estate directed to be dealt with in this way. If he attempts to keep up a fee by a series of destinations-over as here, these become mere substitutions which may easily be evacuated. Such an effect might perhaps have been operated in this case by requiring each daughter receiving her original share to divest herself of the fund after her death without children, had the truster directed this to be done. For example, if there had been a direction that each daughter should bind herself as a condition of receiving the fund to pay it over to her sisters at her death without issue, that would have been effectual, and indeed would have excluded the contention that a fee was given to each daughter in her own share. But in that case there would be a distinction, as the rights of parties would have rested on obligation and not merely on destination. The peculiarity of the present case is that the destinations have reference to a fund which has been parted with and is no longer in the hands of the trustees, and that the destinations practically give the fee to each daughter in whose name the securities are taken.

I think the case of *Buchanan's Trustees* v. *Dalziel's Trustees*, reported in 6 Macph. 536, has a material bearing on the question before us. It was there provided that a fund should be parted with as here, the executor, George Craig Buchanan, being directed to pay £4000 to Jane Craig, the daughter of the testatrix, "but declaring that if the said Jane Craig shall die without lawful issue, then the half of the said sum of £4000 shall return to and belong to the said George Craig Buchanan and his foresaids, but it shall be in the power of the said Jane Craig to dispose of the other half of said sum in any way she shall think proper." Jane Craig having died without issue, £2000 was claimed from her executors by the trustees of George Craig Buchanan, but the Court held that the destination was one which the person receiving payment of the money was entitled to evacuate, and did evacuate by merely having obtained payment of the money from the trustees. There was no necessity for a deed evacuating the destination, because there was in that case no destination to be inserted in the deeds of transfer as here. The Lord President said—"If a legacy is to go to a third person in the event of the legatee dying without issue, that is simply a substitution." Lord Curriehill and Lord Deas expressed the same views. And so on the grounds I have stated, and agreeing in the opinion expressed by Lord Adam, I think that the main question presented in the case should be answered as he proposed.

LORD M'LAREN and the LORD PRESIDENT concurred.

The Court pronounced this interlocutor:—

"Find and declare with reference to the first question, that the fee of the legacies of £500 each, bequeathed by the truster to Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan, vested in them respectively *a morte testatoris*, subject only to defeasance in the event of their having issue: . . . Further, find and declare, with reference to the third question, that the fee of the shares of the residue effeiring to Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan vested in them respectively *a morte testatoris* subject only to defeasance in the event of their having issue."

Counsel for the First and Second Parties—H. Johnston—Sym. Agent—George Bruce, W.S.

Counsel for the Third Parties—Low—Gillespie. Agents—J. & A. Forman & Thomson, W.S.

Counsel for the Fourth Party—Lorimer—Wallace. Agent—Hector F. M'Lean, W.S.

Counsel for the Fifth Parties—Dundas. Agents—J. S. & J. W. Fraser Tytler, W.S.

Saturday, February 8.

SECOND DIVISION.

FYFE'S TRUSTEES AND OTHERS.

Succession—Direction to "Divide and Apportion" Whole Estate amongst Children upon Majority of Youngest Child—Postponed Vesting.

A person directed his trustees "to divide and apportion the free revenue of the whole of my . . . estate . . . among the whole of the children" of the marriage in certain proportions, and "out of the share falling to each of them to defray the expense of his or her maintenance, clothing, and education," and upon their reaching majority "to pay over the shares falling to each of them directly . . . and that aye and until the division of my said means and estate as hereinafter provided." He thereafter directed his trustees, upon the majority of his youngest child, "to divide and apportion the whole of my means and estate . . . amongst the whole of the children" of the marriage in the same proportions as the revenue had been divided, "declaring that the lawful child or children of any of my said children deceasing shall have right to the share which would have fallen to the parent equally as if the parent had survived, but if there shall be no such issue, then the share of the party so deceasing shall be divided equally among his or her surviving brothers and sisters." *Held* (*diss.* Lord Lee) that vesting was postponed until the majority of the youngest child, when the estate fell to be divided.

The late John Fyfe of Kingston, Forfarshire, died upon 13th May 1885 leaving a trust-disposition and settlement dated 2nd December 1857. He was survived by a widow and five children. His eldest child William Fyfe died upon 8th December 1887,

aged 34, without issue, but survived by a widow, in whose favour he had executed a disposition and settlement conveying to her absolutely his whole means and estate, and appointing her his sole executor. His youngest child Elizabeth Barry Fyfe was born upon 10th March 1869, and will attain majority upon 10th March 1890. By his said trust-disposition and settlement the said John Fyfe conveyed all his estate heritable and moveable to trustees.

The said deed contained, *inter alia*, the following clauses:—"(Third) I direct and appoint my said trustees, within twelve months after my son William shall have attained the age of twenty-one years complete (in the event of his attaining such age), to require him to declare whether he will accept the lands and estate of Kingston, as also any other lands and heritable property belonging to me which may not have been sold by my said trustees, under the powers herein contained, at a valuation: . . . . Providing always that before a conveyance is granted of the said lands and estate of Kingston, or any other part of my said heritable subjects, security to the satisfaction of my said trustees shall be found for the payment of the value thereof, within such time as shall be fixed on by my said trustees, otherwise the right secured in favour of my said son William shall, in their option, cease and determine, and they shall have power to dispose of the whole of the said subjects and others as hereinafter provided, without any warning or other procedure, legal or otherwise; and in the event of my said son William dying before reaching twenty-one years of age, I direct and appoint that the haill of the foregoing provisions as to the taking of the said lands and others shall equally apply to my second son on his attaining twenty-one years, and failing him by death before reaching that age then to the next surviving son, but with and under the conditions, provisions, and qualifications before set forth, my wish and intention being that my oldest surviving son for the time on reaching majority shall have the option of acquiring my lands and estate of Kingston and others upon the terms and conditions and with the qualifications before expressed: . . . . (Fourth), I direct and appoint my said trustees to divide and apportion the free revenue of the whole of my said means and estate, both heritable and moveable, after meeting all necessary outgoings, among the whole of the children born or to be born of the marriage between me and the said Mrs Betsy Barry or Fyfe, in such proportions that each son may receive an equal portion, but as much again as each daughter, and so that each daughter may receive an equal portion but only one-half as much as each son; and out of the share falling to each of them to defray the expense of his or her maintenance, clothing, and education, and that aye and until they each respectively reach the age of twenty-one or being daughters be married: And so soon as they shall reach that age, or being daughters be married, then I appoint my said trustees to pay over the shares falling to each of them directly and upon their own receipt only, and that aye and until the division of my said means and estate as hereinafter provided: . . . . (Fifth), So soon as the youngest child born or to be born of the marriage between me and the said Mrs Betsy Barry or Fyfe shall attain the age of twenty-one years complete, then I direct and appoint my said trustees to divide and apportion the whole of my means and estate of every description (including the value of such lands and others as may be taken over at a valuation as before mentioned, or otherwise the proceeds of the said lands and others if the same shall be sold) amongst the whole of the children born or to be born of the marriage between me and the said Mrs Betsy Barry or Fyfe, in the same proportions as is directed in regard to the revenue of my estate, viz., so that each son may receive the like portion but as much again as each daughter, and so that each daughter may receive the like portion, but only one-half as much as each son: Declaring that the lawful child or children of any of my said children deceasing shall have right to the share which would have fallen to the parent equally as if the parent had survived, but if there shall be no such issue, then the share of the party so deceasing shall be divided equally among his or her surviving brothers and sisters: Declaring, farther, that if it shall appear to my said trustees necessary and expedient to advance to any of my children a sum or sums of money to forward them in a profession or otherwise prior to the said period appointed for division, then I authorise and empower my said trustees to advance to them from time to time such sum or sums of money to account of his, her, or their shares, as my said trustees shall deem to be necessary (but of the necessity of which they are to be the sole judges): And I do hereby expressly declare that the shares falling to any of my said daughters, or any sum arising to them as under these presents, shall only be liferented by each of them until they shall attain thirty-five years of age, respectively, and in the event of any of them being married before attaining that age, the share or fund payable to such of them as shall be so married shall be secured beyond the control of any husband."

Doubts having arisen as to the date at which, looking to these provisions, vesting took place under the said trust-disposition and settlement, a special case was presented to the Court of Session by (1) John Fyfe's trustees, (2) his four surviving children, (3) his deceased son William's widow, to have the following question of law determined, viz.—"Had the interest of the said William Fyfe in the trust-estate vested in him at the date of his death so as to transmit to the party of the third part in virtue of his disposition and settlement?"

The parties of the second part maintained that, except so far as advances might have been made, no right or interest under the trust-disposition and settlement in the fee or capital of the trust-estate had vested or

would vest in the children of the testator until the period of distribution mentioned in the settlement, viz., when the youngest child of the truster should have attained 21 years complete, and that the said William Fyfe having predeceased the period of distribution without issue the share destined to him fell to be paid equally to his surviving brothers and sisters in terms of the clause of survivorship contained in the settlement; and argued—This was a clear case of postponed vesting until the youngest child came of age. There were no words of direct gift here, but a definite date was fixed for dividing and apportioning the estate, viz., the majority of the youngest child. The declaration as to the issue of children "deceasing" meant deceasing before the period for division had arrived. Similarly, "surviving" did not mean surviving the truster, but surviving the period of division—*Young* v. *Robertson*, 1862, 4 Macq. 314, *per* Lord Chancellor Westbury.

The parties of the third part maintained that the fee or capital of the trust-estate vested in the children of the truster, including the said William Fyfe, *a morte testatoris*, and that she, as general disponee of the said William Fyfe, had right to the share destined to him (so far as not already advanced) with the accumulations effeiring thereto; and argued—There was no ground for taking this case out of the ordinary rule of vesting *a morte testatoris*. The declaration as to "deceasing" and "surviving" had reference to the truster's death. There was here only suspension of payment, not of vesting. The revenue of the estate was to be allocated among the children in certain proportions, and it was "out of the share falling to each of them" that they were to be maintained, clothed, and educated. That implied that each child's share became vested in him or her at their father's death although the capital was not to be paid over until the youngest child had attained majority—*Muir's Trustees*, October 23, 1869, 8 Macph. 53; *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697; *Waters' Trustees* v. *Waters*, December 6, 1884, 12 R. 253; *Byar's Trustees* v. *Hay*, July 19, 1887, 14 R. 1034.

At advising—

Lord Rutherfurd Clark—Were it not that I know that there is a difference of opinion amongst us I should have thought this to be a typical case of postponed vesting.

There is no bequest of the capital until the youngest child of the testator attains majority. On the occurrence of that event, but not till then, the trustees are directed to divide and apportion the whole estate "amongst the whole of the children born or to be born of the marriage between me and the said Mrs Betsy Barry or Fyfe," in certain specified shares, "declaring that the lawful child or children of any of my said children deceasing shall have right to the share which would have fallen to the parent equally as if the parent had survived, but if there shall be no such issue, then the share of the party so deceasing shall be divided equally among his or her surviving brothers and sisters."

The bequest is thus postponed till the youngest child attains majority. It is to the whole children with a conditional institution of the issue of deceasers, and a destination-over in favour of survivors. In such a case I am of opinion that the shares do not vest until the period of distribution. It seems to me that no other interpretation is consistent with the natural meaning of the language or in accordance with settled canons of construction.

The question turns on the meaning which is to be given to words "deceasing" and "survivors." If it be true that they are to be referred to the period of division, it is conceded that there is no vesting till the occurrence of that event. To what period are these words "deceasing" and "survivors" to be referred. Plainly, in my opinion, to the only period which is mentioned in the clause in which they occur, which to my mind is the only admissible construction, grammatical or legal. I refer them to the period of division with which they are connected, and in doing so I think that I am following the principles of construction which were plainly laid down by the Lord Chancellor in the case of *Gibson* v. *Young*, 4 Macq. 314.

The opposing construction is that they are to be referred to the testator's death. It is said that because all his children are instituted the word "deceasing" must mean "deceasing the testator." I confess that I am unable to see any support for this view. All the children of the testator were instructed that they might take if they survived the period of division. Nothing more is signified. The institution of all the children does not enable us to interpret the words "deceasing" or "survivors." Now, words can only be explained by reference to some period. The only period mentioned in the clause in which they occur is the majority of the youngest daughter, and for the reasons which I have already given they must be referred to this period.

To hold that vesting took place *a morte testatoris* is to hold that the somewhat elaborate clauses in the trust-deed mean nothing more than a simple bequest to the truster's children. But if that was the truster's meaning, why did he not use the ordinary form of words in which it might be naturally expressed? It cannot be said the deed owes its actual form to a desire on the part of the truster to confer on his trustees a discretionary power over the income with a view to the education and maintenance of the children until the period for the division of the capital arrived. For the income is given absolutely to the children, and the trustees have no power to encroach on the share of one child in order to the benefit of another. I can conceive no purpose which the deed in its present form was intended to have if the testator meant that the shares should vest at his death. But if it were his intention that vesting should be postponed till the period of division, it is in the natural and usual form to give effect to that intention.

The trustees have a power prior to the period of division to make advances to the

children to account of their shares of capital if it shall appear to them necessary to do so to forward the children in a profession or otherwise. Such a claim may make for vesting *a morte testatoris*, though it is equally consistent with the postponement of vesting till the period of division. But I think that is of little importance in a case of this kind where the other provisions are to my mind conclusive.

LORD JUSTICE-CLERK — That expresses my opinion also. At the debate I had a leaning to the opposite view, and what most affected my mind was the clause relating to advances. After more deliberate consideration and consultation I have come to the conclusion arrived at by Lord Rutherfurd Clark. I think the correct view of the declaration as to advances is just this, that if, when division comes to be made, a share shall vest in a child to whom advances have been made, such advances shall be deducted from that child's share before it is paid over.

LORD LEE—This special case raises a question under the trust-settlement executed in 1857 by Mr John Fyfe, who died in 1885 leaving five children, the youngest of whom was born on 10th March 1869, and who therefore does not attain the age of twenty-one until 10th March 1890. His eldest son was William Fyfe, who died on 8th December 1887 aged thirty-four. He left no issue, but had executed a disposition and settlement in favour of his widow. The question is whether his share and interest in the residue of his father's estate had vested in him?

This question depends on the intention of the testator as expressed in his settlement, which is in some respects peculiar. After providing for his widow, who takes a liferent of the house in Forfar, in addition to the annuity provided by her marriage-contract, the deed directs that within twelve months after his son William shall have attained the age of twenty-one (in the event of his attaining that age), he is to be called on to declare whether he will accept the lands of Kingston or other lands belonging to the truster at a valuation, and there is a similar direction as to the second son in the event of William dying before he is twenty-one. The intention of the testator is declared to be that his oldest surviving son for the time "on reaching majority" shall have the option of acquiring the lands of Kingston and others upon the terms and with the qualifications therein expressed.

The truster's directions as to the division of his estate are contained in the fourth and fifth purposes of the trust. The fourth purpose relates to "the free revenue of the whole of my said means and estate." This is divided in certain proportions among the sons and daughters, and the trustees "out of the share falling to each" are to defray the expense of his or her maintenance and education until they each respectively attain the age of twenty-one, or being daughters be married," and then the trustees are to pay over the shares falling to each of them directly, "and that aye and until the division of my said means and estate as hereinafter provided." The fifth purpose directs as follows—[*His Lordship here read the clause quoted above.*]

The deed confers express power on the trustees to advance to children, prior to the period appointed for division, "such sum or sums of money to account of his, her, or their shares as my said trustees shall deem to be necessary."

The argument against vesting is founded on the clause declaring that the children of any child deceasing shall have right to the share which would have fallen to the parent equally as if the parent had survived, "but if there shall be no such issue, then the share of the party so deceasing shall be divided equally among his or her surviving brothers and sisters." This survivorship clause is read as referring to the period of ultimate division. I think there is great difficulty in so reading it consistently with the rest of this deed. The direction to divide is in favour of the whole children born or to be born, although the actual division is postponed until the youngest child is twenty-one. It is not easy to believe that a testator who intended his youngest son to take a vested right to his share as soon as he should be twenty-one desired to prevent his eldest son taking any such right unless he also survived the majority of his youngest brother or sisters. *Prima facie*, there is a bequest in favour of all the children. According to the fourth clause each is to receive his own share of the revenue as soon as he attains the age of twenty-one. It is to be paid to him thereafter as the revenue of a share belonging to him. There is nothing in the deed to warrant the idea that the share of revenue payable to any child attaining twenty-one and dying without issue before the final division was intended to be subject to division, or is to be treated otherwise than as revenue of a share belonging to such child. If the testator had intended that in the event of any child who might survive him and attain the age of twenty-one dying before his youngest brother or sister attained majority, his share both of revenue and capital should belong to the surviving brothers and sisters, I should have expected him to say so more distinctly, and to make provision for the application of the revenue of the share thus set free. I do not find that he has done so at all. What he has done, and all that he has done, is to postpone the period of actual division and payment of the capital. I do not know what the second parties maintain as to the disposal of William Fyfe's share of the revenue. That is a difficulty they have not faced. But it is a marked feature in this case, distinguishing it from the case of *Young* and *Donaldson's Trustees*, and from the ordinary case of a survivorship clause. It raises a doubt at least whether the time referred to for survivorship is the same as the period of ultimate division. For the revenue set free is not declared to form a part of residue.

There is no clause dealing with residue, or which contemplates the possibility of any portion of the revenue payable to a child who has attained 21 being applied to any other purpose in case of that child predeceasing the time for dividing the capital.

But there is another clause of the deed which seems to me inconsistent with the postponement of vesting here contended for. I refer to the *proviso* as to the lands of Kingston. It contemplates the eldest son as being in a position at the age of 21 to declare his acceptance of these lands at a valuation. He is to find security "to the satisfaction of my said trustees" for the value. But are the trustees not entitled to accept as security, or part security, his right and interest in the succession? If they are, then presumably the deed was intended to empower him to give such security, although the period of final division had not arrived and might not arrive until after his death. Yet it is contended that the deed is so framed as to make such security worthless unless he survive until the youngest child shall have attained the age of 21.

My opinion is that the testator was here making a deed in favour of all his children, and intended to give to each who should survive the age of 21 a share of his estate.

Another clause which seems to indicate vesting before the period of final division is that relating to advances. Such advances are to be "on account of his or her or their shares." But I do not suggest that this clause is inconsistent with a postponement of vesting.

On these grounds I am unable to read the survivorship clause of this deed as having reference to the period of ultimate division. I am therefore for answering the question here stated in the affirmative.

LORD YOUNG was absent when the case was heard.

The Court answered the question of law in the negative.

Counsel for the First and Second Parties—Law. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Third Party—Sir Charles Pearson. Agent—R. Bruce Cowan, W.S.

Saturday, February 8.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

NEILSON *v.* JOHNSTON.

Reparation — Slander — Privilege — Town Councillor at Council Meeting Accusing Burgh Official of Breach of Duty.

A member of the corporation of a burgh, at a meeting of the town council, stated that eight carcases reported suspicious by the slaughterhouse superintendent had been passed as sound by the sanitary inspector of the burgh, who had neglected to call in proper professional assistance.

In an action of damages by the sanitary inspector against the town councillor, on the ground that he was charged with a scandalous breach of duty, *held* that as the duty in question fell under the supervision of the town council, and as the statements complained of were spoken in discussing this duty, the privilege of the defender was absolute, and an issue *disalloved.*

Reparation — Libel — Newspaper — Innuendo.

It was the duty of the sanitary inspector of a burgh to inspect the carcases of animals killed at the burgh slaughterhouse. He was entitled under the provisions of the Public Health Act to call in any veterinary surgeon to advise with him in cases of doubt or difficulty. The town council of the burgh had appointed a Mr Lawson, veterinary inspector of the burgh.

An article in a newspaper published in the burgh contained the following statements—"It is a notorious fact that ever since Mr Lawson's special appointment of 8th July to examine and report upon all suspected carcases at the slaughterhouse, the sanitary inspector has harassed and wrongously interfered with him in the discharge of his responsible duties. Time after time, when the veterinary inspector granted a certificate, the sanitary inspector challenged its accuracy, and even appealed to, and brought from Edinburgh, professors, who in every instance upheld Mr Lawson's opinion." One of the cows of a dairy had been slaughtered on account of illness. The sanitary inspector, in opposition to Mr Lawson, had pronounced the disease to be pleuropneumonia. Two eminent specialists had adopted Mr Lawson's opinion. "Had the sanitary inspector in this instance got his own will (as unfortunately is too often the case) hundreds of pounds would have been lost to the burgh, and very heavy loss would have been entailed on dealers, stockowners, and dairy proprietors. . . Baffled in his attempts to discredit this official, the sanitary inspector has latterly succeeded (at least for a time) in 'dishing' his 'friend the enemy' in the following manner" . . . Several occurrences were here cited as illustrations of the statement. The article proceeded—"Mr Griffiths waxed eloquent on Thursday in support of his friend, the sanitary inspector, on the great expense and annoyance caused by the friction existing between the two officials. Who, we should ask, is to blame for all this? Without a shadow of authority or cause, the sanitary inspector has occasioned all the expense complained of by his uncalled-for, persistent, and arrogant interference with Mr Lawson in the discharge of his professional duties."

In an action at the instance of the sanitary inspector against the printer