which the daughters may propose to contract: And declaring that the parts of the principal which may be so advanced to the sons and daughters shall not be claimable from the executors of such of them as may die after receiving the same but before the term of payment of their provisions: Declaring also, that in the event of the decease of any one or more of the said children, whether before or after their aunt the said Jane Buchanan or Douglas, leaving issue, such issue shall receive equally among them the share to which their respective parents would have been entitled had they survived, and that the shares of one or more of the children dying after their aunt without issue shall accrue to and be equally divided amongst the survivors."

The testator further directed his trustees to pay over £5000 to the eldest son of his brother Isaac, and provided that any residue which might remain after satisfying the other purposes of the trust was to be paid to the latter.

In terms of the trust, a sum of £20,000 had been set apart by the pursuers, and the income paid to Mrs Douglas during her life, and since her death the annuity of £300 had been paid to her surviving husband Major Douglas. Of the nine younger children of Isaac Buchanan who survived the truster, only two had at the date of this action reached the age of 25, and they had applied to the pursuers for payment of their shares. Other three children, though not yet of the age of 25, had assigned their interests.

The fund *in medio* was the said sum of £20,000, and the defenders called were (1) the nine children of Isaac Buchanan; (2) Isaac Buchanan, for his own interest, for children who might still be born to him, and as administrator-in-law for his minor children; (3) Major Douglas as an individual; (4) the pursuers as trustees and executors; (5) the assignees of Isaac's children who had assigned their interest.

The trustees claimed to hold the fund *in medio* until the death of Major Douglas or of Isaac Buchanan, whichever of these events should latest happen. The children of Isaac Buchanan, and the assignees of those who had assigned their interest, claimed each one-ninth part of the free income of the fund *in medio* after deduction of the annuity of £300 and trust expenses. They were the only parties called who made appearance in the action.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, finds that the only persons entitled to participate in the sum of £20,000 settled by the truster are the children of Isaac Buchanan alive at the death of Mrs Jane Buchanan Douglas, other than Peter Toronto Buchanan, but that no right vests in any such child until it reaches the age of twenty-five: Finds that at the death of the liferenter a ninth share vested in each of Jane Milligan Buchanan and Margaret Douglas Buchanan, who were then twenty-five years of age: Finds that another one-ninth share vested in Harris Buchanan when he attained twenty-five, on 10th April 1876: Finds that, after payment of the annuity of £300 to Major Douglas, each of the said Jane Milligan Buchanan, Margaret Douglas Buchanan, and Harris Buchanan, is entitled to one-ninth part of the surplus interest arising on their respective shares after the same became vested as aforesaid: Finds that until their shares vested in them the other children are not entitled to demand payment of any interest thereon, but without prejudice to the power of the trustees to expend the interest of said shares for their behoof until they attain the age of twenty-five; and with these findings appoints the case to be put to the roll for further procedure.

"*Note*—The Lord Ordinary has found a good deal of difficulty in construing this deed.

"No right could vest till the death of the liferenter, inasmuch as the trust for the children did not come into existence till that event. But the Lord Ordinary thinks that the annuity does not prevent vesting, and accordingly he is of opinion that on the death of the liferenter each child takes a vested interest as it reaches twenty-five. No right, it is thought, can vest before the occurrence of both events, because there is an express clause in favour of survivors in the case of children dying after the liferenter without leaving issue; but this clause cannot, in the opinion of the Lord Ordinary, apply after the period of payment has arrived. Consequently, he holds that each child takes a vested interest when it reaches twenty-five. It was argued that such children as might be yet born to Isaac Buchanan were entitled to participate, but the Lord Ordinary has decided in the negative, because he thinks that the interest of a child reaching twenty-five is definitely ascertained, and that the interest of all is to be equal. Equality could not be preserved if children subsequently born were held to be beneficiaries, for nothing could be withdrawn from the child who had actually received payment.

"It is true that no final distribution can be made till the death of the annuitant, but, in the view of the Lord Ordinary, that circumstance cannot determine the rights of the beneficiaries. The annuity is a mere burden, and, it may be, gives the annuitant a security over the whole fund; but the surplus interest must, it is thought, be divided, and it cannot be divided until a share vests, and without the ascertainment of the amount of the share. Further, the trustees are empowered to advance a part of the sons' and daughters' shares to establish them in business or provide an out-

fit on marriage. This not only enables the trustees to encroach on the capital so as to reduce the security of the annuitant, but also assumes that the share is known.

"The payment of the capital, except in the exercise of the special power given to the trustees, may be deferred until the death of the annuitant. But there is no direction to accumulate interest; and, in consequence, the Lord Ordinary is of opinion that the children who possess a vested right are entitled to a corresponding proportion of the surplus interest. The remainder is subject to the discretion of the trustees; and with respect to the discretion which is given to them, the Lord Ordinary thinks that the word minority, as it occurs in the deed, is to be read as equivalent to 'under 25,' or, in other words, to the artificial minority created by the deed. It is not easy to see why the powers of the trustees are to cease when there is no direction to accumulate, and when no legal claim to interest can arise until vesting.

"The interlocutor which the Lord Ordinary has pronounced disposes of all the questions which are raised in this case other than the immediate payment of the shares which have vested. He doubts whether without the consent of the annuitants any payment can be made. But the only reason to the contrary is, that the annuitant is entitled to the security of the whole fund."

The trustees reclaimed, and argued—The annuitant has a security over the whole fund. The class of beneficiaries includes all the children of Isaac Buchanan at whatever time procreated. Even if money is to be paid over, good security must be given for repayment in case further children shall be born., *Scheniman* v. *Wilson*, 6 Sh. 1019; and *Shaw* v. *Shaw*, 6 Sh. 1149; *Carleton* v. *Thomson*, Feb. 11, 1865 and July 30, 1867, 3 Macph. 514, 5 Macph. 151; *Bateman* v. *Gray*, L.R., 6 Eq. 215; *Gimlet*, L.R., 12 Eq. 427; *Gimlet*, 2 Ch. App. 644.

Argued for children of Peter Buchanan—The existence of the annuity and the survivorship clause do not prevent vesting, which took place at the death of the liferentrix. *Wood* v. *Wood*, 23 D. 338; Jarman on Wills, i. p. 141-143. The annuitant is entitled only to a reasonable investment.

Argued for assignees of children—In England the class of beneficiaries under a gift to children "born and to be born" is fixed when the eldest child is entitled to take.

At advising—

Lord Justice-Clerk—The question here arises under the fourth provision of a will executed by Peter Buchanan, who died in 1860. There are, indeed, two questions—1st, whether, supposing the period of division of the trust-funds to have arrived, the division of the capital is to be prevented by the subsistence of an annuity secured upon the annual produce? 2d, whether, the trust-funds being given on the expiry of the intervening liferent to the children procreated or to be procreated of the truster's brother, who is still in life, a division can now be made among the existing children? On the first of these questions I find no specific authority, but I think it is in conformity with the will of the testator that the surplus should be immediately divided after sufficient provision has been made for the payment of the annuity. A sum of £20,000 was to be set aside and the interest was to be paid during her life to Jane Buchanan, and on her death the interest to the extent of £300 was to be paid to George Douglas, her husband. There is no direction to pay over the whole interest nor to keep up the whole capital as a security for that annuity. I cannot suppose that it was the testator's intention that until the death of the annuitant no part of this fund should be divided. He directed the shares to be paid when they are required, that is, at majority or marriage. There are, no doubt, many cases in which a security for a provision has been constituted over the *corpus* of an estate, but where no real prejudice to the creditor could occur the Court have always interfered to settle the rights of parties on equitable principles. In this case I suggest that the trustees should retain a sum of £10,000 to meet the annuity, and should pay over what remains.

On the second question there has been much discussion both here and in England, but the result has always varied with the words of the settlement as these disclosed the particular intention of the testator. [*Reads ultimate direction of 4th purpose*].—Now, the events on which payment is contingent have happened. At least two children have survived the liferentrix, and have reached the necessary age. It is said the bequest is to a class, but these children are ascertained members of the class, and it makes no difference whether the class be large or small. It is said there is a possibility of further children being born, but there are here no children other than those who are entitled, and I do not think the direction to pay can be suspended on a hypothesis. We do not decide in this case the question whether or not there may be divestiture in the event of subsequent births. My own opinion is that the class of beneficiaries is limited to the children in life at the death of the liferentrix. There are many decisions in which subsequently born children have been excluded, such as *Wood* v. *Wood*, Jan. 18, 1861, 23 D. 338, in which Lord Cowan mentions the authorities—*Mackenzie* v. *Holt's Legatees*, Feb. 2, 1781, Mor. 6602; *M'Courtie* v. *Blackie's Children*, Jan. 15, 1812, Hume 270. On the other hand, we have the well-known cases of *Scheniman* and *Shaw*, in which the contingency of subsequent birth was contemplated and security taken for repayment. I think this case falls under the first category, in which our law entirely corresponds to that of England. It would, I think, looking to the age of the parents and children in this case, be absurd and unjust to refuse payment. I am not prepared to follow the cases of *Scheniman* and *Shaw* in ordering caution. The testator did not intend that caution should be taken; he directs payment. Now, as the possibility of children does not suspend payment, I do not think it ought to have any other effect.

Lord Ormidale—It appears to me that there is raised a question of nicety and difficulty. In order to arrive at its true solution, the intention of the testator, which is the governing rule in this as in all such cases, must, so far as it has been expressed in or can be inferred from his deed of settlement, be given effect to.

According to his deed of settlement, the £20,000 forms the subject of its fourth purpose. He there

directs that upon the death of his sister Mrs Douglas—[*His Lordship read the ultimate direction under 4th purpose*]. Nothing could well be plainer or more explicit than this bequest. It is not made to certain children specifically named, nor is it made to the children who may be born of a particular marriage, but generally to "all the children of my brother Isaac Buchanan, procreated or to be procreated." Why, therefore, should that be held, contrary to the ordinary meaning of the words employed, to be limited to children alive or born prior to the attainment by one of them, if a son, to the age of 25, or the attainment of that age or marriage of one of them, if a daughter, whichever of these events should first happen. The testator has attached no such restrictive condition to his bequest, but, on the contrary, expressly destines it to all the children of his brother, procreated or to be procreated.

But then he provides that the several children's shares should be payable "to the sons on their attaining twenty-five years of age, and to the daughters on their attaining that age or being married, whichever of these events shall first happen;" and, founding on this provision, it was argued for the respondents that the testator must have intended to restrict his bequest to the children of his brother procreated before the attainment of any of them of the age of twenty-five if sons, or of that age or being married if daughters. But why this should be so I have not been able to see. It would not be correct to say that otherwise no share of the bequest can vest or be payable to any of the children intended to be benefitted so long as the testator's brother Isaac Buchanan is alive, although not only some but all of his existing children may, in the case of sons, be greatly more than twenty-five years of age, and in the case of daughters, be either married or more than that age; for this need not be so except in a sense which it is unnecessary, as it would I think be erroneous, to attribute to the testator. The shares of Isaac Buchanan's children may in another, and as I think the true, sense, be held to vest in and be payable to the children as they respectively reach the age of twenty-five in the case of sons, or that age or being married in the case of daughters, and yet there need be no exclusion from a participation along with them in the £20,000 of any children the testator's brother Isaac Buchanan may subsequently have. There is such a thing known in the law as the vesting of provisions or legacies in children as a class on their arriving at a certain age, subject to the amount of the benefit being diminished by the coming subsequently into existence of other children entitled to participate along with them. Such a mode of vesting has been frequently given effect to, and was distinctly recognised and assumed to be indisputable, both by this Court and the House of Lords, in the case of *Carleton and Another* v. *Thomson and Others*, 11 Feb. 1865, and 30 July 1867, 3 Macph. 514, and 5 Macph. (H. of L.) 151. There would, therefore, be no inconsistency in holding that the shares of the £20,000 in question accruing to the existing children of the testator's brother Isaac Buchanan will vest as the sons reach the age of twenty-five, and the daughters that age or being married, subject to the contingency of a divestiture to some extent in the event of there being more children of Mr Isaac Buchanan.

And just as little need any difficulty be supposed to arise in regard to the shares of the existing children being payable and paid when and as they become vested rights, for that could quite well be effected by the children on receiving payment of their shares finding caution to repeat so much as might be necessary to satisfy the claims of other children, if any, that might thereafter come to exist and be entitled to participate in the £20,000. This was the course directed by the Court to be followed in the cases of *Shaw* v. *Shaw*, 6 Sh. 1149, and *Scheniman and Others* v. *Wilson and Others*, 6 Sh. 1019, the circumstances of which were in all essential respects, so far as they bear on the question now under consideration, the same as those of the present case; and the cases referred to are all the more valuable as precedents for the present case, considering that they were cited and recognised as authorities, both in this Court and the House of Lords, in the subsequent and comparatively recent case of *Carleton* v. *Thomson*, to which reference has already been made. They, as well as the principles they embody, were also recognised with approval in the case of *Black* v. *Dykes and Others*, 23d Feb. 1833, 11 Sh. 443.

Nor am I satisfied that any of the other cases, Scotch or English, which were cited and apparently relied on by the respondents at the debate, are of an adverse description. The case of *Wood and Others* v. *Wood*, 23 D. 338, is certainly not so, for there the bequest was, not to children "procreated or to be procreated," but generally to nephews and nieces, the children of two brothers of the testator, who, in the circumstances which there occurred, were held to denote children existing at the death of the liferentrix of the fund, and not children subsequently born. But it is clear, I think, judging from the observations and reasoning of the learned Judges in that case as reported, that the judgment would have been different if the bequest had been, as here, to children "procreated or to be procreated." Thus, the Lord Ordinary (Kinloch) takes care to say that while he decided, as he did, in favour of the children existing at the death of the liferentrix, "it is open in every case to gather from the deed evidence of a different purpose, and to hold, if the deed affords sufficient warrant for the conclusion, that it was not the children at a particular date, but the whole children born or to be born during their father's lifetime who were intended to be favoured." Lord Cowan, again, who delivered the judgment of the Court, affirming that of Lord Kinloch under a reclaiming note, made observations to the same effect; and, in particular, he observed that the cases cited as being adverse to that judgment "had mostly reference to questions under settlements which contained clear destinations to children born or to be born, or were so expressed as to lead to that inference." In place, therefore, of the case of *Wood* v. *Wood* being an authority against, it rather appears to me to be one favourable to the view which I have adopted in the present case, where the bequest is expressly to children "procreated or to be procreated," or, to use the words of Lords Kinloch and Cowan, "born or to be born."

Neither am I satisfied that the English authorities on which the respondents founded can be held to be clear or conclusively favourable to

them. Take, for example, the case of *Whitbread* v. *Lord St John*, 10 Vesey 152, which was that chiefly relied upon by the respondents. It is not stated in the report that Lady St John, in favour of whose children the bequest was made, was dead, although this may be inferred as well from the statement of the case as given in the report, as from the circumstance that Lord St John alone, and not his wife, appears to have been a party to the discussion; and if so, the decision which was pronounced cannot be said to be adverse to the view I have adopted in the present case. But, assuming that Lady St John was alive, as probably she was, still I would hesitate to say that the case is conclusive of the present. I find that Mr Jarman in his Treatise on Wills (p. 165 of 2d vol. 3d ed.) remarks in reference to the question which has here arisen—"We are now to consider how the construction is affected by the words 'to be born or to be begotten,' annexed to a devise or bequest to children; with respect to which the established rule is, that if the gift be immediate, so that it would but for the words in question have been confined to children, if any, existing at the testator's death, they will have the effect of extending it to all the children who shall ever come into existence, since, in order to give to the words in question some operation, the gift is necessarily made to comprehend the whole;" and the case of *Mogg* v. *Mogg*, 1 Mer. 654, to which reference is made in support of this passage, seems to bear it out. Mr M'Laren also, in his Book on Wills (vol. i. p. 654–5), while he notices all the cases bearing on the point, as well English as Scotch, states the law, as I read his remarks, to the same effect. But independently of the said law writers, either English or Scotch, I should feel myself bound by the decisions of our own Court in the cases of *Shaw* v. *Shaw* and *Scheniman* v. *Wilson*, the authority of which has not, so far as I am aware, been ever impugned.

As to the date when the shares of the £20,000, including any surplus interest arising therefrom after satisfying Major Douglas' annuity, vested, I concur with the Lord Ordinary in thinking that it must be held to be on the children, whenever born, of Mr Isaac Buchanan respectively reaching the age of twenty-five in the case of sons, or on their attaining that age or being married, whichever of these events should happen first, in the case of daughters. Nor do I very well see how, in opposition to this view, it can be held, as was contended for by some of the parties, that vesting took place on the death of the liferentrix Mrs Jane Buchanan or Douglas, when it is borne in mind that it is expressly declared by the testator that "in the event of the decease of any one or more of the said children, whether before or after their aunt the said Jane Buchanan or Douglas, leaving issue, such issue shall receive equally among them the share to which their respective parents would have been entitled had they survived; and that the shares of one or more of the children dying after their said aunt without issue shall accresce to and be equally divided among the survivors." There are here a destination-over and also a survivorship clause, both of which might be defeated, and, at any-rate, could not with certainty be carried into effect on the footing of vesting taking place sooner than on the children attaining twenty-five years of age in the case of sons, or, in the case of daughters, attaining that age or being married.

The remaining question, Whether the whole of the £20,000, capital as well as income, must remain intact as long as Major Douglas lives, in order to secure payment of his annuity, is not, I think, attended with any real difficulty, except perhaps in regard to the precise amount of capital that ought to be retained by the trustees to meet the annuity. But to hold that the whole of the £20,000 must be so retained would be as unreasonable as it would be obviously unnecessary. The object of the testator as regards Major Douglas' annuity will be entirely satisfied by the retention, not of the whole £20,000, but merely of so much of that sum as will be sufficient to secure payment of the annuity. £10,000 was suggested as sufficient, and as I cannot see any reason for thinking it would not, that may be held to be the sum which the trustees should be authorised to retain, power being reserved to them, as the Lord Ordinary has reserved it, to expend any surplus income arising on the £20,000 for behoof of Isaac Buchanan's children respectively till they attain twenty-five years of age in the case of sons, or that age or being married in the case of daughters.

Lord Gifford—The Lord Ordinary says that he has found a good deal of difficulty in construing the trust-settlement of the late Peter Buchanan, and in determining its exact effect. I have felt the same difficulty, and although I have ultimately come to agree substantially in the result which the Lord Ordinary has reached —I mean in the mode in which the trustees are bound to distribute the fund *in medio*—there is one question upon which I have great difficulty in agreeing with the Lord Ordinary, and as to which I am disposed, if it can be done, to reserve any rights which may hereafter emerge,—that is, the rights which may possibly arise to future children of Mr Isaac Buchanan, in case any such children should hereafter be born.

In the first place, I am of opinion that no right to any part of the £20,000 could vest in any of the children of Isaac Buchanan until the death of Mrs Douglas, who was the liferentrix of the whole sum, because the deed directs that it is not until that event that the trustees are to hold and apply the said sum of £20,000 and the income and proceeds thereof to and for behoof of the children of Isaac Buchanan (excluding his eldest son Peter). If any of Isaac Buchanan's children had predeceased Mrs Douglas, who died on 9th May 1875, I think such predeceasing children would have taken no share of the £20,000, although their issue, if any, would have taken under the express words of the deed.

In the second place, I do not think that the subsistence of the annuity to Mr George Douglas of itself prevents either the vesting or the payment of the provision in favour of Isaac Buchanan's children. The deed expressly provides for the payment or application of the provision, subject to the burden of the annuity. This can only mean that provision shall be made for the annuitant, that is, that such sum shall be retained sufficient to meet the annuity. It goes no further than this, and such an annuity obtained is certainly terminable. Therefore I

am of opinion that after making due and reasonable provision for this annuity,—and I agree that if £10,000 is retained to meet the annuity this will be more than sufficient to secure the annuitant—the provision of the deed shall take effect. But although the annuity to Mr Douglas will not of itself prevent either vesting or payment to a reasonable extent of the £20,000, I am of opinion that even as to the children of Isaac Buchanan who survived Mrs Douglas, no right could vest in any of them until they respectively attained the age of twenty-five, or, in the case of daughters, until they attained that age or were married, for not only are the shares not payable before these dates or events, but there is a declaration that in the event of the decease of any of the children after Mrs Douglas, and without issue, the shares of such deceasers shall be equally divided among the survivors. I think this conditional clause of survivorship prevents the vesting until the age of twenty-five or the marriage of the daughters. In all cases, however, the trustees have power to expend the interest of the shares or to advance even before the vesting, in terms of the deed.

As I have already said, the main point upon which I have found difficulty is the question, Who are the ultimate beneficiaries embraced under the words "all the lawful children of my brother the said Isaac Buchanan, *procreated or to be procreated?*" and the question is, whether these words will not include children who may yet be born to Mr Isaac Buchanan either of his present or of any future marriage? Mr Isaac Buchanan, I understand, is a gentleman 66 or 67 years of age.

It seems to have been ruled in England that in bequests to the children of a living person the legacy is restricted to the children only who are born at the term of payment of the bequest, and will not include children who may be born after the date of payment or distribution, and this even where the bequest is to *all* the children of a living person. It seems also to have been held that where the bequest is payable to such children at different dates—for example, at their respective majorities—it is the date of the first payment which will fix the total number of legatees, so as to exclude children born after that date. I feel the weight of these authorities, and although the words of the will in the present case are not precisely the same as those which occurred in any of the cases which I have observed, I am not prepared to take the present case out of the general rule so established.

At the same time, I am not prepared to say that the rule will override the expressed intention of the testator wherever that will is so expressed as to make it clear and unambiguous that he intended children born even after the date of payment or distribution to participate in the bequest—for example, by having a claim of repetition from those who had already received payment. Indeed, I think such rule must receive effect, so that if the will in the present case, instead of merely saying children to be procreated, which may mean children procreated before the term of payment, had said children to be procreated at any time during the life of Isaac Buchanan, although after the term of payment, I could not have denied effect to an intention so expressed. The present case, however, seems to fall under the English authorities, and therefore, though not without hesitation, I agree in the finding of the Lord Ordinary, that "the only persons entitled to participate in the sum of £20,000 settled by the truster are the children of Isaac Buchanan alive at the death of Mrs Jane Buchanan or Douglas, other than Peter Toronto Buchanan.

I am not sure, however, whether in the present process it is necessary to decide this question, or to pronounce an express finding excluding the rights of the as yet unborn children. I think it would be enough in this present process of distribution of the fund *in medio* to find that the pursuers Peter Buchanan's trustees are bound to distribute and pay the fund *in medio* (subject to the annuity) to and among the children of Isaac Buchanan now existing, and that as they respectively attain the age of 25, and are not bound and are not entitled to withhold payment or to set apart or retain any sum in respect of the possibility that Mr Isaac Buchanan may yet have other or additional children. This would meet the necessities of the present case, and avoid deciding absolutely against unborn children who cannot of course appear and claim in this process, and who can only be represented by the trustees as holders of the fund. With this suggested variation, and also with the variation that no more need be retained to meet the annuity than £10,000, I am for adhering to the interlocutor of the Lord Ordinary. I do not think that the existing children of Isaac Buchanan who have attained 25, or those in their right, are bound, as a condition of instant payment, to find security or caution of any kind or to any extent to meet the possible case of additional children being hereafter born to Isaac Buchanan. I think to require such caution would be to deny effect to the express direction of the truster, who appoints payment to be made at dates which may be long before the death of Mr Isaac Buchanan.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for Peter Buchanan's trustees, Find that the said trustees are bound to pay and divide the sum of £20,000, settled by the truster, to and among the children of Isaac Buchanan now alive, excepting Peter Toronto Buchanan, and that at the terms of payment fixed by the deeds, and are not entitled to retain or withhold any sum in respect that the said Isaac Buchanan may yet have other or additional children either of his present or of any future marriage; and find that no right vests in any such child until it reaches the age of twenty-five: Find that at the death of the liferenter a ninth vested in each of Jane Milligan Buchanan and Margaret Douglas Buchanan, who were then twenty-five years of age: Find that another one-ninth share vested in Harris Buchanan when he attained twenty-five, on 10th April 1876: Find that after setting aside the sum of £10,000 in order to secure the annual sum of £300 per annum to Major Douglas, payment must be made to such of the children as have attained the age of twenty-five, of one-ninth part of such proportion of the sum of £20,000 as may be available for division; and that until the other children respectively attain the age of

twenty-five they are not entitled to demand payment of any interest thereon; but without prejudice to the power of the trustees to expend the interest of said shares for their behoof until they attain the age of twenty-five: Find all the parties to the cause entitled to their expenses out of the sum of £10,000 available for division, and remit to the Auditor to tax the same and to report; and remit the cause to the Lord Ordinary to proceed with the same, and with power to decern for the expenses now found due; and decern."

Counsel for Trustees—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Children — M'Laren — Jameson. Agent—John Martin, W.S.

Counsel for Assignees—Kinnear—Mackintosh. Agents—T. & R. B. Ranken, W.S.

Monday, June 4.

TEIND COURT.

MINISTER OF BRYDEKIRK *v.* MINISTER AND HERITORS OF HODDAM.

Teinds — Transference of Glebe — United Parishes (Scotland) Act 1876 (39 *Vict. c.* 11,) *sec.* 4, *construction of.*

Held that "The United Parishes (Scotland) Act 1876," in so far as it deals with the transference of a glebe to a *quoad sacra* parish from a united parish, does not apply where the portion of the united parish disjoined forms only a small part of the *quoad sacra* parish.

Opinion reserved, whether it might not be extended to the case where the largest part was taken from the united parish, and small portions from other parishes.

This was a petition presented by the Rev. J. H. Gourlie, minister of the *quoad sacra* parish of Brydekirk, praying that a glebe should be transferred from the benefice of Hoddam to that of Brydekirk under the provisions of the Act 39 Vic. c. 11. The petition set forth that under the Act 1609 c. 23, James VI. and Estates ordained and statuted a union of the kirks, parishes, and glebes of Hoddam, Ecclefechan, and Luce, the place of the kirk to be at Hoddam.

"That under the provisions of the Act 7 and 8 Vic. cap. 44, entituled 'An Act to facilitate the disjoining or dividing of extensive or populous parishes, and the erecting of new parishes in that part of the United Kingdom called Scotland,' a petition was, in the year 1852, presented to the Court of Teinds, praying for the disjunction of a portion of the said united parish of Hoddam, which comprehended the said old parish of Luce, within the bounds of the Presbytery of Annan; and also praying for erection of such portion of Luce in Hoddam, along with portions of the parishes of Annan and Cummertrees, into a parish *quoad sacra*, to be called Brydekirk Parish. That on 26th January 1853 decree of disjunction and erection as prayed for was granted by the said Court, and the petitioner thereafter was duly ordained to be minister thereof.

"That at the date of disjunction and erection foresaid there were, and still are, three glebes, forming part of the benefice of the said united parish of Hoddam, situated respectively at Hoddam, Ecclefechan, and Luce.

"That a large portion of the old parish of Luce, in the said united parish of Hoddam, is now situated in the parish of Brydekirk *quoad sacra.*

"That by 'The United Parishes (Scotland) Act 1876,' 39 Vic. cap. 11, entituled 'An Act to amend the Act of the seventh and eighth years of Her Majesty, chapter forty-four, relating to the formation of *quoad sacra* parishes in Scotland,' it is, by section 4, declared that 'If a portion of a united parish in Scotland has, under the provisions of the recited Act (7 and 8 Vic. cap. 44), been erected into a parish *quoad sacra*, and it shall appear in the course of any proceedings taken under this Act that there is more than one glebe forming part of the benefice of such united parish, it shall be lawful for the Court of Teinds, upon sufficient evidence being produced of the consent of the Presbytery, to decern and declare that one of such glebes, duly described by its marches and boundaries, and with its parts and pertinents, shall be transferred from the minister of such united parish to the minister of such parish *quoad sacra*, and such glebe shall thereafter be the glebe of the said parish *quoad sacra*, and the minister thereof shall be invested with all those rights in relation thereto which were formerly vested in the minister of the said united parish: Provided always that the right to the personal occupancy and enjoyment of such glebe as aforesaid shall continue with the minister of the said united parish in office at the date of such decree, during his incumbency, unless he shall, by a deed duly executed and lodged with the clerk of the Presbytery, renounce the same.'

"That by section 5 of said United Parishes (Scotland) Act 1876, it is declared that 'The glebe which shall be declared as aforesaid to be the glebe of the parish erected *quoad sacra*, shall not be subject to the provisions of any trust constituted in terms of the recited Act, subject to this proviso, that if a manse and offices are erected on such glebe, either before or after decree of disjunction and erection, or decree as aforesaid, the site of such manse and offices shall be subject to the provisions of any trusts constituted in terms of said recited Act.'"

The petitioner produced evidence of the consent of the Presbytery to the transference of the glebe of Luce, as required, and also gave a detailed description thereof.

It appeared from the answers that the population of Brydekirk was 731, and of these 80 formerly belonged to Hoddam. The valuation of Brydekirk was stated to be £4067, of which £475 is the part disjoined from Hoddam. The population and value of Hoddam is 1520 and £14,297 respectively. Parties were not quite agreed as to the population and valuation of that portion of the united parish of Hoddam incorporated into Brydekirk, the counsel for the petitioner stating that according to his information the population was 86 and the value £700. The glebe proposed to be taken was not within the *quoad sacra* parish of Brydekirk, and upon it the manse, offices, and garden of Hoddam had been