long current of authorities, to have created some doubt as to the exact period of the vesting, it has been distinctly settled long ago that where a limitation which might seem to point to a different period of vesting than the immediate operation of the instrument is in effect only a postponing of the interest in possession of the persons in whose favour the settlement is made until after the determination of a previous life estate—in that case the interest in remainder is held to be vested at once from the execution of the instrument.

Here, therefore, there is a perfectly plain and clear trust in the first part of the instrument for all the children at the time of the determination of the liferents, which would determine either by the death of Mr Alexander and the death of Mrs Alexander, or by the death of Mr Alexander and the second marriage of Mrs Alexander. The words which we find afterwards are simply owing to the view which had occurred to the testator that some of the objects of his bounty might be infants at the period of the decease of himself and his wife. Therefore he says that the property, the fee or principal of the shares, shall be payable after the determination of the liferents, and after the whole of the children who shall have survived Mr and Mrs Alexander, and who shall be alive, shall have attained majority. He contemplates that some may possibly die under age in the lifetime of himself and his wife, and that some may be alive after the death of the survivor of the two, and still be under age. If they die before their parents, then this declaration will not take effect, because it says "who shall be alive" at the time the distribution is to be made. As soon as all are cleared away (and with regard to this particular direction the period of payment is distinguished from the period of vesting), either by predeceasing their parents or by attaining the age of twenty-one, then there shall be, not a gift of the principal, but a division of the principal. The period for the division of the principal is pointed out solely with regard to the particular circumstance of some of the children being under twenty-one, and therefore not in a condition to receive or give discharges for the share of the principal to which, together with their brothers and sister, they would become entitled, namely, the first gift at the time of the determination of the previous life interests.

Lord Selborne—My Lords, I agree in what has been proposed to your Lordships.

It was argued by the respondents' counsel that the conditions of survivorship and attainment of majority were here of the substance of the gift. But the sole foundation for that argument was the occurrence of the mention of the survivorship of certain children, and the attainment of their majority, not in any clause either giving interests or defining the conditions upon which interests were given, but in a clause defining the period of time at which interests already given, and given in clear terms to all the children, should be payable or transferable. With regard to the clause which follows, as to the application of income during the interval between the first liferenter and the attainment of majority by the children supposed to be then under age, I see no reason at all to differ from the view which, as I understood my noble and learned friend upon the woolsack, is taken by him, that that is a clause to be applied according to the shares of the children, and not so as to make the income of one share applicable to the maintenance of children not entitled to the capital. But, my Lords, I have no hesitation in saying, that being a question which your Lordships are not called upon to decide, that if it were clearly the other way, and if this trust had been to apply the whole of the income of the entire trust-estate to the maintenance and education of those children only who were minors at the death of the last liferenter, to the exclusion of all children then adult from all benefit of the income until the attainment of majority by the youngest living child, I should still think that such a trust of intermediate income would neither suspend the vesting of the shares of the children who were entitled, subject thereto to the capital of the trust-estate, nor be of itself evidence, apart from the other clauses in the deed, that those children only who survived the last liferenter, and were at that time under age, were entitled to participate in the capital.

My Lords, the only other point upon which I think it necessary to make a single observation is the question with reference to the effect of the marriage settlement. I entirely concur with the terms of the proposed remit which has been mentioned by my noble and learned friend upon the woolsack, but I do not understand your Lordships to mean to express any opinion at all upon the question whether intimation was or was not necessary. That, as well as all other questions connected with the effect of the deed, I apprehend your Lordship's desire to have considered and determined by the Court of Session.

Lord Chancellor—My Lords, perhaps it may be as well that I should say that I quite agree with my noble and learned friend, and that in anything that fell from me I did not for a moment desire to assume that intimation would be found to be necessary. My only desire was that the whole of that question should be considered by the Court of Session.

Cause remitted with a declaration.

Agent for Appellant—John Galletly, S.S.C.

Agents for Respondents—Gibson & Ferguson, W.S.

Tuesday, June 15.

COLONEL ALASTAIR M'DONALD OF DALCHOSNIE *v.* JOHN ALAN M'DONALD AND OTHERS.

(Before Lord Chancellor Cairns, Lords Hatherley and Selborne.)

Marriage-Contract — Deed of Division — Entail — Construction.

Terms of deed of division and facts and circumstances in which *held* that a power of apportionment contained in an antenuptial marriage-contract had been validly exercised by the spouses.

This was an appeal from a decision of the Second Division of the Court of Session. An action of

multiplepoinding and exoneration was raised by the trustees of the late Sir John M'Donald against the appellant and respondents. There was a competition for a sum of £50,000 in 1826. Sir John M'Donald of Dalchosnie married Miss M'Inroy, who was entitled to £50,000 under her father's will. By antenuptial contract the estate of Dalchosnie was conveyed to himself and wife in conjunct fee and liferent and the heirs-male of Sir John. Power was reserved to execute an entail of the whole or any part of the estate, provided the same heirs were first called, and that Lady M'Donald's liferent should not be defeated. Lady M'Donald also conveyed to the trustees her money for the purposes stated in the deed, and after the death of the surviving parent the property was to be assigned to such children as the parents by any joint deed might appoint. The shares of the children were not to become vested interests until the death of the surviving parent. There were seven children of the marriage, of whom two predeceased Lady M'Donald. In 1837 a deed of entail was executed, and a joint deed of division also. In 1866 Sir John died, survived by his wife, who died in 1872. The chief dispute raised under the deeds was whether the parents had validly exercised the power of division and apportionment reserved in the antenuptial contract of marriage. The Lord Ordinary (Gifford) found that this power had not been validly exercised, that the estate of Lady M'Donald fell to be divided among the surviving children as if no apportionment had been made, and the share of each son was to be in proportion as six to four, and none of the daughters were to be entitled to more than £10,000. This interlocutor was reclaimed against by the eldest son, Colonel M'Donald, and after hearing parties the Second Division appointed the cause to be re-heard before seven Judges, when, by a majority of five to two, the Lord Ordinary's interlocutor was adhered to. Colonel M'Donald appealed against this judgment, and the respondents also asked that the judgment should be altered in part.

For the appellant it was mainly contended that the appointment of a sum of £25,000 under the joint deed of division was valid, and not void as was held by the Court below.

At advising—

LORD CHANCELLOR—The only question of difficulty in this appeal is as to the proper construction of a joint deed of division executed by Sir John and Lady M'Donald in the year 1837. When it has been determined what is the proper construction of that deed as a matter of construction, there is no difficulty whatever as to the rules of law which ought to be applied to the case.

At the outset I may say that I certainly do not give any weight to an argument which, somewhat late in the progress of the case, was addressed to your Lordships in favour of the respondents, and in opposition to the view of the appellant—the argument, namely, that because the joint deed of division purported to give to Sir John M'Donald, in the event of his surviving his wife, a life interest in the whole of the trust-property, therefore all that was done by way of appointment subsequently to that life interest was invalid. It might perhaps have been sufficient to say that this point does not appear to have been argued in the Court below, and certainly is not disclosed in the case for the respondents, who, again, have presented no cross-appeal. But putting aside these technical difficulties in the way of the respondents, it appears to me that the argument itself in substance has no foundation. The deed of trust, the antenuptial marriage-contract, provided that the trust-funds in question should not be divisible until the death of the survivor of the spouses; and then, when the joint deed of division came to be executed, although of course it was beyond the power of the spouses to give to Sir John, who was not an object of the power, anything beyond what the settlement had given him, and the settlement had given him only a limited interest of £750 a-year for his life, still the joint deed of division did nothing more than this—it declared that it was the will of the spouses that in the event of Sir John M'Donald surviving Lady M'Donald he should have and enjoy the liferent use of "my" (Lady M'Donald's) "whole property during all the days of his life," "just as I myself would have if I survived him." Now, there was not here any attempt to delay the distribution of the fund to a period longer than that assigned by the deed; for it was not, as I have said, to be distributed until the death of the survivor of the spouses. There was an attempt to give the whole of the income to Sir John during his life, but it was carefully guarded in this way—it was to be, as it necessarily must be, only in the event of Sir John M'Donald's surviving Lady M'Donald. In point of fact he did not survive Lady M'Donald. Under these circumstances it appears to me it would be entirely contrary to reason, and, as far as I know, quite without authority, to hold that an attempted disposition, not in any way interfering with that which was legitimately within the object of the power of distribution of the property, and only to take effect in an event which never has happened, should in any way militate against the validity of the subsequent disposition in the appointment.

Passing bye that, I come to what was done with regard to the children of the marriage. Now, the facts which your Lordships will have to bear in mind with reference to that part of the case are merely these—Lady M'Donald had a very considerable property of her own, amounting to over £50,000. Shortly after the marriage Sir John and Lady M'Donald thought it would be desirable to purchase two properties neighbouring to that which belonged to Sir John M'Donald at Dalchosnie, namely, the properties of Loch Garry and Kinloch-Rannoch, and Sir John purchased these properties for a sum of, I think, £28,000. He borrowed in order to pay for these properties £25,000 of the trust-money which represented the property of Lady M'Donald, and he gave to her trustees a heritable bond over the properties which he had purchased, namely, Loch Garry and Kinloch-Rannoch. When the spouses came to consider the appointment they should jointly make of Lady M'Donald's property they took notice of the state of the landed property. A new entail was made of the Dalchosnie family property, and at the same time an entail was made of the Loch Garry and Kinloch-Rannoch properties. They entailed the whole three upon their eldest son and their other sons in course of entail, and then upon other persons.

Now, there is not the least doubt upon the view which must be taken of the whole of the joint deed of division, coupled with the deed entailing

these properties, that the spouses intended and desired that the estates of Loch Garry and Kinloch-Rannoch, which had been mainly acquired by the £25,000 of trust-property, should go in the course of entail under which they were limited, and should go without the encumbrance on them of the heritable bond securing the £25,000 to the trustees of the trust-funds. And there is not the slightest doubt, at least not in my mind, that if Sir John and Lady M'Donald had been asked, Is that what you desire? Do you desire to execute an instrument which shall say that Loch Garry and Kinloch-Rannoch shall go in the course of entail under which they have been settled, discharged of the £25,000?—they would have said, By all means, that is exactly what we want; Let that be done in whatever way it can be done. But, my Lords, although there is no doubt that that was the general intention of Sir John and Lady M'Donald, the question for your Lordships to consider is this—How have they given effect to that general intention, and have they given effect to that general intention in a way which is open to objection upon the ground of its complete invalidity? My Lords, it was perfectly well known—anyone reading the deed of 1837 would see it—that those who were advising Sir John and Lady M'Donald saw that this general intention of the spouses could not be given effect to except through the medium of an appointment of the trust-fund representing Lady M'Donald's property, and the question again comes to be, have they, in making that appointment of the trust-funds, exceeded the conditions of the power of appointment?

Now, what they did in order to accomplish the intention which they had in view was this—Under the second head of the deed they provided in these words. "That it is our will that the said sum of £25,000 secured over the said estates of Loch Garry and Kinloch-Rannoch, shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate;"—that was the first part of the clause. The second is this—"The sum of £25,000, being the share of my (the said Adriana M'Donald's) property which we, the said John M'Donald and Adriana M'Inroy or M'Donald, have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate;"—that is the second. The third is this—"It being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates of Loch Garry and Kinloch-Rannoch of the same."

Now, as regards the first clause of this second head of the deed, "it is our will that the said sum of £25,000 secured over the said estates of Loch Garry and Kinloch-Rannoch shall be settled on and belong to our eldest son, and other members of our family in succession, being heirs in possession of the entailed estate," if that stood alone, if the deed contained nothing more than that, it would, as it seems to me, be open to this observation, —There is a direction to take £25,000 of the trust-funds, and to settle it on the eldest son—to make it belong to the eldest son,—a person then in existence, a person spoken of, a *persona designata* by the title which then he filled. And if you add the words, "and other members of our family in succession, being heirs in possession of the entailed estate," the most favourable view for the respondents that could be taken of that clause would be this—that while the eldest son was to take in the first place, the other persons who were heirs in the course of the entail were to take afterwards in the same way in which they were to take the estates themselves afterwards, that is to say, the eldest son was to take that which was money in the way in which he was to take the land as heir of entail, or what we should term the tenant in tail, and that he should take it therefore as the fiar, with a simple destination to those who afterwards might become fiars in succession. Your Lordships will readily see that if that were to be the construction, it would make the eldest son the absolute owner of the money, because, of course, the money could not be subject to fetters which would keep it from his absolute *dominium*.

But, my Lords, we have further information in the second clause, which is this—"The sum of £25,000, being the share of my (the said Adriana M'Donald's) property, which we, the said John M'Donald and Adriana M'Inroy or M'Donald, have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate." I again say, if this clause stood alone it would appear to me to be the clearest possible apportionment and appointment of the £25,000 as the share of the eldest son, and under the words "or failing him" if he were not there at the time when the succession opened at the death of the survivor of the spouses, there would be an indication that the heir of entail succeeding to the entailed estate was to come in his place as substitute for him. There again, if that were to be the construction of the second clause, the eldest son being there would be entitled as the object of the appointment to take the money, and the circumstance that there was an alternative limitation, which never came into existence, to a person who might not have been an object of the power, could not in any way defeat or invalidate the appointment to the eldest son, who was an object of the power.

I have pointed out what appears to me to be the only two constructions which these two clauses admit of. There is either an appointment to the eldest son with an appointment by way of succession to the next owners in tail, making both of them fiars, the one a fiar in the first instance with a simple destination to the others afterwards, or there is an appointment to the eldest son if he is alive at the death of the survivor of the spouses, with a conditional substitution of the next heir of entail if the eldest son should not then be alive. In either case the eldest son would be entitled to the *dominium*, the possession of the money.

Then the third clause is this:—"It being our desire and appointment that the said trustees under our marriage contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates of Loch Garry and Kinloch Rannoch of the same."—That is the expression of what I began by saying was without doubt the general intention of the spouses, that by means of the land being disburdened of the heritable bond it should be left to go in succession to the heirs of entail

without the obligation of paying the sum of £25,000. It is simply an expression of a desire which could only be carried into effect with the consent of the person who by the previous clauses was made, according to my opinion, the absolute owner of the £25,000. If he consented the trustees might disburden the estate. If he did not consent the estate had to remain burdened with this bond, and this expression of desire would not be held in any way of itself to take away from that ownership which was created by the former clause. My Lords, it appears to me that the clause with regard to the £10,000 for portions for the younger children entirely corroborates this view of the construction. That clause runs thus:—"It being provided that in case such funds shall exceed £10,000 to each younger child the whole excess above £10,000 shall all fall to the eldest son or heir of entail as above mentioned (that is to say, to the eldest son if he is there, and to the heir of entail if he is not there) "with a view to its being laid out" (it says not by whom) "in the purchase of lands, and entailed with the other estates upon him and the heirs called in the foresaid deed of entail through the whole course of succession." That is, it shall fall to the eldest son, and it shall fall to him with a view to its being laid out in the manner described. Whether it would be so laid out or not would depend upon whether the heir or the eldest son taking it held himself to be bound by or held himself willing to comply with this expression of a wish as to the way in which the money should be used.

My Lords, that is the construction which, as it appears to me, ought to be put upon the deed, and if so the rule of law which is applicable to the subject is beyond all doubt.

It was not in any way disputed at your Lordships' bar. It is a rule to be derived from the authority of *Carver* v. *Bowles* and the numerous class of cases of the same kind, and also from those cases (of which *Laxennes* v. *Tierney* may be taken as an example) which, though not relating to powers, but to gifts and legacies, raise questions almost identical with those which are raised in the cases of which *Carver* v. *Bowles* is an example. From all those cases the plain rule is be derived, that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions.

My Lords, here it appears to me that there is a clear gift in the events which have happened to the eldest son. There is nothing whatever attempted to be added by way of checking his enjoyment of the property but the injunction to the trustees (that is to the other parties) to destroy the security by means of which the money appointed to the eldest son was secured.

The trustees, of course, could not do that without the consent of the person to whom the money was given. It appears to me that there was no authority whatever which would warrant your Lordships in holding that a direction of that kind could invalidate an absolute gift.

That being so, the deed of division appears to me to be entirely efficacious for the purpose of vesting in the eldest son the right to receive the £25,000, and I shall therefore take leave to submit to your Lordships the motion that the interlocutors which are appealed from should be reversed, and that a declaration should be made that the appellant under the settlement and deed of division executed by Sir John and Lady M'Donald is entitled as from the death of Lady M'Donald to the gift of £25,000, secured by heritable bond over the estates of Loch Garry and Kinloch-Rannoch, and that with this declaration the case should be remitted to the Court of Session.

Lord Hatherley—I am of the same opinion. When the case comes to be analysed it is clearly within the authorities that have been cited—so clearly within them that it appears to me that the counsel for the respondents have wholly failed in establishing a distinction in principle between it and the authorities which have long guided the Courts in cases of this description. In the present case there is a power to the spouses to dispose amongst their children of a very large property of the wife, Lady M'Donald, and by the instrument which is now in question they undoubtedly intended to dispose of the wife's property, over which this power existed. The mode in which they attempted to dispose of it, and the collateral views and intentions which may have existed in their minds have not prevented, I think, the operation of the clauses by which the actual disposition is clearly made.

I cannot doubt, My Lords, that there was a desire on the part of the husband and the wife that those estates, which had been bought mainly with the property of the wife, and which were to be the subject of disposition, should be added on to the original family estates, and that inasmuch as £25,000, part of the wife's fortune, had been employed in buying those estates, both the eldest son should be entitled, in the first instance, under the deed by which those estates had been settled to the enjoyment of the property, and if it could be lawfully done, his successors in the entailed estates should have the advantage of enjoying the estates so purchased with the £25,000 discharged from that sum. That appears clearly and undoubtedly from one provision in this deed.

But they had paramount to that, and *as their primary intention* in the execution of the deed, the desire to settle definitely, onerously, irrevocably, and mutually the whole of the said estates of Dalchosnie, Loch Garry, and Kinloch-Rannoch belonging to the husband, and it was also their clear intent "to divide, apportion, and settle the whole property, heritable and moveable, including the said sum of £25,000 secured over the said lands of Loch Garry and Kinloch-Rannoch," belonging to the wife, "on ourselves and our family, and, failing our heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands on heirs-female of the present marriage, giving them a preference and priority to heirs-male of any subsequent marriage." They appear to have thought in making the apportionment some arrangement might be made with reference to the disposition of the property passing on to the heir in the same manner as the original property of the husband was settled, yet the intent to dispose of the whole property over which they had power was undoubtedly and clearly the leading intent of these two persons.

And when they come to dispose of it they do so

in this way:—First they begin, as was noticed by one of the learned Judges in the Court below, by attempting to exceed their power by giving a life interest in the whole property to the husband, who by the original deed had only a life interest in £750 a-year. But it appears to me that, in the events which have happened, that can make no difference whatever in the result of this case, because the power being one which was to be exercised by way of disposing of the property after the death of the husband and wife, and not till then, the husband having died in the lifetime of the wife this attempted excess of the power could in itself never take effect. The children were not entitled to have a disposition of the property until both their parents were dead, and therefore inasmuch as the one died before any such right in the extra portion of the fund beyond the £750 was due to him, no question could possibly arise upon that. This is simply, as the learned Judge in the Court below says, an indication that they had not the full limits of their power steadily before their eyes. As my noble and learned friend who preceded me has observed, the limitation of the extra portion of income to the husband can only be construed, in any view of the case, as a limitation to him, if living at the death of his wife, of that portion of the income. If he is not living, the fund is limited in a way which in the events which took place clearly and plainly takes effect, supposing that to be the only point in the case.

However, the real difficulty of the case has been this,—What is to be done with reference to the disposition that is made of the £25,000? The spouses say that it is their will that the £25,000 that is secured over these estates "shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate." That would have been their desire if they could have effected it as regards the sum of personality—at least what we should call personality — this sum of £25,000. But in doing that, if they had settled it upon the eldest son, and settled it with the same limitations as were expressed with reference to the landed property, the result would have been that it would have gone to him absolutely. And if they had stopped there, he, being alive at the death of the survivor of the two spouses, would have taken the sum absolutely, and would have had it free from any possible claim on the part of those who might come after him, inasmuch as it was not subject to the fetters and limitations imposed by the Act of 1685. But they do not stop there; the words of the deed make it still more plain as they proceed, "the sum of £25,000 being what the share of my" (the wife's) "property which we" (the spouses) "have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son." I cannot conceive any words of appointment more clear than these. I cannot conceive any words (to follow Lord Cottenham's dictum in *Laxennes* v. *Tierney*) that would more completely and clearly and neatly sever one share from the rest of the fund, whether that fund be a testator's general reserve, as in the case of a will, or, as in this case, a fund in which an appointment is made existing in the hands of trustees in one large mass. The fund amounts in the present case to £50,000, and out of it the sum of £25,000 is plainly severed.

That distinguishes this case and the case of *Laxennes* v. *Tierney* from a case like one which was referred to before myself, namely, *Ruckie* v. *Schoefield*, and from all the cases in which you find the gift only, in a continuance of limitations expressed in the instrument without any complete severance of the share at once, and in which you find a subsequent dealing with that share, and interest allotted and apportioned in it to the parties intended to be benefitted, and in those cases if those parties be out of the range of the power the appointment becomes vitiated because you cannot separate it from a continued series of limitations, but here we have a share taken out of the general trust fund, and it is allotted to the eldest son, or failing him to the heir in possession of the entailed estate. He did not fail. At the death of the survivor of the spouses there he was found,—and there was his share found for him,—it was allotted and apportioned for him,—it was taken out of the estate. The case therefore appears to fall as clearly within the case of *Carver* v. *Bowles* as any case that can be conceived.

No doubt, my Lords, the spouses proceed to say after that that they wish the trustees to "renounce and discharge the said heritable bond, and disburden the said lands and estates of Loch Garry and Kinloch-Rannoch of the same." That is a condition superadded to the clear and plain allotment of the share which had been made to the eldest son, and being a condition by which he is not fettered or bound, the condition itself becomes simply a void conclusion as against him, and he takes the property as he would have taken it under the former limitation if it had been a limitation to him by way of settlement in the same manner as the estates were settled, it not being subject to fetters for the reasons I have already assigned.

Then comes a passage which has been much commented upon. It expresses the same view as the passage preceding with regard to the desire of the spouses that the estates should go in the manner they described. In the subsequent passage, with regard to a surplus after giving £10,000 to each of the younger children, nothing is said that could, I think, afford a ground for the respondent's construction of the previous gift of the eldest son's share.—Indeed it was only pressed into the argument in order to show the general intent upon the whole deed (which I do not dispute) that if it could be so the estates of Loch Garry and Kinloch-Rannoch should pass on with Dalchosnie to the eldest son and his successors in possession of the entailed estate without the encumbrance of the £25,000.

Concurrently with that there was undoubtedly also a desire that a full and complete disposition should be made of the funds over which they had the power of appointing. In the exercise of that power I think they have made a sufficient disposition in the events which have happened to the eldest son, and I think the subsequent direction in which they attempt to impose a condition upon the trustees, a condition which the trustees could not with any propriety have fulfilled to release the estate from the bond, fails to take effect. This is in accordance with the authority of cases which have been decided over and over again in the English Courts, the principle of which is co-incident with that which is supported by the learned Judges in the Court below, although they have differed in their argument as to the conditions. I think, therefore, my Lords, that the conclusion

which ought to be come to is that the appointment took effect *simpliciter*.

LORD SELBORNE—My Lords, I read this deed exactly as if the words had stood thus—"We do hereby allot and apportion the sum of £25,000 secured over the estates of Loch Garry and Kinloch-Rannoch as the share of and in my, Adriana M'Donald's, property, of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate, and it is our will and desire that the said sum of £25,000 shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the said entailed estates; and also that the trustees under our marriage contract, or the survivors of them, shall, immediately on the death of the survivor of us, renounce and discharge the heritable bond for the same sum of £25,000 and disburden the said lands and estates of Loch Garry and Kinloch-Rannoch of the same.

So reading the deed, there is, first, an appointment (in the events which have happened) to the eldest son, as fiar, of the whole £25,000. All that follows is but a superadded wish, desire, or condition, having in view the settlement or the release to the owners of the entailed estates of the sum so appointed, which ulterior purpose might be accomplished, and could only be accomplished, through the medium of the estate and interest vested in the eldest son by virtue of this appointment. That wish, desire, or condition not being authorised by the power, must necessarily fail unless the appointee (whether bound to elect or not, by reason of other benefits given to him independently of the power), should elect to give effect thereto; but the appointment itself is not therefore vitiated. The authorities of which *Carver* v. *Bowles* is an example, have determined (on principles which if sound in England must be equally so in Scotland), that an ulterior purpose of this kind, which is *ultra vires* only, and not also a fraud on the power, that it may have operated as a motive to the appointment in the mind of the appointee will, nevertheless, not prevent an object of the power from taking for his own benefit the estate appointed to him, if the words used, according to their proper construction, which must itself be independent of any peculiar doctrines of law applicable to powers, are sufficient to execute the power, and to vest the property in the appointee.

The context of this deed satisfies me not only that, on sound principles of construction this was its real effect, but that the appointors intended to do the very thing which in law they did; and that they well understood that it was necessary that the deed should so operate in order to make it possible that their ulterior wishes should be capable of accomplishment. The declaration and appointment which they made was expressed to be "in consideration of the said deed of entail," (*i.e.* the entail of the Loch Garry and Kinloch-Rannoch estates), as well as "of the powers possessed by us under the said contract of marriage," and after disposing of the £25,000 in the way which has raised this controversy they proceeded to appoint the rest of Lady M'Donald's settled property equally among their "younger children exclusive of the heir" to the extent of £10,000 each, directing that if there were any excess above that amount such excess should all fall to the "eldest son or heir of entail as above mentioned." Here also they superadded the expression of an ulterior wish, to be effectuated through that appointment by the words which followed "with a view to its being laid out in the purchase of lands and entailed with the other estates, upon him and the heirs called in the aforesaid deed of entail through the whole course of succession." And afterwards in two places they referred to the £25,000 as being by this deed "settled on the heir of entail," words which are nearly in those places applicable to the eldest son, as well as to any other heir of entail who, (in different events from those which happened), might have succeeded on the deaths of the appointors to the entailed estates. A comparison of all the passages in which the appointee of the £25,000 is thus spoken of in the singular number, seems to me to make it quite clear that one individual person (to be ascertained with reference to the state of the title to and possession of the entailed estate immediately after the death of the survivor of the appointors), and one person only, was intended to take the 25,000 by way of appointment.

That being so, I agree with your Lordships that the opinion of the minority of the learned Judges in the Court of Session was correct; and that this appeal ought to be allowed.

Interlocutors reversed, and cause remitted with a declaration.

Counsel for the Appellant—Collyer, Martin, Q.C. and Cotton, Q.C. Agents—Loch & Maclaurin, Westminster, and A. P. Purves, W.S.

Counsel for the Respondents—Pearson, Q.C., and Kay, Q.C. Agents—Grahames & Wardlaw, Westminster, and Dewar & Deas, W.S.

Thursday, June 24.

ALEXANDER BREMNER (INSPECTOR OF POOR FOR RATHVEN) *v.* LUNACY BOARD FOR ELGINSHIRE.

(Before Lord Chancellor Cairns, Lords Hatherley, O'Hagan, and Selborne.)

(*Ante*, vol. xi. p. 692; I. R. 1155, 10th July 1875).

Pauper—Parochial Board—Liability—Reference to Arbitration—Homologation.

In a question between two parochial boards as to liability for support of a pauper lunatic, the inspectors for either parish referred the matter to an un-incorporated Society of Inspectors of the Poor—*Held* that this reference, although to a society composed of fluctuating members, was a perfectly valid one, and that the parties having entered into the reference and acted upon the award made were bound by it.

This was an appeal from a judgment of the Second Division of the Court of Session as to the settlement of a pauper named Charlotte Grant. She was born in the West Indies, came to this country at the age of twenty, and went from place to place in Aberdeenshire and Morayshire, sometimes earning her living by service, and sometimes by charity. She was not married, and had acquired no industrial settlement, but in 1858 she went to Rathven and had an illegitimate child. She remained there in a state of destitution, supported