LORD MONCREIFF—The first question is whether Mrs Margaret Christal or Taylor had a vested right under her father's settlement *a morte testatoris*. I am of opinion that in the light of or rather by contrast with the fifth and sixth purposes of her father's settlement, for which his codicil of 18th April 1884 was substituted, such a right did vest in her *a morte testatoris*.

In the fifth and sixth purposes we find that the testator's intention is that no right to the capital shall vest in his immediate children, but that upon the death of the last survivor of them it shall vest in his grandchildren, or such as are alive at that date. By the codicil to which I have referred the testator revokes the fifth and sixth purposes of his settlement, and directs his trustees, on his youngest child attaining the age of twenty-five, to divide the residue of his estate among his immediate children, "the children of any predecessor taking their parent's share." The fifth and sixth purposes of the settlement contained provisions as to accretion and survivorship clauses, but in this codicil, which is in marked contrast, while we find trust purposes which necessitate the postponement of payment, there is nothing to indicate postponement of vesting. The income of the capital of the residue was required, according to the provisions of the codicil, for the maintenance of some of the younger children; and accordingly payment was postponed until the youngest should reach the age of twenty-five years, but I see nothing to compel us to hold that in the codicil there is any intention to postpone vesting. I think the contrary is indicated by the total change from the purposes of the settlement to those of the codicil, and that the change of testamentary intention is enough to justify the Court in holding that the words "any predecessor" in the codicil mean any immediate children who may predecease the testator, and not who may predecease the time of payment.

I am therefore of opinion that the first question should be answered in the affirmative.

The Court answered the first question in the affirmative.

Counsel for the First Party—J. R. Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Second Party — Chree. Agents—Oliphant & Murray, W.S.

Counsel for the Third Party — J. B. Young. Agents — Simpson & Marwick, W.S.

Counsel for the Fourth Party—Graham Stewart. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Fifth and Sixth Parties—Jameson, K.C. — Crole. Agents—Tait & Crichton, W.S.

Saturday, June 27.

SECOND DIVISION.

PEDEN'S TRUSTEE *v.* PEDEN.

Succession — Vesting — Liferent or Fee—Liferent with Power to Test or Appoint among Children.

A testatrix directed her trustees to divide the residue of her estate into five equal portions, and to pay one portion to each of her two sons, and to hold the remaining three portions for her three daughters, "one-third for each, and my trustees shall pay the income of said portions to my said daughters." The testatrix further declared that "while my said daughters shall have no power to obtain payment of the share of my said means and estate to be held for their behoof, they shall have power to legate or bequeath the same in such way as they may see fit, or to appoint the same among such of their children as they may think proper." There was no further provision with regard to the fee of the portions directed to be held for the daughters. *Held* that the three one-fifth portions directed to be held for the daughters did not belong to them respectively in fee, and that they were not entitled to have the same now paid over to them.

Mrs Jane Hogarth or Peden died on 26th September 1885 survived by two sons and three daughters, leaving a trust-disposition and settlement under which she provided with regard to the residue of her estate as follows:—"I direct my trustees to divide the whole of the residue of my means and estate into five equal portions, and to pay one portion thereof to each of my sons, and my trustees shall hold the remaining three portions of my said means and estate for my said three daughters equally between them, one-third for each, and my trustees shall pay the income of said portions to my said daughters. And I declare that the issue of such of my children as may have predeceased leaving issue shall succeed to the share to which their parent would have been entitled if in life: And I further declare that while my said daughters shall have no power to obtain payment of the share of my said means and estate to be held for their behoof, they shall have power to legate or bequeath the same in such way as they may see fit, or to appoint the same among such of their children as they may think proper."

The trustees paid over the two shares falling to the sons and retained the three remaining share in their hands for behoof of the daughters.

In June 1903 the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the sole surviving trustee under Mrs Peden's settlement, and (2) her three daughters.

The question of law was—"Do the said one-fifth shares of residue belong to the second parties respectively in fee, and are they entitled to have the same now paid over to them?"

The first party maintained that on a sound construction of the said settlement he had no power to pay over said shares to the second parties, and that the second parties' rights therein were by the settlement limited to a right of liferent with a power of appointment of the capital.

The second parties maintained that the said shares belonged to them respectively in fee, and that they were accordingly entitled to have the same paid over to them immediately.

Argued for the first party—The power of disposal conferred upon the second parties was not such an unqualified power as was necessary to confer a gift of fee—*Douglas' Trustees* v. *Cochrane*, November 6, 1902, 5 F. 69, 40 S.L.R. 103; *Alves* v. *Alves*, March 8, 1861, 23 D. 712. If the powers conferred were not exercised the second parties' shares fell into intestacy except in the case of a daughter leaving issue, in which case the *conditio si sine liberis institutus decesserit* would apply. The testatrix had assumed that her daughters' powers would be exercised.

Argued for the second parties — The declaration that the second parties should have "no power to obtain payment of their shares" was ineffectual to exclude the principle laid down in *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106; *Rattray's Trustees* v. *Rattray*, February 1, 1899, 1 F. 510, 36 S.L.R. 388. The second parties might assign the liferent or sell the fee of their shares and so defeat the trust, which accordingly was not effectual to exclude their right to immediate payment.

LORD TRAYNER—I do not regard this case as attended with any difficulty. The contention of the second parties is that the trustees were directed "to hold" certain portions of the truster's residue for their behoof; that a direction to hold is equivalent to words of direct gift; that such a gift vests *a morte*, and that any directions inconsistent with the full and immediate enjoyment of the gift must be disregarded. The case of *Miller's Trustees* was of course referred to. But in that case there was no doubt about the vesting, whereas here the first question is, was there a vesting of the fee of the residue. Now, I agree in the view that in some cases a direction to trustees "to hold" for behoof of a beneficiary is equivalent to a direct gift. But in determining whether such a direction is equivalent to a gift the direction must be read in connection with its context, and doing so here I am of opinion that the direction referred to was not equivalent to or intended to express an absolute gift. The purpose for which the trustees are directed to hold is plainly stated. It is "to pay the income" of the estate so held to the second parties. That no gift of fee was intended is also plain, for the truster states that the second parties "shall have no power to obtain payment" of the fee which the trustees are directed to hold. There is no doubt a power conferred on the second parties enabling them to test upon the shares of residue held on their behoof. But a liferent with a power to test is not a fee. In dealing with the construction of the settlement before us (as in all cases of the construction to be put upon testamentary writings) the first thing to be considered is, what was the intention of the truster. That intention is here very clear. The second parties were to have the income of a part of the residue, and might test upon it, but they were to have no power to obtain payment. To give effect to their contention would be in direct opposition to the expressed direction of the truster, for we would be in effect ordering the trustees to pay to the second parties what the truster said was not to be paid to them. I am therefore for answering the question put to us in the negative.

LORD MONCREIFF—I am of the same opinion. The distinction between cases in which the present question arises is often very narrow. In this case there are some indications which point to an intention to confer a right of fee and not only a liferent. In particular, there is no disposal of the fee except in the case of a daughter leaving a will or appointing the fee among her children. That at first sight points to this being a right of fee that is conferred upon the daughter of the testatrix. But taking the clause in question as a whole, I think it is plain that the testatrix intended to restrict her daughters' right to something less than a fee. All that is given to them is the income of their portions, and there is an express direction that they "shall have no power to obtain payment of the share" to be held for their behoof. Further, the only power of disposal that is conferred upon the daughters is a power to do so by will or deed of appointment. Therefore we have not here the absolute power of disposal which has been in some cases held to confer a fee.

In the last case referred to by Mr Craigie, the case of *Rattray*, the Court construed the power to assign as a general power of disposal. I do not think we can so regard what we have here. On the whole matter I agree with Lord Trayner that the question should be answered as he proposes.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court answered the question in the negative.

Counsel for the First Party — Cullen. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second Parties—Craigie. Agent—William Porteous, Solicitor.