With these observations, which do not differ in any way from Lord Adam's opinion, I concur in the judgment proposed.

LORD KINNEAR — I concur in Lord Adam's opinion as to the construction of the gift in the general disposition, the effect of which we are to determine. I also agree with him in desiring to reserve my opinion as to the application of the doctrine of vesting subject to defeasance to the case of a direct conveyance to a disponee in liferent and the heirs of his or her body in fee, with a series of substitutions failing heirs of the liferenter's body, which may of course operate as conditional institution in the event of no such heirs existing. It does not appear to me to be necessary to decide that question in the present case, and I desire reserve my opinion upon it.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—H. Johnston—Guy. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders and Respondents—W. Campbell—Salvesen. Agents—Sturrock & Graham, W.S.

Tuesday, February 20.

FIRST DIVISION.

WRIGHT'S TRUSTEES AND OTHERS.

Succession—Power of Appointment—Exercise of Power Partially Ultra Vires.

A lady by antenuptial contract of marriage directed her marriage-contract trustees to pay the interest of certain sums conveyed to them to her and her husband and the longest liver of them in liferent, and at the death of the survivor to pay over the principal to the children of the intended marriage "in such proportions and at such times and under such conditions as the survivor shall direct and appoint," and failing any such direction and appointment to the children equally. The husband survived his wife, and by testamentary deed divided the marriage-contract funds into three parts, directing his trustees to hold one part for behoof of his daughter F, and the survivor of her and any husband she might marry in liferent, and upon the death of the survivor, for the children in fee, in such manner and proportions as their parents or the survivor of them might direct, and failing such children, to pay the principal to such parties and in such manner as F might direct, and failing such direction to her nearest-of-kin equally.

Held, in a special case to which F, then aged seventy-five and unmarried, was a party, following the cases of *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921; and *Crompe* v. *Barrow*, 1799, 4 Ves. 681, that the appointment by her father of a mere liferent to her with a power of disposal was valid, although it was *ultra vires* of him to make any appointment with regard to any husband she might marry or her children.

Succession — Vesting — Vesting subject to Defeasance.

A father directed his trustees to hold £2000 for behoof of his daughter F, and the longest liver of herself and any husband she might marry in liferent, and the children of such marriage in fee, and failing children, directed them to pay said sum, on the death of the survivor, to the children of his son W, if there were any at that period, and failing such children, to pay one-half of said sum to W, or to his next-of-kin, and the other half to the children of another daughter. W died unmarried survived by F.

Held, in a special case to which F, then aged seventy-five and unmarried, was a party, that there was no vesting in W's next-of-kin subject to defeasance, and indeed, that no vesting could take place until F's death.

Mrs Helen Tovey or Wright, by antenuptial contract of marriage entered into between her and her intended husband John Wright, dated 27th April 1813, conveyed to trustees certain sums in trust, under direction to pay them over after the death of the survivor of her and her husband "to the child or children to be procreated of the said intended marriage, in such proportions and at such times, and under such conditions as the said survivor shall direct and appoint, and failing any such direction and appointment . . . among the children of the said intended marriage equally, share and share alike, at such times as they may think proper, and at furthest, at their respective majorities." . . .

Mr John Wright survived his wife and died in 1861. He was survived by three children of the marriage, viz., (1) William, who died unmarried in 1886, leaving a will by which he divided his estate equally between his sister Florence and his nephew Hamilton George Henderson; (2) Hamilton, who married the Rev. Robert Henderson and died in 1876, leaving two children; and (3) Florence, who was still alive, aged seventy-five and unmarried. Mr John Wright left a trust-disposition and settlement dated 21st February 1855, by which he directed his wife's marriage-contract trustees "in virtue of the powers conferred upon me by the said contract to act under the said contract," to pay over or convey to his testamentary trustees the whole funds held by them "to be applied as follows, viz., one-third part thereof to be paid to" his daughter Hamilton's marriage-contract trustees, "another third part of the foresaid trust funds shall be held by my said trustees in the manner hereinafter directed,

for behoof of my said daughter Florence Wright in liferent, and to the parties after named in fee, and the remaining third part shall be paid to my son William."

He thereafter, in the 4th purpose of his trust-disposition and settlement, directed his testamentary trustees as follows—"My trustees shall lay out and invest the third part or share falling to my daughter Florence of her mother's fortune as aforesaid, . . . and also the further sum of £2000, upon good heritable or other security, taking the securities in their own names, and shall pay over the annual interest or proceeds thereof to my said daughter Florence Wright, during all the days of her life, and in the event of her being married and her husband surviving her, then the annual proceeds thereof shall be paid to him during all the days of his life, and upon the death of the longest liver of the said Florence Wright and any husband she may marry, then the said trust-funds shall be held for behoof of the lawful children of the said Florence Wright in such manner and in such proportions as their parents or survivor of them shall direct by any writing under their hands, or the hands of the survivor, and failing such writing, then equally share and share alike, to be payable to them upon their respectively attaining majority or being married; declaring that the share or shares of any of the children dying without lawful issue before receiving payment shall accresce and belong to the survivors equally, and failing children of the said Florence Wright, then at her death, or if married, at the death of the longest liver of her and her husband, the said trust-funds shall be paid as follows, viz., the share of her mother's fortune aforesaid shall be paid to such parties, and in such manner as my said daughter shall direct by any writing under her hand, and failing such writing, to her nearest in kin equally, and the aforesaid sum of £2000 shall be paid to the lawful children of the said William Wright my son, equally if he has any lawful children at the period of the death of his said sister Florence without issue, or in the event of her being married, upon the death of the survivor of her and her husband, and failing lawful children of the said William Wright then existing, then the one-half of the said sum of £2000 shall be paid to himself or to his next-of-kin, and the other half to the children of the aforesaid Hamilton Wright or Henderson my daughter, share and share alike."

The trustees, as directed, paid one-third of his mother's fortune to William Wright, another third to the marriage-contract trustees of Mrs Hamilton Wright or Henderson, and the remaining third together with £2000 they invested in their own names and paid the income thereof to Miss Florence Wright.

Questions having been raised by Miss Florence Wright with respect to her rights in the two funds liferented by her, a special case was presented to the Court by Mr John Wright's trustees of the first part, Miss Florence Wright of the second part, and the two children of Mrs Hamilton Wright or Henderson of the third part, to have the following questions answered—"(1) Has the power of appointment of the marriage-contract funds of the wife conferred upon the survivor of the spouses under the antenuptial marriage-contract between Mr and Mrs Wright been well and validly exercised by Mr Wright in his trust-disposition and settlement *quoad* the share appointed to Miss Florence Wright? (2) If the first question be answered in the negative—Is Miss Wright entitled to demand immediate payment of said share free from the conditions imposed by said trust-disposition and settlement? (3) Did a right to one-half of the fee of the said sum of £2000 vest *a morte testatoris* in the said William Wright? or on the death of the said William Wright without issue in his then next-of-kin? or is vesting postponed until the death of the said Miss Wright? (4) In the event of the second alternative of the third question being answered in the affirmative—Is Miss Wright vested with the fee of said sum as sole next-of-kin of the said William Wright at the date of his death?"

Argued for the first and third parties—(1) The directions in Mr Wright's trust-deed were a valid exercise of the power conferred upon him by the antenuptial marriage-contract. Trustees were generally instructed definitely to do certain things, or to do them subject to such conditions, restrictions, and limitations as the clause of a power might lay down. Here the donee was only empowered to attach conditions, but that implied also restrictions and limitations. It was competent to Mr Wright to limit his daughter Florence Wright to a liferent with a power of disposal. Whether his directions as to a liferent to any husband she might marry, and as to giving the fee to her children were or were not *ultra vires*, was immaterial, as she had never married—*Lennock's Trustees* v *Lennock*, October 16, 1880, 8 R. 14 *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921; *Crompe* v *Barrow*, 1799, 4 Vesey 681. (2) If Mr Wright's deed was not an effectual exercise of the power, Miss Florence Wright must elect to agree to its terms, or forfeit the provisions it contained in her favour with respect to the £2000. She was not entitled both to reprobate and approbate the deed — *Hewit's Trustees* v. *Lawson*, March 20, 1891, 18 R. 793, for opinions of Lord Kinnear (Ordinary), p. 798, and Lord M'Laren, p. 803; *Ker* v. *Wauchope*, 1819, 1 Bligh's Appeals, 1. (3) With regard to the £2000, no vesting could take place until Miss Wright's death. The doctrine of vesting subject to defeasance was beset with difficulties, and was not readily applied. Here it was quite inapplicable. There was no person or class of persons ascertainable in whom such a fee could vest. Vesting in next-of-kin subject to several possible defeasances was unknown to the law.

Argued for the second party—(1) As to the validity of the appointment—It was settled law that a power of appointment such as had been conferred upon Mr Wright in the present case did not enable

the donee of the power to limit the estate of fee to an estate of liferent, or to confer a benefit on grandchildren or other strangers to the power—*Gillon's Trustees* v. *Gillon*, February 8, 1890, 17 R. 435, Lord Rutherfurd Clark, 441; *Mackie's Trustees* v. *Mackie*, July 4, 1885, 12 R. 1230; *M'Donald's Trustees* v *M'Donald*, March 10, 1874, 1 R. 794, and June 17, 1875, 2 R. (H.L.) 125; *Baikie's Trustees* v. *Oxley*, February 25, 1862, 24 D. 589. Now, here Miss Wright's father had attempted to limit his daughter's interest to a bare liferent in certain contingencies. Even in the event which had happened, of her having no issue, the appointment only gave her a liferent with a power to test. In two cases this had been held competent—*Lennock's Trustees* v. *Lennock*, *supra*; *Wallace's Trustees* v. *Wallace*, *supra*, but in both of these the terms of the powers were much wider than in the present case. In any case, the testator had sought to confer a benefit on strangers to the power. So far therefore the appointment was *ultra vires*, and being improperly exercised in part the whole pointment fell—*Gillon's Trustees*, *supra*, Lord Rutherfurd Clark, p. 442; *Baikie's Trustees*, *supra*, Lord Curriehill, p. 596. (2) As to the vesting of the £2000—The terms of the destination were almost precisely the same as those in a number of recent cases in which vesting had been held to have taken place in the ultimate objects of a series of destinations-over, subject to defeasance in the event of the survivance of intermediate objects—*Murray* v. *Gregory's Trustees*, January 21, 1887, 14 R. 368, and April 8, 1889, 16 R. (H.L.) 10; *Wannop, &c.* (*Haldane's Trustees*) v. *Murphy*, December 15, 1881, 9 R. 269; *Gilbert's Trustees* v. *Crerar*, November 3, 1887, 5 R. 49. The only speciality here was that the ultimate destination was in favour of the next-of-kin of a person who survived the testator. That might have created a difficulty as to the vesting before William Wright's death. But it was unnecessary to consider that as William Wright was now dead. By his death his next-of-kin became a class fixed and ascertainable. And when there was an ultimate destination in favour of a class, the presumption was for vesting as soon as the individuals composing the class became ascertainable—*Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, Lord President, 208; Williams on Executors, ii. 986. Next-of-kin did not include issue of predecessors brought in by the Intestate Moveable Succession Act—*Young's Trustees* v. *Jones*, December 10, 1880, 8 R. 242; and accordingly Miss Wright, the only child alive at her brother's death, was now vested in the sole right to one-half of the fund in question.

At advising—

LORD ADAM—The first and principal question in this case is, whether a power of appointment contained in the antenuptial contract of marriage between Mr and Mrs Wright has been validly exercised *quoad* the share thereby appointed to their daughter Miss Florence Wright, who is the second party to this case.

The fund which is the subject of appointment consists of certain sums of money assigned by Mrs Wright to the marriage-contract trustees. They are directed to hold it in trust for the conjunct liferent of Mr and Mrs Wright, and during the subsistence of the marriage to pay the interest to Mr Wright, and after the dissolution of the marriage to the survivor, and after the death of the survivor, to pay the principal sums to the child or children of the marriage, "in such proportions, and at such times and under such conditions as the said survivor shall direct and appoint," and failing such direction and appointment, then to and among the children of the marriage equally, all as therein specified.

I do not think it can be doubted that under this direction the fund in question belonged to the children of the marriage, subject only to its division or appointment among them by the surviving spouse.

Mr Wright survived his wife, and died on 4th March 1861. At his death there were three children of the marriage in life—one son, William, and two daughters—Hamilton and Florence. Hamilton married the Rev. Mr Henderson, and died in 1876 leaving two sons, who are the third parties to this case. William is also now dead, leaving Miss Florence Wright as sole survivor. She is now over seventy-five years of age, and has never been married.

Mr Wright left a trust-disposition and settlement dated 21st February 1855, by which he professed to exercise the power of appointment in question.

By the third purpose of the trust he directed the trustees under the antenuptial contract of marriage to pay over the whole trust-funds vested in them to his testamentary trustees, who are the first parties to this case. He then directed his testamentary trustees to pay one-third part of these funds, which are the funds subject to appointment, to the marriage-contract trustees of his daughter Hamilton Wright or Henderson, another third part thereof he directed to be held by his trustees in the manner therein directed "for behoof of my said daughter Florence Wright in liferent, and to the parties after mentioned in fee," and the remaining third part he directed to be paid to his son William.

By this appointment, therefore, the whole fund is divided into three parts, two going to the other children of the marriage, and as regards these there is no dispute. It is in reference to the remaining third that the present questions have arisen.

Now, this share is directed to be held for Miss Wright in liferent, the fee being given "to the persons after named." These persons are to be found in the fourth purpose of the settlement, and if Miss Wright is entitled to a fee of the share, her right thereto must be found in the directions therein contained as so far a liferent only has been given to her.

By this fourth purpose Mr Wright directs the trustees to invest the fund and to pay the interest to Florence Wright *during all* the days of her life. He then provides for two possible events, that of Florence marrying

and having children, and that of her not marrying.

In the first of these events he directs his trustees to pay the produce of the fund to her husband during his life, if he should survive her, and on the death of the longest liver of her and her husband, to hold the fund in trust for her children in such manner and in such proportions as their parents or the survivor of them should direct, and failing such directions, then for the children equally, share and share alike, payable on their respectively attaining majority or marriage.

The truster then provides that failing children of Miss Florence Wright at her death, or, if married at the death of the longest liver of her and her husband, the fund in question "shall be paid to such parties and in such manner as my said daughter shall direct by any writing under her hand, and failing such writing, to her nearest-of-kin equally."

So far as regards the provisions above mentioned in favour of the possible husband and children of Miss Florence Wright, I think that they are *ultra vires* of Mr Wright. If such persons had come into existence, they would not have been objects of the power. The only objects of the power are the children of Mr and Mrs Wright, who alone have a right to share in the fund. So far, therefore, as regards these provisions, I think the appointment is invalid.

But in so far as the appointment provides a liferent of the fund to Miss Wright, with, in a certain event, an absolute right to dispose of the fee, I think that it is a valid appointment. Had these provisions in favour of Miss Wright stood alone, that is to say, had they not been mixed up with other provisions which are invalid, they must have received effect. The last case on the subject is that of *Wallace's Trustees* v. *Wallace*, 18 R. 921, in which the trustees under the antenuptial contract of marriage between Mr and Mrs Wallace were directed, after the death of the survivor of the spouses, to pay over certain funds to and for behoof of the surviving children of the marriage in such shares and proportions and subject to such conditions, provisions, and limitations as the spouses or the survivor of them should appoint.

The children of the marriage were, therefore, just as in this case, the only objects of the appointment. The spouses by trust-disposition and settlement directed their testamentary trustees to hold these funds for behoof of their children in equal shares, and to pay to them the income, and, as regards the shares of the daughter, the trustees were directed to settle the share of each daughter upon her at her marriage for her sole and exclusive use during her marriage, so that the same should be held for her behoof, with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, to her heirs and executors, and in regard to the shares of any daughter who might not marry, the trustees were directed to pay the same according to the directions which such daughter might leave by any testamentary deed, and failing such deed, to her heirs and executors.

It was contended in that case by the daughters, who were all unmarried at the time, that the appointment was invalid in respect that the spouses had no power to restrict their right to a liferent with a power to test. The Court, however, following the case of *Lennock's Trustees* v. *Lennock*, 8 R. 14, held that the appointment was valid.

I think that in this respect the present case cannot be distinguished from these two cases, and must be ruled by them.

The gift of the share, therefore, would not fail, because a fee of the share was not given to Miss Wright in terms, but only a liferent with the power of disposal thereof. But, as has been pointed out, the fee of the share is first provided to Miss Wright's children, if any, and the power of disposal of the share is only given to her in the event of the failure of children, and the question arises whether the gift of a liferent to the surviving husband and of the fee to the children in the first place, although altogether *ultra vires*, has the effect of rendering invalid the subsequent provisions or gifts in the appointment, and if not, what is its effect?

Now, I do not think that an appointment is to be considered as altogether invalid because there may be contained in it certain gifts or provisions which are *ultra vires* and cannot receive effect. Of this there is an example to be found in the case of *M'Donald* v. *M'Donald*, 2 R. (H. of L.) 125. In that case the joint donees of the power, Sir John and Lady M'Donald, provided a liferent of the fund, which was the subject of the power, to Sir John. This was *ultra vires*, and it was contended that it rendered the whole appointment invalid. In disposing of this the Lord Chancellor said—"I certainly do not give any weight to an argument, which was addressed to your Lordships in favour of the respondents, that because the joint deed of division purported to give to Sir John M'Donald in the event of his surviving his wife, a life interest in the whole of the trust property, therefore all that was done by way of appointment subsequently to the giving of that life interest was invalid. There was an attempt to give the whole of the income to Sir John during his life in the event of his surviving Lady M'Donald. In point of fact he did not survive Lady M'Donald. Under these circumstances it appears to me it would be entirely contrary to reason, and as far as I know quite without authority, to hold that an attempted disposition, not in any way interfering with that which was legitimately within the object of the power of distribution of the property, and only to take effect in an event which never has happened, should in any way militate against the validity of the subsequent appointment." I think, therefore, that on the authority of that case, the gift of a liferent of the fund to a possible husband of Miss Wright may be disregarded.

The next question is, as to the effect which the gift of a fee to the possible children of Miss Wright has upon the subsequent gift to her.

I am not aware that there is any decision in the law of Scotland on the subject, but the rule of the law of England seems to be that such a provision, although *ultra vires*, is not to be wholly disregarded, and that it depends upon the event of there being children or not whether the ulterior grant to a proper object of the power shall receive effect. The leading case seems to be that of *Crompe* v. *Barrow*, 4 Ves. 681, which resembles in its circumstances the present case very closely.

In that case, by a settlement made previous to the marriage of John James and Mary Barrow, certain funds were assigned to trustees to pay the income to Mary Barrow during her life, and after her decease, upon trust for the children of Mary Barrow by a former or by the intended marriage, in such shares and proportions, and to be paid at such ages and in such manner, as she should direct by her last will and testament, and failing such direction to her children equally.

Mary Barrow by her settlement directed one moiety of the trust-fund to her daughter Frances James; and as to the other moiety, she directed the income to be paid to her son Charles, and after his decease, the fee to be paid to his wife and children, as he might appoint, and failing such appointment equally, and in the event of Charles dying without leaving wife and children, to her daughter Frances James.

As regards this moiety of the fund, the Court declared "that the same is well appointed for the benefit of the defendant Charles Barrow for his life, according to the trusts of the said will and appointment, and that the appointment of the said moiety of the said trust premises after his death, in trust for his wife and children, is invalid, the same not being well appointed by the terms of the power in the said marriage settlement; and declared that, in case Charles Barrow shall die without leaving a wife or child surviving, the same, according to the said appointment, will belong to the defendant Frances James, her executors and administrators."

In giving judgment the Master of the Rolls said—"This limitation over to Frances James is, if Charles Barrow should die without leaving a wife or child surviving. It fails as far as it affects to give interests to the children, but is there any occasion to make it fail upon the other point, the gift over to a person who is an object of the power. There are two alternatives—If Charles Barrow leaves no wife or children at his death, then the limitation over being to a good object shall take effect. If he does leave a wife and child, then it cannot take effect."

I know no reason why the law of Scotland should be different from the law of England in this respect, and as it appears to me that this case of *Crompe* v. *Barrow* is exactly in point, I think we should follow it, and pronounce a similar judgment in this case.

The next question relates to a sum of £1000, half of a sum of £2000, which was Mr Wright's own property, and which he could dispose of as he chose. Mr Wright mixed up this sum with the antenuptial contract fund, and the directions in the deed are, so far, made applicable to both. Thus he directs his trustees to pay the interest of the joint fund to Miss Wright, and after her death to her husband, if she married and he survived, and upon the death of the longest liver, to hold the trust-funds for her children in such proportions as they or the survivor might direct, and failing such directions for their children equally, the share of a child, predeceasing the period of payment without issue, accrescing to the survivor. The truster then separates the two funds and directs that, failing children of Miss Wright, at her death, or if married at the death of the longest liver of her or her husband, the foresaid sum of £2000 shall be paid to the children of William Wright equally, and failing such children then existing, then one-half of the said sum of £2000 to William Wright himself, or to his next-of-kin, and the other half as there directed.

It appears to me to be very clear that under this destination no fee vested *a morte testatoris*, or can vest, until the death of the liferentrix Miss Wright without children, a contingency which has not yet occurred.

It was maintained, however, that a fee vested in William *a morte*, subject to defeasance in the event of Miss Wright leaving children. But that view is quite untenable, because any right which William might ultimately come to have was postponed to that of his children, and was contingent on there being no children of his own in existence at the death of the liferentrix. William could not therefore take a beneficial fee, and such a thing as a fiduciary fee being taken subject to divestiture, I have not heard of. A fee subject to divestiture is only recognised where, failing children, an absolute right of property is given, without ulterior destination, a state of matters which does not exist here—see *Steele* v. *Steele*, 16 Rettie 204.

I think, therefore, that we should find that the vesting of this £1000 is postponed till the death of Miss Wright.

These are all the questions that require to be answered.

LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent at the hearing.

The Court answered the first question in the affirmative, and the third alternative of the third question also in the affirmative.

Counsel for First and Third Parties—H. Johnston — Macfarlane. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Second Party—Dundas—Constable. Agents—Dundas & Wilson, C.S.