in process, and that the lots so divided were thereafter held as the exclusive property of the feuars, to whom they were respectively allotted, and their successors. It is further admitted that although most of these holdings have for thirty or forty years, or longer, been held under separate titles, others have been possessed by the proprietor on their former *pro indiviso* titles alone, and the defenders allege that the subject in question has been held in this manner. They say that no attempt was made to make up a title to this subject as a separate property until the disposition of 1871 was executed for that purpose; but that, nevertheless, it was in fact allotted to one of the feuars under the agreement above mentioned, that it has been possessed as their exclusive property by him and his successors, and that they themselves derive right by a series of transmissions from this original allottee. If the case so averred had been established in fact, I should not have attached much importance to the absence of a written title in the defenders, because they would in that case have been enabled to connect their possession with a *pro indiviso* title—good against the pursuer; and defects in their separate title might still have been obviated, if that were thought necessary. But they have entirely failed to trace their possession to any right derived from feuars who were parties to the agreement for division, or held before the division under a *pro indiviso* title to the commonty. They shew that before the period of prescription the subjects were in the possession of a person named Donald. But there is nothing to shew that he had acquired right from a feuar, or that he was possessing by virtue of any title whatever. The evidence, so far as it goes, seems to support the pursuers' case—that he was a mere occupant by permission of the superior. For I think the pursuer has succeeded in identifying the disputed subject with a lot allocated in the division of the commonty to a person of the name of Corbett, whose *pro indiviso* right was acquired in 1828 by Sir Archibald Edmonstone. The result is, that the defenders have been unable to produce any title to support their possession; and in the absence of any competing title the pursuers must prevail."

The defenders reclaimed, and argued—The pursuer had failed to establish the singular title which the Lord Ordinary had sustained. Though he was admittedly superior, that title alone was not sufficient to ground decree of removing as against the defenders, who had acquired from persons who had possessed the ground for more than the prescriptive period, though they had no written title, and could not connect themselves with any vassal.

Authorities referred to—*Baird & Company* v. *Feuars of Kilsyth*, November 1, 1878, 6 R. 116; Stair, ii, 4, 3; *Laird of Lagg*, M. 13,787; Bell's Prin. 689.

Counsel for pursuers was not called upon.

At advising—

Lord Justice-Clerk—Mr Dickson pleaded his case very skilfully, but he came round to the result at which the Lord Ordinary had arrived, namely, that he had no title. It is left a matter of complete uncertainty what was the real nature of the title upon which he possessed. But I am of opinion that the superior is here within his right. I quite understand that if it could be shown that the pursuers' ground had been given out, and had never been re-acquired by him, there might have been a question how far the heirs of the feuar would be entitled to resist this demand. But the defenders have failed to connect themselves with any feuar or to show any feudal title at all. They cannot therefore raise such a question. I am of opinion that apart from any question as to whether the superior has re-acquired the *dominium utile*, his admitted title as superior is sufficient to justify a decree of removing against the defenders. I think the interlocutor of the Lord Ordinary should be affirmed.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court adhered.

Counsel for Respondents—Graham Murray—Dundas. Agents—Russell & Dunlop, C.S.

Counsel for Defenders — Gloag — Dickson. Agents—Maconochie & Hare, W.S.

Wednesday, June 2.

SECOND DIVISION.

[Lord Trayner, Ordinary.

CRAIG *v.* CRAIG'S TRUSTEES.

Succession—Vesting—Words held not Sufficient to Exclude Vesting a morte testatoris.

A truster, who died in 1877, by his trust-deed bequeathed *inter alia* certain legacies to his children, and the residue of his estate to his sons and the heirs of their bodies equally, including *per stirpes* the lawful children of any son who might have predeceased, declaring as regarded the date of setting apart or payment of the legacies that his trustees should, at the first term after the expiry of six months from his death, pay or set aside for investment such a proportion of each of the pecuniary legacies as the personal estate should yield, the balance to be paid or set aside for investment at Martinmas 1883 should he predecease that term, "declaring that none of my said children or of their issue shall have any right to sell, or dispose of, or assign, or alienate their shares of or interest in the said fund before it is divided." One of the sons died in 1881. *Held* that both his legacy and his share of residue had vested *a morte testatoris*, and that they fell to be computed in ascertaining his widow's *jus relictæ*, the words quoted being applicable to deeds *inter vivos*, and not such as struck at *mortis causa* deeds, and therefore not such as to exclude vesting.

On 10th November 1884, Mrs Craig, widow of the late Archibald Craig of Birdsfield, Blantyre, who died in February 1881, raised an action against the trustees of her deceased husband for the amount of her husband's estate falling to her *jure relictæ*. She was met by pleas (1) of acquiescence and *mora*; (2) of her election to take benefit under her late husband's trust-disposition and settlement.

The Lord Ordinary (Trayner) repelled these pleas, and appointed the case to be put to the roll for further procedure.

The defenders reclaimed to the Second Division, who adhered, and remitted the case to the Lord Ordinary.

The question between the parties at this stage of the case, now reported, related to the construction of the trust-disposition and settlement of John Craig, father of the pursuer's husband, which was dated 28th February 1876. In it he directed—"*Fifth*, I direct my trustees to pay to each of my sons John Craig, James Craig, Alexander Craig, and Thomas Craig, and the heirs of their bodies, the sum of five thousand pounds, and to my son Archibald Craig, and the heirs of his body, the sum of one thousand pounds. . . . . *Seventh*, With regard to the residue of my trust-estate, I direct my trustees to hold one-sixth share thereof for behoof of my son William, ... and to divide the remainder thereof among my other sons [equally, share and share alike, including in the division the lawful children of any of them who may have predeceased as representing the parent or parents, *per stirpes*; and as regards the date of setting apart or payment of the pecuniary legacies above provided, whether in liferent or absolutely, my trustees shall, at the first term of Whitsunday or Martinmas that shall happen after the expiry of six months from the date of my death, pay or set aside for investment, as above provided, such a proportion of each of such pecuniary legacies as my personal estate after satisfying the specific legacies above provided may yield; . . . . declaring that the balance of the said legacies and the said residue shall be paid and set aside for investment as above provided, at the term of Martimas 1883, should I predecease that term, and should I survive that term the said several legacies and residue shall be paid and set apart as above provided at the first term of Whitsunday or Martinmas that shall happen after the expiry of six months from my death; and in the event of any of my sons predeceasing me without leaving lawful issue, but leaving a widow, my trustees shall pay to her during her survivance, or until she shall contract a second marriage, the annual interest of the legacy and share of residue to which her husband would have been entitled: Declaring that none of my said children or of their issue shall have any right to sell or dispose of or assign or alienate their shares of or interest in the said fund before it is divided, or even thereafter in the case of the shares which my trustees are herein above authorised to retain in their own hands so long as they are so retained."

John Craig's trust-estate, so far as available, was only sufficient to pay a small proportion of the several legacies foresaid at Martinmas 1877, being the first term after the expiry of six months from the date of his death, and Archibald Craig received only £85, 15s. 1d. The amount of the residue due and payable to Archibald Craig's children at Martinmas 1883 with interest was £1874, 15s. 3d.

The defenders pleaded—"(3) The balance of the legacy bequeathed to Archibald Craig and the heirs of his body, and the share of the late John Craig's trust-estate payable to Archibald Craig's children at Martinmas 1883, do not fall to be taken into account in ascertaining the amount of the pursuer's *jus relictæ*."

The Lord Ordinary (TRAYNER) repelled this plea.

"*Opinion.*—With regard to the legacy of £1000 bequeathed to the late Archibald Craig by the fifth purpose of his father's settlement, I am of opinion that vesting took place *a morte*. Had there been sufficient free estate at the death of the testator, this legacy would have been due and exigible at once; and the provisions in the seventh purpose with regard to the payment of this and other legacies in the like position amounts only, in my opinion, to a postponement of the term of payment, and does not operate a postponement of vesting. The defenders indeed seem to have already acted upon this principle, as they paid a part of the legacy to the late Archibald Craig. The suggestion now made that the legacy only vested when and so far as paid, and did not vest *quoad ultra*, does not seem to me to be supported by any consideration derivable from the terms of the settlement, or from any principle of law.

"I am also of opinion that the share of residue destined to Archibald Craig vested *a morte*. Against this view the defenders urge two considerations—(1) That the residue was not divisible before Martinmas 1883 (before which date Archibald Craig had died); and (2) that the truster had provided, with regard to residue, 'that none of my children or of their issue shall have any right to sell or dispose of, or assign or alienate, their shares of or interest in the said fund before it is divided.' The first of these considerations presents no difficulty. Payment was no doubt postponed, but I see no reason whatever for holding that vesting was also postponed, or anything to overcome the presumption in favour of immediate vesting. With regard to the second consideration, it appears to me that the provision against alienation, &c., fairly read, does not support the view maintained by the defenders. (1) The words used in the provision referred to are applicable in their most usual sense to an alienation *inter vivos*. They do not exclude the idea that the beneficiary was entitled to test upon the share of the residue falling to him. If he could dispose of his right by a *mortis causa* deed that infers that the right he was so disposing of had vested. (2) The provision in question is properly a restriction upon an existing right. It restrains the beneficiary from alienating or disposing of his share of the residue before the period of division; but that infers the power so to alienate but for the restriction thus placed upon the right. That again appears to me to infer a vested right.

"The result is that both the legacy and the share of residue having vested in the late Archibald Craig, these sums fall to be taken into account in ascertaining the amount of his widow's *jus relictæ*.

The defender reclaimed, and argued—The fund did not fall to be taken into account in ascertaining the pursuer's *jus relictæ*, because there was no gift of either legacy or residue in John Craig's deed till the period of division, which was to be Martinmas 1883. The vesting was postponed till the day of payment. The presumption of vesting *a morte testatoris* was overcome—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, *vide* Lord President, 145; *Laing* v. *Barclay*, July 20, 1865, 3 Macph. 1143; *Stoddart's Trustees, &c.*, March 5, 1870, 8 Macph. 667; *Sloane* v. *Finlayson*, May 20, 1876, 3 R. 678. Further, there was

a destination-over. (1) As regards the legacy it was left to Archibald Craig "and the heirs of his body," which was not the more usual expression "to heirs and assignees." (2) As regards the residue, there was the expression "including in the division the lawful children of any of them who may have predeceased as representing their parent or parents *per stirpes*." The provision against alienation in the deed was sufficient also to overcome the presumption in favour of immediate vesting.

Counsel for the pursuer was not called upon.

At advising—

Lord Justice-Clerk—I am of opinion that the Lord Ordinary is right here in the view he takes of the vesting so far as the particular legacy is concerned. As I understand, the only ground on which it is contended that the legacy did not vest *a morte testatoris* is that the term of payment was postponed, and the same contention is advanced against the vesting of the residue. I am of opinion that the postponement of the term of payment here arises from the anxiety of the testator to make certain that there would be funds enough to meet the legacies which he left, and therefore it did not interfere with the right of the legatee. In that case the presumption of law is that vesting takes place *a morte testatoris* and there is nothing to displace it. As regards the legacy, part of it was paid and, that before the expiration of the term. As regards the residue that was not the case, but even if it had been I think I should have held the postponement as one for the sake of convenience, and as not interfering with the general rule of law that vesting takes place *a morte testatoris*. I have nothing to add to the views of the law which have been most distinctly expressed by the Lord Ordinary.

The Court adhered, and remitted the cause to the Lord Ordinary for further procedure.

Counsel for Pursuer—D.-F. Mackintosh, Q.C. —Graham Murray. Agents—Macbrair & Keith, S.S.C.

Counsel for Defenders—R. Johnstone—Wallace—Dickson. Agents—Bruce & Kerr, W.S.

Friday, June 4.

FIRST DIVISION.

MACFARLANE, PETITIONER.

Election Law—Parliamentary Election—Corrupt and Illegal Practices Prevention Act 1883 (46 *and* 47 *Vict. cap.* 51)—*Expenses—Limitation—Application for Leave to Pay Additional Expenses.*

In an application by a person who had been a candidate at a Parliamentary election for leave to pay certain accounts rendered after the time required by the Corrupt and Illegal Practices at Elections Act 1883, the Court, in respect that the amount of the account was small and that no prolonged inquiry was necessary, *remitted* the accounts to the Auditor.

Observed that the remit was so made only in the special circumstances, and that the case could not be regarded as a precedent.

This was an application under sub-sections 9 and 10 of section 29 of the Corrupt and Illegal Practices Prevention Act 1883 (46 and 47 Vict. cap. 51), by a member of Parliament for leave to pay additional accounts incurred in connection with his election.

The petitioner stated that he was a candidate for the county of Argyll at the election which took place in December 1885, and that he had made the necessary returns of his election expenses on 6th January 1886, but that since that date he had received notice of further claims for election and personal expenses, amounting the former to £23, 4s. 6d., and the latter to £122, 16s. 7d.

He referred to section 29 of the above-mentioned statute, which by sub-section 2 provided that all claims against candidates which are not sent in within the time limited by the Act are to be barred.

The time within which claims are to be sent in is by sub-section 3 limited to fourteen days after the declaration of the poll.

Sub-section 4 provides that all election expenses are to be paid within the time limited by the Act, and any payment made in contravention of this provision is, with certain exceptions, declared an illegal practice, while twenty-eight days after the election is by sub-section 5 fixed as the time within which all expenses incurred must be paid.

Sub-sections 9 and 10, upon which this application was founded, provided as follows:—(Sub-section 9) "On cause being shown to the satisfaction of the . . . Court, such Court, on application by . . . the candidate . . . may by order give leave for payment by a candidate . . . of a claim for any such expenses as aforesaid, although sent in after the time in this section mentioned for sending in claims." . . . (Sub-section 10) "Any sum specified in the order of leave may be paid by the candidate, . . . and when paid in pursuance of such leave shall be deemed to be paid within the time limited by this Act."

The petitioner prayed for leave to pay the above-mentioned accounts.

The Court, in respect of the accounts not being for large sums, remitted the accounts to the Auditor, observing that the procedure followed in this application was not to be regarded as a precedent, and that had the amount been larger and any special inquiry been necessary another mode of inquiry would have been ordered.

Counsel for Petitioner—Rankine. Agents—Mylne & Campbell, W.S.

Friday, June 4.

FIRST DIVISION.

[Lord Lee, Ordinary.

STEVENSON *v.* LEE.

Process—Expenses—Caution—Trust-Deed.

Circumstance in which *held* that the defender of an action who had granted a trust-deed for behoof of his creditor was bound to find caution for expenses.