truster's anticipation, and also because the bequest to those called residuary legatees is not upon a proper interpretation a bequest of residue but a bequest of a defined portion of the estate. I am not able to adopt these views of the Lord Ordinary. My opinion is that the ordinary rule is as applicable to this case as it would be to a case in which the deficiency is created by the payment of ordinary debts. The rights of the widow and her possible repudiation of her conventional provisions were things presumably within the contemplation of the truster, but whether they were or were not seems to be immaterial to the result. If this widow accepted of her testamentary provision his will would have effect. If she did not, but claimed her *jus relictæ*, the operation of the will would be limited to the dead's part. All else would be unaffected. The legatees would receive their bequests according to their several rights. The special legatees would receive their special legacies if the subjects of the bequests were in existence and were free of the burden of contribution for the payment of the widow's claim. In like manner, the general legatees would receive their legacies if there was a fund out of which these could be paid, and last of all, the residuary legatees would receive what remained of the estate after prior rights had been satisfied. In other words, the deficiency created by the claim of the widow for *jus relictæ* must be made up, so far as the residue is concerned, out of the residue; next, if the residue be insufficient, then out of the fund which otherwise would be available for the general legacies, and lastly, if both these are inadequate, then to the extent required out of the subjects of the special bequests. This is the ordinary rule of ranking, and I think must be followed on the present occasion. The Lord Ordinary has another reason for dealing with the present case as exceptional. He thinks that the residuary clause is in this case not a bequest of residue but a bequest of defined portions of the estate, inasmuch as it is a bequest simply of what is not conveyed to others. But it appears to me to be an erroneous interpretation. The clause seems to me to be an ordinary residuary clause. Money not in view of the truster at the time when the settlement was made, and not required for other trust purposes, would fall into residue, and in like manner out of this residue must come moneys which are necessary to meet prior demands according to the settled rules of trust-administration. This finding of the Lord Ordinary must therefore, I think, be recalled, and another, by which the deficiency shall be provided for in the ordinary way out of, first, residue; secondly, general legacies; and lastly, special legacies, be substituted for it.

Lord Young and Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Find that the widow of the testator is entitled, in virtue of her *jus relictæ*, to one-half of his moveable estate remaining after payment of his debts, and that the bequests made by him are prestable and payable out of the other half so far as available, in the following order of preference, viz.:—Firstly, the special legacies; secondly, the general legacies; and lastly, the residue: Recal the said interlocutor in so far as inconsistent with these findings, and *quoad ultra* adhere thereto."

Counsel for Trustees (Real Raisers)—Comrie Thomson. Agents—Romanes & Simson, W.S.

Counsel for Mrs Tait—Darling. Agent—Thomas Dalgleish, S.S.C.

Counsel for Lees and Tait—Mackay—Goudy. Agents—Fraser, Stodart, & Ballingall, W.S.—W. & J. Burness, W.S.

Counsel for Residuary Legatees—Gillespie. Agents—Tawse & Bonar, W.S.—Mitchell & Baxter, W.S.

Thursday, July 8.

SECOND DIVISION.

CRAWFORD'S TRUSTEES *v.* CRAWFORD AND OTHERS.

Succession—Faculty and Powers—Apportionment by Father of Marriage-Contract Funds—Interest on Child's Share—Resulting Intestacy—Conditio si sine liberis decesserit.

By his antenuptial contract a husband bound himself to pay an annuity of £150 to his wife if she survived, and to pay to the children of the marriage, if more than one (which happened), £1500, he having power to apportion this sum among them, and failing apportionment the division to be equal, the period of payment being the first term after his death, or their majority or marriage, but declaring that their provisions should be subject to their mother's jointure if he should not leave sufficient fortune to answer both. In respect of their provisions the legal rights of widow and children were excluded. By a trust-disposition and settlement he subsequently directed that his whole free estate should after payment of debts be held for his widow in liferent, and on her death should be divided into seven shares, of which three of the five children of the marriage should have one each, and the other two children two each, declaring that the trustees might alter this apportionment if they chose, and that none of the shares should vest till they became payable. The estate he left was just sufficient to pay the marriage contract annuity of £150 to the widow, and there was no division till her death. She was predeceased by four of the five children, of whom two left issue. The estate being thus free for division by her death, *held* (*a*) *with regard to the* £1500 *provided to the children by the contract* (1) that the settlement was not intended to operate and did not operate an apportionment thereof, because it declared that the shares given by it should not vest till they became payable on the widow's death, while the right to the funds provided by the contract was an interest vested in the children, and payable at his own death, and because the apportionment under the settlement was made subject to the discretion of the trustees; (2) that the shares in

the £1500 were therefore equal, but that interest was not due upon them until the death of the widow;—(*b*) *as to the residue dealt with by the settlement*, (1) that the issue of the children who predeceased the widow were entitled to their respective shares under the *conditio si sine liberis decesserit*, but (2) that the shares of those who predeceased her without issue did not fall to the child who survived her, but lapsed and fell into intestacy.

By antenuptial contract of marriage executed between David Crawford, writer, Greenock, and Rosina Christian Lee or Crawford, dated 10th June 1828, Mr Crawford bound himself, in the event of his predecease, to provide an annuity of £150 per annum to his widow, and to provide her in household furniture, mourning, &c. He also bound himself to make payment of the sum of £1000 if one, and £1500 if two or more children, to the child or children of the marriage who should be alive at his death. A power of apportionment of this provision was reserved by him, and if this power should not be exercised the money was to be divided among his children equally share and share alike. It was declared that these provisions to the children were to be payable at the first term of Whitsunday or Martinmas after his death, or after their reaching majority or being married, whichever event should first happen after his death, but "shall be subjected to their mother's jointure if the said David Crawford shall not leave sufficient fortune to answer to both." These provisions were declared to be in full of the legal rights of both widow and children.

Mr Crawford died on 27th October 1861 survived by his wife and by the five children of the marriage. He left a trust-disposition and settlement dated 29th August 1861, by which he conveyed all his estate, heritable and moveable (with the exception of certain property he had already conveyed to his wife) to trustees for the purposes thereof. By the first purpose he provided for payment of debts, &c., by the second he directed the whole residue of his estate to be invested and held for his widow's liferent, and gave her the moveables in his house at the time of his death, which provisions were declared to be in fulfilment of his marriage-contract obligation, and out of love, favour, and affection. By the third purpose of this settlement he directed "that upon the death of the said Mrs Rosina Christian Lee or Crawford, my whole free property and estate shall be divided into seven equal portions or shares, of which one shall be given to each of my three sons, David Rose, James Hunter, and William Patrick, and two shares to each of my daughter Jane Lee, and Hugh John. But if my trustees shall find from the circumstances of the family that my daughter and my youngest son should each have a larger share than the double of their brothers, or William more than David or James, then I fully authorise and empower my said trustees and executors to divide, appoint, and award such larger portion or share to my said daughter and to my youngest sons. But declaring that none of these shares shall vest till they become payable; and I do hereby constitute my said trustees and executors to be the absolute arbiters with regard to this apportionment; and I earnestly express the hope that none of my three elder sons will gainsay or contravene this direction and request of mine."

The value of the trust estate was about £3210, and the annual income did not exceed £150, the amount of the widow's annuity provided in the marriage-contract. No part of the trust estate was thus available to meet the £1500 provided to the children of the marriage by the marriage-contract, and therefore while the widow survived none of the children received any payment.

David Rose Crawford, the eldest son, died in 1877 in New York. He left five children. His estates had been sequestrated in 1869 and Robert Keith Pringle, W.S., was at the date of this case trustee thereon. James Hunter Crawford, the second eldest son, died unmarried in 1870, domiciled in New Zealand. By his will T. B. Gillies was his executor. William Patrick Crawford, the third son, attained majority in 1862. He died in New Zealand in 1880, intestate, and leaving a widow and five children, all minors. The administrator of his effects was R. C. Hamilton. Jane Lee Crawford, the only daughter, married James Walkinshaw, who predeceased her. She herself died intestate and without issue in 1873. Her moveable estate had passed to her husband *jure mariti*.

Mrs Crawford died in October 1883, and by her death the estate became divisible. Hugh John Crawford, the youngest child of the marriage, was the only child of the marriage who survived her.

In these circumstances difficulties arose as to the proper division of the trust estate, and the present Special Case was accordingly presented to the Court.

William Ralston Patrick and others, the trustees under the trust-disposition and settlement, were the first parties.

R. K. Pringle, W.S., David Rose Crawford's trustee in bankruptcy, was the second party.

The children of David Rose Crawford were the third parties.

The executor of James Hunter Crawford's will was fourth party.

The administrator of William Patrick Crawford's estate and also his five children were fifth parties.

The executrix of James Walkinshaw, the husband of Jane Lee Crawford, was sixth party.

Hugh John Crawford was seventh party.

The parties of the second, fourth, and sixth parts maintained that in addition to the share of the principal sum of £1500, to which each of the truster's children was entitled under the marriage-contract, they were entitled to receive interest on the same at 5 per cent. from the first term after the truster's death, or in the case of William Patrick Crawford, at least from the first term after he had attained majority thereafter. The parties of the third, fifth, and seventh parts maintained that no interest was due on the marriage-contract provision to children for the period during which the widow received the whole free income of the trust-funds, and that interest was only claimable since the first term after the widow's death, and that at the average rate earned by the trust-investments, which the parties agreed to be 4 per cent. The seventh party further maintained that the truster in his trust-disposition and settlement had exercised the power of division which was reserved by him in the marriage-contract, and that the division of the £1500 should be regulated accordingly.

The parties also differed as to their respective rights in the event of any surplus remaining after satisfying the marriage-contract provisions. The seventh party maintained that as he alone survived his mother, at whose death the right to share in the residue vested, he was entitled to receive payment of the free residue, subject to the shares of one-seventh each thereof to which the children of David Rose Crawford and William Patrick Crawford were entitled as coming in room of their deceased parents under the *conditio si sine liberis*. The parties of the third and fifth parts maintained that the *conditio si sine liberis* applied in favour of the children of David Rose Crawford and William Patrick Crawford, and that they were entitled to the shares the said David Rose Crawford and William Patrick Crawford would have taken if alive at the date of their mother's death. The parties of the second, fourth, and sixth parts maintained that, with the exception of the two seventh parts given to the seventh party, the truster died intestate as to the residue of his estate, and that the same fell to be divided among the truster's children, or their representatives, as intestate succession. All parties admitted that the seventh party was entitled to two-sevenths of the free residue of the trust estate.

The questions submitted for the opinion and judgment of the Court were — "(1) Has the truster in his trust-disposition and settlement and codicil of 29th and 30th August 1861, exercised the power of division reserved in his antenuptial contract of marriage, dated 10th June 1828? (2) Is interest due on the share of the sum of £1500 falling to each of the truster's children under the marriage-contract from the first term after the truster's death in the case of the children who had then attained majority, and from the time of attaining majority in the case of the other children? Or is interest only due thereon from the first term after the death of the truster's widow? (3) Is the interest due on the said shares in either of the alternatives put in question 2 to be calculated at the rate of 5 per centum per annum, or 4 per centum per annum, or is bank interest only to be allowed? (4) Are the children of David Rose Crawford and William Patrick Crawford entitled each to the one-seventh of the free residue of the trust estate destined to their respective parents? (5) Do the three-seventh shares of the said residue destined in the trust-deed to James Hunter Crawford and Jane Lee Crawford (1st) fall to the seventh party; or (2d) do they fall to be divided equally between the seventh party and the children of David Rose Crawford and William Patrick Crawford *per stirpes;* or (3d) do they fall to be treated as intestate succession of the truster? Or (6) Does the whole residue other than the two-sevenths destined to the seventh party fall to be treated as intestate succession of the truster."

The second party argued — I. *As to the apportionment*—Mr Crawford had not by his settlement exercised his power to apportion. The settlement bore only to deal with "free" property, which itself excluded the obligations whereby he had bound himself in the antenuptial contract. But further (1) the trustees were given a power to alter the alleged apportionment, which excluded the idea of apportioning finally a vested fund under a marriage-contract. (2) The shares were not to vest till they became payable. A testator could not exercise a power to divide a vested fund by giving an unvested interest. Nor was it even to be assumed that he intended to do so—*Watson* v. *Marjoribanks*, February 17, 1837, 15 Shaw 586; *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230. The recent Act as to powers of appointment (37 and 38 Vict. c. 37) applied only to appointments made after its date.

II. *On the question of interest*—The period at which, according to the conception of the contract, the provisions to children were not only vested but payable was the death of the father, and the children's rights were bought up by him for these provisions. To suit the circumstances of his estate he had exercised his right to make these provisions remain unpaid till the death of another creditor, the widow, whose claims upon him were exactly of the same nature. Interest was therefore due on the debt to the children from the time when it ought properly to have been paid, and it ought to be at 5 per cent. This was a debt falling under the first purpose—payment of debts.

III. It might be conceded that the *conditio si sine liberis* applied to the shares of residue which D. R. Crawford and W. P. Crawford would have taken if alive at their mother's death. But IV. *Under the fifth question as to intestacy* —The three shares given by the truster to James Hunter Crawford and Jane Lee Crawford should go as intestate succession of the truster. Their respective shares lapsed by their having died before the period of division (the mother's death), and they had no issue to take it under the *conditio*. When property was left in separate shares, and there was no further residuary bequest or destination-over, then any shares that lapsed fell into intestate succession of the truster—*Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566.

The third and fifth parties argued—As to the marriage-contract provision of £1500 no interest is due on the shares of it. [On this point they were stopped.] In respect of the concession by the second party that the *conditio* applied to the shares of residue bequeathed to D. R. Crawford and Mrs Crawford, and that therefore their children took their shares, they did not require to argue that point against him.

The seventh party argued—Except the one-seventh which, as was now admitted, fell to D. R. Crawford's children, and the one-seventh to W. P. Crawford's children under the *conditio*, the remainder of the residue fell to him under the settlement. It was not necessary to have recourse to the doctrine of resulting intestacy, which the Court was always unwilling to resort to. *On the question of apportionment*—The apportionment was good, though it declared the shares not to vest till they were payable. The distinguishing feature of the case was that the money came from the father himself, and it was in his power to deal with it as he chose—See *Mackie's Trustees, supra*. It might have been otherwise if, as in some of the cases, he had been only a person with a power to appoint money which came from another. In that case, though the point need not be decided, the declaration founded on by the second party might have been held *ultra vires*.

At advising—

Lord Craighill—(who delivered the opinion of the Court)—The late David Crawford died in

1861, survived by his wife and by five children of their marriage. All the children predeceased their mother with the exception of Hugh John Crawford, who is the seventh party to the case. Mr and Mrs Crawford were married in 1828, and an antenuptial contract was executed by the spouses on 10th June of that year. By this contract Mr Crawford bound himself, *inter alia*, in the event of his marriage being dissolved by his decease, to make payment to his widow during her life of the free annuity of £150, and he also bound himself to pay to the child or children of the marriage who should be alive at his death one or other of the sums which are specified in the contract—that is to say, £1000 or £1500 according to the number of children. Further, it was provided that it should be in Crawford's power to divide and apportion as he should think proper among the children the sum of £1500, which was the children's portion under the contract in the event of there being more than one. The term of payment was to be the first term of Whitsunday or Martinmas after his death, or after their arriving at majority, or being married, whichever of these events should first happen after his decease. The provisions to the children, however, were subjected to their mother's jointure if Crawford should not leave sufficient fortune to answer both. Mr Crawford before his death executed a testamentary trust-disposition by which under the second head he made additional provisions in favour of his wife, and by the third purpose directed that on the death of Mrs Crawford his whole free property and estate should be divided into seven equal portions or shares, of which one should be given to each of his three sons, David Ross, James Hunter, and William Patrick Crawford, and two shares to each of his daughter Jane Lee and Hugh John Crawford, declaring, however, that should the trustees find from the circumstances of the family that his daughter and his youngest son should each have a larger share than the double of their brothers, or William more than David or James, then he authorised his trustees to divide, appoint, and award such larger portion or share to his said daughter and his youngest sons; declaring also that none of these shares should vest until they became payable. He thereby also constituted his trustees and executors to be absolute arbiters with regard to this apportionment. Mrs Crawford survived till October 1883, and at her death the estate in the hands of the trustees came to be divisible among those who by their marriage-contract or by the trust-settlement were entitled to participate in Crawford's succession. Difficulties, however, arose, some of those interested adopting one view, and some another, and the consequence was the statement of the present Special Case for the opinion and judgment of the Court.

There are five questions presented, the first of which is this:—"Has the truster in his trust-disposition and settlement and codicil of 29th and 30th August 1861 exercised the power of division reserved in his antenuptial contract of marriage, dated 10th June 1828?" This question must, I think, be answered in the negative. It seems to me to be plain from the provisions of the trust-disposition that Mr Crawford did not intend by either settlement or codicil to make an apportionment of the marriage-contract fund. There are two reasons by which I am brought to this conclusion. The first is, that the period of vesting of the marriage-contract provisions was the death of Mr Crawford, whereas the vesting of the provision which is made by the trust-disposition to the children is the death of his widow. In the second place, a power to enlarge or diminish the shares of particular children was conferred upon the trustees, the testator declaring, moreover, that he constituted his trustees the absolute arbiters with regard to this apportionment. Mr Crawford was a lawyer, and must have known that the period of vesting of the marriage-contract provision could not be postponed in the exercise of a power of apportionment, and when the fund which is conveyed by the trust-disposition becomes vested, not at Mr Crawford's death, but at the death of his widow, and when that power of apportionment in whole or in part could not be delegated by him to his trustees, the plain inference is that the fund carried by the third purpose of the trust-disposition was not in whole or in part the fund created for and conveyed to the children by the marriage-contract. This appears to me to be a plain result.

II. The second question is—2. Is interest due on the share of the sum of £1500 falling to each of the truster's children under the marriage-contract from the first term after the truster's death in the case of the children who had then attained majority, and from the time of attaining majority in the case of the other children? Or is interest only due thereon from the first term after the death of the truster's widow?

My opinion is that the first alternative in this question must be answered in the negative, and the second in the affirmative. The interest of the fund in question was required for the liferent of the widow, and till her death there were not moneys under the administration of Mr Crawford's trustees out of which interest on the children's provisions could have been paid till the death of the widow.

III. The third question is,—3. Is the interest due on the said shares, in either of the alternatives put in question 2, to be calculated at the rate of 5 per centum per annum or four per centum per annum, or is bank interest only to be allowed?

The answer to this question is that interest is to be calculated at the rate of only four per cent.

IV. The fourth question is,—4. Are the children of David Rose Crawford and William Patrick Crawford entitled each to the one-seventh of the free residue of the trust-estate destined to their respective parents?

And the answer to this question should be in the affirmative.

V. The fifth question is,—5. Do the three-seventh shares of the said residue destined in the trust-deed to James Hunter Crawford and Jane Lee Crawford (1) fall to the seventh party; or (2) do they fall to be divided equally between the seventh party and the children of David Rose Crawford and William Patrick Crawford *per stirpes;* or (3) do they fall to be treated as intestate succession of the truster? Or 6, Does the whole residue, other than the two-sevenths destined to the seventh party, fall to be treated as intestate succession of the truster?

The three-seventh shares of the residue destined in the trust-deed to James Hunter Crawford and

Jane L. Crawford are intestate succession of the truster, those members of the family having predeceased the death of their mother without issue.

The Lord Justice-Clerk, Lord Young, and Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the Special Case, answer in the negative the first of the questions therein put; the first alternative of the second question in the negative and the second alternative in the affirmative; the third question to the effect that interest is to be calculated at the rate of four pounds per centum per annum; the fourth question in the affirmative; and the fifth question to the effect that the three shares of residue are to be treated as intestate succession: Find and declare accordingly, and that the sixth question is superseded by the answers to the fourth and fifth questions: Find the parties entitled to payment of the trust-estate of the expenses incurred by them in relation hereto: Remit," &c.

Counsel for First Parties—Moody Stuart. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Party — Cheyne — Sym. Agents—Scott Moncrieff & Trail, W.S.

Counsel for Third and Fifth Parties—Watson. Agent—Graham G. Watson, W.S.

Counsel for Fourth and Sixth Parties—H. J. E. Fraser. Agent—F. J. Martin, W.S.

Counsel for Seventh Party—Begg. Agent—Alexander Morison, S.S.C.

Friday, July 9.

SECOND DIVISION.

[Sheriff Court of Lothians at Edinburgh.

ROBERTSON *v.* SCOTT.

Property—Mutual Gable—Payment—Discharge—Singular Successor of Builder of Gable.

When half the cost of a mutual gable has been paid to the builder of it by the proprietor of the adjoining ground, although he has not yet built on that ground, there is no obligation to pay it over again even to the singular successor of the builder, when the gable comes to be used for a tenement on the adjoining ground.

Observations on the nature of the right of the builder of a mutual gable to be recompensed by the owner of the adjoining feu.

On 2d December 1878 Alexander Robertson, builder, acquired by feu-charter from the Magistrates and Town Council of Edinburgh All and Whole that area of ground, consisting of three lots or building stances situated between Nos. 10 on the east and 14 on the west, Royal Crescent, Edinburgh, "inclusive of the ground occupied by one half of the mutual walls on each side," and it being also provided that "the said disponee [Robertson] shall have right to the mutual gables and walls of the adjoining houses in the Royal Crescent so far as we ourselves would have right to the same, upon the payment of half of the expense of the said mutual gables and walls to the person or persons entitled to claim the same."

The proprietor of the adjoining house on the east, No. 10, was David Scott, C.A. Robertson began building operations, and in so doing availed himself of the westmost gable of No. 10, whereupon Scott claimed to be recompensed for a half of the cost of this gable-wall. Scott had acquired his property in 1874 from William Stark's trustees, and the disposition described the subjects as "All and Whole that area or piece of ground with the dwelling-house, cellars, and others built thereon, being No. 10 of the street called Royal Crescent, Edinburgh, which area or piece of ground is bounded on the east by the centre of a mutual gable and division walls with the dwelling-house No. 9 Royal Crescent; on the west by the feus formerly possessed by Robert Watson, builder, and afterwards resumed by the city of Edinburgh." Robertson believing Scott's demand to be well founded, paid him £74, 15s., being the sum agreed on as half the value of the gable.

In 1885 Robertson raised this action in the Sheriff Court at Edinburgh against Scott for repetition of that sum, with interest from its payment, on the ground that he had ascertained that Stark, the defender's author, who in 1828 erected the gable, had received in 1832 payment of one-half of the price of it from the Magistrates of Edinburgh, and that defender never had any right to the unused half of it, nor any right to demand from the pursuer half of the value of it.

The defender averred—He was only a singular successor of Stark. When the pursuer acquired his feu the defender had a real right in the gable in question, which was on the west of the defender's house. He referred to the disposition by the magistrates to Stark in 1828, in which the subjects belonging to him were described as bounded "on the west by the feus formerly possessed by Robert Watson, builder, but now resumed by the city of Edinburgh." At the date of this disposition to Stark he (Stark) had erected No. 10 with the gable in question, but the pursuer did not acquire his feu till 1878, and up to 1879 no buildings were erected on the adjoining stance to the west of the gable. The defender thus acquired the gable in 1874 along with his house, and had right and title to demand from the pursuer one-half of the price or value when the pursuer came to use it as a mutual gable in 1879. He knew nothing of any transactions between Stark and the magistrates which did not appear in the public records.

The pursuer pleaded—"(1) The pursuer having been induced by the false representations of the defender to pay him the sums condescended on, he is entitled to decree as prayed for. (2) The said payments having been made by the pursuer to the defender in error, the pursuer is entitled to restitution. (3) The defender having no right or title to the said gable, so far as acquired by the pursuer, and no sum being due by the pursuer to him, the pursuer is entitled to decree. (4) The defender had no right or title to uplift or receive the price of the unused half of said gable, in respect that the same was built for the town of Edinburgh upon their ground, and paid for by them, or otherwise the town acquired the