interpretation of the word "expenses," as referring to an arbiter's expenses, is that which practically has been adopted and carried out ever since the Act came into force, viz., that arbiters in such cases are entitled, as part of the expenses of the cause, to be paid a reasonable sum for their services. Therefore I agree with your Lordships that the reclaiming-note should be sustained.

The Court pronounced this interlocutor:—

"Recal the said interlocutor reclaimed against: Sustain the first part of the pursuer's third plea-in-law, and remit to the Auditor of Court to fix the amount of the fee due to the pursuer as arbiter; and decern."

Counsel for the Pursuer—Vary Campbell—R. B. Pearson. Agent—Charles George, S.S.C.

Counsel for the Defenders — Dean of Faculty (Asher, Q.C.)—Grierson. Agent—James Watson, S.S.C.

Friday, January 26.

FIRST DIVISION.

(Without the Lord President.)

NISBETT AND ANOTHER (SCOTT'S TRUSTEES) *v.* DUNBAR.

Succession—Vesting—Vesting in Children as a Class.

By her trust-disposition a testatrix left £1800 to A, and failing him to his child or children. By codicil she directed her trustees to invest and settle the sum provided to A "in such manner as to secure the liferent of the said sum to A and the fee to his children equally, and failing the said A and his children, the capital of the said legacy is to revert to my own next-of-kin." A survived the testatrix. He had eight children, two of whom survived the testatrix, but predeceased him. *Held* that the legacy vested *a morte testatoris* in A's children as a class if a child of A was then alive, and therefore that the shares of the children who survived the testatrix but predeceased him had vested in them.

Mrs Jane Cunninghame or Scott died on 8th February 1872 leaving a trust-disposition and settlement and several codicils. By her settlement she made, *inter alia*, the following provision:—"*Secondly*, that my said trustees shall make payment at the first term of Whitsunday or Martinmas after my death of the following legacies to the persons after named, viz., to John Dunbar, my nephew, son of my sister Mrs Lavinia Cunninghame or Dunbar, and of the late John Thomas Dunbar, Esq., the sum of £18,000 sterling, and this in consideration of his having little or no patrimony, and failing the said John Dunbar to his child or children."

By codicil she directed her trustees "to invest and settle the legacy of £18,000 sterling provided to my nephew John Dunbar in said settlement in such manner as to secure the liferent of the said sum to the said John Dunbar and the fee to his children equally; and for that purpose I empower my said trustees and their foresaids to act as trustees themselves in regard to said legacy, or to appoint other trustees for the special purpose; and I also empower my said trustees to appoint curators and tutors to said children during their minority in regard to their interest in the said sum of £18,000 sterling, and failing the said John Dunbar and his children the capital of said legacy is to revert to my own next-of-kin."

John Dunbar above referred to survived Mrs Scott and died on 20th May 1894. He had nine children, one of whom predeceased Mrs Scott, while two others survived her but died unmarried and intestate before their father.

On the death of Mrs Scott her trustees set apart and invested the sum of £18,000 for behoof of John Dunbar in liferent and his children in fee.

By indenture dated 17th October 1894 John Dunbar assigned to his son George Dunbar "All and every the part or share, parts or shares, and interests whatsoever to which he the said John Dunbar then was in anywise entitled in possession, reversion, expectancy, contingency, or otherwise in or by virtue of, *inter alia*, the said trust-disposition and settlement of the 14th day of June 1869, and codicil thereto of the said Mrs Jane Cunninghame or Scott, or as next-of-kin or one of the next-of-kin of his deceased children, the said John Dunbar junior, Arthur French Dunbar, and Florence Scott Dunbar, or any of them, or by any means whatsoever."

Questions having arisen on the death of John Dunbar as to the right passing under this indenture, a special case was presented, in which Mrs Scott's trustees were the first parties, George Dunbar was the second party, and John Dunbar's other children were the third parties.

The second parties maintained that one-eighth part or share of the fee of the said trust fund or legacy of £18,000 duly vested in terms of the said trust-disposition and settlement and the codicil thereto last above mentioned in each of the said two children who survived the truster but predeceased their said father; that the said John Dunbar succeeded on the death of his said two children, by the operation of the Intestate Moveable Succession (Scotland) Act 1855, to one-half of the said two-eighth parts or shares which had so vested in them—that is to say, one-eighth in all of the said *cumulo* fund or legacy—and that the said last-mentioned one-eighth part or share was carried to the said second party by the assignment contained in the foresaid indenture, of date the 17th day of October 1894; that accordingly the second party is now entitled to one-fourth part or share (being one-eighth in his own right and one-eighth as in right of his father) under the said assignment of the investments now repre-

senting the said trust-fund or legacy of £18,000 (under deduction as aforesaid), and that the third parties are only entitled to the remaining three-fourth parts or shares equally amongst them (being three-twentieths of the *cumulo* fund to each of them).

The third parties maintained that no part of the said trust-fund of £18,000 vested in any of the children who predeceased their father, and that accordingly the said trust-fund (under deduction as aforesaid) falls to be divided equally amongst the said John Dunbar's six surviving children, with the result that one-sixth part or share falls to each.

The following questions of law were submitted — "(1) Whether under the said trust-disposition and settlement, and the said codicil, of date 10th May 1871, any shares of the fee of the said trust fund or legacy of £18,000 vested in the two children of the said John Dunbar, who survived the truster but predeceased their father? (2) In the event of the first question being answered in the affirmative, is the said trust fund or legacy divisible in the manner maintained by the second party? or (3) In the event of the first question being answered in the negative, is the said trust fund or legacy divisible in the manner maintained by the third parties?"

At the hearing it was intimated from the Bench that the second and third questions were not in proper form.

Counsel for the parties stated that they would be satisfied with an answer to the first question.

Argued for the second party—If the fund vested in John Dunbar's children *a morte testatoris* the right of the second party was undisputed. On the question of vesting the principle contended for was that the fund vested *a morte* in the children as a class, so that each child took a vested share subject to diminution in the event of any other children being born — *Carleton* v. *Thomson*, Feb. 11, 1865, 3 Macph. 514, affirmed July 30, 1867, 5 Macph. (H.L.) 151; *Hickling's Trustees* v. *Gairdner's Trustees*, March 12, 1896, 23 R. 598, *aff.* Aug. 1, 1898, 1 F. (H.L.) 7. The principle was, that although there was a destination-over, as here, yet vesting took place if any members of the class survived the testator, and the destination-over is regarded merely as a conditional institution — *Cunningham's Trustees* v. *Cunningham*, Nov. 30, 1889, 17 R. 218. In the cases cited on the other side the liferenter had no issue, and the question was whether the estate was disposed of by his will or fell into intestacy. That was a very favourable case for vesting in the liferenter, and was quite distinguishable from the present. The question really was, what was the intention of the testatrix and the terms used by her in the codicil, which must be the ruling document, made it clear that she did not intend vesting to be postponed to the death of the liferenter.

Argued for the third parties—The will and codicil were not antagonistic, and both should be given effect. So read there was a gift to John Dunbar, restricted to a liferent if he died leaving children. Therefore the fee vested in him, subject to defeasance in the event of his being survived by children—*Lindsay's Trustees* v. *Lindsay*, Dec. 14, 1880, 8 R. 281; *Dalgleish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559; *Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R. 553; *Logan's Trustees* v. *Ellis*, Feb. 7, 1890, 17 R. 425; *Stewart's Trustees* v. *Stewart*, Jan. 22, 1896, 23 R. 416; *Mackay's Trustees* v. *Mackay*, June 8, 1897, 24 R. 904. On this view the fund vested in the children on the death of the liferenter, but necessarily only in those who were then alive. The destination-over was merely a conditional institution in the event of John Dunbar predeceasing the testatrix and leaving no issue. The principle of vesting in a class was only applicable to the case where at the death of the liferenter the fiars were a class—for instance, the children of A—which might be increased in number.

At advising—

LORD ADAM — The first parties to this case are the trustees of the late Mrs Scott, to whom she bequeathed her whole property, heritable and moveable, except a house in Ainslie Place, by trust-disposition and settlement dated 14th June 1869, with various codicils annexed.

By the second purpose of the trust-deed and settlement she directed her trustees to make payment—[*His Lordship read the second purpose*]. This, however, she altered by a codicil dated 10th May 1871, by which —[*His Lordship read the codicil*].

The facts which raise the question we have to decide are simple. Mrs Scott, the testatrix, died on 8th February 1872. John Dunbar, the liferenter of the legacy, died on 20th May 1899.

John Dunbar had in all nine children. Of these one predeceased the testatrix, and it is admitted that no right to a share of the legacy ever vested in him. Two of the remaining eight children survived the testatrix but predeceased the liferenter. They died intestate, and it is admitted that thereupon their father John Dunbar became entitled to one-half of their moveable estate, and therefore to one-half of the share of each child in the legacy, if any right to a share had vested in them. It is admitted that John Dunbar validly assigned all his right and interest in these two half shares to his son George, who is the second party to the case.

The question we have to decide therefore is, whether, as maintained by the second party, a right to a share of the legacy vested in each of the two children who survived the testatrix but predeceased the liferenter? or whether, as maintained by the third parties to the case (who are the surviving children other than George), the right of a child to a share of the legacy was contingent on his or her surviving the liferenter.

If the third parties are right in their contention, then the legacy will be divisible into six shares among the six children who

survived the liferenter their father. If the second party is right, the division will be into eight shares, of which he will take his own original share of one-eighth and a half of each of the two one-eighth shares which belonged to the two predeceasing children—or in other words, another eight shares, or one-fourth of the legacy.

It will be observed that the codicil of 10th May 1871 deals with both the liferent and fee of the legacy of £18,000. It necessarily, therefore, revokes the gift *in toto* to John Dunbar contained in the second purpose of the settlement, because there is nothing left on which that clause can operate. It appears to me, therefore, that the claims of the parties must be determined primarily, if not solely, on the construction of the codicil.

Now, the trustees are thereby directed to invest and settle the legacy of £18,000 in such manner as to secure the liferent of the legacy to John Dunbar and the fee to his children equally, and for that purpose the testatrix empowered her trustees to act as trustees themselves in regard to said legacy, or to appoint other trustees for that special purpose. It appears to me that this direction was intended to have immediate effect, and to come into operation upon the testatrix's death.

The trustees chose the former of these alternatives. It is stated in the case that shortly after her death they set apart and invested the said sum of £18,000, and have continued to hold the same for behoof of the said John Dunbar in liferent and his children in fee. In so doing I think they were fulfilling the intentions of the testatrix. But if from that time the trustees have been holding the fee of the legacy for behoof of the children, that means that while the nominal title was in them, the beneficial interest was in the children, or in other words, had vested in them. Nor do I think that there is any doubt as to the meaning in law of the direction "to settle" the legacy in favour of John Dunbar in liferent and his children in fee. It is a gift of the fee to the children as a class. If there were none of the class in existence when the legacy was to be settled—*i.e.*, the death of the testatrix—then the trustees would continue to hold the legacy until it should be seen whether any of the class came into existence. But when a child was born, and the class came into existence, then the legacy would vest in him, but subject to participation with others of the class as they respectively came into existence.

In this case George Dunbar, the second party, was in existence at the testatrix's death. It appears to me accordingly that the legacy then vested in him as representing the class, but subject to participation with his brothers and sisters as they were successively born and came into the class.

I see nothing to suggest that the testatrix intended that a right to the legacy should not vest in the children until the liferenter's death. There is no clause of survivorship among the children. There is no direction to pay at the liferenter's death or at any other time. There is, however, in a subsequent part of the clause a direction that, failing John Dunbar and his children, the capital of the legacy is to revert to the testatrix's own next-of-kin. No doubt, if the right of the children to the legacy had depended on a direction to pay to them at the death of the liferenter, the direction in question might have had the effect of postponing vesting. But, as I have already said, the right of the children depends on the leading direction to settle on the testatrix's death the legacy in certain terms, which I think gave a vested right to the children *a morte testatoris*.

Now, even if the direction had taken the form of a direction to settle the legacy on John Dunbar in liferent and his children equally in fee, whom failing, on the testatrix's own next-of-kin, I think it would have been no more than a conditional institution of the next-of-kin in the event of John Dunbar and his children having failed at the time of the settling of the legacy, and they not having failed it became inoperative.

I think the direction in question meant only that on the death of John Dunbar without having children the legacy was to revert to the testatrix's next-of-kin.

I am of opinion that the first question should be answered in the affirmative.

LORD M'LAREN—I concur in the opinion of Lord Adam in reference to the actual decision of the case before us; but I am not quite clear as to the point mentioned by his Lordship as to what might have been the construction if we could have read the second direction as qualifying the provision in favour of the legatee and his children.

As I read the will, the direction to invest and settle the legacy is a direction in favour of the legatee in liferent and his children in fee only, and the subsequent direction in case of the failure of John Dunbar and his children to pay the legacy to the testatrix's next-of-kin is, on a sound construction, a direction only applicable to the event of the whole family having died before the testatrix.

But if the direction had been to invest and settle the legacy in favour of the legatee John Dunbar in liferent and his children in fee, whom failing his next-of-kin, I should like to reserve my opinion as to whether this was not a direction which would prevent the vesting of any right *a morte testatoris*.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court answered the first question in the case in the affirmative, and found it unnecessary to answer the other question.

Counsel for the First and Second Parties—Dundas, Q.C.—Hunter. Agents—Dundas & Wilson, C.S.

Counsel for the Third Parties—Campbell, Q.C. — Blackburn. Agents — Russell & Dunlop, W.S.