LORD GIFFORD concurred.

LORD YOUNG—I concur in your Lordships' opinion. The only thing I hesitate about in affirming the Lord Ordinary's interlocutor is the matter of waiver. I would not put my judgment on that ground.

The Court adhered.

Counsel for Pursuers—Trayner—Mackintosh. Agent—J. Gill, S.S.C.

Counsel for Defenders — Scott — Kinnear. Agents—Nisbet & Mathison, S.S.C.

Friday, November 26.

FIRST DIVISION.

SPECIAL CASE—M'LAREN AND OTHERS (BRYSON'S TRUSTEES) AND OTHERS.

Succession—Vesting—Conveyance in Trust, with Interposed Liferent and Destination.

B. by his trust-disposition and settlement directed his trustees to pay his wife Mrs B. a liferent of his whole estate during her survivance of him and viduity; and within twelve months after the death of the survivor of him and his said wife, to convey, *inter alia*, certain heritable subjects to his wife's nephew J. B. C., and the heirs of his body, whom failing to W. C, his brother, whom failing as therein set forth. His wife survived him, and did not marry again; she also survived J. B. C., who died in 1870. *Held* that the subjects had not vested in J. B. C. so as to be carried by his testamentary deeds, but fell to be conveyed by the trustees to W. C. in terms of the original destination.

Succession—Calling up of a Bond—Intention.

A testator directed his trustees to convey to a certain series of heirs, within a year after the death of the survivor of himself and his wife, some heritable subjects "if not sold as after mentioned," and under burden of a security of £2000 affecting them. He then proceeded to direct that in case the holders of the bond for £2000 should resolve to call up their money, and should intimate their resolution to do so before said period had arrived, the trustees should make up a title to and sell the subjects, and divide the proceeds among a slightly different series of heirs. During the lifetime of the testator's widow, A., who held one-half of said bond, desired and received payment of his money, and assigned his bond to a third party; and the bond affecting the other half was subsequently similarly assigned. The trustees did not sell until many years after, when the then holders of the bond called it up formally by notarial intimation. *Held* that the trustees had acted rightly, as the former proceedings did not amount to what the testator had contemplated as a "resolve to call up," the bond.

By trust-disposition and settlement dated July 1, 1847, the late John Bryson, plasterer, Bainsford, conveyed his whole estate, heritable and moveable, to trustees for the purposes therein specified. His widow Mrs Margaret Campbell or Bryson was named a trustee *sine qua non* during her viduity, and by the second purpose of the said deed was to enjoy the liferent use of the whole estate during her survivance and viduity, except the subjects fifth therein disponed, which were otherwise destined. The said deed contained the following provisions—"*Fourthly*, Within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be, I appoint my said trustees, at the expense of the disponees respectively, to dispone and convey the several remaining subjects before described, with houses and pertinents thereon, as follows, viz. — The subjects first above disponed, if not sold as after mentioned, to be conveyed under the burden of said security (conveyed) to John Bryson, my nephew, residing with me, and the heirs of his body, whom failing to William Bryson, his brother, whom failing to John Bryson Clark, my wife's nephew, residing with me, whom failing to William Clark, his brother, whom failing to George Clark, his brother, whom failing to his three sisters Mary, Ann, and Margaret Bryson Clarks, all residing in Bainsford, and their heirs; . . . . . . *Item*, the subjects third and seventh above disponed to be conveyed to the said John Bryson Clark and the heirs of his body, whom failing to the said William Clark, whom failing to the said George Clark, whom failing to the said Mary, Ann, and Margaret Bryson Clarks and their heirs: *Fifthly*, In case the holders of the bond affecting the subjects first above disponed resolve to call up their money, and intimate such resolution prior to the expiry of twelve months from the death of the longest liver of my said wife and me, I appoint my trustees to complete all necessary titles to these subjects, and sell the same in such manner as they shall deem proper, and after paying the debt which affects the same, to divide the free proceeds of the price into four equal parts or shares, and to pay to the said John Bryson, my nephew, and his heirs one such share, the said William Bryson, my nephew, and his heirs one such share, the said John Bryson Clark and his heirs one such share, and the remaining share to be paid to the said Margaret Campbell, whom failing the said John Bryson Clark, whom failing his brother William, whom failing his brother George, whom failing his three sisters Mary, Ann, and Margaret Bryson Clarks and their heirs." By the seventh purpose the testator directed the trustees to convey and make over the residue of his estate, heritable and moveable, to his said widow, whom failing to be among John Bryson, William Bryson, and John Bryson Clark equally, and their heirs whomsoever.

The said John Bryson, the testator, died on October 22, 1856, without issue, and was survived by his said wife Mrs Margaret Campbell or Bryson, who did not marry again, and also by the said John Bryson Clark, William Clark, George Clark, and Mary, Ann, and Margaret Bryson Clark, and John and William Bryson.

John Bryson Clark executed a disposition and assignation of his whole right and interest under the said trust-disposition and settlement in favour of the said Mrs Margaret Campbell or Bryson, dated December 6th 1854. There was no evidence of any formal intimation of this assignation to the testator's trustees, but Mrs Bryson was one of the trustees *sine qua non*, and it was found in

her depositories after her death. John Bryson Clark also executed a holograph testament dated November 1st 1865, by which the said Mrs Bryson was named sole executrix and residuary legatee. He died on 21st January 1870 leaving no issue.

John Bryson, the testator's nephew, died without issue on 22d May 1854, and his only brother William Bryson, who was his heir in heritage and moveables, executed an assignation of his own and his said brother's whole interest in the testator's estate in favour of the said Mrs Margaret Campbell or Bryson, dated 30th August 1856. This assignation was duly intimated to the testator's trustees.

At the date of the testator's death in 1851 the bond for £2000 over the Abbotsford Place property (referred to in the said fifth purpose of the deed) was held by and vested in John Smith, writer, Falkirk, to the extent of £1000, and John Wilson of South Bantaskine, Falkirk, to the extent of the remaining £1000. In November 1853 Mr Wilson, by letter addressed to the said John Smith, who was agent for the testator's trustees, gave notice that he desired payment, and in February 1854 he received payment of his part of the bond, granting assignation of the same in favour of Alexander Macvey, Carron; and in July 1854 Mr Smith's part of the bond was assigned to Mrs Foord, Brachenlees. The testator's trustees did not sell the Abbotsford Place property when the bond was thus assigned in 1854; but the holders having by notarial intimation called up the same on February 3d 1875 the trustees sold the property on the 27th of that month at the price of £3000, thus leaving a reversion of £950 after deducting £50 for expenses of realising.

The subjects before referred to as third and seventh disponed by the testator's said deed, were heritable subjects in Falkirk of the gross annual value of £41, 5s.

Mrs Margaret Campbell or Bryson died on 19th April 1879 leaving a trust-disposition and settlement dated 5th January 1878, under which the said Mary Clark (then Mrs Boyd), Ann Clark, and Margaret Clark (then Mrs Bell) were the residuary legatees.

A Special Case was presented to the Court, in which the testator's trustees were the first parties, William Clark was the second party, the residuary legatees under the said Mrs Margaret Campbell or Bryson's trust-disposition were the third parties, and the next-of-kin of John Bryson Clark were the fourth parties.

The second party, William Clark, claimed that the testator's trustees (first parties) should convey to him the subjects third and seventh disponed by the testator, on the ground that John Bryson Clark having died without issue during the lifetime of the said Mrs Margaret Campbell or Bryson, the subjects had not vested in him. The third parties (Mrs Bryson's residuary legatees) objected to such a conveyance being granted, on the ground that the said properties were carried to Mrs Margaret Campbell or Bryson by John Bryson Clark's disposition and assignation and testament, and so fell under her settlement. They also claimed the whole reversion of the Abbotsford Place property in virtue of the destination in the trust-deed, and the assignation by William Bryson, and the disposition and assignation and testament of John Bryson Clark. The fourth parties (John Bryson Clark's next-of-kin) claimed the fourth share of the said reversion destined to him and his heirs.

The questions of law were—"(1) Is William Clark entitled to a conveyance of the properties in Graham's Road and Bainsford, Falkirk, before mentioned? or (2) Did these properties vest in John Bryson Clark, and were they carried by his disposition and assignation or his testament, above referred to? (3) Are the fourth parties entitled to one-fourth share of the reversion of the price of the Abbotsford Place property? or (4) Does the whole of the said reversion fall to the third parties?"

Authorities—*Russell* v. *M'Dowell and Selkrig*, Feb. 6, 1824, F.C.; *Smith* v. *Leitch*, June 2, 1826, 4 S. 659, 3 W. & S. 366; *Stoddart's Trs.* v. *Stoddart*, March 5, 1870, 8 Macph. 667; *Wright* v. *Ogilvie*, July 9, 1840, 2 D. 1357; *Howatt's Trustees* v. *Howatt*, Dec. 17, 1869, 8 Macph. 337; *Campbell* v. *Campbell*, Dec. 11, 1879, 6 R. 310, and H. of L. July 8, 1880, 5 L.R. App. Cases, 787.

At advising—

LORD PRESIDENT—The first question which we have here to determine, on the construction of the settlement of the late Mr John Bryson, has regard to certain subjects which are generally mentioned as the "subjects third and seventh disponed." The scheme of the settlement is to convey to trustees by special conveyance a number of different subjects, and also to convey generally any other lands of which the testator was possessed, and his whole estate. The conveyance to trustees is controlled by the purposes of the trust, but there is nothing but what is contained in the purposes of the trust that can be held to give a beneficial right or interest to anyone here concerned.

As regards the subjects third and seventh disponed, the declaration of the testator's intention is embodied in the fourth purpose or direction, for it is rather a direction, and contains provisions as to a number of different subjects. Taking the words which apply to the subjects in question, it reads thus:—"*Fourthly*, Within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be, I appoint my said trustees, at the expense of the disponees respectively, to dispone and convey the several remaining subjects before described, with houses and pertinents thereon, as follows, viz., . . . *Item*, the subjects third and seventh above disponed to be conveyed to the said John Bryson Clark and the heirs of his body, whom failing to the said William Clark, whom failing to the said George Clark, whom failing to the said Mary, Ann, and Margaret Bryson Clarks, and their heirs." So far as regards John Bryson Clark, and his right and interest in the subjects third and seventh disponed, it depends on this direction to convey; there are no other words of gift in his favour in this settlement as regards these subjects, and no other direction to the trustees to hold them for his behoof. It is only this, that in a certain event the trustees are directed to convey to him and his heirs, whom failing as above. Now, John Bryson Clark predeceased the term at which the conveyance was to be made; he survived the testator, but predeceased the widow; and the question is, Did the fee of these

subjects vest in him before that period arrived? I am clearly of opinion that it did not. It is in vain to review the authorities in a question of this kind; but I think they amount to this, that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then if he does not survive the period he takes no right under the settlement. I think that is settled law, and applicable to this case; and I am therefore of opinion that John Bryson Clark having died without heirs of his body, the duty of the trustees under the fourth head of the settlement is to convey the subjects in question to William Clark.

The other question involves considerations of an entirely different kind. The trustees were directed in a certain event to sell a certain subject and divide it in a particular way; the subject was that known as the Abbotsford Place subject, and is described in the settlement as the subject first conveyed. Now, in this same fourth head the trustees are directed, within twelve months of the death of the longest liver of the testator and his wife, as follows:—"The subjects first above disponed, if not sold as after mentioned, to be conveyed under the burden of said security" (that was, a certain bond for £2000) "to John Bryson, my nephew, residing with me, and the heirs of his body, whom failing to William Bryson, his brother, whom failing to John Bryson Clark, my wife's nephew, residing with me, whom failing to William Clark, his brother, whom failing to George Clark, his brother, whom failing to his three sisters, Mary, Ann, and Margaret Bryson Clarks, all residing in Bainsford, and their heirs." Now, the reservation there—"if not sold as after mentioned"—refers to a provision in the fifth head of the settlement, to this effect:—"In case the holders of the bond affecting the subjects first above disponed resolve to call up their money, and intimate such resolution prior to the expiry of twelve months from the death of the longest liver of my said wife and me, I appoint my trustees to complete all necessary titles to these subjects, and sell the same in such manner as they shall deem proper, and after paying the debt which affects the same, to divide the free proceeds of the price into four equal parts or shares, and to pay to the said John Bryson, my nephew, and his heirs one such share, the said William Bryson, my nephew, and his heirs one such share, the said John Bryson Clark and his heirs one such share, and the remaining share to be paid to the said Margaret Campbell, whom failing the said John Bryson Clark, whom failing his brother William, whom failing his brother George, whom failing his three sisters, Mary, Ann, and Margaret Bryson Clarks and their heirs."

Now, it must be observed that the parties who are to take benefit in the event of the subjects being sold are different from those who are to receive a disposition if they remain unsold, and therefore the event in which the sale is made imperative on the trustees becomes very important in the question of carrying out the intention of this testator. One can hardly suppose that a testator would direct his trustees to divide the subjects, if sold, among one class of beneficiaries, and if not sold among another class, and leave the question of selling or not selling to the discretion of the trustees, or depending on any mere chance. That does not seem a very rational purpose to ascribe to a testator, and I should therefore be inclined to think that the event which was to operate this change in the destiny of these subjects must be one capable of being determinately fixed, and the contemplation of which influenced the testator's mind in making this change of succession follow on that event. As the intention is expressed, it seems to be that if the holders of the bond should press for their money, and the trustees should have to pay up, the subjects were to be sold to enable them to do so. That seems to have been the idea present in the testator's mind. The events which actually occurred are described in the seventh article of the Case. The bond for £2000 was held at the testator's death in 1851 by John Smith, writer, Falkirk, to the extent of £1000, and to the extent of the remaining £1000 by John Wilson. These gentlemen were both assignees to the portions of the bond which they held. John Smith was the testator's agent, and continued after his death to be the agent of the trust. In November 1853 Mr Wilson, by a letter to Mr Smith, gave notice that he wanted payment of his money, and in February 1854 he was paid, granting at the same time an assignation in favour of Alexander Macvey, Carron; and Mr Smith's part of the bond was in July 1854 assigned to Mrs Foord, Brachenlees. The trustees did not think this constituted the event contemplated in the fifth purpose of the trust, and accordingly did not bring the subjects to sale. The question is whether they were right or wrong in doing as they did. On the 3d of February 1875 they did sell the property, and quite rightly, on the bond being called up. But the sale in 1875 could not affect the question here as to vesting, though it does alter the condition of the subjects from heritable to moveable, and makes the price divisible among the persons named in the fifth head of the trust-deed. But if the trustees were wrong not to sell in 1854, the subjects must be dealt with as if they had sold them, and the question would be, whether Mrs Bryson, as assignee of John Clark Bryson, would not be entitled to a share of the price under the fifth head of the settlement, because by reason of the sale, if it had taken place, John Bryson Clark would have been vested in one-fourth of the price. The whole question is, whether they were right or wrong not to sell in 1854? I am not disposed to think that any assignation of this bond necessarily came up to what the testator meant when he spoke of the bondholders resolving to call up their money and intimating their resolution. He seems to have contemplated the whole money being called up, and that that would embarrass the trustees in holding the property, and so it would be better to sell. Now, all that actually happened was this:—Mr Wilson, who was an assignee to one-half of the bond, said he wanted his money. There was no very formal intimation of his wish, though I should not be inclined to lay much stress on that, but he got payment, and assigned his share to another person. Now, did that amount to the holders calling up their money and intimating their resolution? I think not. Only a fragment of the bond—one-half—was called up, and, for aught we know, the other half was not called up at all. The bond was

divided by assignation, and only one of the assignees called up his debt. That being so, I do not think that what was contemplated in the fifth head of the deed has occurred. The trustees were not embarrassed or necessitated to find £2000, as the testator contemplated they might be. In addition, the information we have as to what occurred in 1853 to 1854 is not very complete or definite. No blame attaches for that to the parties, for almost everybody is now dead who could have given information on the subject; but if our information is imperfect and defective the presumption arises that what the trustees did in their discretion was rightly done. It is only fair to the trustees to presume that, and that they had at the time complete information. On the whole matter I am disposed to think, and without difficulty, that it has not been made out by the party contending that sale should have taken place in 1854 that the events had then occurred which were contemplated by the testator in his settlement.

I think, therefore, we should answer the third question in favour of the fourth parties, which disposes of the whole matter.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court pronounced this interlocutor:—

"Find and declare that the properties in Graham's Road and Bainsford, Falkirk, did not vest in John Bryson Clark, and were not carried by his disposition and assignation or his testament, and that William Clark is entitled to a conveyance of these properties: Find and declare that the fourth parties are entitled to one-fourth share of the reversion of the price of the Abbotsford Place property, and decern: Find the third parties liable in expenses to the second and fourth parties," &c.

Counsel for First and Third Parties—Mackintosh—Pearson. Agent—J. Gillon Fergusson, W.S.

Counsel for Second and Fourth Parties—Kinnear—Dickson. Agents—J. & A. Peddie & Ivory, W.S.

Saturday, November 27.

SECOND DIVISION.

[Lord Lee, Ordinary.

PETITION—HOPE JOHNSTONE.

Entail Statutes (11 *and* 12 *Vict. c.* 36)—*Entail Amendment Act* (16 *and* 17 *Vict. c.* 94)—*Provisions to Younger Children, Payable under the Entail within Specified Time and in Specified Manner, Chargeable against the Fee of the Estate.*

A held the estate of A under an entail by which the heir in possession was bound to pay off all provisions in favour of younger children within a period of ten years, and that by yearly instalments of 10 per cent. per annum, and this obligation was enforced by an irritancy to be incurred if any of the heirs of entail in possession should omit for three years to pay the said instalments. *Held* that it was competent notwithstanding this claim to charge provisions to younger children as a permanent burden on the fee and rents of the entailed estate by granting a bond and disposition in security for the amount in terms of the Acts 11 and 12 Vict. c. 36, and 16 and 17 Vict. c. 94.

Remarks *per curiam* on the case of *Campbell*, Jan. 26, 1856, 16 D. 396.

This petition was presented by John James Hope Johnstone, as heir of entail in possession of the Annandale estates, for authority to charge the fee and rents of these estates, other than the mansion-house, offices, and policies, in virtue of sec. 21 of the Act 11 and 12 Vict. cap. 36, with the sum of £16,280, 17s. 9d., being the balance of £56,280, 17s. 9d., as representing three years' free rents of the estates due under four bonds of provision granted by the petitioner's grandfather in favour of his younger children, the estates having been already charged with £40,000 of the said provisions.

The entail under which the estate of Annandale was held was executed by James Johnstone Hope, Earl of Hopetoun, on the 18th July 1799, and registered in the Books of Council and Session 28th June 1816. In it power was given to the heir in possession to provide in competent provisions for younger children:—"But providing always that the whole sum to be granted as portions and provisions to the younger children of my eldest son, or of any heir of taillie in possession at the time, shall not exceed a sum equal to three years' free rent of the said lands, earldom, lordships, baronies, and others, after deduction of all jointures or provisions granted to wives or husbands, and the yearly rent of all former provisions to younger children, which may at the time affect the said lands, earldom, lordships, baronies, and others, and after deduction of all public and parochial burdens; and that the whole sum to be granted as portions or provisions to younger children of any one eldest son or grandson who shall be heir-apparent of my eldest son, or of any of the said heirs of taillie in possession at the time, shall not exceed a sum equal to three years' free rent of the said lands, earldom, lordships, baronies, and others, after deduction as aforesaid; and providing also that such portions or provisions to younger children as aforesaid shall be secured only by bonds of provision, binding for the regular payment thereof by instalments, in manner after mentioned, the heir of entail who for the time shall be in possession of the said lands, earldom, lordships, baronies, and others, and that such bonds of provision shall contain an express condition that it shall not be in the power of the said younger children, or their heirs or assignees, to obtain adjudications against the said lands, earldom, lordships, baronies, and others, or to use any other method of diligence whatever against the same except for levying the rents and the yearly profits thereof; and that such bonds of provision shall also contain this express condition, that the sums contained in the same shall not be exigible at once, but shall be payable only by yearly instalments of 10 per cent. of the capital sum of such provisions, together with the interest due at the time, and that such instalments of 10 per centum of the capital sum of such provisions to younger children, together with the interest due at the time,