the circumstances that have occurred, that he did not intend to disinherit his son. The conclusion seems to be that his estate must be distributed as intestate succession.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for Mrs Elder—Lord Adv. Balfour, Q.C.—Sol.-Gen. Shaw, Q.C.—W. Campbell—Hunter. Agents—J & J. Galletly, S.S.C.

Counsel for Mrs Reid and Mr Lockhart—Salvesen—M,Clure. Agents—Simpson & Marwick, W.S.

Counsel for the Trustees under the Settlement of 1858—Asher, Q.C.—Craigie. Agents—Dalgleish, Gray, & Dobbie, W.S.

Tuesday, March 19.

FIRST DIVISION.

MUIR'S TRUSTEES *v.* MUIR AND OTHERS.

Succession—Liferent or Fee—Repugnancy.

A testator directed his trustees "to hold and retain the whole residue and remainder of my means and estate for behoof of my children, and to divide the same amongst them" in certain proportions, . . . "the shares of sons and of daughters respectively being to be set aside and held and invested and otherwise dealt with as after mentioned, . . . and as regards the shares falling to sons, I direct and appoint my trustees to hold and invest the same in their own names for behoof of my said sons respectively in liferent for their alimentary liferent uses allenarly, and for behoof of their respective issue in fee, . . . but notwithstanding such restriction to a liferent in the case of my sons, it shall be in the power of my trustees to make to any one or more of my said sons such advances out of the capital of their respective shares as my trustees shall judge proper and expedient for the purpose of establishing any of my said sons in any business, . . . and further . . . in the event of any child or children predeceasing me or surviving me and dying before the term of vesting, payment, or setting aside of their shares or provisions without issue, then the shares of such predeceasers shall . . . be divided" among the surviving children and the issue of predeceasers in the same manner and subject to the like conditions as the original shares.

The testator died survived by all his children, and his trustees divided the estate in their hands into specific shares effeiring to each of them. Subsequently a son died survived by a widow, but without issue, leaving a trust-disposition and settlement.

Held that, the son's right being restricted to a liferent, he had no power to test upon the share set aside for him, which fell to be dealt with as provided in his father's settlement.

The late Matthew Andrew Muir, Glasgow, died on 23rd January 1880, possessed of very large estate, the general residue amounting to about £400,000. He left a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to trustees. The deed contained, *inter alia*, the following provisions — "In the fifth place, I direct and appoint my trustees to hold and retain the whole residue and remainder of my said means and estate . . . for behoof of my children, and to divide the same amongst them in such proportions as to give to those of them who may be sons one-third each more than those of them who may be daughters; . . . the shares of sons and of daughters respectively being to be set aside and held and invested and otherwise dealt with as after mentioned: And upon my decease I direct and appoint my trustees to pay to, or expend for behoof of, my children the annual proceeds of their shares, or so much of such annual proceeds as my trustees shall think necessary for their maintenance and education, accumulating the remainder, if any, for their behoof respectively, and adding the same to the capital of their shares until they shall respectively attain the age of twenty-five years if sons, or attain majority or be married, whichever of these events shall first happen, if daughters; and as regards the shares falling to sons, I direct and appoint my trustees, in the first place, to hold and invest the same, or so much thereof as may be available from time to time, in their own names as trustees foresaid for behoof of my said sons respectively in liferent for their alimentary liferent uses allenarly, and for behoof of their respective issue in fee, in such proportions among such issue respectively, if more than one child, and whether there be one or more children, subject to such restrictions, limitations, and conditions (including the restriction of the share of any child to a liferent) as such sons may respectively appoint by any deed under their hand, and failing such appointment equally among such issue, if more than one child, share and share alike: But notwithstanding such restriction to a liferent in the case of my sons, it shall be in the power of my said trustees, . . . in the exercise of the full and unlimited discretion which I hereby confer upon them in that respect, to make to any one or more of my said sons such advances out of the capital of their respective shares as my trustees shall judge proper and expedient (of which they shall be the sole judges in every case), for the purpose of establishing any of my said sons in any business or profession, or for the purchase of any land or other heritable property intended to be used or employed by such sons, or any of them, either for business purposes or for farming, or partly both, or for any other object or purpose which shall meet the approval of my said

trustees, and that either absolutely or subject to such conditions, limitations, or restrictions as my trustees may consider proper or expedient under then existing circumstances: . . . And in regard to the shares of my daughters, I direct and appoint my trustees, at the first term of Whitsunday or Martinmas which shall happen after my decease, and after my daughters shall respectively have attained majority or been married, whichever of these events shall have first happened, to set aside and hold and invest, in their own names as trustees foresaid, the shares of such daughters so attaining majority or being married (but subject always to deduction of any sums expended out of capital as after mentioned, if any such there be), or so much of the said shares as may be then available, the remainder being to be set aside and held and invested, when it becomes available, for behoof of such daughters in liferent for their respective alimentary liferent uses allenarly, and of their lawful issue respectively in fee, in such proportions amongst such issue respectively, if more than one child, and whether there be one or more children, subject to such restrictions, limitations, and conditions (including the restriction of the share of any child to a liferent) as such daughters may respectively appoint by any deed or writing, whether *inter vivos* or *mortis causa*, and failing such appointment, equally among such issue, if more than one child, share and share alike: And in the event of my married daughters, or any them, dying without leaving lawful issue, or, having left issue, in case such issue shall all die before majority or marriage, I hereby provide and declare that it shall be in the power of such married daughters, in contemplation of such event, and the farther event of their being survived by their respective husbands, by any deed or writing, whether *inter vivos* or *mortis causa*, to make provision for such surviving husbands respectively succeeding to an alimentary liferent during viduity, for his alimentary liferent allenarly, to the extent of the free annual interest or income arising from one-half of the capital of such married daughter's share which shall at the time of her decease remain vested in my said trustees as aforesaid, but to that extent only. . . . But in the event of my said married daughters, or any of them, failing to make such provision as aforesaid, I direct and appoint my said trustees to deal with and dispose of the capital of my said married daughters' shares after their decease in manner hereinafter provided: . . . And further, with regard to the shares of my children generally, whether sons or daughters, I hereby provide that, in the event of any child or children predeceasing me, or surviving me and dying before the time of vesting, payment, or setting aside of their shares or provisions, leaving lawful issue, such issue shall in every such case receive (if more than one child, equally among them, share and share alike) the share or shares which would have fallen to their deceased parent or parents had he, she, or they survived, including therein all shares or proportions of shares to which such deceasing parents would have succeeded by the decease of any other child as after mentioned without leaving issue, but in the event of any such child or children predeceasing me, or surviving me and dying before the term of vesting, payment, or setting aside of their shares or provisions without issue, or of such issue all dying in minority unmarried, then the shares of such deceasers shall . . . be divided in the proportion of one and one-third share to each son and one share to each daughter among my surviving children, and the lawful issue of such children as may have died leaving issue, such issue taking, if more than one child, equally among them, share and share alike, the shares or proportions of shares which would have fallen to their deceased parents had they survived: And further declaring that the shares or portions of shares succeeded to by my children through the failure of my other children, or their issue, if any, shall be taken subject to the destinations, conditions, provisions, restrictions, and others herein provided in regard to the principal shares of the children and sons so succeeding, and shall be held, invested, or paid, or set aside, as the case may be, along with the principal shares of such sons and children." Power was also given to the trustees to pay each daughter £500 out of capital for marriage outfit, and to settle on their intended husbands' estate not exceeding one-third of the value of their respective provisions, provided adequate provisions were made by such husbands for such daughters and the children of the intended marriages.

The truster was survived by all his six children, three sons and three daughters, and after his death his trustees administered his estate in terms of the trust-deed, and divided it into specific shares effeiring to each of his children. In 1894 the sons were all above twenty-five years of age and the daughters had attained majority, two of them being married. On 27th April 1894 one of the sons, Matthew Andrew Muir junior, died leaving a trust-disposition and settlement. He was survived by a widow, but there were no children of the marriage.

After his death various questions were raised in regard to his share of the residue of his father's estate, and a Special Case was presented by his father's trustees of the first part, the trustees under his own trust-disposition of the second part, his brothers and sisters of the third part, the children of a brother of the fourth part, and the beneficiaries under his trust-disposition of the fifth part.

The second parties contended that Matthew Andrew Muir junior having died without leaving issue had a valid right and power of disposal of the fee of his share, and that he had validly disposed of the same.

The third parties agreed in maintaining that upon a sound construction of the testator's trust-disposition and settlement the said Matthew Andrew Muir junior had no valid right or power of disposal of the fee of the said share, and that the said

share in the proportion of one and one-third to each son and one to each daughter belonged to them in liferent for their alimentary liferent uses allenarly, and to their respective issue equally *per stirpes* in fee. They further maintained as an alternative to their principal contention above stated, that on the death of the said Matthew Andrew Muir junior, without leaving issue, the fee of the said share fell into intestacy of the testator, and was divisible equally among them along with the second parties (as representing the deceased Matthew Andrew Muir junior), as the whole next-of-kin of the testator. In this alternative contention the second parties concurred alternatively to their principal contention above stated.

The fourth parties adopted the first contention of the third parties.

The fifth parties adopted the principal contention of the second parties; in the event of the same not being sustained, they adopted the first contention of the third parties; and in the event of the said first contention of the third parties not being sustained, they adopted the second or alternative contention of the third parties.

The following questions were submitted for the opinion of the Court:—"(1) Had the late Matthew Andrew Muir junior a valid right and power of disposal by testamentary deed of the fee of the share effeiring to him under the testator's trust-disposition and settlement; and did he validly dispose of it by his said trust-disposition and settlement in favour of the second parties? Or (2) Are the third parties entitled to the said share in the proportion of one and one-third share to each son and one share to each daughter in liferent for their alimentary liferent uses allenarly; and does the fee of said share belong to their respective issue in the same proportions equally among them *per stirpes?* Or (3) Did the fee of the said share upon the death of the said Matthew Andrew Muir junior, without issue, fall into intestacy; and are the third parties entitled to payment of the same equally among them along with the second parties, as representing the deceased Matthew Andrew Muir junior."

Argued for the second parties—"Vesting, payment, or setting aside" denoted one and the same term. "Vesting" was not used in its technical sense; indeed, looking to the last line of the deed quoted above it was highly probable that it was a clerical error for "investing." In any case the trustees had set aside the deceased's share, and as he had attained twenty-five, the period of vesting in him had been reached. If not absolutely, his share vested in him, subject to defeasance in the event of his having children; that condition had not been purified. But further, a liferent with a fee to his children gave him the right to test upon his share in the event of his having no children. The trustees only held the estate to protect the rights of children. They had right to make advances to sons "out of the capital of their respective shares;" that was not consistent with the dea of a bare liferent—*Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Downie's Trustees* v. *Cullen, &c.*, March 16, 1882, 9 R. 749; *Dalgleish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, *supra*, p. 106. The last two cases were very similar to the present. The provision as to children surviving the truster and dying before the term of vesting, payment, or setting-aside, was to meet the case of death before the trustees had had time to set aside the shares, and was not applicable here. If the shares could never vest in the children, as was contended on the other side, this provision was meaningless.

Argued for the third parties—There was no fee in the children. If a fee had vested *a morte*, the clause about surviving the truster and dying before vesting would be meaningless, and there was no subsequent date at which vesting could take place. Not only were the directions to the trustees "to hold and retain" perfectly clear, but the right of sons was in terms restricted to a liferent—*Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566. Here, however, there was no intestacy, because the settlement contained a destination-over in the event of sons or daughters dying without children.

At advising—

LORD M'LAREN—The late Mr Matthew Andrew Muir disposed of the residue of his estate, which amounted to about £400,000, by directing its division amongst his children in certain specified proportions and according to the trusts thereafter mentioned, and then in immediate sequence to this general direction his testamentary settlement proceeds to set forth the trusts upon which his trustees are to hold the shares of residue appropriated to his sons, and also the trusts applicable to the shares of residue which are appropriated to his daughters. The case relates to the share which was appropriated to one of the sons, Matthew Andrew Muir junior, who died childless on 27th April 1894, survived by a widow. This gentleman left a testamentary settlement disposing of his whole estate, in terms which it is unnecessary to consider further than to say that his widow and the children of a sister are interested in the residue of all the estate of which he had power to dispose. The question proposed in this case is whether Mr Matthew Muir junior had the power of disposing of a share of residue falling to him under his father's trust-settlement.

The father's settlement or will begins, as I have said, by fixing the proportions in which his residuary estate is to be enjoyed by different members of his family, and the direction when put shortly amounts to this, that the trustees are "to hold and retain the whole residue and remainder" of his means and estate for behoof of his children, "and to divide the same amongst them in such proportions as to give to those of them who may be sons one-third each more than those of them who may be daughters, . . . the shares of sons and of

daughters respectively being to be set aside and held and invested and otherwise dealt with as after mentioned."

The argument of the son's representatives is that the direction I have quoted amounts to an original gift of a share of residue to each of the testator's children, so that in case the subsequent trusts should fail from any cause, the direction quoted would take effect as a gift of the fee to that child.

I am unable to accept this view as a correct statement of the import of the will, having regard to the conditional nature of the rights thereby given. If a testator begins by making an unqualified division of his estate or residue amongst children, and then by a subsequent clause empowers his trustees to retain the shares of one or more of them, and to pay the income to the child or children for life, and the fee or capital to their issue, it may very well be that the power is only given to the trustees for the protection of the immediate beneficiaries. Accordingly, if one of these should die without issue, and leaving a will, it may be held that the original gift was not displaced, but its effect only suspended during the lifetime of the beneficiary, and for his or her protection. Such a construction is especially appropriate in the case of a daughter whose share is made subject to a trust for herself in liferent and her children in fee, but I do not say that it is confined to the case of shares of succession limited to daughters. It is, however, essential to the proper application of this principle of construction, that there should be an independent unqualified gift to the immediate beneficiary, capable of taking effect when the special trust fails or is exhausted. The cases of *Lindsay's Trustees* v. *Lindsay*, 8 R. 281, and *Dalgleish's Trustees* v. *Bannerman*, 16 R. 539, are examples of the principle that, where the special trust does not completely dispose of the fund because there are no children of the liferenter to take under it, the fee may vest in the liferenter by virtue of the original gift in his or her favour. In the present case the gift to the testator's children is qualified from the beginning by the words "to be held and invested and otherwise dealt with as after mentioned," and it appears to me that by these words we are necessarily referred to the subsequent provisions of the will as being the measure of the rights of the testator's children in the shares, which, for the sake of brevity, he describes as the shares of his sons and daughters.

Turning now to the trusts in relation to the shares of sons, and passing over the direction applicable to maintenance and education during minority, the substance of the provision is, that each son is to take an alimentary life interest in his share, with remainder in fee to his issue, subject to a power of appointment in the parent, and with the addition of very large discretionary powers to the trustees of the will to advance the capital to the testator's sons either for business or other purposes. Under such a trust it is plain that a son of the testator could only obtain the fee through the exercise of the power of disposal given to the trustees. Whether Mr Matthew Muir junior could have compelled the trustees to execute the power in his favour on the principle that he had the substantial interest in the fund, and that there were no children in existence who could be prejudiced by the exercise of the power, is a question on which it is needless to speculate, because the opportunity for doing this has passed, and a power to advance to a beneficiary certainly could not be directly exercised in favour of his legatees. If the will had contained no further provisions regarding the shares of sons the result would be that in the event which has happened the capital of Mr Matthew Muir's share would be undisposed of.

But the possible death of a child of the testator without issue was contemplated by the testator, because, after making provisions with respect to the interests of daughters and their issue, the testator proceeds to make further limitations as to the shares of his sons and daughters in the clause which begins with the words—"And further, with regard to the shares of my children generally, whether sons or daughters." Under this head he provides that "in the event of such child or children predeceasing me, or surviving me and dying before the time of vesting, payment, or setting aside of their shares or provisions without issue, or of such issue all dying in minority unmarried, the shares of such deceasers shall be divided amongst his surviving children in the proportion of one and one-third share to each son and one share to each daughter, including in the destination the issue of other children who may have died. It is not very easy to attach a definite meaning to the words applicable to death "before the term of vesting, payment, or setting aside," but I think these words cannot be confined to the case of the death of a child before the leading purposes of the trust should come into effect, because, as I read the previous clauses, they are to come into effect immediately on the testator's death, while the case here contemplated includes the alternative of a son or daughter dying at any time either without issue, or having had issue who died in minority, and I think the true meaning of the words I am considering is that they cover the case of the death of a son of the testator at any time during the subsistence of the trust of his share, that is, at any time before the capital has either been advanced to him or paid to his children as fiars. I am therefore for answering the second question in the affirmative, and the first and third questions in the negative.

Lord Adam and Lord Kinnear concurred.

The Lord President was absent.

The Court answered the first and third questions in the negative, and the second question in the affirmative.

Counsel for the First Parties—Aitken. Agents—Forrester & Davidson, W.S.

Counsel for the Second Parties—H. Johnston—Dundas. Agents—W. & J. Burness, W.S.

Counsel for the Third Parties—C. S. Dickson—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Fourth Parties—Neish. Agent—John Ross, W.S.

Counsel for the Fifth Parties—W. Campbell—Kippen. Agents—J. & A. F. Adam, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

STEAMSHIP "STATE OF CALIFORNIA" COMPANY, LIMITED *v.* MOORE.

Principal and Agent—Agreement to Work Ship—Obligation of Agent to Continue Business during Fixed Period.

An agreement was entered into between the State Steamship Company, owners of a line of steamers running between Glasgow and New York, and the Steamship "State of California" Company, which had been formed to acquire a new steamship, whereby the State Company undertook to run this steamship as one of their own line in regular turn, giving her "the same attention in all respects, and in the same manner as if she was one" of their own steamers. As remuneration for these services the State Company were to receive a brokerage of 7½ per cent. on the nett amount received by the steamer for ocean carriage, and a further commission on the nett profits, if they exceeded a specified amount. It was further provided that the contract should subsist for ten years from the date of the launching of the steamer. Before the steamer was ready for sea the State Company went into liquidation, and the "State of California" Company lodged a claim of damages in the liquidation for alleged loss of profits consequent on the State Company's failure to fulfil its agreement.

Held that the contract was one of agency, and was contingent upon the State Company continuing to run their line; that they were under no obligation to maintain their line for ten years, and therefore were not liable in damages.

On 11th December 1889 a company was incorporated under the title of the Steamship "State of California" Company, Limited, with the object of acquiring a new steamship of the most modern type, to be run under agreement with the State Line Company as one of their line of steamers between Glasgow and New York.

On 10th December 1889 a minute of agreement was entered into between the State Line Company and the new company with reference to the new ship which was to be built for the latter. The agreement provided—"Whereas it has been arranged between the parties that the first party (State Line Company) shall work and sail for the second party ("State of California" Company) the said steamship in their Transatlantic service along with their own steamers engaged in the same service. . . . This minute witnesseth . . . "*First*, the manager for the time being of the first party shall be the manager of the said steamship, and shall be registered as managing owner thereof. *Secondly*, the first party shall give the said steamship her regular turn in their Transatlantic service along with the other steamers belonging to or managed by them, and shall give it the same attention in all respects, and in the same manner as if it was one of the first party's own steamers. *Thirdly*, This contract shall subsist for a period of ten years from and after the date of the launching of the said steamship, . . . unless brought to an end as hereinafter provided. . . . *Sixthly*, the first party shall not have power to withdraw the said steamship from their line, or to employ it in any other trade except with the consent of the second party." The *eighth* clause provided that the first party should pay expenses of management, and certain other expenses. In the *ninth* place it was provided—"The first party shall receive as remuneration for the above services a brokerage at the rate of 7½ per cent. on the nett amount received for ocean carriage, . . . and a further commission of 5 per cent. on the nett profits . . . where such nett profits exceed 6 per cent. on the whole paid-up capital of the second party." . . .

On the 10th December a further agreement was entered into between the two companies and Messrs Stephen & Sons, who undertook to build the new steamship, to be called the "State of California," at the price of £97,600.

The steamer was launched on 29th January 1891, but before she was ready for sea, on March 4th, the State Company went into liquidation, Alexander Moore, C.A., being appointed liquidator. The State Company being thus unable to perform her part of the above agreement, the "State of California" Company, after endeavouring unsuccessfully to sell the vessel, on 29th July 1891 arranged with Messrs Allan, Glasgow, for her to be run as one of the Allan Line between Glasgow and New York.

Thereafter the "State of California" Company lodged a claim in the liquidation of the State Company for £20,000, as the amount of damage sustained by the claimants through alleged breach of contract on the part of the State Company.

On 13th October 1893 the liquidator rejected this claim—"(3) Because the claim-