accidents arose out of the employment, but in understanding the nature of exceptions which has been recognised where the particular risk to which the employee was subjected was not more than what an ordinary person incurs in the daily walks of life. But, as I say, there is no difficulty in understanding the principle of the decisions where liability was affirmed, because in each case the accident arose out of the nature of the employment, while in this case I think it did not.

LORD GUTHRIE—Mr Patrick in his able argument admitted that any member of the public in this building at the time when the accident happened, or any employee employed at another kind of work, would have been exposed to the same risk as the respondent, but he based his case on the fact that she continued exposed to this risk in a way that a member of the public present at the time would not have been. It seems to me that, looking to the findings, we cannot say that there was a continuous exposure to any risk, because for aught that appears the risk might only have arisen a few seconds before the accident actually happened. But even if there was a continuous exposure to risk it is clear that the risk did not arise out of anything specially connected with the respondent's employment in this building as a fish-worker. I think Mr Moncrieff put the case on its proper basis when he said that the risk was said to arise from the employment, but it really arose from neighbourhood.

The Court answered the question of law in the negative.

Counsel for the Appellant—Moncrieff, K.C.—A. M. Stuart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Anderson, K.C. — Patrick. Agent — T. M. Pole, Solicitor.

HOUSE OF LORDS.

Friday, October 29.

(Before Lord Atkinson, Lord Shaw, Lord Parker, and Lord Wrenbury.)

DONALDSON'S TRUSTEES *v.* DONALDSON'S EXECUTRIX.

Succession—Will—Vesting—Bequest subject to Trust Regulation which is not Exhaustive.

"It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (1 Mac. & G. 551) if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next-of-kin are excluded in any event"—*per* Lord Davey in *Hancock* v. *Watson*, [1902] A.C. 14, at p. 22.

Application of the principle to a Scotch case.

Robert Michael Donaldson, mining engineer, Glasgow, and another, trustees acting under the trust-disposition and settlement, with codicil and letter of instruction, of the deceased Robert Donaldson, iron merchant, Glasgow, *first parties;* Caroline Isobel Donaldson, executrix of the deceased Peter Donaldson, Woodbine, Kilcreggan, Dumbartonshire, who died unmarried on 23rd June 1913, with concurrence, *second party*, and others, being the other children of the said Robert Donaldson or the issue of deceased children, *third*, *fourth*, *fifth*, and *sixth parties*, presented a Special Case to determine what was the interest taken by the deceased Peter Donaldson in a one-third part of his share of the residue of the estate of his deceased father Robert Donaldson (the *testator*).

By his *trust-disposition and settlement* Robert Donaldson provided—"*In the sixth place* I direct my trustees to hold apply pay and convey the residue of my means and estate and the income thereof for behoof of my children and their issue who survive me and for the issue *per stirpes* of any daughter who has predeceased me as follows, viz.—(First) I direct them to set aside for each of my daughters the sum of Fifty thousand pounds but under deduction of such capital sum as I may have settled or undertaken to settle in her marriage settlement or contract or in any deed or document in connection with her marriage and I direct that daughters' provisions shall be held by my trustees or in their option the share of any married daughter shall be paid over to the trustees acting under her marriage settlement or contract to be held by them for behoof of my daughters respectively in liferent for their respective liferent alimentary use allenarly and for behoof of the issue of their respective bodies in fee and that in such proportions under such restrictions (including a restriction to a liferent) at such time or times and upon such terms and conditions as my said daughters may respectively appoint by any writing under her hand whether testamentary or otherwise and failing such appointment then equally between her children who survive her jointly with the issue of any child or children of her who may have predeceased her leaving issue *per stirpes* share and share alike and I provide and declare that in the event of any of my daughters predeceasing me leaving issue such issue shall be entitled equally amongst them to the share of my estate which would have been paid to or been settled upon their mother had she survived and I further pro-

vide and declare that the profits and produce of any daughter's children's share of my estate shall be payable to them from time to time as it falls due and that in whole or in part but only to such an extent as my trustees may consider expedient and payable the fee of any such daughter's children's share and any profits and produce thereof previously accruing not paid over to them on their respectively attaining twenty-one years of age and I further provide that failing a child or children or the issue of a child or children the shares of daughters and the profits and produce thereof so far as the same has not been paid or advanced in virtue of the powers hereinbefore and after conferred shall be held by my trustees for behoof of my surviving sons and daughters and the issue *per stirpes* of any son or daughter who may have predeceased whether before or after me leaving issue share and share alike and that on the same trusts and subject to the same conditions as if the same had formed part of their original shares of my estate (Second) I direct my trustees to hold and apply the remainder of the residue of my estate for behoof of my son or sons and issue of sons as after mentioned that is to say *First* I provide and declare that they shall hold one share for behoof of each son who survives me and one share equal to what their father would have been entitled to had he survived for behoof of the issue *per stirpes* of any son who has predeceased me and that equally between them share and share alike Further if there be only one son or the issue of only one son who survives me I direct that the whole of said remainder of residue shall be held for said surviving son or issue of one son but subject to payment therefrom by my trustees of the sum of Twenty-five thousand pounds further to be set aside and held for each of my daughters surviving me and the issue *per stirpes* of any daughter who has predeceased me and that on the same trusts and subject to the same conditions and powers as if the same had formed part of the sums of Fifty thousand pounds above mentioned in the sixth place and I provide that there shall be given credit (as between the beneficiaries under this purpose of my will) for any capital paid or sums settled or agreed to be paid or settled by me by the marriage settlement or contract of any son or any deed or document in connection with the marriage of a son *Second* I provide and declare that the capital of the shares of sons and any profits or produce thereof after my death so far as not paid over to them in virtue of the powers herein conferred shall not be payable till they attain twenty-five years of age and that the shares of grandchildren and any profits and produce thereof not paid over to them in virtue of the powers herein conferred shall not be payable to them till they attain twenty-one years of age and shall vest absolutely in them respectively as at the term of payment but I provide and declare that in the event of any son predeceasing me leaving issue or having survived me dying before the said term of payment leaving issue or of any grandchild dying before attaining twenty-one years of age leaving issue such issue shall be entitled equally amongst them to the share to which their parent would have been entitled if he had survived and I further provide that the income of sons and grandchildren's shares accruing before said period of payment may be paid over to them by my trustees in whole or in part but shall only be payable to such an extent as my trustees think proper *Third* I direct that the shares of my sons who have attained the age of twenty-five at my death or may thereafter attain that age shall be payable and shall be held as follows (Primo) my trustees shall pay over from time to time such portion thereof not exceeding two-thirds of the capital thereof as they may think proper and (Secundo) they shall hold the remaining one-third and such further portion as they may finally resolve to retain in trust for behoof of my said sons respectively in liferent for their liferent alimentary use allenarly and for behoof of the children of their respective bodies in fee, and that in such proportions under such restrictions (including a restriction to a liferent) at such time or times and upon such terms and conditions as my said sons may respectively appoint by any writing under his hand whether testamentary or otherwise and failing such appointment then equally among his children surviving him jointly with the issue of such of them as may have predeceased leaving issue *per stirpes* share and share alike payable the profits and produce of any such son's children's shares from time to time as it falls due and that in whole or in part as my trustees think proper but only to such an extent as my trustees consider expedient and payable the fee of any such son's children's shares and any profits and produce thereof not paid over on such son's children respectively attaining twenty-one years of age *In the seventh place* I direct that such portion of the residue of my estate as may not be required for the purposes hereinbefore or after mentioned shall be held by my trustees for behoof of and shall be divided equally between and among my whole children sons and daughters surviving jointly with the issue of any son or daughter who may have deceased whether before or after me leaving issue such issue succeeding equally to the share to which their parent would have been entitled if in life and shall be held by my said trustees on the same trusts and be subject to the same conditions as if the same had formed part of their original shares of my estate. . . . *In the ninth place* Notwithstanding anything herein contained I provide that it shall be competent to and in the power of any of my daughters who may die after my decease without issue but survived by a husband to bestow by deed *inter vivos* or *mortis causa* upon such husband the liferent from and after her decease till his death or second marriage of such portion of income of the share of my estate held for her as aforesaid as she may consider adequate not exceeding the liferent of one-third of such share and that upon such terms and conditions and subject to such restrictions as she may impose thereon and I also em-

power any son who may die after me without issue but before his share of my estate has vested absolutely in him to bestow on his widow out of the share of my estate to which he is prospectively entitled an annuity not exceeding Five hundred pounds per annum payable half-yearly at the usual terms and that from the date of his death till her death or marriage after his decease and I further provide and declare (First) that the shares of my estate falling to sons shall vest in them and so far as not liferented by my said wife shall be payable to them on their respectively attaining twenty-five years and until they attain said age the income or produce thereof shall be applied in whole or in part as my trustees may determine in the maintenance and education and upbringing of the son entitled thereto or in such other manner for his benefit as my trustees may consider proper (Second) That it shall be in the power of my said trustees if they shall consider it expedient and of which they shall be sole judges at any time before the term of payment of the share of any son or of any grandchild whether the issue of a son or daughter to apply such portion as they consider proper of the capital of the prospective shares of residue of any of my sons or grandchildren in their maintenance or in promoting their education or for establishing them in business or for preparing them for or settling them in a profession and my trustees shall also have power if they think fit to advance to or for behoof of any daughter out of the capital of the share held for her behoof such sum as in their discretion they may think proper to provide a marriage outfit for her (Third) Notwithstanding the period of the payment of the shares of residue before expressed my trustees shall have the power if they see cause and deem fit in addition to the powers already conferred on them by any writing under their hand to vest absolutely in any son although he may not have attained twenty-five years of age and to pay to him the share of my estate to which he would be entitled if he had attained twenty-five years of age and that to such extent as they think proper They shall also have the power if they see cause and deem it fit to postpone the payment in whole or in part of the shares of all or any of my sons falling to them on their attaining the age of twenty-five years beyond the term of payment and to apply the income thereof during such interval for behoof of or to pay the same to such son or sons or by a writing under their hands to retain the said provisions or any part of them vested in their own persons or to vest the same in the persons of other trustees whom they are hereby authorised to appoint with all or any of the powers privileges and exemptions conferred on themselves so that my sons or any of them as the case may be may enjoy or receive the income only of their respective provisions or part thereof during their lives or for such time as my trustees may fix as an alimentary allowance not assignable by them and not affectable by the debts or deeds or the diligence of the creditors of such son whose share is so dealt with and that the capital of the portion so retained may be settled on or for behoof of the issue of each such son whose share is so dealt with in such proportions on such conditions and under such restrictions and limitations as such son may appoint by any writing as aforesaid which failing equally amongst such issue if more than one and failing issue of any such son then for behoof of such persons or person or for such purpose as such son may appoint by any writing under his hand which also failing for behoof of such son's nearest heirs whomsoever. . . . and (Sixth) That the acceptance of the foresaid provisions in favour of my said wife and children shall be deemed and taken to be in satisfaction to them respectively of all terce *jus relictæ* and legitim and of all claims legally competent to them or any of them upon my death save and except the obligations undertaken by me as aforesaid in connection with the marriage of any daughter or son and without prejudice to the powers which my trustees may have at common law or by statute or otherwise."

The Case submitted the following *questions*—"1. Had the said Peter Donaldson, at the date of his death without issue, a vested right in the fee of the portion of his share of the residue of the testator's estate which was retained by and remains in the hands of the first parties? Or 2. Did the fee of the first portion fall, upon the death without issue of the said Peter Donaldson, to be held or divided by the first parties, in terms of the seventh purpose of the testator's trust-disposition and settlement? 3. In the event of the second question being answered in the affirmative, does the fee of the said portion fall to be held or divided by the first parties for or among (*a*) the third parties in equal shares, or (*b*) the third parties along with the second party in equal shares?"

On 10th December 1914 the Second Division gave the following *opinions*:—

LORD SALVESEN—The question raised in this case is of importance because of the pecuniary amount involved, but in my opinion its solution depends entirely on a construction of the terms of the trust-disposition and settlement of the late Robert Donaldson, and has no general application. The controversy relates to one-third share of residue destined by the testator to one of his sons Peter Donaldson, who survived him for many years but is now dead without issue. The fund is claimed on behalf of his creditors on the one hand, and by his surviving brothers and sisters on the other. If the late Peter Donaldson had a vested right in the capital of the fund in question, it passes to the second party who represents the creditors; if, on the other hand, it did not vest, the creditors have no interest in the distribution. The clause of the trust-disposition and settlement that deals with this share is the *Third, In the sixth place* (Second), the introductory part of which is as follows—"I direct that the shares of my sons who have attained the age of twenty-five at my death or may thereafter attain

that age shall be payable and shall be held as follows (Primo) My trustees shall pay over from time to time such portion thereof not exceeding two-thirds of the capital thereof as they may think proper and (Secundo) They shall hold the remaining one-third and such further portion as they may finally resolve to retain in trust for behoof of my said sons respectively in liferent for their liferent alimentary use allenarly and for behoof of the children of their respective bodies in fee." There follows a power of appointment amongst the children, and, failing such appointment, then a provision that the fund shall be equally divided amongst the deceasing son's children, and the issue of such as may have predeceased leaving issue. There is then a general provision in the terms, "*In the seventh place* I direct that such portion of the residue of my estate as may not be required for the purposes hereinbefore or after mentioned shall be held by my trustees for behoof of and shall be divided equally between and among my whole children sons and daughters surviving jointly with the issue of any son or daughter who may have deceased whether before or after me leaving issue." In my opinion there is not much room for doubt as to the intention of the testator. The words "shall be payable" contained in the third clause of the sixth purpose, must, I think, be regarded as referring exclusively to the provision (primo) relating to the two-thirds of the capital which were to be paid over; and the words "shall be held" as referring to the remaining one-third which was to be held in liferent for each son, and for behoof of his children in fee. As regards this one-third there are no words of direct gift, but merely a direction to hold. The language of the seventh purpose is, I think, habile to dispose of, *inter alia*, such one-third share (which *ex hypothesi* did not vest in the liferenter) in the event of his having no children. It is said, however, that there is a presumption in favour of vesting, and that words of direct gift are contained in the introductory direction which applies to all the bequests in the sixth purpose, namely —"I direct my trustees to hold apply pay and convey the residue of my means and estate and the income thereof for behoof of my children and their issue who survive me." I cannot so read the clause. The words "hold," "apply," "pay and convey" must in my opinion be read disjunctively. The trustees cannot at the same time hold and pay, and the word "apply" is peculiarly appropriate to the income of a share which is to be held for but not paid over to the beneficiary. Nor do I think the argument is at all advanced by the vesting clause, which is in these terms—"I further provide and declare (first) that the shares of my estate falling to sons shall vest in them and so far as not liferented by my said wife shall be payable to them on their respectively attaining twenty-five years and until they attain said age the income or produce thereof shall be applied in whole or in part as my trustees may determine" for their maintenance and education. It is obvious that this clause only refers to such shares as are to be payable to the sons on their attaining twenty-five years, otherwise it would be contradictory of the provisions directing the trustees to hold one-third of such share for their liferent use allenarly. There is another vesting clause, which is precisely to the same effect so far as sons of the testator are concerned—"I provide and declare that the capital of the shares of sons and any profits or produce thereof after my death . . . shall not be payable till they attain twenty-five years of age . . . and shall vest absolutely in them respectively as at the term of payment." As there is no term of payment fixed for the share that was to be liferented so far as the capital of the share is concerned, this vesting clause can only have reference to the income which might accrue during the lifetime of the sons. I am therefore of opinion that the first question falls to be answered in the negative and the second in the affirmative. With regard to the third question, the contention of the second party that as Peter Donaldson survived the testator his estate was entitled to an equal share along with the beneficiaries under the seventh purpose of the trust, was given up at the debate. Head (*a*) of the third question will therefore fall to be answered in the affirmative and head (*b*) in the negative.

LORD GUTHRIE—The parties are agreed as to the law applicable to this case. The difference between them is one of construction.

The fund in question is the share of the late Peter Donaldson in the estate of his father the late Robert Donaldson, which was liferented by him in terms of the clause (*secundo*).

Peter died unmarried, and the question is whether at his death the share in question was vested in him, either absolutely or subject to defeasance. The second party maintains that the share was vested in Peter Donaldson. But in view of the terms of the clause above mentioned she admits that she must find elsewhere in the deed a clause of initial gift to the late Peter Donaldson which will include the fund in question.

This she maintains is to be found in the opening words of the sixth clause of the deed. Now no doubt the words "pay and convey" are to be found there in relation to "the residue of my means and estate." But so is the word "hold." Reading the sixth clause in its entirety, it is clear that there is no initial gift, either to sons or daughters, of the residue as a whole, but that the words of direction to the trustees must be read distributively, the word "hold" applying to liferents, and the words "pay and convey" to shares the fee of which is vested.

The seventh clause is framed in conformity with this view. The words are appropriate to cover the fund now in question—"Such portion of the residue of my estate as may not be required for the purposes hereinbefore or after mentioned" will include, in the case of predeceasing children, money not required for liferents, and in the case of a

liferenter like Peter, who dies childless, money not required for issue. The third, fourth, fifth, and sixth parties being the whole children of the truster surviving at Peter Donaldson's death, or their issue, will take the fund in question under the express provisions of the seventh clause.

The second party founded an argument on the vesting clauses in the will. But these fall to be dealt with on the same principles as apply to the opening words of the sixth clause.

LORD JUSTICE-CLERK—The answer to be made to the questions in this case depends upon the construction of the words of the trust-disposition and settlement of Robert Donaldson. The case relates to a share of his estate destined by him to his son Peter Donaldson, who survived and liferented the share but died leaving no issue to take the fee. It is maintained by his creditors that the fee had rested in Peter Donaldson, and that accordingly it falls to be paid to them.

Now as regards the one-third share liferented by Peter Donaldson I cannot read the provisions of the deed otherwise than as limiting his interest to a liferent. It was pleaded that there was a presumption in favour of vesting. The words founded on as applying a gift of fee are the words by which the trustees are directed to "hold, apply, pay, and convey." These words, as it appears to me, can only be reasonably read as applying separately according to the directions to the trustees, for they are words essentially separative in their character. What is to be held by the trustees is something not to be paid away except in accordance with some direction given elsewhere in the deed where the details of disposal are set forth. Now the testator gives specific directions as to the time at which certain shares are to be paid over to his sons, and to vest in them at the time so fixed for payment. As regards the share in question, he conferred a liferent gift allenarly on Peter Donaldson, and nothing more.

I have no doubt or difficulty in concurring in the opinion of your Lordships that a share which the trustees were directed to hold for a son in liferent, for his liferent use allenarly, and for his children in fee, did not vest in the son to whom the liferent was then given, and that Peter Donaldson having died without issue, the questions in the Special Case must be answered as Lord Salvesen has proposed.

LORD DUNDAS was absent.

This interlocutor was pronounced—"The Lords having considered the Special Case and heard counsel for the parties, Answer the first question stated in the negative and the second question in the affirmative: Answer branch (*a*) of the third question in the affirmative, and branch (*b*) thereof in the negative: Find and declare accordingly, and decern: Find all parties entitled to their expenses out of the share of the estate which was liferented by the late Peter Donaldson, as these may be taxed by the Auditor, to whom remit the accounts thereof for taxation."

The second party appealed to the House of Lords, and referred to *Chambers' Trustees* v. *Smith*, (1878) 3 App. Cas. 795, 5 R. (H.L.) 151, 15 S.L.R. 541; *Lindsay's Trustees* v. *Lindsay*, (1880) 8 R. 281, 18 S.L.R. 199; *Logan's Trustees* v. *Ellis*, (1890) 17 R. 425, 27 S.L.R. 322; *Stewart's Trustees* v. *Stewart*, (1896) 23 R. 416, 33 S.L.R. 297; *Dunlop's Trustees* v. *Sprot's Executor*, (1899) 1 F. 722, 36 S.L.R. 531; *Tweeddale's Trustees* v. *Tweeddale*, (1905), 8 F. 264, 43 S.L.R. 193; *Fyfe's Trustees* v. *Duthie*, 1908 S.C. 520, 45 S.L.R. 368.

At delivering judgment—

LORD ATKINSON—This is an appeal from an interlocutor of the Second Division of the Court of Session, pronounced in a case stated to which the appellant and the first, third, fourth, fifth, and sixth respondents were parties. The question for decision is whether, on the true construction of the confused and ill-drawn trust-disposition and settlement of one Robert Donaldson, deceased, his son Peter Donaldson had at the time of his death, on the 23rd June 1913, a vested absolute interest in the corpus of a certain fund in which he during his life had an alimentary liferent. This fund consisted of one-third part of the share of the residue of Robert Donaldson's trust estate, which by this trust-disposition and settlement he had destined in favour of his son Peter. Robert Donaldson died on the 17th November 1885, and his son Peter, who died childless, consequently survived his father by over twenty-seven years. Three questions were submitted to their Lordships of the Second Division for their opinion. The appellant abandoned her contention as to the third. The remaining two run as follows—"(1) Had the said Peter Donaldson, at the date of his death without issue, a vested right in the fee of the portion of his share of the residue of the testator's estate which was retained by, and remains in the hands of, the first parties? Or (2) Did the fee of the said portion fall, upon the death without issue of the said Peter Donaldson, to be held or divided by the first parties, in terms of the seventh purpose of the testator's trust-disposition and settlement?"

Their Lordships answered the first question in the negative, and the second in the affirmative. The question for your Lordships' decision is whether these answers are correct. Robert Donaldson left him surviving his widow, three daughters, and two sons. Peter, who was born on the 10th July 1860, and was therefore twenty-five years of age at the date of his father's death, and Robert, who was married and had two children when his father died. Two of his daughters were also married and had children. The appellant is a spinster.

The date of this trust-disposition, which may conveniently, I think, be styled a will, was the 16th November 1906. A codicil was added on the 15th February 1911, but in this case nothing turns upon it.

The testator or truster, whichever he may be styled, vested all his property in trustees in trust to hold and apply the proceeds

thereof for nine different purposes, each of which was dealt with in a lengthy passage of his will.

In the passage dealing with his sixth purpose he directs his trustees to "*hold, apply, pay, and convey*" the residue of his estate and the income thereof for his children and their issue who might survive him, and for the issue *per stirpes* of any who might predecease him, as follows—First, he directs them to set aside for each of his daughters £50,000, then makes several provisions as to the settlement of these sums on his daughters and their issue, and winds up with a gift-over of each daughter's share in the following terms—"I further provide that, failing a child or children, or the issue of a child or children, the shares of daughters and the profits and produce thereof, so far as the same has not been paid or advanced in virtue of the powers hereinbefore and after conferred, shall be held by my trustees for behoof of my surviving sons and daughters, and the issue *per stirpes* of any son or daughter who may have predeceased . . . share and share alike, and that on the same trusts and subject to the same conditions as if the same had formedpart of their original shares of my estate." Much reliance was placed by the appellant on this express gift-over, inasmuch as nothing of the kind is introduced into the dispositions in favour of the sons, and the absence of such a clause indicated, it was urged, that the testator designed that the sons should have vested in them the absolute interest in the sums left to them.

Secondly, he directed his trustees to hold and apply the remainder of the residue of his estate for behoof of his sons and their issue as thereinafter mentioned—that is to say, that they should hold one share for behoof of each son who should survive him, and one share equal to what their father would have been entitled to had he survived for behoof of the issue *per stirpes* of any son who had predeceased him, share and share alike. He further provided that if there should be only one son or issue of one son surviving him, the whole of the remainder (less £25,000 to be paid to each of his surviving daughters and to the issue of any deceased daughter) should be held for that son or his issue. He then proceeds—"I provide and declare that the capital of the shares of the sons and any profits and produce thereof after my death, so far as not paid over to them in virtue of the powers herein conferred, shall not be payable till they attain twenty-five years of age; and that the shares of grandchildren, and any profits and produce thereof not paid over to them in virtue of the powers herein conferred, shall not be payable to them till they attain twenty-one years of age, and shall vest absolutely in them respectively as at the term of payment."

He then directs that in the event of any son who survived him dying before such term of payment leaving issue, the issue should be entitled among them to the share of their father; and further provides that the income of the shares of his sons and grandchildren may be paid to them to such extent as his trustees think proper. It was, as I understood, admitted by Mr Macmillan on behalf of the respondents that if the deed stopped there it could not be contended that Peter Donaldson did not on attaining twenty-five years of age become absolutely entitled to the corpus of his share of his father's residue. This does not depend so much on the word "vest" as on the whole frame of the limitation. The term of payment, twenty-five years of age in the case of sons, and twenty-one years of age in the case of grandchildren, is fixed as the time when the capital of each share and any profit or produce accrued thereon is to be payable to and be paid over to them.

The whole difficulty is created by the succeeding clause—clause 3 of this sixth passage of the deed—in which he deals with the payment, in the case of sons, of the shares he has already made absolutely payable to them on their attaining twenty-five years of age. It runs thus—"I direct that the shares of my sons who have attained the age of twenty-five years at my death, or may thereafter attain that age, shall be payable and shall be held as follows—(*Primo*) My trustees shall pay over from time to time such portion thereof not exceeding two-thirds of the capital thereof as they may think proper, and (*secundo*) shall hold the remaining one-third and such further portion as they may finally resolve to retain in trust for behoof of my sons respectively in liferent for their liferent alimentary use allenarly, and for behoof of the children of their respective bodies in fee." He then gives to each son a power of appointment amongst his children with a provision that in default of appointment they should take equally. There is no gift-over attached to this limitation, either in the event of a son reaching twenty-five years of age and dying childless, as Peter did, or in the event of the death under the age of twenty-one years of all the grandchild issue of a son who reached the age of twenty-five years, and in this respect there is no doubt a marked difference between this clause and that dealing with the devolution of the daughters' shares in which there is an expressed gift-over. The reason suggested in argument for the omission of the gift-over was that the absolute interest of the share of each son who had reached twenty-five years of age had been already vested in him absolutely, and was treated as not having been diverted by this latter limitation, else, it was urged, there would be no reason whatever for not providing for these contingencies in this instance as they had been in the former. If, as was urged on behalf of the respondents, this derelict interest in Peter's share is captured by the general words of the seventh passage, to be hereafter referred to, there is no reason why this same passage should not have been trusted to capture the sums left derelict by the failure of the trust declared in the case of the daughters.

It will be observed that the clause empowers the trustees to pay over from time to time as little of the son's share as they please. The amount paid over must not

exceed two-thirds of the share, and the trust to hold for life only operates on what the trustees may finally resolve to retain. The trustees, it was admitted, did in fact pay over to Peter the entire two-thirds of his share on his attaining twenty-five years of age.

The seventh passage of the will is general in its character. It applies to all the purposes of the instrument either theretofore or thereafter mentioned, and was evidently introduced merely to prevent an intestacy as to any portion of the moneys disposed of by reason of the failure of the purposes to which they were devoted. It was clearly shown that there were many cases other than the present which this clause would appropriately meet. It was not at all necessary, therefore, to hold that in order to give it effect it should be held to apply to such a case as the present.

In the ninth passage the testator again returns to the limitation to his sons, providing that the shares of his estate falling to his sons should vest in them, and so far as not liferented to his wife should be payable to them on their respectively attaining the age of twenty-five years. He enables his trustees to make advances for maintenance and education. He then further provides that the trustees should have, in addition to the powers already vested in them, power by writing under their hand to vest absolutely to such an extent as they may think proper in any son before he attained twenty-five years of age the share to which he would be entitled on reaching that age, and also should have power to postpone, if they should deem fit, the payment of the shares of his sons falling to them at twenty-five years of age beyond the term of payment, paying to them the income of the fund withheld.

There is, I think, little dispute, if any, as to the principle of law applicable in cases of this kind to the questions such as that to be decided.

The principle applicable in England is stated by Lord Davey in his judgment in *Hancock* v. *Watson*, 1902 A.C. 14, at p. 22, in these words — " . . . [*quotes, v. sup. in rubric*] . . ."

Many Scotch authorities were cited in argument. The careful perusal of them has led me to the conclusion that the principles they establish are stated fully and accurately by Lord Dunedin in his judgment in *Tweeddale*, 8 Fraser, 264, 43 S.L.R. 193, to the effect—"Where in the beginning of an instrument you find words which purport to bestow a certain gift or interest, and then subsequently find further provisions or declarations which obviously deal with the gift or interest of the same donee, then the further expression of the donor's will must have been inserted by him for one of two purposes, either (1) to enlarge or abridge the gift from what, had the original words remained unadded to, it would have been, or might have seemed on a certain construction of the words to be, or (2) leaving the gift the same to adhibit further conditions or directions as to the way in which the gift is to be enjoyed. . . . The final proposition I take to be this — That where the subsequent declaration does not in terms purport to effect the first purpose, *i.e.*, to enlarge or abridge the gift itself, then on the well-known view of allowing continued effect to all the testator has said, that construction will *in dubio* be preferred which assigns it to the second rather than to the first category."

The difficulty consists in the application of these principles.

Construing the several clauses of this instrument together, I think that clause 3 of passage 6 merely regulates the mode in which such portion of a son's share as shall not have been paid over to him on his attaining twenty-five years shall be enjoyed. It imposes a trust upon that sum no doubt, but I think it does not cut down, save by the imposition of that trust, the absolute interest already vested in the son by the earlier portions of the instrument.

On the whole, therefore, I am of opinion that the interlocutor appealed from was erroneous and should be reversed, that the first question submitted in the case stated should be answered in the affirmative and the second in the negative, and this appeal be allowed with costs here.

LORD SHAW—The judgment of my noble and learned friend Lord Parker, which I am now about to read on his behalf, so completely expresses the opinion which I myself have formed that I respectfully adopt it.

LORD PARKER—[*Read by Lord Shaw*]—The principle on which the appellants rely in the present case is one common to Scotch and English law, and is well stated by Lord Davey in the case of *Hancock* v. *Watson*, 1902 A.C. 14, at p. 22—". . . [*quoted supra in rubric*] . . ."

The question in the present case is therefore whether Peter Donaldson, the son of the testator, who was born in 1860 and had attained twenty-five at the testator's death, took an absolute or only a life interest in the fund in question.

There is nothing in the testator's trust-disposition and settlement material to this question until we come to the directions given by the testator for carrying out what he describes as his "sixth purpose," and he is here dealing with his residuary estate. Such residuary estate is to be held, applied, paid, and conveyed for behoof of his children and their issue who survive him, and for the issue *per stirpes* of any daughter who predeceased him, as follows, namely:—

First, a certain sum is to be set aside for the behoof of each daughter in liferent only and for behoof of her issue in fee, with a power of apportionment for each daughter among her issue, and a proviso that if any daughter predecease him leaving issue such issue are to be entitled equally among them to the share which would have been settled upon their mother had she survived. There is a gift-over of the share of any daughter who dies without issue.

Secondly, the remainder of the residue of the testator's estate was to be held for behoof of his son or sons and issue of sons as described in the words following—that is

to say—"I provide and declare that they (the trustees) shall hold one share for behoof of each son who survives me, and one share equal to what their father would have been entitled to had he survived, for behoof of the issue *per stirpes* of any son who has predeceased me, and that equally between them, share and share alike. . . . I provide and declare that the capital of the shares of sons, and any profits or produce thereof after my death, so far as not paid over to them in virtue of the powers herein conferred, shall not be payable till they attain 25 years of age, and that the shares of grandchildren, and any profits and produce thereof not paid over to them in virtue of the powers herein conferred, shall not be payable to them till they attain 21 years of age, and shall vest absolutely in them respectively as at the term of payment, but I provide and declare that in the event of any son predeceasing me leaving issue, or, having survived me, dying before the said term of payment leaving issue, or of any grandchild dying before attaining 21 years of age leaving issue, such issue shall be entitled equally amongst them to the share to which their parent would have been entitled if he had survived; and I further provide that the income of son's and grandchildren's shares accruing before said period of payment may be paid over to them by my trustees in whole or in part, but shall only be payable to such an extent as my trustees think proper."

It is, I think, beyond dispute that these directions, if considered alone and without reference to the subsequent provisions of the will, are sufficient to confer on sons at the age of twenty-five years, and issue of sons at the age of twenty-one years, an absolute interest in their shares of residue. No one contends that this is not so in the case of issue of sons, but it is contended that the subsequent directions show that the testator intended that his sons should take a liferent only in such part of their shares as was not actually paid over to them in their lifetime, but was retained by the trustees pursuant to the next direction contained in the will. In the case of Peter Donaldson the trustees actually paid over to him in his lifetime two-thirds of his share, but they retained the remaining one-third pursuant to the direction last referred to. The amount so retained was to be held for behoof of Peter Donaldson in liferent for his "liferent alimentary use allenarly," and after his death on trusts which have failed by reason of his death without issue. If, therefore, the gift was absolute in the first instance, it must in the events which have happened now take effect.

I have come to the conclusion that there is nothing in the subsequent provisions of the will to control the directions which, as I have said, *prima facie* create an absolute interest in Peter Donaldson on his attaining the age of twenty-five years. The settlement of one-third of his share cannot alone have this effect. If it could, it is impossible to conceive a case in which the principle laid down in *Hancock* v. *Watson* could have any application at all.

It is observable that the trusts which the testator declares as to the shares of sons retained by the trustees in favour of their issue conclude the directions relating to his "sixth purpose," there being no gift-over in the event of any of the sons dying without issue. But the testator immediately proceeds to his "seventh purpose," and directs that such portion of the residue of his estate as may not be required for the purposes thereinbefore or thereinafter mentioned shall be dealt with as thereby directed. Some stress was laid upon this provision, but in my opinion it has no bearing upon the point in dispute. It is true that if Peter Donaldson did not take a vested interest in his share the moneys now in dispute will pass under this clause, but if he did take such an interest the moneys in question are required for the purpose of giving effect to it, and are by the very terms of the clause itself excluded from its operation. The directions for effectuating the testator's "ninth purpose" are more material. They contain a power for any son who may die after the testator without issue, but before his share in the estate has vested absolutely in him, to confer an annuity on his widow. This power appears to be intelligible only on the footing that each son attained a vested interest at twenty-five, and confirms rather than displaces the conclusion at which I have arrived. It is also followed by a direction that the shares of sons shall vest in them on their respectively attaining twenty-five, and this points to the same conclusion. The trustees further have power, if they think fit, to postpone the payment in whole or in part of the shares of sons falling to them on their attaining the age of twenty-five years beyond the term of payment, and to settle the same for the benefit of such sons and their issue, with an ultimate trust for such persons as they may respectively appoint, and failing appointment for their respective nearest heirs. This power clearly does not relate to the third of Peter Donaldson's share which the trustees retained pursuant to the direction to which I have already referred, and was not exercised in any way by the trustees. It was relied on by the respondents, but I fail to see how it has any bearing on the matter.

I think I have referred to all the provisions of the will which can possibly affect the question your Lordships have to decide, and in my opinion they are not only consistent with but tend to confirm the view that an absolute interest on attaining twenty-five years of age was in the first instance given to sons. This being so the principle of *Hancock* v. *Watson* applies and the appeal succeeds.

LORD WRENBURY—[*Read by Lord Atkinson*]—Upon this appeal the question is whether there is an absolute gift to the son Peter, with trusts imposed upon that absolute interest which fail for want of issue, leaving the absolute gift to take effect to the exclusion of the residuary legatees as in *Hancock* v. *Watson*, or whether that which would without more be an

absolute gift is in fact a gift governed by the subsequent provisions of the will, so that in the events which have happened the son Peter takes no further interest in that in which he was during his lifetime entitled to a liferent.

The sixth clause of the will (introduced by the words "in the sixth place") provides (1) for daughters, giving them a certain sum in settlement by way of liferent, with remainder to their issue as they shall appoint, and in default of appointment equally, with a gift-over in default of issue; and (2) for sons. The provisions for sons is divided into three parts, viz., (*a*) a direction that the trustees shall hold a share for each son who survives the testator (and Peter was such a son); (*b*) a declaration that the capital of the share shall not be payable until the son attains twenty-five, but shall vest in him as at the term of payment (and Peter had attained twenty-five); and (*c*) a direction whose effect is that the trustees may pay the son from time to time such portion not exceeding two-thirds of the capital as they think proper, and shall hold the remaining one-third, and "such further portion as they may finally resolve to retain," in trust for the son for life and his children in fee in such proportions, &c., as the son shall appoint, and failing appointment for the children equally. There is in this case no gift-over in default of issue. The ninth clause provides (1) that the son's share shall vest and be payable at twenty-five; and (3) that the trustees may cause a son's share to vest absolutely before twenty-five, and may also postpone payment after twenty-five, paying in the latter case the income to the son, and holding the corpus in settlement for the son's issue as he shall appoint, and in default of appointment then equally amongst the issue, and failing issue for the son's general appointees, and in default for the son's nearest heirs. Upon these provisions the most notable points are, (*a*) that by the sixth clause the testator did in the case of daughters, and did not in the case of sons, make a gift-over; and (*b*) that in the case governed by the ninth clause the son's share does not go over in default of issue, but passes to the son's appointees, and if none then to his nearest heirs. Notwithstanding this the respondents contend that in the case falling within the sixth clause the absolute gift does not prevail—that there is, in fact, not an absolute gift, but only a gift to the extent contemplated by clause (*c*) (or as the testator calls it, third) of the second part of clause 6, and that the seventh clause takes effect as a gift-over.

In my opinion this is not the true construction of this instrument.

Suppose that the share amounts to £9000. Under clause 6 (2) (*c*) (or third as the testator calls it) the trustees may, after the son is twenty-five, pay him not exceeding £6000, and are to hold £3000 "and such further portion" [part of the £6000] "as they may finally resolve to retain" upon trusts, which upon the respondents' contention fail (when the son dies without issue) for the benefit of the parties entitled under the seventh clause. Suppose the trustees think proper to pay the son only £1000, there will remain £5000 (unless and until they "finally resolve" to retain it), which will fall under the ninth clause, and will pass to the son's general appointees or nearest heirs. It is impossible to suppose that the trustees could in their discretion take this out of the ninth clause and put it into the sixth clause, with the result of excluding persons claiming under the son. Yet this is the case if the respondents are right. For the trustees could "finally resolve" under clause 6 to add this £5000 to the £3000. It would then fall under clause 6 and not under clause 9, and the son's general appointees or nearest heirs would, if this construction were right, be excluded. This, however, is not so if the effect of the sixth clause is merely to direct the manner of enjoyment of the son's share and not to cut down the absolute gift of the share to the son. The absence in the sixth clause of any gift-over in the case of sons, similar to that in the case of daughters, and the frame of the sixth and ninth clauses respectively in the matter to which I have drawn attention, furnish, in my opinion, cogent arguments in support of that which, without that assistance, I should have thought to be the true construction of this deed.

The sixth clause directs the trustees to hold for the son "as after mentioned." The subsequent trusts are not referential but direct trusts. The first is to hold for behoof of the son. This is a plain gift of an absolute interest. The method of enjoyment of this interest is subsequently detailed, but upon cesser of the circumstances in which the method of enjoyment is defined, there is nothing to curtail the previous absolute gift.

But it is said the seventh clause is a gift-over. I think not. If the gift was, as I think it was, an absolute gift, this share was required "for the purpose hereinbefore or hereinafter mentioned," and the seventh clause does not reach it.

For these reasons I think that this appeal succeeds.

Their Lordships reversed the interlocutor appealed, answered the first question in the affirmative, the second in the negative, and allowed expenses of the appeal only.

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