action was under an engagement to return with the ship to England after she had visited the various ports at which she was chartered to call. He was thus bound to remain by his ship and to discharge his duty as engineer of the donkey engine during her stay at New York.

It appears from the evidence that upon the 22d December he left the ship without leave and spent some days on shore. He took away a part of his clothes, and when he returned to the ship upon the 26th he on leaving removed a further portion of his clothes.

At the time when the vessel sailed he was in prison, having been apprehended on a charge of assault at the instance of one of the seamen named Reid.

About the pursuer's absence from the ship there can be no doubt, but was it desertion to the effect of forfeiting any claim which he might have for wages, or was it merely a case of a sailor leaving his ship without permission?

The case is a narrow one, but on the whole I do not think the pursuer intended to desert, nor did the captain apparently treat him as a deserter. Neither upon the 22d nor upon the 26th did the captain enter him in the log-book as a deserter, although upon both these occasions he was absent from the ship.

It was not until the 29th, at which time he undoubtedly was in prison and unable to return to the ship, that the entry was made. In these circumstances there has been here a failure, I think, to prove desertion, especially as it has not been shown that the pursuer took all his clothes with him. On the contrary, part of his present demand is for clothes of his alleged by him to be in the ship at the time she sailed from New York while he was in jail.

I therefore agree with your Lordships that we should affirm the judgment appealed against.

Lord Fraser—The Sheriff-Substitute in his note says that in his opinion the pursuer did desert his ship, but that the defender condoned that desertion. All that I desire to say is that I do not think there is any evidence of condonation, but I agree with your Lordships in thinking that desertion has not been proved.

The Lord President and Lord Deas were absent.

The Court affirmed the interlocutor appealed against.

Counsel for Pursuer and Respondent—Rhind—Watt. Agents—Gunn & Fodd, S.S.C.

Counsel for Defender and Appellant—Pearson—Boyd. Agent—J. Smith Clark, S.S.C.

Saturday, December 6.

SECOND DIVISION.

WATERS' TRUSTEES *v.* WATERS.

Succession — Vesting — Destination-Over — Survivorship.

A truster directed his trustees to hold the residue of his estate equally for his children, and to apply the income (subject to an annuity to their mother) equally among them for their maintenance and education till they respectively reached the age of twenty-five, at which date they were to receive payment of their shares, the shares of daughters to be alimentary and exclusive of the rights of husbands, and the issue of a predeceasing child to be entitled to the share which would have fallen to their parent at the term of payment had he or she then survived. *Held* that the shares vested a *morte testatoris*, and therefore that the share of one child who died intestate and without issue under twenty-five passed to his legal representatives.

James Coltart Waters died at Craigton House, Stirlingshire, on 11th September 1867, leaving a trust-disposition and settlement dated 30th April 1862. He was survived by a widow and three children, Alexander William Dun Waters, Grace G. Waters, and James C. Waters, the eldest of whom had been born in 1863.

By his settlement Mr Waters conveyed his whole estate, heritable and moveable, to trustees for the purposes, in the first place, of payment of his debts and the expenses of the trust; and in the second place, for satisfaction and implement of the provisions in favour of his wife contained in his antenuptial contract of marriage. The third purpose of the trust was in the following terms—"Third, I direct my said trustees, after satisfying the first purpose of this trust, to hold and divide the whole residue of my estate, heritable and moveable, equally for and among any child or children who may be lawfully procreated of my body, and after paying equally from the yearly income of said shares the annuity which may be payable to my widow, to apply the remaining income, or such part thereof as my said trustees may think expedient, towards the maintenance and education of said child or children, and for their use until they respectively attain the age of twenty-five years complete, at which dates I direct my trustees to pay and make over their respective shares so far as not required for payment of said annuity, and upon the death of my widow to pay and make over on their respectively attaining twenty-five years their shares of the investments which may have been retained to meet said annuity: Declaring that the shares of any daughters I may leave, and the interest or produce thereof until they attain the age of twenty-five years, shall be paid to them for their own alimentary use, exclusive of the *jus mariti* and right of administration of any husbands they may marry, and shall not be assignable by them or subject to their debts or deeds, or to the diligence of creditors; and that the issue of any child predeceasing shall be entitled equally among them to the share of my said estate that would have fallen to the predeceasing parent at the term

of payment before mentioned had he or she then survived; and I declare the above provisions in favour of children to be in full of all they could claim as legal provisions in consequence of my death; and in the event of my dying without leaving lawful issue, and having left no settlement or directions of later date, I direct my trustees to divide the residue of my estate, and to make over and pay the same in equal shares to and among my nearest of kin."

Alexander William Dun Waters, the eldest child, died on 22d March 1884, unmarried and intestate. He had been born on April 1863, and thus was not quite twenty-one when he died.

The question then arose whether the one-third of the residue of his father's estate, to payment of which (subject to the widow's annuity) he would have become entitled on attaining twenty-five, had vested in him. This Case was then adjusted. The question was—"Had one-third of the residue of the trust-estate vested in Alexander William Dun Waters at the date of his death?"

The first parties were the trustees under the will of Mr Waters and Grace and James Waters (with their curators). The second party was the widow. The first parties maintained that no part of the trust-estate had vested in A. W. D. Waters, their ground being that the clause in the third purpose conferring a right on the issue of predeceasing children constituted a gift over, and indicated an intention that there should be no vesting until the term of payment. The second party maintained that a right to one-third of the trust-estate vested in each of the testator's children at his death, subject only to the condition that in the event of a child dying leaving issue the share of such child should belong to such issue.

Argued for the first parties—It was no doubt settled that, where payment was postponed merely for the sake of a liferent, vesting took place *a morte testatoris*, but that was not the present case. Here payment was postponed for a special reason personal to the legatee, namely, his reaching the age of twenty-five, and this might never happen. *Dies incertus pro conditione habetur.* This was a condition which might never be purified; therefore vesting was postponed. Further, the destination-over to issue of children showed an intention that the child should take no vested right till the term of payment.

Authorities—*Lang* v. *Barclay*, July 20, 1865, 3 Macph. 1143; *Maxwell* v. *Wylie*, May 25, 1837, 15 S. 1005; *Jackson* v. *M'Millan*, March 18, 1876, 3 R. 627; *Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709.

Argued for the second party—The general presumption in the circumstances of the case was for vesting *a morte testatoris*, and this the first parties' agreement failed to displace. Recent decisions had shown a tendency in the Court to favour vesting *a morte testatoris* in (1) residuary bequests (2) in case of bequests to children, and more particularly when to immediate children, and these were the circumstances of this case. There was no *dies incertus* here, for if the child survived it must occur—as certainly as death in the case of postponement of payment in favour of a liferent. The contention of the first parties would create intestacy with regard to one-half of the residue. This was not to be presumed, and could only take place when clearly shown to have been the intention of the testator. The destination-over did not affect the right given to the immediate legatee.

Authorities—*Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H. of L.) 217; *Mackintosh* v. *Wood*, July 5, 1872, 10 Macph. 933; *Jackson* v. *M'Millan* (*supra cit.*); M'Laren on Wills, ii. 18.

At advising—

Lord Justice-Clerk—The question which arises in this case is the question which so often comes up in settlements of this kind, as to whether certain provisions vest *a morte testatoris*, or whether the period of vesting is postponed to a later date. This question has generally arisen under two sets of circumstances where there is a postponed period of payment. The one case is where the payment is postponed for the benefit of a liferent interest, so that although there is no doubt as to who the party is to whom payment is to be made in the end, there is a doubt as to when the fund will be set free for distribution. The other case arises where the day of payment is postponed for some purpose connected with the trust which is personal to the legatee himself. The distinction is quite reasonable, and it is now conclusively settled that where payment is delayed till determination of a liferent, vesting is not suspended. As the best expression of my general opinion on this matter, I shall read some sentences from the opinion of Lord Blackburn in the case of *Taylor* v. *Gilbert's Trustees* (5 R., H. of L., 217), following Lord Colonsay in the case of *Carlton* v. *Thomson* (5 Macph., H. of L., 151)—"It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once, which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event, but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that a testator intends the gift he gives to be vested subject to being divested, rather than to remain in suspense. As there is no more than a presumption of his intention, it must yield to anything in the testamentary deed which shows a contrary intention." That is substantially what Lord Colonsay laid down in *Carlton* v. *Thomson*, and it was followed in *Gilbert's Trustees*, and may now be regarded as fixed law—that is to say, in the first place, the presumption is that such provisions vest *a morte testatoris*, unless there is something in the deed which directs or implies the contrary; and in the second place, where the delay is for the benefit of persons entitled to liferent interests burdening the subject of the provision, the presumption will not be removed by the mere postponement of the period till the determination of the life interest.

Now, this case to a certain extent raises the other view. There is here a postponement of the period of payment, arising from a regard to the circumstances of the legatee himself. But I have come to be of opinion quite clearly that the general rule or presumption in favour of vesting *a morte testatoris* is not displaced by this postponement of the period of payment, and that upon this one ground, which appears to me quite sufficient, namely, that the trustees are

directed from the first to hold a specific ascertained fund for behoof of the legatees, which is consequently to be set apart for them. The provisions of the deed are, first, the payment of debts; secondly, fulfilment of the provisions in favour of his wife in his marriage-contract; and thirdly—(*His Lordship here read the third purpose of the deed above quoted, down to the words,* "to meet said annuity.") Now, it is to be observed that there here occurs the exact element which Lord Cowan desiderated in *Laing* v. *Barclay*, namely, a special provision or interest in favour of the children from the beginning, although there is a postponement of the term of payment of the whole provision until the child should attain the age of twenty-five. The trustees from the first are not only to hold the fund, but to divide it into special shares, and these are to be held for the legatees, each share belonging separately to each. And this is confirmed by the provision in regard to the daughters —"declaring that the shares of any daughters I may leave, and the interest or produce thereof until they attain the age of twenty-five years, shall be paid to them for their own aliment or use, exclusive of the *jus mariti* or right of administration of any husbands they may marry, and shall not be assignable by them or subject to their debts or deeds, or to the diligence of creditors." Here the income of their shares is to be paid over to the daughters in whole, and the trustees are to have no discretion to withhold any part of it. The only thing which can be said against this view is the existence of the destination-over to the issue of a predeceasing child "had he or she then survived." But that is not a limitation of the legatee's right, but a continuation to his issue of the benefit conferred on him. I do not think that may limit the right which the testator had already given, and on these grounds I think these provisions vested *a morte testatoris*.

Lord Craighill—I think that the residue of this joint-estate vested in the residuary legatees *a morte testatoris*, and that this should be the judgment of the Court. My reasons for this opinion are—(1) That the leading direction of the truster to his trustees is, that on satisfying the first purpose of the trust they are to hold and divide the whole residue of his estate, heritable and moveable, equally for and among any child or children who might be lawfully procreate of his body. There is no reason why there should be this division at that stage of the trust-administration, unless each child was from the first to be owner of the share falling to him or her, according to the prescribed division. Of course this is not decisive, for there might be qualifying words or provisions by which the truster plainly indicated that vesting was to be postponed; but such, I think, are not to be found in this trust-deed. No doubt there is a clause, to which I shall refer more particularly by-and-bye, that might be so interpreted, but this is not a necessary interpretation, and for that reason, as well as upon general considerations, the clause ought not to be so construed. (2) The children are to draw income, and what they are to have is not an allowance from a part of an undivided succession, but the interest or income of the parts which have been appropriated severally to them upon division. (3) There is no direction to accumulate the income which would be set free by the death of a child before the term of payment of the capital. Nor is there bequeathed to survivors a predeceaser's share either of interest or of capital. These omissions, to say the least, are more consonant with the intention that there should be immediate vesting than with the opposite interpretation, which in reality would be a provision for partial or for general intestacy, as regards the residue of the estate. (4) The clause by which the truster directs that the "issue of any child predeceasing shall be entitled equally among them to the share of my said estate that would have fallen to the predeceasing parent at the term of payment before mentioned, had he or she survived," may at first sight present a difficulty, and if the clause could be read only in the way in which it is read by the first parties, the difficulty would probably be insuperable. But I think there is another meaning of which the clause is susceptible, whereby all parts of the truster's directions are brought into harmony. The clause may, and as I think ought, to be read as applicable not to the issue of children who have survived, but to the issue of those, if such there were, who died before the truster. This construction, which just as much as the other is warranted by the words of the clause, is recommended by considerations which cannot be urged for the other interpretation. It favours vesting *a morte testatoris*, which presumably was intended. It prevents an intestacy which otherwise is not excluded, and it reconciles provisions which on the other construction can hardly be harmonised.

Decisions generally quoted on such cases as the present were cited on both sides of the bar, but all I say as to these is, that none of them conflicts with the result to which I have been brought, independently of authority, by the language and the provisions of the truster's settlement.

For these reasons I think the question presented to us for opinion and judgment should be answered in the affirmative.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Young was absent.

The Court answered the question in the affirmative.

Counsel for the First Parties—Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second Party—Mackintosh—Pearson. Agents—Mill & Bonar, W.S.