that where alterations or variations of the conditions of the feu-right have been permitted, the presumption is not for abandonment but only for relaxation of the conditions of feu, according to the nature of the variations to which the feuars have presumably consented.

When we consider the facts of the present case I think it may be taken that the appellants were tolerant of deviations from the conditions of feu which did not interfere with their personal comfort or convenience. They were not made parties to the Guild Court proceedings under which power was given to put up tenement or flatted houses within the area of the superiority, and apparently they did not consider that they had such an interest as would justify their intervention. Now I think it would be a very inconvenient—not to say inequitable—rule that a feuar who becomes aware of some infraction of building conditions by a feuar from the same superior, but at such a distance from himself, that the infraction causes no inconvenience to him, must either apply for an interdict or be taken to have waived his right to enforce the condition in question with conterminous feuars or disponees. I am putting an extreme case in order to test the argument, because if in the case supposed the feuar does not lose his right to object by reason of tolerance or acquiescence where his comfort is not affected, then it is a question of degree, or rather a question of fact, in each case, whether his tacit assent or *non-repugnantia* in one or more cases of deviation from the conditions amounts to an abandonment to all intents of his rights in a question with the community.

In the present case I am not of opinion the abstention from legal proceedings on the part of the appellants, in cases where they did not conceive that their interests were affected, amounts to an abandonment of their rights to enforce the building conditions. I gather from the proof that Mr Baird's interest to enforce the conditions against the respondents is stronger than Mrs Roemmele's interest. But as I am not satisfied that in the case of either of the appellants there has been an abandonment of their contract rights, I think they are *in pari casu* in resisting the present application, and that their appeal should be allowed. I may add that having heard your Lordship's opinion now delivered, I desire to concur in it.

LORD KINNEAR—I agree with the opinion given by your Lordship, and have nothing to add.

LORD PEARSON—I also agree.

The Court sustained the appeal, recalled the interlocutor of the Dean of Guild, and remitted to him to dismiss the petition.

Counsel for the Appellants (Objectors)—Hunter, K.C. — Hon. William Watson. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents (Petitioners)—Cullen, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

Wednesday, July 17.

SECOND DIVISION.

MACKINTOSH AND OTHERS (MACKINTOSH'S TRUSTEES) *v.* MACKINTOSH.

Succession — Vesting — Joint or Several Bequest—Accretion—Legacy to a Class—Intestacy.

A testator in his settlement directed —"That the fee or capital of the whole residue of my means and estate shall be held, applied, and paid . . . to and among my six children" (naming them) "and any other children to be hereafter born to me, who may survive me, equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age." He declared that payments of capital to children should be made on the footing of the trustees retaining the full amount of capital which they might think prudent to retain to meet the provisions in favour of his wife; and "that notwithstanding the foregoing provisions as to the period at which children shall become entitled to their shares of capital, my trustees shall have power to make advances of capital to or for behoof of any of my children at an earlier period than the attainment of twenty-five years, and even during minority, for their advancement or settlement in life," &c., "such advances to form deductions from the ultimate shares of the children receiving the same or for whose behoof the same are made." The testator also directed that his trustees should apply the income of the estate, or so much thereof as they thought necessary, for the maintenance, &c., of the children until the payment of their shares as provided. He was survived by his widow and the six children mentioned.

Held (1) that a share of residue vested in each child *a morte testatoris*; and (2) that the executrix of a child, who had survived the testator but died before reaching twenty-five years of age, was entitled, so far as possible, to immediate payment.

Hugh Mackintosh, shipowner, Nairn, died on 19th October 1900, leaving a trust-disposition and settlement whereby he conveyed his whole estate to his wife Mrs Henrietta Isabella Lawton or Mackintosh and others as trustees. He was survived by his wife and also by his six children, Hugh Harold, Charles, Annie Lauder, Margaret Maud, James Lawton, and Jane Lawton. Hugh Harold having died while still in minority, questions arose as to the share of the trust estate destined to him, and a special case was therefore presented.

The parties to the case were (1) the trustees, (2) the five still surviving children, and (3) the widow, who had been appointed executrix to Hugh Harold.

The trust-disposition, which by its second purpose directed certain payments, including that of an annuity, to the widow, provided—"(*Fourth*) That as soon as conveniently may be after my death my trustees shall set aside an amount equal to what they shall deem to be one-sixth of the residue of my means and estate, valued as at the date of my death, and ascertained after deducting the capital required to be held to meet the foresaid annuity to my widow, and shall hold and invest said one-sixth share of residue for behoof of the said Henrietta Isabella Lawton or Mackintosh if and so long as she shall survive me and remain in viduity, paying to her the free income of the sum so to be set aside and invested, and that half-yearly, or at such other terms and periods as may be found convenient and suitable: Declaring that on the death or second marriage of my said wife said capital sum shall fall back into residue and be held and applied for my children as after mentioned.

"(*Fifth*) That subject to payment of said annuity to my widow, and subject also to fulfilment of the fourth purpose hereof, my trustees shall hold and apply the rents, interests, and other income of the residue of my means and estate, heritable and moveable (including the capital sum required to meet said annuity if and when set free by the death of my widow, and the foresaid sixth part of residue to be invested for her as above mentioned if and when set free by her death or second marriage), or such part of said income as my trustees may deem necessary for the maintenance, education, and advantage of my children until payment of their shares of capital as hereinafter mentioned, and that in such proportions as my trustees may think proper, and the sum so to be allotted for the maintenance and education of my children while they live in family with my widow shall include such an allowance to her for their board as shall be suitable to her and their circumstances in life.

"(*Lastly*) That the fee or capital of the whole residue of my said means and estate shall be held, applied, and paid by my trustees to and among my six children, Hugh Harold, Charles, Annie Lawton, Margaret Maud, James Lawton, and Jane Lauder, and any other children to be hereafter born to me who may survive me, equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age; declaring that while my said wife survives and remains entitled to said annuity and the income of the capital sum to be set aside for her behoof as aforesaid, payments of capital to children shall be made on the footing not only of retaining the full amount of capital required at the time to meet said annuity and the sixth share of capital to be set aside as aforesaid, but also such further capital sum, if any, as my trustees shall deem it prudent to retain for the purposes of said annuity, and to guard against any shortcoming in respect thereof; and it is further provided and declared that notwithstanding the foregoing provision as to the period at which children shall become entitled to their shares of capital my trustees shall have power to make advances of capital to or for behoof of any of my children at an earlier period than the attainment of twenty-five years, and even during minority, for their advancement or settlement in life, or otherwise for their advantage, in the discretion of my trustees, such advances to form deductions from the ultimate shares of the children receiving the same, or for whose behoof the same are made, and the receipts of minors for such advances, or of third parties to whom payments are made for behoof of minors under this provision, shall sufficiently discharge and exonerate my trustees for the same respectively."

The case stated—"Questions have arisen with reference to the share of the trust estate destined by the said trust-disposition and settlement to the said Hugh Harold Mackintosh. The third party *maintains* that the said share vested in the said Hugh Harold Mackintosh *a morte testatoris*, and that (all the parties being agreed that the said share is to be regarded as moveable estate) it has now passed to her as his executrix-dative, and is divisible between her to the extent of one-third, and the second parties equally among them to the extent of the remaining two-thirds. The second parties maintain that the said share has either fallen into intestacy and is divisible among them equally as the testator's heirs *in mobilibus*, his widow's rights having been excluded by the said antenuptial contract of marriage, or that the said share has accresced to their original shares of the trust estate.

"Questions have also arisen as to the period of division of the said share of the trust estate. The first parties maintain that in any view the whole trust estate must be retained by them in order that they may distribute the income among the children in terms of the fifth purpose of the said trust-disposition and settlement and 'in such proportions as they may think proper.' The second parties maintain that in the event of the said share being held to be intestate succession of the testator it falls to be divided among them immediately, so far as it is not required to provide the marriage-contract provisions and the sixth part of the trust estate set aside for the widow. The third party maintains that in the event of the said share being held to have vested in the said Hugh Harold Mackintosh *a morte testatoris* it falls to be immediately paid over to her as executrix-dative, so far as it is not required for the purposes foresaid."

The *questions of law* for the opinion and judgment of the Court were—"(1) (*a*) Did the share of the said trust estate destined to the said Hugh Harold Mackintosh under the said trust-disposition and settlement vest in him *a morte testatoris*, and has it now passed to the third party as his executrix-dative, divisible between her as an individual to the extent of one-third, and the second parties equally among

them, to the extent of the remaining two-thirds, or (*b*) has the said share fallen into intestacy, or (*c*) has it accresced to the shares destined to the other children of the testator by his said trust-disposition and settlement? (2) In the event of it being held that the said share vested in the said Hugh Harold Mackintosh *a morte testatoris*, does the said share fall to be paid immediately to the third party as executrix-dative of the said Hugh Harold Mackintosh, so far as it is not required to provide the marriage-contract provisions and the sixth part of the trust estate set aside for the widow, or must the said share be retained by the first parties in order that they may distribute the income among the testator's children in terms of the fifth purpose and in such proportions as they may think proper? (3) In the event of the said share being held to have fallen into intestacy, does the said share fall to be paid immediately to the second parties so far as it is not required for the foresaid purpose, or must the said share be retained by the first parties in order that they may distribute the income in manner foresaid?"

Argued for the second parties—The shares of residue did not vest till they became payable. The children were only to be "entitled" to the share on attaining twenty-five. The share destined to Hugh not having vested, it accresced to the other children, as in *Menzies' Factor* v. *Menzies*, November 25, 1898, 1 F. 128, 36 S.L.R. 116; and *Roberts' Trustees* v. *Roberts*, March 3, 1903, 5 F. 541, 40 S.L.R. 387. The addition of "children to be hereafter born" strengthened the view that the gift was to the children as a class.

Argued for the third parties—There was vesting in each of the children *a morte testatoris*. There was an initial gift to them; there was the power to make advances to them; and there was no survivorship clause. The case was very like that of *Waters' Trustees* v. *Waters*, December 6, 1884, 12 R. 253, 22 S.L.R. 176, and also resembled *Taylor's Trustees* v. *Christal's Trustees*, June 24, 1903, 5 F. 1010, 40 S.L.R. 738. In *Menzies* (*cit. sup.*) the beneficiary predeceased the testator. In *Adams' Trustees* v. *Carrick*, June 18, 1896, 23 R. 828, 33 S.L.R. 620, there was a survivorship clause and no initial gift.

At advising—

LORD STORMONTH DARLING—This special case raises questions as to the construction of the trust-disposition and settlement of Hugh Mackintosh, shipowner in Nairn, who died in October 1900, survived by his wife and six children. Of these six children one (Hugh) died in 1905 while still in minority, and the main difficulty arises from the fact that the residuary clause provides that "the fee or capital of the whole residue of my said means and estate shall be held applied and paid by my trustees to and among my six children" (naming them) "and any other children to be hereafter born to me who may survive me, equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age"; and then follows a declaration that so long as his wife survives and remains entitled to her marriage-contract and other provisions payments of capital to children are only to be made on the footing of the trustees retaining the full amount which they may think prudent to retain for these purposes, and also a further declaration that the trustees are to have power to make advances of capital to or for behoof of any of his children at an earlier period than the attainment of twenty-five years, and even during minority, for their advancement or settlement in life, such advances to form deductions from the ultimate shares of the children receiving the same or for whose behoof the same are made. It will thus be seen that the gift of residue is in the form of a direction to the trustees to "hold, apply, and pay," and that, although the direction to pay is only to those children who may survive the testator on attaining the age of twenty-five, there is no clause of survivorship among the children themselves, no conditional institution of issue, and no express declaration as to vesting as we had in the case of *M'Laren's Trustees* decided yesterday (*v. sup.*, p. 900).

In these circumstances the second parties, who are the surviving five children of the testator, maintain, with regard to the share of residue destined to Hugh, that it has either fallen into intestacy and is divisible equally among them as the testator's heirs *in mobilibus* (his widow's rights having been excluded by marriage contract), or that the bequest of residue was a joint bequest, not a series of several bequests, and therefore had accresced to survivors. The third party, on the other hand (being the executrix-dative of the deceased child Hugh), claims that Hugh's share vested in him *a morte testatoris*, then passed to his executrix, and is now divisible between her as an individual to the extent of one-third, and the second parties, equally among them, to the extent of the remaining two-thirds.

I am of opinion that the latter is the sound view. There being no time of vesting prescribed by the testator himself, it must depend simply on the legal inference to be derived from the general directions of his trust deed. The primary inference is that vesting took place *a morte testatoris*, in the absence of anything to displace it. I can find nothing to displace it unless it be the direction that each of the children are to be entitled to his or her share "on attaining twenty-five years of age." But a direction of this kind has again and again been held to be a mere postponement of payment and not of vesting, particularly where there is no destination over. One of the purposes of this postponement of payment is expressly said to be "to guard against any shortcoming in respect of" the provisions in favour of the testator's wife. The postponement is therefore, at least to a large extent, for a purpose not personal to the legatees themselves, which is always

an element favourable to early vesting, and so far as the personal interests of the legatees are concerned the testator shows that he has no rooted objection to them receiving payment before their attainment of the age of twenty-five, so long as such payments can be made with due regard to the safety of the widow's provisions, for he gives power to his trustees to advance capital at an earlier period and even in minority "for their advancement or settlement in life, or otherwise for their advantage," and declares that such advances if made shall form deductions from their "ultimate" shares. All this is consistent with immediate vesting, and not consistent with vesting being postponed to any later period.

The other suggestion made by counsel for the second parties as an alternative to the lapse of Hugh's share, viz., that it had accresced to the surviving brothers and sisters, is I think equally inadmissible, for there could be no accretion unless the bequest of residue was a joint one, and there is nothing in the language of the deed to indicate that it was other than a several one.

I am therefore for answering question 1 (*a*) in the affirmative and 1 (*b*) and (*c*) in the negative.

The only other question which requires to be answered on the footing of vesting having taken place *a morte* is the second, which in my opinion ought to be answered in the affirmative, so far as the first alternative is concerned, down to the words "set aside for the widow," and in the negative so far as regards the second alternative. The third question is superseded.

LORD JOHNSTON—The question in this case has been represented as one of several or joint legacy, involving the result of lapse or accretion respectively in the event of the predecease of an individual legatee. I think that the case has been somewhat misconceived by the parties, and that the real question is one of vesting in a class, and that it is a very simple one.

I have used the word "predecease" advisedly, as it is a necessary element in the question either of lapse or of accretion. But then "predecease" involves the determination of the point of time to which it is to be referred—*Young* v. *Robertson*, 4 Macq. 314. Now once that point of time in the present case is ascertained, I think that the key to the determination of the question at issue is found, without the necessity of solving such difficult questions as the Court had to deal with in *Menzies'* case (1 F. 128) and the other cases cited by counsel.

Turning to Mr Mackintosh's settlement, we find that after providing for implement of his marriage-contract obligations to his widow, and disposing specially of his share of his father's estate, which had not yet fallen in to him, he practically makes a settlement of residue only. Thus, in the fourth place, he directs his trustees to set aside a sixth of the residue of his estate and to hold and invest it for behoof of his widow, paying her the free income of the same, the capital to fall back into residue on her death or second marriage and to be held and applied for his children as after mentioned. Then, in the fifth place, subject to such payment to his widow, he directs his trustees to apply the proceeds of the residue of his means, including therein the capital required to meet his widow's marriage-contract provision and the sixth of residue to be invested for her liferent, if and when set free, or such part of said income as his trustees should deem necessary, "for the maintenance, education, and advantage of my children until payment of their shares of capital as hereinafter mentioned, and that in such shares as my trustees may think proper." And then, in the last place, he directs that the fee or capital of the residue of my whole "means and estate shall be held, applied, and paid by my trustees to and among my six children, Hugh, Charles, Annie, Margaret, James, and Jane, and any other children to be hereafter born to me, who may survive me, equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age."

The important words appear to me to be "who may survive me." There is a postponement of payment till the children attain twenty-five in any case, and possibly longer, so far as capital requires to be retained in their mother's interest; but on the testator's death not only is the class which is to take, but also the members of the class who are to take, definitely ascertained. At the date when he wrote his settlement there were children *nati*, who therefore could be named, and also children who might be *nascituri*, but it was conditioned in either case that they should survive him. Hence during his life the gift was joint, and there would be accretion, in a sense, in the event of any predeceasing him, but on their survivance of him there was no further room for accretion—from that point of time onwards their interests then became several. The postponement of payment did not make the children's interests conditional or postpone vesting so as to admit of accretion. That there should be any subsequent accretion something must be found equivalent to a survivorship clause; but then there is none such. In fact there is no point of time to which a survivorship clause could relate except the testator's own death. And the result is, what I have already stated, that the children took interests in severalty as at that date.

The rest of the deed confirms this. I pass over the provision which immediately follows, because it has merely reference to the necessity of retaining the full amount of capital during her life in the widow's interest. But there are other provisions which have an important bearing on the question at issue. In the first place, as already mentioned, until the period of payment of the children's shares arrives the income of the whole or of what remains undistributed is thrown into hotch-pot and directed to be applied for the benefit of the children who have not yet received their

shares. This at first sight does not appear consistent with a vested interest in a several share *a morte*. But it is not so inconsistent as not to be intelligibly explicable and as to override the further consideration that power is given to the trustees, "notwithstanding the foregoing provisions as to the period at which children shall become entitled" not to take a vested interest in but merely to payment of their shares of capital, to make advances of capital to them before they attain twenty-five and even during minority, "such advances to form deductions from the ultimate shares of the children receiving the same." I cannot read "ultimate" as equivalent to "prospective," and I cannot understand how a deduction could be made from an ultimate share of a child who should subsequently predecease twenty-five, if that share never was or became his but is to accresce to those who survive him. Lastly, the provisions in favour of the children are to be in satisfaction of legitim, and as legitim vests *a morte* this also indicates, though not by itself conclusively, that the provisions given in satisfaction are given *a morte*. This therefore adds weight to the last-mentioned consideration.

I have considered the cases of *Paxton's Trustees*, 13 R. 1191, *Menzies' Factor*, 1 F. 128, and the other cases cited, but while I do not think that reference to them is necessary for the judgment, nothing in these decisions appears to me to conflict with the opinion which I have formed.

I therefore answer the first question in its first alternative in the affirmative, and in its second and third alternatives in the negative, the second question in its first alternative in the affirmative, and in its second alternative in the negative, and find it unnecessary to answer the third query.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Stormonth Darling.

LORD LOW was absent.

LORD ARDWALL was in the Extra Division.

The Court answered question 1 (*a*) in the affirmative, 1 (*b*) and 1 (*c*) in the negative, and the first alternative of the second question in the affirmative and the second alternative in the negative.

Counsel for the First Parties—Forbes. Agents—Cumming & Duff, S.S.C.

Counsel for the Second Parties—Scott Brown. Agent—R. F. Calder, Solicitor.

Counsel for the Third Parties Mercer. Agents—Cumming & Duff, S.S.C.

Tuesday, July 9.

FIRST DIVISION.

[Sheriff Court at Airdrie.

LANARKSHIRE COUNTY COUNCIL *v.* AIRDRIE MAGISTRATES. LANARKSHIRE COUNTY COUNCIL *v.* COATBRIDGE MAGISTRATES.

(Reported *ante*, May 22, 1906, 43 S.L.R. 632, and 8 F. 802.)

River—Rivers Pollution Prevention Acts—Burgh—County Council—Pollution Committed Outside District of Petitioning Sanitary Authority—Defences; Prescriptive Use; Upper Pollution; Chemical Re-agents — Relevancy — Title to Sue—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. cap.* 75), *secs.* 3, 8, 20; 1893 (56 *and* 57 *Vict. cap.* 31), *sec.* 1—*Local Government (Scotland) Act* 1889 (52 and 53 *Vict. cap.* 50), *sec.* 55.

The county council of a county divided into districts, in virtue of section 55 of the Local Government (Scotland) Act 1889, presented petitions in the Sheriff Court against the magistrates of certain burghs, seeking, under the Rivers Pollution Prevention Acts, to have them ordained to abstain from "causing to fall or flow or knowingly permitting to fall or flow or to be carried" into certain streams passing through its district any solid or liquid sewage matter. The burghs averred in defence that prior to their taking over the drainage systems their inhabitants had discharged, and had acquired by prescription a right to discharge, sewage into the so-called streams, which were covered over, channelled, and bottomed, and had been as they alleged from time immemorial only channels used mainly for sewage; that the streams were used for the discharge of sewage and industrial refuse by the upper proprietors, over whom they had no control; that the streams in their course received chemical discharges from public works, which acted as re-agents and rendered innocuous any sewage. The Sheriff, holding that there was an admission of pollution, proposed to remit, under section 10 of the Rivers Pollution Prevention Act 1876, to skilled parties on the "best practicable and available means." The burghs appealed.

Held (1) that the averment as to the character of the streams and the use thereof by the inhabitants was irrelevant; (2) that the averment as to use by the upper proprietors was, looking to section 1 of the Rivers Pollution Prevention Act 1893, also irrelevant; (3) that the averment as to the discharge of chemical re-agents did not, if proved, bring the defenders within the exemption, granted by section 3 of the Rivers Pollution Prevention Act 1876, to persons "using" the best available means