do so forthwith: Therefore appoint the defenders on or before the 17th day of February next to lodge in process a minute setting forth the manner in which they propose to implement the said obligation: And (3) Decern and ordain the defenders to make payment to the pursuer Mrs Joanna Birrell or Grosset of the sum of £58, 15s. sterling as at the term of Martinmas 1917, and the like sum of £58, 15s. sterling as at the term of Whitsunday 1918, together with interest on each of said sums at the rate of 5 per cent. per annum from the said dates when they respectively became due."

Counsel for the Pursuers—Chree, K.C.—A.R. Brown. Agents—Lewis & Somerville, W.S.

Counsel for the Defenders—Brown, K.C.—Guild. Agents—Guild & Guild, W.S.

Saturday, December 20.

SECOND DIVISION.

[Lord Hunter, Ordinary.

SMITH'S TRUSTEES *v.* CLARK AND OTHERS.

Succession — Vesting — Liferent or Fee — Direction to Hold and Apply for Behoof of.

Succession — Accretion — Intestacy — Casus amissus — Class Gift of Joint Liferent.

A testator directed his trustees to "hold and apply, pay and convey" the residue of his estate, after disponing of three-fifths thereof, as follows, viz. — "one-fifth thereof to be held and applied for behoof of the children of my daughter" A, and "the remaining one-fifth to and for behoof of my daughter" B, "the shares effeiring to the children of my daughter" A "and to my daughter 'B' to be held for their behoof in liferent for their liferent use only and for behoof of their respective children and the survivors and survivor equally among them in fee, payable and to be conveyed to them on their respectively attaining the age of twenty-five and on the death of their parents, the issue, however, of such of them as may decease leaving issue being entitled to the share which their parent would have taken on survivance." Power was given to the trustees to "pay and convey" to B in the event of her marriage, and to the children of A on their respectively attaining twenty-five or being married, or at such time thereafter as they should think fit, such portions of the shares liferented by them not exceeding one-half thereof as they should think proper. The testator directed, further, that in the event of his daughter B or any of his grandchildren, the children of A, predeceasing him without leaving issue, or of his or her leaving issue, but of such issue not surviving to take, then the share destined to his daughter B or to such grandchild in liferent and his or her issue in fee, should, as regards B's share, fall and accresce (not *per capita* but *per stirpes*) to the other residuary legatees, whom failing to their respective issue, and as regards the share of any such grandchild, should fall and accresce to his surviving brothers and sisters. The daughter B and a grandchild, a son of A, both survived the testator and died without leaving issue. *Held* (1) that the shares of residue liferented by the daughter B and the grandson had not vested in them; (2) that the share liferented by B did not pass to the residuary legatees by virtue of the clause of accretion, the contingency which had happened not having been provided for therein, but fell to be dealt with as intestate succession; and (3) that while the share liferented by the grandson was not carried to his surviving brothers by the terms of the clause of accretion, still the terms of the gift to A's children imported a joint liferent, and on the death of one member of the class without leaving issue his share of the liferent fell to his surviving brothers.

Sir Nathaniel Dunlop of Shieldhill, Biggar, and others, trustees acting under the trust-disposition and settlement of the late George Smith senior, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration against Sir George Smith Clark, Bart., and others, *defenders*, for the determination of certain questions arising under Mr Smith's trust-disposition and settlement. These questions concerned the disposal of two shares of residue which formed the fund in *medio* liferented in terms of the will by (1) Mrs Eliza Smith or Barr, a daughter of the testator, and (2) Lieutenant-Colonel James Clark, K.C., a grandson of the testator, and which were left in doubt in consequence of the liferenters having died without issue.

By his trust-disposition and settlement, dated 12th December 1873, the testator provided, *inter alia* — "With regard to the residue of my means and estate . . . I direct my trustees to hold and apply, pay, and convey the same as follows, viz., one-fifth thereof to be paid and conveyed to my son the said George Smith junior, and that absolutely and as at the date of my death; one-fifth thereof to be held and applied for behoof of the children of my daughter the deceased Mrs Jane Smith or Clark; one-fifth thereof to and for behoof of Mrs Margaret Smith or Kerr, wife of John Pinkerton Kerr, residing at Underwood, Paisley; one-fifth thereof to and for behoof of Ellen Dunlop, only child of my daughter the also deceased Mrs Ellen Smith or Dunlop; and the remaining one-fifth to and for behoof of my daughter Eliza Smith; the shares effeiring to the children of my daughter the deceased Mrs Jane Smith or Clark, to my daughter the said Mrs Margaret Smith or Kerr, to the said Ellen Dunlop, and to my said daughter Eliza Smith, to be held for their behoof in liferent for their liferent use only and for

behoof of their respective children and the survivors and survivor, equally among them in fee—payable and to be conveyed to them on their respectively attaining the age of twenty-five, and on the death of their parent, the issue, however, of such of them as may decease leaving issue being entitled to the share which their parent would have taken on survivance: Declaring . . . (*secundo*) that in the event of either of my said daughters Mrs Margaret Smith or Kerr and Eliza Smith predeceasing me without leaving issue, or of her leaving issue but of such issue not surviving to take in terms of the destination hereinbefore contained, then the share hereinbefore destined to her in liferent and her issue in fee shall fall and accresce (not *per capita* but *per stirpes*) to the other residuary legatees hereinbefore mentioned, whom failing to their respective issue; (*tertio*) that in the event of any of my said grandchildren (viz., the said Ellen Dunlop and the children of my daughter the said Mrs Jane Smith or Clark) predeceasing me without leaving issue, or of his or her leaving issue but of such issue not surviving to take in terms of the destination hereinbefore contained, then the share hereinbefore destined to such grandchild in liferent and his or her issue in fee shall, in the case of the said Ellen Dunlop, fall and accresce (not *per capita* but *per stirpes*) to the other residuary legatees hereinbefore mentioned, whom failing to their respective issue, and in the case of the children of my daughter the said Mrs Jane Smith or Clark shall fall and accresce to his or her surviving brothers and sisters, whom all failing, then to the other residuary legatees hereinbefore mentioned, whom failing to their respective issue (not *per capita* but *per stirpes*) provided always that all shares accrescing in manner hereinbefore specified shall in so far as devolving on females be subject to the same liferent and to the same destination, declarations, and provisions as are herein provided with regard to original shares . . . (*Thirdly*) That notwithstanding anything hereinbefore contained, it shall be in the power of my trustees, should they think proper, as to which they shall be sole judges, to pay and convey to my said daughter Mrs Margaret Smith or Kerr and also to my said daughter Eliza, in the event of her entering into marriage, such portion of the fee of residue hereinbefore provided to them respectively in liferent as my trustees may think fit, not exceeding in all one-half thereof to each of them; and, farther, that it shall be in the power of my said trustees should they think proper, as to which they shall be sole judges, to pay and convey to any of my said grandchildren, the said Ellen Dunlop and the children of the said Mrs Jane Smith or Clark, such portion of the fee of the share of residue hereinbefore provided for him or her in liferent as my said trustees may think fit—not exceeding in all one-half thereof—payable on their respectively attaining twenty-five years of age or on being married, whichever of these events should first happen, or at such time thereafter or from time to time thereafter as my trustees may think fit." [The power to make advances out of the capital of the shares was exercised by the trustees in the case of the beneficiaries whose shares formed the fund *in medio*.]

The testator died on 3rd March 1876 survived by (1) his son George Smith junior, who died on 2nd November 1899, leaving a trust-disposition and settlement under which Robert Workman Smith was the surviving trustee; (2) three grandchildren (being the issue of the testator's daughter Mrs Jane Smith or Clark, who predeceased him), namely, Lieutenant-Colonel James Clark, K.C., C.B., who was killed in action in France on 10th May 1915, and was survived by a widow but left no issue, Sir George Smith Clark, Bart., and Robert Clark; (3) his daughter Mrs Margaret Smith or Kerr, who died in 1877 or 1878 intestate, but leaving issue and survived by her husband John Pinkerton Kerr, who died in 1894 leaving a trust-disposition and settlement; (4) a grandchild Miss Ellen Smith Dunlop, only child of the testator's daughter Mrs Ellen Smith or Dunlop, who predeceased him; and (5) his daughter Mrs Eliza Smith or Barr (designed in the testator's trust-disposition as Eliza Smith), who married and died without issue on 16th April 1917 leaving a trust-disposition and settlement.

Claims were lodged for (1) Robert Workman Smith, the surviving trustee acting under the trust-disposition and settlement of the deceased George Smith junior, and for Mrs Kerr's children and the trustees of her husband John Pinkerton Kerr, (2) Robert Clark and others (Mrs Barr's trustees), (3) Mrs Clark and others (Colonel Clark's trustees), (4) Sir George Smith Clark, Bart., and Robert Clark, the two surviving brothers of the deceased Colonel Clark, with their respective children. The first claimants maintained that there was no vesting of the fund *in medio* in either Colonel Clark or Mrs Barr, and that the fund fell into intestacy. The second claimants maintained that Colonel Clark's share had not vested in him and fell into intestacy, but that Mrs Barr's share had vested in her subject to defeasance in the event of her leaving issue, and that in consequence of her death without issue it passed to them as her trustees. The third claimants maintained that Colonel Clark's share vested in him subject to defeasance in the event of his leaving issue and passed under his will to his trustees. The fourth claimants maintained that there was accretion by survivorship to them in respect of the share liferented by their brother Colonel Clark.

On 1st July 1919 the Lord Ordinary (HUNTER) pronounced the following interlocutor:—"Finds that the balances of the shares of the residue of the estate of the deceased George Smith senior, liferented by the deceased Lieutenant-Colonel James Clark, and the deceased Mrs Eliza Smith or Barr, vested *a morte testatoris* (subject to defeasance in the event of their dying leaving issue): Therefore sustains the claim for the trustees of Lieutenant-Colonel James Clark to the whole of the first portion of the

fund *in medio:* Sustains the first part of the claim (*b*) for the trustees of Mrs Barr to the whole of the second portion of the fund *in medio*."

Opinion.—"[*After a statement of the facts*] —The fund *in medio* consists of the shares of the truster's estate liferented by his grandson Lieutenant-Colonel James Clark, K.C., and by his daughter Mrs Barr, and not paid over to them. Colonel Clark was killed in action in France on 10th May 1915, and was survived by a widow, but left no issue. Mrs Barr died without issue on 16th April 1917. Both these beneficiaries left settlements, the trustees under which are claimants in the action.

[*His Lordship here narrated the terms of the trust-disposition and settlement.*]

"The trustees acting under the wills of Mrs Barr and Lieutenant-Colonel Clark maintain that in the events which have occurred the shares of these beneficiaries had vested in them. They maintain that the provisions giving Mrs Barr and Lieutenant-Colonel Clark liferent interests were intended to operate only in the event of their surviving the testator and dying leaving issue.

"For the residuary legatees alive at the date of Mrs Barr's death and for the brothers of Lieutenant-Colonel Clark who survived him it was contended that the fee of the shares in dispute passed to them under the destinations-over. The testator has, however, as I have already stated, made no direction as to what is to be done in the events that have occurred. To give effect to their contention necessitates the reading into the settlement of words which are not there. It may be that if the testator had contemplated the events which have occurred he would have made the direction which he has given applicable thereto, but for me to so hold appears to be giving effect to speculation as to what the testator would or might have done in events which he has overlooked, and not to be legitimate interpretation of the words which must afford my sole guide in ascertaining his intention. I therefore reject this contention.

"These claimants have an alternative contention—and this is also the contention of others of the next-of-kin of the testator—that the shares of the estate forming the fund *in medio* fall to be treated as intestate estate of the truster. I think that the difficulty of construction—and it appears to me to be a real difficulty—arises between this contention and that put forward by the representatives of the deceased beneficiaries.

"It appears to be perfectly well settled that if a gift of fee has initially been conferred upon a beneficiary by words used by a testator, a subsequent direction to trustees to hold for that beneficiary in liferent allenarly and for his issue in fee does not absolutely cut down the initial gift: In such a case vesting is held to take place *a morte* in the beneficiary subject to defeasance only in the event of his dying survived by children. This was decided in the case of *Lindsay's Trustees* v. *Lindsay, &c.*, 1880, 8 R. 281, 18 S.L.R. 199, and the doctrine is explained by Lord Dunedin in the case of *Tweeddale's Trustees* v. *Tweeddale*, 1905, 8 Fraser 264, at p. 273, 43 S.L.R. 193, whose opinion was accepted as authoritative by Lord Atkinson in *Donaldson's Trustees* v. *Donaldson*, 1916 S.C. (H.L) 55, at p. 63, 53 S.L.R. 97. In the latter case both the learned Judge and Lord Parker of Waddingron quote a passage from Lord Davey's opinion in *Hancock* v. *Watson*, 1902 A.C. 14, at p. 22 as correctly stating a principle common to both Scotch and English law. That passage is in the following terms—'It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (1849, 1 Mac. & G. 551) if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next-of-kin are excluded in any event.'

"The principal question in the case therefore is, Was an initial gift conferred by the testator upon his daughter Mrs Barr and upon his grandson Lieutenant-Colonel Clark? I cannot say that in my opinion this question is free from difficulty. The testator has directed his trustees to hold and apply, pay, and convey his residue in five equal shares. Pay and convey are words certainly importing an absolute gift, but in the application of the four words to the different shares their use is confined to the share going to the truster's son, on whose absolute gift no trust is engrafted or imposed. Have the words 'hold and apply' a similar meaning? Certain cases were cited to me. In *Nicol's Trustees* v. *Farquhar*, 1918 S.C. 358, 55 S.L.R. 303, it was held that no gift of fee had been conferred upon a beneficiary for whom trustees were 'to hold and retain' a share of residue with certain directions as to the disposal thereof. There is of course, as counsel pointed out, a distinction between the words 'hold and retain' and the words 'hold and apply.' In *Tweeddale's Trustees* v. *Tweeddale* Lord Dunedin said—'In one sense it is true that no decision in this branch of the law can ever be authority for another; for as different instruments are being construed, and the sole question is what is the true meaning of each, the decision of the proper construction of the will of A can never, as authority, rule the construction of the will of B.' His Lordship then points out the extent to which opinions in preceding decisions may afford assistance in the construction of a particular deed, but I do not think that the present point is one on which it is necessary or advantageous to go beyond the words used by the testator. If there had been nothing except a direction to the trustees to hold and apply their

shares of residue for behoof of the beneficiaries I think this would have conferred an absolute gift upon them. That I think means an initial gift except to the extent to which it is cut down by the subsequent provisions. In my opinion these provisions do not necessarily mean that nothing more than a bare liferent was conferred upon the beneficiaries. They appear to me merely to impose or engraft trusts upon the absolute interest given, and as these trusts have failed I think that the initial words of the gift are sufficient to carry the shares of the residue to the beneficiaries in preference to allowing them to be treated as undisposed of estate of the testator. I shall therefore sustain the first part of claim (*b*) for the trustees of Mrs Barr, and the first claim for the trustees of Lieutenant-Colonel Clark."

The claimants George Smith junior's trustee and others reclaimed and argued —Vesting depended on there being an initial gift — *Muir's Trustees* v. *Muir's Trustees*, 1895, 22 R. 553, 32 S.L.R. 370. There was, however, no initial gift in this will. The words "hold and apply" were used in opposition to the words "pay and convey." The words "hold and apply" as used in the present will were ambiguous, but read in connection with later clauses in the will undoubtedly imported a liferent. It was quite clear from these later clauses that trust purposes were adjected which were inconsistent with any vesting defeasible or otherwise. The institute was only given a right of alimentary liferent and the fee was in the children. Even under the rule of *Frog's Creditors* v. *His Children*, (1735) M. 4262, such a destination would not carry the fee to the father. It had been decided that where the word "allenarly" was added the rule of *Frog's Creditors* was displaced. The word "only" had the same effect. The general principles of construction of such clauses were to be found stated in *Donaldson's Trustees* v. *Donaldson*, 1916 S.C. (H.L.) 55, 53 S.L.R. 97; *Tweeddale's Trustees* v. *Tweeddale*, 1905, 8 F. 264, 43 S.L.R. 193; *Nicol's Trustees* v. *Farquhar*, 1918 S.C. 358, 55 S.L.R. 303; *Cowan's Trustee* v. *Jardine*, 1913 S.C. 927, 50 S.L.R. 711; *Young's Trustees* v. *Young*, 1901, 3 F. 616, 38 S.L.R. 434; *Anderson's Trustees* v. *Anderson*, 1904, 7 F. 224, 42 S.L.R. 167. In any event "hold and apply" was the more probable antecedent to "to and for behoof of" than "pay and convey." This being so, there was no sufficient direction to override the engrafted trust. The word "hold" was not in any way modified by the word "apply," and "hold" did not imply a gift. It was not necessarily inconsistent with a fee being given, but that was because other controlling words of undoubted meaning were adjected or because there was no disposal of the fee — *Miller's Trustees* v. *Miller*, 1890, 18 R. 301, 28 S.L.R. 236. That was quite a different class of case from the present, because in the present case in the later clauses of the will competing rights were given in the fee which must be held to construe the words under consideration as conferring only a liferent. The punctuation of these words was also important, and favoured the reclaimers' contention—*Turnbull's Trustees* v. *Lord Advocate*, 1918 S.C. (H.L.) 88, 55 S.L.R. 208. In the present case vesting was inconsistent with the power of the trustees to make advances out of capital —*Macgregor's Trustees* v. *Macgregor*, 1909 S.C. 362, 46 S.L.R. 296. That case was in other respects very nearly parallel to the present case and really ruled it. The difference in expression between the gifts to Mrs Barr and Colonel Clark did not really affect the meaning, which was identical. This was shown by the fact that the testator in effect separated the residue of his estate into two parcels of one-fifth and four-fifths, the latter though made up of separate bequests of one-fifth each yet subject to the same destination, and it would be illogical to override this division by engrafting on the latter parcel two separate destinations, which was what would happen if effect were given to the difference of terminology. If, further, these parties were right in their contention that there was no vesting, the result must be intestacy *quoad* these provisions. The will had provided for a destination-over in two specified contingencies, but not in that which had occurred. It was incompetent for the Court to re-write the settlement by reading into it a destination-over which was not there. Accordingly the clause in question could not be regarded as carrying any estate which otherwise would be intestate succession. In *Fyfe's Trustees* v. *Duthie*, 1908 S.C. 520, 45 S.L.R. 368, the Court did not really interfere with the settlement. The further directions in the will as to the share in question showed that they imported a liferent in severalty. This was clear from the use of the words "respective children," and also from the direction as to payment on attaining the age of twenty-five or the death of the parent. These directions imported a complete severance of these parts of the estate — *Macgregor's Trustees* v. *Macgregor*. In *Bartholomew's Trustees* v. *Bartholomew*, 1904, 6 F. 322, 41 S.L.R. 256, founded on by counsel for the claimants Sir George Smith Clark and others, there was no severance till all the daughters were dead or married and therefore the general direction took effect.

Argued for the claimants James Clark's trustees—There was here vesting subject to defeasance. A gift of fee to children, with a liferent to the parents to protect the same, was not inconsistent with an initial gift— *Donaldson's Trustees* v. *Donaldson*, 1916 S.C. (H.L.) 55, *per* Lord Atkinson at p. 64, 53 S.L.R. 97; *Tweeddale's Trustees* v. *Tweeddale*, 1905, 8 F. 264, *per* Lord Dunedin at p. 273, 43 S.L.R. 193; *Muir's Trustees* v. *Muir's Trustees*, 1895, 22 R. 553, *per* Lord M'Laren at p. 557, 32 S.L.R. 370; *Lindsay's Trustees* v. *Lindsay*, 1880, 8 R. 281, *per* Lord President Inglis at p. 285, 18 S.L.R. 199. The alternative to an initial gift was intestacy, and any construction leading to intestacy the Court would if possible avoid. The words "hold and apply, pay and convey," governed everything that followed. The words "hold and apply" were not necessarily inconsistent with an initial gift—*Donaldson's Trustees* v. *Donaldson* (*cit. sup.*), *per* Lord Wrenbury at p. 68; *Tweeddale's Trustees* v. *Tweeddale*

(*cit. sup.*), *per* Lord Stormonth Darling at p. 268; *Greenlees' Trustees* v. *Greenlees*, 1894, 22 R. 136, 32 S.L.R. 106. In *Macgregor's Trustees* v. *Macgregor*, 1909 S.C. 362, 46 S.L.R. 296, founded on by counsel for the reclaimers, it was provided that the share in question was to be held by the trustees subject to certain conditions. The word "apply" clearly meant divestiture of the trustees in favour of the person favoured, and there was nothing in the deed to restrict this to income as against capital. It was easy to infer an intention to give a power of testamentary disposal to the liferenter, and it was only to prevent them leaving their shares away from their issue that the testator gave them a liferent. On the question of a joint liferent parties were here under the rule of *Paxton's Trustees* v. *Cowie*, 1886, 13 R. 1191, 23 S.L.R. 830. The children in the present case were known persons at the time of the testator's death, and that was against a class gift.

Argued for the claimants Mrs Barr's trustees—These claimants were in a stronger position than the claimants James Clark's trustees, whose argument *quantum valeret* they adopted. The difference of terminology in the claimants Mrs Barr's trustees' gift entitled them to maintain that the whole four words "hold and apply, pay and convey," applied to their gift.

Argued for the claimant Sir George Smith Clark, Bart., and others—These claimants did not oppose the interlocutor of the Lord Ordinary, but in the event of his interlocutor being recalled they maintained as against intestacy that a joint liferent was conferred under the will on Colonel Clark and his two brothers. The primary purpose of the will was to give a liferent to the class, and only when the class was exhausted would the children take the fees. Alternatively, it might be argued that a child of a deceased brother would get one-third of the fee, thus defeating the joint liferent to that extent—*Fyfe's Trustees* v. *Duthie*, 1908 S.C. 520, and *per* Lord Low at p. 527, 45 S.L.R. 368; *Muir's Trustees* v. *Muir*, 1889, 16 R. 954, 26 S.L.R. 672; *Menzies' Factor* v. *Menzies*, 1898, 1 F. 128, 36 S.L.R. 116; *Bartholomew's Trustees* v. *Bartholomew*, 1904, 6 F. 322, 41 S.L.R. 256; *Binnie's Trustees* v. *Prendergast*, 1910 S.C. 735, 47 S.L.R. 271; *Fergus and Others*, 1872, 10 Macph. 968. The fact that the children were known was not inconsistent with a class gift. *Fyfe's Trustees* v. *Duthie* was authority for the proposition that it was competent to read into a settlement that which was not there but which was obviously intended to be there.

At advising—

LORD JUSTICE-CLERK—The first question to be determined in this case is whether what is termed an initial gift of fee was conferred on Lieutenant-Colonel Clark and Mrs Barr. In cases like the present Lord Chancellor Halsbury's pronouncement in *Bowman* v. *Bowman* (1 F. (H.L.) 69, 36 S.L.R. 959) and Lord President Inglis' in *Bryson's Trustees* v. *Clark* (8 R. 142, 18 S.L.R. 103) are often referred to but without much practical effect so far as the citation and discussion of the many and varied decisions which are cited as bearing on the particular question under discussion are concerned.

In the present case, attempting to arrive at the expressed intention of the truster as set out in his trust deed, I cannot find any very satisfactory guide in the cases to which we were referred for determining the question as to whether there was such an initial gift as I have referred to. But taking the words of the trust deed itself as what we have to deal with I am of opinion that the truster gave no initial gift of fee either to Lieutenant-Colonel Clark or to Mrs Barr. On a reading of the deed as a whole it is in my opinion as clear as—apart from the multitude of very refined distinctions which have been evolved by what has been termed "a convenient exercise of the 'prætorian power,'"—M'Laren's Wills and Succession, p. 814—anything in this region can be clear that the truster meant his said grandson and daughter to have initially a liferent of a specified portion of his estate and nothing more. I accept as one canon, as to which there cannot, I think, be any dispute, that you must read the deed as a whole, and as another that in so reading the deed, while punctuation must receive due effect in view of the decision of the House of Lords in *Turnbull's* case (1918 S.C. (H.L.) 88, [1918] A.C. 337, 55 S.L.R. 208) one ought not to stop in the middle of a sentence, and so sever the sentence into *disjuncta membra*. Reading this deed as I think the truster meant it to be read, I am of opinion that Lieutenant-Colonel Clark and Mrs Barr took, not a fee, but only a liferent in the shares in which they were originally interested as beneficiaries. The provision to them is to be held for "their liferent use only," and this share is more than once referred to as the share liferented by them.

But then further questions arise as to what is to happen as to the fee of these shares in the events which have occurred, both Colonel Clark and Mrs Barr having survived the truster but died without ever having had issue. For this event the truster has not expressly provided by any special provision such as is set forth in *secundo* and *tertio*. As regards, therefore, the share given to Mrs Barr in liferent the fee thereof seems to me not to have been disposed of in the events which have happened, and that fee therefore in my opinion falls into intestacy.

But as regards the share left to the children of Mrs Clark in liferent, I am of opinion that the bequest of liferent is a joint bequest, and that on Colonel Clark's death without issue the whole liferent fell to be paid equally to his surviving brothers during their joint survivance, and that in the circumstances now existing we should decide nothing more. So far as decided cases go, I think that of *Barber* v. *Findlater* (13 S. 422) lays down rules which seem applicable to the disposal of this one-fifth share. Probably the best course would be for the pursuers and real raisers to lodge a claim to be ranked and preferred as my Lord Dundas proposes.

LORD DUNDAS—The fund *in medio* in this multiplepoinding consists of (1) the share of the residue of the testator's estate liferented by the late Lieutenant-Colonel James Clark, his grandson, and (2) the share of residue liferented by one of the testator's daughters, the late Mrs Barr, in so far as these shares were not paid by the trustees to Colonel Clark and Mrs Barr respectively, under powers to that effect in the trust settlement. The testator had one son who survived him, and four daughters, two of whom, Mrs Clark and Mrs Dunlop, predeceased him leaving issue, and two survived him, Mrs Kerr, who died leaving issue, and Mrs Barr, who died *sine prole*. With regard to the residue of his estate, the truster by his trust settlement *inter alia* directed his trustees "to hold and apply, pay, and convey the same as follows, viz.—One-fifth thereof to be paid and conveyed to my son the said George Smith junior, and that absolutely and as at the date of my death; one-fifth thereof to be held and applied for behoof of the children of my daughter the deceased Mrs Jane Smith or Clark" (one of whom was Lieutenant-Colonel James Clark, who survived the testator but died without issue) ". . . and the remaining one-fifth to and for behoof of my daughter Eliza Smith" (Mrs Barr); the shares effeiring to (1) Mrs Clark's children; (2) Mrs Kerr; (3) the daughter of Mrs Dunlop; and (4) Mrs Barr, "to be held for their behoof in liferent for their liferent use only, and for behoof of their respective children and the survivors and survivor equally among them in fee—payable and to be conveyed to them on their respectively attaining the age of twenty-five, and on the death of their parent, the issue, however, of such of them as may decease leaving issue being entitled to the share which their parent would have taken on survivance."

The first question for decision is whether on a sound construction of the settlement Colonel Clark or Mrs Barr took a vested right of fee in the share liferented by each of them respectively. The Lord Ordinary has answered this question in the affirmative. While I agree with him in thinking that the matter is not free from difficulty, I have come to an opposite conclusion. I may observe in passing that I do not think that any material distinction between the two shares can be based on the words "to and for behoof" occurring in the clause relating to Mrs Barr. I consider this to be merely a piece of clumsy or careless phrasing, and not as indicating any different intention from the direction that one-fifth be "held and applied for behoof of" Mrs Clark's children.

The books abound in decided cases more or less resembling the present from (at least) *Lindsay's Trustees*, 1880, 8 R. 281, 18 S.L.R. 199, onwards. I think that the general rules—or "principles," as they have sometimes been called—by which settlements of this sort should be construed are well established and beyond dispute; and for these it is probably sufficient to refer to *Tweeddale's Trustees*, 1905, 8 F. 264, 43 S.L.R. 193, *Donaldson's Trustees*, 1916 S.C. (H.L.) 55, 53 S.L.R. 97, and to the opinion of Lord Davey in the English case of *Hancock* v. *Watson*, [1902] A.C. 14, referred to in the judgments of Lord Atkinson and Lord Parker of Waddington in *Donaldson's* case. The difficulty—and it is sometimes a considerable one—lies rather in the application of these rules to the language and the circumstances of particular cases as they arise.

The Lord Ordinary's view is that if the direction to hold and apply these shares for behoof of the beneficiaries had stood alone it "would have conferred an absolute gift upon them," and that the subsequent provisions "do not necessarily mean that nothing more than a bare liferent was conferred." He therefore concludes that "the initial words of the gift are sufficient to carry the shares of residue to the beneficiaries." I respectfully think that there is something like a fallacy in this reasoning. A direction to hold for A B, or to hold and apply for his behoof, may import a fee in A B—*Greenlees' Trustees*, 1894, 22 R. 136, *per* Lord Adam, 32 S.L.R. 106, and *Veitch's Trustees*, 1914 S.C. 182, 51 S.L.R. 150; but whether it does so or not is, I think, dependent on the context. Such a direction does not, I apprehend, necessarily confer a right of fee; but must be read along with such other directions, qualifications, or conditions as the deed may contain, before its otherwise indeterminate import can be definitely determined. "The whole of the sentences, wherever found, must be read together," *per* Lord Dunedin in *Tweeddale's Trustees*, 1905, 8 F. at p. 273, 43 S.L.R. 193, *cf.* Lord Adam's observations in *Anderson's Trustees*, 1904, 7 F. at pp. 227 foot, 228 top; 42 S.L.R. 167; and before affirming that this testator intended by the initial direction to confer a right of fee, one must read along with it the other directions and provisions which I quoted at the outset. The Lord Ordinary's reasoning seems to me to run counter to Lord Cottenham's views, as referred to by Lord Davey in his judgment in *Hancock* v. *Watson*, 1902 A.C. 14, which the Lord Ordinary quotes. The terms of the initial gift before us are not in my judgment absolute as they were in so many of the reported cases; and we should therefore "seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts." So construing the settlement before us, it seems to me that, both as regards Colonel Clark and Mrs Barr, the words fall distinctly short of the conveyance of a right of fee, or of fee subject to defeasance. It is, I think—as was observed by Lord President Inglis nearly forty years ago (*Bryson* v. *Clark*, 1880, 8 R. at p. 145, 18 S.L.R. 103)—"in vain to review the authorities in a question of this kind." I abstain, therefore, from doing so, but I may say that the recent case of *Macgregor's Trustees*, 1909 S.C. 362, 46 S.L.R. 296, seems to resemble the case before us in more aspects than one.

If, then, the correct view is that there was no fee vested in Colonel Clark or in Mrs Barr, one must next decide as between

the alternative views presented as to the destination of the shares in question, viz., accretion on the one hand, and intestacy on the other. By the trust-settlement the testator declared, *inter alia*, (*secundo*) that in the event of his daughter Mrs Barr predeceasing him without leaving issue or of her leaving issue but of such issue not surviving to take under the destination thereinbefore contained, then the share destined to Mrs Barr in liferent and her issue in fee should fall and accresce (not *per capita* but *per stirpes*) to the other residuary legatees thereinbefore mentioned, whom failing to their respective issue. Neither of the events contemplated and provided for occurred. Mrs Barr did not predecease the testator, nor did she leave issue. Similarly, it was declared (*tertio*) that in the event of any of the testator's grandchildren, the children of Mrs Clark, predeceasing him without leaving issue, or of his or her leaving issue but of such issue not surviving to take, then the share destined to such grandchild in liferent and his or her issue in fee should fall and accresce to his or her surviving brothers and sisters as provided by said declaration. In the case of Colonel Clark the events contemplated did not occur. He did not predecease the testator, nor did he leave issue. The event which happened was not provided for, viz., that Colonel Clark should survive the testator and die without issue. The Lord Ordinary points out that the testator has made no direction as to what was to be done in the events which have occurred, and declines to read into the settlement words which are not there. I think the Lord Ordinary is right in so declining. The case of *Fyfe's Trustees* (1908 S.C. 520, 45 S.L.R. 368) was earnestly pressed upon our attention by those who sought to obtain an opposite decision. That case is a very peculiar one, but, assuming it to be rightly decided, it certainly affords no direct warrant for treating the language of this settlement in the very drastic manner contended for. If these views are well founded it seems clear that the share liferented by Mrs Barr has fallen into intestacy of the testator, and that so far as the share liferented by Colonel Clark is concerned a similar result could not be avoided by means of any argument founded upon the provisions of declaration (*tertio*) above referred to.

An alternative contention, however, as regards the latter share, was presented by Mr MacRobert which deserves close attention, and which I have come to think is well founded. It is not dealt with in the Lord Ordinary's judgment, but we are informed that it was stated in the Outer House. Mr MacRobert urges that the bequest to "the children of my daughter the deceased Mrs Jane Smith or Clark," is of the nature of a class gift, and not one to the three sons of Mrs Clark individually, although the testator knew, of course, at the date of his will the individuals who composed the family of his deceased daughter. The rule of *Paxton's Trustees* ((1886) 13 R. 1191, 23 S.L.R. 830), it was therefore argued, did not apply, and the operation of accretion as among Mrs Clark's children and their issue was not excluded. I think this view is right. It has been authoritatively explained that the words "persons . . . sufficiently described for identification," as used by Lord President Inglis in *Paxton's Trustees*, must be held to mean, not that the persons are capable of identification—a condition of validity of any legacy — but that they are individually named or identified — *per* Lord Kinnear in *Roberts' Trustees* (1903) 5 F. 544, 40 S.L.R. 237—that "there must be such a description as will separately define the members of the class"—*per* Lord M'Laren in *Bartholomew's Trustees*, (1904) 6 F. 324. Even if the beneficiaries are named, that fact may not be conclusive against the view of joint bequest and consequent accretion—*Menzies*, (1898) 1 F. 128. Mrs Clark's children are not here named or separately defined, and I think we must take it that the testator had regard to the children of his deceased daughter as a body rather than to its constituent members as individuals. The share in question is to be held "for their behoof in liferent for their liferent use only, and for behoof of their respective children and the survivors and survivor, equally among them, in fee." It is argued that this is a class gift to Mrs Clark's children and the survivors and survivor of them in liferent, and to their children and the survivors or survivor of them in fee, and that on Colonel Clark's death without issue his liferent has accresced to his surviving brothers equally, while the fee of the share liferented by him accresces for the benefit of the children and issue of the surviving brothers. It seems quite clear, looking to the words which immediately follow those above quoted, that if Colonel Clark had left a son aged twenty-five, or who attained twenty-five after his death, that son could have demanded and obtained immediate payment and conveyance of the share liferented by his father. But as Colonel Clark died without issue I see nothing to prevent the operation of accretion, which seems to be consistent with the general scope and intention of the settlement. Such a construction appears to me to be sound, and is if feasible to be preferred to one which would result in the partial intestacy of the testator. We are not at present in a position to decide anything as to the fee of the share in question, but if the views which I have expressed on this point are correct I apprehend that the best way of giving effect to them would be for the trustees to lodge an administrative claim, claiming to hold the share for the liferent behoof of Colonel Clark's two brothers and the survivor of them, and the fee for behoof of those who may be ultimately entitled thereto.

LORD SALVESEN — The solution of the various questions submitted to us depends on whether there was an initial gift to the family of the testator's daughter Mrs Clark. I am of opinion, differing from the Lord Ordinary, that there was not. The whole clause so far as it relates to this family must be read together, and so reading it I think the plain meaning was that the share

destined to Mrs Clark's family was to be held by the trustees for their behoof in liferent for their liferent use only, and for behoof of their respective children and the survivors and survivor equally among them in fee. The words "and applied" are satisfied by the implied direction to the trustees to pay the income to the liferenters and the express direction that the fee of any child's share is "payable and to be conveyed to them (*i.e.*, the children of such child) on their respectively attaining the age of twenty-five and on the death of their parent." The late Mr James Clark died without leaving children, and as there is no provision for dealing with the share destined to his issue the case appears to me to be governed by the decision in *Macgregor's Trustees*, 1909 S.C. 362. It follows that Mr James Clark's share would have fallen into intestacy but for the considerations to which I shall afterwards advert.

On the question of vesting I am unable to find any reason for reaching a different result in the case of the share destined to Mrs Barr in liferent alimentary (for a subsequent clause provides for all provisions in favour of females having this character) and her issue. The words "to and" on which much reliance was placed are not accurately used, but the clause regulating the disposal of her liferented share is the same as in the case of Mrs Clark's family. In Mrs Barr's case, as the provisions were in her favour as an individual and she left no issue, I am of opinion that the share destined to her falls to be disposed of as intestate succession of the testator.

On the assumption that the share destined to Mr James Clark's children did not vest in him subject to defeasance, it was contended for his brothers that the liferent provided was a joint one, and accresced to the survivors of the family on his death. This view at first sight seems not capable of being reconciled with the express direction that if Mr James Clark left children the trustees were to pay and convey the fee to them on their attaining twenty-five years of age, which might well have happened during the lifetime of their uncles. I do not think, however, that this is conclusive, although I cannot doubt that had Mr James Clark left issue they would have been entitled to the fee of the share of the estate which he liferented on their reaching the age of twenty-five. As he left no issue the liferent which he enjoyed passes to his brothers on the principle that a joint liferent accresces to the survivors and survivor, subject always in this case to defeasance if the predeceasing liferenter left issue.

Had accretion depended on the clause of accretion (*tertio*) I would have felt constrained to adopt the reasoning of the Lord Ordinary.

LORD GUTHRIE was absent.

The Court at the time of going to press had not issued the adjusted interlocutor.

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HIGH COURT OF JUSTICIARY.

Tuesday, January 27.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Mackenzie, Lord Ormidale, Lord Anderson, and Lord Blackburn.)

GOVERNORS OF GEORGE HERIOT'S TRUST *v.* MATSON.

Justiciary Cases — Revenue — Licences — Male Servant—Assistant Janitor at Technical College — Customs and Inland Revenue Act 1869 (32 *Vict. cap.* 14), *secs.* 27 *and* 19 (3).

The owners and administrators of a technical college, a statutory body, employed a man whole time as an assistant janitor. He wore a uniform provided by them and was paid a weekly wage. His principal duties were with the head janitor to take care of the college buildings, to give personal attendance in the hall of the buildings, and to attend to the requirements of the staff of the college. It was also his duty to open the outer doors of the college when necessary, to answer inquiries by visitors and students and direct them to the proper quarter, to answer the telephones, to give personal attendance on the members of the staff, to go errands to the offices of the owners, and to carry parcels for the staff in connection with the business of the college. He also exercised a general superintendence of the cleaning of the college buildings. He was provided with a box office in the hall of the college for his use in connection with those duties. Justices of the Peace held that the assistant janitor was a male servant in the sense of the Act of 1869, section 19 (3), and that the owners were bound to take out a licence for him. *Held*, on appeal, by a full Bench, (1) (*dis.* Lord Blackburn, *opinion reserved per* Lord Ormidale) that the class of male servants to whom the Act of 1869 applied was not limited to those servants whose main or principal duties were of a personal, domestic, or menial character in relation to their employer —*London County Council* v. *Perry*, [1915] 2 K.B. 193, *per* Bankes, J., at p. 206, *dis-*