will. But that is not so, because the rule has been applied indiscriminately in cases both of testate and intestate succession. Now in cases of intestate succession there can be, strictly speaking, no question of intention any more than there can be in questions of ademption. In both cases it is a question of fact. In the first case the question is, what parts of his estate were in point of fact heritable, and what parts of it were moveable, at the time of the death of the intestate? Just as in a question of ademption, the question is whether in point of fact the subject of a specific bequest was still in existence, and was *in bonis* of the testator at the time of his death or not? There is no room, therefore, for any material distinction between the two cases, and as it has been held in the one case that each part and portion of the estate, although changed by the act of the curator, still retains the character it had at the time of the ward becoming insane, so in the latter case I think it must be held that the subject of a specific bequest, though sold or otherwise disposed of by a curator, must be held to be *in bonis* of the deceased at the date of his death, and if it has been disposed of, that the legatee is entitled to its proceeds or value as a surrogatum therefor.

I am accordingly of opinion that the sale of the shares in question by the curator had not the effect of adeeming the legacy, and that the second parties are now entitled to receive the value of the shares sold by the curator as a surrogatum for their specific bequest. On the other points of the case I have nothing to add to what has been said by Lord Dundas.

The LORD JUSTICE-CLERK concurred.

LORD LOW was absent.

The Court answered the question of law in the negative.

Counsel for the First and Third Parties — Valentine. Agents — Smith & Watt, W.S.

Counsel for the Second Parties—D. P. Fleming. Agent — Andrew H. Hogg, S.S.C.

Friday, January 21.

SECOND DIVISION.

[Lord Johnston, Ordinary.

ANDERSON AND OTHERS (BINNIE'S TRUSTEES) *v.* PRENDERGAST AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance—Class Gift subject to Contingency.

A testator by his trust-disposition directed that the share of residue falling to his daughter Agnes should not be paid to her, but should be held by his trustees, the interest to be paid to Agnes, "and failing her to be paid and apportioned to her children equally, share and share alike, in liferent, . . . and to the issue of her said children in fee, but failing the issue of her said children I direct and appoint that the fee of said share falling and allotted to her shall revert and belong to my other children before named, and to the issue of those who have deceased, equally, share and share alike. . . ."

In a codicil he confirmed the destination of Agnes' share, and after narrating the liferents, continued — "and failing the children of my said daughter Agnes leaving lawful issue of their bodies, then I direct and appoint the fee of her said share . . . to be paid to the lawful issue of her said children, and that equally, share and share alike, but failing lawful issue of the children of my said daughter Agnes, I direct and appoint that the fee of the said share . . . shall revert and belong and be paid to my other children who may then be alive . . . and to the issue of such of them as may have deceased . . ."

In the same codicil he provided for the withholding of a portion of a daughter's share, she "being without lawful issue" at his decease, and its accretion to other daughters should such daughter die "not having lawful issue at the time" of her decease; and with regard to Agnes' portion of any such accretion he declared "which portion . . . as in the case of her own share of my means . . . shall . . . be retained and the interest" paid as previously stated, "and failing her children leaving lawful issue, then the fee of said portion . . . shall, as in the case of her, the said Agnes', own share of my means, . . . be allotted and paid equally among the issue of her children, and that equally, share and share alike."

The liferent conferred on Agnes' children was held to be a joint liferent.

Held that the fee did not vest in the issue of Agnes' children until the death of the last surviving liferentrix.

Carleton v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Cunningham* v. *Cunningham*, November 29, 1889, 17 R. 218, 27 S.L.R. 106; and *Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975, *distinguished*.

Succession — Division per stirpes or per capita.

A testator directed that the share of residue falling to his daughter Agnes should be retained by his trustees; that the interest should be paid to her, and after her death to her children, and that the fee should be paid to the issue of her children. The testator directed that in the event of any of his daughters dying without issue, one-half of the shares destined to them should be paid to his other daughters or their issue. With respect to the accrescing shares falling to his daughter Agnes,

the testator directed that the interest should be paid to Agnes, and failing her to her children, and that "failing her children leaving lawful issue, then the fee . . . shall, as in the case of her the said Agnes' own share of my means and succession, be allotted and paid equally amongst the issue of her children, and that equally, share and share alike." The liferent conferred on Agnes' children was held to be a joint-liferent.

Held that the fee of Agnes' original share was divisible among the issue of her children *per stirpes* and not *per capita*.

This was an action of multiplepoinding and exoneration raised by the trustees of the late John Binnie of Hangingshaw.

The following *narrative* is taken from the judgment of the Lord Ordinary (Johnston): — "John Binnie, who died in 1847, left a trust-settlement dated 1826, and a supplementary trust-settlement dated 1832, and various subsequent codicils. By the original settlement, division of the residue of his estate was provided among his children, who were then a son and five daughters, in terms which I do not need to narrate, as they did not become operative. But for any bearing it may have upon the question now at issue I may add that the key-note of this provision was a stirpital distribution, with vesting at the date of the testator's death.

"In 1832 he executed a supplementary settlement. Vesting was postponed for ten years after the testator's death, and two thirteenth shares having been provided by the original settlement, as modified by this deed, to his daughter Agnes, in regard to the destination of these shares he now declared and appointed '*that the same shall not be payable to her or her children; but I do hereby direct and appoint that the interest or produce of the same shall be paid and apportioned to her in liferent, for her liferent use allenarly; and failing her, to be paid and apportioned to her children equally, share and share alike, in liferent, for their liferent uses allenarly, and to the issue of her said children in fee; but failing the issue of her said children, I direct and appoint that the fee of said shares falling and allotted to her shall revert and belong to my other children before named, and to the issue of those who have deceased, equally, share and share alike. . . .*"

"By a codicil, dated in 1842, the testator . . . directed his trustees, as soon after his decease as they might think proper, to divide amongst and pay over his estate to his surviving children, that is to say, his daughters, for his son had predeceased the date of the codicil, and the issue of such of them as might have deceased, '*with the exception of my daughter Agnes, now Mrs Craig, whose share shall be held and retained by my said trustees, and the interest and produce thereof paid to her half-yearly, and failing her to her children, and the fee thereof shall be paid to the issue of her said children, all as before and after provided.*' The before provided referred to the above-recited provision of the supplementary settlement of 1832. The after provision was as follows—'*In the third place, I hereby confirm the destination of the share of my means and estate of my said daughter Agnes, as contained in the foresaid codicil or supplementary trust-disposition and deed of settlement of date 17th December* 1832, *and I hereby again direct and appoint that the said share so falling to my said daughter Agnes shall not be payable to her, and upon her death the same shall not be payable to her children; but I do hereby direct and appoint my said trustees to hold in their own hands the amount of her said share, and to lend out the same upon good heritable security, taking the bonds and dispositions for the same in their own names . . . . . and I direct and appoint my said trustees to pay the interest or produce of the same to her in liferent, for her liferent use allenarly, and that half-yearly, at the terms of Martinmas and Whitsunday, by equal portions, declaring the same purely alimentary and unaffectable by the debts or deeds of her present or any future husband; and upon her decease I appoint the interest or produce of her said share to be paid and apportioned to her children, equally, share and share alike, in liferent, for their liferent use allenarly, and that half-yearly, at Martinmas and Whitsunday, by equal portions, as aforesaid; declaring the said interest or produce purely alimentary and unaffectable by the creditors of said children; and failing the children of my said daughter Agnes leaving lawful issue of their bodies, then I direct and appoint the fee of her said share of my means and estate to be paid to the lawful issue of her said children, and that equally, share and share alike; but failing lawful issue of the children of my said daughter Agnes, I direct and appoint that the fee of said share of my succession to fall and be allotted to her shall revert and belong, and be paid to my other children who may then be alive, equally, share and share alike, and to the issue of such of them as may have deceased, and that equally, share and share alike, the issue of any of my said children who may have deceased being in that case, as in the original destination of the shares of my succession, entitled to their parent's share of my succession with my children alive at the time, and that equally, share and share alike.*'

"In the fifth head of this codicil an anxious and elaborate provision was made for the case of any of his daughters having no issue, which has an indirect but important bearing on the present question.

"In the event of any of his daughters '*being* without lawful issue at the time' of his death, a special direction was given for dealing with one-half of their respective shares, 'whilst my said daughters are without lawful issue,' and a relative special direction for dealing with such one-half 'upon their having lawful issue.'

"Then in the event of any of his said

daughters '*not having lawful issue at the time of their decease*' he directed his trustees '*to pay and allot the said half of the shares or portions of my means and estate so retained on behalf of my daughter or daughters so deceasing without having lawful issue, to my other daughters having lawful issue, and that equally, share and share alike; and failing any of my daughters having lawful issue, then their share of said half of the share of my daughters dying without having lawful issue shall be divided amongst and paid to the lawful issue of my daughters who may have so deceased, with the exception always of that portion thereof falling to my daughter Agnes.*' With regard to this excepted portion, the testator made this special declaration, '*which portion or share, as in the case of her own share of my means and succession, shall not be paid to her or her children, but shall be retained by my said trustees, and the interest or produce thereof paid half-yearly to my said daughter Agnes, and failing her, said interest or produce shall be paid to her children equally, share and share alike, and failing her children leaving lawful issue, then the fee of said portion of the share of one-half of the share of my said daughters dying without lawful issue falling to my said daughter Agnes, shall, as in the case of her the said Agnes' own share of my means and succession, be allotted and paid equally amongst the issue of her children, and that equally, share and share alike.*'"

The testator's daughter Agnes survived her father and died in 1851. She was twice married. By her first husband Lawrence Mackenzie she had three children — (1) Captain Lawrence Mackenzie, who died in 1887 without issue, (2) Captain John Binnie Mackenzie, who died in 1880 leaving a daughter Mrs Prendergast, and (3) Janet Mackenzie, Mrs Robert Anderson, who died in May 1908 survived by six children and predeceased by five others; and by her second marriage with Mr James Craig she left three other children, (4) Mary Guthrie Craig (Mrs Henry), who died in 1873 leaving seven children surviving and predeceased by two others, (5) Isabella Craig (Mrs Brook), who died in 1875 leaving two children, and (6) Binnie Craig, who died in 1891 leaving two children and predeceased by two others. The total number of Agnes Binnie's grandchildren was thus twenty-seven, of whom eighteen survived their parent and also the last surviving liferentrix Mrs Robert Anderson.

The present action was brought in 1888. The fund *in medio* was one-half of the share of the testator's estate destined to his daughter Agnes, being the three one-sixth parts which were liferented by Captain Lawrence Mackenzie, Mrs Henry, and Mrs Brook. On 11th January 1890 the Second Division determined that the right of liferent conferred on the children of Agnes Binnie was a joint-liferent, and that the shares of predeceasing liferenters accresced to the survivors. Accordingly the fee of the fund *in medio* did not become available for distribution until the death of Mrs Robert Anderson on 31st May 1908.

On 14th July 1908 the cause was wakened, and thereafter claims were lodged for the following claimants—(1) Mrs Prendergast, daughter of Captain John B. Mackenzie, who claimed one-fifth of the fund on the ground that it was divisible *per stirpes;* alternatively she claimed one-eighteenth of the fund on the footing that it was divisible *per capita* and did not vest until the expiry of the liferent. (2) Alexander C. Anderson and others, the six surviving children of Mrs Robert Anderson, who claimed eleven twenty-thirds of the fund on the ground that it was divisible *per capita*, and vested in the issue at birth; alternatively they claimed six-eighteenths of the fund on the footing that it was divisible *per capita*, and did not vest until the expiry of the liferent. (3) Mrs Agnes B. Henry or Blumenthal and others, the seven surviving children of Mrs Henry, who claimed seven-eighteenths of the fund on the ground that it was divisible *per capita* and did not vest until the expiry of the liferent; alternatively they claimed nine twenty-fifths of the fund on the footing that it was divisible *per capita* and vested in the issue at birth. (4) Robert A. Brook and another, the children of Mrs Brook, who claimed one-fifth of the fund on the ground that it was divisible *per stirpes;* alternatively they claimed one-ninth of the fund on the footing that it was divisible *per capita* and did not vest until the expiry of the liferent. (5) Edward J. B. Craig and another, the surviving children of Binnie Craig, who claimed one-fifth of the fund on the ground that it was divisible *per stirpes;* alternatively they claimed four twenty-sevenths of the fund on the footing that it was divisible *per capita* and vested in the issue at birth.

On 1st June 1909 the Lord Ordinary (JOHNSTON) pronounced this interlocutor—"Finds that on a sound construction of the settlement of the late John Binnie, the share of his estate liferented by his daughter Agnes, and by her children and the survivors and survivor in succession, fell on the death of Mrs Anderson, the last survivor, on 31st May 1908, to be divided among the issue of the children of his said daughter Agnes equally *per stirpes*, and in the circumstances equally among the members of each stirps surviving the said last surviving liferentrix."

Opinion.—". . . . . It is not, I think, without significance that the testator commenced in 1826 with the idea of stirpital division, though it does not much advance the question, for he was then thinking of his immediate children, while the present question relates to the special provision for the issue of the children of one particular daughter Agnes. That provision is first met in the supplementary settlement of 1832, which, though repeated, amplified, and explained, still remains the substantive provision regarding this special share. Agnes' share is not to be payable to her or her children. But the interest or produce

of the same is to be paid and apportioned termly to her, and failing her to her children in liferent allenarly, 'and to the issue of her said children in fee.' This is not grammatical, and it is elliptical, but it clearly means that the fee of Agnes' share is to be paid and apportioned to the issue of her children. It is, however, added that failing the issue of her children it shall revert and belong to his other children and the issue of those who have deceased, equally, share and share alike—*i.e.*, I think *per stirpes*.

"Now if I had nothing to guide me but this provision, I should have said that the issue of Agnes' children took no indefeasible right until the lapse of all the successive liferents, that it was only then that the issue then in existence took, and that they took *per capita* among the immediate issue, issue of issue deceased coming in *per stirpes*. But though this is, I think, the natural conclusion from a consideration of the phraseology of the particular provision, it is not consistent with the general current of the settlement up to this point, and the words used are not incapable of another construction, if there is anything in what follows to show that the conclusion, at which I should have arrived from a consideration of this passage alone was not really the intention of the testator.

"Turning then to the codicil of 1842, there is a confirmatory provision in head three, which considerably amplifies the original provision. The destination of the fee then becomes, 'failing the children of my said daughter Agnes leaving lawful issue of their bodies' the fee of Agnes' share is to be paid 'to the lawful issue of her said children, and that equally, share and share alike.' But again it is added 'failing lawful issue of the children of my said daughter Agnes' that the fee is to revert to 'my other children who may then be alive,' equally, share and share alike, and to the issue of predeceasers equally, share and share alike. Had I to rest on this amplification or explanation of what had gone before I should still have said that no indefeasible right vested in the issue of Agnes' children until the lapse of the liferent right, and that the division, at least among the immediate issue, was then *per capita*, issue of predeceasing issue coming in *per stirpes*. Where the testator says 'failing the children of my said daughter Agnes leaving lawful issue of their bodies' the fee of her share is 'to be paid to the lawful issue of her said children,' I think he intends to favour these issue only, and not those who have predeceased their parents. And further, that by the destination-over he limits even their issue to those who then, that is, when the beneficial fee opens, survive. And it must be remembered that issue is a comprehensive word not confined to immediate children, and farther that this is a case where in any event the condition *si sine* would apply. But the construction of the passage is most difficult, and in view of the authority to be immediately referred to, I must admit it to be extremely doubtful whether, notwithstanding the terms of the destination-over, the fee is so limited, to the immediate issue surviving or represented at the opening of the fee, and whether the whole issue born are not intended to be included. I was much pressed to this effect with the case of *Hickling's Trustees*, 1 Fr. (H.L.) 7, not indeed a very satisfactory one to have to rest a judgment upon having regard to the great diversity of judicial opinion manifested.

"But I think I am relieved from the difficulty I should have felt in either applying that authority or in interpreting the passage last referred to without it, by a consideration of the testator's last declaration on the subject. In the fifth head of this codicil of 1842 he deals with possible accretion to Agnes' share, and he emphatically declares his intention that such accretion is to be dealt with 'as in the case of her own share,' and so dealt with to 'be allotted and paid *equally* amongst the issue of her children, and that *equally* share and share alike.' The italics are mine. He thus himself supplies an interpretation for the previous involved and doubtful expressions. There can, in my opinion, be no doubt that this explanation of his meaning can only be properly satisfied by an equal division *per stirpes*, and within the stirps by an equal division *per capita*—*Inglis* v. *M'Neils*, 19 R. 924. This is in accordance, as I have pointed out, with the general idea which pervades the whole settlement, and it is not inconsistent with the primary and substantive direction of the supplementary settlement of 1832, which is still the foundation of the provision.

"If this be the true construction it is in the circumstances immaterial, as the result will be the same whether predeceasing issue are to take a share or only surviving, though personally, notwithstanding the authority of *Hickling's* case, I think, only surviving."

Thereafter the cause came to depend before Lord Cullen, who on 4th December 1909 pronounced an interlocutor whereby he ranked and preferred the claimants in accordance with the findings contained in the interlocutor of 1st June 1909, and granted leave to reclaim.

The claimants Alexander C. Anderson and others (the Anderson family) and Mrs Blumenthal and others (the Henry family) reclaimed, and argued—The issue took a vested interest at birth. The destination-over failing issue was not suspensive of vesting. "Failing issue" might mean either "in the event of issue not being born" or "in the event of issue predeceasing"; *prima facie* it meant "in the event of issue not being born"—*Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Cunningham* v. *Cunningham*, November 29, 1889, 17 R. 218, 27 S.L.R. 106. That was its meaning here, and if so, the bequest was not contingent, but vested at birth. Even if the destination-over were held to refer to the event of issue predeceasing, vesting was not suspended. The representatives of predeceasing issue

were entitled to share provided one member of the class survived—*Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975. (2) The fund was divisible *per capita* and not *per stirpes*. The gift was a gift to a class, and there was no indication of any intention to favour one individual member more than another. In these circumstances the ordinary rule was that the fund was divisible *per capita*—*Mackenzie* v. *Holte's Legatees*, February 2, 1781, M. 6602; *Bogie's Trustees* v. *Christie*, January 26, 1882, 9 R. 453, 19 S.L.R. 363; *Allen* v. *Flint*, June 15, 1886, 13 R. 975, 23 S.L.R. 703, *per* Lord M'Laren; *Hay Cunningham's Trustees* v. *Blackwell*, 1909 S.C. 219, 46 S.L.R. 175, *per* L. P. Dunedin. There was nothing to take the present case out of the ordinary rule. *Searcy's Trustees* v. *Allbuary* (1907 S.C. 823, 44 S.L.R. 536), and *Inglis* v. *M'Neils* (June 23, 1892, 19 R. 924, 29 S.L.R. 795), were distinguishable. In *Searcy's Trustees* (*cit.*) the gift was divisible among families. In *Inglis* v. *M'Neils* (*cit.*) the gift was to A and the children of B; there was to be equal division between A and B's children, and thereafter equal division among the children of B. In the present case the repetition of the word equally was a mere redundancy. It was immaterial that a liferent was given to the children. It might have been important if separate shares of the fund had been destined to a parent in liferent and his issue in fee. But here the liferent was a joint liferent.

Argued for the claimant and respondent Mrs Prendergast—The fund was divisible *per stirpes* and not *per capita*. The gift was in favour of the children in liferent and their issue in fee, and in such circumstances it was presumed that the fund was divisible *per stirpes*—*Richardson* v. *Macdougall*, March 26, 1868, 6 Macph. (H.L.) 18, 5 S.L.R. 454; *Home's Trustees* v. *Ramsay*, December 11, 1884, 12 R. 314, 22 S.L.R. 221; *Allen* v. *Flint* (*cit.*); *Lorn's Trustees* v. *Whitworth*, February 4, 1892, 19 R. 431, 29 S.L.R. 389. Further, the repetition of the word "equally" showed that the testator contemplated in the first place an equal division among the different families, and thereafter an equal distribution of each family's share among the members of that family—*Inglis* v. *M'Neils* (*cit.*); *Searcy's Trustees* v. *Allbuary* (*cit.*) (2) Vesting was suspended until the termination of the liferent. *Carleton* v. *Thomson* (*cit.*) and *Cunningham* v. *Cunningham* (*cit.*) were distinguishable, because here the issue of children took only in the event of children leaving issue. If that were so, the bequest was plainly contingent and the reclaimers could not succeed unless the doctrine of *Hickling's Trustees* v. *Garland's Trustees* (*cit.*) was applicable. *Hickling's Trustees* (*cit.*) had always been regarded as the high-water mark of the doctrine of vesting subject to defeasance. It was distinguishable, because in the present case there was a destination-over. *Hickling's Trustees* (*cit.*) therefore did not apply, and it was necessary to fall back on the ordinary rule that a destination-over was suspensive of vesting—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314; *Bryson's Trustees* v. *Grant*, November 26, 1880, 8 R. 142, 18 S.L.R. 103; *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959.

The claimants Robert A. Brook and another (the Brook family) adopted the argument for the respondent Mrs Prendergast. The claimants Edward J. B. Craig and another (the Binnie Craig family) adopted the argument for the reclaimers on the question of vesting and the argument for Mrs Prendergast as to the division being *per stirpes*.

At advising—

LORD ARDWALL—The fund *in medio* in this case consists of three one-sixth parts of the share of the estate of the deceased John Binnie, provided by him to his daughter Mrs Agnes Binnie or Mackenzie or Craig and her descendants. Another sixth share, namely, that which was liferented by Captain John Binnie Mackenzie, was divided by agreement of parties shortly after his death in 1880, and the two shares liferented by Binnie Craig, who died on 29th August 1891, and Mrs Anderson, who died on 31st May 1908, while their division will follow the decision of this case, are not included in the present multiplepoinding, inasmuch as the liferent of these shares only came to an end on the death of Mrs Anderson on the last-mentioned date.

The family tree shows at a glance the descendants of Mrs Agnes Binnie or Mackenzie or Craig, those who still survive being eighteen in number, all great-grandchildren of John Binnie, the testator. In addition to these, five children of Mrs Anderson, two of Mrs Henry, and two children of Binnie Craig, died before the death of the last liferentrix on 31st May 1908.

Two questions are raised by the parties—first, when vesting took place in the great grandchildren of the testator, and second, whether the division among them is to be *per capita* or *per stirpes*. The members of the two largest families, the Henrys and the Andersons, maintain, as it is their interest to do, that the division is to be *per capita*, while Mrs Bertha Janet Mackenzie and the children of Mrs Craig and of Binnie Craig maintain that the division must be *per stirpes*. The Andersons and the Henrys maintain that vesting took place in all the great-grandchildren of John Binnie at their birth, while others of the claimants contend that there was no vesting till the death of Mrs Anderson on 31st May 1908, when the succession opened.

I shall first deal with the question of vesting. The clause in the deed on the interpretation of which this question turns is the clause in the third place in the deed, which is fully quoted in the opinion of the Lord Ordinary, and of which I only need refer to this part—"And failing the children of my said daughter Agnes leaving lawful issue of their bodies, then I direct and appoint the fee of her said share of my means and estate to be paid to the lawful

issue of her said children, and that equally, share and share alike; but failing lawful issue of the children of my said daughter Agnes, I direct and appoint that the fee of said share of my succession to fall and be allotted to her shall revert and belong and be paid to my other children who may then be alive, equally, share and share alike; and to the issue of such of them as may have deceased, and that equally, share and share alike, the issue of any of my said children who may have deceased being in that case, as in the original destination of the shares of my succession, entitled to their parent's share of my succession with my children alive at the time, and that equally, share and share alike."

It was argued for the Andersons and the Henrys that under this clause a share of the estate vested in each grandchild of the testator's daughter Agnes at his or her birth, and the cases of *Carleton* v. *Thomson* (5 Macph. (H.L.) 151); *Cunningham* (17 R. 218); and *Hickling* (1 F. (H.L.) 7), were relied on as authorities for this contention. But in none of these cases was the wording of the deed under construction the same as here. In *Carleton* v. *Thomson* the phrase under construction was, "in the event of her decease without issue of her body," and Lord Colonsay in dealing with that said—"Decease without issue of the body may mean without leaving issue of her body surviving, or it may mean without having had issue of her body, and it may depend upon circumstances which of these two meanings is to be attached to the words."

In *Cunningham's* case, again, the expression submitted for the construction of the Court was "failing issue," and there the Court held that to mean failing issue being born, and accordingly it was held in the circumstances of that case that a share of a provision liferented by a daughter vested in each of her children at birth. In the present case, however, as appears from the clause above quoted, the condition is "failing the children of my said daughter Agnes leaving lawful issue of their bodies." This in my view can only mean leaving issue at the date of their deaths, and with regard to these children who failed to leave lawful issue at their deaths, then the fee of the shares of such children is apparently to be paid to the surviving issue of other children of Agnes, though I must say it is far from clear what the construction of this clause is; but with regard to the succeeding clause I think there can be no doubt that it provided that "failing lawful issue of the children of my said daughter Agnes," which must be taken to mean failing their leaving lawful issue as expressed in the beginning of the clause, then the testator directs and appoints that the fee of Agnes' share is to be paid to his other children who may then be alive and to the issue of such of them as may have predeceased. There is thus a distinct destination-over in the event of none of the children of the testator's daughter Agnes leaving lawful issue of their bodies, and I do not think it can be successfully maintained that this destination-over would have been frustrated by grandchildren of Agnes having come into existence if they had all died before the expiry of the liferent.

In common with the Lord Ordinary I feel that a difficulty in arriving at this conclusion is raised by the decision in the case of *Hickling's Trustees*. But there again the clauses of the deed under construction were not in the same terms as those in the present case, and I am not disposed to extend the doctrine laid down in *Hickling's Trustees* to the case of a will differing in its terms from the deed under construction in that case, more especially as there was a notable division of judicial opinion in that case.

I am therefore of opinion that vesting did not take place till the death of the last of the liferentrices, Mrs Anderson, on 31st May 1908, when the succession opened, and that vesting then took place in all the grandchildren of Agnes Mackenzie or Craig who then survived.

The next question is whether such vesting took place *per capita* or *per stirpes?*

This question has been so thoroughly and in my opinion so satisfactorily dealt with by the Lord Ordinary that it is unnecessary for me to deal with it at great length. It was argued for the Anderson and Henry families that the whole of the beneficiaries all standing in exactly the same degree of relationship to the testator whose great-grandchildren they are, and to his daughter Agnes whose grandchildren they are, the division naturally, if there was nothing definite to the contrary, ought to be held to be *per capita*, following the same rule as if this had been a question among next-of-kin in intestate succession. It was further pointed out that in the principal deed regulating the succession of Agnes Binnie, their grandmother, the direction was that the fee of her share of the estate should be paid to the lawful issue of her said children, and that equally, share and share alike, and that the natural interpretation of that direction taken by itself is that there should be a division *per capita* among all the lawful issue of Agnes' children. It was further pointed out that it has been already held by the judgment of Lord Kinnear, affirmed by the Inner House in this case, that there was no division of the estate into shares after Agnes' death for the purpose of the liferent provision to her children, but that that liferent had been practically held to be a joint liferent to the children and the survivor of them, and that there was accordingly no presumption here, as in the usual case, that their respective shares of an estate liferented by the children of a testator descend *per stirpes* to their issue. But I agree with the Lord Ordinary that the question at issue falls to be solved by a consideration of the fifth head of the codicil of 1842, where the testator deals with possible accretions to Agnes' share and directs that such accretions are to be dealt with "as in the case of her own share," and it provides, *inter alia*, "failing

her children leaving lawful issue, then the fee of said portion of the share of the one-half of the share of my said daughters dying without lawful issue falling to my said daughter Agnes, shall, as in the case of her, the said Agnes' own share of my means and succession, be allotted and paid equally amongst the issue of her children, and that equally, share and share alike."

It will be observed that there is here a repetition of the direction of equal payment. It was maintained by counsel for the Andersons and Henrys that this was a mere redundancy, but I agree with the Lord Ordinary that if possible a meaning must be given to all the words used by the testator, and I think that according to the authorities which have been quoted to us the meaning which ought to be given is that there should first be an equal division *per stirpes* among the beneficiaries, and then within each stirps an equal division *per capita*. This was the meaning which was given to a similar repetition of the word "equally" in the cases of *Inglis* v. *M'Neils*, 19 R. 924, and *Searcy's Trustees* v. *Allbuary*, 1907 S.C. 823. It is true that in both of these cases there existed more obvious reasons than exist here for holding that the first direction to divide equally applied to a division *per stirpes*, and the second to a division *per capita* among the members of each stirps, but I think that they are both authorities for applying a similar interpretation to the double direction that we have in the present case, and I agree with the Lord Ordinary that as pointed out by him it is possible to gather from the whole testamentary writings of the deceased John Binnie that there was a general idea in favour of a division *per stirpes* throughout, and such a division as we know may be said to be a favourite scheme in family settlements, testators desiring as a rule that their estates should be divided equally among their children and grandchildren *per stirpes* on the ground that one child should not have a preference over another in the division of a parent's estate.

Now it will be noticed that the clause I have just been considering, taken from the fifth head of the codicil of 11th July 1842, sets forth that the destination of the accrescing shares shall be the same as in the case of Agnes' own share. The manner in which that share is to be dealt with is set forth in the third head of the same codicil which has been already quoted and commented on. If there had been a repugnancy between these two directions it would have required to be solved in favour of one or the other; but having regard to the ambiguity of the direction in the third clause so far as the question of division *per capita* or *per stirpes* is concerned, I think it is the proper course to hold that the words of the third clause should be held to be interpreted by the words of the fifth head, with the result of making the division of Agnes' share, first, *per stirpes* to the families of each of her children, and second, *per capita* among the members of each stirps.

On the whole matter I agree with the Lord Ordinary's views as expressed in his opinion, and I am of opinion that the interlocutor reclaimed against should be affirmed.

LORD DUNDAS—I agree with the opinion which has just been delivered, upon both branches of the case as it was presented to us, viz., the question of vesting, and that whether the distribution amongst the beneficiaries should be *per stirpes* or *per capita*. On the second question I confess that my opinion has fluctuated, but I have become convinced that the view of the Lord Ordinary is correct. The key to the solution of this question of construction is to be found in the testator's codicil of 1842, which, dealing with possible accretions to what I may call "Agnes' share," made applicable to "the case of her own share" the direction that it "be allotted and paid equally amongst the issue of her children, and that equally, share and share alike." Now, we are not, I consider, entitled to treat the double use of the word "equally" as mere redundancy if a reasonably feasible meaning can be found for each separate use of the repeated word. It is a well-settled and wholesome rule of construction that some meaning must be found, if that be reasonably possible, for every word which a testator has thought fit to employ. So viewing this testator's language, I think we must hold that he intended that each set or family of "issue" should get an equal share; and then that the component *capita* of each such family should have that share equally divided amongst them. Every will which comes before the Court must, of course, be construed in accordance with the fair and natural meaning of its own words; and it is therefore only within narrow limits that reference to previous authorities can be useful. But I agree in thinking that the decisions in *Inglis* (19 R. 924) and *Searcy's Trustees* (1907 S.C. 823) are of some assistance here, because they afford examples of the double use by a testator of the word "equally" or "equal" in a clause generally analogous to that now under consideration.

LORD JUSTICE-CLERK—This case I found to be very difficult, and I confess that at first I was fairly decidedly of an opinion adverse to that at which your Lordships have arrived. But on further consideration after consultation I have come to the same opinion as that already expressed. Where such a word as "equally" is used twice in stating the detail of a destination, it is the duty of the Court not to hold the word in either case to be mere redundancy. If an interpretation can reasonably be found which gives effect to the word in the immediate connection in which it stands, then that interpretation must be adopted. Taking that principle as a guide I have come to be of opinion that the view taken by Lord Ardwall can be held, and if it can be held, then it must be held.

LORD LOW was absent.

The Court adhered.

Counsel for Pursuers and Real Raisers—R. C. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Claimants and Reclaimers Alexander C. Anderson and Others—Murray, K.C.—C. H. Brown. Agents—Drummond & Reid, W.S.

Counsel for Claimants and Reclaimers Mrs Blumenthal and Others—Murray, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for Claimant Mrs Prendergast—Leadbetter. Agents—Mackenzie & Black, W.S.

Counsel for Claimants Robert A. Brook and Another—Mouncrieff. Agents—Webster, Will, & Company, W.S.

Counsel for Claimants Edward J. B. Craig and Another—Lees, K.C.—D. M. Wilson. Agents—Carmichael & Millar, W.S.

Wednesday, December 15, 1909.

FIRST DIVISION.

SCHOOL BOARD OF GLASGOW *v.* THE KIRK-SESSIONS OF THE PARISHES OF ANDERSTON AND ST MARK'S, GLASGOW, AND OTHERS.

School—Board School—Powers of School Board—Right of Kirk-Sessions to Use of School-house when not in Use as a School—Right of School Board to Change Site of School, Reserving to Kirk-Session Same Use as Formerly of Old School-house—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *secs.* 36 *and* 38.

Two kirk-sessions, the trustees of a parochial school, under the powers given by the Education Act 1872, conveyed a school and its site to the School Board of Glasgow under the proviso that the said kirk-sessions should be entitled to the use of the school-house when not required as a school under the Act. In process of time the School Board built other schools in the immediate neighbourhood of sufficient size to accommodate all the pupils hitherto accommodated in the said school, and in terms of section 36 of the Act closed the school.

Held in a Special Case that the School Board, as they offered to the kirk-sessions the same use of the school-house as formerly, were entitled to close the school, *i.e.*, to change the site of the school.

School—Board School—Powers of School Board—Day Industrial School—Schools Specially Intended for Roman Catholics—Teachers in a Certain School to be all Roman Catholics—Education (Scotland) Act 1872, *sec.* 68—*Children's Act* 1908 (8 *Edw. VII, cap.* 67), *sec.* 132 (24).

Held in a Special Case that in the circumstances therein disclosed the School Board of Glasgow were entitled to start and maintain a day industrial school and a public elementary school for defective children, both specially intended for Roman Catholic children, and in which the religious instruction was to be exclusively according to the Roman Catholic faith, and the teachers therein all of that faith.

Title to Sue—Kirk-Session—School—School Board—Religious Education—Establishment of School for Roman Catholics.

Held that a kirk-session, *qua* kirk-session, had no title to object to the opening by the School Board of a school for Roman Catholic children, to be taught by Roman Catholic teachers in accord with the Roman Catholic faith.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62) enacts—Section 36—". . . A school board may with the sanction of the Board of Education discontinue or change the site of any school under their management, and may sell and dispose of any land and buildings connected with any school so discontinued, or the site of which is so changed. . . ."

Section 38—"With respect to schools now existing . . . in any parish or burgh erected or acquired and maintained, or partly maintained, with funds derived from contributions or donations . . . for the purpose of promoting education, be it enacted that it shall be lawful for the person or persons vested with the title to any such school, with the consent of the person or persons having the administration of the trusts upon which the same is held, to transfer such school, together with the site thereof, and any land or teacher's house held and used in connection therewith, to the school board of the parish or burgh in which it is situated, to the end and effect that such school shall thereafter be under the management of such board as a public school in the same manner as any public school under this Act; and it shall be lawful for the school board with the sanction of the Board of Education, to accept of such transference, and on the same being made and accepted, the said school, with the site and any land and teacher's house included in the transference, shall be vested in the school board, and the school shall thereafter be deemed to be a public school under this Act; and shall be maintained and managed by the school board, and be subject to all the provisions of this Act accordingly; and the existing teachers . . . may be continued as such teachers by the school board, and their continuance in office may be made a condition of the transference. . . . And the use of the school-house at such times and for such purposes as shall not interfere with the use thereof, under the provisions of this Act by the school board may also be made a condition of the transference thereof to the school board."

Section 47 allows school boards to receive and administer bequests "according to the wishes and intentions of the donors."