871—it seems to me that the pursuer has an absolute right to withdraw it if he likes. But what is the result? The result is that the case is in the position it was in before the minute of abandonment was lodged, with this difference that the pursuer has put himself in the position of having caused delay in the proceedings. The defender may enrol and ask for absolvitor, and that motion would be granted unless the pursuer is able to show that his proceedings have been *in bona fide*. In that event the pursuer would be entitled to go on with the case subject to such conditions as to expenses as the Lord Ordinary chose to lay down. It seems to me, then, that the proper interlocutor for your Lordships to pronounce is to recal the Lord Ordinary's interlocutor, sustain the pursuer's motion to withdraw the minute of abandonment, and to remit to his Lordship to proceed with the case as to him may seem just. I do not wish to take it out of the power of the Lord Ordinary to do what he might have done at the time the motion was made to withdraw the minute of abandonment. He will take up the case—the minute of abandonment being gone—and will either allow a proof subject to such conditions as to expenses as he thinks proper, or if he thinks that course consistent with the justice of the case he will assoilzie the defender.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the pursuer's reclaiming note against Lord Johnston's interlocutor dated March 15, 1906, Recal the said interlocutor; sustain pursuer's motion to withdraw his minute; allow him to withdraw said minute accordingly; remit the cause to the Lord Ordinary to proceed therein as to him may seem just: Find the pursuer entitled to expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the taxed amount of said expenses."

Counsel for the Pursuer and Reclaimer—Spens. Agent—Party.

Counsel for the Defenders and Respondents—Lippe. Agents—Boyd, Jamieson, & Young, W.S.

Tuesday, June 5.

SECOND DIVISION.

BATE'S TRUSTEES *v.* BATE.

Succession—Vesting—Trust—Assignation in Trust—Liferent by Implication—Accessory—Repugnancy—Gift of Fee on a Party's Death.

A in contemplation of her marriage to B assigned to trustees her whole estate; "(*Second*) After my death, in the event of my marrying and predeceasing the said" B "and of there being no children or issue of children of said intended marriage, for behoof of the said" B "in liferent . . . so long as he shall remain unmarried . . .; (*Third*) for behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue, equally, or share and share alike, payable at the majority or marriage of such issue, whichever of these events shall first happen . . . after the decease or second marriage of the said" B "if he shall be the longer liver; and (*Fourth*) failing children of my said intended marriage, then for behoof of my own heirs or assignees whomsoever in fee: But declaring always . . . that in the event of the said" B "entering into a second marriage, the foresaid liferent provision created in his favour, in the event before mentioned, shall as on the date of such second marriage *ipso facto* cease and determine." A was married to B, and died intestate survived by B and two sons. B claimed a liferent by implication under the third purpose, or alternatively that the income of the estate till his death or second marriage was undisposed of and fell into intestacy.

Held that B was not entitled to a liferent of the trust estate, that it vested as at A's death in her sons, and that they were entitled to immediate payment both of the capital and the accrued interest, it following as an accessory.

Ralph v. *Carrick*, 1879, 11 Ch. Div. 873, *commented on and distinguished.*

By assignation in trust, dated 16th, 17th, and 20th July 1878, and registered in the Books of Council and Session 15th January 1883, Miss Mary Whitehill, with consents therein set forth, in contemplation of the marriage contracted and about to be entered into between her and Thomas Elwood Lindesay Bate, surgeon in the Bengal Medical Service, conveyed in trust to certain persons therein named, and the acceptors and survivors of them, and to such other person or persons as might be assumed into the trust, her whole estate then belonging to her, or which she might succeed to or become vested in during the marriage. The purposes for which the said trust assignation was granted were as follows:—

"(*First*) For behoof of me, the said Mary Whitehill, in liferent for my liferent use allenarly, exclusive always of the *jus mariti* of my said intended husband; (*Second*) After my death, in the event of my marrying and predeceasing the said Thomas Elwood Lindesay Bate, and of there being no children or issue of children of said intended marriage, for behoof of the said Thomas Elwood Lindesay Bate in liferent for his liferent use allenarly so long as he shall remain unmarried, but not assignable by me or him nor attachable for my or his debts or deeds; (*Third*) For behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue, equally or share and share alike, payable at the majority or marriage of such issue, whichever of these events shall first happen after the decease of the longer liver of myself and my said intended husband if I shall be the longer liver, but after the decease or second marriage of the said Thomas Elwood Lindesay Bate if he shall be the longer liver; and (*Fourth*) failing children of my said intended marriage, then for behoof of my own heirs or assignees whomsoever in fee; but declaring always, as it is hereby specially provided and declared, that in the event of the said Thomas Elwood Lindesay Bate entering into a second marriage, the foresaid liferent provision created in his favour in the event before mentioned, shall, as on the date of such second marriage, *ipso facto* cease and determine: And further declaring that in the event of my being married to and predeceased by the said Thomas Elwood Lindesay Bate without leaving lawful issue of the said intended marriage, the said trustees shall denude themselves of the trust hereby created and retrocess and repone me in and to the whole estate and effects hereby conveyed in the same manner as if these presents had never been granted."

Miss Mary Whitehill was married to Thomas Elwood Lindesay Bate on 27th July 1878, and died intestate on 16th September 1904. She was survived by her husband and by two sons, the only issue of the marriage, Ronald Elwood Bate and Claud Lindesay Bate, who at the date of this case were both of full age. The funds falling under the trust assignation amounted as at the date of the truster's death to £6300, and the yearly income arising therefrom was about £200.

Questions having arisen with regard to the construction and effect of the trust assignation, this special case was presented to the Court. The parties to the case were —(1) Sir Matthew Arthur, Bart., and others, the trustees acting under the trust assignation; (2) Thomas Elwood Lindesay Bate, the husband; (3) Ronald Elwood Bate and Claud Lindesay Bate, the only issue of the marriage.

The second party contended that the truster failed to dispose of the income of the trust funds applicable to the period of his survivance unmarried, in the event, which occurred, of her predeceasing the second party and being survived by issue of the marriage, and that she died intestate *quoad* the said income. Alternatively, the second party contended that under the said trust assignation there was an implied gift to him of the said income of the trust funds, and that he was consequently entitled to payment thereof from the first parties so long as he remained unmarried.

The third parties contended (1) that under the trust assignation the only gift of income to the second party in the event of his surviving the truster was that contained in the second purpose, which did not apply in the event which happened, and was accordingly ineffectual; (2) that on a sound construction of the trust assignation the third parties had now a vested right to the whole trust funds, including the income accruing since the death of Mrs Bate, equally between them; and (3) that in respect of their having a vested right of fee in the trust funds, and of there being no other trust purpose to be served by the retention of the funds in the hands of the first parties until the death or re-marriage of the second party, they were now entitled to have the same paid and made over to them.

The first parties contended that they were bound to hold the trust funds until the death of the second party in terms of the trust assignation; and that, in the event of the contentions of the second party being held to be ill-founded, they were bound to accumulate the income since Mrs Bate's death so long as they could lawfully do so.

The following questions of law were, *inter alia*, submitted to the Court—"(1) Does the income of the trust funds accruing since the death of Mrs Bate, and until the death or second marriage of the second party, form intestate succession of Mrs Bate? or (2) Is the second party entitled, under the trust assignation, to payment from the first parties of the said income so long as he remains unmarried? or (3) In the event of the first two questions being answered in the negative, are the third parties entitled, as at the death of Mrs Bate, to have the whole trust funds paid over to them? or Are the first parties bound to hold the said trust funds until the death or second marriage of the second party?"

Argued for the second party—There was an implied gift of the liferent of the trust funds to the second party so long as he did not marry again. In *Aberdein's Trustees* v. *Aberdein and Others*, March 19, 1870, 7 S.L.R. 433, 8 Macph. 750, Lord Moncreiff at p. 752 said—"A bequest to B on the death of A implies a liferent to A;" and this expressed the rule of *Humphreys* v. *Humphreys*, 1867, L.R. 4 Eq. 475, referred to in M'Laren on Wills, vol. i, p. 322. True, this rule had been qualified in *Ralph* v. *Carrick*, 1879, L.R. 11 Ch. D. 873 (esp. opinions of Cotton, L.J., and James, L.J.), to the effect that a gift to the testator's heir-at-law (but not to a stranger) after the death of A implied a life estate to A. This rule had been followed also as regards next-of-kin—*In re Springfield—Chamberlin* v. *Springfield*, [1894] 3 Ch. 603, and *In re Willats—Willats* v.

Artley, [1905] 1 Ch. 378. Vesting was here postponed, but even assuming vesting the rule applied. Though there was apparently no reported case in which the rule had been applied in Scotland, it was an equitable rule and should be applied. (2) Alternatively, vesting was postponed to the date of distribution—*Young* v. *Robertson*, 1862, 4 Macq. 314—and the truster having failed to dispose of the income of the estate from her death till the date of distribution there was intestacy *quoad* this income. Vesting being postponed there was no room for applying the doctrine of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236.

Argued for the third parties—(1) There was no room for the implication of a liferent; that would neglect the conditions of clause two, again referred to in clause four. This distinguished the case from those cited. (2) The children "then surviving," *i.e.*, at Mrs Bate's death, at that date took a vested interest, and vesting having taken place the income followed the capital, and there being no purpose in keeping up the trust the third parties were entitled to immediate payment—*Miller's Trustees* (*cit. supra*).

LORD LOW—If it were not for the postponement of the term of payment in the third purpose, the construction of the trust-assignation in question would present no difficulty. Apart from that clause the provisions of the assignation are these—In contemplation of her marriage with the second party the deceased Mrs Bate assigned certain funds to trustees to be held by them, (1) for behoof of herself in liferent; (2) after her death and "in the event of there being no children or issue of children of said intended marriage" for behoof of the second party "so long as he shall remain unmarried;" (3) "for behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue equally or share and share alike, payable at the majority or marriage of such issue;" and (4) failing such issue, then for behoof of her own heirs or assignees in fee. It was then declared that in the event of the second party entering into a second marriage "the foresaid liferent provision created in his favour in the event before mentioned shall, as on the date of such second marriage, *ipso facto* cease and determine." Now, if there had been nothing else in the assignation no difficulty could, in the event which has happened, have arisen. Mrs Bate was survived by two sons (the third parties), who have both attained majority, and therefore the second party would have had no claim to a liferent of the trust estate, while the third parties would have been entitled to immediate payment of the capital.

There is, however, in the third purpose a further postponement of the term of payment of the capital which creates considerable difficulty. After the words which I have quoted—"payable at the majority or marriage of such issue"—the following words occur—"whichever of these events shall first happen after the decease of the longer liver of myself and my said intended husband if I shall be the longer liver, but after the decease or second marriage of the said" second party "if he shall be the longer liver."

The second party maintains that payment was postponed in order that he might enjoy a liferent of the trust funds during his life or until he married again, and that that object has been effectually carried out by postponing the term of payment until his death or second marriage, the fee being given to the very persons who would have been Mrs Bate's heirs *in mobilibus ab intestato*.

That contention is founded upon a rule which seems to be well settled in the law of England and which may be stated thus—If a testator destines his estate to his heir-at-law *after the death of A* there is an implied gift of a life estate to A, but if the person to whom the estate is destined after the death of A is not the heir-at-law, the implication does not arise—*Ralph* v. *Carrick*, 11 Ch. Div. 873. The rule is equally applicable to the case of the next-of-kin.

That rule has never been actually applied in Scotland, but apparently the question has never arisen, and I am inclined to think that in circumstances appropriate for the application of the rule it would be adopted by this Court.

Now, if the third purpose here stood alone I think that the rule would have been applicable, but of course that purpose must be read along with and in the light of the other clauses of the assignation, and the question is, whether when so read it discloses an intention on the part of the truster to give a liferent to the second party, in the event, which has occurred, of there being surviving children of the marriage, with sufficient certainty to justify the Court in giving effect to it?

I am of opinion that that question must be answered in the negative. The second purpose of the trust confers a liferent on the second party in the event of there being no children. That seems to me to raise a strong presumption that the intention was that if there were children there should be no liferent, because if the intention was to give a liferent in any event, the obvious course would have been to say so, and one can hardly imagine a conveyancer not merely providing separately for the two cases, but doing so by giving an express liferent if there should be no children, and leaving it to be inferred that there should also be a liferent if there were children, by a mere declaration that payment of the capital should be postponed until the second party's death.

There is further the declaration which I have already quoted and which follows the enumeration of all the trust purposes, to the effect that "the foresaid liferent provision created" in favour of the second party "in the event before mentioned" should cease upon his second marriage. It is plain that that declaration refers only to the liferent given by the second purpose, and further the natural inference from the language of the declaration is that in the

previous part of the assignation only one provision for a liferent to the second party had been made.

In the face of these clauses I think that it is impossible to hold that a liferent, in the event of there being children, was given by implication in the third purpose. It may be that, as matter of fact, the clause in that purpose postponing payment was inserted with the intention of giving a liferent to the second party. But that is mere conjecture, and I apprehend that the Court would not be justified in holding that a liferent was given by implication, unless the implication was so plain as to be practically equivalent to an express provision. It seems to me to be impossible to say that that is the case here.

I am therefore of opinion that the second party is not entitled to a liferent of the trust estate, and I shall now consider the alternative contention urged by the second party, namely, that the income of the trust estate from the death of Mrs Bate until the period of payment is undisposed of and falls into intestacy.

That also is a contention to which I am unable to assent. I think that by virtue of the third purpose the fee of the trust estate vested in the third parties at Mrs Bate's death, and that the income accruing after that date, not having been otherwise disposed of, followed the capital sum as an accessory, and that the third parties have right thereto.

The only other point requiring to be determined is what effect, if any, is to be given to the direction postponing the payment of the capital until the death or second marriage of the second party?

It seems to me to be impossible to gather from the assignation any definite trust purpose which the postponement of the term of payment was intended to serve, and that being so, and an absolute gift of the fee, vesting as at Mrs Bate's death, having been given to the third parties, there is no sufficient reason for keeping up the trust. I am therefore of opinion that the third parties are entitled to immediate payment of the trust estate with the interest which has accrued since Mrs Bate's death.

The result is that, in my judgment, the first alternative of the third question should be answered in the affirmative and all the others in the negative.

LORD STORMONTH DARLING—The puzzle of this trust-assignation (which was executed by the late Mrs Bate a few days before her marriage and in contemplation of that event) lies in the difficulty of reconciling the second trust purpose with the third and with the declaration in the fourth. If she intended that her husband should have a liferent of her estate in any case, whether there were children or not, why did she make it an express condition of the liferent conferred upon him by the second purpose, not only that she should predecease him, but also that there should be no children or issue of children of the marriage? On the other hand, if she intended that he should have no liferent in the event of there being children, why did she make the fee payable to the children only at his death or second marriage if he survived her? The second party, who is the husband, founds on this clause as implying a liferent; and he cites certain English cases which seem to support the proposition that a life estate in A B will be implied from a gift on the death of A B to the testator's heir-at-law or next-of-kin (although not to strangers) on the principle that the postponement of the heir's or personal representative's enjoyment of the subject (real or personal, as the case may be) till the death of A B is intelligible only on the supposition that A B is to take the intermediate income. Certainly no one has been able to suggest any other reason for postponing payment of the capital till after the death or second marriage of the husband.

But while there is much force in this reasoning, I read these English cases as applicable only to the pure case where a life estate may be implied because there is no express provision against it. Here there is an express provision, viz., that the liferent is to arise "in the event of there being no children or issue of children of said intended marriage." It is the only part of the deed in which a liferent is expressly given. And it seems to me that you would have to read these words out of the deed before you could give effect to the second party's argument. It may be permissible to conjecture that these words were not intended as an absolute condition of the liferent; but there they stand, in a deed, moreover, by which the lady was under no contractual obligation to grant a liferent at all, and it would be carrying conjecture too far to treat the words *pro non scriptis*.

I therefore agree with Lord Low on the main question; and I further agree that, the trust estate having vested as at Mrs Bate's death unburdened with any liferent, the third parties are entitled to immediate payment of it.

LORD JUSTICE-CLERK—I have had an opportunity of perusing the opinions which have just been delivered, and I entirely concur in them.

LORD KYLLACHY was absent.

The Court pronounced this interlocutor—

"Answer the first and second questions and also the second alternative of the third question of law in the negative, and the first alternative of the third question in the affirmative."

Counsel for the First Parties—Paton. J. W. & J. Mackenzie, W.S.

Counsel for the Second Party—M'Clure, K.C.—J. H. Millar. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Third Parties—Macfarlane, K.C.—Macmillan. Agents—Roxburgh & Henderson, W.S.