the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner." It is contended that the declaration that the bequest shall not "take effect" is equivalent to a declaration that it shall not vest. The words "take effect" have no fixed legal meaning, and must therefore receive a meaning from the general scope of the deed. Fortunately for the construction of the deed, they are twice repeated. If they are to be read as equivalent to "vest" in the first clause, they must also be read as equivalent to "vest" in the passage which allows the trustees to cause the bequest to "take effect" sooner. Now a power to trustees to vary the time of vesting fixed by the testator is so novel as to lead one to speculate in what form it is to be carried out. I do not say that the testator might not declare in express terms that his trustees shall have power to alter the time of vesting. But I am not prepared to hold that any such power can be inferred from ambiguous words.

The only remaining point in the deed is the power of sale given to the trustees, in which the testator expresses his earnest wish that if possible they should make over his landed property in whole or in part to his son Robert. There is no notion whatever here of any interest beyond Robert.

Taking all these passages together, it seems a very clear case of vesting. And this being so, it would be an unnecessary hardship to Lieutenant Allardice that he should be deprived of an income which might be derived from realizing this estate, especially as the only wish of the testator which is frustrated is one which must necessarily be frustrated in any case. I am therefore disposed to grant authority to sell.

LORD DEAS—I do not think it necessary to enter upon the question of vesting. I am very clearly of opinion that the power of sale ought to be granted, whether the residue is vested in Robert Allardice or not. There is no difficulty in the terms of the deed. It is not required to make out a case of necessity. The trustees have power given them by the trust deed to sell, and there is nothing to hinder them, except the wish expressed by the testator that they shall, if possible, make over the landed property to his son Robert. Another consideration is that if the sale is allowed, the estate will remain in a better form for whoever may get it.

LORD ARDMILLAN concurred with the Lord President, and pointed out that the passage of the trust deed expressing the truster's desire that the trustees should if possible *make over* the landed property to his son Robert on his arriving at the age of thirty years, or earlier if deemed expedient, was the exact counterpart of the passage which provided that the bequest shall not *take effect* until he should attain the age of thirty years, unless the trustees should be of opinion that it should *take effect* sooner; and that the expression "take effect" in the latter passage thus clearly was shown to refer to the term of payment, and not to that of vesting.

LORD KINLOCH—I agree that the power of sale should be given. As far as Robert Allardice is concerned, that is obviously the proper course to take. The only reason against selling would be if it could be shown that there was some one who was entitled to say that it should not be sold. I agree that such reason has not been made good. I agree with your Lordship as to the question of vesting, but, at the same time, I am disposed to concur with Lord Deas that it is not indispensable to decide that question. Suppose that the lady may come at some time or other to the right of this estate, it is plain that she could not retain it. A sale must take place. It resolves itself into a question of expediency. The trustees could have sold without applying to the Court at all, and it is only because Mr Jamieson is a judicial factor that he has thought it necessary to apply to the Court. I do not think that in regard to the interest of the lady it would benefit her not to sell the lands. In short, there is no reason for denying Mr Robert Allardice the great benefit he has in selling.

The Court remitted to the Lord Ordinary to grant authority to sell, as craved.

Agents for Petitioner—Mitchell & Baxter, W.S.

Friday, May 31.

SPECIAL CASE—WALKINSHAW'S TRUSTEES AND OTHERS.

Provision—Marriage-Contract—Vesting—Policy of Insurance—Jus relictæ.

By antenuptial contract a husband bound himself "to provide and secure to the child or children who might be procreated of the marriage, if only one such child, the sum of £2000, and if more than one such child, the sum of £3000," payable after the decease of the longest liver of the spouses; and further, towards securing the said provisions, to effect and keep up a policy of insurance for £1500, at the sight of the marriage-contract trustees. There were two children of the marriage, both daughters, both of whom predeceased their father. The younger died unmarried, having conveyed her whole means to trustees. The elder was married, and had issue. By antenuptial contract she conveyed her whole means, presently belonging to her, or which should be acquired by her during the subsistence of the marriage, to trustees. The father, who survived his first wife, contracted a second marriage, and in anticipation thereof executed a holograph writing, by which he conveyed his furniture to his intended wife. There were no children of the second marriage; his second wife survived him. On his death, the proceeds of the policy of insurance for £1500, amounting, with bonus additions, to £2480, which he had effected in implement of his marriage-contract with his first wife, and assigned to the trustees under that contract, were paid by the insurance company to the said trustees. His moveable estate and furniture (the latter being valued at £600) were only sufficient to pay his debts and leave a balance of £300.

Held (diss. Lord Kinloch)—(1) That the full provision of £3000 vested in the two children of the first marriage at their birth, and was conveyed by their respective deeds in equal shares to the testamentary trustees of the one, and the marriage-contract trustees of the other.

(2) That the widow was not entitled to *jus relictæ* out of any part of the proceeds of the policy of insurance.

(3) That the parties in right of the children of the first marriage were not entitled to payment of the unsecured balance of the provision of £3000, over and above the sum of £2480, in competition with the widow claiming the furniture provided to her, or its value.

Process—Special Case—Pupil.

Procedure in a Special Case, to which pupils are parties.

The late James Walkinshaw was married in 1831 to his cousin Miss Barbara Walkinshaw. In anticipation of their marriage, the parties entered into an antenuptial contract, containing the following clause:—"Further, the said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children who may be procreated of the said marriage, as follows, viz.,—If only one such child, the sum of £2000 sterling, and if more than one such child, the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment until payment, which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to appoint by a writing under his hand, and failing thereof, the said Barbara Walkinshaw, in case of her surviving him, shall have the like power of division, and failing her exercising such power, then the same shall be divided among the said children, share and share alike: Declaring that the said provisions to children are to be subject to the said jointure to the widow during its continuance: And for and towards securing the said annuity or jointure in the first place, and the said provisions to the issue of the marriage in the next place, the said James Walkinshaw hereby binds and obliges himself forthwith to insure, for and during the term of his natural life, in a responsible life insurance office, and with and under the proviso underwritten, to keep insured during the term aforesaid a sum of money not less than £1500 sterling, at the sight and in the names of Daniel Walkinshaw, merchant in Glasgow, and James Walkinshaw, papermaker at Overton, near Greenock, brothers of the said Barbara Walkinshaw, or the survivor of them two; whom failing, such other person or persons as may be named by the said James Walkinshaw, and failing thereof, by the said Barbara Walkinshaw, and that in trust to the end and intent that the sum which shall arise and be received from the said insurance at the decease of the said James Walkinshaw, shall then be lent out and secured by said trustees or trustee, and the rights and securities thereof taken payable to the said Barbara Walkinshaw, if she shall have survived, in liferent for her liferent use of the interest or other proceeds thereof, towards payment of her said annuity or jointure during her life, and the fee at her decease, or in case of her predecease, the sum which may so arise and be received from said insurance shall be applied by the said trustees or trustee towards payment of the before-written provisions to the child or children who may be procreated of the marriage, which provision shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein."

The only children born of the marriage were two daughters—(1) Elizabeth Jane, born 1837, She was married in 1860 to Mr David Rose Crawford, and died April 1870, survived by six children, of whom one has since died. By antenuptial contract, to which her father was a party, Mrs Crawford's whole estate, presently belonging to her, or to which she might acquire right during the subsistence of the marriage, or which stands provided to her, was conveyed to trustees, for purposes which it is unnecessary to specify. (2) Helen Margaret, born August 1839, and died, unmarried, February 1860. Shortly before her death she executed a trust-settlement of her whole estate.

Mrs Barbara Walkinshaw died in December 1867.

Mr James Walkinshaw, on 1st June 1869, contracted a second marriage with Miss Jane Lee Crawford, sister of his son-in-law. On the day previous to his marriage he executed the following holograph writing:—

"17 *Dean Terrace, Edinburgh*, 31*st May* 1869.

"In view of my marriage with Miss Jane Lee Crawford, to be consummated (*D.V.*) to-morrow, I hereby make over and give to her in free gift, to be her absolute property, the whole furniture and plenishing belonging to me, with all napery, pictures, wines, and plate, with exception only of such few articles as are enumerated in the note attached to this gift, which excepted articles are to be given to my daughter Mrs David Rose Crawford. "JAMES WALKINSHAW."

Mr Walkinshaw died 6th June 1871, having thus survived both his daughters.

In implement of the obligation contained in his contract of marriage, Mr Walkinshaw, on 23d October 1832, effected with the Rock Life Assurance Company a policy of insurance for £1500 on his own life, which was assigned to his marriage-contract trustees. The contents of the policy, amounting, with bonus additions, to £2480, were paid in September 1871 by the insurance company to the trustees. The amount of Mr Walkinshaw's moveable estate at his death, including the furniture, which was valued at £600, but throwing out of view the contents of the policy of insurance, was only sufficient to pay his debts and to leave a balance of £300.

The parties to the present Special Case were:—(1) Mr and Mrs James Walkinshaw's marriage-contract trustees. (2) Mr and Mrs Crawford's marriage-contract trustees. (3) Miss Helen Walkinshaw's testamentary trustees. (4) The children of Mr and Mrs Crawford. (5) Mrs Jane Lee Crawford or Walkinshaw, as executrix of her deceased husband and as an individual.

The points in dispute are thus stated in the Special Case:—

"The whole contents of the policy on Mr James Walkinshaw's life, with bonus additions (£2480), is claimed in equal proportions by the parties of the second and third parts. They maintain that the full provision of £3000 vested in the children of James and Barbara Walkinshaw, and that one-half of the said provision was conveyed to the parties of the second part by the marriage-contract of Mr and Mrs Crawford, and the other half to the parties of the third part by the trust-

disposition and settlement of Miss Helen Margaret Walkinshaw.

"Or otherwise, and in the event of the second and third parties failing in the said claim, the parties of the second part claim the fund in question to the extent of £2000, and in that event they maintain that the provision of £2000 was conveyed to them by Mrs Crawford, with consent of James Walkinshaw, her father, under and in terms of the contract of marriage between her and Mr Crawford.

"In the event of the second and third parties failing in the first alternative of the claim above stated, the parties of the fourth part, the children of Mr and Mrs Crawford, claim the provision of £2000, and maintain that the same vested in them on the death of Mr James Walkinshaw, their grandfather, in terms of the contract of marriage between him and Barbara Walkinshaw, their grandmother, and that the said provision was not conveyed to the parties hereto of the second part under the contract of marriage of Mr and Mrs Crawford, their parents.

"Mrs Jane Lee Crawford or Walkinshaw, as executrix foresaid, and as an individual, claims that the whole of the said sum of £2480 is part of the goods in communion between her and her deceased husband, and that the same is subject to *jus relictæ*, and alternatively that £980, being the bonus additions to the foresaid policy of assurance, is subject to *jus relictæ*.

"In any event, the said Mrs Jane Lee Crawford or Walkinshaw claims that, in the circumstances which have occurred, no greater sum than £2000 is due by Mr James Walkinshaw's representatives, in implement of the obligation undertaken by him in his marriage-contract with Barbara Walkinshaw, in favour of the children of the marriage or their issue, and she accordingly claims *jus relictæ* from the sum of £480, being the surplus proceeds of the said policy of assurance in excess of the said sum of £2000.

"In the event of the children's provision under the marriage-contract of James and Barbara Walkinshaw being found to any extent unsecured by the said policy of assurance, the parties of the first, second, third, and fourth parts claim payment of the unsecured balance out of the moveable estate of the deceased James Walkinshaw, after payment of his debts, but preferably to Mrs Jane Lee Crawford or Walkinshaw, the fifth party hereto, claiming the furniture, &c., or value thereof, under the said James Walkinshaw's said holograph writing. If unsuccessful in the said contention, the said first, second, third, and fourth parties hereto claim as aforesaid *pari passu* with the said Mrs Walkinshaw. On the other hand, the said Mrs Walkinshaw claims the said furniture, &c., under the said holograph writing, as a reasonable provision to her, preferably to the said other parties hereto claiming the said unsecured balance: And if successful in the said contention, she claims to rank *pari passu* for the said furniture, &c., or value thereof, with the said other parties."

The questions submitted to the Court were the following:—

"1. Did the full provision of £3000, made by the late Mr James Walkinshaw in his antenuptial contract of marriage with Miss Barbara Walkinshaw, vest in the two children of the marriage, or in either of them?

"2. Was the said provision of £3000 effectually conveyed to the extent of one-half to the second parties by virtue of Mr and Mrs Crawford's marriage-contract, and to the extent of the other half to the third parties by Miss H. M. Walkinshaw's trust-disposition and settlement?

"3. In the event of the above questions being answered in the negative, did the provision made by the late Mr James Walkinshaw in his antenuptial contract of marriage with Miss Barbara Walkinshaw vest in the fourth parties, or was it effectually carried to the second parties by the antenuptial contract of marriage of Mr and Mrs Crawford?

"4. Is Mrs Walkinshaw, the fifth party, entitled to *jus relictæ* from the proceeds, including bonus additions, of the policy of assurance for £1500 effected by her husband on his life? Or, if not, is she entitled to *jus relictæ* from the sum of £980, being the amount of said bonus additions?

"5. In the event of the children's provision under the marriage-contract of James and Barbara Walkinshaw being found, to any extent, unsecured by the said policy of assurance, are the parties hereto of the first, second, third, and fourth parts entitled to payment of such unsecured balance out of the moveable estate of the deceased James Walkinshaw after payment of his debts, but preferably to the said Mrs Jane Lee Crawford or Walkinshaw claiming the furniture, &c., or value thereof, as a reasonable provision made for her by the said James Walkinshaw by his said holograph writing? Or are the said parties only entitled to rank *pari passu* with the said Mrs Walkinshaw? Or is she entitled to claim the said furniture, &c., or value thereof, preferably to the said other parties hereto?"

When the case came up on the Single Bills, the Court, on the motion of counsel who had signed the Special Case for the first, second, third, and fourth parties, appointed Mr Andrew Jameson, advocate, *tutor ad litem* to the fourth parties, who are all in pupillarity, and they were thereafter represented by separate counsel, who was required by the Court to sign the case for them.

SOLICITOR-GENERAL and LORIMER for the first, second, and third parties only.

MONCRIEFF for the fourth parties and their *tutor ad litem.*

WATSON and M'LAREN for the fifth party.

Authorities—On the question of vesting, *Beattie's Trustee*, Feb. 14, 1862, 23 D. 519 (where the former cases will be found cited); *Grant's Trustee*, Feb. 1, 1866, 4 Macph. 336.

At advising—

LORD PRESIDENT—This case turns upon the construction of two documents, *first*, the marriage-contract of Mr and Mrs Walkinshaw in 1831, and *second*, a holograph writing executed by Mr Walkinshaw in anticipation of his second marriage in 1869. By the former deed Mr James Walkinshaw binds and obliges himself to provide and secure to the child or children who may be procreated of the marriage, if only one child, £2000, and if more than one, £3000, payable after the death of the longest liver of the spouses.

There were two children of the marriage, both daughters. One predeceased both parents, and died unmarried in 1860, but leaving a settlement. The other daughter was married in 1860, and died in 1870, her mother having died in 1867. Mrs Crawford left children, who are parties to this case.

Before her death, her father had contracted a second marriage, and he died in 1871, having survived both his children.

The main question is, Whether the provision in the marriage-contract of 1831, in favour of these two children, vested in them, or whether the vesting was postponed till the death of Mr Walkinshaw? This depends on the construction of the marriage contract. (*Reads first portion of excerpt from marriage contract, given above.*)—On this part of the deed the question might arise, whether the provision is made in favour of all the children who might be procreated of the marriage, as they come into existence, or whether the number of children is to be ascertained at the death of Mr Walkinshaw. This, however, falls to be taken in connection with a still more important clause that follows. (*Reads clause in marriage-contract beginning "And for and towards securing."*)—Taking the whole of this part of the marriage-contract together, I am of opinion that, as soon as two children were born, the sum of £3000 vested in them. As to the result of one of them afterwards failing, I shall speak presently. At present it is sufficient to say that the full provision of £3000 vested in the children. No doubt the money was not payable till after the death of the parents, and this gives it, at first sight, the appearance of a right of succession. But there are various considerations which overcome this presumption. In the first place, the peculiar phraseology of the deed is not unimportant. The obligation is not to pay at his death, but to "provide and secure." The objects of the provision are the children "who may be procreated of the said marriage." This term is carried down by reference through the whole clause. But, above all, there is a security created for the payment of the money, of a very substantial kind. Although there is not a conveyance of a previously existing fund, there is such a provision as will secure a valuable estate in the hands of the trustees for behoof of the children. This is always supposing that Mr Walkinshaw continues solvent, and pays the annual premiums. But I am of opinion that the marriage-contract trustees were entitled to insist on Mr Walkinshaw effecting a policy of insurance, and further entitled to compel him to pay the annual premiums. The effect is much as if Mr Walkinshaw had paid up the whole premiums at once, in which case there cannot be a doubt that there would have been a valuable estate in the hands of the trustees, not capable of realisation till the death of Mr Walkinshaw, but still of very considerable present value, and of certain ultimate value. The circumstance that the premiums were not all paid up at once, but had to be paid annually by Mr Walkinshaw, might diminish the present value of the policy, and also, to a certain extent, the perfectness of the security. Still, it cannot be doubted that this policy was a subject increasing yearly in value as Mr Walkinshaw's age advanced, and the number of premiums paid increased. When Mr Walkinshaw died, the trustees were holding for the children, and no one else, their mother being dead. Taking this view, any difficulty in regard to the construction of the marriage-contract is very much removed. It is substantially in the same case as those in which a special fund is set apart for children—put beyond the reach of the father and his creditors. For I think that Mr Walkinshaw's creditors could not have attached the policy at his death, or even during his life. No doubt his insolvency might have stopped the continued payments of the premiums, but by that time the policy might have become of marketable value.

On the whole matter, I have no doubt that the £3000, having become a vested interest at the time when the second child was born, and being secured, as it turned out, to the extent of £2480, by the policy of insurance, that fund in the hands of the trustees belongs absolutely to the two children of the marriage and their representatives, *i.e.*, one-half to the marriage-contract trustees of Mrs Crawford, and one-half to the testamentary trustees of Miss Helen Walkinshaw. Consequently, I am for answering the first question in the affirmative, the second in the same manner. That supersedes the third question. There remains only the question as to the interest of the widow, raised by the fourth and fifth questions. It is out of the question to say that Mrs Walkinshaw is entitled to *jus relictæ* out of the proceeds of the policy. Neither the original £1500, nor the bonus additions, form any part of the moveable estate of Mr Walkinshaw. But Mr Walkinshaw made certain provisions to his second wife by a holograph writing, which I regard as perfectly valid and effectual provisions. They are certainly not unreasonable in amount, nor in kind. The estate of Mr Walkinshaw, keeping out of view the policy of insurance, which did not belong to it, seems to have been very much swallowed up by outstanding debts. The money and furniture have paid off the debts, but have left only a free balance of £300. That £300 must be taken as all that remains of the furniture, and therefore belongs to the widow. She cannot get anything more. The children of the first marriage cannot be made to contribute anything out of their secured provisions to pay their father's debts. If they were claiming unsecured provisions, a different question would arise. But the widow's provision of the furniture being reasonable in amount, must be held preferable to the unsecured balance of the provisions to the children of the first marriage. In regard to the fifth question, I am therefore of opinion that the widow is entitled to the balance of £300, as representing the furniture.

Lord Kinloch—I have arrived at a different conclusion from that which has been now expressed.

The leading question discussed before us regards the period of vesting of the provisions for children contained in the marriage-contract of Mr James Walkinshaw and his wife. The point of inquiry is, whether these provisions vested in each child at its birth, or at what other period vesting took place.

By the marriage-contract in question, "the said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children who may be procreated of the said marriage as follows, viz.—If only one such child, the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment till payment; which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to

appoint by a writing under his hand." Failing Mr Walkinshaw, his wife had the power of apportionment; and if no apportionment was made, "then the same shall be divided amongst the said children share and share alike."

The important characteristic, as it appears to me, of this provision is, that it is a provision by a father for children, out of his own estate, to take effect and be payable after his death. The term of payment expressed is the death of the longest liver of the spouses. This of course implied the death of the husband; and as he was himself the survivor, the case may be taken as simply a provision by a father for children payable after his death. It is not a provision flowing from a third party, such as frequently occurs in marriage-contracts, and creates a very different case. Neither is it a provision having no definite term of payment, but conveying a general right in favour of the class; which is a form of provision also frequently known, and has its own consequences. It is simply a provision by a father to his children, out of his own estate, payable after his death.

I am of opinion that, in itself, and independently of any other clauses, the effect of which I shall afterwards consider, this is, in point of law, a provision of succession. I do not of course mean that the provision is one which the father could gratuitously disappoint. It is succession, but protected succession. The nature of the contract implied an onerous obligation to make good the provision. To this effect there was a proper debt against the father, having to many intents the legal consequences of a debt. But the debt still consisted in an obligation to leave a certain amount of succession; that is, a certain amount of money payable out of his estate after his death. And the claim was not one capable of coming into competition with third parties' creditors. Except as involving an obligation against the father not to defeat it, the provision is simply one of succession, with the legal characteristics of such. One of these I consider to be, that no right vests till the death of the father, and then vests in the children who survive that event, no others. This is a trite rule as to succession. If a father executes a testament, bequeathing a sum of money, payable after his death, to his children amongst them, it is scarcely necessary to say that no right vests in any predeceasing child, and that the bequest devolves amongst the children alive at the father's death. It is exactly so in the present case in regard to the matter of vesting. What the father gives to his children is simply a sum of money payable after his death; £2000 if one child, £3000 if more than one. He binds himself to leave this succession, and his obligation is onerous. But, as in the case of all succession, no right vests till after the father's death, and then exclusively in the children surviving that event.

In the present case both children predeceased the father, but one, Mrs Crawford, left issue. Admittedly on all hands, this issue came in the mother's room by virtue of the *conditio si sine liberis.* The case is therefore the same in principle as if one child predeceased and the other survived the father. The predeceasing child, Miss Helen Margaret Walkinshaw, had, as I conceive, no right vested in her. The only vested right lay in her sister Mrs Crawford, or her children in her room.

It follows, as I think inevitably, that the sum due under this provision out of the father's estate was £2000, not £3000. There was only one child having right to take, and that child could only take what was provided in the case of a single child. The sum of £3000 could only become due where more children than one were to take, and the sum was to be divided amongst them. Division was an indispensable element of the emergence of the larger sum. One child could never take what was alone provided for a plurality. The only right which, in my apprehension, arose under this provision was a right to £2000, and interest from the date of Mr Walkinshaw's death, on the part of Mrs Crawford's children, as coming in her room.

This is the result which I think follows from the application of well known general principles to such a provision as that which I have referred to. And I conceive that the contract contains nothing which interferes with the application of these principles.

I do not think that the use of the word "procreated" in the obligation "to provide and secure to the child or children who may be procreated of the said marriage as follows," implies a right vesting in each child at the time of birth. I think the words simply import a general statement that what follows is the obligation undertaken on behalf of the children of the marriage. The words, "who may be procreated," might equally well have been left out, and the clause have run thus—"the said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children of the said marriage as follows." The words do not import any intendment to rest the constitution of a right on the fact of procreation or birth. They merely intimate that the settlement is now going on to state what is to be done for the children of the marriage. The character and amount of what is done must be gathered from the terms of the actual obligation incurred, not inferred from the employment of this general introductory phrase. When the obligation itself is looked to, it is an obligation to pay "if only one such child, the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw." I consider this to be the common obligation to pay after decease a certain smaller sum if only one child then exists, and a certain larger sum if more than one. It is just an obligation to pay £2000 if one child survived the father, and £3000 if two or more. I can make nothing more or less of it than this.

A strong argument has been employed, founded on the fact that security for these provisions was given by the father to the extent of £1500, in a policy of insurance effected on his life to that amount, and vested in trustees for behoof of the children. This argument deserves consideration, but it is, in my apprehension, insufficient to throw the period of vesting earlier than the death of the father, or to place it, as was contended, at the birth of each child.

The fact of security being given for provisions to children in a marriage-contract is often of great importance in any question between the children and creditors of the father; for the circumstance of security being given may, and has often been found to be, to give a proper *jus crediti,* to the extent at least of the sum secured. It is not so obvious how the granting of security should affect the question of vesting, which must generally

be determined by the terms of the obligation itself. At the same time, I think it fairly urged that the security may be given in such terms as to afford evidence of the intention of the parties regarding the period of vesting. In the present case I do not think that these supply any confirmation of the theory that the provisions vested at the birth of each child. The obligation to pay is unquestionably an obligation prestable only after the father's death. This obligation he secures to the extent of £1500, by a policy of life insurance; that is to say, by an arrangement which does not yield the fund of payment till after his death has taken place. The policy is vested in trustees by an *inter vivos* assignment, but not to the effect of creating any absolute or present interest in the children, but only "towards securing," as the contract expressly runs, payment of the sums provided after the death of the father. This arrangement appears to me entirely to accord with the idea that it was at the father's death, and not sooner, that the provision vested. At all events, it very clearly does not suggest any ground for holding that the provision vested at birth. To say the least, it is equally compatible with the one assumption as with the other. The arrangement simply implies that whether vesting took place at one period or another, a fund was wanted at the father's death for payment; and the policy was the means of finding the fund when it was wanted. Whether one, two, or more children were to share in the fund so provided, or who was to share and who was not, the transaction does not aid us to determine. In other words, the transaction imported nothing but a security for the fulfilment of the primary obligation, whatever that obligation was. If, on the terms of the obligation, the right vested at birth, the policy secured fulfilment of that obligation. If, as I think, it vested only after the father's death, the security applied to that obligation, and made it neither broader nor narrower.

It forms, as I think, no small confirmation of the view which I have taken, that the contract in an after clause declares of these provisions to the children, "which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." I consider these words strongly to intimate that the benefit of the provisions belonged to the children surviving the father, and to these only. The children to be entitled to the provisions were those who had "an interest in their father's means and estate at his decease," which interest the provisions were, *pro tanto*, to satisfy. The funds provided were to be employed in satisfaction of rights arising *mortis causa*, and these only. In other words, they went exclusively to children surviving the father. To allocate any part to a child who predeceased the father, and who therefore had no legal interest in his means and estate at his death, would, as I think, be to abstract a portion of the funds from the purpose to which the contract destined them. I cannot read this clause without feeling satisfied that the children who were to share in the provisions were identical with those who, independently of the provisions, had a legal interest in their father's means and estate at his decease. In other words, the benefit of the provisions was confined to the children alive at their father's death.

I thus draw from a consideration of the whole clauses of the deed the same inference as to vesting which I think follows from the terms containing the destination of the provisions. I fully admit that the question is rightly determined by taking into view the whole clauses of the contract, with the object of gathering from these the true purpose of the granter. It is of course quite competent so to settle provisions on children as to vest the right at birth; and so, should all the children predecease the father, to give the whole provisions to their general representatives or assignees. But the contract must be so worded as clearly to evolve this result. More especially must this be the case where the construction of the provision imports *prima facie* a settlement of succession, not vesting till the granter's death. It seems to me that the inference thus arising cannot be over-ruled, except by very clear and unequivocal evidence of the granter's intention being different. I cannot find in the contract now in question any grounds for holding that the intention of the granter was to vest the provisions at the birth of each child; on the contrary, sufficient grounds for arriving at a directly opposite conclusion.

The conclusion at which I have arrived seems to me to be unaffected by any of the decisions quoted to us. In truth, each case on the subject forms a special case on the terms of the particular deed. The case mainly discussed was that of *Beattie's Trustees* v. *Cooper*, Feb. 14, 1862, 24 D. 519, in which provisions to children by a father in an antenuptial contract were held to vest in each child at its birth. But the provisions in that case were not, under the marriage-contract, payable after the father's death. They were granted indefinitely in favour of the children, and arose under an obligation to secure the sums mentioned, within three months after the marriage, by a bond in favour of the spouses in liferent for their liferent right allenarly (thereby constituting them fiduciary fiars), "and to the children, one or more, to be procreated betwixt them, in fee." The marriage was in August 1810. The father, John Myers, by the antenuptial contract, "bound himself, at Martinmas 1810, to lend out £400 sterling, on a sufficient bond or bonds, and to take the rights and securities thereof to the said John Myers and the said Diana Cooper, and the longest liver of these two in liferent, for their liferent right and use allenarly, and to the children, one or more, to be procreated betwixt them, whom failing, to the said Diana Cooper, her own heirs and assignees, in fee." A bond was accordingly granted to this effect; and the children thereby made present disponees in fee to the sum contained in it. This is plainly an entirely different case from the present; and no sound inference can be drawn from the one case to the other.

The other case chiefly brought before our notice is that of *Grant's Trustee* v. *Gordon*, Feb. 1, 1866, M. 4. 336. The provision there in question, though made in an antenuptial contract, was not made by the intended husband on the children of the marriage, but by the father of the lady. The right did not flow from the father of the children, but from a third party—thereby involving an essential distinction between the two cases. It was constituted by an obligation on the part of this father-in-law to lay out a certain sum on behalf of the children of the marriage, "at the term of Whitsunday or Martinmas that shall happen next after his death, or as soon thereafter as circumstances will permit." Only one child of the marriage existed, who died when about six months old, long before his father and mother, and before his grandfather,

the granter of the provision. The Court held that no right had vested in him to the provision in the marriage-contract, and repelled a plea that such right vested at his birth. The grounds of decision are not, to my mind, all entirely satisfactory. But, just as I think the case of *Beattie's Trustees* no authority against my views, so, on the other hand, I do not rest on this case of *Grant's Trustee* as any authority in their favour. I think the cases to be in their circumstances essentially different. I decide the present case on its own proper grounds.

The result of these views would be to find that the sum payable to the children under the marriage-contract was £2000, not £3000, and that this sum is due to the children of Mrs Crawford in their own right. The sum would be payable out of the proceeds of the policy, including the bonus, which are sufficient to pay it, and to leave a surplus for the widow's legal claims. I agree in thinking that the holograph writing of 31st May 1869 has the effect of an antenuptial contract in favour of the second wife.

LORD DEAS—The important question is the first. I am of opinion that a right vested in the first child at its birth, and that when the second child was born the right became absolute to a provision of £3000. I give no opinion whatever on the point whether the children's provisions were such as to enable them to compete wtth onerous creditors of the father. But even assuming, with Lord Kinloch, that they were not, I have come very clearly to the same conclusions as your Lordship in the chair. The provisions in the marriage-contract of 1831 are in favour of the "children who may be procreated of the marriage." I find nothing in the deed tending to qualify these words, except that the provisions were not payable till after the death of the father, which single element has never been held sufficient to postpone vesting. It seems to me impossible to arrive at Lord Kinloch's conclusion without going counter to the well-considered decision in the case of *Beattie*, which I regard as substantially the same as the present.

LORD ARDMILLAN concurred with the Lord President and Lord Deas.

The Court found—

In regard to *Quest.* 1, "That the full provision of £3000 vested in the two children of the marriage at their birth."

Quest. 2. Answered in the affirmative.

Quest. 3. Superseded.

Quest. 4. "That Mrs Walkinshaw, the fifth party, is not entitled to *jus relictæ* out of any part of the proceeds of the policy of assurance."

Quest. 5. "That the parties hereto of the first, second, third, and fourth parts are not entitled to payment of the unsecured balance of the provision of £3000 over and above the sum of £2480, proceeds of said policy, out of the moveable estate of the deceased James Walkinshaw, in competition with the said fifth party claiming the furniture and other moveables provided to her by the holograph writing of 31st May 1869, or the value thereof, but that she is entitled to claim the said furniture and other moveables, or value thereof, preferably to the said other parties hereto."

Agents for the Fifth Party—M'Ewen & Carment, W.S.

Agent for the other Parties—John Martin, W.S.

Friday, May 31.

STOPFORD BLAIR'S TRUSTEES AND OTHERS, PETITIONERS.

(FOR OPINION OF THE COURT.)

Succession—Legacy—Vesting.

Held that a bequest of £1000 to each of the children of the testator's daughter by her present marriage was limited to children in existence at the death of the testator, and did not include a child born after that date.

This was a case for the opinion of the Court of Session, remitted by the Court of Chancery in England, arising out of certain proceedings in that Court regarding the distribution of the estate of the late Lieutenant-Colonel W. H. Stopford Blair of Penninghame.

Colonel Stopford Blair died 20th September 1868, leaving large heritable and moveable property. He was survived by a son, Edward James Stopford Blair, now of Penninghame, and a daughter, Elizabeth Ellen, who was married in 1847 to Edward Heron-Maxwell. By ante-nuptial contract between Mr and Mrs Heron-Maxwell, to which Colonel Stopford Blair was a party, the latter bound himself to provide £10,000 for the spouses and the survivor in liferent, and for the children to be procreated of the marriage in fee.

In May 1848 Colonel Stopford Blair executed a last will and testament, by which he bequeathed two further sums of £10,000 each, after certain liferents, to be disposed of in the same manner as the sum provided in the marriage contract of his daughter.

In June 1857 the testator added a codicil to the will, containing the following bequest:—"I bequeath to each of her (Mrs Heron-Maxwell) children by this her present marriage £1000 each, free of duty, but to be placed at the discretion of the marriage trustees for their special benefit while under age." He also directed the residue of his personal property at the demise of all the annuitants to be divided between his two children.

On 10th August 1866 he executed a second codicil:—"Having intimated to my son-in-law, E. H. Haxwell, my desire to relieve him of the heavy burden of his insurance (viz. £280) on his life for £8000, to be paid over at his death for the benefit of his family, I hereby bequeath that the clear sum of £8000 be at due time paid over from the residue of my property for the purpose intended."

There were nine children of the marriage between Mr and Mrs Heron-Maxwell at the date of the testator's death. Another, Margaret Emily, was born 19th July 1870.

It was agreed that Colonel Stopford Blair should be held to be a domiciled Scotchman at the date of the will, and thenceforth down to his death.

The questions submitted to the Court were the following:—

"Whether, according to the law of Scotland, the said Margaret Emily Heron Maxwell and any other child of the marriage of the said Edward Heron-Maxwell and Elizabeth Ellen, his wife, born after the death of the testator, is entitled to a legacy of £1000 under the bequest set forth in the 3d paragraph of this case? Or

"Whether such bequest is limited to the children alive at the death of the testator?"