chooses to submit himself for examination the weekly payments fall to be suspended as long as he refuses, and I should therefore answer the second question in the affirmative.

As to the first question, I am of opinion, for reasons which I stated, that it is not open to the appellant to initiate an arbitration process under the 12th section, but assuming that he is, I am of opinion that he should not be allowed to proceed with it until he submits himself for examination to the official medical referee.

The Court answered the two questions of law in the affirmative, and dismissed the appeal.

Counsel for the Claimant and Appellant —Watt, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents- Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Wednesday, July 8.

SECOND DIVISION.

M'KAY'S TRUSTEES *v.* GRAY.

Succession — Vesting — Express Provision as to Vesting—Respective Terms of Payment—Testament—Construction.

A testator directed his trustees to pay over to his wife, so long as she remained his widow, the income of his whole estate. He further directed that his trustees, in the event of his wife predeceasing him, or in the event of her entering into a second marriage, or on her death, in the event of h-r surviving him, should as soon as convenient, after whichever of these events should happen first, realise his estate and pay and make over the residue and remainder thereof to and among his whole children who should survive him, excluding one, equally among them, share and share alike, and that in the case of sons as they respectively attained majority, and in the case of daughters as they respectively attained majority or were married, whichever of these events should happen first, but "the said shares of said residue shall not vest until the respective terms of payment." It was also declared that if any child should die either before or after the testator leaving lawful issue, and without having acquired a vested interest in the said provision, such issue should be entitled to the share which their parent would have taken by survivance, and that the share of any child dying without leaving lawful issue should be divided among the surviving children and the lawful issue of such children as might have died leaving such issue, in equal shares, *per stirpes.*

Held that the period at which a share of the testator's estate vested in the children who survived the testator was the date at which each of them in the case of sons respectively attained majority, and in the case of daughters attained majority or were married, and that the date of vesting was not postponed till the death of the testator's widow.

Daniel M'Kay, builder, Edinburgh, died on 11th June 1890 leaving a trust-disposition and settlement dated 20th February 1885, by which he conveyed his whole estate to trustees.

By the third purpose the testator directed his trustees to pay the income and produce of his whole estate to Mrs Rebecca Trayner or M'Kay, his wife, while she remained his widow.

The fourth purpose was in the following terms:—"In the event of my wife predeceasing me, or in the event of her entering into a second marriage, or on her death, in the event of her surviving me, my trustees shall as soon as convenient, after whichever of these events shall first happen, realise the whole of my means and estate, heritable and moveable, with the exception of the tenement of houses to be conveyed to my daughter Margaret Morrison M'Kay as aforesaid, and shall make payment to my son John M'Kay, whom failing to his lawful children, equally among them, of the sum of £20 sterling, and shall pay and make over the residue and remainder of my said means and estate to and among the whole of my children who may survive me, excluding the said John M'Kay, but including the said Margaret Morrison M'Kay, equally among them, share and share alike, and that in the case of sons as they respectively attain majority, and in the case of daughters as they respectively attain majority or are married, whichever of these events shall first happen, but the said shares of said residue shall not vest until the respective terms of payment: But it is hereby declared that if any child shall die either before or after me leaving lawful issue, and without having acquired a vested interest in said provision, such issue shall be entitled to the share which their parent would have taken by survivance, and the share of any child dying without leaving lawful issue shall be divided among the surviving children and the lawful issue of such children as may have died leaving such issue, in equal shares, *per stirpes.*"

The testator was survived by his wife. She died on 25th March 1900.

The testator was also survived by eight children. One of these, Joseph M'Kay, died on 3rd March 1898 after attaining majority but without leaving issue. He left a will bequeathing all his property to the children of his sister Mrs Henrietta Mackay or Gray.

A question arose as to whether a share in the residue of the testator's estate vested in Joseph M'Kay in view of the fact that he died before the termination of the widow's liferent.

For the settlement of this question a special case was presented for the opinion and judgment of the Court.

The parties to the case were (1) Daniel

M'Kay's trustees; (2) the three children of Mrs Henrietta M'Kay or Gray, and William Gray, their father, as their tutor and curator, and (3) the children and issue of the children of the testator other than John M'Kay and Joseph M'Kay.

The questions of law were—"(1) Did the right to a one-seventh share of the residue of the testator's estate vest in the said Joseph M'Kay? or (2) Does the whole residue fall to be divided between the children of the testator who survived the expiry of the widow's liferent, and the issue of such as predeceased leaving issue, *per stirpes*."

Argued for the second parties—A one-seventh share of the residue of the testator's estate vested in Joseph M'Kay. "The respective terms" of payment in clause 4 of the deed meant the dates on which the sons attained majority and the daughters attained majority or married. The events mentioned at the commencement of the clause could not be "respective," as the estate was to be realised and divided on the first of these which occurred. When Joseph M'Kay attained majority a share of the testator's estate vested in him — *Carruthers' Trustee* v. *Eeles*, February 1, 1894, 21 R. 492, 31 S.L.R. 352. This share had passed to the second parties under Joseph M'Kay's will.

Argued for the third parties—No share of the residue had vested in Joseph M'Kay in consequence of his having predeceased the expiry of his mother's liferent. This period being the term of payment of the residue was the term of vesting fixed by the deed. Accordingly the residue fell to be divided into six equal shares, payable respectively to the children of the testator who survived the said period and the issue of such as predeceased *per stirpes*. The latter part of clause 4 favoured this construction, as it showed that a child might attain majority and leave children without the provision having vested.

At advising—

LORD TRAYNER—The truster here directed his trustees in a certain event to realise his estate and pay it over "to and among the whole of my children who may survive me," share and share alike, as regards sons on their attaining majority, and in the case of daughters on majority or marriage, but it was added "the said shares of residue shall not vest until the respective terms of payment." The present case has reference to the share of residue falling to Joseph M'Kay, one of the truster's sons, who having attained majority (as is admitted although not stated in the case) survived the truster but predeceased his mother, who had a liferent of the whole estate. It is maintained by the third parties that no share vested in Joseph, because he had not survived the term of payment, which they maintain could not arrive before the death of the liferenter—the words "until the respective terms of payment" in the clause above quoted being (according to their contention) the events on the occurrence of which the trustees were directed to realise and pay. These events are, in the opening words of the clause, "the event of my wife predeceasing me, or in the event of her entering into a second marriage, or on her death in the event of her surviving me." I think these are not the "respective terms of payment" on the arrival of which alone the shares were to vest. The opening words of the clause do not refer to "respective terms" of payment at all in my opinion. They represent one event—which might be brought about in different ways—but the one event was the cessation of the liferent. No realisation or division was to take place so long as the liferent right existed—but the shares were to vest on the majority or marriage of the children. The majority or marriage were the "respective terms of payment" to sons and daughters respectively. I think therefore Joseph's share vested in him on his attaining majority, although he could not then obtain payment, the liferent right being still existing. The truster also provides that in the case of children dying before or after him without having acquired a vested right, leaving issue, such issue should take the parent's share, but this clause cannot affect the question before us if Joseph had acquired a vested right before his death. Nor do I think the case affected by the subsequent provision that if any child died without issue his share should go to his surviving brothers and sisters or the issue of a predeceasing brother or sister. That clause I think could only come into effect if a child with a vested interest died without disposing of his share—a share which would have fallen into intestacy but for this survivorship clause. But Joseph having, as I have said, a vested interest, disposed of it by his will, and under it I think the second parties take that share. I would therefore answer the first question in the affirmative.

LORD MONCREIFF—The words which we have to construe are, "the said shares of said residue shall not vest until the respective terms of payment." The second parties maintain that "the respective terms of payment" are the attainment of majority, or of marriage in the case of daughters, if the daughters are married before they attain majority. The third parties on the other hand maintain that the words refer to the death or second marriage of the widow of the testator.

I think that the former construction is the more natural. If the construction contended for by the third parties were adopted, if the truster's widow had entered into a second marriage, the shares of residue would have not only vested but would have become immediately payable to the truster's children although they or some of them might have been in pupilarity or minority.

But I apprehend that the intention of the truster in postponing vesting until the majority or marriage of his children was to ensure that before their shares vested in them and became assignable they should have reached years of discretion. Accordingly he provides that although they might

have survived him, and the death or second marriage of his widow, the shares destined to them should not vest in them until their majority or marriage, which in the case supposed of their having survived both the truster and the widow, or the second marriage of the widow, would be the dates of payment of their respective shares.

Accordingly when the truster provides that the said shares of residue shall not vest "until the respective terms of payment," I think he is necessarily referring to the terms immediately before mentioned, viz., the majority or marriage of the children. Again, the words "respective terms of payment" are scarcely applicable to the death or second marriage of the widow, either of which events would (on the third parties' contention) determine vesting in all the children. On the other hand the dates of the majority or marriage of the children "respectively" are different.

The survivorship clause does not affect the question; it relates to shares which have not vested.

I am therefore of opinion that the first alternative question should be answered in the affirmative.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court answered the first question of law in the affirmative, and found and declared accordingly, and decerned.

Counsel for the First and Second Parties—Cullen—Macmillan. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Third Parties—Wilson, K.C.—M. P. Fraser. Agents—Patrick & James, S.S.C.

Friday, July 10.

SECOND DIVISION.

HOWE'S TRUSTEES *v.* HOWE'S JUDICIAL FACTOR.

Succession—Liferent or Fee—Liferent with Power of Disposal of Fee—Exercise of Power Necessary to Create Right of Fee—Power not Exercised—Destination-over—Vesting—"Heirs whomsoever"—Period at which Heirs to be Ascertained.

By antenuptial contract of marriage a husband disponed and assigned the whole estate which might belong to him at his death to his wife in liferent and to the children of the marriage, and failing children to his heirs whomsoever in fee, with power to the wife to apply for her personal comfort, or for the maintenance and education of the children, part or even the whole of the fee, and also with power to her, in the case of failure of children, to test upon or execute conveyances *inter vivos* or settlements *mortis causa* of the estate, so as to sopite the destination to the husband's heirs whomsoever, but in case these powers were not exercised the estate, or the residue thereof, at her death should devolve upon the heirs as before provided as if the above powers had not been given.

The husband died without issue survived by his wife. Five years afterwards the wife died without exercising any of the powers conferred on her by the marriage-contract.

Held that the wife had only a right of liferent, with power to convert it into a fee, and that as she had not exercised that power the fee had vested in the person who was the husband's heir whomsoever as at the date of his death.

By antenuptial contract of marriage, dated 19th August 1856, the late Alexander Hamilton Howe, surgeon, disponed, assigned, and conveyed his whole estate, heritable and moveable, then belonging to him or which might belong to him at his death, to Anne Forbes Robertson, his wife, "in liferent in case she survives him, and to the child or children to be procreated of the said intended marriage, and failing such child or children by non-existence, or predecease of the liferentrix, but without prejudice to the powers afterwards conferred on the said Ann Forbes Robertson, to the heirs whomsoever of the said Alexander Hamilton Howe in fee, but with power to the said Ann Forbes Robertson in case she may desire the same for her own personal comfort or for the maintenance and education of such child or children of the marriage, or the promotion of their prospects in life, to use and apply for these purposes such part or even the whole (as she may see needful and proper) of the fee or capital of the said Alexander Hamilton Howe's means and estates before conveyed, and that by the purchase of an annuity or annuities or otherwise as she may approve, and also with power to her in case of the failure of children to test upon or execute conveyances *inter vivos* or settlements *mortis causa* of the said means and estate, or the reversion thereof, so as to sopite the above destination to the heirs whomsoever of the said Alexander Hamilton Howe, but in case these powers be not exercised then said means and estate, or the residue thereof at her death, shall devolve upon the heirs of the said Alexander Hamilton Howe as before provided, and as if the above power of testing or conveying *inter vivos* or *mortis causa* had not been given; and for conferring on the said Ann Forbes Robertson these ample powers the said Alexander Hamilton Howe dispones and conveys to her primarily, in trust for the foresaid purposes, the fee of the said heritable and moveable property belonging and which may belong to him at his death, and binds and obliges his heirs to execute in her favour all deeds and conveyances necessary."

Dr Howe died without issue on 25th July 1895 leaving estate worth between £6000 and £7000. He was survived by his wife, who died on 6th December 1900.