some hesitation in affirming that opinion, for the letter quoted on record does not contain terms of obligation at all. Proposals were put forward and the letter gives the terms upon which the pursuer acted for the defender, but yet there was no obligation constituted by that letter. I do not go further than saying that I hesitate to affirm that ground of judgment.

As to the second ground of judgment I entirely concur. If, as the Lord Ordinary says, this account was for legal business in which were included charges for commission, the ground of judgment could not be maintained, "but here," as he says, there is no mixing "up of commission with legal business." The "commission charged is accessory to a proper mercantile account for mercantile business in connection with a mercantile agency." On that ground I am prepared to concur in the judgment of the Lord Ordinary.

LORD ADAM—I am of the same opinion. I agree with your Lordship that this, as the Lord Ordinary says, is not a merchant's account in the sense of the statute, but an account in connection with proper mercantile agency. I am clearly of opinion that the Act has no application to such a case.

On the other ground my opinion is not so strong, but I think I should be prepared to agree with him, although it is unnecessary to give an opinion upon it as we have already a sufficient ground of judgment.

LORD M'LAREN—It results from the decisions that the contracts of sale falling under the statute are generally those of sale by the trader to the consumer, but I imagine that if a contractor undertakes to supply clothes or boots for a regiment of soldiers, his case would be just the same as that of a tailor or a shoemaker who sells to individuals. It has been clearly laid down in the cases of *M'Kinlay* and of *Laing* that the statute does not apply to the case of accounts between merchant and merchant. The one was the case of a contract between parties and their agents in Glasgow who were remunerated by commission. The other was a case of a contract between manufacturers and a mercantile house abroad, in which the remuneration or consideration for the contract was the price of the goods. The present case is one belonging to mercantile transactions, because the pursuer although not by profession a merchant, did mercantile business with the defender who was abroad.

As to the other ground of judgment, it is always difficult to decide whether correspondence constitutes a legal obligation. The question of being a written obligation only arises where otherwise the case would fall under the statute. I have no strong opinion as to that matter in this case. I should not be disposed to hold that to bring the case out of the statute obligatory words were necessary. A promise in writing would probably be enough to elide the statute, if expressed distinctly and with reference to a price or commission ascertained or ascertainable, but there are difficulties in the present case, and I agree that it is unnecessary to decide the question raised, there being another ground for holding the statute does not apply, upon which we are all agreed.

LORD KINNEAR—I agree it is unnecessary to decide the point raised by the first part of the Lord Ordinary's interlocutor, as to which indeed the Lord Ordinary himself does not give so decided an opinion. On the other ground I agree with your Lordship.

The Court adhered.

Counsel for Pursuer and Respondent—Jameson—Alison. Agent—Party.

Counsel for Defender and Reclaimer—Strachan — Craigie. Agents — Miller & Murray, S.S.C.

Friday, June 12.

FIRST DIVISION.

[Lord Low, Ordinary.

PRINGLE *v.* PRINGLE AND OTHERS.

Entail — Disentail — Marriage-Contract — Descent of Estate Secured by Obligation in Marriage-Contract on Issue—Entail (Scotland) Act 1882 (45 *and* 46 *Vict c.* 53), *sec.* 17.

The Entail (Scotland) Act 1882, section 17, provides—"Where any heir of entail in possession . . . shall . . . have secured by obligation in any marriage-contract entered into prior to the passing of the present Act the descent of such estate upon the issue of the marriage . . . it shall not be competent for such heir . . . to apply for . . . the disentail of such estate until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who by himself or his guardian shall consent to such disentail, or until such marriage shall be dissolved without such child being born unless . . . the parties at whose sight the provisions of the contract are directed to be carried into execution shall concur in such application." . . .

An heir of entail in possession by marriage-contract in 1870, upon the narrative of the 4th section of the Aberdeen Act, made the provisions thereby allowed for "the child or children to be procreated of the said intended marriage who shall not succeed to the said entailed lands." These provisions were granted "under all the conditions and provisions and subject to all the restrictions and limitations whatsoever contained in the statute . . . and which provisions before written to children of the said intended marriage are hereby declared to be in full satisfaction to the whole children of the said intended marriage

(including the heir who will succeed to the foresaid entailed lands and estates) of all bairn's part of gear, legitim," &c. It was further provided "that execution shall pass hereon at the instance of" certain persons "for the implement of the whole provisions hereinbefore written in favour of" the spouse "and the child or children of the said intended marriage."

In a petition for disentail the second and third heirs objected that the marriage-contract contained an implied obligation securing the descent of the estates to the issue of the marriage, and that as no children had been born of the marriage the disentail was incompetent without the consent of the marriage-contract trustees, which had not been obtained.

Held that even although the legal rights of the heir who should succeed were excluded on the assumption that he would succeed to the estates, this did not amount to an obligation in the marriage-contract securing that he should succeed.

Entail — Disentail — Valuation of Expectancies—Principle of Valuation.

In a petition for disentail a reporter stated that twenty-six years' purchase was a fair measure of value for an estate in the district; that the estate was so much dilapidated that a purchaser would have to expend £7000 or £8000 on repairs, &c.; and accordingly he reduced the number of years' purchase to twenty.

Held that this principle of valuation was unsound, because the expenditure of such a sum upon repairs would create a more valuable subject, and (*diss.* Lord M'Laren) that twenty-six' years purchase of the present yearly rental was the proper mode of valuation.

Valuation of Woodlands — Principle of Valuation.

See on this point the Lord Ordinary's note.

Alexander Pringle, heir of entail in possession of the lands of Whytbank and Yair, in the county of Selkirk, presented the present petition for authority to record an instrument of disentail of these lands.

The petitioner was born on 13th March 1837. He was married in 1870. There were no children of the marriage.

In his antenuptial marriage-contract the petitioner, after reciting the 4th section of the Aberdeen Act, provided—"Therefore the said Alexander Pringle, as heir in possession foresaid, in virtue of the powers conferred upon him by the foresaid statute, or otherwise pertaining and belonging to him in any manner of way, hereby binds the whole heirs of entail succeeding to him in the said entailed lands and estates of Whytbank, Yair, and others before mentioned, out of the rents or proceeds of the said lands and others, to make payment to the child or children to be procreated of the said intended marriage who shall not succeed to the said entailed lands and estates of the provisions following, payable one year after the death of the said Alexander Pringle, and bearing interest from the date of his death in terms of the said statute; that is to say, for one child the sum of £2000 sterling; for two children the sum of £4000 sterling; and for three or more children the sum of £6000 sterling . . . and declaring that the said provisions to younger children are granted by the said Alexander Pringle under all the conditions and provisions, and subject to all the restrictions and limitations, whatsoever contained in the said statute . . . and which provisions before written to children of the said intended marriage are hereby declared to be in full satisfaction to the whole children of the said intended marriage (including the heir who will succeed to the foresaid entailed lands and estate), of all bairn's part of gear, legitim, portion natural, executry, and everything else that they could ask or claim by and through the decease of their said father and mother, excepting what they or either of them may think fit to bestow of their, his, or her own good will only; . . . and lastly, it is hereby provided and declared that execution shall pass hereon at the instance of Alexander Pringle, residing at Darley Grove aforesaid, eldest son of the said Robert Keith Pringle, and David Scott Moncrieff, Writer to the Signet, Edinburgh, or of either of them, or of the heir of the survivor, for implement of the whole provisions hereinbefore written, conceived in favour of the said Mary Arbuthnot Pringle, and the child or children of the said intended marriage, or any issue of such child or children."

The Lord Ordinary (Low) made a remit to Mr Henry Cook, W.S., to inquire into the facts, and in his report on the procedure in the petition the following passages occurred:—"It is contended by the second and third heirs that there is in the said marriage-contract an obligation that the entailed estates shall descend to the eldest child of the marriage of the nature referred to by the 8th section of the Rutherfurd Act of 1848, and the 17th section of the Entail Act of 1882, the latter of which provides that 'Where an heir of entail in possession of an entailed estate . . . shall have secured by obligation, in any marriage-contract entered into prior to the passing of the present Act, the descent of such estate upon the issue of the marriage, in reference to which such contract is entered into, it shall not be competent for such heir of entail in possession . . . to apply for . . . the disentail of such estate until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who, by himself or his guardian, shall consent to such disentail, or until such marriage shall be dissolved without such child being born, unless the trustee or trustees named in such contract, or the party or parties at whose sight the provisions of the contract are directed to be carried into execution, shall concur in such application or consent.' In the present case there are no trustees named in the

contract, but there are parties named at whose sight execution shall pass 'for implement of the whole provisions hereinbefore written, conceived in favour of . . . child or children of the said intended marriage, or any issue of such child or children.' . . . . They are not consenters to the present application, and the petitioner maintains that he does not require their concurrence, because he maintains that there is no such obligation in the contract securing the descent of the entailed estate upon the issue of the marriage as the Act of Parliament contemplates."

The Lord Ordinary also made a remit to Mr Fletcher Norton Menzies to value the estates in order that the interests of the next heirs might be computed. Mr Menzies valued the estates at £24,358, 11s. 8d. He reported that the estate was much dilapidated; that a purchaser would require to spend £7000 or £8000 on necessary building improvements and repairs; that twenty-six years' purchase of rental was the usual measure of value of estates in the district, but he reduced the scale to twenty years' purchase in view of the expenditure necessary to put the subjects into proper repair.

Objections to this report and valuation were lodged by the second and third next heirs of entail, who estimated the value of the estate on the report of a man of skill at £40,000.

On 7th February 1891 the Lord Ordinary, in view of these objections, made a second remit to Mr Menzies, who adhered to his original opinion. The reporter stated that in coming to his decision he might have put a greater number of years' purchase on the estate, and then deducted from that the £7000 or £8000 necessary to put the property in good repair. He practically attained the same result by taking twenty years' purchase of the existing rental.

On 19th March 1891 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having resumed consideration of the petition, with the report of Mr Henry Cook, W.S., the reports of Mr Fletcher Norton Menzies, and the objections for Robert Keith Pringle and another, and heard counsel for the parties thereon, Finds (1) that the petitioner has not, in the marriage-contract entered into between him and Mary Arbuthnot Pringle his wife, dated 21st March 1870, secured by obligation the descent of the entailed estates of Whytbank and Yair upon the issue of the marriage, and that it is competent for him to apply for the disentail of the said estates without the concurrence of the parties at whose sight the provisions of the said contract are directed to be carried into execution; and (2) that the value of the said entailed estates as estimated by Mr Fletcher Norton Menzies in his said report falls to be altered to the effect of taking twenty-six years' purchase of the yearly value wherever Mr Menzies has taken twenty years' purchase thereof, except as regards the feu-duties at Clovenfords: With these findings appoints the petition to be enrolled for further procedure; and grants leave to reclaim.

"*Note.*—There are two questions arising in this petition which I have been asked to decide before proceeding further.

"The first question is, whether by virtue of the 17th section of the Entail Act of 1882 it is incompetent for the petitioner to apply for the disentail of Whytbank and Yair in respect that he has secured by obligation in the marriage-contract between him and his wife the descent of these estates upon the issue of the marriage, and has not obtained the consent of the parties at whose sight the provisions of the contract are directed to be carried into execution?

"In the marriage-contract the petitioner, upon the narrative of the 4th section of the Aberdeen Act, and by virtue of the powers thereby conferred upon him, made the provisions allowed by the statute for 'the child or children to be procreated of the said intended marriage who shall not succeed to the said entailed lands.'

"It is declared that 'the said provisions to younger children are granted by the said Alexander Pringle under all the conditions and provisions, and subject to all the restrictions and limitations, contained in the said statute.'

"It is also declared that the 'provisions before written to children of the said intended marriage are hereby declared to be in full satisfaction to the whole children of the said intended marriage (including the heir who will succeed to the foresaid lands and estates) of all bairns' part of gear, legitim,' &c. It is provided in the last place 'that execution shall pass hereon at the instance of' certain persons named, 'for the implement of the whole provisions hereinbefore written, conceived in favour of' Mrs Pringle 'and the child or children of the said intended marriage.'

"It was contended for the second and third heirs that the marriage-contract contained an implied obligation securing the descent of the estate to the issue of the marriage, and that as no children had been born of the marriage the disentail was incompetent without the consent of the marriage-contract trustees, which had not been obtained. This contention was founded upon the fact that although the provisions are for the children 'who shall not succeed to the entailed estates,' the legal rights of the heir who will succeed to the entailed estates are excluded.

"I am of opinion that the argument of the next heirs is not well founded, there being in my judgment no obligation in the marriage-contract of the nature contemplated in the 17th section of the Act of 1882.

"The provisions for children in the marriage-contract are those authorised by the Aberdeen Act, and are necessarily limited to the children who shall not succeed to the entailed estates.

"For the heir who shall succeed to the estate there is no provision whatever. The exclusion of his legal rights might or might not be effectual if he should claim legitim, and I do not think it necessary to express any opinion upon

that question. But I cannot find anything in the contract amounting to an obligation securing the descent of the estate to him.

"It is probably true that his legal rights were excluded, because it was assumed that he would succeed to the estates, but I do not think that that amounts to an obligation securing that he shall succeed.

"The next question has regard to the value of the estate upon which the expectancies or interests of the next heirs fall to be computed. A remit was made to Mr Fletcher Menzies to report upon the value of the estates, and he has valued them at £24,358, 11s. 8d. Objections were lodged by the second and third heirs to Mr Menzies' valuation on the ground that it was too low, and they subsequently lodged a report by Mr James Hope valuing the estates at £37,000. I again remitted to Mr Menzies to reconsider his report in view of the objections and of Mr Hope's valuation, and Mr Menzies lodged a second report adhering to his original opinion. I have since had an interview with Mr Menzies, and received full explanations from him upon various points.

"It will be observed that the main differences between Mr Menzies and Mr Hope are (1) as to the value of the hill pasture, and (2) as to the number of years' purchase upon which the capital value of the estate should be ascertained.

"In regard to the yearly value of the hill pasture I have no hesitation in accepting Mr Menzies' valuation, because not only is he a neutral man chosen by the Court, but he possesses great knowledge and experience of hill lands, and his valuation was the result of a most detailed examination of the lands.

"As regards the number of years' purchase, however, I think that Mr Menzies has proceeded upon an erroneous principle. He explains that the estate is in an exceedingly dilapidated condition; and in his second report he says that he has taken only twenty years' purchase of the annual value, because a purchaser would have to expend £7000 or £8000 upon necessary buildings, improvements, and repairs. 'I considered it better,' he says, 'to reduce the number of years' purchase to suit the dilapidated condition of the estates than to take off a fixed sum.'

"Now, Mr Menzies has estimated the yearly value of the estate as it at present exists, that is, in its present dilapidated condition, and he informs me that the number of years' purchase of the rental which an estate in the district in which Whytbank and Yair are situated might be expected to bring is twenty-six. As, however, an expenditure of £7000 or £8000 would be required to put the estate into thoroughly good order, he allows only twenty years' purchase. It seems to me that by following this method of calculation Mr Menzies has to some extent deducted the depreciation of value caused by the dilapidated condition of the estate twice over. No doubt if money is not spent on the estate it will become still more dilapidated and of still less yearly value. But the £7000 or £8000 of which Mr Menzies speaks is not only the sum which is necessary to keep the estate up to its present value, but also what would be required to convert it into an estate in thoroughly good order and repair, including the building of an additional farmsteading. But if the estate was put into thorough order it would become of greater yearly value than it is at present, and the increased yearly value would represent the return which the purchaser would expect to get for his additional expenditure. He would get an estate of the present value for his purchase-money, and would increase the value of that estate by spending £7000 or £8000 more. What Mr Menzies has really done, therefore, is to take the present value of the estate, calculated according to the ordinary rules of valuation (*i.e.*, twenty-six years' purchase of the present yearly value), and then to deduct from that the sum required to make the estate more valuable. I do not think that that is a sound principle, and therefore while I accept Mr Menzies' estimates of the present yearly value, I shall allow twenty-six years' purchase of that value, which he tells me is what might reasonably be expected for a residential estate in the district. I therefore take twenty-six years' purchase where Mr Menzies has taken twenty (except as regards the feu-duties at Clovenfords), and the result is to bring out a total value of £30,184, 11s. 8d. instead of £24,358, 11s. 8d.

"I should further explain the view which I take of the principle upon which the woods and plantations (other than those around the mansion-house and in the policies) should be valued in a case of this sort, because I heard a good deal of argument upon this point. Mr Menzies reports that almost all the woods are of that age that they might be cut down and sold by the heir in possession. In these circumstances, it was suggested on the one hand that no value should be given for the woods at all as the petitioner might cut them down and sell them; and on the other hand, that as the woods have not been cut down, they form part of the estate, and that their full value—that is the value of all the trees—should be included.

"I do not think that either of these extreme views is sound. In valuing an estate upon which there are woods and plantations the valuer would assume that the woods would be dealt with in the ordinary course of prudent administration—that ripe or backgoing trees would be cut, that young plantations would be thinned, and that the removal of old trees would be accompanied by a reasonable amount of planting. Upon such an assumption only can the value of woods be properly estimated, because the value of woods to an estate does not lie wholly in the value of the timber. For example, one use of woods is for shelter, and another is as a covert for game, and both of these

uses involve the maintenance of the woods. I see no good ground for adopting a different mode of valuation in a question between heirs of entail. What the Court has to do in a case of this sort is, I apprehend, to ascertain the fair value of the estate, so that the value of the expectancy or interest of the next heirs may be fixed. Such fair value cannot in my opinion be arrived at by assuming that the heir in possession will act in a way totally opposed to the course of prudent estate management, simply because he has in law power to do so.

"Applying these principles to the present case, I am satisfied with the way in which Mr Menzies has dealt with the woods.

"He has added something to the value of the adjoining fields in respect of shelter, and he has placed a value upon the woodlands and upon the annual cuttings, which are capitalised at the same rate of purchase as the other yearly returns from the estate.

"I was asked to note that both parties moved me to allow a proof as to the value of the estate. I did not, however, see my way to do so. The practice of ascertaining the value of the estate in entail petitions by remit to a man of skill selected by the Court is well settled, and I should be sorry to disturb that practice, because there is no class of questions less suited to determination by proof than questions of mere value."

The petitioner reclaimed, and argued—that the value of an estate might be ascertained by a remit to a reporter or by some other method such as a proof. If a remit was the mode adopted, then the reporter's report must be taken *in toto;* it was unfair to cut and carve on it as the Lord Ordinary had done. The present rental could not be maintained without great outlay owing to the dilapidated condition of the estate. If there were any points upon which the Court desired further information, this could be easily obtained by a further remit to Mr Menzies, and failing this his valuation should be adopted as a fair and reasonable estimate of the worth of the estate.

Argued for respondents—The principle of the reporter's valuation was a wrong one. He took twenty-six years' purchase of the rental and then deducted from that the sum required to make the estate more valuable. There was thus a double deduction. The reporter also omitted to notice that if this larger sum was laid out on the lands a much more valuable subject was thereby created. The reporter admitted that land in the district where their estates were situated was worth twenty-six years' purchase of the rental, and yet he only allowed twenty. The value fixed by the Lord Ordinary was fairer, but it also was too low.

At advising—

LORD PRESIDENT—Two questions are dealt with by the Lord Ordinary in the interlocutor now under review. The first of these is, whether by the marriage contract between the petitioner and his wife the estates in question were secured on the issue of the marriage? Upon that point no serious argument was addressed to us against the view adopted by the Lord Ordinary, so it need not be further noticed.

The second question relates to the mode of valuing the estate upon which the interests of the next heirs fall to be computed.

There can be no doubt from what we have been told about this estate that it is in an exceedingly bad condition, and that it will require a large sum to be expended upon it before it can be put into proper repair. But it must be kept in mind that this dilapidated estate is all that the present petitioner got under the entail, and that if the improvements suggested were carried out they would have to be executed by him out of his own money. The estate in its present condition is as it descended from the last heir, and that it is so dilapidated is a misfortune alike for the heir in possession and for his successors. In estimating the value of the lands in order to compute the interests of the next heirs, it seems to me therefore that we must take this estate as it at present stands, and then determine the number of years' purchase of the rental.

Mr Menzies in his report has estimated property in that neighbourhood to be worth twenty-six years' purchase of the rental, but in order to obtain that price for this estate he considers that it would be necessary in the first place to expend a sum of from £7000 to £8000 upon it. He accordingly reaches his valuation by taking twenty instead of twenty-six years' purchase of the rental. But I cannot see any reason for increasing the value of this estate either for the benefit of the heir in possession or for the heirs in expectancy. I think, as I have already observed, that this estate must be taken as it at present stands, and at its present rental, and I agree with the Lord Ordinary that the value of the property must be taken to be twenty-six and not twenty years' purchase of the rental.

LORD ADAM—What we have to determine is the present market value of this estate, and in trying to ascertain it we cannot proceed upon any hard and fast rule. If an estate be in good order, a large sum will be realised; if dilapidated, a smaller; and so each case will be regulated by its own special circumstances.

As regards the estate which we are here dealing with, there seems to be no doubt that twenty-six years' purchase of the rental would be a fair value if there were no specialties in the case. But it is said to be in so dilapidated a condition that an outlay of from £7000 to £8000 will be necessary to put it into good order. This is what Mr Menzies suggests should be done, and he gives effect to this in his estimate of the value of the property by fixing the price at twenty years' purchase of the present rental. But it appears to me that Mr Menzies has

forgotten that by the outlay of so large a sum on the lands, a much more valuable subject would be created, whereas the proper basis for estimating the true value of this estate is to take it as it at present stands, and determine the price by taking twenty-six years' purchase of the rental.

I therefore agree with your Lordship that we should adhere to the Lord Ordinary's interlocutor.

LORD M'LAREN—The value of the expectancies of heirs-substitute is recognised by statute, and that being so, what we have to determine is the capital value of this estate and also the mode in which this is to be ascertained. As it does not appear to me that the method adopted either by the Lord Ordinary or by Mr Menzies is the right one. I may state shortly the view which I hold upon this matter.

There may be various ways of ascertaining the value of an estate, but the way which Mr Menzies has taken seems to me to be open to serious criticism because he takes a low rental and applies to it a reduced number of years' purchase corresponding with the depreciation of the subject. I think such a method is unsatisfactory, because I agree with the Lord Ordinary in holding that it results in a double deduction.

But then I think the course adopted by the Lord Ordinary is also open to objection, because he proceeds upon a low rental, and he multiplies this by twenty-six. My difficulty about this method is, that it assumes, which I do not think that we are entitled to do, that a purchaser would give twenty-six years' purchase of the rental for an estate in the condition in which this one is reported to be. It appears to me that the capital value of an estate should, for purposes like the present, be estimated at what an intending purchaser would be inclined to give for it. This can be estimated at so many years' purchase of the rental, less the sum necessary to put the estate in good repair.

I think therefore the true value of this property is twenty-six years' purchase of the present rental, less the sum necessary to put it in good condition. By this method no injustice is done either to the heir in possession or to the heirs in expectancy.

LORD KINNEAR—I agree in the view taken by the Lord Ordinary.

The Court adhered, and remitted to the Lord Ordinary to proceed in the cause.

Counsel for the Petitioners—Graham Murray—C. K. Mackenzie. Agents—Murray & Falconer, W.S.

Counsel for the Respondents—D.-F. Balfour, Q.C.—Mackay. Agents—Gill & Pringle, W.S.

Friday, June 12.

SECOND DIVISION.

M'LEAN *v.* M'LEAN AND OTHERS.

Wills and Succession—Legacy "Payable as at my Death," and on Majority or Marriage—Interest on Legacy.

A testator provided for payment to each of his children of a legacy of £10,000, "which shall be payable as at my death, and on their respectively attaining twenty-one years of age, or, in the case of females, on their respective marriages before attaining such age, and the same shall not vest until the period of payment."

Held that interest accrued upon the legacies from the date of the testator's death.

Lachlan M'Lean, who died at Islay House, Argyllshire, upon 9th August 1880, left a trust-disposition and settlement dated 15th June 1880, appointing trustees, *inter alia*, (3) to hold forty thousand pounds for the liferent use of his wife, and to pay her the interest half-yearly in advance, "the first half-yearly payment to be made to her as at the date of my death"—the first half-year's payment to be made from his general estate at the rate of 4 per cent. upon the capital sum. "In the fourth place, as at the date of my death" the trustees were to pay to the widow two thousand pounds, to be disposed of by her as she thought proper. "In the fifth place, for payment to each of my children, sons and daughters, and their respective issue, of a legacy of ten thousand pounds sterling, free of legacy duty, which shall (unless my trustees shall otherwise resolve in their discretion as after mentioned) be payable as at my death, and on their respectively attaining twenty-one years of age, or in the case of females, on their respective marriages before attaining said age, and the same shall not (except in the discretion of my trustees as aforesaid) vest until the period of payment. . . . And it is hereby provided and declared with reference to the legacies hereby bequeathed to my sons and daughters respectively and their respective issue, and to the shares of residue hereby bequeathed to my sons and their issue, whom failing to my daughters and their issue, and notwithstanding anything hereinbefore contained concerning the terms of vesting and payment thereof, or concerning the conditions on which the income hereby provided to my said wife under the third purpose hereof is granted, that my trustees shall not only be entitled to apply the available income of the said legacies and shares of residue, or any part thereof, for the education and maintenance, or otherwise for the benefit of my sons and daughters respectively or their issue, before and until the terms of vesting and payment of the capital, but shall also, with consent of my said wife, if and while she survives me, and after her death at their own discretion, be entitled to anticipate the terms