or dished form") appeared in claim 2 and not in claim 1; and further, that Mr Van Berkel holds to it that the dish-shape of the circular knife was an original invention of his own, and that he was not aware that it had been used in other trades for cutting other substances. The record distinctly puts forward the dished knife used by the respondent as being an infringement of the complainer's machine. But in my opinion he had no intention of claiming, and did not claim, the dish-shaped knife generally and apart from the purposes of his machine. His provisional specification and his unamended complete specification both bore on the face of them that the invention was a combination which included a circular knife of that particular shape; the subject-matter of the invention being described as a machine for slicing meat goods in which a rotating circular knife of dished-form is arranged for cutting the meat. This being so, one does not expect, after reading the specification, to find the knife claimed separately as an independent invention in claim 2, any more than to find the Whitworth lever claimed separately as an invention in claim 3. Accordingly in each clause of the claim there is a distinct reference back to a "machine for slicing German sausages and the like"; and I read the expression "substantially as and for the purposes hereinbefore set forth," occurring at the end of claim 2, as applying to and conditioning the whole of that claim. I hold with the Lord Ordinary that these and the other minor claims "are not, as matter of fair construction, made as subordinate integers, but as appendant only to his principal claim for the invention."

Then it is said that assuming the validity of the complainer's patent the invention was anticipated by Kolbe's patent, published in 1897. Kolbe, however, missed what is by far the most important member of the combination, namely, the dish-shaped knife; and I think it is a just inference from the proof that his machine was (as the Lord Ordinary says) not intended to perform nor capable of performing the meat-slicing operation of the complainer's patent. I am satisfied with the way in which the Lord Ordinary has dealt with this part of the case.

The complainer's patent being thus supported on all points, it is further incumbent upon him in this application to show that it has been infringed by the respondent's sale of the Brinnhäuser machine. I think he has shown this quite clearly. Not only are the two machines very similar in appearance, but they are in great part substantially identical in arrangement and design; and where Brinnhäuser's differs from the complainer's the differences consist in the use of mechanical equivalents to serve the same purposes, but not always to serve them so well.

I am therefore of opinion that the interlocutor should be affirmed.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for Complainer and Respondent—Dean of Faculty (Campbell, K.C.)—Clyde, K.C.—Graham Stewart. Agents—Hutton & Jack, Solicitors.

Counsel for Respondents and Reclaimers—Solicitor-General (Ure, K.C.)—Sandeman—Ballingall. Agents—Paterson & Gardiner, S.S.C.

Thursday, November 29.

SECOND DIVISION.

CAIRNS' TRUSTEES *v.* CAIRNS AND OTHERS.

Succession—Vesting—Vesting Subject to Defeasance—Conditional Institution of Issue.

"Where in a will or settlement a gift, either of a legacy or a share of residue, is so expressed that, notwithstanding a postponed term of payment or distribution, there is at the testator's death no obstacle to immediate vesting except the existence of contingent interests, either prior or subsequent, conceived in favour of issue (either the legatee's issue or the issue of some other person—*e.g.*, a liferenter), the contingency thus affecting the legatee's right is presumed to constitute not a suspensive but only a resolutive condition, operating a divestiture if the issue exist and survive, but otherwise not operating at all."

A testator by his trust-disposition and settlement gave a liferent of his estate to his wife in the event (which happened) of her surviving him, and directed his trustees "on the death of my said wife, if she shall survive me, or on my death should she predecease me," to make over and convey his whole estate to his four children *nominatim* "equally among them, share and share alike, the issue of any predeceasing child taking equally among them their parent's share."

Held that the share of each child vested in it *a morte testatoris*, subject to defeasance in the event of its predeceasing the liferentrix leaving issue.

Process—Special Case—Competency—Question whether Premature.

Under a trust-disposition and settlement the liferent of a testator's estate was payable to his widow, and upon her death the trustees were to divide the capital equally among the testator's four children, the issue of any predeceasing child taking the parent's share.

After the testator's death, but during the life of the widow and four children, a special case, in which all parties interested were represented, was submitted to the Court for the purpose of determining the question whether the testator's children had a vested interest

in their shares. One of the children, who had married and was in delicate health, was desirous of making testamentary provision for his wife and child, and intended, if it transpired that his share had not vested, to claim legitim from his father's estate.

Held that the special case was competent and not premature.

William Cairns died on 14th December 1904 leaving a trust-disposition and settlement, dated 3 d February 1903, and recorded in the Books of Council and Session on 17th December 1904, in which he conveyed his whole estate, heritable and moveable, to trustees, directing them, after payment of his debts and the expenses of executing the trust, to pay the income to his wife if she should survive him. With regard to the capital the trust-disposition and settlement provided as follows:—"(*Third*) On the death of my said wife, if she shall survive me, or on my death should she predecease me, my trustees shall convey and make over my whole means and estate to my said son Charles Edward Stuart Cairns; to my said son William M'Gregor Cairns; to my said son Robert Lyle Cairns; and to my daughter Mrs Margaret Barrie Cairns or Barclay, wife of the said Robert Stewart Barclay, equally among them, share and share alike, the issue of any predeceasing child taking equally among them their parent's share, and the share of each child being payable in the case of sons on their attaining the age of twenty-one years, and in the case of daughters on their attaining that age or being married, whichever event shall first happen, and my trustees shall, after the death of the survivor of my said wife and myself, hold the shares of such children as may then be in minority and pay or apply the income thereof to or for behoof of these children until their respective shares are payable to them as aforesaid."

The testator was survived by his wife and by his four children, all of whom had attained majority before the date of the testator's death. One son, William M'Gregor Cairns, was married, and had a son, William Anderson Cairns. Another son, Robert Lyle Cairns, was also married, and had a daughter Agnes Cairns. A daughter, Mrs Margaret Barrie Cairns or Barclay, was married and had two daughters, Jean M'Gregor Barclay and Bessie Dunlop Barclay. A son, Charles Edward Stuart Cairns, was unmarried. The estate of the testator at his death consisted of moveable property amounting to £21,329, 16s. 5d., and heritable property estimated or worth £2,602, 8s. 1d.

A question having arisen as to the period of the vesting of the shares of the estate, a special case was presented to the Court, to which William Cairns' trustees were the parties of the first part, William Cairns' children the parties of the second part, and the tutors and curators of the grandchildren, who were all in pupilarity or minority, the parties of the third part.

The case stated—"Robert Lyle Cairns, one of the sons of the testator, is, as previously stated, married and has a daughter aged four years. Neither he nor his child is in good health, and it is probable that neither he nor his child will survive the liferentrix. His wife has already expended a considerable part of her own funds for the benefit of his health. In these circumstances the said Robert Lyle Cairns is desirous of making provision by testament for his wife and child, and in the event of the share of his father's, the testator's, trust estate destined to him not vesting in him prior to the death of the liferentrix, it will be necessary for him forthwith to claim his legitim in order to provide for his wife. The second parties maintain that the shares of the estate destined to them under the testator's trust-disposition and settlement vested in them *a morte testatoris*. The third parties maintain that the shares of the estate have not yet vested."

The following questions of law were submitted to the Court in the original case:—"(1) Have the shares of the estate destined to the second parties under the said trust-disposition and settlement vested in them? or, (2) Is vesting postponed until the death of the liferentrix Mrs Agnes M'Gregor or Cairns?"

The following question was added after the hearing, viz.—"(3) Have the shares of the estate destined to the second parties vested in them subject to defeasance in the event of their predeceasing the liferentrix leaving issue?"

At the hearing the Court suggested a doubt as to the competency of the special case, the question between the parties, upon which the opinion of the Court was asked, being a prospective and not a present question.

The parties submitted that the case was *competent*, referring to the following authorities:—Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 63; *Campbell's Trustees* v. *Hudson's Executor*, July 18, 1895, 22 R. 943, Lord Trayner at p. 953, 32 S.L.R. 703; *Chaplin's Trustees* v. *Hoile*, October 30, 1890, 18 R. 27, 28 S.L.R. 51; *Falconar Stewart* v. *Wilkie*, March 15, 1892, 19 R. 630, 29 S.L.R. 534; *Mackenzie's Trustees* v. *Mackenzie's Tutors*, July 1, 1846, 8 D. 864; *County Council of Renfrew* v. *Trustees for Orphan Homes of Scotland*, November 22, 1895, 23 R. 166, 33 S.L.R. 138; *County Council of County of Roxburgh* v. *Melrose District Committee*, March 5, 1897, 24 R. 657, 34 S.L.R. 481; *Watson and Others* (*Scott's Trustees*) v. *Aiton and Another*, June 3, 1891, 28 S.L.R. 673; *Thomson's Trustees* v. *Thomson*, October 22, 1897, 25 R. 19, 35 S.L.R. 16; *Parochial Board of Bothwell* v. *Pearson*, February 6, 1873, 11 Macph. 399, 10 S.L.R. 250.

On the *merits* the third parties referred to *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 37 S.L.R. 959; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346; *Wylie's Trustees* v. *Wylie*, December 10, 1902, 8 F. 617, 43 S.L.R. 383; *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421.

The second parties referred to *Matheson's Trustees* v. *Matheson's Trustees*, February 2, 1900, 2 F. 556, 37 S.L.R. 409; *Ross' Trustees* v. *Ross*, November 16, 1897, 25 R. 65, 35 S.L.R. 101: *Ogle's Trustees* v. *Ogle*, February 4, 1904, 6 F. 359, 41 S.L.R. 284; *Taylor's Trustee* v. *Christal's Trustees*, June 29, 1903, 5 F. 1010, 40 S.L.R. 738.

LORD JUSTICE-CLERK—When this cause was debated, the question was raised from the Bench, whether the case as stated was competent, the difficulty being that the points put in the queries related to matters in regard to which no operative judgment or decree could be pronounced at the present time. I have come on consideration to the opinion that it may be held to be competent in view of what has already been decided in similar circumstances. I confess, had there been no authority in favour of such a course, I should have found it very difficult to hold that an application to the Court by special case was competent.

Upon the merits I have formed a very decided opinion that on the terms of the deed to be construed, there is no ground for holding that there was a postponement of vesting. I think there was vesting *a morte testatoris*. It does not constitute a bar to such a reading that there is a postponement of payment, where that is only to safeguard a contingent interest of issue to be protected. Such a clause only protects a contingent interest, so as to cause a defeasance, if the circumstances occur to cause it to be operative.

My view therefore is that the first parties did not on the death of the testator take an indefeasible right, but that they did take a right which, however, might cease to be effectual if they should die leaving issue which were given a right under the will.

LORD KYLLACHY—(Opinion read by the LORD JUSTICE-CLERK)—In this case I have had some difficulty as to the competency of the special case, but I have come to be of opinion that the question is foreclosed by authority, the present case being, so far as I can see, not distinguishable from the case of *Provan* v. *Provan*, 2 D. 298—a case in which the decision rests not only upon its own authority but upon the approval which it received from the late Lord President Inglis in his review of the authorities on this subject in the case of *Harveys* v. *Harvey's Trustees*, 22 D. 1310.

On the merits it appears to me that the present is a case for the application of a rule of construction, which, in my opinion, is now recognised, viz., this, that where in a will or settlement a gift, either of a legacy or a share of residue, is so expressed that, notwithstanding a postponed term of payment or distribution, there is at the testator's death no obstacle to immediate vesting, except the existence of contingent interests, either prior or subsequent, conceived in favour of issue (either the legatee's issue or the issue of some other person—*e.g.*, a liferenter)—the contingency thus affecting the legatee's right is presumed to constitute not a suspensive but only a resolutive condition—operating a divestiture, if the issue exist and survive, but otherwise not operating at all.

In other words, a gift in the terms supposed vests *a morte testatoris*, but subject to defeasance by the existence of the supposed issue and their survivance to take a vested interest under the will. Whether they will take a vested interest by survivance of their own parent, or only by survivance of the period of payment under the will, may be sometimes a question. In the present case it is, I think, enough to decide that the first parties here do not take, as they contend, an absolute vested interest *a morte*, but, on the other hand, do take a vested interest *a morte*, subject to defeasance if they die leaving issue who take a vested interest under the will.

I do not think it necessary to go over the authorities in detail, for they are now numerous. But I may note the following—*Snell* v. *Morrison's Trustees*, 4 R. 709, p. Lord Shand; *Byars' Trustees*, 14 R. 1034, p. Lord Rutherfurd Clark; *Taylor* v. *Gilbert's Trustees*, 5 R. (H.L.) 217, p. Lord Blackburn; *Thompson* v. *Jamieson*, 2 F. 470, p. Lords Adam, Kinnear, and Kyllachy, and Lords M'Laren, Pearson, and Kincairney; *Tweeddale's Trustees*. 8 F. 264, and cases there cited; *Wylie's Trustees*, 8 F. 617, p. Lord Kyllachy.

LORD STORMONTH DARLING—I have come to be satisfied that although the actual conditions under which the questions of law may arise are more or less problematical, there are parties before us on both sides who are "interested" in the decision of these questions, who would be entitled to raise them in some other form of process, and who sufficiently represent all the interests which may hereafter emerge and be affected by our decision. If so, this special case is competent.

On the merits I agree with your Lordships that the shares of the estate which the trustees were directed to convey at the widow's decease to the second parties *nominatim*, did not vest in them absolutely *a morte testatoris*, but that the true view is that the shares vested in them subject to defeasance in the event of their predeceasing the liferentrix leaving issue. It was argued that the conditional institution of issue here might be referred to the event of the immediate child predeceasing the testator himself. But the phrase is simply "any predeceasing child," and where that is so, without anything more to indicate the testator's meaning, I think that the phrase must be read in the ordinary way as referable to the period of division. On the other hand, it would be contrary to the current of recent decision to hold that vesting was absolutely suspended. Some colour may be given to that argument by the rubric of the case of *Forrest's Trustees*, 6 F. 616. But the question as between suspended vesting and vesting subject to defeasance was not raised purely nor separately argued in that case. And I agree with Lord Kyllachy in the view which he expressed in the case of *Wylie's Trustees*, 8 F. 617, and has sub-

stantially repeated here, that "a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition. In other words, in a case like the present there is no suspension of vesting, but vesting subject to defeasance—defeasance in the event of the primary legatee leaving issue." That doctrine, expounded by Lord Shand so far back as the case of *Snell's Trustees* v. *Morrison*, 4 R. 709, accepted by Lord Rutherfurd Clark in the case of *Byars' Trustees*, 14 R. 1034, and applied by the House of Lords in *Taylor* v. *Gilbert's Trustees*, 5 R. (H.L.) 217, has the great advantage of securing that the interests of issue shall be saved if they exist and survive, and at the same time of avoiding the defeat of the primary legatees' interests should there be no issue.

LORD LOW—Upon the question whether or not this special case is competent I agree with your Lordship. I think that both on principle and authority the case is competent.

Upon the merits the question is as to the time of vesting of the trust estate in the testator's children. That question depends upon the construction of the third purpose of the trust-disposition and settlement. The testator had given a liferent of his estate to his wife in the event (which happened) of her surviving him, and by the third purpose he directed his trustees, "on the death of my said wife, if she shall survive me, or on my death should she predecease me," to make over and convey his whole estate to his four children *nominatim* "equally among them, share and share alike, the issue of any predeceasing child taking equally among them their parent's share."

If it had not been for the destination to issue, vesting would plainly have taken place in the children of the testator *a morte testatoris*, and the question is what is the effect of that destination? It seems to me that it may be regarded either (1) as referring only to the case of a child predeceasing the testator; or (2) as a conditional institution of issue which prevents vesting taking place at all until the period of payment; or (3) as a contingency or resolutive condition which does not prevent vesting in a child *a morte testatoris*, but renders that child's right liable to defeasance or divestiture in the event of his or her predecease of the period of payment leaving issue.

I confess that I was at first disposed to adopt the first of these alternatives, because it seemed to me that the presumption was that the testator intended to give to his children who survived him the fullest right to their shares which was compatible with the liferent to the widow. Upon reconsideration, however, I am satisfied that such a construction would involve taking a considerable liberty with the language actually used, because it would involve reading the words "any predeceasing child" as meaning "any child predeceasing me." I do not think that that would be legitimate, because I can find nothing in the context to take the case out of the general rule that provisions in regard to predecease or survivorship refer to the term of payment.

As between the second and third alternatives, I think that the latter affords the true solution of the question.

The only difficulty which I have felt arises from the fact that there are certain dicta of high authority in recent decisions which might be read as meaning that, so far as the question of vesting is concerned, there is no difference between a destination-over to "heirs" and one to "issue." Now, it must be regarded as settled by the judgment in the House of Lords in the case of *Bowman's Trustees*, 1 F. (H.L.) 69, that unless there are specialties in the settlement which show a contrary intention, a destination-over to "heirs" imports a suspension of vesting until the period of payment, just as if the destination-over had been to a stranger. If, therefore, there is no distinction as regards the period of vesting between a destination-over to "heirs" and one to "issue," it follows that in the latter case also vesting is, in the absence of specialties (and there are none here), postponed until the term of payment.

I shall have a word to say presently in regard to the dicta to which I have referred, but before doing so I venture to point out that there is a very material difference in the result between a destination to "heirs" and one to "issue." In the former case, survivance of the period of payment is the one determining event. If the beneficiary survives that period he takes the fund, and if he does not do so, his heir takes it. There is no other alternative. On the other hand, if "issue" are called, a position of matters may arise which could never happen under a destination to "heirs," because the beneficiary might die before the period of payment without issue, while he could never die without heirs. If, therefore, the effect of a destination to "issue" was, like a destination to "heirs," to suspend vesting until the period of payment, the result of a beneficiary predeceasing the period of payment without issue would be that his share would fall into intestacy, unless there was a provision that the share should accresce to surviving beneficiaries, which is not the case here. I need hardly say that a construction which might result in intestacy is, if possible, to be avoided, and it can be avoided by regarding a destination-over to issue as not being suspensive of vesting, but merely resolutive of the beneficiary's right, in the event of his predeceasing the period of payment leaving issue.

And there is ample authority for that view. It is not necessary to go over the cases in detail, but I may note the judgment of the House of Lords in *Taylor* v. *Gilbert's Trustees*, 5 R. (H.L.) 217; Lord Shand's judgment (which was acquiesced in) in *Snell's Trustees* (4 R. 709); Lord Rutherfurd Clark's opinion in *Byars' Trustees* (14 R. 1034); Lord Kyllachy's statement of the general rule in regard to the contingency of the birth of issue in *Thompson's Trustees* (2 F. 470), a statement in

which Lord M'Laren expressly concurred, and from which I do not think that any of the other Judges dissented; and Lord Kyllachy's judgment (which was acquiesced in) in the case of *Wylie's Trustees* (8 F. 617)—the circumstances of which are substantially the same as those with which we are now dealing.

In regard to the dicta to which I have referred, and which might be regarded as favouring the view that the destination to issue entirely suspended vesting, I have only a few words to add.

There is in the first place Lord Davey's opinion in the case of *Bowman*, where he said that he was unable to see "why a different construction as regards the time of vesting should be given to a conditional limitation in favour of persons unnamed but described as heirs, issue, or the like of the first legatee, and to one in favour of named persons." No doubt his Lordship there put a destination to issue in the same category as a destination to heirs, but it seems to me that that is explained by the nature of the question which was raised in the case. The question was whether a fund had vested *indefeasibly a morte testatoris*, or whether vesting was altogether *suspended* until the period of payment, and I do not think that the passage from Lord Davey's opinion can fairly be read as meaning more than that a destination to issue equally with a destination to heirs prevents *indefeasible* vesting in the first legatee *a morte testatoris*.

I think that very much the same thing may be said in regard to the proposition in law formulated by Lord M'Laren in giving judgment in the case of *Parlane's Trustees* (4 F. 805), especially as his Lordship expressly accepted Lord Kyllachy's view of the effect of a destination to issue in *Thompson's Trustees*.

I confess, however, that the decisions of the First Division in *Parlane's Trustees*, and also in the subsequent case of *Forrest's Trustees* (6 F. 616), would be somewhat embarrassing if it were not for the fact that no one in either case appears to have maintained that vesting, subject to defeasance, had taken place, the only question upon which the Court was asked to pronounce being whether an *indefeasible* right to the fee had vested prior to the period of payment.

The Court answered the first and second questions in the negative and the third question in the affirmative.

Counsel for the First and Third Parties—Spens. Agent—John Wm. Chesser, S.S.C.

Counsel for the Second Parties—Irvine. Agent—John W. S. Wilson, Solicitor.

Friday, October 26.

FIRST DIVISION.

[Lord Dundas, Ordinary.

CRAIG *v.* CRAIG.

Expenses—Taxation—General Finding of Expenses—Disallowance of Expenses in Branch of Case where Unsuccessful—"Particular Part or Branch of the Litigation"—Act of Sederunt, July 15, 1876, *General Regulation* 5.

A served a summons on B, in which he sought to recover (1) and (2) certain sums as assignee of C, such sums being the expenses found due to C in proceedings against him by D, and (3) as an individual a sum of damages for injury done to him by B. He averred that B had conceived ill-will towards him and the intent to unlawfully molest and injure him in his professional career, and he gave numerous instances of alleged injury, and as having been part of the same course of conduct, the proceedings against C by D, of which he averred B, not D, was *dominus litis*. After a proof the Lord Ordinary gave A decree for a certain sum "in full of the conclusions of the summons," and found him "entitled to expenses." In his opinion his Lordship stated, *inter alia*, that A had failed to prove that B was *dominus litis* of the proceedings by D against C. The Auditor having taxed off the expenses effeiring to this part of the case as being a "particular part or branch of the litigation" in which A had been unsuccessful, A took objection, and his Lordship remitted of new to the Auditor, expressing his opinion as being and having been that the action was "in substance an action of damages in respect of one wrong done."

Held, on a reclaiming note (*rev.* Lord Ordinary Dundas), that the Auditor was right.

The Act of Sederunt for Regulating Fees and Charges in the Supreme Courts of Scotland, of date July 15, 1876, in General Regulation 5, provides—"Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings."

On 11th July 1905 Robert Archibald Craig, C.A., Edinburgh, "for himself and also as assignee of Messrs James Aikman & Sons, leather and boot factors, Jeffrey Street, Edinburgh," raised an action against James Craig, C.A. there, in which he sought to have the defender ordained "to make payment to the pursuer, as assignee foresaid of (first) the sum of £95, 19s. 5d. sterling, and (second) the sum of £46, 18s. 9d.