Alexander Campbell. Then, fourthly, the landlord is to assign to Campbell his right to stabling accommodation and some other place connected with these coaches. Fifthly, the tenant is to pay the landlord a rent of £1000 sterling yearly for the said hotel and stables, under the lease, for nine years. Sixthly, the tenant is to be allowed the privilege of using a certain portion of the yard therein mentioned. Seventhly, the tenant's right to a share in the coaching profits is to commence at the 2d of July current on undertaking corresponding obligations. Then there is a certain arrangement about some hay and oats which are in hand; and with the exception of a further arrangement as to the posting establishments connected with the hotel, which really do not enter into the question at all, that is the agreement referred to.

Now, supposing the instrument to have stopped there, it would have been a perfectly good agreement for a period of nine years, with all these several stipulations forming part of a general agreement; and stopping there, and reading no further, I do not see how anybody could possibly say that the £1000 a-year stipulated to be paid by the tenant is to be paid for a heritable assessable subject only, and not also for those other privileges and advantages which he is to obtain under the agreement, and in particular for the conveyance of the right of property in the horses, coaches, and harness, stable, and a great many other things of the same kind. The £1000 a-year is the only consideration given for everything the tenant gets under that new agreement; and therefore it is perfectly clear that some portion of that £1000 a-year must be given for subjects which he is to receive, not in lease but in property, and subjects which are not of an assessable but of a moveable character. I should say in the case I have supposed that it would be quite impossible to take this £1000 a-year as the rent of a heritable subject. Then, does it make any difference that this agreement, instead of stopping there, proceeds formally to let in lease to the tenant the hotel and the stables in Tweeddale Street, and that the tenant becomes bound in consideration of that to pay the £1000 a-year in name of rent. That does not alter the substance of the agreement, which puts the thing in a different form, and in such a form that if it stood alone, that is to say, if there were nothing in the instrument except the letting of the heritable subject, and, on the other hand, the obligation to pay £1000 a-year for the lease, a different case would be presented. It might then be a question how far in such an appeal as this either the landlord or the tenant could get behind the terms of their own lease. But on the very face of this lease we see perfectly well that that which is called rent is only partly rent, and partly also an annual payment in consideration of other things conveying the property to the tenant.

In these circumstances I am very clearly of opinion that the Commissioners were wrong in coming to the conclusion that it was incompetent to examine into the details of the arrangements whereby the sum of £1000 was fixed by the parties as annual rent. They seem to have considered themselves not entitled to make any inquiry. On the other hand, I think they were entitled and bound in the circumstances to inquire how much of this £1000 a-year was, according to a fair valuation, payable in respect of heritable and assessable subjects, and how much for the other things the tenant obtained under his agreement. I am therefore for altering the judgment of the Commissioners.

Lord Deas—The views which your Lordship has just stated are those which occurred to me as soon as this matter was fully and distinctly explained. I am strongly of your Lordship's opinion.

Lord Mure—I am of the same opinion. It is clear on the face of the lease that part of the £1000 rent must have been paid with reference to the purchase of subjects not assessable subjects; and that being the case, I concur with your Lordship that it is not incompetent for the Commissioners to go into the investigation and see what was the fair rent payable for the subjects as assessable subjects, and separate from that which is plainly applicable to moveable property.

Lord Shand—I am entirely of the same opinion. The only observation I have to make in addition is, that even on the appellant's own statement it does not appear that the sum of £650 would be the sum to be taken as his rent, for upon the statement we have in the case it appears that that in any view is the rent of the hotel only, to which some addition must be made in respect of the stables, which are also subject to the lease.

The Court reversed the order of the Commissioners, and remitted to them to make an inquiry.

Counsel for Appellants — Dean of Faculty (Fraser)—J. P. B. Robertson. Agent—J. Young Guthrie, S.S.C.

Counsel for Inland Revenue—Lord Advocate (Watson) — Solicitor-General (Macdonald) — Rutherfurd. Agent—David Crole, Solicitor to Inland Revenue.

Saturday, October 25.

SECOND DIVISION.

SPECIAL CASE—DONALD OR M'NISH AND OTHERS *v.* DONALD'S TRUSTEES.

Succession—Vesting—Accrued Share.

In a case of succession, where the period of vesting and of payment is postponed, a lapsed share will not fall under an ordinary institution of issue.

A testator directed his trustees to dispone and make over to his four daughters equally, on the youngest of them attaining majority, or as soon thereafter as the trustees should find expedient, certain property, declaring that in the event of any of them dying before the period of payment without leaving issue, her share was to go to the survivors; "but in the event of any of my said daughters dying as aforesaid and leaving lawful issue, then the child or children of such predeceaser shall be entitled to the share of their mother as if she had been in life." Two of the daughters predeceased the period of payment—the first left no issue, but the second did. *Held*, in a question between the issue and the two surviving daughters of the truster, that the former

were not entitled to participate in the share of the trust-estate which would have effeired to the daughter who predeceased childless, but were only entitled to one-fourth of the trust-estate as representing their mother.

Succession—Vesting—Period of Payment.

A testator by his trust-deed declared that the provisions therein contained should be alimentary and personal to his children (who were all daughters), and that the same should not be liable to the diligence of their creditors nor of their husbands' creditors, and when conveyed should be exclusive of the *jus mariti* and right of administration of their husbands, and further, that that exclusion should be inserted in the conveyance, and should form part thereof, and that the daughters' discharge should alone be sufficient. The trustees further had power to purchase annuities for the daughters, and various other powers, as the trust-deed bore. *Held*, in conformity with the case of *Allan's Trs.* v. *Allan and Others* (Dec. 12, 1872, 11 Macph. 216), that when the period of payment came the daughters were entitled to receive instant payment on their own receipts, the receipts bearing the various conditions and exclusions in the trust-deed.

Charles M'Donald, sometime merchant in Glasgow, died on the 16th December 1859 possessed of certain heritable property there. He was predeceased by his wife, and survived by four daughters, viz., Mrs Mary Collier Donald or Brown, wife of Colin Brown, sometime engineer and millwright, Govanhaugh, near Glasgow, and now residing there; Mrs Elizabeth Donald or Fife, wife of William Fife, commission merchant, Glasgow; Mrs Catherine Donald or M'Nish, wife of Robert M'Nish, merchant in Glasgow; and Mrs Marion Donald or Clark, wife of William Kerr Clark, residing at Pentonville, Ayrshire. Mrs Brown died on 22d March 1863, survived by two children, viz., John Brown and Marion Brown, the latter of whom was still in minority. Mrs Fife died on 20th December 1863 without leaving issue and intestate. Mrs Clark, the youngest of Charles Donald's daughters, did not attain majority until 29th December 1863, after the death of both Mrs Brown and Mrs Fife. The parties to this case were (1) Mrs M'Nish and Mrs Clark and their husbands; (2) the children of Mrs Brown, and their father as administrator-in-law; and (3) Mrs Donald's testamentary trustees.

Mr Donald left a trust-disposition and deed of settlement dated 9th November 1859, and recorded 14th August 1860, which contained, *inter alia*, the following clauses—"*Fourth*, On the youngest of my said children attaining twenty-one years of age, or as soon thereafter as my said trustees may determine and find expedient, I direct and appoint my said trustees to dispone and make over to my daughters Mary Collier Donald, Elizabeth Donald, Catherine Donald, and Marion Donald, equally among them, share and share alike, the heritable subjects herein and before disponed, if the same shall not be sold in virtue of the powers hereafter granted to my said trustees; or if they sell and dispose of the said heritable subjects, then the price and proceeds thereof shall be paid and made over to my said daughters, equally among them, share and share alike: And declaring that in the event of any of my said daughters dying before the said subjects are so conveyed, or the price and produce thereof paid as aforesaid, without leaving issue, then the share of such predeceaser shall fall and belong to her surviving sisters, equally among them, share and share alike; but in the event of any of my said daughters dying as aforesaid, and leaving lawful issue, then the child or children of such predeceaser shall be entitled to the share of their mother as if she had been in life, and that in equal portions if more than one child." It was further declared that these provisions in favour of the truster's daughters or their children should be purely alimentary, and not subject to their debts or assignable by them, nor liable to the diligence of their creditors, nor the diligence of the creditors of any husbands they might marry, and further, that the provisions when made over should be expressly exclusive of the *jus mariti* of their husbands. The deed then proceeded—"And it is specially declared that this exclusion of the right of said husbands shall be inserted in the conveyances of the said provisions, and of the foresaid subjects, to my said daughters themselves, and shall form part thereof; and declaring that the discharges of my said daughters shall be amply sufficient by themselves alone, without the consent of their husbands; declaring hereby that my said trustees and their foresaids shall have full power, and they are hereby specially authorised and empowered, to lay out or expend said part of the portions payable to each of my said daughters in the purchase of annuities, or in heritable property of any description they think fit, taking the rights thereto in favour of my said daughters as aforesaid, exclusive of the rights of administration of their said husbands in virtue of their *jus mariti* or otherwise; and that, on their respective marriages, if the remainder of the portions payable to them shall be retained by said trustees for their behoof respectively, they shall only be entitled to the interests and profits of the same; and in the event of any of my said daughters predeceasing and leaving issue, their respective shares shall be payable to their lawful children, equally among them, share and share alike, and may be applied for their maintenance, education, and support; and my said trustees and their foresaids shall have full power to invest the said shares belonging to my said daughters or their issue for this purpose; declaring that my said trustees or their foresaids shall always have full power to make such advances out of the principal sums of said shares respectively to any of my said daughters, should they think my said daughter or daughters should require or stand in need of said advances, excluding always the *jus mariti* of their husbands and creditors, all as before specified: Declaring also that my said trustees shall be the sole judges of the propriety of expending the sums above specified in the purchase of annuities for my said daughters; and should they deem such not expedient, then the whole shares shall be held for behoof of my said daughters, with power to apply the same for their behoof respectively, as aforesaid."

The heritable property referred to was sold to the Police Board of Glasgow, and after paying off the debts affecting it the trus-

tees invested the balance (£12,800) on heritable security in their own names as trustees foresaid. The trustees were then in a position to divide the trust-estate, but they had made no formal resolution to do so. Meantime questions arose between the parties as to the destination of the share of the estate which fell or would have fallen to the truster's deceased daughter Mrs Fife, and as to the right of the surviving daughters, the parties of the first part, to demand an absolute conveyance of their respective shares. It was maintained by the parties of the first part that Mrs Fife's share, in consequence of her decease before the period when the truster's youngest child attained majority, fell to be divided between the first parties, as the only children of the truster who survived that period. The parties of the second part, on the other hand, maintained that Mrs Fife's shares vested in her, and that they, the second parties, were entitled to one-third share thereof as representing their mother, who was one of her next-of-kin; or otherwise, that as the issue of a deceased daughter of the truster they were entitled to the share of the estate provided to Mrs Fife which their mother would have taken if in life. Again, the parties of the first part maintained that they were entitled to have their shares of the estate conveyed or paid over to them absolutely and immediately. The parties of the third part, on the other hand, maintained that they were not at liberty to pay over these shares to the surviving daughters, but were bound to hold or settle the same in trust, so as to secure the shares against the husbands of the daughters or against their and their husbands' creditors.

In these circumstances the parties submitted the following questions in law for the opinion and judgment of the Court—"(1) Are the parties of the second part entitled, over and above the share falling to them as the issue of their deceased mother Mrs Brown, to one-third part of the share of the estate which was destined to their deceased aunt Mrs Fife? (2) Are the surviving daughters of the truster entitled to have their shares conveyed or paid over to them absolutely and immediately? (3) Are the parties of the third part bound or entitled to settle the said shares in trust so as to secure the said shares as against the husbands of the said daughters and the creditors of the said daughters and their husbands? (4) In the event of the preceding question second being answered in the negative, do the portions of Mrs Fife's share falling to the surviving daughters fall to be dealt with in the same manner as their original shares?"

Argued for the first parties—On first point—There could not here be held to be vesting, for following *Young* v. *Robertson* (quoted *infra*) there was here a postponed period of payment and a clause of survivorship. It was a clearly established rule of law that under such clauses of destination as there was in the present case, when several of the legatees died before the period of vesting and distribution, some having issue and some not, while the issue would take their deceased parent's share, they could not participate as in right of their parent in the shares of those who died childless (2 Jarman on Bills, 661-2). The wording of the clause here did not exclude this rule, but rather confirmed it—the words being "shall be entitled to the share of her mother as if she had been in life."

Authorities—*Young* v. *Robertson*, Feb. 11, 1862, H. of L., 4 Macq. 337; *Graham* v. *Graham*, March 20, 1868, 6 Macph. 820; *Clelland* v. *Gray*, &c., June 20, 1839, 1 D. 1031.

Argued for second parties—They did not contend that there had been here vesting on general grounds, but there was an express gift to Mrs Brown of all her mother would have had if she had survived, and if the mother had survived there was no doubt she would have been entitled to participate in the accrued share. The construction of the survivorship of the mother must be survivorship of the period of vesting, which was after the share had accrued. The capital was not to be divided until the period of vesting. It therefore included the accrued share, and the share the mother would have had if she had been alive could not be ascertained till this period of division. There was no "share" till the division took place—2 Jarman 663-4; *Eyre* v. *Marsden*, 2 Kee. 564, affd. 4 My. and C. 231; *Young* v. *Robertson*, quoted *supra*.

On the second point of the case (question 2) the following authorities were referred to—*Allan's Trs.* v. *Allan and Others*, Dec. 12, 1872, 11 Macph. 216; *Lady Moray* v. *Scott's Trs.*, Dec. 5, 1872, 11 Macph. 173; *Duthie's Trustees* v. *Kinloch*, &c., June 5, 1878, 5 R. 858; *Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1038.

At advising—

Lord Ormidale—The most important of the questions in this case is the *first*—Whether the parties of the second part are entitled, over and above the share falling to them as the issue of their deceased mother Mrs Brown, to one-third of the share of the estate which was destined to their aunt Mrs Fife? In considering this question I find it impossible to overlook the authorities which were cited at the debate, to the effect that it is an established rule or principle of law that the share of a succession left by a testator to one of several individuals who, as in the present case, dies before a given period, does not, without a positive and distinct indication of intention, go to those who survive. It is so stated by Mr Jarman in his treatise on Wills (vol. ii. p. 661), and was given effect to by this Court in the cases of *Clelland* v. *Gray*, June 20, 1839, 1 D. 1031, and by the House of Lords in the case of *Young* v. *Robertson* (February 1862, 4 Macq. 337). The only question therefore, as it appears to me, for consideration is, whether there is anything in the context of the will or settlement in question which can be held to displace the general rule, and warrant the Court in holding that it was the intention of the testator that the issue of Mrs Brown should in the circumstances have right not only to their mother's share, but also to what may be called the accruing share which was destined to their aunt Mrs Fife? I am unable to say that there is. On the contrary, I am inclined to think, on the best consideration I have been able to give the matter, that the terms of the will or settlement in the present instance go far to support the general rule, and leave us no alternative but to give effect to it. In short, I am disposed to think that by the expression "share of their mother," used by the testator, he meant merely that share or portion of his estate which

was originally destined to the mother, and not the share or portion accruing by the death of Mrs Fife.

In this view the first question submitted for the opinion and judgment of the Court will fall to be answered in the negative.

In regard to the *second* question submitted, I am of opinion that the surviving daughters of the truster are entitled, in conformity with the case of *Allan's Trustees*, 11 Macph. 216, to have their shares paid to them at once on their own receipt or discharge, containing a declaration to the effect that they are purely alimentary, and not subject to their debts or deeds, or assignable by them, or subject to the diligence of their creditors, and shall be held exclusive of the *jus mariti* of husbands, all as provided by the truster.

The *third* question will, in respect of the answer to the second question, fall to be answered in the negative; and the *fourth* question does not arise.

Lord Gifford—I think it must be taken to be quite settled law, both in Scotland and in England, that under clauses of destination like those contained in the trust-deed and settlement of the late Charles Donald, when several of the legatees die before the period of vesting and of distribution, some leaving children, and some without issue, although the children of such predeceasing legatees will take the share which would have belonged to their parents, they will not participate with the surviving legatees in the accrued shares of those who predeceased without issue.

It may not be easy to give a satisfactory reason for this distinction, and the rule excluding issue from participating in accrued shares has often been disapproved of. The rule, however, seems too firmly fixed to be disturbed. The question was deliberately raised and considered in the second appeal in *Young* v. *Robertson* (H.L.), 11th Feb. 1862, 4 Macq. 337, and it was unanimously decided by the House of Lords (Lords Westbury, Cranworth, and Chelmsford), affirming the judgment of this Court, that although the child of a predeceasing legatee was entitled to take his parent's share, he was not entitled to participate in the shares of other residuary legatees who had predeceased the term of vesting without issue.

The words of the deed in *Young* v. *Robertson's* case were these—"Declaring that if any of said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally, or share and share alike, among the survivors of my said grand-nephews and grand-nieces equally." And the judgment that under such a clause the issue of the predeceasing legatee took no interest in accrued shares followed upon a considerable number of previous judgments to the same effect, and which the House of Lords refused to disturb. This is explained in the opinion of Lord Cranworth.

The law of England is thus stated by Mr Jarman (2 Jarman 661)—"It has long been an established rule that clauses disposing of the shares of devisees and legatees dying before a given period do not, without a positive and distinct indication of intention, extend to shares accruing under the clauses in question." As where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares that if any of them die before twenty-one or marriage it shall survive to the others. If one dies and three are living, the share of that one so dying will survive to the other three, but if a second dies, nothing will survive to the remainder but the second's original share, for the accruing-share is as a new legacy, and there is no further survivorship."

The only exception to the rule so fixed is when it can be shown by the terms of any particular deed of settlement that it was the intention of the testator to give the issue of a legatee predeceasing the term of vesting not only their parent's proper share, but also a portion of the accrued shares of legatees who had died without issue. Of course if this was the intention of the testator, it must be given effect to, for the ultimate principle in all cases of testate succession is to carry out the true and expressed *voluntas testatoris*. But then, in the words of Mr Jarman, there must be "a positive and distinct indication of intention." The testator must say something which distinctly shows that he did not intend the general rule of law to apply, but wished to give issue the accrued as well as the original share.

The real question, then, in the present case is, Whether Mr Charles Donald's trust-disposition and settlement is so expressed as to give Mrs Brown's two children, not only the share which their mother would have taken had she survived 29th December 1863, which I take to be the date of vesting, but also a portion of the share which would have belonged to Mrs Fife if she had survived, but which lapsed and accrued in consequence of her death on the 20th of the same month.

I regret that I have been unable to find any words in the deed which would produce this effect. The clause providing that the shares of predeceasers shall fall to their children, if any, is expressed just in the ordinary terms. It is a little more full and explicit than the clause in *Young* v. *Robertson*, but it has really no different meaning. It expresses both contingencies of children dying before the term of vesting leaving issue and without leaving issue. But it is impossible to say that if the clause in *Robertson's* case had been as fully expressed as in the case before us the decision would have been different. I feel myself bound, therefore, by the precedents both in Scotland and in England, to give Mrs Brown's children only their mother's original share, leaving Mrs Fife's share to accrue to her sisters Mrs M'Nish and Mrs Clark, both of whom survived the term of vesting.

Lord Justice-Clerk—On the second and third points I concur with both of your Lordships.

On the first point, viz., Whether the children of Mrs Brown are entitled to participate in the share of their deceased aunt Mrs Fife, I have very serious doubts indeed as to the result at which we ought to arrive. There is no doubt that it is a question depending on the construction of ambiguous words, but looking to the general scope of the settlement I should not have come to the same conclusion as your Lordships. I assume that the principle of *Young* v. *Robertson* in the House of Lords (quoted *supra*), already stated by your Lordships, must be followed. At the same time it is the difference between the two systems of law which has led to this result—we accept the *conditio*

si sine liberis, in England they do not. However that may be, the case of *Young* v. *Robertson* has settled questions of this nature in the case of proper lapsed shares. I should have thought that a lapsed share was properly a share lapsed by the death of the testator, but *Young* v. *Robertson* goes beyond that. Here, however, the case is different from the general one, for it seems to me that the "share" that the children are to take is the share that the mother would have taken in a certain event which has not happened, viz., her survival of the term of payment. Now, this would have included one-third of Mrs Fife's share of the estate. I see here no lapsed share in what I consider the proper sense of the term, and I think the children of Mrs Brown should participate. That is the way in which I should have construed this settlement, though not without some difficulty, but your Lordships have decided the case otherwise.

The Court therefore answered the first question in the negative, the second in the affirmative, the third in the negative, and found it unnecessary to answer the fourth.

Counsel for First Parties — Kinnear — Mackintosh. Agents—J. & J. Ross, W.S.

Counsel for Second Parties—Balfour—Robertson. Agents—Murray, Beith, & Murray, W.S.

Counsel for Third Parties—Jameson. Agents—Murray, Beith, & Murray, W.S.

Friday, October 31.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

SOMERS *v.* THE SCHOOL BOARD OF TEVIOTHEAD.

School—"Old" Schoolmaster—Fees—Agreement—Power to Contract—Education.

An "old" schoolmaster agreed in 1873 with a School Board, appointed under the Education Act, to accept of a fixed salary, with in addition "the Government grant in so far as that exceeded £20." Subsequently a different Board in 1876 resolved to limit the proportion of Government grant to the average sum the teacher "has received for the last three years." *Held*, in an action of declarator raised against the Board by the schoolmaster, that the agreement between the parties must receive effect, as it had not been *ultra vires* of the Board, and was binding upon their successors.

This was an action raised by John Somers, teacher of the public (formerly parochial) school of Teviothead, against the School Board of that parish, concluding for declarator that the pursuer, so long as he continued to perform the duties of teacher of the public school of Teviothead, was entitled under an agreement to that effect, constituted by minute of the School Board dated 22d July, and holograph letter of acceptance by him dated 6th August 1873, and what followed thereon, to payment by the defenders and their successors in office of an annual salary of £95 sterling, as also the whole Government grant earned in respect of the school in so far as it exceeded £20 per annum. There were also conclusions for implement of the agreement and for payment.

The two letters referred to in the summons were as follows:—

"*Hawick, 22d July* 1873.

DEAR SIR,—At a meeting of the Board held yesterday it was resolved that your salary shall 'consist of the sum of £95, and that in addition to this you should get the Government grant in so far as that exceeds £20.'—Yours, &c.

"ROBERT PURDOM, *Clerk.*

"*Teviothead, 6th August* 1873.

DEAR SIR,—I accept of the terms of salary stated in your letter to me of date 22d July last, but prefer that I should be allowed to draw my salary in the old way till 31st October, which is the end of the school year.—Yours, &c.,

"JOHN SOMERS."

On 2d October 1876 the Board passed a resolution in the following terms:—"That the proportion of the Government grant for the school which the teacher is to receive be for the present limited to the average sum which he has received for the last three years, reserving to the Board the allocation of any sum that may be earned in addition to such average—this arrangement to begin after the expiry of the present school year."

Allegations were made by the defenders as to the state of efficiency of the school, which were denied by the pursuer, who alleged that there had been no material change of circumstances.

The pursuer pleaded—"The agreement founded on being binding on the defenders, the pursuer is entitled to decree—(1) of declarator; (2) of implement; and (3) of payment, with interest and expenses, all as concluded for."

The defenders pleaded, *inter alia*—"(2) The defenders are entitled to absolvitor, with expenses, in respect—1st, that the Government grant is subject to their disposal; 2d, that the resolution founded on has been competently and effectually altered by the defenders. (4) The pursuer's vested interests being saved entire, and the defenders having done nothing to interfere therewith, but, on the contrary, having always been willing to concede these to the pursuer, the present action is unfounded, and ought to be dismissed."

The Lord Ordinary (RUTHERFURD CLARK) pronounced an interlocutor declaring and decerning in terms of the libel. He added this note:—

"*Note.*—The pursuer became schoolmaster of the parish of Teviothead in 1871. In July 1873, after the passing of the Education Act, his salary was fixed at £95 per annum, with the addition of the Government grant in so far as it exceeded £20. The question is, whether the pursuer is entitled to claim that salary during his tenure of office, or whether the defenders are entitled to reduce it?

"The defenders did not contend that they could touch the salary of £95, which they alleged represented the emoluments which the pursuer was in use to draw before the passing of the Education Act. But they maintained that they are entitled to reduce the proportion of the Government grant or to withdraw it altogether.

"In the opinion of the Lord Ordinary, the pur-