these terms—'That upon the death of the longer liver of me the said William Renton, and my said spouse the said Margaret Nixon or Renton, my said trustees and their foresaids are hereby directed to convey the foresaid heritable subjects to and in favour of the said William Renton, my son, and to Mary, Bridget, Margaret, Elleson, Catherine, Elizabeth, Charlotte, and Janet Renton, daughters procreated of the marriage betwixt me and the said Margaret Nixon or Renton, and to the survivors or survivor of them, share and share alike, in liferent for their liferent use allenarly and to their respective heirs and assignees in fee.' It appears to me that according to the ordinary rule the word 'heirs' must be interpreted according to the nature of the subject with reference to which the question arises—and means the heirs in heritage if the subject be heritable, and the heirs *in mobilibus* if the subject be moveable. In this case, accordingly, I think that the destination is to William Renton M'Culloch, his mother's heir in heritage, unless the other claimants can show from other parts of the deed that such was not the intention of the testator.

"These claimants accordingly referred to the clause by which it is declared that 'in the event of any of my said children before named predeceasing me leaving lawful issue, such issue shall be entitled to succeed equally to the fee of the portion of my whole heritable and moveable subjects as would have belonged to them had their parent been in life (or been liferented by him or her) at the time of my decease.' No doubt, therefore, if Margaret M'Culloch had predeceased her father her whole children would have succeeded equally among them to the whole heritable subjects in question. But that is not the case with which we have to deal, for Margaret M'Culloch did not predecease her father. It was said, however, that the words 'or been liferented by him or her' mean in the same way as if the subjects had been liferented by him or her—that is, that the issue shall in the event specified succeed equally to the heritable and moveable subjects as if they had been liferented—implying, therefore, that where a share had been liferented the succession to it was to be to the issue equally among them.

"I think, however, that the words are only introduced to indicate the share of the estate which the child would have taken if she had survived, and do not refer to the destination of it.

"The only other clause founded on was that by which it was declared that in the event of the share provided to his son's widow determining by her marriage or death, it shall 'be consolidated with the other parts of my said property, and shall be divided amongst and belong to my said children in liferent and their lawful issue in fee, in manner before mentioned.' It appears to me that this clause refers back to the destination of the whole subjects to his children in liferent and their respective heirs in fee, and that the word 'issue' should receive the same interpretation as the word 'heirs' in that clause—that is, heirs in heritage.

"I am therefore of opinion that Margaret M'Culloch's heir in heritage is entitled to succeed in this case."

Counsel for Defenders and Real Raisers—C. J. Pearson. Agents—H. B. & F. J. Dewar, W.S.

Counsel for other Defenders—C. S. Dickson.

Thursday, December 15.

FIRST DIVISION.

(Before Seven Judges.)

SPECIAL CASE—WANNOP AND ANOTHER (HALDANE'S TRUSTEES) AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance — Contingent Fee—Intestacy.

A truster left the residue of her estate to two grandnieces in liferent equally. On their death the trustees were directed to pay one-half of the capital of the residue to the issue, if any, of the one of the liferentrices, and the other half to the issue, if any, of the other; but in the event of the liferentrices dying without leaving issue, the truster directed her trustees to convey the residue to and among her "own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita*." The liferentrices died without leaving issue. In a competition among those claiming the capital of the residue under the last-mentioned destination—*held (per* Lord Justice-Clerk (Moncreiff), Lord Deas, Lord Young, and Lord Craighill) that a right to the residue did not vest until the death of both liferentrices without leaving issue—*diss.* Lord President (Inglis), Lord Mure, and Lord Shand, who were of opinion that the destination in question was equivalent to a destination to the truster's heirs *ab intestato*, and that the entire residue vested in those heirs *a morte testatoris*, subject to defeasance as to a half or the whole of the residue in the event of either or both the liferentrices leaving issue.

*Process — Hearing before Seven Judges—Division of Opinion, and One Judge Present at Hearing but Absent at Advising—*9 *Geo. IV. cap.* 120, *sec.* 23.

Form of interlocutor where, after a hearing before Seven Judges, the Court were divided in opinion in the proportion of four to three, and a Judge who formed one of the majority was not present at the advising, his opinion being read for him.

The late Miss Isabella Haldane of The Cottage, Haddington, who died on 17th May 1877, by her trust-disposition and settlement, dated January 1877, made over her whole estate, heritable and moveable, in favour of certain persons as trustees. After the death or resignation of the original and some assumed trustees, the trust-estate came at the date of this action to be vested in the Rev. T. N. Wannop and Mr J. P. Wright, W.S., both assumed trustees.

The questions in dispute in the present case depended on the following provisions of Miss Haldane's trust-disposition—"In the sixth place, I direct and appoint my trustees to hold the rest, residue, and remainder of my said estate and effects, or the prices and produce thereof, after answering the purposes before mentioned, and to pay and apply the whole rents, interests, proceeds, and profits thereof, less the expenses of recovering and managing the same, equally to and between the said Georgina Haldane Bruce

and Jane Isabella Bruce, my grandnieces, in their lifetime respectively, so long as both are alive and unmarried—Declaring that in case both or either of them are married, then my trustees shall have full power and authority to enter into a contract or contracts of marriage between the said Georgina Haldane or Bruce and any husband she may marry, and between the said Jane Isabella Bruce and any husband she may marry, so as to secure the liferent interest of the estate and effects before provided to the said Georgina Haldane Bruce and Jane Isabella Bruce, exclusive of their said husbands respectively, in their own lifetime, with power, however, to the said Georgina Haldane Bruce and Jane Isabella Bruce and my said trustees to grant a reasonable sum respectively out of the liferent so provided to them respectively to their said husbands respectively after their decease, this being to be regulated by my said grandnieces themselves and my trustees, and to be dependent partly on the provisions made by their husbands respectively, as to which I commit to my trustees full discretionary powers, hereby conferring on my trustees full power to require a provision to be made by the husbands of my said grandnieces, either by their effecting a policy of insurance on their own lives in name of trustees of the marriage or otherwise, so as to be a security to my said grandnieces and their issue, if there any be, should such marriage take place. In the seventh place, on the decease of the said Georgina Haldane Bruce and Jane Isabella Bruce my trustees shall pay and apply or assign and convey one-half of the capital or entire residue of said trust-estate and effects, after providing for the purposes before-mentioned, to the issue, if any, of the said Georgina Haldane Bruce, and the other just and equal half of said capital to the issue of the said Jane Isabella Bruce, such division being to be regulated by *mortis causa* settlement or otherwise to be made by them respectively; and failing thereof such division among the children (if there any be) being to be equal if more than one—Declaring that if there be issue by either of them who are under twenty-two years of age my trustees shall have power to delay the division till the child or children arrive at that age, they paying such child or children the free interests and profits to be drawn in the meantime. Lastly, in the event of the said Georgina Haldane Bruce and Jane Isabella Bruce dying without leaving issue, or if there be issue, in case such issue dies before the period of division before mentioned, then my trustees shall pay and apply or assign and convey the said residue to and among my own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita.*"

Miss Jane Isabella Bruce died at Haddington on 24th August 1879 unmarried. She left a trust-disposition and settlement dated 24th December 1878, with relative codicil dated 20th February 1879, whereby she conveyed the whole estate and effects, heritable and moveable, which should belong to her at her death, to the Rev. Thomas Nicholson Wannop and another, as trustees for the purposes therein mentioned. Mr Wannop alone accepted of the trust, and on 25th October 1879 he assumed James Struthers, M.D., Leith, as trustee. The residuary legatees under her trust-disposition and settlement were certain charitable institutions.

Miss Georgina Haldane Bruce was married on 11th September 1878 to Dr F. H. S. Murphy. No marriage-contract was entered into between them, and she died without issue, but survived by her husband, at Kamptee, in the Presidency of Madras, on 15th September 1880. By *mortis causa* disposition and settlement, executed by her on 10th December 1878, she conveyed her whole means and estate which might belong to her at her death to her husband, and appointed him to be her sole executor.

Miss Haldane's trustees paid to Mrs Murphy during her life the one-half of the income of the residue of the trust-estate. They also paid the income of the other half to Miss Bruce until her death, since which time that share was retained by them pending the decision in this case.

At Miss Isabella Haldane's death her nearest heirs in moveables were (1) the said Mrs Georgina Haldane Bruce or Murphy, and Miss Jane Isabella Bruce, being the grandchildren and sole descendants of Henry Haldane, who was a brother of the testatrix, and (2) the descendants of Mrs Margaret Haldane or Witherspoon, a sister of the testatrix, consisting of three nieces and one nephew, and the children of six nephews and nieces of the testatrix.

At Mrs Murphy's death the nearest heirs in moveables of Miss Isabella Haldane, the testatrix, were to be found among these descendants of Mrs Witherspoon.

This was a Special Case founded on the foregoing facts, to which Miss Haldane's trustees were the first parties, Dr Murphy was the second party, Miss Bruce's trustees were the third parties, and the Witherspoon family were the fourth parties.

The second party maintained—"(1) That the free residue of Miss Haldane's trust-estate vested at her death, and that under the destination to her nearest heirs in moveables, with the declaration that the division should be *per stirpes* and not *per capita*, a right to one-half thereof then vested in Mrs Murphy and Jane Isabella Bruce, share and share alike; or otherwise (2) Mrs Murphy was entitled on the death of Miss Bruce, to one-half of that half of the residue which was liferented by Miss Bruce, and that in either case a right to a fourth part of the free residue passed to the party of the second part *jure mariti*, or otherwise under Mrs Murphy's settlement, and is now payable to him; and that if it should be held that the one-half of the residue which was liferented by Miss Bruce did not fall to be divided or paid at her death, Mrs Murphy was entitled thereafter during her life to the income of the whole residue of the trust-estate; and that that half of said income which has been retained by Miss Haldane's trustees since Mrs Murphy's death falls to be paid to him as Mrs Murphy's disponee and executor."

The third parties maintained—"That they are entitled to the share of the free residue of Miss Haldane's trust-estate which may be held to have vested in Miss Jane Isabella Bruce, in conformity with the first branch of the second party's contention, which they adopt and refer to, or at least to one twenty-second part of the whole free residue."

The fourth parties maintained—"That the whole residue of the trust-estate falls to be paid to them from and after the death of Mrs Murphy,

to be divided amongst them *per stirpes*, or at least ten-elevenths thereof; and alternatively that they are entitled to (1) five-elevenths of the whole residue from and after the death of Miss Jane Isabella Bruce; and (2) in addition to the said five-elevenths, one-half of the whole residue from and after the death of Mrs Murphy."

The first parties maintained that they were entitled as assumed trustees to a legacy of £19, 19s. each, under a provision of Miss Haldane's settlement whereby she gave "to each of my trustees, excepting the said Georgina Haldane Bruce and Jane Isabella Bruce the sum of £19, 19s. sterling." This question, which formed the eighth of those submitted to the Court, was ultimately settled of consent by the other parties agreeing that the assumed trustees should each receive the legacy.

With the above exception the following were the questions on which the opinion of the Court was asked—"(1) Did the free residue of Miss Haldane's estate vest at her death? Or (2) Did the one-half thereof liferented by Miss Bruce vest at the death of Miss Bruce, and the other half thereof at the death of Mrs Murphy? Or (3) Did the free residue of Miss Haldane's estate vest at the death of Mrs Murphy? (4) Were the descendants of Henry Haldane, the testator's brother, existing at the date of vesting, entitled to the one-half of the residue, or of the share of the residue which so vested? and were the descendants of Mrs Margaret Haldane or Witherspoon entitled to the other half, or in what other proportion did such residue or share of residue vest? (5) Was the half of the residue liferented by Miss Bruce divisible at her death, or at the death of Mrs Murphy? (6) Was Mrs Murphy entitled to a liferent of the whole residue after Mrs Bruce's death? (7) Is the party of the second part entitled to payment of such part of the residue and liferent as vested in or was due to Mrs Murphy?"

After argument before the First Division the case was appointed to be heard before Seven Judges.

Argued for the second party—It was contended, primarily, that the residue of Miss Haldane's estate vested *a morte testatoris* in her "own nearest heirs whomsoever, the division always being *per stirpes* and not *per capita*;" that this vesting was subject to defeasance in the event of the liferentrices leaving issue, and that in order to ascertain what constituted a *stirps* it was necessary to go as near in relationship to the testatrix herself as possible—that was to say, to her brother Henry Haldane, and to her sister Margaret Witherspoon. The division was consequently bipartite, the second party getting one-fourth of the whole, being the half of Henry Haldane's share which vested in Mrs Murphy. Now, that implied, in the first place, that a life-renter might also be fiar of a part of the estate liferented; but it was well settled that he might—*Maxwell* v. *Wylie*; *Balderston* v. *Fulton*; *Mortimore* v. *Mortimore*; *Bullock* v. *Downes*. It was further settled that a destination to one person in liferent and to another in fee did not suspend vesting till the death of the liferenter—*Maxwell* v. *Wylie*; *Nimmo* v. *Murray's Trustees*. Nor did the interposition of issue of the liferenter create a contingency sufficient to suspend vesting—*Balderston* v. *Fulton*; *Snell's Trustees* v. *Morrison*; *M'Lay* v. *Borland*; *Taylor* v. *Gilbert's Trustees*; *Storie's Trustees* v. *Gray*; *Mortimore* v. *Mortimore*; *Bullock* v. *Downes*. [Lord Deas—Then do you contend that the testator's "own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita*," is equivalent to her heirs *ab intestato*?] No. That was contrary to the second party's construction of the term *stirps*. He in no event maintained that the settlement resulted in intestacy. [Lord Deas—Then are you within the English authorities?] Yes. In *Bullock* v. *Downes*, for instance, the residue was left to the persons "of the blood of me" as would have been entitled under the Statutes of Distributions, and that excluded the widow, who was an heir in intestacy in England. But (2) if it should be held that there was no vesting *a morte testatoris*, there was, at all events, vesting as to Miss Bruce's half at her death in those who then came within the truster's ultimate destination of the residue. That produced the same practical result to the second party, of giving him one-fourth of the whole, for the division of the share liferented by Miss Bruce being bipartite, and he as now alone representing one *stirps* got one entire half. It was the intention of the testator that the two portions of her residue, liferented by Miss Bruce and Mrs Murphy respectively, should be treated independently, and if there was held to be no vesting at an earlier date, there must be two periods of vesting, at the deaths of each liferentrix, one of whom might long survive the other. At all events, if the two liferents and the corresponding subjects liferented were not to be held as separate and independent, Mrs Murphy was entitled to the entire liferent after her sister's death, and consequently the share retained by the trustees went to the second party as representing Mrs Murphy.

Authorities—*Maxwell* v. *Wylie*, May 25, 1837, 15 S. 1005; *Balderston* v. *Fulton*, June 23, 1857, 19 D. 293; *Nimmo* v. *Murray's Trustees*, June 3, 1864, 2 M. 1144; *Cockburn's Trustees* v. *Dundas*, June 3, 1864, 2 M. 1144; *Maxwell* v. *Maxwell*, December 24, 1864, 3 M. 318; *Storie's Trustees* v. *Gray*, May 29, 1874, 1 R. 953; *Ferner* v. *Angus*, January 21, 1876, 3 R. 396; *M'Lay* v. *Borland*, July 19, 1876, 3 R. 1124; *Snell's Trustees* v. *Morison*, November 4, 1875, 4 R. 709; *Taylor's* v. *Gilbert's Trustees*, November 3, 1877, 5 R. 49, and July 12, 1877, 5 R (H. of L.) 217; *Turner* v. *Couper*, November 27, 1869, 8 M. 222; *Young's Trustees* v. *Janes*, December 10, 1880, 8 R. 242; *Bullock* v. *Downes*, July 24, 1840, 9 Clark (H. of L.) 1; *Gray* v. *Garman*, January 30, 1843, 2 Hare, 268; *Bird* v. *Luckie*, June 27, 1850, 8 Hare 301; *Ware* v. *Rowland*, January, 29, 1848, 2 Philip's Chanc. Ca. 635; *Baker* v. *Gibson*, March 31, 1849, 12 Beat. 101; *Mortimore* v. *Mortimore*, L.R., May 15, 1879, 4 App. Ca. 448; Jarman on Wills, p. 129, Williams on Executors, 8th edit. pp. 1127 and 1265.

The third parties adopted the first branch of the second party's argument. They did not contend that Miss Haldane's settlement resulted in an ultimate destination to her heirs in intestacy.

Argued for the fourth parties—Their first contention was that vesting did not take place till Mrs Murphy's death, in which case it was un-

necessary to determine, as in a question with the other parties, what was the precise effect of the proviso "the division always being *per stirpes* and not *per capita*," for the entire residue went to the fourth parties; but on the assumption that vesting took place *a morte*, the fourth parties contended that a *stirps* meant a nephew or niece of the testatrix, and that gave ten-elevenths to the fourth parties, and one twenty-second part to each of Miss Bruce and Mrs Murphy, who together represented the truster's remaining nephew Walter Bruce; lastly, on the assumption that vesting took place as to one-half at the death of Miss Bruce, and as to the other half at the death of Mrs Murphy, the fourth parties, on the same interpretation of the term *stirps*, claimed twenty-one twenty-second parts of the whole residue, leaving one twenty-second part (*i.e.*, an eleventh of the half liferented by Miss Bruce) to the second parties. There were thus two main questions (*a*) the date of vesting, and (*b*) the meaning of *stirps*. As to the last, the fourth parties' view was the more natural. It was not probable that the truster should have intended as the *stirpes* persons who were dead at the date of her settlement. The fourth parties' contention was not, however, equivalent to holding that the destination "Lastly," &c., was a destination to the truster's heirs in intestacy. It might be so in point of fact in the present circumstances of the respective families, but it was not necessarily the case. That went to the second head of the argument, for the possibility of the liferentrices having issue was a contingency which suspended vesting unless in a question with the heirs *ab intestato*. That was the result of the cases cited by the second party, particularly the English authorities. But it was admitted—indeed contended—by the other parties that there was no case of intestacy here. The case was therefore within *Bell* v. *Cheape* and *Boyd* v. *Denny's Trustees*. In *Balderston* v. *Fulton* the *dicta* were *obiter* for the heir *a morte*, and the heir on the purification of the contingency was the same person. Miss Bruce's share of the liferent after her, and down to Mrs Murphy's death, went into residue.

Authorities—*Bell* v. *Cheape*, May 21, 1845, 7 D. 614; *Young* v. *Robertson*, February 14, 1862, 4 Macq. 314; *Lord* v. *Colvin*, July 15, 1865, 3 M. 1083; *Stoddart's Trustees*, March 5, 1870, 8 M. 667; *Ramsay's Trustees* v. *Ramsay*, December 21, 1876, 4 R. 243; *Boyd* v. *Denny's Trustees*, January 1877, 15 Scot. Law Rep. 16; *Fergus and Others*, July 13, 1872, 10 M. 968; Bell's Prin. sec. 1883.

The Lords made avizandum.

At advising—

Lord President — The questions which we have to dispose of under this Special Case all depend on the construction of the settlement of the late Miss Isabella Haldane which she executed on the 20th of January 1877.

Her only near relatives were the descendants of her brother Henry Haldane, and of her sister Mrs Margaret Witherspoon, both of whom were dead when Miss Haldane made her settlement. Henry Haldane had one daughter Mrs Bruce, who was also dead at the date of the settlement, but left two daughters, Jane Isabella Bruce, and the other Georgina Haldane Bruce, who was afterwards married to Dr Murphy, and has been called in the course of the argument Mrs Murphy. Mrs Witherspoon had a large family of ten children, of whom six predeceased the testatrix, and one son and three daughters survived.

It is obvious that the testatrix had a preference for the two grand-daughters of her brother, arising probably from their being in this country and well known to her, while the family of Mrs Witherspoon were apparently, like their father and mother, all settled in Canada. Accordingly, the testatrix named the Misses Bruce two of her five trustees. She gave them special legacies of £2000 each, and only £8000 among the numerous descendants of Mrs Witherspoon. She directed her trustees to convey her heritable estate to the Misses Bruce and their heirs, and finally she gave these two ladies a liferent of the whole residue.

The liferent is given "equally to and between" Georgina and Jane "in their lifetime respectively, so long as both are alive and unmarried," and then follows a clause providing for the exclusion of the *jus mariti* of any husband they may marry. The 7th purpose of the trust, which follows this provision of the liferent, is thus expressed: — "On the decease of the said Georgina Haldane Bruce and Jane Isabella Bruce my trustees shall pay and apply, or assign and convey, one-half of the capital or entire residue of my said trust-estate and effects, after providing for the purposes before mentioned, to the issue, if any, of the said Georgina Haldane Bruce, and the other just and equal half of such capital to the issue of the said Jane Isabella Bruce,"—each of the ladies having a power of apportionment amongst her children. Then follows a destination of the residue, "in the event of the said Georgina Haldane Bruce and Jane Isabella Bruce dying without leaving issue, or if there be issue, in case such issue dies before the period of division before mentioned."

A very important question arises as to the character and description of the persons called as residuary legatees in the event last mentioned, but before considering that question it seems necessary to ascertain precisely what are the operation and effect of the clauses providing for the liferenters and their issue with reference to the events which actually occurred.

The testatrix died in 1877. Jane Isabella Bruce died in 1879, and Georgina (Mrs Murphy) died in 1880. Neither of these two ladies ever had any issue.

It appears to me very clear, as the result of the plain language of the settlement, that each of the Misses Bruce was entitled to a liferent of one-half of the residue only, and that in the event of one predeceasing the other the liferent of the predeceaser did not accrue to the survivor. In like manner, it seems as clear that in the event of one dying without issue the fee of the half which she had liferented did not pass to the issue of the other. In short, one-half of the residue was secured to Jane and her family, and one-half to Georgina and her family separately and independently of each other, and therefore in the event of one of these ladies dying without issue the half of the residue liferented by her would immediately be set free for division among the persons called, failing issue of the two sisters.

But who are the parties called in that event?

The direction is—"then," *i.e.*, in the event of the liferenters dying without issue, "my trustees shall pay and apply, or assign and convey, the said residue to and among my nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita.*"

Now, taking the words "my own nearest heirs in moveables whomsoever," without the words which follow, I cannot read them in any other sense than "my heirs in moveables *ab intestato.*"

There are many cases in which similar and equivalent words have received such an interpretation. In *Stewart* v. *Stewart*, Mor. Clause App. 4, the words were "personal representatives." In *Munro* v. *Murray's Trustees*, 2 Macph. 1142, the words were "my own nearest heirs and successors." In *Maxwell* v. *Maxwell*, 3 Macph. 318, the words were "heirs, executors, and assignees." In *Balderston* v. *Fulton*, 19 D. 293, the words were "my own nearest heirs." In all these cases the words were construed as meaning the persons who would have taken the succession if there had been intestacy. It is needless to multiply such examples, but it may be useful to contrast with those already cited a case in which words of a different signification led to an opposite result—*Young's Trustees*, 8 R. 242. In that case the words "next-of-kin" were held not to be equivalent to "heirs *in mobilibus*," because the Moveable Succession Act carefully distinguishes between those who are the nearest of kin, and as such entitled to the office of executors, and the heirs who by that Act have the beneficial interest in the succession of the intestate. The cases of *Munro* and *Young's Trustees*, taken together, are also instructive in showing the different effect which ought to be given to words which express merely propinquity or nearness in blood, and those which express the relation subsisting between a person taking a succession and her predecessor in the property.

For these reasons I can entertain no doubt that the words used in Miss Haldane's settlement, "my own nearest heirs in moveables whomsoever," taken by themselves, are susceptible of no other construction than the heirs who would take *ab intestato* in terms of the Moveable Succession Act.

But what effect is to be given to the words which follow, and which are said to qualify the words on which I have been commenting, viz., "the division always being *per stirpes* and not *per capita?*" Now, such a form of expression must always be understood and interpreted *secundum subjectam materiam*—that is to say, with special reference to the heirs called and the provisions of the settlement otherwise. In the present case it has been suggested that the words may have one of three possible meanings—(1st), The testatrix may have looked upon the descendants of her deceased brother and sister as two *stirpes*, and have intended the residue to suffer a bipartite division between the descendants of Henry Haldane and those of Mrs Witherspoon. But this would be a very strange direction for the testatrix to give to her trustees, if the descendants of Mrs Witherspoon are justified in contending that no right of fee can vest in the heirs *in mobilibus* whomsoever until the whole descendants of Henry Haldane are extinguished by the death of his two grand-daughters without issue. The very event which, according to their view, would bring into operation the division *per stirpes* among the heirs *in mobilibus*, would render this bipartite division impossible. Accordingly, the parties of the fourth part in the Special Case repudiated this construction of the words, and suggested—(2) That they meant only that when one or more of the nearest heirs in moveables had predeceased leaving children, her children should take her share. In this sense the words would do no more than repeat what the Moveable Succession Act has done by introducing representatives in moveables, and so the words "heirs in moveables whomsoever" would remain altogether unqualified. But at last it was suggested—(3) That rejecting the first proposed construction, and adopting the second, *sub modo*, there might yet possibly, though very improbably, occur a state of the Witherspoon family in which the succession *per stirpes* and not *per capita* would not be coincident with the rule of the Moveable Succession Act. Suppose, they say, that all the four surviving children of Mrs Witherspoon predecease the term of vesting, and that the children of the dead children of Mrs Witherspoon all survive, or at least none of them die leaving issue, then all the heirs *ab intestato* being equally near in blood, would take equally *per capita*—(See *Turner*, 8 Macph. 222)—and the words under construction would prevent such division and introduce a succession different from succession according to law.

It is surely a perverse ingenuity that would defeat the purpose of the testatrix by ascribing to her an amount of foresight and legal knowledge which, I venture to say, is beyond the reach of not a few professional lawyers. I prefer to construe the words which she has used by the context of her settlement, and particularly by observing in what sense she has used the words *per stirpes* in another part of the same instrument. Among her special legacies she bequeaths £8000 equally to and among the surviving issue of the sons of Mrs Witherspoon, and to and among her surviving daughters, "and the issue of any daughters who have already predeceased or may still predecease me leaving issue, and that equally *per stirpes*—declaring that the division shall be according to the number of sons and daughters of my said sister Margaret alive or who may have left issue, and that the share of any issue shall be to the same extent as if their respective parents had been in life."

Here is an interpretation clause by means of which he who runs may read what the testatrix means when she speaks of a division *per stirpes*. She means nothing more than that the issue of a predeceasing legatee shall take their parents' share, and thus she means nothing more than is provided by the Moveable Succession Act, and the plain words "my own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita*," are relieved from all the ambiguity which legal ingenuity can contrive.

If, then, the parties called to take the residue in the last direction of this settlement are the heirs *in mobilibus* of the testatrix, the next question is, whether this means the heirs *in mobilibus* at the death of the testatrix, or those who would have been her heirs *in mobilibus* had she died at the appointed period of division.

If the clause "Lastly" had been omitted from

the settlement, it will not be disputed that in the event which has occurred the former class must have taken, though the intestacy was an emerging intestacy which could not be ascertained till the death of the liferenters without issue. The heirs-at-law would have taken a vested fee at the death of the testatrix, subject to defeasance if either of the liferenters left issue.

But why should there be any difference in the result merely because the testatrix, instead of leaving the law to devolve the succession on them by reason of her silence, expresses her purpose that this shall be so? There is nothing unnatural or anomalous in a testator expressing such a purpose. On the contrary, if such be his purpose, it is more natural that he should express it, than that he should leave it to be implied from his silence. If, indeed, there is any reason to suppose from the expressions of the settlement that heirs-at-law at the death are not intended, the case may be very different. But if he simply calls his heirs-at-law, or uses equivalent words, the expressed purpose must receive effect; for heirs-at-law are necessarily those who stand in that relation to the testator at the date of his death. No man can have any other heirs-at-law.

In the absence of authority I should be inclined to say that on principle the plain meaning of the testament must receive effect, just as much as if she had left her intention to be implied by failing to dispose of the fee of the residue.

But there is no want of authority, for the proposition that where a testator calls his heirs-at-law to take his succession in a certain event, he is held to mean his heirs-at-law as at the time of his death. The case of *Maxwell* v. *Wylie* in one of its branches affords an example of this. But perhaps the most instructive case is *Balderston* v. *Fulton*. The testator left a liferent of his estate to his widow, and after her decease a like liferent to his daughter, exclusive of the *jus mariti* of her husband and of the diligence of his creditors, and on the lapse of the last of the two liferents he directs his trustees to make over the estate "to my own nearest heirs, or to any person or persons to whom I may destine the same." But he gave his widow a power at any time during her life to convey the fee of the estate in any way she thought fit by any deed to take effect after her death. The widow survived the testator for four years, but did not exercise her power of disponing of the fee. On the death of the widow, the daughter and her husband raised action claiming an immediate conveyance of the fee, on the ground that she was her father's nearest heir. The question raised is thus accurately stated by Lord Neaves, Ordinary—"What is meant by the term in the fourth purpose, my own nearest heirs? The pursuers say it means Mrs Balderston herself as her father's heir; the defenders, that it means the parties who at her death shall hold that character." The Lord Ordinary was of opinion that the same rule applies to the destination of a fee to a class of persons who are not the heirs-at-law of the testator, and to those that are, and that the general rule is that a destination to a class must be construed as meaning the individuals answering to the description of the class, when the gift to them becomes practically operative. But the Court was of an opposite opinion, and recalled his Lordship's interlocutor, and found—"That there was vested in the pursuer Mrs Jean Balderston, only child and nearest heir of the late James Fulton, a right to the fee or capital of the estate, heritable and moveable, which belonged to him." The leading opinion of Lord Curriehill contains a clear exposition of the law applicable to such a destination. Lord Ivory agreed with him—"That in the construction of this deed the word 'heirs' must be held to be the heirs of the granter at his death, and that his daughter having come to be such heir, she is the party who is fiar of the estate, and that she is vested with the fee *a morte testatoris*." Lord Deas said—"The estate is to be made over after the death of the wife and daughter, but the heirs to whom it is to be so made over are not described as those who shall be the truster's heirs at the time of making over, but simply as his own nearest heirs. Beyond what is contained in the words 'my own nearest heirs' he gives no description whatever of the beneficiaries in the fee."

I shall revert to the case of *Balderston* v. *Fulton* by-and-bye for another purpose. But I have cited it in the meantime only in support of the general rule, which along with other authorities it clearly establishes, that when a testator destines the residue of his estate, either directly or through trustees, to his heirs who would take in the event of intestacy, he must be understood to mean those who hold that character at the time of his death, and that the fee will vest in those persons *a morte testatoris*, though the payment or division of the residue may be postponed for an uncertain period after his death, and though the only words of gift to the heirs be a direction to the trustees to pay or make over at that postponed period.

Neither does it make any difference that the liferenter for the securing of whose liferent the postponement of the fee is directed, should be the heir-at-law or one of the heirs-at-law of the testator, and so entitled to the fee in whole or in part, though he can never become possessor of it in his own lifetime. That was one of the peculiarities of *Maxwell* v. *Wylie*, in which Lord Corehouse said—"It may be conjectured that when the truster provided the fee to his heirs-portioners he meant to except the three heirs-portioners on whom he had previously bestowed the liferent. But there is no declaration expressed or clearly implied to that effect. There is no inconsistency in a liferenter being also a fiar of part of the subjects liferented." In like manner Lord Deas said in *Balderston* v. *Fulton*—"There is no inconsistency in giving an absolute liferent to the daughter, and at the same time making a destination under which she might contingently become fiar."

But it was further contended that the gift of the residue was subject to the condition that the two liferenters should die without leaving issue, that this was a condition suspensive of the gift, and that the residue therefore could not vest till the condition was purified by their death without issue.

On the other hand, it is maintained that as there was no issue of the liferenters in existence either at the date of the settlement or at the death of the testator, there was no existing person who could exclude the heir-at-law, and no existing obstacle to prevent the fee vesting in them; that the condition was not a suspensive

but a resolutive condition; and that the fee, notwithstanding the condition, vested in the heirs, subject only to defeasance on the existence of issue of the liferenters at the expiry of the liferents.

Now, it cannot be disputed that if the residue of an estate is destined to A in liferent, and his issue in fee, and failing his leaving issue then on the expiry of the liferent to B, no right vests in B till the death of the liferenter without issue. This was authoritatively settled in *Bell* v. *Cheape*, and it may be conceded that the same rule will apply where in place of an individual the ultimate gift is to a class either named or described, not being the heirs-at-law.

The foundation of that rule is, that till the period of division or payment arrives it cannot be ascertained who will answer the description of legatee or legatees in the settlement, and be capable of demanding and receiving payment. But in the case of the heirs-at-law being named as residuary legatees — if I am right in the opinion I have already expressed—there occurs another and a much more important consideration to guide the Court in the construction of the settlement, viz., that the persons who are to take are fixed and ascertained at the death of the testator. As there is nothing to prevent the fee from vesting in this ascertained class at the date when they are ascertained — the death of the testator—except the bare possibility of a person or persons coming into existence who by the operation of the settlement would be preferable, it appears to me more consistent with legal principle to hold that the fee vests subject to a possible defeasance, than to hold that it does not vest at all.

A right of property vesting subject to defeasance is no anomaly. On the contrary, the law is quite familiar with such conditional vesting. The most frequent cases are probably those which occur in tailzied succession, when the heir who for the time is next entitled to succeed under the destination may be excluded by the birth afterwards of a nearer heir who for the time is only *in spe*. This branch of the law is now settled on a very clear and satisfactory footing by the recent cases of *Grant's Trustees* v. *Grant*, 22 D. 53; *Stewart* v. *Nicolson* (the Carnock case), *ibid* 72, and *Preston Bruce*, 1 R. 740. The rule and the principle on which it rests are thus clearly and succinctly stated by Lord Curriehill in the Carnock case:—"On the one hand, such posthumous heirs are not displaced by the law itself from their proper position of nearest heirs of their predecessors, although they be not procreated till after the deaths of the latter. Although when they are *in spe* the remoter heirs may make up titles to the inheritance, yet the right which is vested in them by such titles is *sua natura* qualified with a condition that they must denude in favour of the nearest heirs in the event of their afterwards emerging. But that condition not being a suspensive one, the *jus dominii* vests in the remoter heirs so served in the meantime, and in the event of the birth of nearer heirs becoming impossible (as is the case whenever the only party who can be the progenitor of such heirs dies), the right of fee vested by the title is *ipso facto* freed from the conditional obligation and becomes absolute."

But this kind of defeasible fee is not confined to tailzied succession or to heritable succession. It occurs also in the case of moveable succession provided by deed of settlement. Thus in *Robertson* v. *Robertson*, 7 Macph. 1114, a wife's whole property, heritable and moveable, was by her marriage-contract settled upon herself in fee, and in the event of her predeceasing the husband, to him in liferent and the children of the marriage in fee. Failing her executing a power of apportionment, the division of the fee among the children was equal, excepting the eldest child in the event of his succeeding to an estate in right of his father of equal or greater value than his equal share of the estate of his mother. The wife predeceased the husband leaving four children. The eldest son survived his mother but predeceased his father. It was held that the fee vested in the children at the death of their mother, that one-fourth vested in the eldest son although he was heir-apparent to his father's entailed estate of greater value, and that the share which vested in the second son suffered defeasance on his succeeding to his father's estate. The ground on which chiefly the Court held that the fee vested on the death of the mother was, that though the fiars were not named in the deed, both the existence and the number of the fiars were ascertained at that date. This is clearly stated in the leading opinion of Lord Neaves—"But" (his Lordship continues) "though a fee may have vested, our law recognises vesting to take place subject to defeasance upon a supervening event." After explaining the effect of the deed, his Lordship concludes—"The result of this opinion is, that the second son, though at his mother's death not the presumptive heir to his father's estate, has by succeeding thereto lost his interest in the fund with which we are dealing; and, on the other hand, that the eldest son's executors have a claim to the share in the fund which vested in him by his survivance of his mother, subject, no doubt, to defeasance on the occurrence of an event which however did not happen."

The case of *Balderston* v. *Fulton* furnishes another example of the vesting of a fee of moveables subject to defeasance. The widow in that case had an absolute power of disposal of the whole estate during her viduity. She survived her husband for four years, and enjoyed the liferent of the estate, and might have disposed of the fee as she thought fit at any time during these four years, and if she had done so to the prejudice of her daughter the result would have been that the right of fee, which the Court held to vest in the daughter *a morte testatoris*, would have suffered defeasance.

I am not able to make any distinction in principle between the possible exercise of a power of alienating the fee belonging to a survivor of the testator, and the possible existence of issue of a liferenter, as a reason for preventing the vesting of the fee in the heir-at-law, or to hold that the one is a suspensive while the other is a resolutive condition.

I conclude, therefore, that the true construction of the clause in which Miss Haldane disposes of the residue of her estate is that the right to the residue vested in her heirs *in mobilibus* at her death, subject to defeasance in the event of her two grandnieces who liferented the estate leaving issue.

If I could find in other parts of the settlement any indications of an intention to postpone the vesting, and to make those who might have been her heirs *in mobilibus* at that postponed period her residuary legatees, I should give effect to that intention as entitled to prevail against those legal principles which I have endeavoured to expound. But the only specialty of any mark in the settlement operates entirely the other way. By the death of the predeceaser of the two liferenters without issue, one-half of the fee of the residue is set free for division among the "heirs *in mobilibus* whomsoever." But the other half will not be set free till the death of the last survivor of the two liferenters without issue. The heirs *in mobilibus* of the testatrix, therefore, are to be sought for and ascertained (according to the contention of the fourth party), not at one period, but at two separate periods, and the class may be composed of different individuals at the two different periods of division. The result is that the true heirs *in mobilibus* of the testatrix at her death will be one class; those who would answer the description at the death of the predeceasing liferenter will be another; and those who would answer the description at the death of the surviving liferenter will be a third class. It is difficult to believe that when the testatrix uses the plain words "my nearest heirs *in mobilibus* whomsoever," she can have in her mind any such shifting and complicated classes of beneficiaries.

My opinion in this case rests on the clear proposition that a man's heir-at-law in heritage is the person whom the law designates as such at the time of his death, and he can never have any other. And in like manner a man's heirs-at-law *in mobilibus* are those whom the law designates as such at the time of his death, and he never can have any other. So that when the true construction of the words used in the last purpose of Miss Haldane's settlement are once ascertained in the way I have suggested, there is an end of the whole dispute.

My answers to the questions in this Special Case would be:—

1. That the residue of Miss Haldane's estate vested at her death in her nearest heirs *in mobilibus* who would have taken if she had died intestate *quoad* the residue.

2. That *quoad* one-half of the residue, this vested right was defeasible in the event of Mrs Murphy leaving issue.

3. That *quoad* the other half, it was defeasible in the event of Jane Isabella Bruce leaving issue.

4. That neither of these contingencies having happened, the right to the whole residue which vested at the death of the testatrix, subject to such partial or total defeasance, did on the death of both liferenters without issue become absolute.

5. That the residue is divisible into eleven equal shares, one of which belongs to the representatives of Mrs Murphy and Miss Bruce as coming in place of their mother Mrs Bruce, the only child of the brother of the testatrix, four of which belong to the surviving one son and three daughters of Mrs Witherspoon, and the other six belong to the issue of the six children of Mrs Witherspoon who predeceased the testatrix, *per stirpes* and not *per capita.*

Lord Deas*—When a person dies possessed of heritable or moveable estate, or both, the first inquiry to be made with a view to his or her succession is whether he or she died testate or intestate. If the deceased has died intestate, the necessary consequence is that the personal estate (which we have here in the meantime alone to consider) goes to the nearest heir or heirs *in mobilibus* at the time of death, for there is no one else to take. A man may make a will, and may even convey his whole means and estate to trustees for specified purposes in certain events, and yet if these events do not occur, may die intestate as to the whole of that estate, or some part of it, as the case may be. Such was the case of *Lord* v. *Colvin*, Reps., 3d series, vol. 3, p. 1083, in which certain suits relative to the succession of the truster were instituted in the High Court of Chancery, and in which suits competing claimants joined issue upon their claims. But as the deceased had died a domiciled Scotchman it did not occur to that High Court to attempt to solve these claims themselves either by the light of the opinions delivered in the case of *Bullock* v. *Downes* (Clark's House of Lords Reports, vol. 9, p. 1, *et seq.*) or by any other cases or authorities in the English law. Questions were therefore directed to be put for the opinion of this Court, the substance of which was, whether Mr Lord, who represented the nearest heir or heirs of Peter Cochrane, the truster, who had been alive at the time of his death, or who else, was entitled to the succession, or to any and what part or parts thereof?

After a full hearing on this question the Judges of this Court returned an opinion that Mr Lord, as representing the heirs at the death of the truster, was entitled to the whole succession. Nothing, however, was said on that occasion to indicate in the slightest degree that the same would have been the result in any case of testate succession. There are only two kinds of succession known to the law of Scotland—testate and intestate. What is not the one must be the other. All intestate succession is regulated *provisione legis.* All testate succession is regulated *provisione hominis.* In the one case we inquire only what does the law dictate. In the other case we inquire only what was the intention of the testator.

These simple rules were never doubted, so far as I know, at any period of our law. The primary and vital question, therefore, is, whether the present is a case of testacy or intestacy? According to the answer given to that question, so must be the judgment we are to pronounce in the present hearing. Lord Ardmillan stated the point very well in *Lord* v. *Colvin*, thus—"Questions may indeed arise as to whether there was testacy or intestacy, and the solution of that question may take some time. But the question to be solved is, Did the man die testate or intestate? Does the estate pass *provisione hominis* or *provisione legis.*"—p. 1096, bottom. I observe that in the same case I had expressed myself almost literally to the same effect (p. 1095).

I cannot doubt that in the case now before us the testatrix does not leave the fee of the residue of her moveable estate (which is what we are now to decide upon) to be dealt with as intestate

* Lord Deas was absent when judgment was given, but his Lordship's opinion was read by the Lord Justice-Clerk.

succession. She provides amply for her two grandnieces, gives them large powers of disposal if they had chosen to exercise them, but postpones the period of division or distribution among the heirs ultimately called till the death of both these grandnieces, and then, if they both die without issue, the trustees are to "assign and convey the said residue to and among my own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita.*" Laying aside in the first instance consideration of the words "*per stirpes* and not *per capita,*" the only question is, who did the testatrix mean by her "own nearest heirs in moveables whomsoever." I think she meant those who should stand in that degree of blood relationship to her at the period she was then appointing for the distribution of the residue of her moveable estate. The law is not favourable to the supposition of intestacy, but the reverse. Express words are not necessary to take the succession out of that category. Implied intention may be sufficient. As regards the words "*per stirpes* and not *per capita,*" it appears to me that it is only at the period of distribution that the application of these words falls to be or can be ascertained, and therefore, before dealing with them, I should prefer to have before me an accurate statement, which we have not yet got, of the relationship of the parties who claim to have been the nearest heirs *in mobilibus* of the testatrix at the period of distribution, holding that period to have been the death of the survivor of the two liferentrices. If there be any puzzle in the case, it could only be whether the interest of one-half of the capital sum which was relieved from the burden of any liferent between the death of the first and last of the two liferentrices should fall into intestacy. But I think the obvious intention of the testatrix was that there was to be one division of the whole and at one period, and that this is sufficient to prevent any incidental splitting of that kind from taking place.

Lord Justice-Clerk—I concur in the opinion I have just read. The cardinal question raised in this Special Case, and on which the most important elements for decision arise, is one which is not stated categorically among the questions put to the Court. That question is, To whom was the residue of the estate in question left by Miss Haldane's will? And when that question is answered, the vesting of the residue will be found to be a necessary result, and the question in regard to it superfluous.

It is not necessary that I should resume in detail the facts which are stated in the Case, or the clauses of the settlement under which these questions arise. The substance of Miss Haldane's testamentary conveyance and its framework are simple enough. She conveys the whole of her estate to certain trustees for the testamentary purposes expressed in the deed, and after directing the payment of certain legacies in terms which are immaterial to the questions now raised, she directs in the sixth purpose of the deed that the trustees shall hold the rest, residue, and remainder of her estate and shall pay and apply the profits thereof to and for the behoof of her two grandnieces Georgina Haldane Bruce and Jane Isabella Bruce, in liferent as long as both are alive and unmarried. Then there are certain provisions, not immaterial in some aspects of the case, in regard to the rights of any husbands they may have. The seventh purpose of the trust directs the trustees, on the decease of the said Georgina Haldane Bruce and Jane Isabella Bruce, to pay one-half of the capital or residue of the estate to the issue of Georgina Haldane Bruce, and the other half to the issue of Jane Isabella Bruce, with a power of apportionment to each, with a declaration that the trustees shall have power to delay the payment to such issue until the child or children arrive at the age of twenty-two. Then follows the residuary clause, on which the present controversy arises, in the following terms—"Lastly, in the event of the said Georgina Haldane Bruce and Jane Isabella Bruce dying without leaving issue, or if there be issue, in case such issue dies before the period of payment before mentioned, then my trustees shall pay and apply or assign and convey the said residue to and among my own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita.*" The words I have last quoted are those we have to construe. The testatrix died on the 17th of May 1877. Jane Isabella Bruce died unmarried on the 24th December 1878. Georgina Haldane Bruce was married to Francis Henry Swinton Murphy, and died without issue on the 15th September 1880. Both of these ladies left settlements. The question we have to determine under this last-quoted clause of residue is, to whom are the trustees bound to pay under the description, "my own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita?*"

There are, of course, only two alternatives in this question; and they truly relate to the construction of an abbreviated or elliptical form of expression. Does the testatrix mean by "my own nearest heirs" those who are or may be "my own nearest heirs" at her death, or those whom the trustees shall find to be "my own nearest heirs in moveables" when the obligation of payment comes to be fulfilled? If the first of these interpretations is the sound one, it would raise a very strong, probably a conclusive presumption of the testatrix's intention—that vesting was to take place after the death of the testatrix; and if, on the other hand, the persons to whom the trustees are to pay the residue are those whom they shall find to be at that time the nearest heirs of the testatrix in moveables, it is equally plain that the right cannot vest until the period of payment comes.

This is a question of a class which has arisen frequently in our Courts, and has of late years been the subject of consideration in several cases. Like all questions of the kind, it is one of intention, to be gathered from a sound construction of the testator's words; and the tendency which at one time obtained of running such questions into arbitrary rules and formulas has of late years been considerably and, as I think, soundly relaxed. There are, however, some general presumptions, yielding as all such presumptions must, to contrary indications as to the mind of the testator, but still of service in dealing with and elucidating such questions as the present. In the first place, where an estate is left by a testator to trustees with directions to use and apply it by way of payment or otherwise to particular persons or classes at a specified time, it is

necessary to ascertain in the first instance the precise meaning of these instructions, to be gathered from the words in which the testator has given them, and if these are clear they must be obeyed. If the trustees are directed to pay to certain persons at a certain time, the way in which that duty is to be performed must be considered with reference to the period contemplated by the testator, and the probable circumstances at the time when payment comes to be made. Here the residuary legatees are described as a class holding or possessed of a certain character, and to these persons payment is to be made on the death of the liferenters. In the second place, where legatees are not named, but are called as a class, bearing a specific legal character or relation to the testator, the general rule is where there is a direction to pay at a future period to the persons so described, the legatees must possess the character demonstrated at the time when such payment is to be made. In the case of *Balderston* v. *Fulton*, Lord Neaves, who was Lord Ordinary in the case, lays down the rule in very precise language, although on the facts of that case his judgment was altered. He says—"It is a general rule of law that when a right of succession is conferred by a testator on parties called, not as individuals, but by description or character, the party entitled to succeed is the person answering the description or holding the character when the succession opens or takes effect." One exception, however, and a large and generic one, must be made to this rule, and that is, that if the class called are called as the heirs of the testator *ab intestato*—in other words, if the succession be intestate either directly or virtually, and the law at the date of the testator's death is to denote the favoured legatees—then they must be looked for as they stood at the death of the testator, and of course the legacy must vest as at that date.

These principles were substantially applied in the case of *Maxwell* v. *Maxwell*, and the case of *Stodart's Trustees* in the Second Division of the Court. The opinions of Lord Kinloch and of Lord Curriehill in the first of these cases very clearly recognise and illustrate the distinction I have referred to. In the last case we held that the destination of the fee being to the executors of certain of the legatees, these executors were to be found, not at the death of the testator, but at the period when the fund became divisible, and that because the duty of the trustees could only be performed when that period arrived.

I am of opinion that this is a case falling very clearly within the first rule. It is not a case of intestate succession either in words or constructively. The heirs called are not the heirs *ab intestato*. They are a class separately described and demonstrated by the testatrix as the persons to whom the trustees are to pay. Her own nearest heirs taking *per stirpes* and not *per capita* are not necessarily the heirs whom the law would have pointed out at the death of the testatrix, although they may of course in certain circumstances be the same persons. They take *provisione hominis*, not by operation of law, and as payment is only to be made when their possession of the character here described is ascertained by the trustees, those persons only who are then alive and possess that character are entitled to participate.

The cases in which the law of intestacy is invoked by a testator have been brought under a different category, and have been regulated on a different principle. Such was the case of *Bullock*, to which we were referred in the English Courts, where a man left his estate with directions to divide it as the Statute of Distribution would have done had he died intestate. In that case the English Courts felt that they had no alternative, and this is very well expressed in the opinion of the Master of the Rolls, who seems at first to have leant to the opposite view which I have endeavoured to enunciate. But he said—"How can I, when directed to prefer to the succession the class who would have been called under the Statute of Distributions if the testator had died intestate, bring in another class who would not have come in under the Statute of Distributions." So in a case of resulting intestacy, that of *Lord* v. *Colvin*, the First Division held that the heirs entitled to take must needs be those at the death of the testator. But we have no such question here. This is beyond all doubt testate succession, and being so, I think the presumption is that the class of legatees to whom the legacy is to be paid are those holding the character described in the settlement at the date of payment, and that the *stirpes* the members of which are to receive the payment are to be found at that time.

The substance of the settlement seems to me to add great strength to this view. The main feature on which I rely, and which I consider very material, is the fact that the testatrix beyond all doubt was making provision for a contingency probably very remote. There were no individual *personæ predilectæ* in her view. The two liferentrices were grandnieces whose expectations of life might have extended to thirty or forty years, and the period of their issue attaining twenty-two might also very well have extended to some such period. She was an old woman, and she knew who her probable heirs at the date of her own death were likely to be. She shews her favour for some of them in this settlement; and had she meant that they and their descendants should come in, nothing would have been easier than for her to have said so. But that was not her intention as evinced by this settlement. Who her nearest heirs in moveables might be when her two grandnieces and their issue—that is, three generations—had failed, she of course did not know. But she leaves them this residue, and only providing that they shall take *per stirpes* and not *per capita*—she points out the heirs whom the law at that time would designate as nearest to her.

That is the opinion at which I have arrived on this the main question raised in the case. The question is not new to me, for we have had to consider it in the Second Division more than once, and we had the benefit of a very long and learned argument in the analagous case of *Boyd*, decided by Lord Young in 1876, in which we should have requested the assistance of this Division had the case itself not been compromised.

If the view which I have taken is correct, it necessarily solves the question of vesting, which must take place only at the period of distribution. I think it unnecessary to encumber my opinion by any appeal to the contingency implied in the destination to eventual issue of these two liferenters. Without saying anything on the general argument, I should not have rested my opinion

upon it here, and all I shall say in conclusion on this head is, that I imagine the general rules applicable to questions of this class are to be found correctly stated in the opinion of Lord Colonsay in the case of *Carlton*, and in the recent judgment of the House of Lords in the case of *Taylor* v. *Gilbert's Trustees*.

These are my views on the general argument on this Special Case. The other questions I may deal with very shortly. It follows from the views I have expressed that the two grandnieces had a liferent and nothing more, and that the fee of the residue never vested in either of them as one of the nearest heirs in moveables at the death of the testatrix. Whether under the settlement there were two periods of division—one at the death of each of the liferentrices—or only one period of division at the death of the last survivor, certainly admits of argument; but, looking at the terms in which the description of the period of division is expressed, I think there could be no distribution while either sister was alive, and that consequently the survivor was not entitled as one of the nearest of kin of the predeceaser to take a share of the one-half of the fee of which the predeceaser had the liferent. I think, further, that the liferent of Isabella's half did not accresce to the survivor during her life, but simply went to increase the capital of the residue to be divided on the death of the survivor.

It follows from this that no part of the fee vested until the period of distribution; no interest in it was carried by the settlements of either of the sisters.

There remains the practical application of these views, should your Lordships adopt them, and the principle of division *per stirpes* which this result will render necessary. Nothing was said in the discussion from the bar on this subject, nor indeed could it have been taken up until it had been determined who were the legatees under the settlement. Whichever view your Lordships adopt on this question I think the parties should have an opportunity of stating the manner in which they propose to carry it out.

Lord Mure—Under the clause in this trust-deed, by which, in the event of the liferentrices dying without leaving issue, the trustees are appointed to distribute the residue "among my own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita*," the two main questions which arise for consideration are—1st, Who did the testator mean to include under that description? and 2nd, Did she mean it to refer to those who might be her nearest heirs in moveables at the date of the distribution of her residue, or to those who answered that description at the date of her death?

On the first of those questions I have not felt much difficulty. The expressions used as to the mode of division may be somewhat peculiar, but they appear to me to amount substantially to this, that the testatrix meant the residue to go to her own nearest heirs, subject to the right of representation introduced by the Intestacy Act of 1855. For although this is a case of testate succession, it is, I think, necessary, in order to get at the true meaning and intention of the testatrix, to ascertain who were the parties who would have been entitled to succeed to her had she died intestate. Because the expressions used in the various cases which have been referred to, such as "my own nearest heirs and successors," "heirs, executors, and assignees," "own nearest of kindred," all bear reference to intestate succession; and seem to be used to describe the parties who in the event of a testator dying intestate would take the succession, heritable or moveable, as the case may be.

I am therefore of opinion that the words must be construed to mean the parties who would have been her nearest heirs *ab intestato* had she died without a will.

The second question, viz., the period at which the heirs are to be looked for, is attended with more difficulty. But after giving the matter the best consideration in my power I have come to the same conclusion as that expressed by your Lordship in the chair, and substantially on the same grounds.

When a testator speaks of his nearest heirs, the natural presumption is that he has in view those who are his heirs at his own death; and when such expressions are used in a settlement, they ought, in my opinion, to be so construed, unless there is some provision in the context which shows very clearly that the words were used in a different sense. There is, I think, authority for so deciding, both in this country and in England; and there is a passage in the opinion of Lord Deas in the case of *Balderston* which appears to me to put this very distinctly. After quoting the words of the fourth purpose of the trust in that case, by which the estate was to be made over to the testator's "own nearest heirs," after the death of his wife and daughter, who were the liferenters, his Lordship says (19 D. 299)—"The estate is thus to be made over after the death of the wife and daughter, but the heirs to whom it is to be made over are not described as those who shall be the truster's heirs at the time of making over, but simply as his 'own nearest heirs.' Beyond what is contained in the words 'my own nearest heirs' he gives no description whatever of the beneficiaries in the fee. The words used are naturally descriptive of the persons who shall be the truster's heirs, so soon as he leaves heirs, which he does at his death, when his succession truly opens and the deed takes effect, although the trustees are not to denude in favour of those heirs till the occurrence of a specified event." The import and reasoning of this passage appear to me to be distinctly applicable to the wording of the destination to the heirs of the truster in the present case. And I can find nothing in the context to lead to the inference that the words 'my own nearest heirs' are here used in any other sense than that of their ordinary and natural meaning, viz., as being descriptive of the persons who shall be the heirs of the testatrix at the time of her own death, as was decided unanimously in the case of *Balderston*.

The difficulties which appeared to stand in the way of that construction of the clause relating to residue in the case of *Balderston* were, *first*, the fact that the daughter, who claimed as nearest heir at her father's death, was liferented in the whole estate, which was not to be made over to the heirs till after her decease; and, *second*, the fact that a power was given by the truster to his widow, if she survived him, which she did, to alter the destination of the residue as made in the fourth purpose; in respect of which it was

contended that the fee of the residue never could have been intended to be given to, or to vest in, Mrs Balderston as her father's heir during her mother's life, as her right of succession was defeasible at her mother's instance so long as her mother lived, which it thus unquestionably was for several years after the truster's death.

The first of these objections, viz., that founded on the fact that the daughter was liferented in the estate, seems materially to have influenced Lord Neaves in pronouncing the judgment he did in that case. For he says in his note that he does not think the testator, "when leaving a mere liferent to his child, and then directing his trustees after her death to convey the estate to his own nearest heirs, can ever have intended that his daughter should previously have the fee." But when the case went to the Inner House no difficulty was experienced on that head. The interlocutor was altered, and the decision in the case of *Maxwell* v. *Wylie*, 15 S. 1005, in which a precisely similar objection was raised and repelled, was confirmed. But, what is of more importance, as bearing upon the present case, is that the objection founded on the fact that a power to name a residuary legatee was conferred upon the widow, which, it was maintained, necessarily suspended and excluded any right of succession in the daughter till the mother's death, was also repelled, and the fee was held to have vested in the daughter at her father's death, notwithstanding the existence of the contingency by which it was said that vesting was necessarily suspended. That was a decision pronounced, as explained by your Lordship, in circumstances substantially the same as those which here occur. And it is of very material importance to observe, that in the opinion of all the Judges in the Inner House, and of Lord Ivory in particular, the truster's daughter Mrs Balderston was held to have been "vested with the fee *a morte testatoris*," notwithstanding the survivance of his widow—thereby distinctly rejecting the view of Lord Neaves, who, in respect of the power conferred on the widow of naming a residuary legatee, had held that the right of succession was suspended till the widow's death, and that it could not therefore be said that the fee had vested "anywhere by the deed *a morte testatoris*." I have therefore now no difficulty in holding that a similar judgment ought here to be pronounced, because it is, I think, very desirable that on such questions there should not be directly contradictory decisions where that can be avoided.

In such circumstances as those which occur here, and as occurred in the case of *Balderston*, viz., of an ultimate destination to the testator's "nearest heirs," the doctrine that the right to take must be held to be entirely suspended, and vesting excluded during the existence of contingencies, gives place to another rule, viz., that there may be vesting subject to the contingency; and that, I think, is the result of the decision in the case of *Balderston*. It is, moreover, as I have always thought, the main ground on which the Court came to the conclusion in both cases of *Lord* v. *Colvin*, that the estate vested in the heirs *ab intestato* at the death of the truster notwithstanding the existence of various contingent provisions, any one of which, if the events in which they were to take effect had occurred, would have been sufficient to take the estate away from those heirs. The grounds on which the Court there proceeded, as explained by Lord Ivory in the first and by Lord Curriehill in the second branch of that case, appear to me to have been this—That when the residue of an estate is made the subject of contingent bequests, the right of the heirs *ab intestato* of the testator was not thereby absolutely displaced or superseded, but that the term of payment of the residue is merely postponed until it should be ascertained whether any of the contingencies in which it was directed to be given to third parties should eventually happen. Because, to use the words of Lord Ivory, "the conditional bequest was merely a contingent burden upon the succession which had opened *a morte testatoris*;" and Lord Ardmillan in his opinion uses words of similar import, describing the residue as vesting "subject to the conditional provision in the settlement."

That was, no doubt, a case where the estate had become residue as falling to the heirs *ab intestato* through a supervening intestacy, while here the estate has been made the subject of a residuary bequest in favour of those heirs. But if I am right in thinking that by the conception of the will the residue, in the event which has happened, was destined and intended to go to the person who was the heir *ab intestato* at the testator's death, there is then no substantial difference between the cases as regards the question I am now considering—viz., as to whether, because of the contingent provisions, the vesting in the heirs should in the meantime be superseded and absolutely suspended. In the one case the residue is held to belong to the heirs by the operation of the law of intestate succession; in the other it goes to them in respect of the will of the testator; and I can in these circumstances see no sufficient reason why the rule that vesting may take place subject to the contingencies or contingent burdens which affected the residue, should not apply in the one case as well as in the other. And I have the less hesitation in holding that the rule should be here applied, inasmuch as it appears to me to have been acted on substantially by those same Judges in the case of *Balderston*, and because on examining the recent case of *Taylor* v. *Gilbert's Trustees* in the House of Lords, 5 R. 217, to which we were referred in the argument, I find that the decision of the Second Division of this Court appears to have been reversed, as explained in the short but emphatic opinion of Lord Blackburn, mainly in respect of their omission to apply that rule.

Reference was made in the course of the discussion to authorities in the law of England as bearing upon this question. I have thought it right therefore to look into those authorities, and the result of my examination of them is to satisfy me that the law, as there administered, is substantially the same as that which I hold to have been laid down and applied in the case of *Balderston*. In the last edition of Williams on Executors, vol. ii. p. 1127, I find the following passage—"The natural and ordinary meaning of the phrase 'next-of-kin,' is next-of-kin at the death of the person whose next-of-kin are spoken of; and this construction ought to prevail whether the will speaks of the testator's own next-of-kin or of the next-of-kin of some other person, unless the context demonstrates that such a construction would counteract the apparent intention of the testator. And the rule is not varied by the circumstance that the bequest

to the next-of-kin is preceded by a bequest to a tenant for life, or that the bequest is contingent on an event which may or may not happen. Formerly, when the tenant for life was himself one of the next-of-kin, it was at one time thought that the rule was inapplicable. But the law is now settled by a long series of cases, that if there is nothing in the context of the will or the circumstances of the case to control the natural meaning of the testator's words, the next-of-kin living at his death will be entitled, and that if the tenant for life is one of the next-of-kin, or is solely such next-of-kin, he is not on that account to be excluded." In support of this view of the law of England reference is made in the note, among other decisions, to that of *Bullock*, 9 Clark's Apps. 1, as a leading authority; and it appears to me that the statement of the law given in the above passage is fully borne out by that decision, which was the judgment of five very eminent men, pronounced in a Court of last resort on a review of all the earlier cases. Even, therefore, if there had been no authority leading to the same result in Scotland, I should have been disposed to adopt these rules; because they are, I think, sound in themselves, and it is not in any view expedient that on such questions the law in the two countries should be different. And when I find that substantially the same rules were acted on in the case of *Balderston*, I am very clearly of opinion that they ought to be applied in the present case.

Upon the whole, therefore, I have come to the conclusion that, under the destination of residue here in question, a division should be made upon the footing that, in the event which has happened, the residue must be held to have vested in the parties who were the nearest heirs in moveables of Miss Haldane at the date of her death, and that the questions put to us should be answered on that assumption.

Lord Shand—I am of opinion with your Lordship and Lord Mure on the main question in controversy between the parties, and taking the case of course as one of testate succession, that the destination of the residue in the last purpose of the trust to the testator's "own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita*," is a destination to the heirs in moveables at the death of the testator, and not to heirs to be ascertained as at the dates when the residue became payable on the death of Georgina Haldane Bruce and Jane Isabella Bruce respectively.

It appears to me that the effect of the sixth, seventh, and last purposes of the trust, which all relate to the residue of the estate, was to divide or separate the residue into two parts, one to be liferented by each of the testator's grandnieces; and that on the death of each of these ladies respectively without issue the share liferented by her became payable to the testator's nearest heirs in moveables, subject to the provision for a division amongst these heirs *per stirpes* and not *per capita*. According to this view, in the absence of issue of the testator's grandnieces there were two separate terms of payment of residue. It happens that an interval of about a year only elapsed between the death of the one grandniece and the other, but the interval might have been one of many years. In my opinion it was neither the intention nor the effect of the deed that the residue on the occasion of each distribution was to go to those who might be the heirs in moveables at the dates respectively when the liferenters died and the funds became payable, with the result, it might be, of giving the separate halves of the residue to persons entirely different.

Avoiding any detailed analysis of the clauses of the deed, I reach the conclusion that there must be two terms of payment or distribution of residue in the event of there being no issue of the testator's grandnieces, because there is a distinct direction to give a liferent of one-half of the residue to each grandniece, with a power to the trustees to settle the liferent, or part of it, on a surviving husband, with a fee to the issue if any; that there is no provision that the surviving grandniece shall in any event have the liferent of the half of the estate which her predeceasing sister enjoyed, and no direction to accumulate the income of the share enjoyed by the predeceaser, or to delay the payment or division of that share of residue till the death of the other grandniece. The concluding words, "Lastly, in the event of the said Georgina Haldane Bruce and Isabella Bruce dying without leaving issue, then the residue shall be payable to the testator's nearest heirs in moveables," mean, I think, obviously, the said Georgina Haldane Bruce and Isabella Bruce respectively dying without issue.

The destination of the residue, then, is substantially this—as to each half of it—that it is given to the testator's grandnieces in liferent, and to her children, if any, in fee, and failing children to the testator's own nearest heirs in moveables whomsoever. There is a provision also that in case of issue dying before the period of division—being the age of twenty-two—the fund shall be payable to the testator's heirs, but I lay this out of view as immaterial to the question, and for the present I lay also out of view the words "the division always being *per stirpes* and not *per capita*." The question remaining is—Where a testator gives a liferent of part of his estate to a person named, with the fee to the issue, if any, of that person, and declares that failing such issue the part of his estate so destined shall belong or be paid to his own nearest heirs in moveables, does he thereby denote his heirs as at his death, or his heirs to be ascertained as if he had lived till the death of the liferenter without issue—that is, those who may happen to hold the character of his heirs at that time? I am of opinion that the former is the natural and reasonable meaning of the deed. If the testator had added to the words "to my own nearest heirs in moveables," *i.e.*, the heirs who at my death would take my succession if intestate, there could be no question. In my opinion the testator in using the general words "my own nearest heirs in moveables," must be held to refer to his heirs who at his death would take his estate in the case of intestacy, unless he has clearly stated that his heirs, as if he had died at a later date, are intended by him.

It has been maintained that because the contingency of children of the liferenter surviving would exclude the nearest heirs, it follows that when the contingency is purified the heirs are then to be sought for as if the testator had died at that time. I am unable to read the deed in this way. I see no good reason for holding

that because the gift to heirs is made subject to a contingency by which it may be defeated this should alter the ordinary meaning to be attached to the words "my nearest heirs in moveables whomsoever." There is no legal necessity for a construction different from the ordinary construction in consequence of the existence of the contingency, for, as I have said, if the testator had expressly said 'my heirs in moveables at the time of my death,' the contingency would not affect the meaning and operation of these words. Again, in the second stage of the case of *Lord* v. *Colvin*, notwithstanding the existence of various contingencies, any one of which would have defeated the right of the heirs in moveables on these contingencies being satisfied, it was held that the estate belonged not to those who were heirs of the testator at the date when the contingencies became purified, but to the testator's own nearest heirs in the ordinary sense of the term, that is, his heirs at the date of his death. The same view is, I think, supported by the decision in the case of *Balderston*, 19 D. 293, and the case of *Blackwood*, 1833, 11 S. 443 and 699; and the general rule, which is, I think, one of good sense, and not affected by any peculiarity in our law of the construction of a testamentary bequest to heirs, had the approval of a number of Judges of the highest authority in the decision in the House of Lords of the leading case of *Bullock* v. *Downs*, already referred to by your Lordships.

It is maintained that the words of the settlement, "the division always being *per stirpes* and not *per capita*," here create a difference, and point, with reference to a special line of representation, not only to the heirs, but also to the heirs at the date of the payment. I agree in thinking that these words do point to the heirs in moveables, having in view certain lines of representation, but I see no reason for holding that they in any way denote the heirs as at the date of distribution of the fund. The only brother and sister of the testator had predeceased her, but she was survived by descendants of both. The two liferentrices were her grandnieces, being grandchildren of her brother. Her sister, again, left issue, three sons and a daughter, and the children of other six sons and daughters deceased. It appears to me that the meaning of the words in the deed directing a division *per stirpes* and not *per capita*, is that the *stirps* shall be taken as near in relationship to the testator as it can be found, *i.e.*, at her own brother and sister, and accordingly that at each division of residue, the division being *per stirpes* and not *per capita*, the effect was that one-half was appointed to the descendants of her brother Henry Haldane, *i.e.*, to Miss Georgina Haldane Bruce and Isabella Bruce, while the other half was appointed to the descendants of Mrs Witherspoon, that half being divisible into ten parts, a part to each son and daughter alive at the testator's death, and a part to the descendants of each son and daughter who had predeceased. The words *per stirpes* occur in an earlier part of the deed with reference to a legacy of £8000 to the issue of Mrs Witherspoon only, and the truster there explains that she uses the words to refer to her nephews and nieces alive or who have left issue. In that part of the deed they could have no other meaning, for the whole fund there disposed of was given to the Witherspoon branch of the family. But in the residuary clause, where two separate families are made the beneficiaries—the Bruces and the Witherspoons—it seems to me that the purpose and effect of the provision that the division shall be *per stirpes* and not *per capita* is to make the head of each family—I mean the brother and sister respectively of the testator—a *stirps*. It strongly supports this view that any other reading renders the words inoperative and of no use; for if the whole nephews and nieces either alive or who have died without issue are to be held as the *stirpes*, then the Intestate Succession Act operates without these words all that it is said the words are intended to effect. Accordingly, I am of opinion that the heirs in moveables of the testator, to whom the residue as its different parts were set free became payable were—(1) the descendants of the testator's brother Henry Bruce, one part, which part again was divisible into two—one to each of his grandchildren, the grandnieces of the testatrix; and (2) the descendants of the testator's sister Mrs Witherspoon, which part again was divisible into two—one share to each child surviving, and one share to the issue of each child predeceasing, as representing their respective parents.

It was maintained that because the testator's grandnieces were liferenters, and the fee was payable to the testator's heirs in moveables only after the death of the liferenters respectively, it followed that they could not themselves take any part of the fee. But I hold it to be already settled by the law, both of this country and of England, that the fact of a party having been a liferenter of a testator's estate, or part of it, does not affect his right to take the fee, or a share of it, under a destination to heirs in moveables, if the party be the heir in moveables, or one of the heirs in moveables, within the description of those to whom the residue is destined; and the leading case of *Maxwell* v. *Wylie*, and each one of the cases to which I have already referred, including the English case of *Bullock*, is an authority for that view.

Even if the meaning of the words "nearest heirs in moveables" in the residuary bequest be the heirs at the death of the testator, it is still maintained that there was no vesting in the case of Miss Jane Isabella Bruce, because the contingency of her having children during her life was suspensive of vesting in her at all, and the same question arises in regard to her sister as at her death. The argument was founded on the case of *Bell* v. *Cheape*, and on the view that contingency suspends vesting. It appears to me that the case referred to is materially different from the present; and the statement that contingency suspends vesting is one which certainly is not absolutely or universally true. The view has, I fear, been at times given effect to in our law without regard to the nature of the contingency in question, in circumstances which have resulted in defeating in place of giving effect to the intention of the testator; and in saying so I include such cases as that of *Bell* v. *Cheape*, in which it humbly appears to me that the application of the principle to which effect was given resulted in defeating the intention of the testator in favour of a party favoured and named. But it has not been applied by the decision of either Division of the Court in the case of a destination to heirs, and is, I think, inapplicable to that case. If the rule

were as contended for, the second case of *Lord* v. *Colvin* would have been differently decided. Various contingencies there existed under the will of the testator which would have prevented the testator's heirs in moveables taking the succession, and many years elapsed before these contingencies were purified. But these contingencies, any one of which taking effect would have defeated the right, did not suspend vesting, which was held to take place *a morte testatoris*, subject only to this, that the right might be defeated by the contingency occurring. I hold that the same effect results in this case. The case is simply one in which the heirs-at-law of the testatrix take the succession in the same way as in a case of intestacy, subject only to a special provision as to the mode of division being *per stirpes*. The vesting of rights subject to a condition or contingency which may ultimately defeat the right in whole or in part is well known to the law, and it is only a question in each case whether this was or was not the intention of the testator. An express provision in this deed that vesting should take place *a morte testatoris* would of course have the effect of giving the right subject to defeasance, which is, in my opinion, implied though not stated in express terms. Again, a right to a provision often vests in a child born of a marriage, subject to divestiture in part by the birth of succeeding children; or a person may take a vested right by succession, subject to an obligation to devolve the succession in the event of a further and more valuable succession devolving on him. The view to which, I think, effect should here be given is expressed by Lord Blackburn in the case of *Taylor* v. *Gilbert's Trustees* in the House of Lords, and by the Lord Justice Clerk in the same case in this Court, and is also supported by the cases of *Balderston* and *Blackwood* already cited. I am therefore of opinion that not only do the words "my nearest heirs whomsoever" in the deed in question denote the heirs at the death of the testator, subject only to the special provision for representation or succession *per stirpes*, but that the residue vested in these heirs subject only to this, that divestiture would occur in the event of the liferenters respectively having children who survived the age of twenty-two years.

Lord Young—This case regards the capital of the residue of Miss Haldane's estate, which was, under the provisions of her will, liferented by her grandnieces Miss Bruce and Mrs Murphy. Had either of the liferenters left issue, I think the whole capital would have gone to them, although the other died childless, it being otherwise disposed of only in the event of both dying without leaving issue. Miss Bruce died first, and we are asked by the second question whether the one-half of the capital liferented by her then vested, and I am of opinion that it did not, inasmuch as it could not be known while Mrs Murphy survived who would be entitled to it. This answers the fifth question also. With respect to the income of this half after Miss Bruce's death, I am of opinion that Mrs Murphy was entitled to it while she lived, my opinion being founded on the direction to the trustees to pay the whole income "equally to and between" Miss Bruce and Mrs Murphy "in their lifetime respectively so long as both are alive and unmarried." If these words were taken literally, the whole direction would become inoperative on the death or marriage of either lady, but I feel warranted to depart from the letter in order to preserve the sense, which is, I think, that the whole income shall be paid to the two ladies, and, so long as both are alive, divided equally between them. It is not said that on the death of either the survivor shall have the whole, but I think this is implied, in so far as the will does not otherwise provide, and I prefer this implication to intestacy, which is to be avoided if possible, or to accumulating income to fall into residue, for which there is no direction, and which, as matter of implied intention, I think less probable than the implication which I make. Had Miss Bruce been married, this question might have depended on the action of the trustees under the discretionary powers given to them in that event. I have no occasion to consider either that event or the event of her having children. This answers the sixth question.

But these are minor questions. The main questions are the first, third, and fourth—the first and third being alternatives, and the fourth depending on which alternative is affirmed.

If Miss Haldane in the event that happened, viz., the death of both liferenters without issue, died intestate with respect to the residue in question, I need hardly say that I should have answered the first question in the affirmative, it being settled law that intestate estate vests *a morte* of the intestate, however long enjoyment may be withheld. But the parties concurred, I think rightly, in repudiating the notion of intestacy. The will indeed provides, even anxiously, for the very event that has occurred, and although the parties differ as to the construction of it, neither maintains a construction which leads to the same result as intestacy. Thus, on the footing of intestacy, or a construction of the will leading to the same result, it was stated to us by counsel, and is clear from paragraph 10 of the case, that the residue in question is divisible into eleven parts, of which the fourth parties are entitled to ten, the eleventh being divisible between the second and third. In this view, which neither party maintained, but which I believe is taken by some of your Lordships, the dispute regards one-eleventh part of the fund to be divided. But the second and third parties, in whose favour this view is judicially suggested and upheld, claim the half of the fund, and that on the ground that by the will their authors (the liferenters) had a vested right to five and a-half times as much as they would be entitled to by the law of intestate succession. The fourth parties agree that the will is not in harmony with the law of intestacy, although the only difference they allege is that it cuts their adversaries out of the eleventh share of the fund which by that law they would have taken.

I agree with both parties in thinking that their rights are governed by the will, and not by the law of intestacy; and with the second and third parties in thinking that if they (through their authors) have any right at all by the will, it is to the half, and not to the eleventh of the fund. I think they have no right at all, and only mean to say that though I regard their own view of their position as erroneous, I prefer it to that which has been suggested for them by your Lordships in support of a small fraction of their claim.

That view is that the last head of the will

ought to be struck out as effecting no more than would have been effected without it, viz., a resulting trust; and I admit that if testamentary trustees have a fund in hand without instructions the trust results to the testator's representatives, and I am not indisposed to concede that the beneficial right would vest in the representatives *a morte*. But in point of fact the trustees have instructions, and I do not understand it to be maintained by your Lordships, as it certainly is not by the parties, that they must have been equivalent to intestacy in any possible state of the testator's kindred, but only that they were so as it happened, although it might have been otherwise. The proposition must therefore be, that whenever the provisions of a will fortuitously concur with the rules of intestate succession there is intestacy. I cannot assent to this. But I need not dwell on the subject, for the instructions, which were presumably not meant to be a superfluous enunciation of the law of intestate succession, are not merely to find out the testator's heirs in moveables, but having found them, to select those who are the "nearest" to the testator, and to pay to them to the exclusion of those who are more remote. The instructions are not in favour of all the heirs in moveables, but only of the "nearest," the law of intestacy in many circumstances favouring heirs of various degrees of nearness. Here is, I think, a contrast between the will and intestacy of some significance. Further, the division among the "nearest" is directed to be *per stirpes*, while the law of intestacy always requires the division among the "nearest" to be *per capita*. This is another contrast. Either, or both together, would have more or less effect on the result according to circumstances which the testator could not possibly foresee.

But legal heirs in moveables, taking not as such by the public law of succession, but by will, must take *ex testamento et secundum formam doni*, notwithstanding that the law of intestacy necessarily would, or in the circumstances as they happened to exist would, in the absence of a will, have given them as much or exactly the same. Therefore, although I think the will here does not coincide with the law of intestacy, I should not have thought differently of the questions I am considering if it had. They are questions of vesting under a will none the less that the beneficiaries or legatees are the legal heirs of the testator, who would have taken *ab intestato* all she gave them, and indeed all she had to give if there had been no will.

If I read the will as terminating with the provision of a liferent to the grandnieces, and the fee to their children *nascituri*, all beyond being left to the law of intestate succession, whether silently or by superfluous invocation, I should be disposed to think that this imported a fee to the grandnieces to the exclusion of even their own children. There might be an obstacle to the application of this rule of our law while both lived, in respect of the possible rights of the longest liver and her issue. But what of the survivor Mrs Murphy? The liferent (of the whole as I think—of the half certainly) was to her, and the fee to her children *nascituri*, and with no provision *ultra* in the will—at least none which might not be struck out as simply an unmeaning and inoperative superfluity. There is the law of intestacy to be sure, but that being public law always exists, and it would be a novel proposition that the law of intestacy hindered the application of the rule that a liferent to a parent (*i.e.*, a possible parent), with the fee to her children *nascituri*, means a fee in the parent, for if so, it could never operate, the hindrance being unceasing. I rather think that the view of intestacy has been insufficiently considered with reference to its result, which I should say, as at present advised, is not to give an eleventh share of the fund to be divided between the second and third parties, but to give the whole fund to the second parties.

But regarded as a question (for there is truly only one) of vesting under the will, it is really so simple as this—Whether the uncertain event of two ladies dying without leaving issue adjected to a legacy (or bequest of residue) as the condition of payment is a condition exclusive of vesting so long as it is in suspense? I call this a simple question, for all our authorities, text writers, and decided cases answer it in the affirmative. The rule of law has been fixed and familiar as far back as our records reach. It is perhaps unfortunate that the word "vest" and its conjugates, of which we make such frequent use, are so figurative. But as we use them they have a very real and practical meaning, insomuch that to predicate vesting is to predicate a right of property in the thing vested, transmissible by, or through, and in right of the person in whom it is vested. A question of vesting is indeed always a question of capacity to transmit, and, so far as I know, never had or can have any other practical significance. Thus, in the case before us, the question of vesting in the liferenters is no otherwise material than as the legal criterion of property belonging to them and transferable to their representatives. If they were vested with the property of the residue in dispute (or part of it), it will pass by their wills, and otherwise not. The rule of our law to this effect has been as long and firmly settled as any rule I could instance. To go no further back than the beginning of the century, I may refer to the statement of the principle from the Bench in the case of *Graham* v. *Hope*, Feb. 17, 1807, as reported in the Faculty Collection thus—"No principle is more clearly established than that a will can only convey property which is vested in the testator at the time of his death." This statement of the law has been often cited, and always with approbation. Coming down forty years, we have the case of *Bell* v. *Cheape*, in which it was affirmed by the whole Court, *nemine contradicente*, that a bequest of residue conditioned on the death of a liferenter without issue did not vest *pendente conditione*, and that the legatee surviving the testator but predeceasing the liferenter, took nothing transmissible by will or otherwise through her. These two propositions were, indeed, as the report of the case shows, considered indisputable. The specialty which induced a reference to the whole Court was that the bequest was to the legatee, his heirs, executors, and assignees, which, it was argued on plausible grounds, implied an exceptional power to assign before vesting. The Court, by a majority of 12 to 1, rejected this argument, and applied the principle that before vesting there is no capacity to transmit, refusing to admit an exception even when the legacy is to assignees.

Holding the opinion that nothing passes by will which was not the testator's property at

death, I heard with some surprise the view that the claim of the second and third parties is independent of any question of vesting, it being sufficient to support it that the liferenters by whose wills and in whose right they claim were at the testator's death of the class to whom the bequest of residue is made. If they were not of that class, *cadit questio* indeed, but with the result that the second and third parties take nothing, their authors not being legatees. But if they were of the class, and so legatees as clearly as if they had been named—and they could not be so more clearly—their capacity to transmit, and so the right of those who claim under their wills, depends on the question of vesting and nothing else.

After what I have said, it is almost superfluous to add that the bequest of residue in question being conditional on the death of the liferenters without issue, did not vest *pendente conditione*, or until the death of both without issue, and that I therefore answer the first question in the negative and the third in the affirmative. It follows, of course, that in my opinion neither Miss Bruce nor Mrs Murphy had any right of property in the residue which is the subject of the bequest, and that the second and third parties take no right in it by their wills.

We were referred to several English decisions, which I need hardly say are not authorities with us. Nor on a subject where our law has been long and firmly settled by our own authorities, am I disposed to refer to English decisions for light, especially when I think that the law of England differs from ours. By the common law of Scotland vesting is absolutely and universally essential to the capacity to transmit, so that (even in intestacy) so long as confirmation was necessary to vest the personal, and service to vest the real estate, the heir in moveables or in heritage, dying without confirmation or service, could transmit nothing, and the estate remained *in bonis, in testamento*, or *in hæreditate*, as the case might be, to be taken up by the next in succession or right. The law was changed by statute in 1823 with respect to moveables, and in 1874 with respect to heritage. But the law with respect to conditional bequests remains unchanged. These vest not *pendente conditione*, and so till the condition is purified give no right of property capable of transmission by the conditional legatee, but remain *in testamento*. I rather think the law of England is different, to this extent at least, that the conditional legatee may transmit subject to the contingency, and so that his transferee or representative will on the purification thereof take as he would have done had he survived. I venture to suggest that this difference explains the case of *Bullock*, for I have to remark that there was in that case no question made of the predeceasing son's capacity to transmit provided he was of the class to whom the bequest was made. That our law is otherwise settled I need only refer to the case of *Bell* v. *Cheape* to show, not as the original authority for it, but as the strongest possible testimony that it had been so long settled that no one at the bar or on the bench thought it disputable.

If it is thought that we are indebted to the law of England or the acuteness of English lawyers for the doctrine that a man's legal heirs are his kindred of the required propinquity existing at his death, I venture to say it is a mistake. We never had any other doctrine. Accordingly, a legacy to the legal heirs of A is a legacy to those who are so at A's death, exactly as if they had been known beforehand and named. It is true, nevertheless, that such of them as predecease the testator will pass no share of the legacy to their representatives. So also if the legacy be conditional, those of A's heirs who die *pendente conditione*, that is before vesting, will transmit nothing to their representatives by our law, however it may be in England. Nor is the case of a legacy to the testator's own legal heirs at all different, except that they must of necessity survive the testator, and so certainly take if the legacy is absolute. But if it is *sub conditione*, the question (to be decided by our law) will be, whether the condition excluded vesting while it was in suspense, and if it did, the legatees, *i.e.*, the testator's legal heirs, dying *pendente conditione* will transmit nothing. The question is not who are the heirs referred to in the bequest, for it would have been all one had they been named, but whether those predeceasing took a vested right transmissible through them to their representatives. In England, where the capacity to transmit exists notwithstanding of a contingency which would have hindered it with us, it is a question of interest whether the testator meant the legacy to go only to those of his heirs who might survive the purging of the contingency. By our law the legacy goes only to those who so survive, predeceasers transmitting nothing, unless the testator has signified a contrary intention.

Finding no difficulty in disposing of the case as it is presented to us, I have so taken it and answered the questions accordingly. But there is another view on which I should have reached the same conclusion, viz., that Miss Bruce and Mrs Murphy were not of the number of the testator's nearest heirs in moveables, in the sense in which the expression is used by her in the bequest of residue. I assume that the expression is capable of including them if so intended, and that in order to exclude them it must be shown from the will itself that it was the testator's intention to exclude them. I think the will does show this. They were in fact two of her heirs (although not of the nearest), and she provided for them by special legacies and a liferent of residue to such extent as she desired. She then directed her trustees, after the death of those two of her heirs in moveables, to divide the capital which they had liferented among her heirs in moveables. She thus rendered it impossible that these two should participate in the division which she ordered; and I should therefore have thought it reasonable to impute to her the intention that they should not. It would have been otherwise had the impossibility been fortuitous, but here the impossibility was certain from the first, and created no doubt deliberately, by the testator herself. Now, in a direction to divide I am disposed to construe the term "heirs" as limited to those who, having regard to the terms of the direction, are capable of sharing in the division, or at least as excluding those whose participation is by that direction impossible. I might have thought otherwise, though I have no occasion to decide the point, had it been our law, as it may be, and I rather think is, the law of England, that a legatee may transmit to others a legacy which was

never vested in himself, and which he could not himself possibly take. In construing a Scotch will I can attribute no such notion to the testator.

It is proper to observe that Miss Bruce and Mrs Murphy were not in fact of the number of the testator's "nearest heirs in moveables" at her death, although they possibly might have been. As it happened, her nearest heirs were her nephew and three nieces by her sister Mrs Witherspoon, and as I cannot, for the reasons I have stated, disregard the word "nearest" as superfluous or insensible, I should on this ground, and apart from other considerations, have been prepared to prefer them to the grandnieces. Nor does the direction to divide *per stirpes*, and not *per capita*, make any difficulty, for it was impossible that the testator could foresee the state of her kindred at the period of division, and it is of daily experience that such general directions are inoperative in the event that happens.

In order to exhaust the topics discussed I ought to add that I assent to the proposition that a bequest to the legal heirs of the testator operates in favour of those who are so when it takes effect, and that no right passes to the representatives, legal or voluntary, of those who have predeceased. But as a bequest takes effect, as regards the ascertainment of those in whose favour it operates, at the period of vesting, although possession should be postponed—as for instance by a liferent—I fail to see the utility of the proposition; for, accepting it as I do, the bequest we are considering will, according to it, go to the testator's heirs at her own death or at the death of Mrs Murphy, as we shall decide that it vested at the one period or the other—that is to say, according to the answer we return to the first and third questions in the case. If, indeed, we should hold that Miss Bruce and Mrs Murphy are not comprehended by the words "my own nearest heirs in moveables," in the sense in which they are used in the will, neither they themselves nor their representatives can take at all, for they were mere legatees, and I have stated my reasons for favouring this construction. But should this construction be rejected, and the first question be answered in the affirmative, it follows clearly, in my opinion, that these ladies surviving the testator, took a vested right of property in the subject of the bequest, which has passed to the second and third parties as their representatives.

The practical result of the opinion which I have expressed is that the whole residue vested in the testator's nearest heirs in moveables surviving at the date of vesting, viz., the death of Mrs Murphy. These are, as I understand, the testator's nephew and three nieces by her sister Mrs Witherspoon. Being of one *stirps*, the division must necessarily be *per capita*. The children of six nephews and nieces deceased being more remote are excluded. This answers the fourth question and exhausts the case, for the eighth question was not brought under our notice by the parties.

Lord Craighill—I concur in the opinion of Lord Young. Through his Lordship's kindness, I have had an opportunity of considering the opinion which he has read, and as I concur not merely in the results of that opinion, but in its reasons, I have thought it unnecessary to write, as I now think it unnecessary to say, anything further on the questions raised in this case.

When the case came before the First Division, after the advising, Counsel for the second parties cited the Judicature Act 1825 (6 Geo. IV. cap. 120), section 23, which provided that where one Division of the Court consulted the other, "the judgment shall in all cases be pronounced according to the opinion of the majority of the Judges present;" and argued that the opinion of Lord Deas could not competently be considered, his Lordship having been absent when the case was advised.

The Lord President referred to the case of *Mitchell* v. *Canal Basin Foundry Company*, February 5, 1869, 7 M. 480, and thereafter the Lords of the First Division, following that case, pronounced this interlocutor:—

> "In conformity with the opinion of a majority of the Seven Judges present at the hearing on the Special Case (being the four Judges of the First Division and three of the Second Division), answer the first and second questions in the negative and the third question in the affirmative, and with regard to the fourth question, find that the residue of the estate of Miss Haldane vested at the death of Mrs Murphy in the descendants of Margaret Haldane or Witherspoon, reserving the question amongst which of the descendants of the said Margaret Haldane or Witherspoon, and in what proportions, the said residue is divisible: Find, in answer to the fifth question, that the half of the residue liferented by Miss Bruce was divisible at the death of Mrs Murphy; answer the sixth question in the negative; find it unnecessary to answer the seventh question; and of consent answer the eighth question in the affirmative."

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