may be cases where a pursuer is entitled to bring the defender into Court—where, for instance, the defender refuses either to pay or to arbitrate—and in such cases, if the defender subsequently pleads arbitration, the pursuer would naturally be entitled to recover the expenses of raising the action. But I think that, following on what was said in *Levy*, where as here the defender is all along willing to arbitrate, the pursuer cannot recover the expenses of raising the action.

On the other hand, I do not think the defenders here are entitled to an award of their expenses, for they have been to a certain extent in the wrong, since they disputed their liability for any payment at all. We shall therefore pronounce a decree of absolvitor and find no expenses due to or by either party.

LORD KINNEAR and LORD DUNDAS concurred.

The Court recalled the sist and assoilzied the defenders, finding no expenses due to or by either party.

Counsel for the Pursuer—Morison, K.C. —T. Graham Robertson. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders—Boyd. Agents —Boyd, Jameson, & Young, W.S.

Tuesday, July 16.

SECOND DIVISION.

M'ALPINE AND OTHERS (M'LAREN'S TRUSTEES) *v.* M'LAREN AND OTHERS.

Succession—Accretion—Repugnancy—Vesting—Intestacy—Residue—Vesting subject to Defeasance—Presumption.

A testator appointed his trustees "to hold the free residue and remainder of my estate, heritable and moveable, . . . and to apply the same for behoof of my sister" Mrs M'A. "and her children, or such of them as shall be alive at my death, in manner following: That is to say, the said residue and remainder of my said estate shall be divided into eight equal parts or shares, and the said" Mrs M'A "shall be entitled to one of said shares, and her children" J., R., E., and G. "shall each be entitled to one of said shares, and" M. and A., two other children, "shall be entitled equally between them to three of said shares." The trustees were directed to "pay" to sons their shares on attaining twenty-five years, and to daughters on attaining that age or being married, "but said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain the said age, or being daughters respectively attain said age or be married; and . . . in case any of said children shall predecease me or die before his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his or her or their parent would have taken if alive, and the same shall become payable . . .; and providing and declaring that it shall be in the power of my trustees, if they see fit, to apply the free proceeds or income of the presumptive share of any child or lawful issue foresaid . . . towards his or her maintenance, education, or advancement in life."

M. survived the testator, but died, intestate and unmarried, without having attained the age of twenty-five.

Held (*dissenting* Lord Low) that the share of residue destined to M. had fallen into intestacy of the testator, inasmuch as (1) there was no accretion, the gift being a series of separate bequests—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, *followed*; and (2) the word "vest" was to be read in its ordinary sense, the deed being clear and there being no repugnancy.

Opinion per Lord Low that the share of residue destined to M. was intestate succession of M. and not of the testator, and that "vest" must be read as "obtain an absolute and indefeasible right," inasmuch as otherwise the vesting clause was repugnant since M. took *a morte testatoris*.

John M'Laren, grocer and wine merchant, Dunblane, died on 26th July 1900, leaving a trust-disposition and settlement dated 10th August 1899, and registered in the Books of Council and Session 28th July 1900. The residue of his trust estate consisted of heritable properties in Dunblane valued at £2850, but subject to a heritable debt of £1000, and moveable estate amounting to £197, 9s. 2d.

The purposes of the trust-disposition, whereby the testator conveyed his whole estate to trustees, were (1) to pay debts and the expenses of executing the trust; (2) to allow two nieces of the testator, Mary Hastie M'Alpine and Agnes Roy M'Alpine, or either of them, not being married at his death and so long as they should remain unmarried, the use rent free of one of his houses and of the whole household furnishings belonging to him, with provisions as to survivorship, etc.; (3) "Subject to the foregoing provisions and payment of any further provisions or legacies I may hereafter make or leave, I appoint my trustees to hold the free residue and remainder of my estate, heritable and moveable, real and personal, above conveyed and to apply the same for behoof of my sister Mary M'Laren or M'Alpine, wife of John M'Alpine, Grafton Square, Glasgow, and her children or such of them as shall be alive at my death, in manner following: That is to say, the said residue and remainder of my said estate shall be divided into eight equal parts or shares, and the said Mrs Mary M'Laren or M'Alpine shall be entitled to one of said shares, and her children John M'Alpine, Robert

M'Alpine, Elizabeth M'Alpine, and Grace M'Alpine shall each be entitled to one of said shares, and the said Mary Hastie M'Alpine and Agnes Roy M'Alpine shall be entitled equally between them to three of said shares, and that over and above the provisions in their favour contained in article second hereof, but providing and declaring that by acceptance of the provisions herein contained the said Mary Hastie M'Alpine and Agnes Roy M'Alpine shall not be entitled to make any claim after my death against my estate for wages for any period prior to my death; and my trustees shall, to such extent as the provisions contained in article second hereof will permit, pay or make over to the children of my said sister Mrs Mary M'Laren or M'Alpine his or her share in the case of sons on their respectively attaining or having attained the age of twenty-five years, and in the case of daughters on their attaining or having attained said age or being married, whichever of said events shall first happen, but said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain the said age, or being daughters respectively attain said age or be married; and I provide and declare that, in case any of said children shall predecease me or die before his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his, her, or their parent would have taken if alive, and the same shall become payable and transferable to them at the first term of Whitsunday or Martinmas after such share or shares would have become payable to their parent or parents; and providing and declaring that it shall be in the power of my trustees, if they see fit, to apply the free proceeds or income of the presumptive share of any child or lawful issue foresaid, or so much thereof as my trustees may consider proper, towards his or her maintenance, education, or advancement in life . . ."

Mary Hastie M'Alpine survived the truster but died intestate on 21st February 1902, and without ever having been married. She was born on the 17th May 1877, so that at the time of her death she had not attained the age of twenty-five years. In consequence of her death before attaining the age of twenty-five years questions arose in regard to the three-sixteenths share of the residue of the estate to which she would have been entitled had she attained that age, and this special case was presented for the opinion and judgment of the Court.

The parties to the case were (1) John M'Laren M'Alpine and others, trustees of the deceased John M'Laren, first parties; (2) Robert M'Laren, butcher, Dunbarton, the only brother and heir in heritage and one of the next-of-kin of the truster, second party; (3) Mrs Mary M'Laren or M'Alpine, the only sister and one of the next-of-kin of the truster, third party; (4) John M'Laren M'Alpine, Agnes Roy M'Alpine, Robert M'Alpine, Elizabeth M'Alpine, and Grace M'Alpine (the surviving children of the third party), fourth parties.

The second party *maintained* that the share of three-sixteenths of the residue of the estate destined to Mary Hastie M'Alpine had fallen into intestacy, and that said share was heritable estate and fell to him alone as heir in heritage of the truster. The third party adopted the contention of her children, the fourth parties. The fourth parties maintained that the share of three-sixteenths of the residue of the estate destined to the said deceased Mary Hastie M'Alpine accresced to them and their mother, and under the conditions to which the residue was specially destined to them by the third purpose; or alternatively that the said share vested in Mary Hastie M'Alpine and fell to be dealt with as her intestate succession.

The *questions of law*, as finally adjusted, for the opinion and judgment of the Court were as follows—"(1) Does the share of the trust estate destined under the settlement to the deceased Mary Hastie M'Alpine fall to be dealt with as intestate succession of the truster John M'Laren; or (2) Does the said share of the trust estate accresce to and fall to be divided amongst the parties hereto of the third and fourth parts according to their respective interests in the residue of the estate, to the exclusion of all others claiming an interest in said residue? (3) Did the said share of the trust estate vest in the said Mary Hastie M'Alpine on the death of the truster, and does it now fall to be dealt with as her intestate succession?"

As originally presented, the first question contained a second portion dealing with a separate contention of the third party which was abandoned. The third question and the alternative contention of the fourth parties were added, at the suggestion of the Court and with the consent of the second party, after the case had been partly heard.

Argued for the fourth parties (whose argument the third party adopted)—(1) Mrs M'Alpine and her children formed a class to whom there was a joint bequest, and among whom, accordingly, there was accretion, as in *Menzies' Factor* v. *Menzies*, November 25, 1898, 1 F. 128, 36 S.L.R. 116; *Roberts' Trustees* v. *Roberts*, March 3, 1903, 5 F. 541, 40 S.L.R. 387; *Muir's Trustees* v. *Muir and Others*, July 12, 1889, 16 R. 954, 26 S.L.R. 672. The present case resembled these cases—particularly *Menzies*—more than it did *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830. (2) Mary Hastie M'Alpine took a vested interest *a morte testatoris* in the provisions in her favour. There was here an initial gift to the mother and the children; they were apparently treated alike, and presumably the mother took a vested interest *a morte*, and, accordingly, so did the children. The expression "vest" was ambiguous; it had been held it might mean, and here it meant, "vest in possession" or "be payable"—*Young* v. *Robertson*, February 11, 1862, 4

Macq. 314, Lord Cranworth at 330-331; *Popham's Trustees* v. *Parker's Executors*, May 24, 1883, 10 R. 888, 20 S.L.R. 595; *Simpson* v. *Peach*, 1873, L.R., 16 Eq. 208; *Williams* v. *Haythorne*, 1871, 6 Ch. App. 782. The statement that a larger share was given to Mary and Agnes to prevent possible claims for wages showed that an immediate gift was intended. So also did the power to make advances of presumptive shares. "Presumptive" was an accurate word to use of shares vested but subject to defeasance. The testator wished his nephews and nieces to take an absolute right, subject to this, that if they predeceased the term of payment leaving issue their issue should take; he must be presumed to have known the law as laid down in *Snell's Trustees* v. *Morrison, &c.*, November 4, 1875, 4 R. 709; *Cairns' Trustees* v. *Cairns and Others*, November 29, 1906, 44 S.L.R. 96, [1907] S.C. 117.

Argued for the second party—The testator died intestate as regards the share in question. (1) There was no room for accretion, for the gift was of a specific subject—namely, a certain share of the estate—to each individual, who again was named. This, therefore, could not be treated as a gift to a class, and the cases quoted had no application. Each individual took the gift given him or her and no more. That the gift was not a class gift was proved by there being no class in a mother and her children, by the gift to the various individuals not being the same in amount, and by there being no provision for additional members of the supposed class—*i.e.*, for children who might have been born subsequently. The testator, further, spoke, in a later portion of the deed, of the gift to the children as "provisions," in the plural, showing that he intended separate bequests. (2) In the same way there was no room for the doctrine of repugnancy and it was impossible, on the ground that the vesting clause was repugnant to the rest of the deed, to give the word "vest" any but its ordinary meaning. The clauses of the deed all fitted in correctly, and each word was used in its ordinary and appropriate sense. There was no initial out-and-out gift any more than there was in *Dick's Trustees* v. *Cameron and Others*, June 6, 1907, 44 S.L.R. 753, Lord Low at p. 756. The initial gift was a qualified gift and must bear all the qualifications which were subsequently set out. One of these was as to vesting. There was a clear direction as to vesting, and to interpret that word as equivalent to payment was to strain it out of its ordinary meaning, and, on mere supposition as to what the truster might have wished, to make a will for him, and that in a case where his words were clear and not open to construction. Moreover, "vest" was used in antithesis to "pay." The use of the word "presumptive" share also indicated that vest was used in its ordinary meaning.

At advising—

LORD STORMONTH DARLING— . . . (*After narrating origin of action and provisions of the trust-disposition, supra*) . . . On the construction of the clause of residue two main questions seem to arise—one being the question on which the special case was originally brought, viz., as between intestacy of the truster so far as the share destined to Mary M'Alpine is concerned, and accretion of that share to the surviving legatees, and this option, being the question which the M'Alpine family with consent of the heir of the truster were allowed to add to the case, viz., whether vesting in Mary M'Alpine took place *a morte testatoris*, with the result that the consequent intestacy is on her part and not on the part of the truster. It was not maintained by counsel for the third party (Mrs M'Alpine) that if there was intestacy of the truster any but the heir was entitled, and so she made common cause with her children who contended for accretion.

The first of these questions is governed, in my opinion, by the leading case of *Paxton's Trustees* v. *Cowie*, 13 R. 1191. The bequest here, though one of residue, is in favour of seven persons named; they are thus within the description of "a plurality of persons," each of whom is "entitled to his own share and no more;" and the case is to my mind *a fortiori* of *Paxton's Trustees*, because the share which each is to receive, instead of being an equal share with the others, is, in the case of two of them, a larger share than the others. It was argued by Mr Cochran Patrick that the surviving beneficiaries were a class. I do not know that this is of any particular significance where the beneficiaries are named, because after all the question in a case of this kind must always be whether the testator intended a joint bequest or a series of separate bequests, and it is only as favouring the former of these inferences that the fact of there being a class is important. But in my opinion it is vain to contend that a body of beneficiaries which includes a mother and six children can rightly be described as "a class," even apart from the consideration that the shares allotted to them are of varying amount. The cases cited in which the rule of *Paxton's Trustees* has not been followed are all outside the rule as carefully defined by Lord President Inglis. *Muir's Trustees* (16 R. 954) fell outside the rule, because, as explained by the same learned Judge, "the first condition for the application of that rule is that the persons to whom the legacy is left must either be named or sufficiently described for identification," and "it cannot therefore apply to a class of persons of unascertained number." The rule may also be "controlled or avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees." Now, *Menzies' Factor* v. *Menzies* (1 R. 128) and *Roberts' Trustees* v. *Roberts* (5 R. 541) were both cases in which the Court found other expressions in the will indicating that the testator meant that the bequest should be a joint one. I can find no such expressions in this case, and therefore I think there was no accretion.

There remains the other question raised

by the added query whether Mary M'Alpine's share of residue vested in her *a morte testatoris* and now falls to be dealt with as her intestate succession. I quite admit that courts of law are always anxious to avoid such a construction of a will, particularly a will purporting to dispose of a man's whole estate, as will lead to even partial intestacy. I also admit that it is a probable enough conjecture that this testator preferred his nephew and nieces to his heir-at-law whom he never mentions throughout his settlement. Still all presumptions and conjectures must yield to a testator's plain words, and what I cannot get over in this case is that Mr M'Laren not only provided that the shares of residue should be paid to the daughters of Mrs M'Alpine on their attaining the age of twenty-five or being married, whichever of these events should first happen, but expressly declared that their provisions should not vest until they respectively should attain that age or be married. No doubt when you read on you find that the testator provides for the issue of any of them taking their parent's share in the event of the parent predeceasing either the testator himself or the period of vesting, and that there is no other contingency expressly provided for. But that is hardly a reason for inferring that the testator had nothing else in view when he postponed vesting, or, in other words, that his postponement of vesting was not, to some extent at least, personal to the legatee. When the question of vesting is a matter of legal construction from the whole terms of a will, such inferences may be permissible, but not in my judgment where the testator has himself prescribed the time of vesting, and has thus shown that he draws a distinction between vesting and payment. The fact that he makes this distinction seems to me entirely to suspend the necessity of considering these cases in which vesting has been held to mean only what has been termed "vesting in possession"—that is to say, the actual enjoyment rather than the obtaining of a right. That the latter—the obtaining of the right as distinguished from its actual enjoyment—is the ordinary meaning of the word "vesting" is fully conceded by Lord Cranworth in the well-known case of *Young* v. *Robertson*, to which reference was made. I see no reason to doubt that this testator used the word in its ordinary sense, else why did he not content himself with the positive direction to his trustees to pay and make over the shares of daughters on marriage or attainment of twenty-five, and why did he think it necessary to add the negative direction that the shares should "not vest until" the occurrence of one or other of these events. Either this addition meant what I say it means (and what it usually means) or it was mere surplusage and had no meaning at all. To say that when he directed that the provisions of daughters should *not* vest till marriage or the attainment of twenty-five, he meant that vesting should take place *a morte*, subject only to defeasance in the event of their afterwards having children, looks to me very like a contradiction in terms.

Ingenious as the argument for the M'Alpine family is, I think it lays too much stress on the testator's supposed reasons for what he did, and pays too little heed to his express words, whatever his reasons may have been. I have always understood that when a testator makes positive directions as to vesting, a court of construction is relieved from the necessity of speculating about his reasons, and has only the duty of interpreting his directions in their ordinary and natural sense, so as to give, if at all possible, full value to every clause in his will. If such a mode of interpretation should have the effect of letting in the heir-at-law, then the heir has at least this to say for himself, that though there may be a certain presumption against intestacy, there is no presumption in favour of disinhersion. But however that may be, I base my opinion on the simple ground that the words of the clause about vesting distinguish between vesting and payment, and therefore can only be read as importing a suspensive and not a resolutive condition.

I am accordingly in favour of answering the first part of the first question in the affirmative, the second question in the negative, and the third question also in the negative. Owing to the concession of the third party made at the bar it is unnecessary to answer the second part of the first question.

LORD LOW—I am of opinion that the share of the residue of the trust estate destined to the deceased Mary Hastie M'Alpine did not accresce to her surviving brothers and sisters, but that, if no right to the share vested in her, it became intestate succession of the truster. So much I think is quite clear, and I agree with what has been said by Lord Stormonth Darling on that point; but the question whether any right to the share vested in Mary Hastie M'Alpine appears to me to be one of novelty and difficulty, upon which I fear that I have the misfortune to have arrived at a different conclusion from that favoured by your Lordships.

It is said that right to the share could not possibly have vested in Mary Hastie M'Alpine, because it is expressly declared that the provisions to the children of the truster's sister "shall not vest" until the period of payment. Of course I recognise the force of that consideration, but, as I read the settlement, the declaration in regard to vesting is, if read as meaning that the children should take no right of any kind to their shares until the period of payment, inconsistent both with the initial gift and with all the other provisions of the settlement.

The residuary clause practically includes the whole of the truster's estate, and the way in which he deals with it is this. He appoints his trustees to "hold" the residue, "and to apply the same for behoof of" his sister Mrs M'Alpine "and her chil-

dren, or such of them as may be alive at my death, in manner following." The truster then directs his estate to be divided into eight equal parts or shares, and declares that Mrs M'Alpine "shall be entitled" to one share, that four of her children (who are named) "shall each be entitled" to one share, and that the remaining two children, the deceased Mary Hastie M'Alpine and Agnes M'Alpine, "shall be entitled equally between them" to three shares.

It is plain that the division of the estate into eight shares was to take place at the truster's death. It is also plain that Mrs M'Alpine was to be entitled to immediate payment of her share. It is true that there is no express provision to that effect, but it is implied, because the postponement of the period of payment is limited to the shares destined to the children.

It is therefore beyond dispute that when the truster declares that at his death Mrs M'Alpine "shall be entitled" to one share, he means that she is then to take an immediate right to that share; and presumably when he uses precisely the same language in regard to the children's shares, he means the same thing—that is to say, that each child shall take an immediate right to his or her share, although such right may be subject to a resolutive condition, and payment of the share may be postponed. I should have come to the same conclusion if the children alone had been beneficiaries, because for a testator to say that at his death a certain person is to be *entitled* to a certain sum means, according to the ordinary use of the word, that that person is then to have right to the sum, and such a declaration is inconsistent with the idea that unless the beneficiary survives an event, which may or may not occur, he shall have no right whatever. I need hardly add that the fact that there is no direct gift to the children, but only a direction to the trustees, is immaterial, because it is the nature of the right and not the form in which it is given which is to be regarded.

If the declaration in regard to vesting be left out of view, the clauses of the settlement following the initial gift point in the same direction.

There is first a declaration to the effect that the provisions in favour of Mary Hastie M'Alpine and Agnes M'Alpine should be in full of any claim they might have for wages. Mr Craigie founded on that clause as showing that an immediate right was intended to be given, on the ground that a provision to which these beneficiaries might never have a right was not an appropriate or natural way of satisfying a claim for immediate payment of a sum of money in name of wages. That is a legitimate enough observation, but I think that the most that can be said in regard to the clause is that it is not inconsistent with the idea that an immediate gift was given.

There is then a direction to the trustees to pay the children's provisions in the case of sons upon their attaining twenty-five years of age, and in the case of daughters upon their attaining that age or being married. I need hardly say that that direction is in no way inconsistent with vesting *a morte testatoris*.

Omitting in the meantime the declaration as to vesting, the next clause is a declaration that in the event of a child dying "before his or her share of the residue becomes vested, leaving lawful issue alive at the period of vesting," such issue shall take their parents' share, which shall be payable to them at the first term of Whitsunday or Martinmas after the share would have become payable to their parent.

The first remark which I have to make upon that clause is that its object plainly is to protect the right of possible issue of a child dying before the period of payment leaving issue; and I think that it may be regarded as settled that the effect of such a clause is not to prevent vesting *a morte* in the child, but to make the right of that child defeasible in the event of his or her predeceasing the term of payment leaving issue.

I have further to remark upon the clause that the only case provided for is the death of a child before the period of payment survived by issue, who in turn survive the period of payment. There is no provision for the case of a child dying before the period of payment without leaving issue, or of such issue also dying before the period of payment. It is certain that the testator did not intend to die intestate in either of those events, or indeed in any event, and it is difficult to believe that when the conveyancer who prepared the settlement was providing for the event of a child dying leaving issue, it never occurred to him that a child might die without leaving issue, although that was the more probable event of the two. Still more unlikely is it that when he provided that issue of a child predeceasing the period of payment should only take if they themselves survived that period, he should not have considered the question, What was to become of the share if neither child nor issue survived? I think therefore that the inference is that these events were regarded as having been already provided for, which would be the case if the children took right *a morte testatoris*, subject only to divestiture in the event of their death before the period of payment leaving issue who survived the period of payment.

The last clause which has any bearing upon the present question declares "that it shall be in the power of my trustees, if they see fit, to apply the free proceeds or income of the presumptive share of any child or lawful issue foresaid, or so much thereof as my trustees may consider proper, towards his or her maintenance, education, or advancement in life."

I think that a direction or a discretion to trustees to apply the income of a sum destined to a beneficiary for that beneficiary's behoof prior to the period of payment, raises a presumption more or less strong that a right to the sum has already vested in the beneficiary. It was said that

that was not so in the present case, because the share of a child is described as being "presumptive." That description is perhaps more appropriate to a provision which has not vested to any extent than to one which has vested subject to divestiture, but I think that a provision which has not vested absolutely and indefeasibly may fairly enough be described as "presumptive."

Now if the settlement had contained nothing more than the clauses which I have been considering, it seems to me that it would have been clear beyond dispute that the shares destined to the children of Mrs M'Alpine vested in them *a morte testatoris*, subject to the condition protecting the right of possible issue.

But there is the declaration as to vesting. It forms part of the clause postponing payment until the attainment of twenty-five years of age or marriage, and is in these terms—"But said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain the said age, or being daughters respectively attain said age or be married."

That is unequivocally a declaration that vesting shall not take place until the period of payment, and if the words "shall not vest" must be read as being equivalent to "shall not take any right whatever," then it seems to me that there is repugnancy between the declaration and the rest of the settlement, and especially what I have called the initial gift. I have already given my reasons for thinking that that gift, according to the natural meaning of the language used, imports that an immediate right is given to the children in the shares allotted to them respectively, and that the other clauses (apart from the declaration as to vesting) are not only consistent with that view but are inconsistent with any other view, except in so far as the children's right is made subject to a resolutive condition in favour of issue. In these circumstances it seems to me that if the declaration is capable of being construed so as to make it consistent with the rest of the settlement, that construction must be adopted. But is it capable of construction? It was argued with great force that the word "vest" when used in a testamentary settlement has come to have a definite meaning, and that when a testator says that a provision shall not vest until a certain date or event, he means that the beneficiary shall take no right at all until that date or event occurs. That is undoubtedly true in the general case, but still I think that the word "vest" may be used in a more limited sense, and may be so construed if to do otherwise would be inconsistent with the initial gift or direction to the trustees and with the general scheme of the settlement. That appears to have been recognised in the House of Lords in the case of *Young* v. *Robertson*, 4 Macq. 334. Lord Westbury assented to the view that the word "vest," when used in reference to a share of an estate destined to a beneficiary might, according to the context, mean either that the right to the share had become absolute or that the share had come into possession, these being the opposing views for which the appellants and respondents respectively contended. In the same case Lord Cranworth said "the word 'vest' is of at least ambiguous import;" and then he went on to say that "by long usage 'vesting' is ordinarily understood in contradistinction to the not having obtained anything like an absolute and indefeasible right—it is the having obtained the absolute indefeasible right."

Now, in this case substitute for the word "vest" what Lord Cranworth says it has by long usage come to mean, namely, the words "obtain an absolute and indefeasible right," and the difficulty is solved, because a declaration that the children should not obtain an absolute and indefeasible right until the period of payment would be quite consistent with the rest of the settlement by which the children are given a right to their shares *a morte*, defeasible, however, in the event of a child dying prior to the period of payment leaving issue.

It seems to me that that construction gives effect to all the clauses in the settlement, and can be adopted without doing violence to the language used. I prefer such a construction to one which makes the testator say, first, that the children shall be entitled to their shares at his death, and then that they shall not be entitled to them unless and until they attain the age of twenty-five. The latter construction in my judgment not only makes the testator contradict himself, but upsets the whole scheme of his settlement, and gives a result which he certainly never contemplated.

My opinion therefore is that the third question should be answered in the affirmative.

LORD ARDWALL—In this case the share of the trust estate of the deceased John M'Laren destined to the deceased Mary Hastie M'Alpine is claimed by the third parties on two grounds—*first*, that on the death of Mary Hastie M'Alpine her share accresced to the other legatees mentioned in the third purpose of the trust along with her, and *second*, that the said share vested in the said Mary Hastie M'Alpine *a morte testatoris*, and falls to be dealt with as part of her intestate succession. On the other hand, the said share, which is heritage, is claimed as intestate succession of the said deceased John M'Laren by the second party Robert M'Laren as his heir in heritage.

I am of opinion that the claim of the heir-at-law should be given effect to.

With regard to the claim of the third and fourth parties founded on the doctrine of accretion, I am of opinion that the principle of the case of *Paxton*, 13 R. 1191, applies, and that in point of fact this is a stronger case for not applying the doctrine of accretion than *Paxton's*. In *Paxton's* case there was a more homogeneous class consisting of brothers and sisters of the testator; here, on the other hand, the legatees consist of a mother and her children,

being a sister and certain nephews and nieces of the testator, who are all named. But further, these legatees do not take equal shares of the residue. On the contrary, two of them take each a share and a-half, one of these two being the deceased Mary Hastie M'Alpine, whose one and a-half share is in dispute, and counsel for the fourth parties did not seem very certain whether in the case of accretion being held to apply the other more favoured niece of the testator should get one and a-half shares of the lapsed share or only one. In short, the whole clause I think shows that what was given by the testator was a distinct separate gift to each of the individual legatees named, and there are no indications to show that in the event of any of the legatees dying before payment of her share that share was intended to be divided among the remaining legatees.

With regard to the second ground on which the fourth parties found their claim to Mary Hastie M'Alpine's share, namely, that it vested in her *a morte testatoris*, and that they are now entitled to it as her next-of-kin along with her father in the proportions fixed by the Intestate Moveable Succession Act 1855, I am of opinion that on this ground also the claim is not well founded. The deed itself expressly provides that the provisions of residue in favour of the nieces and nephews of the testator should not vest until they respectively attain the age of 25, or in the case of daughters respectively attain the said age or be married, and even with regard to issue of nephews and nieces of the testator this somewhat remarkable provision is made—"And I provide and declare that in case any of said children shall predecease me or die before his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his her or their parent would have taken if alive, and the same shall become payable and transferable to them at the first term of Whitsunday or Martinmas after such share or shares would have become payable to their parent or parents; and providing and declaring that it shall be in the power of my trustees, if they see fit, to apply the free proceeds or income of the presumptive share of any child or lawful issue foresaid, or so much thereof as my trustees may consider proper, towards his or her maintenance, education, or advancement in life." From this last clause it appears that supposing one of the nephews of the testator had married at twenty and had left a child, yet if that child had died before his father, if alive, would have attained twenty-five, he would not take what is called in the clause just quoted his "presumptive share." I think, accordingly, that the testator intended that there should be no vesting of their shares in any of his nephews and nieces till they had attained the age of twenty-five, or in the case of daughters had been married before that age.

It is suggested, however, that the above declaration as to the date of vesting was only intended to protect the interests of issue, but looking to the clause I have quoted I do not think this can be successfully maintained.

But it is said that this declaration is not to be given effect to because it appears from the original words of gift in the deed that in point or law and on a sound construction of the deed the shares of residue vested *a morte testatoris* subject to defeasance. I cannot assent to this argument. The trustees are directed to hold the free residue and remainder of the truster's estate, and to apply the same for behoof of his sister and her children or such of them as shall be alive at his death in "manner following." And when we come to the "manner following" we find *in gremio* of the directions to his trustees this declaration about the postponement of vesting. Now when there is in a deed a clear declaration as to the period of vesting, and all that can be put against that is a doubtful inference from certain other expressions in the deed, I think the plain words of the deed must be preferred, unless it is clear that by adopting that course the true intention of the testator would be defeated, which I do not think can be said in the present case. Had it not been for the direct declaration above quoted as to the period of vesting I think that this case would have fallen within the rule of *Snell's Trustees*, 4 R. 709, but here again I hold that the clearly expressed intention of the testator must prevail over an artificial though useful rule of construction, the introduction of which can only be defended in cases where, unless it is applied, the intentions of the truster cannot be given due effect to.

I therefore am of opinion that the first question should be answered in the affirmative as regards its first alternative, and in the negative as regards its second alternative, and that the second and third questions should be answered in the negative.

LORD JUSTICE-CLERK — Knowing that there was a difference of opinion in the Court as to the proper decision to be given in this case I have considered it the more anxiously, but have in the end come to be of opinion that the view taken by the majority of your Lordships is that which should prevail. Agreeing as I do with what Lord Stormonth Darling has said upon the question of gift to a class I add nothing upon that matter. As regards the question of intestacy, I am entirely in sympathy with the view that where a testator seems to indicate in his will an intention to deal with his whole estate, that intention must be give effect to wherever it is possible to do so consistent with the provisions of the will itself. But, on the other hand, the Court must not seek to make a will effectual to the uttermost according to a supposed intention where no intention has been so expressed in detail as to be reasonably—or rather indeed necessarily—taken from the words used. In this case I find no such declaration of intention which must

be set aside if the second question put to the Court is to be answered in the negative. On the contrary, it appears to me that it can only be by a straining of words out of their ordinary accepted and intelligible sense if vesting *a morte testatoris* is to be held expressed as an intention of the deceased. I go so far with Lord Low as to hold that there may be cases in which the mere use of the word "vest" as applied to a particular event might not be held to be of crucial importance, but that can only be where there are other expressions in the will of such clear import as would create a plain repugnancy if the word "vest" were held to dominate in its ordinary sense. In this case there is nothing to indicate that the testator in declaring that certain provisions should not vest until the occurrence of a certain event meant something different, such as "pay over" or "put into possession." The direction is distinct and positive, and must, I think, receive effect, even although the consequence be contrary to what the testator may have had in his mind, to throw part of his estate into intestacy in the circumstances which have occurred. To hold otherwise would be, in my opinion, to make a different will for the testator than that which he has in fact made—in short, not to carry out an intention which can be spelled out of his deed, but to make a new deed to express what he may have wished to express but has not really expressed by the writing under his hand, which the Court has to construe.

The Court answered the first question in the affirmative, the second question in the negative, and the third question also in the negative.

Counsel for the First and Fourth Parties—Craigie, K.C.—Cochran Partick. Agents—W. & W. Finlay, W.S.

Counsel for the Second Party—Kippen. Agents—Wishart & Sanderson, W.S.

Counsel for the Third Party—Bartholomew. Agent—Robert Cunningham, S.S.C.

Wednesday, July 17.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.

J. A. MACTAGGART & COMPANY *v.* ROEMMELE AND ANOTHER.

Superior and Vassal—Co-feuars—Restrictions on Building—Acquiescence—Enforcement of Restriction by one Feuar against Another—Difference in Position to Enforce of Superior and of Co-feuar.

A community of feuars were under a building restriction against the erection on their feus of tenements. Tenements had however been erected on some of the feus though not on any of those forming a block of ground lying between two roads. A petition having been presented for a lining for tenements on feus in this block of ground, the two adjoining feuars objected and sought to enforce the restriction. The one objector had no tenements on any side of his feu, the other had tenements facing his feu on the opposite side of the road, but on no other side. *Held* that neither objector was barred by the acting and acquiescence of himself and his predecessors in enforcing the restriction.

Per the Lord President—"If the superior allows the act of the first offender to pass he must either have willingly allowed it or he must have conceded that all the legitimate interest to stop such acts was gone, whereas the only inference to be drawn from the *non renitentia* of the co-feuar is that he did not consider that *in that instance* his interest was sufficient to warrant his interfering."

Hislop v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571; and *Earl of Zetland* v. *Hislop and Others*, June 12, 1882, 9 R. (H.L.) 40, 19 S.L.R. 680, *applied*.

On 8th May 1906 Messrs J. A. Mactaggart & Company, builders, 65 Bath Street, Glasgow, presented a petition in the Dean of Guild Court there, craving warrant for a lining for, and for authorisation to erect, certain tenements of dwelling-houses on subjects belonging to them in Kelvinside Gardens and Cambridge Drive, Glasgow. Mrs E. E. Roemmele, 34 Kelvinside Gardens, and William Baird, writer, 40 Kelvinside Gardens, proprietors of subjects bounding the petitioners' ground on the east and west respectively, *inter alios*, appeared as objectors, and sought to enforce an alleged restriction against tenements in the petitioners' title. The petitioners and objectors were co-feuars of feus within a certain line (*red* on the plan referred to in the titles, *dotted* on the plan *infra*), and the questions between them came to be reduced to the following plea taken by the petitioners:—"(2) The respondents objections should be repelled and decree of lining granted as craved in respect . . . and (*d*) in any event the respondents are barred by their acting and acquiescence from insisting on them."

The following plan shows the position of the plots of ground, the red line of the titles being dotted, tenemental property within it being hatched, the remainder of the ground being occupied by villas or similar property:—