rise upon the terms of the deed, and it is narrowed down to this small matter—What is the meaning of the words "payable as at my death?"

The testator gives £10,000 to each of his children, and declares that each sum "shall be payable as at my death," then he gives directions that the legacies shall not vest until the period of payment arrives, and that period is not to arrive until the legatee has attained the age of twenty-one, or, in the case of a female, has been married.

Now, the contention for the third party is, that these words to which I have referred have no practical application at all. According to all sound rules of construction when the testator uses words in his settlement by which he gives directions as to the disposal of his estate we must give a reasonable interpretation and effect to them if possible. Can such a reasonable interpretation be given?

As Lord Young pointed out in the course of the debate, the words used are the same as if the testator had used the words "shall be payable as at 9th August 1880," which happened to be the date of the testator's death. In endeavouring to find out the meaning of the words I think it is most important to take them in their ordinary sense. If that is done the words mean that this £10,000 is to be received by the legatee as at 9th August 1880, and as the period of payment is postponed the only way in which that can be done is to receive the sum with the interest which has accumulated. In construing this clause I think it is quite fair to consider the same words where they occur in other places in the same deed. They occur in two other places in connection with other purposes, and in both these places it is plain that they were inserted for the purpose of making interest run upon the principal sum from the date of the testator's death. That is quite consistent with this clause, and confirms me in the opinion I have come to that I am not straining the meaning of the words when I construe them as I have done. I wish further to say that in going through the deed to see if there are any provisions inconsistent with that view, I did not find any such.

Lord Young—I am of the same opinion. No question of vesting is raised here, although no doubt there might have been some such question raised.

I think, therefore, there is sufficient for our decision in the words "payable as at my death." Now these are familiar words, and there is no doubt of their meaning, and when Mr Dickson was pressed he admitted that he must rely on maintaining that these words were superfluous and had no meaning.

I do not think there is any difficulty in the question. A legacy which was payable as at the date of the death of the testator may never come to be payable at all. It may lapse by the death of the legatee, or there may be some contingency so that it may never be paid, but if the legatee survives the date and the contingency is purified, the legacy must be paid as at the date of the testator's death, and the meaning of that is that interest must be paid upon it from the date of the death.

Lord Rutherfurd Clark—I agree. I think that on the construction of these words there is no difficulty. It seems to me that the direction that the legacy is to be payable as at the date of the testator's death is conclusive.

Lord Trayner concurred.

The Court answered the question in the affirmative.

Counsel for the First and Second Parties—Jameson—H. Johnston—C. K. Mackenzie. Agents—T. & R. B. Ranken, W.S.

Counsel for the Third Parties—C. S. Dickson—Salvesen. Agent—C. E. Loudon, W.S.

Friday, June 12.

FIRST DIVISION.

WALLACE'S TRUSTEES *v.* WALLACE AND OTHERS.

Succession — Marriage-Contract — Provisions to Children — Faculty—Power of Appointment.

By marriage-contract a husband and wife each conveyed a sum of £5000 to trustees, directing them on the death of the survivor of the spouses to pay over the said principal sums "to or for the behoof" of the surviving children of the marriage, and the issue of predeceasers, "in such shares and proportions, and subject to such conditions, provisions, and limitations" as the spouses should appoint by any writing under their hand, and failing such appointment, equally among them, the shares of the sons to be payable on majority, and of the daughters on majority or marriage.

The spouses afterwards executed a mutual trust-disposition and settlement, wherein, after expressing their desire to exercise the power reserved to them in the marriage-contract, they conveyed their whole estate, including the sums conveyed in the marriage-contract, to trustees, directing them to pay a sum of £50 to any child who might have succeeded to the estate of L, and to hold the residue of the estate for the children who might survive them, and the issue of predeceasers, excluding any child who might have succeeded to L, in equal shares; to pay the annual income to or for behoof of their said children equally; to settle an equal share on each daughter on her marriage, for her sole and exclusive use during marriage, so that the same should be held by trustees for her behoof, exclusive of her husband's *jus mariti* and right of administration,

with power to her to test on the fee of the same, and failing her doing so, to convey the same to her heirs and executors, and in the case of any daughter who should not marry, to pay the fee of her share according to any testamentary directions she might have, and in the absence of such directions, to pay the same to her heirs or executors. The trustees were further directed, on paying a son's share, or settling a daughter's, to take said son, or the trustees for said daughter, bound to repay the same in the event of such son or daughter succeeding to the estate of L.

At the death of the survivor of the spouses none of the children had succeeded to L.

Held (1)—following *Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14—that the direction in the trust-disposition and settlement that the daughters' shares should be held by trustees for their behoof was a valid exercise of the power of appointment reserved to the spouses in the marriage-contract; (2) that the direction to the trustees under the later deed to take each beneficiary bound to repay his share in the event of his succeeding to the estate of L was *ultra vires* of the spouses and ineffectual; but (3) that the invalidity of this latter direction did not affect the validity of the exercise of the power of the appointment in other respects.

Question by Lord M'Laren, Whether spouses, in exercising a power of appointment among their children reserved to them in their marriage-contract, can validly prescribe a course of descent in the event of a child not testing on his share.

Robert Agnew Wallace and Jane Colquhoun Bell entered into an antenuptial contract of marriage on 25th August 1859. By said deed Robert Agnew Wallace and Jane Colquhoun Bell each conveyed a sum of £5000 to Sir William Agnew Wallace of Lochryan, and others, as trustees, for the purposes therein set forth. In each case the trustees were directed to pay the liferent of the sums conveyed to the party who had conveyed them during his or her life, and after his or her death to the survivor of the spouses. With regard to the disposal of the capital of said trust funds, the trustees were directed, after the decease of the survivor of the spouses, to "pay over the said capital to or for the behoof of the surviving child or children who may be procreated of the said intended marriage, and of the issue of any child or children who may have predeceased the said intended spouses, leaving issue, in such shares or proportions, and subject to such conditions, provisions, and limitations as the said promised spouses, during their joint lives, and failing either of them, as the survivor shall appoint by any writing under their, his, or her hand, and failing such appointment, equally amongst them, share and share alike (such issue succeeding always only to the shares to which their parents would have been entitled had they been in life), and the shares of the sons to be payable upon their attaining majority, and of the daughters upon their attaining majority or being married, whichever of these events shall first happen." With regard to both sums power was given to the trustees, on the acquisition and discharge of any tutors and curators appointed to any of the issue of the marriage, to advance the share to which any of the issue should at the time have succeeded, or part thereof, for the outfit and advancement in life of such issue. With regard to the sum of £5000 conveyed by Robert Agnew Wallace, the deed further provided that in the event of the marriage being dissolved by the death of Jane Colquhoun Bell without issue then surviving, or if there should be issue at her death, which should fail during the life of Robert Agnew Wallace, the trustees should pay said sum to Robert Agnew Wallace, his heirs and assignees. The provisions in favour of the children of the marriage were also declared to be in full satisfaction of legitim and everything else they could claim through the decease of their father. With regard to the £5000 conveyed by Jane Colquhoun Bell, it was provided that in the event of there being no issue surviving at her death, or of any issue that there might be dying before the terms of payment, the trustees should pay the same to and in favour of such persons as she might direct by any writing under her hand, and failing such writing to her executors and nearest of kin.

On 21st December 1878 Mr and Mrs Wallace executed a mutual trust-disposition and settlement. By said deed Mr Wallace disponed his whole estate to his wife in liferent for her liferent use allenarly, and Mrs Wallace in like manner disponed her whole estate to her husband in liferent. After reciting part of the marriage-contract the deed then proceeded to state that the spouses were desirous of exercising the powers conferred on them in the said contract of marriage with regard to the disposal of the fee of the sums thereby conveyed, and likewise of providing for the disposal of the fee of their whole other estate and effects, and that they therefore disponed to certain trustees their whole estate and effect of every description at present belonging to them or that should belong to them and the survivor at their respective deaths, including the whole sums conveyed by their contract of marriage in so far as any right had been reserved to them therein, *inter alia*, for the following purposes:—In the first place, for payment of debts, deathbed and funeral expenses, and the expenses of the trust. . . . Thirdly, in the event of any of their children having succeeded to the estate of Lochryan, for the purpose of paying to such child £50, as in full of all claims which he or she could make against the spouses either under the contract of marriage or in name of legitim. "Fourthly, To hold the whole residue of our estate and effects, including therein the

several sums conveyed by the foresaid contract of marriage, and over which we have a power of appointment for behoof of the children of our marriage who may survive us, and the lawful issue of any who may predecease us, such issue taking the place of their parent, and succeeding to his or her share, but excluding always that one of our children who may have succeeded to the estate of Lochryan; and that in equal shares and proportions. . . . And we direct the said trustees to pay to, or apply for behoof of our said children, the whole free annual income of our several estates, and that equally amongst them, share and share alike, and on the arrival of our sons at majority respectively, to pay or assign to each of them an equal share of our several estates; and on the marriage of our daughters respectively, to settle and secure on each daughter, for her sole and exclusive use during her marriage, an equal share of our several estates, so that the same shall be held by trustees for her behoof, exclusive always of the *jus mariti* and right of administration, or other right whatever of her husband, with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, the same shall be paid, assigned, or conveyed to her heirs and executors. . . . And in regard to the disposal of the fee of the shares of any of our said daughters who may not marry, we direct the said trustees to pay, assign, or dispone the same according to the directions which each such daughter may leave by any testamentary deed; and failing the execution of such deed, to pay, assign, or convey the same to her heirs and executors: And we further direct the said trustees, on making payment of a share of our said estates to a son, or on settling a share for behoof of a daughter, to take the said son, or the trustees for behoof of such daughter, bound to repay the same, but without the addition of interest, and so that the same may form an addition to the funds available for division among our other children, in the event of such son or daughter succeeding to the said estate of Lochryan."

Robert Agnew Wallace died on 8th June 1887, and Mrs Jane Colquhoun Bell or Wallace on 4th April 1890. They were survived by two sons and seven daughters, none of whom at the date of Mrs Wallace's death had succeeded to the estate of Lochryan. After Mrs Wallace's death questions arose with regard to the administration of the estate which had belonged to the spouses so far as the same was conveyed in their marriage-contract, and a special case was presented in order to obtain the opinion of the Court, *inter alia*, on the following questions:—(1) Are the first parties bound to hand over to the second parties, to be administered in terms of said trust-disposition and settlement, the sum of £5000 conveyed by Robert Agnew Wallace in the said marriage-contract, and the sum of £5000 conveyed by Mrs Jane Colquhoun Bell or Wallace in the said deed? 2) In the provision in the said trust-disposition and settlement directing the trustees on making payment of a share of the deceased's estate to a son, or settling a share for behoof of a daughter, to take the said son, or the trustees for behoof of such daughter, bound to repay the same in the event of such son or daughter succeeding to the estate of Lochryan, a condition which the spouses were entitled to adject to the appointment exercised by them under the powers reserved in the said contract of marriage, and ought it to receive effect? (3) Are the provisions in the said trust-disposition and settlement as regards the shares of the deceased's estates, destined by the said marriage-contract to the fourth parties, a valid exercise of the powers reserved to the spouses in the said contract of marriage, and ought they to receive effect?

The parties to the case were—(1) The trustees under Mr and Mrs Wallace's marriage-contract; (2) the trustees under their mutual trust-disposition and settlement; (3) the sons, and (4) the daughters of Mr and Mrs Wallace.

The first parties maintained that they were bound to retain the two sums of £5000 already mentioned, and to administer the same in accordance with the provisions of the marriage-contract, and such of the provisions of the trust-disposition and settlement, if any, as the Court might find applicable thereto. On the other hand the second parties maintained that the first parties were bound to hand over the said sums to them, to be administered by them under the trust-disposition and settlement.

The third and fourth parties further maintained that the provisions contained in the trust-disposition and settlement to the effect that, in the event of none of the third and fourth parties having succeeded to the estate of Lochryan at the time when the division of the said sums of £5000 took place, each of said parties should come under an obligation to repay his or her share of said sums on thereafter succeeding to the said estate, subject only to a right to retain a sum of £50, were inept and ineffectual. The second parties, on the other hand, maintained that the said provisions must receive effect.

The fourth parties further maintained that they were entitled to payment of their shares of said two sums of £5000 upon their attaining majority or being married, whichever of these events should first happen. The second parties on the other hand maintained that they were entitled to retain said shares and settle them on the marriage of each of the fourth parties in accordance with the provisions of the trust-disposition and settlement.

Argued for the first, third, and fourth parties—1. *On the Lochryan question.*—There was no case in which a provision of this kind, directing trustees to impose an obligation on beneficiaries to repay their share of a trust-estate on the occurrence of a certain event subsequent to their succession, had received effect. 2. *On the limitation of the daughters' rights.*—No doubt the spouses had received a power of ap-

pointment and of imposing limitations and conditions, but the limitation imposed must be of the nature of the right given. In the marriage-contract the trustees were directed to "pay to or for behoof of" the children, *i.e.*, to pay to such as were capable of giving a valid discharge, and for behoof of such as were minors and pupils. The right given in the marriage-contract was a right to a share of the fee, but in the case of the daughters this right was restricted by the trust-disposition to one of liferent with a power of testing on the fee. That was not a proper exercise of the power of appointment reserved to the spouses—*Gillon's Trustees* v. *Gillon, &c.*, February 8, 1890, 17 R. 435; *Baikie's Trustees* v. *Oxley*, February 24, 1862, 24 D. 589; *Moir's Trustees*, June 17, 1871, 9 Macph. 848; *Munro* v. *Munro*, February 13, 1810, F.C.

Argued for the second parties—1. *On the Lochryan question.*—The condition imposed was within the reserved power of appointment. No condition was imposed except with regard to the trust-funds, the true construction being that the share of the truster's estate was given on the condition of the recipient not taking the estate of Lochryan—*Bonhotes* v. *Mitchell's Trustees*, May 27, 1885, 12 R. 984. 2. *On the limitation of the daughters' rights.*—The spouses had validly exercised the power of appointment reserved to them. The marriage-contract did not contain a gift of the fee to the children, but a direction to the trustees on the occurrence of a certain event to pay to or for behoof of the surviving children and the issue of predeceasers. The case accordingly fell within the principle of the case of *Bryson's Trustees* v. *Clark, &c.*, November 26, 1880, 8 R. 142. The direction further was to pay subject to any limitations which the spouses might impose, and the use of the term limitation covered the creation of a trust—*Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14; *Carver* v. *Bowles*, 1831, 2 Russell & Mylne, 201.

At advising—

LORD ADAM—By antenuptial marriage-contract dated in 1859, Robert Agnew Wallace bound himself to pay to the trustees under the contract a sum of £5000, to be invested in their names, and the interest to be paid to him, and if he died survived by his wife, to her. Then comes this clause—"(2) Upon the death of the survivor of the spouses the trustees were directed to pay over the said principal sum to or for the behoof of the surviving child or children of the said intended marriage, and the issue of any of them who might have died leaving issue, in such shares or proportions, and subject to such conditions, provisions, and limitations as the said promised spouses during their joint lives, and failing either of them, as the survivor of them, should appoint by any writing under their, his, or her hand, and failing such appointment, equally among them share and share alike (such issue succeeding always only to the shares to which their parents would have been entitled had they been in life), at the periods and under the same powers of advance as were provided in regard to the disposal of the first sum of £5000 thereinafter assigned by the said Jane Colquhoun Bell to the said trustees." I do not require to quote any other portions of the deed in regard to that sum of £5000. The reference to the provision dealing with the £5000 which was assigned by Mrs Wallace is to the following clause in the subsequent part of the deed—"*Quarto*, With regard to the disposal of the capital or principal of the said trust funds, after the decease of the survivor of the said intended spouses, and of the free interest or annual proceeds to accrue thereon after that event till the arrival of the terms of payment after specified, the said trustees or trustee acting for the time shall pay over the said capital to the extent of £5000 sterling, and interest thereof, to or for the behoof of the surviving child or children who may be procreated of the said intended marriage, and of the issue of any child or children who may have predeceased the said intended spouses, leaving issue, in such shares or proportions, and subject to such conditions, provisions, and limitations as the said promised spouses during their joint lives, and failing either of them, as the survivor shall appoint, by any writing under their, his, or her hand, and failing such appointment, equally amongst them share and share alike (such issue succeeding always only to the shares to which their parents would have been entitled had they been in life)." So far the two clauses appear to me to be expressed in identical terms. Then it is declared that the shares of the sons are to be paid on their attaining majority, and those of the daughters on their attaining majority or being married, whichever event shall first happen. In this respect also the two clauses are identical. Then there is a power given to the trustees to make advances to the minor children. The question we have now to consider is, whether the power of appointment which the father and mother reserved to themselves has been well exercised in the mutual trust-deed and settlement which was executed by the spouses?

The only clause in that deed to which I need to refer is that which is called the fourth purpose of the trust. The power is exercised in such a way as to direct equal division among the children who are the objects of the bounty. The whole residue is to be divided among them "in equal shares and proportions, excluding always that one of our children who may have succeeded to the estate of Lochryan." That being a contingency which has never occurred, the gift is to the children of the spouses and "to the lawful issue of any who may predecease us" all in terms of the power. So far there is no question. But then follow certain conditions and limitations. In the first place, there is a power to the trustees to deduct the amount of any advances to the children about which no question has arisen. Neither is there any question about the shares to be paid to the sons. But a question has arisen in regard to the next clause, which is as

follows:—"And on the marriage of our daughters respectively, to settle and secure on each daughter, for her sole and exclusive use during her marriage, an equal share of our several estates, so that the same shall be held by trustees for her behoof, exclusive always of the *jus mariti* and right of administration, or other right whatever of her husband, with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, the same shall be paid, assigned, or conveyed to her heirs and executors." There is a further provision in regard to the shares belonging to the unmarried daughter—"And in regard to the disposal of the fee of the shares of any of our said daughters who may not marry, we direct the said trustees to pay, assign, or dispone the same according to the directions which each such daughter may leave by any testamentary deed." The question is, whether these conditions are or are not *ultra vires* of the husband and wife?

It appears to me that if the question had not been concluded by decision it would have been open to argument. But I am of opinion that it is impossible to distinguish the case of *Lennock's Trustees* from the present. The matter arose there for decision in exactly similar circumstances. The conditions and limitations of the power were expressed in precisely the same way. I therefore think the case of *Lennock's Trustees* is conclusive, and accordingly that the appointment is a good one.

The clause on which the second question arises is — "And we further direct the said trustees on making payment of a share of our said estates to a son, or on settling a share for behoof of a daughter, to take the said son or the trustees for behoof of such daughter bound to repay the same, but without the addition of interest, and so that the same may form an addition to the funds available for division among our other children, in the event of such son or daughter succeeding to the said estate of Lochryan." I do not very well see how that could ever become an operative condition. It appears to me to be quite ineffectual and *ultra vires*. But assuming that it is not so, I think the law is clear; it is laid down as follows in Sugden upon Powers, p. 526, "Where conditions are annexed to the gift, not authorised by the power, the gift is good, and the condition only is void, so that the appointee takes the fund absolutely. Holding the condition to be void, I think it has no effect upon the appointment in other respects.

LORD M'LAREN—The most important of the questions we are asked to answer in this case relates to the exercise by the spouses of the powers reserved to them in the clause of the antenuptial marriage-contract dealing with their children's provisions. They reserve to themselves a qualified power of distribution. The children's provisions are to be paid to them by the trustees upon the death of the survivor of the spouses, "in such shares or proportions, and subject to such conditions, provisions, and limitations" as the spouses or the survivor of them should appoint. There is a decision of the Second Division of the Court, which is directly in point. The powers in that case—*Lennock's Trustees* v. *Lennock*—and in the deed before us, are expressed in identical terms, and the powers were executed in substantially the same way. The Court there held that the power was well exercised, and I agree with Lord Adam that a power to apportion among the children of the marriage, and to impose conditions and limitations, entitles the spouses, as is the case here, to direct that the fund be held by trustees for the daughters, the income to be paid to them for life, and they to have a testamentary power of disposal. Whether the exercise of such a power can be extended further so as to provide for the event of the daughters not availing themselves of the power of disposal, I give no opinion. I see great difficulty in the way of extending the signification of the reserved power, because, wherever a new course of succession is introduced, persons are taken in who are not proper objects of the power. Here the framers of the settlement have avoided that difficulty, and while they have provided that the daughters shall not have power to dispose of their shares by way of anticipation, they have at the same time given them the power of disposing of the fee by testamentary deed. So far, I think the power of appointment has been validly exercised. On the other points of the case I concur in the judgment proposed.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court answered the first question in the affirmative, the second in the negative, and the third in the affirmative, and decerned accordingly.

Counsel for First, Third, and Fourth Parties — D.-F. Balfour, Q.C. — Guthrie. Agents—John C. Brodie & Sons, W.S.

Counsel for Second Parties—C. S. Dickson—Fleming. Agents—Wallace & Begg, W.S.

Friday, June 12.

FIRST DIVISION.

RANNIE *v.* OGG.

Proving of the Tenor—Entire Absence of Adminicles—Parole.

In an action of proving of the tenor, where the alleged *casus amissionis* was that the granter had himself destroyed the deed, the pursuer produced no adminicles and sought to set up an absolute disposition, of which he was unable to give the terms of the testing clause or the names of the witnesses by parole evidence only. The only important evidence was the admission of the granter that he had destroyed a