uncertainty and consequent ineffectiveness of the bequest are removed by the local limitations imposed. But local limitations expressed by the words "in connection with the parish of Lesmahagow or the neighbourhood" do not add any definiteness to the class of purposes or objects which it was in the mind of the testator to benefit or promote. The foundation of political clubs, schools of art, a zoological garden, or an astronomical observatory in Lesmahagow, along with a thousand other things in connection with that parish or its neighbourhood, might in the trustees' opinion be excellent, but the bequest is void by reason of the uncertainty as to which of them or which class of them the truster meant to favour. This is exactly the reason which invalidates the bequest where there is no geographical reference.

Local limitations do come into play and make the bequest effective if and when they provide the means of identifying the particular objects or institutions which the testator has meant to benefit. I am of opinion that the local connection cannot limit the area of selection of purpose, unless the reference of the testator is to persons, societies, agencies, or institutions actually existing or projected to be established in a particular district.

I agree respectfully with the opinions in the case pronounced by the Lord Justice-Clerk and Lord Salvesen.

Their Lordships dismissed the appeal, but without expenses.

Counsel for the Appellants—Chree, K.C.—M. P. Fraser. Agents—Moncrieff, Warren, Paterson, & Company, Writers, Glasgow—Webster, Will, & Company, W.S., Edinburgh—Grahames & Company, Solicitors, Westminster.

Counsel for the Respondent—The Lord Advocate and Dean of Faculty (Clyde, K.C.)—Forbes. Agents — James Ross Smith, S.S.C., Edinburgh—The Treasury Solicitor (Law Courts Branch).

COURT OF SESSION.

Friday, January 11.

FIRST DIVISION.

ALLAN'S TRUSTEES *v.* ALLAN.

Succession—Trust—Vesting—Dies incertus—Vesting Subject to Defeasance or Suspended Vesting.

A testator directed his trustees to pay one-third of the income of his estate to his widow during her life and to pay or apply to or for behoof of his lawful children the remaining two-thirds of the income in such manner and at such time or times as they might think proper until the youngest surviving child attained the age of twenty-one years complete. He further provided—"Upon the youngest surviving child attaining twenty-one years complete my trustees shall divide the residue equally amongst my children, the lawful issue of any of them predeceasing being entitled equally among them to the share which would have fallen to their parent if alive." The testator was survived by a widow and four children. Before the youngest child attained the age of twenty-one another daughter died without ever having married. *Held* that the share of the daughter had vested in her *a morte testatoris*, subject to defeasance in the event of her predeceasing the term of payment leaving issue, in favour of such issue.

Authorities examined.

William Smith Storie and another, the testamentary trustees of Andrew Allan, solicitor, Falkirk, *first parties*, Mrs Allan, his widow, *second party*, and Robert Andrew Craig Allan and others, his surviving children, *third parties*, brought a Special Case to determine questions relating to the vesting of the residue of his estate.

Andrew Allan died on 30th May 1899 leaving a *trust-disposition and settlement* dated 12th January 1892, which conveyed his whole means and estate to the first parties for various purposes, which included—"(*Second*) For payment to my sisters Barbara Gibson Allan and Jane Blair Allan of an annuity of twenty pounds sterling per annum, each, payable in equal portions half-yearly at Martinmas and Whitsunday, beginning the first payment at whichever of these terms shall first occur after my death, and that free of legacy duty; (*Third*) One-third part of the free interest or income of my said means and estate remaining after providing for the foresaid annuities I direct my trustees to pay or apply to or for behoof of my wife in such manner and at such time or times as they may think proper during her lifetime; (*Fourth*) The remaining two-third parts of the said interest or income of my said means and estate I direct my trustees to pay or apply to or for behoof of my lawful children in such manner and at such time or times as they may think proper until the youngest surviving child attains the age of twenty-one years complete; (*Fifth*) Upon the youngest surviving child attaining twenty-one years complete my trustees shall, after setting apart sufficient portions of my means and estate to meet the foregoing provisions in favour of my sisters and wife, divide the residue equally amongst my children, the lawful issue of any of them predeceasing being entitled equally among them to the share which would have fallen to their parent if alive; and (*Lastly*) the portions of my means and estate set apart, as aforesaid, shall, as they are set free by the deaths of my said sisters and wife respectively, be divided among my said children in the same way as the rest of the capital before mentioned. . . . And I declare that the foregoing provisions in favour of my wife and children are and shall be accepted by them in full satisfaction of everything they could ask or claim at my death, whether in name of *jus relictæ*, terce,

share of moveables, legitim, or other claim competent to them or either of them against my means and estate by or through my death."

The Case set forth—"1. Andrew Allan . . . was survived by his two sisters Jane Blair Allan, who died on 1st April 1908, and Barbara Gibson Allan, who died on 6th February 1916. He was also survived by his widow Mrs Janet Wilson Potter or Allan, and by four children, viz., Robert Andrew Craig Allan, Mary Wordie Allan, Elizabeth Craig Allan, and Janet Evelyn Allan. The testator's widow and the said children are alive, except the said Mary Wordie Allan, who died after attaining the age of twenty-one, unmarried and intestate, on 20th May 1906. The testator's youngest child, the said Janet Evelyn Allan, attained the age of twenty-one on 6th March 1917. 2. . . . The estate of the testator now under the administration of his trustees amounts to £11,500 or thereby. 3. Owing to the fact that the testator's daughter, the said Mary Wordie Allan, died before the youngest of the testator's children attained the age of twenty-one, a question has arisen as to whether any share of the residue of the testator's estate was vested in her at the date of her death."

The second party *contended, inter alia*—"That the said Mary Wordie Allan had at the date of her death a vested right in an equal one-fourth share of the whole residue of the trust estate (including the portions set apart to meet the provisions to the testator's sisters and the second party), and that the same falls to be distributed as intestate estate of the said Mary Wordie Allan."

The third parties *contended, inter alia*—"That no right in the said residue vested in the said Mary Wordie Allan, and that the said residue, under the terms of the said trust-disposition and settlement, has vested in equal shares in the third parties as the children of the testator alive at the date when the youngest attained the age of twenty-one, or alternatively that the said residue, in so far as not required to meet the provision made to the second party in the said trust-disposition and settlement, falls to them equally, and that the remainder of the residue will vest equally in such of the third parties as survive the second party."

The *questions of law* included—"1. Had the said Mary Wordie Allan at the date of her death a vested right in an equal one-fourth share of the whole residue of the trust estate (including the portions set apart to meet the provisions to the testator's sisters and the second party)"?

Argued for the third parties—The first question should be answered in the negative. The whole bequest to children was dependent on the youngest attaining the age of twenty-one. There was no gift to the children, but merely a direction to pay on the youngest attaining twenty-one, and the gift-over to issue was a true destination-over. The attainment of twenty-one was a *dies incertus* and consequently vesting was suspended. There was no vesting subject to defeasance. The following authorities were referred to:—*Adams' Trustees* v. *Carrick*, 1896, 23 R. 828, *per* Lord Adam at p. 831, 33 S.L.R. 620; *Ballantyne's Trustees* v. *Kidd*, 1898, 25 R. 621, *per* Lord Trayner at p. 632, 35 S.L.R. 488; *Ross's Trustees* v. *Ross*, 1902, 4 F. 840, 39 S.L.R. 678; *Bowman* v. *Bowman's Trustees*, 1899, 1 F. (H.L.) 69, *per* Lord Davey at p. 76, 36 S.L.R. 959; *Muirhead* v. *Muirhead*, 1890, 17 R. (H.L.) 45, *per* Lord Watson, 27 S.L.R. 917; *Parlane's Trustees* v. *Parlane*, 1902, 4 F. 805, *per* Lord M'Laren at p. 808, 39 S.L.R. 632; *Forrest's Trustees* v. *Mitchell's Trustees*, 1904, 6 F. 616, 41 S.L.R. 421; *Alves' Trustees* v. *Grant*, 1874, 1 R. 969, *per* Lord Justice-Clerk Moncreiff at p. 971, 11 S.L.R. 559; *Corbet's Trustees* v. *Elliott's Trustees*, 1906, 8 F. 610, *per* Lord Kyllachy at p. 612, 43 S.L.R. 379; *Wylie's Trustees* v. *Wylie*, 1906, 8 F. 617, 43 S.L.R. 383; *Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, 44 S.L.R. 96; *Penny's Trustees* v. *Adam*, 1908 S.C. 662, 45 S.L.R. 481; *Bannatyne's Trustees* v. *Watson's Trustees*, 1914 S.C. 693, *per* Lord President Strathclyde at p. 700, 51 S.L.R. 605; *Ferguson's Trustees* v. *Readman's Trustees*, 1903, 10 S.L.T. 697; *Newton* v. *Thomson*, 1849, 11 D. 452; *Fraser* v. *Fraser's Trustee*, 1883, 11 R. 196, 21 S.L.R. 137.

Argued for the second party—The first question should be answered in the affirmative. The case was one of vesting subject to defeasance in the event of death leaving issue prior to the youngest child attaining the age of twenty-one. The gift-over to issue was not a true destination and did not affect vesting. The following additional authorities were referred to:—*Coulson's Trustees* v. *Coulson's Trustees*, 1911 S.C. 881, 48 S.L.R. 814; *Wilson's Trustees* v. *Quick*, 1878, 5 R. 697, 15 S.L.R. 395; *Taylor's Trustees* v. *Christal*, 1903, 5 F. 1010, 40 S.L.R. 738; *White* v. *Gow*, 1900, 2 F. 1170, *per* Lord M'Laren at p. 1173, 37 S.L.R. 895; *Wilson's Trustees* v. *Wilson's Trustees*, 1894, 22 R. 62, 32 S.L.R. 54; *Naismith* v. *Boyes*, 1899, 1 F. (H.L.) 78, 36 S.L.R. 973.

At advising—

LORD PRESIDENT—In this case the testator directed his trustees to pay two-thirds of the income of his means and estate to his lawful children in such manner and at such time or times as they might think proper until the youngest surviving child attained the age of twenty-one years, and upon the youngest surviving child attaining that age to divide the residue equally among his children, the lawful issue of any of them predeceasing being entitled equally among them to the share which would have fallen to their parent if alive. The testator died in 1899. His youngest surviving child attained majority on 10th March 1917, and one of his four children, Mary Allan, died in the year 1906. The question which we have to decide is—Was there a share of the residue vested in Mary Allan at the date of her death?

Now if there had been no decisions in this chapter of law subsequent to the date of *Young* v. *Robertson*, 1862, 4 Macq. 314, I should have had little difficulty in holding

that no share had vested in Mary Allan at the date of her death, and that vesting was suspended until the date when the youngest surviving child attained majority; because I find in this settlement two considerations present, the concurrence of which seems to me to yield that result—(first) the bequest to the children and their issue is not conceived in the form of a separate gift with a subsequent direction as to the time of payment—it is for the first time implied in the direction to pay on the youngest child attaining majority; and (second) there is the gift-over to their respective issue in the event of any of the testator's children predeceasing the date of payment. These two considerations I have expressed substantially in the language employed by Lord Watson in the case of *Muirhead* v. *Muirhead*, 1890, 17 R. (H.L.) 45, 27 S.L.R. 917. It is true that in that case Lord Watson mentioned a third consideration, namely, a clause of survivorship, but, as will be seen in his opinion in the case of *Bowman's Trustees*, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959, the second consideration to which I have adverted was regarded by him as equivalent to a clause of survivorship, and, indeed, so it is. And the principle of *Young* v. *Robertson*, as expounded by Lord Watson and Lord Davey in the case of *Bowman*, was applied by this Division of the Court in two cases similar to the present—the cases of *Forrest's Trustees*, 1904, 6 F. 616, 41 S.L.R. 421, and *Parlane's Trustees*, 1902, 4 F. 805, 39 S.L.R. 632. No doubt in neither of these cases was the doctrine of conditional vesting, or vesting subject to defeasance, urged or considered by the Court. But I find great difficulty in coming to the conclusion, apparently adopted by Lord Low in *Cairns' Trustees*, 1907 S.C. 117, 44 S.L.R. 96, that the doctrine was wholly ignored or overlooked by the very eminent judges who decided these two cases.

It would be idle, however, to deny that the doctrine of conditional vesting in cases similar to the one before us was enunciated and applied as far back as the year 1875—by Lord Shand in the case of *Snell's Trustees*, 1877, 4 R. 709, and again in 1902 by Lord Kyllachy in the case of *Wylie's Trustees*, 1906, 8 F. 617, 43 S.L.R. 383. Neither judgment was submitted to the Inner House upon a reclaiming note, but neither has ever been, so far as I am aware, questioned. And undoubtedly Lord Kyllachy had before him, when he decided *Wylie's Trustees*, *Bowman's Trustees, Hay's Trustees*, 1890, 17 R. 961, 27 S.L.R. 771, and all the prior authorities, when he came to the conclusion that in a case similar to the present the doctrine of conditional vesting applied, and said—"It has now, I think, to be taken as an established rule of construction that a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition. In other words, in a case like the present there is no suspension of vesting, but vesting subject to defeasance—defeasance in the event of a primary legatee leaving issue." And the doctrine so enunciated and applied was certainly followed by the other Division of the Court in a series of cases embracing *Corbet's Trustees*, 1906, 8 F. 610, 43 S.L.R. 379; *Cairns' Trustees*, 1917 S.C. 117, 44 S.L.R. 96; *Penny's Trustees*, 1908 S.C. 662, 45 S.L.R. 481; and, in slightly different circumstances, *Coulson's Trustees*, 1911 S.C. 881, 48 S.L.R. 814. And unquestionably it was accepted in the case of *Searcy's Trustees*, 1907 S.C. 823, 44 S.L.R. 536, by the Judges in this Division of the Court. I very respectfully associate myself with the views expressed by Lord President Dunedin and Lord M'Laren in the case of *Searcy's Trustees*, and with the view expressed subsequently by Lord Kinnear in the case of *Johnston's Trustees* v. *Dewar*, 1911 S.C. 722, 48 S.L.R. 582.

In my opinion the doctrine is, in cases similar to the present, too firmly rooted in the law of Scotland for us to think of disturbing it. I think it applies to the case before us, and accordingly I am of opinion that we ought to answer the question put to us in the affirmative.

LORD JOHNSTON—The settlement in this case is a very simple one. The testator gave annuities of £20 each to his two sisters for life, and then dealt with his general estate thus—(3rd) one-third of the free income after paying these annuities he directed the trustees to pay to his wife during her lifetime. (4th) The remaining two-thirds of said income he directed his trustees to pay or apply to or on behalf of his lawful children "until the youngest surviving child attains the age of twenty-one years complete." Then follows the clause upon which contest has arisen, viz., (5th) "Upon the youngest surviving child attaining twenty-one years complete my trustees shall, after setting apart sufficient portions of my means and estate to meet the foregoing provisions in favour of my sisters and wife, divide the residue equally among my children, the lawful issue of any of them predeceasing being entitled equally among them to the share which would have fallen to their parent if alive." And then he provides, lastly, that the portions of his estate set apart for his sisters' annuities and his wife's liferent should, as they were set free, "be divided among my said children in the same way as the rest of the capital before mentioned."

This is the whole settlement, except a clause declaring that its provisions in favour of wife and children should be accepted in full satisfaction of legal rights, which do not seem to have been excluded by marriage contract. The testator was survived by his widow and four children. One of these children, Mary Wordie Allan, died unmarried and intestate before the youngest attained majority. The widow and the rest survived, and the youngest of the children has now attained twenty-one. The contest is as to the rights of Mary Wordie Allan in the residue. The widow for her interest in her daughter's succession maintains that Mary Wordie Allan had at the date of her death a vested interest *a morte* in one-fourth of the residue, subject always to the life inter-

est above mentioned and to postponement of payment until the last surviving child should attain majority. The surviving children maintained that nothing vested in Mary Wordie Allan, and that the whole residue, subject as aforesaid, vested in them at the date when the youngest of them attained majority.

We have had a lengthy and I think very academic argument on the subject of vesting subject to defeasance, which so far as I am concerned has not enlightened me. The doctrine of vesting subject to defeasance is one not to be extravagantly extended in application. It is not a panacea to be resorted to to obviate every difficulty in construing a testamentary settlement. It may very easily be abused in the application, and I am not satisfied that it has not sometimes been abused. But I think that this is a case in which the doctrine does apply, and that it is one of the simplest in that branch of succession law and did not call for an elaborate argument on the case law. I think that the result of the provisions of the settlement to which I have adverted is that the testator gave a vested interest to his children *a morte* (1) subject to postponement of payment so far as was necessary to provide for the annuities to his sisters and the limited liferent to his widow; (2) subject to postponement of payment so long as any of them remained in minority; and (3) subject to defeasance in the event of any of them predeceasing the date of the youngest attaining majority leaving issue, in favour of such issue.

The case to my mind partakes much more of the aspect of that of *Lindsay's Trustees*, 1880, 8 R. 281, 18 S.L.R. 199, than of any of the cases which were cited to us more directly bearing on the subject of vesting subject to defeasance. It has often been said that in construing a particular provision in a settlement the Court is bound to consider the settlement as a whole, and to construe the particular provision which may be in question in light of that consideration. So doing, I find no difficulty in there being here no direct gift apart from the direction to distribute. The postponement of payment is in the interest of liferenters only. What the testator contemplated was to conserve a portion of the capital of his estate to provide an income to his wife, and actuated very probably by views as to the amount of the estate which he was likely to leave; which was not large, to keep the rest together in order to afford a joint income for his children living in family until the youngest attained twenty-one. The postponement of capital distribution was a matter solely dictated by these objects, and having no relation to the ultimate interests of his children.

Further, I cannot read the directions to "divide the residue equally among my children" as implying the addition of "then surviving."

And lastly, I think it is an element not to be neglected that the testator's provisions by his settlement were expressly made in satisfaction of legitim to a share of which Mary Wordie Allan was entitled on her father's death. This as it appears to me favours vesting *a morte*, though it may be subject to defeasance rather than postponement of vesting until the last of the children attained majority. This it is evident might have led to entire intestacy, even though all but the youngest who should survive of his children might have been major for some time before the youngest surviving came of age.

I do not, as I have said, think that any elaborate canvass of the authorities on the application of the doctrine of vesting subject to defeasance is needed. If any reference to case law is required it is unnecessary to go beyond the simple case of *Snell's Trustees*, 1877, 4 R. 709.

Lord Mackenzie—I agree that the question ought to be answered in the affirmative. In the first place I wish to say a word about a point which figured to a considerable extent in the argument, namely, that we had here a case where the maxim *dies incertus pro conditione habetur* applied. It does not appear to me that the direction to divide the residue upon the youngest surviving child attaining twenty-one years complete operates to suspend vesting, as would be the case if the condition was personal to the legatee.

In the next place I think this is a typical case of vesting subject to defeasance. The true principle applicable to such a destination is to be found in the principles laid down by Lord Kyllachy and Lord Low in the cases of *Corbet's Trustees*, 1906, 8 F. 610, 43 S.L.R. 379, and *Wylie's Trustees*, 1906, 8 F. 617, 43 S.L.R. 383, and more particularly in the passage to the effect that it is an established rule of construction that a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition. The case of *Corbet* was followed by the case of *Searcy's Trustees*, 1907 S.C. 823, 44 S.L.R. 536. In that case Lord M'Laren refers to the doctrine of vesting subject to defeasance as an excrescence on our system, and says that "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." That is true if it be taken as applicable to moveable succession alone, but it must be remembered that the same eminent Judge said in the case of *Gardner* v. *Hamblin*, 1900, 2 F. 679, 37 S.L.R. 486—"It has been decided in cases which go back at least a hundred years that a destination of heritage subject to devolution in the event of the birth of a nearer heir is effectual, and heirs of entail in possession have been dispossessed by the Court on the birth of nearer heirs." The principle in both cases is just the same—it is vesting subject to divestiture. In the case of *Snell's Trustees*, 1877, 4 R. 709, decided in 1875, which was an Outer House case, all that was done was to apply to moveable succession a principle firmly established long before in the law of Scotland with regard to heritage.

The history of the matter is that the principle of *Snell's Trustees* was applied in *Taylor* v. *Gilbert*, 1878, 5 R. (H.L.) 217, 15 S.L.R. 776, the classical passage being Lord Blackburn's opinion at p. 221. *Snell's Trustees* does not appear to have been cited in the discussion. The principle underlying the decision in *Snell's Trustees* was very clearly stated in the case of *Steel's Trustees*, 1888, 16 R. 204, 26 S.L.R. 146, by Lord President Inglis—more clearly than it had been in the intervening time since the case of *Taylor* v. *Gilbert*, and certainly in the discussion in *Steel's Trustees* the decision in *Snell's Trustees* bulked very largely. The same principle was recognised in the case of *Cairns*, 1907 S.C. 117, 44 S.L.R. 96, and there Lord Low deals with the decision in *Bowman*, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959, and I agree with the view taken that there is nothing that was said in *Bowman* that can affect the application of the doctrine of vesting subject to defeasance in such a destination as we have here.

Mr Candlish Henderson pressed upon us the decision in the case of *Adams*, 1896, 23 R. 828, 33 S.L.R. 620, as being quite inconsistent with the judgment we now propose to pronounce, and it was said that that decision was to the same effect as the decision in *Parlane's Trustees*, 1902, 4 F. 805, 39 S.L.R. 632, and *Forrest's Trustees*, 1904, 6 F. 616, 41 S.L.R. 421. It was said that there was a difference of opinion between the First Division and the Second. It is impossible to suggest that, after the decision in *Searcy*, because in *Searcy's Trustees* the cases of *Forrest*, *Corbet's Trustees*, *Wylie's Trustees*, and *Cairns* were cited. The simple answer to the point made on the case of *Adams* (*cit.*) is this, that there was presented to the Court only two alternatives—either absolute vesting or suspended vesting. The Court did not have the opportunity in *Adams'* case of considering whether the principle which had been enunciated by Lord Shand in *Snell's Trustees*, applied by the House of Lords in *Taylor* v. *Gilbert*, and laid down by Lord President Inglis in *Steel's Trustees*, bore upon the case in hand. Accordingly, as the point was not argued, it cannot possibly be said that the judgment is a decision binding in any way upon us in a case in which vesting subject to defeasance was argued.

I am of opinion that there is no conflict between the views of the First and Second Divisions, and that the case of *Searcy* is a conclusive answer to any such suggestion. The doctrine of vesting subject to defeasance being established, and being in my opinion a useful working principle, should be applied here.

LORD SKERRINGTON—The question in this case is whether the share of her father's estate which was destined to Miss Mary Wordie Allan vested in her on the death of the testator, subject to defeasance if she should have issue and predecease the date of distribution, or whether vesting was suspended until that date. It is true that the will provided for several dates of distribution, because portions of the estate had to be set aside to meet annuities, and these became divisible as the annuities fell in. But the testator made it clear that the persons who were to take these minor portions of his estate were to be the same as those to whom he gave the principal shares of residue. Accordingly one may view the will as if it provided for only one date of distribution, namely, when the youngest surviving child should attain twenty-one years complete. I may note in passing that even although we affirm the view that there was vesting *a morte testatoris*, it does not follow that any child could have demanded immediate payment of his share. The decision of the House of Lords in the case of *M'Culloch's Trustees*, 1903, 6 F. (H.L.) 3, 41 S.L.R. 88, shows how a beneficiary may have a vested right but may yet be bound to submit to a postponement of the payment of his share.

As is usual in similar cases we had a long discussion as to what had been done by other testators in other wills, but we heard comparatively little about what had been directed to be done by this particular testator. Two reasons were urged in favour of the view that there could be no vesting until the date of distribution. It was said that the gift was subject to a condition in respect that it was to take effect upon an event which might never happen, and *dies incertus pro conditione habetur.* If one adheres strictly and literally to the language of the bequest there is no answer to that argument, because none of the testator's children might have attained majority. But the bequest must be construed reasonably, and this is obviously one of the cases where by sticking to the letter one fails to get at the true meaning of the testator. His meaning becomes quite plain when one refers back to the 4th purpose, which deals with the distribution of the income. So long as any child was alive and in minority the income was to be divided among the children, but when the income ceased to be so required (an event which must happen) the capital would fall to be divided as directed in the 5th purpose.

The second argument against immediate vesting was based upon the fact that after directing the residue to be equally divided amongst his children the testator added, "the lawful issue of any of them predeceasing being entitled equally among them to the share which would have fallen to their parent if alive." In other words, the gift in favour of each child was to be subject to a contingency which would operate in favour of the issue (if any) of that particular child, so that such issue should take preferably to the creditors or assignees of their parent. It is, I think, somewhat difficult to understand why it should ever have been supposed that a contingency of this very limited character ought to be construed as making the gift to each child conditional on his being alive at the date of distribution, or, in other words, as operating in favour of the brothers and sisters of the primary legatee.

Various cases were cited in favour of the view that in a destination such as we have here vesting was suspended until the date

of distribution, but in all of them the Court was asked to elect between no vesting at all and absolute vesting *a morte testatoris*. Either of these theories would involve a violation of the plain intention of the testator. To hold that there is immediate unconditional vesting would ignore the rights of the grandchildren. That was actually the solution of the problem which was accepted by this Court in the case of *Hay's Trustees*, 1890, 17 R. 961, 27 S.L.R. 771, and which fortunately was disapproved of by the House of Lords in the case of *Bowman's Trustees*, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959. In other cases it was decided that vesting was postponed until the date of payment, the effect of which was to introduce into the bequest a gift-over in favour of survivors for which no justification was to be found in the words used by the testator. The doctrine of vesting subject to defeasance is valuable merely because it provides legal machinery whereby in certain cases (of which the present is an example) one can give effect to what appears to have been the true intention of the testator. The copious citation of decisions demonstrates (if such a demonstration were needed) that the doctrine may be invoked not merely in the case long familiar in destinations of heritage, viz., on the birth of a nearer heir, but also on the birth of an heir further off in the destination.

For these reasons I agree with your Lordships.

The Court answered the first question in the affirmative.

Counsel for the First and Third Parties—R. C. Henderson. Agents—R. D. Ker & Ker, W.S.

Counsel for the Second Party—W. J. Robertson. Agent — A. E. S. Thomson, Solicitor.

Saturday, January 12.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

NIDDRIE AND BENHAR COAL COMPANY, LIMITED *v.* MONTGOMERY.

Workmen's Compensation — Question — Injury by Accident— Workman Suffering from Two Affections—Duty of Arbitrator to Make Findings as to Character of Injuries due to Accident — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*C.A.S.*, 1913, *L, xiii*, 17 (*a*).

A workman injured by accident claimed compensation, and attributed to the accident injuries to his back and to his heart. His employers admitted liability to pay compensation, but denied that the accident had injured the workman's heart, and further averred that the incapacity due to the injury to the back had ceased at a certain date, and that thereafter any incapacity was due to the condition of the heart. They stopped payment. The arbitrator, without pronouncing findings as to what injuries had resulted from the accident, found the workman entitled to compensation after the date when payment ceased. The employers required a stated case, and proposed questions as to whether the arbitrator was entitled to refrain from stating whether the incapacity was due to the injury to the back or to the heart condition, and as to whether the award should have disclosed a finding as to the *onus* of proof relative to the heart condition. The arbitrator refused to state a case. *Held*, in a note by the employers to show cause why a case should not be stated, that a question of law was involved, and the sheriff *ordered* to state a case containing specific findings regarding the character of the injuries said to have been caused by the accident.

The Niddrie and Benhar Coal Company, *appellants*, presented a note under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) craving for an order upon James Montgomery, *respondent*, to show cause why a case should not be stated for appeal.

The *note* set forth—"In this arbitration, which was decided by Sheriff Guy on 12th November 1917, the said Sheriff has refused, conform to certificate herewith produced, to state and sign a case for which the appellants duly applied in writing.

"In the arbitration the respondent craved an award against the appellants ordaining them to pay to the respondent the sum of £1 per week in name of compensation under and in terms of the Workmen's Compensation Act 1906, commencing the first of said weekly payments as at 27th June 1917 for the week preceding that date.

"The respondent in his pleadings averred that on or about 26th March 1917, while he was engaged in the ordinary course of his employment with the appellants, he sustained personal injuries by accident arising out of and in the course of said employment, viz., injuries to back and heart, in respect of which he averred that he had been, and at the date of the application (10th August 1917) was, incapacitated from work and entitled to compensation therefor under and in terms of the Workmen's Compensation Act 1906. The respondent further averred that the appellants had admitted liability in respect of said accident and said injuries, and had paid him compensation at the rate of £1 per week up to and including payment for the week ending 20th June 1917.

"The appellants in their pleadings denied that the respondent had by the said accident sustained injury to his heart, but admitted that as the result of said accident the pursuer's back had been bruised. The appellants further denied that they had admitted liability in respect of the alleged injuries to the respondent's back and heart, and averred that any inability for work on the respondent's part since 20th June 1917