man in this case had been a British workman and not a foreigner I should have been of the same opinion as the Sheriff-Substitute. This is a case in which the workman went to the employer to ask compensation, and not a case such as occurred in *Fowler* v. *Hughes*, where the employer came to the workman and tendered a payment. In the next place, I think there is no doubt whatever that what the pursuer wanted when he spoke to his foreman Mr Barr, and was taken by the latter to the office, was in fact compensation under the Workmen's Compensation Act, because he says in his evidence that he had been told that he was entitled to half pay and that what he expected to get was a weekly payment of half pay until his hand was better, which, of course is just in fact, whether he knew it or not, compensation under the Workmen's Compensation Act.

Now if a British workman had gone to his employers in similar circumstances and said that he wanted compensation, had accepted weekly payments of half of his wages, and had given receipts in terms of the receipts here, which refer to the Workmen's Compensation Act, I am certainly of opinion that he could not after that have tendered back the payments which he had received and betaken himself to a claim which he might otherwise have had either at common law or under the Employers' Liability Act, upon the ground that when he demanded payment under the Workmen's Compensation Act he was not fully alive to his rights at common law or under the Employers' Liability Act. I think that a British workman must be presumed to know something about his rights, and that if he goes to his employers and asks for compensation under the Workmen's Compensation Act, they have no duty whatever to inquire whether he is or is not fully aware that he might, if he liked, adopt some different course. But then I think that when you are dealing with a foreigner the position of matters is different. This man had been some years in the country, but it is plain from the evidence that his knowledge of English is extremely limited —so limited, indeed, that if an explanation had been given to him in English of the different courses that were open to him, I do not believe that he would have understood what was said to him at all.

As I have said, he had been told, and knew, that he might ask half wages until his hand was better, but it does not appear that he knew how that claim arose, or that he knew that he had any other course open to him. Accordingly, it is apparent that he was not in a position to exercise the option which he had in any proper sense. He knew that he might claim a certain thing, but he knew nothing more. I think that to throw out the action which he has brought, upon the ground that he had deliberately elected to take his compensation under the Workmen's Compensation Act, would be to run the risk of doing very serious injustice. I therefore agree with the course proposed by your Lordship in the chair.

LORD ARDWALL—I agree with the course your Lordships propose. I also agree with Lord Low in thinking that if the pursuer in this case had been a British workman I should have been prepared to affirm the Sheriff-Substitute's interlocutor, but that upon the case as it stands, this being an Italian workman with almost no knowledge of English, there would be great risk of injustice in affirming the interlocutor the Sheriff-Substitute has pronounced. I have only to add that if coalmasters for their own advantage choose to employ foreigners who do not understand the English language, and whose ignorance of that language may introduce considerable peril to other workmen employed in the same pit, they must accept the disabilities of such employment, and one of these, as appears in this case, is that the same presumptions will not apply to negotiations between them and such foreign workmen as would apply to negotiations and agreements with British workmen.

The LORD JUSTICE-CLERK was absent.

The Court recalled the interlocutor appealed against, and remitted to the Sheriff to proceed.

Counsel for the Pursuer (Appellant)—M'Clure, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Respondents) — George Watt, K.C. — Horne — Strain. Agents—W. & J. Burness, W.S.

Thursday, March 14.

FIRST DIVISION.

[Lord Johnston, Ordinary.

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

Succession — Vesting — Vesting subject to Defeasance—Destination to A in Liferent and Children Nascituri in Fee with Destination-over to Families of B and C —Effect of Destination-over being in Separate Clause.

By the *fifth* purpose of his trust-disposition and settlement a testator directed his trustees to hold the residue of his estate for his daughter in liferent and her children *nascituri* equally among them in fee, the issue of any deceasing children taking *per stirpes* their parent's share. He then directed his trustees to dispone to his daughter absolutely his dwelling-house, together with its whole plenishing. He then proceeded—"And (*Sixthly*) in the event of my said daughter predeceasing or dying without leaving lawful issue, I hereby authorise and direct my said trustees to realise the whole residue of my said means and estate . . . and to divide the same in equal proportions amongst the families of" B and C. The daughter survived her father for many years but died without issue.

Held that the residue vested *a morte testatoris* in the families of B and C, subject to defeasance in the event of the liferentrix leaving issue—the fact that the destination-over was made the subject of a separate clause not being sufficient to take the case out of the normal rule.

Corbet's Trustees v. *Elliott's Trustees*, March 13, 1906, 8 F. 610, 43 S.L.R. 379, *followed.*

Succession — Division per stirpes or per capita—"Amongst the Families."

A testator directed his trustees to divide the residue of his estate in certain events "in equal proportions amongst the families of A and B, in equal proportions, share and share alike."

Held that the residue fell to be divided between the families of A and B *per stirpes* and *per capita* in the family.

Succession—"Family"—Immediate Issue.

Held (*per* Lord Johnston, Ordinary) that a bequest to "the families" of A and B did not include grandchildren of A, the issue of a child who had predeceased the date of vesting.

William Searcy, Ella Ville, Ardnadam, died on 1st December 1882, leaving a trust-disposition and settlement, dated 16th December 1880 and registered 20th December 1882. On 6th December 1904, difficulties having arisen in the administration of the trust, John Watt, banker, Glasgow, and others, the trustees acting thereunder, brought an action of multiplepoinding and exoneration, the fund *in medio* being the residue of the trust estate, amounting to £16,400.

The *clauses* of the *trust-disposition* giving rise to the difficulties were:— "(*Fifthly*) After the whole of the foregoing provisions have been paid and satisfied, I direct my said trustees to hold the residue of my whole means and estate in trust for behoof of my daughter Mary Ann Ella Searcy or Murray, wife of the said William Murray, in liferent, for her liferent use only, and to her whole children equally between and among them in fee, the issue of any of deceasing children taking *per stirpes* their parent's share, and to pay the free annual revenue of the same to her in equal proportions at the said two terms of Whitsunday and Martinmas in each year; and further, I direct my said trustees to dispone and make over to my said daughter absolutely, All and Whole the dwelling-house occupied by me, and known as Ella Ville, Ardnadam, together with the whole household and other furniture, goods and effects, and all others therein or in connection therewith, or with the grounds attached thereto, at the time of my death; and (*Sixthly*) In the event of my said daughter predeceasing or dying without leaving lawful issue, I hereby authorise and direct my said trustees to realise the whole residue of my said means and estate in any manner of way as to them shall seem fit, and to divide the same in equal proportions amongst the families of the said John Searcy and the said William Brown, in equal proportions, share and share alike. . . ."

The questions which had arisen were—(1) Did the residue vest *a morte* subject to defeasance, or only on the death of the liferentrix; (2) was the division *per capita* amongst the whole members of the families, or *per stirpes* between the two families; and, in one event, (3) did the word "family" let in grandchildren.

The testator had been twice married. His first wife, by whom he had no children, was a relation, a Miss Searcy, and the John Searcy of the trust-disposition was her brother. His second wife, by whom he had a daughter, the Mary Searcy or Murray of the trust-disposition, was a Miss Brown, and the William Brown of the trust-disposition was her brother.

The testator was survived by his only child Mrs Murray. She died on 7th May 1904, a widow, without issue, but leaving a trust-disposition and settlement.

John Searcy died on 12th June 1898, survived by the following children—(1) Arthur John Searcy, (2) Mrs Maud Ann Searcy or Physick, (3) Mrs Edith Rebecca Searcy or Dickson, who all survived Mrs Murray the liferentrix, and also (4) Frederick William Searcy, who, dying on 10th February 1901, predeceased Mrs Murray the liferentrix, but was survived by one child, John William Searcy, who was alive at the time of the action. Frederick William Searcy had left a trust-disposition and settlement whereby he conveyed his whole estate to trustees.

William Brown died on 5th September 1888, survived by his only child Amelia Brown. She died unmarried and intestate on 18th October 1893, thus predeceasing the liferentrix.

The following claims were made:—1. Arthur John Searcy, Mrs Physick, and Mrs Dickson claimed the whole fund *in medio* on the footing that vesting was postponed till the death of the liferentrix and that they were then the only members of the favoured families; *alternatively* and on the footing that vesting took place *a morte*, subject to defeasance in the event of the liferentrix leaving issue, and that the division among the members of the two families was to be *per capita*, they claimed three-fifths of the fund; *alternatively* and on the footing that vesting took place *a morte* and that the division was to be *per stirpes*, they claimed three-fourths of half the fund.

2. The trustees of the late Frederick William Searcy claimed one-fifth of the fund on the footing that vesting took place *a morte* and that the division was *per capita* among the members of both families; *alternatively*, on the footing that the division was to be *per stirpes*, they claimed one-eighth.

3. John William Searcy and his guardian claimed one-fourth on the footing that vesting was postponed till the death of the liferentrix, that "family," included grandchildren, and that the division among the two families was *per capita*; alternatively they claimed one-eighth in the event of the division being *per stirpes*.

4. Albert John Allbuary, as executor of his mother Mrs Elizabeth Carpenter or Allbuary, who was a sister of Amelia Brown's mother, and Amelia Brown's sole next-of-kin at her death, claimed one-half of the fund on the footing that vesting took place *a morte* subject to defeasance, and that the division was *per stirpes*; alternatively, and in the event of the division being *per capita* he claimed one-fifth.

5. The trustees of Mrs Mary A. E. Searcy or Murray, the liferentrix, maintained that they were entitled to one-half of the fund on the ground that vesting was postponed till her death, and that the division was *per stirpes*, on which construction the share destined to the Brown family had fallen into intestacy and vested in Mrs Murray as heir *ab intestato* of the testator; alternatively, and on the footing that vesting took place *a morte* subject to defeasance, they advanced claims based on Mrs Murray having been Amelia Brown's heir-at-law.

On 9th March 1906 the Lord Ordinary (JOHNSTON) pronounced the following interlocutor:—"Finds, on a sound construction of the trust-disposition of the late John Searcy, and in particular of the fifth and sixth purposes thereof—(*First*) That vesting of the fee of the residue was postponed till the death of the liferentrix the late Mrs Mary Ann Ella Searcy or Murray; (*Second*) that the said residue fell to be divided *per stirpes* between the families of John Searcy and William Brown, and that the share of each family fell to be divided *per capita* among the members of such family: Further, finds that the one-half share of residue destined *per stirpes* to the family of William Brown lapsed into intestacy owing to Amelia Brown, the sole representative of that family, predeceasing the liferentrix, and falls accordingly to the claimants the trustees of the said Mrs Mary Ann Ella Searcy or Murray, the testator's sole next-of-kin at the date of his death: Further, finds with reference to the division of the one-half share of residue falling to be divided *per capita* among the family of the late John Searcy, that the term family, on a proper construction, is confined to the immediate issue of the said late John Searcy, and that the said share falls to be divided *per capita* among his three children who survived the liferentrix. . . ."

Opinion.— . . . [*After narrating facts and fifth and sixth purposes of the trust disposition*] . . .—"A difficult question arises in the circumstances as to the meaning of the destination-over to the families of the said John Searcy and William Brown. But before that question can be reached the question of vesting has to be determined. As the truster's daughter Mrs Murray died without issue, the fifth purpose of the settlement is exhausted without any fee being taken thereunder. The fee is therefore disposed of by the sixth purposes, unless in whole or in part it lapses into intestacy. There are a number of claimants, and amongst others Arthur John Searcy and his surviving sisters, children of the above-mentioned John Searcy, maintain that there was vesting subject to defeasance in the families of John Searcy and William Brown *a morte testatoris*, which vesting became absolute on the death of Mrs Murray, the liferentrix, without issue. On the other hand, the trustees of the late Mrs Murray contend that vesting was postponed until Mrs Murray's death, when, owing to the failure of the family of the above-mentioned William Brown, one-half of the residue fell back into intestacy, and was transmitted to them as the representatives of Mrs Murray herself, as she was the truster's sole next-of-kin. These two claims present the question at issue, and it is unnecessary to examine at this stage any of the other claims.

"Vesting subject to defeasance is now well recognised and accepted in the law of Scotland. But the principle is more easy to enunciate than to apply. Perhaps there could not be a better example of the difficulty of its application, and of the difference of opinion which may be entertained on the subject, than *Nisbet of Mersington's* case—a decision of the whole Court by a narrow majority, reported 2 Fr. 470. I have examined it carefully, and had I been called upon to decide it I am afraid I should have been found in the ranks of the minority. But I think that parties are sometimes too anxious to plead in a doctrinaire way this principle of vesting subject to defeasance, and that there are circumstances in which to apply it would defeat the intention of the testator, so far as that can be gathered from the terms of his settlement. I think that this case is one of them. It may be said that in the result the directions of the fifth and sixth purposes of the testator's settlement are just a destination to the truster's daughter in liferent allenarly and her issue in fee, and failing issue, then over to a class capable of ascertainment at the truster's death, and therefore the very case for which the doctrine of vesting subject to defeasance was invented. But I cannot ignore the method by which the testator reached this assumed result. The destination-over is no mere destination-over bound up with the principal destination, forming part of one consecutive idea and embraced in one and the same clause. On the contrary, the destination-over is an entirely new departure, not merely grammatically separate, but contained in a separate and different clause of the settlement. The fifth clause directs the trustees to hold the residue for the daughter in liferent and her issue in fee, and says nothing about holding for the destinees-over. There is thus no gift or bequest to them as from the testator's death. For what they take they must look entirely to the sixth clause, which takes effect only in the event of the daughter's death without issue, and gives or bequeaths nothing except on that event, and therefore at the daughter's death. If the testator's intention is to be deduced from the terms he has used I cannot think that he intended his destinees-over to take at his death, when he expressly gave them nothing

except on an event occurring which happened twenty-two years after his death. What he really meant, if indeed he really knew what he meant, I cannot of course tell. I can only deduce what he must be assumed to have meant from what he has said, and I think that to apply the doctrine of vesting subject to defeasance to the destination which he has left would be a blind and indiscriminate application of that principle which would defeat testamentary intention. I hold, therefore, that vesting was postponed until the death of the liferentrix, and I find no difficulty in the postponement, for the trustees were holding the fee during the life of the liferentrix for whom it might ultimately concern. The only hesitation I have on the point arises from the fact that the same element which to my mind distinguishes the present case from others where the vesting has been held to be subject to defeasance, was present, though in very different form and degree, in the recent case of *Corbett's Trustees*, decided by the Second Division on 11th February last. But I cannot apply the reasoning of Lord Low, who deals with the point, to the circumstances of the present case.

"Having determined that vesting took place only at the death of the liferentrix, it remains to apply to the circumstances the direction to divide among the families of John Searcy and William Brown. These circumstances are, that at the death of the liferentrix there were living three children of John Searcy and a grandchild, the son of a deceased son, who had long survived the truster but predeceased the liferentrix. William Brown, on the other hand, had only one child, a daughter, Amelia Brown, who survived the truster, but died in 1893, during the lifetime of the liferentrix.

"The clause of division among these families is of doubtful meaning, for it directs division in equal proportions twice over — in equal proportions among the families, in equal proportions share and share alike. The only intelligible meaning that I can give to this is to assume that the truster meant to divide the residue equally between the two families *per stirpes*, and at the same time to divide the share of each family *intra familiam* equally *per capita*. If that be so, then one-half of the residue vested at the death of the liferentrix in the family of John Searcy. But in respect of the predecease of Amelia Brown, the half destined to the family of William Brown lapsed and fell back into intestacy, and therefore falls to the representatives of Mrs Murray, the testator's sole next-of-kin.

"There remains, however, still another question, viz., who compose the family of the late John Searcy? Is that term, in the circumstances, confined to his three children who survived the liferentrix, or does it include the grandson, the sole issue of a son who predeceased that date? I think this is perhaps the most difficult of the questions raised. It is not a case in which any assistance can be got from the doctrine of *si sine liberis*. I have come, however, to the conclusion that there is nothing to lead me to depart from the ordinary construction of the word 'family,' which is confined to the immediate children of the person named. Grandchildren are members of the family of another than he. They cannot be the members both of the family of their grandfather and of the family of their father.

"I shall pronounce findings accordingly, and continue the case so that the relative decree of ranking and preference may be prepared and the case exhausted. As agreed at the bar, the expenses of all concerned will be paid out of the fund *in medio*."

On 17th March 1906 his Lordship, in terms of the foregoing findings, pronounced the following interlocutor—"Ranks and prefers the claimants the trustees of the late Mrs Mary Ann Ella Searcy or Murray to one-half of the residue of the estate of the late William Searcy, and ranks and prefers each of the claimants the said Arthur John Searcy, Maude Ann Searcy or Physick, and Edith Rebecca Searcy or Dickson, to one-third of one-half of the said residue. . . ."

Albert John Allbuary reclaimed, and argued—(1) The Lord Ordinary was wrong in holding that vesting was postponed. Survivance of the term of payment was not made an express condition of vesting; moreover, there was a direction to pay at a *dies certus*. There was here vesting *a morte* subject to defeasance. In the absence of vesting subject to defeasance there must either be absolute vesting or postponed vesting, and both these views might prejudice the issue of the testator's daughter, whom he would naturally wish to benefit. Vesting subject to defeasance reconciled all the conflicting interests, as the right of the secondary legatees would be at once defeated by the birth of issue to the liferentrix. Amelia Brown therefore took a vested interest, and it was not disputed that the reclaimer was in right of that interest. On the question of vesting reference was made to *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217, 15 S.L.R. 776; *Corbet's Trustees* v. *Elliott's Trustees*, February 10, 1906, 8 F. 610, 43 S.L.R. 379; *Wylie's Trustees* v. *Wylie*, December 10, 1902, 8 F. 617, 43 S.L.R. 383; *Hay's Trustees* v. *Hay*, June 19, 1890, 17 R. 961, 27 S.L.R. 771: *Cairns' Trustees* v. *Cairns and Others*, 1907 S.C. 117, 44 S.L.R. 96. As to the date of distribution where the gift was to a class, reference was made to the opinions of Lords Kyllachy and Low in *Corbet's Trustees* (*cit. supra*). The fifth and sixth purposes of the settlement were to be read together—the fact that they were in separate clauses was immaterial. (2) The Lord Ordinary was right in holding that the division between the families was *per stirpes*—*Low's Trustees* v. *Whitworth*, February 4, 1892, 19 R. 431, 29 S.L.R. 389. The word used was "families," and that did not mean individuals but groups of individuals.

Argued for the claimants Frederick William Searcy's Trustees—The claimants adopted the foregoing argument on the

question of vesting. In addition, they argued (1) Survivance of the liferentrix was not an essential condition. The fact that Frederick William Searcy predeceased her did not prevent vesting taking place in him *a morte* subject to defeasance—*Taylor* v. *Gilbert's Trustees* (*cit. supra*); *Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, 26 S.L.R. 146; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346. The narrow majority in *Thompson* was not on the question of vesting but as to whether there was or was not a proper conditional institution. (2) The Lord Ordinary was wrong in holding that the division was *per stirpes*—it was *per capita*. The word used was "amongst"—not "between" —that implied division *per capita*—*Bogie's Trustees* v. *Christie*, January 26, 1882, 9 R. 453, 19 S.L.R. 363; *Abrey* v. *Newman* (1852), 16 Beav. 431; *Barnes* v. *Patch*, (1903) 8 Vesey's Ch. Rep. 603.

Argued for the claimants A. J. Searcy, Mrs M. A. Searcy or Physick, and Mrs E. R. Searcy or Dickson—(1) The Lord Ordinary was right in holding that vesting was postponed. The sixth purpose was independent altogether of the fifth, and did not come into operation until both conditions had been purified—*Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421. The fifth and sixth purposes were mutually exclusive, for if there were issue their existence evacuated the destination in the sixth clause. The case fell within the rule of *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103. In *Cairns' Trustees* (*cit. supra*) the case of *Bowman* v. *Bowman* (July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959) was appealed to by Lord Kyllachy as an authority for the proposition that the period of vesting was in general concurrent with that of division. An intention to suspend vesting might be inferred from the deed as a whole —*Per* Lord Colonsay in *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, at p. 154, 4 S.L.R. 226, at p. 228. See also same case in Court of Session, February 11, 1865, 3 Macph. 514. (2) The division ought to be *per capita*. On this point the claimants adopted the argument for F. W. Searcy's trustees. (3) Family did not include grandchildren. There was nothing in the will to give it a more extended meaning. The *conditio si sine* which was invoked in *Irvine* v. *Irvine*, July 9, 1873, 11 Macph. 892, 10 S.L.R. 625, did not apply here. Reference was also made to *Low's Trustees* (*cit. supra*) and to *Cattanach's Trustees* v. *Cattanach*, November 28, 1901, 4 F. 205, 39 S.L.R. 154.

Argued for Mrs Mary A. E. Searcy or Murray's trustees—(1) Vesting was postponed (the claimant adopted the argument for the preceding claimants on this point). The cases of *Taylor* v. *Gilbert's Trustees* and *Thompson's Trustees* v. *Jamieson* (*cit supra*) did not apply, for the destination-over was not a separate and substantive provision as here, but an integral part of one and the same destination. The testator could not have intended vesting *a morte*, as in that event the representatives of the Brown family, now extinct, would cast out the representatives of his own daughter. There was here a suspensive condition, not a proper conditional institution as in *Corbet's Trustees* (*cit. supra*). There being none of the Brown family alive, and there being no gift to the *heirs* of that family, there was intestacy *quoad* the share destined to them. The gift to the Brown family was contingent on their survivance —*Hickling's Trustees* v. *Garland's Trustees*, Aug. 1, 1898, 1 F. (H.L.) 7; 35 S.L.R. 975. Assuming A. M. Brown's share fell into intestacy the present claimants were in right of it as representing the heir *ab intestato* of the testator. (2) On the question of division the claimants adopted the argument for A. J. Allbuary. The division was *per stirpes*. The words "in equal proportions" were used twice in the same clause; that could only mean a division of the whole in equal "portions" between the two families, and a subsequent division of each half in equal "portions" amongst the members of each family. Otherwise the clause would be unintelligible. Reference was made to *Home's Trustees* v. *Ramsays*, Dec. 11, 1884, 12 R. 314; 22 S.L.R. 221; and to *Inglis* v. *M'Neils*, June 23, 1892, 19 R. 924; 29 S.L.R. 795.

Argued for J. W. Searcy and his guardian—In the event of vesting being held postponed the claimants contended that "family" included grandchildren. They referred to *Irvine* (*cit. supra*); *Low's Trustees* (*cit. supra*); *Macdonald's Trustees* v. *Macdonald*, Oct. 26, 1900, 8 S.L.T. 226; *Pigg* v. *Clarke* (1876), L.R. 3 Ch. Div. 672; *Williams* v. *Williams* (1851), 1 Simon N.S. Ch. 358.

At advising—

LORD PRESIDENT—This is a question arising upon the will of a certain William Searcy. Mr Searcy had been twice married. One of his marriages was to a relation of his own name. The other marriage, his second marriage, was to a Miss Brown. He had no children by his first wife Miss Searcy, but by the second he had one child, a daughter, who married a gentleman named Murray. That was accordingly the state of his family at the time when he made his will, and the matter in dispute concerns the residue, the clause dealing with the residue being clause 5, which is in the following terms:—"(*Fifthly*) . . . [*quotes, supra*] . . ." Then he makes a special disposition of a certain villa to his daughter absolutely, and goes on—"And (*sixthly*) . . . [*quotes, supra*] . . ."

Now Mr Searcy, the testator, died in 1882. Mrs Murray, his daughter, survived him and lived till 1904, but she never had any children. Of course, until Mrs Murray's death there was no question that the trustees were holding the remainder of the estate for her liferent, and if she had any children there is no question they would have taken, but as there are no children and never have been, a competition has arisen as to who gets the residue under the clause I have read. That depends primarily on the question of at what date the families

of John Searcy and William Brown are to be determined, or—to put it in another phrase—that depends really on the date of vesting. The Lord Ordinary has examined the matter very carefully and he has come to the conclusion that the vesting is postponed until the death of the liferentrix Mrs Murray. I do not disguise from myself that if the whole matter had been entirely open, and if I had simply read this deed and nothing else, I think I should have come to the conclusion that the testator did not mean the Searcy and Brown families to be searched for until after it was certain there were to be no grandchildren of his own. But while I say that, and that consequently I should in that way have arrived at the same conclusion as the Lord Ordinary, I am afraid that to be honest I must also admit that if the whole matter had been open I should never have hit upon the device of vesting subject to defeasance. I confess frankly that I think it might have been a better world if it could have been contrived that there should be no decisions whatever on vesting since the date of *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151; and *Young* v. *Robertson*, February 14, 1862, 4 Macq. 509. But unfortunately that is not the state of matters, and I cannot go back on the long series of decisions that have been given on this subject, affirmed as they have been by the House of Lords, and, accordingly, I have got to apply the doctrine of vesting subject to defeasance—a doctrine which I think was said by Lord Rutherfurd Clark, and I agree with him, to be a contradiction in terms.

That being so, I confess I am utterly unable to distinguish this case from the case of *Corbet's Trustees* (8 F. 610). The cases seem to be quite undistinguishable except in one particular, and it is the only difference that can be pointed to as existing between the two cases. It is the fact that in *Corbet's Trustees* the direction-over was all brought into one sentence with the original gift of residue. It is the fact here that it is contained in another purpose of the trust-disposition, that is to say, in the sixth purpose instead of the fifth. Everything else is the same, even to the small point of the direction-over being given after the direction to realise, which direction to realise does not apply to the original gift of the fee of the residue to the issue of the liferenter. All that is just the same in *Corbet's Trustees* as it is here. Now, though I agree with something that has been said in the House of Lords, that law is not a logical science, and that we are not to proceed by steps of inexorable logic if we think there is anything in the deed that points to an intention to achieve a different result, yet I cannot feel that the fact that the thing is written in two sentences instead of in one can make any difference to the application of the principle. And for this reason, that we know the framing of provisions in two clauses instead of one is a mere accident, depending on the individual idiosyncrasy of the man who drew the deed. Some persons divide their sermons into heads, others prefer to construct them in one long passage, and I think it can make no difference here that there is a "fifthly" or a "sixthly" interpolated. That indeed would be running distinction mad. Accordingly I come to the conclusion, following *Corbet's Trustees*, that this is a case of vesting subject to defeasance. I say that all the more readily for I find that all the Judges of the Second Division agreed in the judgment in *Corbet's Trustees*, and that one of them, Lord Kyllachy, had formed one of the minority in *Thomson's Trustees* v. *Jamieson* (2 F. 470). In other words, I think they recognised, as we do, that after *Thomson's Trustees* there was no getting over the doctrine.

Now that being the principle to be applied, the effect of it is not doubtful. It settles that the families of John Searcy and William Brown are to be taken as they existed *a morte testatoris*. As at the death of the testator, which was in 1882, the family of William Brown consisted of Amelia Brown. Amelia Brown died in 1883, and died intestate, but it is admitted that, she being English, according to the law of England the family of Allbuary are now the representatives of Amelia Brown. It is also admitted—there is no question about it—that the family of John Searcy is to be taken as represented by Arthur John Searcy, Maud Ann Searcy or Physick, Edith Rebecca Searcy or Dickson, and the trustees of the late William Frederick Searcy, who lived till 1891, and therefore of course survived the testator.

The only other question that then remains is—What is to be the division between these two families? Upon that I have never had any doubt, and my view is that the word "amongst" really means "between." I think that is the only way in which you get a consistent meaning for the whole sentence; and what the testator means is, I think, that each family is to take its equal share, and then the members of each family are to divide that share among themselves. And, after all, that is a common-sense view of the settlement, because obviously the testator after making provision for his own offspring, that is to say his daughter and her issue, felt that he wanted to act fairly between the families of his two wives, and therefore gave one half to each family. Accordingly I come without difficulty to the conclusion that the true meaning is an equal division between the two families, and then a further division among the members of each family. That is perhaps not a very accurate expression, but it indicates the way we intend to dispose of the case; and accordingly we shall pronounce an interlocutor bringing out the results I have just indicated.

LORD M'LAREN—I have felt this case to be a case of difficulty, but on the best consideration I can give to this will I am of the same opinion as your Lordship. The chief difficulty is in the application of the doctrine of vesting subject to defeasance. The Lord Ordinary develops two criticisms

upon that doctrine which are worthy of consideration. He says, in fact, that it is an excrescence upon the Scottish law of vesting, but accepting it as being now a part of our system he says—and I think justly—that all such rules are only guides for the interpretation of the testator's meaning, and that we have still to consider whether there is not in any particular case a ground for displacing the inference that would be drawn in accordance with these rules. I think that if we look at the present question historically there can be no doubt that the principle of vesting subject to defeasance is an excrescence on our system. Having a tolerably fair acquaintance with the older decisions as well as those of more recent date, I am satisfied that no trace of the doctrine is to be found in any of the reported cases until we come to a period about thirty years ago. Not until then is it alluded to as part of our system by the Court of highest authority. If, as we have sometimes been told, the construction of a will is not matter of law, but is rather what I should call matter of logical deduction from the language used, then I agree with your Lordship that I at least could not have found from the language used in the class of cases to which this doctrine applies an intention to give the vested right and afterwards to take it away. However, we must look at this principle as now part of the law of Scotland, and endeavour to apply it as best we can.

It is quite true, as pointed out by the Dean of Faculty, that if we find from the context that the testator meant something which it is difficult to reconcile with an application of this principle, we must give effect to that distinctive intention. But in comparing the language used in this case with that in other cases in which the principle of vesting subject to defeasance has been applied, I find nothing to take this case out of the normal example or category, except that the destination-over, instead of being put expressly as a qualification of the original gift, is made the subject of a separate clause. Now I am afraid that is not a distinction sufficient to entitle us to deal with this case exceptionally, because it is a known principle that all clauses in a deed are to be read as if the whole deed were one sentence, and where the logical connection of two clauses requires that they should be read in sequence they must be read in sequence. It is often important to consider the order of clauses and the mode in which they are separated from each other for the purpose of determining whether a testator meant an independent condition or meant a qualification or addition to something antecedent. But then I do not think that in this case such a question arises, because it seems to me to be perfectly clear from the language of the sixth purpose that it was intended as a qualification of the fifth. The testator begins by stating as a condition of the sixth purpose the failure of the objects of the fifth, and I think the circumstance that he heads this part of the destination with a different numeral does not in any way prevent its being read as a continuation of the fifth purpose and a qualification of it, as we must hold it to be if we admit the doctrine of vesting subject to defeasance.

While I have considerable sympathy with the Lord Ordinary's view on both points, I have not been able to satisfy myself that we are entitled in accordance with the decided cases to treat this case as exceptional, and I think it therefore follows—because I do not think it necessary to repeat what your Lordship has said about the pedigree of the testator's family—that the division will be in two equal shares between the Searcy family and the Brown family; and one result of that will be that the relatives of the deceased member and Mr Allbuary and another, who come in under the English law of succession, will be entitled to participate in the distribution.

LORD PEARSON—I agree with your Lordship on both parts of the case. The Lord Ordinary's decision on the question of vesting, when closely examined really turns upon the circumstance that the primary bequest to the testator's daughter in liferent and her issue in fee is contained in one clause of the will, while the destination-over is found in a separate and subsequent clause, which was only to take effect in the event of the daughter's death without issue. I do not think that is a safe ground of judgment, for it appears to me to give undue weight to the mere form or draughtsmanship of the will as against the substance of it. The substance of it is that the trustees were to hold the residue for a series of purposes; and the terms in which these purposes are expressed must be read as a whole, and the usual canons of construction applied to them. Now if this is done, I do not think there can be much doubt as to the result. I sympathise with the Lord Ordinary in his remark that it is difficult to tell what the testator really meant, if indeed he knew what he meant, in the precise event which has happened. But that just emphasises the propriety of applying the ordinary rules of construction of which testators are supposed to be aware, and so doing I think this case must follow the case of *Corbett's Trustees*. It is true that this will was dated and the testator died long before that decision was pronounced, so that it cannot be said that the testator or his adviser had it in view. But *Corbett's Trustees'* case followed upon a long line of authorities, and proceeded on the footing that the canon of construction applicable in a case like the present was fixed, so far at least as a canon of construction can be fixed; and I think it clearly applies to the case in hand.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Find on a sound construction of the trust-disposition of the late William Searcy, and in particular of the 5th and 6th purposes thereof, that the vesting of the fee of the residue took place at the testator's death in the families of John Searcy and William Brown

subject to defeasance in the event of the testator's daughter leaving issue: Further, find that the one-half share of residue destined to the family of William Brown falls to the claimant Albert John Allbuary as executor of the late Mrs Elizabeth Carpenter or Allbuary: Further, find with reference to the division of the one-half share of residue falling to be divided among the family of the late John Searcy, that the said share falls to be divided among his three children who survived the testator, viz., the claimants Arthur John Searcy, Mrs Maud Ann Searcy or Physick, and Mrs Edith Rebecca Searcy or Dickson, and the trustees of the deceased William Frederick Searcy, a predeceasing son of the said John Searcy: Therefore sustain the claims lodged on behalf of the said claimants, and rank and prefer the said claimants accordingly."

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Counsel for Claimants W. F. Searcy's Trustees—Craigie, K.C.—Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for Claimants J. W. Searcy and his Guardian—Ballingall. Agent—W. B. Rainnie, S.S.C.

Thursday, March 14.

FIRST DIVISION.

MILLER'S TRUSTEES *v.* MILLER.

Succession—Trust—Construction of Testamentary Writings—Subjects Included in Bequest—"Furniture, Pictures, Books, Linen, and Others"—"Household Furniture and Plenishing of Every Description, including Pictures, Books, Linen, and Others"—"Furniture and other Effects therein"—Wines and Liquors—Interest in Wines and Liquors of Party having Use for Life—Liferent as distinguished from Use for Life through Trust.

A testator directed his trustees "to deliver to my said wife as her own absolute property out of the furniture and plenishing of said H.— House, . . . such furniture, pictures, books, linen, and others that she may select for her personal use."

He also directed his trustees "to convey and make over to my said wife as her own absolute property the house No. 45 G.— S.— . . . . together with the whole household furniture and plenishing of every description, including pictures, books, linen, and others (but excepting silver plate) in said house. . . ."

And he also directed them "to allow my said wife to occupy and possess during her lifetime . . . . the said mansion-house of M.—and offices, and furniture, and other effects therein. . . ."

Held (1) that in all three bequests wines and liquors were included; and (2) further, that under the third bequest, while the beneficiary was entitled to consume as much of the wines and liquors as was required while she resided at M., the trustees were not bound, or entitled at their discretion, to sell the wines and liquors and pay the beneficiary the interest on the price.

Observations on the more extensive inclusion of "a right of possessing and enjoying subjects under a trust" than of "a liferent."

Sir James Miller, Bart., of Manderston, Berwickshire, died, without issue, but survived by his wife the Hon. Eveline Mary Curzon or Miller, on 22nd January 1906. He left a trust-disposition and settlement dated 4th December 1901 and recorded 26th January 1906, whereby he conveyed his whole estate to Sir George Houston Boswall, Bart., of Blackadder, and others as trustees.

Difficulties having arisen as to the construction of certain clauses of the trust-disposition, as to whether wines and liquors were included in the bequests, a special case was presented, to which the trustees were the *first* parties and the widow the *second* party.

The *trust-disposition* gave the uses, ends, and purposes of the trust, *inter alia*, as follows, the particular clauses in question being third place (*third*) and sixth place (*third* and *seventh*):—"In the first place, for payment of all my just and lawful debts, deathbed and funeral expenses, and the expenses of executing this trust: In the second place, for payment to my trustees acting for the time equally among them of an annuity of £150 . . . : In the third place, for payment and delivery of the following legacies and bequests, and implement of the following directions, namely—(*First*) To my wife the Honourable Eveline Mary Curzon or Miller, the sum of £25,000 . . . . : (*Second*) To lease to my said wife during her life, should she desire it, Hamilton House, Newmarket, should the same belong to me at my decease, or any other house at Newmarket that may then belong to me, at a rental of £150 per annum, but in the event of my said wife not being desirous of occupying said house the same shall form part of my general estate: (*Third*) To deliver to my said wife as her own absolute property out of the furniture and plenishing of said Hamilton House, Newmarket, or any other house at Newmarket which may belong to me at my decease, such furniture, pictures, books, linen, and others that she may select for her own personal use: (*Fourth*) To deliver to my said wife as her own absolute pro-