very heroic attempt was made to rectify this in 1880 and in 1881. That attempt might have succeeded even although there was dissimilarity in the respective restrictions, because there is no objection to the creation of a community with reciprocal obligations differing *hinc inde* in the several cases so long as that is done clearly and expressly. But the attempt of 1880-1881 failed just because the restriction was not made to apply to the property of A in any deed affecting the fee of that property. Upon the other branch of the case — the question of the nuisance clauses—I entirely agree with what your Lordship proposes.

LORD CULLEN did not hear the case.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Dean of Guild dated 1st February 1923: Alter his interlocutor of 11th January 1924 by deleting therefrom the seventeenth finding in fact and the subsequent findings in fact and law (first) and (second) therein: With this alteration affirm said last-mentioned interlocutor: Repel the sixth plea-in-law for the respondents and objectors: Open up the record and allow the same to be amended in terms of the minute of amendment for the appellant and the answers thereto for the petitioners: . . . And said amendments having been made, of new close the record, allow the parties a proof before answer of their averments contained in the objection 3 and the answers thereto, and remit to the Dean of Guild to take said proof and to proceed as accords."

Counsel for the Appellant — Robertson, K.C. — Stevenson. Agents — Beveridge, Sutherland, & Smith, W.S.

Counsel for the Petitioners—Wilton, K.C. — Dykes. Agents — Cornillon, Craig, & Thomas, W.S.

Thursday, March 20.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

WILSON'S TRUSTEES *v.* MACKENZIE AND OTHERS.

Succession — Vesting — Intermediate Vesting Subject to Defeasance or Postponed Vesting—Direction to Hold for A's Liferent Alimentary Use and that of his Wife in Case she shall Survive him, "and thereafter" for behoof of A's Lawful Issue, or the Survivors of them in Fee, whom failing his Nearest Heirs and Assignees in Fee—Period at which Heirs of A Ascertained.

A testator directed his trustees, instead of paying over to his son the balance of his share, "to hold and retain the same in trust for his liferent alimentary use . . . and for behoof of his present wife, in case she shall survive him, for her liferent alimentary use, . . . and thereafter for behoof of his lawful issue or the survivors of them equally among them in fee, whom failing his nearest lawful heirs and assignees in fee." The son, who survived his father, died intestate in 1884 leaving a widow and a son. The latter died in 1898 leaving no issue but survived by his wife, to whom he had bequeathed his whole estate. On the death of the son's widow in 1922 claims to succeed to the said share were made (1) by the grandson's widow, and (2) by the son's nearest lawful heirs as ascertained at that date, viz., 1922. *Held* (*diss.* Lord Hunter) that the fee of the son's share of his father's estate did not vest till the death of the son's widow in 1922, and that accordingly the claim of the son's nearest lawful heirs as at that date fell to be sustained.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary (BLACKBURN):—"The late John Wilson of Hillpark died on 2nd March 1879 leaving a trust-disposition and settlement dated in January of the same year. He was survived by a widow and a number of children. After making certain provisions for his widow and his eldest son he in the sixth place directed his trustees, 'subject to the special provisions and exceptions after-written in respect of the shares of' his sons Thomas and William and his daughter Catherine, who was then married, to divide the residue of his estate into equal shares corresponding to the number of his younger children who might survive him and of those who might have predeceased him leaving issue. The trustees were directed to make payment of the shares of the younger sons and married daughters on their attaining the age of twenty-one years, but to continue to hold the shares of unmarried daughters for the payment to them of the annual interest until their marriage, when the trustees were directed to pay and make over to them the fee of the shares. In the event of any daughter dying unmarried the fee of her share was to go to 'her nearest heirs and testamentary assignees.' Power was given to any child predeceasing the testator and leaving issue to appoint his prospective share among his issue 'in such proportions, at such times, and subject to such conditions, restrictions, and limitations' as he or she might direct. Failing such appointment the share of a child predeceasing and leaving issue was to be divided equally among such issue. From the terms of these general provisions it appears that the share of a predeceasing child vested in his issue *a morte testatoris*. The question in this case relates to the share of the testator's son William, which was subject to certain special provisions contained in the trust-disposition and settlement. The testator had undertaken certain obligations in his son William's marriage contract, and after directing his trustees to implement these obligations out of the share of the residue devolving to William he directed them, 'instead of paying over the balance of the said share to my said son, to hold and retain the same in

trust for his liferent alimentary use of the free annual proceeds thereof only, and for behoof of his present wife in case she shall survive him, for her liferent alimentary use of the free annual proceeds thereof only, so long as she shall remain unmarried after his death, and thereafter for behoof of his lawful issue or the survivors of them equally among them in fee, whom failing his nearest lawful heirs and assignees in fee.' The balance of the said share constitutes the fund *in medio* in the present case. William survived his father and died intestate in 1884 leaving a widow who died on 21st November 1922 and a son John Herbert, who married in 1897 and died without issue in 1898. John Herbert left a will by which he bequeathed his whole estate to his widow, the claimant Mrs Coralie Williams or Wilson or Mackenzie."

Claims were lodged by (1) Mrs Coralie Mabel Lloyd Williams or Wilson or Mackenzie, the widow of John Herbert Murrie Wilson, a grandson of the testator and the son of William Wilson, and (2) the nearest lawful heirs as at 21st November 1922 of the said William Wilson.

Mrs Mackenzie averred, *inter alia* — "(Cond. 2) The claimant is the widow of John Herbert Murrie Wilson, son of the late William Wilson and a grandson of the testator. The said William Wilson died on 14th May 1884. He was survived by his wife Mrs Jessie Scobie Murrie or Wilson, who died on 21st November 1922. The said William Wilson had two children, a son who died in infancy, and the said John Herbert Murrie Wilson, who married the claimant in 1897, and who died in Ceylon on 18th January 1898. (Cond. 3) By his last will and testament, dated 16th January 1898, the said John Herbert Murrie Wilson (therein named Herbert Murrie Wilson) left his whole estate and effects, real and personal, to the claimant for her sole and absolute use. Letters of administration were issued to the claimant by the District Court of Badulla, Ceylon, on the 5th November 1898. (Cond. 4) The claimant claims that on a sound construction of the trust-disposition and settlement of the said John Wilson the share of the residue provided for the said William Wilson vested in the said John Herbert Murrie Wilson on the death of the said William Wilson, and was carried to the claimant by the last will and testament of the said John Herbert Murrie Wilson above referred to."

She pleaded—"On a sound construction of the trust-disposition and settlement of the testator the share represented by the fund *in medio* having vested in the late John Herbert Murrie Wilson on his father's death, the claimant should be ranked and preferred in terms of her claim."

The claimants, the nearest lawful heirs of William Wilson, averred — "(Cond. 3) These claimants maintain that by the terms of his said trust-disposition and deed of settlement the share of his estate destined by the testator to the said William Wilson and his widow in liferent did not vest in the heirs of the said William Wilson until the expiry of said liferents, and that said heirs fall to be ascertained as at that date, viz., 21st November 1922."

They pleaded, *inter alia*—"1. On a sound construction of said trust-disposition and settlement the fund *in medio* vested in the heirs of the said William Wilson as at the death of his widow, viz., 21st November 1922, and these heirs fall to be ascertained as at that date."

On 10th August 1923 the Lord Ordinary (BLACKBURN) sustained the claim for the nearest lawful heirs of William Wilson.

Opinion. — [*After the narrative quoted supra*]—"It is maintained for her (the claimant Mrs Mackenzie) that the fund *in medio* vested in her late husband John Herbert on the death of his father William in 1884 and is carried to her under his will. The other claimants in the case are the next-of-kin of William as at the date of the death of his widow in 1922, who maintain that vesting was postponed until that event occurred. The gift of the fee contains a survivorship clause applicable to William's issue and a destination-over to his lawful heirs and assignees. As the individuals who might prove to be William's heirs and assignees were not ascertainable at the testator's death, I think it is clear that this is not a case of vesting subject to defeasance — *Steel's Trustees*, 16 R., *per* Lord President at p. 208. But I have found some difficulty in reaching a conclusion as to whether vesting was postponed till the death of William only or until the termination of both liferents. At neither date would there be any difficulty in ascertaining either the survivors of his issue, his lawful heirs —see Lord Dundas in *Wyllie's Trustees*, at p. 226 — or his assignees. The position of the words 'and thereafter' with which the destination of the fee opens, following as they do on the constitution of the two liferents, point to postponement of vesting till the termination of both liferents. But when these events had occurred there would remain nothing for the trustees to do 'thereafter' except to make payment to the fiars who would then be ascertained, whereas the direction to the trustees is not to make payment but 'to hold and retain for behoof of' the fiars. If the words 'and thereafter' refer to the event of William predeceasing his wife, this direction could be given effect to, as the trustees would continue to hold and retain the fee for behoof of the fiars then ascertained during the subsistence of the widow's liferent. The clause is somewhat carelessly drawn, and I cannot avoid the impression that the words 'and thereafter' were inserted with reference to the words 'at his death' which immediately precede them. This would give effect to what seems to be the general scheme of the settlement, namely, that vesting should take place in the issue of the children on the death of their parent and the testator. The clause relative to the share in question appears to me to be inserted for the purpose of restricting William's enjoyment rather than for the purpose of affecting the immediate vesting of the fee in his issue on his death. But after repeated consideration I cannot hold

that this meaning of the word 'thereafter' is so clear as to overcome the general rule that words of survivorship refer to the period of distribution unless some other period is specified—*Young* v. *Robertson*, 4 Macq. 314. There could be no distribution in this case till the termination of the widow's liferent. Accordingly I feel bound to hold that vesting was postponed till that event occurred, and I shall rank the claimants the Rev. John Bruce Wilson and others, who were William's lawful heirs as at that date, to the fund *in medio*, with expenses to all parties as between agent and client out of the fund."

Mrs Coralie Mabel Lloyd Williams or Wilson or Mackenzie reclaimed, and argued —Vesting was not postponed to the date of distribution, but took place on the death of the testator's son William subject to defeasance on his leaving issue. At that date his son John Herbert Wilson, the testator's grandson, acquired a vested right subject only to the second liferent. The use of the word "assignees" in the settlement also pointed to the correctness of this view. To hold otherwise would be to deprive that word of any meaning—*Barr*, 1903, 11 S.L.T. 426; *Steel's Trustees*, 1889, 16 R. 204, at p. 208, 26 S.L.R. 146; *Miller*, 1875, 2 R. (H.L.) 1, 12 S.L.R. 19. The claimant therefore was entitled to be preferred to the fund *in medio*. Counsel also referred to *Wylie's Trustees* v. *Bruce*, 1919 S.C. 211, 56 S.L.R. 156; *Gregory's Trustees* v. *Alison*, 1889, 16 R. (H.L.) 10, at p. 14, 26 S.L.R. 787; *Anderson's Trustees*, 1917 S.C. 321, 54 S.L.R. 282.

Argued for the nearest lawful heirs—The general rule was that vesting took place at one or other of two dates—*a morte testatoris* or at the date of distribution. If it was sought to take this case out of that general rule, then clear words of direction in the settlement itself must be relied upon —*Marshall* v. *King*, 16 R. 40, *per* Lord President Inglis at p. 43, 26 S.L.R. 24. But there was nothing in the testator's words here to support this contention. On the contrary, the natural interpretation of the word "thereafter" was that vesting was to be postponed until the two liferents had expired and the period of distribution had arrived—*Young* v. *Robertson*, 4 Macq. 314, at pp. 319, 325, 334; *Wylie's Trustees* (*cit. sup.*), at p. 226; *Melrose*, 1869, 7 Macph. 1051, at p. 1057; *Buchanan's Trustees*, 4 R. 754, at pp. 757-763, 14 S.L.R. 503; *Murray's Trustees*, 1919 S.C. 552, 556, 56 S.L.R. 503. As these claimants were the nearest lawful heirs of William Wilson at the death of the second liferenter, they were accordingly entitled to succeed.

At advising—

LORD ORMIDALE — The question in this case as argued to us appears to depend for its answer on the meaning and effect to be given to the clause of Mr Wilson's settlement quoted by the Lord Ordinary in his opinion. On the best consideration that I can give to the clause I come to the conclusion that the testator's intention was that vesting in the fee of William's share should be postponed until the termination of the liferent interests given to William and his wife.

It is not suggested that any fee vested in William or in anyone else on the death of the testator. That being so—there being no vesting *a morte testatoris*—the general rule is that vesting is postponed until the date when the fund falls to be distributed unless the testator has very clearly specified some other term. In *Marshall* v. *King* (16 R. 40, at p. 43) the Lord President says this—"If the term of vesting is not the date of the death of the testator, it is difficult to find any other period of vesting except the period of distribution, if we except some special cases where the testator has either expressly or by implication assigned a term of vesting other than the period of distribution. Such cases have occurred, but where no other period is suggested the term of vesting is either (1) the death of the testator or (2) the period of distribution." It is for the claimant Mrs Mackenzie to show that the present is one of the excepted special cases, and in my opinion she has failed to do so. It was not contended for her that there was vesting on the death of William in William's only child then alive. The trustees are to hold the share "for behoof of William's lawful issue or the survivors of them," and the Lord Ordinary's opinion is that on the authority of *Young* v. *Robertson* (4 Macq. 314) the words of survivorship must refer so far as William's issue are concerned to the period of distribution, and this view, I understand, was acquiesced in by the reclaimer. It was maintained, however, by her that under the destination-over to William's "nearest lawful heirs and assignees" William's son John Herbert took a vested right as William's heir at William's death, subject to divestiture only in the event of John Herbert, William's son, surviving the termination of the liferents. I agree that it is not enough merely to suggest the improbability of such a result having been within the contemplation of the testator. There must be some context to support the suggestion, otherwise it is merely a matter of conjecture. That was pointed out by Lord Watson in *Gregory's Trustees* v. *Alison* (16 R. (H.L.) 10), and that case and others like *Haldane* v. *Murphy* (9 R. 269) — see the opinions of the minority Judges which were approved by the House of Lords in *Gregory's Trustees* — and the older case of *Maxwell* v. *Wylie* (15 S. 1005) are illustrations in point.

But I can find no ground for holding that the heirs of William must necessarily be looked for as at William's death. That seems to me rather to beg the question. If they are, then being a class of persons capable of being ascertained at that date the language of the Lord President in *Steel's Trustees* (16 R. 204, at p. 208) would appear in terms to apply, although so far as I am aware there are few cases to be found where vesting subject to defeasance has been held to take place at a date intermediate between the testator's death and the period of distribution, and in them the destination-over has been not to heirs but to survivors, and the class has been reduced

to a single person — *e.g.*, *Gardner* v. *Hamblin*, 2 F. 679.

But apart from that the first question falling to be determined is whether or not the date of vesting is postponed until the termination of the liferents—that is, until the date of distribution. If it is, then it is at that date that the heirs must be looked for.

That the testator's intention was to suspend vesting appears to me to be reasonably clear. The determining factor in the construction of the clause is the word "thereafter." Without it the direction to the trustees would be the familiar and simple one to hold for William and his wife in liferent and their issue or the survivors in fee, whom failing, and so on, and in that case there would have been vesting in William's child or children *a morte testatoris*. But the word of course cannot be thus ignored and some meaning must be given to it. I do not think that it falls to be read as having reference to the death of William. The testator is dealing *primo loco* with the income of William's share and *secundo loco* with the fee, and the word "thereafter" is introduced for no other purpose than to mark with emphasis that no right to the fee is to emerge until both the liferent interests are spent. It is only then that the trust for the fiars commences to operate. It is admittedly so in the case of William's issue, and I can see no reason at all for thinking that the testator intended to assign an earlier date in the case of his heirs, who are only called to take on the failure of the issue. The interests of both are alike controlled by the word "thereafter," and "thereafter" means on the conclusion of the liferents—that is, when the share falls to be paid. Till that date vesting is suspended, and it is at that date that William's heirs must be looked for. The cases of *Gregory's Trustees, &c.*, already referred to, are not authorities to the contrary. They are unlike the present in one essential particular, namely, that in them the heirs or next-of-kin called as conditional institutes were the heirs or next-of-kin of the testator, and these — in the absence of any specific direction to the contrary — can only be ascertained as at the date of the testator's death, and necessarily therefore included his children, who had also been called as primary institutes. Here, on the other hand, we are dealing not with the testator's own succession *ab intestato*, but with the heirs of a legatee who had no beneficial interest in the fee but was only a liferenter of the share in question. In such a case the heirs called as conditional institutes take independently in their own right. Their right is not one of succession to the legatee, and there is no necessity therefore for ascertaining them as at the legatee's death. If there is a clear indication in the settlement that vesting is to be postponed until a later date, then the heirs called on the failure of issue should be ascertained as at that later date—*Wylie's Trustees*, 1919 S.C. 211; *Stodart's Trustees*, 8 Macph. 667; Lord Kyllachy in *Thompson's Trustees*, 2 F. 470, at 484; *Maxwell*, 3 Macph. 318.

For the reasons stated I think that vesting was suspended.

I admit that it is difficult to find in the events which have occurred, and on what I hold to be the true construction of the clause, any intelligible meaning for the word "assignees." Taking it in its collocation, I should have thought that it was intended to have its usual meaning of assignees after vesting. But as admittedly nothing vested in William that would appear to be irrelevant. But taking it to mean "nominees" or "appointees," as Lord Kyllachy did in *Barr* v. *Parnie* (11 S.L.T. 426), its use by the testator does not by any means infer that vesting was not suspended until after the termination of the liferents. I think the reclaiming note should be refused.

LORD HUNTER—The late Mr John Wilson of Hillpark, after making provision for his wife in the event of her surviving him and for his eldest son, provided that the residue of his estate was to be divided into as many shares as corresponded to the number of his younger children who might survive him and of those who had predeceased leaving issue. Subject to special provisions as to the shares of certain of his family, one share was to be conveyed to each of his sons and of his married daughters on his or her attaining the age of twenty-one. In the case of unmarried daughters the trustees were to pay to each of them the annual interest of one share and to pay the fee to her upon her marriage, and failing her marrying to pay and convey the fee thereof to the nearest heirs and testamentary assignees of such daughter. In the case of his son William he gave the following direction to his trustees after implementing certain obligations in his son's marriage contract: — "Instead of paying over the balance of the said share to my said son, to hold and retain the same in trust for his liferent alimentary use of the free annual proceeds thereof only, and for behoof of his present wife in case she shall survive him, for her liferent alimentary use of the free annual proceeds thereof only, so long as she shall remain unmarried after his death, and thereafter for behoof of his lawful issue or the survivors of them equally among them in fee, whom failing his nearest lawful heirs and assignees in fee." The present action relates to the balance of this share.

The testator died on 2nd March 1879. His son William died intestate in 1884 leaving a widow, who died on 21st November 1922, and a son John Herbert, who married in 1897 and died without issue in 1898. John Herbert left a settlement by which he bequeathed his whole estate to his widow the reclaimer, on whose behalf it is maintained that the fund *in medio* vested in her late husband on the death of his father in 1884 and was carried to her under his will. The Lord Ordinary has negatived this view, holding that no vesting took place in the fee of William's share of his father's estate until the death of his widow in 1922. In this view I am unable to concur. On the

death of William Wilson his son John Herbert was his only heir. If therefore the destination-over was effective at that date there was nothing to prevent vesting in John Herbert, the liferent provision in favour of his mother operating to postpone his right to payment and enjoyment of the estate, but not to postpone the vesting of his interest in the fee.

It was argued for the respondents that the heirs of William were to be looked for, not at the date of his own death but on the death of his widow (it might have been on her second marriage). The ordinary rule of construction is that a man's heirs fall to be determined at the date of his death. In *Gregory's Trustees* v. *Alison* (16 R. (H.L.) 10, at p. 14) Lord Watson said—"The rule, as I understand it, is simply this, that in cases where a testator or settler in order to define the persons to whom he is making a gift employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour." The same reasoning appears to me to apply where the destination is to a class of persons usually ascertained upon the death of another. In that case the death of that other will be the date when, in the absence of evidence of contrary intention, the selection of the favoured persons will fall to be made. That it is open to a testator to prefer heirs of himself or of another as ascertained at an artificial and not the natural date is evidenced by a number of cases, of which reference may be made to one of the most recent—*Wylie's Trustees* v. *Bruce* (1919 S.C. 211), decided by the whole Court. What evidence, however, is there that the testator intended his son William's heirs not to be ascertained at his death but at a subsequent or artificial period?

The respondents relied strongly on the presence of the word "thereafter," meaning after the death of both William and his widow, as pointing in favour of the ascertainment of William's heirs upon the death of his widow. I am unable to attach such importance to the use of this word. In the case of a simple destination to trustees to hold for A in liferent and on his death for B in liferent and thereafter for A's heirs in fee, there would not, I think, be anything to prevent vesting of the fee on A's death in his heirs as then ascertained. In *Mortimore* v. *Mortimore* ([1879] 4 App. Cas. 448) a testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter and her children, but when one died and left no children the interest was to be paid to the others, and after the death of the last survivor the fund was to be divided among her children, "and if there be no such children that the same be paid to such person or persons as will then be entitled to receive the same as my next-of-kin under the statute for the distribution of intestates' estates." It was held that under the words of the will the class of "next-of-kin" described the persons who filled that character at the time of the death of the testator and not at the death of the last surviving daughter. The Lord Chancellor (Lord Cairns) in the course of his speech said (at p. 451)—"In the words of this particular will there is a gift to a class of persons who are thus described—'My next-of-kin under the statute for the distribution of intestates' estates.' That is a class which according to the statute must be ascertained at the death of the testator, and, as I took the liberty to mention during the argument, it is not an artificial class of next-of-kin to be created. The only other words are 'that the same be paid to such person or persons as will *then* be entitled to receive the same.' Now I am quite willing to look at the word 'then' as if it meant at the expiration of the preceding limitation, but then what does this amount to? Why this—At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next-of-kin at the time of his death." That case followed *Bullock* v. *Downes* (9 H.L.C. 1), and both cases were by Lord Watson in *Gregory's Trustees* said to be equally authoritative in construing Scottish as in construing English wills.

As I read the testator's settlement, there appears to me to be evidence that he meant the heirs of his son to be determined at the natural date for ascertaining them and not at an artificial date. I am unable to concur in the view that no significance is to be attached to the use of the word assignees as referring to a right that can only be enjoyed after vesting. It is no doubt true that in the Whole Court case of *Bell* v. *Cheape* (1845, 7 D. 614) it was held by a majority of the Whole Court that assignees there referred to assignees after vesting had taken place and not to persons appointed by the legatee before the period of vesting. In that case a legacy was left to A, his heirs, executors, or assignees, in the event of B, who liferented the subject of it, dying without issue:—A predeceased B, having assigned the legacy; B afterwards died without issue. A's next-of-kin were preferred to his assignee. The words "or assignees" were treated as merely words of style referable only to the time, which did not occur but might have occurred, when the right should vest in A. In the present case there is no room for treating the word assignees as a word of style for no vested interest is given to William. Unless therefore the word is to be written out of the deed—a course which is contrary to the ordinary rule of construction, which necessitates some meaning, if possible, being given to every expression used by the testator—it must refer to a right conferred upon William Wilson to make an appointment in favour of some selected person which would be valid in the event of his widow dying predeceased by all their issue. In the case of *Barr* v. *Parnie* (1903, 11 S.L.T. 426), Lord Kyllachy held the word "assignees" in a destination similar to the present as equivalent to nominees or

appointees. With the reasoning of that learned Judge I respectfully concur. If I am right in this view as to the meaning of "assignees" I think it affords strong reason for assuming that the testator meant his son William's death to be the date when his heirs were to be ascertained.

On the assumption that the ascertainment of the heirs of William Wilson is not postponed to the date of his widow's death you have a destination-over in favour of a class ascertained at a particular date, *i.e.*, William's death, and therefore room for the operation of the rule that vesting will then take place in them subject, it may be, to divestiture in the event of a contingency or contingencies occurring. The circumstance that the ascertainment of the class arises, not on the testator's death but at a different date, is no obstacle to the application of the rule. This appears from the oft-quoted passage in the opinion of Lord President Inglis in *Steel's Trustees* v. *Steel* (16 R. 204), where (at p. 208) he says—"I think the result of all the cases on this subject may be summarised thus—Where a fund is settled on daughters of the testator for their liferent use allenarly, and their children, if any in fee, whom failing, to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last-named person or persons will depend on these considerations—whether the persons so called to the succession, if only one, was a known and existing individual at the death of the testator, or if more than one, whether the persons so called were all of them known and existing at that date; or if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the liferenters or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called or the individuals composing the class are ascertained. But when the person or persons called are known, or the individuals composing the class are ascertained at the death of the testator, then the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters, or any of them leaving issue."

In *Taylor, &c.* v. *Gilbert's Trustees* (5 R. (H.L.) 217) Lord Blackburn said (at p. 221)—"It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once, which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event, but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that a testator intends the gift he gives to be vested subject to being divested rather than to remain in suspense." A comparison of the provision in favour of the testator's son William with the provisions in favour of his unmarried daughters and of another son whose personal enjoyment of his share was restricted to an alimentary liferent confirms the view that the testator was contemplating the death of a child, to whom payment was not personally to be made, as the date when the interests in the fee of that share were to vest. As I read the provision of the settlement, on William's death his share vested in his heirs subject to divestiture in the event of some only of the issue of the marriage surviving the widow. The survivorship clause applies only to the issue and does not affect the destination-over to the heirs. In the present case as the only contingency which effects divestiture could not apply—there being only one child and one heir—I think that there was absolute vesting in John Herbert Wilson on his father's death.

The view just indicated necessitates John Herbert being treated as called both as one of the issue and in the destination-over. It is said that this is anomalous. The situation, however, is not without precedent. In *Gregory's Trustees*, already referred to, spouses in a postnuptial contract conveyed their whole estate "each of them to the other, in case of his or her survivancy, in liferent," and to the children of the marriage in fee, with power to the father to apportion among the children. There was also a declaration that in the event of the dissolution of the marriage without children or of the decease of all the children in the lifetime of the survivor then "it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties, and failing any such disposition, then, and in that case the said whole funds and estate settled by these presents shall, after the decease of the said parties, suffer division in manner after mentioned—that is to say, the whole funds and estate after mentioned belonging or which may belong to" the husband "shall fall to and become the property of his own nearest-of-kin," and the wife's property to her nearest-of-kin. The husband died without leaving any further deed, and was survived by his widow and by one child. The latter died leaving one child. Both predeceased the widow. It was held in the House of Lords that on the husband's death the fee of his moveable estate vested in the only child of the marriage, and that as he was his father's "nearest-of-kin," in the sense of the deed, his right was not subject to divestiture in the event (which happened) of his predeceasing his mother, the liferentrix. Lord Watson in the course of his speech said (at p. 15)—"In these circumstances I am of the opinion that his 'nearest-of-kin,' within the meaning of the deed, are the same person or persons to whom the law prevailing in 1840 would have assigned his intestate moveable succession at the time of his death in 1858. I can find nothing

adverse to that interpretation of the deed, unless it be the suggestion that it is improbable the spouses should have intended to make a direct conveyance to their children, and also to include them in the destination to their 'nearest-of-kin.' That is a kind of probability which has frequently been put forward without success in cases of this description, and whenever it is, as here, unsupported by the context, it can only afford material for conjecture." An earlier Scots case may be cited, *i.e.*, *Blackwood* v. *Dykes* (1833, 11 S. 443). In that case a testator disinherited his eldest son and conveyed his property to trustees to hold for his second son and his issue, and failing issue to the testator's heirs and assignees whatsoever. On the failure of the second son and his issue it was held that the disinheriting words could not prevent the oldest son taking as his father's nearest heir when the succession opened to that class.

In my opinion the interlocutor of the Lord Ordinary ought to be recalled and the reclaimer ranked and preferred to the fund *in medio*.

LORD JUSTICE-CLERK (ALNESS)—The question in this case is whether the fee of William Wilson's share in his father's estate vested at the date of his death in 1884, or whether vesting was postponed till the death of his widow in 1922. That question, I apprehend, falls to be determined in accordance with the intention of the testator, and that intention must be sought for and found in the testamentary language which he has employed, or which his advisers, on his behalf and with his approval, have employed. In the solution of such a problem mere conjecture should have no place. An uneasy feeling that had the testator foreseen a certain contingency which arose after—it may be long after—the date of his death, he would probably have dealt with it in another manner must not deter the Court from dealing with that contingency in the only manner which the language of the testator's settlement permits and prescribes.

When then did the testator intend the fee of the share of his estate which he left to his son William to vest? It is conceded that there was no vesting *a morte testatoris*. The remaining alternatives are that the fee vested on the expiry of the first liferent, *i.e.*, the liferent enjoyed by William, or on the expiry of the second liferent, *i.e.*, the liferent enjoyed by his widow. Now, the latter date is the date of the distribution of William's share, and I take it to be well settled that, apart from any indication to the contrary, that date, failing vesting *a morte*, will be deemed to be the date when a testator intended vesting to take place—*Marshall*, 16 R. 40; *Wylie*, 1919 S.C. 211.

But in this case, in the view which I take of it, not only is there no indication of an intention on the part of the testator to provide a date for the vesting of William's share other than the date of distribution, but in my opinion the testator's language makes it clear that that is the date which he intended, and indeed the date which he prescribed. The language of the settlement, in short, so far from excluding the application of the general rule to which I have referred, emphasises it. I take a very simple view of the case. The fact, however, that your Lordships have differed in opinion and have thought it proper to support your respective views by, if I may say so, an exhaustive and illuminating review of case law, naturally impairs the confidence which I should otherwise have felt in the view I hold, makes me suspect its simplicity, and doubt its sufficiency. However that may be, my view is this. I am unorthodox enough to think that this is a case which, given the application of one or two well-settled principles of testamentary law, falls to be determined solely by reference to the terms of the deed itself. Indeed, I think that the decision of the problem submitted to us depends upon the construction of one word in that deed, viz., the word "thereafter." That word appears to me to be vital, and, if it be necessary, as I think it is, to give effect to every word, and in particular to every important word, which a testator has employed, then the result is not in doubt.

Does the word "thereafter" refer to the death of William, or does it refer to the events narrated in the settlement just before the word occurs, *i.e.*, the two liferents? If the former, the reclaimers must succeed; if the latter, the respondents must succeed. Now, having given the best consideration I can to the argument which we heard, and having studied the settlement anxiously and repeatedly, I feel bound to prefer the latter interpretation. The opposite view I think treats the word "thereafter" as superfluous, and indeed denies all meaning to it. For I regard a construction which interprets the word as referring to the immediately preceding words "at his death" as quite inadmissible. Were the word "thereafter" absent from the settlement, I should have held that vesting took place at the date of William's death. But as the word is there and must receive effect, I am satisfied that it refers not to the date of William's death but to the date when the second liferent expired. That interpretation, it seems to me, accords to the word its natural and plain meaning in the collocation in which it is found. It involves that the trustees begin to hold for the liars only after the liferents are exhausted, and that as at that date the heirs of William are to be ascertained. The word, having regard to its context, settles, in my opinion, the date of vesting in the heirs and issue of William alike. I can find no warrant in the deed for affixing one date to vesting in heirs and another date to vesting in issue. The reclaimers' argument involves that, as I think, anomalous and unprescribed result. Moreover, if the word "assignees" be read as equivalent to "nominees," I think, agreeing with Lord Ormidale, that the use of these words by the testator does not in any way conflict with the interpretation which I have suggested. I therefore concur with Lord Ormidale in thinking that the reclaiming note falls to be refused.

LORD ANDERSON did not hear the case.

The Court adhered.

Counsel for the Claimant and Reclaimer Mrs Coralie M. L. Williams or Wilson or Mackenzie—Henderson, K.C.—Macdonald. Agents—Fraser, Stodart, and Ballingall, W.S.

Counsel for the Claimants and Respondents, the Rev. J. B. Wilson and Others and also for John James Moubray and Others (the testamentary trustees of the late John Wilson), Pursuers and Real Raisers—Chree, K.C.—Duffes. Agents—Mackenzie & Wyllie, W.S.

Thursday, March 20.

SECOND DIVISION.

[Lord Constable, Ordinary.

NORFOR AND OTHERS *v.* ABERDEENSHIRE EDUCATION AUTHORITY.

(Reported *ante*, July 13, 1923, 60 S.L.R. 553.)

School — Transferred School — Powers of Education Authority with regard thereto —"Hold, Maintain, and Manage as a Public School" — Education (Scotland) Act 1918 (8 *and* 9 *Geo. V, cap.* 48), *sec.* 18 (3) *and* (9).

Statute — Education (Scotland) Act 1918 (8 *and* 9 *Geo. V, cap.* 48)*—Construction— "Hold, Maintain, and Manage as a Public School."*

By the Education (Scotland) Act 1918, section 18, provision is made for the transfer of voluntary schools to the Education Authorities constituted by that statute. By sub-section (3) it is enacted—"Any school so transferred shall be held, maintained, and managed as a public school by the Education Authority, who shall be entitled to receive grants therefor as a public school, and shall have in respect thereto the sole power of regulating the curriculum and of appointing teachers." To this enactment are adjected three provisos, viz. — (*a*) That the existing staff of teachers shall be taken over; (*b*) that the religious belief and character of all teachers appointed to the staff shall be approved by representatives of the Church or denominational body in whose interests the school has been conducted; and (*c*) that facilities shall be provided for religious instruction in the school by a supervisor to be approved as aforesaid. By sub-section (9) it is provided that after the expiry of ten years from the transfer of a school the Department may in certain circumstances discontinue the school, or maintain it as a public school free from the conditions prescribed in sub-section (3).

The trustees of a voluntary school transferred it under the provisions of the Education (Scotland) Act 1918 to the County Education Authority. Prior to the transfer the school was carried on as a primary school, providing a full primary course of instruction together with a supplementary course. Two years after the transfer the Education Authority resolved to alter the status of the school by discontinuing the giving of primary instruction therein to pupils beyond the infant or junior stages, whereupon the former trustees of the school brought an action against the Education Authority for declarator that the defenders were bound for the space of at least ten years from the date of the transfer to maintain the school as a primary school providing a full and supplementary course of instruction, and for interdict against the defenders for the said space of time maintaining the school as a school for infants and junior pupils only, or otherwise than as a school providing a full primary course of instruction. *Held* (*rev.* judgment of Lord Constable, Ordinary) that the defenders were bound to hold, maintain, and manage the school for the space of at least ten years from and after the date of the transference as a public school of the same character and status as at the date of the transference.

Robert Thomas Norfor, C.A., Edinburgh, as secretary and treasurer of the Representative Church Council of the Episcopal Church in Scotland, and others, *pursuers*, brought an action against the Education Authority for the county of Aberdeen, *defenders*, for declarator (1) that St John's Episcopal School, New Pitsligo, was at the date of the passing of the Education (Scotland) Act 1918 (8 and 9 Geo. V, cap. 48) on 21st November 1918 a voluntary school within the meaning of "the Education (Scotland) Act 1897" (60-61 Vict. cap. 62); (2) that the said school was transferred as and from 15th May 1919 to the defenders as the Education Authority for the county of Aberdeen, in terms of the said Education (Scotland) Act 1918, by the trustees for behoof of the congregation of St John's Church, New Pitsligo . . .; (3) that at the date of the said transference the said school was a primary school providing a full primary school course of instruction together with a further supplementary course; and (4) that the defenders as Education Authority foresaid and as such now vested in the property, control, and management of the said school in virtue of the said transference and of the provisions of the said Education (Scotland) Act 1918, are bound in terms of the said Act to hold, maintain, and manage the said school for the space of ten years at least, from and after the said 15th May 1919 as a primary public school providing a full primary and supplementary course of instruction, subject to the provisions of the said Education (Scotland) Act 1918, and to the defenders' curriculum for the time being applicable to courses of primary instruction in schools under their charge; "*or alternatively, as a public school of the same character and status as at the date of the said transference and providing similar instruction to that pro-*