"It seems to the Lord Ordinary that the Act was intended to include roads over which there was a general use though not a public right. It can hardly be doubted that there is within the district a number of roads made for the use of feuars which might be shut up if the consent of all were obtained. These are not public roads, for the public could not complain of their abolition. But they are roads which *de facto* the public use, and are intended gradually to come into public use. It seems to the Lord Ordinary that the purpose of the Act was to enable the Road Trust to assume the management of such roads in the cases provided by the 33d section of the Act.

"The 35th section throws considerable light on the question, and seems, indeed, to be conclusive. It declares that all private streets, when assumed by the trustees, shall be open to the public as fully in every respect as if they were the streets in Schedule A—in other words, the ordinary streets of the city. The public right begins on the assumption of the trustees, and this implies that it did not exist till the fact of assumption. The provision in the 32d section tends to the same conclusion.

"The pursuer further argued that the road in question did not fall within the operation of the 33d section, because that section applies only to roads which shall not have been made up and constructed. The meaning of the Act cannot be well ascertained without considering the 32d section along with the 33d. The former section relieves the trustees of any obligation to assume private streets 'in which the carriageway shall not have been made up and constructed and put in a state of repair.' But as soon as that is done the trustees are bound to assume the maintenance of them. The latter section entitles the trustees in certain cases to require that private streets shall be made fit for use by the owners of heritages in such streets, with the view of the trustees afterwards assuming the maintenance of them. The meaning seems to be, that when the trustees desire to assume a private street into their management they are entitled to have it 'made up, constructed, and causewayed' at the expense of the owners, and therefore it appears to the Lord Ordinary that when the 33d section deals with the case of a private street 'not having been made up and constructed,' it refers to its condition at the time when the trustees propose to assume it.

"The case is a hard one for the pursuer, but the Lord Ordinary is of opinion that he must pronounce decree of absolvitor."

The pursuer reclaimed, but the Court—viz., Lord Ormidale, Lord Gifford, and Lord Adam (the latter having been called in in the absence of the Lord Justice-Clerk)—unanimously adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Keir. Agent—Party.

Counsel for Road Trust (Defender and Respondent)—M'Laren—Robertson. Agent—W. Archibald, S.S.C.

Counsel for Heriot's Hospital (Defender and Respondent)—Gloag. Agents—M'Ritchie, Bayley, & Henderson, W.S.

Thursday, February 28.

SECOND DIVISION.

SPECIAL CASE — GRANGER AND OTHERS (WILSON'S TRUSTEES) AND QUICK (WILSON'S JUDICIAL FACTOR).

Succession—Vesting—Postponed Payment.

A testator directed his trustees to pay to his children equally the free annual income of the trust, and at the majority of his youngest surviving child to realise and divide his estate equally among his children after providing for certain annuities, the issue of deceasing children receiving their parent's share. Power to advance a fixed sum to account of share at marriage or for setting up in business was also given.—*Held* that the provisions to children vested *a morte testatoris*, and passed, therefore, on the death of one of the children prior to the period of payment, to the legal representative of the deceased child.

This was a Special Case presented by Allan Granger and others, trustees of the late William Wilson, baker, Glasgow, of the first part; and William David Quick, accountant in Glasgow, judicial factor on the estate of William Wilson junior, and acting under section 164 of the Bankruptcy (Scotland) Act 1856, of the second part.

William Wilson senior died on 6th November 1874. His estate, which consisted of both heritage and moveables, amounting in value to £6762, fell to be regulated by his trust-disposition and settlement, dated 18th January 1867, whereby he appointed Granger and others his trustees and executors, and nominated them tutors and curators of his children. The third purpose of that deed provided for payment of annuities of £70 and £10 respectively to the truster's wife and his sister-in-law; and the fourth purpose directed the equal division and payment of the remainder of the free annual revenue of the trust-estate among the children until the youngest surviving child should attain majority. The fifth purpose, *inter alia*, made the following provisions:—"Upon the youngest of my surviving children attaining the age of twenty-one years complete, my said trustees and executors shall provide for the payment of the foresaid annuities after mentioned, and shall then sell, realise, and convert into money the whole residue and remainder of my means and estate, heritable and moveable, real and personal, and divide the proceeds equally among my lawful children; and in the event of any of my children dying before the said period for payment, leaving lawful issue, such issue shall receive equally among them the share to which the parent would have been entitled if in life, and the shares falling to minors shall be paid over to their lawful guardians for their behoof. . . . And notwithstanding the said period for the payment of the shares of the residue, I provide and declare that it shall be lawful to and in the power and option of my said trustees and executors, if they shall think fit, to advance and pay before the period of payment foresaid to any of my said children a sum not exceeding £100 sterling, for the purpose of establishing a son in business or

fitting out a daughter on marriage, and which shall be held to be a payment to account of his or her share of the residue, and from the date of such advance, the share of the annual rents, interest, and produce falling to the party receiving such advance shall suffer a deduction to the amount of the interest on the sum advanced at the rate of 4 per cent."

William Wilson senior was survived by his wife and six children, all of whom except William Wilson junior were alive when this case was presented. Thomas, the youngest surviving child, would not attain majority till 12th October 1879. The annuities had been regularly paid by the trustees, and the free revenue divided equally among the surviving children. It was further stated in the case that the trustees proposed to fulfil the other directions of the deed, and that they intended to retain the capital and to continue to pay the annuities and to divide the free revenue of the residue until the event should happen the occurrence of which was to determine the period of payment. They had also, in exercise of their discretion, and under the conditions imposed by the said trust-disposition and settlement, advanced to William Wilson junior the sum of £100 to establish him in business. William Wilson junior died on 6th October 1875 without issue, but survived by his widow. At the time of his death he was thirty years of age. He died intestate and in debt, and a judicial factor was appointed. No part of the revenue of the trust-estate had been paid to him, or anyone representing him, since his father's death.

The questions submitted to the Court were:—"(1) Whether a one-sixth share of the capital of the residue of the trust-estate of the deceased William Wilson vested in William Wilson junior prior to his death? (2) Whether, if the former question be answered in the affirmative, the first parties are bound to pay to the second party the portion of the free revenue of the trust-estate which would have fallen to the said William Wilson junior had he been alive, less the interest of moneys advanced to the said William Wilson junior from the said trust-estate?"

Argued for the first parties—That no share of the residue vested in William Wilson junior, and the capital of what would have been his share went to augment the shares of the surviving children. There was not any gift except in the direction to divide. Not only that, but the free revenue would now be divided into five instead of six shares.

Argued for the second party—Vesting here took place *a morte testatoris* in case of each child. There was merely a suspended payment. The income also of the sixth must, until the youngest son is twenty-one, be paid over to the judicial factor.

Authorities — *Jackson's Trustees* v. *Macmillan*, March 18, 1876, 3 R. 627; *Walker* v. *Park*, Jan. 20, 1859, 21 D. 286; *Howat's Trustees* v. *Howat*, Dec. 17, 1869, 8 Macph. 337; *Maitland's Trustees* v. *M'Dermaid*, March 15, 1861, 23 D. 732; *Alves' Trustees* v. *Grant*, June 3, 1874, 1 R. 969; *Carleton* v. *Thomson*, June 30, 1867, 5 Macph. (H. of L.) 151; *Sloan* v. *Finlayson*, May 20, 1876, 3 R. 678; *Pearson* v. *Casamajor*, July 18, 1839, Maclean and Robinson, 685; *Stewart's Trustees* v. *Stewart*, July 17, 1851, 13 D. 1386; *Buchanan's Trustees*, May 25, 1877, 4 R. 725; *Richardson's Trustee* v. *Cope*, March 8, 1850, 12 D. 855; *Maxwell* v. *Wylie*, May 25, 1837, 15 S. 1005; *Graham's Trustees* v. *Gilbert*, Nov. 3, 1877, 15 Scot. Law Rep. 32.

At advising—

Lord Ormidale—This is one of a class of cases in which there is frequently some difficulty in ascertaining satisfactorily the true meaning of the testator, especially as regards the question of vesting.

Is it to be held that the rights conferred by the late Mr Wilson on his six children vested *a morte testatoris*, or that they will not vest till the youngest surviving shall attain the age of twenty-one? That is the question which the Court has now to decide in reference to the right or interest of the testator's son William, who died after his father, the testator, but before his father's youngest surviving child attained the age of twenty-one.

That there is a trust here, and a continuing one, for certain purposes, and that there is no direct gift by the testator to his children, are circumstances which do not, I think, require to be regarded as of much importance, keeping in view the other features of the case. Nor does it materially affect the disputed question that there are two annuities, one of £70 and the other of £10, which must be satisfied out of the testator's estate before it can be divided among his children, for it has been long since settled that annuities or liferents have not the effect of suspending vesting.

It is, however, I think, of great importance that the testator in the present case directs his trustees not only to pay and divide the remainder of the free interest and produce of his estate, after the annuities are satisfied, "equally to and among my lawful children, or for the maintenance, education, and upbringing of such of them as may be in minority, and that half-yearly," but also that he declared it should "be in the power and option of my trustees and executors, if they shall think fit, to advance and pay before the period of payment foresaid to any of my said children a sum not exceeding £100 sterling for the purpose of establishing a son in business or fitting out a daughter in marriage, and which shall be held to be a payment to account of his or her share of the residue." These are very marked indications of the testator's intention that his children should from the first—that is, from his own death—have an interest, and the exclusive interest, after the annuitants in his estate—not merely that they should have the immediate enjoyment of the income or produce of the estate, but also, when necessary, of the fee or capital itself. So weighty are the considerations thence arising in favour of vesting *a morte testatoris*, that it certainly requires something very strong indeed to obviate their effect in that direction.

Now, the only thing that was or could be founded on as indicative of the testator's intention that vesting should be postponed till the youngest of his surviving children should reach the age of twenty-one, is the provision and declaration contained in the fifth purpose of his settlement, that upon that event "my trustees and executors shall provide for payment of the annuities after mentioned, and shall then sell,

realise, and convert into money the whole residue and remainder of my means and estate, heritable and moveable, real and personal, and divide the proceeds equally among my lawful children; and in the event of any of my children dying before the said period for payment leaving lawful children, such issue shall receive equally among them the share to which the parent would have been entitled if in life." But here it will be observed that the language of the testator points merely to payment and final distribution of his estate, and does not necessarily denote that there had been till then any postponement of the vesting of the rights themselves of his children. His language is indicative rather—and I think strongly indicative—of there having been vesting previous to the ultimate payment and division—that is to say, vesting on his own death; and this is the only view, as it appears to me, which can be taken of the matter consistently with the testator's other directions to his trustees, to which I have already referred. If there had been anything of the nature of a survivorship in the destination, that might have led to a different result, but there is nothing of that nature.

The point, however, relied on by the first parties to the Special Case arises from the words used by the testator, that "in the event of any of my children dying before the said period of payment leaving lawful issue, such issue shall receive equally among them the share to which the parent would have been entitled if in life." This, it was argued, amounts to a destination-over—or at anyrate is a contingency upon which vesting is made to depend. But I am not satisfied that this argument is sound. The words relied upon, although peculiar and not quite free from ambiguity as to their true object, may, I think, be perfectly well satisfied by holding that they are referable, not to the time when the testator's youngest surviving child should be twenty-one, but to his own death, and that their true object was to provide against the lapsing of the share or shares of any of his children who might die before himself leaving lawful issue. This, I think, is, in the circumstances, a more reasonable construction or application of the testator's language in the fifth purpose of his settlement than that relied on by the first parties to the Special Case—a construction or application certainly more consistent with the other provisions and directions of the testator.

The authorities also appear to me to support the conclusion that vesting took place *a morte testatoris*. Thus, in the case of *Marchbanks* v. *Brockie and Others*, Feb. 18, 1836, 14 S. 521, where part of a testator's estate was left on the death of a liferenter to particular individuals named, "and to their respective heirs in case of their death," it was held that there was vesting *a morte testatoris*, and this although, as here, there had been no direct destination to the favoured parties, and although the indications otherwise were not so strong in favour of vesting *a morte testatoris* as those in the present case. It is true, however, that the destination-over, if it can be called so, was, in the case referred to, to the heirs in place of to the lawful issue of the parties primarily favoured, but that can make no difference, for the lawful issue of the favoured parties in the present case must necessarily be their heirs. Nor do I, for the reasons I have already stated, think that it makes any substantial difference that in the present case it is said in so many words that the failure in respect of which the heirs should succeed is the attainment of twenty-one years of age of the youngest surviving of the testator's children. And that I am right in this is clear from the case of *Wallace* (Mor. App. clause 6), referred to with approbation by Lord Glenlee in the case of *Marchbanks*, for in that case of *Wallace*, besides a general resemblance to the present, in other respects there was a clause more strongly indicative, I think, of postponed vesting than that founded on by the first parties in the present case, to the effect that "in the event of the decease of any of the said Alexander Wallace's children before their share of the sums hereby bequeathed to them becomes payable, the share of the child or children so deceasing, or the balance thereof remaining unpaid, shall fall equally among the survivors of said children, share and share alike"—and yet it was held that vesting took place *a morte testatoris*. The cases of *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667, (H. of L. 2 Macq. 276) and *Foulis* v. *Foulis*, February 3, 1857, 19 D. 362, although peculiar in some respects, are in their general bearing calculated to support the same conclusion; and in the former the destination failing the parents was to their children, and in the latter to their issue, as in the present case.

Upon the whole matter, and especially keeping in view what I must hold to be the clearly manifested intention of the testator—and that is the governing rule for our guidance—I have come to be of opinion, without much difficulty, that both of the questions in the Special Case ought to be answered in the affirmative.

Lord Gifford and Lord Adam (who had been called in to this Division in the absence of the Lord Justice-Clerk) concurred.

The Court answered the questions in the affirmative.

Counsel for First Parties—Trayner—Kennedy. Agent—J. Carment, S.S.C.

Counsel for Second Party—Asher—Jameson. Agent—J. Martin, W.S.

Friday, March 1.

SECOND DIVISION.

[Sheriff of Aberdeen and Kincardine.

DAVIDSON *v.* BISSET & SON.

Ship—Charter-Party—Bill of Lading—Where they varied as to Ports of Call.

A charter-party bore that a vessel was to proceed to each of two ports of call to deliver cargo. The order in which the ports were to be visited was reversed in the bills of lading, and it appeared that both the owner and master of the vessel had been desirous of the alteration which had been made