Thursday, February 28.

COURT OF SEVEN JUDGES.

NICOL'S TRUSTEES *v.* FARQUHAR AND OTHERS.

Succession — Vesting — Fee or Liferent — Construction.

A testatrix directed her trustees, on her death predeceased by her daughter or on her daughter's death, to "hold and retain in their hands" the whole of her means and estate then in existence for her two grandchildren equally, and to "pay the annual income and produce of their respective shares to each during all the days of their lives, with power to each of them to dispose of the capital of their respective provisions" under her testamentary writings "by marriage contract or testamentary writings." The trustees were given power to make advances to the grandchildren out of capital for their outfit or advancement in life, and the testatrix declared that if either of the grandchildren predeceased her leaving issue, such issue were to take their parent's place, but if her daughter (who was unmarried) married, her trustees should make over to her half of the capital under their charge, the remaining half to be retained by the trustees for behoof of the grandchildren on the same terms as was provided with regard to their shares of residue. The testatrix was survived by her daughter, who was unmarried and was predeceased by one of the grandchildren who died intestate and unmarried. The other grandchild survived. *Held*, in a Court of Seven Judges (*dis.* Lord Johnston and Lord Mackenzie), that there was no gift of fee in favour of the grandchildren, but that they had received merely a liferent with power of disposal by marriage contract or testamentary writing, and that consequently nothing vested in the grandchild who had predeceased the testator's daughter.

Mary Helen Campbell Nicol and others, the testamentary trustees of the late Mrs Jane Chalmers or Nicol, *first parties;* Albert Farquhar, father of the late Lieutenant Alastair Charles Nicol Farquhar, R.N., by Mrs Alice Jane Nicol or Farquhar, a daughter of the late Mrs Jane Chalmers or Nicol, as executor-dative of his son, *second party;* Albert Farquhar and others, the marriage-contract trustees of Mrs Adeline Mary Farquhar or Todd, daughter of Albert Farquhar and his wife, and granddaughter of Mrs Jane Chalmers or Nicol, *third parties;* David Montague Alexander Chalmers, the sole surviving marriage-contract trustee of Mrs Annie Chalmers Nicol or Thorneycroft, another daughter of Mrs Jane Chalmers or Nicol, *fourth party;* Mary Helen Campbell Nicol, unmarried daughter of Mrs Jane Chalmers or Nicol, *fifth party;* and Albert Farquhar as an individual, *sixth party*, brought a Special Case for the determination of questions relating to their rights under the trust-disposition and settlement of Mrs Jane Chalmers or Nicol.

Mrs Jane Chalmers or Nicol, widow, died on 29th April 1907 leaving a *trust-disposition and settlement* dated 7th March 1906, which after conveying her whole means and estate, heritable and moveable, to the first parties and directing the payment of debts and pecuniary legacies which she might bequeath by any writing under her hand, provided as follows:—"(*Third*) Whereas my daughter Mrs Annie Chalmers Nicol or Thorneycroft, wife of the said James Baird Thorneycroft, is already sufficiently well endowed, and it has been agreed between her and me that it is unnecessary that I should make any pecuniary bequest to her, I leave to her as a memorial of myself the articles named in a letter or memorandum signed by me and addressed to my trustees; and (*Lastly*) I direct my trustees to hold the residue of my estate hereby conveyed and pay the whole annual income thereof to my daughter the said Miss Mary Helen Campbell Nicol, with the exception of one-third of the income of the estate coming to me from my late son George William Nicol, which shall be paid equally between my grandchildren Alastair Charles Nicol Farquhar, midshipman, Royal Navy, at present serving on His Majesty's ship 'Majestic,' and Adeline Mary Farquhar, at present residing with me at Roscobie foresaid, during all the days of the life of the said Miss Mary Helen Campbell Nicol, but on my death predeceased by her, or on her death, my trustees shall hold and retain in their hands the whole of my means and estate then in existence for my said two grandchildren, the said Alastair Charles Nicol Farquhar and Adeline Mary Farquhar, equally, and shall pay the annual income and produce of their respective shares to each during all the days of their lives, with power to each of them to dispose of the capital of their respective provisions hereunder by marriage contract or testamentary writings, and with power to my trustees in their own absolute discretion to advance such part of the capital as may be deemed expedient for their outfit or advancement in life; declaring that should either of my said grandchildren predecease me leaving issue such issue shall take their parents' place, but declaring that if the said Mary Helen Campbell Nicol marry my trustees shall make over to her at the date of her marriage one-half of the capital under their charge, the remaining half to be retained by my trustees for behoof of my said grandchildren on the same terms as is herein above provided with regard to their shares of residue; declaring further that the provisions hereunder in favour of females shall be for their own separate use, and shall be exclusive of the *jus mariti* and right of administration of any husband or husbands they have married or may marry, and shall not be subject to such husbands' debts or deeds or the diligence of their creditors . . . and I revoke all former testamentary writings executed by me."

The Case set forth—"3. The residue of the estate left by the testatrix amounts to

about £20,000. This includes a sum of about £2800 to which she succeeded on the death of her son the said George William Nicol, which is the sum referred to by the testatrix as 'estate coming to me from my late son.' The said sum is hereinafter referred to as the George Nicol Fund. 4. The testatrix had four children. She was predeceased by her daughter Mrs Alice Jane Nicol or Farquhar, who was no longer alive at the date of the said trust-disposition and settlement, and by her son the said George William Nicol, shipowner in Aberdeen, who died intestate and unmarried. The testatrix was survived by her daughters Mrs Annie Chalmers Nicol or Thorneycroft, wife of the said James Baird Thorneycroft, and the [fifth party]. 5. Mrs Alice Jane Nicol or Farquhar was married to the [sixth party]. Of the marriage there were two children, a son, Lieutenant Alastair Charles Nicol Farquhar, R.N., who lost his life at sea on 17th June 1916, and a daughter Mrs Adeline Mary Farquhar or Todd, wife of William Hogarth Todd, in the employment of the Indian Public Works Department, and presently stationed at Raipur, Central Provinces, India. 6. The heirs *in mobilibus ab intestato* of the testatrix as at the date of her death were (1) the said Mrs Annie Chalmers Nicol or Thorneycroft, (2) the [fifth party], and (3) the said Mrs Adeline Mary Farquhar or Todd, and the said Lieutenant A. C. N. Farquhar, representing their mother the said Mrs Alice Nicol or Farquhar. The said Mrs Thorneycroft and the said Mrs Todd have by general conveyances in their marriage contracts assigned all their rights and interests to their marriage trustees as after mentioned. The interest of the said Lieutenant Farquhar is now represented by the second party. 7. The said Lieutenant A. C. N. Farquhar died unmarried and left no testamentary writing regulating the succession to his means and estate. The said Albert Farquhar has been decerned his executor-dative conform to decree in his favour by the Sheriff of Aberdeen, Kincardine, and Banff at Stonehaven, dated 2nd August 1916, and as such executor is the second party hereto. 8. The said Mrs Annie Chalmers Nicol or Thorneycroft, by antenuptial contract of marriage, dated 1st and 4th July and registered in the Books of Council and Session 14th July 1885, conveyed and made over to certain trustees therein named and their successors the whole property, heritable and moveable, real and personal, then belonging and resting-owing to her or that she might succeed to and acquire and that should pertain and be resting-owing and belonging to her during her marriage. The only trustee now acting under the said antenuptial contract of marriage is the fourth party hereto. 9. The said Mrs Adeline Mary Farquhar or Todd, by antenuptial contract of marriage, dated 12th April, and registered in the Books of Council and Session 30th May 1914, disponed, assigned, conveyed, and transferred the whole means and estate then belonging to her, and which she might acquire or succeed to during the subsistence of the marriage, to certain trustees named therein. The trustees now surviving and acting are the third parties hereto. The other trustee, Captain James Farquhar Todd of the Central India Horse, who has been a long time 'missing' in the war, is believed to have been killed. 10. In consequence of the death of the said Lieutenant A. C. N. Farquhar questions have arisen as to whether or not he had at the time of his death a vested right of fee in one-half of the residue of the estate of his grandmother the testatrix (subject to the liferent provided to the fifth party in terms of the trust-disposition and settlement and to partial defeasance to the extent of one-half in the event of the marriage of the fifth party), also whether or not Mrs Todd had, as at the date of the death of Mrs Nicol the testatrix, or subsequently by virtue of Mrs Todd having disposed by marriage contract of her rights under Mrs Nicol's will, a vested right of fee in the other half of the residue of the estate of her said grandmother subject to partial defeasance as aforesaid."

The second and sixth parties *contended* that the deceased Lieutenant A. C. N. Farquhar had at the time of his death a vested right of fee in one-half of the residue of the estate of the testatrix, including the George Nicol Fund (subject to the liferent provided to the fifth party and to partial defeasance to the extent of one-half in the event of the marriage of the fifth party).

The third parties contended that Mrs Todd had as at the date of the death of the testatrix a vested right of fee in one-half of the residue of the estate of the testatrix, including the George Nicol Fund, subject to the liferent provided to the fifth party and to partial defeasance to the extent of one-half in the event of the marriage of the fifth party.

The fourth party contended that neither Lieutenant A. C. N. Farquhar nor Mrs Todd had any vested right of fee in any part of the residue of the estate of the testatrix under her settlement, but that in the events which have happened one-half of said residue (subject to the liferent provided to the fifth party and to partial defeasance to the extent of one-half in the event of the marriage of the fifth party) now formed intestate estate of the testatrix and had vested in her heirs *ab intestato*.

The fifth party concurred in the contention of the fourth party.

The *questions of law* included—"1. (*a*) Had Lieutenant A. C. N. Farquhar a vested right of fee in one-half of the whole residue of the estate of the testatrix, including the George Nicol Fund (subject to the liferent provided to the fifth party in terms of Mrs Nicol's trust-disposition and settlement and to partial defeasance to the extent of one-half in the event of the marriage of the fifth party); or (*b*) does the fee of the said half (subject as aforesaid) form intestate estate of the testatrix?"

Argued for the fifth party—No share of the residue vested in Lieutenant Farquhar. The only direction as to the capital of the share of residue was with reference to the death of the testatrix predeceased by the fifth party (an event which had not happened)

or to the death of the fifth party in the event of her surviving the testatrix. The fifth party had survived the testatrix and was still alive, and vesting was therefore postponed until her death. The subsequent directions to the trustees to hold and retain it did not affect that result. The words "shall hold and retain" were qualified by the words "during all the days of their lives" just as much as the word "pay" was. Further, what followed showed clearly that the grandchildren had only a limited power of disposal of the shares in question, *i.e.*, by marriage-contract or by will. Reading the clause as a whole, the words "hold and retain" could not be construed as a direct initial gift of fee; they were words of neutral meaning qualified by distinct limitations and there was no clearly expressed initial gift. The words "share of residue" and their "share" were very general words of description and gave rise to no inference. If the words "hold and retain" were read as conferring an initial gift of fee, then on the principle of *Miller's Trustees* v. *Miller*, 1890, 18 R. 301, 28 S.L.R. 236, those limitations would fly off and the intention of the testatrix would be defeated. Where there was a clear initial gift followed by limitations of that gift to provide for a contingency which did not occur the initial gift took effect *ab initio*—*Tweeddale's Trustees* v. *Tweeddale*, 1905, 8 F. 264, *per* Lord President Dunedin at p. 273, 43 S.L.R. 193—but that did not apply when there was no clear initial gift—*Macgregor's Trustees* v. *Macgregor*, 1909 S.C. 362, *per* Lord President Dunedin at p. 265, 46 S.L.R. 296. The principle of *Tweeddale's Trustees* was applicable to both England and Scotland, and was applied in *Donaldson's Trustees* v. *Donaldson*, 1916 S.C. (H.L.) 55, 53 S.L.R. 97, *per* Lord Atkinson at p. 63. The word "pay," which applied here only to income, connoted a definite gift, but the words "hold and retain" were ambiguous, and did not necessarily or always connote a gift. The rule as to vesting where there was a clear gift of fee subject to provisions for a contingency which did not occur was stated in *Muir's Trustees* v. *Muir's Trustees*, 1895, 22 R. 553, *per* Lord M'Laren at p. 557, 32 S.L.R. 370. Where there were ambiguous directions, such as to hold for, &c., followed by words giving limited powers of disposal, no fee was held to be given and there was no vesting—*Peden's Trustees* v. *Peden*, 1903, 5 F. 1014, 40 S.L.R. 741; *Forrest's Trustees* v. *Reid*, 1904, 7 F. 142, 42 S.L.R. 133; *Anderson's Trustees* v. *Anderson*, 1904, 7 F. 224, 42 S.L.R. 167; *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, 1909 S.C. 472, 46 S.L.R. 217. *Greenlees' Trustees* v. *Greenlees*, 1894, 22 R. 136, 32 S.L.R. 106; *Cowan's Trustees* v. *Jardine*, 1913 S.C. 927, 50 S.L.R. 711; *Watson's Trustees* v. *Watson*, 1913 S.C. 1133, 50 S.L.R. 901, were all cases in which there was a clear initial gift limited by later words to provide for a contingency which did not happen and the fee was held to vest. Here there was no clear initial gift, and there was a subsequent limitation to a power of disposal by will or by marriage contract, and if the powers of disposal were not exercised as in the present case nothing vested.

Counsel for the fourth party adopted the argument of counsel for the fifth party.

Argued for the second and sixth parties—The testatrix had at the date of the will one married daughter, one unmarried daughter, and two grandchildren by a predeceasing daughter. The married daughter was in good circumstances, and accordingly the testatrix merely provided for the unmarried daughter and the two grandchildren. Accordingly it was natural that she should divide the fee of the residue between the two grandchildren and call the halves of it their shares. If the grandchildren were to predecease the testatrix leaving issue, the issue were to take in place of their parents, but if the grandchildren died after the testatrix leaving issue, if the fifth party's argument was right, the issue would get nothing, which was a most improbable result. The words relating to "the remaining half" of the residue were much more consistent with a fee being given than a liferent. Further, there was a good reason for the trustees holding the capital, for if Mary Helen Campbell Nicol married there would be divestiture of one-half of the residue. That could only be secured by keeping the capital in the hands of the trustees. There was nothing to cut down the initial gift. *Tweeddale's* case (*cit.*) applied. The subsequent words merely explained how the fee was to be enjoyed. The term "hold" was quite habile to confer a fee. Subsequent words might cut down the gift, but if the subsequent words did not do so the word "hold" conferred a fee—*Donaldson's Trustees* (*cit.*), *per* Lord Atkinson at p. 63, and Lord Wrenbury at p. 68. The absence of a destination-over after the grandchildren was in favour of a fee being given to them. Further, the terms in which the grandchildren were given a liferent of the George Nicol fund were different from the terms in which their right to the share of residue was given. The limitative words were merely directions as to enjoyment. The directions of the testatrix could be carried out *modo et forma* as she had expressed them. An administrative trust was quite reasonable, because some of the beneficiaries might well be minors. The case might well have been different if the limitative words had been contained in a codicil. The use of the word share indicated a fee. The present case was *a fortiori* of *Greenlees'* case (*cit.*), *per* Lord Adam at p. 139, and Lord M'Laren at p. 139. "To hold for behoof of" had been held to confer a gift of fee—*Gillies' Trustees* v. *Hodge*, 1900, 3 F. 238, *per* Lord Trayner at p. 240, and *per* Lord Moncreiff at p. 242, 38 S.L.R. 150. All the arguments open in the present case were open in that case and in *Greenlees'* case. If there were further purposes to be served, *e.g.*, if there was a destination-over, the words to hold for did not confer a fee. That was a further purpose which would justify the continuance of the trust—*cf.*, *Yuill's Trustees* v. *Thomson*, 1902, 4 F. 815, 39 S.L.R. 668. Here, however, there was no destina-

tion-over, and no interest other than that of Lieutenant Farquhar. *Muir's* case (*cit.*) and *Forrest's* case (*cit.*) were distinguished, for in both of them there was a destination-over. *Peden's* case (*cit.*) turned on the fact that the beneficiaries were to have no power to obtain payment. In *Anderson's* case (*cit.*) there was a destination-over, and Lord Adam and Lord M'Laren, both of whom gave opinions in *Greenlees'* case, did not think their opinions in that case conflicted with those delivered by them in *Anderson's* case. In *Macgregor's* case (*cit.*) it was assumed that there was no gift of a fee at all. The present case was not distinguishable from *Greenlees'* case.

Counsel for the third parties adopted the argument for the second and sixth parties.

At advising—

LORD SKERRINGTON—The only question debated before Seven Judges was whether the testatrix Mrs Nicol intended by her will to confer upon each of her grandchildren, Lieutenant Farquhar and Mrs Todd, an absolute right to one-half of the residue of her estate or only a liferent of that half coupled (*a*) with a general power of disposal exerciseable by marriage-contract or by will, and (*b*) with a discretionary power to the trustees to advance capital for the outfit or advancement in life of the beneficiary. In either view the interest of each grandchild, or as the testatrix aptly phrased it his or her "share of residue," was liable to be cut down by one-half if the testatrix's daughter Miss Nicol should marry.

In order to arrive at the true character of these residuary gifts the will must of course be studied as a whole and not in compartments. Accordingly the presence in or the absence from it of what has been conveniently described as an "initial gift" of the fee in favour of the grandchildren would not necessarily be conclusive. On the other hand if words can be found which fairly construed amount to such a gift, that circumstance might and probably would in the present case prove to be the determining factor in the decision which ought to be pronounced. By an "initial gift" I mean a gift expressed in words which plainly and unambiguously confer an absolute right of fee upon a legatee. A clause conceived in terms which are not clear or which are susceptible of two meanings, though it may ultimately be construed as an absolute gift of the fee, falls within a different category, because its meaning and effect have to be cleared up by inferences drawn from other parts of the will.

The importance of an initial gift as an aid to construction depends upon a principle of general application in the interpretation of all testamentary writings, viz., that the intention to revoke a legacy must be established with as much certainty as the original intention to bequeath. Founding upon this principle counsel for the second and sixth parties argued that in the clause which I am about to quote the testatrix did two different and separable things. In the first place, according to the argument, she conferred upon her grandchildren equally a gift of the fee of the residue subject to defeasance as regards one-half. In the second place she proceeded to define the manner in which the legatees should enjoy their legacies. The clause is as follows:—Upon the death of the liferentrix Miss Nicol "the trustees shall hold and retain in their hands the whole of my means and estate then in existence for my said two grandchildren, the said Alastair Charles Nicol Farquhar and Adeline Mary Farquhar equally, and shall pay the annual income and produce of their respective shares to each during all the days of their lives, with power to each of them to dispose of the capital of their respective provisions hereunder by marriage contract or testamentary writings, and with power to my trustees in their own absolute discretion to advance such part of the capital as may be deemed expedient for their outfit or advancement in life, declaring that should either of my said grandchildren predecease me leaving issue such issue shall take their parent's place, but declaring that if the said Mary Helen Campbell Nicol marry, my trustees shall make over to her at the date of her marriage one-half of the capital under their charge, the remaining half to be retained by my trustees for behoof of my said grandchildren on the same terms as is herein above provided with regard to their shares of residue." Let it be assumed for the moment that at the outset of this clause the testatrix had in so many words directed that the residue should be held for her grandchildren "in fee," or alternatively that she had given some direction which necessarily, though only by implication, imported a gift of the fee. Even upon that assumption the remainder of the clause would have operated as a partial and contingent revocation of that gift to take effect in the event of the marriage of Miss Nicol. But there would have been no necessary inconsistency between such a partially defeasible fee and the other directions above quoted. These latter would naturally be construed as declarations having reference to the mode in which the grandchildren should enjoy their legacies—directions which would be effectual during nonage or coverture, but ineffectual in the case of a beneficiary of full legal capacity. If then it were legitimate to construe the first part of the clause as one which clearly and unambiguously confers upon the grandchildren a fee subject to partial defeasance, we should probably be compelled to decide that the fee thus given had never been taken away, and that Lieutenant Farquhar's share of the residue is now vested in his legal representative, the second party.

Counsel for the second and sixth parties argued that a direction to hold a share of residue for a beneficiary was *prima facie* equivalent to a direction to hold it for him in fee, and must receive effect as such except in so far as the absolute gift so conferred could be shown to have been subsequently revoked. This contention is, in my opinion, contrary to good sense and to the ordinary use of the English language, and I can discover no justification for it in any of the numerous decisions which were cited. No

doubt a direction to hold for a beneficiary will, if no more follows, be construed as a direction to hold for him subject to no restriction, and therefore as absolute proprietor, but that is a very different proposition and one to which no objection can be taken. In the present case I read the clause not as doing two separate things but as doing one thing only. The testatrix could not, in my judgment, have expressed more clearly than she did the limited nature of the purposes for which and for which alone her trustees were to "hold and retain" the residue on behalf of her grandchildren. If authority is needed in order to negative a contention which, as I understand, none of your Lordships is prepared to affirm, I may refer to the case of *Peden's Trustees* v. *Peden*, 1903, 5 F. 1014, 40 S.L.R. 741, where the gift which the Court had to construe was in substance indistinguishable from that in the present case. I may also refer to the judgment in *Anderson's Trustees* v. *Anderson*, 1904, 7 F. 224, 42 S.L.R. 167, and to Lord Adam's observations in regard to the impropriety of stopping in the middle of a sentence in order to construe it piecemeal, and in regard to the different effects according to the contexts of a direction to hold "for behoof of" a beneficiary. Counsel for the second and sixth parties placed great reliance upon the observations of the same learned Judge in *Greenlees' Trustees* v. *Greenlees*, 1894, 22 R. 136, 32 S.L.R. 106, but the will which he was there construing directed the trustees to "pay, convey, and hold." The latest authority to which we were referred was the judgment of the House of Lords in *Donaldson's Trustees* v. *Donaldson*, 1916 S.C. (H.L.) 55, 53 S.L.R. 97. In his speech Lord Atkinson referred with approval to the exposition of the law given by Lord Davey in an English case, and by Lord Dunedin in a Scotch case, and pointed out that the only difficulty was its application. The will before the House was long and complicated. Lord Atkinson explained in detail the reasons which led him to think that an absolute right to the corpus of his share had been conferred upon a certain beneficiary (p. 62), and also his reasons for holding that the subsequent clauses did not cut down that gift, but merely imposed a trust upon it. Counsel founded strongly upon a dictum of Lord Parker of Waddington (p. 68) to the effect that a direction to "hold for behoof of" the beneficiary was a "plain gift of an absolute interest," but this observation must be construed in the light of its subject-matter, and lends no support to the contention that the expression in question has a technical meaning and is equivalent apart from its context to a direction to hold for the beneficiary in fee.

Nothing which I have said up to this point militates in any degree against the opinion which commends itself to two of your Lordships, to the effect that if the will and its scheme of distribution are considered as a whole, it is reasonable to infer that when the testatrix directed her trustees to hold the residue for her grandchildren she in fact intended and desired that each grandchild should be the absolute proprietor of his or her share. That of course is very much a question of impression. So far as I am concerned two elaborate arguments have not altered the opinion which I formed on first hearing this will read aloud, viz., that its terms are not ambiguous; that we are invited not to construe a will but to break it; and that any judicial interference with or addition to the express directions given by the testatrix would be unjustifiable and mischievous. We are actually called upon to read into a will words which it does not contain in order that a whole series of provisions which it does contain may be rendered either superfluous or, contrary to the expressed wish of the testatrix, ineffectual during the whole lifetime of the respective beneficiaries. The propriety of such a process would be questionable even in the case of a will which was plainly unreasonable if construed literally and naturally. In the present case the will was eminently fair and sensible, because I must assume that the testatrix had a good reason in her mind for subjecting her grandchildren to some restrictions, though not of a very onerous character, and that with this object in view she conferred on each an interest which fell short of an absolute right of ownership although it approached very near thereto. The only point in regard to which it was suggested that the will according to its natural construction would place the grandchildren in a position of disadvantage, which the testatrix cannot reasonably be supposed to have intended, has reference to the possibility that one of them might survive the testatrix, leaving issue, but might neglect to provide for such issue by marriage-contract or by will. This possibility was a somewhat remote one, and if it had been explained to the testatrix by her solicitor when she was making her will, she might not have attached any importance to it. She might have answered that unless a grandchild contracted a secret marriage he would be advised to make a marriage settlement or a will, and that even if he were so foolish as to marry secretly, the omission to make a settlement or will might be rectified at any time during his life. Accordingly it is a matter of pure conjecture whether she would or would not have thought it desirable to provide for the event of a child dying without having disposed of his or her share of residue in favour of his issue. On the other hand it was essential that she should provide against the chance of a grandchild predeceasing her leaving issue, and accordingly she expressly substituted such issue in their parents' place. I cannot think that this substitution supports the inference that the issue of a grandchild must necessarily have been intended to take benefit by the will even though the parent had survived the testatrix and had neglected to provide for them in the manner so clearly pointed out by the will.

For the foregoing reasons I am of the opinion that the first question of law should be answered in the negative as to alternative (*a*) and in the affirmative as to alternative (*b*).

LORD JUSTICE-CLERK—I have had the advantage of reading Lord Salvesen's opinion in this case, and I agree with the conclusion which he has reached.

LORD DUNDAS—I have come to the same conclusion. Like the Lord Justice-Clerk I have had the advantage of reading Lord Salvesen's opinion, in which I agree.

LORD JOHNSTON—I think that the result of a sound construction of the residue clause of this will, if its general purpose may prevail over special provisions which, if isolated, can be made to appear as having an inconsistent or even repugnant effect, is to confer a fee and not a liferent merely upon the late Lieutenant Farquhar and his sister. I do not think that much, if any, assistance can be derived from authority, of which we had a full citation, in the determination of this case, the settlement to be construed being of such peculiar structure. The intention of the testatrix is, I think, only to be ascertained by consideration of the general purpose so deduced from the deed as a whole, provided the specialties and even apparent inconsistencies do not make it impossible to give effect to that general purpose, and this I do not think that they do.

Viewing then the residue clause as a whole, the primary intention of the testatrix is, I think, apparent, viz., to carry out a very intelligible object, namely, the just and considerate application of residue to the requirements of her unmarried daughter Miss Mary Helen Campbell Nicol and the two children of her deceased daughter Mrs Farquhar. It must be premised that the testatrix had other two children, a son, George William Nicol, who predeceased her, leaving to her a part or the whole of his estate, amounting to about £2400, which she earmarks, and which may be termed the George Nicol fund, and a daughter Mrs Thorneycroft, to whom, as she was already fully endowed, she leaves a personal remembrance merely. With that object the testatrix provides primarily for the event of Miss Nicol remaining unmarried, in which case I think that she clearly shows that she wished to provide as fully as possible for her comfort during her life, leaving the two Farquhar children to depend substantially on their father who survives. And accordingly during Miss Nicol's unmarried life she provides the two Farquhars with only one-third of the income of the George Nicol fund, which would hardly supply them with pocket-money, to the amount of £20 apiece. But then if Miss Nicol should marry, the testatrix impliedly assumes that she would no longer be so dependent upon her provision from her mother, but would be more nearly *in pari casu* with the two Farquhars, and accordingly she resorts to an equal distribution to her and the Farquhars, regarded *per stirpes*. To this conception of the testatrix's intention it must be added that while, if Miss Nicol marries, the testatrix intended that she should have half the residue in fee, and that her liferent of the whole should thereupon determine, she contemplated that if Miss Nicol should die unmarried the whole residue should be held for the Farquhars, and if she should marry the one equal half. In what I have given as the evident purpose in the mind of the testatrix I must be understood to mean that that is the result of viewing the residue clause as a whole. It does not preclude the conclusion that it is not the intention which can be legally deduced from the words she has used, or which can receive effect owing to her failure to give more distinct expression to it at certain points.

The present question has, I think, only been rendered possible by the very exceptional though laudable effort of the testatrix's solicitor to compress a complex disposition, providing for several contingencies, if indeed he has not found himself obliged to clothe with the garb of a will professionally drawn, a will quite self made, so far as essential provisions are concerned—a supposition for which there is a good deal to say.

The real difficulty in giving effect to what I regard as the real intention in the lady's mind is (1) that she does not use words expressly conferring an interest in fee on the Farquhar children. I am fully alive to the importance of an express initial gift in fee, which, or the absence of which, is usually conclusive. But it cannot be said to be universally necessary. Its implication is always possible as the true intention of the testator to be deduced from the terms used fairly construed in relation to their whole context which in this case is practically the whole settlement. And (2) that she does use words expressly conferring an interest in capital on Miss Nicol in one contingency. But there is this counter consideration (3) that the result of allowing the first two mentioned conditions to prevail over the general conception of the deed would be to create intestacy in certain contingencies, with a consequent eventual distribution of residue in a way which the testatrix certainly did not contemplate. It is enough to say in explanation of the last consideration that it would give through intestacy to Mrs Thorneycroft a resulting one-sixth of the residue if Miss Nicol marries, and one-third if she does not, whereas the testatrix expressly says *in initialibus* of her will "whereas my daughter" Mrs Thorneycroft "is already sufficiently well endowed, and it has been agreed between her and me that it is unnecessary that I should make any pecuniary bequest to her, I leave her as a memorial of myself," &c., and would give corresponding resulting amounts to Miss Nicol and the Farquhar grandchildren respectively, though *ex hypothesi* the testatrix must be assumed to intend that Miss Nicol should get no capital unless she married, and that the Farquhars were to get no capital at all in any event but only a power of testamentary disposal.

I think that, to understand the residue clause, there is much to be said for taking an unusual course and, beginning at the end, to work backwards. For convenience all reference to the parenthetical disposal of the George Nicol fund may be omitted as only complicating the issue without aiding

in its solution. In the last paragraph the testatrix declares "that if the said Mary Helen Campbell Nicol marry my trustees shall make over to her at the date of her marriage one-half of the capital under their charge, the remaining half"—that is of the capital—"to be retained by my trustees for behoof of my said grandchildren in the same terms as is hereinabove provided with regard to their shares of residue." It would from this be naturally assumed that their shares of residue were shares of residuary capital, and it would be rather startling to find after all that her intention was that her Farquhar grandchildren should not have any interest in capital beyond a power of disposal by marriage-contract or testamentary deed, but a mere liferent, and yet that their issue would take no interest in the capital, indeed no interest at all, except in the one event of their parents predeceasing the testatrix; that there is neither clause of accretion nor destination-over; and that resulting intestacy *quoad* one half or the whole of the capital according as Miss Nicol does or does not marry is certain unless the Farquhar grandchildren severally exercise their powers. But this is the necessary result of the interpretation contended for by the marriage-contract trustees of Mrs Thorneycroft and by Miss Nicol. Further, this is to be deduced from a clause which clearly gives to Miss Nicol if she marries the fee of one-half of the residue, and disposes of the other half for behoof of the Farquhar grandchildren "on the same terms as is herein above provided with regard to their shares of residue," that is, their equal shares of the whole residue in the contingency of Miss Nicol not marrying.

What then are the "terms above provided with regard to their"—*i.e.*, the Farquhar grandchildren's—"shares of residue"? The trustees are directed "to hold the residue of my estate hereby conveyed, and pay the whole income thereof to my daughter the said Miss Mary H. C. Nicol, but on my death predeceased by her or on her death my trustees shall hold and retain in their hands the whole of my means and estate then in existence for my said two" Farquhar grandchildren "equally, and shall pay the annual income and produce of their respective shares to each during all the days of their lives." [It is not added "for their liferent alimentary use allenarly," as might have been naturally expected had the intention of the testatrix been that which is attributed to her by the majority of your Lordships.] It is this, the equal shares of her whole means and estate, which the testatrix thus designated as "their respective shares," and in the subsequent clause refers back to as "their shares of residue."

The question therefore then comes to be, does the testatrix really mean by making no express gift of fee and by directing these "respective shares" to be held and retained by her trustees, and the annual income and produce thereof to be paid to each during their lives, to confine her grandchildren to a liferent allenarly, while herself making no disposal of the fee? Were there no other provisions affecting the "respective shares" of the Farquhar children it would indeed be difficult to avoid the conclusion that the testatrix though her settlement bore all the *indicia* of a universal settlement had failed to effectuate her intention. But there follow three important clauses which I think obviate this conclusion, and the effect of these is enhanced by the absence of other clauses which, were the intention of the testatrix that which it is proposed to attribute to her, one would naturally look for. The clauses which immediately follow are—1st, "power to each of them" (the Farquhar grandchildren) "to dispose of the capital of their respective provisions hereunder by marriage contract or testamentary writing"; 2nd, power to the trustees in their discretion to make advances of capital; 3rd, the declaration "that should either of my said grandchildren predecease me leaving issue, such issue shall take their parents' place." And these must be read in light of the absence of (4) any fee to issue subject to the parents' liferents, (5) any clause of accretion, and (6) any destination-over.

The key to the construction of this confused and involved testamentary document is I think to be found in No. 3, viz., the conditional institution of issue in the sole event of either grandchild predeceasing the testatrix. I read this as an unmistakable indication that the testatrix intended and considered she was making a disposition of her property which would take effect provided only the beneficiaries survived her, and this is amply confirmed by the absence of any fee to issue in event of the beneficiaries surviving her and subsequently dying, or clause of accretion, or destination-over. There remains the question, Is this evident intention so countered by inconsistent conditions and provisions that it cannot prevail? I cannot think that if there is a clear intention manifested to divide the capital of residue between the Farquhar grandchildren in event of Miss Nicol remaining unmarried, or in the event of Miss Nicol marrying, between them and her, there is anything which compels to this conclusion. The direction to the trustees to "hold and retain" while paying over the income, the power to them to advance, the power to the beneficiaries to settle, when read in the light of the obvious main intention, all indicate to me that while giving absolutely the testatrix desired merely to impose a trust for administration. This she has attempted by the adjection of powers of continued administration during the lives of the beneficiaries. But she has thereby neither reduced the fee to a liferent nor effectually in law burdened the fee—*Miller's Trustees* v. *Miller*, 1890, 18 R. 301, 28 S.L.R. 236.

I do not think that the several important authorities, *Tweeddale's Trustees*, 1905, 8 F. 264, 43 S.L.R. 193, *M'Gregor's Trustees*, 1909 S.C. 362, 46 S.L.R. 296, *Donaldson's Trustees*, 1916 S.C. (H.L.) 55, 53 S.L.R. 97, are in any way a bar to this conclusion. They involve elements which entirely distinguish them from the present case, to which it

would be difficult to find anything really analogous.

The result of my opinion, stated in technical language, is that Mrs Nicol has conferred a fee *a morte* of the residue of her estate upon her two Farquhar grandchildren equally, whom failing their issue respectively should they predecease her, but subject (1) to her daughter Miss Nicol's liferent so long as she remained unmarried, and (2) to defeasance *quoad* one-half of the capital in the event of Miss Nicol marrying; and that she has endeavoured to impose a trust for administration which being inconsistent with the fee is ineffectual. I think therefore that the main queries should be answered—1 (*a*) in the affirmative, and (*b*) in the negative, and 2 in the affirmative. The rest so far as necessary can be answered in accordance.

LORD SALVESEN—The only point which we are called upon to decide is as to whether a fee in one-half of the residue of the testatrix vested in the person of the late Lieutenant Farquhar on her death. In my opinion the decision of this depends entirely on the language of the trust-disposition and settlement, and very little aid can be got from authority. The intention of the testatrix as deduced from the language which she used falls to be ascertained in each case, and if that is held to be sufficiently clear regard need not be had to decisions which have interpreted wills couched in different terms.

The material deductions, which are all contained in the last purpose, are as follows:—(1) The trustees were to hold the residue and pay the income to the only unmarried daughter; (2) on her death the trustees were to hold and retain the residue for behoof of the two grandchildren equally, and to pay the annual income of their respective shares to each during their lifetime; (3) power was given to the grandchildren to dispose of the capital of their respective provisions by marriage contract or testamentary writing, and power was also conferred upon the trustees to advance such part of the capital as might be deemed expedient for their outfit or advancement in life. There is also a declaration that should either of the grandchildren predecease the testatrix leaving issue such issue should take their parent's place; but there is no similar declaration as to what was to happen if the grandchildren survived the testatrix either with or without issue and without having exercised the power of disposal specially conferred. This is the event which has in fact happened, for Lieutenant Farquhar survived his grandmother but died intestate.

A direction to hold and retain residue for behoof of a named person will, no doubt, if there is nothing more, operate as a gift, but it does not do so in my opinion where it is followed by a clause that they are to do so for the purpose of paying the income during the lifetime of the beneficiary, and where a limited power of disposal of the capital is expressly conferred. Such a limited power presupposes that the fee has not vested in the beneficiary, otherwise it becomes meaningless. If the intention of the testatrix in this case had been that the fee of the residue should vest in her grandchildren on her death it is not possible, I think, to explain why she should have given a limited power of disposal at all, still less why she should have conferred power on the trustees to advance a part of the capital. The maxim *expressio unius est exclusio alterius* applies in my opinion to this case, and it follows that the power of disposal may be exercised in the prescribed ways but not otherwise. We cannot tell what the testatrix would have done if her attention had been called to the contingency which has actually occurred. It may be that in such a case she would have desired the lapsed share of residue to go to her other residuary legatee, or to the next-of-kin of the deceased beneficiary, or to her own next-of-kin, but in the circumstances of this family I am not surprised that she made no special provision for a contingency which might well have seemed remote. Had Lieutenant Farquhar executed a will there can be no doubt that his prospective share of the residue would have passed under it, and the testatrix may not unnaturally have thought that this power which was expressly conferred would be sufficient to meet all that she had in view. Any grandchild who contemplated having issue would naturally exercise the power conferred, either by marriage contract or by testamentary disposal in favour of his issue, and if he died young before having incurred family obligations there is no reason *a priori* to suppose that the testatrix would have preferred his heirs rather than her own to succeed to the share of her estate which she had destined to him. Be that as it may, the fact remains that so far as she has expressed her intentions they are limited to a gift in favour of the grandchild of the income of the share destined to him with a power of disposal which has not been exercised.

I am therefore of opinion that there was no vested right of fee in the half-share of the residue which was set aside for the benefit of Lieutenant Farquhar. It follows that this half-share forms intestate estate of the testatrix, and, subject to the prior liferent conferred upon her unmarried daughter, falls to her own next-of-kin, subject to partial defeasance in the event of the marriage of her daughter.

LORD MACKENZIE—The question whether there was a vesting *a morte* of the share of residue destined to Alastair Charles Nicol Farquhar, a grandson of the testatrix, or whether that share fell into intestacy, is one of considerable difficulty. I have come to be of opinion that it vested *a morte*, subject to it being diminished by one-half if Miss Mary Nicol married.

The testatrix had one married daughter and one unmarried, and two grandchildren, issue of a daughter who predeceased her. The married daughter being well off, it was matter of agreement between her and her mother that there should be no pecuniary bequest in her favour. This is set out in the third purpose. The estate was to be

divided between the unmarried daughter and the two grandchildren. The direction is to hold the residue and pay the income to the unmarried daughter Miss Mary Helen Campbell Nicol during all the days of her life (I omit meantime any reference to the George Nicol Fund), and at the end of the residue clause there is a direction that if she married the trustees were to make over to her one-half of the capital of the residue. Immediately following the gift of liferent to Miss Nicol is the gift to the grandchildren, and what has to be observed is that the language is different from that previously used when only a liferent was intended. The direction is—"but on my death predeceased by her, or on her death, my trustees shall hold and retain in their hands the whole of my means and estate then in existence for my said two grandchildren, the said Alastair Charles Nicol Farquhar and Adelina Mary Farquhar, equally." It can hardly be argued that if the bequest stopped there its effect would not have been to confer a fee upon each to the extent of one-half. There is sufficient warrant for taking the view that the direction to "hold for" may be read as conferring a gift. In the present case I think the fair construction is to read what follows as merely an indication of the way in which the fee is to be enjoyed. There is a complete separation of the shares of the two grandchildren, and no survivorship clause or destination-over to anyone else in the event of either predeceasing the liferentrix. The shares of the grandchildren are spoken of as "their respective shares," "the capital of their respective provisions," and "their shares of residue." All this is against resulting intestacy. The clause taken as a whole is more consistent with the view that the direction to the trustees to pay the income, the power to the legatees to dispose by marriage-contract or testamentary writing, and the power to the trustees to advance part of the capital, were intended only to protect the legatees. There is no declaration that there is to be an alimentary liferent. The direction to pay the income is not inconsistent with there being a gift of fee.

There is one clause that tells strongly in favour of vesting, and that is in these terms —"Declaring that should either of my said grandchildren predecease me leaving issue such issue shall take their parent's place." This clause was inserted to prevent the bequest to either grandchild lapsing. It does not, however, provide for the case of a grandchild surviving the testatrix and predeceasing the liferentrix. In that case, if the grandchild had not made a will or disposed of his or her share by a marriage contract, then according to the argument against vesting any issue he or she might have would take nothing. In favour of vesting is the more likely explanation that no provision was made for that contingency, because the fee having vested in the grandchild it was unnecessary. It does not, in my opinion, affect the construction of the deed that the directions as to the mode of enjoyment fail of their effect in consequence of the decision in *Miller's Trustees*, 1890, 18 R. 301, 28 S.L.R. 236.

I am therefore of opinion that question 1 (*a*) should be answered in the affirmative.

LORD PRESIDENT—In the residue clause of this will which we are asked to construe I can find no phrase of doubtful import and no direction to which the law of Scotland denies effect. It directs the trustees to hold in their own hands a capital sum and to pay the income to the two beneficiaries all the days of their lives equally between them, which is both intelligible and feasible. Further, the direction to dispose of the capital sum in terms of and as directed by the marriage settlement or will, as the case may be, of the beneficiaries is equally feasible and equally intelligible.

This seems to me to be a typical case of a bequest of an unlimited liferent with a strictly limited power of disposal of the fee. To it therefore is applicable the dictum or canon of construction laid down by Lord Dunedin in *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, 1909 S.C. 472, 46 S.L.R. 217, where his Lordship says—"As the law at present stands upon authority the Court will not declare a fee unless there is both an unlimited liferent and an absolute power of disposal as opposed to a mere testamentary power of disposal." If authority were sought in support of this view I think it is to be found in the case of *Peden's Trustees* v. *Peden*, 1903, 5 F. 1014, 40 S.L.R. 741, which appears to me to be on all fours with the present case. I do not leave out of view that in the will in *Peden's* case there appeared a declaration that "the beneficiaries shall have no power to obtain payment of the shares to be held for their behoof." But that is as clearly implied in the present case as it was expressed in *Peden's* case.

For these reasons I concur in the opinions delivered by the majority of the Court.

The Court answered branch (*a*) of the first question of law in the negative, and branch (*b*) of the first question in the affirmative.

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