LORD PRESIDENT—The facts as explained to us at the discussion show that this lady has separate estate, because one aspect of the question turned on the comfort of the home to which the children would be taken if the custody were given to the mother. When the question of expenses was disposed of we were not asked to allow the expenses of the wife to be taxed as between agent and client. Accordingly, I think the account must go back to the Auditor to be taxed as in the ordinary case.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion. I think when it is intended to move for expenses as between agent and client, that ought to be made part of the motion for expenses, and that if such expenses are allowed, a finding to that effect should enter the interlocutor allowing expenses, because I cannot see that it is part of the Auditor's duty to determine, apart from an order of Court, what is a proper case for taxing expenses as between agent and client.

LORD KINNEAR was absent.

The Court remitted the account back to the Auditor to tax the same as between party and party.

Counsel for the Petitioner—C. K. Mackenzie—J. R. Christie. Agent—Alexander Campbell, S.S.C.

Counsel for the Defender—W. Campbell—Hunter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Friday, February 18.

SECOND DIVISION.

BALLANTYNE'S TRUSTEES *v.* KIDD.

Succession — Vesting — Direction to Hold for Behoof of Children and to Pay on Youngest Attaining Majority—Power to Make Advances of Capital of Share "which will Probably Fall to Each Child" —Repugnancy.

A testator by his trust-disposition and settlement directed his trustees to pay the whole income of his estate to his widow, and upon her second marriage or death to hold the residue of his estate for behoof of his children till the youngest of them should reach majority, when the trustees were to divide and pay over the same equally among the children, declaring that the issue of children predeceasing the time of division should succeed to their parent's share. By a codicil he authorised his trustees to advance to sons on their attaining majority, or to daughters on their attaining majority or being married, a sum not exceeding one sixth of the share of his estate which would "probably fall to each child," such advances to be debited to such child and deducted from his share when it fell to be paid, and further provided that any of his children being major and unmarried and not desiring to reside in family with his widow, should "receive the whole income from the approximate amount of their shares in proportion to the income which might be derived from" his estate. The widow took her legal rights and so forfeited her provisions under the settlement.

Held (*diss.* Lord Young) (1), following *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697, that the provisions in favour of the children vested *a morte testatoris;* and (2), following *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136; and *Stewart's Trustees* v. *Stewart*, December 17, 1897, 35 S.L.R. 298, that the widow's interest being now at an end, the direction to postpone payment till the youngest child attained majority was ineffectual, as being repugnant to the children's vested right of fee, and that consequently those of the children who had attained majority were now entitled to immediate payment of their shares. *Adam's Trustees* v. *Carrick*, June 18, 1896, 23 R. 828, *distinguished, commented on*, and *doubted.*

Thomas Ballantyne, pawnbroker and jeweller in Glasgow, died on 21st May 1887, leaving a trust-disposition and settlement dated 14th June 1886, and a codicil dated 27th April 1887, whereby he conveyed his whole estate heritable and moveable to trustees for the purposes therein mentioned, and appointed his trustees tutors and curators to his pupil and minor children.

The first purpose of the said trust-disposition and settlement was for payment of debts and expenses. The second purpose provided for the widow getting the liferent use and enjoyment of the deceased's dwelling-house and furniture so long as she remained his widow; and the third purpose provided for payment to the widow, during her lifetime, of the whole annual income of his estate, under burden upon her of the maintenance and education of his sons till they attained majority, and of his daughters till they became married; and it was declared that the liferent to her should terminate on her entering into a second marriage. The fourth purpose was as follows:—"(*Fourth*) Upon the subsequent marriage or upon the death of my said wife, or upon my death should I survive her, I direct my trustees, after providing for the annuity and legacies after mentioned, to hold the remainder of my whole means and estate in trust for behoof of my children, till the youngest of them shall reach majority, when my said trustees shall, with the least possible delay, convert the whole of my estate, heritable and moveable, into money (if they should not have already done so in virtue of the powers given to them under these presents), and shall divide and pay over the same equally among them;

Declaring that if any of my said children shall predecease the time of division leaving issue, such issue shall succeed to their parent's share equally among them." The fifth purpose was for payment to such of his children as might be in pupilarity or minority at the time of his decease of a legacy of £100 each, payable to sons on their attaining majority, and to daughters on their attaining that age or being married, whichever event should first happen. The sixth purpose was for payment of an annuity to his sister, the seventh was for payment of various legacies, and the eighth made provision for an old assistant acquiring his business. The trust-disposition also contained a declaration that the foregoing provisions in favour of the truster's wife and children were and should be in full of all that she or they could claim by or through his decease in respect of terce, *jus relictæ*, and legitim, or any other legal claims competent to them respectively. The first clause of the codicil dealt with the acquisition of his business. The second and third clauses were as follows:—"(*Second*) I hereby authorise and empower my said trustees, if they shall think proper, to advance and pay to such of my children as may require it, in the case of sons upon their attaining majority, and in the case of daughters upon their attaining majority or being married, whichever event shall first happen, a sum not exceeding one-sixth of the share of my estate, which will probably fall to each child, said sum or sums to be paid out of the capital of my estate, and to be debited to the children who may receive such payment, and deducted from their share when it falls to be paid; Declaring that this provision is in addition to the fifth provision of my foregoing trust-disposition and settlement, and that my said trustees shall be the sole judges as to whether such advance should be made to my said children or any of them: and (*Third*) In the event of any of my children, after attaining majority and being unmarried, not desiring to reside in family with my widow (although it is my wish that they continue to do so), they shall respectively be entitled to receive the proportion of the income which may be derived from their respective approximate shares in the residue of my estate—that is, they shall receive the whole income from the approximate amount of their shares in proportion to the income which may be derived from my estate; Declaring that the liferent interest of my widow shall be decreased accordingly."

A holograph letter was found in the deceased's repositories after his death, in the following terms, viz.—"*March* 1887. My dear Children—In all probability you will be one of these days without an earthly father. Jeannie with her dear husband and family, dear Maggie, Nancy, and Josephine (who seems so far away just now), Bessie, Horatio, Tom, Nelly, Arthur, Jackie, and darling Willie. To each and all of you I leave a father's blessing and means, which last I sincerely trust may never prove a snare to you, but which may, if wisely administered, afford you inward satisfaction and a great deal of pleasure in doing little acts of kindness to others. I hope you will all continue to live together in unity and harmony, standing loyally by Mamma, and thereby gaining the approval of your own consciences and the respect and esteem of others. God bless you. Your affectionate father, THOMAS BALLANTYNE."

Mr Ballantyne left heritable property valued at £1400, a bond and disposition in security moveable *quoad* succession but heritable *quoad* the widow's rights, which realised £156, 15s. 2d., and other moveable property amounting before deduction of debts and expenses to £13,228, 18s. 6d.

Mr Ballantyne was survived by his widow and by eleven children, five sons and six daughters, one of whom died on 23rd April 1892 survived by one pupil child, and leaving a will by which she appointed her husband her sole executor and universal legatory.

The truster's widow claimed her terce and *jus relictæ*, and so forfeited the provisions in her favour in the trust-disposition and settlement. She received one-third of the net moveable estate, and was regularly paid her terce.

The annuity provided for by the fifth purpose was paid till the death of the annuitant, and all the legacies were also paid except those payable to the two minor children upon their respectively attaining majority.

From the date of the truster's death till the term of Martinmas 1896 the trustees paid to each of his major children one-eleventh of the income of the residue, and they expended for the benefit of each of the minor children one-eleventh of the income during the same period.

At the term of Whitsunday 1897 the trustees, in respect they had doubts as to their power to make any payments whatever, declined to continue to pay or expend the income of the residue of the estate to or for behoof of Mr Ballantyne's children, as they had been in the habit of doing. A question having consequently arisen as to the interest of the children and issue of children in the residue of the estate and in the annual income derived therefrom, the present special case was presented for the opinion and judgment of the Court.

In addition to the facts above set forth, it was stated in the case that at the date when the case was presented the truster's widow was still alive and unmarried, that all the eleven children who survived the truster were still alive except one, a daughter, who had died leaving one pupil child, as stated above, that two of the daughters who were still alive were married, that all the children who were still alive were now major except two of the sons, that two of the sons (being major) and one of the daughters were not residing in family with the widow, and that the widow was willing if the estate could be divided to discharge her terce for the value of an annuity of the average amount thereof.

The parties to the special case were (1) the trustees; (2) the children major and

minor of the truster who were still alive and the husband of the daughter who had survived the truster but was now dead, as sole executor and universal legatory of his wife; (3) the children of the truster who were not living in family with the widow; and (4) the pupil child of the daughter who had died.

The first parties contended that the residue of the estate had not vested and would not vest in the persons entitled thereto till the period of division provided for in the trust-disposition and settlement, viz., the attaining of majority of the youngest child after the second marriage or death of the widow, or at all events that vesting would not take place until the time when the trustees were directed to hold the residue for behoof of the children, viz., the second marriage or death of the widow, and the first parties also maintained that at whatever period vesting had taken or would take place they were not entitled or bound to pay either capital or income to the second parties until the period of division had arrived. The second parties maintained that vesting took place *a morte testatoris*, that the period of division was postponed simply for the purpose of protecting the widow's liferent which had now been forfeited, that the widow having elected to claim her legal rights must be presumed to be legally dead, and that as there were no interests to protect, the major children were entitled to instant payment of their shares of residue (under deduction of £200 to be retained by the first parties to meet the contingent legacies to the minor children), and in any event that the children, whether major or minor, were entitled to have the income of their shares expended for their behoof as formerly till the period of division. The third parties maintained that, in any event, as they had elected not to reside in family with the widow, they were entitled to receive the proportion of the income which might be derived from their approximate shares of the residue of their father's estate. The fourth party adopted the contention of the first parties, and he maintained that the share of the estate destined to the pupil's mother would, when the succession opened, fall to be paid to the pupil or his father as his tutor-at-law.

The questions of law for the opinion and judgment of the Court were as follows:—"(1) Did the residue of the trust means and estate of Mr Ballantyne vest in his children *a morte testatoris?* or is the vesting thereof postponed (1) till the second marriage or death of the truster's widow, or (2) till the youngest child of the truster attains majority if the widow enters into a second marriage or dies before that event? (2) If there was vesting *a morte testatoris*, are the major children entitled to instant payment of their shares? or Is payment postponed (1) till the youngest child of the truster attains majority though the truster's widow be then alive, or (2) till the second marriage or death of the truster's widow? (3) If there was vesting *a morte testatoris*, but if payment of the capital is postponed, are the major children entitled to payment of the income of their shares till the period of payment, and are the trustees entitled to expend the income of the shares of the minor children respectively for their behoof until they attain majority? (4) If payment is postponed, and should the third question be answered in the negative, are the third parties entitled to payment of the income of their approximate shares of the residue?"

Argued for the second and third parties—(1) Vesting took place *a morte testatoris*. This was so upon the fourth purpose of the trust-disposition and settlement even apart from the codicil. The trustees were directed to hold for behoof of the children, and to pay at a postponed period, the issue of children predeceasing the time of division taking their parent's share. There was no survivorship clause, and the provision in favour of the issue of children predeceasing the period of payment did not amount in law to a destination-over. The postponement of payment was not adjected as a condition of the gift, but merely for the protection of the widow's liferent, and therefore did not import postponement of vesting.—*Ross's Trustees*, December 18, 1884, 12 R. 378; *Jackson* v. *M'Millan*, March 18, 1876, 3 R. 627; *Hay's Trustees* v. *Hay*, June 19, 1890, 17 R. 961; *Ross's Trustees* v. *Ross*, November 16, 1897, 25 R. 65. The last-mentioned case was directly in point, and indeed the present case was stronger, because here the beneficiaries were the testator's children, and in *Ross's Trustees* they were not. But when the codicil was taken into consideration the case for vesting *a morte testatoris* was still clearer. The codicil assumed that the children's shares vested *a morte*, as appeared from the terms of its second and third clauses. The word "probably" in the second clause only referred to the amount of the share, as was shown by the use of the word "approximate" in the third clause. These clauses showed that the testator intended the children to have severally a vested right each in his or her respective share. As to the effect upon vesting of such powers to give or rights to get anticipatory payments see *Ross's Trustees*, 12 R. 378, *cit.* and *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697. The case of *Adam's Trustees* v. *Carrick*, June 18, 1896, 23 R. 828, relied upon by the other parties, was distinguished from the present. There the trustees had power to advance not only to the children but also to the widow. There was no reference to the individual shares of the children as there was here, and the beneficiaries were not ascertained until the period of payment. The Court there proceeded upon the view that there was no gift except by way of a direction to pay at a postponed period with a survivorship clause implied. See *per* Lord Adam at page 832. Such an interpretation of the residue clause in the present deed was not admissible, for the beneficiaries were ascertained before the period of payment, and the trustees were directed to hold for behoof of the children on the cessation of the widow's liferent, and not on the

youngest child attaining majority for behoof the survivors. Here, in the view that vesting was postponed, partial intestacy would result if a child predeceased the period of payment without leaving issue. Even apart from the codicil the cases were distinguished, but in view of the codicil the distinction was quite clear. Moreover, *Adam's Trustees* was an isolated case and ought not to be followed if it conflicted with the authorities referred to above. It was not supported by the subsequent decision of *Mackinnon's Trustees* v. *MacNeill*, June 29, 1897, 24 R. 981, which on the contrary was an authority in these parties' favour. (2) If vesting took place *a morte testatoris*, then the children who had attained majority were entitled to immediate payment of their shares, the further postponement of payment till the youngest child attained majority being ineffectual as void for repugnancy, and there being now no necessity for postponing payment to secure the widow's liferent—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136; *Stewart's Trustees* v. *Stewart*, December 17, 1897, 35 S.L.R. 298. In the case of *Russell* v. *Bell's Trustees*, March 5, 1897, 24 R. 666, it was held that vesting was suspended, the restriction being effectual as a qualification of the gift. (3) In any event, the 3rd and 4th questions should be answered in the affirmative. There was no direction to accumulate income.

Argued for the first and fourth parties—There was no vesting (1) till the death or second marriage of the widow, or (2) till the youngest child attained majority, whichever of these events occurred last. The terms of the deeds here were practically the same as in the case of *Adam's Trustees* v. *Carrick*, *cit.* That case was not isolated. It was one of a series of which *Sloan* v. *Finlayson*, May 20, 1876, 3 R. 678, was an example. It had, moreover, been approved, although it was distinguished in *Mackinnon's Trustees* v. *MacNeill*, *cit.* The fact that the trustees in *Adam's* case had power to advance to the widow was not sufficient to account for the decision, because such a power did not affect the vesting of provisions in favour of children but only their amount—*Reddie's Trustees* v. *Lindsay*, March 7, 1890, 17 R. 558. The postponement of payment here was not merely to secure the widow's interest, for the trustees were directed after her interest had ceased to hold till the youngest child had attained majority. On the residue clause apart from the codicil no several rights were conferred upon the children, and the beneficiaries could not be determined till the period of payment. In these circumstances the absence of a survivorship claim was not of importance as regards vesting, for it was not required. The codicil did not make any difference in this respect. The "shares" of children were no doubt mentioned, but it was only "the share" "which will probably fall to each child," and the word "probably" plainly referred to the contingency of the right, and not merely to the amount. This interpretation was supported by the fact that subsequently where the amount only was referred to the word "approximate" was used and not "probable." At least this was a fair meaning to attach to the word "probable," and it had this advantage, that it did not conflict with the testator's intention, which was clear (whether allowable or not in law), whereas in the opposite view the whole provision as to making advances was meaningless and nugatory. The interpretation suggested also harmonised with the interpretation suggested for the residue clause. Such a reference to "a child's share" did not import a several right in each child, especially when it occurred in a codicil to a deed by which no several rights were given. There was therefore here nothing but a direction to the trustees to pay at a postponed period, and the beneficiaries had no several interests, their several interests not being capable of determination till the occurrence of the event upon which the trustees were to pay. Such a postponement of payment imported postponement of vesting—*Adam's Trustees*, *cit.*; *Reeves' Executor* v. *Reeves' Judicial Factor*, July 14, 1892, 19 R. 1013. The trustees were not even directed to hold for behoof of the children till after the widow's death or second marriage, and vesting at any rate could not take place till that event occurred. As regards vesting, this provision was not affected by the fact that the widow had renounced her liferent and taken her legal provisions—*Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45. In *Ross's Trustees*, 12 R. 378, *cit.*, and *Ross's Trustees* v. *Ross*, 25 R. 65, *cit.*, several rights were given to the beneficiaries, and these cases were consequently distinguished from the present. *Wilson's Trustees* v. *Quick*, *cit.*, must be held as overruled by *Adam's Trustees*, *cit.* (2) If vesting took place *a morte testatoris*, then probably the major children were entitled to immediate payment.

At advising—

LORD JUSTICE-CLERK—The first question in this case is, whether the residue of the estate of the late Thomas Ballantyne vested in his children *a morte testatoris* under his trust-disposition and settlement. The trustees, upon the subsequent marriage or death of his widow, who was left a liferent, were directed to hold "the remainder of my whole means and estate for behoof of my children till the youngest shall reach majority, and then on realisation to divide and pay over the same equally among them," children of a child predeceasing to take the parent's share. By a subsequent codicil power was given to the trustees to advance to any child upon majority, and in the case of daughters if they married in minority, one-sixth of the share "which will probably fall to each child, said sum or sums to be paid out of the capital of my estate, and to be debited to the children who may receive such payments, and deducted from their share when it falls to be

paid. Then it is further provided—"Declaring that this provision is in addition to the fifth provision of my foregoing trust disposition and settlement, and that my said trustees shall be the sole judges as to whether such advance should be made to my said children or any of them; and (*Third*) in the event of any of my children after attaining majority and being unmarried, not desiring to reside in family with my widow (although it is my wish that they continue to do so), they shall respectively be entitled to receive the proportion of the income which may be derived from their respective approximate shares in the residue of my estate—that is, they shall receive the whole income from the approximate amount of their shares in proportion to the income which may be derived from my estate; Declaring that the liferent interest of my widow shall be decreased accordingly."

Now, it appears to me that these being all the clauses relating to this matter, and there being no clause giving any directions as to vesting, and there being no destination-over, the presumption is for vesting *a morte testatoris*. For a direction to hold for A B is a gift to that person according to decisions. This case resembles in its essential features cases which have been already decided to that effect. Two cases I would particularly refer to, viz., the case of *Wilson's Trustees* v. *Quick* in 5 R., and the case of *Greenlees* in 22 R. If these cases were soundly decided, then I hold that the first question in the case must be answered in the affirmative. We were referred to a case of *Adam* v. *Carrick* in 23 R., which it is said is an authority to the opposite effect. I cannot say that I quite understand how that case came to be decided as it was. The opinions given do not, so far as I can see, disclose with any clearness how it came to be so. It would appear that to some extent the Bench was influenced in that case by the case of *Bryson's Trustees*, and dealt with the case as if *Bryson's Trustees* applied. I think that if that was the view on which the Court proceeded, it was not a sound view. In that case there was a destination-over, which was a most important distinction as affecting the question of vesting. Further, there certainly are distinctions between *Adam's* case and the present, because in *Adam's* case there was a power to pay the capital of the estate to the widow, which was hardly consistent with a vesting *a morte testatoris* in others. It has been said that it is impossible to reconcile the decisions in this class of cases. Agreeing, as I do, with the decision in the cases of *Wilson's Trustees* and *Greenlees*, I am prepared to answer the first alternative of the first question in the affirmative.

The second question is, whether there being vesting *a morte testatoris*, those in whom the shares have vested being major are entitled to have their shares paid over to them. That question appears to me to have been practically settled by the case of *Miller*, and I therefore am prepared to answer the first alternative of the second question in the affirmative.

It follows that the first part of the third question does not require to be answered, and that the second part should be answered in the affirmative. The fourth question would not require to be answered.

LORD YOUNG—The only deeds which we have to consider are the trust-disposition and settlement and the codicil. The settlement and the codicil must be read and construed together as the settlement of the maker. The first observation which I have to make upon these deeds is that there is here no conveyance to any beneficiary. The only conveyance is to the trustees. The rest of the trust-deed beyond the conveyance to the trustees is purely will—not conveyancing at all, but expression of will on the part of the maker which it is his desire that his trustees should give effect to, and the codicil is entirely expression of will and intention. Now, I take it to be a well-established rule of law (although no doubt there are decisions in conflict with it) that an expression of will in a testamentary instrument must be taken according to the plain ordinary meaning of the language used to express it. There are no technicalities in the matter. We are familiar with the technicalities of conveyancing, any blunder or non-observance of which may lead to disastrous results. But there are no technicalities in the expression of will and intention; there is no technicality there at all. The only question in the first instance for the trustees is—What is the will, what is the intention, expressed according to the ordinary meaning of the language used to express it? And if there is a dispute about that, it is for the Court to say what, upon reading that language (and they have no other information), was the will of the user of the language. Now, applying that principle to the deeds in question here, what do we find—[*His Lordship read the fourth purpose of the trust-disposition and settlement.*] Is there any dubiety about that as an expression of will and intention? The trustees are to hold the estate until a certain time, when they are to divide and pay over the same equally among the children. I do not fail to notice that the trustees are to hold "for behoof of the children." What is "their behoof" we are to ascertain from the will—that is to say, from the expression of his intention in the will; but they are not to part with the estate, or to divide it, or pay it to anybody, till the youngest child attains majority. Now, that being so, the next question is, Was it a lawful intention? I am unable to say that I know of any law, either common law or statute law, which makes it illegal for a man who is *sui juris* and has the absolute power of disposing of his own property to hand it to his trustees, saying, "Keep it till the youngest of my children attains majority, and then divide it among the children, and if any of them are dead, then the issue of the predecessors shall take." And if it is a legal intention, and is distinctly expressed, my opinion is that, according to the established law of Scotland, founded upon considerations of

abundant good sense, it must be given effect to. As to vesting, the deed itself says nothing expressly as to that. Therefore upon the question of vesting we depend upon the law and the will, for the law applicable to the matter depends largely upon the will that is to be dealt with. I assume it to be too clear to be dwelt upon, that in the absence of anything to the contrary there is vesting *a morte testatoris*. What is meant by "anything to the contrary." It means if the testator has expressed no intention and will which holding vesting *a morte testatoris* will defeat. You cannot hold that there is vesting *a morte testatoris* here, for that would be contrary to the intention of the testator. I am prepared to reject the view that there was vesting *a morte testatoris* here, and that upon the language of the will alone. Let me refer also to the codicil—[*His Lordship read the codicil*]. It exhibits his view that his children are not to be entitled, before the youngest attains the age of twenty-one, to receive payment of their shares, but the trustees are to hold the money and to have a discretionary power. That was lawful. My opinion therefore is that we cannot in this deed hold that there was vesting *a morte testatoris*, and that we must give effect to the clearly expressed will of the testator, that there shall be no division or payment until the youngest child attains the age of twenty-one, except in the exercise of the absolute discretionary power which is given to the trustees by the testator.

LORD TRAYNER—I am of opinion that the residue of the testator's estate vested in his children under the terms of the fourth purpose of his trust settlement *a morte*. The leading direction in that fourth purpose to the trustees is to hold the residue for behoof of the truster's children. I take that as meaning to hold the residue for the children as from the testator's death. The reference to his widow's death or re-marriage, with which the clause commences, has reference to the period before which payment is not to be made, not the period at which the trustees are to commence "to hold . . . for behoof of my children." If the clause under construction is a direction to hold as from the testator's death for behoof of the children, that amounts to a gift to the children as from the same period. As Lord Adam observed in the case of *Greenlees*, a direction "to hold for behoof of a person is equivalent to a gift to that person." I think my view is supported by that case and the decision in the case of *Wilson's Trustees*. The case of *Adam's Trustees* v. *Carrick* was founded on as an authority against the opinion I have expressed. I think it is not. The judgment in that case proceeded upon the ground (as I read it) that no gift or other right was conferred on the children, but only a direction to pay at a certain time, on the occurrence of a certain event, and that the only persons entitled to participate were those who survived the period when payment was to be made. In short, the principle on which that case was decided was that which was applied in the case of *Bryson's Trustees*, 8 R. 142. If I am right in thinking that *Adam's* case was decided on that principle, then it is not an authority against my view, for I am of opinion, as I have said, that there was here a gift to the children, taking effect at once, with only a postponement of the period of payment. I must, however, say, with all deference, that I should have considerable difficulty in adopting the construction of the clause in *Adam's* case which was put upon it by the Court. There was there no substitution to the children in the event of their failure before the time of payment, while there was such a substitution in *Bryson's* case. It was on the fact of there being such a substitution that the decision in *Bryson's* case proceeded. I am unable to reconcile the decision in *Adam's* case with the decision in *Wilson's* and *Greenlees'* cases to which I have referred. If there was here vesting *a morte*, and the first question be answered accordingly, the answer to the second question seems to follow. Whatever view I may personally entertain as to the right and power of a testator to direct that the payment of even a vested right shall be postponed, I think such a question is not now an open one. It has been decided repeatedly that directions as to the postponement of the payment of a vested right are repugnant to the gift, or a limitation of the right, which cannot receive effect. The second question must therefore also be answered in the affirmative. It is unnecessary to notice any of the other questions beyond saying that the latter half of the third question should also be affirmed.

LORD MONCREIFF—1. I am of opinion that the residue of Mr Ballantyne's estate vested in his children *a morte testatoris*. I see nothing in the fourth purpose of the trust-disposition and settlement, taken by itself, to indicate postponement of vesting. There is no survivorship clause or destination-over, it being well settled that the conditional institution of issue has not this effect.

The terms of the codicil place this beyond doubt. They confirm the view which I have indicated by providing for payment to a certain extent, even during the widow's liferent, of the income and capital of the children's respective shares of residue, such advances to be deducted from the shares when paid.

In questions of vesting it is hard to argue from one case to another; but I may point out that the case of *Wilson's Trustees* v. *Quick*, 5 R. 697, is directly in point. There the period of payment was the majority of the youngest child, and there was a power to make advances to the children as in the present case.

The case of *Adams*, 23 R. 828, was pressed upon us as an adverse authority, and it may be admitted that the grounds of judgment on this point, which are stated very shortly

by Lord Adam, conflict with the view which I have indicated of the fourth purpose of the trust taken by itself. But there was this essential difference in the circumstances of that case, which no doubt affected the judgment, that although the trustees had power to make advances of income and capital, it was a general power which could be exercised without restriction in favour of the widow or all or any of the children. There was no recognition of separate individual shares of residue in the children, and no provision for the deduction of advances from the shares of the children for whom they were respectively made.

2. Assuming that the shares of the residue vested *a morte testatoris*, the next question is, whether the children who have attained majority are entitled to immediate payment of the capital of their shares. Counsel for the first and fourth parties did not seriously dispute this, and I think rightly, because in my opinion we are bound by authority to hold that they are so entitled.

The question has arisen in consequence of the truster's widow, who is still unmarried, having claimed her legal rights and forfeited the provisions in her favour in the trust-disposition and settlement. Under the third purpose of the settlement she had a total liferent of the residue subject to the burden of maintaining and educating the children; but this right was liable to be encroached upon to a certain extent by the directions in the codicil for payment of advances of income and capital to children on their attaining majority. The result of the widow's election is to subvert the scheme of the settlement to a certain extent, and the question is really the same as if she died or married again.

As matters stand, postponement of payment is not required in order to protect or provide for any other present or ulterior interest or trust purpose; it is merely a restriction on the major children's enjoyment of a fully vested right of fee in their respective shares, and as such falls to be disregarded as repugnant to and inconsistent with a right of fee. This is settled by a series of cases—*Miller's Trustees* v. *Miller*, 18 R. 301, followed by *Wilkie's Trustees* v. *Wight's Trustees*, 21 R. 199; and *Greenlees' Trustees*, 22 R. 136.

As I observed in the case of *Russell* v. *Bell's Trustees*, 24 R. 666, it is not always easy to decide whether any particular case falls within the rule established in the case of *Miller's Trustees*, or is ruled by the earlier case of *Smith* v. *Chambers' Trustees*, as decided in the House of Lords, 5 R (H.L.) 151. I think, however, that the present case is ruled by *Miller's Trustees*, because here the beneficiaries have a fully-vested unconditional right of fee, and there are no ulterior purposes to which the shares or the income thereof are to be applied in the event of the trustees not paying them to the children themselves. In *Chambers' Trustees* there were such directions, which were held by the House of Lords to overrule or qualify the directions previously given for payment and vesting; and the same feature is to be found in the later case of *White's Trustees*, 23 R. 836.

The Court pronounced the following interlocutor:—

"Answer the first and second questions therein stated by declaring that the trust estate of the deceased Thomas Ballantyne vested *a morte testatoris*, and that his major children are entitled to instant payment of their shares: Answer the third question therein stated as amended by declaring that the minor children are entitled to have the income of their shares expended for their behoof till the period of payment: Find and declare accordingly, and decern."

Counsel for the First and Fourth Parties — Dundas, Q.C. — Chisholm. Agent — J. Gordon Mason, S.S.C.

Counsel for the Second and Third Parties —Salvesen—J. J. Cook. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, February 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MACGOWN *v.* CRAMB.

(*Ante*, vol. xxxiv. p. 345, 24 R. 841.)

Expenses—Husband and Wife—Action by Wife—Dominus Litis.

In an action raised by a married woman with the consent and concurrence of her husband as her curator and administrator-at-law, *held* that the husband was liable conjunctly and severally along with his wife in the expenses of the action, in respect (1) that he was proved to have been in truth the instigator and promoter of the action, and (2) that though duly advised of the motion to make him personally liable in expenses, he did not appear to oppose it.

Opinion reserved, whether a husband who merely gives his consent and concurrence to an action at the instance of his wife thereby renders himself liable in the expenses of the action.

This was an action of declarator of right of property in certain subjects raised by Mrs Susannah Cramb or MacGown, wife of William MacGown, Glasgow, "with the consent and concurrence of the said William MacGown her husband as her curator and administrator-at-law."

On 8th June 1897 the Lord Ordinary (KINCAIRNEY), after a proof, assoilzied the defender and found her entitled to expenses.

The pursuer reclaimed, and on 25th November 1897 the Court, there being no appearance for the reclaimer, adhered to the Lord Ordinary's interlocutor, refused the