Wednesday, July 9.

SECOND DIVISION.

SPECIAL CASE—M'JANNET AND OTHERS (HAMILTON'S TRUSTEES) *v.* HAMILTON AND OTHERS.

Trust — Voluntary Trust-Disposition — Vesting — Power of Apportionment—Alimentary Provision.

H executed a voluntary *inter vivos* trust-disposition and assignation in favour of trustees, whereby he assigned £20,000 to them for various purposes, *inter alia*—(1) to pay him for his alimentary use allenarly the whole free annual income; (2) to hold the fee for behoof of the whole lawful children born and to be born of him, and the issue of the bodies of such of them as might die, in such shares and proportions as he might fix by any writing under his hand, failing such writing equally *per stirpes*. The deed was further declared irrevocable, and was duly delivered when completed, payment to be made to the children on their attaining majority after the father's death—prior to that date the income, so far as necessary, to be applied for their behoof. The trustees possessed the estate under it for twenty years. H then executed a deed of apportionment and division, and relative deed of renunciation, in part exercise of the power reserved in the trust deed, by which he renounced his liferent over £8500, being part of the £20,000 which was in the hands of his trustees, and directed them to divide it among his children, of whom there were seven, the youngest being seventeen years old. H at the time was sixty-eight years old and a widower. *Held*—in a question whether the deeds of renunciation and apportionment were within H's power—(*diss.* Lord Ormidale) (1) That the fee of the £20,000 vested in the children who were born at the date of delivery of the trust deed; (2) That he was entitled to renounce his liferent to the extent to which he had so done, it having been granted by himself for his own behoof, and that the deed of apportionment was therefore within his power, and was reasonable in the circumstances.

The question involved in this Special Case related to the disposal of a sum of £20,000 which was left by Mr Ferguson of Cairnbrock, sometime baker in Irvine, and afterwards residing there, by his trust-disposition and settlement dated 13th May 1853 and 22d September 1855.

Mr Ferguson left this sum to John Hamilton in liferent, and to his children equally among them in fee, and after Mr Ferguson's death a question arose between the parent and children as to the fee of the fund in question. After various procedure both in the Court of Session, 22 D. 1442, and the House of Lords, 24 D. (H. of L.) 8, and 4 Macq. 397, Mr Hamilton was found entitled to the fee. During the progress of the litigation Mr Hamilton executed a trust-disposition and assignation in favour of William M'Jannet, banker in Irvine, and others, whereby he assigned to them the £20,000, as trustees for the ends, uses, and purposes therein narrated. These trustees were the first parties to this case. The purposes of this trust deed were, *inter alia*, as follows:—The £20,000 was assigned to the trustees in trust, *inter alia*, as follows—*Second*, "My trustees shall make payment to me the said John Hamilton, for my alimentary use allenarly, of the whole free annual income or revenue of the trust-funds, and that half-yearly and periodically from time to time as the same falls due, during the whole term of my life. *Third*, I reserve to myself the power at any time of making to a widow who may be left by me a liferent provision, not exceeding £150 value per annum, which my trustees shall be bound to satisfy out of the trust-funds or property as I may direct. *Fourth*, My trustees shall hold the fee or capital of the free trust-funds and produce thereof after my death (subject to the eventual provision to my widow as aforesaid) for behoof of the whole lawful children born and to be born of me the said John Hamilton, and the issue of the bodies of such of them as may die, in such shares and proportions as I may fix by any writing under my hand, but failing such writing, then among such children and their issue equally *per stirpes*." Then followed a direction to apply the free income of the estate after the granter's decease, as far as the trustees considered necessary, to the maintenance and education of his children until they attained twenty-one years, and then from time to time to convert into cash as much of the capital as might be necessary, and divide and pay the same to his children according to their respective rights in the fee. The deed was further declared irrevocable. In the litigation above referred to, these trustees after their appointment took the place of Mr Hamilton, and when the fee was ultimately found to belong to him, they got possession of the £20,000, less expenses, and had held and administered it ever since.

By deed of apportionment and division, and relative renunciation, dated 17th January 1879, Mr Hamilton, in exercise and execution in part of the power of apportionment, division, and appointment reserved to him in the trust-disposition and assignation above narrated, renounced his right of liferent over, and directed and apportioned the sum of £8500, part of the trust-funds in the hands of his trustees, to and amongst his whole children, in the shares and proportions mentioned therein, and directed and appointed his trustees to pay the respective sums therein named to his children immediately on delivery of the deed to them. At the date of the execution of this deed of apportionment Mr Hamilton was sixty-eight years of age. He was a widower, his wife having died on 16th March 1877. His whole children were in life. They formed with him the second parties to this case, and were seven in number, three of whom were married, and the youngest of whom was born in April 1861.

The question raised related to the power of Mr Hamilton to execute this deed of apportionment and division and relative renunciation. For the first parties, viz., the trustees, it was maintained that the deed was contrary to the provisions of the trust-disposition and assignation in their favour, particularly to the fourth purpose thereof, and was therefore invalid. They considered that they were bound to retain the whole sum of £19,230, as the balance of the £20,000 conveyed to them, till the death of Mr Hamilton. For the second parties it was

maintained that Mr Hamilton was entitled, under the trust-disposition and assignation, to apportion the sum of £19,230 in different parts from time to time, and that the deed of apportionment was a valid exercise of that power.

The questions for opinion and judgment were—"(1) Is the said John Hamilton entitled to renounce his liferent over and apportion any part of the said sum of £19,230 to the effect that the same shall be paid over by the first parties during the lifetime of the said John Hamilton, and if so, to what extent? (2) Assuming the first question to be answered in the affirmative, has the said John Hamilton validly exercised the power belonging to him by the said deed of apportionment and division and relative renunciation, and are the first parties bound to pay over the sums apportioned thereby?"

The arguments sufficiently appear from the opinions delivered.

Authorities—*Laing* v. *Barclay*, July 20, 1865, 3 Macph. 1143; *M'Donald's Trs.* v. *M'Donald and Ors.*, Mar. 10, 1874, 1 R. 794, and H.L. June 17, 1875, 2 R. 125; *Sloane* v. *Finlayson*, May 20, 1876, 3 R. 678.

At advising—

Lord Justice-Clerk—[*After stating the terms of the trust-disposition*]—This is not a testamentary instrument, nor can its operation be determined by the rules of testamentary succession. Neither is it in any respect of the nature of a contract. It is an *inter vivos* conveyance by the granter of the capital sum of £20,000, burdened by a provision in favour of his widow and by his own liferent. The deed is entirely voluntary and gratuitous. The granters are persons who may fall under two classes or descriptions—*first*, the children of his subsisting marriage, and *secondly*, any children the granter might have by any other marriage. The number of the first class have become certain by the dissolution of the granter's marriage on the death of his wife in 1877. As the granter has not married again, there are no existing interests under the second class, excepting such as may be represented by the granter himself. This conveyance was delivered to the trustees for behoof of the grantees or beneficiaries at the time of its execution in 1859. The deed is declared to be irrevocable. Failing apportionment the funds are to be divided equally. But the granter has the fullest power of appointment.

I am of opinion that the right or interest in the capital of this sum of £20,000 was transferred when the deed was delivered from the granter to the grantees who were then in life, and vested at once in them, subject to the existence of other children of that or any subsequent marriage of the granter, and subject also to their father's power of apportionment. But these two contingencies did not prevent the conveyance from taking immediate effect on the capital or fee by the absolute divestiture of the granter, and the consequent investiture of the grantees. The intervention of a trust does not affect this result. The interests would have been precisely the same if the conveyance had been to the children in life *nominatim*, and to any others *nascituri*, under the same conditions; and those in life would have taken a fiduciary fee for those unborn.

Some difficulty no doubt arises from the phraseology of the instructions given to the trustees, who are directed to "hold the fee or capital of the free trust funds and produce thereof after my death" for behoof of the whole lawful children of the granter. But reading the whole instrument together any difficulty thus created seems to disappear. When this deed was executed, it was still doubtful whether the fee of this sum might not be found to be in the children under Mr Ferguson's bequest. The whole is conveyed to the trustees, and the produce only is to be held for the granter. The fee therefore was held for the children from the first, and this provision was one intended solely to secure the right of the granter to the produce for his life. After his death the produce as well as the capital was to be held for the children, and that is the true effect of the words "after my death."

One other consideration raised some doubt in my mind at the debate, founded on the provision in regard to the children or issue of those of the beneficiaries "as may die"—that is, who may have died before the shares have been ascertained or become payable. If this had been a proper conditional institution of issue, it might have been contended that there could be no vesting until the granter's death. But that is not its legal effect. The fee or capital was the property of the children from the date of the delivery of the deed; and this is a mere destination intended to exclude accretion among the members of the class to the injury of the children of any who might die before the funds were divided.

Such being the effect of the deed of 1859, it is now proposed by the father to liberate a certain proportion amounting to about half of this capital sum from the burden of his liferent right, and to execute an irrevocable deed of apportionment among the only existing beneficiaries. The question is, whether he has power to do so?

As far as his own interest in the produce of this fund is concerned, he may deal with it as he pleases, and discharge it when he likes. No one else has the slightest interest in that matter, or any *locus standi* to interfere with it. The alimentary character attached to it in the instrument was a provision made by himself in regard to his own property for his own benefit. He is as free to recall it as he was to make it, as it was in my opinion wholly inoperative for any practical purpose. It was not an alimentary liferent, because it might have been attached by his creditors, and therefore belonged to himself unconditionally. However far courts of law may have gone in preventing persons in a position requiring protection from renouncing rights conceived in their favour, I know of no authority or precedent either here or in England for holding that a man of full age and *sui juris* can put his property out of his power and beyond the reach of his creditors without constituting at the same time some right, direct or contingent, in regard to that property in another. The only other question is, whether the renunciation or discharge of the liferent will accelerate the period of division. If I am right in holding that the beneficial interest vested when the deed was delivered, there can be no ground for saying that it should not, provided this deed of apportionment be a valid exercise of the power. I see no objection to it. It relates no doubt only to a portion of the fund, but

that simply leaves the rest to be divided equally in terms of the conveyance if there be no further apportionment. The only contingent adverse interest is in the possible issue of a possible second marriage of the father, but it will not escape observation that the power of apportionment left the father the absolute master of all these interests, and that he might, as the law now stands under the recent statute, have excluded them altogether. As it is, enough will be left in the hands of the trustees to equalise all possible claims.

In conclusion, I have to remark that it is at least open to question whether the conveyance in 1859, in so far as it related to children of a second marriage, did not remain wholly within the power of the granter. It was a provision in his own favour as against the children of the first marriage; but there being no person in existence who has an interest to enforce it, and as it was not granted *intuitu matrimonii*, it is in its nature revocable, and in this respect the question seems to be ruled by the principles laid down by Lord Rutherfurd in the case of *Morrison*, 16 S. 529. But it is unnecessary to decide this point in the present case.

Lord Ormidale—It cannot be doubted, and I did not understand that it was disputed at the debate, that Mr Hamilton divested himself of the fee or capital fund of £200,00 in question by the trust-disposition and assignation, and it is not to be overlooked that he expressly declared his deed doing so to be irrevocable. The deed was accordingly at once delivered to the trustees, and they afterwards received the fund, and have been in the possession and administration of it for some years. It may be important also, in some views which might be taken of the case, to observe that the trust-disposition and assignation referred to is not of the nature of a divestiture by Mr Hamilton of his whole estate, and that it did not comprehend *acquirenda* to any extent. It was limited to a specific fund. Mr Hamilton now desires to divide nearly one-half of the fund amongst his children presently alive, and the question is, can he do so?

By the trust-disposition and assignation referred to, Mr Hamilton transferred *habili modo* the £20,000 in question to certain trustees for the purpose, first, of paying some expenses connected with the realising of the fund and the expenses attending its management; and for the purpose, secondly, of paying to himself the whole free income or revenue of the fund for his "alimentary use allenarly" during the whole term of his life. He then, in the third place, reserves to himself the power of making a provision out of the trust-fund of a yearly sum not exceeding £150 to a widow who might be left by him. So far no mention is made of the capital or fee of the fund or of its disposal. This is done for the first time by the fourth purpose of the deed, which is in these terms—[*quotes ut supra*].

Now, in the first place, it cannot be questioned—and I did not understand it was questioned—that it was perfectly lawful for Mr Hamilton—assuming his solvency, and nothing is said to the contrary, and there is no question here with creditors—to have laid aside and secured a particular fund for his children after his death in the manner and terms in which he did so by the trust-disposition and assignation referred to. The only question raised between the parties is, not the lawfulness of Mr Hamilton's trust-disposition and assignation, but what is its true meaning and effect, or, in other words, does it entitle him now to pay and divide, or to call upon his trustees now to pay and divide, among his children presently alive about one-half of the trust-fund?

It appears to me that in executing the trust-disposition and assignation Mr Hamilton's object was to secure the fund in question for his children after his death, being probably satisfied that they would be otherwise sufficiently cared for so long as he himself lived. But this legitimate and perfectly natural and rational object might be entirely defeated were the whole trust-fund to be now at once in his own lifetime paid and divided among—and if paid and divided, possibly if not probably spent and lost by—his presently existing children. I say the whole trust-fund, because were we to sanction payment and division of the one-half as proposed, I do not very well see how we could refuse and sanction division and payment of the other half whenever afterwards asked to do so. But, for my own part, I am unable to see upon what principle we can hold that Mr Hamilton is at present entitled to pay and divide, or to call upon his trustees to pay and divide, any portion whatever of the capital of the trust-fund. No such right is reserved to Mr Hamilton, the power of apportionment and division being manifestly one which, as it appears to me, was not intended by him to come into operation till after his death. In any other view Mr Hamilton would have it in his power now, and has had it in his power all along, at any time he pleased, to revoke and disregard his trust-disposition and assignation, notwithstanding that he expressly declared it to be irrevocable, and that it has been for many years a delivered and operative deed.

But it was contended for Mr Hamilton's children, who are the second parties to the Special Case, as I understand their argument, that as the fee or capital of the trust-fund has already vested in them, and as they concur with Mr Hamilton in desiring a present division and payment, no one has an interest to object. I cannot assent to this view. So far as Mr Hamilton was concerned, he had entirely divested himself by the trust-disposition and assignation, but in place of the fee being thereupon at once vested in his children then existing, it remained in the trustees as a fiduciary fee to await the event of Mr Hamilton's death, for till then it would be impossible to tell what number of children Mr Hamilton might have, or whether children who had predeceased himself might not leave issue. Accordingly Mr Hamilton expressly directs in the fourth purpose of his deed that his trustees "shall hold the fee or capital of the free trust-funds and produce thereof after my death" in order to be administered by them in the manner which he then goes on to specify. But it will be obviously impossible that the trustees can hold after his death either the fee or capital of the trust-fund, or the produce thereof, to be administered or dealt with by them in any way whatever, if nearly one-half of the capital or

fee is now divided and paid away, for to the extent of that half at least an end will be put to the trust, and there will be nothing to administer. I cannot think that such a result was contemplated by Mr Hamilton when he executed the trust-deed, or is consistent with its terms. Again, by the fourth purpose of the deed Mr Hamilton's trustees are directed to hold the fee or capital of the fund and the produce thereof "for behoof of the whole lawful children born and to be born" of him, "and the issue of the bodies of such of them as may die, in such shares and proportions as I may fix by any writing under my hand, but failing such writing, then among such children and their issue equally *per stirpes*." It is the whole of the trust-funds that Mr Hamilton points at, and not merely one-half or any other part of it; and it is not merely for behoof of Mr Hamilton's children existing at the date of the trust-deed that his trustees are to hold the fund, but his "whole lawful children born and to be born" of him, "and the issue of such of them as may die." How this can be reconciled with the notion that the whole fund, or any part of it, vested in Mr Hamilton's children alive at the date of the trust-deed, or at any other time, to the effect of being divided and paid before his death, I fail to see. If indeed Mr Hamilton had contemplated any such vesting, he would have said so, in place of using language calculated, as it appears to me, to lead to a different impression. If, then, taking his deed as it stands, it were to be held that the trust-fund vested in the children alive at its date, or at any other time before Mr Hamilton's death, and on that assumption it were now paid and divided, it would of course be impossible for the trustees to hold the fund for behoof of the child or children who might survive him, or for behoof of the issue of such of them as had previously died. It is true that Mr Hamilton might under his reserved power of apportionment regulate the shares of the children or their issue who might survive him as he pleased, but that is a very different thing, in any view I can take of it, from holding that he could now and at once entirely extinguish in whole or in part the shares or interests of the children who may yet be born to him, or of the issue of such of his children as may predecease him. Just suppose it to happen that previous to Mr Hamilton's death all his children excepting one had died without leaving issue, I rather think that that one surviving child would be entitled to the whole trust-fund, for there would in the event suggested be no room for apportionment. Or suppose the case of the predeceasing children leaving issue, they could not participate in the fund if it were now divided and paid away. Or suppose that Mr Hamilton were to contract a second marriage, and have several more children than he now has—and that was and is still a possible event—it is obvious that their shares or interests in the fund might be in a great measure sacrificed if the proposed division and payment were now made.

These considerations—and there are others to the same effect suggested by the terms of the trust-deed—appear to me to negative the idea that there can be any such vesting of the trust-fund, or any operative apportionment of it prior to the death of Mr Hamilton, the truster, so as to warrant a present division and payment. It may indeed be doubted whether there can be vesting even on the death of Mr Hamilton, or till the period of distribution; but the determination of this point is not necessary for the solution of the only two questions which have at present to be answered by the Court.

But supposing that although the fund were to be held not to vest absolutely and unqualifiedly till the death of Mr Hamilton, it was contended for the second parties that it must at anyrate be held to have previously vested in his children as a class, subject to diminution in favour of children, if any, subsequently born. Even if this were so, I must own my inability to see how it can avail the second parties, who desire not to have it affirmed merely that the trust-fund has vested in them as a class, leaving them on that footing to test upon their shares or raise money upon them as a fund of credit, subject to the contingency of Mr Hamilton having more children, but to have immediate division and payment made in their favour.

Assuming, then, that no part of the capital of the trust-fund can now be paid to or divided amongst Mr Hamilton's children presently alive, and that his deed of apportionment and division is incompetent to effect that object, it is unnecessary to determine whether he has or has it not in his power to renounce his alimentary liferent, for that point only arises, looking to the terms of the queries submitted to the Court, in connection with the validity otherwise, or rather the present operative effect, of his deed of appointment and division.

But while these are the views which I entertain of the rights of parties in this case—views which if given effect to would prevent any present division and payment of the fund in question—I have not been disappointed to find that the opinions of both your Lordships is such as must lead to a different result—a result which may not unlikely be more conducive to the advantage and welfare of Mr Hamilton's family than that which my impression of the law of the case points at.

Lord Gifford—The questions raised under this Special Case are of interest and importance, and are not unattended with difficulty, as sufficiently indeed appears from the opinions now delivered. After full consideration, however, I have come to be of opinion with your Lordship in the chair that the deed of apportionment and division by John Hamilton, dated 17th January 1879, is within his power and competency, and that the same should receive effect, and to this extent I answer the questions put in the affirmative. But I do not think it necessary to go further, and I do not say—and I do not need to say—that Mr Hamilton could destroy or revoke the trust altogether or denude the trustees, by any act of his in favour of his existing children or any of them, of the whole trust funds. The sum embraced in the deed of apportionment of January 1879 embraces only a part of the trust funds—considerably less than one-half of the whole—and to this extent I think Mr Hamilton is entitled to make it available for present payments to his children, who are really the fiars in the fund, and who concur in desiring present payments to account. An ample fund is left to meet all the ultimate purposes of the trust, and I think the partial allotment and distribution now

proposed is reasonable and proper and fairly within the power of Mr Hamilton and his children. Beyond this I do not go.

The original fund was a sum of £20,000 which was bequeathed by the late Mr Ferguson of Cairnbrock to John Hamilton, one of the parties to the present case, in liferent, and to his children equally among them in fee. After Mr Ferguson's death, and in distributing the funds and paying the legacies left by him, a question arose whether John Hamilton was entitled to the absolute fee of the £20,000, or whether he was only entitled to a bare liferent thereof—a liferent allenarly—the fee being destined to and reserved for his children equally? This question formed the subject of a good deal of litigation, but it was ultimately decided both by this Court and by the House of Lords that the absolute fee belonged to John Hamilton himself, and that his children had only a *spes successionis* to him, defeasible by him at pleasure—18th July 1862, 4 Macq. 397.

Before the ultimate decision of this question was pronounced in the House of Lords, Mr Hamilton granted a trust-disposition and assignation of the whole fund in favour of trustees, who are the first parties to the present case, dated 7th March 1859. This assignation proceeds on the narrative of the questions which had arisen regarding the fee of the bequest, and it bears that the granter had resolved, "in the event of its being found that the fee belongs to me," to convey it in trust as therein mentioned. The trust-deed is expressly declared irrevocable. It was duly delivered and intimated as a final *inter vivos* deed, and it has been acted upon ever since. The trustees are in possession of the whole fund, which by legacy-duty and expenses has been reduced to £19,230. The leading purposes of the trust were, first, to pay to Mr Hamilton himself "for my alimentary use allenarly" the "whole free annual income of the funds;" and then, subject to a power to provide for a widow, the deed proceeds—"Fourth, my trustees shall hold the fee or capital of the free trust funds and produce thereof after my death, subject to the eventual provision to my widow as aforesaid, for behoof of the whole lawful children born and to be born of me the said John Hamilton, and the issue of the bodies of such of them as may die, in such shares and proportions as I may fix by any writing under my hand, but failing such writing, then among such children and their issue equally *per stirpes;*" and then provision is made for the maintenance and education of children or grandchildren in minority and for the ultimate division of the fee.

Under this trust Mr John Hamilton has hitherto received the whole free income of the fund. He is now a widower upwards of sixty-eight years of age, and he has seven children, all of whom have attained majority excepting the youngest daughter, who is upwards of eighteen years of age. The eldest son is thirty-one years of age. Mr Hamilton is now desirous that a part of the capital of this fund of £19,230 should be advanced and paid to his children, most of whom need it for their outfit in life, the payment to his youngest daughter being postponed till her majority or marriage, and for this end he proposes to renounce his liferent over the part of the fund which he intends for immediate distribution among his children, amounting in all to £8500. The question is, Can he with the consent of his whole family do this, and will the trustees be justified in parting with nearly a half of the whole trust fund? I have come to think that the proposed arrangement is reasonable and legally competent.

The first question is, Can Mr Hamilton renounce any part of a liferent which he himself has by his own trust deed declared to be "for my alimentary use allenarly?" I think he can, at least to the extent to which he now proposes to do so. It was finally fixed by the judgment of the House of Lords that the whole trust fund was Mr Hamilton's absolute property. He was unlimited fiar thereof, and could dispose of the whole at his pleasure, and therefore if an alimentary fund has been really created, it has been created, not by any third party, but by Mr Hamilton himself, and for his own exclusive behoof. Now, I think it is established law that a person cannot by means of a trust or by any similar device secure his own estate for his own aliment or his own alimentary liferent, so that it shall not be subject to the diligence of his just and lawful creditors whensoever their debts have been contracted; so that if Mr Hamilton should incur debt, I cannot doubt that his lawful creditors could attach the liferent in the hands of the trustees, notwithstanding the declaration as to its alimentary nature contained in the trust deed. The clause would be unavailing against creditors. It does not follow that without contracting debt Mr Hamilton might at his own pleasure annul the alimentary clause in his own final delivered and irrevocable deed. But all difficulty is, I think, removed in the present case when we consider the amount of the annual income which Mr Hamilton has chosen to declare alimentary. The trust funds produce between £700 and £800 a-year, and I think it cannot be doubted that that is far more than in any possible view could be held to be a proper and protected alimentary provision, even although it had flowed from a third party to a person in Mr Hamilton's circumstances and position. Mr Hamilton himself proposes for the benefit of his children, who are all entering life, to renounce his liferent over a part of the fund, and under his powers of apportionment to distribute among his whole existing children a part of the capital. In this way he reduces his own annual income. I think he is well entitled to do so, and as the reserved capital will still produce an income for him of between £400 and £500 a year, I think this is sufficient, and that it would be unreasonable on this ground to prevent the proposed distribution.

In the next place, if the difficulty arising from the alimentary liferent is got over, I think there is no objection to the instant distribution of a limited part of the fee among the whole children, who are in reality the sole existing fiars. It was said that no fee has vested in any of the children, because the fee is destined not only to existing children but to children who may yet be born to Mr Hamilton and to the issue of any of his immediate children who may predecease him. Now, it is possible that Mr Hamilton, though sixty-eight years old, may marry again and have children, but I do not think that this contingency prevents the vesting. I think the fee has already vested in the existing children as members of a

class, subject to the contingency that the number of individuals in the class is not fixed; but this does not prevent the vesting in the already existing members of the class; and then as Mr Hamilton has very ample powers of apportionment by any writing under his hands, I think that he may apportion part of the capital to his existing children, and may make their shares instantly payable, reserving a sufficiency to meet all future contingencies. I think he has made this partial apportionment quite legally and effectually—and for aught that appears to me, quite reasonably—by the deed of apportionment and division of 17th January 1879. It is fixed that such a power of apportionment as we have here may be exercised partially and from time to time as the circumstances of the family may seem to require it. See among other cases *Smith Cuninghame* v. *Anstruther's Trs.*, as decided in the House of Lords April 25, 1872, 10 Macph. H.L. 39. I think the reference in the trust deed to the issue of children is merely an expression of what the law would itself do—that is, place the issue of predeceasing children in the place of their respective parents.

I am therefore of opinion, though not without difficulty, that Mr Hamilton's deed of apportionment and division of 17th January 1879 should receive effect, and that the trustees are entitled and bound to make the partial division therein directed.

The Court therefore answered both questions in the affirmative.

Counsel for First Parties—Trayner—Moncrieff. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Parties—Pearson. Agents—Dove & Lockhart, S.S.C.

Wednesday, July 9.

SECOND DIVISION.

SPECIAL CASE — THOMSON AND OTHERS (THOMSON'S TRUSTEES) *v.* THOMSON.

Husband and Wife—Communio bonorum—*Donation—Policy of Insurance effected on Life of Wife subsequent to Marriage, and taken payable to her Heirs.*

A policy of insurance was effected after marriage on the life of a wife, payable six months after her decease to "her heirs, executors, or assignees." The husband paid all the premiums, and on two occasions got advances of money on the security of the policy. By an antenuptial contract of marriage the wife had assigned her whole estate, *acquirenda* as well as *acquisita*, to her husband. The husband predeceased, leaving a trust-disposition and settlement by which his whole means and estate were disponed to trustees for various purposes. In a question between the wife and the husband's trustees regarding the right to the policy of insurance, *held* that it belonged to the wife, in respect that it was a donation to her by her husband which was not recalled by him, and therefore was not his property at the time of his death, nor carried by his general trust-disposition and settlement.

Observed (*per* Lord Gifford) that the rule of law to the effect that a particular destination of a specific subject is not derogated from by a general settlement of a testator's whole estate, unless the intention appeared to be otherwise, was applicable in such a case as the above.

Thomas Thomson and his wife Mrs Margaret Gray or Lumsden or Thomson were married on 3d October 1838. They had previously executed a marriage-contract, in which, *inter alia*, Mrs Thomson, in consideration of various provisions in her favour by her husband, which she accepted as in full of all her legal provisions, assigned to her husband, and his heirs and assignees, "all and sundry lands and heritages, goods, gear, debts, and sums of money, as well heritable as moveable, at present belonging or resting-owing to her, or that shall pertain or belong to her during the subsistence of the said marriage," &c.

Soon after the marriage there was effected on the life of Mrs Thomson a policy of insurance with the Scottish Widows' Fund for £200. The policy was dated 24th October 1838, and was taken entirely in favour of Mrs Thomson, "with consent of her said husband." The policy bore that the application was made by Mrs Thomson, that the first annual contribution and entry-money was paid by her, and that "her heirs, executors, or assignees" were to be entitled to payment of the sum insured. The premiums were regularly paid by the husband as they fell due until his death. In 1857 a loan of £80 was given by the insurance company on the security of the policy, which was repaid in 1863. In 1863 another loan of £125 was given in conformity with an agreement dated 18th November and 9th December 1863. This agreement was unilateral in name of Mrs Thomson, with the special advice and consent of her husband, and as taking burden on him for his wife, and was signed by both husband and wife. The advance was repaid on 22d July 1870. Both of these loans were given to and for behoof of Thomas Thomson, and were repaid by him. He died on 25th February 1879, having executed a trust-disposition and settlement dated 6th November 1871, by which, *inter alia*, he gave, granted, and assigned to his trustees, for the purposes mentioned in the deed, "all and whole lands and heritages, goods and gear, debts and sums of money, policies of insurance," &c., and generally the whole estate belonging or owing to him, or that should be belonging and owing to him at the time of his death. There was no special mention of the above policy of insurance on his wife's life.

It was admitted at the discussions before the Court that Mr Thomson at his death was the holder of at least two policies of insurance other than the one on his wife's life.

At Mr Thomson's death a question arose between his testamentary trustees, the first parties to this case, and his widow, the second party, as to who was in right of the policy in question, and this Special Case was agreed upon.

The following questions of law were submitted for the decision of the Court:—"(1) Does the said policy on the life of the second party