feuars, for the title of Tait is the most favourable for the respondents.

It is contended by the feuars that they have right to a street or road 20 feet wide from Cowgate Street to their several feus, and that they can enforce this right against the pursuer, though a singular successor, because the right which they claim is a right of servitude.

It is certainly a natural reading of Tait's title to suppose that the intended street was to be formed of the same width throughout, and that may be assumed to have been the meaning of the parties to the feu-contract from the description of the northern boundary. It is equally natural to suppose that the street was to be a straight one, and if so, part of it would have been laid on what is now Hendrie's property. It is not contended that the street can now be straight, inasmuch as Hendrie's property cannot be made to contribute. The street which the feuars claim is one with a peculiar curve, owing to the projection of Hendrie's property by 10 feet beyond their own building line, and owing to that curve it would occupy 10 feet of the ground on which the pursuer proposes to build.

The question cannot be decided by the titles alone; we must look to the state of possession. We find that there has been some attempt to form a street-way. At the entrance from Cowgate Street and between the property of the pursuer and Hendrie the street-way is only 10 feet wide. The pavement laid by the Police Commissioners has left an entrance of 10 feet and no more, and the gas and waterpipes have been laid in that 10 feet. For a long time there was no enclosure, but the property of the pursuer to the north of what I call the street-way could not be used as a part of the street, inasmuch as it was considered higher than the ground adjacent to it. For the last ten years it has been occupied by buildings though of a somewhat temporary kind, and they were erected under the authority of a decree of lining, without any objection so far as I can discover.

In these circumstances I am satisfied that the feuars have no right of servitude over the ground in question. I cannot hold that it was intended to be included in the street mentioned in the titles, because the subsequent use has shown that it has been always excluded from it. It is very likely that the purpose was abandoned of throwing a part of Hendrie's property into the street, and hence the street is only 10 feet wide between their property and the pursuer's. But the abandonment of the original plan does not prove that another was adopted which included the pursuer's ground.

The right which we are considering is not a right of passage, but a right to a particular street. For the street was laid down on a plan. Hence the feuars meant to show where the street is which is mentioned in the feu-contract. They cannot otherwise prove that any part of it was to be made in the pursuer's ground. We are not in a case where the pursuer is claiming to be liberated from a servitude which once existed. The feuars are hereby to establish their right. I do not see how it is possible for them to do so in the face of the facts which I have narrated.

There remains the point raised under the statute, and that turns on the question whether the pursuer is proposing to lay out a new street or part of a new street.

We have nothing to do with public roads which have been included in burgh under special statutory powers, and which on being included come to be streets of the burgh. Victoria Street was never a public road. It led to no public place. It was never anything else than a street; it has been regarded for many years as a street, and it has been partly built on, though on one side only. It has been all along dealt with by the Police Commissioners as a street. I do not think that the pursuer proposes to form any new street or any part of a new street. She is merely proposing to build up to the building line of an existing street in the burgh.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor and granted decree of lining.

Counsel for Petitioner—W. Campbell—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Dickson—A. S. D. Thomson. Agents—Patrick & James, S.S.C.

Friday, March 9.

OUTER HOUSE.

[Lord Wellwood.

THE LORD ADVOCATE *v.* HOTSON.

Succession — Succession-Duty — Vesting — Interposed Liferent—Destination to A B, whom Failing to Children of A B.

A testator directed his testamentary trustees to pay one-third of the residue of his estate to A, one of his daughers, "whom failing to her lawful children, equally among them." Another third of the residue he directed his trustees to hold for B, another daughter, in liferent, and on her decease he directed them to pay the said share of residue to A, "whom failing to her children as aforesaid." A survived the testator, but predeceased B. *Held* (on the authority of *Hay's Trustees* v. *Hay*, 17 R. 961) that the share of residue liferented by B vested in A *a morte testatoris*.

In this action, which was at the instance of the Inland Revenue, the defender Hamilton Andrew Hotson, executor of the deceased Mrs Marion Buttery or Hotson, was called on to exhibit additional inventories of the executry estate. The question involved was whether certain provisions of her father's settlement had vested in Mrs

Hotson *a morte testatoris*, and ought therefore to have been included in the inventory.

On 9th March 1894 the Lord Ordinary (WELLWOOD) decerned against the defender, holding that the provisions in question had vested.

The facts are fully set forth in the Lord Ordinary's note.

"*Note.*—By his settlement the late Alexander Buttery disposed of the residue of his estate, the whole of which he conveyed to trustees as follows:—'Thirdly, I direct my said trustees to pay or make over one equal third part of the nett residue of my whole estate to Mrs Maria Buttery or Hotson, wife of John Hotson, writer in Glasgow, whom failing to her lawful children, equally among them: Fourthly, I direct my said trustees to retain one equal third part of the said nett residue of my estate for behoof of Mrs Alice Buttery or Kerr, widow of James Kerr, lately residing at Dumfries, for her liferent use allenarly, and to make payment to her at two terms in the year, Martinmas and Whitsunday, by equal portions, of the free interests and proceeds of the said share, and after her decease I direct my trustees to pay or make over the said share to the said Mrs Maria Buttery or Hotson, whom failing to her children as aforesaid; and fifthly, I direct my said trustees to retain the remaining third part of my said estate for behoof of Mrs Laurina Buttery or Gillon, wife of Dr Robert Gillon, minister of the parish of Inchinan, for her liferent use allenarly, and to make payment to her at the terms above specified, of the free interests and proceeds of the said share, and after her decease to pay or make over the same to the said Mrs Maria Buttery or Hotson, whom failing to her children as aforesaid."

"Alexander Buttery died on 19th March 1877 survived by his three sisters—Mrs Hotson, Mrs Kerr, and Mrs Gillon. Mrs Hotson died intestate on 24th March 1877, leaving four children—John, Alexander, James, and Hamilton Hotson, who succeeded to what estate she left. Mrs Kerr, who liferented one-third of the residue, died on 22nd September 1880. Mrs Gillon, the other liferentrix, died on 6th November 1885.

"The defender Mr Hamilton Andrew Hotson was decerned executor-dative *qua* next-of-kin of his mother on 1st February 1878, and he gave up an inventory and subsequently two additional inventories of Mrs Hotson's personal estate.

"The present claim against Mr Hamilton Hotson is made under somewhat peculiar circumstances. It appears that on the death of Mrs Kerr and Mrs Gillon the shares of capital liferented by them were paid away on the footing that no right to those shares had vested in Mrs Hotson. The defender states that he did not claim and does not intend to claim these shares as executor of Mrs Hotson, and that if he did claim it Mr Buttery's trustees acted in *bona fide* in dividing the money, and are not now in a position to pay it to him.

"The case when examined in the light of the decisions resolves itself into a very narrow question. It is well settled that postponement of payment of capital when the only reason of postponement is to secure a liferent does not postpone vesting, and the result is the same although the gift of the fee consists of a direction to pay at the expiry of the liferent.

"But if, in addition to postponement of payment, there is a proper contingent destination; if, for instance, the direction is at the death of the liferenter to pay to A B, whom failing to C D, it is settled that in the absence of evidence of a contrary intention vesting is postponed till the death of the liferenter—*Bryson's Trustees* v. *Clark*, 8 R. 142.

"On the other hand, it has been decided that a direction to pay on the expiry of a liferent to A B and his heirs or his children vesting is not postponed, the destination to the heirs or children not being held to be an independent destination-over—*Hay's Trustees* v. *Hay*, 17 R. 961.

"The question which I have to decide is, whether the present case is ruled by the former or the latter decision. In the case of *Bryson's Trustees* the direction was at the death of the longest liver of the testator and his wife to convey certain subjects to his nephew John Bryson Clark and the heirs of his body, whom failing to William Clark, his brother, &c. John Bryson Clark survived the testator, but predeceased the testator's widow without leaving heirs of his body, but leaving a trust settlement. On the death of the liferentrix a question arose between the parties who took under John Bryson Clark's settlement and the said William Clark, who, it will be observed, was an independent conditional institute. John Bryson Clark having died without issue no question arose between his testamentary representatives and his issue, and the only expression in favour of John Bryson Clark being a direction to convey to him on the occurrence of a certain event, and failing him to an independent conditional institute, it was held that as he did not survive the period fixed for payment he took no right under the settlement.

"In *Hay's* case, again, the direction was on the expiry of a liferent to convey to Charles Crawford Hay and his heirs. Charles Crawford Hay survived the testator, but predeceased the liferenter, leaving a will in favour of certain trustees. His heir was his son Charles Douglas Hay. The contest arose between Charles Crawford Hay's trustees and Charles Douglas Hay, the question being whether any right vested in Charles Crawford Hay. The First Division, reversing Lord Kinnear, sustained the claim for the trustees of Charles Crawford Hay. The grounds of judgment are very clearly expressed in Lord M'Laren's opinion, which concludes thus—'We must endeavour to find some definite criterion to be applied to such cases, and I think the true criterion is this, that where the legatees of the second order are either mentioned by name or by some description independent of the first, then

they may be taken to be *personæ delectæ* and their contingent interest is sufficient to suspend the vesting of the estate. But if the legatees of the second order are described as the children, or issue, or heirs of the institute (there being no ulterior destination), those are to be considered in this question as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit which it was possible for the truster to give him, consistently with the benefits previously given to liferenters or other persons. For these reasons I am of opinion that General Crawford Hay took a vested interest under the direction to convey to him and his heirs, and that the Lord Ordinary's interlocutor should be altered to this extent and effect.'

"The views thus stated by Lord M'Laren are in accordance with Lord Justice-Clerk Moncreiff's opinion in *Jackson* v. *M'Millan*, 3 R. 630 — 'In order, therefore, to determine in any given case whether survivance of such a term be a condition of the gift or the postponment be only a burden on it, it is of the last importance to ascertain what is the primary object of the testator in postponing payment, and if the words indicate that the primary object was to secure an interposed interest, especially if they disclose no other, the presumption is strong that the legacy is not conditional, and that its enjoyment only is qualified. It is this consideration which gives importance to any ulterior destination which may be adjected to the gift, for if there be any separate and independent interest contingently favoured it will then be easier to presume that favour to that interest was in part at least the reason for postponing payment. But to have this effect the interest must be substantially separate and such as to indicate specific favour on the part of the testator. But a legacy to A and his heirs, or A and his children, is not the separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee whose children or heirs are mentioned. They only find a place in the destination through the relation which they bear to the *persona prædilecta* and in cases like the present in which the gift is only inferred from the direction to divide the instruction to the trustees to pay to the heirs of the legatee if he predecease the period of division, may be regarded more as the natural result of the legacy having vested than as an indication of the reverse." The direction in that case was on the expiry of the liferent to divide the property among the testator's younger children "or if dead their nearest lawful heirs, share and share alike."

"In the present case I am unable to find sufficient indication of intention that as to the shares of residue liferented vesting should be suspended until the expiry of the liferent. The solitary indication of such an intention is the use of the words 'whom failing' which are the appropriate words to introduce an independent destination. But it is clear that the *persona prædilecta* was Mrs Hotson. She alone is named in connection with the fee of the residue. She took one-third of it absolutely on surviving the testator, and would undoubtedly have taken the remaining two-thirds absolutely if she had survived the liferenters. Her children are not mentioned by name, they are called as a class, and there is no ulterior destination. The words 'whom failing' used in connection with the one-third directed to be paid to Mrs Hotson on the death of the testator, would simply have had the effect of preventing a lapse of the legacy had she predeceased that date. If the words used had been 'and' (or 'or') 'her lawful children,' the result would have been the same, they would in that event have taken as conditional institutes, 'and' being read as equal to 'whom failing.' Now, I do not think that the testator intended to confer any higher right on Mrs Hotson's lawful children in connection with the shares liferented, and the elliptical expression which he uses in regard to those shares, viz., 'whom failing to her children as aforesaid,' strengthens this view.

"It was argued that Mrs Hotson's children might not necessarily have been her heirs. But in point of fact they all survived her, and took what estate she left as her heirs *ut mobilibus*. Besides, whether necessarily her heirs or not, they were in the words of Lord Moncreiff and Lord M'Laren favoured by the testator out of regard to the legatee whose children they were, and thus had only a derivative interest. On those grounds, though reluctantly, I think the Crown's claim must be sustained on the footing that right to the shares liferented by her sisters vested in Mrs Hotson *a morte testatoris*."

Counsel for the Pursuer — Asher, Q.C. A. J. Young. Agent—Solicitor of Inland Revenue.

Counsel for the Defender — Ure — Low. Agents—Campbell & Smith, S.S.C.

Wednesday, May 30.

OUTER HOUSE.

[Lord Wellwood.

THE GOVERNORS OF THE INNER-PEFFRAY MORTIFICATION *v.* DRUMMOND.

Interest—Interest Due on Bond—Legal Interest—Repeal of Usury Laws (17 *and* 18 *Vict. c.* 90).

Under a heritable bond, granted in 1696, the interest payable was 6 per cent., the highest rate then exigible, or such other rate as might thereafter be exacted as the highest legal rate. *Held*