Friday, March 10.

EXTRA DIVISION.

(Lord Kinnear, Lord Dundas, and Lord Mackenzie.)

JOHNSTON'S TRUSTEES *v.* DEWAR AND OTHERS.

Succession — Vesting — "Nearest in Kin" — Destination to A in Liferent and A's Issue in Fee, whom Failing to B, whom Failing to B's Issue, and whom Failing to Testator's Nearest in Kin — Vesting Subject to Defeasance.

A testator, after giving an alimentary liferent of a sum of £4000 to a grandchild, Barbara Johnston, continued — "In the second place, I hereby direct and appoint the said trustees, after the death of the said Barbara Johnston, to make payment of the foresaid principal sum of £4000, after deducting therefrom all necessary charges, duties, and expenses of management of the trust, to and amongst the lawful child or children to be procreated of the body of the said Barbara Johston, and that in such shares and proportions as she the said Barbara Johnston may direct and appoint by any deed or writing under her hand, and failing her exercising that power and faculty then to and amongst her lawful child or children equally if more than one. In the third place, in the event of the death of the said B. J., my grandchild, without lawful issue of her body, or if such issue being born shall predecease her, then and in that case I direct and appoint the said trustees to divide the trust funds under their management into two equal parts, and make payment to Mrs J. J., my daughter, whom failing to her lawful children equally, whom also failing to my nearest in kin equally, of one just and equal half thereof. And to Mrs I. Laird, my daughter, whom failing to her lawful children equally, whom also failing to my nearest in kin, of the other just and equal half thereof."

Barbara Johnston having died unmarried and predeceased by the testator's two daughters and their issue, *held* that the "nearest in kin" entitled to the fund were those having that character at the death of the liferentrix, not of the testator, there being no vesting subject to defeasance.

James Alexander Dewar, M.D., Arbroath, and another, trustees of the deceased Robert Johnston of Denfield, acting under his trust-disposition and settlement and two relative codicils, brought an action of multiplepoinding and exoneration dealing with the disposal of a principal sum of £4000 which had been liferented in alimentary liferent by the testator's granddaughter Barbara Johnstson.

The clauses of the codicil dealing with this principal sum are quoted *supra in rubric.*

The testator died on 1st June 1856, survived by two daughters, Mrs Jamieson and Mrs Laird, who were his nearest in kin, and together with the granddaughter Barbara Johnston his heirs *in mobilibus ab intestato.* Barbara Johnston never married, and died on 9th May 1909. She was predeceased by Mrs Jamieson, who died in 1871, and her issue, and by Mrs Laird, who died in 1884, leaving no surviving child.

Claims were lodged for various claimants, claiming as or as representing beneficiaries under the wills of Mrs Jamieson and Mrs Laird.

They pleaded, *inter alia*—"(1) On a sound construction of the testamentary writings of the said Robert Johnston, the fund *in medio* vested *a morte testatoris* in the said Mrs Jamieson and Mrs Laird equally as next-of-kin of the said Robert Johnston, subject to defeasance in the event of the said Barbara Johnston, the liferentrix, leaving issue."

Claims were also lodged for various grandnephews and grandnieces of the testator, who claimed as his nearest in kin at the date of the death of the liferentrix.

They pleaded—"On a sound construction of the destination in the third purpose of the first codicil, dated 17th December 1853, vesting having been postponed until the date of death of Miss Barbara Johnston, the claimants are entitled to be ranked and preferred in terms of their claim."

On 15th March 1910 the Lord Ordinary (SKERRINGTON) repelled the claims for the claimants under the wills of Mrs Jamieson and Mrs Laird, and sustained the claims for the grandnephews and grandnieces of the testator.

Opinion.—". . . [*After narrative*] . . . In these circumstances Mr Mackintosh, as counsel for various claimants who are or represent beneficiaries under the wills of Mrs Jamieson and Mrs Laird, argued that each of these ladies acquired a vested right *a morte testatoris* to one-half of the fee of the provisions liferented by Barbara, but subject to defeasance in certain events which did not happen. I am of opinion that this argument is unsound, and that I cannot give effect to it without extending the principle of vesting subject to defeasance far beyond the point to which it has hitherto been carried. Theoretically there is no reason why the doctrine should not be extended to any and every case where there is a contingent destination or a conditional institution. If a man dies leaving a will, the law itself confers upon his heir a vested right to the deceased's estate subject to defeasance if and so long as he is effectually excluded by the will. It does not follow, however, that in construing a will or settlement the Court ought to attribute to a testator or settlor an intention to confer a right of this peculiar character. The time will come when the Inner House may have to consider whether it is possible to avoid carrying the doctrine to what are perhaps its logical conclusions, but in the meantime, as a Judge of first instance, I do

not think it any part of my duty to extend it beyond the limits of precedent, unless of course the testator's intention is clear and unambiguous. In the present case there are two difficulties in the way of holding that the testator's daughters acquired a vested right *a morte*. In the first place, there is a double contingency owing to the possible existence of children yet unborn, viz., the children of the liferentrix and the children of the supposed contingent fiars. Sitting in the Outer House I have already refused to extend the doctrine to such a case, and I see no reason to change the view which I then expressed—see *Young and Others* v. *Gordon and Others*, 1909, 2 S.L.T. 321. In the second place, if Mrs Jamieson and Mrs Laird each took a vested right *a morte* it would be necessary as regards two one-fourth shares of the fund to extend the doctrine to a case where one existing person is conditionally instituted on the failure of another existing person. That would be novel and contrary to the limits of the doctrine as explained by Lord M'Laren in *Gardiner* v. *Hamblin*, 1900, 2 F. 685. I accordingly hold that vesting as regards the whole fund *in medio* was postponed until the death of the liferentrix.

"If I am right as to this, it follows that the gift *quoad* the fee was wholly inoperative at the death of the testator and until the death of the liferentrix. In this respect the present case is very different from that of *Gregory's Trustees* v. *Alison*, 1889, 16 R. (H.L.) 10, where it was held that a marriage-contract conferred a vested though defeasible right at the husband's death, and that his 'nearest of kin' must be sought for at that date. Accordingly I think that I am not bound in the present case to attribute to the expression 'nearest in kin' what has been authoritatively decided to be its primary meaning, but that I am entitled to hold that the testator referred to the persons who would answer to that description at the date of vesting. In favour of this construction there is the authority of Lords Kyllachy, Adam, and Kinnear in *Thomson's Trustees*, 1900, 2 F. 484. The only alternative would be to hold that the case was one of intestacy in respect that the testator's nearest in kin, viz., his daughters, had predeceased the date of vesting. Though I am not a great admirer of the presumption against intestacy, it is difficult in the present case to suppose that what the testator really intended to express was that his daughters or the survivor of them should succeed conditionally on both or either outliving their niece.

"I accordingly sustain the claims for the grandnephews and grandnieces, who were the nearest in kin to the testator at the death of the liferentrix."

The claimants under the wills of Mrs Jamieson and Mrs Laird reclaimed, and argued—There was a general presumption in favour of vesting *a morte testatoris*, which was capable of being rebutted by other interests being interposed. In the present case there was nothing in the codicils inconsistent with vesting *a morte*. The words "nearest of kin" meant *prima facie* nearest in kin at the death of the testator—*Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; *Bullock* v. *Downes*, 1860, 9 Clark (H.L.), 1, *per* Lord Cranworth, p. 18; *Mortimore* v. *Mortimore*, 1879, L.R., 4 App. Cas. 448. This was in accordance with the construction given to the words "heir-at-law"—*M'Donald's Trustees* v. *M'Donald*, 1907 S.C. 65, 44 S.L.R. 49; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269 (*per* Lord President at 280), 19 S.L.R. 217. The natural result of this was that there must be vesting subject to defeasance in those who had the character of next-of-kin at the date of the testator's death—*Balderston* v. *Fulton*, January 23, 1857, 19 D. 293. There were two classes of cases in which vesting subject to defeasance had been given effect to, viz., a contingency resolutive (1) on the birth of children of the legatee, (2) on the birth of children of the liferenter. The only specialty here was that both these contingencies occurred in the one destination, and yet if either were taken separately there was clearly vesting subject to defeasance. But there was no reason for refusing to give effect to the principle when they both occurred in the same destination. In the present case the last part of the destination was the same as the second, and therefore free to be read out. This made it a typical case of vesting subject to defeasance. The following cases were referred to as instances of the application of the principle—(1) Birth of issue of legatee—*Wylie's Trustees* v. *Wylie*, December 10, 1902, 8 F. 617, 43 S.L.R. 383; *Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, 44 S.L.R. 96; *Penny's Trustees* v. *Adam*, 1908 S.C. 662, 45 S.L.R. 481. (2) Birth of issue of liferenter—*Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217, 15 S.L.R. 776; *Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, 26 S.L.R. 146; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346. The only case where a double contingency of this kind had occurred was the Outer House case of *Young and Others* v. *Gordon and Others*, 1909, 2 S.L.T. 321, mentioned by the Lord Ordinary.

Argued for the respondents—To ascertain the persons entitled to take, it was necessary, in the first place, to ask what was the date of vesting described by the testator, and only after that who were the persons entitled to take. On a sound construction of the codicil vesting was postponed till the liferentrix's death, and the persons called to the succession as next-of-kin were the persons who bore that character at the date of distribution. The destination in the present case was analogous to that in *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103, where vesting was postponed. To say that there was vesting in the nearest in kin subject to defeasance was to carry the doctrine of vesting subject to defeasance beyond the limits that the Courts had authoritatively laid down, and to make defeasance operate on a double contin-

gency—(1) survivance of issue of the liferentrix, (2) the survivance of issue of the testator's daughters. This was contrary to the limits of the doctrine as laid down by the Lord President in *Gardner* v. *Hamblin*, February 27, 1900, 2 F. 679, 37 S.L.R. 486, and in *Taylor* v. *Gilbert's Trustees* (*cit. sup.*) and *Steel's Trustees* v. *Steel* (*cit. sup.*). At the time the testator wrote, he did not know who his nearest in kin would be, and it was no reason for applying the doctrine of vesting subject to defeasance that they happened to include persons already favoured in the destination. It followed, therefore, that the period of vesting and distribution being the same, the persons then entitled must be the persons who held the character of next-of-kin at the period when the right became operative. Even if the appellants were right in saying that on its *prima facie* meaning the expression "next of kin" meant those who held that character at the death of the testator, still there might be evidence of intention deducible from the will which would displace this meaning —*Gregory's Trustee* v. *Alison* (*cit. sup.*), *per* Lord Watson. In the present case the circumstances as to the period of vesting were sufficient to displace any such *prima facie* meaning, and there were authorities to the effect that the expression "nearest in kin" might have to be construed as meaning those who bore that character after the testator's or the legatee's death—*Thompson's Trustees* v. *Jamieson* (*cit. sup*), *per* Lord Kyllachy; *Maxwell* v. *Maxwell*, December 24, 1864, 3 Macph. 318; *Stodart's Trustees, &c.*, March 5, 1870, 8 Macph. 667. If the circumstances of this will led to the conclusion that vesting took place on the liferentrix's death, then *Gregory's Trustees* v. *Alison* (*cit. sup.*) and *Balderston* v. *Fulton* (*cit. sup.*) did not apply. *Nimmo* v. *Murray's Trustees*, June 3, 1864, 2 Macph. 1144, and *Baillie's Trustees* v. *Whiting*, 1910 S.C. 891, 47 S.L.R. 684, were referred to.

At advising—

LORD KINNEAR—The question in this case depends on the construction of a certain codicil to the will of a testator named Robert Johnston, who died on 1st June 1856. The only matters of fact which it is necessary to have in mind in reading the will are that the testator having died at the date I have mentioned, was survived by two daughters, Mrs Jamieson and Mrs Laird, who were then his nearest of kin, and by a granddaughter, who was one of his heirs *in mobilibus* under the statute, and who, of course, was not one of his nearest of kin, being in a degree more remote than her two aunts. It is with reference to these facts that we have to consider what is the meaning of the codicil in question.

What the testator does is to direct that a certain sum of £4000 shall be set aside; and he directs his trustees to make payment of the free annual rents or interest of that sum to and for behoof of Barbara Johnston, his grandchild, during her lifetime, under declaration that her liferent is to be purely alimentary and not assignable, and upon her death to make payment of the principal sum to and amongst the lawful child or children to be procreated of the body of the said Barbara Johnston. So far the will is perfectly simple. In point of fact Barbara Johnston died in 1909 without leaving issue, so that the direction to pay the fee to her children fell.

The provision for the event of her leaving no children is that in that event the truster directs and appoints his trustees to divide the trust funds into two equal parts and to make payment to his daughter Mrs Jamieson, whom failing to her lawful children equally, whom also failing to his nearest in kin equally, of one just and equal half thereof; and then to his daughter Mrs Laird, whom failing to her lawful children equally, whom also failing to his nearest in kin, of the other just and equal half thereof. The two daughters both died before the granddaughter. Mrs Jamieson died in 1871, survived by four children, but they all died before the liferentrix Barbara Johnston. Mrs Laird died in 1884, leaving no children surviving her. Therefore upon the death of these two ladies the direction as to the disposal of the principal sum had not come into operation, because Barbara Johnston was still alive and it could not be known whether she would leave issue or not. Then upon her death there was no operative direction to the trustees except to pay to the "nearest in kin" of the testator; and the question is, whether he meant by that persons who answered the description of his nearest in kin at the date of his death, or the persons who answered that description at the date when the direction to pay to them took effect, or, in other words, at the death of the liferentrix without leaving issue.

The first material point to consider is that there is no gift to the nearest in kin at all except that which is involved in the direction to pay to them on the death of the granddaughter without issue. I cannot say that I feel myself much assisted in solving the question which really arises—which of the two sets of "nearest in kin" he intended to favour—by any presumption as to the meaning of the phrase. With the greatest possible respect for very high authority I think there can be no presumption founded upon what is supposed to be the primary meaning of these words, because the words are descriptive of a class; they apply equally to the class of persons who answer the description of nearest of kin at one time and to those who answer that description at another time. The body of a man's nearest relations must necessarily vary from time to time with the birth of new relations and the death of old ones; and the mere words "nearest of kin" to my mind convey no significance whatever except that of propinquity of blood at whatever time it is necessary to look for the persons who answer the description.

Therefore it appears to me to be clear enough that whatever grounds we have for solving the question which of the two classes

of heirs is really intended must be found in the words of direction to the trustees, and not in any special meaning of the words themselves. I think this is entirely consistent with the doctrine laid down by Lord Cairns in the case of *Mortimore* v. *Mortimore*, which was cited by one of the parties, because he explains very clearly the reason upon which it is necessary to construe a different expression altogether with reference to the period of the death of a testator and to no other period. In that case there was a bequest to a class of persons who were described as "my next-of-kin" under the statute for the distribution of intestate estates. Lord Cairns pointed out that that is a class which, according to the statute to which the testator refers, must be ascertained at the death of the testator. Now if the words next-of-kin in our law implied any reference to a right of succession at all, I think the case of *Mortimore* v. *Mortimore* would be applicable, because although the words are not qualified by an express reference to the statute, if the testator means that the people who are to take benefit by his will are the people who take under the law of intestate succession, they, according to the law, must be fixed at the date of his death, when his right passed by inheritance to them. But the words "nearest in kin" have no such signification at all; on the contrary, they are specially distinguished by the statute which regulates moveable succession in Scotland from heirs *in mobilibus*.

Therefore I think we must go back to the clause itself to try to find out what the testator meant by it, without any aid or hindrance from any presumption founded upon the mere words of the description. In the first place, he begins by giving a liferent to his granddaughter Barbara Johnston. She dies leaving no issue, and in that event, he says, in the first place, that the trustees are to divide the trust funds into two equal parts and to give one-half to his daughter Mrs Jamieson, whom failing to her children. If she had survived she would have taken that half to the exclusion of the "nearest in kin." She was one of the "nearest in kin" herself, and she would have excluded the others and taken, not in the character and description of one of the "nearest in kin," but by virtue of the express gift to herself personally. Then if she died leaving children, these children would have excluded the "nearest in kin"; and the other half would have been treated in like manner in favour of Mrs Laird and her children. Therefore there is a clear direction for the distribution of the estate in the event of Barbara Johnston's death without issue between the two beneficiaries particularly named and their children before the gift to the "nearest in kin" on their failing can take effect.

Now when it does take effect it is to be observed that the persons who happen to answer the description of "nearest in kin" at the testator's death are exactly the two people to whom primarily the destination of the estate had been given in the event of Barbara Johnston's death without children—namely, his two daughters—and it is only upon their death and the failure of their children that any gift is to take effect in favour of the "nearest in kin." If there had been a class of "nearest in kin" to which Mrs Jamieson and Mrs Laird, with other persons, belonged, I do not know that it would have been very material to say that they had been already favoured by name, and therefore that the class of "nearest in kin" must be a different class from that to which they belonged. But it is a totally different matter when they constituted the whole class, and *prima facie* it does not appear to be probable, on a mere construction of this will, that the testator meant to say, "Give my estate in equal portions to my two daughters, and if either dies give her half to her children; and if she leaves no children, then give the whole to my two daughters as my nearest in kin."

I take it that we are to construe the will, as I have been endeavouring to do, with reference to its own terms, and not subject to any supposed rules of law, because the first thing we have to do in reading the will is to gather from the words the testator used what we think he has meant, and it is only when we have got at his intention as a simple matter of construction that we then have to consider whether the conclusion which we reach ought to be modified or is displaced by any settled rule of law. I cannot say I have much doubt upon reading the will itself that when the testator said in the particular event to which the direction applies—"I direct you then and not sooner to make payment to my nearest in kin equally," that he meant to the persons answering that description at the date when the gift should take effect, and not to the person who would have answered that description at the time when no gift in their favour was operative at all.

Now it is said, and I think this was the main point in the argument, except the point upon what was said to be the presumption as to the meaning of the words "nearest in kin," that this construction does not give effect to what is called the rule of vesting subject to defeasance. I think if the question be stated in that form—whether the rule of vesting subject to defeasance is applicable or not—it is merely stating again in different words the question which I have been considering. If the testator meant that the gift to his next-of-kin should vest *a morte testatoris*, then, of course, he must have meant that it should take effect in favour of the persons who were then his next-of-kin. If he meant that his nearest of kin at his death were to take, I do not think there would be much difficulty in saying that he meant vesting *a morte testatoris*. If we are to apply that rule as an aid to construction, then I confess I have difficulty in seeing how it helps us at all.

But I agree with the Lord Ordinary that to apply it to this case would be extending the doctrine much beyond the point to

which it has been already carried. I cannot say I agree with him altogether in thinking that it would be a logical extension of the doctrine to carry it that length. I prefer his second view, that whether it is logical or not it is an extension to which he will not give effect. I cannot say for myself, in the cases where it has been held that interests have vested subject to defeasance, I can find any principle of law which is capable of being drawn out to a logical conclusion unless it be the principle that you are to construe a will so as to give effect to the presumed intention of the testator when there is nothing in the will which will tend to rebut that presumption. The only doctrine, so far as I understand it, that has received effect in a description of vesting subject to defeasance is this, that when a gift is made in such terms that it would take effect absolutely at the death of the testator but for the single contingency of the possible birth of issue of a particular person, that is a possibility which interferes so little, for practical purposes, with the primary legatee treating the legacy as his own subject to his being divested by the single event, that it must be presumed that the testator intended that he should so treat it. In the leading case it is pointed out that it is for the benefit of the object of the testator's bounty that he should be able to deal with his expectant interests as if they were vested in him subject to being divested upon the happening of the subsequent event, rather than that he should be prevented from dealing with them at all on the ground that they are kept in suspense. It must be presumed that the testator intended to give that benefit in a case in which the contingency which should exclude the primary legatee is so simple as that of the birth of children to one particular person.

Accordingly it has been held that where a fund is given in liferent to a daughter or a granddaughter and to her issue, if any, and failing this issue to a person or class of persons at the testator's death, without any further destination which could possibly exclude such a legatee, the legacy is vested in him subject to defeasance rather than that his interest is held in suspense until the death of the liferentrix whether she has issue or not. But then the condition upon which that doctrine has been applied has always been that there is no other contingency but that very simple one, and that it is the possibility of issue without any further destination on their failure that raises the presumption. But because a particular intention may be inferred from certain circumstances, it does not follow that it must be inferred from other and different circumstances.

I must say I agree entirely with the Lord Ordinary in holding that the doctrine is excluded when you find that the gift to be construed is subject first to the contingency of the liferentrix leaving issue, and failing such issue to a further destination as regards one-half to a particular individual and then to her issue, and as regards the other half to a second individual and her issue before it can take effect in favour of the persons to whom it is ultimately destined. There is first of all a gift to the possible children of Barbara Johnston. If they fail, then there is a division of the estate between two people particularly described. If either of them dies leaving issue, then it is to her children, but if both fail without leaving issue then only to the next-of-kin. I agree therefore with the Lord Ordinary that the doctrine of vesting subject to defeasance is inapplicable.

On the whole matter, I think the fair meaning of this codicil is that the testator intended to direct his trustees to pay to the persons whom they shall find to answer the description of "nearest in kin" at the death of Barbara Johnston without issue, and in the event of her two aunts having predeceased her without issue, and no sooner.

LORD DUNDAS—I agree with your Lordship upon all points, and have nothing to add.

LORD MACKENZIE—I am of the same opinion.

The Court adhered.

Counsel for the Reclaimers—M'Clure, K.C.—Mackintosh. Agents—Mackenzie & Kermack, W.S.

Counsel for the Respondents—A. R. Brown. Agents—T. & R. B. Ranken, W.S.

Wednesday, March 15.

FIRST DIVISION.

[Lord Dewar, Ordinary.

JACK *v.* BLACK.

(Reported on the Merits, January 28, 1911, *supra*, p. 331.)

Expenses—Tender—Expenses Subsequent to Tender—Expenses Incurred in the Natural Progress of the Cause—Delay in Accepting Tender.

Where a tender is lodged, the pursuer, if he means to accept it, must do so within a reasonable time. Where that time has been exceeded the defender is entitled to the expenses incurred by him in the natural progress of the cause between the date when the tender ought to have been accepted and its acceptance—the question as to what is a reasonable time being matter for the consideration of the Auditor.

In this case, which was an action of damages for wrongous use of diligence in obtaining a warrant to carry back a tenant's furniture to premises vacated by him, the Lord Ordinary (DEWAR) on 2nd November 1910 approved of an issue for the trial of the cause.

On 10th February 1911 his Lordship fixed the trial for 30th May. On the same day the defender lodged a tender of £75 with expenses to its date. The tender was accepted by the pursuer on 2nd March 1911.