you are to ascertain whether new buildings have been put up on each separate part. You must regard the land taken under the Act of 1873 as a whole, debit the company with the rent of the houses as a whole as they stood at the date of the Act, then credit them with the value of the buildings put up since on the land, and deduct the sum so credited from that debited. This is precisely what the pursuer here has done.

It would be out of the question to credit the company not only with the value of buildings put up on the ground taken under this statute, but also with the increase in value during the years in question of the general undertaking; on no reasonable construction of the statute could it be possible to do that.

I think that our decision in this case is precisely on the lines of the case of *Hall* v. *The Glasgow Union Railway Company.*

The Court adhered.

Counsel for Pursuer — Mackintosh — Lang. Agents—W. & J. Burness, W.S.

Counsel for Defenders--Trayner--R. Johnstone. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

SPECIAL CASE—M'ALPINE'S TRUSTEES.

Trust-Deed—Residue—Clause of Survivorship—Vesting — Specific Bequest — Conditio si sine liberis

A testatrix directed her trustees and executors to make payment of certain legacies, and "after the death of the longest liver" of herself and her sisters "to pay, assign, and dispone" the residue in favour of three nephews, equally between them, "and that on their respectively reaching the age of twenty-one years complete." In the event of any of the nephews dying before reaching twenty-one his share was to accresce to the survivors. Two of the nephews having died after reaching twenty-one, but before the longest liver of the sisters of the testatrix —*held* (*diss.* Lord Deas) that their shares of residue had vested in them on attaining the age of twenty-one.

The *conditio si sine liberis* is not applicable to a bequest of corporeal moveables, such a legacy not being of the nature of a provision.

A testatrix by her settlement directed her trustees to pay and deliver certain legacies and bequests without deduction for legacy-duty. By a codicil she recalled a particular legacy and bequeathed the subject of it to other legatees without mentioning legacy-duty. The codicil, however, declared that it was in no way to infer a revocation of the settlement, which was to stand in full force with the alteration made thereon by it. *Held* that the legatees named in the codicil were not liable to pay the legacy-duty.

This was a Special Case relating to the construction of the settlements of Mary M'Alpine, Helen M'Alpine, and Margaret M'Alpine, daughters of the deceased Reverend Walter M'Alpine, minister of the gospel at Culross. Mary M'Alpine died upon 9th January 1860, Helen M'Alpine upon 18th June 1871, and Margaret M'Alpine upon 6th April 1881.

By her deed of settlement, registered in the Books of Council and Session in 1860, Mary M'Alpine disponed the whole of her estate, in the event of her dying unmarried, to and in favour of her sisters Margaret and Helen, for their life-rent use allenarly. She also directed her executors to "make payment of the following legacies which I hereby leave and bequeath to the persons after named." With regard to the residue she provided—"I hereby, after the death of the longest liver of me and my said sisters, appoint my said executors, or trustees to be named and appointed by me as before mentioned, to pay, assign, and dispone the same to and in favour of my nephews Walter, Charles Hunt, and John William M'Alpine, equally between them, share and share alike, and that on their respectively attaining the age of twenty-one years complete; and I hereby declare that if any one or more of my said nephews shall depart this life before he or they shall attain the age of twenty-one years, then the share or shares of him or them so dying shall go and accresce to the survivors or survivor equally amongst them: Providing, nevertheless, that if any of my said nephews so dying shall have left lawful issue, then such issue shall have right to the share or respective shares which their deceased parent or parents would have been entitled to."

By joint deed of trust and nomination dated 1846, and registered 21st July 1881, Mary M'Alpine, Helen M'Alpine, and Margaret M'Alpine disponed their whole means and effects to the parties mentioned therein, as trustees for the uses and purposes referred to in the said deed and in their respective deeds of settlement.

Helen M'Alpine, who died in 1871, left a settlement dated in 1864, by which she revoked a deed of settlement which she had executed in 1846, and conveyed her whole estate to trustees for the purposes mentioned in the deed. The residue of her estate was directed to be conveyed to her nephews Charles Hunt M'Alpine and John William M'Alpine, equally between them, share and share alike; but it was declared that "if either of them shall predecease the longest liver of us [that is, herself and her sister Margaret] without leaving lawful issue, then the share of such one so predeceasing shall go and accresce to the survivor, but if either of them so predeceasing shall have left lawful issue, then such issue shall be entitled equally, if more than one, to the share which their deceased parent would have been entitled to if alive."

The first codicil to this settlement, as to which one of the questions in the present case arose, was in the following terms:--"I, Miss Helen M'Alpine, within designed, do hereby revoke and recall the legacy of my silver plate bequeathed by the foregoing deed of settlement to my niece Susan Alexander M'Alpine or Goodwyn, now wife of George Stuart, Esq., residing at No. Melville Street, Edinburgh, and also of my third part or share of the whole furniture, linen, books, and other effects in the house No. 12 Melville Street,

Edinburgh, where I reside, contained in my said deed of settlement before written, dated 25th June 1864; and I do hereby, after the death of the longest liver of me and my sister Margaret M'Alpine, leave and bequeath my said third part or share of the whole silver plate, furniture, linen, books, and other effects belonging to me in the said house, to my nephews Charles Hunt M'Alpine and John William M'Alpine, sons of my late brother James M'Alpine, equally between them, share and share alike, or to the survivor of them."

By the eighth purpose of her deed of settlement Helen M'Alpine directed her trustees to pay over and deliver any legacies bequeathed by her in full without any deduction or abatement whatever for legacy or succession-duty or otherwise.

Margaret M'Alpine, who died in 1881, left a settlement dated 1864, with various codicils, which were in terms similar to those of her sister Helen; and in particular the same provision was made by both sisters as to their share of the plate, furniture, &c., in the house in Melville Street, and with reference to the payment of legacies without deduction of legacy or succession-duty.

Of the three nephews referred to in Miss Mary M'Alpine's settlement, one, Walter M'Alpine, died abroad in 1862 after attaining twenty-one years of age, unmarried and intestate.

Charles Hunt M'Alpine, another nephew, died in New Zealand in 1874, after attaining twenty-one, leaving a widow Mrs Mary Louise M'Alpine and one child Walter Kenneth M'Alpine.

John William M'Alpine, the third nephew, also attained twenty-one. He survived all three testatrices.

The parties to this case were (first) John William M'Alpine; (second) the niece Mrs Susan Alexander M'Alpine or Steuart, mentioned in the codicil of Miss Helen M'Alpine, with the consent and concurrence of her husband; (third) the trustees and executors of Charles Hunt M'Alpine, acting under his said last will and testament and relative codicil; (fourth) the guardians nominated and appointed by the said last will and testament of Charles Hunt M'Alpine to his only child Walter Kenneth M'Alpine; and (fifth) the whole surviving and acting trustees under the testamentary settlements of the said Mary, Helen, and Margaret M'Alpine.

The first question on which the parties desired the opinion of the Court related to the date of vesting of the shares of residue of Miss Mary M'Alpine's estate.

It was contended, on behalf of the second and third parties above named, that vesting took place as soon as the residuary legatees under Miss Mary M'Alpine's settlement attained the age of twenty-one years complete, and that they were therefore entitled, along with the first party John William M'Alpine, as the representatives of Walter M'Alpine, to the third part or share of the said residue bequeathed to him by Miss Mary M'Alpine.

On the other hand, it was contended on behalf of John William M'Alpine, the first party, that he was entitled to the whole of this third part or share of the residue, as the only one of the residuary legatees named who survived the death of the last survivor of the testators Miss Margaret M'Alpine, who liferented the whole residue.

It was also contended by the third parties that they were entitled, as the representatives of Charles Hunt M'Alpine, to his share, or one third part of the said residue; while it was contended on the other hand by the fourth parties that vesting did not take place until Miss Margaret M'Alpine's death, and that this share belonged to their ward Walter Kenneth M'Alpine.

The remaining questions related to the settlements of Miss Helen and Miss Margaret M'Alpine.

It was contended by the first party, John William M'Alpine, that he was entitled to the whole of the bequests of plate, furniture, and other effects bequeathed by the first codicils to these settlements, dated 16th February 1867, as his brother Charles Hunt M'Alpine predeceased the survivor of the testators, and that in any event he was entitled to the whole of the subjects falling under the bequest in the first codicil of Miss Margaret M'Alpine; while it was contended by the fourth parties that they are entitled, on behalf of their ward Walter Kenneth M'Alpine, as coming in place of his father Charles Hunt M'Alpine, to one half of the said bequests. In the last place, in the event of the first party John William M'Alpine being held entitled to the whole of the said bequests of silver plate, furniture, &c., it was contended by him that he was not liable to payment of legacy-duty thereon; while it was contended by the fourth parties, on behalf of Walter Kenneth M'Alpine, that legacy-duty was payable by the legatee, and not out of the residue of the estate.

The following questions were submitted for the opinion of the Court:—"(1) Did the third part or share of the residue of Miss Mary M'Alpine's estate, destined to Walter M'Alpine, vest in him on his attaining the age of twenty-one years complete, and is it now payable to his representatives? Or (2) Did the said third part or share of the residue of Miss Mary M'Alpine's estate lapse by Walter M'Alpine predeceasing Miss Margaret M'Alpine, and has it now vested in and become payable to the first party John William M'Alpine, the only one of the residuary legatees who survived Miss Margaret M'Alpine? (3) Did the third part or share of the residue of Miss Mary M'Alpine's estate, destined to Charles Hunt M'Alpine, who predeceased Miss Margaret M'Alpine, vest in him on his attaining the age of twenty-one years complete, and is it now payable to the third parties as his testamentary trustees? Or (4) Is the said third part or share of the said residue payable to the fourth parties for behoof of their ward the said Walter Kenneth M'Alpine, as coming in place of his father? (5) Is John William M'Alpine entitled to the whole silver plate, furniture, linen, books, and other effects bequeathed (1st) by the codicil dated 16th February 1867, to the settlement of Miss Helen; and (2d) by the codicil, dated 16th February 1867, to the settlement of Miss Margaret M'Alpine, as the only one of the legatees thereof who survived Miss Margaret M'Alpine? Or (6) Is Walter Kenneth M'Alpine entitled to one-half of both or either of the said bequests as coming in place of his father Charles Hunt M'Alpine? (7) In the event of John William M'Alpine being held entitled to the whole of both or either of the said bequests of silver plate, furniture, &c., is he liable to payment of the legacy-duty thereon?"

Argued for the first party—As he alone survived the death of the survivor of the testators, neither Walter M'Alpine nor the representatives of Charles Hunt M'Alpine could take any share of the resi-

due of Mary M'Alpine's estate which had been liferented by Margaret M'Alpine, the survivor of the sisters. There could be no vesting here until the death of the last liferentrix. By the terms of the deeds it was expressly provided that the legacies were to be paid free of legacy-duty.

Argued for the second and third parties—It was clearly the intention of the testators that vesting should take place as soon as the residuary legatees attained respectively the age of twenty-one years. If effect was given to this contention, then Walter and the representatives of Charles Hunt M'Alpine were entitled to a share of Mary M'Alpine's estate. As the non-attaining of twenty-one years was the sole condition upon which the clause of survivorship was to apply, and both Walter and Charles Hunt M'Alpine had reached that age, it was in direct opposition to the intention of the testators that vesting should be delayed until after the death of the longest liver of the liferenters.

Authorities—*Donaldson's Trustees* v. *M'Dougall*, July 20, 1860, 22 D. 1527; *Young* v. *Robertson*, Feb. 11, 1862, 4 Macq. 314; *Stodart's Trustees* v. *Stodart*, March 5, 1870, 8 Macph. 667; *Bryson's Trustees* v. *Clark*, Nov. 26, 1880, 8 R. 142; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H of L.) 51; *Melrose's Trustees*, July 15, 1869, 7 Macph. 1050; *Laing* v. *Barclay*, July 20, 1865, 3 Macph. 1143; *Barber* v. *Findlater*, Feb. 6, 1865, 13 Sh. 422; *Mackenzie* v. *Dickson*, March 11, 1840, 2 D. 833.

At advising—

Lord President—We have before us in this Special Case the settlement of three maiden ladies, sisters, who resided in Melville Street of this city. Each of them has a separate settlement, and there is in addition a deed of trust and nomination which was executed by the whole three. It is not, however, necessary to consider these settlements as a whole in order to dispose of the questions raised in this Special Case.

The first of these questions has reference to the disposal of the residue of Miss Mary M'Alpine's estate, and the question put to us is—[*His Lordship here read questions* 1 *and* 2 *above quoted*]. Miss Mary M'Alpine died in 1860, survived by her two sisters, Miss Helen M'Alpine, who died in 1871, and Miss Margaret M'Alpine, who died in 1881. The residue of Miss Mary M'Alpine's estate was destined to her three nephews, Walter, Charles, and John William M'Alpine, and as regards them it is stated that Walter M'Alpine, the nephew whose share is in dispute, died in 1862 after attaining the age of twenty one years, unmarried and intestate. If the estate vested in him in consequence of his surviving the testator and attaining twenty-one years, then the first question falls to be answered in the affirmative, but if, on the other hand, his predeceasing the surviving liferenter prevented his share from vesting, then the second question will have to be answered in the affirmative. Miss Mary M'Alpine's settlement is dated the 22d November 1860, and she there dispones to and in favour of her sisters Margaret and Helen, for their liferent use allenarly, the whole of her estate; and then follows this clause —"And after the death of the longest liver of the said Margaret and Helen M'Alpine, I hereby direct my executor or executors after named, and such person or persons as I may hereafter name to be executors and trustees in any codicil or other deed which I may hereafter execute, to make payment of the following legacies which I hereby leave and bequeath to the persons after named;" and then follow certain specified legacies. The only other clause of this deed of importance as affecting this question is the clause disposing of the residue, on the construction of which the whole question depends. It is in these terms—"I hereby, after the death of the longest liver of me and my said sisters, appoint my said executors, or trustees to be named and appointed by me as before mentioned, to pay, assign, and dispone the same to and in favour of my nephews Walter, Charles Hunt, and John William M'Alpine equally between them, share and share alike, and that on their respectively attaining the age of twenty-one years complete." And then follows a clause of survivorship to which I shall have to advert more particularly bye and bye; but taking the two clauses together, viz., that which deals with the special legacies and that which disposes of the residue, there is an important contrast between them. In that which deals with the special legacies there is not only a direction to pay after the death of the longest liver of the liferenters, but the testatrix also uses the words "which I hereby leave and bequeath," whereas in the residue clause there are no words of gift but only a direction to pay. If the matter had stopped there it might have been a question of some difficulty whether it was not intended to postpone vesting until after the death of the longest liver of the liferenters. I am not sure whether words such as these have by themselves been held to import a postponing of vesting, but it is certainly always of importance where there are no words of gift except an order to pay, and that circumstance is in the present case undoubtedly somewhat fortified by the contrast which I have pointed out. It is very seldom that the single element is present by itself. There are always other parts of the deed either fortifying or overcoming it, and this deed is no exception to the general rule. In this case it is the clause of survivorship which, I think, removes all doubts as to the testator's intentions, and it is in these terms—"And I hereby declare that if any one or more of my said nephews shall depart this life before he or they shall attain the age of twenty-one years, then the share or shares of him or them so dying shall go and accresce to the survivors or survivor equally amongst them: Providing, nevertheless, that if any of my said nephews so dying shall have left lawful issue, then such issue shall have right to the share or respective shares which their deceased parent or parents would have been entitled to." Now, here is an express clause of survivorship and it specifies in the clearest terms upon what condition and upon what only the right of the survivor shall accresce. It is on condition that any of the nephews shall die before attaining twenty-one years. That is the sole case in which the right of survivorship is given to the others. It is contended by the party maintaining the negative upon the first question that there is enough here to show that the testatrix intended to create a right of survivorship which was to operate to the effect that the money was not to be paid until after the death of the last liferenter, and that although she specified the non-attainment of twenty-one years of age as the sole condition upon which the clause of survivor-

ship should apply, she meant further that it should not be applied until after the death of the longest liver of the liferenters. But I cannot adopt such a construction, which is quite opposed to the words of the deed. If she had intended that the two conditions should be enforced—1st, that the person taking should survive the longest liver of the liferenters, and 2d, that he should attain the age of twenty-one—she would have expressed that in the clause of survivorship. It is the omission of the one condition, and the clear expression of the other, which leads me to say that the latter alone must be applied, viz., that the beneficiary shall survive the testator and have attained the age of twenty-one. If that be so, then vesting takes place, and the first question falls to be answered in the affirmative and the second question in the negative.

The next point is raised by the third and fourth questions, which still have reference to the estate of Mary M'Alpine, but which do not refer to Walter M'Alpine but to Charles Hunt M'Alpine. He attained the age of twenty-one years, but died in 1874 prior to the decease of the longest liver of the liferenters, leaving a widow and one child, Walter Kenneth M'Alpine. The question is whether his share vested; and it is thus put--[*His Lordship here read questions* 3 *and* 4 *above quoted*]. Now, it follows from the answer which we have given to the first and second questions that the third question must be answered in the affirmative, because the same conditions apply here as in the case of Walter M'Alpine.

But the fourth raises this independent point. It would have been right for us to answer it in the affirmative if the share had not been vested, but it cannot be so if it did. Therefore question 3 must be answered in the affirmative, and 4 in the negative.

The fifth question relates to the settlement of Miss Helen M'Alpine. She died in 1871, and the question relates to her share of the silver plate, &c., and is in these terms—[*His Lordship here read question* 5]. Now, this depends upon the construction of the words of gift contained in two deeds. In her codicil of 16th February 1867 Miss Helen M'Alpine recalled the legacy of the silver plate, furniture, &c., which she had previously bequeathed to her niece Susan M'Alpine, and in place thereof "I do hereby, after the death of the longest liver of me and my sister Margaret M'Alpine, leave and bequeath my said third part or share of the whole silver plate, furniture, linen, books, and other effects belonging to me in the said house to my nephews Charles Hunt M'Alpine and John William M'Alpine, sons of my late brother James M'Alpine, equally between them, share and share alike, or to the survivor of them;" and in Miss Margaret M'Alpine's codicil to her settlement words substantially, if not literally, the same are made use of. Now, the only ground upon which Walter Kenneth M'Alpine, the child of Charles Hunt M'Alpine, could claim his father's share of the legacy would be that he was entitled to it under the *conditio si sine liberis*. If that does not let in his claim, nothing else will do so. Now, I hold it to be quite settled in law that to a legacy of this kind the *conditio* does not apply. The bequest is to two parties and the survivor, and if the one dies the other is to take the whole. We had the question before us in the recent case of *Brown's Trustees* (reported *infra*, p. 557), and we decided it then without any difficulty.

The only remaining question is the seventh, and that perhaps is attended with some little difficulty, although I cannot say that in the end I have had any hesitation on the subject. It is—[*His Lordship here read question* 7 *above quoted*]. That depends, in the case of Miss Helen's share, on the construction of her settlement along with the codicil which gives the share to her two nephews. There is first the original bequest to her niece Susan, and in her settlement she gives directions "to pay over and deliver" the said legacies, and to invest the said sums of money in full, without any deduction or abatement whatever for legacy or succession-duty or otherwise. If the bequest of furniture and silver plate to her neice Susan M'Alpine had remained unrecalled, it could not be disputed that she would be entitled to receive payment of it without any deduction whatever, the words being a direction to pay over and deliver. But it is not under this deed that John William M'Alpine claims, but under the codicil in which Miss Helen recalls the legacy to her niece and gives that share to her nephews Charles and John William. But she says nothing about delivering the legacy free of succession-duty. The only ground upon which it can be maintained that that condition is applicable to the new legacy is that there is a particular declaration inserted in the codicil to the effect "that these presents shall in no way infer revocation of my said deed of settlement before written, but that the same shall stand in full force with this alteration thereon." The plain meaning is that everything shall stand except in so far as altered by codicil, and that is equivalent to saying to the executors—"You shall put Charles and John in place of Susan in reference to the plate, while in all other respects the deed is to stand."

Therefore as regards the legacy of plate to John William M'Alpine, I think that it is only reasonable to apply the exception, and therefore to hold that he is entitled to receive these bequests without any deduction for legacy-duty, and that being so question 7 falls to be answered in the negative.

Lord Deas—In this case three maiden ladies, Misses Mary, Helen, and Margaret M'Alpine, daughters of the Rev. Walter M'Alpine, who predeceased them, executed *mortis causa* deeds of settlement by which they respectively conveyed their whole means and estate, heritable and moveable, to certain trustees, whom they also named their executors.

The earliest in date of these deeds which we have now to consider, and at the same time the most important as regards the value of the residuary estate thereby disposed of, is the deed of Mary, which was executed on 22d April 1846. That deed sets out by assigning and disponing, in the event of her dying unmarried, "to and in favour of Margaret and Helen M'Alpine, my sisters, and the longest liver of them in liferent, for their liferent use thereof allenarly," her whole property, heritable and moveable. It then bequeaths certain money legacies and annuities, which are directed to be paid by the trustees and executors. The deed then proceeds thus—"And with regard to the free residue and remainder of my estate and effects, heritable and moveable,

real and personal, above conveyed, I hereby, after the death of the longest liver of me and my said sisters, appoint my said executors or trustees to be named and appointed by me as before-mentioned to pay, assign, and dispone the same to and in favour of my nephews Walter, Charles, and John M'Alpine, equally between them, share and share alike, and that on their respectively attaining the age of twenty-one years complete: And I hereby declare that if any one or more of my said nephews shall depart this life before he or they shall attain the age of twenty-one years, then the share or shares of him or them so dying shall go or accresce to the survivors or survivor, equally amongst them, providing nevertheless that if any of my nephews so dying shall have left lawful issue, then such issue shall have right to the share or respective shares which their deceased parent or parents would have been entitled to."

The question we have to decide under the clause or clauses just quoted is, When did the residuary estate of the testatrix vest in the beneficiaries?

It was ably contended by Mr Gillespie, on behalf of the first party, that there could be no vesting so long as any of the three sisters—that is, the aunts, who were the liferenters—were alive.

On the other hand, Mr Gloag, for the 2d and 3d parties, contended not less ably that vesting took place in each of the three nephews as they respectively attained majority, altogether irrespective of whether all of the three aunts were then dead or not. The dates of their deaths were as follows—Mary died in January 1860, Helen in June 1871, and Margaret in April 1881.

It will be noted that the means and estate dealt with in the deeds of the aunts consisted wholly of means and estate which, being her own, each of them were entitled to dispose of onerously or gratuitously at her pleasure. The single and overruling principle of construction applicable by our law to *mortis causa* deeds dealing with such means and estate is to discover, and this mainly from the terms of the deed, what was the intention of the testator or testatrix, and then as nearly as practicable to give effect to it. We acknowledge no other rules or principles of construction of *mortis causa* deeds whatever.

In putting to myself the question whether the testatrix in this case meant her residuary estate to vest in the beneficiaries while one or more of her sisters were yet alive, I could not help being greatly struck by the words with which she begins the clause or set of clauses by which alone it is admitted on all hands that the bequest of residue to her three nephews is made. The words I refer to are—"I hereby, after the death of the longest liver of me and my said sisters, appoint my said executors," &c., to pay, assign, and dispone the same, that is, her residuary estate, heritable and moveable, to and in favour of her three nephews named, equally among them.

It is only after the death of the longest liver of the testatrix and her sisters that anything whatever is appointed to be done by the trustees and executors either in the way of payment, assignation, or anything else. The death of the survivor of the sisters is thus, I apprehend, the earliest date at which vesting can possibly take place. The trustees and executors have no more power or authority to do anything in the way of paying, assigning, &c., till the specified event has occurred than if they had been expressly prohibited from doing so. To pay or assign to the nephews or any of them so long as any one of the sisters shall be alive would be to act directly in the face of the deed, or—what would be equally contrary to all sound principle—to attribute no meaning or effect to the leading words of it, and thereby virtually to strike them out of the deed. The rule, on the contrary, is to assign a meaning if possible to every word, which there is no difficulty in doing here; because, holding the vesting as regulated by the first words of the clause quoted, the words which follow fall naturally and quite consistently to import that although vested at the death of the last survivor of the aunts the shares shall not be payable unless or until the nephews have respectively attained the age of twenty-one years complete.

Not only are there no words of gift apart from the direction to pay, assign, and dispone, but these words themselves are parts of a direction or appointment which is not to come into operation "till the death of the longest liver of me and my said sisters."

To construe the words as to payment, &c., to the nephews on their respectively attaining the age of twenty-one as absolute and applicable to all circumstances, whether any of the aunts remained alive or not, and so to convert them into vesting clauses, is to attribute to them a purpose or at least an effect which deprives the emphatic words "after the death of the longest liver of me and my said sisters," with which the clause commences, of all apparent purpose or effect whatever. I prefer the construction which attributes a consistent purpose and effect to both sets of words, the one having reference to vesting, and the other, as the words of it expressly bear, to payment or the equivalent of payment only.

The nephews were obviously quite young men at the date of Mary's settlement, and I construe her deed just as if she had said "I wish my residuary estate to vest in them, but not to be paid or made over till they respectively attain the age of twenty-one years complete." This reading gives a consistent meaning and effect to every word in the deed, and I think it puts on the deed the construction which the testatrix intended it to bear.

Lord Mure—The only question of those submitted to us on which there is any difficulty is the one on which your Lordship and Lord Deas have arrived at a different conclusion. I am myself sensible that it is attended with considerable nicety, arising from the circumstance that there does not appear to be any direct gift of the residue apart from the direction to pay it at a particular time, viz., "after the death of the longest liver of the sisters," a circumstance which has always been held to be a material element for consideration in deciding when the period of vesting is to arrive. But although it is a material element it is not conclusive of the question, as was contended for on the part of the first and some of the other parties to the case. For there are various cases in which a contrary decision has been given, when it was clear from the whole tenor of the deed, or from the way in which others of the regulating clauses of the deed were

framed, that the intention was that vesting should take place at a period different from that at which the period of payment was fixed. Now, in this case we have, I think, a solution of the difficulty in the clause of survivorship to which your Lordship has referred. In that clause a different period of time is taken for the application of the clause than that of the death of the longest liver of the sisters, viz., the period when each of the nephews should arrive "at the age of 21 years complete." Dealing with the matter therefore as one of intention, I agree with your Lordship in thinking that the way in which the period of time is brought into operation by the testatrix in this clause indicates that it was her intention or understanding of her settlement that her nephews were to have absolute right to their provisions on arriving at twenty-one years of age, subject, of course, to the right of her sisters to draw the interest during their lives. I am therefore of opinion that the four first questions should be answered as your Lordship has recommended.

With reference to the other question, I also concur. The point raised as to the application of the *conditio si sine liberis* was settled not long ago in the case of *Brown's Trustees*, and must be ruled the same way here. That disposes of the 5th and 6th questions, and the 7th falls, I think, to be answered in the negative.

Lord Shand—I am of the opinion expressed by the majority of your Lordships. In seeking to arrive at a just consideration of the meaning of the settlement I think it is in the first place advisable to ascertain what the effect would have been if the deed had contained no clause of survivorship. Taking the case in that view, it appears that the testament bequeathed the liferent of the residue to the surviving sisters and the longest liver of them, while the fee is destined to the nephews. If it were to be held that the fee of the estate had not vested from the date of death, and her three nephews had predeceased the liferenters, their aunts, the testatrix would have died intestate. The destination being one of a liferent to the sisters and a fee to the nephews, that is *prima facie* a case in which vesting takes place *a morte testatoris*, and the only circumstance apart from the survivorship clause which can be represented to be against that result is that the bequest is given in the form of a direction to pay over and distribute "after the death of the longest liver of me and my said sisters."

It is contended that because payment is directed to be made only after the death of the survivor of the two sisters, therefore there is no vesting. It has been often said, and truly said, that in cases involving the construction of testamentary writings the question to be regarded by the Court is, what was the intention of the testator. I do not suppose that there is any peculiarity in the law of Scotland in this respect. I do not know of any system of jurisprudence in which the purpose of the Judge in construing a testamentary deed is not to reach the intention of the testator. But, while this is so in this country, as in all others, I should be sorry if the Court had been thereby prevented, or were now prevented, from laying down and following out general principles or rules of construction which might serve as a guide to testators or to conveyancers in framing deeds of settlement. I think there are many well-settled rules which are of value and importance in this branch of the law, and that it would be singular if it were otherwise.

In the case of *Snell's Trustees* (Nov. 4, 1875, 4 R. 711) I have anticipated very much what I have to say in reference to the clause here in question. There, as here, in a disposition and settlement in favour of trustees, there was a bequest of a liferent to one party while the fee was given to others. There, as here, the bequest was given in the form of a direction "to pay, assign, and dispone" after the death of the longest liver of the liferenters. It appeared to me then, and still appears to me, to be a settled rule of construction that where the sole reason for the postponement of the term of payment is the right of an annuitant, or, as here, the protection of a liferent or liferents, the law holds that vesting *a morte testatoris* will take place unless there be a provision or clear expression to a contrary effect. I repeat what I said in that case (p. 711) that "the reason of the rule . . . is the presumed intention of the truster to give to the children or other legatees all the benefits that a right of fee can give consistently with the securing of the life interests provided, and such benefits are often of the utmost importance, though the term of payment be deferred, in enabling the legatees to enter into business or to contract obligations in a marriage settlement."

In my opinion in the case of *Snell's Trustees* I enumerated various important authorities in support of the view to which I there gave effect, and cited cases containing *dicta* by the House of Lords which bore directly on it. Among others I referred to the case of *Carlton* v. *Thomson*, 1867, 1 L.R., Scot. App. 235. To these authorities I have now to add the opinions of Lord Blackburn in the case of *Taylor* v. *Gilbert's Trustees*, July 12 1878, 5 R. (H. of L.) 517, and of the Lord Justice-Clerk (Moncreiff) in the case of *Jackson* v. *M'Millan*, March 18, 1876, 3 R. 627. So much for one general principle which here applies.

Again, with regard to the specialty which arises from the form of the bequest and the use of said words "pay, assign, and dispone" after the death of the longest liver of the liferenters, I have also to refer to the considerations stated in my judgment in the case of *Snell's Trustees*, and to the authorities there mentioned. Although undoubtedly where the direction to pay is in that form this is an element or circumstance to be taken into account with others, I attach little importance to it if it exists by itself and is unsupported by other really material considerations pointing in the direction of suspension of vesting till the term of payment. The direction is to pay after the death of the survivor of the liferentrices. But how could it be otherwise, seeing that the fund is to be held for the liferentrices and the survivor during their lives? Suppose that the lady had expressly declared in an earlier clause that the fund was to be held for the sisters in liferent and the nephews in fee, the direction would have been exactly the same, and would have been the same whether expressed or left to implication; the form might be different but the substance is absolutely the same. And therefore it is that I attach little importance to the form of the direction to pay over after the death of the

liferenter. If the direction were followed by a clause of survivorship or by a destination-over applicable to the term of payment, as in the case of *Young* v. *Robertson*, February 14 1862, 4 Macq. (H. of L.) 314, that would make all the difference, because there vesting would, according to another settled rule, be absolutely prevented. The provision in that case would in substance be that the legatee should survive the term of payment, and failing his doing so that others should take. But where there is neither a clause of survivorship nor a destination-over vesting takes place with a clause such as occurs in the present deed. The rule is so stated not only in the cases to which I referred in the case of *Snell's Trustees*, but also in the case of *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. So also in the case of *Stodart's Trustees*, March 5, 1870, 8 Macph. 667, although that case was very special in its circumstances, and is perhaps open to the observation that the judgment is not quite consistent with a number of other authorities. These considerations are sufficient to dispose of this case if there were no clause of survivorship.

In regard to the clause of survivorship which here occurs, it must be observed it is not in the terms generally understood by a clause of survivorship. If it had been so—if it had been similar to that which occurred in the case of *Young* v. *Robertson*, 4 Macq. 314—if the bequest had been followed by such words as these, viz., declaring that "if any of the said residuary legatees shall die without leaving lawful issue, the same shall belong to and be divided equally or share and share alike among the survivors of my said nephews"—then the vesting would have been suspended till the term of payment. Such a clause would be referable to the term of payment, so that payment would only be made upon condition that the beneficiaries were then in life; and the same rule would hold in the case of a destination-over. In the present case there is no clause of survivorship applicable to the term of payment. The condition contained in the clause of survivorship is one applicable to the legatee himself alone, and this the simple one that he shall attain the age of twenty-one. But there is no reference whatever to the term of payment of the bequest as in the cases to which I have alluded. An argument was maintained by Mr Gillespie to the effect that the qualification must be read into and carried over to the clause regulating the term of payment so that the clause should be taken to mean shall attain the age of twenty-one and survive the term of payment; but I decline to read any words into the deed. The bequest, no doubt, would pass to the survivors of any nephew dying before twenty-one years of age, but the clause imposes no further condition suspensive of vesting after the death of the testatrix. And so, upon the whole matter, I am of opinion that the estate vested in the nephews upon the death of their aunt, subject only to the condition that they should have reached the age of twenty-one years.

The next question is, whether the *conditio si sine liberis* applies to a legacy of furniture and of pictures. But I am of opinion that such a legacy does not partake of the nature of a provision, and therefore following the view taken by this Division of the Court in the case of *Wauchope and Others (Brown's Trustees)*, that the fourth question ought to be answered in the negative, and the fifth in the affirmative.

I am also of the same opinion with your Lordships as regards the matter of the payment of legacy duty which is raised by the seventh question.

The Court pronounced the following interlocutor:—

"Find and declare that the third part or share of the residue of Miss Mary M'Alpine's estate destined to Walter M'Alpine vested in him on his attaining the age of twenty-one years complete and is now payable to his representatives: Find and declare that the third part or share of the residue of Miss Mary M'Alpine's estate destined to Charles Hunt M'Alpine who predeceased Miss Margaret M'Alpine vested in him on his attaining the age of twenty-one years complete, and is now payable to the third parties as his testamentary trustees: Find and declare that John William M'Alpine is entitled to the whole silver-plate, furniture, linen, books, and other effects bequeathed (1) by the codicil, dated 16th February 1867, to the settlement of Miss Helen M'Alpine, and (2) by the codicil, dated 16th February 1867, to the settlement of Miss Margaret M'Alpine, as the only one of the legatees thereof who survived Miss Margaret M'Alpine: Find and declare that the said John William M'Alpine, is held entitled to both the said bequests of silver-plate, furniture, &c., without deduction for legacy-duty thereon, and decerns."

Counsel for First Party—Gillespie. Agents—Gillespie & Paterson, W.S.

Counsel for Second and Third Parties—Gloag. Agents—Macritchie, Bayley, & Henderson, W.S.

Counsel for Fourth and Fifth Parties—Mackay. Agents—Lindsay, Howe, & Co., W.S.

Friday, December 22, 1882.

FIRST DIVISION.

SPECIAL CASE—WAUCHOPE AND OTHERS, (BROWN'S TRUSTEES).

Succession—Accretion—Conditio si sine liberis.

A testatrix by a codicil to her settlement directed that her plate and pictures should at her death be equally divided among her five children. She was predeceased by her sons George and Robert, the latter of whom had issue. *Held* (1) that such a bequest did not accresce to the co-legatees; (2) that the *conditio si sine liberis* did not apply to such a bequest; and (3) that therefore these two lapsed shares fell to be distributed according to the directions in the residuary clause of the settlement.
