sesses the only legal title to the custody of her child. The putative father has no right over it at all. The child is very young; it was born so lately as the 21st of March 1886, and therefore in addition to her legal title to its custody the petitioner is also the natural custodier of a child at such an early age. There is therefore a *prima facie* case in favour of the petitioner. But as regards the question of custody there are other considerations to be taken into account besides the legal title, and the Court has always considered as of importance the interest of the child itself, and its position as regards the possibilities of life, health, and support.

The present case is unusual in its circumstances. We naturally inquire how the mother came to part with her child, and that leads to the disclosure of a peculiar history. The petitioner, with the approval of the father of the child, delivered the child at the age of three months, and before it was baptised, into the custody of the respondent and his wife. This was done on an arrangement that the respondent and his wife should adopt the child—they being childless—and that the child should remain permanently with them. The petitioner was obviously not able to maintain the child, and was quite willing to be quit of it. The child is very delicate from causes of a painful kind, and it is not disputed that since it has been in the custody of the respondent the child has been carefully tended. The question comes to be therefore, whether it would be inconsistent with the welfare of the child, especially in regard to its health and its chances of life, to restore it to its natural and legal custodier. We had presented to us with the answers a medical certificate of a gentleman who attended professionally in the respondent's family, and who in particular attended this child. On the 3rd of November 1886 he wrote as follows — [*His Lordship read the medical certificate quoted above*].

Now, this information, and other circumstances which came out on the first hearing of this petition, induced the Court to order the petitioner to lodge a minute stating her present place of abode, where she had been in the interval between the birth of the child and the present time, and what means and ability she possessed of maintaining the child if it should be delivered into her custody. The minute lodged in obedience to this order discloses a wandering and restless life, and exhibits no apparent means sufficient to enable the petitioner to maintain or take charge of such a delicate child, with the exception of a statement to the effect that the petitioner has succeeded to money by the death of an aunt. Her place of abode, and the general circumstances of her life, show that she is not in a condition to secure to the child the necessary safety and comfort. Since the minute was lodged it has been explained in correspondence between the agents of the parties that the statement as to succession to an aunt is a mistake, and it was said that the petitioner has succeeded to money by the death of two uncles. But when asked to explain what that money was, or who her uncles were, and when asked to exhibit any deed by which the money was left to her, all further explanation has ceased. Therefore we are compelled to conclude that the supposed source of means thus claimed for the petitioner is an entire delusion, and that the petitioner is in the most straightened circumstances, and is not in a position to sustain any additional burden.

It is fortunate, as bearing out the necessity for careful charge of this child, that we have a further certificate from the same medical gentleman, bringing down his opinion to the 24th of November, and it is enough to say that, although the condition of the child is fairly good, he mentions the presence in it of some unpleasant and dangerous symptoms, and he concludes thus—"The manifestation of further symptoms depends much upon the health of the child, and it is very essential that she should have (as she has at present) generous diet, warm clothing, and careful nursing, otherwise her bodily condition would certainly deteriorate, and her health and life be seriously endangered." Now, I think we have enough before us to conclude that if the child were delivered to the petitioner she could not provide for it the generous diet, warm clothing, and careful nursing which are here said to be essential, and therefore it follows that to deliver the child to the petitioner would be to imperil not only its comfort, but its health and its life. In these circumstances I think we have here a case to overcome the legal title of the petitioner, for it is apparent that the highest interests of the child—its health and life—would be endangered by such a course, and I am therefore for refusing this petition.

Lord Mure and Lord Adam concurred.

Lord Shand was absent from illness.

The Court refused the petition.

Counsel for the Petitioner—Craigie. Agent—William Gunn, S.S.C.

Counsel for the Respondent—Salvesen. Agent—D. Howard Smith, Solicitor.

Thursday, December 22.

SECOND DIVISION.

MURRAY'S TRUSTEES *v.* BLOXSOM'S TRUSTEES.

Marriage-Contract—Vesting of Provisions to Children.

In an antenuptial marriage-contract the husband bound himself to pay a sum of money to the child or children of the marriage at the first term of Whitsunday or Martinmas after his death if he should survive, or after the death of the widow if she should survive. There was a power of appointment reserved to the husband, and failing appointment the money was to be divided equally, the issue of children predeceasing succeeding to their parents' shares. In the event of there being no children of the marriage, or of the child or children predeceasing the last survivor of the spouses without issue, then the sum was to be held by the trustees for behoof of the heirs and assignees of the husband. No appointment was made. The husband predeceased his wife, survived by three

daughters, one of whom predeceased her mother leaving issue. *Held* that the daughter's share vested on the death of her father.

Trust—Provisions to Children—Direction to Trustees to Hold and Apply—Discharge by Father—Alimentary Provision.

In a trust-disposition and settlement by which the residue was left to the truster's children and the issue of children predeceasing, there was a declaration that the provision, so far as in favour of females, should be alimentary. The trustees were directed to hold and apply the rents and income of the estate for the education and maintenance of the children, "and to retain the capital in their own hands under the trust hereby constituted until they can pay it over to trustees under a marriage-contract or otherwise appointed by my children respectively under trust, which shall prescribe that the said income and produce shall be alimentary for my said children, and the capital provided to their issue: Declaring that my said trustees and executors shall only be effectually discharged by the trustees under such last-mentioned trusts." One of the daughters of the truster predeceased leaving children. *Held*, on the death of the truster, that the share falling to these children should be paid to their father upon his discharge, to be administered for their behoof, and that the declaration that the fund was to be alimentary only applied to the immediate children of the truster, and was not to be extended to grandchildren.

In 1853 Charles Wilson Murray was married to Mrs Mary Bayne Playfair or Murray. He died on 15th August 1873, survived by his widow and three daughters. By his will he bequeathed all his estate to his widow absolutely. One of his daughters, Miss Jane Anne Murray, was on 6th June 1876 married to Mr William Gibson Bloxsom, and died on 24th April 1878. By her antenuptial contract of marriage she conveyed to trustees all estate and effects that belonged or should belong to her, for the liferent use of the spouses and the survivor of them, and for the children of the marriage in fee. She was survived by her husband and by two children. Mrs Murray died on 23rd August 1886, survived by two unmarried daughters, and by Mrs Bloxsom's children.

By the antenuptial marriage-contract between Mr and Mrs Murray the latter was to receive, in the event of her surviving her husband, a free liferent annuity of £150. It was further provided as follows—"The said Charles Wilson Murray in contemplation of the said marriage hereby binds and obliges himself and his foresaids to make payment to the child or children of the said intended marriage of the sum of Four thousand pounds sterling, and that at the first term of Whitsunday or Martinmas after his, the said Charles Wilson Murray's death, if he shall survive the said Mary Bayne Playfair, or at the first term of Whitsunday or Martinmas after her death if she shall survive him, with the legal interest thereof from the term of payment during the not-payment of the same: Declaring that in case there shall be two or more children of the marriage the sum payable shall be divisible among the said children in such proportions as the said Charles Wilson Murray may appoint by a writing under his hand at any time of his life, and failing such appointment, the same shall be divided equally, the lawful issue of such of the children as may have predeceased succeeding always to the shares to which their parents would have been entitled had they been in life, and until the said provisions shall have become payable, or until the said child or children shall be able to maintain themselves, the said Charles Wilson Murray hereby binds and obliges himself and his foresaids to aliment, educate, and maintain them in a manner suitable to their rank in society." In security of this provision to his children and of the annuity to his wife, Mr Murray bound and obliged himself to assign a policy of insurance upon his life for £4000 to the trustees named in the deed. The deed then provided as follows—"And in the event of there being no children of the marriage, or of the child or children of said marriage predeceasing without lawful issue the last survivor of said spouses, then the sum or sums which may come into the hands of the trustees under said policy of assurance shall, after providing for said annuity, be held by them for behoof of the heirs and assignees of the said Charles Wilson Murray."

On her part Mrs Murray assigned to the trustees all her property, heritable and moveable, then belonging or which should belong to her during the subsistence of the marriage, except the provisions therein made for her, for certain specified purposes. In regard to her property it was provided—"Declaring that after the death of both of said spouses the said trustees and their foresaids shall, in the event of there being only one child born of said marriage, or surviving at the death of the last survivor of said spouses, convey and make over said lands and heritages, and debts and sums of money, and other the said heritable and moveable estate and effects of the said Mary Bayne Playfair, to the said child; and in the event of there being more than one child born of said marriage, and surviving at the period of the death of the last survivor of said spouses, that the said trustees and their foresaids shall convey and make over said heritable and moveable estate to the said children in such proportions as the said Charles Wilson Murray may appoint by a writing under his hand at any time of his life, and failing such appointment the said trustees and their foresaids shall divide the same equally among said children, the lawful issue of such of the children as may have predeceased succeeding always to the shares to which their parents would have been entitled had they been in life; and in the event of there being no children born of said intended marriage, or of the child or children of said marriage predeceasing without lawful issue the last survivor of said spouses, then the said trustees and their foresaids shall convey and make over the said heritable and moveable estate of the said Mary Bayne Playfair to her own heirs or assignees."

By her trust-disposition and settlement dated 6th May 1874 Mrs Murray directed her trustees—"(*Second*) I direct my said trustees and their foresaids to hold and apply, pay, divide, and convey the whole rest, residue, and remainder of my means and estate, heritable and moveable,

real and personal, with the rents, profits, and produce thereof, to and for behoof of my lawful child or children, payable in such proportions and at such terms, and under such conditions and restrictions, as I may direct by any writing under my hand, whether the same be clearly probative or not, and failing such writing, then to my lawful children equally, the lawful issue of any predeceasing child being entitled to the interest which such child would have taken had it survived; declaring that the provisions, so far as in favour of or descending upon females, shall be purely alimentary, and shall be exclusive of the *jus mariti* and right of administration of any husbands they may marry, and shall not be affectable by their debts or deeds or the diligence of their creditors, and I direct and appoint my said trustees and executors to hold and apply the rents, interest, and other produce and income of my means and estate falling to each of my said children, or such part thereof as my said trustees may deem necessary and proper for the upbringing, education, clothing, and maintenance of the said children respectively, and to retain the capital in their own hands under the trust hereby constituted until they can pay it over to trustees under a marriage-contract, or otherwise appointed by my children respectively under trust, which shall prescribe that the said income and produce shall be alimentary for my said children, and the capital provided to their issue: Declaring that my said trustees and executors shall only be effectually discharged by the trustees under such last mentioned trusts."

No appointment was made by Mr and Mrs Murray under either of these deeds.

On Mrs Murray's death in 1886 questions arose as to the administration of the one-third share of the funds under Mr and Mrs Murray's marriage-contract, and Mrs Murray's settlement, which was admittedly due to Mrs Bloxsom's children, who were in pupillarity. The amount of Mr Murray's life policy was £4000, the amount of the funds falling under the conveyance by Mrs Murray in her marriage-contract was £9352, and of those falling under her trust-disposition and settlement about £30,000.

This special case was presented for the determination of these questions.

The *first* parties to the case were Mr and Mrs Murray's marriage-contract trustees; the *second* parties were Mrs Murray's testamentary trustees; the *third* parties were Mr and Mrs Bloxsom's marriage-contract trustees; and the *fourth* party was Mr Bloxsom, as tutor and administrator-in-law for his children. A curator *ad litem* was appointed to Mr Bloxsom's children.

During the argument it was admitted that one-third of the fund of £9352 falling under Mrs Murray's marriage-contract fell to be administered by Mr Bloxsom for his children's behoof. As regarded the children's share of the £4000 under the life policy, the *first* parties, Mr and Mrs Murray's marriage-contract trustees, contended, as against the *third* parties, Mr and Mrs Bloxsom's marriage-contract trustees, that under the provisions of the marriage-contract that sum did not vest until the death of Mrs Murray in 1886, and that as Mrs Bloxsom had predeceased her mother it did not fall under the conveyance to her marriage-contract trustees. The *first* parties also contended, as against the *fourth* party, Mr Bloxsom, that they were entitled to administer the funds forming this share during the minority of Mrs Bloxsom's children, and to apply the income from time to time for their behoof.

As regarded the one-third of £30,000, the share of Mrs Murray's estate, the *second* parties, Mrs Murray's testamentary trustees, maintained that this fund did not vest in Mrs Bloxsom, and therefore did not fall under her marriage-contract. Further, that the terms of the destination to children conferred on those surviving the testatrix a mere alimentary liferent, and that although a share of the fee of the trust-estate might have vested in Mrs Bloxsom's children at Mrs Murray's death, the conditions as to administration by the marriage-contract trustees of any daughters marrying after the death of the testatrix could not be held to apply to the case of a predeceasing child who had married and left lawful issue, an event which was not contemplated or provided for by Mrs Murray in her trust-disposition and settlement. Mrs Murray's testamentary trustees therefore maintained that they were not entitled to pay over the fund to Mrs Bloxsom's trustees, or even to Mr Bloxsom, as tutor and administrator-in-law for his children, but were bound to administer the fund during the minority or until the marriage of the children, and to apply the income from time to time for their behoof.

The questions of law were these—"(1) Did a right to any portion of the proceeds of the policy on Mr Murray's life vest in Mrs Bloxsom? and if so, is that right carried by the conveyance in her marriage-contract? (2) Did a right to any portion of the funds settled by Mrs Murray in her part of her antenuptial contract on the children of the marriage vest in Mrs Bloxsom? and if so, is that right carried by the conveyance to the parties of the third part? (3) If Mrs Bloxsom did not acquire a vested right to a share of either the policy fund or Mrs Murray's marriage-contract fund, are the parties of the first part entitled to administer the shares of these funds, or either of them, falling to Mrs Bloxsom's children during the minority or until the marriage of the said children respectively? or are they bound to pay over these shares, or either of them, to the party of the fourth part as tutor and administrator-in-law for his children? (5) If not, do the terms of Mrs Murray's settlement, directing the trustees to pay the shares effeiring to her children to their respective marriage-contract trustees, entitle Mrs Bloxsom's marriage-contract trustees, the parties of the third part, to receive from Mrs Murray's testamentary trustees, the parties of the second part, the fee of one-third of the said fund falling to Mrs Bloxsom or her children, and to administer the same in terms of the trust under which they act? or otherwise (6) Are the parties of the second part bound to pay over the fee of said one-third share to the party of the fourth part as tutor and administrator-in-law for his said children? or are they entitled to hold and administer said share during the minority or until the marriage of said children respectively, and apply the income thereof from time to time for their behoof?"

Upon the question of the vesting of the £4000 fund it was argued by the *third* parties, Blox-

som's marriage-contract trustees—That it vested at latest on the dissolution of the marriage by the death of Mr Murray. That therefore it vested in Mrs Bloxsom, and was carried by the conveyance to her marriage-contract trustees. The case was the same as that of *Wardlaw's Trustees* v. *Wardlaw*, July 7, 1880, 7 R. 1070. With regard to the £30,000 fund—Mrs Bloxsom's children were entitled to one-third of this, or to £10,000, but Mrs Murray's settlement directed that when any of the children had trustees under a marriage-contract the money should be paid to and administered by them.

Argued for the curator *ad litem* to Mr Bloxsom's children with regard to the £4000 fund. Vesting was suspended until the death of the survivor of the spouses. The wife survived, and therefore there was no vesting till her death. As Mrs Bloxsom predeceased that date, the share never vested in her, but was carried direct to her children. The direction was to pay at the first term after the husband's death, or at the first term after the wife's death, "if she shall survive him." Further, there was a destination over to the heirs and assignees of the settlor if the children of the marriage predeceased the survivor without leaving lawful issue—*Young* v. *Robertson*, February 11, 1862, 4 Macq. 314. With regard to the £30,000 fund, the distinction in Mrs Murray's settlement was between the children and their issue. There was no power to the trustees to hold the fund for the issue of children, but only for the children themselves. The fund should be paid to Mr Bloxsom as tutor and administrator-in-law for his children—*Stevenson's Trustees* v. *Dumbreck*, February 18, 1857, 19 D. 462—*aff.* February 11, 1861, 23 D. (H. of L.) 1, and 4 Macq. 86.

At advising—

Lord Justice-Clerk—I think the money falling to Mr Bloxsom's children must be paid to him to be applied for them at his discretion. As regards the clause in Mrs Murray's settlement, that the sum left to her daughter is to be purely alimentary, I think that the testatrix has failed to express her intention with sufficient precision for it to receive effect, and that nothing further can be done than to put into the discharge to be granted with reference to Mr Bloxsom's daughters' provision a declaration that it is to be held for their alimentary use, whatever may be the worth of such a clause.

Lord Young—I am of the same opinion. There are three questions. The first is as to the vesting of the provision under the marriage-contract between Mr and Mrs Murray, which consists of the policy of assurance for £4000. I am of opinion that this sum vested in the children on Mr Murray's death, not because that was the date of the dissolution of the marriage, for I think it would not have vested on the death of Mrs Murray if the marriage had been dissolved by her death. If it vested on the death of Mr Murray it therefore vested in Mrs Bloxsom, who survived her father, and it accordingly passed to her marriage-contract trustees. Secondly, as to the provision by the mother in the marriage-contract, I am of opinion that there was no vesting until the death of the surviving wife. I cannot help saying that I think the difficulty arises from an error in conveyancing, for it is difficult to imagine that the parties intended a different period of vesting for these two funds. The parties are agreed, for reasons I can well understand, that the share in the £9000 did not vest until the mother's death. The result of that is that as Mrs Murray survived Mrs Bloxsom, the latter's children take the share in their own right, and not under any conveyance from Mrs Bloxsom in her marriage-contract. Thirdly, I would make the same observation in regard to the provision in Mrs Murray's settlement. There was no vesting in regard to it in Mrs Bloxsom's lifetime. On the death of Mrs Murray, who survived her, the funds in that settlement vested in Mrs Bloxsom's children. They are therefore the fiars of a sum of about £10,000 under their grandmother's will. They are still in pupillarity, and so cannot receive the money themselves, but their father is their legal guardian, and he is entitled to receive the money, and to give a legal discharge for it for them. His duty—and I have no doubt he will discharge it properly—is to administer this money for the benefit of his children, and he is not obliged in law to find caution. But I do not doubt he will secure them against any misfortune which might happen to him. That, in my opinion, he will best do by a voluntary deed.

Lord Craighill—I concur. The only matter with regard to which I felt any difficulty was the interpretation of the clause in the marriage-contract in regard to the £4000. If I was to judge by the words of the deed alone I think that no vesting of this sum was intended, but then we must look to the interpretation which was put upon a precisely similar clause in the case of *Wardlaw's Trustees*, 7 R. 1070, and with that case before me I must hold that there was vesting. In regard to the other matters I agree with the opinions expressed by Lord Young and your Lordship in the chair.

Lord Rutherfurd Clark—I concur. I think that this sum of £4000 vested upon the death of Mr Murray. It is not necessary for us to deal with the sum of £9000. With regard to the sum in Mrs Murray's settlement, I think Mrs Bloxsom's children take the fee, and that upon the authority of the case of *Stevenson* v. *Dumbreck*, 4 Macq. 86, the money must be paid over for them to their father, who has a legal right to receive it, and to grant a discharge. I think that that discharge should be a simple discharge without any qualification whatever. As to the limitation of the right in Mrs Murray's settlement, I do not think that its effect can be extended to the case of grandchildren, as by the force of the words I think its effect is limited to Mrs Murray's immediate issue and not to her grandchildren. I do not think that we should extend such a clause further than is necessary.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the special case, are of opinion, in regard to the *first* of the questions therein stated, that a right to one-third of the sum of Four thousand pounds, part of the sum payable under the policy of insurance on the life of Mr Murray, vested on his death in Mrs Bloxsom, his daughter, and was transmitted to the parties of the third part by the

conveyance in her contract of marriage with William Gibson Bloxsom, the party of the fourth part; in regard to the *second* question, that it falls to be answered in the negative, and that one-third of the funds settled by Mrs Murray in her antenuptial contract of marriage vested, on the death of the survivor of the spouses, in the children of Mrs Bloxsom; in regard to the *third* question, that the parties of the first part are bound to pay the said share of the said sum of Four thousand pounds to the parties of the third part, the trustees under Mrs Bloxsom's marriage-contract, and to pay the said one-third share of the fund settled by Mrs Murray as aforesaid to the said William Gibson Bloxsom, as tutor and administrator-in-law for the said children, on delivery of a receipt and discharge by him in that capacity; in regard to the *fourth* question, that it falls to be answered in the negative, and that one-third share of the funds bequeathed by Mrs Murray in her deed of settlement vested at her death in the children of Mrs Bloxsom; in regard to the *fifth* question, that it falls to be answered in the negative; and in regard to the *sixth* question, that the parties of the second part are bound to pay the said share of the sums bequeathed by Mrs Murray as aforesaid to the said William Gibson Bloxsom, as tutor and administrator-in-law for the said children as aforesaid, upon a receipt and discharge by him as such: Find and declare accordingly: Find the parties entitled to payment out of the several funds falling to Mrs Bloxsom or her children, in proportions corresponding to the amount thereof respectively of the expenses incurred by them in relation to the special case, as the same shall be taxed by the Auditor of Court, and decern."

Counsel for the First and Second Parties—Balfour, Q.C.—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Third and Fourth Parties—D.-F. Mackintosh—J. A. Reid. Agents—J. & A. F. Adam, W.S.

Counsel for the Curator *ad litem*—R. V. Campbell. Agent—Andrew Forrester, W.S.

Friday, December 23.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EARL OF FIFE *v.* WHARTON DUFF.

Teinds—Over and Underpaying Heritors—Decree of Approbation—Prescription.

In 1792 F obtained a decree of approbation of a sub-valuation made in 1629, although in the interval he had been paying stipend in excess of the valued teind. Subsequently to the date of the decree of approbation, F continued, under interim decrees of locality pronounced in successive processes of augmentation, modification, and locality, to make overpayments of stipend. It was not until 1844 that the decree of approbation was produced and founded on. In 1882 a final decree of locality was obtained. F then raised an action to recover from another heritor the amounts alleged to have been underpaid by her, corresponding to F's overpayments from the year 1812 to 1881. The defender pleaded prescription as regarded the claim, except for the last forty years. To this F replied that he was *non valens agere* during the years of prescription, because he could not sue for repayment of the alleged overpayments till a final decree of locality had been obtained. The Court *held* that the reason why F had not produced the decree of approbation in the interim processes was that he preferred making the overpayments to running the risk of having the decree challenged on the ground of dereliction; that he had made his overpayments designedly, as if no such decree existed, in order to validate his decree of approbation by prescription; that he was therefore not entitled to plead that he was *non valens agere;* and that his claim beyond forty years from the date of raising the action was prescribed.

Observations on the cases of *Weatherstone* v. *Marquis of Tweeddale*, November 12, 1833, 12 S. 1, and *Campbell's Trustees* v. *Sinclair*, *&c.*. July 18, 1877, 4 R. 1126—*revd.* April 15, 1878, 5 R. (H. of L.) 119.

This was an action at the instance of the Earl of Fife against Miss Anne Wharton Duff of Orton, in the county of Elgin, concluding for payment of £3293, with interest, which the pursuer alleged to be due to him by the defender in respect of stipend of the ministers of the parish of St Andrews Lhanbryde, underpaid by the defender and her predecessors from the teinds of the lands of Barmuckity and others belonging to them in the said parish from 1812 to 1881.

The circumstances out of which the action arose were as follows—Between 1812 and May 1886, the date of the present summons, three different processes of augmentation, modification, and locality of stipend of the parish of St Andrews Lhanbryde had been raised. The first of these was in September 1812, and the second was in September 1842. These two were conjoined on 9th February 1844. The third action was raised in September 1863, and it was conjoined with the two previous actions in January 1868. The final locality was dated May 1882, when it was discovered that throughout the parish there had under the interim schemes of locality from 1812 to 1881 been a number of under and overpayments.

The pursuer averred that as heir *in mobilibus* of the then proprietors of part of the lands in respect of which overpayments were made, he was entitled to relief from the defender as representing the proprietor of part of the lands in respect of which underpayments had been made.

The defender, while admitting her liability to account for underpayments for forty years before the date of the action, averred as follows—That in 1629 the teinds of the lands in the parish of Lhanbryde were valued by the Sub-Commissioners of Elgin, and that in 1792 the then Earl of