Session, I entirely concur. In *Clarke* v. *Carfin Coal Company* I had occasion to say that the rule which admits the particular action with which we are now dealing "does not rest upon any definite principle capable of extension to other cases which may seem to be analogous, but constitutes an arbitrary exception from the general law which excludes all such actions founded in inveterate custom, and having no other *ratio* to support it." The appellant maintained that whenever an individual is negligently injured there arises to each person standing towards him in the relation which I have explained an independent right of action contingent only upon his death sooner or later, and its being traceable to the injury which he received. For that proposition no authority whatever was produced except the worn-out analogy of actions of assythment. It would be the merest waste of your Lordships' time to go back to our ancient authorities for the purpose of examining the nature of an action of assythment, and showing that between it and an action by relatives in respect of negligence no analogy exists. In the case of *Eisten* v. *Eisten*, already cited, the Lord President said—"This is not an action of assythment, and it does not partake in any degree of the nature of such an action." Lord Deas—"To such a case I agree with your Lordships that the law of assythment is not applicable." Lord Ardmillan and Lord Kinloch expressed their opinions in similar terms. To my mind the only relevant question in the present case is, has the rule ever been carried so far as to recognise the competency of an action at the instance of relatives, whether an action in respect of the same *injuria* has been raised by the deceased during his lifetime, and is still a depending litigation? Unless that question can be answered in the affirmative, the appellant's action is in my opinion incompetent. There is no case to be found in the reported decisions of the Court of Session in which an action was sustained after the deceased's claims had been settled or extinguished by an adverse judgment, or where he had raised an action which passed to and might be insisted in by his executor, and the existence of such a right of action has not been affirmed or even suggested by a single text-writer. There is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognised they must bring one suit—and one only—in which the damages due to them respectively might be assessed. In that state of the law I do not think this House ought to encourage the creation of a new right and corresponding liability which are at present unknown in Scotland.

The LORD CHANCELLOR, and LORDS HERSCHELL, MORRIS, and FIELD concurred.

Their Lordships dismissed the appeal.

Counsel for the Appellant — Rhind — Kennedy. Agents—Keeping & Gloag, for D. Howard Smith, Solicitor.

Counsel for the Respondents—Sol.-Gen. Graham Murray, Q.C.—Johnston. Agents—Ingleden, Ince, & Colt, for T. & W. A. M'Laren, W.S.

Monday, July 25.

(Before the Lord Chancellor, Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, and Lord Hannen.)

HUGHES AND ANOTHER (EDWARDES' TRUSTEES) *v.* EDWARDES AND ANOTHER

(*Ante*, vol. xxviii. p. 244, and 18 R. 319.)

Succession—Vesting—Marriage-Contract—Clause—Construction—Conditio si sine liberis.

In an antenuptial marriage-contract the wife conveyed a sum of £4000 to trustees. The deed provided that in the event of the marriage being dissolved by the predecease of the wife leaving children, the husband should have an alimentary liferent of this fund, that after his death the capital should be paid over to the children of the marriage on their attaining majority, and that if there were no children alive at the dissolution of the marriage, or should they all die before the terms of payment of their provisions as aforesaid, the husband should continue to have the liferent of the fund during his life, but that the whole capital should be subject to the wife's disposal by will. In the parallel clause which dealt with the event of the husband predeceasing the wife, it was provided that the wife should have an alimentary liferent of the fund; that after her death the interest was to be applied for behoof of the children during their minority, and that on their attaining majority the capital was to be paid to them, but subject to the declaration that if "such children should all die before their mother, or . . . should they all die before attaining majority, and without leaving issue of their own bodies," the fund should continue to be held for the alimentary liferent of the widow; and it was further declared that in the event of the wife surviving her husband, and of the failure of issue of the marriage, she should have the right to test on the capital. It was expressly provided that the provisions to children should not be payable, or become vested interests, or be transmissible by them until after the death of the longest liver of the spouses, and until the children attained majority.

The marriage was dissolved by the predecease of the wife, who was survived by one son, and left a will in

which she made over all she possessed to her husband.

In an action by the husband and son for payment upon their joint discharge of the £4000, *held* (*rev.* judgment of the First Division) that the trustees were bound to maintain the trust, not only for the protection of the husband's alimentary liferent, but also for the possible issue of the son.

This case is reported *ante*, vol. xxviii. p. 244, and 18 R. 319.

Hughes and Another (Edwardes' Trustees) appealed.

The respondents did not appear.

At delivering judgment—

LORD CHANCELLOR — My Lords, all I desire to say in this case is that I am quite satisfied, after the argument before your Lordships, that there is no authority in the law of Scotland for any such construction as is insisted on.

I have had an opportunity of reading the judgment prepared by my noble and learned friend Lord Watson. I entirely concur in that judgment, and I do not think it necessary to state anything further.

LORD WATSON—My Lords, the appellants as trustees under an antenuptial contract between Dr and Mrs Edwardes, dated 20th February 1855, hold in trust a sum of £4000 which was settled by the lady's stepfather upon the spouses and their children. The marriage was dissolved by the death of Mrs Edwardes on the 10th June 1862, leaving a son who was her only child. In this action her husband and son are pursuers, and they conclude for a declaration that the appellants are bound to make payment of the sum in question to them upon receiving their joint-discharge. The First Division of the Court, reversing the decision of the Lord Ordinary (Kincairney), has given decree to that effect. The pursuers have not appeared as respondents in this appeal, which has been heard *ex parte*. Although your Lordships have not had the advantage of listening to an argument in support of their judgment, the reasoning which prevailed with the three learned Judges who constituted the majority of the First Division is fully disclosed in the opinions which they delivered.

Under the provisions of the marriage-contract the sole duty of the trustees during the lifetime of both spouses was to pay the income of the fund to Mrs Edwardes for her personal and alimentary use, exclusive of the *jus mariti* and right of administration of her husband. Separate directions are given with respect to the disposal of the income and *corpus* of the fund applicable to the alternative events of the wife or husband predeceasing. In the event of the wife's predecease leaving a child or children, the trustees are directed to pay the income to the husband during his life for his alimentary use, his right to assign and the diligence of his creditors being excluded On his death the capital is made payable to "the said child or children," after their attaining majority in the case of sons, and in the case of daughters, after their attaining majority or being married. Should there be no child or children alive at the wife's decease, or should they die before the terms at which their provisions become payable, the trustees are directed to make over the capital at her husband's death to any person whom she may appoint by will or other writing, whom failing to her nearest heirs and executors.

Mrs Edwardes on the 17th April 1860 made a will in favour of her husband the terms of which are sufficient to carry the capital of the trust-fund to him upon the occurrence of the events in which the testatrix had power to dispose of it. Although these events have not occurred, the pursuers maintained, in both Courts below, that they were entitled to present payment upon their joint demand, because the fund, which has not yet vested in either of them, must inevitably belong to one or other of them—to the son in the event of his surviving his father, and to the father in the event of his son's predecease. If that were an accurate statement of the beneficial interests in the fee of the trust-fund which can emerge in any possible event, and there were no obstacle interposed by the terms of the trust, I should be prepared to hold, as I indicated in *Muirhead* v. *Muirhead and Crellin*, 15 App. Cas. 300, that they were entitled to immediate payment of the fund. But in my opinion their right to immediate payment cannot be affirmed if, notwithstanding their ultimate interest, the terms of the trust require that it shall be kept up, or if their right is liable to defeasance by the possible existence of other beneficiaries.

The appellants argued that there are three reasons, each of them in itself sufficient to justify their refusal to pay over the capital of the trust-fund to the pursuers. First, that in present circumstances they are bound to retain it for the protection and continuance of the husband's alimentary liferent; secondly, that in the possible event of the son's death leaving issue before his interest becomes vested, such issue will be entitled to take if they survive their grandfather; and thirdly, that the will of Mrs Edwardes in her husband's favour was revoked by the subsequent birth of her son.

Only the first and second of these reasons were pleaded by the appellants in the Court of Session. The Lord Ordinary and Lord Adam, who held that the appellants were under no obligation to denude, rested their judgment upon an affirmance of the second, and expressed no opinion upon the first. The late Lord President (Inglis), who with Lords M'Laren and Kinnear constituted the majority of the First Division, necessarily dealt with and rejected both these reasons in arriving at the judgment appealed from. The third reason was not submitted by the appellants either to the Lord Ordinary or to the Inner House, and in my opinion it ought not to be considered by your Lordships. According to the law of Scotland, the question whether the testament of a parent is

revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case. In this case not only was the point not raised in either Court below, but the record contains no averment to the effect that the younger of the pursuers was born after the date of his mother's will. The allegation of the date of his birth, upon which the plea is founded, was made for the first time in the appellants' case, to which there is no answer; and even there it is stated incidentally, and is not put forward as a reason for denying effect to the will of Mrs Edwardes.

The learned Judges of the Inner House who decided in favour of the pursuers, do not suggest that a trust duly constituted for payment of an alimentary annuity can be brought to an end by the joint action of the annuitant and the parties having beneficial right to the fee. A rule to the contrary has long been settled, and was recently enforced in *Whyte's Trustees* v. *Whyte*, 4 Sess. Cas. (4th series) 786, and *Duthie's Trustees* v. *Kinloch*, 5 Sess. Cas. (4th series) 858. In both instances the parties entitled to the fee had a vested interest, which is not the case here; and in *Duthie's Trustees* v. *Duthie*, the alimentary liferenter and the beneficial fiar were one and the same person. Yet it was held that the combined action of all parties interested could not defeat the settlor's intention to make the annuitants' right alimentary, a result which could not be attained except by continuing the trust. None of their Lordships disputed the existence or force of the rule, but they were of opinion that its application was in this case excluded by the terms of a clause in the marriage settlement which provides that the trustees shall have power to pay over the capital of the fund "at any time after the death of the predeceasing wife, and the failure of issue on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will, or settlement, or of her heirs and executors, failing her executing a will or settlement." The view which they took was thus explained by the Lord President, 18 Sess. Cas. (4th series), p. 327—"The only obstacle to the application of this clause is the existence of the other pursuer Henry Frederick (that is, of the son). But the clause just quoted shows that there was no intention to maintain the trust in all events merely for security of the alimentary liferent, and if all parties interested, the surviving husband and the only child, are desirous to put an end to the trust and obtain a conveyance of the fee, it appears to me that the principle, if not the letter, of the clause is clearly applicable." I find it is impossible to concur in that interpretation, which in my opinion is as much at variance with the spirit as with the letter of the clause. The clause contains an exception which appears to me to accentuate the expression of the settlor's intention that the trust shall continue for the purpose of making the husband's liferent alimentary, in every event save the one specified, namely, the failure of issue of the marriage, and the consequent devolution of the fee to the wife's heirs, legal or testamentary. It was the obvious purpose of the settlor to provide that the surviving husband should remain in the enjoyment of a strictly alimentary allowance so long as there existed children or issue of the marriage whom he was under an obligation to support, and that the trust was not to be terminated until the fee devolved upon persons to whom he owed no such obligation.

The Lord Ordinary held that by virtue of the implied condition *si sine liberis decesserit*, issue of children are conditionally instituted, and that a child of the younger pursuer would take the fee in the event of his father predeceasing the liferenter. When the case went to the First Division, the majority were of opinion that the deed contained expressions sufficient to oust the condition, if otherwise applicable; whilst Lord Adam thought that irrespective of the condition, its terms were sufficient to give to issue of children, on the failure of their parent before the term of payment, the share of fee which he would have taken on survivance. But all the learned Judges of the Division, Lord Adam included, treated it as an open and doubtful question whether the *conditio si sine liberis decesserit* applies to a provision in a marriage contract. No reason was assigned by any of their Lordships for the doubt which they thus cast upon a principle which I have been accustomed to regard as settled, and I have not been able to discover any foundation for it.

In *Wood* v. *Aitchison*, Mor. Dict. 13,043, John Aitchison became bound, in the marriage articles of his son Thomas, to invest £400 in land, or on security, and to take the right in favour of the spouses and the longest liver of them in liferent, "and to the child or children to be procreated betwixt them, whom failing, to the said John Aitchison his heirs and assignees whatsoever in fee." The wife predeceased her husband, at whose death there were alive one son of the marriage, and the daughter of a predeceasing child. The surviving son claimed the whole provision, but the Court held that the daughter, by virtue of the implied condition, was entitled to take her parent's share. Their Lordships were unanimously of opinion, "that in all provisions of this sort, the issue of children predeceasing the term of payment were entitled to that share which their parent could have claimed." It would be no light matter to disturb a decision of the Court of Session upon such a point in the year 1789—a decision which must not only have been relied upon in practice, but so far as I am aware, during the century which has since elapsed, the authority of which has never been questioned. It was followed in *Robertson* v. *Houston*, 20 Sess. Cas. (2nd series, 989), and so late as the year 1870 the First Division, in *Arthur and Seymour* v. *Lamb*, 8 Sess. Cas. (3rd series) 928, upon a case remitted for their opinion, advised the Court of Chancery that a provision by a father in a Scotch contract of marriage, "in favour of himself

in liferent and to the children of the said intended marriage in fee," did not lapse by the only child of the marriage predeceasing the liferenter, but subsisted in favour of the issue left by that child.

I cannot therefore doubt that according to the law of Scotland the condition must be read into the provision with which we are dealing, unless its application is expressly or impliedly excluded by the context. The expressions upon which the majority relied as ousting the condition, occur in the directions for the disposal of the fee in the event of the husband's predecease. In that case the wife took an alimentary liferent, the fee being payable on her decease to the "child or children" of the marriage. Then follow declarations to the effect that "if such child or children should all die before their mother, or although they should survive her, should they all die without leaving issue of their bodies," their mother's alimentary annuity was to continue, but that in the event of "failure of issue" she was to have the power of disposing of the capital by will or other writing, to take effect at her decease. Upon these conditions the Lord President observed—"The contrast between this and the clause applicable to the predecease of the wife is very remarkable. In the latter the only parties entitled to the fee as institutes are 'children.' In the former the grandchildren are conditionally instituted to their parents, and the widow's right to test is made dependent not on the failure of children but on the failure of the issue of the marriage, a term of more elastic signification than 'children,' and including descendants of any generation if the natural meaning is not controlled by the context." His Lordship accordingly came to the conclusion that the settlor having used different words of gift in the two events contemplated, and having expressly instituted issue of children in the one case and omitted them in the other, must be held to have done so intentionally. The same reasoning was adopted by Lords M'Laren and Kinnear.

I do not think that there exists any such contrast between the two clauses as their Lordships have suggested. In both clauses the words of gift are precisely the same, being to "the child or children of the marriage." The expressions "should they all die before attaining majority, and without leaving issue of their own bodies," are only introduced for the purpose of limiting the wife's power of disposal by will in the event of her surviving her husband. In the event of her predeceasing him her powers appear to me to be subject to the same limitation, because in that event it is provided that the trustees may pay to the liferenter, and to her heirs-at-law, or by will, "at any time after the death of the predeceasing wife and the failure of issue," or, in other words, after the failure of children and their descendants. What might have been the effect of an express gift to children in the one event, and to children and their issue in the other, it is unnecessary for the purposes of this case to determine. In my opinion these incidental expressions occurring in each clause point in the same direction. They equally indicate the understanding of the settlor that his gift to "a child or children" would bear the meaning which the law ascribes to the words in a marriage-contract provision, and would therefore include the issue of such child or children. I am confirmed in that impression by the fact that the two clauses already referred to are followed by provisions applicable to both, in which the beneficiaries are described as "children of the marriage." I can hardly conceive that the settlor meant these words to signify children only in the one clause, and children whom failing their issue in the other.

For these reasons I have come to the conclusion that the interlocutor of the Inner House, in so far as appealed from, must be reversed, and the interlocutor of the Lord Ordinary restored. Your Lordships are not required to deal with the question of expenses in the Courts below, seeing that there is no appeal from that part of the interlocutor of the First Division which disposes of them. I think the appellants ought to have their costs of this appeal as between agent and client out of the trust fund in question.

LORD HERSCHELL—My Lords, I have had an opportunity of reading the opinion which has just been delivered by my noble and learned friend. I entirely concur with it, and I have nothing to add.

LORD MACNAGHTEN—It seems to me that the trustees have done no more than their duty in refusing to hand over the trust funds to Dr Edwardes and his son. In my opinion they have made good both the grounds on which their refusal was based.

The authorities cited by the learned counsel for the appellants have satisfied me that the trustees were bound to uphold the trust for the purpose of protecting the surviving husband's alimentary liferent. If I understand aright the opinion of the late Lord President, he would have come to the same conclusion but for a special clause in the settlement which gives the trustee power to pay over the capital of the trust estate after the wife's death in the event of failure of issue of the marriage. Whether, even in that case, the trustees would have been bound to denude against their own judgment is perhaps doubtful. I can understand that the lady's stepfather or his advisers may have thought that if it should happen that there was no issue of the marriage to be cared for, there would be less reason for securing an alimentary provision for the husband, and that the matter might well be left to the discretion of the trustees. But however that may be, I am unable to assent to the view that because the trustees are authorised or even required to part with the trust funds in one particular case which has not happened, it follows that in another and a different case the Court is at liberty to set aside restrictions which the law allows and the settlement has in terms imposed.

On the second point also I venture to differ from the opinion of the majority of the First Division of the Court of Session. The settlement is not well drawn, but if it is read fairly, it is I think impossible not to see that it was the intention of the parties to make provision for the issue of children dying in the lifetime of their parents. I doubt whether the word "children" in this settlement of itself and by its own force comprehends "grandchildren." I rather think that the word "children" is used in its proper sense; and so I think is the word "issue." But it seems to me that the settlement is framed upon the view that in calling children the settlors were at the same time calling the issue of children. The settlement itself speaks of its provisions as being provisions "for the issue of the marriage." Each purpose of the trust that deals with the interest of children contains somewhere a reference to issue, and the reference I think is not the less significant because it is brought in (so to speak) rather casually. In fact the condition *si sine liberis* seems to run through the whole settlement, and to have been in the contemplation of the parties throughout. In the result I think that the interest of possible grandchildren cannot be disregarded.

On both grounds, therefore, I am of opinion that the appeal must be allowed.

LORD MORRIS—My Lords, I concur.

LORD HANNEN—My Lords, I also concur.

Interlocutor appealed from reversed with costs.

Counsel for the Appellants—Rigby, Q.C. —Asher, Q.C.—Dick Peddie. Agent—Andrew Beveridge, for Macandrew, Wright, & Murray, W.S.

Monday, July 25.

(Before the Lord Chancellor, Lord Watson, Lord Macnaghten, and Lord Hannen.)

JOHNSTONE *v.* DUKE OF BUCCLEUCH.

(*Ante*, vol. xxviii. p. 435, and 18 R. p. 587.)

Superior and Vassal—Casualty—Composition—Entry—Trust.

In 1810 an unentered proprietor of lands, which he had inherited from an ancestor who was a singular successor of the last-entered vassal, and who held an unconfirmed *a me* infeftment, by an *inter vivos* trust-disposition and settlement disponed the lands to trustees, directing them to pay his debts, and annuities to himself and his wife, and to carry out the provisions of his deeds of settlement in favour of his wife, children, or any other person or persons. The trustees were empowered to sell his lands, with his written consent, for payment of debts, and were bound to reconvey the remainder when the debts were paid, or whether paid or not, at Martinmas 1814.

The truster died in 1811. In 1815 the trustees were infeft on a decree of adjudication and implement obtained by them against the truster's heir, and were entered with the superior as trustees for the uses and purposes of the trust-deed only, by charter of sale, adjudication, and confirmation narrating the grounds of their right, and confirming the dispositions and unconfirmed infeftments since the date of the last vassal's entry. They paid composition. In 1860 the last surviving trustee reconveyed the remaining lands to the truster's heir-at-law, who was infeft on the conveyance, and was thereby in 1874 entered with the superior by the operation of the Conveyancing Act 1874, sec. 4. The last surviving trustee died in 1863. The superior demanded a casualty of composition; the vassal tendered relief-duty.

Held (*aff.* judgment of the Second Division) that the heir was liable in payment of composition in respect that the trustees' entry did create a new investiture, but even if it did not, the present owner was not the heir of an investiture recognised by the superior, for his ancestor had not been entered, and the superior's confirmation of the trustees' title was confined to what was necessary to complete the new investiture, and had no effect in confirming the truster's infeftment.

This case is reported *ante*, vol. xxviii, p. 435, and 18 R. 587.

Sir F. J. W. Johnstone appealed.

At delivering judgment—

LORD WATSON—My lords, the appellant is proprietor of three parcels of land, known respectively as Dornock, Woolcoats and Torbeckhill, situated in the county of Dumfries, and within the dukedom of Queensberry, which is now vested in the respondent. These lands were conveyed to the appellant by Masterton Ure as trustee under a disposition executed by Sir John Lowther Johnstone of Westerhall, the appellant's grandfather. In September 1860 the appellant recorded his conveyance in the General Register of Sasines; and immediately on the passing of the Conveyancing and Land Transfer (Scotland) Act 1874, he, by virtue of its provisions, became the entered vassal of the respondent, and (Mr Ure having died in the interval) also liable in payment of a feudal casualty in respect of his entry. The parties have differed as to the causalty payable, and they have adjusted a special case in order to obtain a decision upon the question whether the appellant's liability is that of an heir or of a singular successor. The Second Division of the Court, by a majority of three Judges against one, have held that he is a singular successor, and must therefore pay compensation, being a year's rent of the lands.