surviving brother. Andrew predeceased his mother intestate and without leaving descendants, and therefore James M'Grouther is entitled to the whole.

Alternatively I should have been prepared to hold that as the interest on the shares of James and Andrew was paid to their mother for about twenty-five years, not *ex pietate*, but on the faith of the alleged agreement, and as Jack paid nothing for her support, James M'Grouther would be entitled to set it off against any claim which Jack has; and that as the interest would extinguish Jack's claim, James M'Grouther would be entitled to absolvitor on this ground also.

The Court pronounced this interlocutor:—

"Sustain the appeal and recal the said interlocutor of 20th November 1900, as also the interlocutor of the Sheriff-Substitute dated 8th March 1900: Find in fact (1) that the late James M'Grouther, who died intestate on 16th June 1869, left moveable estate to the extent of £500, one-third of which fell to his widow Mrs M'Grouther as *jus relictæ*, and two-thirds thereof to his two sons, of whom the defender is one; (2) that prior to the year 1873 the said Mrs M'Grouther and her two sons had entered into an agreement whereby Mrs M'Grouther renounced her right to said one-third in favour of her sons and assigned such right to them and the survivor of them in consideration of her being entitled to the whole interest and proceeds of said £500 during her lifetime; (3) that said agreement was acted on, and the whole interests of said sum were paid to and received by Mrs M'Grouther from the date of said agreement until the date of her death on 9th August 1898; (4) that no part of said £500 belonged to or was *in bonis* of the said Mrs M'Grouther at the date of her marriage to the pursuer Thomas Jack, or at the date of her death; (5) that Andrew M'Grouther died without issue in the year 1890, and his share of said £500 thereupon fell to his brother the defender; and (6) that the pursuer lived apart from his wife and had not contributed to her support for fourteen years prior to her death, and that the defender had contributed to her maintenance during that period and had a claim therefor against the estate exceeding the amount of any claim which the pursuer could have *jure relicti* or otherwise: Find in law that the pursuer has no right to any part of said sum of £500 *jure mariti* or otherwise, nor to any claim against the estate of Mrs M'Grouther *jure relicti* or otherwise: Therefore assoilzie the defender James M'Grouther from the conclusions of the action at the instance of the pursuer Thomas Jack, and decern: And in the action at the instance of the said James M'Grouther against the said Thomas Jack and others, Find and declare that the sum of £500 contained in a deposit-receipt of the Royal Bank of Scotland, dated 14th April 1898, in the name of 'Mrs Jane Horne M'Grouther, No. 5 Silvergrove Street,' with all interest accrued thereon, is now the property of the said James M'Grouther, and that the said Thomas Jack has no right, title, or interest in or to the same: Authorise the said James M'Grouther to take possession of said deposit-receipt, and to uplift and receive payment of the contents thereof, with all interest accrued thereon, and decern."

Counsel for the Pursuer and Respondent Jack—W. Thomson. Agent—W. J. Haig Scott, S.S.C.

Counsel for the Defender and Appellant M'Grouther—W. Campbell, K.C.—Hunter. Agents—Gill & Pringle, S.S.C.

Tuesday, June 18.

FIRST DIVISION.

WILSON'S TRUSTEES *v.* WILSON.

Succession — Vesting — Vesting Postponed — Survivorship Clause — Division per capita in Uncertain Event.

A truster directed his trustees to hold the residue of his estate for behoof of his children equally in liferent for their respective liferent uses allenarly, and for behoof of their issue respectively *per stirpes* equally among them in fee; and failing any of his children by decease "without leaving issue who may attain to the age of majority or be married," then to the survivors or survivor of his children and their issue respectively *per stirpes*, who should attain majority or be married, in liferent and fee respectively, subject to the declaration that if the issue of his son A who should become major or be married exceeded in number the issue of his son B who should attain majority or be married, the shares falling to these two families were to be massed together and divided *per capita*. The truster's son B predeceased the truster leaving one child who attained majority. The truster was survived by his son A, who was survived by four children three of whom were major, and was predeceased by one child who died unmarried after attaining majority, and by one child who had attained majority and married and left one child.

Held that vesting in a share of the fee or capital destined in liferent to the truster's two sons took place in those of their children only who not merely attained majority or married but also survived their parent; but that, as issue of the truster, a share in the fee of said capital would vest in the great-grandchild of the truster whose parent had predeceased the truster's surviving son, on his attaining majority or being married.

Succession—Interest—Residue.

A testator directed his trustees to hold the residue of his estate for behoof of his children equally among them in liferent for their respective liferent alimentary uses allenarly, and for behoof of the issue of his said children respectively *per stirpes* equally among them in fee, and failing any of his children by decease without leaving issue who might attain the age of majority or be married, then to the survivors or survivor of his said children and their issue respectively *per stirpes* who might attain majority or be married, in liferent and fee respectively; and also directed that in the event of any of his children dying leaving issue it should be in the power of the trustees until the arrival at majority or marriage of such issue to apply the annual proceeds of their presumptive shares or part thereof towards the education and maintenance of such children. One of the truster's sons predeceased him leaving one child who attained majority. During the life of the truster's surviving son the trustees paid such sums as appeared to them to represent the income of the share which would have been liferented by the son who predeceased him to that son's child, with the result that at the date of the death of the truster's surviving son there were accumulations of that income in the trustees' hands. *Held* that these accumulations of income fell into residue, and did not belong to the predeceasing son's child.

Gavin Wilson, sometime quarrymaster, Cambuslang, died on 20th February 1885, leaving a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to the trustees and for the trust purposes therein mentioned. The fourth purpose of the said trust-disposition and settlement was in the following terms:—"In the fourth place, with regard to the residue and remainder of my means and estate, my said trustees shall hold and invest the same in their own names for behoof of the whole of my children equally among them in liferent for their respective liferent alimentary uses allenarly, . . . and for behoof of the issue of my said children respectively *per stirpes*, equally among them in fee, subject to the contingent exception and declaration after mentioned with regard to the issue of my sons William Wilson and James Wilson, and failing any of my said children by decease without leaving issue who may attain to the age of majority or be married, then to the survivors or survivor of my said children and the issue of their bodies respectively *per stirpes* who may attain to majority or be married, in liferent and fee respectively as aforesaid, subject to the said contingent exception and declaration after mentioned with regard to the issue of my said sons William Wilson and James Wilson, . . . Declaring always, and providing by way of exception, that in the event of the issue of my son William Wilson who may attain to the age of majority or be married exceeding in number the issue of my son James Wilson who may attain to the age of majority or be married, the shares of said residue falling to the issue of my said two sons, while they shall equal in amount when taken together the shares falling to the issue as aforesaid of any other two of my children, shall not be divided *per stirpes*, but shall be slumped together and then divided *per capita* equally among the issue of my son William and the said issue of my son James: Declaring also that in the event of any of my children dying leaving issue, it shall be in the power of my trustees, until the arrival at majority or marriage of such issue or any of them, to apply the annual proceeds of their presumptive shares, or such part thereof as they may think proper, towards the education, maintenance, and upbringing of such children, or any of them."

Gavin Wilson had *inter alios* two sons, William and James. He was survived by his son William; his son James predeceased him, leaving one child, George, who attained majority in 1898.

William Wilson died in 1900, and had seven children, of whom four survived him, three being major, and one, John Wilson, being a minor; one had predeceased him in 1900 unmarried after attaining majority; one had predeceased him in minority unmarried; and one, James Wilson junior, had predeceased him in 1891, after attaining majority and being married, leaving one child, Jamesina, who was still a pupil.

William Wilson until his death liferented a share of the truster's estate, and the trustees held the share which would have been liferented by James Wilson if he had survived the truster, and paid such sums as appeared to them to represent the income of that share to his only child, until the death of William Wilson, with the result that they accumulated out of the income of the share which would have been liferented by James Wilson if he had survived the truster, £200 or thereby, which fell to be distributed in terms of the fourth purpose of the truster's settlement.

In consequence of the death of William Wilson, the truster's son, the share of the estate liferented by him, and the share of the estate which would have been liferented by the truster's son James Wilson if he had survived the truster, and the interest accumulated in this share, fell to be distributed in accordance with the directions of the truster contained in the fourth purpose of the trust-disposition and settlement.

Questions having arisen as to the import of the fourth purpose of the trust-disposition and settlement, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were, (1) Gavin Wilson's trustees; (2) the four surviving children of William Wilson and the only child of James Wilson; (3) the representatives of the two deceased children of William who had attained majority or married, and the trustee for the creditors of one of his surviving children; and (4)

Jamesina the child of James Wilson junior.

The third parties maintained that a share of the fee of the share liferented by William Wilson, and of the fee of the share the liferent of which would have been enjoyed by James Wilson had he survived the truster, vested in a grandchild of the truster who survived the truster and attained majority or was married, even although such grandchild predeceased its parent. These parties consequently maintained that the capital of these two shares fell to be divided into seven parts, one part to be retained until it was seen whether John Wilson attained majority or married, one part to be paid to each of William Wilson's three other surviving children, one to be paid to the representatives of each of his two children who predeceased him after attaining majority, and one part to be paid to the child of James Wilson.

The second parties maintained that vesting in a grandchild of the truster was subject to these conditions—(*a*) that he or she should survive the liferenter, and (*b*) that he or she should be at the liferenter's death either major or married, or should thereafter either attain majority or be married, and they accordingly maintained that the shares in question were divisible into five parts, one to be retained until it was seen whether John Wilson attained majority or married, one to be paid to each of William Wilson's three other surviving children, and one to be paid to the child of James Wilson.

The fourth party maintained that in the event of the Court holding that vesting had not taken place in her father she was entitled to one-sixth share of the shares in question as issue of William Wilson, and accordingly that these shares were now divisible into six parts, two parts to be retained for herself and John Wilson respectively until they attained majority or married, and one part to be paid to each of William Wilson's other surviving children, and one part to be paid to the child of James Wilson.

James Wilson's child agreed with the contention of the second parties, subject to the qualification that he was entitled to the whole of the accumulated income of the share destined to his father in liferent.

The following were the questions of law for the opinion and judgment of the Court—"(1) Did a share of the fee or capital destined in liferent by said trust-disposition and settlement to the truster's two sons William and James vest in a grandchild who attained majority or was married, although such grandchild predeceased its parent? (3) Did vesting in the fee of said capital only take place in grandchildren of the truster who not only attained majority or were married but also survived their parent? (4) In the event of the question 3 being answered in the affirmative, is the fee of the capital now divisible into six parts, and are four of these six parts now payable to the three major surviving children of William Wilson, and George Wilson son of James Wilson, and do the other two parts fall to be retained for Jamesina Wilson and John Wilson until they either attain majority or get married? (5) Does the accumulated interest or income on the share destined to James Wilson in liferent fall to George Wilson his son, or does said interest or income fall to be divided as part of the capital of the fee?"

The arguments sufficiently appear from the opinion of Lord M'Laren.

At the hearing the following cases were cited. For the third and fourth parties—*Playfair's Trustees* v. *Hunter*, July 18, 1890, 17 R. 1241; *Turner's Trustees* v. *Turner*, March 4, 1897, 24 R. 619; for the second parties — *Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7 (*distinguished*); *Selby* v. *Whitaker*, August 1, 1877, L.R. 6 Ch. D. 239; *Fyfe's Trustees* v. *Fyfe*, February 8, 1890, 17 R. 450; and in particular for James Wilson's child the cases of *Graham* v. *Graham's Trustees*, February 12, 1863, 1 Macph. 392, and *Fergusson* v. *Smith*, December 4, 1867, 6 Macph. 83, were cited, and the case of *Playfair's Trustees*, *cit. supra*, was distinguished.

At advising—

LORD M'LAREN—This case relates to the vesting of the residue of the estate of Mr Gavin Wilson, who died on 20th February 1885. By the fourth purpose of his trust-settlement he directed his trustees to hold the residue and remainder of his estate for behoof of his children, "equally among them in liferent for their respective liferent alimentary uses allenarly," subject to a declaration with which we are not concerned, "and for behoof of the issue of my said children respectively *per stirpes*, equally among them in fee," subject to a contingent exception and declaration which will presently be considered. It may be convenient to consider the effect of each part of the destination separately; and I may observe before proceeding further that the directions which I have quoted would, *prima facie*, confer a life interest in common on the children who survived the testator and a right of fee in their issue, so that each surviving child of the testator would take an equal share in liferent without survivorship, and the issue of each child would take the fee of the share liferented by the parent.

The trust-settlement proceeds to say, "failing any of my said children by decease without leaving issue who may attain to the age of majority or be married, then to the survivors or survivor of my said children, and the issue of their bodies respectively, *per stirpes*, who may attain to majority or be married, in liferent and fee respectively as aforesaid," subject to the said contingent exception and declaration.

The hypothesis of this provision is that one or more of the testator's children may possibly die without leaving issue, in which event the provision of survivorship is to take effect. The plain meaning and effect of the provision is that, until the death of any one or more of the testator's children, or it may be until the number of the children is reduced by death to one, the desti-

nation of the fee is undetermined, because if the child dies leaving issue the capital of the parents' share will go to the issue, but if the child dies without leaving issue, the share will devolve in liferent and fee to the surviving children and the issue of their bodies who may attain to majority or be married.

In a recent case on appeal from this Court an observation was made with which I entirely sympathise, to the effect that in such cases we ought first of all to endeavour to ascertain the meaning of the testator from the words he has used, rules of construction being of secondary importance. In the present case the rule, that words of survivorship are in general to be taken to refer to the period of payment, would lead to the same conclusion as I have derived from the language of the will itself.

The condition of a right liferented by a parent passing to his issue is that the parent shall leave issue who shall attain to the age of majority or be married. If the condition had been only that the parent should leave issue, we might have held, on the authority of the case of *Hickling's Trustees* in the House of Lords, that the condition was purified by the survival of any one member of the family, and that the benefit of the institution accrued to all the issue including the representatives of those who had predeceased the parent. But the further condition of the attainment of the age of majority or state of marriage appears to me to be a condition personal to each residuary legatee, and to imply that those legatees only who fulfil all the requirements of the complex condition are to participate.

The alternative construction involves the extraordinary assumption that the right of the representatives of a deceased grandchild of the testator is to depend on the event of another grandchild who survives attaining majority or being married in minority. This would be going a step further than the case of *Hickling's Trustees*, and perhaps I may be allowed to say that the meaning attributed to the will in *Hickling's* case, although arbitrary, was not unreasonable, while the construction which I reject in this case is I think not reasonable, and therefore not a probable construction.

We have also to consider the effect of what the testator calls the "contingent declaration and exception" applicable to the issue of his two sons William and James. This is to the effect that, in the event of the issue of William who may become major or be married exceeding in number the issue of James who may become major or be married, the shares falling to these two families are to be massed together and divided *per capita*. Now, if it had been intended that the representatives of issue who might predecease their parent or die in minority should participate in the *per capita* division, it is in the last degree unlikely that this division *per capita* should have been made contingent on the majority or marriage of other members of the family. The number of participants in the division according to the construction which I reject would be just the same whether one or more than one of the family attained majority or were married, and the condition would have no practical effect except in the case of all the family dying in minority and unmarried, in which case the share was already given over to the issue of surviving children. But if we read the will in the sense that those only who attain majority or are married are to participate in the division, then the condition becomes intelligible, having for its object no doubt the simplification of the division of the estate and the equalisation of interests amongst the issue of William and James.

If the suggested construction is well founded it follows that the first question should be answered in the negative and the third question in the affirmative. The second question does not arise, and the fourth question, which is consequential on the third, will be answered in the affirmative.

In regard to the fourth question, I need only say that it was admitted by counsel, and is perfectly clear, that Jamesina, the daughter of James Wilson *secundus*, a great-granddaughter of the testator, falls within the meaning of the word "issue," and is entitled to a share in the division of the residue.

The fifth question arises in this way. The testator's son James predeceased him leaving one child, the claimant George. The trustees, acting within their powers, applied part of the income which would have come to James if he had survived towards the maintenance of his son George. After crediting the trust-account with this payment there remains a surplus, derived from the accumulation of income, amounting to about £200. The question is, whether this money belongs to George or is to be carried to account of residue. In my opinion the money is residue, first, because the testator in giving the trustees the power to apply income towards the maintenance of minor children describes it as the "annual proceeds of their presumptive shares;" and secondly, because, as I hold, no right vested in any of the testator's issue until majority. The income, so far as not required for the purposes of the power, is not specially appropriated, and is therefore residue. I think that the fifth question should be answered accordingly.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court answered the first question in the negative, the third and fourth in the affirmative, and found in answer to the fifth question that the accumulated income of the share destined to James Wilson in liferent fell into residue.

Counsel for the First and Second Parties—Craigie. Agent—William Balfour, S.S.C.
Counsel for James Wilson's child, Second Party—A. M. Anderson. Agent—William Balfour, S.S.C.
Counsel for the Third and Fourth Parties—M'Millan. Agents—Gill & Pringle, S.S.C.