and I am more than doubtful if what occurred there, assuming it has been recorded, could be used as evidence of an aggravation of a crime inferring dishonesty. The 63rd section of the Criminal Procedure (Scotland) Act 1887 provides that what may be lawfully put in evidence as an aggravation of a crime inferring dishonesty is an extract of a previous conviction obtained in any part of the United Kingdom of such a crime. For the reasons I have mentioned, I am of opinion that there has been no "conviction" of the Jedburgh offence, and the appellant is, in my judgment, entitled to obtain this conviction, if he can do so, for the purpose to which I have referred.

The result of our judgment will probably be this—the appellant, if he thinks it necessary, having saved the point of procedure, to do anything further will proceed against the respondent with a view to having him convicted of the Jedburgh offence. If a conviction is obtained, the Sheriff, after hearing the procurator-fiscal on the point, will, if he remains of opinion that the respondent has already been adequately punished in England, in all likelihood dismiss him from the bar without further penalty. This is, of course, a matter entirely for the Sheriff, and I merely set forth what I surmise will be the sequel of these proceedings in order to show the unlikelihood of any injustice being sustained by the respondent by reason of a double punishment being inflicted upon him for the same offence.

Counsel for the Crown then intimated that it was not intended to proceed further against the accused, and that therefore it was unnecessary to remit the case to the Sheriff Court.

The Court sustained the appeal, and answered the question in the case in the negative.

Counsel for the Appellant—Gillon. Agent—Sir William S. Haldane, W.S., Crown Agent.

Counsel for the Respondent — A. M. Mackay. Agents—Winchester & Nicolson, S.S.C.

COURT OF SESSION.

Tuesday, March 10.

SECOND DIVISION.

MARSHALL'S TRUSTEE *v.* CAMPBELL.

Succession—Vesting—Postponement of Payment—Destination of Heritable Subject to Person Named "and her Heirs and Successors whomsoever"—Destination of Pecuniary Legacy to Person Named "and her Heirs and Representatives."

A testator, who had by trust-disposition assigned his whole estate to trustees, directed them to pay the liferent thereof to his widow, and after her death to give and convey a heritable subject to his daughter A "and her heirs and successors whomsoever," and a pecuniary legacy also to A "and her heirs and representatives." A survived the testator but predeceased the liferentrix.

Held that the fee of both legacies vested in A *a morte testatoris*, the destination to A's heirs introduced by the word "and" not being suspensive of vesting.

John Foster, surviving testamentary trustee of James Marshall, retired carrier, Bathgate, *first party;* Mrs Jeanie Russell or Campbell, widow of James Marshall Campbell, the elder son of Mrs Catherine Marshall or Campbell, a daughter of the testator, as general disponee and executrix-nominate of the said James Marshall Campbell, *second party;* Hugh Campbell, the younger son of the said Mrs Catherine Marshall or Campbell, *third party;* and Mrs Margaret Campbell or M'Nair, Mrs Catherine Campbell or Malloch, and Mrs Jessie Campbell or M'Grouther, the daughters of the said Mrs Catherine Marshall or Campbell, *fourth parties*, presented a Special Case for the opinion and judgment of the Court.

After the death of the testator his trustees administered his estate in terms of his trust-disposition until the death of his wife, the liferentrix thereunder. Various questions were then raised with regard to the vesting of two legacies bequeathed by the testator to his daughter the said Mrs Catherine Marshall or Campbell, and for the determination of these questions the Special Case was brought.

The Case stated—"1. The late James Marshall, retired carrier, Bathgate, hereinafter referred to as 'the testator,' died on 1st October 1893. He left a trust-disposition, dated 23rd January 1893, which was recorded in the Sheriff Court Books of the County of Linlithgow on 6th October 1893. . . . The testator was at the time of his death possessed of moveable estate amounting to £630, 11s. 2d., and, *inter alia*, the heritable property hereinafter mentioned. 2. By his said trust-disposition the testator assigned, disponed, conveyed, and made over to the trustees therein named for executing the trust thereby created all and sundry lands and heritable estate of whatever kind, as also his whole moveable and personal means and estate of whatever kind which should belong to him at the time of his death. After providing for payment of his just and lawful debts, funeral expenses, and the expense of executing the trust thereby created, the testator by the second purpose of the said deed directed that his trustees should, as soon as convenient after his decease, make up their title as trustees foresaid to the whole of his said heritable and moveable estate, and should, yearly or half-yearly, give and pay to testator's wife, Mrs Margaret Fairley or Marshall, during her lifetime, the whole rents, interests, and produce of his said heritable and moveable estate. 3. By the third purpose of said deed the testator, *inter alia*, directed that his said trustees, as soon as convenient after the death of his said wife, should

give, assign, dispone, and convey to his daughter, 'Catherine Marshall or Campbell, wife of Duncan Campbell, railway inspector, Bathgate, and her heirs and successors whomsoever, all and whole that dwelling-house, stables, and piece of garden ground therewith connected, belonging to me, situated in Mid Street, Bathgate, and presently tenanted by the said Duncan Campbell and Mutter, Howie, & Company, contractors, Bathgate.' 4. By the fourth purpose of said deed the testator, *inter alia*, directed that his said trustees should, as soon as convenient after the death of his said wife, sell, dispose of, and convert the whole of the remainder of his heritable and moveable means and estate, with the exception of the household furniture and other effects after mentioned, and should, out of the proceeds thereof, give and pay to his said daughter 'Catherine Marshall or Campbell and her heirs and representatives three hundred pounds sterling,' and to his son James Marshall, the 'three oil paintings of my father, my mother, and himself, and also my gold watch and chain; but in the event of him predeceasing me, said gold watch and chain shall be given to my grandson James Campbell, Mid Street, Bathgate. 5. By the fifth purpose of said deed the testator gave directions regarding the division of the residue or remainder of his estate, but as there is not sufficient estate to pay in full the legacies directed to be paid by the fourth purpose of said deed, there is no residue."

By the fifth purpose of said deed the testator directed that his said trustees should, "after paying the foresaid legacies, divide the residue or remainder of my moveable means and estate, if any, including my household furniture and effects, with the exception of said oil paintings and gold watch, equally between my said daughters Catherine Marshall or Campbell and Isabella Marshall or Foster."

The testator was survived by his wife, the said Mrs Margaret Fairley or Marshall; by his children, the said Catherine Marshall or Campbell and James Marshall; and by his grandson, the said James Campbell. The testator's daughter, the said Catherine Marshall or Campbell, died intestate on 18th July 1906, survived by her husband, the said Duncan Campbell, and by the following children, viz. — the said James Marshall Campbell (called James Campbell in said trust-disposition), Hugh Campbell, Mrs Margaret Campbell or M'Nair, Mrs Catherine Campbell or Malloch, and Mrs Jessie Campbell or M'Grouther. The said Duncan Campbell died intestate on 3rd June 1910, survived by said children. The said James Marshall Campbell died on 8th October 1910, survived by his widow, the said Mrs Jeanie Russell or Campbell, but without issue, and the testator's wife, the said Mrs Margaret Fairley or Marshall, died on 15th March 1912.

The *contentions* of the parties were as follows:—"In regard to the legacy of the dwelling-house and others in Mid Street, Bathgate:—The second party contends that on a sound construction of the testator's trust-disposition the said legacy vested in the said Catherine Marshall or Campbell, *a morte testatoris*, and on her death vested in her heir, the said James Marshall Campbell; or alternatively that at the date of her death, when her heir was ascertained to be the said James Marshall Campbell, her eldest son, said legacy then vested in him. The second party acccordingly contends that the said subjects ought to be conveyed to her as general disponee under the will of the said James Marshall Campbell. The third party contends that on a sound construction of the testator's trust-disposition, vesting of the said legacy was postponed until the death of testator's widow, the said Mrs Margaret Fairley or Marshall, and that the said legacy then vested in him, the eldest surviving son of the said deceased Mrs Catherine Marshall or Campbell, and that the said subjects ought to be conveyed to him as heir-at-law of the said Mrs Catherine Marshall or Campbell at 15th March 1912.

"In regard to the legacy of £300:—The second party contends that the said legacy vested in the said Mrs Catherine Marshall or Campbell *a morte testatoris;* that on her death one-third thereof vested in the said Duncan Campbell *jure relicti;* that one-fifth of said third vested in the said James Marshall Campbell on the death of the said Duncan Campbell, and that in the event of the legacy of the heritable property having vested at any other time than the death of the testator, one-fifth of said legacy of £300 vested in the said James Marshall Campbell on the death of the said Mrs Catherine Marshall or Campbell. The second party contends alternatively that the said legacy of £300 vested, at the death of the said Mrs Catherine Marshall or Campbell, in her five children, before named, as 'her heirs and representatives.' The claim of the second party is therefore for one-fifth of one-third, or alternatively, for one-fifth of the whole of said legacy of £300. The third and fourth parties contend that vesting of the said legacy was postponed until the date of the death of the liferentrix; that it falls to be divided amongst the fourth parties as the then heirs and representatives in moveables of the said Mrs Catherine Marshall or Campbell, subject to the right of the third party as heir to the heritable property before mentioned to collate the said heritage."

The following *questions of law* were submitted:—"(1) Did the legacy of the dwelling-house and others in Mid Street, Bathgate, bequeathed to the said Catherine Marshall or Campbell and her heirs and successors vest (*a*) *a morte testatoris*, or (*b*) at the date of her death, or (*c*) at the date of the death of the liferentrix of testator's estate? (2) Did the legacy of £300 bequeathed to the said Catherine Marshall or Campbell and her heirs and representatives vest (*a*) *a morte testatoris*, or (*b*) at the date of her death, or (*c*) at the date of the death of the liferentrix of testator's estate."

Argued for the second party — (1) Both legacies vested in Mrs Campbell *a morte testatoris*. The words "and her heirs and

successors" whomsoever, and the words "and her heirs and representatives," did not constitute ulterior destinations suspensive of vesting. The words were merely tautological. A "successor," and still more a "representative," meant a person who took in place of another person who had already taken. The words merely imported that the legatee should have an absolute right. Vesting was suspended in cases where suspension was necessary in order to give effect to an ulterior destination, but in the present case there was no such reason for suspension, because there was not really any ulterior destination. In the present case the word "representatives" and the word "successors" were introduced by the word "and." That distinguished the present case from *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959, where the introductory word was "or." "Or" was equivalent to "whom failing"—*per* Lord Watson, *ibid.*, 1 F. (H.L.) at 72, 37 S.L.R. at 960. But "and" was not equivalent to "whom failing"—*Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346, *per* Lord Low, 2 F. at 496, 37 S.L.R. at 360. The following authorities were also referred to—*Hay's Trustees* v. *Hay*, June 19, 1890, 17 R. 961, 27 S.L.R. 771; *Manson* v. *Hutcheon*, January 16, 1874, 1 R. 371, 11 S.L.R. 190; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Wright* v. *Fraser*, November 16, 1843, 6 D. 78, *per* Lord Justice-Clerk (Hope) at 83; Bell's Dictionary, *voce* Succession; Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 4. Alternatively (2), on the death of Mrs Campbell the heritable legacy vested in James Marshall Campbell as her heir and successor, and the moveable legacy vested in him in part as one of her heirs and representatives—*Gardner* v. *Hamblin*, February 28, 1900, 2 F. 679, 37 S.L.R. 486; *Thompson's Trustees* v. *Jamieson* (*cit.*).

Argued for the third and fourth parties—The terms in which the gift of the legacies was expressed, viz., to convey them to the person entitled to them after the expiry of a liferent, favoured the view that the testator intended to postpone vesting till the expiry of the liferent. The ulterior destinations to Mrs Campbell's "heirs and successors whomsoever" and to her "heirs and representatives" were proper gifts-over which had the effect of postponing vesting till the expiry of the liferent—*Bowman* v. *Bowman*, *per* Lord Watson (*cit.*). The word "and" meant "or." The following cases were also referred to—*Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, *per* Lord Low at 125, 44 S.L.R. 96, at 100; *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, *per* Lord M'Laren at 619, 41 S.L.R. 421, at 423; *Thompson's Trustees* v. *Jamieson* (*cit.*), *per* Lord Moncreiff at 505, 37 S.L.R. at 366; *Hay's Trustees* v. *Hay* (*cit.*); *Clark's Executors* v. *Paterson*, December 5, 1851, 14 D. 141; *Bell* v. *Cheape*, May 21, 1845, 7 D. 614.

At advising—

LORD SALVESEN—The trust-disposition of the late James Marshall which we are called upon to construe contains provisions of the simplest kind. The testator left his estate to trustees, whom he directed to pay his widow a liferent of his whole estate, and as soon as convenient after her death to convey to his daughter Catherine "and her heirs and successors whomsoever" a dwelling-house and offices in Bathgate. By the fourth purpose he also directed his trustees as soon as convenient after his wife's death to sell his heritable and moveable estate so far as not specially destined, and to pay his said daughter Catherine "and her heirs and representatives" £300 sterling. Catherine survived the testator but predeceased the liferenter. The point of law for our decision is, did these legacies vest *a morte testatoris*, or was vesting postponed until the death of the liferentrix?

It seems to be settled by authority that vesting is not postponed merely by the interposition of a trust for the purpose of securing a liferent. If, therefore, the two legacies in favour of Catherine had been expressed as being payable to her only it was conceded that they would *prima facie* have vested in her *a morte testatoris*. On the other hand, it is equally clear that if there had been a proper substitution in the destination of the fee, such substitution would be presumed to have been made in view of the contingency of Catherine predeceasing the liferenter, in which case the fee would not vest in Catherine unless and until she survived the liferentrix.

The third and fourth parties maintained that the words added after Catherine's name, "and her heirs and successors" in the one case, and the similar words "and her heirs and representatives" in the other, are to be read as an institution of Catherine's heirs to the legacies primarily destined to her conditional upon her predecease of the liferentrix—in other words, as being equivalent to "whom failing by her predecease of the liferentrix to her heirs and representatives." I am unable so to construe them. In the case of *Hay's Trustees* v. *Hay*, 17 R. 961, where the direction to the trustees was on the expiration of a liferent to convey a certain heritable subject to "A B and his heirs," the First Division held that the fee vested in A B *a morte testatoris*, and that the heirs were introduced into the destination only in the event of the legatee not surviving the testator. The words here are at least as favourable to vesting *a morte* as those used by the testator in *Hay's* case. Indeed, my own opinion, apart from authority altogether, would have been that they were introduced by the conveyancer simply as words of style indicative of the testator's intention to pass the full right of property to the legatee; so that it would either pass to her heirs if she died intestate, or according to her directions whether testamentary or *inter vivos*. Similar words are constantly introduced into bonds for repayment of money or dispositions of heritage. They express nothing more than the law implies; and it appears to me not necessary to attach any peculiar weight to them simply because they occur in a testamentary deed. No doubt they would have the effect of preventing the lapse of the

legacy in the event of the legatee dying before the testator, but that can scarcely have been within his contemplation, as the gift is obviously made on the assumption that the testator will be survived by the objects of his bounty. It appears to me difficult to assume that the testator should prefer the unknown heirs of his daughter to herself simply because she happened to predecease the liferentrix, or that if he did so intend he should not have made his meaning quite plain. The presumption is always in favour of vesting as at the death of the testator, unless language is used which points to a contrary intention. It was strongly argued on behalf of the third parties that the case of *Hay's Trustees* was no longer authoritative in view of the opinions of Lord Watson and Lord Davey in the case of *Bowman* v. *Bowman's Trustees*, 1 F. (H.L.) 69. I do not read these opinions, even if they had been concurred in by the other members of the tribunal, as in any way overriding *Hay's Trustees*, but merely as commenting adversely on one of the reasons assigned by Lord M'Laren for his judgment. The destination, moreover, in *Bowman's* case was quite differently expressed from the one we have here, the gift being given to A B "or his heirs," and not, as here, to A B "and her heirs and successors." Lord Watson speaks of the destination in *Bowman's* case giving an alternative right to the heirs to receive payment at the death of the liferentrix—language which is quite inapplicable to the destination as expressed here. Moreover, in the subsequent case of *Thomson's Trustees*, 2 F. 470, a majority of the whole Court held that a destination to "A B and his heirs or assignees" did not import a proper conditional institution of A B's heirs suspensive of vesting in him, and that the fee vested in him *a morte testatoris;* and the minority of the Court dissented upon grounds applicable only to the particular settlement there under construction. Lord M'Laren, who was in the minority, can scarcely be supposed to have disapproved of the judgment in *Hay's Trustees*, in which he gave the leading opinion; and there is no suggestion in any of the opinions that that case was no longer to be regarded as authoritative. On the contrary, Lord Moncreiff in dealing with this very matter says—"Lord Watson and Lord Davey take exception to the statement of the law in *Hay's Trustees* which was adopted by the Court and has been followed in subsequent cases. Perhaps the law was somewhat too broadly stated in that case, but in view of a series of decided cases in this Court, which at present it is unnecessary to cite, I am not prepared to hold, until it is directly decided, that a destination to 'A and his heirs or assignees' is the same thing or should receive the same effect as a destination to A, whom failing to B." I agree with that opinion and with the reasoning of the Judges who constituted the majority of the Court in *Thompson's* case, and I accordingly move your Lordships that we should answer the first branch of the first and second questions in the affirmative.

LORD ANDERSON—I agree. The question to be determined in this case depends, in the main, on a consideration of the terms of the third and fourth purposes of the trust-disposition of the late James Marshall.

The second party presented an alternative argument as to the period of vesting, maintaining that there was either vesting in Mrs Campbell *a morte testatoris*, or that there was vesting in her children at the date of her death, which occurred at a date intermediate between the death of the truster and the death of the liferentrix. I was not impressed with the argument for vesting at an intermediate date. A truster may, it is true, fix any date he may choose as that of vesting, but where an unusual or unwonted date is suggested, there must be clear indication of his intention to fix that date. In a case like the present, where a liferent has been bestowed, it is practically unprecedented to find the period of vesting at any other date than that of the death of the testator or of the liferenter. I am unable to hold that the truster meant to fix the date of his daughter's death as the period at which what he had bequeathed to her should vest in her children. The only case to which we were referred in which the Court had found that vesting had taken place at an intermediate date was that of *Gardner*, 2 F. 679. That case presented these special features—(1) the deed in question was a declaration of trust addressed by two sisters to their three brothers regarding certain bank stock, to the purchase price of which each of the five had contributed an equal part; (2) a Court of three Judges held that the deed fell to be construed as if it were a joint settlement of the fund; and (3) a majority of the Court held that the fee had vested, on the death of the second brother, in the last surviving brother, subject to defeasance in the event of the sisters having children. Both sisters ultimately survived all three brothers, and died without issue, and the representatives of the last surviving brother, by the judgment of the majority of the Court, took the whole fund. That decision, accordingly, does not seem to me to impinge upon the proposition I stated, to wit, that it must be clearly indicated by the language used that the testator meant to fix an unusual period of vesting, and in the present case I am unable to reach the conclusion that he has done so.

I have formed the opinion that the truster intended vesting to take place at his death. To begin with, there is a presumption that vesting occurs at the earliest possible date, that is, in general, *a morte testatoris.* Further, the presumption in favour of vesting *a morte* is unusually strong in the case of provisions to the truster's immediate children—*Jackson*, 3 R. 627. This presumption is not affected by the fact that payment has been postponed to a time certain, as to the expiry of a liferent; nor does it weaken the presumption that the machinery of a trust has been set up—*Carleton*, (1865)

3 Macph. 514, and (1867) 5 Macph. (H.L.) 151, see Lord Colonsay, at p. 154. On the other hand, where there is contingency both in time and event in connection with a bequest, the presumption is that there is no right in the beneficiary unless and until the condition had been purified. A clause of survivorship is, in general, referable to the period of division, and a proper destination-over is, in substance, equivalent to a clause of survivorship. It is maintained by the third and fourth parties that in the present case there is a proper destination-over, the effect of which is to postpone vesting. The decision accordingly really turns upon the effect which is to be given to the phrases in the third and fourth purposes "and her heirs and successors whomsoever" and "and her heirs and representatives."

Prior to the decision of the House of Lords in the case of *Bowman's Trustees*, 25 R. 811, and 1 F. (H.L.) 69, it was well settled that a destination-over, in order to be effectual to postpone vesting, must be to a person named or described independently of the institute. (*Hay's Trustees* v. *Hay*, 17 R. 961; *Ross's Trustees* v. *Ross*, (1897) 25 R. 65; *Mellis* v. *Mellis' Trustee*, (1898) 25 R. 720; *Bowman's Trustees* v. *Bowman*, 25 R. 811, and 1 F. (H.L.) 69). In *Bowman's Trustees* in the House of Lords there are dicta in the opinions of Lord Watson and Lord Davey to the effect that a destination-over in favour of the heirs of an instituted child should have the same effect as a destination-over in favour of a stranger. The question always remains, however, whether the clause under consideration has effected a proper destination-over. In *Bowman's Trustees* the phrase used was "or to their respective heirs," the conjunction "or" being a proper equivalent for the words "whom failing," which are ordinarily employed in a proper destination-over. In the present case the conjunction used is "and," which is not synonymous with "whom failing." It seems to me that the law laid down in *Bowman's Trustees* cannot be held as impugning what has been so often decided in these Courts—that a gift to A and his heirs is nothing more than a gift to A. The law, in my judgment, still remains as stated by Lord Justice-Clerk Moncreiff in the case of *Jackson*, where he says at p. 630—"But a legacy to A and his heirs, or A and his children, is not a separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee whose children or heirs are mentioned. They only find a place in the destination through the relation which they bear to the *persona prædilecta;* and in cases like the present, in which the gift is only inferred from the direction to divide, the instruction to the trustees to pay to the heirs of the legatee, if he predecease the period of division, may be regarded more as the natural result of the legacy having vested than as an indication of the reverse." I find that this passage was quoted and approved in *Ross's Trustees*, 25 R. 65, at pp. 72 and 73. Lord M'Laren's opinion in *Hay's Trustees* is to the same effect. I do not regard the terms "successors" and "representatives" in conjunction with "heirs" as having any other effect than that of strengthening the considerations in favour of vesting *a morte*. The term "heirs" has reference to intestate succession, and the other terms were probably introduced to include testate succession. If this be so, vesting *a morte* is presupposed, as otherwise there could be no proper testamentary disposition by the institute of the property bequeathed by the trust-disposition.

I stated at the outset that the question for decision was mainly dependent on a consideration of the third and fourth purposes of the trust-disposition, but in endeavouring to ascertain the truster's intention his deed as a whole should be looked at. An examination of the fifth clause seems to confirm and corroborate the conclusion as to the date of vesting which I have expressed. By that clause the residue is bequeathed to the two daughters of the truster *nominatim*, and without any reference to their heirs. This clause clearly imports vesting *a morte*, and I cannot think the truster intended to fix a different period of vesting for the other bequests which he made in favour of his daughters.

I therefore agree that the questions should be answered as suggested by your Lordship.

LORD JUSTICE-CLERK — I have had an opportunity of reading the opinions of Lord Salvesen and Lord Anderson, with both of whom I concur.

LORD DUNDAS and LORD GUTHRIE were absent, Lord Dundas being engaged in the Extra Division, and Lord Guthrie being on circuit.

The Court answered head (*a*) of each of the two questions in the affirmative.

Counsel for the First and Second Parties —D. P. Fleming. Agent—John Sturrock, Solicitor.

Counsel for the Third and Fourth Parties —Macquisten. Agents—Purves & Simpson, S.S.C.

Wednesday, March 11.

SECOND DIVISION.

ROSS *v.* ROSS.

Poor's Roll—Admission—Poverty—Absence of Objections by Adverse Party—Power of Court to Refuse Admission—Codifying Act of Sederunt, A, x, 6.

The Codifying Act of Sederunt, A, x, 6, enacts—"On the lapse of eight days after the date of insertion in the minute book, or of four days next after publication of the printed minute book containing said intimation, if the paper shall have been lodged during vacation or recess, the party's agent shall box a note to the Lord President of the Division, simply stating the names and