ters of inhibition, in the form mentioned in section 156, and schedule (QQ) of the said last recited Act, shall be by production of a *Fiat ut* petition, duly obtained in the Bill Chamber on a bill presented along with a proper ground of debt, or along with a depending summons upon which the inhibition is to be raised." The same Act provides that this enactment is not to apply to inhibition used on the dependence where the summons contains the warrant. But, with this exception, while the bill is still necessary, it seems to follow that the purpose for which it was formerly required is the very purpose for which it is still kept up, viz., to set forth the ground of debt; and the statement, where the facts are not simple, as here, must be something fuller and more explicit. So in this case the letters of inhibition should have contained the statement on which the creditor now relies. On these grounds, I am of opinion that the inhibition should be recalled.

LORD DEAS—I am of opinion that the only way in which the creditor could use diligence of inhibition was by founding on the original bill, and the renewal bills as well. I am not prepared to say that the setting forth of a verbal agreement would have entitled the creditor to diligence had it not been otherwise incompetent.

LORD ARDMILLAN—There are two important rules of law which bear upon this case, though the case itself is one of some nicety. First, where a past due bill is renewed by means of granting a new bill, the creditor is not entitled to do diligence on the old bill during the currency of the renewal bill; and, in the second place, a creditor holding a bill of which the term has not arrived may use diligence, but only on alleging *vergens ad inopiam*, or other equally emergent and important fact. In the circumstances here, there can be no doubt that the two bills for £25 and £35 respectively were given as renewals, and the effect of taking these other bills was to postpone the payment of the first. It was, therefore, in the position of a bill the term of which had not arrived, and the creditor was not entitled to conceal the real circumstances of the case in obtaining letters of inhibition. If he had alleged *vergens ad inopiam* he would have been entitled to his diligence in security, and the law would not have considered it oppressive.

LORD JERVISWOODE concurred.

The Court accordingly recalled the inhibition, with expenses.

Counsel for Petitioner—Harper and W. Watson. Agent—Henry Buchan, S.S.C.

Counsel for Respondent—M'Kechnie and Scott. Agent—William Black, S.S.C.

Saturday, June 28.

SECOND DIVISION.

[Lord Gifford, Ordinary.

ELLIOT'S TRS. AND OTHERS *v.* BOWHILL AND OTHERS.

Testament—Period of Vesting—Alimentary Provision—Residue.

A testator by trust-disposition directed his trustees—(1) during the currency of certain leases yearly to divide the profits among the beneficiaries, his children, and provided that such sums were to be strictly alimentary and not assignable or liable to be attached by creditors; (2) on the expiry of the leases to realise the crop and stocking, and divide the capital among his children. *Held*—(1) that the whole rights of the surviving children vested *a morte testatoris*, and (2) in a question with assignees and creditors, that the provisions of the deed as to the alimentary nature of the annual payments were valid and effectual.

Observed (*per* Lord Justice Clerk) that in this case the condition in point of time was a character of the thing bequeathed, and that there was no interposed second party to take prior to the division of residue, the persons favoured in each purpose being the same.

Donation—Provision under marriage-contract—Share of Residue.

A father bound himself to pay £1000 to his daughter's marriage-contract trustees; subsequently he divided his property by a trust-deed equally among his children—*held* that in making this settlement he must have had the prior obligation in view, and that the trustees were bound to pay the £1000 as a debt, without imputing it to this daughter's share of the residue.

This case came up by reclaiming-note against the Lord Ordinary's (GIFFORD) interlocutor of 26th December 1872. The conclusions of the summons were—"(1) that it should be found and declared that the rights and interests of Henry Elliot, James Elliot, Dorothy Elliot or Bowhill, Mary Elliot or Railton, Robina Elliot or Turnbull, and of the deceased Elizabeth or Bessie Elliot and William Elliot, the surviving children of the deceased James Elliot, in the residue of the trust-estate of the said deceased James Elliot, as provided to them by the second and third purposes of the trust constituted by his trust-disposition and settlement, dated the 18th August 1865, including their interests in the tacks of the farms of Lamberton, Lamberton Shiells, and Bastleridge, and whole stock, crop, and others upon the said farms, vested in them and each of them respectively at and after the date of their said father's death: and that, from and after the said date, they had power to demand and receive from the trustees of their father, or from the judicial factor upon his trust-estate, a conveyance and assignation of the whole interest of the deceased under said tacks, and of the whole stock, crop, and others upon the said farms, and had also power to grant valid conveyances or assignations of their several rights and interests in the said leases, and in the said stock, crop, and others, and otherwise to dispose of them as their absolute property, except in so far as the same had been conveyed or assigned by them previous to their said father's death; and (2) that the sum of £1000 sterling, which by contract of marriage between Henry Turnbull and Robina Elliot or Turnbull, the deceased James Elliot bound and obliged himself, and his heirs, executors, and successors, within six months after his death, to pay to the trustees under the said contract of marriage, for the purposes therein mentioned, or to the survivors or survivor of them, together with interest from the 12th day of June 1867, being the date when the same was paid to

the said trustees, ought to be deducted from the share or interest of Robina Elliot or Turnbull in the residue of her father's estate, or at least that the same falls to be imputed as a payment to account in settling or ascertaining the amount of the said Robina Elliot or Turnbull's share of or interest; and the said Robert Cameron Cowan ought and should be decerned, by decree foresaid, to make payment to the pursuers, Henry Elliot and James Elliot, of the respective shares of the annual produce of the trust-estate to which they are entitled as two of the sons of the deceased James Elliot; as also to make payment to the pursuer James Elliot, as executor of the said deceased Elizabeth or Bessie Elliot, of the share of the interest, income, or annual produce of the said estate to which the said Elizabeth or Bessie Elliot was entitled as one of the daughters of the said deceased James Elliot; as also to make payment to the pursuer, James Elliot, as executor of the said deceased William Elliot, of the share of the interest, income, or annual produce of the said estate to which the said William Elliot was entitled as one of the sons of the said deceased James Elliot; as also to make payment to the pursuers, James Elliot and Mrs Mary Elliot or Railton, equally between them, as assignees of the said Mrs Dorothy Elliot or Bowhill and Thomas Bowhill, of the share of the interest, income, or annual produce of the said estate to which the said Mrs Dorothy Elliot or Bowhill is entitled as one of the daughters of the said deceased James Elliot; as also to make payment to the pursuer, the said Mrs Mary Elliot or Railton, of the share of the income, interest, or annual produce of the said estate to which the said Mrs Mary Elliot or Railton is entitled as one of the daughters of the said deceased James Elliot, during the currency of the foresaid tacks of the farms of Lamberton, Lamberton Shiells, and Bastleridge, and thereafter to make payment of the said share of the said interest, income, or annual produce, and also of the said Mrs Mary Elliot or Railton's half of the interest, income, or annual produce of the said estate to which the said James Elliot and she are entitled as assignees of the said Mrs Dorothy Elliot or Bowhill and Thomas Bowhill, to the said James Elliot and James White Smith, as accepting trustees under the said trust-disposition and conveyance granted by the said Mrs Mary Elliot or Railton, with consent of the said John Robert Railton; and, further, the said Robert Cameron Cowan, as judicial factor, ought and should be decerned and ordained, by decree foresaid, to pay over, convey, or assign to the pursuers respectively, or those in their right at the time when the same falls to be divided, the fee or capital of the shares of the residue of the trust-estate of the said deceased James Elliot falling to them respectively."

James Elliot, tenant at Lamberton, died on 29th September 1866, leaving a trust-disposition and settlement dated 18th August 1865, by which he disponed, assigned, and conveyed to certain trustees, and to the survivors or survivor of them, his whole moveable or personal estate and means of whatever kind then belonging or which might belong to him at the time of his death, and specially he thereby disponed, assigned, and conveyed to the trustees his whole right and interest in a tack of the farms and lands of Lamberton and Lamberton Shiells, as also in a tack of the lands of Bastleridge, with all the clauses and obligements therein contained, profits and emoluments which might arise therefrom, with power to them as trustees foresaid to occupy and possess said lands, and to intromit with and uplift the rents, profits, and duties thereof during the remaining years of the tacks, and he thereby further nominated and appointed his trustees to be his sole executors and intromitters with his whole goods and effects, excluding all others from that office, but in trust always for the uses and purposes therein mentioned. [The purposes of the trust are fully set forth in the note to the Lord Ordinary's interlocutor.]

The truster was survived by the following children, namely, the pursuers, Henry Elliot, James Elliot, and Mary Elliot, now Mrs Mary Elliot or Railton, and also by Mrs Dorothy Elliot or Bowhill, and Mrs Robina Elliot or Turnbull, and the deceased Elizabeth or Bessie Elliot and William Elliot. These still survive, with the exception (1) of Elizabeth Elliot, who died upon the 24th day of April 1871, leaving a testamentary disposition, dated 5th November 1866, and with codicil thereto, dated 9th March 1868, and (2) of William Elliot, who died on 26th January 1872, leaving a disposition and settlement, dated 13th October 1871. In both of these dispositions the pursuer, James Elliot, was appointed sole executor.

The trustees of the deceased James Elliot accepted and gave up an inventory of the deceased's personal estate, amounting to £20,289, 16s. 8d., inclusive of the value of the stock, crops, and implements on the farm of Dalgleish, and also a debt due to the deceased by his son Henry Elliot, which it is understood now amounts to above £5000, in security of which the defender, the judicial factor on his estate, holds an assignment to the lease of the farm of Akeld in Northumberland, and a security over the stock, crops, and implements on the said farm. The truster did not die possessed of any heritable estate other than the leases of the various farms tenanted by him. These were the farms of Lamberton, Lamberton Shiells, and Bastleridge, mentioned in his trust-disposition and settlement, and also the farm of Dalgleish, in Selkirkshire, which the said deceased James Elliot occupied as joint-tenant along with his brother, the Henry Elliot, farmer, Greenriver, and the lease of which expired at Whitsunday 1867. The yearly rent payable for the farms of Lamberton and Lamberton Shiells amounts to £1550, and the lease expires in 1876. The yearly rent of the farm of Bastleridge, of which the lease expires at the term of Whitsunday 1873, is £495. At the date of the death of James Elliot there was no formal lease of Lamberton and Lamberton Shiells, but a draft lease had been adjusted between him and the landlord in terms of the missive of lease, and his trustees were called upon shortly after his death to execute a formal lease of the said two farms, which was accordingly done. After the death of James Elliot various arrangements were made by the trustees for the management of his estate, but as these did not prove satisfactory to all parties concerned, the trustees resolved to resign. This accordingly three of them did on 19th October 1867, and the remaining trustee, along with those who had resigned, by petition applied to the Court for the appointment of a judicial factor on the trust-estate, and for authority to resign his office of trustee and executor, and to discharge the whole petitioners of

their intromissions with the trust-estate. The prayer of the petition was granted by interlocutor, dated November 30, 1867, and Mr Barstow, C.A., appointed judicial factor, he found caution, and entered on the duties of his office. On 17th May 1870 the pursuers and defenders jointly presented a petition to the Court, setting forth, *inter alia*, that they were the whole parties interested in the trust-estate of James Elliot; that they had made an arrangement among themselves for the adjustment and settlement of their rights, and for the future administration and management of the funds and estate left by the said James Elliot; and that they were anxious to avoid the heavy expense entailed upon them by the appointment of a judicial factor, and they therefore, *inter alia*, craved the recal of the said factory, and the appointment of the said Charles Murray Barstow as judicial factor foresaid. In this petition, Lord Mackenzie, Ordinary, on 22d June 1870, pronounced an interlocutor, whereby he, *inter alia*, sisted procedure in the said petition in so far as regarded the prayer for recal of Mr Barstow's appointment, and the leases of the farms of Lamberton, Lamberton Shiells, and Bastleridge, and the whole stock, crop, and others thereon, until the petitioners should have obtained decree in a competent process to which all parties interested should have been called, that on a sound construction of the trust-disposition and settlement of the said James Elliot, the petitioners were, during the currency of the said leases of Lamberton, Lamberton Shiells, and Bastleridge, entitled to the said leases, and to the whole stock, crop, and others thereon, and to conveyances and delivery of the same. Sundry minutes were lodged in said petition, and other procedure took place, and on 15th October 1870 Lord Mackenzie pronounced an interlocutor recalling the appointment of Mr Barstow as judicial factor on the estate of the deceased James Elliot, and nominating the defender, Robert Cameron Cowan, C.A., to be judicial factor on the estate in his place.

In consequence of the interlocutor of Lord Mackenzie (Ordinary) of date 22d June 1870, and of the death of Miss Bessie or Elizabeth Elliot, which happened on the 24th April 1871, and of the death of William Elliot, which happened on 26th January 1872, it has become necessary that the question of the vesting of the estate of the deceased James Elliot should be determined. The parties in this case are the whole parties beneficially interested in the estate of the deceased James Elliot, and the said Robert Cameron Cowan has been called as a defender for any interest he may have in the premises as judicial factor on the trust-estate.

By antenuptial contract of marriage, dated 13th November 1861, between Henry Turnbull, farmer, at Blackadder, and Robina Elliot or Turnbull, daughter of James Elliot, farmer at Lamberton, to which contract of marriage the said James Elliot was a party to the effect after mentioned, the said Mrs Robina Elliot or Turnbull, in consideration of the provisions in her favour therein contained, assigned and disponed to certain trustees, for the purposes therein mentioned, and to their assignees, all her property, heritable and moveable, excepting only her provisions therein specified; and the deceased James Elliot bound and obliged himself and his heirs, executors, and successors, within six months after his death, to pay to the said trustees for the purposes therein mentioned, or to the survivors or survivor of them, the sum of £1000, together with interest thereon at the rate of five pounds per centum per annum from the date of payment until payment thereof. This sum of £1000 was, on 12th June 1867, paid by the trustees of James Elliot to the defenders, the trustees under the said contract of marriage, and they granted a discharge for the same. The defenders, the said John Allan and John Turnbull, are the sole accepting and acting trustees under the said contract of marriage. The pursuers believe and aver that it was not the intention of the said deceased James Elliot to give to the said Mrs Robina Elliot or Turnbull a larger share of his estate than his other sons and daughters. By assignation and conveyance, dated 12th and 13th December 1870, Mrs Dorothy Elliot or Bowhill assigned, disponed, conveyed, and made over from them and their heirs, executors, and representatives, to and in favour of the pursuers, James Elliot and Mary Elliot (now Mrs Railton), and their heirs, executors, and representatives whomsoever, all and whole the share, being one-seventh, to which she, the said Mrs Dorothy Elliot or Bowhill, had right as one of the seven children of the said deceased James Elliot, of the whole estate, heritable and moveable, belonging, addebted, or resting-owing to the said deceased James Elliot at the time of his decease, whether conveyed as aforesaid to his said trustees by his said disposition and settlement, or left undisposed of by him, and of the price or prices and produce thereof when sold and realised, as also during the currency of the foresaid leases, her the said Mrs Dorothy Elliot or Bowhill's one-seventh share of the profits and emoluments arising therefrom, all as contained in the said disposition and settlement of the said deceased James Elliot of the date aforesaid, or of whatever other date or dates the same might be. The said assignation and conveyance was duly intimated to the judicial factor on the said trust-estate of the said James Elliot, and is herewith produced and referred to. By trust-disposition and conveyance, dated 19th June 1871, Mrs Mary Elliot or Railton disponed, assigned, and conveyed to certain trustees, for the purposes therein mentioned, the whole estate, heritable and moveable, real and personal, of every description (except cash then in hand, and under the reservation therein mentioned), then belonging to her, or which she might acquire or succeed to during the subsistence of the said marriage, and in particular, and without prejudice to the said generality, *inter alia*, not only All and Whole the one-seventh share to which she had right as one of the seven children of the said James Elliot, but also to the extent (being one-half) to which she had right to the same in virtue of the foresaid assignation and conveyance in favour of her, the said Mary Elliot, and the said James Elliot, the one-seventh share of the said Mrs Dorothy Elliot or Bowhill, of the whole estate, heritable and moveable, belonging, addebted, and resting-owing to the said deceased James Elliot at the time of his death, whether conveyed as aforesaid to his said trustees by his said disposition and settlement, or left undisposed of by him, and of the price or prices and produce thereof when sold and realised. It was by the said trust-disposition and conveyance declared that the same was granted subject to the reservation, to the said Mary Elliot to uplift, receive, and apply to her own

separate use, exclusive of the *jus mariti* and right of administration of her said intended husband, the said share corresponding to the portions of the said deceased James Elliot's estate thereby conveyed, which had accrued, or which should accrue, during the currency of the leases therein mentioned, of the profits and emoluments arising therefrom, and that on her own separate receipt only, for which shares of the said profits and emoluments, in so far as uplifted by her, the said Mary Elliot, during her life, the said trustees acting under the said trust-disposition and conveyance should not be accountable; subject to which reservation the said Mary Elliot thereby authorised her trustees to demand and receive from the judicial factor on the estate of the said deceased James Elliot all that were thereby conveyed, on the same becoming payable, in terms of his said disposition and settlement, and to grant discharges and receipts therefor which should be sufficient to the said judicial factor or his successors. The said trust-disposition and conveyance contains clauses declaring the purposes of the trust thereby created, and various other declarations and clauses, and is herewith produced and referred to for its terms. It was duly intimated to the defender, the said Robert Cameron Cowan, as judicial factor on the said trust-estate of the said James Elliot. Miss Elizabeth or Bessie Elliot, by testamentary disposition, dated 5th November 1865, left to her brother, the pursuer James Elliot, her whole means and estate, heritable and moveable, nominating him her sole executor of this estate. James Elliot gave up an inventory, and was confirmed executor. William Elliot, by disposition and settlement dated 13th October 1871, left to his brother, the pursuer James Elliot, his whole means and estate, heritable and moveable, and nominated him his sole executor. James Elliot is in course of giving up an inventory of the personal estate of his brother, and of obtaining confirmation as his executor. The following assignations in security have been intimated to the defender Robert Cameron Cowan, as judicial actor foresaid, viz.:—(1) Bond and assignation in security by the said James Elliot, the said deceased William Elliot, and the said Mary Elliot, in favour of Mary Prentice Kirkwood, dated 12th March 1868, now assigned to Mrs Mary Barber. (2) Bond and assignation in security by the said James Elliot and Miss Mary Elliot (now Mrs Railton), in favour of Messrs Woods & Co., dated 17th February and 17th March 1871; and (3) Bond and assignation in security by the said Henry Elliot in favour of Messrs Woods & Co., dated 17th February 1871; and (3) Bond and assignation in security by the said Henry Elliot in favour of Messrs Woods & Co., dated 1st April 1871. Any decree to be pronounced in the present process in favour of the pursuers, the said James Elliot, Mrs Mary Elliot or Railton, John Robert Railton, and the said James Elliot and James White Smith, as trustees foresaid, and the said Henry Elliot respectively, will be subject to the rights of the creditors in the said several bonds and assignations in security affecting their respective shares.

The pursuers pleaded—"(1) On a sound construction of the trust-disposition and settlement of the said deceased James Elliot, the provisions in favour of his children contained in the *second* and *third* purposes of the trust vested *a morte testatoris*. (2) Said provisions having so vested in the children of the said James Elliot, the pursuers were and are entitled to deal with the shares of the said estate to which they respectively obtained right on his decease as their own absolute property. (3) On a sound construction of the said trust-disposition and settlement, and of the contract of marriage between the said Henry Turnbull and Mrs Robina Elliot or Turnbull, the sum of £1000, provided in the latter deed by the said deceased James Elliot, is not over and above the equal share of the residue of his estate to which Mrs Turnbull is entitled under his said trust-disposition and settlement; and the same, with interest, ought to be debited and charged by the judicial factor on the trust-estate of the said James Elliot, as a payment to account of the share of residue provided to the said Mrs Robina Elliot or Turnbull. (4) The pursuers are entitled to receive the annual income, interest, produce or profits, arising from the shares of residue of the said trust-estate, to which they are respectively entitled; and also, when the period of division arrives, to receive payment of the fee or capital of their said respective shares."

The defenders (Mrs Bowhill and others) pleaded that, "on a sound construction of the trust-disposition and settlement of the deceased James Elliot, the provisions therein in favour of his sons and daughters did not vest *a morte testatoris*, and that being so, the pursuers are not entitled to decree as concluded for."

The defenders, Mrs Turnbull and others, pleaded that "(1) On a sound construction of the late James Elliot's trust-disposition and settlement, no interest in the fee of the provisions referred to in the second and third purposes of the trust vested in the children on the death of their father, or will vest until the termination of the leases. (2) No valid conveyance or assignation could be granted by any of the children either of the share of the fee which had not vested, or of the share of the liferent which was declared to be not assignable. (3) Under the provisions of her contract of marriage, Mrs Robina Elliot or Turnbull's marriage-contract trustees were creditors of James Elliot's trust-estate for £1000, and Mrs Robina Elliot or Turnbull is entitled to her share of the residue of the trust-estate under her father's trust-disposition and settlement without deduction of the said sum of £1000, or any part thereof."

The defender, the judicial factor, pleaded—"(1) Upon a sound construction of the trust-disposition and settlement of the late James Elliot, the provisions in favour of his children contained in the second and third purposes of the trust, do not vest till the respective periods of expiry of the leases therein mentioned. (2) The defender, as representing the said trust, being bound to hold the said leases, and the crop, stock, and others on said farms for the purpose of the income and profits thereof, forming an alimentary fund for behoof of the various members of the truster's family during the currency of said leases, the pursuers are not entitled to the conveyance and assignation concluded for. (3) Generally, the pleas of the pursuers being inconsistent with a sound construction of the said trust-disposition and settlement, the defender is entitled to be assoilzied from the conclusions of the action."

The Lord Ordinary pronounced the following interlocutor and Note:—

"*Edinburgh, 26th December* 1872.—The Lord

Ordinary having heard parties' procurators, and having considered the closed record, the trust-disposition and settlement of Mr James Elliot, the other deeds produced, and the whole process, Finds that, according to the sound construction of the trust-disposition and settlement of the said James Elliot, dated 18th August 1865, each of his seven children who survived him took a vested right and interest in one seventh part of the whole free residue of his means and estate, and that *a morte testatoris*,—that is, on the death of the said James Elliot, which took place on or about 29th September 1866: Finds that each of the said seven children of the said James Elliot took a vested right and interest in one seventh part of the yearly interests, profits, and emoluments arising after the death of the said James Elliot, and payable in terms of his said deed yearly until the final division of his said estate, and that the said right and interest vested *a morte testatoris*,—that is, on the death of the said James Elliot: Finds that the said annual profits and emoluments payable yearly to each of the testator's children in terms of his deed up to the term or terms fixed for the final division of his estate, are strictly alimentary, and are not assignable by any of the said children, nor liable to be attached in any way by their creditors, or by the creditors of the husbands of any of the testator's daughters; and finds that the provision to this effect contained in the said trust-deed and settlement is valid and effectual in law: Finds that the trustees and representatives and estate of the said deceased James Elliot are liable and bound to pay the sum of £1000, with interest, contained in and provided by the antenuptial contract of marriage, dated 13th November 1861, between Henry Turnbull and Mrs Robina Elliot or Turnbull, the truster's daughter, and that in terms of the said antenuptial contract; and finds that said sum of £1000 and interest does not fall to be imputed towards or deducted from the provisions and interest to which the said Mrs Robina Elliot or Turnbull is entitled under her father's said trust-disposition and settlement: And with these findings, appoints the cause to be enrolled, that the same may be applied to the conclusions of the action, and for farther procedure therein; and meantime reserves all questions of expenses, and grants leave to reclaim against this interlocutor.

"*Note.*—Instead of dealing directly and in the first instance with the various declaratory and other conclusions of the summons, the Lord Ordinary thinks it more expedient to pronounce definite findings on the various questions of law raised on the record. If these findings are affirmed or acquiesced in, or varied on a reclaiming note, there will be no difficulty in thereafter exhausting the formal conclusions of the action. In accordance with what he understood to be the wish of the parties, the Lord Ordinary has given leave to reclaim.

"The trust-disposition and settlement of the late Mr James Elliot, tenant at Lamberton, is a very short and simple deed, and yet the questions arising under it are attended with considerable nicety.

"The deed is dated 18th August 1865, and is in the form of a universal trust-deed. It conveys to the trustees therein named the truster's whole estate, heritable and moveable, of every description; and, in particular, it assigns two leases, the first of Lamberton and Lamberton Shiells, and the other of Bastleridge, of which farms the truster was tenant, and which leases had different periods of endurance. The purposes of the trust are,—first, payment of debts and funeral charges. The second and third purposes, upon which the whole present questions turn, are thus expressed:—'Secondly, That my said trustees shall, during the currency of the leases of Lamberton, Lamberton Shiells, and Bastleridge, yearly divide the profits and emoluments arising therefrom among the various members of my family, share and share alike, the child or children of any predeceasing succeeding to the portion that would have belonged to his, her, or their deceased parent; declaring that the sums so payable to each of my family are intended to be strictly alimentary, and shall not be assignable, nor liable to be attached in any way by their creditors, or the creditors of the husbands of any of my daughters: Thirdly, Upon the expiry of the tacks of Lamberton, Lamberton Shiells, and Bastleridge, my said trustees are hereby authorised to realise the whole stock, crop, and others thereon, and to divide the same equally among my sons and daughters; declaring that the child or children of any predeceasing shall succeed to the portion that would otherwise have belonged to his, her, or their deceased parent.'

"The truster died on 29th September 1866, survived by seven children, viz., Henry, James, Mary (Mrs Railton), Dorothy (Mrs Bowhill), Robina (Mrs Turnbull), Elizabeth, and William. Elizabeth and William Elliot have since died, both leaving settlements, appointing their brother James to be their sole executor. Mrs Turnbull was married during her father's life, and before the date of his trust-deed, and in her marriage-contract her father bound himself to pay £1000 to the marriage-contract trustees. Mrs Bowhill in 1870 conveyed her share of the succession to James and Mary Elliot, and in 1871 Mary Elliot (Mrs Railton) conveyed her share of the succession, including her half of Mrs Bowhill's share, to trustees, for certain purposes. Certain assignations in security have also been granted by James Elliot, William Elliot, Mary Elliot, and Henry Elliot, upon which claims arise.

"The estate is now under the management of a judicial factor, and the present action has been brought to determine the rights of the various parties under the trust-deed, and under the various assignations and conveyances which have been granted.

"I. The first and most important question is, When did the shares of the residue of the testator's estate vest in his children respectively? Did the right vest *a morte testatoris*, or was vesting suspended till the period of division fixed by the deed, being the expiry of the leases of Lamberton, Lamberton Shiells, and Bastleridge? The Lord Ordinary is of opinion that, according to a sound construction of the trust-deed, the whole residue of the estate vested in the testator's children *a morte testatoris*, one seventh share in each child; and that vesting of the residue was not suspended till the period or periods of ultimate division.

"In cases like the present, the presumption always is for instant vesting. In a universal settlement the equal share of each child is necessarily in full of legitim; and as legitim would have vested *a morte*, it is reasonable to hold that its substitute also so vested, unless there be some provision expressed or implied to the contrary.

"The bequest of the residue to the testator's children is in no sense made conditional. It does not depend on any uncertain or contingent event, but the direction is absolute, that on the expiry of the leases the whole proceeds of stock, crop, and others, are to be divided 'equally among my sons and daughters.'

"The postponement of the division till the expiry of the tacks is a mere postponement in point of time, and not in any view a postponement depending upon contingency. The tacks are certain to expire at fixed and known dates; and the direction must be read just as if the testator had fixed these dates as the dates of division. *Dies cedit sed non venit.*

"It is to be noticed also that the postponement of division was merely for the necessary purpose of administration and realisation. The farms were to be carried on till the expiry of the leases; and it was only then that the crops, stocking, &c., could be realised and divided. It was the mere accident of the condition or investment of the testator's means which caused the postponement, and not anything connected with the position of the beneficiaries. It is as if the estate had been locked up in bonds, payable at a distant date. They could not be divided until the day of payment arrived. A postponement like this never suspends the vesting, any more than a direction, for the sake of convenience, to pay six months or twelve months after a testator's death.

"Still farther, if the period of vesting is to be postponed till the period of division, it would lead to the awkward and anomalous result, that there would be four separate periods of vesting. It is only the 'whole stock, crop, and others,' on the farms that are to be realised and divided at the expiry of the leases. Now, although a large portion of the testator's means were invested on the farms, there was considerable separate estate: *inter alia*, a policy of insurance and considerable debts. The provision about realising and dividing the crop and stocking would not affect the general estate, which would be held to vest *a morte testatoris*. Then, the crop and stocking on Lamberton and Lamberton Shiells would be divisible in 1876, that on Bastleridge in 1873, and that on Dalgleish—which is a joint tenancy, not specially mentioned in the deed—would be divisible in 1867. It is thought that the idea of these separate periods of vesting as to different portions of the estate—which, however, are all dealt with as a general residue—is quite inadmissible.

"Nor is there any real difficulty occasioned by the provision that the issue of predeceasing children shall succeed to their parents' share. The Lord Ordinary reads the word 'predeceasing,' both in the third purpose and in the second, as meaning predeceasing the testator. There is no ulterior destination,—no destination over to survivors, and no reference to the children of the testator surviving the ish of the leases or the final periods of division.

"On the whole, the Lord Ordinary has not much difficulty in fixing on the death of the testator as the period of vesting of the whole residue of his estate.

"II. It is thought that no distinction can be taken, as to the period of vesting, between the residue or shares of residue of the testator's estate and the intermediate annual proceeds which are to be paid to the children until the final periods of division arrive. The Lord Ordinary thinks that both provisions vested instantly *a morte testatoris*. As the testator was survived by all his seven children, each child instantly took, as a vested right and interest, not only a seventh share of the capital which might be ultimately divided, but also a seventh share of the proceeds which might accrue and become divisible between the date of the testator's death and the date of the ultimate destination.

"It is true the children might have been made conjunct liferenters, so to speak, so that the annual proceeds would divide among the surviving children, to the exclusion of the representatives of deceasers, and this although the ultimate shares of residue had vested in and were transmitted by the children deceased. But no such conjunct liferent or conjunct annuity-right has been effectually constituted in the present case. Each child seems to be entitled to take for himself and his representatives not only one seventh of the residue, but one seventh of the interim proceeds.

"III. There is, however, a difference between the accruing proceeds which are to be paid annually, and the share of residue ultimately divisible. The first—that is, the annual payments of accruing profits—are declared to be 'strictly alimentary, not assignable,' nor liable to be attached by creditors in any way, or by the husbands of daughters. No such condition or provision is attached to the ultimate share of the residue.

"Notwithstanding the ingenious argument urged by the assignees and creditors against the validity of the clause declaring the proceeds alimentary, and prohibiting assignation or diligence, the Lord Ordinary is of opinion that the clause is a legal and competent one, and must receive effect. It is, no doubt, true that such clauses are sometimes ineffectual, however strongly expressed,—as, for example, when the beneficiary has a right to demand instant payment of a capital sum, a provision that the interest shall be alimentary will go for nothing. In the present case, however, while there is no doubt as to the meaning and intention of the testator, there is really no difficulty in carrying out that intention. The whole estate is vested in trustees, and not in the beneficiaries themselves. The trustees are under an imperative direction during the currency of the lease to divide yearly only the profits arising therefrom; and there seems nothing incompetent, nothing even unreasonable, in the provision that during the limited period prescribed by the deed the shares of the annual profits shall be strictly alimentary for the children; and though the children may alienate or assign their shares of the capital, yet, while the leases subsist, they are secured in a yearly alimentary provision which cannot be defeated.

"It was not disputed that the testator might have given an alimentary life-rent to one or more of his children, which would not be arrestable or assignable; and if so, it is difficult to see why such a provision may not be made terminable at the end of a fixed number of years.

"Of course, the only effect of the provision is, that the yearly payments while the tacks last, will be made to the children themselves, or on their own receipts. There is nothing to prevent each child, on getting payment, handing over the money to his or her assignee, or otherwise disposing of it at pleasure. Farther, as the declaration is limited to the children themselves, the executors or suc-

cessors of deceased children are no way affected thereby.

"IV. The only other question which it is necessary to decide at present, is the effect of the provision made or obligation undertaken by the testator in Mrs Turnbull's antenuptial contract of marriage. Is that provision to be imputed as part of, or to be deducted from, the equal seventh share which Mrs Turnbull takes under her father's settlement, or are the two provisions to be held concurrent and cumulative?

"The Lord Ordinary, though not without some hesitation, is of opinion that Mrs Turnbull's marriage-contract trustees are entitled, as creditors, to demand payment of the £1000, in terms of the antenuptial contract of marriage, and that the sum does not fall to be deducted from the equal seventh share to which Mrs Turnbull is entitled under her father's trust-deed. All such questions are ultimately *questiones voluntatis*, but the presumption is *in dubio* that the provisions are cumulative.

"In the present case, the presumption that the antenuptial provision was a *precipuum* arises very strongly. The antenuptial contract is an onerous deed, and is the first in date. Mr Elliot became by that deed absolute debtor to his daughter's trustees in £1000. He could not revoke or alter the obligation; and although he might satisfy it with a legacy, it must be shown that the legacy was intended to be, and actually was, in satisfaction of the debt. The testator, when he made his trust-deed, must be held to have had his obligations fully in view, and, in particular, the obligation to his daughter's trustees, which he had come under less than four years previously. The first purpose of the trust is to pay his debts, and this £1000 is really one of these debts. It is only after this first purpose is fulfilled and all debts are paid, that the residue falls to be managed and distributed, under the second and third purposes of the trust.

"Then, there is no identity, nor even much similarity, between the two provisions. The £1000 is a direct debt due to the marriage-contract trustees, bearing interest from a fixed date. The other is a share of residue, uncertain in amount, and payable, not to the trustees, but to Mrs Turnbull herself, or her assignees. It is a mere accident that the trustees happen to be her assignees. The ultimate application of the £1000 and interest thereon, and of the testamentary provision and interest, are also different; and the interim alimentary liferent which the trust-deed creates in favour of Mrs Turnbull individually and untransferably, can hardly be compensated by a debt payable to her marriage-contract trustees. In short, as the testator has not himself chosen in his trust-deed to make any allowance for or reference to the £1000, the Court cannot make a will for him, even though it were much more clearly shown than it is that he had overlooked or forgotten his daughter's marriage-contract.

Against this interlocutor a reclaiming-note was presented by Mrs Bowhill and others.

At advising—

Lord Justice-Clerk—[After stating the facts], The first question which we have to decide, arising on the construction of this settlement, is at what period the interests created by the second and third purposes of this trust vested in the persons designated as entitled to take under them, and that again was presented in the argument in a double light—(1) as regarded the annual profits of the farms in question, and (2) as regarded the ultimate division of the value of the stock and crop on these farms at the termination of the respective leases.

It has been contended, on the one hand, that the interests under both purposes vested *a morte testatoris*, while, on the other hand, the defenders have maintained that the intermediate profits of the farms only vested at each annual period of division, and that the price or value of the stock and crop only vested at the expiration of each of the leases.

In the view which I take of this case it is not necessary to enter in any detail into the authorities which were quoted to us on each side in regard to the principles of construction applicable to the vesting of interests, the payment or enjoyment of which are postponed beyond the period of the testator's death. Some general rules indeed, so far as such can be applicable to that which is necessarily in each case a question of intention, are pretty firmly fixed. In the first place, the general presumption is that testamentary bequests vest *a morte testatoris*. In the second place, this result is not necessarily excluded because payment or enjoyment of the bequest is postponed until the termination of some interposed temporary interest, such as a liferent. And thirdly, if there be ulterior resulting interests created, failing the donee first designated, it will be more easy to presume that the testator intended that vesting should be suspended until the postponed term arrived.

In regard to the last of these rules, it can have no application to the present case, seeing that there are no ulterior or resulting interests created by the settlement, unless indeed the institution of children in place of their deceasing parents could be held to bear that character. But I am very clear, and as far as I know it has been uniformly held, that the expression of the condition *si sine liberis* cannot be regarded in that light. The subject was fully treated of by Lord Moncreiff in the case of *Provan*, and although his judgment in that case was altered by the Court on a general view of the testator's intention in the particular deed, I know of no authority adverse to the general views which he expressed on this subject.

In regard to the second of those rules, viz., the effect of the interposition of a liferent right between the legatee and the death of the testator, so as to postpone the period of payment, I cannot state the law better than in the words of Lord Corehouse in the case of *Forbes* v. *Luchie*, 16 Shaw, 374, which I do with the more confidence that it was referred to as being still acknowledged law in the opinion of Lord Colonsay, in the House of Lords, in the case of *Carlton* in 1867. He says—"I do not think that the fee of the residue was prevented from vesting in these children, either by the circumstance that the term of paying to each child its respective share was postponed until after the death of the liferentrix who survived the testator, or by the circumstance that a trust by executors was interposed for carrying into effect the intentions of the testator, or, finally, by the circumstance that the bequest of the residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim*." These rules, of course, are subject to be controlled in each individual case by the general complexion of the settlement and the intention to be gathered from its provisions. And especially by the reason

or object which it may appear that the testator had in view in postponing the payment of the interests conveyed by him.

The present case, however, appears to me to stand entirely clear of that category of the law, and a just apprehension of its real nature and import removes all difficulty in regard to its construction. In the first place, there is property here with no interposed interest at all. There is no interjected second party to take prior to the division of residue. That is not in any degree the nature of those provisions. The second purpose of the trust relates to the mode in which the annual profits of certain farms belonging to the testator are to be divided. The third purpose relates to the mode in which the value of the stock and crop on each of these farms, at the expiration of the respective leases, is to be divided. The subjects of the two purposes are entirely different, although arising out of the same occupation or speculation, viz., the leases of the farms. Farther, the persons who were favoured in each purpose are not different but the same, at least as far as the descriptive words are concerned. They are in both instances the truster's family, that is, his children, and the children of those who predecease. And lastly, the postponement of the several periods of division in regard to the profits under the second purpose, and of the realised value of the crop and stocking under the third, arises not in respect of any interposed interest in favour of another, but solely and entirely from the nature of the particular property to which the interest bequeathed attaches, and which is the subject of it. Of course, the profits of the farm could only be divided as they were realised year by year, and in that respect the testator only gave, under the same conditions, what he himself had. In like manner, the testator could only have realised his stock and crop at the termination of the lease, as he was not entitled to displenish his farm during its currency. In both instances the subject conveyed by the settlement was a deferred interest, but one which was deferred in the person of the testator, and which he conveyed precisely as he held it himself. In such a case it appears to me entirely vain to contend that where the condition in point of time is not attached to the interest of the beneficiary, but is an interest and character of the thing which is bequeathed, it can possibly be held to qualify or affect vesting *a morte testatoris*.

In this view the words in regard to predecease present no difficulty at all. As the postponed period does not depend on the life or death of any one, it would be altogether a forced construction to refer the word predecease to it, when its natural and satisfactory relative is found in the death of the testator himself. The term is precisely the same under both purposes, and in both have reference to the death of the testator. Indeed, I do not see, especially under the second purpose, how the construction of the defenders could be practically applied, for no term is fixed for the payment of the annual profits, which is left entirely to the discretion of the trustees.

At first sight some difficulty is created by the peculiar terms of the qualification attached to the bequest under the second purpose, but I have come to concur in the view which the Lord Ordinary takes of that matter. I think that the declaration that these yearly profits shall be alimentary and not assignable or attachable, limits the right of the beneficiary during his life, and is effectual to do so, but no farther. Whether it would attach also to his children is open to question, but I am satisfied that it does not interfere with the power of *mortis causa* disposition, and therefore, on the whole matter, I am of opinion on this branch of the case that these provisions vested *a morte testatoris*, and that the findings of the Lord Ordinary are sound.

The second question which was argued to us is also one of considerable interest. It seems that the late Mr Elliot, in the marriage contract of his daughter Robina, in 1861, undertook to pay to her marriage trustees the sum of £1000, and it is contended on the part of the trustees that that amount, which has been already paid, must be imputed *pro tanto* to her share of the succession, on the principle of *debitor non presumitur donare*.

The case of *Kippen*, where this question was very fully discussed, truly exhausts the authorities, and I think it unnecessary to go over them. It really reduces this matter to a question of intention. The maxim *debitor non presumitur donare* in such a case is easily overcome by an opposite presumption, and covers very little ground in a *mortis causa* settlement. Provisions to children in such a deed are in their own nature donations; and in regard to them the presumption is that the granter intended them as a gift. In the case of *Elliot*, 1 Shaw, p. 218, Lord President Hope laid down the principle that double legacies were presumed to be cumulative. In the cases which were quoted to us of *Grant* v. *Anderson* and of *Nimmo*, the question arose, in the first place, not in regard to residue, but in regard to specific legacies; and, secondly, where there was a reasonable coincidence in amount between the obligation and the provision. In the case of *Grant* the obligatory writing was posterior to the gift. In the present case it would be hard to hold that an uncertain share of residue was intended in satisfaction of a specific debt. The trustees under the settlement were obliged to pay the debt in the first instance, and then, at a postponed term, to divide the residue which remained. They have paid the debt, and they are now bound to carry out the second and third purposes of the trust according to the terms in which their instructions are expressed. Although *debitor non presumitur donare*, yet, if the words of the gift be clear, as they seem to be in this deed, the presumption must yield to the fact.

Lords COWAN, BENHOLME, and NEAVES concurred. The Court adhered to the judgment of the Lord Ordinary.

Counsel for Pursuers and Respondents—Watson and Balfour. Agents—Dalmahoy & Cowan, W.S.

Counsel for Mrs Bowhill and others (Reclaimers)—Millar, Q.C., and Burnet. Agents—Adam & Sang, W.S.

Counsel for Mrs Turnbull and others—Solicitor-General (Clark), Q.C., and H. Smith. Agents—H. & H. Tod, W.S.

Counsel for Judicial Factor—Mackintosh. Agents—Jardine, Stodart, & Fraser, W.S.