B and his heirs or assignees in fee" vests the fee in B *a morte testatoris—Cochrane* v. *Cochrane's Executors*, 17 D. 103; *Douglas*, 2 Macph. 1008, both cases subsequent to *Bell* v. *Cheape*. A gift to "A in liferent, and in the event of A dying without issue to B in fee," also vests the fee in B subject to defeasance. Why, he asks, should a different effect be given to a bequest where those two forms are combined and the gift is to "A in liferent, and in the event of A dying without issue to B and his heirs or assignees in fee?" When it is ascertained on A's death without issue that the condition flies off, the condition is simply read out of the bequest, and the words which remain involve a vested fee in B from the first.

Possibly, in special circumstances, the words may have a different meaning forced upon them by the context. But the words in their natural sense simply express at length what is involved in a bequest to B on the expiry of a liferent, viz., power to assign or test on the bequest, and failing his doing either, a gift through him to his heirs *ab intestato*.

The argument that the bequest vested *a morte testatoris* gains strength from the difficulty of fixing on any other time of vesting. Those of the consulted Judges who support the contentions of the first and third parties respectively agree in assuming, without discussion, that the adjection of the words "and his heirs or assignees" is suspensive of vesting, but they differ as to the result. Lord M'Laren's view is that on the death of Robert Nisbet, there being no ulterior destination beyond his heirs, the suspensive condition vanished, and right vested in his heirs at that date subject to defeasance. It is a strange result (in a question of intention) that the testator should have preferred that the fund should vest in the unknown heirs of his favourite son to the exclusion of the latter, although they also should predecease the liferentrix.

Lord Kyllachy again assumes that vesting was postponed till the death of the liferentrix, and according looks for the heirs as at that date.

Vesting at the testator's death is I think the simplest as well as the soundest solution.

3. I am reluctant to express an opinion as to the effect to be given to the observations of Lord Watson and Lord Davey in the case of *Bowman*. The present case can be decided without running counter to the judgment; and the *dicta*, however weighty, were to a certain extent *obiter*. Lord Davey does not appear to differ materially from the views of the Scottish Judges in such cases as *Wilson's Trustees* v. *Quick*, 5 R. 697; *Byar's Trustees*, 14 R. 1034; and *Hay's Trustees*, 17 R. 961. He says—"I think the circumstance that the gift-over is not in favour of some *persona delecta* by name may be taken into consideration together with other circumstances appearing on the will which affect the construction." I think it will be found in the case of most wills that effect could be given to this statement of the law with much the same result as if the canon of construction formulated in *Hay's Trustees*, 17 R. 961, were applied.

Lord Watson and Lord Davey take exception to the statement of the law in *Hay's Trustees* which was adopted by the Court, and has been followed in subsequent cases. Perhaps the law was somewhat too broadly stated in that case; but in view of a series of decided cases in this Court which at present it is unnecessary to cite, I am not prepared to hold, until it is directly decided, that a destination to "A and his heirs or assignees" is the same thing, or should receive the same effect as a destination to "A, whom failing to B."

As I have already said, I think that in the present case, giving the fullest effect to the case of *Bowman*, there are ample grounds for holding that right to this legacy vested in Robert Nisbet, and passed through him to his executrix, and through her to the second party. I am therefore prepared to answer the second question in the affirmative.

The Court pronounced this interlocutor:—

"Having resumed consideration of the cause with the opinions of the Consulted Judges, in conformity with the opinions of the majority of the Judges of the Court, answer the question of law therein stated by declaring that the right to the sum of £3500 provided for behoof of Mrs Hannah Nisbet or Thompson under the trust-disposition and settlement of her father Lieutenant-Colonel Robert Nisbet, vested in Robert Nisbet junior *a morte testatoris*, subject to defeasance only in the event of the said Mrs Hannah Nisbet or Thompson leaving issue: Find and declare accordingly, and decern."

Counsel for the First Parties—Dundas, Q.C. — Cook. Counsel for the Fourth Parties — Macfarlane. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Second Party — Kincaid Mackenzie — Pitman. Counsel for the Third Parties — Ure, Q.C. — Blackburn. Agents — J. & F. Anderson, W.S.

Friday, January 26.

FIRST DIVISION.

[Sheriff Court of Ayrshire.

KENNETH & SONS *v.* NORTHERN DISTRICT COMMITTEE OF AYRSHIRE COUNTY COUNCIL.

Water Supply — Special Water Supply District — Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38) *sec.* 131.

By section 131, sub-section 1, of the Public Health (Scotland) Act 1897 it is provided that a resolution by a local authority for forming a special water

supply district or for enlarging or limiting the boundaries of a special water supply district, shall be published in one or more newspapers circulating in the district."

Held that by "district" is meant the whole district administered by the local authority, and that it is not limited either to the area or areas with which it is proposed to deal, or to the special water supply district of which they form or are intended to form a part.

Section 3 of the Public Health (Scotland) Act 1897 provides that "In this Act the following words and expressions have the meanings hereinafter assigned to them, unless such meaning is inconsistent with the context—The word 'district' means the district of any local authority under this Act."

Section 131 provides that "(1) Upon requisition to that effect made in writing by a parish council or by not fewer than ten ratepayers within the district, the local authority shall be bound to meet after twenty-one days' notice . . . . and shall, whether water supply has been already provided or not, consider the propriety of (*a*) forming part of their district into a special water supply district or—(*b*) enlarging or limiting the boundaries of a special water supply district . . . . . and the resolution of the local authority shall determine all questions regarding the payment of any debt which may affect any district or special water supply district, and the right to impose and the obligation to pay any assessment affected by such determination . . . and such resolution shall be published in one or more newpapers circulating in the district, or by the posting of handbills throughout the district . . . . and within twenty-one days after the date of the first publication of such resolution it shall be competent for any person interested to appeal against the resolution to the sheriff, and the sheriff, not being a sheriff-substitute resident within the district, may either approve or disapprove of such resolution . . . . . and the decision of the sheriff shall be binding and shall be final."

Section 185 enacts that, "Bye-laws made by a local authority under this Act shall not . . . . be confirmed unless notice of intention to apply for confirmation of the same has been given in one or more of the local newspapers circulated within or by handbills posted throughout the district to which such bye-laws relate."

By section 122, which deals with special drainage districts, it is provided that the requisition to the local authority to meet is to be by "a parish council or by not fewer than ten ratepayers within the district of a local authority."

At a meeting of the Northern District Committee of the County Council of Ayrshire held on 10th November 1898, it was resolved to enlarge the boundaries of the Special Water Supply District of Dreghorn to the effect of including therein two additional areas which lay in the parishes of Dreghorn and Irvine, and were both within the Northern District of the county.

A notice of this resolution was published on 14th November 1898 in the *Glasgow Herald*.

On 27th April 1899 an action was raised in the Sheriff Court of Ayrshire against the Northern District Committee by Messrs A. Kenneth & Sons, coalmasters, Dreghorn, craving the Court "to interdict the defenders from proceeding upon the after-mentioned resolution passed by them as if the same had been duly published in terms of the Public Health (Scotland) Act 1897, and had become final; and from executing any works with a view to carrying said resolution into effect until it shall have been duly published and become final in terms of said statute."

The pursuers, who were proprietors of subjects within one of the proposed additional areas, averred that "the said resolution of the defenders had not been published in one or more newspapers circulating in the district, or by the posting of handbills throughout said district," as required by the statute. They averred that they had learnt for the first time on January 22nd 1899 of the publication of the notice in the *Glasgow Herald*, and that "(Cond. 6) The pursuers, who were strongly opposed to said resolution, which would throw a very heavy burden upon them without any corresponding advantages, requested the defenders to publish the same in terms of the statute that they (the pursuers) might exercise their statutory right of appealing against it; but the defenders have refused to do so, contending erroneously that one publication in the *Glasgow Herald* was enough to comply with the statute."

They further averred that there were several local weekly papers in which notices affecting the district had formerly been advertised, and that "the *Glasgow Herald* is not as matter of fact a newspaper which circulates in the district in question."

The pursuers pleaded—"(1) The defenders being about to act upon the resolution in question, although the same has not been published as required by the Public Health (Scotland) Act 1897, interdict should be granted as craved, with expenses."

The defenders contended that the publication in the *Glasgow Herald* was a due compliance with the requirements of the statute, that newspaper being "a newspaper circulating in the district of the defenders as local authority under said Act, which district . . . includes the Special Water Supply District of Dreghorn."

They pleaded—"The resolution in question having been duly passed and published in terms of the Public Health (Scotland) Act 1897, and being in every respect regular and legal, the defenders are entitled to take all lawful action and proceedings thereon, and the interdict craved should be refused, with expenses."

The Sheriff-Substitute (HALL) allowed the parties a proof.

The pursuers while not disputing that the *Glasgow Herald* circulated in the Northern

District of the county, endeavoured to prove that it did not circulate in the existing Special Water Supply District, or in the proposed additional areas. In view, however, of the decision of the Court it is unnecessary to refer further to the evidence led.

The Sheriff-Substitute on 28th June 1899 pronounced the following interlocutor:—"Finds that on 10th November 1898 the defenders, as Local Authority of the Northern District of Ayrshire under the Public Health (Scotland) Act 1897, passed a resolution to alter and enlarge the boundaries of the Special Water Supply District of Dreghorn, to the effect of including therein the areas described in the prayer of the petition: Finds that the said resolution was published by the defenders in the *Glasgow Herald* of 14th November 1898: Finds that the *Glasgow Herald* is a newspaper circulating in the district of which the defenders are the local authority within the meaning of section 131, subsection 1, of the said Public Health (Scotland) Act 1897: Finds in law that the said resolution was published at the said date in terms of the said Public Health (Scotland) Act 1897: Therefore sustains the defences and assoilzies the defenders from the conclusions of the action: Finds the pursuers liable in expenses," &c.

Note.—"By section 3 of the Public Health (Scotland) Act 1897 the word 'district' is defined to mean 'the district of any local authority under this Act.' It seems, however, to be law that the definition of a word contained in the interpretation clause of a statute is not conclusive, but must give way if in any particular context the sense so requires (Hardcastle on Statute Law, 2nd ed. p. 236); and the pursuers argued that in section 131, sub-section 1, the sense requires that the word 'district' should have a more restricted meaning than that given to it in the foregoing definition, and should be limited either to the area or areas with which it is proposed to deal under that section, or at all events to the special water supply district of which they form, or are intended to form, a part. In my opinion, the word 'district' in section 131, sub-section 1, means the district of the local authority as defined by section 3, and I think this clearly appears from comparing it with section 122, where the meaning is so expressed. Taking this view, I cannot doubt that the *Glasgow Herald* is a newspaper circulating in the district within the meaning of section 131, sub-section 1, having in fact the largest circulation in that district of any daily newspaper. It may be that its daily circulation falls short of the once-a-week circulation of some of the local weekly newspapers; but had it been the intention of the Legislature to make it imperative on the local authority to publish such a resolution as the one in question in a local newspaper, this would have been expressly provided in the Act as it is in regard to bye-laws under section 185. The defenders were therefore free to exercise their own discretion as to the newspaper or newspapers in which a resolution should be published, provided they could truly be described as newspapers circulating in the district. I may not think that in this particular case they made the best possible exercise of their discretion; but I feel constrained to hold that the requirements of the statute were complied with, and that the defenders are accordingly entitled to absolvitor."

The pursuers appealed to the First Division.

The arguments of the parties appear sufficiently from the opinions of the Court.

LORD PRESIDENT—Two questions arise in this case—First, what is the meaning of the word "district" as used in the part of section 131 of the Public Health (Scotland) Act 1897, which requires that a resolution of the local authority relative to any of the matters there mentioned "shall be published in one or more newspapers circulating in the district;" and second, whether the *Glasgow Herald* was at the date of the resolution in question a newspaper circulating in that district.

The pursuers do not in the record state what they maintain to be the meaning of "district" as used in the part of section 131 referred to, although they were somewhat pointedly challenged to do so by the defenders' answer 4, in which it is stated that the *Glasgow Herald* "is a newspaper circulating in the district of the defenders as local authority under the said Act." That is the Act of 1897. It might have been expected that if the pursuers had meant to contend that that was not the "district" referred to in section 131, they would have stated what in their view the territorial area there described as the "district" was. But the Sheriff-Substitute in his note says that the pursuer's contention before him was that the word "'district' should be limited either to the area or areas with which it is proposed to deal under that section, or at all events to the special water supply district of which they form or are intended to form a part." A choice was then given of several alternatives which might be taken as the "district," and the pursuer's counsel also gave us the choice of several alternative areas which might be the "district" referred to. I understood, however, that he preferred the existing water supply district of Dreghorn *plus* the areas proposed to be added to it. As to the area thus suggested it may be sufficient to say that it was not an ascertained or established area at the time when the advertisement requires to be made. It would be natural to suppose that the Act in speaking of "district" must have referred to some area having a known legal status at the time; but the existing special water supply district with a proposed enlargement had no such status, having only reached the stage of being a proposed water supply district.

What I have now said would not go far towards solving the question, though the suggested meaning is antecedently improbable. In considering what is meant by the term "district" in section 131, it is

important to observe that in the interpretation clause of this Act (section 3) it is declared that the word "'district' means the district of any local authority under this Act." I do not say that this would be conclusive, as the word "district" might be afterwards used in the statute with such context as to make it clear that a different area was referred to. But still it is a very important starting point that *prima facie* the district is the district of the local authority, which in this case is the Northern District Committee of the County Council of Ayrshire, thereby making the "district" the Northern District of the county.

The question then comes to be, whether in section 131 that definition is displaced by anything which occurs in the section. Now, it appears to me that so far from there being anything in section 131 to show that the "district" there referred to was some other area, the terms of the section support the view that the district referred to is the area mentioned in the statutory definition. There is, first, a provision that upon a requisition of a certain number of ratepayers "within the district" certain things shall be done. It is to be presumed that ratepayers within the district who make a requisition must be resident within a known area having a legal status at the time, before anything is done in regard to advertisement; and that would apply to the whole district of the local authority, because they are the authority of the whole district from which it was proposed to sever a part and add it to the existing special water supply district of Dreghorn. As the territory administered by the local authority would or might be affected, it would be antecedently probable that notice would be required throughout the "district" in the statutory sense. This view seems to me to receive confirmation from the decision that recourse may be had against the whole "district" to make good any shortcoming in the power of a special water supply district to recover the whole cost of water supply works within it.

Next, after defining under five heads the different proposals which may be considered, section 131 continues, "and the resolution of the local authority shall determine all questions regarding payment of any debt which may affect any district or special water supply district"—contrasting the "water supply district" with the "district" in the sense of the interpretation clause. There could of course be no special debt affecting a minor district which had not yet been constituted under the Act, and in this section the "district" in the statutory sense is contrasted with another district described at large as a "special water supply district." Then comes the part of section 131 under which this question arises—"And such resolution shall be published in one or more newspapers circulated in the district." This cannot refer to the special water supply district, because when that district is meant it is so particularly described. The same contrast between the use of the word "district" and "special water supply district" or "special district" occurs throughout the rest of the section.

Reference was made in the argument to section 122, and quite properly, as it deals with a subject not very different from special water supply districts, viz., special drainage districts. It provides that upon requisition by not fewer than ten ratepayers "within the district of the local authority," the authority shall do certain things. It is quite true that here the words "of the local authority" are added, but which are not added in section 131. It may be said that the addition of these words was unnecessary, because "district" used alone would have had the same meaning. But the addition shows this, that in dealing with an analogous subject the territorial unit taken is the larger one of the local authority. The language differs in the two sections; but it appears to me that the meaning is the same in both, and I have already pointed out that unless there is something to displace the statutory definition it must prevail.

Reference was made to section 185, relative to the publication of notice of intention to apply for confirmation of bye-laws, which is required to be given "in one or more of the local newspapers circulated within, or by handbills posted throughout the district to which such bye-laws relate." There is one expression there which might give rise to discussion, viz., what is a "local newspaper"? and whether it does not mean a newspaper published as well as circulated in the locality. That is a less clear section than section 131, but it does not indicate in the policy of the statute anything at all inconsistent with what appears to me to be the true construction of section 131. For these reasons I consider that the Sheriff-Substitute is right in the view which he has taken as to the meaning of "district" in section 131.

The second question is, whether the *Glasgow Herald* is a newspaper circulating in the district, and if the views which I have expressed as to the meaning of "district" in section 131 are correct, I do not understand this to be disputed. The district of the local authority is a large one containing twelve parishes, and it is proved that the *Glasgow Herald* circulates largely in it. It is not necessary to say whether adequate circulation of the *Glasgow Herald* is proved in the smaller "district" contended for by the pursuer, though I rather think it is. Even there a certain number of copies are sold and most of them probably read by more than one person. The selection of the newspapers is however eminently a matter which the statute has left to the administrative decision of the local authority. I therefore think the interlocutor of the Sheriff-Substitute is correct upon this point also.

LORD M'LAREN—I concur. The construction of the word "district" as meaning the district of the local authority is very plainly indicated in the interpretation clause, and I think it is not displaced by anything in the context of the special provision to

which we have been referred. There may have been reasons which induced the Legislature to direct that publicity should be given to the proposed rearrangement through a newspaper which would circulate over the whole of a county or at least the whole of a district of a county in preference to publication through a newspaper having a merely local circulation. One reason might be that non-resident proprietors would be more likely to receive notice through a newspaper such as the *Glasgow Herald* having a wide circulation; but we cannot inquire into those reasons, nor can we review the discretion of the District Committee of the County Council in their choice of an organ of publication. So far as I am able to form an opinion, they seem to have chosen a suitable newspaper of very wide circulation, and one which in point of fact was taken in by the party who is stating the objection, but as Mr Clyde said that is merely a "jury point" I do not enlarge upon it. My opinion is that the District Committee has rightly interpreted its powers under the statute.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Refuse the appeal: Find in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute dated 28th June 1899: Affirm the said interlocutor: Of new assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable in additional expenses from the date of said interlocutor, and remit," &c.

Counsel for Pursuers—Solicitor-General (Dickson, Q.C.)—Clyde. Agents—Webster, Will, & Co., S.S.C.

Counsel for Defenders—Ure, Q.C.—James Reid. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, January 26.

SECOND DIVISION.

[Lord Pearson, Ordinary.

MURRAY *v.* NORTH BRITISH RAILWAY COMPANY.

Arbitration—Reference—Expenses—Fee to Arbiter — Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *sec.* 32.

Section 32 of the Lands Clauses Consolidation (Scotland) Act 1845 provides that in all cases of arbitration under it "the expenses of the arbiters or oversman, as the case may be, . . . shall be borne by the promoters of the undertaking."

Held (*rev.* judgment of Lord Pearson) that these expenses included the reasonable remuneration of the arbiters and oversman.

By section 32 of the Lands Clauses Consolidation (Scotland) Act 1845 it is enacted with regard to the costs of statutory arbitrations — "All the expenses of any such arbitration and incident thereto to be settled by the arbiters or oversman as the case may be shall be borne by the promoters of the undertaking, unless the arbiters or oversman shall award the same sum as, or a less sum than, shall have been offered by the promoters of the undertaking, in which case each party shall bear his own expenses incident to the arbitration: And in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decreet-arbitral or award in the Books of Council and Session, shall be borne by the promoters of the undertaking."

In 1896, in the course of the compulsory taking of certain property in Helensburgh belonging to the trustee of the late Mrs Macintosh by the North British Railway Company under the North British Railway Act 1893, a dispute arose between the parties as to the amount of compensation claimed by the trustee, and a statutory arbitration was entered into by them to determine the amount. The Railway Company appointed Hugh Mayberry, property valuator, Glasgow, as their arbiter, and Mrs Macintosh's trustee appointed Gabriel Gullane Murray, land valuator, Glasgow, as his. The arbiters appointed the late Sheriff Comrie Thomson to be their oversman.

The arbiters inspected the subjects of the claim at Helensburgh. Proof was led before them on 3rd and 4th May 1897 in Glasgow, and on 14th October in Edinburgh, and on the last of these occasions counsel were heard on the concluded proof. In the course of the proceedings the arbiters signed eleven orders or interlocutors.

The arbiters disagreed and devolved the submission on the oversman, who after certain procedure awarded the claimant Mrs Macintosh's trustee £2090.

The clerk and legal assessor to the arbiters suggested to the Railway Company that each of the arbiters should be paid a fee of £52, 10s. for their skill, trouble, and outlays. The Railway Company, however, refused to pay any remuneration to Mr Murray, the arbiter appointed by Mrs Macintosh's trustee.

Mr Murray thereupon raised an action against the Railway Company for £52, 10s., as reasonable and suitable remuneration in the circumstances. He averred that the defender had paid suitable remuneration to the pursuer's co-arbiter Mr Mayberry and to the oversman, and that it had been the universal practice and custom since the passing of the Lands Clauses Consolidation Act of 1845 for the promoters to pay suitable remuneration to the arbiters and oversman taking part in references under the Act.

The pursuer pleaded — "(3) A suitable charge or remuneration to statutory arbiters being part of the expenses of the arbitration and incident thereto, the defenders are liable therefor under the statute, and the charge sued for being