separate stations, as there would be in the case supposed, but substantially one station for joint-accommodation, I think, with great deference to Lord Adam, that this reasoning of the learned Judge in support of his judgment fails. I have merely ventured to add these observations to what your Lordships have said in order to show that so far as I am concerned I have very carefully considered the elaborate opinion which his Lordship has delivered in this case.

My Lords, I have only further to add, that if the canon of construction which has been applied in so many cases, that you are not to interfere with the rights of third parties in a private personal and local Act such as this is, public though it be—if it is to be applied here—there can be no possible doubt upon the case. But, my Lords, even taking it upon the footing that the Great North of Scotland Company had appeared before the committee which passed this Act and that upon their intervention these words "in so far as the Caledonian Company have the power to give such use" had been inserted, I should have been prepared to hold that the result must be the same, because I think that the North British Company have failed to show that the Caledonian Company had any power whatever to give the use of the station for which they have here contended.

I therefore agree with your Lordship in thinking that the decision must be reversed.

LORD BOWEN—My Lords, I concur both in the reasoning of the noble and learned Lords who have already spoken, and in the result to which that reasoning has led them, and I have really nothing which I could usefully add to the observations which have been already made.

Their Lordships decided that the interlocutor appealed from be reversed; that it be declared that the defenders are not entitled without the consent of the Great North of Scotland Railway Company, part-owners thereof, to use the joint-passenger station or any part thereof, or the conveniences connected therewith, for the purposes of their traffic, or to run over or use with their engines, trucks, or carriages of any description the said station or the railway through the same, or the sidings, accesses, or works extending for 200 yards on each side of the passenger shed of the said joint-passenger station, or any part of the same; and that the cause be remitted with this declaration to the Court below to proceed therein as is just. That the respondent do pay the costs both here and in the Court below.

Counsel for the Appellants—Sir Henry James, Q.C.—A. Graham Murray, Q.C.—James Ferguson. Agents—Dyson & Company, for T. J. Gordon & Falconer, W.S.

Counsel for the Respondents—The Lord Advocate (Balfour, Q.C.)—Solicitor-General for Scotland (Asher, Q.C.)—Sir R. Webster, Q.C.—Finlay, Q.C. Agents—Loch & Company, for James Watson, W.S.

COURT OF SESSION.

Tuesday, February 20.

FIRST DIVISION.

[Lord Low, Ordinary.

TURNER *v.* GAW.

Succession—Vesting—Conditional Institution—Vesting subject to Defeasance.

A person left her whole heritable estate to her daughter J in liferent for her liferent use allenarly and to the heirs of her body in fee, whom failing to her three sons and another daughter equally, share and share alike, and the respective heirs of their bodies in fee. J died in 1890 unmarried, predeceased by her brothers, one of whom had made up a title to a fourth share of their mother's heritable estate and had disponed it to A. After J's death, her sister and the eldest son of each of her three brothers each made up a title to a fourth of the heritable estate and then disponed their shares to B.

Held—following *Bell* v. *Cheape*, May 21, 1845, 7 D. 614—that no part of the estate vested until J's death, and accordingly, that the conveyance to A was inoperative and the whole estate now belonged to B.

Observed—following the opinion of Lord President Inglis in *Steele's Trustees* v. *Steele*, December 12, 1888, 16 R. 204—that vesting subject to defeasance can only apply where the destination of a fee of an estate, failing the issue of the liferenter, is to persons named or ascertained at the death of the testator, without any ulterior destination to their executors, heirs, or assignees, as conditional institutes.

Question—Whether the principle of vesting subject to defeasance is applicable to the case of a direct disposition of a heritable subject without the intervention of a trust.

Mrs Janet Allison or Miller died infeft in certain heritable subjects in the parish of Dunoon. She left a general disposition and settlement dated 27th November 1865, by which she assigned and disponed her whole heritable estate to her daughter Janet Miller in liferent for her liferent use allenarly, and to the heirs of her body in fee, whom failing to her sons Matthew, John, and Alexander, and her daughter Margaret Millar or MacDougald equally between them, and share and share alike, and the respective heirs of their bodies in fee.

Janet Miller, the daughter, enjoyed the liferent until she died unmarried on 31st October 1890.

Her brother Matthew, who predeceased her, after making up a title to the one-fourth part *pro indiviso* of the fee of the heritable subjects left by his mother, sold and disponed this part in 1883 to James William Turner, Solicitor, Greenock. After Janet's death her sister Margaret

and the eldest son of each of her three brothers, who were then dead, each made up a title to one-fourth *pro indiviso* share of the heritable estate, which they disponed to Mrs Gaw, Dunoon.

In December 1892, Turner, as in right of Matthew Miller's fourth, brought an action against Mrs Gaw to have it found and declared that he was proprietor of one-fourth *pro indiviso* of the heritable estate left by Mrs Miller, and to have the disposition in favour of Mrs Gaw declared null and void so far as it purported to convey to her more than three-fourths of said subjects.

The pursuer pleaded—"(1) The pursuer's author, the said Matthew Miller, having a right to make up a title to one-fourth share of said piece of ground, and having done so, and thereafter conveyed said one-fourth share to the pursuer, the pursuer is entitled to decree of declarator as craved. (2) The pursuer being proprietor, feudally vested in said one-fourth share of said piece of ground, is entitled to have the disposition in favour of the defender reduced in so far as it purports to convey property belonging to him."

The defender pleaded—"(1) the pursuer's averments are irrelevant. (2) The pursuer not having any valid title to any portion of the subjects libelled, the defenders are entitled to be assoilzied with expenses."

Upon 3rd June 1893 the Lord Ordinary (Low) repelled the pleas-in-law stated by the pursuer: Sustained the defences so far as preliminary, and assoilzied the defenders.

The pursuer reclaimed, and argued—The fee of one-fourth part of the heritable subjects vested in Matthew upon the death of his mother, subject to defeasance in the event of his sister Janet marrying and having children, otherwise the fee would be *in pendente*. Matthew had validly made up a title to his mother as regarded that fourth, and had also validly thereafter disponed it to the pursuer. The principle of vesting subject to defeasance was now well recognised—*M'Lay* v. *Borland*, July 19, 1876, 3 R. 1124; *Steele's Trustees* v. *Steele*, December 12, 1888, 16 R. 204; *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H. of L.) 10, which set up the opinion of the minority, including that of Lord President Inglis in *Wannop* (*Haldane's Trustee*) v. *Murphy*, 9 R. 269.

Argued for the respondent—The case was ruled by *Bell* v. *Cheape*, May 21, 1845, 7 D. 614, and by *White's Trustees* v. *Chrystal's Trustees*, March 2, 1893, 20 R. 460. Nothing vested until Janet's death. The fee was not *in pendente*, but there was a fiduciary fee in her for her children should she have any—*Newlands*, April 26, 1798, 3 Ross's Leading Cases, 634; *Ferguson* v. *Ferguson*, March 19, 1875, 2 R. 627. Matthew Miller's title was invalid and vested nothing in him. The doctrine of vesting subject to defeasance was not applicable to the present case—See Lord President Inglis' opinion in *Steele's Trustees* (above)—which rendered that case an authority in favour of the respondent.

There could only have been vesting in Matthew and his brothers and sister subject to defeasance had the destination stopped with them—persons ascertainable at their mother's death—whereas the heirs of their bodies were called as conditional institutes. Further, the principle of vesting subject to defeasance had never been applied, and was inapplicable to the case of heritable estate.

At advising—

Lord Adam—The question in this case is, whether a disposition granted in the pursuer's favour by the late Matthew Miller of one-fourth part *pro indiviso* of the fee of certain subjects is a valid disposition or not. If not, the pursuer has no title to insist in this action. The question depends on whether or not the *pro indiviso* fee thereby disponed was vested in Matthew Miller at the date of the disposition, and that again depends on the construction of a general disposition and settlement dated 27th November 1865 left by his mother Mrs Miller.

By that deed Mrs Miller disponed to and in favour her daughter Janet Miller in liferent for her liferent use allenarly, and to the heirs of her body in fee, whom failing to and in favour of her sons—Matthew Miller, John Miller, and Alexander Miller, and her daughter Margaret Miller, equally between them share and share alike, and the respective heirs of their bodies in fee, her whole estate, heritable and moveable. Matthew Miller predeceased the liferentrix, his sister Janet Miller.

I think that this case is ruled by *Bell* v. *Cheape*, 7 D. 614, and that consequently no fee vested in the sons Matthew, John, and Alexander Miller, or in the daughter Margaret *a morte testatoris*, but that their right was contingent on their surviving the liferentrix; that the heirs of their bodies respectively were conditionally instituted to them, and that therefore in the event of any of them predeceasing the liferentrix, the heirs of their bodies would take on her death without issue.

If this be so, then Matthew Miller having predeceased the liferentrix never had any right to the subjects, and the share which he would have taken had he survived passed to his son Matthew.

It is maintained, however, that the doctrine of vesting subject to divestiture applies in this case, and that a fee vested in Matthew and in the other sons and daughter subject to divestiture, in the event of the liferentrix Janet leaving heirs of her body, an event which did not happen.

It appears to me, however, that this is not a case to which that principle applies.

The conditions necessary for its application are thus formulated by the late Lord President in the case of *Steele's Trustees* v. *Steele*, 16 R. 204—"I think," he says, "the result of all the cases on the subject may be summarised thus—When a fund is settled on daughters of the testator for their liferent use allenarly, and their children, if any, in fee, whom failing to another person or persons in absolute property with no further destination, the vesting of the

fee in the last named person or persons will depend" on certain considerations which he proceeds to point out.

But the conditions precedent under which alone certain considerations have to be regarded do not exist in this case, because the fee is not given in absolute property to the sons and daughter with no further destination. There is the further destination to the heirs of their bodies respectively.

Now, the importance of that further destination comes out very clearly in that case from his Lordship's desiring to correct an error in the report of his opinion in the previous case of *Haldane's Trustees*. He says—"My words as reported are—'It cannot be disputed that if the residue of an estate is destined to A in liferent and his issue in fee, and failing his leaving issue, then on the expiry of the liferent, to B, no right vests in B till the death of the liferenter without issue. This was authoritatively settled in the case of *Bell* v. *Cheape*." Now, he goes on to say, "this is not sound law, and nothing of the kind was settled in *Bell* v. *Cheape*. But the blunder consists in this, that after these words 'on the expiry of the liferent to B,' there ought to be added, 'and his heirs, executors, and assignees,' which makes the proposition good law, and truly represents the judgment in *Bell* v *Cheape*, for that judgment proceeded on the ground that B's heirs and executors were called as conditional institutes after B, and were entitled to succeed in place of B if he predeceased the death of the liferenter and the term of payment." So in this case the heirs of the body of Matthew were called as conditional institutes after him, and would have been entitled to succeed in his place if he predeceased the liferentrix Janet.

On the authority therefore of these cases I concur in the result at which the Lord Ordinary has arrived, although I do not concur in the grounds on which he has rested his judgment. I do not think that the decision of the case at all depends on the fact that the destination is to "heirs of the body," and not to "children." I also wish to say that I doubt whether the doctrine of vesting subject to divesting would have been applicable in the present case, even although there had been no ulterior destination to the heirs of the body. It will be observed that it is the case of a direct disposition of a heritable subject without the intervention of a trust. I have always understood it to be settled law since the case of *Newlands* that a conveyance to A for his liferent use allenarly, and to his children or the heirs of his body *nascituri* in fee, vested a fiduciary fee in A for his children, and I do not at present see how a fiduciary fee being vested in one person for that person's children or issue is consistent with a beneficial fee in the same subjects, being at the same time vested in another person.

Neither do I at present see why the person in whom the beneficial fee is said to be vested may not make up a title and sell the subjects, and so defeat the rights of children who may come subsequently into existence.

It is not, however, necessary to decide the question in this case, but I desire to reserve my opinion should the case hereafter occur for decision.

LORD M'LAREN—I concur in all that Lord Adam has said.

In the first place, I assent to the view indicated by Lord Adam, that no decision on the vesting of a beneficiary under a trust can ever be an authority on the construction of a heritable destination. The fundamental principles applicable to the construction of such destinations are altogether diverse, and inapplicable the one to the other. In a proper heritable destination, of course the principle of construction is substitution, while in that of a trust destination the principle is always conditional institution. If I leave heritable estate to A in liferent, and to B, whom failing to C, in fee, or it may be to any number of substitutes in succession, the liferent and the fee always and necessarily vest concurrently in the liferenter and the first named fiar, and it makes no difference in the construction what words ("whom failing" or "on the death of A") are used to connect the names of the different persons who are to take in succession. Accordingly, there can be no suspension of vesting in such a case. The exception which Lord Adam has noticed, of a disposition to a parent in liferent and to his heirs or his issue in fee, introduces a third principle of construction distinct from the two to which I have referred, because in this case the parent is a beneficiary to the extent of his own liferent, and he holds in trust for the interest of his children, but, as I take it, universally, on the condition that each child takes a vested interest on its birth. I know of no such thing as suspension of vesting under a direct heritable destination in liferent and fee except the necessary suspension until a fiar is born.

The other point on which I have a view is the proposed application of the rule of vesting subject to defeasance. I agree, for the reasons already given, that it is altogether inapplicable to this case, but I think that even if this were a case of trust, it is not a case for the application of the doctrine, because the necessary condition of vesting subject to defeasance is that if the original institution, say of issue, were absent or supposed to be absent from the deed, the persons next in order would take a vested interest *a morte testatoris*, and that, as explained by the late Lord President in the passage read, can only be where they are a class of persons definitely ascertained. If they are a class of persons ascertained and the period of distribution is postponed, then it is evident that even if there were no original destination to issue that class could not take a vested interest at death, because the presumption always is that the words of survivorship or conditional institution are referred to the period when the trust expires.

With these observations, which do not differ in any way from Lord Adam's opinion, I concur in the judgment proposed.

LORD KINNEAR — I concur in Lord Adam's opinion as to the construction of the gift in the general disposition, the effect of which we are to determine. I also agree with him in desiring to reserve my opinion as to the application of the doctrine of vesting subject to defeasance to the case of a direct conveyance to a disponee in liferent and the heirs of his or her body in fee, with a series of substitutions failing heirs of the liferenter's body, which may of course operate as conditional institution in the event of no such heirs existing. It does not appear to me to be necessary to decide that question in the present case, and I desire reserve my opinion upon it.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—H. Johnston—Guy. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders and Respondents—W. Campbell—Salvesen. Agents—Sturrock & Graham, W.S.

Tuesday, February 20.

FIRST DIVISION.

WRIGHT'S TRUSTEES AND OTHERS.

Succession—Power of Appointment—Exercise of Power Partially Ultra Vires.

A lady by antenuptial contract of marriage directed her marriage-contract trustees to pay the interest of certain sums conveyed to them to her and her husband and the longest liver of them in liferent, and at the death of the survivor to pay over the principal to the children of the intended marriage "in such proportions and at such times and under such conditions as the survivor shall direct and appoint," and failing any such direction and appointment to the children equally. The husband survived his wife, and by testamentary deed divided the marriage-contract funds into three parts, directing his trustees to hold one part for behoof of his daughter F, and the survivor of her and any husband she might marry in liferent, and upon the death of the survivor, for the children in fee, in such manner and proportions as their parents or the survivor of them might direct, and failing such children, to pay the principal to such parties and in such manner as F might direct, and failing such direction to her nearest-of-kin equally.

Held, in a special case to which F, then aged seventy-five and unmarried, was a party, following the cases of *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921; and *Crompe* v. *Barrow*, 1799, 4 Ves. 681, that the appointment by her father of a mere liferent to her with a power of disposal was valid, although it was *ultra vires* of him to make any appointment with regard to any husband she might marry or her children.

Succession — Vesting — Vesting subject to Defeasance.

A father directed his trustees to hold £2000 for behoof of his daughter F, and the longest liver of herself and any husband she might marry in liferent, and the children of such marriage in fee, and failing children, directed them to pay said sum, on the death of the survivor, to the children of his son W, if there were any at that period, and failing such children, to pay one-half of said sum to W, or to his next-of-kin, and the other half to the children of another daughter. W died unmarried survived by F.

Held, in a special case to which F, then aged seventy-five and unmarried, was a party, that there was no vesting in W's next-of-kin subject to defeasance, and indeed, that no vesting could take place until F's death.

Mrs Helen Tovey or Wright, by antenuptial contract of marriage entered into between her and her intended husband John Wright, dated 27th April 1813, conveyed to trustees certain sums in trust, under direction to pay them over after the death of the survivor of her and her husband "to the child or children to be procreated of the said intended marriage, in such proportions and at such times, and under such conditions as the said survivor shall direct and appoint, and failing any such direction and appointment . . . among the children of the said intended marriage equally, share and share alike, at such times as they may think proper, and at furthest, at their respective majorities." . . .

Mr John Wright survived his wife and died in 1861. He was survived by three children of the marriage, viz., (1) William, who died unmarried in 1886, leaving a will by which he divided his estate equally between his sister Florence and his nephew Hamilton George Henderson; (2) Hamilton, who married the Rev. Robert Henderson and died in 1876, leaving two children; and (3) Florence, who was still alive, aged seventy-five and unmarried. Mr John Wright left a trust-disposition and settlement dated 21st February 1855, by which he directed his wife's marriage-contract trustees "in virtue of the powers conferred upon me by the said contract to act under the said contract," to pay over or convey to his testamentary trustees the whole funds held by them "to be applied as follows, viz., one-third part thereof to be paid to" his daughter Hamilton's marriage-contract trustees, "another third part of the foresaid trust funds shall be held by my said trustees in the manner hereinafter directed,