[18*th July* 1839.]

(Appeal from the Court of Session, Scotland.)

ALEXANDER PEARSON and WILLIAM ROBERTSON,
Appellants.[1] (No. 23.)

[*Pemberton — John Stuart.*]

Miss JANE CASAMAIJOR and others, Respondents.

[*Attorney General (Campbell) — Lord Advocate (Rutherfurd).*]

Et è contra.

Legacy — Testament — Vesting. — A testator, by a trust disposition and settlement, directed his trustees, after payment of his debts and the expenses of the trust, 3dly, to pay a legacy of 500*l.* to his sister Mrs. A.; 4thly, to pay annuities of 400*l.*, 400*l.*, and 200*l.*, to his other three sisters, during their respective lives, which several annuities were appointed to be paid half-yearly during the lives of his said sisters respectively; and in the event that after payment of his debts and obligations due at his death, payment of the expenses attendant on the execution of the trust, and of the 500*l.* to his said sister Mrs. A., the residue of the proceeds of his funds and estate should not be sufficient for yielding the foresaid annuities thereby settled on his said sisters, then it was his meaning and intention that the said residue, whatever it might be, should be vested and laid out, and the interests or dividends arising therefrom be paid unto and divided among his said three sisters, Mrs. F., Mrs. P., and Mrs. B., during their respective lives, in the same proportions, and exactly in the same terms, in every respect, as therein pointed out, with respect to the full annuities of 400*l.*, 400*l.*, and 200*l.*; and 5thly, in the event of there being any of the proceeds of his said funds and estate remaining, after setting apart capital sums sufficient to yield the three annuities of 400*l.*, 400*l.*, and 200*l.*, then his said trustees should pay such

[1] Rep. 15 D., B., & M., 275.; F. C. 16th Dec. 1836.

surplus, together with the capital sums so to be set apart for answering the foresaid annuities, as and when such capital sums should become tangible by the deaths of the said annuitants respectively, or in the event of there being no surplus, then the capital sums, whatever their amount might be, so to be vested and laid out as aforesaid, as and when such capital sums should become tangible as aforesaid, to and among Mary, Helen, Alexander, and Mary Ann, children of Mrs. P., and to three daughters of Mrs. B., equally among them, share and share alike, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas after their respectively attaining majority or being married, whichever of these events should first happen, or as soon after the first of these events as the said capital sums so to be set apart should become tangible, by and through the deaths of the said several annuitants respectively, declaring, that until such several shares became payable, the interest or dividends of each share should be payable to the above-named persons respectively, for their maintenance and education, with full power to advance the whole or part of the share of A. P. for his outfit; and in the event of the deaths of any one or more of the said seven residuary legatees, before the term of payment (one or more, as the case might be,) of their shares as aforesaid, but that such deceasers should leave issue in life, and in life at the time that their father or mother would have been entitled to have received payment of their shares had they survived, the share of such deceasing parent should belong and be paid to and among their issue respectively, and that at the periods at which deceasing parent would have received the same had they been in life,—the trustees to regulate themselves accordingly, power being given to them to secure the shares falling to the seven legatees, so as all or any one or more of them shall only be entitled to draw the interest or dividends of their respective shares during their several lives, and the capitals of their shares shall in that case descend to their respective heirs, &c.; and 6thly, in the event that the residue of his funds, after payment of the 500*l*. to his sister Mrs. A., should amount to the sum of

15,000*l.* sterling or upwards, to pay out of such residue 1,000*l.* sterling to each of George and Thomas P., sons of Mrs. P.; but if such residue should be under 15,000*l.*, and should not be less than the sum of 8,000*l.*, then the said George and Thomas P. should only be entitled to 500*l.* each; but if such residue should not amount to the said sum of 8,000*l.*, then the said George and Thomas P. should not be entitled to receive any thing, the above-mentioned eventual legacies being to be payable to the said George and Thomas P. at the first term of Whitsunday or Martinmas after his death, with interest from said term of payment till paid. The testator was survived by his sisters Mrs. F. and Mrs. P., but not by Mrs. B. He was survived also by five of the legatees, including A. P. Mrs. F., one of the annuitants, died, predeceased by A. P. and M. P. A. P. had attained majority, and executed a general settlement in favour of Mrs. F. The free residue of the testator's estate exceeded 15,000*l.*, but the payment of the annuities before Mrs. F.'s death exhausted the annual income of it. In an action of multiplepoinding for fixing the interests of the several parties,—Held, 1. (affirming the judgment of the Court of Session, which affirmed a finding by the Lord Ordinary,) "that "the shares of the residue, so far as the same consisted "of capital sums set apart for answering the said an-"nuities, provided to the said A. P. and M. P. by the "fifth purpose of the trust, whereby the residue was "appointed to be paid to the seven individuals therein "named, share and share alike, and the 'survivors or "survivor' of them, under the conditions farther therein "expressed, were not so vested in the said A. P. and "M. P. as to enable them effectually to dispose thereof." Per L. C. There is sufficient upon the face of the trust deed to show that the term "survivor" does not refer to the period of the testator's own death, but that it refers to the period at which these sums would become tangible, and that would lead to an affirmance of the said finding. Held, 2. (varying the interlocutor of the Court of Session, and remitting, with a declaration,) that the legacies to G. P. and T. P. by the sixth purpose of the deed declared

were payable to them at the first term of Whitsunday or Martinmas after the testator's death; and that the sum applicable to the payment of the aforesaid annuities was the residue of the said trust fund, after deducting as well the testator's debts and obligations, the expenses of the trust, and the legacy of 500*l.* to Mrs. A., as the said two legacies payable to G. P. and T. P.

2d Division.

Lord Ordinary Moncreiff.

BY a trust disposition and settlement, dated 16th April 1810, Alexander Porterfield esq., of Porterfield, now deceased, disponed to and in favour of Alexander Pearson esq. (the appellant), and of Frederick Fothringham esq., now deceased, his whole estate, real and personal, in trust, for the following, among other, purposes; after disposing of his whole property and paying his debts: Thirdly, to make payment of a legacy of 500*l.* to his sister Mrs. Camilla Porterfield or Alexander, wife of Boyd Alexander esq., of Southbar. Fourthly, to pay the following annuities to his sisters after named, during their respective lives, viz. to Mrs. Christian Porterfield or Fothringham an annuity of 400*l.*; to Mrs. Ann Porterfield or Paterson, wife of Lieutenant-Colonel Thomas Paterson, residing in Charlotte Square, Edinburgh, a like annuity of 400*l.*; to Mrs. Margaret Porterfield or Buchanan an annuity of 200*l.*, and this over and above and in addition to the annuity already settled on the said Mrs. Margaret Porterfield or Buchanan by him, which several annuities thereby provided the said Alexander Porterfield directed and appointed his said trustees to pay to his said sisters, during all the days of their respective lives, and that half-yearly, commencing payment thereof at the second term of Whitsunday or Martinmas which should happen after his death, for the year preceding such first terms of payment, and continuing payment thereafter at two terms in the year, Whitsunday and Martinmas as

aforesaid, during the lives of his said sisters respectively; and for the better fulfilment of this purpose, he thereby directed his said trustees to vest and lay out capital sums for answering the foresaid respective annuities on any security or securities which they might think proper, either personal, heritable, or in the public funds, and to take said securities in such terms as they might think best adapted for fulfilling the foresaid purpose; and in the event that after payment of the said Alexander Porterfield's debts, and fulfilment of the obligations in which he might stand bound at the time of his death, payment of the expenses attendant on the execution of the trust and of the 500*l.* to his said sister Mrs. Alexander, the residue of the proceeds of his funds and estate should not be sufficient for yielding the foresaid annuities thereby settled on his said sisters,—then it was his meaning and intention that the said residue, whatever it might be, should be vested and laid out, and the interest or dividends arising therefrom be paid unto and divided among his said three sisters, Mrs. Fothringham, Mrs. Paterson, and Mrs. Buchanan, during their respective lives, in the same proportions and exactly in the same terms, in every respect, as before pointed out with respect to the full annuities of 400*l.*, 400*l.*, and 200*l.*; and he thereby directed his said trustees to regulate themselves accordingly. The fifth purpose of the trust was:—"In the event of there being any of the proceeds "of my said funds and estate remaining, after setting "apart capital sums sufficient to yield the three annui- "ties of 400*l.*, 400*l.*, and 200*l.*, as above specified, then "I hereby direct my said trustees or trustee to pay "such surplus, together with the capital sums so to be "set apart for answering the foresaid annuities, as and

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" when such capital sums become tangible by the deaths " of the said annuitants respectively, or, in the event of " there being no surplus, then the capital sums, what- " ever their amount may be, so to be vested and laid " out as aforesaid, as and when such capital sums shall " become tangible, as aforesaid, to and among Mary " Paterson, Helen Paterson, Alexander Paterson, and " Mary Ann Paterson, all children procreated of the " marriage between the said Lieutenant-Colonel Thomas " Paterson and Mrs. Ann Porterfield or Paterson, " Buchanan, Buchanan, and " Buchanan, all daughters of the said Mrs. Margaret " Porterfield or Buchanan, equally among the said " Mary, Helen, Alexander, and Mary Ann Patersons, " , , and Buchanans, share and " share alike, and the survivors or survivor of them, and " that at the first term of Whitsunday or Martinmas after " their respectively attaining majority or being married, " whichever of these events shall first happen, (under " the declaration however after mentioned,) or as " soon after the first of said events as the said capital " sums so to be set apart for answering the foresaid " annuities shall become tangible, by and through the " deaths of the said several annuitants respectively; " hereby declaring, that until such several shares become " payable the interest or dividends of each share shall " be payable to the above-named persons respectively, " for their maintenance and education; but I hereby " give full power to my said trustees or trustee to " advance the whole or any part of the principal sum " falling to the share of the said Alexander Paterson, " if they or he shall judge it necessary for his outfit or " establishment in the world; hereby further declaring,

" that in the event of the deaths of any one or more of " the said Mary, Helen, Alexander, and Mary Ann " Patersons, or , , and " Buchanans, before the term of payment " (one or more, as the case may be,) of their shares, as " aforesaid, but that such deceasers shall leave lawful " issue of their bodies in life, and which issue shall be " in life at the time their father or mother would have " been entitled to have received payment of their shares " had they survived, the share of such deceasing parent " shall belong to and be paid to and among their issue " respectively, and that at the periods at which such " deceasing parents would have received the same had " they been in life. But farther, it is hereby expressly " provided and declared, and I do hereby direct and " appoint my said trustees or trustee to regulate them- " selves accordingly, that it shall be completely in the " power of my said trustees or trustee, if they or he " shall think it proper so to do, to settle and secure the " shares falling to all or any one or more of the said " Mary, Helen, and Mary Ann Patersons, and , " , and Buchanans, so as all " or any one or more of them shall only be entitled to " draw the interest or dividends of their respective " shares during their several lives, and the capitals of " their shares shall, in this case, fall and descend " to their respective heirs, executors, or assignees." By the sixth purpose of the trust the trustees are directed, in the event of the residue of his funds and estate, after payment and fulfilment of debts and obligations, and of the legacy of 500*l.* to Mrs. Alexander, amounting to upwards of 15,000*l.*, to pay out of such residue the sum of 1,000*l.* to each of George and

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Thomas Patersons, sons of Lieutenant-Colonel Thomas Paterson; but if such residue should be under 15,000*l.*, and not less than 8,000*l.*, these two legacies were to be reduced to 500*l.* each; while, if the said residue should not amount to 8,000*l.*, the said George and Thomas Patersons were not to be entitled to receive any legacies at all; and which legacies were to be payable at the first term of Whitsunday or Martinmas after the testator's death, and to bear interest from the said term of payment till paid.

The testator died in the year 1815. Two of the three annuitants, Mrs. Fothringham and Mrs. Paterson, survived him. Of the seven residuary legatees five survived him, of whom Alexander Paterson was one. Alexander Paterson attained majority in 1818, and died in 1820, leaving a settlement of his whole property in favour of Mrs. Fothringham and husband, and the survivor of them. At that time both the annuitants were alive, but one of them, Mrs. Fothringham, died in 1834; the other annuitant, Mrs. Paterson, still survives. Upon Mrs. Fothringham's death Mr. Pearson (one of appellants), as trustee of Mr. Porterfield, raised an action of multiplepoinding and exoneration, in which several parties claimed. But the principal question related to the disposal of the capital sum that was disengaged by the death of Mrs. Fothringham. Mrs. Fothringham's trustees (Messrs. Pearson and Robertson the appellants) claimed to be ranked,—1, for arrears of annuity due to that lady at her death, and, 2, for Alexander Paterson's share of the fund, on the plea that his share had vested in him previous to his death, and was bequeathable by will. On the other hand, Miss Casamaijor and other legatees (respondents) re-

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sisted the second part of that claim on the ground that the legacy to Alexander Paterson had not vested. The respondents objected also to the first part of that claim that Mrs. Fothringham's trustees had no right to the annuity subsequent to the last term before her death.

Mrs. Fothringham's trustees and Mrs. Paterson, two of the annuitants, further maintained that in ascertaining the amount of the income of the trust estate falling to the annuitants, the interest of the two legacies to George and Thomas Paterson ought not to be deducted from that income, but that the said two legacies, with interest due at the death of the annuitants, ought to be taken from the capital of the residue.

The questions raised upon the construction of the trust disposition are explained and disposed of in the following interlocutor (3d June 1836) by the Lord Ordinary, and in the relative note:—"The Lord Ordi-
"nary having considered the closed record, and heard
"parties procurators thereon, and made avizandum,
"Finds, primo, that as the trust deed, in the fourth
"article of the purposes thereof, expressly ordains the
"trustees to pay the annuities thereby provided to the
"three parties named, commencing the first payment
"at the second term of Whitsunday or Martinmas
"after the testator's death, and as the only event pro-
"vided for, whereby the amount of those annuities was
"to be diminished, is expressly the event, that after
"payment of the testator's debts and obligations, the
"expenses of the trust, and one legacy of 500*l.* to
"Mrs. Alexander, 'the residue of the proceeds of my
"'funds and estate shall not be sufficient for yielding
"'the foresaid annuities hereby settled on my foresaid
"'sisters,' the said annuitants were entitled to receive,

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" and the trustees were bound to pay, the full annuities " so provided to them during their lives respectively, so " far as the residue, after those deductions, were sufficient for the purpose; and finds, that their claim to " such annuities cannot be diminished or affected by " the subsequent provision of the two legacies to George " and Thomas Patersons, by the sixth purpose of the " said trust, or by the interests accruing on those provisions: Finds, secundo, that the annuitants were " entitled to a full year's annuity at the second term " after the testator's death, it being expressly provided " that the annuities shall then be paid 'for the year " 'preceding such term of payment:' Finds, tertio, that " it has been sufficiently proved, and is now admitted, " that Alexander Paterson, to whom a share of the " residue of the estate was provided, survived the years " of majority; and finds that Mary Paterson, another " of the residuary legatees, was married to the claimant, " James Archibald Casamaijor, many years ago; but " finds it admitted that both these parties predeceased " Mrs. Fothringham, the annuitant, who died on the " 31st March 1834: Finds, quarto, that the shares of " the residue of the estate, so far as the same consisted of " capital sums set apart for answering the said annuities, " provided to the said Mary and Alexander Patersons, " by the fifth article of the purposes declared, whereby the " said residue was appointed to be paid to the seven in- " dividuals therein named, share and share alike, 'and " 'the survivors or survivor of them,' under the con- " ditions farther therein expressed, were not so vested " in the said Mary and Alexander Patersons, as to " enable them effectually to dispose thereof: Finds that " the children of the said Mary Paterson, who were in

" life at the death of Mrs. Fothringham, are entitled, as " conditional institutes, to succeed to the share ap- " pointed in the first instance to be paid to her, accord- " ing to the express provision to that effect; and finds, " that in the event which has occurred, the share pro- " vided to Alexander Paterson must fall to 'the sur- " 'vivors' of the seven legatees named, who were in " life at Mrs. Fothringham's death, together with the " children of Mary Paterson, surviving, to the extent " of one portion thereof, in the place of Mary Paterson " herself, as conditional institutes: Therefore ranks and " prefers the claimants, the trustees of Mrs. Fothring- " ham, in terms of the first article of their claim, re- " serving all questions as to the amount of such arrears " of annuities; but repels the second claim made for " them: Ranks and prefers the claimant Mr. Casa- " maijor, as administrator-in-law for his children Jané, " Mary, and Elizabeth, and their attorney and man- " datories, in terms of the second alternative in the " second article of his claim; but repels the claim made " in his own right; and in respect that the claim made " to a share of the legacy left to George Paterson was " abandoned at the debate, as it had become known " since the record was made up, that George Paterson " had left a deed of settlement, repels the first article of " Mr. Casamaijor's claim: Ranks and prefers the claim- " ant Mrs. Rynd, according to the second article of her " claim; but supersedes consideration of her first claim, " with reference to the Lord Ordinary's interlocutor of " the 24th March last: Ranks and prefers Mr. Alex- " ander Pearson, as trustee under the marriage settle- " ment of Mrs. Helen Paterson or Bligh, in terms of " his claim: Ranks and prefers Mr. Pearson, in like

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" manner, as trustee in the marriage settlement of " Mrs. Ann Paterson or Shepheard, in terms of his " claim: Ranks and prefers the claimant Mrs. Ann " Porterfield or Paterson, and her husband and man- " datories, in terms of her claim; reserving all questions " as to the amount of such arrears of annuities; finds " no expenses due to any party; and appoints the cause " to be enrolled, in order that the points remaining for " consideration may be disposed of, and the multiple- " poinding finally extricated, on the principles of this " interlocutor.[1] (Signed) JAMES W. MONCREIFF."

" [1] *Note.*—This cause is certainly one of great difficulty, in two points, " but especially in that which stands fourth in the findings of the above " interlocutor. The first point presents a considerable perplexity, by the " apparent contradiction between the fourth and sixth heads of the trust " purposes. But after much consideration, the Lord Ordinary is of " opinion that the provision of the annuities must take effect according " to its terms, which are quite clear, unambiguous, and unqualified, " except by the clauses of that provision itself. The sixth provision of " the conditional legacies to George and Thomas Patersons, however it " may seem to interfere with the investment of the funds for securing the " annuities, contains no declaration that the annuities shall be at all " diminished on account of those legacies. Although, therefore, it may " be difficult to explain under what views it was that the testator regu- " lated those legacies by the amounts of residue stated, the Lord " Ordinary is satisfied that there is no such distinct expression of will " to alter or restrain the provision of the annuities, as can be held legally " to produce that effect. The ultimate question here is not at all " between the annuitants and the legatees, George and Thomas, but " solely between the residuary legatees and the annuitants. There is no " doubt that the special legacies must be paid, because the free residue " did exceed 15,000*l.*, and they must, of course, bear interest from the " term of payment. The real question is, whether the interest of those " legacies is to be held as a burden diminishing the annuities, or as a " burden diminishing the ultimate residue to remain for the residuary " legatees. The Lord Ordinary is of opinion that neither by the terms " of the deed, nor by any presumption as to the probable intention of the " testator, can it be held that the burden was meant to affect the annuities " which were made a primary purpose of the trust. It is entirely a ques- " tion of intention. But the provision of the annuities being the first in " order, and from its nature, presumed to be of first importance in the " testator's mind, and the words being clear, the Lord Ordinary thinks

Against this interlocutor reclaiming notes were presented to the Court by several parties. The appellants

" that nothing but the most express words in a later part of the deed " could be held to take away a right so explicitly given.

" There seems to be no doubt on the point which stands second " in the interlocutor, that the annuitants were entitled to a full year's " annuity at the second term after the testator's death. It is much the " same as if he had ordered a half-year's annuity to be paid at the first " term after his death. The point seemed to be conceded.

" The third finding merely comprehends certain points of fact, neces- " sary for raising the fourth question. But it was certainly admitted " in the debate, that the fact of Alexander Paterson having survived " majority was sufficiently proved.

" That fourth question is the great difficulty in the case. It is purely " a question of intention. Some aid may, indeed, be obtained from the " decided cases. But when they have been all considered, it still " becomes necessary to return to the deed itself, and to weigh every " word of the remarkable clauses in this destination of the residue of the " estate.

" If there had been a surplus after securing the annuities, there is no " doubt that it must have become payable to each of the nominatim " legatees who survived the testator, if they also attained marriage or " majority. But though this circumstance creates a peculiarity in this " trust, if the shares of the capital sums invested for the annuities must " be dealt with in a different manner, it does not appear to the Lord " Ordinary that it goes a great way to solve the question here in con- " troversy. The case of a surplus is a very simple case; and it could " scarcely come to any other result, unless it were supposable that it " might be a question, whether even marriage or majority was necessary " to vest the right? But while the terms of the deed would probably " exclude this last construction, the question as to the capital sums which " were to be locked up evidently stands on a separate footing, in so far " as a separate and independent quality or condition necessarily came to " be added to the other suspensive declarations.

" The trustees are appointed to pay that part of the residue, ' as and " ' when such capital sums become tangible by the deaths of the said " ' annuitants respectively.' This means tangible to the trustees. When " that event happens, they are to pay to the individuals named, ' and the " ' survivors or survivor of them '—Survivors of what? If the deed had " gone no farther, the words must either have meant survivors of the " testator, or survivors of the event before mentioned. The subsequent " clauses will not admit of the first construction; and it seems but rea- " sonable to suppose, that at least ' survivors' of the event was included " in the expression. But the clause goes on to fix the terms of payment, " which are the first term after majority or marriage, ' or as soon after " ' the first of the said events as the capital sums shall become tangible' " by the deaths of the annuitants respectively. Here it is distinctly con-

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reclaimed against the interlocutor in so far as it found that the share of the trust estate, left to the late Alex-

templated, that the parties might be married or of age, while yet the shares could not be paid to them, the funds not being tangible. This last event, therefore, is a separate and necessary term or condition of the payment; and if it must be granted that the provision in favour of the survivors is a conditional institution, with reference to the terms of marriage or majority, it is very difficult indeed to say that it is not so in respect of the term before which no payment could be made to any one.

"The two clauses which follow, allowing the interest or dividends to be applied for the maintenance and education of the legatees until the shares become payable, and empowering the trustees to advance part of the principal sum to Alexander Paterson, if they should think it necessary, evidently have reference to this state of the case, that the funds had become tangible by the death of the annuitants, while yet some of the legatees were neither married nor of age; for it cannot be supposed that the trustees could exercise such a power, while the funds stood wholly invested, and required for the annuities. However useful in argument, therefore, these clauses might have been, if the question were, whether there could be a vesting before marriage or majority, they evidently do not apply to the event of the funds continuing locked up. And this leads inevitably to the inference, that the provision to the 'survivors' had a much more direct reference to the fact of the legatees being survivors of the one event essential to the payment, than to the terms of marriage or majority, afterwards mentioned.

"But the clause which appears to the Lord Ordinary to be of most importance, in connexion with the provision to 'survivors,' is that which declares, that in the event of the deaths of any of the individuals, 'before 'the term of payment (one or more, as the case may be,) of their 'shares as aforesaid, but that such deceasers shall leave lawful issue of 'their bodies in life, and which issue shall be in life at the time their 'father or mother would have been entitled to have received payment 'of their shares, had they survived,' the share shall belong, and be paid to such issue, 'and that at the periods at which such deceasing parents 'would have received the same had they been in life.' It is impossible to doubt, that in this clause the testator had in view all the events on which the payment was suspended, and specially the decease of the annuitants. The words 'one or more,' in the way they are placed, are very singular, and really must relate to the successive contingencies in the deaths of the annuitants. What is the substance of the provision? The effect of it will be best tried by looking to the case of Mary Paterson. The clause necessarily supposes marriage; so that that term of payment was necessarily past. Yet it is provided that in the event of any of the parties dying 'before the term of payment,' ('one or more'), leaving issue, which shall be in life at the time when their father or mother would have been entitled to receive payment,

ander Paterson, was not so vested in him previous to his death as to enable him effectually to dispose thereof;

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" 'had they survived,' the share shall belong and be paid to such issue.
" The party being married, and leaving issue in life, even that issue shall
" not take, unless it be in life at the still postponed term at which the
" parents, if surviving, would have been entitled to payment. Then,
" who is to take if the issue survived the parent but was not in life when
" the money was payable? Plainly, not the parent who had predeceased
" the child, nor any one in that parent's right; and not the child's heir,
" seeing that it never was within the condition of the destination, not
" having been in life at the period fixed. In the case supposed, the share
" must evidently go to the 'survivors' of the other legatees.

" But take it in another way:—Mary Paterson dies, her children sur-
" vive, and are in life when Mrs. Fothringham's annuity ceases. Are
" they not conditional institutes? The very case stated is, that they
" were in life at the time when Mary would have been entitled to re-
" ceive payment if she had survived; in which it is implied, that as she
" did not survive, she never was entitled to receive payment, and that it
" is in their own right as conditional institutes, and not as substitutes
" through her, that the children are entitled to take the share, and ex-
" clude the other survivors. The Lord Ordinary must confess, that he
" sees no other way in which the clause can be reasonably construed. It
" distinctly explains the meaning of 'survivors' in the previous clause,
" and renders it impossible to suppose that the testator considered the
" share as already vested in the married legatee, so as to enable him or
" her to defeat the right of the children.

" But, if the share was not vested in Mary Paterson, so as to enable
" her to exclude her own children, neither could it be vested either in
" her or in Alexander Paterson, to the effect of excluding, by deed, the
" conditional institution of the other legatees surviving, in the more
" general case of the party dying before the capital sums were tangible,
" and leaving no issue. The clause seems to demonstrate, that in the
" estimation of the testator, the term of payment to which the survivance
" peculiarly referred was the period when the capital sums might suc-
" cessively be set free; and therefore the Lord Ordinary is on the
" whole of opinion, that it is impossible to hold that there was any vested
" right to render a conveyance effectual by a party who did not survive
" that term.

" It must necessarily follow, from the view above taken of the clause
" as to the case of a legatee dying, but leaving issue, that such issue must
" be considered as in the same place in which the parent, if surviving,
" would have been, and so entitled as one survivor to a share of the
" legacy fallen by the death of Alexander Paterson.

" The Lord Ordinary will not enter minutely into the cases cited.
" The late case of Marjoribanks against Aikman, 18th February 1836,
" (14 D., B., & M., 521.) was much relied on. That was itself a very dif-
" ficult case. The Lord Ordinary would have concurred in the judgment,

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and in so far as it sustained the claims of the other residuary legatees to the share of the residue left to the said

" though he must also have agreed with the Court in not adopting the " test for such cases laid down in the note of the Lord Ordinary in that " case. But the present is a far more special case, in which, however " natural the leaning may be in favour of the vesting of such a legacy, he " finds himself constrained, by what he thinks the evident intention of the " testator, to hold that the right was not vested. The case of Smith " against Leitch (4 S. & D. 659., new edit. 665,) is a very important " case, though the report of it in the House of Lords (3 W. & S. 366.) " is not quite satisfactory. But the judgment in that case would have " been the other way if it had not been for the marked change in the " form of expression in the destination to Andrew Leitch, from that " which had been used in all the previous branches of the destination, and " the omission in his case of the material words which distinctly qualified " the right given in the others.

" The only other case to which the Lord Ordinary will refer (though " a great many were quoted to him) is that of Wallace against Wallace, " 28th January 1807, (Fac. Coll.) He certainly thinks that case of " great importance, and it seems to him, when carefully considered, to " afford a safe guide for the decision of this cause. There were two " points in it, and the parties who maintain the vested right naturally " refer to that which is reported second in order as the most important. " That related to a simple legacy to Alexander Wallace, the deed pro- " viding that on the death of the longest liver of the testator and his " wife, the trustees should pay that legacy to him. There was no " destination over or ulterior, and the simple question was, whether that " legacy had lapsed by Alexander Wallace predeceasing Mrs. Houston? " It cannot be doubted that the judgment was right, which found that it " had not lapsed. But it would have been a very different case even in " that branch of it if there had been a farther, and, as in this case, nomi- " natim institution or substitution of others, in case he did not survive the " longest liver.

" But the first part of that case appears to be the most instructive for " the present cause. That related to the residue of the estate, which was " to be divided among the children of Alexander Wallace ' that may be " ' in life at the death of the longest liver of me and my said spouse ;' " these sums being made payable also at marriage and majority, ' which- " ' ever of these events shall first happen after the decease of the longest " ' liver of me and my said spouse.' Then there was a provision, that in " the event of the death of any of the said children before their share " became payable, it should accresce to the survivors equally. Nothing " can be more like to the present case, except that the deed there did not " contain the clause excepting from the right of the survivors the case of " a child dying before the shares were payable, but leaving issue. But " what was the question, and the ground of judgment? It was entirely " on the implied condition, ' si sine liberis decesserit,' as qualifying the

Alexander Paterson, and found no expenses due. The respondents reclaimed against the interlocutor in so far as it was unfavourable to them. On advising these reclaiming notes, the Lords of the Second Division of the Court, of this date, pronounced the following interlocutor:—" 16th December 1836. The Lords, having " heard counsel for the parties, and advised the cause, " adhere to the findings in the Lord Ordinary's interlocutor reclaimed against; recal the decernitures " therein contained, hoc statu, and remit to his Lord- " ship to apply these findings, and to proceed in the " cause as to his Lordship shall seem just."

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Judgment of Court, 16th Dec. 1836.

Mrs. Fothringham's executors, Messrs. Pearson and Robertson, appealed against the above interlocutors in so far as the claim of the legatees to the share left to Alexander Paterson was sustained.

The Misses Casamaijor, Mrs. Rynd, and Mrs. Long Wellesley (legatees) entered a cross appeal against the

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" farther institution of the survivors. No one imagined or attempted to " argue, that, independent of that special case of a child left, which stands " on a peculiar presumption of equity, the share of the residue could have " been held to be vested in the child predeceasing Mrs. Houston, to the " effect of supporting a conveyance to a stranger. The whole pleadings " and opinions assumed the reverse. But wherein does this case differ? " Essentially in this only, that here the testator has so provided for that " case of a child dying before the fund was set free, but leaving issue, as " to shew that in actual intention he meant precisely what in Wallace's " case was presumed on a known rule of law, with the additional circum- " stance of a positive exclusion of the child if not in life when the con- " tingency emerged. No question, Mary Paterson's children must take, " and any child of Alexander would have taken also. But does it follow, " that either on general law, or on the provisions of this deed, there was " a vesting in them to transmit the right; independent of the conditio " si sine, &c. or the special provision of the testator? The Lord Ordinary " thinks not.

" The case of Mirrlees, 17th May 1826, (Mirrlees v. Mathie, 17th May " 1826, 4 S. & D. 591, (new ed. 599.) was not fairly tried on the " material question, and at any rate was different in essential points, " though bearing a resemblance to this case in some particulars.

" J. W. M."

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first finding in the interlocutor of the Lord Ordinary adhered to by the Court.

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Appellants.—It is clear, from the structure and terms of the trust deed, that the intention of the testator was that Alexander Paterson, one of the nominatim residuary legatees, having survived the testator, and having also survived his own majority, there became vested in him a right to one-fifth part of the whole residue, including those portions of the residue which had been set apart to answer the annuities.

In the law of Scotland a fundamental distinction, in reference to the question of vesting, is to be found between legacies left to individuals called nominatim,—known to the testator as existing persons,—about whose identity there can be no doubt or uncertainty; and legacies left to persons called by mere description, as members of a class, nati or nascituri, whose very existence, number, and identity are contingent and uncertain, not only at the date of the testament, but also at the death of the testator. The certainty and complete ascertainment of the legatees which obtains in the former class, as opposed to the contingency and uncertainty as to the persons and number of the legatees which may exist in the latter, has given rise to very different, and indeed to contrary, rules of construction in regard to the vesting of the legacy, as applicable to these two classes of legacies.

The rules as to the vesting of legacies in nominatim legatees adopted by the law of Scotland from that of Rome are:—

1. A legacy, even when left to a nominatim legatee, does not vest until the death of the testator; and there-

fore, unless the legatee survive the testator, the legacy does not vest in him.

2. Where a legacy is made payable to a nominatim legatee at a certain fixed period, however remote, or at a time that must arrive, although it is uncertain when,—the legacy is held to vest at the death of the testator (dies legati cedit), although the period of payment is postponed (sed not venit).

3. When a legacy is made payable to an individual on the occurrence of an event which is in its own nature uncertain, or on the arrival of a period which may never come at all,—the legacy does not vest, unless and until the condition is purified by the occurrence of the event, or the arrival of the period. (Dies incertus pro conditione habetur). But as soon as the condition is purified, the right vests, although the legatee may die before it be possible to obtain payment.[1]

Where legatees are not mentioned nominatim, but are called as a class of persons who may or may not exist, or who may be more or fewer in number, the rule as to the vesting of the bequest in any of the contingent legatees is different from that which applies to nominatim legatees. The most ordinary instance of this kind of legacies is where they are left to the children of an existing individual, or to the issue of a subsisting marriage. Where the children of an individual are called, there must exist an uncertainty as to the

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[1] Digest, lib. 36. tit. 2. l. 31.; Codex, lib. 6. tit. 53. l. 3.; Wallace v. Wallace, 28th Jan. 1807 (Mor. Dict., App. 6. voce Clause); Sess. Papers, Adv. Lib. 1806–7, II. 267; Semples, 15th Nov. 1792, Mor. 8108; Hume v. Hume, 28th Jan. 1807, not reported, but see Hume's MS. Notes; Leitch's Trustees v. Leitch and others, 2d June 1826, F. C. and 3 W. & S. 366–379; Mirrlees v. Mathie, 17th May 1826, F. C.; Smith v. M'Beth, 30th May 1834, F. C.; Aikman v. Marchbanks and Brockie, 18th Feb. 1836, F.C. and 14 D., B., & M., 521.

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number of the legatees, until the death of the parent. Where the issue of a marriage are called, the same uncertainty must continue until the dissolution of the marriage. In both these cases, therefore, the presumption is, that the testator did not intend that the right should vest at all during the subsistence of the uncertainty. It very often happens that whilst a legacy or a residue is given to children, a liferent is given to the parent, by which the term of payment is postponed until the parent's death; and in this way the period of payment comes to coincide with the vesting of the right by the termination of the uncertainty as to the legatees. But this is merely an accidental coincidence. The coincidence does not take place where the issue of a marriage are called as legatees, and where a conjunct liferent is given to the spouses. In such a case the legacy vests on the death of either parent, although the period of payment does not arrive until the death of both.[1]

The cases now cited afford instances of a provision made under a trust deed to the children of a particular person, in which case the uncertainty as to the person and number of the beneficiaries, continues during the life of that parent. But cases sometimes occur where the beneficiaries are described as the children or the issue of a particular marriage. In such cases, the dissolution of the marriage, by the death of either of the parents, is the event which puts an end to the uncertainty. This, to be sure, may not be the term of payment, where a conjunct liferent is provided to the two

[1] Glendinning and Ghaunt v. Walker and others, 30th Nov. 1825, Fac. Coll., and 4 S. & D. 237., new ed. p. 241.; Dick v. Gillies, 4th July 1828, 6 S. & D. 1066. new ed.; Clavering v. Clavering, 12th Nov. 1833, (by the Lord Ordinary) rep. in 2 S. & M'L. 320 (note); Scougalls v. Birch or Walker, 9th July 1834, 12 D., B., & M., 910, affirmed on appeal, 2 S. & M'L. 305; Buchanan v. Downie, 12th Feb. 1830, F. C., & 8 S., D., & B., 516.

parents. But still, by the death of either parent, the children of the marriage are finally ascertained; there no longer remains any uncertainty as to the number or persons of the beneficiaries, nor any objection in principle to the vesting of the fee, under the burden of the surviving parent's liferent.[1]

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Certain terms of payment are specified, viz. the marriage or majority of the legatees; but the period at which the legacy is to vest is nowhere expressly stated. The mere circumstance that the whole or a portion of the estate bequeathed is subject to the interest of an annuitant or liferenter in no respect affects its vesting according to law, although it may afford a very good reason why the testator should provide that the legacy should not be paid, even at the specified term of payment, if the fund from which it is to be paid is not at the term of payment released from the operation of the liferent. The testator has created a liferent over certain funds, the fee of which he has also disposed of; and as he has specified no period at which the fee is to vest in the party to whom it has been so disposed of, it is clear that it must legally vest in that party upon the death of the testator. The payment was necessarily postponed, not with reference to the circumstances of the legatee, but to the state of the property.[2] The class of legatees must answer the description at the time the gift was to take effect.

Where several legatees are called together, there is frequently a substitution of the survivor or the survivors. The effect of such a provision may be, either that the

[1] Sivright v. Dallas, 27th Jan. 1824, Fac. Coll., and 2 S. & D. 643. (new ed. 543.)

[2] Atkins v. Hiccocks, 1 Atky. 500.

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survivors are to take after the original legatees, whichs the case of proper substitution, or else that they are to take in case some of the original legatees fail without having taken at all, which is the case of conditional institution.

It may be well to consider the clause of destination which occurs in the present case, in both of these lights. There is here a destination in favour of seven individuals, "share and share alike, and the survivors or sur- "vivor of them." Now, if this provision in favour of the survivors or survivor be considered as a proper substitution, its effect merely was, that as each of the individual legatees died their right of legacy should pass by succession to the survivors, provided that no alterations had been made by the deceasing legatee upon this order of succession. The survivors, being understood to take by succession, were of course liable to have that succession disappointed by the deed of the original legatee, in whom the right is supposed to have been previously vested. An instance of proper substitution occurred in the case of Duncan and others v. Miles and others, 27th June 1809.[1] If, again, it be considered as a case of conditional institution, the condition was purified by the legatee's survivance of the testator.

By the application of these rules to the present case it follows that the legatees must survive the testator, but it is by no means necessary that they should survive the annuitants who are appointed to liferent certain parts of the residue. The existence of these annuitants may delay the payment of such parts of the residue as are employed to meet the annuities, but cannot prevent

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[1] Fac. Coll.

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the vesting of the legatees right. The meaning of the term survivors or survivor is plainly the survivors or survivor of the testator. The surplus of the estate, after a sum is set apart for answering the annuities, clearly became vested in the legatees at the death of the testator, though the enjoyment thereof, except in so far as necessary for the maintenance of the legatees, might be postponed till their majority or marriage; and the same words cannot be read differently as to portions of the same fund. In Cripps v. Woolcott[1], by Sir John Leach, words of survivorship were referred to the period of division and enjoyment, but there the meaning put on survivor is inconsistent with that in Doe v. Prigg, 8 Barn. & Cress. 231. (See judgment as delivered by Bayley, J.[2]); where it was held that the term "sur-"viving" referred to the testator's death; the question being now sub judice in a case before the Lord Chancellor[3]; and see also Hill v. Chapman (1 Ves. jun. 405).

In the Cross Appeal.—The trustees of Mrs. Fothringham, who there appeared as respondents, maintained, that it was clear from the terms of the sixth purpose of the trust, that the legacies to George and Thomas Paterson ought not to be deducted from the capital invested for answering the annuities. The whole residue of the estate, after payment of debts and other onerous obligations, "whatever it might be," was directed to be invested in payment of the annuitants, if there were not otherwise funds for the purpose; in short, with the exceptions above referred to, and the payment of the legacy to Mrs. Alexander, these annuities were to be at all events secured to the full extent of funds left by the

[1] 4 Mad. 11. [2] 8 B. & C. 235.
[3] Wordsworth v. Wood, (since decided,) 4th Dec. 1839.

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testator. These were clearly the primary objects and purposes of the trust; every subsequent bequest was plainly subsidiary thereto.

Respondents.—It being admitted that the will is to be construed according to the enixa voluntas of the testator, the clear inference is that Alexander Paterson's share did not vest, in respect he did not survive Mrs. Fothringham. Till the death of the annuitants there was no vesting of the legacies, which therefore depended on contingencies; Alexander Paterson's share did not vest because the event of the fund being tangible had not arrived. When a trust is granted for the protection of the interest of various substitutes the deed subsists, and enures to the protection of all parties interested. The view of the appellants is sufficiently met by the authorities. The case of Wallace[1] illustrates the effect of a destination of a residuary trust fund, after the death of a liferentrix, to a class of persons and the survivors of them, and shews that the survivance of such term of division and payment was a condition precedent of such right, even although it had been also qualified with an express declaration that the shares were to be payable to such persons on their respectively attaining majority or being married. See also Lawsons v. Stewart[2]; Davidson v. Miln, 13th Feb. 1828[3]; Buchanan, 12th Feb. 1830[4]; Mowbray v. Scougall, 9th July 1834[5]; and in the House of Lords, 31st August 1835.[6]

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[1] Mor. App. voce Clause, No. 6.
[2] 2 W. & S. 625.
[3] 6 S. & D. 536.
[4] 8 S., D., & B., 516.
[5] 12 D., B., & M., 910.
[6] S. C. 2 S. & M'L. 305.

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But even although the right to a share of the fee or capital should be held to have vested in Alexander Paterson in his lifetime, yet that right could not be defeated by the gratuitous settlement on which the appellants founded. A right to two or more parties jointly, subject to a condition of accretion in favour of the survivor of them, communicates to each of the joint owners not only a qualified right to his or her own share, but a conditional right to the other shares,—not to be defeated gratuitously, while it remains in the possession of a trustee subject to its ultimate destination. Bissett, 26th Nov. 1799 [1]; Seton, 6th March 1793 [2]; Ersk. b. 3. tit. 8. s. 44. and the case there cited.

In the Cross Appeal.—According to the sixth purpose of the trust, the funds (the interest of which was to be paid to the annuitants) were to consist of the residue of the trust estate, after deducting the provisions to George and Thomas Paterson; the yearly sums which were divisible between the annuitants could not exceed the interest or dividends arising from such residue. The provisions to George and Thomas Paterson were expressly directed to be paid to them at the first term of Whitsunday or Martinmas after the testator's death, and to bear interest from the said term of payment till paid, and that not subject to any qualification whatever in favour of the annuitants.

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LORD CHANCELLOR.—My Lords, on one part of this case I confess I am surprised that such a decision should have been made; more especially when I find it must have been twice argued, first before the Lord Ordinary,

[1] Mor. App. 1. voce Deathbed, No. 2. [2] Mor. 4219,

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and afterwards before the Inner House; for it appears to me, though there is a little discrepancy between the two clauses, taking the whole instrument together there is not a foundation for the argument. The author of the deed directs certain sums to be invested for the payment of three annuities to his sisters, in the event that the residue of his funds and estate should be sufficient for that purpose, after payment of all the debts, fulfilment of all obligations in which he might stand bound at the time of his death, payment of the expenses attendant on the execution of the trust, and of 500*l.* to his sister, Mrs. Alexander; but if the residue of his funds and estate shall not be sufficient for yielding the aforesaid annuities thereby settled on his sisters, they should be reduced accordingly, not enumerating in that list the deductions from the capital monies required for the purpose of paying portions of 1,000*l.* to George and Thomas Paterson. By a subsequent part of the same deed he directs the payment of 1,000*l.* to those two persons; and then he says, there shall be paid a certain sum after his death; "the remainder of the said residue "being to be vested and laid out for yielding the said "annuities hereby provided as aforesaid, the above-"mentioned eventual legacies being to be paid to the "said George and Thomas Paterson at the first term "of Whitsunday or Martinmas after my death, with "interest from the said term of payment till paid." He gives, therefore, 1,000*l.* each to those individuals, to be paid at a certain specified time after his own death, and he directs that the remainder of the residue shall be invested and laid out for yielding the annuities. He has omitted, undoubtedly, in the first enumeration, the deduction from the residue to realize these sums, though

he has fixed the precise period at which they are to be paid. The question being whether those sums are to be paid to the prejudice of the annuitants, the Court have held that the annuitants are to be paid in full, notwithstanding the express direction in the deed that these legacies are to be paid within a certain time after his death. It appears to me there is no room for dispute as to the necessity of giving effect to that direction; that exhausts one of the appeals. The judgment of this House must interpose to set that right. With regard to the other clauses, they are not consistent with each other; and I would, therefore, propose to your Lordships to reserve the consideration of the questions arising out of these till Thursday next, when your Lordships will have had an opportunity of looking more particularly into them.

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Further consideration adjourned.

LORD CHANCELLOR.—My Lords, this case was adjourned for the purpose of giving your Lordships an opportunity of looking over the deed on which the question arises. There were two appeals: one as to the payment of two sums of 1,000*l.* each, which by the judgment of the Court of Session it had been found were not payable, except subject to annuities. The note of the Lord Ordinary sets out the grounds on which he had come to that conclusion, stating that "The sixth provi-
" sion of the conditional legacies to George and Thomas
" Paterson, however it may seem to interfere with the
" investment of the funds for securing the annuities,
" contains no declaration that the annuities shall be at
" all diminished on account of those legacies. It is
" entirely a question of intention; but the provision of

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" the annuities being the first in order, and from its " nature presumed to be of first importance in the tes- " tator's mind, and the words being clear, the Lord " Ordinary thinks that nothing but the most express " words in a later part of the deed could be held to " take away a right so explicitly given."

The decision of the Lord Ordinary, therefore, agreeably with that of the Inner House, proceeds upon this, that there is nothing to shew that the annuities were to be diminished on account of the legacies, and that unless there are express words in the latter part of the deed, they will not have the effect of taking away the right that is expressly given in the early part of the deed. There are certain words contained in this deed which must by some accident have been overlooked. In the earlier part of the deed, after directing payment of his debts, and fulfilment of the obligations existing at the time of his death, payment of the expenses attendant on the execution of the trust and of 500*l.* to his sister Mrs. Alexander, he directs that, in the event of the residue of the proceeds of his funds not being sufficient, the whole shall be invested in the annuities. There is, in that enumeration, no doubt, no mention of those legacies to George and Thomas Paterson; but he provides in what events the property he might leave to his legatees shall be payable. In the event of the residue being 15,000*l.* or upwards, then he directs 1,000*l.* to be paid to each of George and Thomas Paterson. If it shall be under 15,000*l.* and not less than 8,000*l.*, then that George and Thomas Paterson shall only have 500*l.* sterling each. The remainder of the said estate was to be vested and laid out for yielding the annuities as aforesaid. But if such residue shall not amount to 8,000*l.*, then he says,

" It is my intention that the said George and Thomas " Paterson shall not be entitled to receive any thing " whatever under this deed; and I direct my said " trustees and trustee to regulate themselves accord- " ingly; the above-mentioned eventual legacies being " to be payable to the said George and Thomas " Paterson at the first term of Whitsunday or Martin- " mas after my death, with interest from said term of " payment till paid." There is a distinct period fixed at which those legacies shall be paid; and it is obvious that those legacies are to be paid even in the event of there not being sufficient to provide for the payment of those annuities and those sums without a diminution of the amount of the annuities. I apprehend, therefore, it is quite clear there is that which the Lord Ordinary says would be sufficient. There is evidently a statement in the latter part of the deed giving a construction which would be undoubtedly the proper construction if there had been such a provision in the other part of the deed; taking then the whole together, I apprehend there is no doubt that the decision of the court below is incorrect, and that these legacies of 1,000*l.* each are payable at the time therein directed, though that may interfere with the payment of the annuities.

The other question which arises is undoubtedly a question of much greater difficulty, turning entirely upon the construction of this instrument, and how the words " survivors or survivor " are to be understood to apply,—whether at the period of the testator's death, or at the several periods at which the several sums he has given by this instrument are to be payable, i. e. referring the payment of any surplus from the sums set apart to

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answer the several annuities, together with these sums, to the periods at which the several annuitants might die, by which death the funds, according to the expression used in this deed, would be tangible.

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My Lords, in a case of this kind, very little assistance is to be derived from reference to authorities, for though the general rules are very well understood, both in this country and in Scotland, yet when there are particular expressions used on the face of an instrument leading to the indication of intention, they must govern; the general rules apply only where there is no particular indication. The earlier judgments in this country, in cases where there is nothing to lead to the contrary conclusion as to the testator's intention, have a very strong tendency to refer the provision to the period of the testator's death. The later cases have very much departed from that rule, and notwithstanding the very strong opinion expressed by Sir John Leach in one of the cases referred to[1], it may be considered that the point is not now very clearly established as a distinct proposition; but that in the one class of cases or the other we must be regulated by the expressions used by the testator. Your Lordships must endeavour to collect the inference to be drawn from these expressions; it is impossible to reconcile all the expressions in this insrument.

The testator has given several annuities of 400*l.*, 400*l.*, and 200*l.* to his three sisters, and he has directed his trustees to invest capital sufficient to secure those annuities. He has then provided for two events, that of there being more money belonging to his estate than sufficient for the purpose of securing the payment of the annuities;

[1] Ante, p. 707.

and he has provided for another event, that of his estate not being adequate to provide for the payment of all those annuities. He directs that if the estate is not sufficient for the payment of all those annuities, then the annuities shall abate; but if there be more than sufficient, if there be a surplus, he directs that the surplus, together with the invested sums when tangible by the deaths of the said annuitants respectively, shall be paid by the trustees thus, "or in the event of there being no surplus, " then the said invested sums, when tangible as afore- " said, shall be paid to 'seven persons,' share and " share alike, and the survivors or survivor of them, " and that at the first term of Whitsunday or Martin- " mas after their respectively attaining twenty-one or " being married."

Now, in speaking of the death of the annuitants, and the period therefore at which these various sums would become what he calls tangible, he refers to those periods as the periods at which the sums would be to be paid; he also refers to two other periods, at which he says they shall be paid, namely, when the legatees attained twenty-one or were married. It is obvious one of the periods referred to is when such invested sums should become tangible by the death of the annuitants, the other refers to the period at which the annuitants should respectively marry or attain twenty-one; and looking therefore at the subsequent clauses, the author of this instrument has given us this clue to his meaning, that in speaking of the periods of payment he speaks of the periods at which the property would become tangible, and also the periods at which the parties should die or attain twenty-one.

Then there are four provisions with reference to the

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interests of those several legatees. The question will be, whether in directing those provisions there is any indication of intention sufficient to shew what he means by the words "the survivors or survivor of them,"—to what period they should apply. He provides first that the legatees should have maintenance payable out of their shares; secondly, there is a power to the trustees to advance to Alexander, who is one of the legatees, for his outfit and establishment, the whole or any part of the sum falling to his share. Now those two provisions evidently assume that the property, or some portion at least of the property, has become vested in enjoyment, or is capable of enjoyment by the intermediate interests being removed before the legatee attains majority or is married. It is not a fund of which any other persons could have the enjoyment; he must have meant maintenance out of a fund belonging to the legatee appropriated to the legatee, and he provides for the maintenance of the legatee for the period during which from personal inability he was not in the enjoyment of it, namely, before majority or marriage. When he authorizes the advance to Alexander of any part of the sum falling to him, he must mean the share which was his, subject to personal disability, in which case the trustees are authorized to advance to him any portion of the sum they might think proper. In the same way, in the third place, a power is given to the trustees to settle and secure the shares falling to all or any of the female legatees, so as to enable them to draw the interest of their shares during their lives, and the capital of their shares to go to their heirs and executors. It is not absolutely necessary that the property for that purpose should be in possession, because the settlement might be

made prospectively, in order to secure the share which might eventually become theirs. The great probability is, that if the question had arisen upon these provisions, it would have been considered that those were shares of what they were entitled to in possession, but with a power given to the trustees to intercept the actual enjoyment for the purpose of settling upon them for life, with remainder to those that might come after them.

But then, my Lords, comes the provision upon which the great question arises. It is provided, that if any of the legatees die before the term of payment (one or more, as the case may be) of these shares, leaving issue which shall be in life at the time the parent would have been entitled to have received payment of their shares had they survived, such issue shall take the parent's share at the time at which such deceasing parents would have been entitled to receive the same if they had been in life.

Now the way of trying the question upon this provision appears to me to be this: — suppose the shares were all vested at the time contended for by the appellants, namely, at the moment of the testator's death, and not, as contended for on the other hand, that the vesting was postponed during the continuance of the particular interests of the annuitants:—if the legacies vested, and the term of payment only was postponed, it is singular that a provision should be made for the children of those particular parties who would be provided for without it, because it would become the property of the parent, and the parent would of course have dominion over it, for the purpose of providing for his children.

But it is hardly necessary to reason upon the impro-

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bability of that being the testator's intention, because, though he has before expressed other periods of payment, namely, that the payment is to depend on attaining twenty-one or marriage, yet the payment even at these terms is to depend upon the sums becoming tangible by the death of the annuitants. When he therefore refers to the time at which the legatees are to be entitled to their legacies he refers expressly to the time at which the capital shall become tangible, the terms of payment referred to as "terms of payment (one or more) of their "shares as aforesaid" are dependent entirely upon the fact of the funds having become tangible by the death of the annuitants. A legatee attaining twenty-one and marrying, would have no power over his legacy expectant upon the death of an annuitant, his or her death, before the death of the annuitant, would give the legacy to his or her children; if the legatee died before the annuitant, leaving a child, the legatee clearly would not take, the child is to come in his place. Nothing is more improbable than that the donor should intend to provide for the children of a legatee who should attain twenty-one, and marry, as against the parent, but it is very natural that he should wish to secure the legacy to the family of a legatee who should die before he became entitled, leaving children. It seems to me clear that the testator conceived that if the legatee should die before the funds became tangible, such funds would not belong to the legatee. He says, "the payment of the share "which the father or mother would have become entitled to receive had they survived," and he gives it to such children only as shall be in life at those times; if the term "survivors" refers to the times at which the funds would become tangible, and therefore divisible,

the provision is natural and consistent, as it only secures to the family of each legatee dying before the time of payment, leaving issue, the benefit of the legacy against the other surviving legatees.

It is from this clause, and this clause only, it appears to me that the testator's intention may fairly be inferred; and it does appear to me that the provision in that clause in favour of children is not consistent with the vesting of the capital at the time of the testator's death; that the provisions are not consistent with what must have been his obvious wish if he had looked to the vesting of the capital either at that period or at the time when a legatee became of age or was married; that it can be reconciled only with his applying it to the survivorship, at the periods at which the funds constituting the capital might be relieved from the payment of the annuities. I think that your Lordships will come to the conclusion that there is sufficient upon the face of this instrument to shew that the term "survivor" does not refer to the period of his own death, but that it refers to the period at which those sums would become tangible: that would therefore lead to an affirmance of the interlocutor appealed against. With regard to the other question, the interlocutor brought before your Lordships by the cross appeal must be reversed. Your Lordships have not before you the means by which this can be set right here. I apprehend that the form of the order will be to affirm the interlocutors in the original appeal, and to vary them so far as relates to the legacies, declaring that those legacies were payable to George and Thomas Paterson, at the first term of Whitsunday or Martinmas after the testator's death, and then to remit it to the Court below, to

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carry into effect that order, because your Lordships have not the proceedings in that state before you which will enable you to settle the question finally. I understand that the cause is in that state which will enable the Court below to proceed upon that declaration.

Lord Advocate.—Certainly, my Lords.

The House of Lords ordered and adjudged, That the said original petition and appeal be and the same is hereby dismissed this House; and that the said interlocutors, so far as complained of in the said original appeal, be and the same are hereby affirmed: And it is further ordered and adjudged, That the part of the said interlocutors which is complained of in the said cross appeal be varied, by omitting so much thereof as finds that the claim to such annuities cannot be diminished or affected by the subsequent provision of the two legacies to George and Thomas Patersons by the sixth purpose of the said trust, or by the interests accruing on those provisions: And it is declared, That the legacies of one thousand pounds sterling to each of the said George and Thomas Patersons (under the trust disposition and settlement of Alexander Porterfield esquire) were payable to the said George and Thomas Patersons at the first term of Whitsunday or Martinmas after the death of the said testator; and that the sum applicable to the payment of the annuities payable under the said trust disposition and settlement was the residue of the said trust fund, after deducting as well the testator's debts and obligations, the expenses of the trust, and the legacy of five hundred pounds to Mrs. Alexander, as the said two legacies payable to the said George and Thomas Patersons: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this declaration and judgment.

RICHARDSON and CONNELL,—SIMPSON and COBB, Solicitors.