guished it from *The School Board of Neilston, supra*, and it fell under the saving clause of the Lord Justice-Clerk's opinion therein. That case, moreover, dealt with a ground annual, a *debitum fundi*, not with a contract of location. The commencement of building operations showed that to the pursuer the value was as a building site, and the open market was not necessarily the test of value — *M'Laren* v. *Burns*, February 18, 1886, 13 R. 580, 23 S.L.R. 398; *Hill* v. *Caledonian Railway*, December 21, 1877, 5 R. 386. To ascertain the appropriate use of the ground and the year's rent therefor, the whole year must be looked at, not one isolated day in it when it happened to be bare—*Houstoun* v. *Buchanan*, March 1, 1892, 19 R. 524, 29 S.L.R. 436.

At advising—

LORD JUSTICE-CLERK—The subject in respect to which a casualty has to be fixed in this case is one which up to 1904 was occupied by buildings, and which, although it was not occupied by buildings at the date of the summons, was in an unoccupied state solely because the buildings were pulled down with a view to the immediate erection of new buildings which have since been placed upon the ground. It was therefore plainly a building site, and the question to be decided is for what could it be let at the date of the raising of the action in these circumstances. The pursuers maintain that this should be ascertained by a consideration of what could be got for the site, not as a building stance but as a piece of bare ground let for a year for some temporary purpose, such as a builder's yard or any similar use to which a piece of ground on which there was no immediate prospect of buildings being put up might be put for a time. I can see no ground for taking any such course in estimating the fair value from year to year of this ground, which was only for the moment a site without buildings actually standing on it, but which never for any year of time stood in that position. The facts in this case are peculiar, and I agree with the Lord Ordinary that it cannot be ruled by any previous decision. But I agree with him also that in taking the course he has done, he infringes in no way any principle on which any of the decided cases is based. I think the assessment of the fair feu-duty at the sum at which he has fixed it, is a perfectly fair assessment on the data before him, and must be taken as "the sum for which they might then be let."

I would therefore move that his judgment be affirmed.

LORD KYLLACHY—I am of the same opinion. I am entirely satisfied with the Lord Ordinary's judgment.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers) — Craigie, K.C.—J. D. Millar. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defender (Respondent) — Wilson, K.C.—Chree. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, February 10.

SECOND DIVISION.

CORBET'S TRUSTEES *v.* ELLIOTT'S TRUSTEES AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance — Conditional Institution of Class Members of which not Ascertained —Direction to Sell and Divide—Effect on Postponement of Vesting.

A truster directed his trustees to hold his heritable property and apply the annual proceeds for the maintenance of A, declaring that if A should be survived by lawful issue his trustees should hold the heritable property and apply the proceeds for the maintenance and education of said issue, and should convey it to said issue equally on their attaining majority; but in the event of A not having lawful issue, or of his issue dying before majority, then his trustees were to "thereupon sell said heritable property and divide the free proceeds thereof as follows:—viz., one-fourth part thereof to the children of B equally, one-fourth to the children of C equally, one-fourth to E, one-fourth to F, whom failing to his children equally *per capita*." A survived the testator and died unmarried.

In a special case dealing with the provisions to B's children, *held* that vesting was not postponed till the death of A, but took place *a morte testatoris* in the children of B alive at the time of the testator's death, subject to defeasance in the event of A dying leaving issue.

Forbes v. *Luckie*, January 26, 1838, 16 S. 374; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151; *Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H.L.) 1, *commented on.*

Succession—Vesting—Uniform Period of Vesting—No Presumption in favour of.

Per Lord Kyllachy—"I think it is clear both on principle and authority that there is no general presumption as against vesting of different provisions at different periods."

Succession—Vesting—Destination to Issue —Contingencies depending on Birth or Survivance of Issue—Conditional Institution of Issue—Suspensive or Resolutive Condition.

Per Lord Kyllachy—"It is now, I apprehend, settled law that destinations to issue or contingencies depending on the birth or survivance of issue operate generally not as suspensive but as resolutive conditions, and have therefore no effect in the event of no issue in fact existing.

Thompson's Trustees v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346,

and *Wylie's Trustees* v. *Wylie and Others*, 29th November 1902 (reported *infra*), *referred to.*

The Reverend Adam Corbet, who died on 11th October 1896, left a trust-disposition and settlement by which he conveyed his whole means and estate to trustees for various purposes. The tenth purpose was in the following terms:—"I direct my trustees to hold and manage my heritable properties in Aberdeen, including feu-duties and ground-rents there belonging to me, and expend and apply the free yearly proceeds and revenue thereof for the maintenance and comfort of my half-brother Robert Corbet, commencing at the first term of Whitsunday or Martinmas after my death, and subject to this declaration, viz., that the interest of the said Robert Corbet in the same shall be purely alimentary, and shall not be assignable by him, or attachable for his debts or deeds, declaring that if the said Robert Corbet shall have and be survived by lawful issue, my trustees shall hold and manage said heritable property, ground-rents, and feu-duties, and expend and apply the free annual revenues or proceeds thereof for the maintenance, upbringing, and education of said issue, and shall convey said heritable property, feu-duties, and ground-rents to said issue equally on their attaining majority; but that if the said Robert Corbet shall not have lawful issue, or having lawful issue, that all of them shall die before majority, my trustees shall thereupon sell said heritable property, feu-duties, and ground-rents, and divide the free proceeds thereof as follows, viz., one-fourth part thereof to the children of the said James Corbet equally, one-fourth part thereof to the children of the said Mrs Christian Corbet or Davidson equally, one-fourth part thereof to the said Mary Frances Henry, and one-fourth part thereof to the said William Stewart—whom failing, to his children equally *per capita*."

Robert Corbet died on 29th April 1904 unmarried. James Corbet died on 20th August 1892. He had a family of five, viz., one son and four daughters. The son predeceased the truster unmarried; two daughters survived the truster, but predeceased the liferenter Robert Corbet, leaving representatives; two daughters survived the truster and the liferenter Robert Corbet.

A special case was brought to determine the rights of James Corbet's children and their representatives under the tenth purpose of the settlement. The first parties to the case were the Rev. Adam Corbet's trustees, the second, third, fourth, fifth, sixth, seventh, and eighth parties were the representatives of the two daughters who had predeceased the liferenter, the ninth parties were the two daughters who survived the liferenter.

The questions of law submitted to the Court were, *inter alia*—"(1) Did the one-fourth of the estate of the late Dr Adam Corbet destined to the children of James Corbet by the tenth purpose of the said trust-disposition and deed of settlement vest *a morte testatoris* in the children of Dr James Corbet alive at the death of the truster, but subject to defeasance in the event of the said Robert Corbet dying leaving issue? or (2) Was vesting of the said one-fourth postponed till the death of Robert Corbet the liferenter?"

Argued for the second, &c., parties—There was vesting *a morte testatoris* in James' children subject to defeasance in the event which did not happen of Robert leaving issue—*Snell's Trustees* v. *Morrison*, November 4, 1875, 4 R. 709; *Taylor, &c.* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217, 15 S.L.R. 776; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346. The fact that the members of the class were not finally ascertained did not prevent vesting *a morte testatoris*—*Forbes* v. *Luckie*, January 26, 1838, 16 S. 374; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151; *Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H.L.) 1. And the fact that the class took its vested right subject to defeasance was also immaterial—*Houston* v. *Houston's Trustees*, 1894, 1 S.L.T. 403, 2 S.L.T. 118; *Cumming's Trustees* v. *Anderson*, November 15, 1895, 23 R. 94, Lord M'Laren, p. 97, 33 S.L.R. 77. The direction to sell and divide did not postpone vesting—*Ballantyne's Trustees* v. *Kidd*, February 18, 1898, 25 R. 621, 35 S.L.R. 488. And the destination of William Stewart's share did not affect the present question, inasmuch as the conditional institution of his children did not suspend vesting in him and even if it did, there was no presumption of law in favour of the same period of vesting for all provisions under a settlement.

Argued for the ninth parties—Vesting was postponed until the death of Robert Corbet, because the estate, to one-fourth of which James Corbet's children became entitled, did not come into existence until that event—*Adam's Trustees* v. *Carrick*, June 18, 1896, 23 R. 828, 33 S.L.R. 620; *Graham's Trustees* v. *Graham*, November 30, 1899, 2 F. 232, 37 S.L.R. 163; *Roberts' Trustees* v. *Roberts*, March 3, 1903, 5 F. 541, 40 S.L.R. 387; *Alves' Trustees* v. *Grant*, June 3, 1874, 1 R. 969, 11 S.L.R. 559. Vesting in a class *a morte* subject to defeasance could only take place where the members of the class were ascertained at the date of death—*Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, at 208, 26 S.L.R. 146. In the cases of *Snell's Trustees* and *Taylor*, *cit. sup.*, the question of the possibility of vesting in an unascertained class was not considered. The cases of *Corbett's Trustees* v. *Pollock*, June 18, 1901, 3 F. 963, 38 S.L.R. 723, and *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450, indicated that the doctrine of vesting subject to defeasance would not be extended to such a case as the present. The destination to William Stewart and his children must be read along with the destination to James Corbet's children, as there was a legal presumption in favour of a uniform period for the vesting of provisions under a settlement. Now, the conditional institution of William Stewart's children had the effect of postponing vesting in his case and there-

fore also in the case of James Corbet's children.

LORD KYLLACHY—In this special case I am of opinion that the first question falls to be answered in the affirmative. Apart from the destination-over to the possible issue of the liferenter, there could, I apprehend, be no possible obstacle to vesting *a morte* in the existing children of James Corbet, and it is now, I apprehend, well settled that destinations to issue, or contingencies depending on the birth or survivance of issue, operate generally not as suspensive but as resolutive conditions, and have therefore no effect in the event which occurred here of no issue in fact existing. This principle—first recognised in the cases of *Snell's Trustees* v. *Morrison* (4 R. 709), and *Taylor* v. *Gilbert's Trustees* (5 R. (H.L.) 217)—was fully formulated in the opinions and accepted and applied by the whole Court in the recent case of *Thompson's Trustees* v. *Jamieson* (2 F. 479); and it appears to me to be decisive of the present question.

It is said that the children of James Corbet are here instituted as a class and not named individually; and that as the membership of the class might fluctuate between the death of the truster and the period of division, there could be no vesting *a morte* in a class which was thus in a sense indefinite. But it is now, I apprehend, too late to urge that particular argument. If not previously, it was expressly negatived in the case of *Forbes* v. *Luckie* (16 S. 374). And that case has been followed by several other cases of a later date—the accepted doctrine being that there may quite well be vesting *a morte* in the members of a class existing at the date of vesting, subject it may be to diminution of shares *pro tanto* if before the date of division new members of the class come into existence. All this will be found explained in Lord Corehouse's judgment in the case of *Forbes* v. *Luckie*, in the judgment of Lord Colonsay in the case of *Carleton* v. *Thomson* (5 Macph. (H.L.) 151), and in the judgment of Lord Cairns in the case of *Miller* v. *Finlay's M. C. Trustees* (2 R. (H.L.) 1).

It was also contended that vesting *a morte* was—as regards one of the shares of residue (a share not here in question)—excluded by the existence of a destination-over to the legatee's (W. Stewart's) issue, and that this being so there was a strong presumption against different periods of vesting with respect to different parts of the residue. To this, however, there are two answers. In the first place, I think it clear, both on principle and authority, that there is no general presumption as against vesting of different provisions at different periods. The scheme of the settlement may require or presume uniform vesting; but it is, I think, impossible to say that there is anything of that kind here. Further, and in the next place, it appears to me that upon the principle already referred to, accepted as I have said by the whole Court in the case of *Thompson's Trustees* v. *Jamieson*, the destination-over to William Stewart's children is entirely consistent with vesting *a morte* in William Stewart, subject to defeasance in the event of his dying before the period of payment leaving children. I had occasion to consider that question some years ago in the Outer House in the case of *Wylie's Trustees*, November 1902 (*reported infra, next case*) in which a similar question arose, and in which my judgment may be referred to. There was a reclaiming-note to this Division of the Court, but on the particular point in question the reclaiming-note was not, I understand, pressed.

LORD LOW—The questions in this case depend upon the construction to be put upon the tenth purpose of the trust-disposition and settlement of the deceased Rev. Adam Corbet, who died upon 11th October 1876. He there directed his trustees to hold his heritable properties in Aberdeen (which consisted of houses, building-ground, and feu-duties), and to apply the free yearly proceeds for the maintenance of his brother Robert Corbet as an alimentary provision, "declaring that if the said Robert Corbet shall have and be survived by lawful issue, my trustees shall hold and manage said heritable property and expend and apply the free annual proceeds thereof for the maintainance, upbringing, and education of said issue, and shall convey said heritable property to said issue equally on their attaining majority."

If, however, Robert Corbet should not have issue, or if they should all die before majority, the truster directed his trustees to sell the heritable properties and to divide the free proceeds into four parts, and to pay "one-fourth part to the children of the said James Corbet" (also a brother of the truster) "equally, one-fourth part to the children of the said Mrs Christian Corbet or Davidson" (a sister of the truster) "equally, one-fourth part to the said Mary Francis Henry" (a niece of the truster), "and one-fourth part to the said William Stewart" (a nephew of the truster), "whom failing equally to his children *per capita*."

Robert Corbet was never married, and died on 29th April 1904, and the question is whether the one-fourth of the price of the heritable properties destined to the children of James Corbet vested in them *a morte testatoris* or at the death of Robert Corbet.

It was contended, in the first place, that vesting, even subject to defeasance, could not take place in the children of James Corbet until Robert Corbet's death, because the estate to one-fourth of which they were given right did not come into existence until that event. That argument was founded upon the fact that if Robert Corbet left issue the trustees were directed to divide the actual heritable properties among such issue, and that it was only in the event of failure of such issue that the heritable properties were to be converted into money, which was the subject of the bequest to James Corbet's children and the other parties named. I do not think that the argument is sound, because it seems to me that the direction to sell was merely

intended to simplify administration. The number of persons favoured in the event of Robert Corbet dying without issue might have been very considerable, and it is of course much more convenient to divide money among a number of people than land or houses.

Now, if the direction to sell at the particular date does not affect the question of vesting, the destination to be construed is, when stripped of superfluities, in form a very simple and familiar one. It is really a destination to Robert Corbet in liferent allenarly and to his children *nascituri* in fee, whom failing to the children of James Corbet. That is the kind of case to which the doctrine of vesting subject to defeasance has been held to be applicable; and the only ground upon which it was maintained that vesting subject to defeasance did not take place in the children of James Corbet at the truster's death was that the individuals composing this class — James Corbet's children — were not then ascertained, James Corbet being alive, and it being possible that additional children might be born to him.

That argument was founded upon the well-known exposition of the law of vesting subject to defeasance which was given by Lord President Inglis in the case of *Steel's Trustees* (16 R. 204). His Lordship there figured the case of a destination of a fund to the children of the testator in liferent allenarly and their children if any in fee, whom failing to another person or class of persons in absolute property, and his statement of the law applicable to such a case, upon a consideration of all the authorities, was, that "if the person or persons so called are known, or the individuals composing the class are ascertained at the death of the testator, the fee will vest in them, subject to defeasance, in whole or in part, in the event of the liferenters or any of them leaving issue; if they are not so known and ascertained, the fee will not vest until the occurrence of the event which will determine who are the persons called, or until the individuals composing the class are ascertained."

Now, if no more is meant by that passage than that where there is a destination to a class of persons there can be no vesting unless and until such a class comes into existence, then there is nothing in the Lord President's dictum inconsistent with the view that vesting took place in James Corbet's children *a morte testatoris*. If, however, what was meant was that where the destination is to the children of A, and A has children at the death of the testator, vesting cannot take place in them if it be possible that the number of the individuals composing the class may be increased by the subsequent birth of children, there is, so far as I can find, no prior authority for the proposition.

Now, I find in the decisions that in some cases a destination to the children of A has been held to vest the fund in the children existing at the death of the testator to the exclusion of children subsequently born, and in other cases in the children existing at the death of the testator and also in children subsequently born as they come into existence, but I find no case in which, in the absence of anything of the nature of a survivorship clause, or of a contingency personal to the legatees, vesting *a morte* has been negatived when children were then in existence, for the sole reason that the number of the children might be increased by subsequent births.

The leading cases upon the subject appear to me to be *Forbes* v. *Luckie*, 16 S. 374; *Carleton* v. *Thomson*, 5 Macph. (H.L.) 151; and *Miller* v. *Finlay's Trustees*, 2 R. (H.L.) 1.

In the first of these cases the testator directed his executors to pay the interest of the estate to his daughter Mrs Lawrie, and after her death "to pay the whole remainder and residue of my estate to the whole children of the said Mrs Lawrie to be lawfully procreated of her body, share and share alike." The testator died in 1811, at which date Mrs Lawrie had two children. Both of these children predeceased Mrs Lawrie, who survived until 1836 but had no other children. It was held that the residue had vested in the two children at the death of the testator. It is plain that that conclusion could not have been arrived at if vesting depended upon whether the whole individuals composing the favoured class had been ascertained, because Mrs Lawrie might have given birth to children after the death of the testator. The ground of judgment was put very shortly by Lord Fullarton, who said that he saw no reason "for denying effect to words, although relating to children to be procreated, which would confessedly have created a vested right in an individual named."

In *Carleton* v. *Thomson*, Lord Colonsay, who delivered the judgment of the House, after referring with approval to *Forbes* v. *Luckie*, stated the law in the following terms:—"The circumstance that some of the members of the favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them so soon as they respectively come into existence, although the amount of the benefit to accrue to each may not be then ascertainable. That is quite settled."

That is a very distinct and unequivocal statement of the law.

The case of *Miller* v. *Finlay's Trustees* is a somewhat striking illustration of the doctrine that the postponement of the period of payment until the termination of liferent rights, will not prevent vesting in a favoured class of feears, even although it is possible that the members composing the class may be increased in numbers between the death of the testator and the termination of the liferents. The case related to an *inter vivos* trust, the truster having disponed a heritable property to trustees. The purposes of the trust were for payment of the yearly income to the truster during his life, and after his death to his wife if she should survive him, and "after the determination of the foresaid liferents in trust for the whole lawful children of the present marriage" between the truster and his wife, "share and share

alike." It was further declared that "the fee or principal of the shares of the said children shall be payable after the determination of the said liferents, and after the whole children who shall have survived" the spouses "and who shall be alive shall have attained majority."

This Court held that nothing vested in the children until the termination of the liferents, the main ground of judgment being that the declaration which I have quoted in regard to the fee or principal of the shares amounted to a condition of survivorship. The House of Lords, however, held that vesting took place at the date when the trust was constituted, in children then born and in others as they came into existence.

It was argued that in all these cases the children in whom vesting was held to have taken place were institutes, whereas here the question arises in regard to conditional institutes who are to take only in the event of failure of issue of the liferenter. I do not think that that distinction is well founded. In cases similar to the present, in which the doctrine of vesting subject to defeasance has been applied, the question has always arisen because the class called as institutes did not exist at the death of the testator and might never come into existence. Of course if they do come into existence the bequest in their favour will take effect. But that consideration has been held not to prevent vesting taking place in the conditional institutes, subject to defeasance in the event of the children first called coming into existence. In other words the conditional institutes take subject to the condition that they shall be divested if the class instituted comes into existence. That condition, however, is resolutive and not suspensive of the right, and therefore to suspend vesting there must be something in the destination to the conditional institutes themselves—such as a survivorship clause—which would in any event, even if they had been institutes, have prevented them taking an immediate right. I think that the authorities to which I have referred show that there is no element of that kind in this case, and accordingly I concur with your Lordship that the first question should be answered in the affirmative.

I have only a word to add in regard to what Lord Kyllachy said about the destination of one fourth of the fund to "William Stewart, whom failing, to his children *per capita*." I by no means desire to indicate any disagreement with the views expressed by Lord Kyllachy, but merely to say that the question of the effect of that destination appears to me to be one upon which there is a great deal to be said upon both sides, and that I have not formed any opinion upon the subject because it did not appear to me to have any direct bearing upon the present case.

LORD STORMONTH DARLING—I think the first question should be answered in the affirmative.

LORD JUSTICE-CLERK—That is my opinion also.

The Court answered the first question in the affirmative.

Counsel for First Parties — Ingram. Agents—Dalgleish & Dobbie, W.S.

Counsel for Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Parties—Macfarlane, K.C.—Grainger Stewart—Nicolson—J. H. Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.—F. J. Martin, W.S.

Counsel for Ninth Parties—M'Lennan, K.C. — Chree. Agent — Alexander Ross, S.S.C.

Saturday, November 29, 1902.

OUTER HOUSE.

[Lord Kyllachy, Ordinary.

WYLIE'S TRUSTEES *v.* WYLIE AND OTHERS.

(Referred to in preceding case.)

Succession — Vesting — Vesting subject to Defeasance—Conditional Institution of Issue—Suspensive and Resolutive Conditions.

A marriage contract provided that the trustees should during the subsistence of the marriage pay to the wife or to her husband if he survived her the annual proceeds of the trust funds, and with regard to the capital that it should "belong to the child or children of the said intended marriage, . . . share and share alike, . . . declaring that if any child of the said intended marriage shall have predeceased the said term of payment" (in the event which happened the death of the liferentrix) "leaving lawful issue, such issue shall succeed to the share of such child so predeceasing."

The liferentrix survived her husband and died survived by several children and predeceased by a son A, who was survived by a daughter B, who survived the liferentrix.

Held that a contingency depending merely upon the existence or survivance of issue fell to be read as a resolutive and not as a suspensive condition, and accordingly that a share of the capital vested originally in A, subject, however, to defeasance in the event, which happened, of his predeceasing the term of payment leaving lawful issue, and therefore that B took in her own right as conditional institute.

By a marriage contract it was provided that the trustees should during the subsistence of the marriage pay over to Mrs Elizabeth Crosbie or Wylie, the wife, or to her husband Alexander Henry Wylie, if he survived her (which he did not), the free interest or annual proceeds of the property thereby conveyed; "and with regard to the disposal of the capital or remainder of the principal of the said trust funds, when