and defender were often seen together in such circumstances as led the witnesses to believe that they were keeping company as lad and lass. The defender's denial of these facts gives the case a very different complexion from what it would have had if he had admitted that he had honourably courted the pursuer. Unless we are to take the pursuer and her witnesses as having concocted a story, the evidence establishes that there were incidents in which the pursuer and defender took part which showed that they were in intimate and peculiar relations with one another. The letter of 23rd December 1894 is lost, but he denies that he received any such letter. The woman who brought the letter gives evidence that there was such a letter. If she is to be believed, written communications of the kind mentioned must have passed between the parties. Then there are other meetings which the pursuer avers took place between her and the defender, which the defender denies, and which I hold to be proved. In such circumstances I think that there is sufficient corroboration of the pursuer's statements to allow us to come to the conclusion that she has proved her case, and that the decision of the Sheriff ought not to be disturbed.

LORD MONCREIFF—I am satisfied that in the whole circumstances there is sufficient corroboration of the pursuer's evidence to entitle us to pronounce decree in her favour. In all such cases the pursuer's evidence requires corroboration, but the kind of corroboration depends upon the circumstances of the case. It is not often that the act itself or even indecent familiarities between the parties can be directly proved. Both the pursuer and the defender are now competent witnesses, and a great deal depends upon the nature of the parties' evidence. If the defender in an action of this kind refused to go into the box, that fact would go a long way towards proving the truth of the pursuer's case. In the same manner, if the defender goes into the box and gives false evidence upon important particulars, in regard to which the evidence of the pursuer is corroborated, that will also tend to prove the truth of the pursuer's case. Here there is no doubt that the defender has spoken falsely in denying that he had meetings with the pursuer on various dates, and that he received a letter from her in December 1894, matters which are spoken to by the pursuer and proved by independent testimony. In these circumstances I think that there is here substantial corroboration of the pursuer's statements. The Sheriff-Substitute has taken a different view. He has done so, however, not because he doubts the truth of the pursuer's case, but because he he considers himself bound by authority to hold that it is not sufficiently corroborated. In my opinion there is sufficient corroboration, taking into consideration the defender's denials of proved statements and the evidence of the other witness, Annie Hunter, in the case.

LORD TRAYNER—This is a case in which the proof is so conflicting as to leave me in considerable doubt as to whether the pursuer has proved her case. I rather incline to agree with the Sheriff-Substitute, and hold that the pursuer has failed to prove that the defender is the father of her child. But I must say I have great suspicion of the truth of the defender's evidence, and in view of the fact that both your Lordship and Lord Moncreiff have come to the conclusion that the pursuer has made out her case, I am not prepared to dissent.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal, and affirm the interlocutor appealed against: Find that the pursuer has proved that the defender is the father of her illegitimate child born on or about 7th August 1895: Therefore of new decern against the defender in terms of the prayer of the petition."

Counsel for the Pursuer—Orr. Agents—Coutts & Palfrey, S.S.C.

Counsel for the Defender—Baxter—T. B. Morison. Agent—George F. Welsh, Solicitor.

Saturday, June 20.

SECOND DIVISION.

WHITE'S TRUSTEES *v.* WHITE.

Succession—Vesting—Discretionary Power in Trustees to Postpone Payment—Conditional Institution of Children if Beneficiary Died Unpaid — Whether Power Exercised.

A testator directed his trustees to divide the residue of his estate among his children in certain proportions—in the case of sons upon their attaining majority, and in the case of daughters at majority or marriage, with a destination-over in the case of those predeceasing or dying in minority, to their issue, whom failing the testator's other children or their issue; and he provided, with respect to the shares falling to his sons, that the capital of the one-half thereof should not be payable to them respectively until they should respectively have attained the age of twenty-five years, "declaring nevertheless that my trustees shall have power to pay to any of my sons the capital of the said half, in whole or in part, as soon after he shall have attained majority as they shall deem advisable; and that, on the other hand, my said trustees, if they shall consider it for the interest of any of my sons, shall have power to withhold payment of the capital of such half, in whole or in part, even after he shall have attained the

age of twenty-five years complete, and that either during the remainder of his life or for such shorter period or periods as my trustees shall from time to time determine," the interest to be payable as an alimentary provision not subject to his debts or deeds; "declaring also, that in case any of my sons shall die after me, and after attaining majority, but without having received payment of the whole of the capital of the above-mentioned half . . . the capital of such half, or so much thereof as shall remain in the hands of the trustees, shall be paid to the lawful issue of the body of such son, whom failing to such persons as he should appoint by a revocable writing under his hand." One of the sons, who survived the testator, died after attaining the age of twenty-five survived by two pupil children, and leaving a trust-disposition and settlement by which he conveyed his whole estate, including his share of his father's estate, to trustees for certain purposes. At his death he had not received payment of the whole of his half-share of residue above referred to. The trustees had not recorded any minute determining to exercise their power to withhold payment of any part of his share, but there was no allegation that they had acted improperly or negligently in withholding payment. The trustees had allocated certain securities to the share falling to the son in question, and the son had granted a discharge to the trustees of all the sums paid or allocated.

Held (1) that the direction to divide on majority did not in this case import an unconditional gift of fee as regards one-half of the son's share, but was effectually qualified by the subsequent provisions, vesting being postponed until payment, not in virtue of the power to postpone payment, which by itself would have been insufficient to postpone vesting, but in virtue of that power taken along with the conditional institution of the son's children in the event of non-payment at his death; (2) that the trustees not being bound to minute their determination, and having withheld payment for two years after the son attained the age of twenty-five without protest, it must be presumed in the absence of proof or admission that they had acted contrary to their duty, that they had withheld payment in the exercise of the power conferred upon them; (3) that consequently the unpaid portion of the son's share was not carried by his settlement, but fell to be paid to his widow as guardian of his pupil children, the direction to retain until majority or marriage being only applicable to the truster's own children.

Jamieson v. *Allardice*, May 30, 1872, 10 Macph. 755; *Chalmer's Trustees*, March 16, 1882, 9 R. 743; *M'Elmail* v. *Lundie's Trustees*, October 31, 1888, 16 R. 47; *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; and *Wilkie's Trustees* v. *Wight's Trustees*, November 29, 1893, 31 S.L.R. 135, *distinguished.*

The late James Farquhar White of Balruddery died on 5th September 1884 predeceased by his wife, but survived by two sons and six daughters. He left a trust-disposition and settlement dated 14th February 1868 with eight codicils thereto, by which he conveyed to the trustees therein named, and for the purposes therein mentioned, the whole estate, heritable and moveable, real and personal, which should belong to him at the time of his death. By the fifth purpose of the trust-disposition and settlement the truster appointed his trustees "to divide the residue of my estate, heritable and moveable, real and personal, after answering the foregoing purposes and all accumulations thereof, amongst the whole lawful children or remoter issue procreated or to be procreated of my body, in such shares that James Martin White, my son, or his lawful issue, shall receive three shares, each of my other sons or their lawful issue two shares, and each of my daughters or their lawful issue one share; and that after my death, and in the case of sons, upon their respectively attaining majority, and in the case of daughters upon their respectively attaining majority or being married, whichever of these events shall first happen;" and he provided that in case any of his sons should predecease him or die in minority, the share of such deceasers should fall and belong to his lawful issue, whom failing to the testator's other children or their issue. The sixth purpose of said trust-disposition and settlement was as follows:—"With respect to the shares of the residue, original or accresced, falling to my sons, I declare that the capital of the one-half thereof, whether original or accresced, shall not be payable to them respectively before they shall respectively have attained the age of twenty-five years complete, but they shall receive the interest thereof from the time of their respectively attaining majority: Declaring nevertheless that my said trustees shall have power to pay to any of my sons the capital of the said half, in whole or in part, as soon after he shall have attained majority as they shall deem advisable; and that, on the other hand, my said trustees, if they shall consider it for the interest of any of my sons, shall have power to withhold payment of the capital of such half, in whole or in part, even after he shall have attained the age of twenty-five years complete, and that either during the remainder of his life, or for such shorter period or periods, as my said trustees shall from time to time determine; and the interest on the capital so retained shall be paid to such son yearly or half-yearly as it falls due for his aliment, and such interest shall not be assignable by him, nor subject to his debts or deeds or the diligence of his creditors: Declaring also, that in case any of my sons shall die after me, and after attaining majority, but without having received payment of the whole of the capital of the above-mentioned half

of his shares, original or accresced, of the residue, the capital of such half, or so much thereof as shall remain in the hands of the trustees, shall be paid to the lawful issue of the body of such son, whom failing to such person or persons as he shall have appointed by a revocable writing under his hand, and failing such appointment, to my other children or their respective issue, in the same proportions and subject to the same provisions as their original shares.

At the truster's death his younger son Alexander Sidney White was in minority. He attained majority on 29th March 1888. No allocation of the truster's estate was made until May 1890.

It was admitted that the minutes of meetings of the trust were correct, and accurately set forth the actings of the trustees. From the minute of meeting held on 8th July 1889 it appeared that on that date the trustees resolved that valuations of the trust-estate, with the exception of certain heritable properties, as at 30th June 1889, should be obtained and a scheme of division made up. From the minutes it further appeared that on 6th November, the valuations having been obtained and a scheme of division made up, the agents were instructed to prepare a discharge and ratification for the signatures of the beneficiaries.

The discharge referred to, which was dated 2nd May 1890 and subsequent dates, proceeded on a narrative of the truster's settlement and codicils, and of the various steps taken by the trustees towards realising the estate, and on the further narrative that, with a view to an interim division, a state and scheme of division showing the estate of the trust, and of the portion thereof of which an interim division was then to be made, had been made up, that the securities set forth in that state had been valued, and that the trustees, in place of realising same, were to make them over to beneficiaries. It contained the following clause:—"And now seeing . . . that the said trustees have allocated to me, the said Alexander Sidney White, the securities and cash of the value of £80,957, 11s. 6d. conform to column 'B' in the said scheme of division, and have made payment or accounted for to me for the sum of £48,000 thereof, and in virtue of the power conferred upon them by the said trust-disposition and settlement and codicil thereto, the said trustees have retained and hold for my behoof the balance of £32,957, 11s. 6d; . . . we, the said James Martin White and Alexander Sidney White, hereby severally and respectively exoner, acquit, and *simpliciter* discharge the said trustees, and their respective heirs, executors, and successors, and also the agents of the trustees, and all other persons whomsoever, of and from the foresaid several and respective sums of money and securities paid and allocated to us respectively: . . . Reserving always to us, the said James Martin White and Alexander Sidney White, and to us [*then follow the names of the daughters*], "and our . . . children or remoter issue, or the persons entitled to claim through us . . . the respective shares falling to us . . . of the residue of the means and estate of the said deceased James Farquhar White in so far as the same is not included in the said scheme of division."

On 8th July 1889, the trustees, having in view that Mr J. Martin White, the elder son of the truster, had attained the age of twenty-five, and also the discretionary powers conferred upon them by the fifth and sixth heads of the truster's settlement, resolved by minute to pay the said Mr J. Martin White his share of the residue, "under deduction of . . . a sum of £15,000 withheld by them in virtue of the powers reserved to them under the sixth head of the settlement." Alexander Sidney White, the younger son of the truster, only attained twenty-five years of age on 29th March 1892. The trustees had not by any minute resolved whether payment of the balance of his share of his father's estate or any part of it, should be withheld by them in exercise of their discretionary power.

Alexander Sidney White died on 4th November 1894, survived by a widow, Mrs Amy Constance Andrew or White, and by two children, Alison Marjorie White and Ian Sidney White, who were both in pupillarity. He left a trust-disposition and settlement, dated 26th July 1894, with relative codicil, by which he conveyed to the trustees therein named, for the purposes therein set forth, his whole means and estate, heritable and moveable, real and personal; and further, without prejudice to said general conveyance, 'the share of the residue, original and accrescing, falling to me under the trust-disposition and settlement and codicils thereto of my father, the deceased James Farquhar White, Esquire of Balruddery. At the date of Mr Alexander Sidney White's death, his father's trustees held the foresaid balance, amounting, according to the 1889 valuation, to £32,957, 11s. 6d. of the share of the residue of his father's estate which had been specially allocated to him in the first division before his death, and the income from which had during his lifetime been regularly paid to him. Since Mr Sidney White's death the trustees had made a final valuation and division, allocating to his share an additional sum of £5180, which they retained and held along with the said £32,957, 11s. 6d. previously allocated, making together a balance of £38,137, 11s. 6d. in their hands. Mr Alexander Sidney White's settlement contained no appointment of tutors or guardians to his children.

In these circumstances, questions having arisen as to the meaning of the clauses above quoted in the late James Farquhar White's trust-disposition and settlement, the present case was presented for the decision of the Court.

The parties to the case were—(1) The trustees of the late James Farquhar White; (2) The trustees under the trust-disposition and settlement of Alexander Sidney White, and (3) Alexander Sidney White's children and their mother as their guardian in virtue

of the Guardianship of Infants Act 1886.

The contentions of the parties appear from the arguments of counsel, *infra*.

The questions of law for the opinion and judgment of the Court were as follows:—"(1) Are the second parties, in virtue of the disposition in their favour contained in Mr A. Sidney White's trust-disposition and settlement, entitled to demand and receive from the first parties the portion of Mr A. Sidney White's share of his father's estate allocated to him in terms of the discharge quoted, but still in the hands of his father's trustees? (2) Are the second parties entitled to demand and receive from the first parties the share of the portion of Mr J. F. White's trust-estate unallocated at the date of Mr A. Sidney White's death? (3) If the first or second question be answered in the negative, is Mrs Sidney White, as guardian of her pupil children, entitled to receive the portion of Mr A. Sidney White's share of his father's estate referred to in the first question, and the share of the unallocated estate referred to in the second question, or either of them? (4) Are the first parties entitled and bound to retain said shares, or either of them, until the attainment of majority in the case of Ian Sidney White, or until that event or marriage in the case of Alison Marjorie White?"

Mr James Pitman, advocate, was appointed *curator ad litem* to the children of the late Alexander Sidney White, but after considering the case he adopted the argument of the third parties.

Argued for the second party—(1) Alexander Sidney White had at his death a vested right of fee in the whole of his share, which was consequently carried by his settlement. The fifth purpose expressly conferred such a fee upon him, and there was nothing in any other part of the deed which was sufficient to derogate from the right so conferred—*Stewart's Trustees* v. *Stewart*, January 22, 1896, 23 R. 416, and cases there followed—see also *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301. The power to postpone payment could not postpone vesting—*M'Elmail* v. *Lundie's Trustees*, October 31, 1888, 16 R. 47; *Jamieson* v. *Allardice*, May 30, 1872, 10 Macph. 755. Still less a mere failure to pay over at the date appointed—*Chalmers' Trustees*, March 16, 1882, 9 R. 743. The clauses of a will must all be read together, and the meaning most consistent with the intention of the testator as gathered from the whole deed should be preferred to the apparent literal meaning of a particular clause. The rule followed by the House of Lords in *Lady Constance Mackenzie* v. *Duke of Sutherland's Trustees*, May 15, 1896, 33 S.L.R. 628, applied only to the case of *voces signatæ*. The maxim *Posteriora derogant prioribus* did not apply to wills (see Trayner's Latin Maxims, 465), and therefore the fact that the last clause of the sixth purpose was subsequent to the fifth purpose was not of importance. It was quite a natural construction of the clause to take it as referring only to the case of a son dying between 21 and 25, and this construction was to be preferred as most consistent with the absolute gift in the fifth purpose—see also *Chalmers' Trustees, cit.* Indeed, any other construction could only lead to the clause being held void for repugnancy—*Duthie's Trustees* v. *Forlong*, July 17, 1889, 16 R. 1002. (2) The power to withhold payment had never been exercised by the trustees. It had never been held that a discretionary power of this kind had been validly exercised by merely neglecting to pay over. In all the cases the trustees had formally intimated that they had availed themselves of the power conferred upon them. See *Chambers' Trustees* v. *Smith*, November 9. 1877, 5 R. 97, and April 15, 1878, 5 R. (H. of L.) 151; *Weller* v. *Ker*, March 2, 1866, 4 Macph. (H. of L.) 8; *Mackinnon's Trustees* v. *Official Receiver of Bankruptcy in England*, July 19, 1892, 19 R. 1051. It could not even be inferred here that such was the trustees' intention, because in the case of the other son there was a formal minute withholding payment of part of his share, and it was to be presumed that if they had intended to withhold part of A. S. White's share, they would have recorded a minute to that effect. The trustees could not be said to have determined to withhold payment unless they had minuted their intention to do so. The *onus* of showing such determination was upon the third parties, and the absence of an admission in the case that the trustees had so determined was fatal to their view. The third parties were not entitled to take advantage from the trustees having failed to pay over, as they were bound to do if they had not determined to withhold payment. In such a case the maxim *quod fieri debet infectum valet* applied, and the event contemplated by the last clause of the sixth purpose, even on the supposition that that clause referred to the case of a son dying after 25, had never arisen. (3) The discharge was favourable to the view maintained by these parties. The allocation there spoken of was equivalent to payment. The trustees' actings were only consistent with the view that they regarded A. S. White as a fiar. Such allocation was incompatible with the exercise of the power of withholding payment.

Argued for the third parties—The contention of the third parties gave effect to the plain meaning of the last clause of the sixth purpose, and was entitled to prevail. (1) This was not a case of an absolute fee vesting *a morte testatoris*, for there was a destination-over, and there could be no vesting at least till majority. But even if A. S. White had a vested right after he attained majority, the exact nature of that right could not be determined until his death, or until payment by the trustees—See *per* Lord President Inglis in *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281, at p. 285. In the case of *Chalmers' Trustees, cit.*, there was no power to the trustees to withhold payment. (2) The mere fact that the trustees had not paid over was sufficient to show that they had exercised the power to postpone payment—See *per* Lord Young (Lord Ordinary) and Lord Shand in *Chalmers' Trustees* v. *Smiths, cit.* at pp. 99 and 121 respectively.

There has been no direction as to any particular way in which the power was to be exercised. In *Willer* v. *Ker, cit.*, the truster directed that the trustees' disapprobation must be minuted if it were to have effect in restricting the beneficiary to a liferent. It must be presumed, apart from admission to the contrary, that the trustees had acted lawfully, and they could only withhold payment lawfully in exercise of their power to do so. But from the minute of 8th July 1889 it appeared that the trustees had applied their minds to the question of withholding payment, and had determined to do so. (3) The allocation referred to in the discharge was not equivalent to payment. Generally, this case most nearly resembled *Chalmers' Trustees, cit.*, and *Howat's Trustees* v. *Howat*, December 17, 1869, 8 Macph. 337, and following the analogy of these cases the third parties' views were entitled to receive effect. As to the contention of the first parties, if the third parties prevailed it must be under the final clause of the sixth purpose, and that clause negatived any idea of the trustees holding the fund for behoof of grandchildren till their majority or marriage.

Argued for the first parties—In the event of the third parties being held entitled to the fund, the trustees submitted that they were bound to hold their shares until respectively A. S. White's son attained majority, and his daughter attained majority or was married. The words sons and daughters, in the clause of the fifth purpose appointing the date of vesting, was meant to include grandchildren, as elsewhere in the deed, when referring to his own children, the testator always used the words "my sons" and "my daughters."

At advising—

LORD MONCREIFF—Under the will of his father James F. White, the late Alexander Sidney White was entitled under the conditions after mentioned to a share of the residue of James White's estate. Part of the share was paid to Alexander White in May 1890, but the balance of his share remained in the hands of his father's trustees at the date of his death. The first question which we have to decide in this special case is whether right to the balance which was not paid over vested in Alexander White. If it vested in him it passed to the parties of the second part, his testamentary trustees; if it did not vest, the parties of the third part, being his only children, are entitled to it, under the express conditional institution in their favour in the settlement of James White.

The answer to the question depends upon the meaning and effect of the declaration at the close of the sixth purpose of James White's settlement. But for that declaration I do not think that there is anything in the earlier part of the deed which necessarily leads to a postponement or suspension of vesting. If the fifth purpose is taken by itself the shares of the sons vested at majority—not *a morte testatoris*, because a survivorship clause prevents that—but at majority. But the sixth purpose qualifies and controls the fifth in several material particulars. It begins by declaring that the capital of one-half of the shares falling to the sons "shall not be payable to them respectively before they shall respectively have attained the age of twenty-five years complete." What follows shows that this declaration does no more than indicate the truster's view as to the time before which, in the absence of any special reason to the contrary, the remaining half should not be paid over; because immediately thereafter he confers upon his trustees a discretionary power on any of his sons attaining majority either to pay to him the whole of the remaining half of his share or part thereof, or, if they should think it for the son's interests to do so, to retain it or part thereof not merely until he attained the age of twenty-five, but if necessary during the remainder of his life, meantime paying only the interest to him.

So far, important as are these modifications, they do not necessarily involve postponement of vesting or prevent testing. But when we come to the declaration which follows, I think it is clear that the truster contemplated and expressly provided for the contingency of the trustees not paying over the balance of a son's share on his attaining majority or twenty-five years, and the possibility of the son dying before receiving payment. The declaration is as follows:—"Declaring also, that in case any of my sons shall die after me and after attaining majority, but without having received payment of the whole of the capital of the above-mentioned half of his shares, original or accresced, of the residue, the capital of such half, or so much thereof as shall remain in the hands of the trustees, shall be paid to the lawful issue of the body of such son, whom failing, to such person or persons as he shall have appointed by a revocable writing under his hand, and failing such appointment, to my other children or their respective issue, in the same proportions and subject to the same provisions as their original shares."

I shall first consider the argument on the footing that this declaration, if effect be given to it, involves the result that Alexander White having died without having received payment of the balance of his share, the capital passed to his lawful issue as conditional institutes.

The second parties on this assumption maintain that the declaration should not receive effect, because they say it is repugnant to the gift of fee in the fifth purpose of the trust. If it were repugnant, the general, though not the inflexible rule of construction would be to give effect to it as containing the later expression of the truster's intention, but it is too late to regard such a declaration as repugnant to the original bequest. It has been decided more than once in the House of Lords that a power to trustees to restrict the right of a beneficiary to a liferent, and settle the fee on his issue or other beneficiaries, may be sustained as being a competent condition of the grant. This was notably decided in

Chambers' Trustees v. *Smith*, as decided by the House of Lords, 5 R. (H. of L.) 151, reversing the decision of the First Division of this Court, and in the earlier case of *Weller* v. *Kerr*, 4 Macph. (H. of L.) 8.

The ratio of these decisions I take to be, that there, as here, there was not an unconditional gift of fee; that where such a discretionary power is conferred on trustees, it is to be read as a condition of the bequest, and operates suspension of vesting until the share is actually paid over to the beneficiary, even although a time of vesting is named in the deed. This clearly appears from the opinions of Lord Young and Lord Shand in this Court, and of the noble and learned Lords in the House of Lords in the case of *Chambers*. Where, again, there is an unconditional gift of fee and no ulterior destination dependent on the exercise or non-exercise of the power, directions or powers given to trustees to manage or withhold the provisions beyond the period of vesting will, except when necessary for trust purposes, be disregarded as inconsistent with the right of fee. The recent case of *Miller's Trustees*, 18 R. 301, and *Wilkie's Trustees*, 31 S.L.R. 135, are strong examples of this. Again, postponement of payment alone will not postpone vesting—*Jamieson*, 10 Macph. 755; *M'Elmail*, 16 R. 47.

Here the bequest made in the fifth purpose was not unconditional, being qualified by the wide-reaching provisions of the sixth purpose, and the terms of the declaration.

It remains to notice two other points which were urged on behalf of the second parties. It was maintained that the declaration only applies to the period between the attainment of majority and the attainment of twenty-five years by the son, and that as Mr Alexander White attained the age of twenty-five years on 29th March 1892 right to the balance fully vested in him. I think that this contention is untenable, because the discretionary power given to the trustees may be exercised even after the beneficiary has attained the age of twenty-five years as well as before that period.

There is more difficulty about the remaining argument, which was to the effect that as there is no minute showing that the trustees resolved to retain the balance after Alexander White reached the age of twenty-five; and as the balance was under the will payable on his attaining that age, the maxim *quod fieri debet infectum valet* applies. Now, in the first place, I think it clear that the words "die without having received payment" in this case do not admit of the interpretation which was put upon similar words in the case of *Chalmers' Trustees*, 9 R. 743. There the words "should die previous to payment" were interpreted, not as meaning previous to the actual receipt and payment of the provision, but previous to the time at which the testator had declared the provision to be payable, viz., majority. In the case of *Chalmers' Trustees*, however, there was nothing to indicate that the truster intended or contemplated postponement of distribution, as in the case of *Howat's Trustees*, 8 Macph. 337, and *Macdougall* v. *Macfarlane's Trustees*, 17 R. 761, and as in this case.

If, however, it had been clear that there was an express direction to pay to the beneficiary on his attaining the age of twenty-five years, and that the trustees were in fault in not then making payment, the second parties might have been entitled to prevail. But, first, the deed only says that the balance "shall not be payable to them respectively before they shall have respectively attained the age of twenty-five years complete." Secondly, I find no statement or admission that the trustees were in any way in fault in delaying to pay; or that they did not retain the balance of Alexander White's share under the power conferred upon them. On the contrary, it appears from a discharge signed by Alexander White on 2nd May 1890, at which time the trustees might if they had thought proper have paid over to him the whole of the balance (he having attained majority on 29th March 1888), that the trustees retained and held the balance in virtue of the power conferred upon them by the settlement, which was a power to retain even after the son attained the age of 25.

I may observe in passing that in my opinion nothing turns upon the allocation of certain securities to satisfy Alexander White's share, which the trustees made, I presume, under the codicil of 18th March 1876. That allocation was not equivalent to payment to Alexander White, or an acknowledgment that the trustees held for him alone. It only operated as an appropriation of particular securities at specified values for behoof of all the parties (including Alexander White) who might ultimately be found entitled to that share or part thereof.

Further, the trust-deed does not make it imperative that the trustees should minute their resolution to retain the balance. In point of fact, they did retain it without objection on the part of Alexander White for upwards of two years after he had attained majority, and I think that in order to overcome the express declaration in the sixth purpose the second parties required to show by the clearest evidence or admission that in withholding payment until after Alexander White's death the trustees acted contrary to their duty and in excess of their powers. This in my opinion they have failed to do.

I therefore think that the first question must be answered in the negative. The second question, which I take it refers to a further balance of about £5000, which was not allocated to Alexander White's share before his death, should also be answered in the negative.

The third and fourth questions have in this view to be considered. I think that the third question should be answered in the affirmative, and the fourth in the negative. Mr James White's trustees are directed in the event which has happened, of Alexander White dying without having executed payment of the balance, to pay

the same to the lawful issue of his body. The only ground on which it is maintained for the first parties that they should retain the balance is that in the fifth purpose it is declared that payment is to be made in the case of sons only on their attaining majority, and in the case of daughters on their attaining majority or being married. But I am of opinion that the words "sons" and "daughters" apply only to the truster's children and not to remoter descendants.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court answered the first, second, and fourth questions in the negative, and the third question in the affirmative.

Counsel for the First Parties—Cheyne—Clyde. Agents—Henry & Scott, W.S.

Counsel for the Second Parties—Dundas—Neish. Agents—White & Nicolson, S.S.C.

Counsel for the Third Parties—Macfarlane—Dudley Stuart. Agents Henderson & Clark, W.S.

Tuesday, June 23.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

M'AULAY *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation — Negligence — Railway — Getting Out of Train Not at Platform—Invitation to Alight.

In an action of damages against a railway company, the pursuer averred, that about five o'clock in the morning in January, when some yards from the station to which he was travelling, the train stopped; that he stepped out, in the belief that the train had arrived at the station. He further averred that he was justified in this belief by the fact that the railway company were in the habit of leaving the station unlit, and that at the point where the train stopped there was a parapet wall in a line with, and abutting the coping of the platform, the top of which in the darkness resembled the platform; and that on discovering his mistake he was about to re-enter the train when it started again without warning, with the result that he was precipitated over the parapet, and sustained certain injuries. *Held* that these averments were irrelevant, nothing being alleged which could be reasonably construed as an invitation to alight.

Whittaker v. *Manchester and Sheffield Railway Company*, L.R., 5 C.P. 464, note (3), *distinguished per* Lord Young.

John M'Aulay, mason, Crosslee, Johnstone, brought an action in the Sheriff Court at Glasgow, against the Glasgow and South-Western Railway Company, in which he sought damages for certain injuries sustained by him.

He averred—"(Cond. 2) On 15th January 1896 the pursuer was a passenger in a third-class carriage from Johnstone to Elderslie by the workmen's train leaving Johnstone at twenty-four minutes past five o'clock in the morning, and had duly paid his fare. (Cond. 3) The station at Elderslie is not lighted at all by the Railway Company, and when some yards from the platform of that station the train stopped, but at that time it had not reached the said platform. (Cond. 4) About 300 yards before entering the station platform, and in a line with, up to, and abutting the coping of the platform, is a parapet wall which reaches to the footboard of the carriage, and resembles the station platform, although it is narrow. (Cond. 5) On the train stopping, the pursuer in the darkness stepped out on to the parapet wall, where there is a bridge over the Glasgow, Paisley, and Johnstone Canal, thinking it to be the station platform owing to the darkness, and the fact that the defenders systematically were in the habit of leaving Elderslie Station unlit, the pursuer, along with other passengers, believed, and was justified in believing, that the train had arrived at the station platform. (Cond. 6) When he discovered where he was, he turned round to re-enter the carriage, but the train started suddenly and without any previous warning, and the pursuer was precipitated over the parapet on to the ground, a distance of 10 feet. He was rendered unconscious by the fall, and lay there for several hours, when he was taken to the Paisley Infirmary, where he remained till 19th February. In consequence of said accident defenders now light the station in the morning."

The defenders pleaded, *inter alia*—(1) The pursuer's statements are irrelevant.

On 29th May 1896 the Sheriff-Substitute (BALFOUR) allowed a proof before answer.

The pursuer appealed to the Court of Session for jury trial, and lodged an issue for the trial of the cause.

The defenders objected to the relevancy of the action, and argued—The pursuer had stated no reasonable ground for supposing that he was at the station. The fault alleged was failure to light, but if the station had been lighted on the morning in question, that would not have prevented the accident to the pursuer. There was nothing here which could be construed into an invitation to alight as there was in all the cases quoted for the pursuer. A failure to light a station properly was not an invitation to get out at any point on the line where a train might stop. Of the two things which the pursuer said induced him to get out, the failure to light had nothing to do with the accident, and the existence of the parapet wall was not a fault on the part of the company.

Argued for the pursuer—If a railway company brought a train to a standstill in such circumstances as to induce a passenger reasonably, but erroneously, to suppose that