a destination-over. (1) As regards the legacy it was left to Archibald Craig "and the heirs of his body," which was not the more usual expression "to heirs and assignees." (2) As regards the residue, there was the expression "including in the division the lawful children of any of them who may have predeceased as representing their parent or parents *per stirpes*." The provision against alienation in the deed was sufficient also to overcome the presumption in favour of immediate vesting.

Counsel for the pursuer was not called upon.

At advising—

Lord Justice-Clerk—I am of opinion that the Lord Ordinary is right here in the view he takes of the vesting so far as the particular legacy is concerned. As I understand, the only ground on which it is contended that the legacy did not vest *a morte testatoris* is that the term of payment was postponed, and the same contention is advanced against the vesting of the residue. I am of opinion that the postponement of the term of payment here arises from the anxiety of the testator to make certain that there would be funds enough to meet the legacies which he left, and therefore it did not interfere with the right of the legatee. In that case the presumption of law is that vesting takes place *a morte testatoris* and there is nothing to displace it. As regards the legacy, part of it was paid and, that before the expiration of the term. As regards the residue that was not the case, but even if it had been I think I should have held the postponement as one for the sake of convenience, and as not interfering with the general rule of law that vesting takes place *a morte testatoris*. I have nothing to add to the views of the law which have been most distinctly expressed by the Lord Ordinary.

The Court adhered, and remitted the cause to the Lord Ordinary for further procedure.

Counsel for Pursuer—D.-F. Mackintosh, Q.C. —Graham Murray. Agents—Macbrair & Keith, S.S.C.

Counsel for Defenders—R. Johnstone—Wallace—Dickson. Agents—Bruce & Kerr, W.S.

Friday, June 4.

FIRST DIVISION.

MACFARLANE, PETITIONER.

Election Law—Parliamentary Election—Corrupt and Illegal Practices Prevention Act 1883 (46 *and* 47 *Vict. cap.* 51)—*Expenses—Limitation—Application for Leave to Pay Additional Expenses.*

In an application by a person who had been a candidate at a Parliamentary election for leave to pay certain accounts rendered after the time required by the Corrupt and Illegal Practices at Elections Act 1883, the Court, in respect that the amount of the account was small and that no prolonged inquiry was necessary, *remitted* the accounts to the Auditor.

Observed that the remit was so made only in the special circumstances, and that the case could not be regarded as a precedent.

This was an application under sub-sections 9 and 10 of section 29 of the Corrupt and Illegal Practices Prevention Act 1883 (46 and 47 Vict. cap. 51), by a member of Parliament for leave to pay additional accounts incurred in connection with his election.

The petitioner stated that he was a candidate for the county of Argyll at the election which took place in December 1885, and that he had made the necessary returns of his election expenses on 6th January 1886, but that since that date he had received notice of further claims for election and personal expenses, amounting the former to £23, 4s. 6d., and the latter to £122, 16s. 7d.

He referred to section 29 of the above-mentioned statute, which by sub-section 2 provided that all claims against candidates which are not sent in within the time limited by the Act are to be barred.

The time within which claims are to be sent in is by sub-section 3 limited to fourteen days after the declaration of the poll.

Sub-section 4 provides that all election expenses are to be paid within the time limited by the Act, and any payment made in contravention of this provision is, with certain exceptions, declared an illegal practice, while twenty-eight days after the election is by sub-section 5 fixed as the time within which all expenses incurred must be paid.

Sub-sections 9 and 10, upon which this application was founded, provided as follows:—(Sub-section 9) "On cause being shown to the satisfaction of the . . . Court, such Court, on application by . . . the candidate . . . may by order give leave for payment by a candidate . . . of a claim for any such expenses as aforesaid, although sent in after the time in this section mentioned for sending in claims." . . . (Sub-section 10) "Any sum specified in the order of leave may be paid by the candidate, . . . and when paid in pursuance of such leave shall be deemed to be paid within the time limited by this Act."

The petitioner prayed for leave to pay the above-mentioned accounts.

The Court, in respect of the accounts not being for large sums, remitted the accounts to the Auditor, observing that the procedure followed in this application was not to be regarded as a precedent, and that had the amount been larger and any special inquiry been necessary another mode of inquiry would have been ordered.

Counsel for Petitioner—Rankine. Agents—Mylne & Campbell, W.S.

Friday, June 4.

FIRST DIVISION.

[Lord Lee, Ordinary.

STEVENSON *v.* LEE.

Process—Expenses—Caution—Trust-Deed.

Circumstance in which *held* that the defender of an action who had granted a trust-deed for behoof of his creditor was bound to find caution for expenses.

This was an action at the instance of Thomas Stevenson, builder and joiner, Edinburgh, against J. B. W. Lee, S.S.C. for payment of (first) the sum of £324, 0s. 10d. for work alleged to have been done and goods supplied on the employment of the defender; (second) the sum of £15 as remuneration for managing certain properties of the defender; and (third) the sum of £40 for outlays and trouble following on an alleged agreement between the pursuer and the defender in regard to subjects in the Lawnmarket. The summons also concluded for declarator that certain subjects in Tay Street, North Merchiston, Edinburgh, had been conveyed by the pursuer to the defender in security only of sums advanced or paid by him as cautioner for the payment of a composition offered by the pursuer under the sequestration of his estate, and that the defender was bound to convey the subjects to the pursuer on receiving payment of the balance due on the accounts between them. There were also conclusions for accounting.

The defender's pleas were as follow—"(1) *Nihil debit.* (2) The pursuer not having duly performed in a tradesmanlike manner, or completed, the work he undertook to perform for the defender, is not entitled to the contract price. (3) There was no agreement binding on the defender to feu to the pursuer the Lawnmarket ground, and the pursuer gave up any fancied right to the feu. (4) The subjects in Tay Street having been purchased by the defender at the advertised upset price, which was a full one, and the pursuer having consented to the disposition, he is now precluded from challenging it, except by reference to the defender's writ or oath. (5) Compensation."

The Lord Ordinary (LEE) on 3d February 1886 pronounced this interlocutor:—"On the motion of the pursuer, and in respect that it is not disputed that the defender since the closing of the record has executed a trust-deed divesting himself of his whole estates for behoof of creditors, appoints the defender to find caution for the expenses of process, and that within fourteen days from this date: Meantime adjourns the diet of proof to a day to be afterwards fixed; and, on the defender's motion and no objections being stated, grants leave to reclaim against this interlocutor.

"*Note.*—Although this case does not fall under the rule requiring that a pursuer, being a sequestrated bankrupt, must find caution for expenses, I think that it is a question for the discretion of the Court whether the circumstances do not entitle the pursuer to demand that the defender be ordained to find caution as a condition of going on with the defence. That defence is a special one, and imposes a considerable *onus* on the defender. But he has voluntarily, and pending the litigation, dispossessed himself of his whole means and estates. I think that the pursuer's motion is reasonable, and should be granted."

The defender reclaimed, and argued—The circumstances were not such as to justify an order on the defender to find caution—*Taylor* v. *Rothwell and Others*, March 1, 1833, 6 W. and S. 301; *Stephen* v. *Skinner*, May 31, 1860, 22 D. 1122; *M'Alister* v. *Swinburne*, November 7, 1873, 1 R. 166.

Pursuer's authorities—*Grieve* v. *Cunningham*, December 17, 1869, 8 Macph. 317; *Miller* v. *M'Intosh*, March 18, 1884, 11 R. 729; Goudy on Bankruptcy, 355.

The trustee did not sist himself as a party.

The Court, after the argument, ordered a statement to be lodged showing the position of the defender's affairs. A joint-minute was accordingly lodged which set forth the following facts:—"By the said trust-deed the defender assigned, disponed, conveyed, and made over to and in favour of William Alexander Wood, chartered accountant, Edinburgh, whom failing such other person or persons as should be appointed in manner mentioned in the deed, as trustee for behoof of the defender's whole lawful creditors at the date thereof who should accede thereto, or be assumed into the benefit of the trust, and to the assignees of the said trustee or trustees, all and sundry his whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind or wherever situated, then belonging or which might belong or accrue to him during the subsistence of the trust, with the whole writs, titles, and instructions thereof, and all that had followed or could competently follow thereon.

"The trust purposes are, generally, for distribution of the defender's estate among his creditors on the same footing as if an award of sequestration had been made under the Bankruptcy Statutes.

"The deed contains the following special provision—'Further, in the event of any of my creditors delaying or refusing to accede to this trust, or taking separate measures, or pursuing diligence against me, or in the event of any other circumstances arising which shall render the step expedient in the judgment of the trustee, it shall be in the power of the trustee or trustees acting for the time to apply for sequestration under the Bankruptcy Acts on my behalf, and in such event or events I hereby constitute and appoint such trustee or trustees my mandatories for that purpose.'

"The secured creditors of the defender have either intimated their accession to the trust-deed or are in possession of the subjects granted in security under actions of maills and duties. About half of the unsecured creditors have acceded, but the remainder have not, and one creditor, whose claim amounts to £400, refuses to accede, but has done no diligence against the estate. One or two other unsecured creditors of small amount also refuse to accede.

"(2) *Accession by Pursuer to Defender's Trust-Deed.*

"The pursuer accedes to the said trust-deed. His only claim is that sued for in the present action.

"(3) *Possession and Administration of the Defender's Estate by the Trustee.*

"The trustee has entered upon the possession and management of the defender's estates, heritable and moveable. He has sold and realised for behoof of the creditors the defender's moveable estate, and has drawn rents of the heritage.

"Further, he has completed a title by infeftment in the heritable subjects in Tay Street, Edinburgh, the ownership of which is claimed by the pursuer in this action. He has not completed a title to any other heritable subject.

"The trustee has sisted himself as pursuer in

one action pending at the instance of the truster (the present defender)."

At advising—

LORD PRESIDENT—We have now got in the form of a joint-minute the information with regard to the state of Mr Lee's affairs, and an account of what has been done under the trust-deed.

The deed is, generally speaking, for the distribution of the defender's estates as if they had been sequestrated, and there is also a special provision by which a mandate is granted to the trustee to apply for sequestration if that should be necessary in the execution of the trust. The import of all this is clearly to indicate that Mr Lee is in embarrassed circumstances, and that he is practically insolvent. It appears that one-half of the unsecured creditors have acceded to the trust-deed, and that the other half have taken no separate measures. The secured creditors have either intimated their accession to the trust-deed, or else are in possession of the security subjects. The pursuer has acceded to the trust-deed, and the only claim he has is that for which he sues in the present action. The trustee has completed a title to the heritable subject in dispute, and in these circumstances I do not quite understand the position the trustee has taken up. But we have nothing to do with that. The question with which we are concerned is whether the defender is to be allowed to defend this action without finding caution. In the circumstances I am of opinion that he cannot be allowed to defend without finding caution.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court adhered, and ordained the defender to find caution within seven days. There was also leave given to the trustee to sist himself within the same period.

Counsel for Pursuer (Respondent)—Strachan. Maclennan. Agent—A. Rodan Hogg, Solicitor.

Counsel for Defender (Reclaimer)—Gardner. Agent—J. B. W. Lee, S.S.C.

Friday, June 4.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MITCHELL *v.* CALEDONIAN PROPERTY INVESTMENT BUILDING SOCIETY.

Building Society—Unadvanced Member—Withdrawal—Effect of Withdrawal.

Held, on a construction of the rules of a building society, that a shareholder whose notice of withdrawal had expired, continued a member until his connection with the society was terminated by his being paid out.

Building Society—Clause of Arbitration.

The rules of a building society provided that "Any shareholder or any person claiming by or through any shareholder . . . . feeling aggrieved by any decision of the directors or shareholders, of whatever nature such may be, shall appeal to a board of arbitrators." . . . *Held* that a member who had given notice of withdrawal, but had not received payment of the value of his shares, was still a shareholder in the sense of the rule above quoted, and a plea by the society that the dispute between it and the shareholder, as to whether he could be paid out in ordinary course, was one which fell under the clause of arbitration, *sustained*.

William Mitchell, Ferry Road, Dundee, was the holder of twenty-four fully paid-up C shares of £25 each of "The Caledonian Property Investment Building Society," which carried on its business in Dundee. In February 1879 Mitchell desired to withdraw his shares, and he accordingly gave notice of his intention as required by rule 11, which provided—"Any member holding unadvanced shares may withdraw from the Society on the expiry of three months from the date when he shall have given notice to the manager in writing of his intention to withdraw, and shall be entitled to receive the amount standing at his credit in the books of the Society as at the immediately preceding annual balance; but if the money in hand shall at any time be insufficient to pay all the members wishing to withdraw, they shall be paid in rotation, according to the priority of their notices."

The Society, through its officers, made answer that they had not funds in hand sufficient to meet the sum demanded. They paid him interest on the amount down to July 1881.

In September 1885 Mitchell raised the present action against the Society concluding for payment of £600.

He averred that in May 1879, when his notice of withdrawal expired, the Society had sufficient funds to have paid him out in full.

The defenders averred that prior to February 1879 a number of shareholders had intimated their intention to withdraw, and that at the time the pursuer's intimation expired there was no money on hand to pay him out. Further, that the Society having met with losses the directors had been obliged to offer either (1) payment at 15s. per £1 after voting off the loss, or that a withdrawing shareholder should wait some time for his money, and that they had offered the pursuer £400, the amount at his credit after deducting the loss, together with interest, which offer the pursuer declined. They stated that the dispute fell under the arbitration clause in rule 29—"Any shareholder, or any person claiming by or through any shareholder, *or under the rules*, or any office-bearer feeling aggrieved by any decision of the directors or shareholders, of whatever nature such may be, shall appeal to a board of arbitrators to be appointed by the shareholders at the annual meeting of the Society. The board shall consist of twelve arbitrators not immediately interested, three of whom shall be balloted for in each case of dispute."

The words in italics, "or under the rules," were maintained by the pursuer to have been inserted without authority.

The pursuer, *inter alia*, pleaded that having given the notice required by the laws of the Society he was entitled to be paid the £600 standing at his credit, with interest; and further, that by the notice of withdrawal he became a creditor of the Society.