and LORD JERVISWOODE having summed up, the jury returned a unanimous verdict for the pursuer.

Agent for Pursuer—John Robertson, S.S.C.
Agent for Defender—John Galletly, S.S.C.

Friday, November 19.

FIRST DIVISION.

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

Vesting—Construction—Trust-Settlement. A father directed his trustees to convey the residue of his estate to his two children equally on the marriage or majority of the youngest. There was also a number of somewhat contradictory declarations of the rights of each child under certain contingencies, one of which occurred. *Held* that, in the absence of unmistakeable declaration, the most reasonable construction must be put upon the words of the trust-settlement, and that the share of each child vested at its majority or marriage.

By antenuptial contract of marriage, in June 1842, between Henry Wardrop and Rosalie Wilhelmine Meyer, each party conveyed certain property to trustees for certain purposes. By the third purpose the trustees were directed, on the death of the survivor of the spouses, to convey certain household furniture and others, and certain heritable subjects, to the children of the marriage, in such proportions and under such conditions as Mr Wardrop should specify; failing which specification, equally. It was further provided, "in case any of the said children shall die before the said subjects are conveyed in fee as aforesaid, then the share and interest thereof of any of them so dying shall accresce to their lawful issue; whom failing, to their surviving brothers and sisters and their issue, share and share alike, the succession always being *per stirpes et non per capita:* Declaring, however, that as it is not the wish of the parties hereto that the said children shall be heritably vested with the said subjects till the youngest shall attain majority, the said trustees shall hold the said subjects or shares thereof belonging to the said children till said period, and shall apply the said rents thereof in the maintenance and education of the said children in such manner or to such amount as shall to them appear expedient, conveying the said subjects or shares thereof to the said children as aforesaid on the youngest attaining majority."

By trust-disposition and deed of settlement, dated 13th November 1851, Mr Wardrop, with the special advice and consent of Mrs Wardrop, conveyed to and in favour of Mrs Wardrop and certain other trustees his whole estate, heritable and moveable, for certain purposes. By the fourth purpose he directed the trustees to cause his children to be educated and maintained in such a manner as the trustees should think proper, till the marriage or majority of each of the children; and he provided that the expense thereof should be defrayed out of the general income of his means and estate, and not from the children's shares respectively. He further directed that the surplus income thereafter of his means and estate should be accumulated and form part of the general residue till the youngest child attained majority or was married. By the fifth purpose he directed the trustees, on the marriage or majority of his youngest child, to convey to his daughter Rosalie Augusta Wardrop, and his son Frederick Meyer Wardrop, certain heritable subjects in specified shares; and in order that this provision might have full effect, he provided his "said son's right and interest in my means and estate shall not vest in him so as to be attachable for his debts or assignable by his deeds until six months after the period fixed for the conveyance of said estates, or until the said estates are conveyed, whichever shall first happen."

The seventh, eighth, and ninth purposes were as follows:—"Seventh, I direct the whole residue and remainder of my estates to be converted into cash, and, with all accumulations, to be equally divided betwixt my said son and daughter, or their respective children, share and share alike. Eighth, In the event of the death of either of my children without issue, I direct my trustees to convey my whole estates, after payment of the foresaid debts, legacies, expenses, and others, to the survivor and his or her foresaids, on the same terms and under the same restrictions as is provided before with regard to their several portions. Ninth, In the event of the death of both of my children without issue, and before majority or marriage, I direct my trustees to convey my said whole estates to the said Henry Cowan in liferent, and his children in fee."

By the tenth purpose he declared that, as under his antenuptial marriage-contract the provisions therein conceived to his wife and children were in lieu of terce, *jus relictæ*, and legitim, that the provisions under this trust-settlement should be so also.

Mr Wardrop died on 9th December 1851, but his son ratified the trust-disposition and settlement. He was survived by his wife and two children. The elder of these, a daughter, attained majority on 29th May 1864, married Mr Gossling on 16th January 1866, and died on 13th February 1868, leaving two children. By her marriage-contract, dated 16th January 1866, she conveyed to certain trustees her whole estate, heritable and moveable, then vested in her, or that should accresce to her during the subsistence of the marriage. Mr Wardrop's younger child, Frederick Meyer Wardrop, attained majority on 4th July 1868.

Mr Cowan, the sole surviving trustee under the trust constituted by Mr Wardrop's marriage-contract, on 1st June 1864 assumed Mrs Wardrop as a trustee; and both of them are trustees under Mr Wardrop's subsequent trust-disposition and settlement. As various disputes arose as to the rights of parties under these deeds, the trustees raised a multiplepoinding; and claims having been lodged by the parties respectively, it was found that the point at which parties were at issue was the date when the provisions vested in Mrs Gossling and Mr Frederick Meyer Wardrop.

The Lord Ordinary (ORMIDALE) found that the residue of Mr Wardrop's estate did not vest till the majority of his son; and therefore that as the daughter predeceased this period, her brother was entitled to one-half of the residue, and her children, in terms of the destination in the trust-deed, to the other half.

Mrs Gossling's marriage-contract trustees reclaimed.

WATSON and DEAS for them.

SOLICITOR-GENERAL and H. J. MONCREIFF for Mr Wardrop's trustees, Mrs Wardrop, and Mr F. M. Wardrop.

GIFFORD and M'LEAN for Mrs Gossling's children and their tutor *ad litem*.

At advising—

LORD PRESIDENT—The question raised by this reclaiming-note, and decided by the Lord Ordinary, is upon the construction of the settlement of the late Mr Wardrop, when the residue of his estate vested? that is to say, whether any of the residue vested till the yonngest of his children came of age? His settlement is framed upon the footing that he was not to have any more children than the two. The daughter attained majority in 1864. She was afterwards married in 1866, and died in February 1868. The son survived her, and attained majority in July 1868; that is to say, sometime after the death of his sister.

Now the Lord Ordinary has held that the residue of the trust-estate left by Mr Wardrop did not vest in his two children, or either of them, till 4th July 1868, when the younger attained majority; and therefore that none of the residue could have vested till July 1868. He held, therefore, that none of it could have vested in Mrs Gossling. There are a number of clauses in this deed, all of which require to be examined. It is only necessary to observe, in passing, that the provisions to the widow were chiefly settled by her marriage-contract. The only exception is, that she is life-rented in a house in Queen's Crescent, Glasgow.

Then comes the fourth clause, and it is the difficult one. It provides thus—"I direct and appoint my said trustees to cause my children to be educated and maintained in such a manner as the said trustees shall think proper, until the said children severally arrive at majority or marriage, whichever event shall first happen; and I provide that the expense of such education and maintenance shall be defrayed out of the general income from my means and estate, and shall not form a deduction from my children's shares of my said means and estate, and that there shall be no count and reckoning betwixt or amongst my children relative to the sums so to be disbursed in educating and maintaining them, which is a matter that I leave solely to the discretion and decision of the trustees." The concluding direction in this fourth purpose is, "The surplus income from my means and estate, after payment of the sums so to be disbursed in educating and maintaining my children and current expenses, shall be accumulated and form part of the residue of my estate until the youngest of my children shall attain majority or be married." Now, taking that along with the seventh purpose, the question comes to be, when did the residue vest? The purpose is (*reads*).

The construction of the Lord Ordinary is that till the youngest of the children reaches majority or is married the residue is to accumulate,—the additions are to go to it. *Prima facie*, this is the meaning of this direction. But it it is not impossible to read it thus—that the surplus income is to go to increase the residue till the youngest child shall attain majority or be married; that the residue shall consist of those additions as well as the principal; but that the daughter's share shall be held to have vested in her at her majority or marriage.

Now, to fix on the majority or marriage of the youngest child as the period of vesting is to fix on a period that might never have arrived. If the youngest child had died, then the period of vesting must have been the majority or marriage of the daughter. This therefore supplies one way in which the vesting would take place not at the marriage or majority of the youngest child. Or, if the youngest child had married and died before the eldest, then the share of the eldest would have vested before she attained majority or was married. These results of course would be absurd; and we are not therefore to take this as the proper reading, unless the testator expressly used words that can bear no other construction. Or if she had married at seventeen, and her brothor not till after he attained majority, though married for eight years, she would not have a shilling to bless herself with.

The ninth purpose provides a destination-over in a certain event, viz., if both children died before majority or marriage. But it does not provide a destination if one of them attained majority or was married. In solving the question you have the choice of two difficulties, but the one of them is much less than the other. And the other clauses of the deed support the less difficult solution. The sixth purpose is, "at the death of the survivor of my said spouse and me, or at the second marriage of my said spouse, I direct my trustees to convey my house and offices in Queen's Crescent to or for behoof of my daughter and her foresaids, according to the destination, and under the restrictions provided in regard to the other properties falling to their portion." But can it be contended that the fulfilment of this purpose is to be deferred till the marriage or majority of the youngest child?

The eighth purpose is a clause of survivorship. It is (*reads*). Nohow could the survivor receive the whole of the residue on this reading, if the son died first, and before majority or marriage.

I come to the conclusion, not that there was vesting *a morte testatoris*, nor that the vesting was at the majority or marriage of the youngest child, which the Lord Ordinary thinks the only alternatives; but that the daughter's share vested in her at her marriage or majority, just as the son's would at his. The effect of this would therefore be that the conveyance in the daughter's marriage-contract must receive effect.

LORD DEAS stated at considerable length his concurrence.

LORD ARDMILLAN gave no opinion, having been engaged in the Registration Appeal Court when the case was argued.

LORD KINLOCH—I have felt great difficulty in arriving at a satisfactory construction of the settlement of Mr Henry Wardrop now in question. The deed has been framed in a very slovenly and unskilful manner, and contains some provisions which it is scarcely possible to bend into consistency with others. There is no interpretation possible which will not leave doubts behind. But on the whole matter I have come to a conclusion different from that of the Lord Ordinary.

The question before us is whether the share of the residue given by the testator to his eldest child Rosalie Augusta Wardrop, afterwards Mrs Gossling, vested in her at her own majority or marriage, or not till the majority or marriage of her brother Frederic Meyer Wardrop, who was four years younger than herself. There is no question raised before us as to vesting *a morte testatoris*; and that supposition may be thrown entirely aside.

On the question actually before us it is undoubtedly a preliminary consideration of some importance that the assumption of Mrs Gossling's right not vesting till the majority or marriage of

her younger brother leads into several results of an anomalous, if not absurd character. We cannot indeed compel testators to be rational who have chosen to be the reverse; but in a matter of doubt rationality is to be presumed rather than the reverse. It is certainly an anomalous consequence that the majority or marriage (for the events are put on the same level) of the younger child should fix the period of vesting not only for himself but for his sister; so that whenever he should be married, however early, not only his portion should vest, but also his sister's, even though she herself should neither be major nor have been married. On the other hand, it is somewhat anomalous that if the sister should be married she should have no power of dealing with her fortune in her marriage contract, nor until her brother should obtain majority, perhaps seven or eight years afterwards. To make her power of testamentary bequest contingent on her brother being major or married appears somewhat unreasonable. Nor is it to be overlooked that, on the supposition of the vesting being postponed to the brother's majority, which was four years later than her own, there is a period of several years during which she might be unprovided with a legal right of maintenance; for the maintenance provided by the settlement ceases with her own majority or marriage; and her right under the deed vesting *ex hypothesi* only at the time of her brother attaining the same point, which might be several years afterwards, she would meanwhile have no fund of credit on which to procure maintenance for herself. Supposing her to be married at seventeen, which is not an impossible event in the case of a young lady of expectations, it might be eight years before she could obtain maintenance out of her father's estate (to the one half of which she was entitled), either for herself or her children. These and other similar consequences fairly raise a presumption against the interpretation which involves them; and impose on us the duty of considering very carefully whether another construction may not fairly be put on the deed consistently with the terms employed in it.

I find the main ground of my conclusion in the ninth purpose of the trust deed of Mr Wardrop, which provides, "In the event of the death of both of my children without issue, and before majority or marriage, I direct my trustees to convey my said whole estates to Henry Cowan in liferent and his children in fee." If this clause stood by itself, there could not be a doubt that the period of vesting of the respective shares of the residue was each child's own majority or marriage. The destination-over in favour of Mr Cowan and his family only took effect if both children predeceased majority or marriage without issue. If either of them became major or was married, whether elder or younger, the destination-over failed of effect. This is just in other words to say that each child's share vested at his or her own majority or marriage. There runs consentaneously with this clause that other, which appoints the trustees "to cause my children to be educated and maintained in such a manner as the said trustees shall think proper, until the said children severally arive at majority or marriage, whichever event shall first happen." This cessation of maintenance at majority or marriage, whichever should first happen, fairly implies that the child's right in the residue vested at the time his claim for maintenance ceased.

The opposite conclusion is chiefly rested on the clauses which provide for an accumulation of the testator's fortune, both principal and interest, so far as not necessary for the maintenance and education of the children, till the majority or marriage of the youngest. These clauses are read, and quite legitimately, in connection with the provisions, in the 7th and 8th purposes of the trust; the first of which declares that the fortune, with all its accumulations, that is, with all its accumulations down to the majority or marriage of the youngest child, should be divided equally between the two children or their issue; and the second of which provides, "In the event of the death of either of my children without issue, I direct my trustees to convey my whole estates, after payment of the foresaid debts, legacies, expenses, and others, to the survivor and his or her foresaids." The argument—and it was a strong one—maintained before us was that the date of the conveyance, which was clearly the majority or marriage of the youngest child, was the date at which it was to be determined which child survived the other; and in whose favour, therefore, the benefit of survivorship accrued. In other words, as the estate was to devolve on the survivor of the date at which the youngest child became major or married, this necessarily implied that vesting did not take place till that date.

There cannot be a doubt that, under the provisions of the deed, an accumulation was provided which superseded payment or conveyance of the estate till the majority or marriage of the youngest child. But it is trite that the date of payment or conveyance is not necessarily the date of vesting. It is an obvious objection in the present case, to the conclusion now under consideration, that it involves a declaration in the deed of two different periods of vesting—the one in the question with Mr Cowan, the other in the question betwixt the children themselves. For, as regards Mr Cowan, there cannot be a doubt that vesting took place so as to exclude the destination-over in his favour, if either one or other of the children arrived at majority or marriage. It is certainly not incompetent, nor even unusual, to insert provisions in such a deed, regulating only the rights of the children *inter se*, and wholly inoperative as to third parties. It happens also at times that a different period of vesting is provided for different legatees. But it certainly is by no means a common case that, as to the same legatee, the period of vesting should be different as regards one competition and as regards another. The period of vesting is, generally speaking, one and fixed in regard to each party favoured.

I have come after much consideration, and some vacillation, to the conclusion that this provision as to survivorship, which is the only one creating serious difficulty, can be read consistently with holding the vesting to take place at each child's own majority or marriage. The opposite conclusion rests entirely on the assumption that in the 8th purpose of the trust the date of survivorship is by necessary implication the youngest child's majority or marriage. But I do not think this necessarily follows. The clause contains no mention of date whatever. Nor is the date intended necessarily derived from any reference to previous clauses; for it so happens that the previous clauses refer to several different dates. The clause simply says—"In the event of the death of either of my children without issue, I direct my trustees to convey my whole estate to the survivor." I think that it may fairly be held that in framing this clause the testator had no thoughts of

date in his mind, but was simply expressing the general intention that if one child died without issue the surviving child should take all. Survivorship, generally and indefinitely, of one child to the other dying without issue is all the thought expressed by the clause. But in this view the clause must be read in connection with that immediately following, which clearly implies the date of vesting to be each child's own majority or marriage. The clause was not intended to take away from either of the children a right which had previously vested; it was intended to provide a survivorship in a case in which vesting had not taken place. Indisputably this was its purpose. It must be held to have been so in the argument on either side. When the testator provides for a survivorship "in the event of the death of either of my children without issue," he cannot mean their death at any time whatsoever; he must mean their death "before the time at which their right vests in them under this deed." This is necessarily the legal meaning of the clause, just as much as if these words were inserted in it. And I think the clause must be read with this insertion, which only expresses in words that which is at any rate implied in it—that is to say, the survivorship is provided for "in the event of the death of either of my children without issue before the time at which his or her right vests under this deed." To discover the time of vesting provided by the deed recourse must be had to its other clauses; and in the clause immediately adjoining it is found to be very clearly the majority or marriage of each child.

The practical result of my opinion is, that the interlocutor of the Lord Ordinary should be altered, and that the right of Mrs Gossling in the residue of her father's estate should be found to have vested in her at her own majority. It formed, therefore, a subject of valid conveyance in her marriage-contract; and the trustees under that contract should be preferred in the present competition.

Agents for Mrs Gossling's Marriage-Contract Trustees—Duncan, Dewar, & Black, W.S.

Agents for Mr Wardrop's Trustees, Mrs Wardrop, and Mr F. M. Wardrop—Morton, Whitehead, & Greig, W.S.

Tutor *ad litem* for Mrs Gossling's Children—R. B. Johnston, W.S.

REGISTRATION COURT.

MURRAY *v.* M'GOWAN.

Tenant and Occupant—Bank Agent—Defeasibility. Circumstances in which *held* that a bank agent occupied the subjects in respect of which he claimed to be enrolled on a tenure defeasible at the pleasure of his employers, and therefore had no right to the franchise.

The Sheriff stated the following Special Case:—"At a Registration Court for the Burgh of Wigtown, held by me at Wigtown upon the 1st day of October 1869, under and in virtue of the Act of Parliament 31 and 32 Vict., cap. 48, intituled 'The Representation of the People (Scotland) Act 1868,' and the other statutes therein recited, William M'Gowan, cheese-dealer, Wigtown, objected to the name of Thomas Murray, bank agent, High Street, Wigtown, being retained upon the list of persons entitled to vote in the election of a member for the said burgh of Wigtown. Mr Murray's name was not upon the list of voters as adjusted by me last year, but has been placed on the assessor's list this year as tenant and occupant of dwelling-house, High Street, Wigtown. It was objected by the said William M'Gowan that the said Thomas Murray is not in the occupancy of the dwelling-house as tenant within the meaning of sec. 11 of the Act 2 and 3 Vict., cap. 65—that he occupies the dwelling-house not as a tenant, but as agent for the Clydesdale Banking Company, and at the pleasure of the Bank.

"The following facts were proved:—Mr Murray's name is entered in the valuation roll for the present and previous years as tenant and occupant of dwelling-house and bank-office, High Street, Wigtown, at rent or value of £35, the Clydesdale Banking Company being entered as proprietors of the premises. Mr Murray is and has been for several years agent at Wigtown for the Clydesdale Banking Company, of which he is a partner, and has conducted the business in an office forming part of a house in High Street there, in which house he has also resided. Mr Murray has no lease of the dwelling-house, written or verbal, and has never paid rent to the bank, but occupies the dwelling-house as part of his remuneration as agent, and has done so for several years. The furniture in the bank office belongs to the Bank, but the dwelling-house was furnished by the claimant. The safe in the bank-office is secured by a bolt connected with a bed-room in the said dwelling-house above. There is only one door of access from the street to the bank-office and dwelling-house, there being an entrance door from the lobby to the bank, and an entrance door from the same lobby to the dwelling-house. The poor-rates and other taxes have been assessed on the Bank as owner, and on Mr Murray as tenant or occupier. These and other taxes are, in the first instance, paid by Mr Murray, and repaid to him by the Bank. Mr Murray's salary is payable at the rate of a fixed sum per annum. He is dismissable from his office of agent at the pleasure of the Bank. Mr Murray on 19th November 1868 granted a bond to the Bank, which was produced to me, and which contains the following clauses, viz.:—

"Declaring that, in the event of the death or bankruptcy of me, the said Thomas Murray, or of my being removed from office by the Ordinary Directors of the said Banking Company for the time being, or in any other event whereby I may be incapacitated from exercising the office and trust committed to me by the said Banking Company, the whole bank notes, promissory notes, bills, and other obligations, securities, or documents of debt, specie, and funds, books, repositories, and effects connected with or belonging to the business of banking, found in the office or place of business in which the business of the said Banking Company committed to my charge for the time shall have been carried on by me, or those acting under me, or in any chests, safes, desks, or other repositories in the said office, shall be held and presumed to be the property of the said Banking Company, and not of me, the said Thomas Murray, or of my representatives: as also, that all the notes of the said Banking Company found in my possession at the time, whether lying in the said place of business or elsewhere, shall be held and presumed to be the property of the said Banking Company, until proof be brought to the contrary, nor shall any of the