is no difficulty in disposing of the petition so far as the girl is concerned. As to the boy, the one ground of failure of evidence of the father's wish is sufficient for the disposal of the case, but it is also to be noted that the children are attached to one another and desire to be together, and that it is impossible to suggest that the interest of either would be subserved by the one being taken and the other left. I am therefore for refusing the petition.

LORD ADAM—I am of the same opinion. We thought on the previous occasion that we had not sufficient facts before us to enable us to dispose of this petition, and accordingly took means for obtaining additional information by appointing a curator *ad litem*, who should make further inquiries, and report.

We have now got a very careful and lucid report from Mr Lee, which satisfies me that we have now got sufficient material for disposing of the case. I agree that the wish of the father is perhaps the predominant consideration in such cases as the present, but I may be allowed to say that I do not know that by the law of Scotland the same paramount weight is given to his wishes as seems to be attached to them by the law of England, which seems to ignore altogether those of the mother although still alive. But we have not got any express desire on the father's part, but only an argument as to what would have been his desire. If there were no other facts to which to refer, we might draw the inference from both parents being Roman Catholics, that they wished their children brought up in their own faith. But this is not so. We know how the father during his lifetime treated those children, never taking them to a Roman Catholic church, but accompanying them to a Protestant place of worship. Could he have been asked whether he wished them not brought up as Protestants, I think he would have said yes, but at least I am very clear that we cannot draw the inference that he had any strong desire they should be brought up Roman Catholics.

Then are we to say that the wishes of the girl, who, although of the same age as her brother, is a minor, are to be overruled? I do not know how far the law of England would be different on this point, because by it a girl is an infant until 21. It is plain, however, that there is a manifold difference in the laws of the two countries on this subject, making the application of English cases by no means clear. We have, I think, no right to disregard the girl's wishes, and I see no reason for separating these children.

LORD M'LAREN—I quite agree with your Lordship in the chair, and I also desire, like Lord Adam, in case the question may hereafter arise, to reserve my opinion as to the supposed exclusive preference of the father's opinion in regard to the education of the children, which have been left under the care of the mother, because under the Guardians Act greater authority is now given to the mother than could formerly be claimed for her, and that is an indication which I should not wish to overlook in dealing with any question such as this. I can conceive that there are cases where it would be very much to the advantage of the children that they should be in the care of the mother even where her opinions happen to differ from those of a deceased father. Probably this does not arise, because very often there is an understanding between parents on such subjects, but I should not wish to be understood as assenting to the doctrine that under all circumstances the wish of a deceased father should prevail in regard to the education of his children, under circumstances which he could not see, and which are entirely different from what were contemplated.

LORD KINNEAR—I agree with your Lordship, and have nothing to add.

The Court refused the petition with expenses.

Counsel for the Petitioner—Young—Gunn. Agent—John Mackay, S.S.C.

Counsel for the Respondent—Ure—Clyde. Agents—Dove & Lockhart, S.S.C.

Thursday, July 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

A B *v.* C D.

Process—Auditor's Report—Time within which Objections must be Lodged—Date from which Time Runs—A.S., February 6, 1806.

The A.S. of February 6, 1806, provides that "in case either party means to object to the report of the Auditor he shall immediately lodge with the clerk a note of his objections."

Held that objections should be lodged within 48 hours of the issuing of the Auditor's report, and not merely of the returning of the process to the clerk, but where objections were lodged on the same day as the process was returned, and on the 8th day after the signing of the report, they were allowed to be received.

Expenses—Fees to Skilled Witnesses.

A B brought an action of declarator of nullity of marriage against her husband C D, alleging that the defender was impotent, and that the marriage had "never been consummated, no carnal copulation having followed thereupon." The defender denied these allegations. Proof was fixed for 24th May, but upon 22nd May the pursuer lodged a minute of abandonment and the defender's account of expenses was remitted to the Auditor in the usual way. The Auditor's report was signed on 3rd July. On 4th July the defender's

agents wrote to their client to ask instructions as to objecting to the Auditor's report, and received an answer on 6th July. Objections were lodged for the defender on 11th July, and the process and report were returned to the Clerk of Court on the same day. These objections mainly related to the disallowing of the following — "*Witnesses' Fees*—

Dr Heron Watson, Edinburgh, £299 5 0
Disallowed of fee of £315 charged.
Dr Renton, Glasgow, 312 18 0
Disallowed of fee of £323, 8s. charged."

These fees were charged in respect of the witnesses having gone to London to examine the person of the pursuer in order to enable them to give evidence for the defender at the proof. The pursuer had named London as the place of examination.

The pursuer objected to the competency of the defender's note of objections, and the Lord Ordinary (WELLWOOD) reported the matter to the First Division.

"*Note.*— . . . The pursuer maintains that the defender's objections were lodged too late, not being lodged till eight days after the report was signed by the Auditor.

"The defender maintains that there being no inflexible rule as to the time within which objections must be lodged, the delay—five days from receiving instructions — was in the circumstances not too great. He further maintains that as the objections were lodged whenever the process was returned to the clerk they were timeously lodged, in other words, that the 48 hours which are allowed in practice run not from signature and completion of the report but from the time when it is lodged in process. It is mainly in regard to this point that I report the case.

"No time within which objections must be lodged is fixed by Statute or Act of Sederunt applicable to the Court of Session as is done in the Act of Sederunt of 10th July 1839, section 109, as to procedure in the Sheriff-Courts, by which only 48 hours from the completion of taxation are allowed. The words of the Act of Sederunt of 10th July 1839 are—'It shall be competent for either party, within 48 hours after an account has been taxed, to lodge a note of specific objections to such taxation which the Sheriff shall dispose of with or without answers as he shall see cause. No reclaiming petition shall be competent against any interlocutor regarding the taxation or modification of expenses; nor shall any appeal be competent against any such interlocutor unless lodged within 48 hours from its date.'

"By the Act of Sederunt of 6th February 1806 the Auditor of the Court of Session, who was then for the first time appointed, was directed to examine and tax the account, and report thereon to the Court or the Lord Ordinary; and it was further enacted that 'in case either party means to object to the report of the Auditor he shall immediately lodge with the clerk a note of his objections.'

"By the Act of Sederunt 11th July 1828, section 69, it was provided that 'after the account is taxed, the agent'—that is, the agent for the party found entitled to expenses —'shall be entitled to get back the process in order to return the same to the clerk.'

"No decision precisely in point has been cited to me. In the case of *Adamson & Gulland* v. *Gardner*, July 4, 1878, 15 S.L.R. 664, the late Lord President Inglis in his opinion spoke of the 48 hours allowed in practice as running from the time when the Auditor's report was lodged with the Clerk of Court. His Lordship's words are, 'In ordinary cases objections cannot be received more than 48 hours after the process has been returned from the Auditor.'

"The only other case referred to was the recent case of *Stewart & Company* v. *Johnstone*, June 17, 1893, 20 R. 832, decided by the First Division of the Court. The argument proceeded on the assumption that according to custom the note of objections must in general be lodged within 48 hours. But the question here raised did not purely arise, because the note of objections was not lodged until a month after the taxation of the account, and probably long after the report was lodged.

"A considerable sum depends upon these objections, and as it is of some importance to remove doubt on the point of practice, I feel justified in reporting the matter to the Court."

Argued for defender—An Act of Sederunt was not to be construed so strictly as an Act of Parliament. The A.S. did not prescribe any time, and even if 48 hours were the proper time, it was not fixed from what time the 48 hours were to run. It was reasonable to make them run from the returning of the process. There had been no undue delay, and the Court might well allow the objections to be received.

Argued for the pursuer — The cases referred to by the Lord Ordinary had interpreted the "immediately" of the A.S. as meaning 48 hours. The issuing of the report by the Auditor was the proper time from which the 48 hours should run, otherwise the objector, if as here the person holding the process, could take any time he pleased to consider the propriety of lodging objections by delay in returning the process to the Clerk. In this case between a husband and wife there would be no hardship in giving effect to the strict rule of 48 hours from the issuing of the report.

At advising—

LORD PRESIDENT—The view I take, in the first place, is that the time from which the forty-eight hours run is the time at which the Auditor has returned his report in the sense of handing it back to the agent who has tendered it to him for audit—that the forty-eight hours run, in short, from the promulgation of the report and not from the date at which it is lodged in process. Otherwise the date would be an entirely uncertain date, and one more or less determinable by a person whose interest might be to create delay.

In the second place, however, the case in

hand appears to me to be a fair case for holding that the objections to the report are not too late. This was evidently a moot point in practice, and the circumstances mentioned at the bar would lead me to admit an extension of the usual period of forty-eight hours, which after all is only the interpretation put by practice upon a clause in an Act of Sederunt.

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

The Court allowed the note of objections to be received, and remitted to the Lord Ordinary to dispose thereof, and his Lordship allowed fees of 125 guineas and 100 guineas to Dr Watson and Dr Renton respectively instead of £15, 15s. and £10, 10s. as allowed by the Auditor.

"*Note.*—At the previous hearing on 14th July I heard a full argument not only on the competency, but also on the merits of the objections. The competency of the objections having now been sustained, I am of opinion on the merits that the Auditor has not allowed sufficiently large sums in respect of the fees paid to Dr Heron Watson and Dr Renton. The sums allowed by the Auditor, viz., £15, 15s. and £10, 10s., were fixed on the footing of what would have been paid to medical men resident in London. The examination of the pursuer in London was rendered necessary by her declining to come to Scotland for this purpose, and I think that in the circumstances the defender was entitled to employ medical men resident in Scotland, who would be available as witnesses when the trial took place. If the defender had employed London doctors of equal eminence, he would have required to pay them on the same scale if he had asked them to attend the trial. I therefore think that the fees allowed by the Auditor are inadequate, but I am not prepared to allow, as against the pursuer, the whole of the fees paid to Dr Heron Watson and Dr Renton. I shall allow in all a fee of 125 guineas for Dr Heron Watson, and a fee of 100 guineas for Dr Renton."

Counsel for the Pursuer — Jameson — Clyde. Agent—Lockhart Thomson, S.S.C.

Counsel for the Defender — Dickson — M'Clure. Agents — Webster, Will, & Ritchie, S.S.C.

Friday, July 13.

SECOND DIVISION.

(Before Seven Judges).

ELIOTT'S TRUSTEES *v.* ELIOTT.

Trust — Marriage-Contract — Will — Construction—Husband and Wife—Liferent and Fee—Denuding—Alimentary Liferent to Wife Burdening her Right to Fee.

By antenuptial contract of marriage between a husband on one part, and his wife and her father on the other, the husband disponed and conveyed to trustees his whole means and estate for payment to himself during his life, and after his death to his wife, if she should survive him, of the free annual income or revenue thereof for the liferent and alimentary use allenarly of them and the survivor of them, declaring that the same should not be affectable by the debts or deeds of either of them or the diligence of their creditors. The marriage-contract further provided that in the event of the wife surviving the husband, and there being no children of the marriage, the trustees should, on the wife's death, pay and convey the whole trust-estate to the husband's heirs and assignees whomsoever.

By will and codicil the husband bequeathed all his real and personal estate, including any property over which he had power of appointment whatsoever or wherever to his wife absolutely.

There were no children of the marriage. The wife survived the husband.

Held (*diss.* Lord Young, Lord Adam, and Lord M'Laren) that the widow's right to the fee of the estate was burdened with her right to an alimentary liferent, and that the marriage-contract trustees were not entitled to hand over the capital to her, but were bound to hold the estate during her life, and pay her the income as an alimentary provision.

By antenuptial contract of marriage dated 23rd and 27th April 1886, entered into between George Augustus Cuming Eliott on the one part, and Edith Hamilton, daughter of Richard Fisher Hamilton, with the advice and consent of her said father, and the said Richard Fisher Hamilton for himself on the other part, George Augustus Cuming Eliott disponed and conveyed to trustees his whole means and estate "for payment to the said George Augustus Cuming Eliott during his life, and after his death to the said Edith Hamilton, if she shall survive him, of the free annual income or revenue thereof for the liferent and alimentary use allenarly of them and the survivor of them, declaring that the same shall not be affectable by the debts or deeds of either of them or the diligence of their creditors." The antenuptial con-