and on the doubt as to which officer should be appointed being stated at the bar, his Lordship stated that he considered the judicial factor to be the more suitable officer, on the ground that if a factor *loco absentis* was appointed, that assumed a certainty in whom the right to the property lay, whereas in truth that was still in doubt; and therefore appointed Mr James Matheson Bain, banker, Arbroath, who had been suggested in the prayer of the petition, to be judicial factor.

Counsel for Petitioners—Moody Stuart. Agent —David Roberts, S.S.C.

Friday, May 19

FIRST DIVISION.

SPECIAL CASE—SCOTTS' TRUSTEES.

Succession — Vesting — Contract of Marriage — Power given to Wife to Dispose by Will of Money contributed by her in event of there being no Issue, or there being Issue who all Die before Term of Payment—Clause of Return.

A marriage-contract provided that the trustees should, after the death of the longest liver of the spouses, pay the principal sum contributed by the wife to the child or children of the marriage, in such shares, if more than one child, as the spouses or the survivor should appoint, or failing such appointment, in equal shares—"And in case there shall be no children of the said marriage, or if there shall be children, in case the whole of the said children shall die before the term of payment of their shares of the trust-moneys, then, and on either of these events, it shall be competent to and in the power of" the wife to dispose of the said principal sum by will as she might see fit. "And, lastly, in the event of there being no children of the said intended marriage, or in case the said children shall die before their shares become due and payable, without leaving lawful issue of their bodies," then the said principal sum should go to the heirs whatsoever of the wife. The wife predeceased the husband, leaving several children, but having made no deed of appointment jointly with her husband. *Held* that the provisions in favour of the children of the marriage did not vest till the death of the husband, and that therefore, though he had executed and delivered a deed of appointment in favour of one of his sons who predeceased him, the sum so appointed was not carried by the deed of that son.

In the year 1834 Mr George Scott, merchant in Prince of Wales Island, East Indies, married Miss Lucy Grace Brown, daughter of the then deceased David Brown, merchant in Penang, at Trinity Lodge, Dunse, Berwickshire. An antenuptial-contract was executed by Mr George Scott on the one part, and by Miss Brown, with consent of Major Brown, sole acting trustee of her father, on the other. By this contract Mr George Scott bound and obliged himself to make payment to the child or children of the marriage, on his, her, or their attaining the age of twenty-one years, or if daughters at marriage, of a sum of £4000, in such proportions as might be appointed by the spouses by a joint-deed, or, as the survivor might appoint, by a writing under his or her hand; while Miss Brown conveyed to the marriage-contract trustees her whole means and estate, amounting to £2250, for payment (first) of the expenses of the trust; (second) that the trustees should hold, pay, and apply the interest thereof to such person or persons, and such uses and purposes, as she should alone and without her husband's consent direct by a writing under her hand, declaring that it should not be lawful for her to deprive herself of the benefit thereof by anticipation; or otherwise, that they should hold and apply the interest thereof for the separate use of herself and the children of the marriage, excluding the *jus mariti* of her husband; declaring that in the event of his surviving her he should be entitled to the interest during his life. The marriage-contract then provided—"(Third) That the said trustees shall, after the decease of the longest liver of the said George Scott and Lucy Grace Brown, pay over the principal sum or stock to the child or children of this intended marriage in terms of a joint deed to be executed by the said George Scott and Lucy Grace Brown at any time: Declaring that in the event of the death of either of them without making such division, the survivor shall have the same power; and in case no division shall be made in manner before mentioned, then the said stock or principal sum shall belong to and be divided among the children, share and share alike; and in case there shall be no children of the said marriage, or if there shall be children, in case the whole of the said children shall die before the term of payment of their shares of the trust moneys, then, and in either of these events, it shall be competent to and in the power of the said Lucy Grace Brown, by any deed or last will, to assign or bequeath all or any part of the said principal stock or sum to such person or persons as she shall think fit. And (lastly) in the event before specified of there being no children of the said intended marriage, or in case the said children shall die before their shares become due and payable without having lawful issue of their bodies, then the said principal sum or stock shall go and be payable to the heirs whatsoever of the said Lucy Grace Brown." In consideration of the obligations undertaken by the husband as above narrated, the deed proceeded to discharge the legal rights of the wife in the event of her survivance, and also to discharge the legal rights of the children, if any.

The marriage was dissolved in 1844 by the death of Mrs George Scott, to whom until her death the trustees had paid the interest of the trust funds. She and her husband had executed no joint deed of apportionment among the children of the marriage, of whom there were five—Margaret Brown Scott, George Smyth Scott, Hugh Robert Scott, Alexander Brown Scott, and David Scott. The two last-named died in minority and unmarried. Hugh Robert Scott reached majority, but died unmarried in 1872. George Smyth Scott died in 1877, leaving one daughter, Amy Hindmarsh Scott. Margaret Brown Scott alone of the children survived the father, who died in 1880. She was married in 1855 to Mr Walter Scott. Previously to their marriage

a deed of indenture in English form was executed, to which deed Mr George Scott was a party, and whereby on the narrative of his own marriage-contract, and that no joint deed of apportionment had been made by himself and his wife, he covenanted and agreed that he would prior to the solemnisation of the marriage make a deed appointing one-third of the £4000 provided by himself in his marriage-contract, and one-third of the £2250 provided by his wife to the trustees of the marriage, or otherwise that he would by a subsequent deed of appointment or by his last will make such an appointment. Such a deed of appointment he accordingly executed in 1875, appointing one-third of these two sums from and after his decease to Mrs Walter Scott's marriage-contract trustees, and that his son George Smyth Scott "shall from the date of these presents stand possessed of the remaining two-thirds of the said sum of £4000 sterling, and shall from and after the decease of the said George Scott stand possessed of the remaining two-thirds of the said sum of £2250 sterling, subject to the trust of the said firstly hereinbefore recited indenture of settlement" (Mr and Mrs George Scott's marriage-settlement), "in trust for himself the said George Smyth Scott, his executors, administrators, and assigns." This deed of appointment was delivered to George Smyth Scott, who died two years later—1877—as already stated. Previously to his death in 1877 Mr George Smyth Scott, by indenture in English form, borrowed at Penang from Brown & Co., merchants there, $1770.69, and Brown & Co. undertook to remit monthly to Mrs G. Scott, his wife, $100 till the remittances should amount to $600. In security of this loan he assigned to the individual partners of Brown & Co. the two-thirds of the £2250 appointed to him by the deed of appointment.

On the death of Mr George Scott in 1880, as to this sum of two-thirds of £2250 which had been assigned to Brown & Co., Miss Amy Hindmarsh Scott, George Smyth Scott's daughter, maintained that the assignation by her father to Brown & Co. was inept, in respect that the right of the children of the marriage between Mr and Mrs George Scott to any part of the £2250 provided by Mrs George Scott did not vest till the death of the survivor of the spouses, and that the right to the two-thirds of £2250 had therefore not vested in the lifetime of her father, who predeceased his father Mr George Scott. Brown & Co., on the other hand, maintained that the two-thirds of £2250 had vested in George Smyth Scott during his life, and was therefore carried by the assignation. This Special Case was then presented to the Court. The first parties were the marriage-contract trustees of Mr and Mrs George Scott, Miss Amy Hindmarsh Scott was the second party, and Brown & Co. were the third parties.

The question of law was—"Is the second party entitled to the two-thirds of the said sum of £2250 appointed to her father by the said deed of appointment, or were the said two-thirds carried by the assignation in favour of the third parties granted by the said George Smyth Scott?"

Argued for the second party—The exercise of the power of appointment in 1875 could not affect vesting. It only fixed the shares when vesting took place. There could be no vesting till the death of the longest liver of Mr and Mrs George Scott. The wife had a power of testing, not only if there were no children of the marriage, but also if there were children, and they all died before the term of payment. That was inconsistent with vesting in the children themselves, and so also was the provision that if there were no children, or if there were children who all died before their shares became due and payable without leaving lawful issue of their bodies, the fund was to return to the heirs whatsoever of Mrs George Scott—*Lockhart* v. *Scott*, February 25, 1858, 20 D. 690.

Argued for third parties—The presumption was in favour of vesting at the dissolution of the marriage at latest. There was no destination-over, only a power to the mother to test in a certain event—*Romanes* v. *Riddell*, January 13, 1865, 3 Macph. 348.

At advising—

Lord President — The question before us relates entirely to the vesting of money which was contributed by the wife whose marriage-contract is before us, and it is unnecessary to advert to any other part of the deed. That money is to be liferented by herself, being enjoyed by her independently of her husband during the subsistence of the marriage. After the dissolution of it by his predecease it is to be liferented by her, and after the dissolution of it by her predecease it is to be liferented by him. Then come the words relating to the disposal of that money after the decease of both spouses. It is provided that "the trustees shall, after the decease of the longest liver of the said George Scott and Lucy Grace Brown, pay over the principal sum or stock to the child or children of this intended marriage, in terms of a joint deed to be executed by the said George Scott and Lucy Grace Brown at any time; declaring that in the event of the death of either of them without making such division the survivor shall have the same power; and in case no division shall be made in manner before mentioned, then the said stock or principal sum shall belong to and be divided among the children, share and share alike." Now, so far the deed admits of no double construction. The term of payment is the death of the longest liver, and the fee is then all to be paid to the child, or to the children of the marriage in equal shares, unless that is prevented by a joint deed of the spouses, or by a deed of the survivor of them directing the division to be in equal shares. So far there is no indication as to vesting, and there being nothing to prevent vesting in anything I have read, no objection could be taken to vesting of the provisions either at the dissolution of the marriage or at an earlier period; it does not matter to this case which. But the deed goes on to provide for what shall be done failing children, which may be either by there never being any issue of the marriage, or there being children and their not surviving a particular term. The deed provides for both these contingencies by providing, first, that if there shall be no children of the marriage the money is to belong to the lady from whose side it came; she may test upon it, or if she does not, it goes to her heirs and executors. Next it provides that if there be children, "in case the whole of the said children shall die before the term of payment of their shares of the trust monies, then, and in either of these events,

there being no children, or there being children who all die before the term of payment, it shall be competent to and in the power of the said Lucy Grace Brown, by any deed or last will, to assign or bequeath all or any part of the said principal stock or sum to such person or persons as she shall think fit; and, lastly, in the event before specified of there being no children of the said intended marriage, or in case the said children die before their shares become due and payable without having lawful issue of their bodies, then the said principal sum or stock shall go and be payable to the heirs whatsoever of the said Lucy Grace Brown." We must therefore see whether either event happened, on the happening of which the money was to go back to the wife. There were children, and therefore the first contingency did not happen. But they all died, except Mrs Margaret Brown Scott, before the term of payment, and the question in this case is, whether as to children who died before the term of payment there was any vesting of the provisions made for children or not? I think that it is impossible to give effect to the plain meaning of the words of this deed and at the same time to hold that there was vesting. The case, I think, is within the rule of *Lockhart* v. *Scott*, and is distinguished from that of *Romanes* v. *Riddell*. In *Romanes* v. *Riddell*, to take that case first, the provision was, that "upon the death of the survivor of her, the said Agnes Gilchrist and her husband, the trustees are to account for and pay over to the child or children of this marriage, in such proportions, if more than one child, as the father and mother or the survivor of them may direct by any deed to be executed by them or the survivor; and in case of no such deed being executed, equally between or among them, the said children, share and share alike; and failing a child or children of this marriage, then to the nearest heirs or assignees whatsoever of her the said Agnes Gilchrist."

The only event in which there was to be a reverting to the lady was a failure of issue in the sense that none should ever exist. That was the construction adopted by all the Judges, and I think it a most legitimate one. These words would have been strained if we had been said to include the event of the death of children who had existed but died before the term of payment, for that contingency is in such deeds ordinarily expressed, and so *Romanes* v. *Riddell* only settles that "failing children of the marriage" means the contingency of their never coming into existence. In *Lockhart* v. *Scott* the double event was provided for, as it is here. The provisions to children were to be payable on the death of the longest liver of the spouses, "and in case the said John Gibson Lockhart shall survive the said Miss Sophia Charlotte Scott, and there be no children of the marriage or lawful issue of such children alive at her death, or in case the children, if any, shall have died before the term of payment of their respective provisions without leaving lawful issue of their bodies, then the said trustees shall immediately pay over or assign the whole of the foresaid sum of £400 to the said John Gibson Lockhart, his heirs or assignees," he being the person from whom it came. That is just a provision such as we have here—that in two separate events the money should revert to the person from whom it came. A son of that marriage who survived the mother but predeceased the father was found to have no vested interest. Lord Curriehill, who delivered the leading opinion, said—"The next contingency provided for is that of Mr Lockhart surviving his wife and there being no children of the marriage then alive. In that case the fund is to revert to Mr Lockhart, who furnished it. But there is this other declaration—of very great importance in the present question — that the same thing shall happen if there be children alive when Mr Lockhart survives his wife, but if they shall have died before the term of payment without leaving lawful issue. This makes it quite clear that until the arrival of the term of payment, whenever that may be, in the sense of this clause there could be no vesting in the children, because in the event of their dying before that term leaving lawful issue the whole of the fund is to be restored to Mr Lockhart; or if he himself should have predeceased that term of payment it is to go to his heirs or his assignees. I quite agree with the argument of the second party here that that case is precisely in point, and am therefore for holding that the fund did not vest during the lifetime of Mr Scott, and that the second party is therefore entitled to succeed.

Lord Deas—Two decisions were quoted to us —*Lockhart* v. *Scott* and *Romanes* v. *Riddell*. The authority of neither was impeached, and there is no conflict between them. The question here is, which of them rules the present case? For the reasons very clearly stated by the counsel for the second party, I am of opinion with your Lordship that *Lockhart* v. *Scott* rules, and that *Romanes* v. *Riddell* has no application.

Lord Mure—I concur. What I go upon chiefly is the provision as to the disposal of the provisions by the mother in the event of any children who might be born of the marriage predeceasing the term of payment. [*His Lordship here read the clause quoted supra.*] I think that is quite inconsistent with vesting in a child who predeceases the term of payment.

Lord Shand—I concur. The deed not only appoints a certain term of payment—the death of the longest liver of the spouses—but provides that the children must survive the term of payment in order to the vesting of their provisions. It expressly gives the share of a child who does not survive the term of payment to the heirs of the mother, subject only to a child of a deceased child taking the parent's share. It makes no difference to the question here that the child of a deceased son takes the parent's share.

The Court therefore answered the question in favour of the Second Party.

Counsel for First and Second Parties (Mr and Mrs George Scott's Trustees and Miss Amy H. Scott)—Mackintosh—Low. Agent—John Turnbull, W.S.

Counsel for Third Parties (Brown & Co.)—Trayner—Darling. Agent—C. & A. S. Douglas, W.S.