LORD JUSTICE-CLERK — I concur with Lord Dundas. I have had an opportunity of perusing his opinion prepared after consultation, and it so entirely expresses my views that I find it unnecessary to add anything. I will only say that I desire to confine my opinion to the matters dealt with by Lord Dundas. Beyond that I do not wish to go.

The Court answered the three questions of law in the negative.

Counsel for the Appellants — Johnston, K.C. — Aitchison. Agents — R. D. Ker & Ker, W.S.

Counsel for the Respondents—Solicitor-General (Morison, K.C.) — D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, May 23.

FIRST DIVISION.

BANNATYNE'S TRUSTEES *v.* WATSON'S TRUSTEES.

Succession — Vesting — Vesting subject to Defeasance — Conditional Institution — Destination-over — Double Contingency — Legacy — Lapse.

A testator directed his trustees to hold a sum of money for behoof of A in liferent and her children in fee, declaring that in the event of any of the children dying before the term of payment therein prescribed leaving issue, such issue should be entitled to their parent's share. In the event of any of the children dying without issue, the share which such predeceaser would have taken on survivance was to be paid to his or her surviving brothers and sisters and the issue of such as had predeceased. In the event of A's death without issue the legacy was to be paid to her brother B, whom failing to his issue, whom all failing to C, D, and E, the children of X, and the survivors and survivor of them, the issue of any who should have predeceased being entitled to the share which their parent would have taken on survivance. B and the three children of X all survived the testator, but all of them predeceased the liferentrix without issue, E being the last survivor. On the subsequent death of the liferentrix without issue a question arose as to the parties entitled to the legacy.

Held that the legacy had lapsed, and had not vested, subject to defeasance, either in B or in E.

Observations on the doctrine of vesting subject to defeasance.

On February 6, 1913, R. D. Watson, The Hermitage, Teignmouth, and others, the testamentary trustees of the late John Bannatyne, merchant in Glasgow, *first parties;* the said R. D. Watson and another, the trustees and executors of the late James Watson, Streatham Hill, Surrey, *second parties;* Francis Martin, writer, Paisley, and another, the testamentary trustees of the late Miss Eliza M. Cogan, 29 Stafford Street, Edinburgh, *third parties;* and J. C. Livingston, W.S., Edinburgh, the testamentary trustee of the late R. J. Bartholomew, Ascog, Bute, *fourth party,* presented a Special Case with regard to the rights of the second, third, and fourth parties in part of the testator's estate.

By his trust-disposition and settlement Mr Bannatyne, who died on 19th August 1878, provided, *inter alia,* as follows:—"Thirdly, I direct my trustees to make payment to each of Susan Matilda Cunningham Graham Bartholomew and Robert John Bartholomew, both children of the deceased Robert Bartholomew, merchant in Glasgow, of the sum of two thousand five hundred pounds, and that on their respectively attaining the age of twenty-one: Declaring that in the event of either of them predeceasing the said period of payment leaving issue, such issue shall be entitled to the legacy which their parent would have taken on survivance: And further, that in the event of either of them predeceasing the said period without leaving issue, then the legacy which would have been taken by such predeceasor on survivance shall fall and accresce to the survivor of the said two legatees, whom failing, to his or her issue, whom all failing, then the said two legacies shall fall into and form part of the residue of my estate."

The last purpose of the said trust-disposition and settlement was as follows:—"And *lastly,* and with regard to the residue of my estate (including therein such of the foregoing legacies as may have lapsed) . . . I direct my trustees as at my death to pay and convey the same absolutely to and in favour of the said James Watson, whom failing by his predeceasing me, then to and among his children and the survivors and survivor of them, the issue however of any of them who may have predeceased me leaving issue being entitled to the share which their parent would have taken on survivance." The said James Watson, who was a nephew of the testator, survived him and died on 26th December 1899.

By a codicil the said John Bannatyne provided as follows:—"With reference to the legacy of two thousand five hundred pounds provided by the third purpose of my said trust-disposition and settlement in favour of Susan Matilda Cunningham Graham Bartholomew, now Henn, I hereby direct my trustees, instead of paying the same as therein directed, to hold and apply, pay and convey the same for behoof of the said Mrs Susan Matilda Cunningham Graham Bartholomew or Henn, in liferent for her liferent use only and to and among her children in fee, and that in such shares and proportions, and subject to such terms, conditions, and restrictions, and otherwise as she may appoint by any writing under her hand, and failing such writing, then to and among such children equally, and that on their respectively attaining the age of twenty-one and on the death of their said mother: Declaring that in the event of any of the

said children dying without having attained the said term of payment and conveyance leaving issue, such issue shall be entitled to the share which their parent would have taken on survivance: And further, that in the event of any of the said children dying without leaving issue, then the share which such predeceaser would have taken on survivance shall fall and accresce to his or her surviving brothers and sisters along with the issue of any brother or sister who may have deceased leaving issue, such issue always taking the share which their parent would have taken on survivance: And further, declaring that in the event of the death of the said Mrs Susan Matilda Cunningham Graham Bartholomew or Henn without leaving issue, or of her leaving issue but of such issue not surviving to take in terms of the destination hereinbefore contained, then the said legacy shall fall and accresce to her brother Robert John Bartholomew, named and designed in my said trust-disposition and settlement, whom failing to his issue, whom all failing to Robert Orr Cogan, Eliza Cogan, and Mary Susan Cogan, children of the late Robert Cogan, merchant in Glasgow, and the survivors and survivor of them, the issue, however, of any of them who may have predeceased leaving issue being entitled to the share which their parent would have taken on survivance: And with this addition to my said trust-disposition and settlement I ratify the same."

Mrs Henn, the liferentrix of the legacy of £2500, Robert John Bartholomew, and the children of the late Robert Cogan, all survived the testator. Robert John Bartholomew predeceased the liferentrix, having died on 20th July 1884, aged thirty, and never having had issue. Mary Susan Cogan died unmarried on 1st April 1885. Robert Orr Cogan died on 25th January 1886, never having had issue. Eliza M. Cogan died unmarried on 13th June 1910, leaving a trust-disposition and settlement, the surviving trustees nominated under which were the third parties to the case. Mrs Henn, the liferentrix, died on 16th October 1911, leaving no issue.

The second parties *maintained* that on a sound construction of the said trust-disposition and settlement and codicil the said legacy of £2500 lapsed on the death of the said Mrs Henn, and fell into and now formed part of the residue of the trust estate which vested in the said deceased James Watson, and that the same with all accrued income fell to be paid to them as trustees and executors of the residuary legatee.

The third parties *maintained* that from and after 25th January 1886 the said legacy of £2500 vested in the said Eliza M. Cogan, but subject to defeasance in the event of (1) the said Mrs Henn leaving issue who should survive and take in terms of the destination in their favour, or (2) the said Eliza M. Cogan predeceasing Mrs Henn survived by issue; that on the death of the said Eliza M. Cogan the said legacy became a vested right in her estate, subject to defeasance only in the event of Mrs Henn leaving issue who should survive and take; and that on the death of Mrs Henn without issue the said legacy became payable to the persons in right of the estate of the said Eliza M. Cogan.

The fourth party *maintained* that the said legacy vested *a morte testatoris* in the said Robert John Bartholomew, subject to defeasance in the event (1) of the liferentrix leaving issue who should survive and take in terms of the destination in their favour; (2) of him the said Robert John Bartholomew predeceasing the liferentrix and leaving issue who should survive and take; or (3) of him the said Robert John Bartholomew predeceasing the liferentrix not leaving issue who should take, and the said Robert Orr Cogan, Eliza M. Cogan, or Mary Susan Cogan, or any of them surviving the liferentrix or predeceasing the liferentrix leaving issue who should survive and take; and that none of the said events having occurred the said legacy remained vested in him and in his estate, and was transmitted by his trust-disposition and settlement to him, the fourth party.

The *questions of law* were—"(1) In the circumstances above set forth, did the legacy of £2500 which was liferented by Mrs Henn become on the death of Miss Eliza Martin Cogan a vested right in the latter's estate, subject to defeasance in the event of Mrs Henn leaving issue who should survive and take, and is it now payable to the third parties? Or (2) did the said legacy vest in the said Robert John Bartholomew so as to be transmitted by his trust-disposition and settlement to the party of the fourth part? Or (3) has the said legacy lapsed and fallen into residue, and does the amount thereof, with the accumulations of income thereon since Mrs Henn's death, fall to be paid to the second parties?"

Argued for the second parties—Where, as here, there were two separate survivorship clauses with a destination-over to a long series of conditional institutes, vesting was postponed to the date of distribution—*Young* v. *Robertson*, February 11, 1862, 4 Macq. 314; *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103. The contention of the third parties that vesting took place in the last survivor of the Cogans was unsound, for the words "survivors and survivor of them" occurring in the codicil, and on which they (the third parties) founded, referred not to survivance *inter se* but to survivance of the date of distribution—*Boyle* v. *Earl of Glasgow's Trustees*, May 14, 1858, 20 D. 925; *Nolan* v. *Hartley's Trustees*, December 12, 1866, 5 Macph. 153, 3 S.L.R. 108. Assuming, however, that they did refer to an *inter se* survivance the result was the same, for there was a destination-over to issue, and that was enough to suspend vesting—*Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632; *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421; *Young* v. *Gordon*, November 9, 1909, (1909) 2 S.L.T. 321; *Johnston's Trustees* v. *Dewar*, March 10, 1911 S.C. 722, 48 S.L.R. 582. The case of *Coulson's Trustees* v. *Coulson's Trustees*, June 9, 1911, 1911 S.C. 831, 48 S.L.R.

814, was distinguishable, for there the contingency was alternative and not conditional. The contention of the fourth party that vesting took place *a morte* in R. J. Bartholomew, the first of the conditional institutes, subject to defeasance in certain events which had failed, was equally unsound, for it involved an extension of the doctrine of vesting subject to defeasance much beyond its well recognised limits. Where, as here, the persons conditionally instituted could not be ascertained at the death of the testator that doctrine was inapplicable—*Snell's Trustees* v. *Morrison*, November 4, 1875, 4 R. 709; *Earl of Dalhousie's Trustees* v. *Young*, May 24, 1889, 16 R. 681, 26 S.L.R. 525; *Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, 26 S.L.R. 146; *Turner* v. *Gaw*, February 20, 1894, 21 R. 563, 31 S.L.R. 447; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, *per* Lord Kyllachy at p. 485, 37 S.L.R. 346; *Gardner* v. *Hamblin*, February 28, 1900, 2 F. 679, 37 S.L.R. 486.

Argued for third parties — The words "survivors and survivor of them" occurring in the bequest to the Cogan family referred to survivance *inter se*, not to the date of distribution. That being so, when the family was reduced to one, vesting took place in the survivor, for the clause of survivorship fell to be read out of the will—M'Laren on Wills, i. 648; *Newton* v. *Thomson*, January 27, 1849, 11 D. 452, *per* Lord Mackenzie at p. 456; *Maitland's Trustees* v. *M'Dermaid*, March 15, 1861, 23 D. 732; *Lindsay's Trustees*, May 22, 1885, 12 R. 964, 22 S.L.R. 638; *Begg's Trustees* v. *Reid*, January 31, 1899, 1 F. 498, *per* Lord Moncreiff at p. 501, 36 S.L.R. 382; *Ferguson's Trustees* v. *Readman's Executors*, March 3, 1903, 10 S.L.T. 697; *Lawrie's Trustees* v. *Lawrie*, July 6, 1905, 7 F. 910, 42 S.L.R. 693. The only contingency by which the survivor's right could thereafter be defeated was the birth of issue to herself or the birth of issue to the liferentrix, and both of these were resolutive not suspensive conditions—*M'Lay* v. *Borland*, July 19, 1876, 3 R. 1124; *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217, 15 S.L.R. 776; *Wylie's Trustees* v. *Wylie*, December 10, 1902, 8 F. 617, 43 S.L.R. 383; *Cairns' Trustees* v. *Cairns*, November 29, 1906, 1907 S.C. 117, 44 S.L.R. 96; *Penny's Trustees* v. *Adam*, February 25, 1908 S.C. 662, 45 S.L.R. 481. Both of these resolutive conditions had failed, and vesting accordingly had become absolute.

Argued for the fourth party—Where, as here, the destination-over contained several branches, vesting took place in the first branch, viz., R. J. Bartholomew, subject to defeasance in the event of certain contingencies which had failed, and vesting therefore had become absolute—*Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787. Vesting subject to defeasance was not limited to cases where only one contingency was involved, nor was it rendered inapplicable by the conditional institute of issue, for a destination-over to issue was not suspensive of vesting—*Wylie* (*cit.*); *Cairns* (*cit.*); *Penny* (*cit.*).

At advising—

LORD PRESIDENT—It is common ground that none of the numerous cases cited to us in the course of the debate will rule this case. If, therefore, we are free to approach the consideration of the questions submitted to us wholly unencumbered by prior authority, I do not think they are attended with any difficulty. For the testator has expressed his intentions in language singularly clear and unequivocal.

By his settlement he, *inter alia*, entrusted £2500 to his trustees. From the date of his death they became the fiduciary fiars of that sum of money, and by his second codicil he directed them how to apply it. He told them to pay the income, but the income only, to a Mrs Henn during her lifetime. At her death, but not until her death, they were to pay the capital to her children. If there were none they were to pay it to her brother. If he was dead they were to pay it to his children. If he left no children they were to pay it to three persons—a brother and two sisters of the name of Cogan. If one of the three was dead they were to pay it to the remaining two. If two were dead they were to pay it to the third; and if all were dead they were to to pay it to the issue—the children of the Cogan family, each family taking the shares which their parent would have taken had they survived.

Now at the death of the liferentrix (she died childless on the 16th October 1911) Robert, her brother, and the three Cogans had all died childless. In other words the legacy lapsed. But the trustees were not without guidance in that event, for they were told that if the legacy did lapse they were then to pay the money to the testator's nephew James Watson as his residuary legatee.

That, it appears to me, is the plain meaning of the second codicil, read as I think it ought to be read in relation to the third purpose and the last purpose of the settlement. In my recital of the terms of the bequest I have not used the exact language of the testator. I have employed less conventional, but I hope not less precise, phraseology. In the second codicil there is to be found one clause, and one only, which it is said is open to two interpretations. It is the clause of bequest to the Cogans, which is thus phrased—"To Robert Orr Cogan, Eliza Cogan, and Mary Susan Cogan, children of the late Robert Cogan, merchant in Glasgow, and the survivors and survivor of them, the issue, however, of any of them who may have predeceased leaving issue being entitled to the share which their parent would have taken on survivance." Does that clause of survivorship apply to the date of payment and distribution, or does it not? I think it does. I do not think the language is open to two interpretations. To an unsophisticated mind—I mean a mind unsophisticated by the study of vesting cases—a clause of survivorship indicates that the survivor must be looked for at the supreme moment when something is to be done for the survivor, namely,

to pay him money, and if he is not alive at that date, his prior existence is wholly disregarded by any unsophisticated person.

Now it appears to me that the language of the testator here plainly indicates that the survivor is to be looked for at the date of distribution. In other words, the rule of *Young* v. *Robertson*, 4 Macq. 314, is to be applied, and that for the very clear and cogent reasons given by the noble Lords who decided that case. In every other part of the second codicil in which we find the words "survivance" and "surviving," that is the sense in which they are used, and I cannot think it would result in anything but confusion if we were to interpret these words of bequest to the Cogans in any different sense. If that is the true interpretation of this codicil, then the answer to the questions put to us is easy.

But we were urged by counsel for the third parties to reject the plain and obvious meaning of the testator's words and to apply to this case the doctrine of vesting subject to defeasance. I decline, and if I am asked for reasons, I give them in the words that Lord M'Laren used in the case of *Turner* v. *Gaw*, 21 R. 563, where he says—"It is not a case for the application of the doctrine, because the necessary condition of vesting subject to defeasance is, that if the original institution, say, of issue, were absent or supposed to be absent from the deed, the persons next in order would take a vested interest *a morte testatoris*, and that, as explained by the late Lord President in the passage read,"—a passage from *Steel's Trustees*—"can only be where they are a class of persons definitely ascertained. If they are a class of persons not ascertained, and the period of distribution is postponed, then it is evident that even if there were no original destination to issue, that class could not take a vested interest at death because the presumption always is that the words of survivorship or conditional institution are referred to the period when the trust expires."

Now it may be said that that is too limited and narrow a statement of the doctrine. I cannot think that at this time of day and having in view subsequent decisions any wider statement would be correct. Thus stated, it does not appear to me to be inconsistent with the judgment of the House of Lords in *Taylor* v. *Gilbert's Trustees*, 5 R. (H.L.) 217, because the keynote of that judgment will, I think, be found in the penultimate paragraph of Lord Gordon's opinion, concurred in by the Lord Chancellor and Lord Hatherley, where he points out that by a clause in the settlement which had been entirely overlooked in the Court of Session the testator expressed a clear intention that vesting should take place prior to the date of distribution. And as I read the judgment it would have affirmed, and not reversed, the judgment of the Court of Session had that clause been absent. And it was exclusively upon the construction of that overlooked clause—which their Lordships regarded as decisive of the case—that a judgment was pronounced vesting the bequest before the date of distribution.

But much has happened since the date of *Taylor* v. *Gilbert's Trustees*, and probably the full effect of the judgment of the House of Lords in the case of *Bowman*, 1 F. (H.L.) 69, has not yet been clearly realised, for the destruction of the canon of interpretation laid down in *Hay's Trustees*, 17 R. 961, which we find in the judgments of Lord Watson and Lord Davey in *Bowman's* case, appears to me to leave very little of the doctrine of vesting subject to defeasance. If, as Lord Watson says, a gift-over in favour of the heirs of an instituted child is to have exactly the same effect, and to receive the very same interpretation, as a gift-over in favour of any other relative or a stranger *nominatim*, then apparently the doctrine of vesting subject to defeasance must have very nearly reached the vanishing point.

To my mind the most significant exposition of the doctrine which we now have is in the latest case, and comes from the lips of a Judge whose eminence in this domain of law no one will question—Lord Kinnear—who said in *Johnston's Trustees* v. *Dewar*, 1911 S.C. 722—"I cannot say for myself that 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 to 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 a 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. The condition

upon which that doctrine has always been applied is 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."

I cannot think the true basis of this artificial canon of construction is to be found in a presumed desire on the part of a testator that a legatee should have ample and immediate opportunity of borrowing on the security of his expectancy, and to the eye of a trained lawyer who keeps in mind that there is now no distinction between a gift-over in favour of the heirs or issue of an instituted child and a gift-over in favour of a stranger *nominatim*, a doctrine poised on so narrow a ledge as this holds out very little prospect of longevity.

But whatever view may be taken of the doctrine of vesting subject to defeasance, I desire to decide this case—and I understand both your Lordships desire so to decide—on the simple ground that the doctrine is wholly inapplicable here, because the testator has plainly expressed his intention that vesting should be suspended until the date of distribution, and that nobody should take any part of this capital sum of £2500 unless and until they survived the period of payment.

Holding these views, I think we ought to answer the first and second questions in the negative, and third question in the affirmative.

LORD MACKENZIE—It was maintained by two of the parties to this case, (1) Robert John Bartholomew and (2) Eliza Cogan, that the fee of the legacy of £2500 bequeathed by the second codicil had vested subject to defeasance. I am of opinion that the contention of neither party is well founded, and that the legacy of £2500 lapsed and falls into residue in terms of the settlement.

I do not reach this conclusion by reading into the second codicil the provisions of the third clause of the settlement. The codicil is in substitution for that clause, and supersedes it. The effect of the codicil must be ascertained from its own terms.

As regards Robert John Bartholomew, who maintains that there was vesting *a morte* subject to defeasance, the case is a typical one of suspended vesting. The gift is one of liferent followed by certain destinations of the fee prior to Robert John Bartholomew; then there is a destination to him with a destination-over. It is settled by a number of cases, of which *Bryson's Trustees* v. *Clark*, 8 R. 142, is the most familiar, that vesting is in such a case suspended. This claim therefore fails.

The position of Eliza Cogan is, that from the date when she became the last survivor of the family the fee vested in her subject to defeasance only in the event of (1) the liferentrix leaving issue, or (2) in the event of herself predeceasing the liferentrix leaving issue. We heard a good deal of argument on the question whether there could be vesting subject to defeasance in the event of there being two or more contingencies. In the view I take it is not necessary to express an opinion upon this point. The case should be decided upon another ground. I may, however, say, with reference to the argument, that I am unable to see why the mere fact that there are two contingencies (neither of which would *per se* be suspensive of vesting) must necessarily lead to the conclusion that they are not to be regarded as resolutive. A condition personal to the legatee suspends vesting. A condition which is not personal, which depends upon the existence of someone yet unborn, is *prima facie* resolutive. The combination of two or more resolutive conditions does not of necessity operate to make them suspensive.

There is no reason in principle why a fee should not vest subject to divestiture upon one or more than one contingency. But it must always be a question on the language of the particular settlement whether the inference should be drawn that the testator meant there should be vesting. There is nothing inconsistent with this in what was said by Lord Kinnear in his judgment (in which I concurred) in the case of *Johnston's Trustees*, 1911 S.C. 722. I cannot regard the case of *Steel's Trustees*, 16 R. 204, as laying down an artificial rule which must be strictly limited. That this was not the view of the Lord President is shown by the judgment in *Dalhousie's Trustees*, 16 R. 605, as regards the share of Edward Bannerman Ramsay. The observations of Lord M'Laren in *Gardner* v. *Hamblin*, 2 F. 679, upon the application of the doctrine of vesting subject to defeasance are in accordance with what is above stated. A consideration of what was said in *Taylor* v. *Gilbert's Trustees*, 5 R. 49, *per* Lord Justice-Clerk, at p. 57, 5 R. (H.L.) 217, confirms this view This case also shows that vesting subject to defeasance need not necessarily be *a morte*. Lord Kyllachy's statement of the general rule in regard to the contingency of the birth of issue in *Thomson's Trustees*, 2 F. 270, is to the same effect.

We also heard argument upon whether there was what could be called a proper destination-over in the event of the failure of Eliza Cogan, the destination not being to a third party nor to heirs, but to issue. This raises the question which is discussed by Lord Low in *Cairns' Trustees*, 1907 S.C. 117, as to the effect of the opinions expressed in *Bowman's Trustees*, 1899, 1 F. (H.L.) 69, in view of the cases of *Parlane's Trustees*, 4 F. 805, and *Forrest's Trustees*, 6 F. 616. This question also it is not necessary to consider, as, in my view, the case ought to be disposed of independently of this consideration.

Coming to what is the ground of my judgment, I do not think that the survivorship clause which is attached to the destination to the Cogan family ought to be construed as limited to survivorship of the three members of the family *inter se*. If one looks at the earlier branches of the destination, what was evidently in the testator's mind when the word survivor is used was surviving to take. In the case of the Cogan family the destination is to the three members of it "and the survivors and survivor of them." It was argued that as the class was reduced to one the effect of

the clause was exhausted and the whole fee vested in Eliza Cogan on the death of Robert in 1886, Mary having died in 1885. The cases which were said to be analogous to the present are *Gardner* v. *Hamblin, Ferguson's Trustees*, 10 S.L.T. 697, *Lindsay's Trustees*, 12 R. 964, and *Begg's Trustees*, 1 F. 498. Reference was also made to M'Laren on Wills, i, 648. In the present case, however, on a sound construction of the special terms of this codicil, the condition of Eliza Cogan taking any vested right was survivance of the period of distribution, the death of the liferentrix. The word "survivor" must be construed with reference to the same period as the word "survivors." The "survivor" could only take anything if he or she outlived the term at which the "survivors" would take anything. Now on the death of the first of the Cogans the two "survivors" would not take any vested right. They would take nothing unless they survived to take, *i.e.*, survived the period of distribution. The same construction ought, in my opinion, to be applied in the present case to the word "survivor." That also means survive to take. As Eliza Cogan predeceased the liferentrix she did not survive to take, and upon this ground the contention on her behalf fails. This construction of the clause receives confirmation from the concluding words of the clause, "the issue, however, of any of them who may have predeceased leaving issue being entitled to the share which their parent would have taken on survivance." This shows that survivance is used with reference to the period at which the parent would have taken something. If the parent predeceases this period leaving issue, then the issue are to take. If the parent does not outlive this period, then he or she does not satisfy the meaning attached by the testator to the word survivor, and takes no vested fee.

The first and second questions ought, in my opinion, to be answered in the negative, and the third in the affirmative.

LORD SKERRINGTON — I concur in the result at which your Lordships have arrived. With reference to the observations made by your Lordship in the chair in regard to the doctrine of vesting subject to defeasance, I should be glad if on some future occasion it were found possible to reconsider certain of the decisions on this branch of the law.

LORD JOHNSTON was absent.

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

Counsel for the First Parties—Bartholomew. Agents — Maconochie, Duncan, & Hare, W.S.

Counsel for the Second Parties—Mackenzie, K.C.—Smith Clark. Agents—W. & F. Haldane, W.S.

Counsel for the Third Parties — Blackburn, K.C.—A. R. Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Fourth Party—A. M. Hamilton. Agents—Livingston & Dickson, W.S.

HIGH COURT OF JUSTICIARY.

Monday, May 25.

(Before the Lord Justice-General, Lord Guthrie, and Lord Ormidale.)

M'INTYRE *v.* PERSICHINI.

Justiciary Cases—Statutory Offence—Bye-law—Construction—"Keep Open"—Place for Public Refreshment—Burgh Police (Scotland) Acts 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 316; 1903 (3 *Edw. VII, cap.* 33), *sec.* 82; *and* 1911 (1 *and* 2 *Geo. V, cap.* 51), *sec.* 1 (1).

The keeper of a place for public refreshment was charged with keeping open his premises after the hour fixed for closing the same under a bye-law made under the Burgh Police Acts and the Glasgow Police Act 1866. It was proved that the door of the premises was left open, after the closing hour, on two occasions, for periods of forty-five minutes and twenty-five minutes respectively, but it was not proved that on either occasion the premises were used for public refreshment after the closing hour.

Held that the facts proved constituted an offence under the bye-law.

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 82, as amended by the Burgh Police (Scotland) Act 1911 (1 and 2 Geo. V, cap. 51), sec. 1 (1), provides—"(1) Every person who shall keep or suffer to be kept or used any house, building, part of a building, or other premises as a place for public refreshment at any time between the hours of eight of the clock at night and five of the clock of the following morning, or at any time on Sunday, without being registered in a register to be kept by the Town Council . . . shall be liable to a penalty. . . . (2) Section 316 of the principal Act shall be deemed to confer power on the Town Council to make bye-laws in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than fifteen hours daily, except on Sunday, when the bye-laws may provide for closing throughout the day, or for any specified hours, . . . and the provisions of the principal Act relating to bye-laws and the confirmation and enforcement thereof shall apply accordingly.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) enacts:—Section 316—"The Commissioners may from time to time make bye-laws as they think fit for the purposes after mentioned, *videlicit*"—. . . [*Then follows a list of general purposes for which bye-laws may be made.*]

The bye-laws made by the Corporation of the City of Glasgow in virtue of the powers conferred on them by the above-quoted Acts, signed on 29th August 1912, are, *inter alia*, as follows:—"1. *For regulating the hours of opening and closing*—(1) A person registered in terms of section 82 (1) of the Burgh Police (Scotland) Act 1903, as amended by the Burgh Police (Scotland)