Wednesday, June 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

CURRIE AND ANOTHER (HAY'S TRUSTEE) *v.* HAY AND OTHERS.

Succession—Vesting—Conveyance to Trustees—Interposed Liferent—Direction "to convey and make over to C and his Heirs."

A testator directed his trustees to hold the residue of his estate for behoof of his wife, and after her death, in the event of her surviving him, "to convey and make over my lands of Farmfield . . . to and in favour of my brother C . . . and his heirs." C survived the testator but predeceased the liferentrix. *Held* that the only object of calling the heirs of C was to provide for the contingency of his predeceasing the testator, and that vesting took place *a morte testatoris.*

The deceased George James Hay, Captain in the Royal Navy, died on 21st October 1862, leaving a trust-disposition and settlement dated 21st February 1845.

By the second purpose of his trust-disposition the trustee directed his trustees to hold the whole residue of his means and estate, heritable and moveable, for behoof of his wife, in the event of her surviving him, for her liferent use allenarly.

By the third purpose the trustees were directed, "as soon as convenient after my death and after the death of the said Mrs Georgiana Middleton Whitefoord, in the event of her surviving me, to convey and make over my lands of Farmfield, in the parish of West Kilbride, to and in favour of my brother Charles Crawford Hay and his heirs."

Charles Crawford Hay died upon 27th September 1873. He thus survived the truster, but predeceased the liferentrix Mrs Georgiana Middleton Whitefoord or Hay, who died on 22nd December 1887. A question arose at the death of the liferentrix whether the estate was vested in Charles Crawford Hay, and the present action of multiplepoinding was raised by the trustees of Captain James Hay to have it determined who was entitled to succeed to the lands of Farmfield under the destination contained in the third purpose of his trust-deed.

Claims were lodged by (1) Mrs Ellen Frances Hay and another, the testamentary trustees of the late Charles Crawford Hay to whom by his last will, dated 2nd September 1873, he bequeathed all his real and personal property. The claimants maintained that the lands of Farmfield vested on the death of the testator in Charles Crawford Hay, and duly claimed to be ranked and preferred to the said lands and the rents thereof from 22nd December 1887. (2) Charles Douglas Hay, a son of the late Charles Crawford Hay, who was heir-at-law both of his father and of his uncle the testator Captain Hay. He maintained that in one or other of these capacities he was entitled to a conveyance in his favour by his uncle's trustees, and that no right to the said lands vested in Lieutenant-General Charles Crawford Hay, he having predeceased the said liferentrix.

On 20th July 1889 the Lord Ordinary (KINNEAR), *inter alia,* sustained the claim for Charles Douglas Hay to the whole fund *in medio.*

"*Opinion.*—There are no direct words of gift in favour of the testator's brother, but only a direction to the trustees to convey the lands of Farmfield to him and his heirs as soon as convenient after the death of Mrs Whitefoord. This might not be enough to postpone vesting if there were no destination in favour of heirs. But it is settled that 'when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period, he takes no right under the settlement' — *Bryson's Trustees v. Clark,* 8 R. 145, *per* Lord President. The only question therefore is, whether a direction to convey to Charles Crawford Hay and his heirs is equivalent to a direction to convey to him, whom failing to his heirs. But the general rule is that under a direction to convey in these terms, if the first institute does not survive the period of conveyance, the heirs take as conditional institutes in their own right, and not as representing him. The case of *Bell* v. *Cheape* is an illustration of this rule, and it has been followed in subsequent cases. The rule may no doubt be excluded by the expression of a contrary intention. But there is no indication of a contrary intention in the present case."

Mrs Ellen Hay and another (Charles Crawford's trustees) reclaimed, and argued —It was not the intention of the testator to prefer the heirs of the institute to the institute himself, and his whole object in inserting the words "and his heirs" into the destination was to provide for the contingency of the institute predeceasing him — *Halliburton* v. *Halliburton,* June 26, 1884, 11 R. 979. There was nothing here of the nature of a destination-over, and so the cases cited by the Lord Ordinary (*Bell* v. *Cheape* and *Bryson's Trustees*) did not apply. The words "and his heirs" did not involve conditional institutes, and it was upon this point that the judgment of the Lord Ordinary was wrong as to the object for which the words were inserted—Bell's Prin. secs. 1693 and 1701. There was nothing in the deed to suggest that vesting was to be suspended, and it accordingly took place *a morte testatoris—Marchbank* v. *Brockie,* February 18, 1836, 14 Sh. 521; *Maxwell* v. *Wylie,* May 25, 1837, 15 Sh. 1005; *Forbes* v. *Luckie,* January 26, 1838, 16 Sh. 374; *M'Alpine* v. *M'Alpine,* March 20, 1883, 10 R. 837; *Ross* v. *Ross,* December 18, 1884, 12 R. 378; *Steele's Trustees* v. *Steele,* December 12, 1888, 16 R. 204.

Argued for Charles Douglas Hay—There

was here a direction to the trustees to pay, and there was a destination-over to the heirs of Charles Crawford Hay. This was an action in which the words "whom failing" might fairly be read in, and the destination was then to A, and whom failing to his heirs. In such cases vesting was suspended until the term of payment arrived, and as the beneficiary did not survive the liferentrix, at whose death the time of payment arrived, no right vested in him —Ersk. iii. 9, 9; *Maxwell* v. *Maxwell's Trustees*, December 24, 1864, 3 Macph. 318; *Stoddart's Trustees* v. *Stoddart*, March 5, 1870, 8 Macph. 667; *Finlay* v. *Mackenzie*, July 9, 1875, 2 R. 909; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 278; *Fyfe's Trustees* v. *Fyfe*, February 8, 1890, 17 R. 450.

At advising—

LORD M'LAREN—In this case we have to consider an important general question in the law of vesting which is raised by the Lord Ordinary's judgment.

The property of the testator is conveyed to trustees, who are directed to hold the trust-estate for the liferent use of Mrs Georgiana Whitefoord, and on the death of the liferenter they are directed to convey the estate of Farmfield to General Crawford Hay and his heirs. General Crawford Hay survived the testator, but predeceased Mrs Whitefoord; and the Lord Ordinary has sustained the claim of the General's heir-at-law in competition with his testamentary disponees.

There are here four elements which enter into the consideration of the question of vesting. These are—(1) The nature of the estate, which is heritable; (2) The form of the gift, which is indirect, because the estate is given through the intervention of trustees; (3) The nature of the event on the occurrence of which the gift is to take effect; and (4) The destination or description of the objects of the gift.

I will consider these elements of intention in their order, avoiding as far as possible comment upon topics which do not arise for decision in the present case.

(1) Amongst the elements which influence the decision of a case of vesting, the quality of the estate as being heritable or moveable is probably the least important. In the numerous cases of trust conveyance of mixed estate, heritable and moveable, it has been generally assumed that the same principles of construction are applicable to the bequests. Whether these are charged on the aggregate estate, or are of the nature of specific bequests of money or landed estate, or even where the trust has relation to heritable estate exclusively, if the other conditions of the trust are such as are consistent with vesting, the circumstance that the trustees are directed to make a conveyance at a future period will not interfere with the right of the beneficiary to the immediate enjoyment of the estate. This is very well illustrated by *Lord Stair's* case, 2 W. & S. 615, where trustees were directed to purchase lands to be entailed on a series of heirs, and it was held that on the expiration of one year after the truster's death the institute was entitled to the interest of the money, although in fact no purchase of lands had been made. It is true that where the estate is destined to a series of heirs, and the gift is made contingent on an uncertain event, the right of the institute may be in suspense until the event is determined, but this is a result which follows from the nature of the destination itself, and is in no way distinguishable from the analogous cases of moveable succession, where the right of the beneficary first named is suspended by reason of some contingency on which the conveyance is made to depend.

(2) The next element for consideration is the form of the gift, whether direct or through the intervention of trustees. In ambiguous cases this may be a material consideration. It is to be kept in view that our rules of construction applicable to vesting are for the most part merely presumptive, liable to be displaced by clear evidence of intention derived from other clauses of the will or deed. Now, if a testator says in so many words, I give a liferent of all my estate to A, and I bequeath legacies on certain specified conditions to B, C, and D, giving the legacies by *de præsenti* words of gift to these persons, it is more easy to infer an intention to create an immediate vested interest in the legatees than it would be if the testator had begun by making a conveyance of his whole estate to trustees, and had then directed them subject to the same conditions, and on the death of the person to whom the liferent interest is given to make payment of these legacies. In the case first supposed the legal estate is in an executor, but *prima facie* an executor is only a trustee for immediate distribution, and in the absence of any continuing trust the most probable interpretation would be that the legatees first named were intended to take vested interests subject to the burden of the general liferent. If a continuing trust is constituted the theoretical difficulty in holding a fee to be in suspense is removed, and the vesting will be determined by the other conditions of the gift. To this extent I think that the circumstance of the gift being made in the form of a direction to trustees may come to be an important element, although I do not think it is so in the present case. It is always to be considered that even where the estate of a deceased person is legally vested in trustees, the beneficiary has a concurrent estate or *jus crediti* which he may vindicate by action, and where the subject of the bequest is a specific heritable estate the beneficiary has all the substantial rights of a fiar. In such a case it may fairly be held that a conveyance of specific estate to trustees for his use is equivalent to a conveyance to himself, and is to be governed by the same general rules of construction for the purpose of securing to him every benefit which the truster may reasonably be held to have intended. A conveyance to trustees is a convenient arrangement for securing liferent interests, and is not inconsistent with

a general intention to give to the institute in the fee all the rights which he could have acquired in virtue of a direct conveyance to himself.

(3) With respect to the nature of the event on which the gift is to take effect, I think if we look to the best sources of authority—to the leading decisions and the statements of our best writers—that we have recognised the distinction taken in the Roman jurisprudence between events certain and uncertain. This is a real distinction, especially where the uncertain event is one which would have the effect of putting an end to the contingent interest of the legatee by putting a nearer heir in his place. For example, if a testator gives a liferent of his estate to A, and on the death of A without leaving issue directs his trustees to make over a share of his estate to B and his heirs, it is not difficult to read such a destination as containing an implied gift to the issue of A, and it is plain enough that the gift to B cannot be vested in right until it is ascertained whether A is survived by issue. This is the case of *Bell* v. *Cheape*, one of the cases quoted by the Lord Ordinary, but as I think not rightly applied by him. I do not think that the case of *Bell* v. *Cheape* can be considered as an authority for the proposition that in the simple case of a legacy to A, and on the death of A to B and his heirs, the right of B is suspended until the death of the liferenter, because this would in practice amount to a reversal of an elementary rule of vesting, viz., that in the simple case of postponement of payment to an event certain the right of the legatee shall vest. But in *Bell* v. *Cheape* the legacy in dispute was given on the event of the death of a liferenter without issue. There could be no vested right in anyone until the possible and preferable claim of the issue of the liferenter was taken out of the way. And it was rightly held that in such a case the heir of the legatee took as conditional institute in preference the legatee's assignees.

I do not enter further on the question of postponement of payment to an uncertain event, because in the present case the estate is undeniably given on the occurrence of a certain event, namely, on the death of Mrs Whitefoord.

(4) There remains for consideration the last of the elements to which I alluded in my introductory observations, the nature of the destination itself. As I have already observed, a direction to pay to persons named in succession on the occurrence of an event creates only a contingent and eventual right in the institute. The most familiar illustration is the case of a destination to a plurality of persons and the survivors of the class. It was observed by Lord Westbury in one of the leading cases on this subject that a direction to trustees to pay to the survivors of a family at a future period, in the absence of expressions of a contrary tending, means that the trustees are to pay to those who are surviving at the period of payment. Consequently there can be no vested rights until the fact of survivance is ascertained. It is not doubted that the same principle of construction would apply to a proper destination, *e.g.*, a direction to pay to A, whom failing to B. On the other hand, it was held by the House of Lords in the noted case of *Carleton* v. *Thomson*, that for this purpose a gift to a lady and her issue was not inconsistent with vesting—in other words, was not a contingent destination. A very good reason for this exception to the rule last mentioned is that in a gift to a legatee and his issue, or heirs of the body, the testator only gives expression to the natural law of inheritance, and sufficient effect is given to his words by supposing them to have been introduced for the purpose of giving a right to the children in case the parent should predecease the testator. Now this rule is firmly established in our law, and the reason of the rule appears to me to be applicable to a gift to a legatee and his heirs. We must endeavour to find some definite criterion to be applied to such cases; and I think the true criterion is this, where the legatees of the second order are either mentioned by name or by some description independent of the first, then they may be taken to be *personæ delectæ*, and their contingent interest is sufficient to suspend the vesting of the estate. But if the legatees of the second order are described as the children, or issue, or heirs of the institute (there being no ulterior destination) these are to be considered in this question as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit which it was possible for the trustee to give him consistently with the benefits previously given to liferenters or other persons. For these reasons I am of opinion that General Crawford Hay took a vested interest under the direction to convey to him and his heirs, and that the Lord Ordinary's interlocutor should be altered to this extent and effect.

LORD SHAND—I am of the same opinion, and I concur generally in the grounds of judgment stated by my brother Lord M'Laren.

The deed here contains, so far as the heritage is concerned, very few provisions. The trustees are directed merely to hold the residue of the estate, heritable and moveable, and to apply it for behoof of the testator's wife in the event of her surviving him, after which follows the third purpose of the deed under which the question in dispute arises, and by it the trustees were directed "as soon as convenient after my death, and after the death of the said Mrs Georgiana Middleton Whitefoord, in the event of her surviving me, to convey and make over my lands of Farmfield, in the parish of West Kilbride, to and in favour of my brother Charles Crawford Hay and his heirs."

The facts of the case are simple, and are capable of being stated in a sentence. Charles Crawford Hay survived the testa-

tor, but he predeceased the liferentrix, and in these circumstances the effect of the Lord Ordinary's judgment is this, that he has preferred the heirs of the institute to the institute himself or to his disponee.

Now, it appears to me that this decision runs counter to what has been determined in previous cases, The testator died in 1862, and his direction to his trustees was that they were to convey and make over the lands in question to his "brother Charles Crawford Hay and his heirs." The Lord Ordinary has held that the result of this destination is, that the testator has preferred his brother's heirs, unknown and uncertain, to his brother himself. In that view I am not prepared to concur.

I think that the person favoured by the testator is Charles Crawford Hay, and that his heirs are merely called, probably out of favour to him, as substitutes and as conditional institutes in the particular case of Charles Crawford Hay happening to die before the testator. With reference to the two cases referred to by the Lord Ordinary in his note, it does not appear to me that either of them has an application to that now before us, for with regard to *Bryson's Trustees* there was in that case a destination-over, the direction to the trustees being to convey certain subjects to A and the heirs of his body, whom failing to B, and nothing but a direction to convey on the death of the liferenter. Here the language is quite different, for the direction to the trustees is to hold the residue, and substantially to hold it for behoof of Charles Crawford Hay and his heirs in fee.

In the case of *Bell* v. *Cheape* the Court held that vesting had been suspended, because the deed expressly declared that the term of payment was to be postponed not only until the death of the liferentrix, but also until it was seen whether or not she left issue, which latter event would have changed the succession. In the present case the facts are materially different from those which existed either in the case of *Bell* v. *Cheape* or in *Bryson's Trustees*. It may be indeed a question whether the case of *Bell* v. *Cheape* is of the same value and authority now as it was, because since that case the doctrine of vesting subject to defeasance has been much more elaborated than it then was, and our law upon the subject has been more matured.

In the present case there are a variety of elements tending to show that vesting of the heritable estate in the testator's brother took place *a morte testatoris*.

I agree with the opinion expressed by Lord Curriehill in the case of *Douglas* v. *Douglas*, 2 Macph. 1008, in which, delivering the judgment of the Court, and reversing the opinion of Lord Kinloch, he says, that there are several considerations which require to be balanced "with a view to ascertain the presumable intention of the testator." In the first place, the survivance of the term of payment is not an express condition of this provision." So in the present case surviving the term of payment or term of conveyance is not made a condition of taking under the deed. "Second, the payment is not postponed to a *dies incertus* such as the majority or marriage of the legatees, but to a date which was certain, the death of the liferentrix. So in the present case the term of payment was the death of the testator's widow. "Third, there is also the absence of any substitution to the legatee, or what is called in England a destination-over." Nor is there in the present case any destination-over. Lord Curriehill then goes on to say—"Now, in the absence of these things, which are the usual indications of an intention to suspend the vesting of legacies to the term of payment or solution, although it is not *per se* conclusive, leaves a strong presumption that no such suspension was intended, and what confirms this presumption is that there is no indication of the term of payment having been postponed for any purpose other than that of providing the yearly income to the widow."

There is in the present case a careful provision for the widow, but her interests as liferenter are fully protected, though a right of fee has vested in the heritage. Indeed the only difficulty which the case presents arises from the testator having conferred the bequest upon the person whom he intended to benefit, by a direction to his trustees to "convey and make over" the lands of Farmfield.

I have remarked upon these words in previous cases, and without repeating the observations which I then made, I shall only say that I am still of the opinion which I then expressed. The direction to "convey" cannot have much meaning in restricting or postponing the vesting of the beneficiary's right in such a case, because the conveyance is to the trustees who are to hold the estate for administration during the life of the liferentrix. It appears to me that it is just the natural way of expressing a destination such as we have here, where an immediate administration is interjected between the testator and the beneficiary. The principal argument which was urged against vesting was founded on this mode of making the bequest, and it is one which, for the reasons I have stated, I cannot give effect to. On the whole, I am of opinion that the right to this bequest vested in Charles Crawford Hay *a morte testatoris*.

LORD ADAM—After the best consideration which I have been able to give to this case I have come to be of opinion that the only object for which a conveyance in favour of Charles Crawford Hay was to be postponed was in order that the interests of the widow might be protected. I am therefore of the opinion expressed by your Lordships that there was vesting here *a morte testatoris*.

With reference to the cases of *Cheape* and of *Bryson's Trustees* I shall only observe that I do not think that either of them have any application to the present case. As to the meaning of the destination here, I am inclined to agree with the interpretation put upon it by Lord M'Laren, and to hold that the effect of it was not to confer upon the heirs an independent right, but that they were merely called in the event

of Charles Crawford Hay predeceasing the testator.

LORD PRESIDENT—I concur entirely with the view of this destination, which has been taken by my brother Lord M'Laren, and I desire only to add that a destination in the terms in which it is expressed in the present case differs very materially from that in the case of *Bryson's Trustees*. There the direction was to convey certain heritable subjects to A and the heirs of his body, whom failing to B, whom failing to C, whom failing to certain other parties *nominatim*, "and their heirs," and it was with reference to that destination that I gave the opinion a portion of which is quoted by the Lord Ordinary. The passage is in these terms—"It is in vain to review the authorities in a question of this kind, but I think they amount to this, that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him, to certain other persons as substitutes or conditional institutes to him, then if he does not survive the period he takes no right under the settlement;" and I added, "I think that is settled law," and also that it was applicable to that case, and in that view the other Judges concurred. Now, I do not think that anything which we are doing here in any way interferes with what the Court in that case declared to be settled law.

With regard to the case of *Bell* v. *Cheape*, it does not appear to me that it has any application to the present case. I do not desire in any way to call in question the authority of that decision, and what my brother Lord Shand has termed the more matured state of our law on the subject of vesting subject to defeasance does not appear to me to be in any way inconsistent with the decision in *Bell* v. *Cheape*.

The Court recalled the Lord Ordinary's interlocutor and ranked and preferred the claimant Mrs Ellen Francis Hay and another (Charles Crawford Hay's trustees), to the whole fund *in medio*.

Counsel for the Pursuers and Real Raisers—Low—Burnet. Agents—Pringle, Dallas, & Company, W.S.

Counsel for Charles Crawford Hay's Trustees—Low—Burnet. Agents—Pringle, Dallas, & Company, W.S.

Counsel for Charles Douglas Hay—Sir C. Pearson—Gillespie. Agents—Dundas & Wilson. C.S.

Wednesday, June 18.

SECOND DIVISION.

[Sheriff of Perthshire.

MORRISON *v.* FORBES.

Deposit-Receipt—Donation Mortis Causa—Proof.

Circumstances in which it was *held* that a person who had acted as his deceased aunt's manager, and who had taken a deposit-receipt in her and his names jointly, "payable to either or the survivor," which had been afterwards handed over to him, had failed to prove that the sum contained therein had been gifted to him by donation *mortis causa*.

James Morrison, joiner, 19 Kinloch Street, Dundee, executor-dative of the deceased Isabella Cameron, East Haugh, Pitlochry, who died intestate upon 1st September 1888, brought an action in the Sheriff Court at Perth against Duncan Forbes, joiner and builder, Pitlochry, for payment of £184, 19s. 11d., being the sum contained in a deposit-receipt with the branch of the Bank of Scotland at Pitlochry dated 25th June 1888, with interest from 3rd September 1888. The deposit-receipt bore that the money had been received from Miss Isabella Cameron and Mr Duncan Forbes, and was payable to either or the survivor. The pursuer averred that notwithstanding the terms of said deposit-receipt the sum contained therein belonged wholly to the said Isabella Cameron, and formed part of her executry estate, but that upon 3rd September 1888 the defender had uplifted the said sum from the bank. The defender, who was a nephew of the deceased, admitted that he had uplifted the money, but explained that the sum contained in the deposit-receipt had been donated to him by the deceased by donation *mortis causa*.

A proof was allowed, at which the defender deponed—"My aunt lived with me from January 1880, when my mother died. . . . I conducted her business for her from the time she came to live with us. I went to the bank and drew her interest for her. . . . About twenty months before she died the deposit-receipt was changed. Till then it had been in her own name. In February 1887 it was changed to the joint names of herself and me. I think that after that it was just renewed twice. . . . The renewals of the receipt were in our joint names. The last time the interest was drawn I got it for myself to keep. My aunt could neither read nor write. . . . She had always been talking about the kindness I had shown to her. . . . About three weeks before the receipt was changed into our joint names she spoke about leaving me all she had. She said in Gaelic, 'It is yourself that will get it all,' or something to that effect. The next conversation would be about three weeks after that. I was going to the bank, and she told me to take the deposit-receipt and change it into our joint names. . . . The receipt had been in