cation of final judgments are to contain a copy of the summons or petition and defences or answers with the interlocutors, and without any other narrative or without argument, and such bills are to be at once passed by the Lord Ordinary on the bills on caution for expenses both in the Inferior Courts and in the Court of Session, or on juratory caution.

"By the Act of Sederunt (11th July 1828, sec. 25), following on that statute, it is ordered that in advocations of interlocutory judgments and in every suspension at the lodging of the letters for calling, articulate reasons of suspension or advocation shall be lodged, and the answers are to be in corresponding form.

"The next statute to be noticed is the Advocations and Suspensions Act of 1832 (1 and 2 Vict. cap. 86, sec. 3.), which enacts that advocations of interlocutory judgments are to be by note in the Bill Chamber prefixing the interlocutor, and praying for relief or remedy, with articulate statements of reasons of advocation and note of pleas in law. Answers may be ordered, and the note if passed is to be called, and the record closed in note and reasons, or on revised reasons and answers, or on condescendence and answers, and the cause is thereafter to proceed before the Lord Ordinary and the Court of Session in common form; and by the next section it is enacted that in suspensions of Inferior Court decrees *in foro*, except removings, the procedure is to be by note reciting the import and effect of the decree, and praying for relief; and on caution for implement of the decree and expenses in the Court of Session the note is to be passed, but 'when a party is desirous to have such decree of any Inferior Court pronounced *in foro* suspended without caution, or on juratory caution, and also in suspensions of decrees of removing, there shall be annexed to such note of suspension an articulate statement of the facts on which the suspension is founded, and a note of pleas in law, and such note shall be laid before the Lord Ordinary on the Bills, who may pronounce such order as shall be just; and where answers shall be ordered, such answers shall be in a similar form to the reasons of suspension; and in case the Lord Ordinary shall pass the note, the same procedure shall take place as is hereinbefore provided in the case of advocation of interlocutory judgments,' that is to say, the record is to be made up by the Lord Ordinary, and the cause proceeded with as an ordinary action in the Outer House.

"By the Act of Sederunt (24th Dec. 1838, sec. 3) following on that statute, it is provided that suspensions shall still be competent on consignation and that the same procedure is to be observed in such suspensions as in suspensions without caution, or on juratory caution: in other words, as in advocations of interlocutory judgments.

"The next statute is the Act 11 and 12 Vic., c. 36, the 9th and 32d sections of which have been already recited.

"By the Act of Sederunt, 5th February 1861 (sec. 6), it is provided that where by the existing practice notes of advocation or suspension require to be lodged in the Bill Chamber containing an articulate statement of facts and pleas in law, and are followed by answers prepared in a similar form, and such notes are passed by the Lord Ordinary, the complainer shall lodge revised reasons of advocation or revised reasons of suspension, as the case may be, when the cause is called, either in time of Session, or on any box day in vacation or recess, and on the other hand the respondent or charger shall lodge revised answers when he returns the process as aforesaid; and by sec. 7 it is provided that every record which is closed in the Outer House shall, unless the Lord Ordinary otherwise appoint, be printed, and the interlocutor closing the record or holding the same to be closed shall in all cases be held to be an appointment to print the same, unless the contrary be expressed in the interlocutor.

"By the Court of Session Act 1868 (31 and 32 Vict. c. 100), it is enacted that in all proceedings in the Bill Chamber, as soon as an interlocutor passing the note has become final, and caution has been found or consignation has been made when ordered, the cause shall become for all purposes an action depending in the Court of Session, and may immediately be enrolled by either party in the Motion Roll of the Lord Ordinary to whom it is marked.

"It appears to me that by the minute lodged by the complainers before the answers were lodged, the present process became a note of suspension on consignation, which requires an articulate statement of reasons of suspension and note of pleas in law, and as it contained these when presented, and as answers were ordered and lodged, and as the note has been passed by interlocutor, now final, the record must be closed and the case proceeded with in the Outer House. I have therefore refused the motion of the respondent to report the cause to the Inner House."

This judgment has become final.

HOUSE OF LORDS.

Thursday, February 25.

M. P. GALT (ALEXANDER'S FACTOR) *v.* MILLER (FINLAY'S TRUSTEE) AND OTHERS.

Succession—Vesting—Trust—Remit.

A took the title to heritable subjects which he had purchased in the names of certain persons, who, by deed of declaration of trust, declared that they held the subjects in trust *inter alia* for the payment of the free yearly proceeds to A during his life, for his liferent use allenarly, and after his death to his wife, if she survived him, her liferent to be restrictable to such extent and in such manner as might be fixed by A; and after the determination of the foresaid liferents, in trust for A's children, in such shares and proportions as might be fixed by A, and failing such apportionment, share and share alike; declaring that the fee of the shares should be payable after the determination of the said liferents, and after the whole children who should have survived A and his wife, and who should be alive, had attained majority, or at such other times after the determination of the said liferents as should be fixed by A. A died, survived by his wife, and without fixing the shares of the children. *Held* (reversing the judgment of the Second Division of the Court of Session) that the children's shares of the estate vested before the death of the widow. Cause remitted to the Second Division to review generally the interlocutors complained of.

The late John Henry Alexander, proprietor and

late manager of the Theatre Royal, Dunlop Street, Glasgow, in the year 1829 purchased the subjects known as the Theatre Royal, Glasgow, and took the conveyance thereto in favour of certain persons as trustees, for the ends, uses, and purposes to be declared in a deed of declaration of trust to be executed by the trustees. The trustees were duly infeft in the subjects.

By deed of declaration of trust, dated 31st December 1830 and 14th January 1831, the trustees declared that they held and were infeft in said subjects thereby conveyed in trust for the following purposes—*1st* to *4th*, For payment of certain expenses and debts of Mr Alexander.

"In the *5th* place, but only after we are freed and relieved from all reasonable obligations come under by us, in trust for the payment of the free yearly proceeds or rents thereof to the said Henry Alexander during his life, for his liferent use allenarly, and after his death, in the event of his being survived by Mrs Elizabeth Riddell or Alexander, his spouse, in trust for the payment to the said Mrs Elizabeth Riddell or Alexander, in like manner, of the free yearly proceeds or rents thereof during her life, for her liferent use allenarly; it being declared that, in the event of the said Mrs Elizabeth Riddell or Alexander surviving the said John Henry Alexander, and marrying again, or of her doing anything inconsistent with a good and respectable moral character, the said liferent shall, upon such marriage or immoral conduct, *eo ipso* cease and determine, and restrictable the said liferent to such an extent and in such manner as may be fixed by any probative writing to be subscribed by the said John Henry Alexander, even on deathbed; declaring that the foresaid provisions in favour of the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and his or her interest in the present trust, shall be nowise attachable for debt, but that the same shall be considered alimentary, and, after the determination of the foresaid liferents, in trust for the whole lawful children of the present marriage between the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, in such shares and proportions as shall be fixed and determined by any probative writing subscribed by the said John Henry Alexander as before mentioned, and failing such writing, then share and share alike; declaring that the fee or principal of the shares or interest of the said children shall be payable after the determination of the said liferents, and after the whole children who shall have survived the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and who shall be alive, shall have attained majority, or at such other times after the determination of the said liferents, and under such conditions or provisions as shall be fixed by the said John Henry Alexander in any writing to be left by him as before mentioned; it being hereby provided that after the determination of the said liferents it shall be in the power of the trustees, or a majority of them, to make payment to the said children yearly of such part of the free proceeds or rents of the trust-subjects as shall in their discretion be necessary for their maintenance and support in a respectable manner, the remainder of the said rents being accummulated and massed with the trust-funds, and payable at the dates and under the conditions foresaid."

The deed of declaration of trust further declared that the trustees had powers to borrow money, and grant heritable securities therefor over the trust-property, to appoint factors, to assume new trustees, to sell and dispose of said subjects, and to resign office; and further, it contained a provision that the trust shall continue to subsist "aye and until the whole purposes thereof are fulfilled," and "until the same can be wound up, on the shares of the parties interested therein as fiars becoming payable as before mentioned."

Mr Alexander died on 15th December 1851, leaving a testament; but it did not fix and determine the shares of his children in the fee of the trust-estate. He was survived by his wife Mrs Elizabeth Riddell or Alexander, who died upon the 8th day of April 1872, and by four children, one of whom was Mrs Mary Anne Alexander or Finlay, who married on 30th June 1845 John Finlay, carver and gilder in Glasgow. Mr Finlay died upon 19th March 1872.

Three of the trustees named by Mr Alexander accepted the trust, and the trust was administered by them and by trustees assumed by them, down to December 1864, when the trustees then in office resigned, and the pursuer, Mr James Galt, C.A., was appointed judicial factor on the trust-estate.

On 28th February 1852 Mrs Finlay and her husband, who had married without an antenuptial contract, entered into a postnuptial contract of marriage, whereby, *inter alia*, Mrs Finlay, with the consent of her said husband, and the spouses with mutual assent and consent, gave, granted, assigned, disponed, and made over to and in favour of themselves, and certain persons therein mentioned as trustees, without prejudice to the general estate of the said spouses thereby conveyed, all right, title, and interest, "which she or the said John Finlay, her husband, now has or may hereafter have in the succession or estates, heritable and moveable, of her father, the said deceased John Henry Alexander, and also all right, title, and interest which she may have in the succession or estates of her mother, the said Elizabeth Alexander."

This postnuptial contract was registered on 7th December 1857, and it and the assignation therein contained were duly intimated to the pursuer, as judicial factor, on 29th November 1865. The estates of the said John Finlay were sequestrated in the year 1858, and the defender John Miller was appointed trustee thereon. Mr Finlay remained undischarged under his sequestration at the date of his death.

In consequence of the death of Mrs Alexander, the liferent of the trust-estate came to an end; and under the 5th purpose of the trust the fee fell to be divided in equal portions among Mr Alexander's four children.

The one-fourth share of the trust-estate offeiring to Mrs Finlay was claimed by (1) John Miller, as trustee on the sequestrated estate of John Finlay, her husband, and (2) by the trustees acting under the postnuptial contract between her and her husband. The judicial factor accordingly raised the present action of multiplepoinding and exoneration.

The trust-estate in the hands of the judicial factor consisted of £12,125. The subjects of which the trust-estate originally consisted having been burned down in 1863, the trustees then acting sold the site of the theatre and its ruins, and recovered the sums due under policies of insurance. The proceeds of the sale and policies formed the fund *in medio*.

The Lord Ordinary (ORMIDALE) sustained the claim of Mr and Mrs Finlay's marriage-contract trustees, and the Second Division, on appeal by Miller, adhered to the interlocutor. Against this judgment Miller appealed to the House of Lords, and on 25th February 1875 their Lordships made the following order:—

"After hearing counsel this day upon the petition and appeal of John Miller, accountant in Glasgow, trustee on the sequestrated estates of John Finlay, carver and gilder in Glasgow, now deceased, complaining of an interlocutor of the Lord Ordinary in Scotland, of the 11th of March 1873, and also of an interlocutor of the Lords of Session there, of the Second Division, of the 17th of July 1873, and praying their Lordships to reverse, vary, or alter the said interlocutors, and to give the petitioner such relief in the premises as to this House in their Lordships' great wisdom should seem meet; as also upon the answer of Mrs Mary Anne Alexander or Finlay, widow of the deceased John Finlay, carver and gilder in Glasgow; Thomas Learmonth, wright in Govan; William Broom, iron and coal master in Glasgow; and John Wight, chartered accountant in Glasgow, original and assumed trustees, acting under contract of marriage between the said John Finlay and Mrs Mary Anne Alexander or Finlay, put in to the said appeal; and due consideration had of what was offered on either side in this cause: Ordered, by the Lords Spiritual and Temporal in Parliament assembled that the cause be and the same is hereby remitted back to the said Second Division of the Court of Session in Scotland to review generally the interlocutors complained of, and if in their opinion a proof shall appear to be necessary in reference to the allegation of intimation of the postnuptial settlement of the 28th of February 1852, and to the other alleged facts and circumstances following said allegation, all contained in article 5 of the condescendence of the respondents, the marriage-contract trustees, then to allow such proof, and to report their opinions on the whole case to this House: And this House does not think fit to pronounce any judgment upon the said appeal until after the said interlocutors shall have been so reviewed, and the opinions thereupon shall have been reported according to the direction of this order."

Their Lordships delivered opinions as follows:—

LORD CHANCELLOR—My Lords, I will invite your Lordships' attention to the circumstances, which are somewhat peculiar, under which this case now comes before you. There is a fund *in medio* in the Court of Session in an action of multiplepoinding, and that fund is claimed by the present appellant, who is the assignee under a sequestration. The bankrupt, whose assignee he is, and in whose right he claims the fund, is a person of the name of John Finlay, who is now dead. The fund is said to have belonged to John Finlay *jure mariti* in right of his wife, who before her marriage with him was Mary Anne Alexander. The right of Mary Anne Alexander arose under a voluntary settlement executed on the 1st of January 1831 by her father. The property which was the subject of that settlement was a theatre in Glasgow, and undoubtedly at the time of the settlement the theatre was heritable property. Now, it is said that by virtue of that settlement and the acts done under it the share which was alloted under the settlement to Mary Anne Alexander became moveable property, and passed to her husband *jure mariti*, and that the assignee of the husband is now entitled to claim so much of the fund *in medio* as represents that share. My Lords, to that statement I must add this, that Mary Anne Alexander having been married to John Finlay in the year 1845, no settlement was executed on the occasion of that marriage, but in the year 1852, on the 28th of February, a postnuptial settlement was executed between them, which clearly, by the admission of both sides, included the share of Mrs Finlay in the property in question.

Under those circumstances, the questions which naturally would fall to be considered by the Court would be three in point of number, and I think your Lordships will agree with me that the order in which, logically, they ought to be considered would be the order in which I am now about to state them. First, it would require to be ascertained whether the postnuptial settlement which I have mentioned, of the 28th of February 1852, was properly intimated to the trustees who held this property, so as to make it a complete and binding disposition, because if, by reason of the circumstances under which it was executed, and by reason of proper intimation having followed, it was a complete and binding disposition, it would clearly include the interest of Mrs Finlay, whether the property be looked at as heritable or as moveable property. The second question would be, whether the property continued to be, as it was at the time of the original settlement of 1831, heritable, or whether it had been converted into moveable property, because if it continued heritable the *jus mariti* would, as I have said, be excluded. And the third question would be, whether upon the construction of the settlement of 1831 the share in the property settled and provided for Mrs Finlay was vested in her anterior to the time when the persons who were liferenters under that settlement died, or whether the vesting did not take place until the death of the liferenters, because, my Lords, the liferenters being her father and her mother, the survivor of them did not die until the 8th of April 1872, a period subsequent to the death of John Finlay, the bankrupt, and consequently, if the vesting of the share of Mrs Finlay did not take place before the death of the liferenter, there would be nothing to go to her husband *jure mariti*, and nothing to come to the present appellant as his assignee in bankruptcy.

Now, my Lords, these being the three questions to be considered, and the order in which, as it appears to me, they ought conveniently to have been considered being such as I have mentioned, your Lordships find that out of the three questions only one, and that the third, has been considered or dealt with either by the Lord Ordinary or by the Court of Session. The Lord Ordinary and the Court of Session have considered and determined the question with regard to the vesting; they have determined nothing with regard to the question whether the property was heritable or moveable, or as to whether the postnuptial settlement was binding or not binding; and the interlocutors pronounced, and which are under appeal, merely assert the right to the fund *in medio*, and repel the claim of the appellant, the assignee in bankruptcy, but do not state the ground upon which the fund *in medio* is awarded to the respondents and refused to the appellant.

Under these circumstances, I must ask your

Lordships' attention, in the first place, to the question which has been determined by the Court of Session, and then request your Lordships to consider what course further should be taken with regard to the case.

My Lords, on the question of vesting—on the question whether the share of Mrs Finlay vested before the death of her parents—I should have thought, but for the respect which I entertain for the opinion of the learned Judges who have taken a different view in the Court below, that the question hardly admitted of doubt or of argument. Certainly, according to our ideas in this country of the construction of instruments of this kind—ideas which have been formed upon a long series of decided cases—the question would hardly appear to be an arguable question, because your Lordships will observe that the settlement, after providing for the interest given by way of liferent to the parents, continues, in words which your Lordships will find at the top of page 61 of the appellants' case:—"After the determination of the foresaid liferents, in trust for the whole lawful children of the present marriage between the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, in such shares and proportions as shall be fixed and determined by any probative writing subscribed by the said John Henry Alexander as before mentioned, and failing such writing, then share and share alike"—(I will omit the parenthetical words with regard to the writing to be subscribed by John Henry Alexander, for none such was made, and I will read the sentence without those parenthetical words)—"After the determination of the foresaid liferents, in trust for the whole lawful children of the present marriage between the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander," "share and share alike."

My Lords, I pause there for the purpose of saying that there is no conveyancer in England who, if he wished to express a trust which would give to a father and mother life interests with immediate vested remainder to all the children of the marriage alike, could have found words more clear and apposite to express an intention of that kind. They are the apt and appropriate words, according to our ideas, for describing liferent interests with vested interests in remainder, and under them interests of that kind would vest in the children from time to time as they were born, the first child born taking the whole in remainder, with the interest opening to admit others subsequently born. If nothing more was found, and if a child died under twenty-one in the lifetime of his parents, he would have a vested interest which, if not given over to any person else, would go to his representatives. On the other hand, if in the lifetime of his parents he attained the age of twenty-one, he or she would be able to make arrangements with regard to that portion of the property on marriage or otherwise, as property in which the interest of the child was absolutely vested.

Now, my Lords, that being so, is there anything in the words which follow which in any way takes away, qualifies, or puts a different construction upon the words which I have read? It appears to me that the words which follow are words which merely point to the manner of payment and the division of the fund or property in question,—"Declaring that the fee or principal of the shares or interest of the said children shall be payable after the determination of the said liferents." Who are "the said children" mentioned there? "The whole lawful children of the marriage" between the father and the mother. Therefore the sentence reads thus,—"The fee or principal of the shares, or interest of the whole lawful children of the marriage, shall be payable after the determination of the liferents." If any of them had died before, it would be payable of course to their representatives. But what of those who survived? The sentence continues,—"And after the whole children who shall have survived the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and who shall be alive, shall have attained majority"—(I pass over again parenthetical words relating to an appointment, none having been made),—"it being hereby provided that after the determination of the said liferents it shall be in the power of the trustees, or a majority of them, to make payment to the said children, yearly, of such part of the free proceeds or rents of the trust-subjects as shall, in their discretion, be necessary for their maintenance and support in a respectable manner, the remainder of the said rents being accumulated and massed with the trust-funds, and payable at the dates and under the conditions foresaid."

My Lords, I read this as a direction, the consequence of which would be, that if there were children alive after the death of the parents, some of whom, or all of whom, might be under age, there was to be no absolute division until the youngest had attained the age of twenty-one; but there was to be a power on the part of the trustees to use the income of the various shares, so far as in their discretion it appeared to be necessary, for the maintenance of those who could not during that interval receive the principal. That is perfectly consistent with the possibility of there having been children who might have predeceased their parents, and who, in that case, would not be there to be maintained, but whose representatives would be entitled at the period of the division to the absolute payment of their shares.

My Lords, I have said that in this country that would in my opinion have been the interpretation of the words, and I may point out to your Lordships that that interpretation, as it appears to me, satisfies the meaning of every single word in the whole of these sentences. It also accords with that which now has been in this country a cardinal rule of construction, namely, that where you find interests given to a class, but the payment postponed for the purpose of letting in preceding life interests, the interest so given in remainder are vested immediately, and are not postponed until the time of payment. My Lords, is there any difference between the law of Scotland and the law of England upon that point? The construction which I have ventured to submit to your Lordships does not depend upon any technical rules either of feudal law or of English conveyancing. It depends upon the ordinary construction of ordinary words, and upon the plain consideration of the exigencies which, upon a settlement of this kind, are naturally supposed to lead to the form in which the provision for a family is made. And I may remind your Lordships that in the case which was cited at the bar, and which came before this House, the case of *Young* v. *Robertson*, it was expressly admitted I think at the bar, and certainly held by your Lordships, that there was no technical

difference between the law of England and the law of Scotland upon the construction of clauses of this kind, but that the clauses were to receive their natural meaning according to the plain principles of interpretation, whether the settlement was an English settlement or a Scotch settlement.

My Lords, upon what ground in this case has it been held that this should not be the construction placed upon the settlement? Not upon the ground of authority, for the only authority cited was the case to which I have referred, namely, *Young* v. *Robertson*. That is no authority at all for the decision arrived at by the Court of Session, for in the case of *Young* v. *Robertson* there was that which there is not here, namely, a provision in favour of survivors, which required you at once to determine the period at which the survivorship was to take place, and to hold that those only who were alive at that period could take. And your Lordships will observe that which, as it appears to me, accounts in some degree for the decision arrived at by the learned Judges in the Court below, namely, that the Lord Justice-Clerk, and I think Lord Benholme also, and the Lord Ordinary, appear to be of opinion that there is something in the form of this settlement which operates as a gift to the children by way of survivorship at the death of the liferenters. My Lords, I can find no such words. The words of the trust and the gift are, as I have already said, to "the whole lawful children." The introduction of the term "survivor" is in a different clause and for a different purpose, namely, to provide with regard to those children surviving who might be under the age of twenty-one that they should not receive payment until they attained their full age.

My Lords, I am therefore, notwithstanding the great respect which I feel for the united authority of the learned Judges in the Court below, compelled to advise your Lordships to hold that there is in this case a vested interest in all the children of the settlers, including the wife of the bankrupt, Mrs Finlay.

That being so, the third of the three questions which I pointed out to your Lordships as being the questions in the case, ought, in my opinion, to have been determined in favour of the appellant, and adversely to the respondents.

But will that dispose of the whole case? Certainly not. There remain the first and the second questions which I have mentioned, and upon which we have no decision and no opinion of the Court below. My Lords, it would be extremely inconvenient, and I think it would be contrary to your Lordships' general practice, if you were now to have those questions fully argued before you, and to arrive at an opinion upon them as a Court of first instance without having the benefit of the opinion of the learned Judges upon these questions, one or both of which may to a considerable extent depend upon considerations of Scotch law. I should, therefore, humbly recommend your Lordships not to determine either of those other questions, but, finding that so far as the Court below has gone, and upon the question which alone they alone have entertained, your Lordships are unable (if you should be unable) to agree with them, I should submit to your Lordships that the case should go back to the Court of Session in Scotland in order that upon the two other questions I have mentioned we may have the benefit of the opinion of the learned Judges of that Court. Those two questions your Lordships will remember are, the question whether the property continued to be heritable, or had become by conversion (to use an English term) moveable property? and the question, whether the postnuptial settlement had been intimated to the trustees of the original settlement so as to make that postnuptial settlement a binding instrument as against the property, whatever might be its character.

My Lords, I should therefore recommend your Lordships, and I propose to move, that the course should be taken in this case which was taken in the case of *Lord Fife* v. *Duff*, in the year 1861, where a similar remit was made, namely, that an order should be made in this form:—To remit the cause to the Second Division of the Court of Session to review generally the interlocutors complained of, and if in their opinion a proof shall appear to be necessary in reference to the intimation of the postnuptial settlement of the 28th February 1852, averred in article 5 of the condescendence of the respondents, the marriage-contract trustees, then to allow such proof, and to report their opinion on the whole case to this House; and this House does not think fit to pronounce any judgment upon the said appeal until after the interlocutors shall have been so reviewed and the opinions thereupon shall have been reported according to the direction of this order.

Lord Chelmsford—My Lords, I agree entirely with my noble and learned friend upon the woolsack as to the vesting of the shares of the children under the deed of declaration of trust of Mr Alexander, and I must say with him that if it were not for my great respect for the learned Judges in Scotland I should have thought the question almost too clear for argument. With regard to the other points, I think the only way of disposing of them is that which has been proposed by my noble and learned friend.

Lord Hatherley—My Lords, I concur entirely in the proposal which has been made by the Lord Chancellor as to the manner in which this case should now be dealt with.

The only point which we have had before us for our consideration, and the only point which has been decided in the Court below, has been the point with reference to the period at which the interest of the children was to be treated as a vested interest. Upon that point I have been compelled, like my noble and learned friends who have preceded me, to come to a conclusion contrary to that which was come to by the Court below. It appears to me that the very plain and distinct declaration of trust as to the persons in whom the property shall vest cannot be overridden by a direction given in a subsequent part of the settlement after the gift has been made to the children as to what is to be done in the event of any of those objects of the settlement being minors at the time of the death of the survivor of Mr and Mrs Alexander. The limitation to the children is absolute after the determination of the liferents, one of which liferents might be determined by the second marriage of Mrs Alexander. At that time, whenever the liferents determined, there is a strict declaration of trust for the "whole lawful children" of the marriage between Mr and Mrs Alexander. And although that expression might in itself have been supposed, but for a

long current of authorities, to have created some doubt as to the exact period of the vesting, it has been distinctly settled long ago that where a limitation which might seem to point to a different period of vesting than the immediate operation of the instrument is in effect only a postponing of the interest in possession of the persons in whose favour the settlement is made until after the determination of a previous life estate—in that case the interest in remainder is held to be vested at once from the execution of the instrument.

Here, therefore, there is a perfectly plain and clear trust in the first part of the instrument for all the children at the time of the determination of the liferents, which would determine either by the death of Mr Alexander and the death of Mrs Alexander, or by the death of Mr Alexander and the second marriage of Mrs Alexander. The words which we find afterwards are simply owing to the view which had occurred to the testator that some of the objects of his bounty might be infants at the period of the decease of himself and his wife. Therefore he says that the property, the fee or principal of the shares, shall be payable after the determination of the liferents, and after the whole of the children who shall have survived Mr and Mrs Alexander, and who shall be alive, shall have attained majority. He contemplates that some may possibly die under age in the lifetime of himself and his wife, and that some may be alive after the death of the survivor of the two, and still be under age. If they die before their parents, then this declaration will not take effect, because it says "who shall be alive" at the time the distribution is to be made. As soon as all are cleared away (and with regard to this particular direction the period of payment is distinguished from the period of vesting), either by predeceasing their parents or by attaining the age of twenty-one, then there shall be, not a gift of the principal, but a division of the principal. The period for the division of the principal is pointed out solely with regard to the particular circumstance of some of the children being under twenty-one, and therefore not in a condition to receive or give discharges for the share of the principal to which, together with their brothers and sister, they would become entitled, namely, the first gift at the time of the determination of the previous life interests.

Lord Selborne—My Lords, I agree in what has been proposed to your Lordships.

It was argued by the respondents' counsel that the conditions of survivorship and attainment of majority were here of the substance of the gift. But the sole foundation for that argument was the occurrence of the mention of the survivorship of certain children, and the attainment of their majority, not in any clause either giving interests or defining the conditions upon which interests were given, but in a clause defining the period of time at which interests already given, and given in clear terms to all the children, should be payable or transferable. With regard to the clause which follows, as to the application of income during the interval between the first liferenter and the attainment of majority by the children supposed to be then under age, I see no reason at all to differ from the view which, as I understood my noble and learned friend upon the woolsack, is taken by him, that that is a clause to be applied according to the shares of the children, and not so as to make the income of one share applicable to the maintenance of children not entitled to the capital. But, my Lords, I have no hesitation in saying, that being a question which your Lordships are not called upon to decide, that if it were clearly the other way, and if this trust had been to apply the whole of the income of the entire trust-estate to the maintenance and education of those children only who were minors at the death of the last liferenter, to the exclusion of all children then adult from all benefit of the income until the attainment of majority by the youngest living child, I should still think that such a trust of intermediate income would neither suspend the vesting of the shares of the children who were entitled, subject thereto to the capital of the trust-estate, nor be of itself evidence, apart from the other clauses in the deed, that those children only who survived the last liferenter, and were at that time under age, were entitled to participate in the capital.

My Lords, the only other point upon which I think it necessary to make a single observation is the question with reference to the effect of the marriage settlement. I entirely concur with the terms of the proposed remit which has been mentioned by my noble and learned friend upon the woolsack, but I do not understand your Lordships to mean to express any opinion at all upon the question whether intimation was or was not necessary. That, as well as all other questions connected with the effect of the deed, I apprehend your Lordship's desire to have considered and determined by the Court of Session.

Lord Chancellor—My Lords, perhaps it may be as well that I should say that I quite agree with my noble and learned friend, and that in anything that fell from me I did not for a moment desire to assume that intimation would be found to be necessary. My only desire was that the whole of that question should be considered by the Court of Session.

Cause remitted with a declaration.

Agent for Appellant—John Galletly, S.S.C.

Agents for Respondents—Gibson & Ferguson, W.S.

Tuesday, June 15.

COLONEL ALASTAIR M'DONALD OF DALCHOSNIE *v.* JOHN ALAN M'DONALD AND OTHERS.

(Before Lord Chancellor Cairns, Lords Hatherley and Selborne.)

Marriage-Contract — Deed of Division — Entail — Construction.

Terms of deed of division and facts and circumstances in which *held* that a power of apportionment contained in an antenuptial marriage-contract had been validly exercised by the spouses.

This was an appeal from a decision of the Second Division of the Court of Session. An action of