the best in the interest of the children. Although such an appointment is unusual, the cases quoted by Mr Younger prove that it is not without precedent, the difficulty as to jurisdiction being got over by the person appointed lodging a bond prorogating the jurisdiction of the Court. It appears to me that if the gentleman named is prepared to do this, we should appoint him in the special circumstances of the case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Appoint John Barnes, residing at 278 Hoe Street, Walthamstow, manager of the London and Brazilian Bank, Limited, Walthamstow, to act as tutor to Patrick Wood Sim, Catherine Sim, and Edward William Boyd Sim, jointly with Mrs Catherine Jane Barnes or Sim the petitioner, and decern: the said John Barnes always granting a bond of prorogation in the usual form to the satisfaction of the Clerk of Court, before extract."

Counsel for the Petitioner — Younger. Agents—Waddell & M'Intosh, W.S.

Counsel for the Respondent—M'Lennan. Agents—Macpherson & Mackay, S.S.C.

Thursday, July 4.

FIRST DIVISION.

DOWNIE'S TRUSTEES.

Succession—Fee or Liferent—Gift Qualified—Successive Liferents—Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17.

A trust-disposition and settlement contained the following provision as to residue—"I direct my said trustees . . . to hold the residue of my estate . . . for behoof of any children I may have, with power to my trustees to advance such sums as may be necessary for their aliment and education until such children shall respectively reach twenty-one years of age, and upon such children respectively attaining twenty-one years of age my trustees shall pay to him or her the equal share accruing to him or her of the whole free proceeds of my estate, and that at such times and in such proportions as to my trustees shall seem fit, and that during all the respective lives of the said children." After providing that the children's shares should not be subject to the diligence of their creditors, and in the case of females should be exclusive of their husbands' *jus mariti*, the disposition proceeded—"Providing and declaring that my trustees shall hold my heritable and moveable estate in trust, and after the above provisions are fulfilled apply the proceeds thereof for behoof of the children of my children equally *per stirpes* during their lives." There was no express disposal of the fee except in the event of the truster dying without issue.

The truster was survived by two unmarried daughters, by one son who subsequently died intestate and unmarried aged 21 years, and by the son of a daughter who had predeceased the testator and also the date of the settlement. *Held*, on a general construction of the clause above quoted (1) that the gift to the truster's children was limited to an alimentary liferent; (2) that the gift to grandchildren was also limited to a liferent, the fee being undisposed of by the will; and (3) that on the death of each of the children the share liferented by him or her fell to be held by the trustees for behoof of the son of the daughter who had predeceased, and of any other grandchildren who might come into existence *per stirpes* in liferent, but subject as regards *nascituri* to such claim as might be competent to them under the provisions of the Entail Amendment (Scotland) Act 1868, section 17.

Question whether, if the daughters should marry and leave children, these children, as persons entitled to a liferent of moveable estate and born after the death of the granter, would be entitled on attaining majority to demand from the trustees an absolute conveyance of the share subject to their liferent, under the provision of section 17 of the Entail Amendment (Scotland) Act 1868.

Succession—Conditio si sine liberis.

Opinion (*per* Lord M'Laren) that where a liferent interest is given to children, with a provision that the liferent interest of each child who is instituted is to pass to his or her descendants, the children of a child who has predeceased the date of the will will not be entitled to a share.

John Downie, nurseryman in Edinburgh, died in 1892, leaving a trust-disposition and settlement, dated 28th December 1886, by which he appointed his wife and certain other parties (who accepted but resigned the trust) to be his trustees, and conveyed to them his whole heritable and moveable estate for the trust purposes therein mentioned.

After directing the trustees to allow the testator's wife the liferent use of certain houses, and to allow his daughters Jemima and Margaret Isabella the liferent use of a certain house and grounds, and after providing for certain legacies, the testator directed as follows—"And I direct my said trustees, after paying and providing for the foresaid expenses, debts, legacies, annuities, and others, to hold the residue of my estate, heritable and moveable, for behoof of any children I may have, with power to my trustees to advance such sums as may be necessary for their aliment and education until such children shall respectively reach twenty-one years of age. And upon such children respectively attaining twenty-one years of age my trustees shall pay to him

or her the equal share accruing to him or her of the whole free proceeds of my estate, and that at such times and in such proportions as to my trustees shall seem fit, and that during all the respective lives of said children. Declaring that the sums of money hereby bequeathed to my wife and children shall not be attachable by the diligence of any creditor, and shall be, in so far as descending on females, expressly exclusive of the *jus mariti* and right of administration of any husband they may respectively marry, and shall not be affectable by the deeds or debts of such husband or husbands, or any diligence or execution following thereon. Declaring always that it shall not be in the power of my said trustees or their foresaids to sell or dispose of any part of my heritable estate upon any ground whatever. Providing and declaring that my trustees shall hold my heritable and moveable estate in trust, and after the above provisions are fulfilled apply the proceeds thereof for behoof of the children of my children equally *per stirpes* during their lives, and in the event of my dying without issue my trustees shall divide the whole of my estate amongst my nearest of kin."

Mr Downie was survived by his wife Mrs Isabella Kay or Downie, by two daughters Jemima Downie and Margaret Isabella Downie, both of whom were unmarried at the date of their father's death, and who were still alive and unmarried, by one son John Thomas Downie, who died intestate and unmarried on 15th June 1899, aged 21 years, and by John Downie Adair, the son of a daughter who had died on 4th December 1870. John Downie Adair was born on 3rd June 1864.

Questions having arisen as to the effect of certain provisions in the trust-disposition, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Mrs Downie as trustee; (2) Miss Jemima and Miss Margaret Downie; and (3) Mrs Downie as an individual.

A supplementary case was also presented, the parties to which were (1), (2), and (3) the first, second, and third parties to the principal special case, and (4) John Downie Adair.

The questions-of-law were (in addition to certain questions relating to the disposal of the heritable estate, on which it is unnecessary to enter)—"(4, as amended) Did the fee of the residue vest *a morte testatoris* in the truster's three children then surviving and in the fourth party as coming in place of his deceased mother? or alternatively did the fee of said residue vest *a morte testatoris* in the said three children alone? (5) Does the fee of the residue form intestate succession of the truster? (6, as amended) Does the fee of the residue fall to be held by the first party for behoof of the fourth party and of the truster's other grandchildren *nascituri per stirpes* in fee? (7) In the event of question 4 or 5 being answered in the affirmative, is the first party entitled to retain the capital of the residue in her hands to secure the liferent conferred upon the truster's grandchildren *nascituri*?

The Entail Amendment (Scotland) Act 1868 enacts (section 17)—"It shall be competent to constitute or reserve by means of a trust or otherwise a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the granter . . .) be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such party. . . ."

Argued for the second parties—There was a distinct gift of the fee to the children, and any subsequent destination to the grandchildren was repugnant to the main clause, and could not receive effect—*Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136; *M'Clymont's Executors* v. *Osborne*, February 26, 1895, 22 R. 411; *Mackay's Trustees* v. *Mackay's Trustees*, June 8, 1897; 24 R. 904. On that construction the fourth party could not claim a share under the *conditio si institutus sine liberis decesserit*, because his mother was not one of the class instituted—*Sturrock* v. *Binny*, November 29, 1843, 6 D. 117; *Rhind's Trustees* v. *Leith*, December 5, 1866, 5 Macph. 104; *Morrison's Trustees* v. *Macdonald*, November 24, 1890, 18 R. 181. Any other construction would result, in the event of either of the daughters having children, in a liferent to a person unborn at the date of the deed. Such a liferent was contrary to section 17 of the Entail Amendment Act 1868 (quoted *supra*).

Argued for the fourth party—(1) On a sound construction of the deed the children of the truster took a liferent only, and he as a grandchild was entitled to a liferent also; (2) even if the fee was in the children he was entitled to his mother's share under the *conditio si sine liberis*. The cases cited on the other side were not cases where the truster was a direct ascendent. If he was the *conditio* applied.

At advising—

LORD M'LAREN—This special case is submitted by the parties interested in order to have their rights to the fee of the heritable and moveable estates of the late John Downie judicially ascertained.

The trust settlement of Mr Downie is certainly not a model deed in point of drafting. The parties concur in stating (Art. 5) that its provisions are "contradictory and ambiguous," and I am so far of the same mind that I think it unlikely that our decision will be quoted as a precedent, because there is really nothing to be considered except the interpretation of a somewhat involved and obscure destination of residue.

The testator begins by directing his trustees (after providing for the execution of the six preceding purposes of the trust) to hold the residue of his estate heritable and moveable "in trust for behoof of any children I may have," with a power to make necessary advances during their respective minorities. This looks like a gift of the fee, but the direction is immediately qualified in such a way as to show that nothing more that a life-interest was intended to be given to the testator's immediate descendants. The will proceeds to direct that on the children respectively attaining twenty-one years of age the trustees shall pay to each child the share accruing to him or her of the whole free proceeds of the testator's estate, and that "during all the respective lives of said children." These liferent provisions are then declared to be alimentary, and, in so far as regards the succession of females, to be exclusive of the *jus mariti* and right of administration. Passing over a prohibition against selling the heritable estate, the destination of the residue (including heritable estate) is completed by a trust in terms, which I shall presently consider, in favour of the testator's grandchildren, or as he describes them "the children of my children."

I pause here to notice that there are decided cases where a testator in his scheme of bequest begins as Mr Downie has done by announcing a general intention in favour of his children, and then proceeds to impose restrictions or to give directions designed to secure an income for life to the children. In such a case, where there is either no subsequent destination of the fee, or where the parties instituted have failed, it may be that the original gift or expression of intention to benefit the children has such force as to operate as a gift of the fee to the children notwithstanding the subsequent direction to pay the income of their shares to them for life. But I know of no case where such a construction has been put upon general words leading up to a special destination, whereby trustees were directed to pay the income of the estate to children for life and after their death to hold the estate for the benefit of grandchildren.

In the present case we could not give effect to the claim of the second parties (the testator's children) to the fee without nullifying the subsequent provision in favour of his grandchildren. It is true that these grandchildren are not named in the will. But there is a trust to hold the residue for their benefit, and this, according to a very well established rule, is equivalent to a declaration that the right of the parents is a liferent use allenarly, and so there is no legal obstacle to carrying out the truster's intention that his children's children were to enjoy the estate after the termination of the life interests of his immediate issue. I must add that I see no reason for drawing a distinction between the heritable and the moveable estates in this connection. The heritable estate consists of houses which are made the subjects of separate special bequests or provisions for life in favour of the testator's wife and children; the expression used in each case being that the trustees "shall allow" the grantee the liferent use of the particular subject. The moveable property, as I have stated, is to be enjoyed by the children for life in equal shares. One of these shares has lapsed by the death of the testator's son, and it is clear that during the joint continuance of the lives of the testator's daughters the income and usufruct of the remaining two-thirds of the property, heritable and moveable, is completely disposed of. But again, when the testator comes to deal with the interests of grandchildren it is the "heritable and moveable estate" that is made over in trust for their benefit, the whole estate being massed together as a general residue.

I pass now to the consideration of the nature of the interest taken by the testator's grandchildren under the will. The testator's direction is that the trustees shall hold the heritable and moveable estate in trust, and (after the preceding purposes are fulfilled) "apply the proceeds thereof for behoof of the children of my children equally *per stirpes* during their lives." There is no express disposal of the fee except in the event (which did not happen) of the testator dying without leaving issue, in which case it is given to his nearest of kin.

I see no reason for putting a special construction on the words which I have just quoted. The interests given to the grandchildren are expressly limited to the duration of their lives, and in the absence of any further declaration of the testator's intention, the members of the class can take no higher interests than life interests under the will. The surviving descendants of the testator are two unmarried daughters and a grandson, son of a daughter who died before the date of the will, who is the claimant under the supplementary case.

In the event of the daughters marrying and leaving issue, their children (being born after the date of the settlement) would apparently be entitled under the Entail Amendment Act 1868, sec. 17, to demand a conveyance of the fee from the trustees. But it would be premature to offer a judicial opinion on this point, and in the mean time we can only treat the prospective interests of such non-existing persons as a right of liferent in terms of the will.

The question as to the rights of John Downie Adair, the grandson, is simplified by the consideration that there is in my opinion no immediate disposal of the fee, and that the class described as "the children of my children" take under the will a liferent in succession of the whole estate. Now, it seems to me not to be open to doubt that Mr Adair is a member of the class. At present he is the only member of the class. If the provision were that the liferent interest of each child who is instituted was to pass to his or her descendants, I do not think that Mr Adair would be entitled to participate, because his mother had died before the date of Mr Downie's will, and therefore was not one of the per-

sons instituted beneficiaries. But the gift is not so expressed; it is an independent gift to all the testator's grandchidren of the liferent use of the residue of his estate as it should arise; and in my opinion it follows that on the death of one of the children the heritable and moveable estate enjoyed by him or her would pass to the grandchildren collectively. The testator no doubt adds the words *per stirpes;* but these words only regulate the mode of enjoyment of the estate by the grandchildren *inter se.* For example, if one of the surviving children should leave two or more children and the other remain unmarried, the daughter's children would take one-half of the vacant share among them, and Mr Adair would take the other half.

Collecting these results, it follows, in my opinion, that we should answer the first question in the affirmative. It is then unnecessary to answer the second question. The third question will be answered in the negative, the fourth question (as amended) also in the negative. I do not think we can give any answer to the fifth question, because we do not at present know how the fee may be affected by the Entail Amendment Act 1868. In answer to the sixth question (as amended) and the seventh question, we may find that on the death of each of the liferenters the share liferented falls to be held by the first party as trustee in terms of the will for behoof of the fourth party, and for any other grandchildren of the trustee who may come into existence *per stirpes* in liferent, but subject as regards *nascituri* to such claim as may be competent to them under the provisions of the Entail Amendment Act 1868.

The LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR not having been present at the hearing gave no opinion.

The Court answered the questions in the case in accordance with LORD M'LAREN'S opinion.

Counsel for the First Party — W. J. Robertson. Agents—Nisbet & Mathieson, S.S.C.

Counsel for the Second Party — C. D. Murray. Agents — Campbell & Smith, S.S.C.

Counsel for the Third Party — Taylor Cameron. Agents—Nisbet & Mathieson, S.S.C.

Counsel for the Fourth Party—Fleming. Agents—Guild & Guild, W.S.

Thursday, July 4.

SECOND DIVISION.

STILLIE'S TESTAMENTARY TRUSTEES *v.* STILLIE'S MARRIAGE-CONTRACT TRUSTEES.

Husband and Wife—Marriage-Contract—Annuity Provided to Wife by Marriage-Contract—Larger Alimentary Annuity Provided by Husband in Will to be in Satisfaction of Marriage-Contract Annuity—Power of Wife to Discharge Marriage-Contract Annuity—Denuding—Succession—Trust.

By antenuptial contract of marriage, to which the husband and wife alone were parties, the husband bound himself to provide for his widow an annuity of £100 during all the days and years of her life, but in the event of the widow entering into a second marriage it was provided that the annuity should be restricted to £50, and that this restricted annuity should be alimentary and not affectable by her debts or deeds or the debts or deeds of her husband. By his trust-disposition and settlement the husband directed his trustees to pay his widow an annuity of £360, restrictable in the event of a second marriage to £120, and this annuity, both original and restricted, was declared to be purely alimentary, and to be in place and in full satisfaction of the provision conferred on the wife by the marriage-contract.

The husband died survived by his wife and leaving no issue. After his death the funds in the hands of his testamentary trustees were insufficient to afford payment to the widow of the annuity of £360, and the funds contributed by him to the marriage trust and in the hands of the marriage-contract trustees were more than sufficient to meet the annuity of £100.

Held that the marriage-contract trustees were bound, with consent of the widow, to hand over the funds in their hands to the testamentary trustees, so that payment of the larger annuity might be made to the widow.

Elliott's Trustees v. *Elliott,* July 13, 1894, 21 R. 975, *distinguished.*

By antenuptial contract of marriage dated 30th June 1857 between Thomas Logan Stillie and Ann Bell, Mr Stillie bound and obliged himself and his heirs, executors, and successors "to content and pay to the said Ann Bell, his promised spouse, in case she survives him a free yearly jointure or an annuity of £100 sterling during all the days and years of her life she shall survive the said Thomas Logan Stillie, restrictable in the event after mentioned, payable half-yearly at two terms in the year, Whitsunday and Martinmas, by equal portions, in advance, commencing the first term's payment at the first term of Whitsunday or Martinmas next ensuing after the said Thomas Logan Stillie's death for the half-