law of Scotland, or indeed of any civilized country, that in that case such a reference in a declarator of marriage was to be permitted. There were no cases which clearly decided that a reference involving the interests of third parties was ever allowed, and if there were, the House should hesitate before it sanctioned them. But if such cases did exist, then, even if the reference were competent, the Court in its discretion ought not to allow it. Even if there had been no marriage of the respondent with Mrs Forbes, there must almost always in such cases be some interests of creditors or other persons involved, and these must necessarily be affected by the result of the reference. Therefore, even if this reference were in the circumstances competent, it certainly ought not to have been allowed by the Court, in the exercise of its judicial discretion, and was rightly refused. .

Lord Westbury said that he had no intention to give any opinion in this case, inasmuch as he had been compelled to be absent from the latter part of the argument, owing to severe domestic affliction, but he had had the advantage of hearing the whole of the appellant's opening address, and if he had, upon hearing and considering that address, been able to bring his mind to believe there was any probability of her success, he would have struggled to the utmost to be present throughout the rest of the case. But he felt bound to say that he could not at the outset see any ground for altering the conclusion at which the Court below had arrived. He felt it necessary to give this explanation why he did not take any part in the present judgment.

Lord Colonsay said that, after the opinions which had been delivered, the case was now decided, whatever view he himself might have taken. But in so important a case he would make a few observations. In the Court below, when this application was first made, he felt it was one of so much novelty that he advised the Court to order cases to be printed; and, after hearing two arguments, he came to the conclusion that this reference to oath could not be allowed. The question had been again argued fully at their Lordships' bar, and he had considered the case, but felt there was no ground for altering his former opinion. It was quite clear, as a general proposition, that a party in ordinary cases was entitled to make a reference of this kind to the oath of an adversary; and he thought it was as competent to do so after a judgment of the House of Lords as after a judgment of the Court of Session. If unappealed against, it was also clear that the reference was not a matter of right, but was in the discretion of the Court. It had been argued that such a reference in an action of declarator of marriage was altogether incompetent since the statute of 11 George IV. That was a point which he felt it unnecessary to consider in the Court below, and he would rather not commit himself to any opinion on that point on the present occasion. Another point was, that the reference, if allowed, might compel the party to answer *in suam turpitudinem*. He thought there was great weight in that objection; but whatever might be the law as to the competency of this reference, when the question came to be whether the Court, in the exercise of its discretion, ought to allow it, he confessed all the principles of the law were against allowing such reference; and he quite concurred with the observation of his noble and learned friend Lord Cranworth, that such a reference ought only to be allowed to settle some point between the two parties themselves, but should never be allowed where the interests of a third party were involved. That was the true line to be drawn. Therefore, he quite agreed in the conclusion to which their Lordships had come. But he might be allowed to add, that if, on reconsidering the matter, he had seen the least ground to alter his former judgment, he would not have had any hesitation in doing so.

Appeal dismissed.

Tuesday, July 30.

CARLETON AND ANOTHER *v.* THOMSON AND OTHERS.

(In Court of Session, 11th Feb. 1865, 3 Macph., 514.)

Trust—Residue—Vesting. The residue of a trust-estate was vested in trustees for behoof of the truster's daughter in liferent and her children in fee, to be kept by them until they in their discretion should see fit to settle it in the most safe and secure manner on her and her children; and, in the event of her decease without issue, the residue to go to the truster's nieces. At the truster's death the daughter was married and had two children. Five were subsequently born to her but they all predeceased her, only one of them leaving issue. Held, (aff. C. S.) that a share of the provision vested in each of the five children at its birth.

Andrew Hunter, surgeon, H.E.I.C.S., died in 1811, leaving a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to trustees for certain purposes. The residue of the trust-estate, including the fee of £10,000, set apart for answering the provisions to the spouse of the testator, was directed "to be vested in my said trustees for behoof of my said daughter, the said Mrs Isabella Sarah Hunter *alias* O'Reily, in liferent (exclusive of the *jus mariti* of her husband) and her children in fee, to be kept in trust by them till they in their discretion shall see proper to settle it in the most safe and secure manner on her and her children. And in the event of her decease without issue of her body, I hereby direct and appoint my said trustees to convey and make over the said residue" to the truster's nieces, equally among them, the share of any niece dying without issue to go equally among the survivors. The testator left no lawful issue. He was survived by Mrs O'Reily, his natural daughter. At the time of his death, in 1811, two children had been born to Mrs O'Reily, viz., Anne, Mrs Carleton, and Isabella, Mrs Hudson, and both of them were married during the lifetime of their mother, and both survived her. Five children were born to Mrs O'Reily after the death of the testator. Three of them died in infancy. Another, John, died in 1852, married, and leaving issue. Another, Andrew, died in 1859, unmarried. Mrs O'Reily died in 1861. The question at issue was, Whether or not a share of residue vested in each of these five children, who were born after the death of the testator, and predeceased the liferentrix?

The First Division of the Court, affirming the judgment of the Lord Ordinary (Jerviswoode), held that a share of the provision vested in each of the five children at its birth.

Lord Curriehill, with whom the other Judges concurred, thought that, although the provision in

question admitted of being read as indicating an intention, either that it should vest during Mrs O'Reily's life, or that it was to vest in no one till her death, the former was the more probable intention, and it was strongly confirmed by the clauses of the deed, and by the entire absence of those conditions which are generally held to postpone vesting.

Mrs Carleton and Mr Hudson, as in right of his wife deceased, presented this appeal.

Sir Roundell Palmer, Q.C., and Anderson, Q.C., for appellants.

Attorney-General (Rolt), Q.C., Lord Advocate (Gordon), and Neish, Q.C., for respondents.

Lord Colonsay—My Lords, the interlocutors of the Lord Ordinary and of the First Division of the Court of Session, now in part appealed from, were pronounced in reference to a competition of claims in a process of multiplepoinding and exoneration raised by the testamentary trustees of the late Andrew Hunter, surgeon, sometime in the service of the Honourable East India Company.

Mr Hunter, by a trust-disposition and settlement dated 12th January 1808, and the codicils thereto annexed, dated 18th January 1808 and 2d May 1809, and also by a supplementary trust-disposition and settlement, dated 18th January 1808, conveyed, in the event of his death without lawful issue of his body, to trustees, all and sundry his whole means and estate, heritable and moveable.

The trust-deed of 12th January 1808, after securing £10,000 for the purposes of the provisions in favour of the truster's spouse, and making certain other testamentary provisions, proceeds as follows:—"And the residue of my said estate and effects, heritable and moveable, including the fee of the £10,000 set apart for answering the provisions to my said spouse, I direct and appoint to be vested in my said trustees for behoof of my said daughter, the said Mrs Isabella Sarah Hunter, *alias* O'Reily, in liferent (exclusive of the *jus mariti* of her husband) and her children in fee, to be kept in trust for them till they in their discretion shall see proper to settle it in the most safe and secure manner on her and her children; and, in the event of her decease without issue of her body, I hereby direct and appoint my said trustees to convey and make over the said residue of my said estate and effects, including as aforesaid, and remaining, after payment of my said debts and legacies, to and in favour of my said nieces, Mrs Ann Wood, Mrs Grizel Charles, Mrs Marion Mair, Margaret, Jane, and Agnes Hunter, Mrs Janet Riddle, Mrs Eleonora Sandilands, Isabella and Agnes Hunter, equally amongst them; but in the event of their, or either or any of them, dying without lawful issue, the share of such niece dying without issue to go equally among my said other nieces and their issue; but burdened always with the sum of £3000 sterling to the said John Tracy O'Reily, which I had settled as a portion on my said daughter in case of her marriage, or such part thereof as may be due at her death, and the lawful interest of the same from the first term of Whitsunday or Martinmas after her death, during the not-payment, and also with the burden of an annuity of £200 sterling yearly to the said John Tracy O'Reily during his life, after the death of his said spouse, and with the further burden of the payment of a legacy of £500 sterling to Lieutenant John Hunter, in the service of the Honourable East India Company, my nephew, in the event of the decease of my said daughter without issue, and to be payable at the first term of Whitsunday or Martinmas after her death, with the lawful interest thereof after said term of payment during the not-payment of the same." The terms of the codicils and of the supplementary trust-deed are immaterial in the present case.

Mrs Isabella Sarah Hunter was the natural daughter of Mr Hunter, the truster, and was the wife of John Tracy O'Reily, formerly of the 5th Dragoon Guards.

The truster died on 29th March 1811 without lawful issue. He was survived by his spouse, and also by his natural daughter Mrs O'Reily and her husband. At the time of the truster's death, Mr O'Reily was resident in Ireland, and he continued to reside there till his death in 1841. He was survived by his wife, who lived till 7th January 1861.

When Mr Hunter made his trust-disposition and settlement, in 1808, there had not been any children born of the marriage of Mr and Mrs O'Reily. Before the death of the truster, two children were born of that marriage, viz., Anne Jane Hunter, now Mrs Carleton, born 6th January 1809, and Isabella Sarah Hunter, afterwards Mrs Hudson, born 20th February 1811, both of whom survived their mother, and both were claimants in the present competition, but Mrs Hudson having died is now represented by her husband. After the death of the truster, five children were born of the said marriage, all of whom predeceased their mother. Three of them died in infancy, and predeceased their father. The other two survived their father and attained maturity. One of them, John Tracy, died in 1852 intestate, but survived by his wife, and leaving lawful issue, who by their guardian are claimants in this competition; the other, Andrew Hunter, died in 1859, unmarried, domiciled in Ireland, and having left a will.

It appears that Mr O'Reily the elder left a testament, dated 9th April 1840, in the following terms:—"Whereas I have been advised that I am entitled, in right of three of my deceased children, to the reversion of a distributive share of certain funds and properties devised by the will of the late Andrew Hunter, my wife's father, after my said wife's decease, in case it shall appear that I am so entitled, I leave and bequeath the same to my son Andrew Hunter O'Reily, and desire that this may be taken as a codicil to my last will and testament." And it further appears that Andrew Hunter O'Reily by his will conveyed his interest in the trust-estate to Livingston Thomson and Richard Graydon, who, as representing that interest, are claimants in this competition.

After the death of Mrs O'Reily, the truster's daughter, the trustees raised the present process of multiplepoinding and exoneration, for the purpose of obtaining a judicial determination of the rights of all parties claiming interest in the trust-estate, and a judicial exoneration of their own actings as trustees. The several parties claiming an interest in the trust-estate having lodged claims, a record was made up and closed, and the parties were heard upon the questions raised under that record.

The leading question debated, and which if decided one way would practically have disposed of the whole cause, was, Whether under the terms of the trust-disposition and settlement of Mr Hunter, those of the children of his daughter Mrs O'Reily, who predeceased her, had or had not a vested interest in the trust-estate? On the part of Mrs Carleton and Mrs Hudson, who alone survived their mother, it was contended that no interest had vested in

any of the children who predeceased their mother the liferentrix, and in that view they claimed the whole residue. On the part of the other claimants, as representing in various ways and in various effects the children who had predeceased their mother, it was contended that the vesting of the interest in those children was not suspended till their mother's death; that they had a vested interest during her life, and that such interest was transmissible, and transmitted to their representatives by law or by will. If that question had been decided in favour of Mrs Carleton and Mrs Hudson most, if not all, of the other claims and questions that have been raised would have been excluded; but the Lord Ordinary and the Inner-House decided it against them, and they have appealed. Other questions are involved in the appeal, but I shall first deal with the question of vesting. When the question arises under a *mortis causa* settlement, whether the benefit given is or has become a vested right, the intentions of the testator, in so far as they can be discovered or reasonably inferred from the deed, taken as a whole, and from the circumstances legitimately collected under which the deed was made, should have effect given to them. It is *questio voluntatis*. That is the cardinal rule and guide. The task of discovering the testator's intentions is sometimes perplexing, and in such cases aid may to some extent be derived from the application of general rules or presumptions recognised in previous decisions. The general rule of law as to bequests is, that the right of fee given vests *a morte testatoris*. That rule holds although a right of liferent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class. The postponement of the period of payment till the death of a liferentrix does not suspend the vesting, nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed, the creation of a trust is a very usual mode of securing the interest of a liferenter, where the right to the fee is nevertheless intended to vest in the person or class of persons for whom it is destined. Although the *jus dominii* may be in trustees, the *jus crediti* is in the beneficiaries as a vested right. At one time doubts were entertained as to the case where the settlement was by a trust-deed, to hold for a liferenter and successive persons as fiars, but the tendency of recent decisions in that class of cases, and indeed in almost all cases, has been in favour of the vesting of the fee *a morte testatoris*, unless the terms of the deed are such as to exclude that construction.

The case of *Forbes* v. *Luckie* (16 Shaw, 374) supplies authority on most of these points. Lord Fullerton was the Lord Ordinary in that case, and the judges in the Inner-House, while affirming his judgment, delivered their opinions fully. Lord Corehouse spoke very decidedly on the several points above referred to. Lord Gillies and Lord Mackenzie added the weight of their great authority. In subsequent decisions the authority of that case has been fully recognised and given effect to. The circumstance that some of the members of the favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them as soon as they respectively come into existence, although the amount of the benefit to accrue to each may not be then ascertainable. That is quite settled.

There may, however, be cases in which vesting is suspended. Thus, where the right is made conditional on a contingency personal to the legatee, such as marriage or arrival at majority, events or dates uncertain, which may never have taken place, there is a presumption, though not insuperable, that vesting, or right to take, was intended to be suspended until the occurrence of the contingency should be ascertained. So also, in reference to that, effect may be deduced from an express clause of substitution or survivorship applicable to the members *inter se* of a class to whom the fee is destined. These are the most usual indications of intention to suspend vesting. But neither of them occurs in the deed now under consideration. An inference of intention to suspend vesting may in a particular case be collected from the whole purpose and tenor of a deed. I shall presently consider whether the purpose and tenor of the present deed are or are not such as fairly to support that inference. It has been contended that where, in addition to postponement of the period of payment during the life of a liferenter, there is a substitution, or, as it is sometimes called, a destination over, in favour of parties other than the fiars first named, there is a presumption that the vesting also was intended to be postponed till the death of the liferenter. There are cases in which that circumstance has, in connection with other circumstances, been taken into account, but it is by no means a conclusive circumstance; whether the clause founded on in the present case is truly a substitution or destination over in the sense and to the effect contended for, is a matter to which I shall afterwards advert.

As regards the purpose and tenor of the whole deed now under consideration, I am very clearly of opinion that the leading purpose of the testator was to confer the benefit of the great bulk of his fortune on his daughter in liferent, and on her children in fee. That purpose could best be carried into effect through the instrumentality of a trust; but, as already shown, such an arrangement does not at all imply that the right of the children as fiars was not to vest during their mother's life, that in the event of the marriage of any of the daughters during their mother's life their right could not be made available in their marriage settlement, or that any of the sons, in the event of his entering into a profession or business, was to have no *jus crediti* that could be made available for his benefit. That is not presumable. I think it is rather to be presumed that the truster intended to give to the children all the benefits that a right of fee could give consistently with securing the liferent interest of their mother.

Then the deed contains a clause which, I think, shows that the truster contemplated and authorised a termination of the trust before the death of the liferentrix, if the trustees in their discretion should think fit to act upon it. The words are:—that the residue now in question was "to be kept *in trust* by them *till* they in their discretion shall see proper to settle it in the most safe and secure manner on her and her children." I cannot read that clause as a mere instruction as to the investment of funds to be thereafter held by them in trust. The plain meaning of the words is, that the trust is to continue till, and only till, the trustees see proper to settle the trust-fund in the most safe and secure manner on the mother in liferent and the children in fee. If the trustees had exercised that power the right to the fee must have vested in the children directly instead of indirectly through the trust. That such a mode of dealing with the fund was a thing present

to the mind of the testator appears to me to indicate very clearly that he intended by the deed to create a *jus crediti* in favour of the children. It was argued, that if the trustees were denuded of the trust under that clause, the right of fee must have gone to the mother, as the trustees could not have introduced the word "allenarly" to qualify her right, no such word being in the trust-deed. That is a fallacy. The trust-deed did not prescribe any *formula;* and the duty of the trustees would have been to introduce whatever words were necessary to give her the same measure of benefit as she had under the trust-deed, and no more. Then again, suppose the mother had renounced her liferent of the whole or a part, in favour of her children, it does not appear that there was anything to prevent the children from demanding immediate possession and enjoyment. Then again, as already noticed, there is no clause of survivorship, nor is the right or the time of payment made contingent or conditional on an event which may never happen, such as marriage or attaining majority; elements some of which are to be found in almost all cases in which the vesting is intended to be suspended.

These considerations are all hostile to the notion that in this case vesting was suspended till the death of the liferentrix.

On the other side of the question, the feature most relied on and most deserving of consideration is the clause whereby the nieces are introduced. But, in the first place, that clause is not of the nature of a substitution. It is of the nature of a conditional institution or bequest, depending on a condition or contingency which never did occur. In the second place, I think the contingency was excluded as soon as Mrs O'Reily had issue of her body. The words "decease without issue of her body," may mean without leaving issue of her body surviving her, or it may mean without having had issue of her body, and it may depend upon circumstances which of these two meanings is to be attached to the words. The appellants contend for the former of these meanings, and, in that view, they contend that the clause in favour of the nieces was tantamount to a substitution or destination over, and therefore gives aid to their plea that the vesting was intended to be suspended. Even if that were the character of the words, and that there was anything else in the deed to which they could give aid, I do not think that the aid would be material or would go far towards displacing the other considerations I have alluded to. But I am not disposed to adopt the meaning which the appellants attach to the words. I do not think that the testator intended to prevent Mrs O'Reily, in conjunction with her children, being, as they might have been all of full age, from making arrangements and dealing from their respective rights of liferent and fee, without regard to the contingent interests of the nieces.

For the reasons I have stated, my opinion is, that the right vested *a morte testatoris* in the class, some of whom were in existence at that time, and that a *jus crediti* vested in each child at its birth, although the amount of the benefit was subject to the contingency of there being more children born.

I do not think it necessary to notice in detail the several cases under the head "vesting" that have been referred to. Each case depended on the particular terms of the deed which gave rise to it. But on a review of all the cases, I think that the scope and tendency of them is to the effect I have indicated. The leaning of the law is towards vesting, unless there be something in the deed to exclude that construction. I find nothing in this deed to exclude it.

The appellants have another plea on the record, which, though it does not appear to have been much if at all relied on in the Court below, and is not noticed in the printed case for the respondents, was pressed in argument at the Bar with much ability, and deserves consideration. It is that, even assuming the residue to have vested as contended for by the respondents, the share or interest of the children who predeceased the liferentrix accrued to the survivors *jure accrescendi.* The appellents were the only survivors, and, consequently, the importance to them of this plea, if well founded, is obviously very great.

In support of this plea, reference was made to the Civil law and to a passage in Lord Stair's Institutes, iii, 8, 27. The doctrine of the Civil law as to the *jus accrescendi* is subtile and unclear. The civilians differ in their interpretation of it, and even Lord Stair has not succeeded in making it clear. He begins his section on the subject thus:—"The right of accrescence is that whereby the portion of an heir *legator* or *fidei commissor* befalleth to another, not by a new and several succession, but by the first succession and as part thereof. We have little use of this; and, therefore, I shall be shorter in the many subtile debates agitated amongst the doctors thereupon." Nevertheless, he was led into writing a section of more than ordinary length with him, and not quite free from the subtlety he ascribes to the debates of the doctors, but which was perhaps inseparable from the subject. His remark, however, is true, that the doctrine is not much in use with us; and from the whole tenor of the dissertation referred to, it appears that the doctrine he was there more particularly dealing with had reference to the case of parties named by the testator to take immediately on his death, and as to what should happen if any of those conjoined in such a nomination cannot or will not enter or accept, that is, cannot, as by reason of having predeceased the testator, or being for some reason disqualified, or will not, as by choosing to decline. In such cases, the interest which the testator intended to give to the party who cannot or will not take it, was to go to the person or persons conjoined with him, or to be otherwise dealt with according to the form of words used. Thus Stair there says,—"In the institution or substitution of heirs, or in legacies and *fidei commisses,* if there be more persons, and some of them joint as to both matter and words, the rights of those so conjunct do accresce (*if any of the persons so conjunct do not or cannot accept*) to the rest of the conjunct and not to those that are disjunct in the matter, though they be conjunct in the words." The whole doctrine there treated of had reference apparently not to the case of a postponed interest or of a subsequent succession, but to the case of parties who were to take in the first instance, or, in the words of Lord Stair, "the first succession." But we are not dealing with a case in which there was any inability or unwillingness or failure to accept. The bequest was to a class, and the class must be held to have accepted the beneficial right which vested in them. It would be a mistake to suppose that Lord Stair, in commenting on the *jus accrescendi* of the Civil law recognised it as implicitly adopted into the law of Scotland. He not only begins the section (27) with the remark that the right of accrescence referred to is not in much use with us, but he also begins the next section (28) thus:—"The law and

customs of Scotland have reduced the matter of testaments and succession in moveables much nearer to natural equity, and made it much shorter and plainer than the Roman law."

I do not mean to suggest that the principle of accretion or *jus accrescendi* has no place in the law of Scotland in any conjunct right. It is to some extent recognised, and although in most of the cases in which it is recognised, authority for it may be found in the Civil law, nevertheless it would be wrong to hold that everything on this subject that has authority in the Civil law has been adopted into the law of Scotland, and especially wrong to hold that the rules of the Civil law applicable to the inability or unwillingness of parties to take at the testator's death are to be implicitly applied in our law to the subsequent succession to parties who have taken.

The passage cited from Bell's Principles, section 1882, also fails to support the contention of the appellants. By the word "survivors" in that passage is meant the legatee who has survived the testator; and, accordingly, the authorities Mr Bell refers to as collected in his illustrations of the passage cited are cases in which one of the legatees had predeceased the testator; and the question was, Whether the share of the legatee so predeceasing accresced to the survivor?

It is a general rule in the law of Scotland that where the right to a fee has vested, it transmits or passes to heirs, unless in the nature of the subject or in the language of the deed which gives the right there is something that requires a departure from that rule. In the case of a legacy or bequest which has vested, the rule applies as strongly as in other cases. The question of the vesting or not vesting of the right of fee pending a liferent is, as I have already observed, a question of intention, to be gathered from the deed. The same observation applies to the question Whether, in a case where the fee is provided to a class, the share of one of the class is, on his death, to accrue to the survivors of the class or to go to his own heirs by law or by will?

In every such question the governing rule is, that the intention of the testator must prevail, in so far as it can be reasonably inferred from the whole clauses of the deed. That such is the rule, appears sufficiently from the two cases to which the appellants have referred, as if they had been decided on some abstract rule of the Civil law. In one of them, *Barber* v. *Findlater*, Lord Jeffrey, who was Lord Ordinary in the case, began his judgment in these words:—"The Lord Ordinary considers this a *questio voluntatis;*" and then he proceeded to examine minutely the clauses of the deed, and to inquire into the presumable intention of the testator. So also in the other case, *Tulloch* v. *Welsh*, Lord Moncreiff, who was Lord Ordinary on that case, said:—"This is rather a nice case. The whole question is on the just and legal construction of the settlement in the clauses constituting and regulating the right of liferent given. There certainly are rules derived from the Civil law which have *some application* to that question, but *the governing rule* is, that the intention of the testator must prevail in so far as that intention is expressed, or can be reasonably ascertained, from the whole clauses of the deed."

These cases were not decided on the authority of the Civil law, though some mention of it was made incidentally. Nor do they otherwise support the contention of the appellants, for they are distinguishable from the present case, not only in the clauses and language of the deeds, but in the nature of the thing that was the subject of contention. In neither of them was there any competition for a right of fee directly involved. In both of them the question was, whether the annual proceeds of a fund were to be wholly paid to the liferenters so long as any of them survived, or whether, upon the death of each liferenter, a portion of the annual proceeds was to be set apart and accumulated till a future period, for the benefit of those who might ultimately become entitled to the fee? The question turned rather on the terms in which the right of liferent was given, than on the terms in which the right of fee was given. In such a question, as to the enjoyment of a temporary interest in the annual proceeds, the intention of the testator may be inferred from elements which would not indicate an intention to depart from the ordinary rule of law, that a right of fee which has once vested transmits or passes to heirs.

The only other case on which the appellants founded in this branch of their argument, was the case of *Burnet* v. *Burnet* (16 Dunlop, 780). That case is in some respects peculiar, and the statement of it in the marginal note cited by the appellants does not quite accurately express the ground of the decision. It was the case of a provision of a sum of money to children payable on majority or marriage. Several of them had attained majority before the death of their father; one afterwards died in minority, unmarried. It was held that, as some had attained majority, the right to the sum of money had vested in the class; but as to the one who died, it was held that, as his right to participate in the fund was contingent on his attaining majority or being married, and as neither of these contingencies had ever occurred, the whole sum was payable to those who did attain majority. That case clearly has no applicability to the present case, which has no such elements in it.

It is therefore necessary, in reference to the plea of accretion, to look for the intention of the testator. In doing so, I assume, for the reasons I have already stated, that he intended the right of the children in the fee to vest, and did not intend that the vesting should be suspended till the death of the liferentrix. That being so, and the general rule being that a fee once vested passes to heirs, unless there be in the deed conferring the fee something that excludes the application of that rule, I look to see if there is anything in this deed indicating an intention to exclude the application of the general rule. It is very easily excluded if such is the intention; and, in the case of a bequest to a class, that is generally done by a clause declaring that, in the event of the death of any of the members of the class before the period of distribution, or before some other event specified, his share should go to the survivors, as is done in this same deed in regard to the testator's nieces, but there is no such clause in regard to his daughter's children. Upon the effect of the contract between these two classes, I take leave to borrow the language of Lord Jeffrey, in the case of *Calder* v. *Dickson* (4 Dunlop, 1368)—"The omission" (he said) from this part of the settlement of any such accrescing clause as will be found in the immediately preceding part of it, affords the strongest possible grounds for concluding that no similar arrangement was intended as to provision now in question." Nor do I find in this deed anything else to lead me to the conclusion that, while the testator intended, as I hold

he did intend, that the right of fee should vest in his daughter's children, he nevertheless intended that the ordinary incidents of a vested right should be excluded: I think that is not to be presumed.

Two other reasons of appeal are stated in the printed case. One of them (the second reason) is involved in what I have already said. The other (the fourth reason) was not insisted on, and does not appear to be well founded.

On the grounds I have stated, I am of opinion that the interlocutors appealed against should be affirmed, and that the clause should be remitted back to the Court of Session.

Lord Chancellor—My Lords, I have had an opportunity of seeing and considering the opinion which has just been delivered by my noble and learned friend. It coincides exactly with the view which I had, independently of it, taken of the whole case; and it expresses that view so fully and so completely, that I feel that I could add nothing useful; I shall therefore content myself with saying that I entirely agree in the opinion which has been expressed by my noble and learned friend, and in the conclusion at which he has arrived—that the interlocutors appealed from should be affirmed.

Lord Cranworth—My Lords, I am exactly in the same position as my noble and learned friend on the woolsack. My view of this case has been stated so fully and so ably by my noble and learned friend opposite, that I will only add, that I rejoice to think that the conclusion at which the Court of Session has arrived in this case with respect to the law of Scotland, as I understand it on the subject of vesting, is precisely similar to what the decision would have been if it had been an English case.

Lord Advocate—Will your Lordships permit me to apply to you to dispose of the costs of the appeal, it was a unanimous judgment.

Lord Colonsay—I presume that the costs should follow the affirmance of the judgment.

Anderson, Q.C.—It is a question of construction.

Interlocutors affirmed, and appeal dismissed, with costs.

Agent for Appellants—Hunter, Blair, & Cowan, W.S., and Loch & Maclaurin, Westminster.

Agent for Respondents—Wm. Miller, S.S.C., Duncan & Lyon, S.S.C., and Adam Burn, Doctors Commons.

JURY TRIALS—JULY SITTINGS.

Monday, July 22.

FIRST DIVISION.

(Before the Lord President.)

MACKENZIE *v.* DRUMMOND.

Reparation—Slander. Verdict for pursuer.

In this case, in which Keith William Stewart MacKenzie of Seaforth, in the county of Ross, was pursuer, and Henry Dundas Drummond of 12 Devonshire Place, Portland Place, London, was defender, the issues were:—

"1. Whether, on the 22d October 1866, within the railway station at Dingwall, the defender, in the presence and hearing of the pursuer, as also of Edward Francis Cash, Adjutant 1st Administrative Battalion of Ross-shire Rifle Volunteers, Archibald M'Lean, M.D., Dingwall, and other persons, or one or more of them, did falsely and calumniously say of and concerning the pursuer that he was a 'damned liar,' or did use words of the like tenor, import, and effect, of and concerning the pursuer, to the loss, injury, and damage of the pursuer?

"2. Whether, on the 22d day of October 1866, within the railway station at Dingwall, the defender, in the presence and hearing of the pursuer, and of Edward Francis Cash, Adjutant 1st A. B. Ross-shire R. V., Archibald M'Lean, M.D., Dingwall, and other persons, or one or more of them, did falsely and calumniously say to the pursuer, 'You are a damned lying thief;' 'You made one statement in London, and another in the north;' or did use words of a like tenor, import, and effect, of and concerning the pursuer, to the loss, injury, and damage of the pursuer?

"3. Whether, on the 22d October 1866, within the railway station at Dingwall, the defender, in the presence and hearing of the pursuer, and of William Paterson, station-master, Dingwall, Edward Francis Cash, Adjutant 1st A. B. of Ross-shire R. V., Archibald M'Lean, M.D., Dingwall, and other persons, or one or more of them, did falsely and calumniously say of and concerning the pursuer that he was a 'scoundrel,' or did use words of the like tenor, import, and effect, of and concerning the pursuer, to the loss, injury, and damage of the pursuer?

"4. Whether, on the 22d day of October 1866, within the railway station at Dingwall, the defender, in the presence and hearing of the pursuer, and of William Paterson, station-master, Edward F. Cash, Adjutant 1st A. B. Ross-shire R. V., and other persons, or one or more of them, did falsely and calumniously say to the pursuer, 'Your word is not worth a damn; and it is a wonder they don't turn such a beggar out of the country;' or did utter words of the like tenor, import, and effect, of and concerning the pursuer, thereby meaning to represent that the pursuer was a liar, and such a dishonourable person that he deserved to be turned out of the country, to the loss, injury, and damage of the pursuer?

Damages laid at £1000.

The pursuer and other witnesses were examined in support of the pursuer's case.

The defender had denied, on record, the alleged slander. In his examination at the trial, he admitted that he had said to the pursuer on the occasion in question, "I wonder they would tolerate such a fellow as you are in the county. Your word is not worth a damn;" and stated that he was still of the same opinion, and that he had uttered the words under great provocation, and when greatly irritated at the conduct of the pursuer, who, he stated, had agreed to give evidence in his favour in a dispute between a Mr Finlayson and the defender, but had ultimately given evidence of precisely the opposite kind.

Mr Innes, solicitor, Inverness, who had acted as agent for the defender in the suit between him and Finlayson, was called as a witness for the defence, and defender's counsel proposed to examine him about what had passed between him and the pursuer relative to the said suit, with the view of impeaching the pursuer's testimony. The pursuer's counsel objected that that matter was not pertinent to the issue.